

In the Supreme Court of Nevada

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

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NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. Kobeh Valley Ranch, LLC is a Nevada limited liability company. Kobeh Valley Ranch, LLC is a wholly owned subsidiary of General Moly, Inc. a Delaware corporation with its primary place of business in Lakewood, Colorado. General Moly, Inc.'s stock is publicly traded.

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ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(9) because it is an appeal involving water determinations made by an administrative agency – the Nevada Division of Water Resources.

JURISDICTIONAL STATEMENT

This appeal is taken by appellant, Kobreh Valley Ranch, LLC (hereinafter “KVR”) from the Amended Order Granting Objection to Proposed Order Remanding to State Engineer; Order Granting Petitions for Judicial Review; and Order Vacating Permits entered on March 9, 2016, by Department 2 of the Seventh Judicial District Court, Eureka County, Nevada. This Court has jurisdiction over the appeal of a final order of a district court. Nev. Const., art. 6 § 4; NRAP 3A(b)(1). Appellants’ Notice of Appeal was timely filed.

ISSUES PRESENTED

Did the district court err by summarily vacating KVR’s permits and denying KVR’s water right applications without remanding this matter to the State Engineer for further evidentiary proceedings that are consistent with this Court’s opinion.

STATEMENT OF THE CASE

The district court did not properly interpret this Court’s instructions on

remand. The district court, however, did properly follow those instructions by vacating the State Engineer's approval of KVR's Monitoring, Management, and Mitigation Plan (hereinafter "3M plan"). But then, rather than simply overturning Ruling 6127 and remanding this case to the State Engineer for additional proceedings consistent with this Court's opinion, the district court summarily vacated KVR's permits and *denied KVR's water right applications*. KVR was deprived of the opportunity to present evidence, and the State Engineer was denied the opportunity to consider and rule whether any identified conflicts could be successfully mitigated. Accordingly, KVR respectfully requests that this Court direct the district court to remand this matter to the State Engineer for additional proceedings that are consistent with its opinion. These proceedings should be evidentiary, fact-finding, proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

KVR proposes to develop the Mount Hope project which is a molybdenum mine in Eureka County, Nevada. The Mount Hope project will be one of the largest molybdenum mines in the world. Molybdenum is a mineral that is critical to manufacturing steel and other products that are used on a daily basis by millions of people. The development and operation of the mine will greatly enhance the

economic development efforts of the State of Nevada and provide substantial tax revenue for Eureka County. Almost \$300 million dollars has already been invested in this effort. When the mine is operational, it will employ approximately 400 people in full-time positions. JA 1445-47.

The mine process requires 11,300 acre feet of water per year (“AFA”). KVR filed many water right applications to appropriate new water rights and change existing water rights (collectively hereinafter “Applications”).¹ About half of the water needed for the project came from changes to existing water rights that were purchased by KVR, and the other half came from applications for new appropriations. All of KVR’s Applications were protested by various parties including the respondents in this appeal. *Id.*

In October 2008, the State Engineer conducted five days of hearings on the Applications. Six months later, the State Engineer issued Ruling 5966, and granted the Applications. The respondents appealed Ruling 5966. The district court subsequently vacated the ruling *and remanded* the case back to the State Engineer for additional proceedings because the State Engineer relied on evidence that the

¹ The Applications were filed by a variety of individuals and entities. Those Applications not filed by KVR were later assigned and/or transferred to KVR.

protestants did not have an opportunity to contest. JA 313-314.

The State Engineer conducted a second hearing in December 2010, and May 2011. On July 5, 2011, the State Engineer issued Ruling 6127, and granted 11,300 AFA in groundwater rights for KVR. The State Engineer conditioned the approval of KVR's water rights on the submission of a 3M plan. The respondents appealed the State Engineer's determination to the district court. The relief requested by those respondents was the vacation of Ruling 6127 and denial of the KVR Applications. JA 1-4.

In December, 2011, the State Engineer issued water right permits to KVR based on the approval in Ruling 6127 of the KVR Applications. The respondents filed separate appeals from the issuance of KVR's permits in district court. The relief requested in each of those appeals was to vacate the permits, and one appeal asked that the vacated permits be remanded to the State Engineer "with instructions to deny the underlying applications." JA 299. The appeals from the issuance of KVR's permits were consolidated with the earlier appeals from the issuance of Ruling 6127. The district court upheld Ruling 6127. The appeal from that order is Supreme Court case no. 61324. JA 583-84.

In October, 2011, during the pendency of the consolidated appeals from

Ruling 6127 and prior to the issuance of the KVR permits, KVR submitted a draft 3M plan to the State Engineer. 3M plans had been regularly required by the State Engineer as a condition of approval of water right applications. However, no statute or regulation existed that expressly stated the requirements of such plans. When KVR developed its 3M plan, it relied on the past practice of the State Engineer, as well as direct input from the State Engineer's office and Eureka County. JA 1225. The 3M plan did not include specific details on mitigation, but left the determination of specific mitigation to the discretion of the State Engineer. JA 1356.

