

EXHIBIT 1

EXHIBIT 1

NO. FILED

JUN 03 2016

Eureka County Clerk

By [Signature]

Case Nos. CV 1108-155
CV-1108-156
CV-1108-157
CV-1112-164
CV-1112-165
CV-1202-170
CV-1207-178

Dept No. 2

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF EUREKA

EUREKA COUNTY, a political subdivision
of the State of Nevada,
Petitioner,

v.

STATE OF NEVADA, EX. REL., STATE
ENGINEER, DIVISION OF WATER
RESOURCES,

Respondent.

CONLEY LAND & LIVESTOCK, LLC, a
Nevada limited liability company, LLOYD
MORRISON, an individual,

Petitioners,

v.

OFFICE OF THE STATE ENGINEER OF THE
STATE OF NEVADA, DIVISION OF WATER
RESOURCES, DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES, JASON KING, State Engineer,
KOBEL VALLEY RANCH, LLC, Real Party in
Interest,

Respondents.

ORDER DENYING KOBEL VALLEY
RANCH, LLC'S MOTION TO ALTER OR
AMEND JUDGMENT

SEVENTH JUDICIAL DISTRICT COURT
GARY D. FAIRMAN
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA



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Eureka County
Clerk & Treasurer



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KENNETH F. BENSON, an individual,
DIAMOND CATTLE COMPANY, LLC, a
Nevada limited liability company, and
MICHEL and MARGARET ANN
ETCHEVERRY FAMILY, LP, a Nevada
registered foreign limited partnership,

Petitioners,

v.

STATE ENGINEER OF NEVADA, OFFICE OF
THE STATE ENGINEER, DIVISION OF
WATER RESOURCES DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES,

Respondent.

EUREKA COUNTY, a political subdivision of
the State of Nevada,

Petitioner,

v.

STATE OF NEVADA, EX. REL., STATE
ENGINEER, DIVISION OF WATER
RESOURCES,

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KENNETH F. BENSON, an individual,
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Nevada limited liability company, and
MICHEL and MARGARET ANN
ETCHEVERRY FAMILY, LP, a Nevada
registered foreign limited partnership,

Petitioners,

v.

STATE ENGINEER OF NEVADA, OFFICE OF
THE STATE ENGINEER, DIVISION OF
WATER RESOURCES DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES,

Respondent.



1 KENNETH F. BENSON, an individual,
2 DIAMOND CATTLE COMPANY, LLC, a
3 Nevada limited liability company, and
4 MICHEL AND MARGARET ANN
5 ETCHEVERRY FAMILY, LP, a Nevada
6 registered foreign limited partnership,

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Petitioners,

v.

STATE ENGINEER OF NEVADA, OFFICE OF
THE STATE ENGINEER, DIVISION OF
WATER RESOURCES DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES,

Respondent.

MICHEL AND MARGARET ANN
ETCHEVERRY FAMILY, LP, a Nevada
Registered Foreign Limited Partnership,
DIAMOND CATTLE COMPANY, LLC, a
Nevada Limited Liability Company, and
KENNETH F. BENSON, an individual,

Petitioners,

vs.

STATE ENGINEER OF NEVADA,
OFFICE OF THE STATE ENGINEER,
DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES,

Respondents.

KOBEH VALLEY RANCH, LLC, a
Nevada limited liability corporation,

Intervenor-Respondents.

PROCEDURAL HISTORY

On March 2, 2016, this Court entered an order granting objection to proposed



1 order remanding to state engineer; order granting petitions for judicial review; order
2 vacating permits ("order"); on March 9, 2016, this Court entered an amended order
3 granting objection to proposed order remanding to state engineer; order granting petitions
4 for judicial review; order vacating permits ("amended order"); on March 28, 2016, Kobeh
5 Valley Ranch, LLC, filed a motion to alter or amend judgment ("motion"); Eureka County
6 filed an opposition to Kobeh Valley Ranch, LLC's motion to alter or amend judgment
7 ("opposition") on April 11, 2016; on April 11, 2016, Michel and Margaret Ann Etcheverry
8 Family, LP, and Diamond Cattle Company, LLC ("Etcheverry and Diamond Cattle") filed
9 their response in opposition to Kobeh Valley Ranch, LLC's motion to alter or amend
10 judgment ("response in opposition"); on April 21, 2016, Kobeh Valley Ranch, LLC, filed its
11 reply in support of its motion to alter or amend judgment. The court has reviewed the
12 pleadings and does not require any further briefing or oral argument.

