

**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.

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**EUREKA COUNTY'S RESPONSE IN OPPOSITION TO  
REAL PARTY IN INTEREST KOBEH VALLEY RANCH, LLC'S  
MOTION FOR LEAVE TO FILE SURREPLY BRIEF**

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KAREN A. PETERSON, NSB 366  
[kpeterson@allisonmackenzie.com](mailto:kpeterson@allisonmackenzie.com)  
DAWN M. ELLERBROCK, NSB 7327  
[dellerbrock@allisonmackenzie.com](mailto:dellerbrock@allisonmackenzie.com)  
KYLE A. WINTER, NSB 13282  
[kwinter@allisonmackenzie.com](mailto:kwinter@allisonmackenzie.com)  
ALLISON MacKENZIE, LTD.  
402 North Division Street  
Carson City, NV 89703-4168  
Telephone: (775) 687-0202

~and~

THEODORE BEUTEL, NSB 5222  
[tbeutel.ecda@eurekanv.org](mailto:tbeutel.ecda@eurekanv.org)  
EUREKA COUNTY DISTRICT ATTORNEY  
701 South Main Street  
P.O. Box 190  
Eureka, NV 89316  
Telephone: (775) 237-5315

Attorneys for Petitioner,  
EUREKA COUNTY

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Petitioner, EUREKA COUNTY, by and through its counsel of record, ALLISON MacKENZIE, LTD., and THEODORE BEUTEL, ESQ., EUREKA COUNTY DISTRICT ATTORNEY (hereinafter “EUREKA COUNTY”), pursuant to Rule 27(a)(3) of the Nevada Rules of Appellate Procedure (“NRAP”), submits its Response in Opposition to Real Party in Interest KOBEN VALLEY RANCH, LLC’s (“KVR”) Motion for Leave to File Surreply Brief (“Motion”) filed on November 21, 2016. For the reasons set forth in the Memorandum of Points and Authorities below, KVR’s Motion should be denied by the Court.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I.**

#### **INTRODUCTION**

The briefing in this matter is complete in accordance with the Court’s Order issued September 16, 2016. KVR now seeks leave to submit a Surreply Brief to respond to EUREKA COUNTY’s argument made in its Reply to Answers to Petition for Writ of Prohibition or in the Alternative, Writ of Mandamus (“Reply”) filed October 24, 2016. The proposed Surreply Brief is almost identical in content to KVR’s Motion for Leave to File Surreply Brief.

There is no authority for surreply briefs in the Nevada Rules of Appellate Procedure. KVR’s Motion should be denied because even if surreply briefs were

provided for by the Court's rules, there is no new matter raised in EUREKA COUNTY's Reply to which KVR should be allowed to address. KVR simply does not like EUREKA COUNTY's reply argument because it uses KVR's and the STATE ENGINEER's statements in their pleadings before the district court in a related case to discredit KVR's argument in this case on the issue of the priority of KVR's new Applications pending before the STATE ENGINEER. By its Motion, KVR seeks to clarify and explain its previous pleadings submitted to the district court and what it intended the STATE ENGINEER to act on at the Pre-Hearing Conference. *See* KVR Motion, pp. 3-4. This is not the type of "new matter" raised in a reply that warrants a surreply. KVR's Motion should be denied and the Court should disregard the argument in KVR's Motion which is essentially identical to the Surreply Brief it seeks leave to file.

## **II.**

### **RELEVANT FACTS**

In October of 2015 and April 2016, KVR filed Applications 85573 through 85604, inclusive, 86149 through 86153, inclusive, and 86157 through 86161, inclusive, with the STATE ENGINEER to appropriate water or change existing

water rights in the Kobeh Valley and Diamond Valley Hydrographic Basins for the Mount Hope Mine Project. Appendix at Vol. 1, pp. 009-163; Vol. 4, pp. 566-631.<sup>1</sup>

