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STATE ENGINEERS OFFICE

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATIONS 53987)	WHITE PINE COUNTY,
THROUGH 53992, INCLUSIVE, AND 54003)	GREAT BASIN WATER
THROUGH 54021, INCLUSIVE FILED TO)	NETWORK, ET AL.'S
APPROPRIATE THE UNDERGROUND)	RESPONSE TO SNWA
WATERS OF SPRING VALLEY, CAVE)	MOTION IN LIMINE TO
VALLEY, DELAMAR VALLEY AND DRY)	EXCLUDE EXHIBITS
LAKE VALLEY HYDROGRAPHIC BASINS)	GBWN/WPC 281, GBWN/WPC
(184, 180, 182 AND 181), LINCOLN COUNTY)	282, GBWN/WPC 290,
AND WHITE PINE COUNTY, NEVADA.)	GBWN/WPC 292, OR PARTS
)	THEREOF, AND RELATED
)	TESTIMONY

Pursuant to the State Engineer's letter dated August 8, 2017, Protestants White Pine County, Great Basin Water Network, et al. (Protestants), by and through their attorneys, Advocates for Community and Environment (ACE), hereby respond to the Southern Nevada Water Authority's (SNWA's) *Motion in Limine to Exclude Exhibits GBWN/WPC 281, GBWN/WPC 282, GBWN/WPC 290, GBWN/WPC 292, or Parts Thereof, and Related Testimony* dated August 18, 2017 (SNWA Motion in Limine). For the following reasons, SNWA's motion is without merit and should be denied.

I. BACKGROUND

The upcoming remand hearing on SNWA's groundwater development project applications is the result of an appeal to district court of the State Engineer's 2012 Rulings 6164 through 6167 on those applications. On December 13, 2013, Judge Estes issued a Decision in *White Pine County, et al. v. Jason King*, holding that the State Engineer's findings related to availability of water, conflicts with existing rights, the public interest, and the environmental soundness criteria in Rulings 6164 through 6167 were unsupported by substantial evidence and

1 were arbitrary and capricious. *White Pine County, et al. v. Jason King*, Case No. CV1204049
2 (Remand Decision), at 12-13, 16 (Dec. 13, 2013). As a result, the court remanded SNWA’s
3 applications to the State Engineer to perform four tasks:

- 4 1. “The addition of Millard and Juab counties, Utah in the mitigation plan so far as
5 water basins in Utah are affected by pumping of water from Spring Valley Basin,
6 Nevada;
- 7 2. A recalculation of water available for appropriation from Spring Valley assuring
8 that the basin will reach equilibrium between discharge and recharge in a
9 reasonable time;
- 10 3. Define standards, thresholds or triggers so that mitigation of unreasonable effects
11 from pumping of water are neither arbitrary nor capricious in Spring Valley, Cave
12 Valley, Dry Lake Valley and Delamar Valley; and
- 13 4. Recalculate the appropriations from Cave Valley, Dry Lake and Delamar Valley
14 to avoid over appropriations or conflicts with down-gradient, existing water
15 rights.”
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18 *Id.* at 23. SNWA and the State Engineer appealed the district court’s Remand Decision to the
19 Nevada Supreme Court and filed petitions for writs of mandamus seeking extraordinary review
20 of the Remand Decision, but the Supreme Court denied the petitions and dismissed the appeals,
21 requiring the State Engineer to comply with the Remand Decision. *King v. Corporation of the*
22 *Presiding Bishop*, No. 64815, slip op. (Nev. Feb. 6, 2015); *King v. Seventh Judicial District*
23 *Court*, No. 65776 (Nev. May 21, 2015); *Southern Nevada Water Authority v. Seventh Judicial*
24 *District Court*, No. 65775 (Nev. May 21, 2015).
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1 On September 14, 2016, the State Engineer held a status conference on the remanded
2 applications. As SNWA concedes, during the status conference, counsel for White Pine County,
3 GBWN, et al. made it clear that the issues on remand should be those “covered by” Judge Estes’
4 four directives. See SNWA Motion in Limine at 3, n.2. Following the status conference, the
5 State Engineer issued an *Interim Order on Pre-Hearing Scheduling* finding that “[a]n additional
6 administrative hearing is necessary to provide the parties the opportunity to fully address the
7 issues remanded,” *Interim Order on Pre-Hearing Scheduling*, at 2 (Oct. 3, 2016), while limiting
8 the scope of the hearing to the “issues identified in [] Judge Estes' Ruling, and [providing that]
9 only new evidence relating to those issues will be considered in addition to the existing record.”
10 *Id.* at 3. On November 28, 2016, the State Engineer issued a *Notice of Hearing and Interim*
11 *Order*, which provided for the exchange of evidence in two simultaneous exchanges, an initial
12 evidentiary exchange on June 30, 2017, and a second evidentiary exchange of rebuttal evidence
13 to initial evidentiary submissions on August 11, 2017. *Notice of Hearing and Interim Order*, at 8
14 (Nov. 28, 2016).

