Case No. 70157

In the Supreme Court of Nevada

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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.

REPLY BRIEF

District Court Case No.'s CV-1108-155, CV-1108-156, CV-1108-157, CV-1112-164, CV-1112-165, CV1202-170, and CV-1207-178

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Docket 70157 Document 2016-30760

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 the 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 subsidy 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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FACTUAL AND PROCEDURAL BACKGROUND

The Mt. Hope project will be an integral part of the Nevada's economy. The project will be one of the largest molybdenum mines in the world. The development and operation of the mine will greatly enhance the economic development in Nevada and will provide substantial tax revenue for Eureka County. KVR RA 1-17.

Eureka County indicated on numerous occasions it is not against the Mt. Hope project. Eureka County encouraged KVR to engage in dialogue with the State Engineer that "will result in a binding, mutually-beneficial agreement for development, management, monitoring, and mitigation of these groundwater resources." JA Vol. VII at 1158, Vol. XXV at 4820, 4824, 4827, 4830, 4832, 4836, 4839, 4843-44, and 4858 (*Eureka County v. State Eng'r*, Case No. 61324). Eureka County's protest was "aimed at ensuring that any development of water resources in Kobeh Valley is conducted in full accordance with Nevada law." JA 4820.

After Ruling 6127 was issued, KVR worked with Eureka County to develop a monitoring, management and mitigation plan to protect existing water rights from conflicts ("3M Plan"). After the 3M Plan was submitted to and approved by the State Engineer, Eureka County did not appeal that decision. Even in its challenge to Ruling 6127, Eureka County understood that if the Court agreed with Eureka

County's position and "reverse[d] the District Court's judgment and vacate[d] the State Engineer Ruling 6127, KVR can still proceed with its project." Supp JA 75 (emphasis added). Eureka County stated that:

> KVR simply must either: (1) reconfigure the points of diversion of its proposed wells to eliminate the conflicts; (2) reduce the size of its project or improve water-use efficiency to eliminate the conflicts; or (3) work cooperatively with senior water rights holders to resolve the conflicts before KVR's Applications are considered and approved by the STATE ENGINEER. Further, the STATE ENGINEER will have clear direction on the mandates of NRS 533.370(2) and his authority to approve applications.

Even though KVR could still proceed with its project if Eureka County succeeded in its appeal, on June 24, 2014, Eureka County filed an application to appropriate 6,000 acre feet of water in Kobeh Valley. Supreme Court Case No. 71090, Eureka County Verified Writ Petition, filed August 23, 2106 at 21-22. Eureka County now asserts it has a senior position to appropriate roughly half of the water that was made available when the district court denied KVR's applications. *Id.*

After the Court's opinion was issued in this case, KVR wanted to move forward expeditiously to comply with the Court's 3M Plan requirements. KVR submitted a proposed order to the district court that was properly served on all parties. JA. 1363. When the district court denied the KVR applications, KVR

wanted to expeditiously restart water development activities so it filed new applications to change the use of its existing water rights. Those applications are presently pending before the State Engineer, but Eureka County has sought a writ of prohibition from the Court to prohibit the State Engineer from considering those new applications. *Id.*

Contrary to Respondents' assertions, KVR has not had difficulty finding water supplies.[1] KVR owns over 6,000 acre-feet of existing groundwater rights in Kobeh Valley. In addition, the perennial yield of the valley exceeds the water allocated to existing permitted uses, so water supplies are still available in Kobeh Valley. Accordingly, there is adequate water in the basin to fully support the project.

What KVR has had difficulty with is the appropriation and change application process required to put the available water to beneficial use at the Mt. Hope project. That process was made more difficult by the district court's ruling. After the ruling, when KVR filed new applications to restart the water development process, the Respondents filed new protests. Respondents' present even more claims, many of

[1] The only documents Eureka County cites to for this proposition are briefs that it filed in prior proceedings. *See* Supp JA 074. The number of applications needed does not reflect any difficulty in finding water, but only reflects the number of separate water rights KVR owns and can change to mining uses.

which arise from a disputed interpretation of the effect of the district court's order, or are based exclusively on the fact this appeal is pending. Proceeding with new applications is far more costly and time-consuming than a remand hearing to consider 3M evidence.

SUMMARY OF ARGUMENT

The Court did not reverse Ruling 6127. The Court reversed the district court's denial of the Respondents' petitions for judicial review and remanded for proceedings consistent with the Court's opinion. The Court also announced new procedural requirements. 3M Plans must now be submitted and considered before a water right application is approved, and a 3M Plan must contain specific and effective mitigation measures that will be enacted if the use of water conflicts with existing rights. These requirements require fact-finding by the State Engineer, and a remand by the district court to the State Engineer would be consistent with these new requirements.

