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STATE ENGINEERS OFFICE

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.

DANIEL S. VENTURACCI AND AMANDA L. VENTURACCI'S OBJECTIONS TO THE PRELIMINARY ORDER OF DETERMINATION

COMES NOW, DANIEL S. VENTURACCI and AMANDA L. VENTURACCI ("Venturacci") by and through their attorneys of record, PAUL G. TAGGART, ESQ. and DAVID H. RIGDON, ESQ., of the law firm of TAGGART & TAGGART, LTD., and hereby respectfully submits their objections, pursuant to NRS 533.145, to the Nevada State Engineer's August 30, 2018, Preliminary Order of Determination ("Preliminary Order").

INTRODUCTION

Daniel S. Venturacci and Amanda L. Venturacci are the current owners of five previously separate ranches located in the northeastern part of Diamond Valley.[1] These five ranches were identified on a range map filing submitted to the State Engineer by Mr. Jacobsen in 1928.[2] All five ranches were occupied and settled prior to 1905 and used water from various springs, supplemented by spring runoff from nearby canyons. The five ranches listed from south to north are: (1) Thompson Ranch (aka Diamond Springs Ranch), (2) Cox Ranch (aka Telegraph Station), (3) Willow Field, (4) Rock Canyon Ranch, and (5) Box Springs Ranch (aka Mau Ranch). In addition to evidence that was filed along with the various proofs, four additional submittals of evidence were provided to the State Engineer in support of the proofs on various thumb drives and CDs. These submissions included extensive historic research, mapping and surveys conducted by various government agencies

[1] *See* Document Nos. 232994, recorded 5/19/2017, and 236259, recorded 10/18/2018, Eureka County Recorder. A Report of Conveyance to update ownership to be filed soon.
[2] *See* Range Map 135-30, Official Records, Nevada Division of Water Resources. Available online at: http://images.water.nv.gov/images/Range%20Maps/135-30.pdf

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 and groundwater 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. The groundwater table has been lowered sufficiently to dry up cultivated meadows that flourished prior to extensive groundwater development to the south. The net effect was the lowering of the hydraulic head that ceased groundwater discharges, created ground subsidence and caused the proliferation of fissures that intercept creek flows to their historic place of use. Most of the springs 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 snowmelt and ceased flow of some of the canyon springs that are tributary to the canyon streams.

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 and streams. These springs irrigated immediately adjacent pasture and meadow land while water that flowed to the surface from the springs was diverted either by natural flow or by pumping into open ditches and conveyed (sometimes for miles) to other lands where it was used to flood irrigate crops and meadow grasses. Natural irrigation, conveyance through open ditches, and flood irrigation of fields and meadows are all beneficial uses of water that were recognized under Nevada's pre-statutory water law as establishing appropriative rights to water.

PROCDEURAL BACKGROUND

In 1981, because of concerns of over pumping, Milton Thompson requested action by the State Engineer to protect his vested water rights which were being impacted by groundwater development. The State Engineer held several hearings, and issues several orders, to start to address the issues Mr. Thompson raised. On October 8, 1982, the State Engineer issued Order 800 commencing 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 not further action was taken. On June 11, 2014, Sadler Ranch filed a request to adjudicate springs located on its property. Initially the State Engineer denied this request and that decision was appealed by Sadler Ranch. 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,[3] investigate the sources of water and the proofs of appropriation,[4] and issue a preliminary order of determination "establishing the several rights of claimants to the waters."[5]

"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 preliminary order of determination made by the State Engineer."[6] Such objections must be filed within 30 days after thc cvidcncc and proofs have been opened to public inspection and must "state with reasonable certainty the grounds of the objection."[7]

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.[8] The Nevada Supreme Court has interpreted this to be a "notice pleading" standard.[9] Under notice pleading a petitioner is only required to provide "adequate notice of the nature of the claim."[10] Such notice must set forth the facts which support a legal theory, but does not need to use precise legalese describing the grievance.[11] Rather the pleadings are to be "liberally construed to place into issue such matters which are fairly noticed."[12] 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.

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[3] NRS 533.110.
[4] NRS 533.100.
[5] NRS 533.140.
[6] NRS 533.145(1).
[7] NRS 533.145(1) & (2).
[8] See NRCP 8(a).
[9] *Hay v. Hay*, 100 Nev. 196, 198, 679 P.2d 672, 674 (1984).
[10] *Id.*
[11] *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995).
[12] *Hay*, 100 Nev. 198, 679 P.2d 674.