KVR submitted its final 3M plan for review on May 10, 2012. The State Engineer reviewed and approved the 3M plan. Certain respondents, but not Eureka County, appealed the approval of that 3M plan. The only relief sought in that appeal was to disallow water use under the KVR permits until a 3M plan "is submitted that satisfactorily provides express conditions for monitoring and mitigating conflicts with existing rights." JA 645. The district court upheld the State Engineer's approval of the 3M plan. JA 1171.

Appeals were filed in this Court from each of the district court's orders. Case no. 61324 involved appeals from the order that upheld Ruling 6127 and the issuance of KVR's permits. Case no. 63258 involved the appeal from the order that upheld

KVR's 3M plan. This Court consolidated case no. 61324 and 63258. JA 1348.

This Court reversed and remanded the consolidated appeals. The Court held the State Engineer could not condition the approval of an application on a yet-to-be developed 3M plan, and that substantial evidence did not exist in the record to demonstrate that KVR's post-Ruling 6127 3M plan would mitigate conflicts between KVR's permits and certain existing water rights. In addition, the Court noted that, based on the record before it, the Court could not determine from the record which KVR Application would conflict with existing rights, and, therefore, it had to "overturn the entire decision." JA 1362. The Court then instructed the district court to conduct "proceedings consistent with this opinion." *Id.*

After this Court issued its remitter, KVR asked the district court to remand the case to the State Engineer for additional fact-finding proceedings consistent with this Court's instructions. JA 1364. Respondents opposed KVR's request. JA 1372-1378. Without a hearing, on March 9, 2016, the district court denied KVR's request and entered an order that granted the petitions for judicial review, vacated the State Engineer's approval of KVR's 3M plan, vacated KVR's permits, and then *denied all*

of KVR's Applications.² JA 1416-1421. KVR appeals from that order.

SUMMARY OF ARGUMENT

After discussing the meaning of "conflict," this Court made a limited ruling regarding the sufficiency of KVR's 3M plan and found there was insufficient evidence in the record to determine if the conflicts could be avoided by a successful 3M plan. Since the district court cannot be a fact finder, remand to the State Engineer was required. Remand to the State Engineer was required because the Court could not determine whether mitigation could avoid conflicts. This Court's general instructions for remand did not direct the district court to vacate KVR's permits, or deny KVR's Applications. An evidentiary proceeding before the State Engineer is required for the fact-finding this Court's opinion required, and is consistent with the law of the case. KVR should have an opportunity to build a proper record that complies with the new legal standards that were announced by this Court. In addition, the respondents that challenged KVR's actual 3M plan only requested that KVR be required to submit a new 3M plan that satisfactorily mitigates

² To clarify, KVR's permits were issued after the State Engineer granted KVR's applications. *See* NRS 533.370(2). If a permit is vacated, the water right reverts back to application status for further consideration by the State Engineer. The district court eliminated any further consideration of the KVR applications by the State Engineer when it judicially denied the KVR applications.

conflicts with existing rights.

STANDARD OF REVIEW

“A district court’s conclusions of law are reviewed de novo.” *White v. Continental Ins. Co.*, 119 Nev. 114, 116, 65 P.3d 1090, 1091 (2003). An opinion of this Court remanding a case to a district court constitutes the law of the case on remand. *Hsu v. County of Clark*, 123 Nev. 625, 629-630, 173 P.3d 724, 728 (2007) (“[w]hen an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case . . .”) (quoting *Wickliffe v. Sunrise Hospital*, 104 Nev. 777, 780, 766 P.2d 1322, 1324 (1988)). Accordingly, in the present case, the district court’s interpretation of this Court’s instructions on remand is reviewed de novo.

ARGUMENT

I. REMAND TO STATE ENGINEER IS REQUIRED TO ALLOW KVR TO SHOW IT CAN MITIGATE CONFLICTS WITH EXISTING RIGHTS.

This Court did not expressly direct the district court to deny KVR’s Applications or to vacate KVR’s permits. This Court only overturned Ruling 6127 and directed that *proceedings* occur consistent with its order. Such proceedings must involve fact-finding because this Court could not determine what mitigation options were proposed or whether they would be successful.

A. A proper record should be developed consistent with this Court's opinion.

Clearly, if the record before the Court had allowed it to identify factual evidence that only certain KVR permits involved a conflict with existing rights that could not be mitigated, it would have instructed that only those permits be vacated. The remaining permits would still be valid. Since such a factual record did not exist, this Court expected the district court to remand the matter to the State Engineer to determine if conflicts could not be mitigated.³ Of course, the record demonstrates that the conflicts identified by this Court were with water rights in the Kobeh Valley Basin. Some of the permits granted by the State Engineer were in the Diamond Valley Basin, where no conflicts were identified. Without that factual inquiry by the State Engineer, it was improper for the district court to vacate any KVR permits, or deny any KVR applications.

