IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

THE STATE OF NEVADA STATE ENGINEER; THE STATE OF NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES; AND KOBEH VALLEY RANCH, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Appellants,

vs.

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

Respondents.
_____/

Case No. 70157

RESPONDENT EUREKA COUNTY'S RESPONSE IN OPPOSITION TO APPELLANT, KOBEH VALLEY RANCH, LLC'S
MOTION TO EXPEDITE APPEAL

Respondent, EUREKA COUNTY, by and through its counsel of record, ALLISON MacKENZIE, LTD., and THEODORE BEUTEL, ESQ., the EUREKA COUNTY DISTRICT ATTORNEY, submits its response in opposition to the Motion to Expedite Appeal filed by Appellant, KOBEH VALLEY RANCH, LLC ("KVR") on May 20, 2016 for the reasons set forth in the Memorandum of Points and Authorities below.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

RELEVANT PROCEDURAL BACKGROUND

This appeal seeks clarification of the remand instruction in this Court's Opinion issued in Case Nos. 61324 and 63258 on October 29, 2015. *See Eureka Cnty v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015). The previous consolidated appeals relate to the district court's denial of petitions for judicial review of Nevada State Engineer's Ruling No. 6127 and the approval of Appellant, KVR's Management, Monitoring and Mitigation Plan ("3M Plan") by the Nevada State Engineer. This Court reversed the district court's orders and remanded the cases for further proceedings consistent with its Opinion. In doing so, the Court held:

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> "In sum, substantial evidence does not support the State Engineer's finding that KVR would be able to "adequately and fully" mitigate the fact that its groundwater appropriations will cause Kobeh Valley springs that sources existing rights to cease to flow. The State Engineer's decision to grant KVR's applications, when the result of the appropriations would conflict with existing rights, and based upon unsupported findings that mitigation would be sufficient to rectify the conflict, violates the Legislature's directive that the State Engineer must deny use or change applications when the use or change would conflict with existing rights. NRS 533.370(2). As appellants have met their burden to show the State Engineer's decision was incorrect, NRS 533.450(10), the State Engineer's decision to grant KVR's applications cannot stand."

See Eureka Cnty v. State Engineer, 131 Nev. Adv. Op. 84, page 16, 359 P.3d 1114, 1121 (2015) (citations omitted). The Court then stated:

> "We therefore reverse and remand these matters to the district court for proceedings consistent with this opinion.[4]"

> Footnote 4 at the end of the sentence stated:

> "[4]From the record and Ruling 6127, it is unclear which of KVR's applications for proposed use or change in Kobeh Valley, if it can be pinpointed, is the appropriation that will cause the springs to dry up. Therefore, we must overturn the entire decision."

Appellants did not file a petition for rehearing or seek clarification of the Court's Opinion.

Instead, counsel for Appellant KVR submitted proposed orders and a letter to the district court's chambers via email indicating that "Based on the Supreme Court opinion regarding the above-referenced cases and the recently issued Remittitur, enclosed are proposed orders remanding the case to the State Engineer for further proceedings."[1] Respondents filed a Joint Objection to KVR's request for ex parte orders and requested a hearing. After the Objection was fully briefed, the district court issued an Order Granting Objection to Proposed Order Remanding to State Engineer; Order Granting Petitions for Judicial Review; Order Vacating Permits. In doing so, the district court determined that remand to the Nevada State Engineer was not warranted or required by this Court's Opinion. On March 9, 2016, the district court issued an Amended Order correcting a citation and otherwise granting the identical relief provided for under the original order (the "March 9, 2016 Order"). The district court correctly determined not to remand the matter to the Nevada State Engineer as this Court did not require such.

Following the March 9, 2016 Order, Appellant KVR filed a Motion to Alter or Amend Judgment in the district court and Respondent Eureka County filed its

[1] The Court's Remittitur to the Eureka County Clerk was issued November 23, 2015 and a corrected Remittitur was issued by the Court on March 8, 2016.

Opposition. On April 18, 2016,[2] while the Motion to Alter or Amend was pending before the district court, Appellant KVR filed its Notice of Appeal seeking to have this Court clarify its remand instructions and to direct the district court to vacate its March 9, 2016 Order and remand the matter to the Nevada State Engineer for additional fact finding. The instant Motion to Expedite Appeal followed.

II.

ARGUMENT

A. Expedited review, without additional briefing, is unwarranted.

In support of its Motion, Appellant first asserts that no additional briefing should be required before this Court as the issue of whether the district court was to remand to the Nevada State Engineer has been extensively briefed in the proceedings below and no further briefing will assist this Court in interpreting its own ruling. Aside from the general assertion that expeditious review of an appeal serves the general public's interest and reference to NRAP 47(a) for the proposition that this Court has broad discretion to regulate its practice consistent with law and justice, Appellant KVR provides no legal authority supporting its Motion. In fact, Appellant KVR provides not one citation to any authority supporting its assertion that this Court should rule in a pending appeal without first

[2] The Nevada State Engineer filed its Notice of Appeal of the district court's March 9, 2016 Order on or about April 14, 2016.

being provided the record of the district court proceedings which is the subject of the appeal or the parties' respective briefs on the issues on appeal.

