IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS IN AND TO ALL WATERS OF DIAMOND VALLEY, HYDROGRAPHIC BASIN NO. 10-153, ELKO AND EUREKA COUNTIES, NEVADA.

KOBEH VALLEY RANCH, LLC'S OBJECTIONS TO THE PRELIMINARY ORDER OF DETERMINATION

COMES NOW, KOBEH VALLEY RANCH, LLC ("KVR"), by and through its counsel PAUL G. TAGGART, ESQ. and EVAN J. CHAMPA, ESQ., of the law firm of TAGGART & TAGGART, LTD., and hereby respectfully submits its objections, pursuant to NRS 533.145, to the Nevada State Engineer's August 30, 2018, Preliminary Order of Determination and Abstract of Claims ("Preliminary Order").

INTRODUCTION

Diamond Valley is currently the most over-appropriated and over-pumped groundwater basin in the State of Nevada. This over-pumping of the groundwater basin has had a significant impact on the surface water resources in the basin including the many natural springs along the eastern and western edges of the valley and the ephemeral canyon streams that conduct water from the surrounding mountain ranges to the valley floor. Most of the spring flows have diminished or completely dried up. Meanwhile, land subsidence associated with groundwater declines has opened fissures along the edges of the basin that have captured and redirected the flow of the canyon springs.

Electricity was not brought to Diamond Valley until the late 1950s. Because of the lack of electricity, all ranching and farming prior to 1913 used water from naturally flowing springs. These springs irrigated immediately adjacent pasture and meadow land while water that flowed to the surface from the springs was diverted into open ditches and conveyed (sometimes for miles)

to other lands where it was used to flood irrigate crops and meadow grasses. Conveyance through open ditches, flood irrigation of fields and meadows, and the subsequent natural irrigation are all beneficial uses of water that were recognized under Nevada's pre-statutory water law as establishing appropriative rights to water.

KVR is the owner of water rights from water sources as set forth in the Preliminary Order in the above referenced matter, and therefore has an interest in the water sources subject to the Preliminary Order in Diamond Valley, Basin No. 153. KVR has reviewed the subject Preliminary Order and is in agreement with some of the State Engineer's findings, but is concerned with many of the other findings within the Preliminary Order. Accordingly, KVR objects in part to the Preliminary Order as set forth herein.

The following is a list of general objections and issues KVR has toward to the Preliminary Order. These objections should not be interpreted to be a complete list of all objections made or held by KVR toward the Preliminary Order or any final order issued by the State Engineer. KVR withholds the right to put forth more evidence to support the objections listed below, including, but not limited to testimony, documentary evidence, affidavits, and ancient records. Additional evidence will be supplied by KVR during a hearing held by the State Engineer to further prove up the claims made by KVR.

PROCEDURAL BACKGROUND

On October 8, 1982, the State Engineer issued Order 800 initiating the Diamond Valley adjudication proceedings. On November 18, 1982, the State Engineer issued Order 802 setting a deadline of February 10, 1984, for individuals with claims of rights to file their proofs of appropriation. On December 23, 1983, the State Engineer extended this deadline to February 10, 1985. On January 25, 1985, the State Engineer again extended the deadline to August 12, 1985.

After the period for filing proofs expired, the adjudication proceedings stalled and no further action was taken until Sadler Ranch, LLC requested that the State Engineer adjudicate its rights to two particular springs. On August 21, 2015, the State Engineer issued Order 1263

reviving the dormant basin-wide adjudication proceedings. On October 16, 2015, the State Engineer issued Order 1266 establishing a new deadline for the filing of proofs of May 31, 2016. On March 8, 2016, the State Engineer denied a request from the United States Bureau of Land Management to extend the time for the filing of proofs.

On June 6, 2017, the State Engineer entered into a settlement agreement with Sadler Ranch, LLC concerning the adjudication proceedings. The agreement required the State Engineer to issue a Preliminary Order of Determination no later than August 30, 2018, and a Final Order of Determination no later than January 31, 2020. On August 30, 2018, the State Engineer issued the instant Preliminary Order.

