

IN THE SUPREME COURT OF THE STATE OF NEVADA

EUREKA COUNTY,

Petitioner,

vs.

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

Respondent,

and

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

Real Parties in Interest.

**EUREKA COUNTY'S REPLY TO ANSWERS TO PETITION FOR WRIT
OF PROHIBITION OR IN THE ALTERNATIVE,
WRIT OF MANDAMUS**

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I.

INTRODUCTION

Petitioner, EUREKA COUNTY, by and through its counsel of record, ALLISON MacKENZIE, LTD., and THEODORE BEUTEL, ESQ., EUREKA COUNTY DISTRICT ATTORNEY (hereinafter “EUREKA COUNTY”), submits its Reply in support of its Verified Petition for Writ of Prohibition, or in the alternative, Writ of Mandamus (“Petition”) pursuant to this Court’s Order issued September 16, 2016.¹

The facts of this case illustrate that KVR and the STATE ENGINEER initiated the appeal pending before this Court in Case No. 70157. The issue before this Court in Case No. 70157 is KVR’s original Applications to develop water for its Mount Hope Mine Project. KVR’s repeat Applications seek the same water from the same hydrographic basin in the same total quantity for the same Mount Hope Mine Project. *See* KVR’s Supplemental Appendix at 122 noting that the total combined

¹ JASON KING, P.E., NEVADA STATE ENGINEER (“STATE ENGINEER”) filed his Answer to EUREKA COUNTY’s Petition on October 6, 2016. KOBEH VALLEY RANCH, LLC (“KVR”) filed its Answer to EUREKA COUNTY’s Petition on October 7, 2016. Real parties in interest DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION, ETCHEVERRY FAMILY LTD. PARTNERSHIP, and DIAMOND CATTLE COMPANY, LLC, filed notices that they would not be providing Answers and that they support EUREKA COUNTY’s Petition.

duty of the 2015 and 2016 Change Applications filed by KVR is reduced from 11,678.18 acre feet annually (“afa”) to 11,382.43 afa. In its Answer, KVR acknowledges that its repeat Applications were “provisionally filed” in case KVR did not prevail in Case No. 70157. KVR’s Answer at 6. Further, in Case No. 70157, KVR admits it filed its repeat Applications to restart water development for the Mount Hope Mine Project and the repeat Applications “will be withdrawn if KVR prevails in [Case No. 70157].” *See* KVR’s Reply Brief filed in Case No. 70157 at 3, 28.

Since the same water for the same project is pending before this Court in Case No. 70157, the STATE ENGINEER does not have jurisdiction to proceed with KVR’s repeat Applications. In its Answer, the STATE ENGINEER asserts that EUREKA COUNTY “jumped the gun” by filing its Petition. STATE ENGINEER’s Answer at 13. It is the STATE ENGINEER, however, who has jumped the gun because he is without jurisdiction to proceed with KVR’s repeat Applications.²

² Lack of subject matter jurisdiction can be raised at any time during the proceedings and is not waivable. *See Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990) (holding that a district court’s custody ruling was void because the court lacked subject matter jurisdiction); *Westside Charter Service, Inc. v. Gray Line Tours of Southern Nevada*, 99 Nev. 456, 459, 664 P.2d 351, 353 (1983) (concluding that because the Public Service Commission was without jurisdiction to exercise any authority in regard to the matter decided upon in the district court’s judgment, its grants of special tariffs to Westside Charter were void).

Therefore, a writ of prohibition is warranted to stop the STATE ENGINEER from considering KVR's repeat Applications.

II.

SUMMARY OF ARGUMENT

In their Answers to EUREKA COUNTY's Petition, KVR and the STATE ENGINEER argue that writ relief is not appropriate in this matter because EUREKA COUNTY has a plain, speedy and adequate remedy in the ordinary course of law; the STATE ENGINEER is not considering the same applications as before this Court in Case No. 70157; and the STATE ENGINEER can consider applications out of order. These arguments lack merit and EUREKA COUNTY's Petition should be granted.

First, EUREKA COUNTY has no plain, adequate or speedy remedy to halt the STATE ENGINEER's actions on KVR's repeat Applications. While NRS 533.450 provides a statutory right to petition for judicial review of a STATE ENGINEER's final decision, the STATE ENGINEER's Notice of Pre-Hearing Conference and action to proceed on KVR's repeat Applications is not an "order" or "decision" subject to judicial review pursuant to NRS 533.450(1).