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 March 1, 1905.[13] The quantity of a claim is based on the water ultimately placed to beneficial use. Beneficial use of water is the basis and measure of the right to use water.[14] To constitute a beneficial use of water, the applicant must intend to use the waters for a beneficial use and actually apply the water to a beneficial use.[15] 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."[16] 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 based on historical records or to assign a more junior priority date to such a claim.

If substantial evidence demonstrates that water was placed to beneficial use on a particular property using natural irrigation or flood irrigation via 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. The key question when evaluating each proof is how much water was used to irrigate the claimed lands under historic conditions.

OBJECTIONS

I. General Objections Related To All Venturacci Proofs Of Appropriation.

The Preliminary Order uses several assumptions and conclusions that apply universally to all proofs, including a basin-wide duty that does not consider local conditions specific to individual water sources or historic evidence of actual use, the rejection of irrigation from spring

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[13] Summary of Statutory Procedures For Filing Claims of Vested Rights, Making Application for a Water Right, and Summary of Fees of the State Engineer, Jason King, revised April 2008. www.water.nv.gov/documents/se_procedures_fees_brochure.pdf.

[14] NRS 533.035.

[15] *Steptoe Live Stock Co. v. Gulley*, 53 Nev. 163, 295 P. 772, 775 (1931).

[16] *Ormsby Cty. v. Kearney*, 37 Nev. 314, 352, 142 P. 803, 809 (1914).

sources without man-made ditches originating at the spring point of diversions, and the analysis of the supplemental nature of the various water sources put to beneficial use on the various ranches. Specific objections related to the individual proofs are discussed in a later section.

Following is a list of general objections and issues Venturacci has regarding the Preliminary Order. These objections should not be interpreted to be a complete list of all objections made or held by Venturacci regarding the Preliminary Order or any final order issued by the State Engineer. Venturacci reserves 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 Venturacci during a hearing held by the State Engineer to further prove up his claims.

A. The irrigation duties established in the Preliminary Order are insufficient do not reflect the irrigation practices in use prior to 1913.

On page 10 of the Preliminary Order, the State Engineer determined that the duty of water required to be diverted from all of the various sources in 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. 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 evidence submitted with the proofs support the duty referenced in each proof. Some ranches had topography, geology, and soil types that necessitated a higher diversion of water to allow the beneficial uses, while other ranches were able to use less water to accomplish the vested beneficial uses. Factors such as the length of the conveyance ditches and the distance from the water source also impact the duty required for the various beneficial uses of water evidenced under

the proofs. Evidence was submitted to the State Engineer evaluating these factors and supporting the duties claimed. Proof owners also supplied the State Engineer with evidence of perennial yields of the various sources of water, such as spring flow measurements, and evidence of the portion of the supply that was beneficially used. All evidence of duty on record supports the duty set forth in the filed proofs, and there is no evidence that these duty numbers are unreasonable.

The duty determination in the Preliminary Order was based in part on the Net Irrigation Water Requirements ("NIWR") published by the State Engineer for each basin in Nevada. The vested right owners also used the same published NIWR in their evidence as one more layer of evidence to support their individual claimed duties. The evidence submitted by the vested right owners includes considerations such as irrigation efficiencies and soil conditions. However, 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 there are no individualized determinations of conveyance losses for each property. Instead, the duty determinations appear to be based on 100% irrigation efficiency, or greater. These findings do not consider the historic irrigation practices which were in place when the water was first put to beneficial use.

The State Engineer published values recognize that the total evapotranspiration ("ET") for alfalfa is 3.2 ft, while highly managed pasture grass is 3.1 ft, low managed pasture grass is 2.5 ft, and grass hay is 3.0 ft. The NIWR is the ET value minus average local precipitation. The State Engineer's published NIWR for alfalfa is 2.5 ft, highly managed pasture grass is 2.5 ft, low managed pasture grass is 2.0 ft, and grass hay is 2.4 ft. The NIWR is the water requirement of the plant at its location, and does not consider conveyance losses from the point of diversion that are necessary to convey the water from the point of diversion to the plant.