13
14 **DISCUSSION**

15 Kobeh Valley Ranch, LLC's ("KVR") motion filed pursuant to NRCP 59(e)
16 argues that the court's amended order entered March 9, 2016, was issued in error and is
17 manifestly unjust because it "fails to allow KVR an adequate opportunity to amend the 3M
18 plan to render it compliant with the newly anticipated and wholly unprecedented standards
19 adopted by the Nevada Supreme Court."¹ Eureka County and Etcheverry and Diamond
20 Cattle oppose KVR's motion on the basis that (1) KVR is precluded from re-litigating old
21 matters under NRCP 59(e); (2) the court's amended order was not issued in error; and (3)
22 the court's vacation of the KVR permits is not manifestly unjust.²

23
24
25 ¹Motion at 6.

26 ²Opposition at 6-7; response in opposition at 6-10.

Rule 59(e)

A motion to alter or amend a judgment is an extraordinary remedy which cannot be used to re-litigate old matters or to raise arguments or present evidence that could have been raised prior to the entry of judgment.³ A 59(e) motion to have a court reconsider its decision is appropriate if a court (1) is presented with newly discovered or previously unavailable evidence, (2) committed a clear error of law or fact upon which the judgment rests, (3) the initial decision was manifestly unjust, and (4) if there is an intervening change in controlling law.⁴

KVR's reply to joint objection to proposed orders of Kobeh Valley Ranch, LLC, filed December 16, 2015, argued that a court order failing to remand this case to the State Engineer for further consideration would effectively deny KVR's water rights applications, cause it to lose priority, require KVR to initiate a new applications process, increase the difficulty to KVR in the applications process, waste resources, incur more financial debt, and be time consuming.⁵ KVR's instant motion and reply cite the same arguments.⁶ KVR's current motion seeks to re-litigate the same issues it previously raised to this Court. Rule 59(e) precludes re-litigation of these issues. KVR's motion must be denied unless this Court committed error or its decision was manifestly unjust.

**THIS COURT'S AMENDED ORDER
WAS NOT ISSUED IN ERROR**

In its order this Court stated, "The Nevada Supreme Court did not remand the cases to the State Engineer for further proceedings consistent with its opinion which it could have done if the court concluded additional administrative review and findings

³*Stevo Design, Inc. v. SBR Marketing Ltd.*, 919 F. Supp.3d 1112, 1117 (D. Nev. 2014).

⁴*Id.*

⁵Reply at 4, 7, 8.

⁶Motion at 4-10, reply at 3-11.



1 were necessary.”⁷ This Court is aware that the Nevada Supreme Court remands
2 administrative appeals to the district court with instructions to further remand to the
3 administrative agency. To be clear this Court by the language used in the amended order
4 did not intend to convey that the Supreme Court used a procedure directly remanding
5 administrative appeals from the Supreme Court to the administrative agency, bypassing
6 the district court. To the extent KVR was unclear or mislead by this Court’s choice of
7 words, this Order serves to clarify the court’s amended order concerning the remand
8 process.

9 KVR argues that when the Supreme Court remanded to this Court that it did
10 so for the purpose of having this Court conduct or order a “proceeding consistent with this
11 Order.”⁸ KVR states the effect of the Supreme Court’s “remand to the district court is
12 effectively an order requiring the district court to further remand the issue to the State
13 Engineer for additional fact-finding”⁹ and this Court did not read in the proper context the
14 Supreme Court’s decision when it held “the State Engineer’s decision to grant KVR’s
15 applications cannot stand.”¹⁰ The court has again reviewed the Supreme Court’s opinion
16 and disagrees.

17 Had the Supreme court found that further proceedings were necessary
18 before the State Engineer, its procedural history of remanding cases to the State Engineer
19 strongly suggests its opinion would have included language “remanding to the district court
20 with instructions to the district court to remand for further proceedings by the State
21 Engineer.”

22 ⁷Amended order at 5.
23 ⁸Motion at 7; Eureka County v. State Engineer, 131 Nev. Adv. Op. 84 at 16, 359 P.3d
24 1114, 1121 (2015).
25 ⁹Motion at 7.
26 ¹⁰*Id.*



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KVR cites a number of Nevada cases for the proposition that the Supreme Court is not empowered to remand issues directly to the State Engineer.¹¹ The cases demonstrate a direct remand from the Supreme Court to the State Engineer has not been followed by the Supreme Court, however, each of the cases contain specific instructions from the Supreme Court to the district court to remand the issue back to the State Engineer for further proceedings when the Supreme Court believed such action was necessary.¹² No specific instruction from the Supreme Court to this Court to refer or remand the matter to the State Engineer appears in its opinion.