17 As part of the initial evidentiary exchange ordered by the State Engineer’s November 28,
18 2016, *Notice of Hearing and Interim Order*, White Pine County, GBWN, et al. submitted an
19 expert report written and signed by Dr. Myers (GBWN/WPC 281) as required by the State
20 Engineer’s *Notice of Hearing and Interim Order*. As part of that evidentiary exchange White
21 Pine County, GBWN, et al., like SNWA, also submitted other reports and materials that
22 supported and formed part of the bases for Dr. Myers’ opinion testimony. Those materials
23 included *Groundwater-Dependent Ecosystems in Oregon: An Assessment of Their Distribution*
24 *and Associated Threats* by Brown, et al. (GBWN/WPC 282), *Rapid Transport Pathways for*
25 *Geothermal Fluids in an Active Great Basin Fault Zone* by Fairley and Hinds (GBWN/WPC
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1 290), and *Mapping Groundwater Dependent Ecosystems in California* by Howard and Merrifield
2 (GBWN/WPC 292), all of which were relied on by Dr. Myers, formed part of the bases for the
3 conclusions reached, and were cited in his expert report. SNWA's Motion in Limine seeks to
4 exclude all three of these documents as well as the majority of Dr. Myers' expert report.

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6 **II. ARGUMENT**

7 **A. IT WOULD BE INAPPROPRIATE, AND INCONSISTENT WITH THE**
8 **STATE ENGINEER'S PRIOR PRACTICE, TO EXCLUDE AND FAIL TO**
9 **CONSIDER DR. MYERS' INITIAL REPORT AND SUPPORTING**
10 **EXHIBITS**

11 Within the context of an administrative hearing on water rights applications before the
12 State Engineer, the exclusion of relevant evidence as requested by SNWA's Motion in Limine is
13 inappropriate. The State Engineer's hearing regulations make clear that the paramount goal of a
14 protest hearing is to create a fully developed record that contains all relevant evidence to support
15 a sound decision. "The objective of a protest hearing is to develop a record upon which the State
16 Engineer may rely to make a sound decision." NAC 522.180. This description of the objective
17 of a hearing such as this remand hearing clearly counsels in favor of an inclusive approach to
18 arguably relevant evidence, so that the State Engineer can be sure he has all of the available
19 pertinent information before him necessary to make a fully informed, sound decision.

20 In contrast to court proceedings where the rules of evidence apply strictly and motions in
21 limine serve the purpose of excluding evidence from trial that might tend to confuse or unfairly
22 prejudice a jury, consideration of the Myers Report and supporting materials would not unfairly
23 prejudice the State Engineer. Unlike a jury, the State Engineer has the requisite expertise to
24 evaluate the credibility and weight of the evidence presented at the upcoming hearing. It is
25 largely for this reason that the technical rules of evidence do not apply to State Engineer
26 proceedings. NRS 533.365(7). If SNWA is of the opinion that the Myers Report and supporting
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1 materials are not pertinent or persuasive, then SNWA’s critique of that evidence through its own
2 rebuttal evidence and cross-examination in the hearing, rather than the pre-hearing exclusion of
3 information that could be helpful to the State Engineer, is the appropriate procedure to follow.
4 At the very least, the proper time to determine the admissibility of the report and supporting
5 materials would be during the hearing when foundational testimony has been provided and the
6 exhibit is offered into evidence.
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8 The inappropriateness of SNWA’s request that the State Engineer exclude the majority of
9 GBWN’s evidence also is apparent from the fact that NAC 533.260, on which SNWA’s motion
10 is premised, does not contemplate or provide for such preemptive exclusion of evidence prior to
11 a protest hearing. Rather it provides for the State Engineer to do one of two things either during
12 or following a protest hearing: “(a) [r]equesting a party to cease his or her line of examination or
13 narrative; or (b) [r]effusing to consider the testimony when making his or her final
14 determination.” NAC 533.260. The language of both methods provided for in this section
15 plainly contemplate that the State Engineer would first hear, or consider, the evidence in question
16 in the context of the protest hearing before deciding whether it is relevant or should be
17 considered as part of the basis for the State Engineer’s final determination in the matter before
18 him. Thus, SNWA’s motion is an inappropriate attempt to prematurely and improperly exclude
19 White Pine County, GBWN, et al.’s evidence and testimony and should be denied.
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22 **B. THE EVIDENCE SNWA SEEKS TO EXCLUDE IS RELEVANT TO THE**
23 **ISSUES ON WHICH THE DISTRICT COURT REVERSED AND**
24 **REMANDED THE PREVIOUS DETERMINATIONS FOR**
25 **RECONSIDERATION**

26 SNWA’s extraordinarily narrow reading of the Remand Decision does not square with
27 the analysis and terms of that Decision and would render the remand proceeding essentially
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1 meaningless.¹ An accurate, complete, reading of the Decision makes it clear that Judge Estes
2 remanded the case for both (1) recalculation of available water such that pumping will reach
3 equilibrium within a reasonable timeframe and not cause impermissible conflicts or impacts, and
4 (2) definition of mitigation standards, thresholds or triggers such that reliance on SNWA's
5 proposed monitoring, management, and mitigation plans (3M plans) to support findings under
6 the conflicts with existing rights, public interest, and environmental soundness criteria would not
7 be arbitrary and capricious. His analysis of those issues and explanation of the deficiencies that
8 required reversal and remand of the State Engineer's previous rulings makes it clear that
9 correcting those deficiencies on remand necessarily requires reconsideration of the evidence in
10 the record and any additional evidence submitted by the parties that addresses the hydrology,
11 modeling, drawdown, and impacts related to those issues. *White Pine County et al. v. Jason*
12 *King*, Case No. CV1204049, at 12-13, 16 (Dec. 13, 2013). That is the type of evidence presented
13 by Dr. Myers, which plainly relates to the findings under NRS 533.370's requirements
14 concerning the availability of water, conflict with existing rights, the public interest, and
15 environmental soundness, which findings Judge Estes found were not supported by substantial
16 evidence and were arbitrary and capricious in the State Engineer's 2012 Rulings.