STANDARD OF REVIEW

I. The Adjudication Process.

The adjudication of claims of vested water rights is governed by NRS Chapter 533. Pursuant to NRS 533.085(1), vested rights to take and use water that were initiated in accordance with Nevada's water laws prior to 1913 cannot be impaired by the State Engineer or by the application or enforcement of any of the provisions contained in NRS Chapter 533. Under NRS 533.090, the State Engineer has authority to initiate proceedings to determine the relative rights of various claimants to the use of water from a particular source. Once that process is initiated, the State Engineer is required to issue an order setting a deadline for the taking of proofs of appropriation from claimants,[1] investigate the sources of water and the proofs of appropriation,[2] and issue a preliminary order of determination "establishing the several rights of claimants to the waters."[3]

"Any person claiming any interest in the stream system involved in the determination of the relative rights to the use of the water . . . may object to any finding, part or portion of the

[1] NRS 533.110.
[2] NRS 533.100.
[3] NRS 533.140.

preliminary order of determination made by the State Engineer."[4] Such objections must be filed within 30 days after the evidence and proofs have been opened to public inspection and must "state with reasonable certainty the grounds of the objection."[5]

The requirement to state the grounds of the objections with "reasonable certainty" is similar to the "short and plain statement of the claim" standard used for the filing of a civil complaint.[6] The Nevada Supreme Court has interpreted this to be a "notice pleading" standard.[7] Under notice pleading a petitioner is only required to provide "adequate notice of the nature of the claim."[8] Such notice must set forth the facts which support a legal theory, but does not need to use precise legalese describing the grievance.[9] Rather, the pleadings are to be "liberally construed to place into issue such matters which are fairly noticed."[10] Accordingly, as long as objections to a preliminary order of determination provide clear notice of the issues that will be raised at the hearing on the objections, they are legally sufficient.

II. Standards for Reviewing Proofs of Appropriation.

Vested rights to surface water sources are those rights for which the construction of the works of diversion were initiated prior to 1905. The quantity of a claim is based on the water placed to beneficial use prior to 1905 using the irrigation practices of that time period. The Nevada Supreme Court has held that the adjudication process outlined in the statutory water law cannot impair an established vested right and that such rights "shall not be diminished in quantity or value."[11] Accordingly, the State Engineer is without discretion to recognize a vested appropriation at an amount less than what the evidence in the record shows was beneficially used prior to 1905 or to assign a more junior priority date to such a claim.

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[4] NRS 533.145(1).
[5] NRS 533.145(1) & (2).
[6] *See* NRCP 8(a).
[7] *Hay v. Hay*, 100 Nev. 196, 198, 679 P.2d 672, 674 (1984).
[8] *Id.*
[9] *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995).
[10] *Hay*, 100 Nev. at 198, 679 P.2d at 674.
[11] *Ormsby Cty. v. Kearney*, 37 Nev. 314, 352, 142 P. 803, 810 (1914).

If substantial evidence demonstrates that water was placed to beneficial use on a particular property using flood irrigation and open conveyance ditches, the State Engineer must recognize the quantity of water necessary to accomplish this task regardless of whether he believes that such practices are inefficient or that the same quantity of acreage can be adequately irrigated with less water under modern irrigation practices. Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion."[12] The key question when evaluating each proof is how much water was needed to irrigate the claimed lands under historic conditions.

OBJECTIONS

Based on the information available, KVR objects to the State Engineer's finding of the duty for Harvest, Meadow/Pasture crops, and Diversified Pasture, the finding of abandonment, and reliance on insufficient evidence based on the following reasons.