By letter dated April 27, 2016 to the STATE ENGINEER, KVR requested the STATE ENGINEER immediately proceed with consideration and granting of KVR's new Applications. Appendix at Vol. 4, pp. 562-565. After receiving KVR's request, the STATE ENGINEER issued a Notice of Pre-Hearing Conference on KVR's new Applications. Appendix at Vol. 5, pp. 834-835. The caption of the Pre-Hearing Conference identified the following Applications as the subject of the Pre-Hearing Conference: Applications 85573 through 85604, inclusive, 86149 through 86153, inclusive, and 86157 through 86161, inclusive. Appendix at Vol. 5, pp. 834-835. As KVR now concedes in its Motion, the Applications noticed by the STATE ENGINEER for the Pre-Hearing Conference included all three categories of new Applications filed by KVR following this Court's decision in *Eureka County v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015), including the eleven (11) applications for new appropriations which are junior in priority to EUREKA

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<sup>1</sup> In its Motion, KVR labels these Applications as its "new Applications", falling into three categories. See KVR Motion, p. 4. EUREKA COUNTY referred to these Applications as "repeat Applications" or "ingeminate Applications" in its Petition for Writ of Prohibition or in the Alternative, Writ of Mandamus ("Petition") and in its Reply. Using different names for the KVR Applications does not create any issues which warrant the submission of a Surreply Brief.

COUNTY's Application 83948 filed June 24, 2014. *See* KVR Motion, pp. 4-5 and footnotes 6, 7 and 8.

In the district court proceedings leading up to the appeal filed by KVR and the STATE ENGINEER in Case No. 70157 before this Court, KVR and the STATE ENGINEER argued that EUREKA COUNTY's Application 83948 was senior to KVR's new Applications in an effort to get KVR's initial Applications remanded back to the STATE ENGINEER and/or to obtain equitable relief. *See* Exhibit 1 attached hereto, true and correct copies of pages 1398, 1403 and 1450 of Joint Appendix Volume VII filed in Case No. 70157, cited in EUREKA COUNTY's Reply, pp. 25-26 and footnotes 6 and 7. These pages from KVR's and the STATE ENGINEER's pleadings arguing the senior priority of EUREKA COUNTY's Application 83948 are the "new matter" KVR contends it should be given the opportunity to respond to in the Surreply Brief. *See* KVR Motion, p. 2.

### **III.**

#### **LEGAL AUTHORITY**

KVR cites NRAP 28(c) as authority for its Motion. In relevant part, NRAP 28(c) provides that after an appellant files a brief in reply to a respondent's answering brief, no further briefs may be filed unless this Court so permits.



KVR's legal authority is misplaced. This case is a writ proceeding. NRAP 21 governs writ proceedings, not NRAP 28. There is no authority in NRAP 21 for further briefing beyond what the Court orders. KVR's Motion should be denied.

#### IV.

#### ARGUMENT

#### EUREKA COUNTY'S REPLY DOES NOT RAISE NEW MATTERS.

EUREKA COUNTY presented this Court with the following issue in its Petition: "Whether Respondent, STATE ENGINEER, has authority to proceed with KVR's repeat Applications despite other pending applications with an earlier priority date in the same hydrographic basin that have not been acted upon." *See* Petition, p. 2. EUREKA COUNTY then argued that "the STATE ENGINEER has proceeded with KVR's instant repeat Applications out of order and in disregard for other applications filed to appropriate water in the Kobeh Valley Hydrographic Basin with an earlier, senior priority date." *See* Petition, p. 20.

KVR filed its Answer addressing this issue raised by EUREKA COUNTY. KVR argued the STATE ENGINEER was not considering the same applications as this Court in Case No. 70157 and KVR's new change applications are senior to EUREKA COUNTY's Application 83948. *See* KVR Answer, pp. 17-18, 21-23. KVR further argued the STATE ENGINEER has the authority to act on KVR's

