IN THE SUPREME COURT OF THE STATE 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,
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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APPELLANT STATE OF NEVADA, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, STATE ENGINEER'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

This is an appeal from the March 9, 2016, final order of the district court granting Respondents' Petitions for Judicial Review and Vacating Permit Applications of Appellant Kobeh Valley Ranch, LLC (hereafter "KVR") for the appropriation of water and the district court's denial of Appellant KVR's Motion to Alter or Amend Judgment filed June 3, 2016. Joint Appendix (JA) at 1394-1403, 1545-1557. Jurisdiction is proper before this Court pursuant to NRAP 3A(a) and 3A(b)(1), and NRS 533.450(9). Appellant State Engineer timely filed his Notice of Appeal on April 8, 2016. JA at 1449-1466. Accordingly, Appellant State Engineer's appeal is timely pursuant to NRAP 4(a)(1).

II. ROUTING STATEMENT

This case is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(9) because it is a case involving an administrative agency appeal concerning the determination of an application to appropriate water, and pursuant to NRAP 17(a)(14) as it raises as a principal issue a question of statewide importance and seeks to clarify an inconsistency in the interpretation of this Court's published

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decision in *Eureka Co. v. State Engineer*, 131 Nev. Adv. Op. 84, issued on October 29, 2015.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the district court correctly interpreted this Court's opinion in *Eureka Co. v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114 (Oct. 29, 2015), to decide, with finality, KVR's applications to appropriate water rather than remand the matter to the State Engineer?

B. Whether the district court's decision vacating and denying KVR's pending applications to appropriate water pursuant to NRS 533.370 was in excess of its constitutional authority set forth in Nev. Const. art. III, § 1?

IV. STATEMENT OF THE CASE

This appeal follows the reversal and remand by this Court in *Eureka Co.* to the district court for further proceedings consistent with that decision. 131 Nev. Adv. Op. 84, 359 P.3d 1114. The underlying appeal, consolidated Case Nos. 61324 and 63258, arose from the district court's orders denying Respondents' petitions for judicial review of Appellant State Engineer's Ruling No. 6127 that granted Appellant

KVR's applications to appropriate water for a beneficial use subject to an approved monitoring, management, and mitigation (3M) plan. Following review, on September 18, 2015, this Court reversed and remanded the district court decision, which was published on October 29, 2015. In that decision, this Court, specifically found that "substantial evidence did not support the State Engineer's findings that KVR would be able to 'adequately and fully' mitigate the fact that its groundwater appropriations will cause Kobeh Valley springs that source existing rights to cease to flow." *Eureka Co.*, 131 Nev. Adv. Op. 84, 359 P.3d at 1121.

On March 9, 2016, following the reversal and remand, the district court issued an Amended Order Granting Objection to Proposed Order Remanding to State Engineer; Order Granting Petitions for Judicial Review; Order Vacating Permits, whereby the district court vacated and denied KVR's numerous applications to appropriate water for a beneficial use pursuant to NRS 533.370(2).[1] JA at 1394-1403. The

[1] KVR Application Nos. were 72695, 72696, 72697, 72698, 73545, 73546, 73547, 73548, 73549, 73550, 73551, 73552, 74587, 75988, 75889, 75990, 75991, 75992, 75993, 75994, 75995, 75996, 75997, 75998, 75999, 76000, 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76745, 76746, 76802, 76803, 76804, 76805, 76989, 76990, 77171, 77525, 77526,

district court issued its order in accordance with its interpretation of this Court's decision in the *Eureka Co.* appeal. JA at 1397-1399.

Appellant KVR sought reconsideration of the district court's March 9, 2016, order by means of a Motion to Alter or Amend Judgment filed March 25, 2016. JA at 1420-1431. Respondent Conley Land & Livestock, LLC and Lloyd Morrison opposed KVR's motion on April 7, 2016, and Respondent Eureka County opposed the motion on April 11, 2016. JA at 1437-1448, 1467-1494. Appellant State Engineer filed a Non-Opposition to the motion seeking reconsideration of the district court decision. JA at 1507-1510. Appellant KVR filed its reply on March 21, 2016, and the motion was submitted to the district court for review on March 25, 2016. JA at 1516-1544.