I. The Duty For Irrigation Purposes Is Insufficient.

The State Engineer determined that the duty of water required to be diverted from all of the various water within Diamond Valley is 3.0 acre-feet per acre ("af/a") for harvest crop, 2.0 af/a for meadow/pasture, and 0.75 af/a for diversified pasture.[13] However, there is no evidence on record to support these duties or to justify the reduction of the duties claimed by the several vested water right owners in their respective proofs. Evidence in the proof files, other State Engineer permit files, and evidence submitted as part of this adjudication indicate a much higher duty of water and a varied duty dependent on the unique conditions present at each irrigator's property (topography, soil type, distance between water source and irrigated acreage, etc.).

The duty determination in the Preliminary Order does not consider important factors which are necessary to grow the different types of crops. These factors include irrigation efficiency and transmission losses. The Preliminary Order indicates that the duties consider conveyance losses, but in reality, the duty figures appear to be based on 100% irrigation efficiency, or more. These

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[12] *Bacher v. Office of State Eng'r of State of Nev.*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006).
[13] Preliminary Order, p. 10.

findings do not consider realistic irrigation practices which were in place when the water was first put to beneficial use.

The evidence submitted with the proofs indicate that a great quantity of water was used by the appropriators to produce crops in Diamond Valley. Specifically, KVR provided the State Engineer with historical duty calculations based not only on the Net Irrigation Water Requirement ("NIWR"),[14] but the following lines of information: (1) Food and Agriculture Organization of the United Nations Annex I; (2) Nevada Cooperative Extension Service Fallon Office reference to Publication No. 3375; (3) a calculation of Shallow Open Water NIWR based on conveyance efficiency for acre-feet per acre duty; and (4) Nevada Division of Water Resources Permit 4273 spring crop growth and harvest. Proof owners also supplied the State Engineer with evidence of perennial yields of the various sources, such as spring flow measurements and evidence of the portion of the supply that was beneficially used. All evidence of duty in the record supports the duty set forth in the filed proofs, and there is no evidence that these duty numbers are unreasonable.

A. Harvest Crop Duty

The duty established for harvest crop in the Preliminary Order is insufficient for the following reasons. The State Engineer published the NIWR for harvest crop in Diamond Valley at 2.5 af/a, but even for lands irrigated miles from the spring or creek source, the Preliminary Order only allows for up to 0.5 foot conveyance loss. Substantial evidence in the record actually support a duty of 4 to 4.5 af/a of vested duty for harvest crops. KVR submitted evidence of duty for crop growth ranging from 4 af/a to 6.25 af/a for the irrigation seasons, with 3 af/a being the established duty for winter irrigation. Even historically, the State Engineer has issued permits for statutory water rights based on a duty of 4 af/a. Certificates in Diamond Valley which are based on the actual application of water are greater than 3 af/a, even when taking into consideration current,

[14] Huntington, J.L. and Allen, R.G., 2010, *Evapotranspiration and Net Irrigation Water Requirements for Nevada*: Department of Conservation and Natural Resources-Division of Water Planning, Carson City, Nevada.

more efficient, irrigation methods.[15] Substantial evidence is in the record to support a duty for harvest crops of at least 4.5 af/a as specified in the various proofs.

B. Meadow and Pasture Land Duty

For meadow and pasture land, the Preliminary Order establishes a duty too low for actual irrigation of these crops. While the NIWR for highly managed pasture grass is 2.5 ft and grass hay is 2.4 ft, the Preliminary Order recognizes a duty of only 2 af/a for managed meadow or pasture land. This amount is far less than the amount consumed by meadow and pasture plants without accounting for conveyance losses. The duty set forth in the Preliminary Order is insufficient to irrigate the crop type specified, even if the irrigation practice were 100% efficient. KVR supplied evidence that supports a duty ranging from 4 af/a for grass hay to 6.25 af/a for highly managed pasture grass. Again, permits and certificates issued by the State Engineer indicate a duty generally of 4 af/a for such pasture and meadow irrigation during the irrigation season. Winter water rights issued in the basin, which historically use less water than crops grown in the irrigation season, indicate a duty of 3 af/a.[16] Thus, substantial evidence is in the record to support the proof claims of duty for pasture and meadowland of the claimed amounts under the various proofs.