The State Engineer-published NIWR for harvest crop in Diamond Valley is 2.5 af/acre and the Preliminary Order sets the duty for harvest crop at 3 af/a. This only leaves 0.5 af/acre for conveyance losses from the point of diversion to the field, despite the fact that many of the irrigated

lands are located miles from the spring or creek source. This determination is contrary to evidence on the record. Substantial evidence in the record supports a duty of 4 to 4.5 af/a of vested duty for harvest crops.

For meadow and pasture land, while the NIWR for highly managed pasture grass is 2.5 ft and grass hay is 2.4 ft. the Preliminary Order recognizes only a duty of 2 af/a for managed meadow or pasture land, which is 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. Thus, substantial evidence is on the record to support the proof claims of duty for pasture and meadowland of the claimed amounts under the various proofs.

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 the 3 af/a under the Preliminary Order. These statutory permits and certificates were issued based on a more efficient center-pivot method of irrigation rather than the flood irrigation techniques that were historically used before the introduction of electricity. 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. The duties listed in the Preliminary Order are also inconsistent with the procedure and duties recognized in other similarly situated vested use areas. For example, the Ophir Creek Decree recognizes harvest crop as having a duty of 4.5 af/a and Class B culture of "Meadow Pasture" and assigns it a duty of 4 af/a.[17]

Finally, the State Engineer set a duty for diversified pasture at 0.75 af/a. There is no support in the record for this determination. The 0.75 af/a duty for diversified pasture is less than half than the lowest published NIWR in Diamond Valley (2 af/a for low managed pasture grass). When individualized conveyance losses are factored in, this will often lead to an absurd result (a negative quantity of water being available to support plant growth). There is simply no evidence on record

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[17] Ophir Creek Decree at 7.

to support the State Engineer's estimated duties while substantial evidence exists to support the duties claimed under the various proofs.

Choosing a duty based solely on an estimated NIWR does not provide a claimant with the actual amount of water they historically placed to beneficial use. Rather, the State Engineer's decision severely limits the amount of water a claimant is entitled to under Nevada water law. As such, there is insufficient evidence on 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. Further the Preliminary Order did not consider additional water consumed by cultivated plants relying on natural irrigation and no analysis was performed of the soil types or the ability to use this water to achieve the same crop as was established under the proofs. 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.

Venturacci objects to the State Engineer's duty calculations and cultural classifications.

B. <u>The Preliminary Order fails to recognize natural irrigation water placed to beneficial use on pasture and meadow lands immediately adjacent to springs and seeps.</u>

The Preliminary Order fails to consider the significant amount of water that naturally irrigated the pastures and fields immediately adjacent to the various spring and seeps. Where a pasture or field has been purposefully maintained with natural irrigation pursuant to the customs in the area, the water consumed by the crops and grasses on that property is recognized as a beneficial use. Nevada courts have long recognized that an appropriation of water is based on both the intent for beneficial use and the actual use of the water, irrespective of whether the means of

diversion is man-made or natural.[18] Where beneficial use can occur without the need for a man-made diversion and it was the local custom to use water in such a manner, the courts have held that the lack of a man-made diversion is not a reason to hold such an appropriation as invalid.[19]

The fact that the over-pumping in the basin has halted this irrigation today is not relevant to a beneficial use determination. All that matters is whether the irrigation was occurring prior to 1905 and whether the owner or user of the property was making beneficial use of it. Evidence was provided of the beneficial usc of natural irrigation for the growing of crops and the grazing of livestock, including the work done by the appropriators to improve the pasture through seeding of more desirable grasses and the draining of the fields to cut the hay growing thereon. This intentional and purposeful beneficial use of the water is sufficient to establish a vested right to the water, irrespective of whether man-made ditches were used to convey the water from the point of diversion. Venturacci was able to point to the specific diversion points for the irrigation, being multiple springs located on their property, and to the beneficial use of this water. Venturacci objects to the Preliminary Order's failure to recognize natural irrigation from the various spring sources on their ranches as a significant source of water to the claimed places of use.

C. The Preliminary Order Improperly Re-Assigns the Primary Source of Water for Irrigated Pastures and Fields From Springs and Seeps to Mountain Canyon Streams.