Respondent State Engineer filed his Notice of Appeal of the March 9, 2016, district court order on April 8, 2016. JA at 1449-1466. Respondent KVR filed its Notice of Appeal on April 12, 2016. JA at 1495-1498. The district court issued its order denying Appellant KVR's Motion to Alter or Amend Judgment on June 3, 2016.

77527, 77553, 78424, 79911, 79912, 79913, 79914, 79915, 79916, 79917, 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930, 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940, 79941, and 79942. JA at 16-57.

JA at 1545-1557. This appeal arises from the district court's March 3, 2016, and June 3, 2016, orders in which the district court rejected a remand to the State Engineer and instead ordered that KVR's applications be vacated and denied pursuant to NRS 533.370(2). JA at 1394-1403, 1545-1557.

V. STATEMENT OF THE FACTS

This Court has previously reviewed the detailed history of the disputed water rights applications of Appellant KVR in the *Eureka Co.* case; however, for the purpose of reacquainting the Court with the underlying factual history, the State Engineer offers this brief summary.

The State Engineer issued Ruling No. 6127 on July 15, 2011, whereby he granted numerous applications of KVR for beneficial uses associated with the Mt. Hope Mine Project conditioned upon the approval of a 3M plan, which was to be prepared and approved prior to any groundwater development under the applications granted (permits) in the ruling. JA at 16-57. However, Protestants to KVR's applications were concerned that certain applications applied for new uses and changes to the place and/or manner of use in the Kobeh Valley

Hydrographic Basin would adversely impact existing springs and groundwater rights. JA at 19-25.

Following the issuance of Ruling No. 6127, several Protestants filed petitions for judicial review before the Seventh Judicial District Court in Eureka County, Nevada, seeking review of the State Engineer's findings relating to the 3M plan and the failure of the ruling to adequately protect the Protestants' existing rights in violation of NRS 533.370(2), as well as challenging the approval of an inter-basin transfer of certain water from Kobeh Valley to Diamond Valley. JA at 1-109. Respondents Eureka County, Conley Land & Livestock, LLC, Lloyd Morrison, Kenneth Benson, and Diamond Cattle Company, LLC and Michel and Margaret Ann Etcheverry Family, LP fully briefed the issues before the district court, and following oral arguments, which were heard on April 3, 2012, the district court issued an order on June 13, 2012, denying the petitions for judicial review. JA at 581-639.

Subsequently, KVR, in cooperation with Eureka County, developed a 3M plan, which went through several revisions and included an opportunity for Protestants Kenneth Benson and the Etcheverry Family to comment on the draft plan. JA at 1157-1158.

The State Engineer ultimately approved the 3M plan, subject to revision based upon the monitoring results, future need, and his continuing authority over KVR's permits and the 3M plan. JA at 1158-1160. The impacted parties again filed petitions for judicial review challenging the State Engineer's approval of the 3M plan. JA at 1155.

The second petitions for judicial review were fully briefed and oral arguments heard by the district court on April 15, 2013. JA at 1156. After consideration of all arguments and evidence on May 17, 2013, the district court entered its order denying the petitions for judicial review. JA at 1155-1171.

The petitioners then sought appellate review of the district court's June 13, 2012, and May 17, 2013, decisions before this Court. JA at 1179. The primary issue addressed previously by this Court was the finding by the State Engineer in Ruling No. 6127 that existing water rights were recognized to be impacted by the KVR pumping, and the State Engineer's finding that KVR could fully mitigate the impact and the directive to KVR to develop a 3M plan for his review and approval prior to any pumping of the water rights granted pursuant to

the ruling. *Eureka Co.*, 131 Nev. Adv. Op. 84, 359 P.3d. 1121. *See also* JA at 1346-1362. Notably, this Court clarified that the State Engineer's record supporting Ruling No. 6127 was "unclear" as it did not provide specific information sufficient to determine which of the KVR applications for proposed use or change of use in Kobeh Valley will result in the drying up of the springs in that valley. *Id*. at n.4. Because this Court found that insufficient facts and evidence were present within the State Engineer's record, it was determined that the entire decision must be overturned and remanded it back to the district court. *Id.* Further, while Protestants raised other issues relating to the appeal, this Court did not reach those remaining issues, instead remanding the matter back to the district court for proceedings consistent with this Court's opinion. *Id.*

