

IN THE SUPREME COURT OF THE STATE OF NEVADA

EUREKA COUNTY, A POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA; KENNETH F. BENSON,
INDIVIDUALLY; DIAMOND CATTLE
COMPANY, LLC, A NEVADA LIMITED
LIABILITY COMPANY; AND MICHEL
AND MARGARET ANN ETCHEVERRY
FAMILY, LP, A NEVADA REGISTERED
FOREIGN LIMITED PARTNERSHIP,

Appellants,

vs.

THE STATE OF NEVADA STATE
ENGINEER; THE STATE OF NEVADA
DIVISION OF WATER RESOURCES; AND
KOBEL VALLEY RANCH, LLC, A NEVADA
LIMITED LIABILITY COMPANY,

Respondents.

**EUREKA COUNTY’S RESPONSE TO MOTIONS FILED REGARDING
AMICUS CURIAE BRIEFS; EUREKA COUNTY’S MOTION FOR
PERMISSION TO FILE RESPONSE TO BRIEFS**

Appellant, EUREKA COUNTY, a political subdivision of the State of
Nevada (hereinafter “EUREKA COUNTY”), by and through its counsel,
ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD., and
THEODORE BEUTEL, ESQ., EUREKA COUNTY DISTRICT ATTORNEY,
hereby files its Response to NV Energy’s Motion for Leave to File Brief of *Amicus*

No. 61324

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Curiae and the Nevada Mining Association’s Motion to Appear as *Amicus Curiae* and to Join in the Brief of the Municipal Water Purveyors. EUREKA COUNTY further seeks permission to file a response to the *amici curiae* brief of the municipal water purveyors and NV Energy’s *amicus curiae* brief if NV Energy’s brief is accepted by this Court. EUREKA COUNTY’s response to the pending motions for leave to file *amicus curiae* briefs and its motion for permission to file a response to the *amicus curiae* briefs are filed pursuant to Nevada Rules of Appellate Procedure (“NRAP”) 27(a).

I.

**EUREKA COUNTY’s Response to NV Energy’s Motion for
Leave to File *Amicus Curiae* Brief**

EUREKA COUNTY urges the Court not to accept the *amicus curiae* brief of Nevada Power Company and Sierra Pacific Power Company, doing business as NV Energy, and deny NV Energy’s motion for leave to file *amicus curiae* brief. NV Energy’s brief mirrors the arguments of Respondents, STATE ENGINEER and KOBEH VALLEY RANCH, LLC (hereinafter “KVR”), and misstates EUREKA COUNTY’s position in this appeal. Because NV Energy’s brief will not assist the Court, NV Energy’s motion for leave to file an *amicus curiae* brief in this appeal should be denied. See Dow Chemical Co. v. Mahlum, 115 Nev. 13, 15, n.1, 973 P. 2d 842, 843, n.1 (1999) (stating that motions for leave to file *amicus curiae*

briefs should be denied where the issues raised substantially mirror those raised on appeal and will not assist the Court); Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (motion for leave to file brief as *amicus curiae* should be denied where the proposed brief echoes arguments made by petitioner).

II.

EUREKA COUNTY's Response to Nevada Mining Association's Motion to Appear as *Amicus Curiae* and to Join in the Brief of Municipal Water Purveyors

EUREKA COUNTY also urges the Court to deny the motion filed by the Nevada Mining Association to appear as *amicus curiae* and to join in the *amici curiae* brief filed by the municipal water purveyors. The Nevada Mining Association's motion does not comply with NRAP 29. The Nevada Mining Association's motion fails to state the reasons why an *amicus curiae* brief on its behalf is desirable and neglects to adequately describe why it has an interest in this case. See NRAP 29(c). While the description of the mining industry in the Nevada Mining Association's motion makes for interesting reading, the motion only generally mentions water in its statement of interest. The motion does not identify any interest the Nevada Mining Association has in this case, or any interest the Nevada Mining Association has in water rights, or any interest the Nevada Mining Association has in another case that may be affected by the decision in this case or that the Nevada Mining Association has unique information

or perspective that can help the Court beyond the help that counsel for the parties are able to provide. See Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir. 1997). The Nevada Mining Association merely appears to want to join in the brief filed by the municipal water purveyors; its motion does not describe any interest the Nevada Mining Association itself has in this case or state the reasons why “its” (i.e., the municipal water purveyors’) brief is desirable as required by NRAP 29(c). Thus, the Nevada Mining Association’s motion to appear as *amicus curiae* and to join in the brief of the municipal water purveyors should be denied.

III.