The Court required Ruling 6127 to be vacated based on the incomplete record that did not include a 3M Plan or evidence that mitigation would be effective. The Court left open the opportunity for KVR, on remand, to develop a 3M Plan to meet the new standards adopted by the Court. KVR can submit a 3M Plan before the

State Engineer's consideration of KVR's applications, and will provide Respondents the opportunity to review the plan before that consideration. The plan will provide evidence of mitigation to demonstrate that the applications will not conflict with existing rights.

KVR should be given an opportunity to present that evidence so the State Engineer and the courts can evaluate KVR's applications with what the Court considers to be a proper record. Instead of denying KVR's applications, the proper course of action for the district court on remand was to vacate Ruling 6127, and remand the matter to the State Engineer for such proceedings.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE COURT'S OPINION REQUIRES REMAND TO THE STATE ENGINEER TO ALLOW KVR TO SHOW IT CAN MITIGATE CONFLICTS WITH EXISTING RIGHTS.

KVR's first argument in its opening brief was a textual one that related to the actual words used by the Court in its opinion. KVR argued that the Court elected to use the word remand in general instructions and did not specifically instruct the district court to deny KVR's applications. Respondents incorrectly claim that the Court's remand language clearly mandates, and categorically states, that the district

court must deny KVR's applications. Eureka County Answering Brief at 11 ("The Court's ruling on appeal mandated that KVR's applications be denied."); Etcheverry Answering Brief at 4, 10.

A. The Court included the word *remand* in its opinion for a reason.

The Court expressly provided a general remand instruction to the district court, and the word *remand* must be given affect. If the Court wanted the outcome of its opinion to be the summary denial of KVR's applications, it could have simply reversed State Engineer Ruling 6127, instead of reversing *and* remanding. *Cf. Bacher v. State Engineer*, 122 Nev. 1110, 1123, 146 P.3d 793, 801 (2006) ("we reverse the district court's order denying appellants' petition for judicial review.") Instead, the Court chose to use the word *remand* in its instruction.

Respondents cite to no rule or legal precedent that precludes an appellate court from providing a general remand instruction when it expects further action by an inferior tribunal. Respondents cite to cases that included explicit remand instructions, *see* Eureka County Answering Brief at 17-18, but that is not required. Federal courts recognize that "[u]nless otherwise specified, a remand order is presumed to be general," and a general remand leaves discretion to the *fact-finding tribunal* to act consistent with the opinion that directed remand. *United States v.*

McFalls, 675 F.3d 599, 604 (6th Cir. 2012). Unlike a limited remand, "[a] general remand effectively wipes the slate clean" by giving the fact-finding tribunal authority to redo the entire process. *Id*. at 606 (internal citations omitted).

Here the district court erred when it determined that the Court's opinion required summary denial of KVR's applications. Without explicit limiting language in the remand instruction, the presumption in favor of general remand required the case be further remanded to the fact-finding tribunal for additional proceedings consistent with the scope of the opinion.

1. *Bacher v. State Engineer*, 122 Nev. 1110, 146 P.3d 793 (2006).

The post-opinion history in the *Bacher* case demonstrates that only a strict reversal should preclude a remand to the State Engineer. After the Court issued the *Bacher* decision, the real party in interest (Vidler Water Company), sought to have the case remanded to the State Engineer. *Vidler Water Co., Inc. v. State Eng'r*, 124 Nev. 1516, 238 P.3d 863 (Table), 2008 WL 6102097 at 2-3 (2008) (unpublished disposition). Vidler requested remand to have the State Engineer consider evidence regarding a factual issue that had already been fully determined by the Court. That factual issue was whether the project was justified based on the applicant's need for the water. *Id*. The district court denied Vidler's request. *Id*.

The Court upheld the district court's denial because the issue for which remand was sought had already been definitively decided. *Id*.

This case is distinguishable from *Bacher* because the Court included remand in its instruction to the district court. Also, in the *Bacher* opinion, the Court did not established any new standard or rule, and instead, reviewed the record and made a factual determination that the project was not justified pursuant to NRS 533.370(3)(a). In the instant case, the Court issued a new procedural rule – that any 3M Plan that is used to avoid conflicts with existing rights must be considered before approval of a water right application. Finally, in *Bacher*, the Court definitively ruled on the justification of need issue. Here, the Court did not reach the conflicts issue because if found that without a 3M Plan in the record, the record could not support the State Engineer's decision. *Eureka Cnty v. State Eng'r*, 131 Nev. Adv. Op. 84, 17, 359 P.3d 1114, 1122 (2015).