applications first, and out of order if it desires. *See* KVR Answer, pp. at 23-24. KVR's position regarding the priority of its new Applications *vis a vis* EUREKA COUNTY's Application 83948 was announced in its Answer. Based upon these arguments made by KVR in its Answer, it is clear the issue of the relative priority of KVR's new Applications filed with the STATE ENGINEER was raised in EUREKA COUNTY's Petition, and not for the first time in its Reply. KVR and the STATE ENGINEER made prior inconsistent arguments about the priority of KVR's new Applications and whether they might fall behind EUREKA COUNTY's Application 83948 in their pleadings before the district court leading to their appeal filed in Case No. 70157. EUREKA COUNTY properly brought those inconsistent positions and arguments made by KVR and the STATE ENGINEER regarding the priority of KVR's new Applications to this Court's attention in its Reply. EUREKA COUNTY did not mischaracterize KVR's or the STATE ENGINEER's arguments before the district court which were quoted verbatim from KVR's and the STATE ENGINEER's pleadings in EUREKA COUNTY's Reply. *See* Reply, pp. 25-26, footnotes 6 and 7. This Court can determine if EUREKA COUNTY's use of KVR's and the STATE ENGINEER's prior inconsistent arguments is persuasive and does not need KVR's proposed Surreply Brief. This is not new matter which was raised for the first time in EUREKA COUNTY's Reply.

In addition, there is no misunderstanding in the record that needs to be cleared nor do the context of KVR's and the STATE ENGINEER's statements before the district court need to be explained. In their arguments before the district court, KVR and the STATE ENGINEER do not distinguish the priority of KVR's new Applications based upon three categories or whether they are change applications or applications for new appropriations. The arguments before the district court merely referenced KVR's "new applications" or "KVR's applications behind Eureka County". KVR's "three-category" description of its new Applications was introduced in this case, long after KVR's and the STATE ENGINEER's arguments were made to the district court. It has no bearing on the arguments made to the district court, there is no misunderstanding of KVR's own prior words and nothing needs to be explained or put into context. Plain and simple, KVR and the STATE ENGINEER argued in the district court the opposite of what they argue in this case regarding the priority of KVR's new Applications. EUREKA COUNTY did not raise any new matters in its Reply; it merely pointed out the past inconsistent statements and arguments made by KVR and the STATE ENGINEER regarding the priority of KVR's new Applications to the district court. EUREKA COUNTY is not required to give prior advance-notice to KVR when it uses KVR's prior inconsistent statements made in court filings in a related case to rebut the arguments KVR made

to this Court in this case. In its September 16, 2016 Order, this Court gave EUREKA COUNTY the opportunity to file a reply. The Court did not give a party aligned with the Respondent an opportunity for surreply. Any confusion, as KVR now claims, was caused by KVR's own words and actions and not by EUREKA COUNTY in properly quoting KVR's own language and argument regarding the same.

Lastly, KVR seeks to explain, for the first time, what it "intended to request" when it asked the STATE ENGINEER to proceed on its new Applications. *See* KVR Motion, p. 4. This is not a new issue raised by EUREKA COUNTY's Reply. The STATE ENGINEER issued his Notice of Pre-Hearing Conference listing all KVR's new Applications as part of the proceeding. If KVR had a problem with the scope of KVR's Applications the STATE ENGINEER noticed for the Pre-Hearing Conference, KVR should have advised the STATE ENGINEER. Trying to explain or rationalize now "what it meant", long after the fact and in contradiction to its own request, is not grounds for allowing surreply.

## V.

### CONCLUSION

Based upon the foregoing, EUREKA COUNTY respectfully requests this Court deny Real Party in Interest Kobeh Valley Ranch, LLC's Motion for Leave to

File Surreply Brief as EUREKA COUNTY did not present any new matter that KVR was not able to respond to in its Answer and requests the Court disregard the argument in KVR's Motion which is essentially identical to the Surreply Brief it seeks leave to file.

DATED this 28<sup>th</sup> day of November, 2016.

**ALLISON MacKENZIE, LTD.**  
402 North Division Street  
Carson City, NV 89703  
(775) 687-0202

By: /s/ Karen A. Peterson

KAREN A. PETERSON, NSB 366  
[kpeterson@allisonmackenzie.com](mailto:kpeterson@allisonmackenzie.com)  
DAWN M. ELLERBROCK, NSB 7327  
[dellerbrock@allisonmackenzie.com](mailto:dellerbrock@allisonmackenzie.com)  
KYLE A. WINTER, NSB 13282  
[kwinter@allisonmackenzie.com](mailto:kwinter@allisonmackenzie.com)