C. Diversified Pasture Duty

The duty established for diversified pasture is too low for the following reasons. The Preliminary Order has a duty for diversified pasture at 0.75 af/a duty. There is no support in the record for this determination. The 0.75 af/a is less than the lowest published NIWR in Diamond Valley, being 2 af/a for low managed pasture grass. The evidence KVR supplied supports a duty for low managed pasture grass, or diversified pasture, of 3.33 af/a to 5 af/a. Thus, there is no

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[15] *See e.g.*, Certificate 9808 at a duty of 4 af/a for flood irrigation from Hunter Creek for mostly harvest areas but also including some pasture irrigation; Certificate 9076 for flood irrigation from Hildebrand Creek with a duty of 4 af/a for harvest crops; Certificate 18992 for pivot irrigation from underground pumping. *See also* mitigation right Certificate 16935 for a duty of 3.38 af/a based on meter readings for pivot irrigation of 120.713 acres from an underground source to mitigate the loss of spring flow at the same location.

[16] *See* Buschelman spreadsheet.

evidence on record to support the reduction to vested water rights, and there is substantial evidence in the record to support the duties claimed under the various proofs.

D. Conveyance Losses

The Preliminary Order does not contain an analysis based on substantial evidence in the record to establish reasonable conveyance losses associated with historical irrigation practices. KVR included an analysis of why conveyance loss and source factors are necessary when determining the duty of water. This analysis shows that choosing a duty based solely on the NIWR does not provide a claimant with the actual amount of water previously put to beneficial use. Rather, the conveyance losses in the Preliminary Order severely limits the amount of water a claimant is entitled to under Nevada water law. As such, there is insufficient evidence in the record to justify a reduction in duty less than that established in the various proofs of vested water use.

The Preliminary Order should have included an individual claim-by-claim determination of conveyances losses associated with historic farming and ranching practices. Instead, the Preliminary Order assumes that all the claims had the same level of conveyances losses for each irrigated acre regardless of the size of the property, the proximity of the source of water to the irrigated acreage, or the topography and soils conditions present. The failure to make individualized determinations of irrigation duties for each property, based on that property's unique characteristics, results in under-estimating the quantity of water placed to beneficial use prior to 1905.

II. Vested Water Rights Were Not Abandoned.

The State Engineer asserts that "[t]he prior appropriation system of acquiring water rights by those who were early settlers on the public domain is recognized by the State Engineer as a way of establishing vested water rights."[17] Continuing on page 12, the State Engineer states "[t]hese appropriations already made on the public lands and recognized by Congress were a confirmation

[17] Preliminary Order, p. 11.

of the right to insist on the use of the waters to the extent necessary for beneficial purposes for the entire place of use before any control of the public domain was exerted by the federal government." The State Engineer concludes by saying that "the claims for irrigation wherein portions of the places of use claimed are lands controlled by the federal government are viable claims unless otherwise determined in this Order."

Also, on page 13 of the Preliminary Order, the State Engineer states that "abandonment of a water right is the voluntary 'relinquishment of the right by the owner with the intention to forsake and desert it,'[18]" which is "a question of fact to be determined from all the surrounding circumstances."[19] However, "[t]hough the longer the period of nonuse, the greater the likelihood of abandonment, [the Court] find no support for a rebuttable presumption."[20] The State Engineer concludes by saying "[a]t a minimum, proof of continuous use of the water rights should be required to support a finding of lack of intent to abandon."[21]

The State Engineer then states, on page 121 of the Preliminary Order, that cancellation of Homestead Entry ("HE") and Desert Land Entry ("DLE") applications between 1913 and 1919 "clearly indicates an intent to abandon the HE and DLE applications." Because of this cancellation, the State Engineer says that placing water to beneficial use "do[es] not meet the criteria of a claim of vested right."[22] These assertions are in error for a number of reasons.