The district court should have simply ordered the State Engineer to 1) vacate Ruling 6127 and 2) conduct fact-finding proceedings to allow KVR the opportunity

³ The district court concluded in its Amended Order that “[t]he Nevada Supreme Court did not remand the cases to the State Engineer for further proceedings consistent with its opinion which it could have done if the court concluded additional administrative review and findings were necessary.” JA 1420. The district court later clarified that it did not intend to imply that it believed the Supreme Court could remand directly to the State Engineer without going through the district court. JA 1572.

to present evidence that a detailed 3M plan that includes satisfactory mitigation of conflicts with water rights could effectively accomplish what this Court found lacking in Ruling 6127.

B. This Court's instructions expressly included remand, which requires more than summary dismissal.

This Court included the word 'remand' in its instructions to the district court for a reason. If the Court had intended to instruct the State Engineer to deny the Applications, it would have simply reversed or provided specific instructions to vacate the KVR permits and deny the KVR Applications. For instance, in *Bacher v. State Engineer*, 122 Nev. 1110, 146 P.3d 793 (2006), this Court simply reversed the district court's ruling without providing any remand instruction. *Bacher* at 1123, P.3d at 801. In contrast, in *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 234 P.3d 912, 920 (2010), the Court provided explicit instructions for remand.

When compared to the instructions the Court has given in other cases, the instructions in this case are general. That general remand language implies some form of proceeding will occur that consists of more than summary dismissal of KVR's applications.

Summary dismissal is also inconsistent with the procedural posture of the appeals. In case no. 63258 (the appeal of the approval of the 3M plan), the petitioners only requested that KVR be required to submit a satisfactory 3M plan. JA 645. If the Court had intended KVR's Applications to be denied, case no. 63258 would be moot. Yet the Court remanded that appeal (case no. 63258) to the district court. Further, in case no. 61324 (the appeal of Ruling 6127 and issuance of KVR's permits), the petitions for judicial review expressly requested vacation of the KVR permits and denial of the KVR applications. JA 1-4. But, even though these requests were expressly made, this Court did not grant that relief because it did not have the facts it needed in the record. KVR filed over 80 applications, only some of which are for new appropriations or pose the potential for impacts if mitigation is not satisfactory. Most of the applications were in Kobeh Valley, but some were in Diamond Valley. Therefore, the district court erred by vacating the KVR permits and denying the KVR Applications.

II. AN EVIDENTIARY PROCEEDING BEFORE THE STATE ENGINEER IS CONSISTENT WITH THIS COURT’S OPINION BECAUSE THE PRINCIPLES ARTICULATED IN THAT OPINION REQUIRE ADDITIONAL FACTUAL ANALYSIS.

A. Only the State Engineer can conduct the fact-finding that is required by this Court’s prior opinion in this case.

This Court has clearly established that the State Engineer is the appropriate fact-finder and the judiciary has no independent fact-finding function regarding water right applications. *See* NRS 533.450; *see also* *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979) (“neither the district court nor this court will substitute its judgment for that of the State Engineer: we will not pass upon the credibility of the witnesses nor reweigh the evidence . . .”). A district court may not “substitute its judgment for that of the State Engineer” or “pass upon the credibility of the witnesses nor reweigh the evidence.” *Id.* Instead, it may only make “a determination of whether substantial evidence in the record supports the State Engineer's decision.” *Id.*

KVR filed over 80 water rights applications with the State Engineer. Some of these applications were for new appropriations, while others merely sought to change the point of diversion and manner and place of use of existing rights. When this Court ruled that substantial evidence did not support the issuance of Ruling 6127, it made no specific findings with respect to individual applications.

JA 1362. This Court made a limited ruling regarding the sufficiency of KVR's 3M plan and then left it to the remand proceedings to determine, based on that ruling, whether sufficient evidence exists that "successful mitigations efforts may be undertaken so as to dispel the threat to existing right holders." JA 1348.

NRS 533.370(2) directs the State Engineer, not the district court, to reject an application if the proposed use or change conflicts with existing rights and cannot be mitigated. Since additional fact-finding is needed to make this statutory determination, the district court was required to further remand this case to the State Engineer. Instead, the district court summarily vacated all KVR's permits, and denied KVR's Applications. The State Engineer, as the fact-finder, should have been allowed to hear evidence and to determine whether mitigation will be successful.