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Second, the STATE ENGINEER lacks jurisdiction to proceed with KVR's repeat Applications because the Applications involve the same subject matter pending before this Court in Case No. 70157. The STATE ENGINEER recognizes *Westside Charter Service, Inc. v. Gray Line Tours of Southern Nevada*, 99 Nev. 456, 664 P.2d 351 (1983), may preclude any further advancement of KVR's pending applications. STATE ENGINEER's Answer at 24-25. However, the STATE ENGINEER "believes it appropriately has jurisdiction to advance consideration of KVR's application to a pre-hearing conference," and he "welcomes further clarification regarding the Court's decision in *Westside Charter*" as to how far acting on the matter extends under the facts presented in this case. STATE ENGINEER's Answer at 7, 17, 24-25.

Third, this Court's holding in *Westside Charter* precludes the STATE ENGINEER from acting on KVR's repeat Applications until all issues raised in Case No. 70157 are resolved because the subject matter at issue in Case No. 70157 and the subject matter of KVR's repeat Applications is the same—water development for the Mount Hope Mine Project. *Westside Charter* prohibits action by the STATE ENGINEER even if some of KVR's repeat Applications for the Mount Hope Mine Project are not identical to its original Applications for water development for the Mount Hope Mine Project at issue in Case No. 70157.

Finally, writ relief is warranted in this matter to stop the STATE ENGINEER from proceeding with KVR's repeat Applications when other pending applications have an earlier priority date in the same hydrographic basin.

III.

REPLY ARGUMENT

A. WRIT RELIEF IS WARRANTED BECAUSE EUREKA COUNTY IS WITHOUT A PLAIN, ADEQUATE OR SPEEDY REMEDY TO HALT THE STATE ENGINEER'S ACTIONS ON KVR'S REPEAT APPLICATIONS.

In relevant part, NRS 533.450(1) states that “any person feeling aggrieved by any order or decision of the STATE ENGINEER . . . affecting the person's interests . . . may have the same reviewed by a proceeding for that purpose.” In their Answers to EUREKA COUNTY's Petition, KVR and the STATE ENGINEER argue writ relief is not appropriate in this matter because EUREKA COUNTY has a plain, speedy and adequate remedy in the ordinary course of law under NRS 533.450. KVR's Answer at 14; STATE ENGINEER's Answer at 12-13. This argument, however, ignores the fact that the STATE ENGINEER's action to proceed on KVR's repeat Applications through the issuance of a Notice of Pre-Hearing Conference is not an “order” or “decision” subject to judicial review under NRS 533.450. *See Howell v. Ricci*, 124 Nev. 1222, 1228, 197 P.3d 1044, 1048 (2008) (“[S]o long as the decision affects a person's interests that relate to the administration of

determined rights, and is a final written determination on the issue, the aggrieved party may properly challenge it through a petition for judicial review.”)

Here, the Notice of Pre-Hearing Conference issued by the STATE ENGINEER is neither a decision affecting a person’s interests related to the administration of determined rights, nor is it a final written determination on the issues presented by KVR’s repeat Applications. *See Howell*, 124 Nev. at 1228, 197 P.3d at 1048-49. KVR and the STATE ENGINEER do not address *Howell* in their Answers. Nonetheless, KVR and the STATE ENGINEER assert that writ relief is not warranted in this matter because EUREKA COUNTY could have shown up at a pre-hearing conference and presented its argument as to why the STATE ENGINEER should not proceed on KVR’s repeat Applications. KVR’s Answer at 15; STATE ENGINEER’s Answer at 13. Although the STATE ENGINEER claims that the decision “to set the matter for a pre-hearing conference is not a substantive matter which warrants or even justifies intervention at this stage of the proceedings,” the STATE ENGINEER asserts that “even should the STATE ENGINEER elect to proceed with considering the substance of KVR’s new applications” the STATE ENGINEER’s final decision is subject to judicial review. STATE ENGINEER’s Answer at 13-14. However, any future appeal once the STATE ENGINEER issues a final determination on KVR’s repeat Applications will not permit this Court to

meaningfully review the issues presented now because the STATE ENGINEER will have already fully acted in a proceeding beyond his authority and any such appeal will not be sufficiently adequate and speedy. *See Beazer Homes Holding Corp. v. District Court*, 128 Nev. Adv. Op. 66, 291 P.3d 128, 133 (2012); *D.R. Horton v. District Court*, 123 Nev. 468, 474-75, 168 P.3d 731, 736 (2007).