First, the State Engineer cannot require a claimant to provide evidence of continuous use to show a lack of intent to abandon their vested water right, as stated in the Preliminary Order. The Nevada Supreme Court recently answered whether this statement adheres to Nevada water law. In *King v. St. Clair*,[23] the Supreme Court expressly rejected the State Engineer's position that this showing must be made. There being no shift in the burden of proof, the State Engineer must prove, "by clear and convincing evidence," that an owner of the water right intended to abandon

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[18] *In re Manse Spring*, 60 Nev. 280, 287, 108 P.2d 311, 315 (1940).
[19] *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).
[20] *U.S. v. Orr Water Ditch Co.*, 256 F.3d 935, 945 (9th Cir. 2001) (quoting *U.S. v. Alpine Land & Reservoir Co.*, 27 F.Supp.2d 1230, 1242 (1998)).
[21] *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002).
[22] Preliminary Order, p. 121.
[23] 134 Nev. Adv. Op. 18, 414 P.3d 314 (2018).

it and took actions consistent with that intent.[24] Clear and convincing evidence "need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference... may be drawn."[25]

Second, as mentioned above, relinquishment of a water right is a fact to be determined from all the surrounding circumstances. The State Engineer used cancellations of the HE and DLE applications as the only factor to deny many of KVR's vested claims. Cancelling these applications do not pertain to the applicant's intent to beneficially use water. Rather, this only shows an applicant's intent to not take fee title to the land. KVR included varying lines of evidence which, taken together, showed an intent to beneficially use water. Declining fee ownership of land does not provide clear and convincing evidence of an intent to forever forsake the ownership and beneficial use of a vested water right.

Similarly, the pre-statutory appropriator at Romano Ranch was in litigation over his water rights prior to 1913.[26] The action pertained to the use of water on the Romano Ranch and assists the State Engineer in determining that there was a greater concern over the valid use of water rather than the fee ownership of land. As such, the State Engineer was in error to conclude that declining fee-ownership in land equates to an abandonment of irrigation water.

Third, the State Engineer on pages 11 and 12 of the Preliminary Order states that placing water to beneficial use on federal lands creates a vested claim to that water. However, the State Engineer later says that water used after cancellation of the HE and DLE applications "do[es] not meet the criteria of a claim of vested right."[27] These HE and DLE cancellations occurred over 50 years after the water had been put to its initial beneficial use. Strictly adhering to Nevada water law, the water was put to beneficial use, regardless of whether it was on fee-owned or federally owned land, creating a vested right.

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[24] *See Town of Eureka v. Office of State Eng'r of State of Nev., Div. of Water Res.*, 108 Nev. 163, 169, 826 P.2d 948, 952 (1992).
[25] *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995) (quoting *Gruber v. Baker*, 20 Nev. 453, 477, 23 P. 858, 865 (1890)).
[26] *Frank Romano v. Edgar Sadler and Huntington and Diamond Valley Stock and Land Co.*, 1913.
[27] Preliminary Order, p. 121.

Fourth, the State Engineer's denial based only on the non-existence of HE and DLE applications does not take into consideration that historical irrigation did not stay within the strict confines of the Public Land Survey System boundaries. Nearly every acreage denied by the State Engineer on the grounds of HE and DLE applications abuts other acreage which was granted a land patent. The State Engineer failed to analyze actual irrigation methods and locations on neighboring parcels. Without this necessary analysis, the findings in the Preliminary Order were not based on clear and convincing evidence.