Remand proceedings consistent with the Court's opinion call for detailed factual analysis. The record before the Court only contained analysis that was prepared before a 3M plan was developed. JA 1362. Given this Court's opinion, additional analysis needs to be performed to verify that threats to existing rights that are attributable to KVR's Applications can be successfully mitigated to prevent potential conflicts to such existing rights. Such an analysis can only be done by

remanding the case to the proper fact-finding authority – the State Engineer. Remand proceedings should include analysis of mitigation options to determine whether they will be successful. The analysis should be based on evidence that is presented to the State Engineer and is subject to cross-examination by protestants.

A record supported by substantial evidence can then be adduced that specifically identifies the circumstances that will require the implementation of mitigation measures, the exact mitigation measures that will be undertaken, and, if the mitigation will entail the provision of replacement water, the source of such water and whether the means of conveying that water will “fully restore the senior water rights at issue.” JA 1356. In addition, KVR will present evidence and argument to the State Engineer to address the concern of this Court regarding the issue of abandonment or forfeiture of a senior’s water right during the period of time when the senior water right holder accepts or uses replacement water furnished by KVR. JA 1358.

After the State Engineer has a chance to consider evidence about whether successful mitigation is possible, he can apply the procedures and standards that are law of this case, and determine if specific threats to existing rights can be adequately and fully mitigated in accordance with this Court’s opinion.

B. This Court's opinion allows limited remand proceedings.

Factual analysis on remand by the State Engineer is consistent with the opinion of this Court and the law of the case doctrine. The doctrine of the law of the case prohibits consideration of issues which have been decided by a superior tribunal in a prior proceeding in the same case. As noted in *Office of the State Eng'r, Div. of Water Res. V. Curtis Park Manor Water Users Assn*, 101 Nev. 30, 33, 692 P.2d 495, 497 (1985):

The doctrine of the law of the case provides that where an appellate court states a principle of law in deciding a case, that rule becomes the law of the case, and is controlling both in the lower court and on subsequent appeals, *as long as the facts are substantially the same.* (emphasis added).

“In short, issues decided in earlier appellate stages of the same litigation should not be reopened, except by a higher court, absent some significant change in circumstances.” 5 Am. Jur. 2d Appellate Review §566.

However, “the doctrine does not bar a district court from hearing and adjudicating issues not previously decided, and does not apply if the issues presented in a subsequent appeal differ from those presented in a previous appeal.” *Dictor v. Creative Management Services, LLC*, 126 Nev. 41, 44-45, 223 P.3d 332, 334 (2010) (emphasis added; internal citations omitted). “Subjects an appellate

court does not discuss . . . do not become the law of the case by default.” *Bone v. City of Lafayette, Ind.*, 919 F.2d 64, 66 (7th Cir. 1990).

In *Dictor*, this court decided an appeal of a dispute over a subrogation claim in a negligence and conversion case. *Dictor* at 43, P.3d at 333. The district court had granted a motion for summary judgment in favor of the defendant based on NRS 687A.095 (precluding certain claims against an insured party whose insurance carrier is insolvent). *Id.* This Court reversed after determining that the statute did not apply. *Id.* On remand, the defendants raised a similar statutory defense under a choice-of-law analysis which applied Mo.Rev.Stat. § 375.772. *Id.* Based on this asserted defense the district court again granted defendant’s motion for summary judgment. *Id.* at 43-44, P.3d at 333-334.

On appeal, the plaintiff argued that the district court violated the law of the case doctrine by granting the second motion for summary judgment. *Id.* at 44. P.3d at 334. However, this Court concluded that “[o]ur previous decision was narrow and strictly determined that NRS 687A.095 did not apply.” *Id.* at 45, P.3d at 334. It further stated that “our prior order did not compel the district court to proceed to trial, nor did it preclude the district court from addressing alternate statutory defenses or other pretrial dispositional motions.” *Id.* Because of this, the

district court's consideration of the additional statutory defense did not violate the law of the case doctrine. *Id.*

C. In this case, remand to State Engineer is consistent with the legal holding in this Court's opinion.

Here, as in *Dictor*, this Court's ruling was limited to specific issues – KVR's 3M plan – and did not rule so exhaustively on legal issues as to preclude future fact-finding. The Court ruled on the record before it, but left open the possibility that mitigation could be acceptable if supported by a proper record. JA 1362. The Court focused on due process considerations that require the State Engineer, before granting applications, to review a 3M plan, and to give protestants an opportunity to challenge the evidence presented, so assurances can be made that mitigation will be adequate and effective. JA 1359-61. The Court addressed the right of protestants to have a full and fair opportunity to be heard, before applications are approved. JA 1360. None of these legal conclusions preclude future fact-finding, or indicate that KVR should be denied the opportunity to prepare and submit a revised 3M plan that comports with this Court's first instructions regarding 3M plans.

What this Court did in its opinion was to construct a legal framework under which KVR applications can be considered on remand. The legal framework articulated by this Court outlines the due process and evidentiary requirements that must be met to support a 3M plan. KVR seeks only the opportunity to meet the requirements articulated by this Court.