Even if EUREKA COUNTY had presented objection at a pre-hearing conference, this would not resolve the fact that the STATE ENGINEER lacks jurisdiction to proceed with KVR's repeat Applications while Case No. 70157 is pending before this Court. *See Westside Charter Service, Inc. v. Gray Line Tours of Southern Nevada*, 99 Nev. 456, 459, 664 P.2d 351, 353 (1983) (once appeal had been filed challenging an administrative agency's decision, agency is without jurisdiction to act further on the matter until all questions raised by the appeal are finally resolved). It is also clear from the STATE ENGINEER's Answer that he believes he has jurisdiction and intends to proceed to consider KVR's repeat Applications. "The State Engineer believes he has authority to proceed with setting the pre-hearing conference on KVR's pending applications based upon the differences between KVR's prior and new applications. . . . The State Engineer determined that he could proceed with consideration of KVR's applications because the points of diversion, place of use and/or manner of use were different than KVR's

prior applications decided in Ruling No. 6127.” STATE ENGINEER’s Answer at 17-18. Therefore, EUREKA COUNTY has no plain, adequate or speedy remedy to halt the STATE ENGINEER’s actions on KVR’s repeat Applications and EUREKA COUNTY is entitled to writ relief.

B. WRIT RELIEF IS WARRANTED BECAUSE THE STATE ENGINEER LACKS JURISDICTION TO PROCEED WITH KVR’S REPEAT APPLICATIONS WHILE CASE NO. 70157 IS PENDING.

The STATE ENGINEER lacks jurisdiction to consider KVR’s repeat Applications while KVR’s and the STATE ENGINEER’s appeal is pending in Case No. 70157. As explained by the Court in *G. and M. Properties v. Second Judicial District Court*, 95 Nev. 301, 304, 594 P.2d 714, 715 (1979), “[p]rohibition will issue when there is an act to be arrested which is without or in excess of the jurisdiction of the trial judge and there is no a plain, speedy and adequate remedy in the ordinary course of law.”

In *G. and M. Properties*, this Court granted writ relief to prohibit the district court from assuming jurisdiction and hearing untimely water rights exceptions. *G. and M. Properties*, 95 Nev. at 306, 594 P.2d at 717. In reaching its decision to issue a writ of prohibition, the Court noted that “[t]he Writ of Prohibition is unquestionably appropriate as a remedy to hold proceedings in an inferior court which are not within the jurisdiction of such court.” *Id.* at 304, 594 P.2d at 715

(quoting *Culinary Workers v. Court*, 66 Nev. 166, 170, 207 P.2d 990, 992 (1949)). The Court reasoned that although an appeal is available from a final judgment, the issuance of a writ may be warranted “particularly in circumstances where, as here, the trial court is alleged to have exceeded its jurisdiction and the challenged order is not appealable.” *G. and M. Properties*, 95 Nev. at 304, 594 P.2d at 715-16. *See also Ham v. Eighth Judicial District Court*, 93 Nev. 409, 416, 566 P.2d 420, 424 (1977) (issuing a writ of prohibition to preclude a district court judge from exceeding his jurisdiction by voluntarily disqualifying himself from a pending case when the judge had made unrebutted declarations that he was not biased or prejudiced).

In its Answer, KVR argues that *Walcott v. Wells*, 21 Nev. 47, 24 P. 367 (1890), stands for the proposition that writ relief is not warranted in this matter because other remedies are provided by law to afford EUREKA COUNTY full relief. KVR’s Answer at 16. KVR contends that EUREKA COUNTY must first “fully exhaust its administrative remedies before requesting equitable relief in the form of a writ.” KVR’s Answer at 17. KVR’s contention is without merit.

As the Court acknowledged in *Walcott v. Wells*, a writ of prohibition “is not a writ of right, but one of sound judicial discretion, to be issued or refused according to the facts and circumstances of each particular case.” *Walcott*, 21 Nev. at 51, 24 P. at 368. The Court in *Walcott* further stated that “[i]f the inferior court has

jurisdiction of the subject-matter of the controversy, and only errs in the exercise of its jurisdiction, this will not justify a resort to the extraordinary remedy by prohibition.” *Id.* In *Walcott*, the petitioner, after filing her complaint in the district court, sought to dismiss the complaint. *Id.* An issue arose as to whether the complaint was dismissed before the defendant filed an answer setting forth a counterclaim. *Id.* The petitioner applied for a writ of prohibition to prevent the district court from proceeding with the case on the basis that the district court lacked jurisdiction to try the case because the case had been dismissed. *Id.* In denying petitioner’s application for writ relief, the Court in *Walcott* concluded that the district court had jurisdiction to try the case. *Id.* Further, the Court noted that if the district court decided the case adversely to petitioner, the petitioner would have redress through an appeal. *Id.* Thus, the facts and circumstances presented in *Walcott* did not warrant writ relief because the district court acted within its jurisdiction. *But see Baker v. Labor Commission*, 351 P.3d 111, 113 (Utah Ct. App. 2015) (holding that administrative agency lacked jurisdiction to allow employee to withdraw her wage claim after the matter was on judicial review; the attempted withdrawal did not moot the controversy).

