Case No. 71090

In the Supreme Court of Nevada



EUREKA COUNTY,

PETITIONER,

vs.

JASON KING, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

RESPONDENTS,

AND

KOBEH VALLEY RANCH, LLC; ETCHEVERRY FAMILY LTD. PARTNERSHIP; DIAMOND CATTLE CO., LLC; AND DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION,

REAL PARTIES IN INTEREST.

# REAL PARTY IN INTEREST KOBEH VALLEY RANCH, LLC'S ANSWER TO EUREKA COUNTY'S VERIFIED PETITION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE, WRIT OF MANDAMUS

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## NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. Kobeh Valley Ranch, LLC is a Nevada limited liability company. Kobeh Valley Ranch, LLC is a wholly owned 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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## NRAP 17(A)(9) ROUTING STATEMENT

This is a matter involving a water right determination made by an administrative agency, and therefore is properly routed to the Court and not the Court of Appeals. NRAP 17(a)(9).

## JURISDICTIONAL STATEMENT

The writ is not proper because NRS 533.450 provides a legal remedy and the Writ Petition raises factual disputes. *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981).

## ISSUES PRESENTED

1. Does NRS 533.450 provide Eureka County with a plain, speedy, and adequate remedy at law?
2. Is the State Engineer considering different subject matter than this Court is considering in case no. 70157?
3. Are KVR's water right applications senior to Eureka County's water right applications?

## STATEMENT OF THE CASE

Kobeh Valley Ranch, LLC ("KVR") is seeking the most expeditious path to comply with the Court's decision in *Eureka Cnty. v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015).[1] The most expeditious path is a prompt remand from the Court's *Eureka County* decision, through the district court, to the State Engineer. When that remand was denied by the district court, KVR and the State Engineer appealed that decision, but also started down an alternative path with new applications filed with the State Engineer. These paths are not incongruent. Both paths involve KVR's submittal of a monitoring, management and mitigation plan ("3M Plan") to the State Engineer. If the Court upholds the district court's decision, KVR's 3M plan will be considered as part of its new applications. If the Court reverses the district court, KVR's 3M Plan will be considered in the remand proceedings related to KVR's initial applications.

What the alternative paths allowed was a timely consideration by the State Engineer of KVR's 3M Plan with the new applications. The delay in setting and conducting a hearing on the new KVR applications resulting from Eureka County's improper Writ filing, and the State Engineer's resultant vacancy of the pre-hearing

[1] *Cf. Huckabay Properties, Inc. v. NC Auto Parts, LLC*, 130 Nev. Adv. Op. 23, 322 P.3d 429, 430 (2014) (noting "the public's interest in expeditious resolution of appeals"); *City of Las Vegas v. Int'l Ass'n of Firefighters, Local # 1285*, 110 Nev. 449, 451, 874 P.2d 735, 737 (1994) (noting that it "is a matter of the utmost concern to this court, to litigants in general, and to this State's citizens" that "appeals proceed to finality in an expeditious fashion").

conference, postpones the issuance of KVR's water rights for its mining project. Such a continuing delay postpones the eventual production at the mine, which has direct financial consequences to the mining project.

## FACTUAL AND PROCEDURAL BACKGROUND

KVR is seeking the approval of the water rights applications to develop the Mount Hope Project – one of the largest molybdenum mines in the world. The development and operation of the mine will greatly enhance the economic development efforts of the State of Nevada and provide substantial tax revenue for Eureka County. Almost $300 million dollars has already been invested in this effort. When the mine is operational, it will employ approximately 400 people.