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19 Given that Judge Estes found there was not substantial evidence in the record to support
20 findings with regard to availability of water, conflicts with existing rights, the public interest, and
21 environmental soundness, SNWA's inappropriately narrow reading of the Remand Decision to
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25 ¹ SNWA's attempt to characterize the issues on remand so narrowly as to exclude evidence that
26 plainly is relevant to basic factors within the issues on remand also is contrary to the way SNWA
27 characterized the issues on remand and the broad set of issues they implicated in SNWA's
28 briefing to the Nevada Supreme Court. *See* Southern Nevada Water Authority, Petition for Writ
of Mandamus or, in the Alternative Prohibition at 44-45, 47-50, *SNWA, et al. v. Seventh Judicial*
District Court, et al., No. 65775 (Nev. May 30, 2014).

1 exclude this evidence would expose the State Engineer's determination of the issues on remand
2 to repeated reversal by depriving him of substantial evidence concerning those issues. Remand
3 Decision, at 12-13, 16.

4 SNWA's inappropriately narrow presentation of the issues on remand also is belied by
5 the fact that SNWA argued before the Nevada Supreme Court that it would be impossible to
6 permit SNWA's project and comply with Judge Estes' Decision, effectively acknowledging that
7 compliance with the Remand Decision necessarily implicates questions related to availability of
8 water, conflicts with existing rights, threats to the public interest, and environmental soundness.
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10 *See* Southern Nevada Water Authority, Petition for Writ of Mandamus or, in the Alternative
11 Prohibition at 44-45, 47-50, *SNWA, et al. v. Seventh Judicial District Court, et al.*, No. 65775
12 (Nev. May 30, 2014). Such inconsistency with its previous position exposes the invalidity of
13 SNWA's position in its Motion in Limine.
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15 **1. The Scope of the Issues on Remand**

16 As SNWA concedes, Nevada recognizes a broad definition of relevance, SNWA Motion
17 in Limine at 4, lines 16-18, and Nevada law generally favors admission of relevant evidence.
18 NRS 48.025. The question, then, is what is relevant to the analysis that the State Engineer is
19 required to perform on remand? To answer this question, the State Engineer must look to the
20 discussion and analysis of these issues in the District Court's Remand Decision, and ensure that
21 he is fully informed with regard to the elements of the issues that Judge Estes found to be
22 deficiently addressed in the 2012 Rulings.

23 a. Availability of Water

24 With regard to Spring Valley, Judge Estes' Decision requires the state engineer to
25 perform a recalculation of the amount of water that is available for appropriation from Spring
26 Valley. The court's Remand Decision requires that the State Engineer ensure that equilibrium
27 between recharge and discharge in the basin will be reached within a reasonable time period
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1 under the pumping proposed in SNWA's water rights applications, which implicitly requires that
2 such equilibrium be reached without causing either conflicts with existing rights or unreasonable
3 impacts to the affected environment in violation of Nevada law (as part of the public interest
4 requirement as well as the interbasin transfer provision). *White Pine County et al. v. Jason King*,
5 Case No. CV1204049, at 12-13, 16, 23 (Dec. 13, 2013). Thus, on its face this direction requires
6 the State Engineer to consider evidence that relates to the factors involved in determining how
7 much water properly can be considered available for SNWA's proposed pumping, taking into
8 account the constraints or limitations placed on availability of water such as conflicts with
9 existing water rights and threats to the public interest, including environmental impacts. *Id.*

10 The evidence presented in Dr. Myers' report and the supporting exhibits that informed his
11 report relates to these three aspects of the remand issue concerning SNWA's applications in
12 Spring Valley. Although SNWA may find it inconvenient, evidence that relates to the amounts
13 and locations of ET discharge and the sources of recharge that supply that discharge under
14 existing conditions is plainly relevant to the determinations that the State Engineer is required to
15 make on remand. This also includes evidence relating to the flow of groundwater within Spring
16 Valley and interbasin flow in and out of Spring Valley. It also must include evidence relating to
17 whether the amounts of water and pumping scenarios being considered will result in equilibrium
18 being reached between recharge and discharge, the time frame under which equilibrium will be
19 reached, and the extent to which existing water rights or the environment will be impacted by the
20 drawdown associated with reaching such a new equilibrium. Because the evidence in question
21 on this motion relates to these factors, all of it is relevant to the issues that the State Engineer
22 must consider to fully address the broad issue, or question, concerning SNWA's Spring Valley
23 applications on remand.

24 With regard to SNWA's pending applications in Cave, Dry Lake, and Delamar (CDD)
25 Valleys – the three valleys within the White River Flow System (WRFS), Judge Estes' Decision
26 again requires the State Engineer to perform a recalculation of the amount of water that is
27 available for appropriation from the affected groundwater system without running afoul of the

1 same constraints that apply to the recalculation of water for SNWA’s Spring Valley applications.
2 Similar to what is required in Spring Valley, the court’s Decision requires the recalculation of
3 water available for SNWA’s CDD applications “to avoid over appropriations or conflicts with
4 down-gradient, existing water rights.” As Judge Estes’ Decision makes clear avoiding over
5 appropriation and conflicts involves consideration of how much water is available for SNWA to
6 pump from the affected groundwater system while ensuring: (1) that the system will come to
7 equilibrium; (2) that it will do so without violating the limitations in Nevada law that prohibit
8 conflicts with down-gradient existing water rights or threats to the public interest, including
9 unreasonable impacts to the environment; and (3) that this will happen within a reasonable time.