With the instructional clarity the Supreme Court has historically provided to district courts for remand to the State Engineer to conduct further proceedings when a case posture so required, this Court does not read and cannot infer such was the intent from the language in this Supreme Court opinion. The Supreme Court made distinct findings (1) that there was not substantial evidence to support the State Engineer's finding that KVR would be able to "adequately and fully" mitigate the fact that its ground water appropriations will cause Kobeh Valley springs that sources rights to cease to flow,¹³ (2) that the State Engineer's decision to grant KVR's applications when the result of such appropriations would conflict with existing rights and based upon unsupported findings that mitigation would be sufficient to rectify the conflict violates the Legislature's direction that the State Engineer must deny use or change applications when the use or change would

¹¹*Id.*

¹²In *Town of Eureka v. Office of the State Engineer*, 108 Nev. 163, 169, 826 P.2d 948, 952 (1992), the Supreme Court clearly stated "we reverse and remand to the district court for referral to the State Engineer. In *Revert v. Ray*, 95 Nev. 782, 788, 603 P.2d 262, 265 (1979), the Court stated "the judgment of the district court must, therefore, be reversed and the instant case remanded to the State Engineer for a full and fair determination . . .". In *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 199, 234 P.3d 912, 920, the Court stated "we reverse the district court's order denying petition for judicial review and remand the matter to the district court with instructions in turn, remand the matter to the State Engineer for further proceedings consistent with this opinion."

¹³Eureka County at 1121.



1 conflict with existing rights,¹⁴ and that (3) "KVR's pumping would not merely impact existing
2 water rights; the very evidence upon which the State Engineer relied demonstrates that
3 KVR's appropriation would cause the complete depletion of the source of existing water
4 rights." These findings lead the Supreme Court to hold that the State Engineer's decision
5 to grant KVR's applications was incorrect and could not stand.¹⁵ The Supreme Court's
6 holding on the issues mandates that this Court grant the petitions for judicial review.

7 This Court has read the Supreme Court's opinion in proper context. The
8 opinion does not require or suggest further proceedings by the State Engineer. Without
9 direction in its opinion to remand the case to the State Engineer for further consideration
10 or proceedings and without indicating what it expected the scope of the proceedings to
11 include, this Court properly granted the petitions for judicial review and vacated permits.

12 KVR also argues that this Court's amended order was manifestly unjust
13 because of KVR's perceived lack of standards for approval of a 3M plan prior to the
14 Supreme Court's opinion and that it relied upon the State Engineer's direction in
15 developing its 3M plan which now it should be allowed to amend to conform with the
16 Supreme Court's opinion.¹⁶ Based on "new and unprecedented standards," KVR asserts
17 it should again return to the State Engineer and be allowed to present evidence for another
18 3M plan establishing that no conflicts will occur with existing water rights.¹⁷ Nothing in the
19 Supreme Court's opinion suggests that it adopted unprecedented new standards which
20 KVR should be allowed to comply with in further proceedings on remand to the State
21 Engineer. Rather, the opinion clearly states that "The State Engineer's decision to grant
22 KVR's applications, when the result of appropriations would conflict with existing rights,
23 and based upon unsupported findings that mitigation would be sufficient to rectify the

24 ¹⁴*Id* at 1118.

25 ¹⁵*Id*.

26 ¹⁶Motion at 9; reply at 4,5,9-11.

¹⁷*Id*.



1 conflict, violates the Legislature's directive that the State Engineer must deny use or
2 change applications when the use or change would conflict with existing rights. NRS
3 533.370(2)."¹⁸

4 KVR is not being punished for the State Engineer's failure to follow a
5 statutory duty as KVR suggests when relying upon *Great Basin Water Network v. State*
6 *Engineer*.¹⁹ In KVR's case, the Supreme Court held there was not substantial evidence
7 to support the State Engineer's findings. The Supreme Court's opinion may be a harsh
8 result for KVR, however, based upon the Court's history of clearly remanding cases to the
9 district court for referral or remand to the State Engineer when the Supreme Court believed
10 such action was necessary, the language in the Supreme Court's opinion in this case does
11 not support action being taken by this Court to remand this case to the State Engineer for
12 further proceedings.

13 Good cause appearing,

14 IT IS HEREBY ORDERED that KVR's motion to alter or amend judgment is
15 DENIED.

16 DATED this 1st day of June, 2016.

17 
18 DISTRICT JUDGE

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20
21 ¹⁸Eureka County at pg. 16, 359 P.3d at 1131.