As stated in *Westside Charter*, the STATE ENGINEER’s power and authority in relation to KVR’s repeat Applications is suspended as to questions raised by

KVR's and the STATE ENGINEER's appeal in Case No. 70157. *Westside Charter*, 99 Nev. at 459, 664 P.2d at 553; *Fischback & Moore of Alaska, Inc. v. Lynn*, 407 P.2d 174, 176 (Alaska 1965). As this Court noted in *Westside Charter*, this rule is based on common sense. The full exercise of this Court's appellate jurisdiction in Case No. 70157 should not be subject to conflict or compromised because KVR and the STATE ENGINEER want the STATE ENGINEER to assert jurisdiction over the same matter and proceed with KVR's repeat Applications. KVR's "alternative path" to have this Court and the STATE ENGINEER asserting jurisdiction over the same subject matter—water rights for the Mount Hope Mine Project—is contrary to law and should be rejected by this Court. Therefore, a writ of prohibition is warranted to stop the STATE ENGINEER from considering KVR's repeat Applications.

C. THE HOLDING IN *WESTSIDE CHARTER* PRECLUDES THE STATE ENGINEER FROM ACTING ON KVR'S REPEAT APPLICATIONS UNTIL ALL ISSUES RAISED IN CASE NO. 70157 ARE RESOLVED.

In its Answer, the STATE ENGINEER acknowledges that the holding in *Westside Charter* may preclude the STATE ENGINEER from advancing on KVR's repeat Applications. STATE ENGINEER's Answer at 25. Further, the STATE ENGINEER "welcomes this Court's clarification" regarding whether the STATE ENGINEER has jurisdiction to consider KVR's repeat Applications while Case No.

70157 is pending before this Court. STATE ENGINEER's Answer at 25. The STATE ENGINEER is correct to question his authority to conduct further proceedings with KVR's repeat Applications.

Irrespective of the STATE ENGINEER's acknowledgment that *Westside Charter* may preclude advancement on KVR's repeat Applications, KVR claims that the holding in *Westside Charter* does not apply in this case. KVR's Answer at 19-21. KVR argues that *Westside Charter* is inapplicable because, while a stay was issued in *Westside Charter* to maintain the status quo pending appeal, a stay does not exist in this case. KVR's Answer at 19-20. Further, KVR argues that *Westside Charter* maintained its valid license during the pendency of the appeal and, only after the Public Service Commission of Nevada ("PSC") issued a new license during the appeal, the Court ruled that the PSC acted improperly. According to KVR, *Westside Charter* is inapplicable to the facts of this case because KVR "does not have valid permits or applications that are being considered by the Court."³ KVR's Answer at 19-20. KVR's arguments lack merit for several reasons.

³ KVR's argument that it "does not have valid permits or applications that are being considered by the Court" is disingenuous. KVR's Answer at 19-20. KVR still has all the base water rights it held prior to the issuance of STATE ENGINEER's Ruling 6127 which is currently before this Court in Case No. 70157.

First, despite KVR's assertions to the contrary, the holding in *Westside Charter* clearly prohibits an administrative agency, such as the STATE ENGINEER, from considering or taking further action on the same matter while an appeal of that agency's order or decision is pending before an appellate court. In *Westside Charter*, the Court noted that "where an order of an administrative agency is appealed to a court, that agency may not act further on that matter until all questions raised by the appeal are finally resolved." *Id.* at 459, 664 P.2d at 353. *See also Fischback & Moore of Alaska, Inc. v. Lynn*, 407 P.2d 174, 176 (Alaska 1965) (recognizing general rule that when an administrative agency's order is appealed to a court, agency's power and authority over the matter is suspended because court's jurisdiction over subject matter must be complete and not interfered with or frustrated by concurrent action of administrative agency) (overruled on other grounds by *City and Borough of Juneau v. Thibodeau*, 595 P.2d 626, 629 n. 6 (Alaska 1979)). Therefore, since KVR and the STATE ENGINEER initiated the appeal pending before this Court in Case No. 70157, the STATE ENGINEER is precluded from taking any further action on KVR's repeat Applications until all issues raised in Case No. 70157 are resolved.