10 SNWA’s motion seeks to exclude evidence in Dr. Myers’ report and supporting exhibits
11 that relates to the amounts and sources of recharge and ET discharge, the paths and quantities of
12 groundwater flow, and the potential effects to downgradient water rights and environmental
13 resources in the WRFS, all of which are relevant to the factors that the State Engineer must
14 consider in making a new, correct determination that fully addresses the concerns articulated in
15 Judge Estes’ Remand Decision. Accordingly, SNWA’s request to exclude this evidence is
16 improper and should be denied.

17 b. Monitoring, Management, and Mitigation

18 With regard to SNWA’s 3M plans, Judge Estes’ Decision explained how the lack of
19 standards, thresholds, or triggers made it impossible for there to be a properly informed
20 determination about whether unreasonable effects of SNWA’s proposed pumping to the
21 environment or existing rights could be prevented or effectively mitigated. Remand Decision at
22 16. As a result, Judge Estes held that the State Engineer’s approval of SNWA’s applications was
23 arbitrary and capricious with regard to the requirement under Nevada law that the State Engineer
24 ensure that the proposed water use neither conflict with existing rights nor threaten the public
25 interest, including unreasonable impacts to the environment. *Id.*

26 Addressing this issue on remand necessarily requires that the State Engineer consider
27 evidence concerning, and make as fully informed a determination as possible about, whether the

1 proposed amount of pumping and the proposed standards, thresholds, or triggers of the 3M plans
2 will allow for effective monitoring and appropriate action to prevent such proscribed effects or
3 ensure timely effective mitigation of such effects throughout the affected groundwater systems.
4 This in turn requires consideration of whether the model and modeling evidence presented by
5 SNWA are adequate to set objective thresholds and triggers or to disclose when and where
6 drawdown effects are likely to occur, when and where effective mitigation measures will need to
7 be implemented, and how long it will take for those measures to mitigate the groundwater
8 drawdown effects caused by SNWA's project. Accordingly, the evidence in Dr. Myers' report
9 and supporting exhibits concerning the adequacy of SNWA's model and modeling results is
10 relevant to the determinations the State Engineer must make to respond to the 3M issue
11 remanded by the district court.

12 SNWA's assertion that GBWN/WPC exhibit nos. 282 and 292 should be excluded
13 because they contain observations regarding the hydrologic impacts of SNWA's proposed
14 pumping on the availability of groundwater for groundwater dependent ecosystems and other
15 biological resources, SNWA Motion in Limine at 1, line 25, is mistaken. SNWA incorrectly
16 characterizes these observations as being opinions on biology "matters," in which SNWA argues
17 Dr. Myers is not qualified as an expert. In fact, Dr. Myers' observations and opinions plainly
18 address the hydrologic implications of the drawdown that would be caused by SNWA's
19 proposed groundwater export project, including the implications for SNWA's 3M plans'
20 potential effectiveness with regard to the existing water rights and environmental resources those
21 plans purport to protect (i.e., the reduced amount and availability of water from the affected
22 groundwater systems to support those rights and resources). Not only are those hydrologic
23 impacts within the scope of Dr. Myers' expertise, they also go to the heart of the principal issues
24 on remand concerning the amount of groundwater that properly may be considered available for
25 appropriation from the targeted groundwater systems and the potential efficacy of SNWA's 3M
26 proposal.

1 Similarly, there should be no dispute about the relevance of evidence concerning whether
2 objective standards, thresholds, and triggers presented in connection with SNWA's 3M plans are
3 adequate to ensure effective monitoring of the affected groundwater systems to prevent
4 unreasonable groundwater drawdown or effective mitigation of drawdown effects, which in turn
5 will affect the existing water rights and environmental resources that are required to be protected.
6 These types of evidence relate to and must be considered to make an informed determination
7 concerning the adequacy and effectiveness of the standards, thresholds, and triggers that
8 supposedly will suffice to make SNWA's proposed 3M plans effective. Therefore, the evidence
9 in Dr. Myers' report and supporting exhibits relating to these factors is relevant to the monitoring
10 and mitigation issue remanded by Judge Estes, and SNWA's motion to exclude such evidence
11 should be denied.

12 c. SNWA's Redesigned ET Capture Project Will have Dramatically
13 Different Impacts Than the Project Presented to the State Engineer in 2011
14 and Requires a New Analysis of Impacts

15 The inappropriateness of SNWA's attempt to limit the scope of remand issues also is
16 apparent from the fact that SNWA has chosen to present a redesigned groundwater development
17 project in Spring Valley that relies on a proliferation of different points of diversion than were
18 considered in the 2012 Rulings, which will result in dramatically different impacts than were
19 analyzed for the project as presented in the 2011 hearing.² SNWA has acknowledged, that an ET
20 capture project such as this redesigned project will result in vastly different impacts from the
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24 ² Because SNWA has presented an entirely different project in Spring Valley for the 2017
25 remand hearing, SNWA's statement that the "facts of this case remain 'substantially the same'"
26 is plainly incorrect and thus, in addition to the reasons stated above, *Geissel v. Galbraith*, 105
27 Nev. 101 (1989), is not relevant to SNWA's argument. See SNWA Motion in Limine at 5.