22 ¹⁹126 Nev. at 191-199, 234 P.3d at 920 (2015). In *Great Basin Water Network*, the
23 State Engineer failed to take action on applications within one year after the close of
24 the protest period. Over 830 protests were filed after publication of a statutory notice in
25 1990 against 146 applications. Fifteen years later in 2005, at a pre-hearing conference
26 many of the attendees requested the applications be re-noticed and the protest period
re-opened. The State Engineer denied this request, and after a petition for judicial
review was denied, the State Engineer violated his statutory duty by ruling on
applications beyond the one year statutory limitation for review. Upon the suggestion
of the parties, after considering the inequities that would be suffered by the parties, the
Supreme Court held that a timely filed protest and/or the appeal of the State Engineer's
untimely ruling, the appropriate and most equitable remedy was to re-notice the
applications and re-open the protest period.

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By [Signature]

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CONLEY LAND & LIVESTOCK, LLC, a
Nevada limited liability company, LLOYD
MORRISON, an individual,

Petitioners,

v.

OFFICE OF THE STATE ENGINEER OF
THE STATE OF NEVADA, DIVISION OF
WATER RESOURCES, DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES, JASON KING, State
Engineer, KOBEH VALLEY RANCH, LLC,
Real Party in Interest,

Respondents.

CERTIFICATE OF SERVICE

SEVENTH JUDICIAL DISTRICT COURT
GARY D. FAIRMAN
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA



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Eureka County Clerk
[Signature]



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KENNETH F. BENSON, an individual,
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Nevada limited liability company, and
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registered foreign limited partnership,

Petitioners,

v.

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Respondent.

MICHEL AND MARGARET ANN
ETCHEVERRY FAMILY, LP, a Nevada
Registered Foreign Limited
Partnership, DIAMOND CATTLE
COMPANY, LLC, a Nevada Limited
Liability Company, and KENNETH F.
BENSON, an individual,

Petitioners,

vs.

STATE ENGINEER OF NEVADA,
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DIVISION OF WATER RESOURCES,
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KOBEH VALLEY RANCH, LLC, a
Nevada limited liability corporation,

Intervenor-Respondents.



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The undersigned being an employee of the Eureka County Clerk's Office,
hereby certifies that on the 3rd day of June, 2016, I personally delivered a true and
correct file-stamped copy of the following:

***Order Denying Kobeh Valley Ranch, LLC's Motion To Alter Or Amend
Judgment***

addressed to:

Karen A. Peterson, Esq.
Allison, Mackenzie, Pavlakis, Wright &
Fagan Ltd.
P.O. Box 646
Carson City, Nevada 89701

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Woodburn and Wedge
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Eureka County District Attorney
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Therese A. Ure, Esq.
Schroeder Law Offices, P.C.
440 Marsh Avenue
Reno, Nevada 89509

In the following manner:

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|-------------------------------------|---|--------------------------|---------------------------|
| <input checked="" type="checkbox"/> | regular U.S. mail | <input type="checkbox"/> | overnight UPS |
| <input type="checkbox"/> | certified U.S. mail | <input type="checkbox"/> | overnight Federal Express |
| <input type="checkbox"/> | priority U.S. mail | <input type="checkbox"/> | Fax to # _____ |
| <input type="checkbox"/> | hand delivery - | | |
| <input type="checkbox"/> | copy placed in agency box located in the Eureka County Clerk's Office | | |

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA STATE
ENGINEER; THE STATE OF
NEVADA DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES, DIVISION OF WATER
RESOURCES; and KOBEH VALLEY
RANCH, LLC,

Appellants,

vs.

EUREKA COUNTY, a political
subdivision of THE STATE OF
NEVADA; KENNETH F. BENSON,
an individual; DIAMOND CATTLE
COMPANY, LLC, a Nevada limited
liability company; and MICHEL AND
MARGARET ANN ETCHEVERRY
FAMILY, LP, a Nevada registered foreign
limited partnership,

Respondents.