On November 25, 2015, KVR submitted proposed orders to the district court for consideration that would have remanded KVR's applications from the district court to the State Engineer for further fact-finding to determine which of the more than 80 applications would have an adverse impact to the Kobeh Valley springs and existing rights, which was specifically articulated to be of concern to this Court.

JA at 1363-1369. Respondents objected to the proposed orders on December 3, 2015, arguing that this Court's opinion required that KVR's applications be denied. JA at 1370-1391. KVR replied to those objections. JA at 1392-1400. Then on March 9, 2016, the district court granted the objections to the proposed orders and issued an order finding that this Court did not remand the underlying cases and applications to appropriate water to the State Engineer for further proceedings. JA at 1416-1425.

The district court interpreted this Court's findings in the *Eureka Co.* decision stating that "substantial evidence does not support the State Engineer's findings that KVR would be able to 'adequately and fully' mitigate the fact that it's groundwater appropriations will cause Kobeh Valley springs that sources existing rights to cease to flow" to mean that the district court, not the State Engineer, had the authority to determine the outcome of each of the applications. JA at 1419-1420. The district court further relied upon this Court's findings in the *Eureka Co.* decision that "[t]he State Engineer's decision to grant KVR's applications when the result of 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" and the holding that "the State Engineer's decision to grant KVR's applications cannot stand." JA at 1419-1420. The district court's decision did not address this Court's findings set forth in footnote 4. JA at 1416-1425. Nor did the district court consider the equity of its decision to vacate and deny all of the existing applications of KVR. JA at 1416-1425.

In seeking reconsideration of the district court's order, KVR not only addressed the limitations of this Court in remanding a matter directly to the State Engineer, but the role of the district court in such proceedings. JA at 1447-1449. Further, KVR argued that the district court's decision to vacate and deny KVR's applications was contrary to the direct language of this Court's findings set forth in footnote 4 of the opinion. JA at 1540-1541. In response, when issuing its order denying KVR's motion to alter or amend the judgment, the district court relied upon the absence of a specific instruction from this Court directing the district court to remand the matter to the State Engineer for further

proceedings. JA at 1572-1573. And while the district court gave thoughtful analysis to this Court's findings that there was insufficient evidence to support the State Engineer's decision and that the ruling resulted in a conflict to existing rights in violation of state law, the district court did not remand back to the State Engineer the matter to make additional factual findings, but rather elected to uphold its ruling on KVR's applications pursuant to NRS 533.370(2). JA at 1567-1579. Further the district court rejected the equity arguments asserted by KVR and denied the motion to alter or amend the judgment. JA at 1574-1575.

VI. SUMMARY OF THE ARGUMENT

The district court erroneously interpreted this Court's decision in *Eureka Co.* to preclude a remand of this matter to the State Engineer. Further, the district court exceeded its constitutional authority when it exercised a duty of the executive branch by denying and vacating KVR's applications. Finally, the district court's denial of the applications is not consistent with this Court's findings in *Great Basin Water Network v. State Engineer*, which found that it was inappropriate to punish an

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applicant, like KVR, for the State Engineer's failure to follow his statutory duty. 126 Nev. 187, 199, 234 P.3d 912, 920 (2010).

VII. STANDARD OF REVIEW ON APPEAL

Here, the legal question is two parts: (a) did the district court properly interpret this Court's decision in *Eureka Co*. in not remanding this matter to the State Engineer; and (b) did the district court exceed its constitutional authority in deciding pending applications to appropriate water pursuant to NRS 533.370(2)? Accordingly, because a question of law and interpretation of statutory and constitutional authority is present, de novo review of the district court's order is proper. *See, e.g.*, *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 616 (2014) (While a district court's decision is generally reviewed for abuse of discretion, where "as here, the decision implicates a question of law, the appropriate standard of review is de novo."); *Milton v. State Dep't of Prisons*, 119 Nev. 163, 164, 68 P.3d 895, 895 (2003) (Where the district court applied the wrong legal standard, a pure question of law is raised, subject to de novo review.); *Matter of Halverson*, 123 Nev. 493, 509, 169 P.3d 1161, 1172 (2007) ("We review

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purely legal issues, including issues of constitutional and statutory construction, de novo.").