1 project SNWA presented for the 2011 hearing.³ Despite this inescapable fact, SNWA has
2 chosen not to provide the State Engineer with drawdown maps, asking the State Engineer instead
3 to rely on those that resulted from the 2011 project, which SNWA suggests was designed to
4 minimize impacts. Drici, et al., *Simulation of a Groundwater Production Scenario Related to*
5 *Southern Nevada Water Authority Groundwater Applications in Spring Valley, Nevada*, at 21
6 (2017). This piecemealing of the permitting process and analysis is contrary to Nevada law,
7 which requires a project to satisfy all of its requirements, including the limitations placed on
8 appropriations by the availability of water, conflict with existing rights, public interest, and
9 environmentally sound criteria of NRS 533.370(2), (3). Thus, a failure to consider the evidence
10 in Dr. Myers' report and supporting exhibits that relates to these factors would not satisfy
11 Nevada law or Judge Estes' Remand Decision.
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14 Dr. Myers' report and supporting exhibits are properly presented evidence that is directly
15 relevant to and probative of the issues that are the subject of Judge Estes' Remand Decision.
16 Thus, the State Engineer should deny SNWA's request to exclude this evidence.

17 **2. The Law of the Case Does Not Support Exclusion of This Evidence**

18 SNWA's discussion of a line of cases, SNWA Motion in Limine at 4-5, related to the
19 "law of the case" doctrine has absolutely no relevance here, where Judge Estes' Decision did, in
20 fact, disturb the findings SNWA now claims still stand as "law of the case." Judge Estes
21 explained that because the State Engineer could not make a decision supported by substantial
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25 ³ Compare Southern Nevada Water Authority, Reply Brief at 39, *SNWA, et al. v. Seventh*
26 *Judicial District Court, et al.*, No. 65775 (Nev. May 30, 2014) (citing CPB Answering Brief at
27 13 n5, 23) (noting that ET Capture project would result in devastating effects), *with* Drici, et al.,
28 *Simulation of a Groundwater Production Scenario Related to Southern Nevada Water Authority*
Groundwater Applications in Spring Valley, Nevada, at 21 (2017) (noting that the 2011 project
was designed to minimize impacts).

1 evidence that the project would reach equilibrium and because there was no 3M plan in place,
2 the State Engineer could not ensure compliance with the availability of water, conflict with
3 existing rights, public interest, and environmental soundness components of Nevada law, and
4 therefore the matter must be remanded. *White Pine County et al. v. Jason King*, Case No.
5 CV1204049, at 12-13, 16 (Dec. 13, 2013).
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7 SNWA's focus on the "law of the case" doctrine is misguided, as no question of law is
8 being disputed in this remand hearing. Apparently SNWA misunderstands that its desire to
9 construe Judge Estes' Decision as narrowly as possible to limit the evidence that SNWA must
10 address is merely an interested party's litigation position, which is not the sort of legal rule or
11 construction of law that the "law of the case" doctrine applies to. Accordingly, SNWA's entire
12 discussion of the "law of the case" doctrine is misplaced and simply does not bear on the simple
13 question at issue on this motion, which is whether relevant evidence should be excluded.
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15 SNWA's argument on this point displays a basic misunderstanding of the fundamental
16 nature of the issues remanded by the district court for reconsideration and correction, which is
17 apparent from the court's analysis of the deficiencies in the record on these issues. SNWA's
18 misunderstanding of the issues is reflected in its assumption that Judge Estes' limitation of the
19 issues on remand to "those findings that are the subject of this Order" excludes from
20 consideration the very findings and factors that Judge Estes found to be deficient and that
21 underpin and are essential to the determination of those issues. SNWA Motion in Limine, at 5,
22 lines 6-10 and note 8. SNWA's assertion begs the question of what findings are called into
23 question by the district court's analysis and ruling, and therefore are subject to its Order. The
24 answer to this question lies in the logically required foundation for the determinations of the
25 State Engineer that the district court reversed and remanded, which are discussed in the
26 preceding section of this Response. As explained above, the factual issues addressed in Dr.
27 Myers' report and supporting exhibits are core components of the determinations that must be
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1 reexamined and corrected on remand. Accordingly, SNWA's effort to exclude that evidence is
2 inappropriate and would effectively prevent the State Engineer from discharging his obligation
3 on remand to fully address the issues identified in the district court's Decision.

4 SNWA goes so far as to insist that Dr. Myers' use of SNWA's pending applications as a
5 starting point for his initial analysis of the hydrologic and mitigation plan issues that are before
6 the State Engineer on remand violated the directives of the district court's Decision. SNWA
7 Motion in Limine, at 6, lines 10-13. This does not follow from Dr. Myers' starting point of
8 SNWA's existing applications, and it makes no sense because those applications and the points
9 of diversion they specify are what is pending before the State Engineer, what served as the basis
10 of the evidentiary record that the district court ruled on, and therefore what the State Engineer
11 should use as a starting point for this remand hearing. What Dr. Myers did in his initial report
12 was reexamine the evidentiary record and the readily available more recent information since the
13 State Engineer's 2012 Rulings, which is all Protestants had to work with up to the time of the
14 initial evidentiary exchange, in light of the analysis and directives in Judge Estes' Decision.

