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.

Case No. 70157

DC Case Nos. CV-1108-155
CV-1108-156
CV-1108-157
CV-1112-164
CV-1112-165
CV-1202-170
CV-1207-178

APPELLANT STATE OF NEVADA, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, STATE ENGINEER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES CITED

CASES

STATUTES

OTHER AUTHORITIES

I. STANDARD FOR REVIEW OF DISTRICT COURT'S DECISIONS

The district court's decision raises two issues. First, whether this Court's decision in *Eureka Co. v. State Engineer*, 359 P.3d 1114 (2015), as applied, was an abuse of discretion. Second, whether the district court acted in excess of its constitutional authority when it decided, with finality, Real Party in Interest Kobeh Valley Ranch, LLC's (KVR) more than 80 pending applications to appropriate water. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 616 (2014); *Milton v. State Dep't of Prisons*, 119 Nev. 163, 164, 68 P.3d 895, 895 (2003); *Matter of Halverson*, 123 Nev. 493, 509, 169 P.3d 1161, 1172 (2007).

II. ARGUMENT

The State Engineer, upon reviewing this Court's October 2015 *Eureka Co.* decision, had a reasonable belief that this Court intended there to be further fact finding to determine "which of KVR's applications for proposed use or change in Kobeh Valley, if it [may] be pinpointed, is the appropriation that will cause the springs to dry up." 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1121 n.4 (2015). Based upon this

reasonable belief, the State Engineer did not believe it was necessary to seek a rehearing.

It is not insignificant that neither Respondents, Eureka County nor Diamond Cattle Company and Michel and Margaret Ann Etcheverry Family, LP ever addressed footnote 4 in their answering briefs. The Court's decision to make this very critical inclusion into its decision in *Eureka Co*. provides complete context and perspective to the decision. Just as a mere footnote, footnote 4, in *United States v. Carolene Products Co*., 304 U.S. 114 (1938), offered insight and served as a caveat to the United States Supreme Court's decision, in this case this Court's footnote 4 provides insight and context to its findings and decision—the requirement for additional fact finding to determine which of KVR's applications actually conflict with existing rights.

This is particularly significant when considering KVR had more than 80 applications pending before the State Engineer to appropriate water from both the Kobeh Valley hydrographic basin, the site where the impact to existing rights was addressed, as well as the Diamond Valley hydrographic basin—two separate groundwater basins.

Thus, based upon this Court's decision, the State Engineer interpreted the ruling to clearly necessitate further fact finding to determine which of KVR's applications would conflict with existing rights in Kobeh Valley, and make further findings consistent with the Supreme Court's decision.

A. Because Further Fact Finding was Necessary, the District Court's Vacating and Denial of KVR's Applications was in Excess of its Constitutional Authority in Violation of the Doctrine of Separation of Powers

The State Engineer has appropriately relied upon this Court's findings in *Revert v. Rey*, 95 Nev. 782, 603 P.2d 262 (1979). In *Revert*, this Court very clearly established the boundaries of judicial review of a decision of the State Engineer. Those boundaries preclude evidentiary determinations, and as Respondents have opined, this Court has routinely specified that factual questions are to be remanded to the State Engineer. *See, e.g.*, *Revert*, 95 Nev. at 788, 603 P.2d at 265; *Town of Eureka v. State Engineer*, 108 Nev. 163, 169-170, 826 P.2d 948, 952 (1992); *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1061, 944 P.2d 835, 843 (1997).

Where, in this case, the State Engineer's Ruling No. 6127 failed to provide the necessary detail to specify which of the more than 80 applications to appropriate water in two separate hydrographic basins had an impact to existing rights, neither this Court nor the district court could properly distinguish which specific applications should be granted or denied. In *Eureka Co.*, this Court stated "[w]e therefore reverse and remand these matters to the district court for proceedings consistent with this opinion" and specific directive supported by footnote 4, providing:

> 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. 131 Nev. Adv. Op. 84, 359 P.3d at 1121.

Inherent in these findings is not only the fact that this Court found the State Engineer failed to adequately support his findings in Ruling No. 6127, but that based upon that absence of substantial evidence, this Court was unable to discern which of the more than 80 applications were in violation of NRS 533.370(2). *Id.*

The only reasonable and rational conclusion is the directive for further proceedings consistent with the *Eureka Co.* decision was a

district court order making similar findings as to the deficiency of the Ruling No. 6127 and directing the State Engineer to resolve the factual record to specify those applications which would adversely impact existing rights.

The absence of a specific directive to remand this matter to the State Engineer did not, and should not have, precluded the district court from remanding this matter back to the State Engineer for that necessary further fact finding. Clearly, additional facts were found to be necessary in this matter. *Id.* at n.4. However, when the district court disregarded the specific findings in footnote 4, the need for additional fact finding to determine which of the more than 80 applications were in violation of NRS 533.370(2), and instead exercised the executive branch power to not only vacate, but deny the applications, the district court exceeded its authority in violation of Nev. Const. art. III, § 1.