VIII. ARGUMENT

A. The District Court's Decision To Rule On KVR's Applications To Appropriate Water Pursuant To NRS 533.370(2) Exceeds Its Constitutional Authority And A Violation Of The Separation Of Powers Set Forth In Article III, Section 1, Of The Constitution Of The State Of Nevada.

1. The Nevada Constitution Article III, Section 1, establishes the separation of powers between the executive branch, the State Engineer, and the judicial branch, the district court.

The separation of powers doctrine is fundamental to our system of government, the development of three separate, but equal, branches of government to exercise independent powers, only to be checked and balanced by the other branches of government. *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967). The Nevada Constitution clearly defines the separate roles of each branch of government. Nev. Const. art. III, § 1. And within these separate roles designated to each branch, "no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to

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either of the others, except in the cases expressly directed or permitted in this constitution." Nev. Const. art. III, § 1(1).

This clearly defined separation of the roles of each branch is one which is necessary for the function of state government and one which is unique in the express prohibition against "any one branch of state government from impinging on the functions of another branch." *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 212 P.3d 1098 (2009). The judicial powers of the courts pursuant to Nev. Const. art. III, § 1, and Nev. Const. art. VI, § 1, "is the authority to hear and determine justiciable controversies. Judicial power includes the authority to enforce any valid judgment, decree or order." *Galloway*, 83 Nev. at 20, 422 P.2d at 242.

The *Galloway* Court went on further to state that "[j]udicial [p]ower, or the exercise of judicial functions cannot include powers or functions that do not stem from the basic judicial powers and functions" set forth in the Constitution, unless expressly otherwise provided for in the Constitution. 83 Nev. at 20, 422 P.2d at 242-43. The Court in *Galloway* continued:

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> Such a power or function would have to be termed non-judicial and would have to be otherwise expressly authorized by the Constitution to be valid. Hence it follows that the judicial power, and the exercise thereof by a judicial function, cannot include a power or function that must be derived from the basic Legislative or Executive powers.

83 Nev. at 21, 422 P.2d at 242-43. Within the legislative branch resides the authority to frame and enact laws, to amend or repeal them. *Id.*, 83 Nev. at 20, 422 P.2d at 242. The executive powers, as conferred to the executive branch, extend to "carrying out and enforcing the laws enacted by the Legislature," except where a constitutional mandate or limitation exists. *Id.*

The Legislature created the Office of the State Engineer in 1903 for the express purpose of performing those duties prescribed by the Legislature through the statutes of Nevada. NRS 532.010, NRS 532.110. Of the many duties and responsibilities conferred upon the State Engineer was the authority to appropriate waters of the state. Specifically, the Legislature stated:

> Any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, change in

> place of diversion or change in manner or place of use, **apply to the State Engineer** for a permit to do so. NRS 533.325. (emphasis added).

Furthermore, the authority to approve or reject an application to appropriate water explicitly rests with the State Engineer. *See* NRS 533.370. The Legislature has very clearly defined the parameters of the State Engineer's authority to grant or deny applications to appropriate water by specifically providing that:

> 1. [T]he **State Engineer shall approve** an application to appropriate water to beneficial use if . . .
> 2. Except as otherwise provided . . . where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights . . . or threatens to prove detrimental to the public interest, **the State Engineer shall reject** the application and refuse to issue the requested permit . . . NRS 533.370. (emphasis added).

Thus, the authority to approve or deny an application to appropriate water rests solely within the authority of the State Engineer of Nevada, a role explicitly delegated to the executive branch by the Legislature. Further, this Court has clearly established that the State Engineer, even with his quasi-judicial authority, is an executive officer of the

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executive branch of government, not the judiciary. *See Ormsby Co. v. Kearny*, 37 Nev. 314, 142 Pac. 803 (1914).