15 Importantly, the *Interim Order on Pre-Hearing Scheduling* did not limit such
16 consideration to evidence involving "changes in circumstances" since the 2011 hearing. *See*
17 SNWA Motion in Limine at 6-7. Such a limitation is artificially imposed by SNWA without any
18 support in the record in an attempt to inappropriately limit the scope of this remand hearing and,
19 in effect, render it meaningless. Indeed, additional evidence and testimony on topics already
20 considered by the State Engineer in the previous hearing is exactly what is contemplated by a
21 remand Decision which remands for the purpose of providing the State Engineer and applicant
22 with an opportunity to provide the substantial evidence that was lacking to support the State
23 Engineer's initial Ruling 6164.

24 Further, if the State Engineer's intent was for the Protestants only to respond to SNWA's
25 new evidence, then there would have been no purpose in scheduling simultaneous exchanges of
26 initial evidence. The apparent common sense approach provided for in the State Engineer's
27 *Notice of Hearing and Interim Order* was to have both sides develop and present evidence that

1 fully addressed the factors contained in the issues on remand, and then each side had the
2 opportunity to rebut or criticize what it saw as the flaws in the other side's evidence. This
3 approach provides all parties with an adequate opportunity to develop their own evidence and
4 rebut the other parties' evidence, and that is exactly what has been done. Accordingly, there is
5 no reasonable basis for excluding any of the evidence contained in Dr. Myers' report or the
6 supporting exhibits, or for adding any additional time to the hearing for SNWA to rebut evidence
7 it already has had an opportunity to rebut and which it already has an ample opportunity to probe
8 on cross-examination.

9 SNWA asserts that there can be no examination of the factual basis for the determination
10 of the amount of water that properly can be considered available for the groundwater pumping
11 and export proposed in SNWA's applications, and therefore Protestants should not be permitted
12 to present any evidence that relates to these matters. SNWA Motion in Limine, at 6, line 24, and
13 at 7, line 20. This assertion is inconsistent with Judge Estes' determination that the record lacked
14 substantial evidence to support the State Engineer's determinations regarding how much
15 groundwater was available for appropriation from the targeted basins and groundwater systems.
16 Remand Decision at 11-13, 15-18, 19-20, 22-23. Because Judge Estes found that the State
17 Engineer's determinations of these issues were invalid due to those evidentiary deficiencies, it is
18 not only appropriate, but essential, for evidence on these issues to be presented to and considered
19 by the State Engineer on remand.

20 Thus, contrary to SNWA's assertion, Judge Estes did not uphold, but rather "disturbed,"
21 the State Engineer's findings as to those legal criteria, and the State Engineer's failure to ensure
22 compliance with Nevada law on those points was the basis for the court's Decision to remand the
23 matter to the State Engineer for further proceedings and completion of the four tasks listed at the
24 end of the Decision. *See* Remand Decision, at 12-13, 16; *see also King v. Corporation of the*
25 *Presiding Bishop*, No. 64815, slip op., at 2-3 (Nev. Feb. 6, 2015) (Pickering, J., dissenting).
26 While the parties did agree that "[t]he scope of the remand hearing [would] be limited to the
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1 specific issues identified in [] Judge Estes' Ruling," *Interim Order on Pre-Hearing Scheduling*, at
2 3, SNWA's characterization of those issues is not accurate in light of the analysis contained in
3 Judge Estes' Decision and would undermine the State Engineer's ability to fully comply with the
4 Remand Decision.⁴ Specifically, SNWA selectively presents the court's statement that the court
5 "would [sic] not disturb the findings of the Engineer" to suggest that it related only to the four
6 remand tasks listed at the end of the Decision and that the State Engineer's findings on the issues
7 of availability of water, conflicts with existing rights, the public interest criterion, and
8 environmental soundness criterion remain undisturbed by Judge Estes' Decision. *See* SNWA
9 Motion in Limine at 3. However, this is not what the Decision actually said. The quote in its
10 entirety reads as follows: "After an in-depth review of the record this Court will not disturb the
11 findings of the Engineer save those findings that are the subject of this Order." *White Pine*
12 *County et al. v. King*, at 23. As discussed above, when read in its entirety, it is clear that the
13 issues of compliance with the availability of water, conflicts with existing rights, the public
14 interest, and environmental soundness criteria of NRS 533.370 are directly implicated by and
15 subject to Judge Estes' Remand Decision and are the basis for the four remand tasks that are
16 before the State Engineer. Indeed any other reading would result in a nonsensical outcome that
17 is inconsistent with the language and reasoning of Judge Estes' Decision.

23 ⁴ The portion of the status conference transcript cited by SNWA actually confirms that
24 Protestants White Pine County, GBWN, et al.'s position was that issues and evidence related to
25 hydrologic characterization, drawdown, and impacts like those presented by Dr. Myers to
26 support findings with regard to NRS 533.370's availability of water, conflicts with existing
27 rights, the public interest, and environmental soundness criteria are implicated by the Remand
28 Decision as they clearly are "covered" by Judge Estes' four directives. *See* SNWA Motion in
Limine at 3 n. 2. So it simply is not correct to claim that Protestants agreed to SNWA's current
unreasonably narrow characterization of the issues on remand.