### I. KVR'S INITIAL APPLICATIONS

The mine process requires 11,300 acre feet of water per year ("AFA"). KVR filed many initial water right applications to appropriate new water rights and change existing water rights (KVR's "Initial Applications").[2] About half of the Initial Applications were change applications to change existing mining and irrigation water rights that were purchased by KVR for the project. The other Initial Applications

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

were applications for new appropriations. All of the Initial Applications were granted in Ruling 6127 by the State Engineer.[3]

This Court reviewed the issuance of Ruling 6127 (case no. 61324). On September 18, 2015, this Court issued an order that reversed and remanded Ruling 6127. The Court concluded that the State Engineer could not pre-condition approval of the Initial Applications on the development of a future plan for monitoring, management and mitigation ("3M Plan"). 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, ___, 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.* 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.*

A pre-approved and adequate 3M Plan must be in the record, the Court concluded, to support the State Engineer's findings that the Initial Applications will

[3] The State Engineer had previously approved KVR's Initial Applications in Ruling 5966. The district court remanded that ruling to the State Engineer because the State Engineer improperly relied on evidence the protestants did not have an opportunity to previously contest. EC APP 881-82.

not conflict with existing rights. Without it, the Court found substantial evidence did not exist to support the 'no conflicts' determination in Ruling 6127. The Court stated the approval of KVR's applications cannot stand because a later-filed 3M Plan could not legally provide the substantive evidence needed to support 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. 84, 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.

At the request of Eureka County, arguing that the order presented matters of first impression, on October 29, 2015, this Court granted Eureka County's request and issued its published opinion. On March 7, 2016, the district court vacated Ruling 6127 and denied KVR's Initial Applications.[4] No stay was sought or granted to maintain KVR's Initial Applications in permit status pending appeal. KVR and the State Engineer appealed that order, and this Court is considering that appeal of the district court's order in case no. 70157.

[4] KVR submitted a proposed order to the district court and served that request on all parties and all parties had an opportunity to respond and object to the proposed order. Those objections were successful. EC APP 884-85.

## II. KVR'S NEW CHANGE APPLICATIONS

Promptly after the Court issued its unpublished decision regarding Ruling 6127, KVR immediately started the process of complying with the Court's order. On October 28, 2015, KVR filed new change applications with the State Engineer and new applications to appropriate water. KVR indicated that these applications were provisionally filed in case the district court did not remand KVR's Initial Applications to the State Engineer. After the district court's order on March 7, 2016, KVR filed additional new change applications with the State Engineer. These new applications are now pending before the State Engineer (KVR's "New Change Applications" and "New Appropriation Applications").

As part of the New Change Applications, KVR will present a 3M Plan that addresses all of the Court's substantial evidence concerns. KVR will identify specific mitigation options and present evidence of the effectiveness of those options. KVR will 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.[5] KVR will

[5] 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

also demonstrate that mitigation water rights can be permitted for an existing water right holder when the KVR applications are permitted. KVR will provide a 3M Plan that was previously lacking in the record to address the Court's previous substantial evidence determinations. Protestants will have an opportunity to challenge the evidence presented with the 3M Plan.

Eureka County incorrectly refers to KVR's New Change Applications as repeat or ingeminate applications. KVR explained the difference between its Initial Applications and the New Change Applications in its April 27, 2016 letter to the State Engineer. EC APP 562-565; KVR SUPP 119-121. Because the New Change Applications do not conflict with the Court's jurisdiction in case no. 70157, KVR stated that the pendency of case no. 70157 should not delay the State Engineer's consideration of the New Change Applications.

As KVR explained to the State Engineer, in 2014, KVR was awarded 4,344 acre feet on new water rights for irrigation of ranches that it owns. Permits 78272-78275 were issued on April 27, 2014, with a 2009 priority date. EC APP 565. No protests or appeals were filed regarding the issuance of Permits 78272-78275. Concurrent with its April 27, 2016 letter, KVR filed change applications on Permits

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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).

78272-78275 to use that water in its mining project. Those change applications are Applications 86157-86160. Neither Permits 78272-78275, nor Applications 86157-86160, are before the Court in case no. 70157. *Id*.