Unlike *Bacher*, the Court included remand in its instruction in this case. Even so, Respondents claim that remand to the State Engineer is only appropriate if the Court provides explicit instructions directing such action. Eureka County Answering Brief at 17; Etcheverry Answering Brief at 6. Yet, Respondents defend the district court's decision to deny KVR's applications even though that action did

not flow directly from an explicit instruction. Certainly the district court had to interpret the Court's opinion to comply with the general remand instruction, and was not limited to taking only action that was explicitly directed.[2]

2. ***Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 234 P.3d 912 (2010).**

Respondents wrongly claim the *Great Basin* case demonstrates that a district court can only remand to the State Engineer if the Court gives such an explicit instruction. In *Great Basin* an original opinion was issued on January 28, 2010. *Great Basin Water Network v. State Eng'r,* 126 Nev., Adv. Op. 2, 222 P.3d 665 (2010).[3] In the original opinion, the Court reversed the district court's decision and remanded. The Court then instructed the district court to "undertake the necessary proceedings to adjudicate the proper remedy." *Id.*

Based on a concern that this remedy could have negative state-wide ramifications, the State Engineer and the real party in interest (the Southern

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[2] The Court also did not specify whether any or all of the petitions for judicial review should be granted by the district court. The petitions sought varied and conflicting relief: remand for more specific mitigation provisions, vacation of permits and denial of applications. The district court had to go beyond the Court's explicit instructions by interpreting the Court's opinion to decide whether remand to the State Engineer was appropriate.

[3] Pursuant to Supreme Court Rule 123, this is not cited to provide precedential authority.

Nevada Water Authority (SNWA)) filed petitions for rehearing pursuant to NRAP 40. Case No. 49718, SNWA's Petition for Rehearing, March 15, 2010. The petitioners for rehearing argued that the district court cannot properly resolve how the administrative agency should act without first permitting the agency to consider the issues in light of its expertise. *Id*. at 9. The petitioners requested that the matter be remanded to the State Engineer for further proceedings. *Id*. at 10. On June 17, 2010, the Court withdrew its first opinion and issued the new opinion with specific instructions for the district court to remand to the State Engineer. *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 199, 234 P.3d 912, 920 (2010). Specific instructions in *Great Basin* were added as a result of rehearing proceedings, and do not prove that such instructions must be included for a district court to remand to the State Engineer.

Respondents are also incorrect when they argue that KVR should have sought rehearing and is now precluded from arguing that this matter should have been remanded to the State Engineer. Eureka County Answering Brief at 22, 27; Etcheverry Answering Brief at 10. Unlike the instructions in the original *Great Basin* opinion, the Court's remand instruction in this case was general and did not explicitly direct the district court to adjudicate a remedy. Otherwise KVR would

have sought rehearing. KVR accepted the new rules related to the 3M Plans. KVR reasonably interpreted the general remand instruction. KVR understood that instruction to direct a remand to the State Engineer to conduct the additional fact-finding proceedings required to properly implement the Court's newly articulated standards. KVR, therefore, is not precluded from advocating for that result now.

The Court's general remand instruction should have been read by the district court in the context of the opinion as a whole. Since the Court's opinion adopted a new rule which requires additional factual determinations, and only the State Engineer can make those factual findings, remand by the district court to the State Engineer is required.

B. The Court held that State Engineer Ruling 6127 cannot stand, not that the KVR applications themselves cannot stand.

Respondents rely extensively on the Court's statement that "the State Engineer's decision to grant KVR's applications cannot stand." *Eureka Cnty v. State Eng'r*, 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1118 (2015). Respondents' argument that this language mandated the district court to deny KVR's applications lacks merit.

Clearly, the Court held that the State Engineer's decision to grant KVR's applications cannot stand. That decision was made in Ruling 6127. The Court held that Ruling 6127 cannot stand. But when Ruling 6127 was vacated, only the State Engineer's *approval* of the KVR applications was vacated. Nowhere in the Court's opinion did it hold that the KVR's applications themselves cannot stand. Since Ruling 6127 cannot stand, the applications reverted back to pending status and remain active until the State Engineer issues a subsequent ruling. If the Court had intended the previously approved KVR applications to actually be denied, it would have only *reversed* Ruling 6127, like it did in *Bacher*.