Second, the holding in *Westside Charter* was not dependent on the stay of judgment having been issued while the case was pending on appeal. *Westside Charter*, 99 Nev. at 460, 664 P.2d at 354. The stay of judgment simply reinforced

the Court's conclusion that the PSC was without jurisdiction to act when it did in granting Westside Charter's second tariff application. *Id.*

Third, the Court in *Westside Charter* determined that the "subject matter" of the second tariff application was the same as the "subject matter" pending on appeal—the authority of Westside Charter to operate—notwithstanding that the tariff applications filed by the applicant were not identical. *Id.* at 460, 664 P.2d at 353. The "subject matter" pending on appeal involved the district court vacating the PSC's broad grant of authority to Westside Charter. *Id.* In particular, the district court vacated that portion of the tariff permitting the transfer of passengers and their baggage between McCarran Airport and the hotels and motels in Las Vegas. *Id.* The court also restricted Westside Charter's authority to operate nightclub tours only from midnight until 2:00 a.m. *Id.* at 457-58, 664 P.2d at 352. Similarly, the "subject matter" of the second tariff application involved the PSC granting Westside Charter the authority to operate downtown city tours, modified city tours, main nightclub tours, late nightclub tours, Hoover Dam-Lake Mead tours, and to transport passengers and baggage to and from McCarran International Airport and Union Pacific Stations. *Id.* at 458, 664 P.2d at 352.

Since the “subject matter” was the same, the Court in *Westside Charter* concluded that the PSC was “without power to deal with the subject matter of the underlying judgment before that appeal was decided.” *Id.*

Because a decision by this Court favoring Westside ultimately could have changed the character of the original judgment, PSC’s actions in entertaining and granting the tariffs before a final decision on that appeal were improper, conflicting with the jurisdiction of the district court. Although PSC may have been correct in assessing the merits of Westside’s appeal, it was nonetheless without power to deal with the subject matter of the underlying judgment before that appeal was decided.

Id. See also *Fischback & Moore of Alaska, Inc. v. Lynn*, 407 P.2d at 176 (“The court’s jurisdiction over the subject matter of an appeal must be complete and not subject to being interfered with or frustrated by concurrent action by the administrative body.”). Thus, KVR’s and the STATE ENGINEER’s argument that the STATE ENGINEER may proceed on KVR’s repeat Applications for water for its Mount Hope Mine Project because the repeat Applications are not identical to the original Applications has already been rejected by this Court in *Westside Charter*.

Finally, *Black’s Law Dictionary* defines “subject matter” as “[t]he issue presented for consideration” or “the thing in dispute.” *Black’s Law Dictionary* 1652 (10th ed. 2014). Here, “the thing in dispute” is KVR’s water development for its Mount Hope Mine Project. Further, the “issue presented for consideration” in

KVR's and the STATE ENGINEER's appeal pending in Case No. 70157 is review of the District Court's decision to deny KVR's water Applications and vacate the water permits improperly issued by the STATE ENGINEER for the Mount Hope Mine Project in accordance with this Court's holding in *Eureka County v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015). The water sought to be developed is from the same hydrographic basin and for the same Mount Hope Mine Project. Pursuant to *Westside Charter*, the subject matter before this Court in Case No. 70157 and the subject matter before the STATE ENGINEER are the same.

The exercise of administrative jurisdiction by the STATE ENGINEER will conflict with the proper exercise of this Court's jurisdiction. KVR acknowledges the conflict of jurisdiction when it admits its repeat Applications were "provisionally filed" in the event KVR does not prevail in Case No. 70157, and the repeat Applications will be withdrawn if KVR does prevail in Case No. 70157. KVR's Answer at 6; KVR's Reply Brief filed in Case No. 70157 at 28. The STATE ENGINEER also appears to acknowledge the conflict of jurisdiction in its request for clarification as to whether the STATE ENGINEER has jurisdiction of the repeat Applications pursuant to *Westside Charter*. STATE ENGINEER's Answer at 25.

KVR and the STATE ENGINEER invoked this Court's jurisdiction over KVR's water development for its Mount Hope Mine Project by filing their appeal in

Case No. 70157. This Court's jurisdiction over the appeal must be complete and not subject to being interfered with or frustrated by concurrent action by the STATE ENGINEER on KVR's repeat Applications for water development for its Mount Hope Mine Project.⁴ By letter to the STATE ENGINEER dated April 27, 2016, KVR claims it "is entitled to proceed forward at this time without being delayed further by the Supreme Court proceeding." Petitioner's Appendix Vol. 4 at 562. KVR's and STATE ENGINEER's attempt to invoke concurrent action by the STATE ENGINEER on the same subject matter while Case No. 70157 is pending before this Court is impermissible and must be stopped through the issue of a writ of prohibition. *See Westside Charter*, 99 Nev. at 460, 664 P.2d at 353. *See also G. and M. Properties v. Second Judicial District Court*, 95 Nev. 301, 306, 594 P.2d 714, 717 (1979) (holding that the issuance of a writ of prohibition was warranted to stop the district court from taking action when it was without jurisdiction).