The Legislature unambiguously vested the judicial branch with the authority to determine whether decisions of the State Engineer are in conformity with the laws enacted by the legislative branch. NRS 533.450(1). *See also, Howell v. State Engineer*, 124 Nev. 1222, 1227-28, 197 P.3d 1044, 1048-49 (2008). Accordingly, the district court's review, and this Court's subsequent review, is restricted to determining whether the State Engineer's decision was in conformity with Nevada law. *See Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1980). When the ultimate finding is that the State Engineer's decision is not in conformity with Nevada law, as was the circumstance in this case, the case should be remanded to the State Engineer for a full and fair determination in conformity with the court's findings. *See, e.g.*, *Id.*, 95 Nev. at 787-88, 603 P.2d at 264-65 ("[T]he State Engineer must clearly resolve all the crucial issues presented" and the district court must remand the case "to the State Engineer for a proper determination" of those issues. (internal citations omitted)).

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2. The district court violated the separation of powers doctrine under Article III, Section 1, by misinterpreting this Court's decision in *Eureka Co.* and by ruling on KVR's applications.

As has been established, the authority to decide an application to appropriate water rests squarely within the authority of the State Engineer, not the courts. However, when the district court declined to remand this matter back to the State Engineer for further proceedings in conformity with this Court's findings in the prior ruling, the district court exceeded its constitutional authority and violated the separation of powers doctrine. The authority to grant or deny an application to appropriate water for a beneficial use or to change the place of diversion, manner of use, or place of use of appropriated water rests squarely in the authority of the executive branch and within the State Engineer. NRS 533.325; NRS 533.370; *Kearney*, 37 Nev. 314, 142 Pac. 803. This Court even fully acknowledged the State Engineer's authority in its opinion in *Eureka Co.*, stating that it is "[t]he State Engineer, who is charged with administering water rights in this state, . . . is required to approve" water rights applications, subject to statutory requirements. 131 Nev. Adv. Op. 84, 359 P.3d at 1117

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(citing *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1061, 944 P.2d 835, 843 (1997)).

Yet, despite this very clear delegation of authority, the district court rejected the premise that it must remand the case to the State Engineer for further proceedings. JA at 1572-1574. The district court found that had this Court intended its opinion to result in a remand to the State Engineer, this Court's procedural history "strongly suggests its opinion would have included language 'remanding to the district court with instructions to the district court to remand for further proceedings by the State Engineer.'" JA at 1572. The district court erred when it ignored the clear delimitation of separate and distinct powers designated to each branch of the government and instead assumed the role of the executive agency in deciding to vacate and deny each of KVR's applications.

Further compounding the erroneous findings of the district court is the district court's failure to apply the full context and findings of this Court in the *Eureka Co.* decision. Specifically, this Court found that KVR's appropriations were "in conflict with existing water rights." *Eureka Co.*, 131 Nev. Adv. Op. 84, 359 P.3d at 1118. And based upon

the fact that the 3M plan proposed within Ruling No. 6127 did not determine exactly what mitigation would entail, but deferred such findings to a later date, was contradictory to the State Engineer's obligations under NRS 533.370(2). *Id.*, 131 Nev. Adv. Op. 84, 359 P.3d at 1120. This Court based this conclusion on the fact that "those who protest an application to appropriate or change existing water rights must have a full opportunity to be heard . . . [including] the ability to challenge the evidence upon with the State Engineer's decision may be based." *Id.* However, because any challenge to a later developed 3M plan would not result in the review or challenge to the proposed use or change applications, but only to the 3M plan, may ultimately result in a potential due process violation. *Id.*

This Court went on further to find that the State Engineer's duty, when granting an application, is to sufficiently explain and support with substantial evidence the decision to allow for judicial review. *Id.*, 131 Nev. Adv. Op. 84, 359 P.3d at 1120-21. Thus, if the State Engineer's decision to grant applications, which conflict with existing rights, based upon the premise that the conflict could be fully mitigated, there must be substantial evidence in the record at the time the

decision is made supporting the fact that the anticipated "would be successful and adequate to fully protect those existing rights." *Id.*, 131 Nev. Adv. Op. 84, 359 P.3d at 1121. Based upon these findings, this Court reversed and remanded "these matters to the district court for proceedings with this opinion." *Id.* Directly connected to this directive, in footnote 4, this Court stated:

> 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. *Id.*, 131 Nev. Adv. Op. 84, 359 P.3d at 1121 n.4.