Electronically Filed
Jun 14 2016 01:38 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Case No. 70157

**RESPONSE TO ORDER TO SHOW CAUSE AS TO WHY APPEAL
SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION**

Appellant, Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (“State Engineer”), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Senior Deputy Attorney General Micheline N. Fairbank, hereby respectfully responds to the Court’s Order to Show

// //

Cause filed on May 24, 2016. This Response is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND FACTUAL SUMMARY

Appellant State Engineer timely initiated this appeal on April 8, 2016, following the March 9, 2016, Amended Order of the District Court. The appeal was docketed with the Court on April 14, 2016. On March 25, 2016, Appellant/Real-Party-in-Interest Kobeh Valley Ranch, LLC (“KVR”), filed its Motion to Alter or Amend Judgment pursuant to NRCP 59(e). The briefing on Appellant KVR’s Motion to Alter or Amend Judgment was completed and submitted for review on April 26, 2016. On June 3, 2016, the Order Denying KVR’s Motion to Alter or Amend Judgment was filed by the District Court and the Notice of Entry of Order was filed by Petitioner/Appellee Eureka County the same day. A true and correct copy of the Order Denying KVR’s Motion to Alter or Amend Judgment is attached hereto as Exhibit 1.

II. LEGAL DISCUSSION

Appellant State Engineer timely filed his Notice of Appeal despite the filing of Appellant KVR’s Motion to Alter or Amend Judgment in an abundance of caution to preserve the appeal. Courts are granted discretion to grant or deny a motion, whether under the rule of civil procedure upon which the motion is brought, or another rule upon which the Court deems appropriate.

This Court lacks jurisdiction to hear an appeal that is filed beyond the time limits set forth in NRAP 4(a). *See Winston Products Co. v. DeBoer*, 122 Nev. 517, 519-20, 134 P.3d 726, 728 (2006). Nevada Rules of Civil Procedure Rule 59 and 60 differ with respect to tolling the time for a timely appeal. While a motion brought pursuant to NRCP 59 will toll the time for an appeal, a motion decided under NRCP 60 does not toll the time for an appeal. *See, e.g., Chapman Indus. v. United Ins. Co. of Am.*, 110 Nev. 454, 457-59, 874 P.2d 739, 741-42 (1994). Therefore, while Appellant KVR's Motion to Alter or Amend Judgment was brought under NRCP 59, were the motion to be determined a NRCP 60 motion, there would not be tolling of the time to file the notice of appeal. And because a post-judgement motion may be subject to court discretion, Appellant State Engineer filed his notice of appeal in an abundance of caution to assure that this Court would not be divested of jurisdiction due to an untimely appeal.

However, given that the District Court has denied Appellant KVR's Motion to Alter or Amend Judgment, any issue regarding this Court not yet having jurisdiction is moot. *See* Exhibit 1. Appellant KVR's Motion has been finally decided and therefore, jurisdiction over this appeal is properly before this Court.

III. CONCLUSION

Appellant State Engineer timely and properly sought to preserve his appeal by filing the Notice of Appeal following the District Court's March 9, 2016, final order. Moreover, given the fact that the District Court has ruled on and denied Appellant

KVR's Motion to Alter or Amend Judgment, any question as to this Court's jurisdiction over the appeal is moot and the appeal should accordingly be permitted to proceed.

RESPECTFULLY SUBMITTED this 14th day of June, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Micheline N. Fairbank
MICHELINE N. FAIRBANK
Senior Deputy Attorney General
Nevada Bar No. 8062
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: (775) 684-1225
Fax: (775) 684-1108
Email: mfairbank@ag.nv.gov

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 14th day of June, 2016, I served a copy of the foregoing RESPONSE TO ORDER TO SHOW CAUSE AS TO WHY APPEAL SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION, by electronic service to:

Paul G. Taggart, Esq.
David H. Rigdon, Esq.
TAGGART & TAGGART, LTD.
Respondent, Kobreh Valley Ranch, LLC

THEODORE BEUTEL, ESQ.
Eureka County District Attorney
Respondent, Eureka County

Ross E. De Lipkau, Esq.
Gregory H. Morrison, Esq.
PARSONS BEHLE & LATIMER
Respondent, Kobreh Valley Ranch, LLC

Karen A. Peterson, Esq.
Dawn Ellerbrock, Esq.
Kyle A. Winter, Esq.
ALLISON, MACKENZIE, LTD.
Respondent, Eureka County

Francis M. Wikstrom, Esq.
PARSONS BEHLE & LATIMER
Respondent, Kobreh Valley Ranch, LLC

Jennifer Mahe, Esq.
MAHE LAW, LTD.
Respondent, Eureka County

Laura A. Schroeder, Esq.
Therese A. Ure, Esq.
SCHROEDER LAW OFFICES, P.C.
*Respondents, Kenneth F. Benson,
Diamond Cattle Company, LLC,
and Michel and Margaret Ann
Etcheverry Family LP*

/s/ Dorene A. Wright

INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Order Denying Kobeh Valley Ranch, LLC's Motion to Alter or Amend Judgment filed June 3, 2016	13