For several of the proofs filed by Venturacci and/or Milton Thompson, the Preliminary Order recognizes the ephemeral mountain canyon streams as the primary source of irrigation water for the place of use while rejecting claims on the adjacent springs and seeps. This is precisely the opposite of what the evidence shows. The springs and seeps were the primary source of irrigation for the claimed places of use while the mountain streams provided additional supplemental water during the spring runoff when it was available. Diversion from the canyon drains occurred decades after the lands were originally settled and the first beneficial uses of water on the ranches were

[18] *Steptoe Live Stock Co.*, 53 Nev. 163, 295 P. 772, 775.
[19] *Id.*

established. Given the ephemeral nature of these streams it would have been impossible to maintain irrigation at the claimed places of use relying on the streams alone. In addition, if the meadows had been created solely by mountain runoff, they would not have disappeared when the spring flow was shut off.

The springs and seeps were identified in the 1879 GLO plat (which have also been substantiated in the 1928 Range Map and crop surveys performed by the Soil Conservation Service). These documents provide proof that the properties now owned by Venturacci relied upon those spring and seep sources of water. In addition, the National Resources Conservation Sservice published a report illustrating the breadth and extent of the meadow area fed by the discharge of the springs. This evidence supports the pre-statutory beneficial use of the spring and seep water.

The Preliminary Order's recognition that the claimed places of use were placed under cultivation prior to 1905 necessarily requires a recognition of the claims to the waters of the springs and seeps (including waters that naturally irrigated the meadows). Venturacci objects to the Preliminary Order's attempt to re-assign the primary source of water from what were reliable, constantly flowing sources to ephemeral sources of water that were supplemental in nature.

II. Objections Related To Specific Proofs Of Appropriation.

A. Thompson Ranch (V-01114, V-01115)

Two irrigation proofs were filed for the Thompson Ranch. Proof V-01114 seeks recognition of the pre-statutory use of water from Horse Canyon for supplemental irrigation of 208.97 acres of grain and alfalfa, 646.52 acres of hay, and 780.87 acres of diversified pasture. Proof V-01115 seeks recognition of the pre-statutory use of water from the Taft/Thompson springs and other groundwater discharges for the same acreage as V-01114. Proofs V-01114 and V-01115 are supplemental to each other; however, as noted above, it should be recognized that the spring sources identified in Proof V-01115 were reliable, constantly flowing water sources that were the primary source of water for the claimed place of use. The ditch that brought additional water to

the Thompson Ranch from Horse Canyon was not constructed until after 1879, decades after the first settlement on the ranch and placement to beneficial use of the ample spring water irrigating the ranch.

Contrary to the filed claims and substantial evidence submitted to support the proofs, the Preliminary Order recognizes a total combined duty for Proofs V-01114 and V-01115 of 420.96 afs with a priority date of 1880 from all sources for irrigation of 204.30 acres of harvest and meadow culture (12.36 acres of harvest and 191.94 acres of meadow).

1. The Preliminary Order assigns an improper priority date to V-01115.

The State Engineer notes that the Thompson Ranch was first settled in 1859.[20] However, in the Preliminary Order an 1880 priority date is assigned to both proofs. The 1880 date is the date of construction of the ditch from Horse Canyon to the Thompson Ranch. As evidenced by the GLO plat, in 1879 there was no diversion from Horse Canyon to the Thompson Ranch fields, and all irrigation was supplied solely by the springs and irrigation ditches from the springs. The 1880 priority is correct for Proof V01114, for Horse Canyon, but is not correct for Proof V01115, which was water supplied by the springs and beneficially used when the ranch was first settled as early as 1859.

The1879 GLO survey noted the irrigating ditch, meadows, hay cultivation, and existing structures that were observed in field notes that predated the 1879 map, with the source being the Taft springs. If the diversion structures and beneficial use originated in 1880, they could not have been observed by the GLO surveyors prior to 1879 to have been included on the map. Substantial evidence was submitted supporting the priority of use of water from the springs as early as 1859, and all evidence supported the full diversion of the springs to irrigate the entire ranch and cultivation of hay prior to 1879.

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[20] Preliminary Order, p. 161.