EUREKA COUNTY’s Motion for Permission to File Response to *Amici Curiae* Brief of Municipal Water Purveyors

The Truckee Meadows Water Authority, the Southern Nevada Water Authority, the Cities of Fernley, Minden, Carson City, Henderson, North Las Vegas, and Las Vegas, and the Gardnerville Ranchos General Improvement District (hereinafter “municipal water purveyors”) filed an *amici curiae* brief in this appeal. EUREKA COUNTY requests permission to file a response to the municipal water purveyors’ *amici curiae* brief. The scope of EUREKA COUNTY’s reply brief pursuant to NRAP 28(c) is limited to answering any new matter set forth in the answering briefs filed by the STATE ENGINEER and KVR.

The *amici curiae* brief filed by the municipal water purveyors raises issues not set forth in the answering briefs filed by the STATE ENGINEER and KVR, and EUREKA COUNTY does not have an opportunity under the appellate rules to respond to the new matters raised in the *amici curiae* brief in its reply brief. Further, because the *amici curiae* brief filed by the municipal water purveyors was filed pursuant to NRAP 29(a) without the consent of the parties or leave of court, EUREKA COUNTY does not have an opportunity to comment on whether the *amici curiae* brief is appropriate in response to a motion for leave to file the *amici curiae* brief. Accordingly, EUREKA COUNTY respectfully requests permission to file a response to the *amici curiae* brief filed by the municipal water purveyors. This Court has allowed the filing of responses to briefs filed by *amicus curiae* in rehearing proceedings when it allowed the filing of an *amicus curiae* brief. See McKellar Development of Nevada, Inc. v. Northern Insurance Company of New York, 107 Nev. 562, 816 P.2d 456, 457 (1991) (concluding the respondents shall have 30 days within which to file a supplemental brief in response to the brief of the *amici curiae*.); D'Angelo v. Gardner, 107 Nev. 104, 807 P.2d 1391 (1991) (concluding the appellant shall have 30 days to file a response to the briefs of respondents and the *amici curiae* on rehearing).

The *amici curiae* brief filed by the municipal water purveyors misstates the issues on appeal and EUREKA COUNTY's arguments concerning the authority of

the STATE ENGINEER. The municipal water purveyors incorrectly argue that EUREKA COUNTY is taking a “no impacts” position and is against groundwater development. Further, the municipal water purveyors assert that EUREKA COUNTY is advocating that this Court reverse the STATE ENGINEER’s decision in Ruling 6127 based on “theoretical impacts,” even though the facts of this appeal involve quantified known impacts to existing water rights. See Amici Curiae Brief at page 4. Finally, the municipal water purveyors contend that if the STATE ENGINEER finds that an “impact” to existing water rights can be “fully mitigated,” then such impact never rises to the level of a “conflict” under NRS 533.370(2). The municipal water purveyors make such contention even though the STATE ENGINEER relied on a future, undefined mitigation plan that was not part of the record to protect existing water rights holders in this case.

EUREKA COUNTY seeks permission to respond to the unwarranted concerns presented in the *amici curiae* brief of the municipal water purveyors which ignore the specific factual evidence in this case. See Powers v. United Services Auto Association, 115 Nev. 38, 45, 978 P.2d 1286, 1290 (1999). In the Powers case, this Court felt compelled to respond to the “parade of horrors” detailed in the briefs of the respondent and *amici curiae*. This Court noted that a central point in its prior opinion that seemed to escape the notice of the respondent and *amici curiae* was that every case must be considered on its own facts. This

Court concluded: “In a different case, with different facts, a different result might have been reached. Sweeping conclusions about new causes of action and a chilling effect on fraud investigations are simply not warranted by the somewhat unique facts of this case.” Powers, 115 Nev. at 45, 979 P.2d at 1290. EUREKA COUNTY’s response will assist the Court by responding to the sweeping conclusions of the municipal water purveyors of the chilling effects on water development in the State of Nevada alleged and wrongly assumed to be EUREKA COUNTY’s position in this case.

EUREKA COUNTY seeks permission to respond to the *amici curiae* brief of the municipal water purveyors to redirect this Court’s attention to the applicable law and facts of this case. EUREKA COUNTY’s position that a junior appropriator’s proposed groundwater pumping which completely dries up existing surface water right holders’ springs and stockwatering wells is a conflict under NRS 533.370(2) is consistent with the plain language of the statute, Nevada and federal case law, and preserves the prior appropriation doctrine.

IV.

**EUREKA COUNTY’s Motion for Permission to File
Response to Amicus Curiae Brief of NV Energy if the Court grants
NV Energy’s Motion**

If the Court grants NV Energy’s motion, EUREKA COUNTY requests permission to file a response to NV Energy’s *amicus curiae* brief. The *amicus*

curiae brief proposed by NV Energy presents arguments in support of the STATE ENGINEER's authority to condition issuance of permits based on a monitoring, management, and mitigation plan to alleviate any potential impacts to existing water rights. The facts of this appeal, however, involve quantified known impacts to existing water rights. Therefore, EUREKA COUNTY seeks permission from this Court to respond to the arguments presented in NV Energy's *amicus curiae* brief and to refute the same based on the facts of this appeal.

DATED this 25th day of February, 2013.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

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