Respondents also fail to take into account the context of the 'cannot stand' statement. The reason the Court determined that the approval announced in Ruling 6127 cannot stand was because substantial evidence in the record *at the time of the issuance of Ruling 6127* did not indicate that KVR would be able to adequately and fully mitigate potential conflicts with existing water rights. *Id*. The Court reached this conclusion because at the time Ruling 6127 was issued, KVR's 3M plan had not been developed and KVR's witnesses could not testify about the effectiveness of a yet-to-be-developed 3M Plan. As such, the Court ruled that Respondents met their burden to show the State Engineer's approval was incorrect. But the Court

did not hold, as Respondents claim, that the Respondents met their burden to prove the KVR applications should actually be denied. Eureka County Answering Brief at 18-19.

II. AN EVIDENTIARY PROCEEDING IS CONSISTENT WITH THE PRINCIPLES ARTICULATED IN THE COURT'S OPINION AND IS REQUIRED FOR ADDITIONAL FACTUAL ANALYSIS.

In *Eureka County*, the Court established new legal standards for when the State Engineer must consider 3M plans and how they must be supported. Because these new requirements are relevant factors that apply to KVR's applications and call for factual analysis, the applications must be revisited by the State Engineer. *Florida Power and Light Company v. Lorion*, 470 U.S. 729, 743-44 (1985).

Respondents claim the district court's refusal to remand to the State Engineer is supported by the holding in *McDonnell Douglas Corp. v. National Aeronautics and Space Administration*, 895 F. Supp. 316 (D.D.C. 1995). This claim is without merit, and in fact, *McDonnell Douglas Corp.* supports KVR's contention that remand to an administrative agency is appropriate when a factual matter exists for an agency to evaluate. *Id*. at 319.

McDonnell Douglas Corp. was a Freedom of Information Act ("FOIA") case concerning information that was involuntarily provided by the plaintiff. *Id*. at

317. The district court applied the *National Parks* standard and upheld the plaintiff's position that the information was exempt from FOIA. *Id.* (citing *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)). While on appeal, the D.C. Circuit reinterpreted FOIA exemptions in *Critical Mass* and then remanded *McDonnell Douglas Corp.* to the district court with express and limited instructions to reexamine the applicability of the FOIA exemption in light of *Critical Mass*. *McDonnell Douglas Corp. v. National Aeronautical and Space Admin.*, 1994 WL 50621 (D.C. Cir. 1994) (unpublished disposition).

On remand, NASA requested further remand to NASA for consideration of the applicability of *Critical Mass*. *McDonnell Douglas Corp.*, 895 F. Supp. at 318. Remand to NASA was denied because there was "no need for agency expertise or experience to make the *legal conclusion* [required on remand]." *Id*. (emphasis added). The district court held that *Critical Mass* applied to only voluntary disclosures and did not alter its prior reliance on *National Parks*. The court stated that "*National Parks* still provides the appropriate legal standard, negating the agency's perceived need to reflect on new law." *Id.* at 319.

McDonnell Douglas Corp. does not support Respondents' position. Since the district court could determine, without making factual findings, which legal test applied, remand was not prudent. But *McDonnell Douglas Corp.* acknowledged that if fact-finding was needed, further remand to an administrative agency would be proper, and that "when faced with a matter an agency has not yet evaluated, it is appropriate to remand the matter to the agency for review." *Id*. at 319 (citing *Florida Power and Light Company v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598, 1607 (1985)).[4]

Similarly, in *Florida Power and Light*, the United States Supreme Court reviewed the issuance of a license by the Nuclear Regulatory Commission and stated that the task of a court reviewing an agency decision is to apply the appropriate standard of review to the agency decision, based on the record the agency presents to the reviewing court. *Id*. at 743-744 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 492, 91 S. Ct. 814 (1971)). The Supreme Court

[4] Relying on *McDonnell Douglas Corp.*, in *Nelson v. United States*, 64 F.Supp.2d 1318, 1325-26 (N.D. Ga. 1999), the district court found remand to the agency unnecessary because there would be no need to further supplement the record. Similar to *McDonnell Douglas Corp.*, the agency in *Nelson* was not faced with new factors to evaluate.

explained that if an agency has not considered all relevant factors, or the record created at the agency level is inadequate to answer the legal questions in front of the reviewing court, the appropriate action "is to remand to the agency for additional investigation or explanation." *Id*.

The Court in this case found that the State Engineer did not consider all relevant factors because he did not consider a 3M Plan before he issued Ruling 6127. The Court also found that the record before the State Engineer was inadequate to answer the legal questions regarding conflicts with existing rights. Such a new standard clearly qualifies as a "relevant factor" as outlined in *Florida Power and Light*. Since *Eureka County* made the 3M Plan rules different, KVR is not requesting a third bite at the same apple. The new 3M Plan requirement represent a new apple, and KVR and the State Engineer must have the first bite.