2. The State Engineer summarily disregarded additional evidence submitted with the amendments to both proofs.

The earlier priority dates and inclusion of diversified pasture and meadow not included in the original filings are supported by substantial evidence and the summary rejection of this evidence is improper. There is nothing in Nevada's water law that prevents a party from amending their proof if additional evidence is discovered supporting the amendment. The Preliminary Order summarily rejects the new evidence submitted with the amendments without any analysis or evidentiary support. The only reasoning provided in the Preliminary Order for the rejection of all amendments is that the original proofs must be more accurate since they were filed closer in time to the first placement of water to beneficial use. However, the initial proofs state they were based only on estimates and were not based on any "evidence at hand." All amendments gave reasons for the amendments and supplied additional documentation to support the amendments. In addition, even Payne's 1912 notes indicated a culture higher than what was referenced in the initial proofs. The State Engineer needs to fully consider and analyze the additional evidence submitted with the amended proofs.

The evidence submitted with the amended proofs makes clear that the original proofs were filed for a limited purpose and did not reflect the full historical use of water. In addition, the place of use listed in the original proof did not include the full area where water was placed to beneficial use, nor all beneficial uses of the water. At the time the proof was filed, Mr. Nels Taft, who filed the proof, did not own all of the property that was irrigated from the springs and that is now included within the ranch. Accordingly, he did not file a proof for those places of use. Further, Mr. Taft filed on those areas that were being cultivated for hay, grain, garden, or alfalfa, and did not include the adjacent meadow or pasture land that was being beneficially used to supply grazing to the livestock operation.

The proof was amended in 1975 to "show pasture lands not shown in the original filing" and to add stockwater as a secondary use. The acreage was amended to include a total of 607.93 acres of meadow grasses, grain, and pasture. However, the mapping ended at the fence line, and

did not recognize uses on the deeded land that was outside the fenced area, which also included pasture and meadow land used in the ranching operation and irrigated from the springs. Based on additional research, the proofs were amended in 2013 to "show the full historic use of the water rights and comingled nature" including all "owned lands by the applicant and adjacent fenced improvements." The priority date was also updated to properly reflect the historic documentation. Volumes of evidence, including aerial photographs, tax records, survey notes from the 1870s, soil survey information, deeds, photographs, ground truthing images and notes from a licensed water rights surveyor, and other relevant historic documentation were filed in 2013 to support the amendments. All aerial images, independent mapping services conducted by the federal government (GLO and United States Department of Agriculture), photographs, water right surveys, and historic documents consistently show the land as being irrigated as provided under the amended proofs.

Venturacci objects to all findings in the Preliminary Order related to the source and placement to beneficial use of water from the Taft/Thompson Springs and Horse Canyon that are inconsistent with the totality of the evidence and claims submitted with Proofs V-01114 and V-01115.

B. <u>Cox Ranch and Willow Field (V-02845, V-02846, V-02847, V-10368)</u>

Proof V-02845 seeks recognition of the pre-statutory use of water from Telegraph Canyon (aka Road Canyon) for irrigation of 72.82 acres of hay and 272.07 acres of diversified pasture. Proof V-02846 seeks recognition of the pre-statutory use of water from unnamed springs and seeps for irrigation of 72.82 acres of hay and 272.07 acres of diversified pasture. Proof V-02847 seeks recognition of the pre-statutory use of water from Cox Canyon for irrigation of 72.82 acres of hay and 272.07 acres of diversified pasture. Proof V-10368 seeks recognition of the pre-statutory use of water from Judd Canyon and unnamed springs and seeps to irrigate 190.59 acres of rye grass and diversified pasture. The claimed place of use for Proofs V-02845, V-02846, and V-02847 is

the Cox Ranch where the waters from the three sources is comingled. The claimed place of use for Proof V-10368 is the Willow Field.

The Preliminary Order recognizes irrigation use at the Cox Ranch under Proof V-02845 for 64.5 acres of harvest with a total duty of 129 afs, under Proof V-02846 for 29.2 acres of harvest with a total duty of 58.4 afs, and under Proof V-02847 for 3.1 acres of harvest with a duty of 6.2 afs. With respect to Willow Field, the Preliminary Order recognizes 102.35 acres of Meadow with a duty of 204.7 afs.

Proofs V-02845, V-02846, and V-02847 were originally filed in 1974 supporting the irrigation of 80.66 acres of land within the fenced area of the Cox Ranch. The proofs were amended in 2013 to recognize the pasture land that was beneficially used outside of the fenced culture area. The original priority date was listed as 1901, which was the date of the first patent on Cox Ranch. This date was amended to pre-1879 to be consistent with documentation filed in support of the amended claim. The Cox house was noted on the 1879 GLO map and tax records and applications for patents were filed to support the earlier priority date and the amended proofs. Aerial images, photographs, and independent surveys from the federal government were filed to support the amended proofs and all show a consistent culture on the property as was claimed.