1 In addition, SNWA mischaracterizes White Pine County's assertion in advance of the
2 September 14, 2016, status conference that no hearing was required on remand because the court
3 had called for the State Engineer to reconsider the evidence in the record and make
4 recalculations and determinations that comply with the law as clarified in the district court's
5 Decision. That approach to remand would not narrow the character of the analysis that Judge
6 Estes required on remand. Rather it would have called for the State Engineer to perform the
7 required reconsideration of the issues on the basis of the voluminous evidentiary record that
8 SNWA had generated over the course of the more than two decades between the 1989 filing of
9 the applications and the conduct of the 2011 hearing on the applications. While reconsideration
10 on the basis of the existing record would have avoided the time and expense of an additional
11 hearing to consider newly contrived evidence from SNWA, it would not have narrowed the
12 scope of analysis required on remand in any way, but rather would have required the State
13 Engineer to reconsider whether the evidence in the record was sufficient to support granting
14 SNWA's applications under the legal standards articulated by the District Court.

15 Further, the State Engineer's determination after that status conference that an "additional
16 administrative hearing is necessary to provide the parties the opportunity to fully address the
17 issues remanded," October 3, 2016, Interim Order at 2, is consistent with an understanding that
18 basic aspects, or factors, of the issues on remand need to be considered to fully address those
19 issues in accord with the district court's ruling. Thus, there is no merit to SNWA's invocation of
20 "the law of the case" doctrine.

21 **C. THE PORTIONS OF DR. MYERS' REPORT THAT SNWA SEEKS TO**
22 **EXCLUDE CONTAIN USEFUL, RELEVANT SCIENTIFIC**
23 **INFORMATION AND CONCLUSIONS THAT WILL ASSIST THE**
24 **STATE ENGINEER IN MAKING A WELL-INFORMED,**
25 **SCIENTIFICALLY GROUNDED DECISION**

26 As explained above, SNWA's request to exclude the bulk of the expert report prepared
27 by Dr. Myers (GBWN/WPC_281) should be denied because the entirety of the report is relevant
28

1 to and probative of the issues before the State Engineer on remand. The relevance of this
2 evidence to a number of the specific issues is further explained below.

3 **1. Expert Opinions Related to Recharge and Discharge Estimates:**

4 SNWA has requested the State Engineer to exclude the entire “Conceptual Flow Model”
5 section of Dr. Myers’ report in an effort to prevent the State Engineer from evaluating the model
6 in connection with a determination about whether the project can reach equilibrium. However,
7 Dr. Myers’ discussion of recharge and discharge estimates is well within the scope of the remand
8 decision because a discussion of both ET and recharge and where it occurs is necessary to an
9 analysis of whether or not equilibrium can be reached in a reasonable timeframe, and Dr. Myers
10 appropriately relied on the record as it existed at the time his report was drafted as the basis for
11 his analysis. Moreover, Dr. Myers relied only on the State Engineer’s estimates of ET and
12 Perennial Yield, while listing a variety of estimates that already are in the record to highlight the
13 degree of uncertainty in those estimates. Dr. Myers has presented no new estimates of either ET
14 or PY. Moreover, it simply is not the case that the State Engineer’s findings on perennial yield
15 were not disturbed by Judge Estes’ Decision. *See White Pine County et al. v. King*, at 12-13 The
16 Remand Decision’s discussion of perennial yield and the factors that may necessitate it being set
17 at an amount below the maximum measure of ET discharge directly calls into question the
18 appropriate measure of perennial yield as it applies to the groundwater systems targeted by
19 SNWA’s applications. *See id.* at 10, 12-13.

20 **2. Projected Drawdown and Model Impacts in Spring Valley:**

21 SNWA suggests that evidence concerning impacts from the drawdown caused by
22 SNWA’s proposed pumping is not relevant to this hearing, and that the State Engineer already
23 explored those impacts and analyzed them as a basis for the 2012 Ruling. However, Judge
24 Estes’ decision makes clear that the purpose of requiring SNWA’s project to reach equilibrium is
25 to ensure that the project will not result in groundwater mining. In other words, Judge Estes’
26 Decision and Nevada law require a project to reach equilibrium, because impacts continue to
27 increase as long as equilibrium is not reached and groundwater mining is occurring.

1 Additionally, Judge Estes held that a 3M plan with triggers and thresholds was necessary to
2 enable the State Engineer to support his analysis of whether the proposed pumping would cause
3 conflicts with existing rights or threaten the public interest by causing unreasonable
4 environmental impacts. *White Pine County, et al. v. Jason King*, Case No. CV1204049, at 12-
5 13, 16. So, an analysis of impacts is necessary to determine whether a proposed 3M plan,
6 including its standards, thresholds, and triggers, can be effective. Thus, evidence concerning the
7 impacts of pumping is relevant to both the issue of available water and equilibrium, as well as
8 the evaluation of the 3M plans, and consideration of such evidence is necessary to comply with
9 Judge Estes' Remand Decision. Further, as noted above, SNWA has dramatically redesigned the
10 proposed project in Spring Valley without presenting evidence concerning drawdown, instead
11 asking the State Engineer to rely on old findings concerning a dramatically different project in
12 that basin, which no longer are relevant to the newly redesigned ET capture project that SNWA
13 has acknowledged will have devastating impacts. *See* Southern Nevada Water Authority, Reply
14 Brief at 39, *SNWA, et al. v. Seventh Judicial District Court, et al.*, No. 65775 (Nev. May 30,
15 2014) (citing CPB Answering Brief at 13 n5, 23) (noting that ET Capture project would result in
16 devastating effects). Given this changed project, a proper reading of Judge Estes' Remand
17 Decision requires the State Engineer to consider evidence concerning the project's drawdown
18 and associated impacts in order to ensure a legally sound decision.