KVR also explained to the State Engineer that it owns existing irrigation and mining water rights at the Fish Creek, Damale, and Bobcat Ranches, and the Atlas Gold Mine. EC APP 563–64. KVR attempted to change those water rights for use at the project as part of KVR's Initial Applications. However, when the Initial Applications were denied, KVR still owned its water rights at Fish Creek, Damale, and Bobcat Ranches, and the Atlas Gold Mine. Since the district court's denial of the Initial Applications was not stayed, the existing water rights that were the base rights for those Initial Applications were no longer linked to any permit. KVR explained to the State Engineer that it was filing new change applications on these existing water rights. *Id*. KVR then alternatively requested the State Engineer to immediately proceed with consideration of only its New Change Applications. EC APP 565.

Eureka County filed protests against all of KVR's new applications, and KVR filed answers to those protests. The resolution of those protest grounds is now pending before the State Engineer. In its protest, Eureka County raised the same issue it does here - that the State Engineer would be operating *ultra vires* if he considered KVR's new applications. EC APP 668. KVR responded by arguing the Court focused substantially on the need for a 3M Plan and KVR intends to comply

with the Court's decision, not circumvent that decision. KVR SUPP 123-139; 147-227. Eureka County also argued in its protest that it has a senior water right application that should be considered before KVR's new applications. KVR responded by arguing that Eureka County's application is not senior, that the State Engineer can grant KVR's new applications as temporary mining rights pursuant to NRS 533.371, and that the State Engineer can designate preferred uses in Kobeh Valley pursuant to NRS 534.120 and prefer mining uses over all other uses. *Id.*

## III. EUREKA COUNTY'S APPLICATION TO APPROPRIATE WATER IN KOBEH VALLEY.

On June 24, 2014, Eureka County filed Application 83948 to appropriate water in Kobeh Valley. Eureka County's application is for an interbasin transfer of 6,000 acre feet water from Kobeh Valley to Diamond Valley. Eureka County's application was filed after the priority date for KVR's water rights at Fish Creek, Damale, and Bobcat Ranches, and the Atlas Gold Mine. Eureka County's application was also filed after the State Engineer issued Permits 78272-78275 to KVR with a 2009 priority date.

At the time Eureka County filed this application, the water it sought was permitted to KVR in Ruling 6127, and there was no remaining water available for appropriation. Eureka County specifically stated its application to appropriate KVR's water was for use after the completion of mining activities. EC APP 005. Eureka County stated, "[u]pon cessation of production of pumping by the mines

(KVR and McEwen), when temporary water rights revert back to the source, the water will be available for use in Diamond Valley." *Id.* KVR's mining activity is projected to last more than 40 years. EC APP 569.

## IV. STATE ENGINEER'S NOTICE OF PRE-HEARING CONFERENCE

On July 26, 2016, the State Engineer issued a Notice of Pre-Hearing Conference regarding KVR's new applications. A pre-hearing conference is similar to a pre-trial conference in a civil action. The State Engineer scheduled the conference for August 25, 2016.

The State Engineer identified a series of issues for discussion at the conference. One issue was Eureka County's participation in the review of the 3M Plan and what role should it play. EC APP 834. Another issue was whether the prior record from the Ruling 6127 proceeding could be used in a hearing on KVR's New Change Applications. *Id*. Typically, by stipulation of the parties, a prior record can be incorporated into a new hearing record to save administrative time and resources. None of these issues, nor any protest issues, were decided before August 23, 2016, when Eureka County filed its Writ Petition.

## V. THE WRIT PETITION

Eureka County waited almost a month after the State Engineer issued his Notice of Pre-Hearing Conference to file its Petition, and Eureka County did not consult with opposing counsel or provide any notification of its intention to file the

Writ Petition. Eureka County filed at the last possible moment, and after KVR personnel had traveled to appear at the conference.[6]

Also on August 23, 2016, at approximately 1:36 p.m., Eureka County sent a letter to the State Engineer requesting that the August 25, 2016 conference be "postponed pending the Supreme Court's action" on its Writ Petition. On August 23, 2016, within hours of receiving Eureka County's letter, the State Engineer granted the request and issued its Order Vacating Pre-Hearing Conference. The State Engineer's order stayed any further consideration of all KVR's new applications until a decision is made by this Court on Eureka County's Writ Petition. KVR has filed a motion for reconsideration before the State Engineer requesting that a hearing date and pre-conference hearing be scheduled subject to the Court's review of the Eureka County Writ, and that motion is currently pending. Real Party in Interest Kobeh Valley Ranch, LLC's Supplemental Appendix, Volume I, KVR SUPP 140-146.