The district court erred when it interpreted specific parts of this Court's opinion to require vacating KVR's permits and denying KVR's Applications. First, the district court referenced the summation paragraph of this Court's opinion. JA 1420. That paragraph restated what the Court concluded earlier in the opinion – that the record before the Court does not contain substantial evidence that KVR's 3M plan would be effective. JA 1362. This conclusion does not preclude a proper record from being developed that would support effective mitigation.

Second, this Court concluded “the State Engineer's decision to grant KVR's applications cannot stand.” JA 1361. Ruling 6127 encompasses the State Engineer's decision to grant the Applications. Hence, this Court concluded that Ruling 6127 could not stand, not that the Applications themselves cannot stand. Otherwise the Court's comment that it could not pinpoint the offending application would make no sense.

Third, this Court concluded that the current record “demonstrates that KVR’s appropriation would cause the complete depletion of the source of existing rights.” But, on this point, the Court later implied that a proper record could remedy this defect. The Court commented at JA 1356, that:

Nowhere in the ruling, however, does the State Engineer articulate what mitigation will encompass, even in the most general sense. And evidence of what that mitigation would entail and whether it would indeed fully restore the senior water rights at issue is lacking: there was no mitigation plan in the record before the district court or in existence when KVR's applications were granted.

Remand is appropriate for consideration of specifically what mitigation will encompass and whether it will fully restore existing rights. Since such a mitigation plan was not before the State Engineer when he issued Ruling 6127, remand is appropriate to now allow such a plan to be submitted and considered by the State Engineer and subject to challenge by protestants.

III. REMAND TO THE STATE ENGINEER IS PROPER BECAUSE THIS COURT ANNOUNCED NEW RULES REGARDING 3M PLANS.

In *Eureka County*, this Court was presented with a question of first impression. The Court was asked whether NRS 533.370(2) “allows for the State Engineer to take into account the applicant’s ability to mitigate the drying up of existing rights holders’ water source” when he is considering whether a conflict

exists between a new application and an existing water right. JA 1348. The question of mitigation and what level of evidence is required to support a 3M plan had not been previously reviewed by the Court. Also, the State Engineer does not have regulations in place to explain how mitigation plans should be developed.

KVR had no legal guidelines to follow when it was developing the 3M plan required by Ruling 6127. Instead, KVR relied on the past practice, advice and direction of the State Engineer, including the direction to obtain input from Eureka County. Since the State Engineer's interpretations of Nevada water law are entitled to deference by the judiciary, KVR's reliance on the State Engineer's advice and direction was reasonable. *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) ("an agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action.") (citing *Clark Co. Sc. Dist. v. Local Gov't*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974)).

This Court announced at least two new rules in *Eureka County* that establish procedures for 3M plans that are different than the State Engineer's prior practice. First, the Court held that a water rights application cannot be approved on the condition that the applicant develops a 3M plan in the future. Second, this Court

held that a 3M plan must define the specific mitigation measures that will be implemented, be supported by evidence that demonstrates that mitigation efforts will be successful, and be subject to review and challenge by protestants. This matter should have been remanded to the State Engineer for consideration of KVR Applications in light of these new rules.

A. In consolidated case no. 61324, this Court announced a new rule that 3M plans must be available for review prior to the approval of a water rights application.

Prior to the issuance of the opinion in *Eureka County*, the State Engineer interpreted NRS 533.370(2) to allow him to approve a water right application which had the potential for conflicts with existing rights if it was conditioned upon the future development of a 3M plan. However, in *Eureka County* this Court ruled that “the State Engineer’s decision to grant an application . . . must be made upon presently known substantial evidence, rather than information to be determined in the future.” JA 1359. Accordingly now, when a 3M plan is required by the State Engineer, it must be made available for consideration by the State Engineer and members of the public *before* any water rights applications associated with it can be approved. *Id.* In this case, a 3M plan was not available to the State Engineer or the protestants when Ruling 6127 was issued.

1. Prior practice of State Engineer

Before the opinion in *Eureka County* the State Engineer's regular practice was to approve water rights applications conditioned on the future development of monitoring plans or mitigation plans. See KVR Pamphlet of State Engineer Decisions Relating to Monitoring or Mitigation.⁴ None of these previous rulings and permits conforms to the rule articulated by this Court in *Eureka County*. Examples of permits that required 3M plans to be developed in the future are listed below.