III. The Evidence Relied Upon Was Insufficient.

The Preliminary Order was not based on substantial evidence. The State Engineer gave the greatest amount of weight to field notes taken on November 18, 1912, and a map from May 20, 1913, because according to the State Engineer, they "paint[] a picture of what was likely present prior to 1905."[28]

A. Reliance on Maps

The map from May 20, 1913 ("Romano Map"), specifically shows areas labeled as "wheat" or "pasture" which were subsequently denied based only upon the cancellation of HE applications. As a specific example, western portions of the northwest quarter of Section 12, Township 23 North, Range 52 East contain a fenced-in area which was used to grow wheat. The State Engineer denied these two acreages on the ground that the HE application was not approved, in contradistinction to the State Engineer's prior statement that the Romano Map was among the "best evidence."[29]

Upon filing the proofs of vested claims on April 17, 1985, the associated map ("Boyack map") provided the same information as the Romano Map, but included further detail of the ditch systems as well as delineation of pasture irrigation. Similarly, for the amended proof maps filed on May 31, 2016 ("Buschelman map"), the accuracy of the delineation of the irrigated acreage increased to coincide with actual historical irrigation practices. Relying on one map, based only

[28] Preliminary Order, p. 120.
[29] *Id.*

on its age, does not adhere to considering all possible evidence. Therefore, the findings in the Preliminary Order relating to mapping are not based on substantial evidence.

B. Reliance on Field Notes

On November 18, 1912, Harvey M. Payne, Assistant Field Engineer with the Office of the State Engineer, visited six ranches located in the northwestern portion of Diamond Valley. These notes on "The Ranches on the Road Between Eureka and Mineral Hill, Eureka County, Nevada" ("Field Notes") covered a distance of 19.5 miles from the first ranch visited to the last. KVR objects to the weight the State Engineer gave to this line of evidence.

The Field Notes do not contain the quantitative information customarily gathered under field operation standards as set forth by the State Engineer in the 1913-1914 Biennial Report.[30] The goal of surveying irrigated areas is to have a one percent error, which arises by properly noting the legal subdivision, traversing the ditches, making cross-sections and taking the grade, platting the crops, and segregating the definite areas to each ditch.[31] "In addition to the surveying and mapping, the areas must be checked and compared with the claims."[32] There is no evidence this work was completed and therefore, the cursory Field Notes cannot rise to the level of being considered among the best evidence.

Similarly, the Nevada Supreme Court invalidated the process by which the State Engineer used to administer its adjudication power. In *Ormsby County v. Kearney*,[33] the Court held, *inter alia*, that "it is made the duty of the owners of such rights to present their claims and to support the same by proofs, in order that such rights may be determined for administrative purposes under the act." Importantly, the Court held that "the act gives the State Engineer no discretion to award an appropriator a less amount of water than the facts show he is entitled to."[34] Here, however, the

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[30] State of Nevada Biennial Report of the State Engineer 1913-1914, W.M. Kearney, 1915.
[31] 1913-1914 Biennial Report, p. 29.
[32] *Id.*
[33] 37 Nev. 314, 142 P. 803.
[34] *Id.*, 37 Nev. at 353, 152 P.2d at 809.

State Engineer utilized the same line of evidence at issue in *Ormsby*[35] to award a lesser amount of water than KVR claimed. This action is in direct contravention of the Court's ruling in *Ormsby County* and NRS 533.085.[36]

C. Other Information Not Relied On

Staff from the Office of the State Engineer ("Staff") investigated KVR's claims over a 10-day period in 2017.[37] Staff was unable to locate any flowing spring sources because, as stated in the proofs, the springs became permanently dry in 1972. KVR objects to some of the conclusions of Staff as adopted by the State Engineer in the Preliminary Order, as well as the findings of the State Engineer which did not adopt the conclusions of Staff.[38]

1. V04476

Staff concluded their investigation agreed best with the amended proofs submittal. However, the State Engineer denied 13.51 acres of harvest wheat and alfalfa irrigation based only on the cancellation of an HE application. The location at issue is shown in the Romano Map, the Boyack Map, and the Buschelman Map, all showing pre-statutory use of water. Specifically, the Romano Map shows the fence line and various types of crops located in the two quarter-quarter sections which were denied by the State Engineer. Here, the State Engineer specifically disregarded what he considers some of the best evidence in favor of one piece of information which does not provide intent to abandon water.

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[35] The mapping efforts of Field Engineers and their assistants (Payne et al.) resulted in a reduction of water claimed as a pre-statutory use, spawning the litigation which resulted in *Anderson v. Kearney*, a case which was disposed of at the same time as *Ormsby County v. Kearney*.