⁴ KVR's argument that the STATE ENGINEER has concurrent jurisdiction to proceed with KVR's repeat Applications under NRS 533.370(4)(e) is wrong because the STATE ENGINEER is without jurisdiction to consider the matter while Case No. 70157 is pending. NRS 533.370(4)(e) gives the STATE ENGINEER authority to postpone action outside the 2 year requirement to act on applications where court actions or proceedings are pending which may affect the outcome of the application. The statute supports the holding in *Westside Charter* and does not grant the STATE ENGINEER concurrent jurisdiction with a pending court action.

Because the STATE ENGINEER is precluded from taking any further action on KVR's repeat Applications for its Mount Hope Mine Project until all issues raised in Case No. 70157 are resolved, EUREKA COUNTY's Petition should be granted.

D. WRIT RELIEF IS WARRANTED TO STOP THE STATE ENGINEER FROM PROCEEDING WITH KVR'S REPEAT APPLICATIONS WHEN OTHER PENDING APPLICATIONS HAVE AN EARLIER PRIORITY DATE IN THE SAME HYDROGRAPHIC BASIN.

In its Answer, the STATE ENGINEER grievously mischaracterizes EUREKA COUNTY's June 27, 2014 letter to the STATE ENGINEER in an attempt to mislead this Court.⁵ STATE ENGINEER's Answer at 19-22. The June 27, 2014 letter explains why EUREKA COUNTY filed Application 83948 in the Kobeh Valley Hydrographic Basin ("Kobeh Valley"). Petitioner's Appendix Vol. 1 at 4-5. EUREKA COUNTY's letter does not acknowledge that its proposed pumping will have impacts similar to those identified by KVR, nor does the letter state that EUREKA COUNTY's development of the water is dependent on KVR's investment of time and money to develop the water. Further, EUREKA COUNTY's letter does not agree to a sequence of development of the water first by KVR, nor does the letter state that EUREKA COUNTY intends to rely on KVR's groundwork to develop

⁵ EUREKA COUNTY's June 27, 2014 letter is on the letterhead of the Eureka County Board of Commissioners and is signed by J.J. Goicoechea, Chairman. Petitioner's Appendix Vol. 1 at 4-5.

EUREKA COUNTY's proposed use of the groundwater resources in Kobeh Valley. For the reasons set forth below, this Court should disregard the STATE ENGINEER's specious argument regarding EUREKA COUNTY's letter and the STATE ENGINEER's flawed reasoning for failing to move forward with EUREKA COUNTY's senior Application 83948, and any other senior applications pending in the same hydrographic basin prior to KVR's junior Applications.

First, the proposed point of diversion in Kobeh Valley and proposed place of use in Diamond Valley contained in EUREKA COUNTY's Application 83948 for municipal water rights are totally different than KVR's numerous proposed points of diversion for its wells and KVR's proposed place of use on federal land for the Mount Hope Mine Project. Petitioner's Appendix Vol. 1 at 6-8. To imply that KVR's investment of time and money to develop water for its mining use could be used somehow by EUREKA COUNTY to develop water from a different location in Kobeh Valley for its municipal use is just factually inaccurate and distorts the statements in EUREKA COUNTY's letter. Petitioner's Appendix Vol. 1 at 4-5.

Second, EUREKA COUNTY's letter to the STATE ENGINEER does state that EUREKA COUNTY filed its Application 83948 because the STATE ENGINEER listed an interbasin transfer of water as one option to ameliorate the current situation in Diamond Valley. Petitioner's Appendix Vol. 1 at 4. EUREKA

COUNTY's initial reaction was not very favorable to this option because of its belief that there was a general lack of unappropriated groundwater in adjacent basins that might be appropriated for transfer to Diamond Valley. Petitioner's Appendix Vol. 1 at 4. Once EUREKA COUNTY learned that the STATE ENGINEER considered KVR's and another company's mining uses in Kobeh Valley as temporary uses, EUREKA COUNTY filed Application 83948 for an interbasin transfer of groundwater from Kobeh Valley to Diamond Valley. Petitioner's Appendix Vol. 1 at 4. EUREKA COUNTY's June 27, 2014 letter states: "Upon cessation of production pumping by the mines (KVR and McEwen), when the temporary water rights revert back to the source, the water will be available for use in Diamond Valley." Petitioner's Appendix Vol. 1 at 5.

Third, EUREKA COUNTY's letter discusses the need for the interbasin project to maintain EUREKA COUNTY's agricultural supply and economic base and to keep the Town of Eureka's water supply for its businesses and homes intact. Petitioner's Appendix Vol. 1 at 4-5. EUREKA COUNTY's letter concludes there is a need for the project and it is in the public interest for the project to move forward. Petitioner's Appendix Vol. 1 at 4-5.