## SUMMARY OF ARGUMENT

Eureka County seeks to entangle the Court in the preliminary steps of an administrative agency proceeding even though meaningful review is available after a

[6] The Writ Petition was filed only two days before the scheduled conference. Even though the relief requested had to occur within 14 days, Eureka County's Writ Petition did not follow with the procedures for emergency motions in NRAP 21(a)(6) and 27(e).

final judgment. Absent extremely compelling circumstances, which are not present here, the Court should not be asked to intervene and become involved with the scheduling of hearings by administrative agencies when a final agency decision is appealable. More importantly, the Court should not be asked to decide an issue Eureka County has already presented to the State Engineer and which the State Engineers has advised is an issue for review at the pre-hearing conference. Eureka County should not circumvent the State Engineer's ability to decide issues that are pending before him with a request for writ relief.

The Writ Petition should be denied. Eureka County has a plain, speedy, and adequate remedy at law pursuant to NRS 533.450. Eureka County's contention that KVR's new applications are identical to the previous applications is factually incorrect. Eureka County also states incorrectly that the priority system precludes the State Engineers from considering KVR's new applications.

## STANDARD OF REVIEW

The State Engineer's exercise of discretion is reviewable pursuant to NRS 533.450. NRS 533.450 allows "any person feeling aggrieved by any order or decision of the State Engineer" to appeal that order or decision to the district court of the county in which the water is located.

A writ of prohibition is the counterpart of a writ of mandamus and is used to arrest a tribunal from exercising judicial functions when such proceedings are in

excess of the jurisdiction of that tribunal. *Mineral Cnty. v. Dept. of Conservation and Natural Res.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001). Writ relief is not appropriate to control a discretionary act of administrative agency unless the agency's discretion is manifestly abused or exercised arbitrarily or capriciously. *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-4, 637 P.2d 534, 536 (1981).

An appellate court is not the proper forum for consideration of a writ petition in cases where disputed questions of fact exist. *Round Hill*, 97 Nev. at 604, P.2d at 536. In addition, issuance of a writ is a purely discretionary act. *Smith v. Eighth Judicial Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Accordingly, this court routinely receives and denies writ petitions where such petitions fail to comply with the requirements of NRAP 21(a) since such petitions "waste this court's valuable and limited judicial resources." *Pan v. Eighth Judicial Dist. Ct.*, 120 Nev. 222, 229, 88 P.3d 840, 844 (2004).[7]

A writ will only issue if the petitioner demonstrates no plain, speedy, and adequate remedy at law.[8] "A remedy does not fail to be speedy and adequate, because, by pursuing it through the ordinary course of law, more time probably

[7] In *Pan*, the petitioner failed to provide a comprehensive factual analysis in the petition and also neglected to submit necessary parts of the record. *Pan*, 120 Nev. at 222, 88 P.3d at 844. Here, Eureka County makes inaccurate factual claims that are unsupported by the record.

[8] *See Helig v. Christensen*, 91 Nev. 120, 123, 532 P.2d 267, 269 (1975) (writ relief is improper where a petitioner has a right to appeal decision of lower tribunal).

would be consumed" than in a writ proceeding. *Washoe County v. City of Reno*, 77 Nev. 152, 156, 360 P.2d 602, 603 (1961). This Court has ruled that "even if an appeal is not immediately available because the challenged order is interlocutory in nature, the fact that the order may ultimately be challenged on appeal from the final judgment generally precludes writ relief." *Pan v. Eighth Judicial Dist. Ct.*, 120 Nev. 222, 225, 88 p.3d 840, 841 (2004). Also, a writ will only issue if a petitioner proves a lower tribunal is acting without or in excess of its jurisdiction. *City of North Las Vegas v. Eighth Judicial District Court*, 122 Nev. 1197, 1202, 147 P.3d 1109, 1113 (2006).