~and~

THEODORE BEUTEL, NSB 5222  
[tbeutel.ecda@eurekanv.org](mailto:tbeutel.ecda@eurekanv.org)  
**EUREKA COUNTY DISTRICT  
ATTORNEY**  
701 South Main Street  
P.O. Box 190  
Eureka, NV 89316  
(775) 237-5315

Attorneys for Petitioner,  
EUREKA COUNTY

## **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:

Via Court's E-flex Electronic Filing System:

Adam Paul Laxalt, Esq.  
Micheline N. Fairbank, Esq.  
Justina A. Caviglia, Esq.  
Nevada Attorney General's Office  
[alaxalt@ag.nv.gov](mailto:alaxalt@ag.nv.gov)  
[mfairbank@ag.nv.gov](mailto:mfairbank@ag.nv.gov)  
[jcaviglia@ag.nv.gov](mailto:jcaviglia@ag.nv.gov)

Laura A. Schroeder, Esq.  
Therese A. Ure, Esq.  
Schroeder Law Offices, P.C.  
[counsel@water-law.com](mailto:counsel@water-law.com)  
[t.ure@water-law.com](mailto:t.ure@water-law.com)

Ross E. de Lipkau, Esq.  
Gregory H. Morrison, Esq.  
Francis Wikstrom, Esq.  
Parsons Behle & Latimer  
[rdelipkau@parsonsbehle.com](mailto:rdelipkau@parsonsbehle.com)  
[gmorrison@parsonsbehle.com](mailto:gmorrison@parsonsbehle.com)  
[fwikstrom@parsonsbehle.com](mailto:fwikstrom@parsonsbehle.com)

Paul G. Taggart, Esq.  
David H. Rigdon, Esq.  
Taggart & Taggart, Ltd.  
[paul@legaltnt.com](mailto:paul@legaltnt.com)  
[david@legaltnt.com](mailto:david@legaltnt.com)

Debbie Leonard, Esq.  
McDonald Carano Wilson LLP  
[dleonard@mcdonaldcarano.com](mailto:dleonard@mcdonaldcarano.com)

DATED this 28<sup>th</sup> day of November, 2016.

/s/ Nancy Fontenot  
NANCY FONTENOT

**EXHIBIT “1”**

**EXHIBIT “1”**



1 Engineer follows and appeal any decision. Correcting the procedural deficiency is not a "third  
2 bite at the apple."

3 Lastly, there is no statute or rule that requires KVR's applications to be denied instead of  
4 remanded and denial would serve no purpose other than to destroy the priority date of the  
5 applications and force the parties and the State Engineer to unnecessarily waste resources  
6 beginning the process from scratch. The date KVR's applications were filed is their priority date  
7 for the purpose of determining if there is water available to be appropriated under NRS  
8 533.370(2). If KVR's applications are denied and it must file new applications, then any  
9 intervening applicant who has properly applied for water rights will have priority over KVR as to  
10 the remaining volume of water available for appropriation in the basin (Kobeh Valley).<sup>3</sup>  
11 Accordingly, denying the applications will subject KVR to the risk that subsequent appropriators  
12 have applied for the remaining volume of water in the basin. On the other hand, Petitioners have  
13 failed to cite any practical reason why the applications must be denied and there are none.  
14  
15

16 b. KVR did not violate the Seventh Judicial District Court Rules

17 Second, Petitioners question the procedure by which KVR submitted the proposed orders  
18 to chambers, citing 7JDCR 13, which provides that "[e]x parte orders are disfavored and counsel  
19 are encouraged to move with notice whenever possible." Rule 13 refers to orders entered by the  
20 court pursuant to an ex parte motion. No ex parte motion has been made here, as the proposed  
21 orders were submitted to the Court to aid in complying with the Supreme Court's instructions  
22 remanding the case. Petitioners were given simultaneous notice and have interposed their  
23 objections and proposed alternative orders.  
24  
25  
26

27 <sup>3</sup> Eureka County fails to reveal to the Court that it has filed applications in the meantime that may  
28 gain priority if KVR is forced to start over. See, Application 83948, available at:  
<http://water.nv.gov/data/permit/index.cfm>