III. REMAND TO THE STATE ENGINEER IS PROPER BECAUSE THE COURT'S OPINION ARTICULATED NEW RULES AND STANDARDS REGARDING 3M PLANS.

The Court made two specific changes to the prior practice of the State Engineer regarding 3M Plans and the mitigation of conflicts with existing rights. First, 3M Plans must be available for review *before* the approval of a water right application. *Eureka Cnty v. State Eng'r,* 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1118

(2015). Second, 3M Plans must contain specific mitigation measures and substantial evidence must support that those measures will be successful. *Id.* at 11, 359 P.3d at 1119. These new procedures change the way the State Engineer previously used 3M Plans to monitor and mitigate impacts to senior water rights to avoid conflicts. *See* KVR Pamphlet of State Engineer Decisions Relating to Monitoring or Mitigation.

Neither Respondent has effectively challenged the contents of KVR's pamphlet. The pamphlet includes clear evidence of the regular and customary practice of the State Engineer prior to the *Eureka Cnty* decision. In the pamphlet, KVR documents no less than forty decisions issued by the State Engineer which approved water rights applications conditioned on the *future* development of 3M Plans. *See* KVR Pamphlet of State Engineer Decisions Relating to Monitoring and Mitigation. The pamphlet demonstrates clear and convincing evidence that the regular custom and practice of the State Engineer prior to the issuance of the Court's opinion was to condition approval of water right applications on a future 3M Plan. Respondent's claim that all of the examples in the pamphlet were not appealed to a court does not alter this fact.

A. Respondents are estopped from arguing the Court did not adopt new rules and standards.

Respondents now claim the Court's opinion did not establish new rules and procedures. Eureka County Answering Brief at 25; Etcheverry Answering Brief at 13. They claim that instead of adopting new rules or standards, the opinion merely "emphasized" already well-established rules and standards. *Id.* Respondents' arguments are inconsistent with prior arguments made to the Court, and lack merit.

On September 18, 2015, the Court issued an unpublished order of reversal and remand in *Eureka Cnty v. State Eng'r.* Case Nos. 61324 and 63258; 2015 WL 5554628 (Sept. 18, 2015). On October 2, 2015, Respondents jointly filed a motion for publication of the order as an opinion. KVR did not object to that motion. On October 29, 2015, the Court reissued its decision as a published opinion.

In their joint motion, Respondents argued the Court decided an issue of first impression. Pursuant to NRAP 36(c), a decision of the Court should only be published if it: (1) presents an issue of first impression, (2) alters, modifies, or significantly clarifies a rule of law previously announced by the court, or (3) involves an issue of public importance that has application beyond the parties. A case of first impression is defined as a case "that presents the court with an issue of law that has not previously been decided by any controlling legal authority in that jurisdiction."

BLACK'S LAW DICTIONARY 258 (10th ed. 2014). Therefore, by definition, a case of first impression is one where the court formulates a new rule or standard that did not previously exist.

Respondents' description of the issue of first impression agrees with KVR's argument here. Respondents stated that:

> [T]his Court ruled [in its order] that the State Engineer may not defer a clearly defined mitigation plan until a later date. Such mitigation measures must be addressed in evidence at the time of the State Engineer's determination on the applications. *This is an important issue of first impression in the State of Nevada*, and *the Court's ruling has significant precedential value* necessitating publication in the Nevada Reports.
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> Motion at 7 (emphasis added).

Respondents also stated:

> All present and future applicants before the State Engineer, and all existing water rights holders in the State of Nevada, need to know the precedential value of this case when filing applications to appropriate or change and relying on mitigation measures in the application process.
>
> Motion at 4.

Respondents' arguments now are inconsistent with what they argued in their motions for publication. The Etcheverry Respondents now state that the opinion only "emphasized the significance of a well-established rule," "announced nothing new," and established "neither new law nor new procedure." *Id*. at 13-15.

Likewise, Eureka County states that "the Court did not adopt new standards for granting applications" and that "the Court deliberately did not adopt *any* new standards or rules." Eureka County Answering Brief at 25-26 (emphasis added).

The Court previously relied on Respondents' argument and concluded that its published opinion resolved an issue of first impression. Even now, Respondent Etcheverry acknowledges that the Court rejected the State Engineer prior practice of conditionally approving applications based on subsequently developed 3M Plans. Ectheverry Answering Brief at 13. As such, Respondents are judicially estopped from arguing that a new rule was not articulated in the Court's opinion.