## ARGUMENT

### I. EUREKA COUNTY HAS A PLAIN SPEEDY AND ADEQUATE REMEDY AT LAW.

Eureka County concedes that it can appeal any decision the State Engineer makes regarding KVR's New Change Applications or New Appropriation Applications. Writ Petition at 18. Since Eureka County can appeal any "order or decision" of the State Engineer pursuant to NRS 533.450, writ relief is not warranted.[9]

[9] The Supreme Court recently denied similar Writ Petitions in cases involving water rights. In *SNWA v. Seventh Judicial Dist. Ct*, the Court found that "petitioners have an adequate legal remedy in the form of a petition for judicial review, or subsequent appeal, from any adverse decision on remand." Order Denying Petition for Writ of Mandamus, Supreme Court Docket No. 65775. In *State Engineer v. Third Judicial Dist. Ct.*, the Court relied on *Pan v. Eighth Judicial Dist. Ct*, and held that NRS 533.450 provides a legal remedy, and writ

Eureka County filed a protest of KVR's applications with the State Engineer. In the protest, Eureka County raised the same issues it raises in the Writ Petition. Specifically, Eureka County alleged that the State Engineer's consideration of KVR's Applications would be an *ultra vires* act and would improperly consider applications out of order. KVR responded to these arguments and the State Engineer scheduled a pre-hearing conference to consider those issues. The hearing notice included a list of issues for the parties to address at the hearing. The list included the issues that Eureka County raised, asked which protest ground remains viable, and included claim or issue preclusion. EC APP 834. Just two days before the conference was scheduled to begin, Eureka County filed the Writ Petition.

Eureka County had a full and fair opportunity to attend the pre-hearing conference and raise the same claims it raises here. The State Engineer should have had the first opportunity to address the protest issues and Eureka County has appeal rights under NRS 533.450. Since an appeal pursuant to NRS 533.450 would allow a meaningful review, the Writ Petition is not proper.

Eureka County claims that "[w]aiting until a final determination in the underlying proceedings involving KVR's ingeminated Applications would take many *months*." Writ Petition at 19. This claim does not make Eureka County's

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relief was improper. Order Denying Petition for Writ of Prohibition or Mandamus, Supreme Court Docket No. 69921.

remedy pursuant to NRS 533.450 inadequate because administrative proceedings often take months, if not years, to complete. *Washoe County v. City of Reno*, 77 Nev. 152, 156, 360 P.2d 602, 603 (1961). Yet this is precisely the path Eureka County expects of KVR: wait perhaps years for its applications to be acted upon. As it is, the Writ Petition was filed on August 23rd, and Eureka County's reply to the Answers to the Writ Petition is not due until October 21, 2016. Effectively, KVR has suffered harm as a result of the improper actions of Eureka County.

Eureka County cites to *G. and M. Properties v. Second Judicial Dist. Ct.*, 95 Nev. 301, 594 P.2d 714 (1979) and claims an appeal is not an adequate remedy when a lower tribunal exceeds its jurisdiction. Writ Petition at 19. However, according to *Walcott v. Wells*, 21 Nev. 47, 24 P. 367, 368 (1890), a "writ should not be granted except in cases of a usurpation or abuse of power, *and not then unless the other remedies provided by law are inadequate to afford full relief*. *Id*. (emphasis added).

Nonetheless, *G. and M. Properties* is distinguishable from this case. In *G. and M. Properties* a district court allowed objections to be filed after a deadline. *Id*. at 303, P.2d at 715. The Court relied heavily on the plain, unambiguous language of NRS 533.170 which places a strict deadline on the filing of exceptions to final orders of determination. *Id*. at 305, P.2d at 716. The Court ruled that where "a trial court misconceives the meaning of a mandatory statute and as a consequence acts when the law expressly enjoins it from acting, relief through an extraordinary writ is

mandated." *Id*. Here, there is no statute that unambiguously places a mandatory duty on the State Engineer to postpone consideration of KVR's New Change Applications until the appeal in case no. 70157 is resolved. Accordingly, Eureka County's reliance on *G. and M. Properties* is misplaced.