[36] "Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913."

[37] Field Investigation Report for the Diamond Valley (Basin 153) Adjudication of Kobeh Valley Ranch Claims V04476, V04477, V04478, V04479, V04480, V10905, V10906, V10907, V10908, V10909, V10910, V10911, V10912, V10913, V10914, V10915, V10916, V10917, June 5-8, 19-23, 2017. ("Field Investigation").

[38] KVR does not object to the findings regarding Vested Claims V10914 and V10915.

2. V04477

Staff concluded that "observations on the ground best agree with the original submittal" made in 1985.[39] As stated above, the Boyack map submitted in 1985 closely resembles the Romano Map made in 1913. For this claim, and particularly focusing on the fenced-in area used for growing wheat as discussed above, the State Engineer denied all but two acres based upon three HE cancellations.

Notwithstanding the State Engineer's previous assertion that a vested claim is valid even if put to use on federal land and also that the Romano Map was considered the best evidence, the State Engineer denied 28.4 acres of proven irrigation use based on cancellation of these HE applications. Similarly, the State Engineer used the same justification for denying the remaining 31.11 acres along Siri Ditch No. 1.

The State Engineer also determined that irrigation practices contained some discrepancies when comparing the three maps in the record. Particularly, the State Engineer notes that the Romano and Buschelman maps show Siri Spring being supplemented by Romano Springs No. 1 and 2. Even if this irrigation practice were in place, the irrigation water from Siri Spring would only be supplemented by a small portion of Romano water due to the long distance that the Romano water would have to travel in order to be placed to beneficial use. As such, a reduction in the amount of water used from Siri Spring is not based upon substantial evidence in the record.

Based on the Romano Map, Boyack Map, and staff conclusions, the State Engineer's decision to deny 59.51 acres of harvest wheat and alfalfa is unsupported by substantial evidence.

3. V04478

Staff's only conclusion regarding Sulphur Spring is that the Romano Map noted that the spring "produced very little water."[40] This notation pertains to the several small springs located northeast of Sulphur Spring, but not Sulphur Spring itself. This notation in the Romano Map does not provide enough evidence to limit the acreage identified in the original and amended proofs.

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[39] Field Investigation, p. 32.
[40] Field Investigation, p. 33.

Payne's statement in his Field Notes that irrigation "will not exceed 40 acres"[41] is not substantiated with any quantitative field notes or maps. Further, Payne identifies there is pasture at the ranch but opines that it is "probably not irrigated." [42] This assumption is unsupported by any other evidence and the weight given should reflect that fact.

Finally, the State Engineer denied 126.12 acres of meadow based on HE application cancellation. As explained above, this line of evidence does not support a relinquishment of water historically put to beneficial use.

4. V04479

Staff concluded that "wild hay and alfalfa field agree with the amended submittal" while the meadow "agrees with the original submittal."[43] Again, the State Engineer denied 132.36 acres of irrigated land based on cancelled HE applications. Curiously, the SE¼ SW¼ of Section 13, T.23N., R.52E., M.D.B.&M. was among the HE applications cancelled. Yet, the State Engineer found water was put to beneficial use over 35.2 acres in this quarter-quarter. This fact further shows that denying a vested claim based only on cancellation of HE applications is not based upon substantial evidence in the record.

5. V04480

Staff stated their field investigations were "consistent with the original submittal and descriptions made on the 1913 Romano Map."[44] The State Engineer failed to find there was irrigation on 42.58 acres of land as shown specifically on the Boyack Map. The State Engineer provided no evidence or justification to support his conclusion that these lands were not irrigated. Absent any evidence to the contrary, KVR is entitled to the water necessary to irrigate 42.58 acres according to the proven historical practices.