"The primary purpose of judicial estoppel is to protect the judiciary's integrity." *Mainor v. Nault*, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004). Judicial estoppel generally applies where: (1) the same party has taken two positions, (2) the positions were taken in judicial proceedings, (3) the party was successful on asserting the first position, (4) the two positions are inconsistent, and (5) the first position was not taken as a result of ignorance, fraud, or mistake. *Id*.

Here, Respondents have clearly articulated two inconsistent arguments in judicial proceedings in front of the Court: (1) that the Court's opinion decided an important issue of first impression (i.e. articulated a new rule), and (2) that the

Court's opinion did not articulate a new rule or standard, but merely emphasized an existing law and procedure. The Court accepted the first argument and reissued its determination as a published opinion, thereby making Respondents successful in asserting their first position. Accordingly, Respondents are judicially estopped from claiming the Court's opinion did not articulate a new standard regarding when a 3M Plan must be submitted, and what must be addressed therein.

B. KVR relied on prior practice of State Engineer and now has the right to comply with new rules governing 3M Plans.

Respondents also claim KVR is not entitled to equitable relief for an evidentiary hearing to comply with the new 3M Plan rules. Eureka County Answering Brief at 24; Etcheverry Answering Brief at 11. The Court has previously held that "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 reason for this policy is that there are many aspects of Nevada water law which have not been definitively

addressed by the courts, are open to interpretation, or are based on customs not documented in state statutes or regulations.[5]

The reasonableness of KVR's reliance on the prior practice of the State Engineer is beyond question. First, even the district court initially agreed that water right applications could be conditionally approved based on a future 3M plan. Second, the shear volume of prior decisions in KVR's pamphlet of mitigation decisions attest to the fact that KVR was acting reasonably when it relied on the State Engineer's past practice to conclude what Nevada water law previously required for mitigation.

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[5] Indeed, the informal nature of many of the policies and procedures of Nevada water law was acknowledged by the authors of a treatise on the subject – The Nevada Law of Water Rights. In this book the authors provide the following caveat:

> In handling water rights problems in Nevada over the years, and in dealing with the office of the State Engineer, the co-authors have encountered numerous pitfalls, customs, policies, and folklore which, although *uncharted in the law books*, are a part of the reality of practicing law in this field. Due to their off-the-record character, many of these curiosities are *not susceptible of verification* by the customary methods of legal research.

ROSS E. DE LIPKAU & EARL M. HILL, THE NEVADA LAW OF WATER RIGHTS 8-1 (Rocky Mountain Mineral Law Foundation, 2010)(emphasis added).

The Court has also ruled 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). Eureka County argues that *Great Basin* can be distinguished since the appeal in that case was from an order issued by the State Engineer before the applications went to hearing. That distinction is not relevant to question at hand. Because there are aspects of Nevada water law that are uncharted by the courts, applicants must be able to rely on the prior practice of the State Engineer in the approval of prior water rights. When that prior practice is later determined to have been faulty, the applicant should not bear the burden of the mistake.

Accordingly, since KVR initially relied on the prior practice of the State Engineer regarding 3M Plans, KVR should now have the opportunity to conform its 3M Plan to the new standards articulated by the Court.

C. KVR should be allowed to present substantial evidence to support an effective 3M Plan.

Respondents claim KVR should not be allowed to submit new 3M Plan evidence because the Court already ruled that the substantial evidence does not exist to approve KVR applications. Leaving aside the obvious fact that the record before

the Court lacked a 3M Plan or evidence supporting it, Respondents wrongly claim the Court's opinion was founded on the lack of substantial evidence.

1. The Court's primary concern was due process.

The real reason the Court reversed Ruling 6127 was that without a 3M Plan, the State Engineer and the protestants could not adequately review KVR's applications. The Court's primary concern was that a decision to grant an application "must be made upon presently known substantial evidence." *Eureka Cnty v. State Eng'r*, 131 Nev. Adv. Op. 84, 15, 359 P.3d 1114, 1120 (2015). Putting "all other arguments aside," the Court disagreed with the State Engineer's fundamental premise that "he may leave for a later day, namely the day the 3M Plan is put before him, the determination of exactly what KVR's mitigation would entail." *Id.* This concern was rooted in first principles of due process. The Court held that protestants must have an opportunity to be heard, and that opportunity "necessarily means that the opportunity to challenge the evidence must be given before the State Engineer grants proposed use of change applications." *Id.*

The Court's primary concern was the same in *Great Basin*, and Respondents are wrong when they assert that "none of the inequities of *Great Basin Water Network* are present here." Eureka County Answering Brief at 30. In *Great Basin*,

the Court wanted protestants to have a present right to protest applications that were pending before the State Engineer for more than one year. The Court fashioned a remedy to protect that right without harming the water right applicant. The same should be true here. KVR's applications should be remanded to the State Engineer so protestants can have a full opportunity to review evidence relating to the 3M Plan, and KVR should not be punished because the State Engineer did not believe that was required during the prior hearing.