The Preliminary Order improperly discounts water placed to beneficial use on BLM land adjacent to the Cox Ranch despite the fact that the State Engineer found this land to have been cultivated and a valid pre-statutory use of water. In addition, the Preliminary Order ignores substantial evidence submitted with the Cox Ranch amended proofs and determined that 257.9 acre of the amended proofs was "waste land"[21] without evidence to support this determination. This "waste land" was patented to the Cox family. To conclude that a settler would have settled, claimed, and ultimately purchased from the government over 200 acres of wasteland is illogical. Further, tax records relating to this land consistently labeled the land as "farming land" or "grazing land."

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[21] Preliminary Order, p. 170.

In 1912, Payne noted that the Cox ranch had a vested right to eight acres of alfalfa and 60 to 70 acres of harvest hay. This amount of culture is consistent to what was used within the fenced area of Cox Ranch. The amended proof claims 72.82 acres of harvest hay, which is consistent with the culture observed by Payne in 1912, and which is also supported by aerial images, photographs, and soil surveys. The Payne investigation was silent as to the use of the surrounding land for pasture; however, substantial evidence was filed to support the use of pasture for grazing cattle on the surrounding unfenced property that was eventually patented to private ownership and is now owned by Venturacci.

Willow Field was originally claimed by William Cox and has been irrigated by springs. The Preliminary Order rejected the springs as sources of irrigation on the Willow Field because the 2016 field investigators were unable to locate the spring sources. However, evidence was submitted that groundwater pumping to the south of the ranch dried up the springs in the early 1980s and 1990s. In the 2016 field investigation State Engineer staff noted that they observed some grass in the general area where the spring sources were claimed, but concluded that the grass was supported by something other than a spring that had been impacted from pumping and ceased to flow. Substantial evidence was provided documenting the spring sources prior to the 1990s. The spring sources were also mapped by a licensed water rights surveyor and ground truthed. Aerial images from the 1950s through the 1970s clearly shows springs supplying irrigation water within the claimed areas. Also, the soil survey maps document springs located at one or more of the claimed points of diversion.

Substantial evidence also supports the acreage on Willow Field that was claimed. Despite this evidence, the Preliminary Order only recognized the mapped acreage of rye grass culture on the field, and completely discounted the pasture acreage. All evidence supports the claimed acreage, and is consistent as to the use and extent of the claim. Further, the priority date is improper, as evidence was submitted that the application for patent for Willow Field was filed in 1882, and the Cox house was observed by land surveyors in the 1870s.

In addition, the Preliminary Order appears to indicate that most of the water used on the Cox Ranch and Willow Field came from the ephemeral canyon streams while discounting the substantial quantity of water from the more reliable springs and seeps that irrigated the claimed places of use on a year-round basis. Aerial photographs clearly demonstrate that water was consistently flowing from these spring sources during times when no water was flowing in the canyon springs. Also, evidence was filed to support the irrigation season pumping from the springs on the ranch from a horse drawn pump.[22]

Accordingly, Venturacci objects to all findings in the Preliminary Order with respect to V-02845, V-02846, V-02847, and V-10368 to the extent those findings are inconsistent with the claims and evidence submitted with the various proofs.

C. Rock and Box Springs Canyons (V-01110, V-10973, V-01111, V-10972)

As an initial matter, the Preliminary Order and field investigations identify the owner of these claims (and the property that is the place of use for the claims) as Milt S. Thompson. However, Mr. Thompson recently passed away and the claims and the associated lands are now owned by Daniel and Mandi Venturacci who have standing as successors-in-interest to Mr. Thompson to file these objections.

Proof V-01110 seeks recognition of the pre-statutory use of water from Rock Canyon for irrigation of 21.25 acres of alfalfa, meadow grass, and grain. Proof V-01111 seeks recognition of the pre-statutory use of water from Box Springs Canyon for irrigation of 36 acres of alfalfa, meadow grass, grain, and garden. Proof V-10972 seeks recognition of the pre-statutory use of water from springs and seeps adjacent to the Mau Ranch (aka Box Springs Canyon Ranch) for irrigation of 115 of acres alfalfa, hay, and meadow grasses. Proof V-10973 seeks recognition of the pre-statutory use of water from springs and seeps adjacent to Rock Canyon Field to irrigate 166.64 acres of meadow hay. The claimed place of use for Proofs V-0110 and V-10973 is the Rock Canyon Field. The claimed place of use for Proofs V-01111 and V-10972 is the Mau Ranch.