Also, the State Engineer limited the extent of irrigation based on the locations of the ditch and slough sourcing Tule Spring water to northerly lands as depicted in the Romano Map. The

[41] Field Notes, page numbers omitted.
[42] Field Notes, page numbers omitted.
[43] Field Investigation, p. 32.
[44] Field Investigation, p. 32.

subsequent creation of ditches only shows that previous irrigators were working the land with efficiency in mind. KVR believes that the new ditches were able to more efficiently convey the water, resulting in the same amount of water being applied to more acreage. This new irrigation system does not reduce the pre-statutory amount of water put to beneficial use, but instead establishes how efficient irrigation practices result in more land cultivation.

6. V10905-V10913

Staff made two important findings associated with the spring complex under these claims. First, Staff made an unsupported conclusion that much of the pasture in sections 18 and 19 were not irrigated in the past. As noted above, in the intervening 45 years since the springs ceased flowing, natural vegetation has had time to reclaim the one cultivated land. As such, the resulting conclusion in the Preliminary Order is not based upon substantial evidence in the record. This resulted in the denial of 270.66 acres of irrigated land.

Similarly, as was found under Claim 04480, Staff determined the ditch system cut off irrigable land. As the analysis under Claim 04480 shows, the change in placement and number of ditches shows an intent to efficiently irrigate different portions of land. This finding resulted in the denial of 69.41 acres of land.

7. V10916 & V10917

Staff concluded that "wild hay and alfalfa field agree with the amended submittal" while the meadow "agrees with the original submittal."[45] Again, the State Engineer denied 149.56 acres of irrigated land based on cancelled HE applications. Of primary concern is that most of the areas denied under this standard are within fenced portions of the ranch as shown on the Romano Map. This action by the previous owners shows their intention to protect the cultivated land and, in turn, continue the beneficial use of water on the public domain.

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[45] Field Investigation, p. 32.

CONCLUSION

The findings in the Preliminary Order are based upon insufficient information, the resulting conclusions amounting to an arbitrary and capricious decision, as well as an abuse of discretion. As such, the findings relating to Kobeh Valley Ranch should be amended to account for a proper calculation of duty, placing water to beneficial use on non-fee-owned land, and giving proper weight to maps filed.

Respectfully submitted this 7th day of November, 2018.

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EXHIBIT INDEX

Exhibit	Description
1.	Affidavit of Evan J. Champa, Esq.

EXHIBIT 1

EXHIBIT 1

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS IN AND TO ALL WATERS OF DIAMOND VALLEY, HYDROGRAPHIC BASIN NO. 10-153, ELKO AND EUREKA COUNTIES, NEVADA.	**AFFIDAVIT OF EVAN J. CHAMPA IN SUPPORT OF KOBEH VALLEY RANCH, LLC'S OBJECTIONS TO THE PRELIMINARY ORDER OF DETERMINATION**

STATE OF NEVADA)
) ss:
COUNTY OF CARSON CITY)

I, EVAN J. CHAMPA, ESQ., being duly sworn depose and say:

1. I am a citizen of the United States, over 18 years old, and have knowledge of the following facts.

2. I am the attorney for Kobeh Valley Ranch, LLC ("KVR") in the above-referenced matter, and make this affidavit in support of KVR's Objections to the Preliminary Order of Determination ("Objections").

3. On August 30, 2018, the State Engineer entered a Preliminary Order of Determination and Abstract of Claims ("Preliminary Order") in the above-referenced matter.

4. My client, KVR, is the owner of water rights from water sources as set forth in the Preliminary Order.

5. On behalf of my client, I have prepared KVR's Objections and verify that all the objections stated therein are true and accurate to the best of my knowledge.

6. Further affiant sayeth naught.

DATED this 7th day of November, 2018.

EVAN J. CHAMPA, ESQ.

SUBSCRIBED and SWORN to before me
this 7th day of November, 2018,
by EVAN J. CHAMPA.

NOTARY PUBLIC

SARAH HOPE
Notary Public - State of Nevada
Appointment Recorded in Carson City
No: 15-3128-3 - Expires September 17, 2019