Implicit in this statement is the understanding that not every one of KVR's 80-plus applications would conflict with the protestants existing rights in Kobeh Valley. Further, numerous applications, which were vacated and denied by the district court in its March 9, 2016, order, include applications for changing the place and/or manner of use in the Diamond Valley Hydrographic Basin, a completely separate and distinct groundwater basin than where the Kobeh Valley springs and

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conflicting rights are present.[2] JA at 16, 29-37. However, because the State Engineer's decision and record did not contain sufficient detail to allow the Supreme Court to determine which of the more than 80 applications would result in the challenged conflict, this Court found that the entire ruling must be overturned. *Eureka Co.*, 131 Nev. Adv. Op. 84 n.4, 359 P.3d at 1121. JA at 1362.

Because this Court clearly identified the fact that there were factual deficiencies within the State Engineer's record and decision, the appropriate response for the district court was to remand this matter back to the State Engineer to make specific findings as to those applications that present the actual conflicts to existing rights associated with the Kobeh Valley springs. *See, e.g.*, *Revert*, 95 Nev. 782. This Court spent considerable time addressing the deficiencies it found in the State Engineer's record regarding the 3M plan. *Eureka Co.*, 131 Nev. Adv. Op. 84, 359 P.3d at 1118-21. Specifically, this Court

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[2] Application Nos. 76005-76009, 76802-76805, and 78424 are all applications which sought to change existing water rights within the Diamond Valley Hydrographic Basin, not the Kobeh Valley Hydrographic Basin. JA at 38. These applications were decided by the State Engineer in Ruling No. 6127 and were summarily vacated and denied by the district court in its March 9, 2016, order and affirmed in its June 3, 2016, order. JA at 38.

found that the State Engineer did not address, even generally, what mitigation would encompass. *Id.*, 131 Nev. Adv. Op. 84, 359 P.3d at 1119. In short, this Court determined that evidence of what the anticipated mitigation plan would involve was not present and that there was an absence of substantial evidence to support numerous presumptions and inferences utilized to support the State Engineer's decision to grant KVR's applications and approve the 3M plan. *Id.*, 131 Nev. Adv. Op. 84, 359 P.3d at 1119-21.

Reading the plain language of this Court's decision to vacate and remand Ruling No. 6127, it is clear that the State Engineer should be directed to conduct further proceedings. The State Engineer could reevaluate KVR's applications and allow for greater fact finding as to the purported impacts to the springs present in Kobeh Valley, and detailed those specific applications which would have an impact and to what extent. The State Engineer could require that KVR submit a more specific and detailed 3M plan, and afford the protesting parties a full opportunity to be heard and challenge the evidence relied upon the State Engineer in approving any proposed 3M plan. Clearly, this Court contemplated that additional fact finding by the State Engineer would

provide clarity to the proceedings. *Id.*, 131 Nev. Adv. Op. 84, 359 P.3d at 1118-21.

Yet, on remand, the district court did not have available to it any more information than did this Court. The absence of sufficient evidence regarding the specific applications presenting the actual conflict, and the deficiencies with the ability of the 3M plan to mitigate the impact to existing rights was no further developed before the district court than before this Court. Yet, the district court substituted itself for the State Engineer in acting upon the applications pursuant to NRS 533.370(2) and in violation of Nev. Const. art. III, § 1(1). JA at 1426-1437, 1567-1579. The district court impermissibly exercised the power conferred to the State Engineer by the Legislature in NRS 533.325 and NRS 533.370 by vacating and denying KVR's applications. JA at 1426-1437, 1567-1579.