[22] Exhibit 166, page 22 of the Chain of Title and Exhibits filed May 26, 2016.

For both places of use, the waters from the canyon streams and the springs and seeps comingle at the place of use and are partially supplemental.

The Preliminary Order recognizes irrigation use at the Rock Canyon Field under V-01110 for 21.25 acres of harvest with a total duty of 63.75 afs while rejecting all irrigation claims under V-10973 (the Preliminary Order does recognize stock water uses under V-10973). With respect to the Mau Ranch (aka Box Springs Ranch), the Preliminary Order recognizes irrigation use under Proof V-0111 for 36 acres of harvest with a total duty of 108 afs while also rejecting all irrigation claims under V-10972 (the Preliminary Order does recognize stock water uses under V-10974).

The Preliminary Order and field investigations rely heavily on certificates issued to prior owners in 1912 for the water flowing from the ephemeral canyon springs. These certificates were issued under a statutory scheme that was later invalidated by the Nevada Supreme Court under *Ormsby County*. In *Ormsby County*, such old certificates were rejected and found to be null and void. Evidence indicates that the prior owners only filed proofs for the canyon water because that is the only water they believed they needed to prove up under that statutory scheme. The Preliminary Order improperly relied on these proofs and used them to reject later-filed proofs for the springs and seeps that, by virtue of flowing year-round and being located immediately on or adjacent to the claimed paces of use, irrigated the properties. In doing so the Preliminary Order relied entirely on impermissible evidence and ignored substantial evidence submitted in support of the proofs, including aerial photographs, showing that much of the pasture and meadow was irrigated and producing cultivated crops during times when the canyon streams were not flowing.

Box Springs Ranch got its name because of the large spring located on the property.[23] The owners built a box around the spring to keep the livestock out of it. There was a wooden box on the spring and out from it flowed a "nice little stream of water." The owners made a dam and controlled the application of the spring flow on the irrigated land. Historical documents were supplied in the late 1800s that there was a hundred acres of meadow and pasture land irrigated on

[23] Exhibit 165 – Diamond Valley Dust, page 27, filed May 26, 2016.

the Box Springs Ranch.[24] Tax records consistently labeled the ranch as "hay land."[25] Aerial images also support the claim of irrigation from the springs on Box Springs Ranch.

The field investigation noted they saw many other springs but the Preliminary Order says on page 158 that the other springs "are not mentioned as a POD for the claim" however the proof clearly has listed as a POD "[a]dditional springs and seeps area located in the place of use." While they were not mapped, since there are many, they were in fact included and referenced as points of diversion.

Also, the irrigation use is consistent with observations made by Payne in 1912. Payne did not say there were 35 acres of alfalfa and no other water use, as appears to be the interpretation of the Preliminary Order. He said only "the ranch consists of approximately 35 acres of alfalfa" but was silent as to any meadow or pasture or stock water use. Supplied in the record is evidence of such use. The purpose of Payne's visits was to investigate "some" water use in Eureka, and not "all" water uses. The investigation was conducted under the statutory scheme as later overturned under *Ormsby County*. Payne was investigating the proof on file at the time, Proof V01111, which was referencing 36 acres of alfalfa irrigated from the canyon water. He was not investigating to determine the entirety of vested water use on the ranch. Payne's investigation is not contrary to the other evidence supplied; rather, it aids support for the claim of 35 acres of culture, but in no way is evidence against the meadow and pasture use also claimed in the proofs filed before the State Engineer. Evidence supports that prior to the water imported from the canyons, being Rock Canyon prior to 1905 and David Canyon after 1905, the springs supplied sufficient water to sustain approximately 115 acres of meadow hay as referenced in Proof V10972. The culture of alfalfa was enabled once the canyons were used to supply additional water to the land to allow the higher culture. However, based on the tax assessments and historical document, it is clear that prior to the ditches built to supply canyon water to the land, spring water was utilized to support settlement

[24] Exhibit 165 – Diamond Valley Dust, page 10.
[25] *See* Exhibits 31, 36, 41, 45, 54, 60, 66 of the Chain of Title filed May 26, 2016.

of the property and establish ranching operations. The canyon water was used to supplement this activity, not create it.