The STATE ENGINEER's argument takes EUREKA COUNTY's letter out of context and ignores the facts and circumstances that existed at the time the letter

was written. STATE ENGINEER's Answer at 19-22. At the time EUREKA COUNTY's letter was written, the STATE ENGINEER had granted KVR's mining permits and the STATE ENGINEER's action had been upheld by the district court. Petitioner's Appendix Vol. 1 at 4-5. Based on the STATE ENGINEER's analysis in Ruling 6127, at that time there was only 2,600 acre feet of water available to appropriate in Kobeh Valley with the grant of KVR's original Applications. STATE ENGINEER's Supplemental Appendix at 231. Since that time, additional rights have been granted in Kobeh Valley, many of them temporary mining uses, for a total of 18,419.75 acre feet of permitted water rights in Kobeh Valley. Petitioner's Appendix Vol. 5 at 916, 918. Thus, EUREKA COUNTY's letter explains one of the advantages of EUREKA COUNTY's interbasin transfer option was that it did not need to be implemented immediately to address the need for water in Diamond Valley. Petitioner's Appendix Vol. 1 at 4-5. Although the interbasin transfer would not be implemented immediately due to the mining uses, EUREKA COUNTY had already funded efforts for the Diamond Valley stakeholders and was funding research to achieve a measurable reduction in irrigation pumping while maintaining crop production. Petitioner's Appendix Vol. 1 at 4-5.

EUREKA COUNTY's letter does state that EUREKA COUNTY would benefit from KVR's analysis and development of the resource as a source of water

supply for the 40 year planned mine life of the Mount Hope Mine Project. The benefit would be the data collected and analyses from KVR's pumping of the resource. EUREKA COUNTY's letter states: "This analyses and data collected to date are helpful even if the Mount Hope Project were not able to move forward due to lack of financing for the project or some other unforeseen circumstance." Petitioner's Appendix Vol. 1 at 5. The letter goes on to explain how EUREKA COUNTY's proposed project will fit within the STATE ENGINEER's water budget for Kobeh Valley once the mining use ceases, how ongoing and future monitoring efforts will provide data so that EUREKA COUNTY's interbasin transfer will not conflict with existing water rights in Kobeh Valley and that EUREKA COUNTY would need its applications processed and permits in hand to ensure that EUREKA COUNTY's investment in the planning, feasibility analysis and exploration stages would not be frustrated by someone who might file applications ahead of EUREKA COUNTY in Kobeh Valley. Petitioner's Appendix Vol. 1 at 5. There is no inference or statement in the letter that EUREKA COUNTY does not have the financial ability or good faith intent to proceed with the interbasin transfer project.

While the details of the project might take 10 years to finalize, EUREKA COUNTY wanted its applications processed and permits in hand to be able to undertake the appropriate investigations to flesh out the details of the project.

Petitioner's Appendix Vol. 1 at 5. Nowhere does EUREKA COUNTY's letter acknowledge that its proposed pumping will have impacts similar to those identified by KVR for its mining project or that EUREKA COUNTY's development of its interbasin project is dependent on KVR's investment of time and money to develop the water. EUREKA COUNTY's letter does not agree to a sequence of development of the water first by KVR or that EUREKA COUNTY intends to rely on KVR's groundwork to develop EUREKA COUNTY's proposed use of the groundwater resources of Kobeh Valley. EUREKA COUNTY's June 27, 2014 letter was written with the known facts at that time—KVR had permits issued by the STATE ENGINEER for its project in Kobeh Valley with a planned mine life of 40 years.

EUREKA COUNTY specifically stated it wanted its applications processed and permits in hand to start the planning, feasibility analysis and exploration stages of its inter-basin transfer project. Petitioner's Appendix Vol. 1 at 5. EUREKA COUNTY's request for its applications to be processed and permits in hand is not the request of an applicant that does not have any intention in good faith to construct the work necessary to apply the water to beneficial use or does not have the financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use.

It appears from the STATE ENGINEER's Answer that he has already predetermined EUREKA COUNTY's Application 83948 without any request for further information from EUREKA COUNTY or having provided the basic notions of due process to EUREKA COUNTY. *See Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979) (holding that parties must have a full opportunity to be heard, a right that includes the ability to challenge the evidence upon which the STATE ENGINEER's decision may be based). *Accord Eureka County v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015). KVR's vacated permits for its Mount Hope Mine Project are no longer senior to EUREKA COUNTY's Application 83948. Accordingly, there now is groundwater available for appropriation in Kobeh Valley. EUREKA COUNTY's Application 83948 is the next application in line for determination in the Kobeh Valley Hydrographic Basin and should be considered next by the STATE ENGINEER as provided by NRS 533.355 and 534.080(3).