2. Each of the Court's substantial evidence findings was based on incomplete record.

The Court relied on the same defect in the record for all of its substantial evidence findings. Each finding was based on the fact KVR did not submit a 3M Plan, or evidence supporting a 3M Plan, before its applications were approved. The reason the Court found substantial evidence did not exist in the record to support the 'no conflicts' determination in Ruling 6127 is because KVR did not submit a 3M Plan before Ruling 6127 was issued.

The Court stated the approval of KVR's applications cannot stand because a later-filed 3M Plan could not provide substantial evidence to support the Ruling 6127. The Court clearly stated if the applications were "[c]onsidered separate and

apart from any potential mitigation techniques," the appropriations conflict with existing water rights. *Eureka Cnty,* 131 Nev. Adv. Op. at 10, 359 P.3d at 1118. Likewise, the Court's statement that Ruling 6127 "violates the Legislature's directive that the State Engineer must deny" conflicting appropriations was premised on the fact Ruling 6127 was "based upon unsupported findings that mitigation would be sufficient to rectify the conflict." *Id.* at 16, P.3d at 1121.

Based on the lack of a pre-approval 3M Plan, the Court also found the State Engineer's decision (Ruling 6127) was "not supported by sufficient evidence that successful mitigation efforts may be undertaken." *Eureka Cnty*, 131 Nev. at 3, 359 P.3d at 1117. The Court stated, "[n]owhere in the ruling, however, does the State Engineer articulate what mitigation will encompass," and "evidence of what that mitigation would entail and whether it would indeed fully restore the senior rights at issue is lacking." *Id.* at 11, P.3d at 1119. The Court relied on the fact, "there was no mitigation plan in the record before the district court or in existence when KVR's applications were granted." *Id.* The Court said KVR's experts "did not specify what techniques would work," or how they would be implemented. *Id.* The Court commented that substitution of water rights "was not reflected in the Sate Engineer's decision or the evidence that was presented to him," and "there was no evidence

before the State Engineer that KVR applied or committed certain of its already obtained water rights to mitigation." *Id.*

Each of these concerns can be addressed by submission of 3M Plan evidence demonstrating that existing rights will be protected. KVR now understands what the Court expects of it and the State Engineer. KVR is prepared to present a 3M Plan that addresses all of the Court's substantial evidence determinations. KVR will present evidence to address whether substitute water rights are available, can be sufficient, and can be delivered without interruption. KVR will address the fact that existing water rights will not be abandoned if mitigation water rights are provided.[6] KVR will also demonstrate that mitigation water rights can be permitted for an existing water right holder when the KVR applications are permitted. KVR should

[6] Nonuse, an essential element of abandonment, cannot occur if the nonuse is due to causes outside the owner's control. *See Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 70 P.3d 669, 681 (Idaho 2003)("Water rights are not forfeited because of the failure to use them . . . if such failure is caused by circumstances beyond the control of the water right holder."); *see also Rocky Ford Irr. Co. v. Kents Lake Reservoir Co.*, 135 P.2d 108, 111 (Utah 1943)("the courts have uniformly held that forfeiture will not operate in those cases where failure to use is the result of physical causes beyond the control of the appropriator . . . where the appropriator is ready and willing to divert the water when it is naturally available."); NRS 534.090(2) (stating that the State Engineer shall consider the unavailability of water which is beyond the control of the holder when deciding on extensions of time to work a forfeiture).

be given the opportunity to provide the 3M Plan that was not previously in the record and that could change the Court's previous substantial evidence determinations.

D. Failure to remand is manifestly unjust.

The district court's summary denial of KVR's Applications is manifestly unjust for many reasons. First, KVR must start over in assembling water rights for the mine project. While this process can be completed, it will be far more expensive and time-consuming. New applications had to be filed that will be withdrawn if KVR prevails in this appeal. Rather than being able to use the prior record in a remand hearing, KVR will have to reassemble witnesses and evidence for all issues, not just 3M. The time to prepare for a larger hearing will be longer. Judicial economy would be best served by having KVR just present the 3M evidence the Court found lacking.