Because the district court incorrectly interpreted this Court's decision in *Eureka Co.*, to preclude a remand of this matter to the State Engineer, the district court's order was in error. Further, the district court's decision to exceed its constitutional authority and exercise the duty of the executive branch in denying and vacating KVR's

applications was also in error. Accordingly, the district court's decision must be reversed and this matter remanded back to the State Engineer for further proceedings consistent with this Court's ruling in *Eureka Co.*, 131 Nev. Adv. Op. 84, 359 P.3d at 1121.

B. The district court's decision is inconsistent with this Court's findings in *Great Basin Water Network v. State Engineer*, 126 Nev. 187, 234 P.3d 912 (2010).

The district court has the authority to "grant equitable relief when water rights are at issue." *Great Basin Water Network*, 126 Nev. at 199, 234 P.3d at 919, citing *Engelman v. Westergard*, 98 Nev. 348, 647 P.2d 385 (1982), and *State Engineer v. American Nat'l Ins. Co.*, 88 Nev. 424, 498 P.2d 1329 (1972). Here, it is inconsistent with this Court's ruling in *Great Basin* to deprive KVR of the relative priorities of their more than 80 applications as a result of "the State Engineer's failure to follow his statutory duty." *Id.*, 126 Nev. at 199, 234 P.3d at 920.

While different underlying facts and circumstances surrounded the State Engineer's decision in *Great Basin*, the underlying premise is the same—in both cases the applicant in good faith submitted applications in reliance on the State Engineer's adherence to his statutory duties. However, in both instances, this Court has found that

the State Engineer failed to abide by his statutory duties, to the detriment of the applicants. *Compare Eureka Co.*, 131 Nev. Adv. Op. 84, 359 P.3d 1114 to *Great Basin Water Network*, 126 Nev. 187, 234 P.3d 912.

This Court's poignant words from *Great Basin* resonate here: "[A]pplicants cannot be punished for the State Engineer's failure to follow his statutory duty." *Great Basin Water Network*, 126 Nev. at 199, 234 P.3d at 920. Here, this Court found that the State Engineer violated "the Legislature's directive that the State Engineer must deny use or change applications when the use or change would conflict with existing rights" based upon the determination that a yet to be determined 3M plan would appropriately mitigate existing present in Kobeh Valley. *Eureka Co.*, 131 Nev. Adv. Op. 84, 359 P.3d at 1121.

Because this Court acknowledged that the State Engineer may be able to determine which specific applications within the numerous applications filed by KVR actually result in the conflict, but Ruling No. 6127 failed to do so specify, this Court was unable to cherry pick which applications or part of the ruling were improper, thus overturning the entire ruling. *Id.*, 131 Nev. Adv. Op. 84 n.4, at 1121.

Therefore, the equitable result is a remand to the State Engineer to make further findings regarding the actual conflicts present in Kobeh Valley, consistent with this Court's prior decision in the *Eureka Co.* opinion.

IX. CONCLUSION

Because the district court incorrectly interpreted this Court's decision in *Eureka Co.* to preclude a remand of this matter to the State Engineer, the district court's order was in error. Further, the district court's decision to exceed its constitutional authority and exercise the duty of the executive branch in denying and vacating KVR's applications was also in error. Accordingly, the State Engineer respectfully requests this Court vacate the district court's March 9, 2016, order and remand this matter to the district court with direction that the district court remand this matter to the State Engineer for

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further proceedings consistent with this Court's ruling in *Eureka Co.*, 131 Nev. Adv. Op. 84, 359 P.3d 1114.

RESPECTFULLY SUBMITTED this 17th day of August, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this 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 opening brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14 pitch Century Schoolbook.

2. I further certify that this opening brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the opening brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, and contains 5,381 words.

/ / /

3. Finally, I hereby certify that I have read this appellate 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 opening brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying opening brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 17th day of August, 2016.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 17th day of August, 2016, I served a copy of the foregoing APPELLANT STATE OF NEVADA, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, STATE ENGINEER'S OPENING BRIEF, by electronic filing to:

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