KVR and the STATE ENGINEER's argument that KVR's change applications are senior to EUREKA COUNTY's Application 83948 and therefore all KVR's repeat Applications for its Mount Hope Mine Project should be heard before EUREKA COUNTY's Application 83948 is without merit. First, KVR and the STATE ENGINEER are the parties who previously argued that EUREKA COUNTY's Application 83948 was senior to KVR's repeat Applications in the

district court proceeding leading up to Case No. 70157 in an effort to get KVR's initial Applications remanded back to the STATE ENGINEER and/or to obtain equitable relief.⁶ Despite the arguments advanced by KVR and the STATE ENGINEER in the district court proceeding leading up to Case No. 70157, KVR and the STATE ENGINEER now attempt to argue that EUREKA COUNTY's Application 83948 is not senior to KVR's repeat Applications. This new argument directly conflicts with the previous arguments on record with the district court in Case No. 70157.⁷

⁶ See Joint Appendix ("JA") Volume ("Vol.") VII at 1392-1400, being KVR's Reply to Joint Objection to Proposed Orders of KVR, filed in Case No. 70157. "If KVR's applications are denied and it must file new applications, then any intervening applicant who has properly applied for water rights will have priority over KVR as to the remaining volume of water available for appropriation in the basin (Kobeh Valley)." JA Vol. VII at 1398. KVR further cites to EUREKA COUNTY's Application 83948. JA Vol. VII at 1398. See also JA Vol. VII at 1401-1406, being STATE ENGINEER's Joinder to KVR's Reply to Joint Objection to KVR's Proposed Orders, filed in Case No. 70157. "In this case, KVR should not be forced to the back of the line because the Nevada Supreme Court found insufficient evidence exists to support the STATE ENGINEER's Ruling 6127. To do so places KVR's applications behind EUREKA COUNTY, whom has its own applications to appropriate water for a beneficial use from Kobeh Valley pending before the STATE ENGINEER." JA Vol. VII at 1403.

⁷ In KVR's Motion to Alter or Amend Judgment filed in the district court proceeding leading up to Case No. 70147, KVR argued: "KVR may lose the priority position of the Applications for the remaining water in Kobeh Valley. In the time since KVR's Applications were filed, numerous entities, including EUREKA COUNTY, have filed new applications to appropriate the groundwater sought by KVR. If KVR's applications are denied, the water associated with those applications will be made

Finally, it is undisputed that the 11 new applications to appropriate water in KVR's repeat Applications have a priority date of October 28, 2015, and are junior in priority to EUREKA COUNTY's Application 83948 which has a priority date of June 24, 2014. KVR's Answer at 23; STATE ENGINEER's Answer at 6, 19. By these 11 applications, KVR seeks to appropriate a combined total amount of 15 cfs or 7,893.47 afa of water for its Mount Hope Mine Project.⁸ Petitioner's Appendix Vol. 1 at 9-17, 22-26, 32-36, 42-46, 76-80, 91-95, 116-119, 140-153. Nowhere is there statutory authorization for the STATE ENGINEER to allow new junior applications seeking to appropriate water to be acted upon ahead of a senior application because the junior applications are bundled with change applications that may have a senior base right. If the STATE ENGINEER grants KVR's 11 junior applications to appropriate water ahead of EUREKA COUNTY's senior application, there will not be water available in Kobeh Valley for EUREKA COUNTY to

available to these later-filed applications.” JA Vol. VII at 1450.

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<u>CFS</u>	<u>AFA</u>	<u>APPLICATION NOS.</u>
6.0 cfs	2,669.5 afa	85573, 85574
3.0 cfs	2,000 afa	85576, 85578, 85580, 85590
1.0 cfs	723.97 afa	85587, 85595, 85600, 85601
<u>5.0 cfs</u>	<u>2,500 afa</u>	85602
Totals: 15.0 cfs	7,893.47 afa	

appropriate notwithstanding that EUREKA COUNTY has the senior application to appropriate.

IV.

CONCLUSION

Based upon the foregoing, EUREKA COUNTY hereby requests this Court issue a Writ of Prohibition, or in the alternative, Writ of Mandamus pursuant to NRAP 21(a) and prohibit the STATE ENGINEER from taking any further action regarding KVR's protested Applications 85573 through 85604, inclusive, 86149 through 86153, inclusive, and 86157 through 86161, inclusive, filed to appropriate the underground waters of Kobeh Valley (139) and Diamond Valley (153) Hydrographic Basins, in Eureka County, Nevada pending a final determination in the appeal before this Court in Case No. 70157 involving the same subject matter. The STATE ENGINEER is without authority to deal with the subject matter of the KVR repeat Applications before the appeal in Case No. 70157 is decided. In addition, EUREKA COUNTY asks this Court to direct the STATE ENGINEER to proceed to process applications in the Kobeh Valley Hydrographic Basin by priority, as the law requires.

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DATED this 24th day of October, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on the following parties as outlined below:

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