Ruling/Permit	Issue Date	Basin	Use
Ruling 5194, Permit R-014	1/7/2003	Warm Springs Valley	Municipal
Ruling 5616, Permits 70610, 70611, 71540T	5/17/2006	Truckee Canyon Segment	Quasi-municipal
Ruling 5816, Permits 73960-73966, 74368	1/15/2008	Red Rock Valley	Municipal
Ruling 5918, Permits 72296-72306, 72308-72349	12/3/2008	Lake Valley	Municipal
Ruling 6038, Permits 77564-77565, 75185-78186	4/6/2010	Steptoe Valley	Mining
Ruling 6108, Permits 80028-80042	4/28/2011	Fernley Area and Carson Desert	Geothermal

⁴ Here, the issues presented require a review of the past practice of the State Engineer when requiring mitigation, issuing water rights for mitigation, and approving 3M plans. Nevada Rule of Appellate Procedure 28(f) directs that if the Court's determination of the issues presented requires a review of "statutes, rules, regulations, etc.," the relevant parts of those items can be supplied in pamphlet form. Also, the State Engineer's permits and rulings are public records of which the Court may take judicial notice. KVR's pamphlet does not include all permits relating to 3M plans that the State Engineer has issued, but it constitutes a representative sample.

Specifically, in 2011, the State Engineer issued Ruling 6108 approving water for a geothermal project. In that ruling the State Engineer conditioned his approval on the future “[a]pproval by the State Engineer of a monitoring and mitigation plan prior to the development and consumptive use of the water.” KVR Pamphlet at P000592. In 2010, the State Engineer issued Ruling 6038 approving water for a mining project. In that ruling the State Engineer conditioned his approval on the applicant’s future development of “[a]n approved monitoring and mitigation plan.” KVR Pamphlet at P000513.

In 2008, the State Engineer issued Ruling 5918 approving water for municipal development purposes. In that ruling the State Engineer conditioned his approval on the applicant’s future development of “[a] monitoring, management, and mitigation plan approved by the State Engineer.” KVR Pamphlet at P000484. Also in 2008, the State Engineer issued Ruling 5816 approving water for municipal development purposes. In that ruling the State Engineer conditioned his approval on the applicant’s future development of an “[a]pproved monitoring and mitigation plan.” KVR Pamphlet at P000407.

In 2006, the State Engineer issued Ruling 5616 approving water for quasi-municipal use. In that ruling the State Engineer placed the following condition on

the approval “[t]he Applicant is required to have a monitoring plan approved by the State Engineer prior to the diversion of any water under permits that may be issued pursuant to [these applications].” KVR Pamphlet at P000306. Based on this condition the applicant in that case would only be required to submit the plan after the permits were issued but before the water was put to use.

In 2003, the State Engineer issued Ruling 5194 approving water for an aquifer storage and recovery project. In that ruling the State Engineer placed the following condition on the approval: “[a] monitoring plan must be developed and approved by the State Engineer prior to any recovery of water for exportation. The monitoring plan must include a mitigation plan for any adverse impacts to domestic wells and existing rights that are as a result of operating the recharge, storage, and recovery project.” KVR Pamphlet at P000239.

2. Application of prior practice in this case.

The State Engineer followed this prior practice when he issued Ruling 6127, and approved KVR’s Applications, based on the development of a 3M plan in the future. A condition of each permit that was issued based on Ruling 6127 was that no pumping could occur until an approved 3M plan was in place. The district court also upheld the State Engineer’s prior practice when it rejected the challenge

to Ruling 6127. The district court stated, “There is nothing in the record to suggest that these other springs or wells are unique or that mitigation would not be possible and the uncertainty of any impacts supports the State Engineer’s decision to protect rights to these sources through the development and implementation of an approved 3M plan.” JA 590.

Therefore, it is clear that when this Court overruled the district court, it announced a new requirement that altered the prior practice of the State Engineer.

B. In consolidated case no. 61324, this Court announced a new rule that 3M plans must contain specific mitigation measures and substantial evidence must prove the measures will be successful.

This Court’s opinion requires an applicant to specify up-front the exact mitigation measures that will be employed in response to projected conflicts and demonstrate that they will be successful in preventing conflicts. JA 1356. (“While KVR’s experts testified as to the existence of a few possible mitigation techniques, *they did not specify what techniques would work*, much less techniques that could be implemented to mitigate the conflict with the existing rights in this particular case.”) (emphasis added).

Prior to *Eureka County*, the State Engineer had approved mitigation plans that allowed an applicant to wait until a conflict actually manifested itself before

determining what type of mitigation would be required. *See* KVR Pamphlet of State Engineer Decisions Relating to Monitoring or Mitigation. The purpose behind such plans was to allow the mitigation to be precisely tailored to the particular problem after the specific cause and extent of the problem is known. Examples of 3M plans that were approved without outlining specific mitigation options are listed below.