Eureka County erroneously relies upon *McDonnell Douglas Corp. v. National Aeronautics & Space Corp.*, 895 F. Supp. 316 (D.D.C. 1995), to support its proposition that remand to the State Engineer is improper. Respondent Eureka County's Answering Brief at pp. 14-15.

Here, unlike in *McDonnell Douglas*, it was this Court, not the State Engineer, making a finding of a deficient factual record.

In *McDonnell Douglas*, NASA raised the issue of a factual deficiency in the record before the agency below, and utilized this personal finding of a factual deficiency to argue that there was a need for further proceedings before the agency. *Id.*, 895 F. Supp. at 318. However, in this case, following this Court's findings in *Eureka Co.*, the State Engineer is accepting the deficiency in Ruling No. 6127 identified by this Court finding that the decision failed to afford the courts sufficient information regarding the specific applications resulting in the violation of NRS 533.370(2). *Compare Eureka Co.*, 131 Nev. Adv. Op. 84, 359 P.3d at 1121 with *McDonnell Douglas*, 895 F. Supp. at 318.

The State Engineer asserts that the appropriate and proper manner in which to fulfill this Court's directive is further fact finding to specifically identify which of KVR's applications within the Kobeh Valley are found to conflict with existing rights. The only manner in which this Court or the district court can make this determination is through a remand to the State Engineer for further fact finding—fact finding consistent with this Court's directive in the *Eureka Co.* decision.

Thus, the State Engineer is not seeking a second, or even a third, bite at the apple, rather to fulfill his duty to make decisions in conformity with Nevada law as reviewed and applied by this Court. And because the State Engineer is the sole agency authorized by the Legislature to engage in that fact finding, the district court's interpretation and application of this Court's decision in *Eureka Co*. through the vacating and denial of those 80-plus applications was in violation of its constitutional authority. *See Comm'n on Ethics v. Hardy*, 125 Nev. 285, 212 P.3d 1098 (2009). *See also Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237, 242-43 (1967).

B. Equitable Relief, Such as that Applied in *Great Basin Water Network v. State Engineer*, 126 Nev. 187, 234 P.3d 912 (2010), is Appropriate and Proper in this Case

The State Engineer's failure to properly specify which of the more than 80 applications to appropriate groundwater by KVR conflicted with existing rights in Kobeh Valley warrants equitable relief to KVR. *Great Basin Water Network*, 126 Nev. 187, 234 P.3d 912 (2015). However, equitable relief is not limited to timely acting on protest applications, it is appropriate for the State Engineer to engage in

further fact finding or further proceedings consistent with the Court's findings.

This Court has acknowledged that the State Engineer has the capacity to determine which of KVR's applications actually result in a conflict to existing rights in Kobeh Valley. *Eureka Co*., 131 Nev. Adv. Op. 84, 359 P.3d at 1121 n.4. However, due to the State Engineer's lack of specificity, this Court could not discern which of the more than 80 applications would result in that conflict, necessitating the Court finding the State Engineer's entire Ruling No. 6127 was not supported by substantial evidence. *Id*.

In a basin where there are significant and competing demands for a limited water supply, priority of applications is of great importance to all parties. And while the State Engineer does not give greater value or interest to any applicant over another outside of those considerations set forth in NRS 533.370, the State Engineer is interested in honoring the priority system of Nevada, including those who have submitted applications for the appropriation of water. And the State Engineer has found the equitable analysis of this Court in *Great Basin*, to preserve the interests of an applicant where "the State Engineer's failure to

follow his statutory duty" results in the potential impact to an applicant's priority. *Great Basin Water Network*, 126 Nev. at 199, 234 P.3d at 920.

Thus it is appropriate for this Court to grant equitable relief to KVR by remanding Ruling No. 6127 back to the State Engineer to make specific findings as to which of KVR's applications do not impact existing rights, and determine which applications must be denied pursuant to this Court's findings in *Eureka Co.*

III. CONCLUSION

Based upon the foregoing, the State Engineer asserts that clarification of this Court's decision in *Eureka Co.* is appropriate and that this matter be remanded back to the State Engineer for further proceedings consistent with that opinion.

RESPECTFULLY SUBMITTED this 30th day of September, 2016.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this reply brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the reply brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, and contains 1,684 words.

3. Finally, I hereby certify that I have read this reply 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 reply 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 reply brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 30th day of September, 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 30th day of September, 2016, I served a copy of the foregoing APPELLANT STATE OF NEVADA, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, STATE ENGINEER'S REPLY BRIEF, by electronic filing to:

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