Second, many new legal issues are now presented with the new applications KVR filed. Supreme Court Case No. 71090, Eureka County Verified Writ Petition, filed August 23, 2106, JA 171-490. KVR's initial award of roughly 6,000 acre feet of new appropriations is at issue. Eureka County claims it is entitled to that water, while KVR believes it controls that water in subsequently issued water rights. *Id.* Eureka County is also challenging whether the base rights KVR purchased from

irrigation projects remain valid after the district court's order. These new legal questions would not exist if the district court had remanded KVR's initial applications to the State Engineer.

Third, KVR never had a fair chance to submit a 3M Plan prior to the evaluation of its applications that complies with the Court's requirements of specific and effective mitigation options. KVR's witnesses testified based on the premise that a future 3M plan would be developed and would protect existing rights. Their testimony was not informed by real mitigation analysis because KVR understood that such analysis was premature.

Fourth, KVR is simply trying to follow the rules and standards to obtain the water necessary to operate its project. KVR has complied with every rule and procedure that it reasonably understood based on the dictates of the Nevada water statutes and the policies and procedures of the State Engineer. Respondents' claim that KVR seeks a "third-bite at the apple" wrongly implies KVR is at fault and should not get another bite at the apple. This is not true. After the first hearing, the State Engineer approved KVR's applications but he improperly relied on evidence the protestants did not have an opportunity to contest. The case was *not* remanded based on any action or omission of KVR. After the second hearing,

the State Engineer and the district court approved KVR's applications and its 3M Plan. Far from wanting to take a third-bite at the apple, KVR respectfully requests that it not be punished by having to start over.

E. Remand is not precluded by law of the case.

Eureka County claims that KVR is seeking to re-litigate an issue that is controlled by the law of the case. The doctrine of law of the case states that when an appellate court makes a decision, that decision is controlling on lower courts, as well as in any appeal thereafter. *LoBue v. State ex rel. Dept. of Highways*, 92 Nev. 529, 554 P.2d 258 (1976). Respondents correctly state the district court is bound by the statements of law in the Court's opinion. But Respondents wrongly claim that the law of the case required the district court to deny KVR's applications.

The law of the case is that KVR's water right applications cannot be approved *before* the State Engineer and the public are able to properly consider whether a 3M Plan can ameliorate potential conflicts. Accordingly, the law of the case does not prevent the district court from remanding the case to the State Engineer with instructions to consider a 3M Plan developed in accordance with the standards articulated by the Court before ruling on KVR's applications.

Eureka County incorrectly states the Court declined to answer KVR's claim that the State Engineer can conditionally grant applications based on future successful mitigation. Eureka County Answering Brief at 37. The Court clearly held that the State Engineer cannot conditionally approve an application in that fashion. The question the Court declined to answer was whether mitigation could be used to successfully address a conflict, and that is the question KVR is requesting the State Engineer to consider on remand. Since the Court expressly declined to address this issue, law of the case does not limit the consideration of that issue on remand.

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

The Court's analysis in the *Eureka County* opinion focused on the State Engineer's decision that was made in Ruling 6127. The Court did not review the contents of the 3M Plan that was submitted by KVR after Ruling 6127 was issued because the Court held that such information should be made available to protestants before a decision is made to grant a water right application.

Only Respondent Etcheverry filed a petition for judicial review challenging the State Engineer's approval of the 3M Plan, and in that petition, Etcheverrry only sought remand. JA 645. The only relief sought was for the district court to disallow water use under KVR's permits "until a 3M Plan is submitted that satisfactorily provides express conditions for monitoring and mitigating conflicts with existing rights." *Id*.

The Court did not conclude that Etcheverry's petition was moot, and it reversed and remanded that petition to the district court. Accordingly, it is consistent with the Court's opinion for the district court to remand the Etcheverry petition to the State Engineer with instructions that he request KVR to submit a satisfactory 3M Plan. Respondent Etcheverry did not address this point that remand to the State Engineer is exactly the relief they requested in their 3M Plan challange.

CONCLUSION

For the reasons stated herein, KVR respectfully requests that the 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 the 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' 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 Appellant's Reply 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 Reply 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 7,000 words and 650 lines, specifically, the word-processing system used to prepare the brief (Microsoft Word) reports that the brief consists of 6,999 words and less than 650 lines.

3. Finally, I hereby certify that I have read this Appellant's 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 Appellant's Reply 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 Reply Brief is not in conformity with the requirements of the Nevada Rules of Appellate procedure.

DATED this 30th day of September, 2016.

By: /s/ David H. Rigdon

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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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