Ruling/Permit	Issue Date	Basin	Use
Ruling 5132 Permits 65456, 66227	6/12/2002	Mequite Valley	Municipal
Ruling 5641 Permit 73553	8/11/2006	Pahrump Valley	Quasi-municipal
Ruling 5760 Permit 70934	8/21/2007	Tracy Segment	Instream Flow
Ruling 6038 Permits 77564-77565, 75185-78186	4/6/2010	Steptoe Valley	Mining

Specifically, in 2010, the State Engineer issued Ruling 6038 approving water rights applications for a mining project in which he concluded that “there will be no conflict with the existing water rights at Murray Springs as continual mitigation will be required through a monitoring, management, and mitigation plan approved by the State Engineer to ensure the senior water rights on this source are satisfied.” KVR Pamphlet at P000512. The ruling contained no specific description of what the “continual mitigation” measures would entail.

In 2007, the State Engineer issued Ruling 5760 approving water rights applications to provide instream flows for wildlife purposes. In the ruling he included a condition that stated “[i]f the effect of granting this application does not have a neutral effect on efficiency calculations under OCAP, adequate mitigation must be provided.” KVR Pamphlet at P000359. Again, what “adequate mitigation” consists of is not specified in the ruling.

In 2006, the State Engineer issued Ruling 5641 approving water rights applications for quasi-municipal purposes. He included in the ruling a condition stating that “[i]f unreasonable impacts to the Protestant’s existing domestic well are demonstrated, the Permittee or any assignee will be required to mitigate the same.” KVR Pamphlet at P000327. The ruling contains no description of what this mitigation will entail.

In 2002, the State Engineer issued Ruling 5132 approving water rights applications for municipal purposes. He included in the ruling a condition stating that “[i]f impacts to any existing domestic wells and water rights are demonstrated on the Nevada side of Mesquite Valley, the applicant or any assignee will be required to mitigate the same.” KVR Pamphlet at P000222. Again, no mention is made as to the specific mitigation measures which will be required.

The Court's holding in *Eureka County* clearly articulated a new standard for the approval of mitigation plans.

C. KVR should be provided an opportunity to comply with the new rules.

1. KVR reasonably relied on the State Engineer's prior practice.

KVR's reliance on the State Engineer's prior rulings and guidance as to the sufficiency of the 3M plan was reasonable given the fact that there was no statute, regulation, or precedential case law which provided alternative direction as to what the plan should include or what standards would guide its approval. In fact, this Court has stated that "lay members of the public are entitled to rely upon [the State Engineer's] advice as to the procedures to be followed under state water law." *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 1061, 944 P.2d 835, 843 (1997) (citing *Bailey v. State*, 95 Nev. 378 594 P.2d 734 (1979).)

The Nevada Supreme Court has clearly directed that an applicant "cannot be punished for the State Engineer's failure to follow his statutory duty." *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 199, 234 P.3d 912, 920 (2010). In *Great Basin Water Network*, this Court ruled that the State Engineer violated his statutory duty under NRS 533.370(2) to rule on certain water rights applications

within one year of the date the applications were filed. *Id.* at 198, P.3d at 919. However, this Court also found that “[v]oiding the State Engineer’s ruling and preventing him from taking further action would be inequitable to [the applicant] and future similarly situated applicants.” *Id.* at 199, P.3d at 920. To resolve this dilemma, the Court exercised its equitable powers and allowed the State Engineer to republish the applications and reopen the protest period on remand. *Id.*

Here we have a similar situation. In *Eureka County*, this Court found that the State Engineer violated his statutory duty under NRS 533.370(2) when he approved KVR’s applications subject to a condition that KVR develop a 3M plan in the future. JA 1348. However, if the district court’s amended order stands, it will be KVR and not the State Engineer that will bear the brunt of the State Engineer’s mistake. This result is just as inequitable as the result that could have faced the applicant in *Great Basin Water Network*.

KVR should not be punished because this Court concluded the State Engineer failed to meet his statutory duty regarding 3M plans. In good-faith reliance on the State Engineer’s advice, KVR diligently pursued the development of the 3M plan using the best resources available to it at the time. Accordingly, rather than vacate KVR’s permits and deny KVR’s Applications, the district court

should have remanded this matter to the State Engineer to allow KVR to comply with the Court's newly adopted standards.

2. Failure to remand is manifestly unjust.

The district court's summary vacation of KVR's Applications creates two consequences that are unfair and unjust. First, KVR must start over in assembling water rights for the mine project. Second, the district court's amended order has spawned a number of specious arguments that KVR must now contest to develop its project.

The district court's summary vacation of the permits requires KVR to completely restart the process of acquiring water for the mine project. This will involve significant expense and delay that could otherwise be avoided.

Also, under the terms of KVR's change permits, the underlying base water rights were abrogated. Normally, when the approval of a change application is vacated, the water reverts back to the base right. In this case the respondents are erroneously claiming that since the base rights were abrogated at the time the change permits were issued, and since the district court's vacation of those permits occurred subsequent to that time, the base rights no longer exist. *See e.g.* Eureka County Protest of Application No. 85573 at § 8. In effect, the Protestants are

arguing that the district court's vacation of the change permits effectively cancelled the base rights and returned KVR's private property to public ownership.