1 appropriations would deplete the water available to satisfy existing rights at issue, they are  
2 undeniably 'in opposition' thereto and thus 'conflict with' the existing rights under  
3 NRS 533.370(2). *Eureka Cnty*, \_\_\_ Nev. at \_\_\_, 359 P.3d at 1118. The Court further found  
4 that the State Engineer's ruling was not supported by substantial evidence in the record.  
5 *Id.*, \_\_\_ Nev. at \_\_\_, 359 P.3d at 1120. However, the Nevada Supreme Court's Order  
6 does not direct the district court or the State Engineer to reject KVR's applications. See  
7 generally *Id.*

8 Second, such an interpretation is unsupported and inconsistent with the Nevada  
9 Supreme Court's prior decisions. Specifically, the Nevada Supreme Court has "previously  
10 recognized the district court's power to grant equitable relief when water rights are at issue."  
11 *Great Basin Water Network v. State Eng'r*, \_\_\_ Nev. \_\_\_, \_\_\_, 234 P.3d 912, 919 (2010),  
12 citing *Engelman v. Westergard*, 98 Nev. 348, 647 P.2d 385 (1982), and *State Engineer v.*  
13 *American Nat'l Ins. Co.*, 88 Nev. 424, 498 P.2d 1329 (1972).

14 Just as the Nevada Supreme Court found that preventing the State Engineer from  
15 taking further action on the Southern Nevada Water Authority's (SNWA) applications with a  
16 1989 priority date would be inequitable to SNWA, such a result in this case would be likewise  
17 inequitable to KVR. An applicant "cannot be punished for the State Engineer's failure to follow  
18 his statutory duty." *Id.*, \_\_\_ Nev. at \_\_\_, 234 P.3d at 920. Therefore the Nevada Supreme  
19 Court in *Great Basin* found that the proper and equitable remedy was to remand the matter to  
20 the State Engineer for further proceedings consistent with the order. *Id.*

21 In this case, KVR should not be forced to the back of the line because the Nevada  
22 Supreme Court found insufficient evidence exists to support the State Engineer's Ruling  
23 No. 6127. To do so places KVR's applications behind Eureka County, whom has its own  
24 applications to appropriate water for a beneficial use from Kobeh Valley pending before the  
25 State Engineer. The appropriate and equitable remedy is to remand KVR's applications back  
26 to the State Engineer for further review consistent with the Nevada Supreme Court's Order.

27 ///

28 ///

his statutory duty.”<sup>16</sup> The Supreme Court’s finding that the State Engineer failed to meet his statutory duty in approving the 3M Plan and the associated permits should not result in KVR being punished with the vacation of the permits. Rather, this Court should remand the case to the State Engineer to allow KVR to revise the 3M Plan to conform to the Supreme Court’s newly adopted standards.

C. The decision of the Nevada Supreme Court articulated new and unprecedented standards for the development of 3M Plans.

Prior to the Supreme Court’s decision, there was no statute, regulation, or case law that articulated the standards for approval of a 3M Plan developed in conjunction with an application to appropriate water. The adoption by the Supreme Court of the standard of review for 3M Plans is new and wholly unprecedented. There is simply no way that KVR could have known the standard that the Supreme Court would apply to its review of the plan before the rendering of the decision. If the State Engineer and KVR had known the Supreme Court would require a 3M Plan to be part of the original approval or to include more specific mitigation evidence, KVR would have done it. KVR should be given the opportunity to do that now.

This Court, on two prior occasions [Judges Papez and Thompson] affirmed the actions taken by the State Engineer. Given this, it is manifestly unjust to vacate the Permits before providing KVR an opportunity to amend the plan in a manner that will bring it into conformance with the Supreme Court’s directive.

D. This Court’s vacation of the KVR’s permits is manifestly unjust.

The denial of KVR’s Applications, as required by this Court’s Order, will have significant economic ramifications for the State of Nevada. 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 available to these later-filed applications. This is a manifestly unjust result. A project of great economic significance to the State of Nevada should not be placed in jeopardy based on a failure of the 3M Plan to

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<sup>16</sup> *Great Basin Water Network v. State Eng’r*, \_\_\_ Nev. \_\_\_, \_\_\_, 234 P.3d 912, 920 (2010).