Finally, since Eureka County did not fully exhaust its administrative remedies before requesting equitable relief in the form of a writ, Eureka County's claims are not justiciable.[10] Otherwise, every minor determination made by an administrative agency regarding an application, license, or permit would be subject to writ review and the courts would be flooded with requests to micro-manage administrative agencies. Accordingly, Eureka County's request for writ relief should be rejected.[11]

## II. THE STATE ENGINEER IS NOT CONSIDERING THE SAME SUBJECT MATTER AS THE COURT.

Eureka County contends that the State Engineer cannot act on KVR's New Change Applications while case no. 70157 is pending. Eureka County is wrong because the State Engineer is not considering the same subject matter as the Court. For instance, KVR's New Change Applications include the change applications on Permits 78272-78275. These permits were granted in 2014 and were not part of the

[10] *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007); *see Benson v. State Engineer*, 131 Nev. ___, ___, 358 P.3d 221, 224 (2015).

[11] Eureka County's claim is also not justiciable because, as it concedes, the notice of pre-hearing conference is not appealable and "is not a decision affecting" its interest. Writ Petition at 19.

water rights at issue in KVR's Initial Applications. Also, when KVR's Initial Applications were denied, the base rights in those applications remained in good standing.[12] KVR filed new change applications for those base rights that are different from KVR's Initial Applications that are involved in case no. 70157.

### A. Concurrent Jurisdiction

Assuming arguendo that there are applications subject to review in case no. 70157, which there are not, Nevada statutes also recognize that the State Engineer and courts may share concurrent jurisdiction. NRS 533.370(4)(e) allows the State Engineer to delay consideration of an application if a court action is pending that may affect the outcome of the case. The statute also implicitly acknowledges that the State Engineer may act on such an application even if a court proceeding is pending that may involve the water right. The statute reflects the intent of the Legislature to allow the State Engineer to exercise concurrent jurisdiction over waters that are being simultaneously considered by a court.[13]

[12] *See Anderson Family Associates v. Ricci*, 124 Nev. 182, 179 p.3d 1201 (2007) (base water rights remain in good standing after change application is canceled).

[13] Since the subject matter of KVR's New Change Applications is not the same as that in case no. 70157, the doctrine of prior exclusive jurisdiction does not apply. *State Engineer v. Te-Moak Tribe of Western Shoshone Indians of Nevada*, 339 F.3d 804, 809 (2003).

### B. The Court's holding in *Westside Charter* does not apply.

The *Westside Charter* case addressed whether an administrative agency may take action while an appeal of that agency's order is pending before an appellate court. *Westside Charter Service, Inc. v. Gray Line Tours of Southern Nevada*, 99 Nev. 456, 459, 644 P.2d 351, 353 (1983). The Court held that in situations where the agency's order is before it on appeal, the appellate court maintains jurisdiction over the subject matter of the appealed order, precluding further action by the administrative agency. *Westside Charter* is inapplicable here because no stay was issued in the current case, the State Engineer's consideration of KVR's new applications will not conflict with the jurisdiction of the Court, and water rights are fundamentally different, as explained below, from the subject matter in *Westside Charter*.

In *Westside Charter*, the district court reviewed the issuance of a license to Westside Charter by the Public Service Commission ("PSC"). The district court upheld certain portions of Westside Charter's certificate but limited the scope of the license from what was issued by the PSC. While an appeal of that district court decision was pending at the Court, a stay was entered to maintain the status quo. *Id.* at 458, 644 P.2d at 352.[14] Since the stay maintained Westside Charter's license as it

[14] The existence of the stay was a key factor in the Supreme Court's decision. *See Westside Charter,* 99 Nev. at 459, 644 P2d at 353 ("It is also clear that the district court's stay of judgment while the case was under appeal did not allow PSC to deal

had been granted by the PSC, that license was valid during the appeal to the Court. After the PSC issued a new license to Westside Charter during the pendency of the appeal, the Court ruled that the PSC had acted improperly.