Finally, if the vacation of KVR's new appropriations stands, KVR will lose priority for the remaining water in Kobeh Valley. In fact, Eureka County filed an application for nearly all the remaining water in that valley. Eureka County's application is junior to the KVR permits that the district court vacated, but potentially senior to new applications that KVR filed after this Court's opinion in *Eureka County*. Given this, it was manifestly unjust for the district court to vacate KVR's change permits rather than to remand for further proceedings before the State Engineer.

In the same way that this Court provided a remedy in to the applicant in *Great Basin Water Network*, here the district court should have remanded to the State Engineer for KVR to have the opportunity to revise its 3M plan to conform to the new rules articulated in the *Eureka County* decision.

IV. REMAND TO STATE ENGINEER IS PROPER BECAUSE IN CONSOLIDATED CASE NO. 63258, THE ONLY RELIEF REQUESTED WAS THAT KVR SUBMIT A SATISFACTORY 3M PLAN WITH EXPRESS CONDITIONS FOR MONITORING AND MITIGATING CONFLICTS.

After Ruling 6127 was issued and the KVR permits were granted, KVR prepared a 3M plan. KVR sought and received input from Eureka County and other protestants regarding that plan. JA 1225. After the plan was approved by the State Engineer, only Benson and Etcheverry challenged that decision.⁵ They appealed and requested specific relief. The only relief sought was that KVR's water use be disallowed until a 3M plan "is submitted that satisfactorily provide express conditions for monitoring and mitigating conflicts." JA 645. Accordingly, the only relief the district court could grant in that appeal is a remand to the State Engineer with instructions that he request KVR to submit a satisfactory 3M plan.

Additionally, this Court articulated clear standards in its opinion for an effective 3M plan. On remand to the State Engineer, Benson and Etcheverry can receive the relief they requested, and KVR has a clear understanding of what a

⁵ Eureka County did not appeal the approval of the 3M plan. By failing to appeal, Eureka County waived its right to claim that different relief should have been requested or granted in case no. 63258. *See generally, Vidler Water Co., Inc. v. State Engineer*, 124 Nev. 1516, 238 P.3d 863 (2008) (Table), 2008 WL 6102097 at 2-3 (2008) (unpublished disposition) (refusing to allow a party that did not participate in an appeal from intervening after judgment to offer additional evidence).

satisfactory plan requires. In fact, after this appeal was filed in the district court in 2012, KVR received federal approval of its project. That approval came in the form of a Record of Decision (“ROD”) that was issued by the United States Bureau of Land Management (“BLM”) after KVR complied with the National Environmental Policy Act (“NEPA”).⁶ The NEPA effort yielded a thorough analysis of potential impacts from the mine project on water uses in the area. After that analysis, the BLM placed conditions of approval on KVR in the ROD. Those conditions of approval specifically require mitigation of unreasonable impacts on local water uses. These mitigation requirements are currently binding on KVR, even though the State Engineer has yet to consider a new 3M plan from KVR.

Given the economic importance of the Mt. Hope mining project, a remand for consideration of an effective mitigation will serve critical policy concerns of protecting existing rights while allowing water supplies to be placed to beneficial use.⁷ KVR should be given the opportunity to draft a 3M plan that meets the

⁶ Available at: Record Of Decision Mount Hope Project, U.S. Department of the Interior, Bureau of Land Management (Nov. 2012), http://www.blm.gov/style/medialib/blm/nv/field_offices/battle_mountain_field/blm_information/nepa/mount_hope_project.Par.28223.File.dat/2012%2011%2016_Mount_Hope_ROD_FINAL.pdf

⁷ See NRS 533.370(2) and NRS 533.025.

standards articulated by this Court, promotes the maximal use of the state's water resources and "fully restore[s] the senior water rights at issue." JA 1356.

CONCLUSION

For the reasons stated herein, KVR respectfully requests that this Court order the district court to remand this matter to the State Engineer for further proceedings to allow KVR to comply with the requirements of this Court's opinion.

CERTIFICATE OF COMPLIANCE

I, David H. Rigdon, Esq., declare the following under penalty of perjury:

1. I hereby certify that this Appellants' Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this Appellant's Opening Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

2. I further certify this Appellant's Opening Brief complies with the page-volume limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP 32(a)(7)(C), it contains less than 14,000 words and 1,300 lines, specifically, the word-processing system used to prepare the brief (Microsoft Word) reports that the brief consists of 8,473 words and 999 lines.

3. Finally, I hereby certify that I have read this Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Appellant's Opening brief complies with all applicable Nevada Rules of Appellate Procedure. I

understand that I may be subject to sanctions in the event that the accompanying Appellant's Opening Brief is not in conformity with the requirements of the Nevada Rules of Appellate procedure.

DATED this 17th day of August, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NRS 533.450, I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of the foregoing, as follows:

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