Rock Canyon Ranch consists of two pasture segments. The most northern field is irrigated from spring water and canyon drainage, and the lower fields are irrigated from local springs only. Payne appears to have investigated water use in the upper field, but his notes are silent as to the lower fields. In his visit to the upper field, Payne noted that "there is a spring in the field" but it was used for stock only, and "the sole source of water for irrigation, therefore, is derived from Rock Canyon." The proof on file in 1912 was only filed for a small field in the upper ranch area, and nothing was said about the lower ranch fields. Further, just because Mr. Payne did not observe irrigation from the spring in the fall of 1912, does not mean it did not support the beneficial use of water on the ranch. Additional evidence supports that the northern field spring was an improved spring that was used for irrigation. The soil survey maps show an improved spring on the upper ranch irrigating the main field and grasses grown in the lower field. Aerials, especially the higher resolution aerials from 1967, clearly show multiple springs irrigating the fields as claimed. The claimed culture for the springs is meadow hay. This would not have been included in the reference to culture or alfalfa from Payne relating to the creek water.

The Preliminary Order notes on page 148 "[t]here were no assessment records for the area submitted in support of the claim which could have shed light on agricultural use." However, Item 45 of the Chain of Title is a tax record for Rock that is from 1891. This tax record labels Rock as a "possessory interest in and to a tract of farming land."

Accordingly, Venturacci objects to all findings in the Preliminary Order with respect to V-01110, V-01111, V-10972, and V-10973 to the extent those findings are inconsistent with the claims and evidence submitted with the various proofs.

D. <u>Stock water claims</u>

Venturacci objects to the reduction in livestock numbers that were claimed in the various proofs for stock water use. Additionally, Venturacci objects to the claims of other users of water

on the sources within their rangeland and on tributaries to the canyons that supplied irrigation water to their various ranches. Specifically, Venturacci objects to Proofs R-04271 and R04277 filed by the BLM on Rock Springs and Box Springs, which are subject to vested rights on Box Springs Ranch and Rock Creek Ranch. All springs that discharge within the water sheds of those ephemeral creeks that supply water to the Venturacci ranches are fully appropriated for use on those ranches.

CONCLUSION

For the reasons stated above, and other that may arise during the course of these proceedings, Daniel S. Venturacci and Amanda L. Venturacci hereby object to the State Engineer's Preliminary Order of Determination.

Respectfully submitted this 7th day of November, 2018.

TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900 – Telephone
(775) 883-9900 – Facsimile

By:______________________

PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
Attorneys for Daniel S. Venturacci and Amanda L. Venturacci

EXHIBIT INDEX

Exhibit	Description
1.	Affidavit of David H. Rigdon, 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 DAVID H. RIGDON IN SUPPORT OF DANIEL S. VENTURACCI AND AMANDA L. VENTURACCI'S OBJECTIONS TO THE PRELIMINARY ORDER OF DETERMINATION**

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

I, DAVID H. RIGDON, 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 Daniel S. Venturacci and Amanda L. Venturacci ("Venturacci") in the above-referenced matter, and make this affidavit in support of Venturacci's Objections to the Preliminary Order of Determination ("Objections").

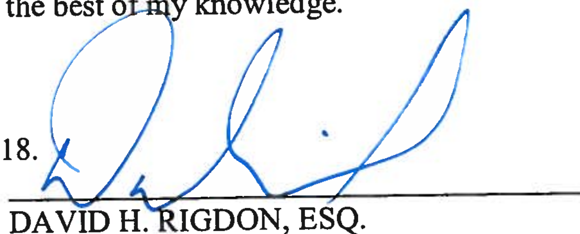
3. On August 30, 2018, the State Engineer entered a Preliminary Order of Determination and Abstract of Claims ("Preliminary Order") in the above-referenced matter.

4. My client, Venturacci, is the owner of vested pre-statutory water rights from various water sources as set forth in the Preliminary Order and the Objections.

5. On behalf of my client, I have prepared Venturacci'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.



DAVID H. RIGDON, ESQ.

SUBSCRIBED and SWORN to before me
this 7th day of November, 2018,
by DAVID H. RIGDON.

NOTARY PUBLIC