Here, KVR's Initial Applications have been denied, and a stay does not exist. As a result of the district court's order, KVR does not have valid permits or applications that are being considered by the Court. That is why KVR proceeded alternative and proper paths. The State Engineer will not be considering whether to grant rights that already exist in a case before the Court. Therefore, no jurisdictional conflict exists.

The Court also stated in *Westside Charter* that administrative consideration of a matter should only be limited by a court in "situations where the exercise of administrative jurisdiction would conflict with the proper exercise of the court's jurisdiction." *Westside Charter*, 99 Nev. at 459, P.2d at 353. In this case, the State Engineer's exercise of jurisdiction over KVR's New Change Applications does not

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with the subject matter of the judgment until a final decision had been rendered. The purpose of a stay is to preserve the status quo ante. It does not allow further modifications on the subject matter of the judgment . . . In this case, the stay of judgment pending appeal effectively prevented any further administrative proceedings on the subject matter of the appeal while the order denying the NRCP 60(b) motion was on appeal. Thus, PSC was without jurisdiction to act when it did in regard to Westside's second application.")(internal citations omitted).

conflict with the Court's review of the State Engineer and KVR's appeal of the district court order.

In addition, water rights are much different than the tariff rights granted by the PSC in *Westside Charter*. When KVR's Initial Applications were denied, the water associated with them reverted to the base right. By contrast, when Westside Charter's tariff was ordered to be partially vacated, there was no residual right that Westside Charter could utilize. KVR, on the other hand, retained its property right in the base rights, and it retained the right to seek a change in the place of diversion or the place and manner of use of the water. Therefore, the *Westside Charter* does not apply in this case.

## III. EUREKA COUNTY'S DEFECTIVE PRIORITY ARGUMENT DOES NOT JUSTIFY WRIT RELIEF.

### A. Eureka County has a plain, adequate and speedy remedy for its priority argument.

Eureka County raised its priority argument in protests to KVR's New Change Applications and New Appropriation Applications. After the State Engineer makes a decision on that issue, Eureka County can appeal that decision pursuant to NRS 533.450. Therefore, the writ relief Eureka County requests should be rejected.

### B. KVR's New Change Applications are senior to Eureka County's application.

KVR's New Change Applications request a change to existing water rights that have senior priorities. By contrast, Eureka County's application is for a new

appropriation of water from Kobeh Valley. When a change application is filed, it carries the priority date of the underlying base right. NRS 533.040(2). Since KVR's base rights are senior in priority to Eureka County's application, KVR's New Change Applications are senior in priority and it is entirely proper for the State Engineer to act on them first.

Eureka County's incorrectly claims that the requirement in NRS 533.355 indicates that change applications do not keep the priority date of their base right. The reference to NRS 533.355 relates to applications that are returned for correction and is irrelevant to determining the priority for that change application. The priority date of a base right is determined by the first application that was filed to appropriate the water. This priority date carries forward and is attached to all permits issued to change the point of diversion or manner and place of use of the rights. Each base right for KVR's New Change Applications is senior to Eureka County's application. KVR SUPP 001-118.

Eureka County claims that the hydrographic abstract shows that their application is senior to KVR's New Change Applications based on the file date. Writ Petition at 11. The table Eureka County references, however, is ordered by filing date, not by priority date. The table also contains a column of priority dates

for each application that confirms the priority date for KVR's New Change Applications is senior to the Eureka County's application. EC APP 934.[15]

Eureka County incorrectly claims that NRS 534.080(3) supports its priority argument. Eureka County Writ at 10, 20. NRS 534.080(3) is only applicable to new appropriations. The relevant statute is NRS 533.040(2) which relates to applications to change the place of use of existing water rights. Under Nevada water law and practice, water already appropriated can be moved "without losing priority of right." NRS 533.040(2).