Upon review of the relevant authority, expeditious review without additional briefing is unwarranted in this case. This Court has indicated its willingness to expedite cases when requested to do so if time is a factor and if necessary to resolve issues before they become moot. *See Personhood Nevada v. Bristol*, 126 Nev. 599, 603, 245 P.3d 572, 575 (2010) *citing In re Candelaria*, 126 Nev. --------, 245, P.3d 518 (2010) (expediting briefing and entering a summary disposition before later explaining the disposition in an opinion, to meet election deadlines); *LVCVA v. Secretary of State*, 124 Nev. 669, 191 P.3d 1138 (2008) (expediting appeals and resolving case before November general election); *See also Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 89 P.3d 36 (2004) (Court will expedite appeals from orders denying motions to compel arbitration to the extent the Court's docket permits). Similar avenues also exist in criminal appeals and child custody disputes. *See* NRAP 3C; NRAP 3E. Expedited appeals have also been granted upon a showing of good cause. *See, e.g., Board of County Com'rs of Clark County v. Las Vegas Discount Golf & Tennis, Inc*., 110 Nev. 567, 568-69, 875 P.2d 1045, 1045-46 (1994).

In *Las Vegas Discount Golf*, appellants asked to expedite the appeal because of the economic hardship they would suffer in a delayed proceeding and because the issues presented in its appeal had been fully briefed in the court below. 110 Nev. at 568. Cause appearing, this Court granted the request to expedite the appeal. *Id*. at 568-569. Specifically, the Court made its determination based upon the affidavits filed with this Court which included estimates that a one-year delay would result in costs to the County to the tune of $686,385.00 in addition to appellant Golf Center of America losing $26,000.00 per week. *Id*. at 568, n 3.

Here, Appellant KVR argues that an expedited appeal without briefing is warranted in order to prevent the parties from expending significant time and effort in drafting and filing duplicative briefs. However, no affidavit is provided indicating the estimated expenses that would be incurred should an expedited appeal not be granted, nor does Appellant KVR present any argument that the passage of time or that its issues on appeal would be rendered moot if not decided expeditiously. In fact, Appellant KVR's Motion is cyclical in nature. On the one hand, it is argued that the matter has already been briefed, i.e., that the work has already been performed, while on the other hand it is argued that Appellant would have to expend significant time and effort to file the duplicative argument. Such arguments do not warrant a finding of cause, and the appeal should not be

expedited without the aid of the district court record and the parties' respective opening and responding briefs. Accordingly, Appellant KVR's Motion should be denied.

B. Expedited Review, with additional briefing, is unwarranted.

Next, Appellant KVR argues that should this Court determine that further briefing is necessary, it should be ordered to be completed in an expedited manner. Specifically, Appellant KVR requests that this Court issue an order requiring Appellant opening briefs be filed within 20 days from an order granting its motion, and that Respondent answering briefs be filed no later than 20 days after the deadline to file Appellant opening briefs. This schedule shortens the time for Respondents to file their answering briefs by 10 days. Again, Appellant KVR relies on the argument that the issues raised in this appeal have already been thoroughly researched and briefed by the parties in the proceedings below.

Appellant KVR argues that its proposed expedited briefing schedule shortens the time in which KVR has to file its opening brief by 100 days. Appellant's argument is flawed and seeks unnecessary relief from this Court. Under NRAP 31(a)(1)(A), unless a different briefing schedule is provided by a court order in a particular case, the appellant shall serve and file the opening brief within 120 days after the date on which the appeal is docketed in the Supreme

Court. Thereafter, the respondent shall serve and file the answering brief within 30 days after the appellant's brief is served. NRAP 31(a)(1)(B). This authority provides the maximum time within which the briefs must be filed and does not preclude an appellant from serving and filing its opening brief in advance of the 120 day time period prescribed. Appellant KVR apparently wishes to file its opening brief in advance of the 120 day time period and there is nothing in the Court's procedural rules preventing KVR from doing so. Respondents would be required to file their answering brief within 30 days after said opening brief was served, whenever that time may come. The relief Appellant KVR seeks is within its own control and can be achieved without an order from this Court.

Appellant KVR's motion to expedite appears to effectively request that Respondents' time to file their answering briefs be reduced by a total of 10 days. As a practical matter, this result could be achieved by Appellant KVR expeditiously filing its opening brief and not waiting for the Court to rule on Appellant KVR's motion. Appellant KVR is asking this Court to expedite its docket, yet it has taken no steps or actions to expedite the matters which are under its control in its appeal. Accordingly, and based upon Appellant KVR having presented no evidence or authority supporting its request to expedite, and there being no rule or authority preventing Appellant KVR from filing its opening brief

in advance of the 120 day time period, this Court should not require briefing to occur on an expedited schedule.

III.

CONCLUSION

Based upon the foregoing, Respondent EUREKA COUNTY requests that this Court deny Appellant KVR's Motion to Expedite Appeal.

Dated this 26th day of May, 2016.

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CERTIFICATE OF SERVICE

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

✓ Court's eFlex electronic filing system

as follows:

Laura Schroeder, Esq.
Francis Wikstrom, Esq.
Ross de Lipkau, Esq.
David Rigdon, Esq.
Adam Laxalt, Esq.
Therese Ure, Esq.
Gregory Morrison, Esq.
Paul Taggart, Esq.
Micheline Fairbank, Esq.

DATED this 26th day of May, 2016.

/s/ Nancy Fontenot
NANCY FONTENOT

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