### C. The State Engineer can consider applications out of order.

Even though KVR's eleven New Appropriation Applications that were filed in October, 2015 are junior to Eureka County's application, the State Engineers is vested with discretion to take action on them first. The State Engineer regularly permits junior applications, and makes those permits subject to senior rights that are granted in the future. Also, many basins in Nevada are not adjudicated, which means vested water rights that were initiated prior to Nevada's adoption of a statutory permit system have not been quantified. Yet, the State Engineer retains authority to grant junior water rights under Nevada's statutory system with express permit terms that subordinate those water rights to all existing senior rights. Finally, as KVR explained in its April 27, 2016 letter, the State Engineer can grant junior mining

[15] *Compare* Eureka County Application 83948 with priority date of June 24, 2014, with KVR Application 85575 with priority date of May 27, 1980.

rights based on preferred uses or on a temporary basis. Accordingly, Nevada law does not prohibit the State Engineer from granting junior water rights before the determination of a senior claim is complete.

Also, in *Round Hill*, the State Engineer relied on NRS 533.370(4)(e) to justify his decision to act on junior priority applications before considering senior applications in the Tahoe basin. The State Engineer withheld consideration of senior applications that were subject to federal litigation, even though he had considered and granted junior applications from the same water source. As Eureka County does here, the petitioners in *Round Hill* sought a writ of mandamus against the State Engineer to force him to act on senior applications first. The Court denied the request because factual issues existed regarding how much water was available for appropriation, and factual issues cannot be resolved by the Court.

Disputed factual issues exist in this case, as they did in *Round Hill*. Eureka County's claim that Kobeh Valley is fully appropriated is a disputed fact. The permitted water use in Kobeh Valley is determined by the consumptive use that is allowed under existing water rights, not the amount of water that can be pumped, so the permitted water use in Kobeh Valley is significantly less than 18,419.75 acre feet. Also, the amount of unadjudicated water rights is in dispute because, as Eureka County has claimed in other forums, many of the claims are not valid. Therefore, Eureka County's Writ Petition should be denied.

## CONCLUSION

Eureka County has not made a compelling case for the Court to intervene in the day to day administrative activities of the State Engineer. Accordingly, KVR respectfully requests the Court to deny Eureka County's request for writ relief.

## CERTIFICATE OF COMPLIANCE

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

1. I hereby certify that this Real Party In Interest Kobeh Valley Ranch, LLC's Answer To Eureka County's Verified Petition For Writ Of Prohibition Or In The Alternative, Writ Of Mandamus 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 Real Party In Interest Kobeh Valley Ranch, LLC's Answer To Eureka County's Verified Petition For Writ Of Prohibition Or In The Alternative, Writ Of Mandamus has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

2. I further certify this Real Party In Interest Kobeh Valley Ranch, LLC's Answer To Eureka County's Verified Petition For Writ Of Prohibition Or In The Alternative, Writ Of Mandamus complies with the page-volume limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP 32(a)(7)(C), it contains less than 14,000 words and 1300 lines, specifically, the word-processing system used to prepare the brief (Microsoft Word) reports that the brief consists of 5,921 words and less than 507 lines.

3. Finally, I hereby certify that I have read this Real Party in Interest Kobeh Valley Ranch, LLC's Answer to Eureka County's Verified Petition for Writ Of Prohibition or in the Alternative, Writ of Mandamus, 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 Real Party in Interest Kobeh Valley Ranch, LLC's Answer to Eureka County's Verified Petition for Writ Of Prohibition or in the Alternative, Writ of Mandamus complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event that the accompanying Real Party in Interest Kobeh Valley Ranch, LLC's Answer to Eureka County's Verified Petition for Writ Of Prohibition or in the Alternative, Writ of Mandamus is not in conformity with the requirements of the Nevada Rules of Appellate procedure.

DATED this 6th day of October, 2016.

By: /s/ David H. Rigdon

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## CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1), I hereby certify that I am an employee of TAGGART & TAGGART, LTD, and that on this date, I caused the foregoing document to be served on all parties to this action by electronic filing to:

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