19 **3. Model Construction:**

20 Although the State Engineer accepted SNWA's model structure, that acceptance was
21 based on the simulations presented in 2011. Given the Remand Decision's directives and the
22 fact that the Decision held that the State Engineer's findings on availability of water, conflicts
23 with existing rights, the public interest, and the environmental soundness criteria were
24 unsupported by substantial evidence and were arbitrary and capricious, the State Engineer is
25 obliged to reconsider the model structure on remand, and whether it is appropriate for SNWA's
26 new proposed pumping scheme. Evidence pertaining to the model structure is appropriate
27 because SNWA runs the model with different scenarios. For example, because SNWA now is

1 pumping at 101 different locations in Spring Valley, evidence that the model is much less
2 accurate due to computational efficiencies is highly germane to the State Engineer's
3 consideration of the issues on remand.

4 **4. Equilibrium Analysis in WRFS:**

5 Consideration of evidence regarding the time to equilibrium in the WRFS is an
6 unavoidable component of the analysis required on remand because it is inextricably connected
7 to consideration of what conflicts or impacts will occur in downgradient basins, when they will
8 occur, and how long they will take to mitigate. *See* Ruling 6165 at 48, 80. Here, too, the
9 evidence presented by Dr. Myers concerning the shortcomings of SNWA's model is directly
10 relevant to a consideration of the 3M plans' effectiveness, including the adequacy of the plans'
11 standards, thresholds, and triggers.

12 **5. Interbasin Flow Calculations:**

13 Interbasin flow calculations contained in Dr. Myers' report were taken from the FEIS
14 model and simulated as part of the pumping to equilibrium analysis. Dr. Myers has presented
15 these calculations as examples of changes caused by pumping to equilibrium. In other words,
16 the report properly presents these interbasin flow calculations as part of the consideration on
17 remand of impacts caused by pumping to equilibrium. While the State Engineer may have made
18 findings as to interbasin flow numbers in Rulings 6164 through 6167 based on a certain
19 conceptual flow model, he did not analyze changes in those numbers due to pumping.
20 Presenting the interbasin flow numbers, at equilibrium and after years of pumping, is essential to
21 an informed consideration of impacts that are likely to be caused by pumping to equilibrium,
22 which is essential to consideration of the issues on remand. Thus, Dr. Myers' use of interbasin
23 flow calculations is relevant to and probative of an integral factor of the issues on remand.
24 Excluding such evidence would subject a ruling on remand to likely reversal. Therefore, the
25 State Engineer should deny SNWA's attempt to inappropriately prevent the State Engineer from
26 considering such evidence.

1 **D. DR. MYERS IS QUALIFIED TO PROVIDE ALL OF THE OPINIONS**
2 **CONTAINED IN HIS EXPERT REPORT, AND HIS QUALIFICATIONS**
3 **ARE NOT APPROPRIATE FOR A MOTION IN LIMINE**

4 As discussed supra, Section II(A), the qualifications of a witness are properly addressed
5 when Dr. Myers' reports and testimony are offered as evidence during the upcoming hearing on
6 remand and are not properly addressed prior to the hearing in the context of a motion in limine.
7 See NAC 533.260. Moreover, Dr. Myers' resume and experience make clear that he is qualified
8 to provide all of the expert testimony contained in his report.

9 **1. Monitoring, Management, and Mitigation Plan Section Opinions**
10 **Related to Water Rights Quantification**

11 In the area of water rights, Dr. Myers simply lists the number of stream and spring rights
12 contained on the State Engineer's web page. This use of the State Engineer's own material and
13 numbers should not be controversial and there should be no question that a hydrologist of Dr.
14 Myers' expertise and experience is qualified to make use of and rely on it just as was done in the
15 2011 hearing on these applications. Use of the State Engineer's own water rights data to support
16 hydrologic analysis does not require water rights surveying expertise and is an appropriate use of
17 such data in analyzing the potential hydrologic effects of drawdown caused by SNWA's
18 proposed pumping. Accordingly, Dr. Myers' use of this information is properly within his
19 expertise as a hydrologist and should not be excluded.

20 **2. Analysis of Monitoring, Management, and Mitigation Plans**

21 Dr. Myers is qualified to present the expert opinions contained in the Monitoring,
22 Management, and Mitigation Plan section of his report relating to groundwater dependent
23 ecosystems, as is apparent on the face of Dr. Myers' resume. Additionally, during the upcoming
24 hearing Dr. Myers will describe in greater detail his experience as an expert on monitoring,
25 management, and mitigation, which was a component of various projects listed on his resume in
26 a way that may not make that aspect of the work apparent.

1 Dr. Myers' analysis considers that groundwater feeds groundwater dependent
2 ecosystems, and that the amount of water available depends on the depth to groundwater which
3 will be affected by SNWA's pumping. Dr. Myers has experience modeling the uptake and
4 discharge of groundwater by groundwater dependent ecosystems (GDEs), and that experience is
5 the basis of his testimony on this subject. Dr. Myers relies on GBWN/WPC 282, GBWN/WPC
6 290, and GBWN/WPC 292 to make the point that GDEs require groundwater at amounts that
7 may vary by ecosystem. Thus, this information was submitted not as evidence supporting
8 specific predictions, but rather as evidence highlighting the importance of this factor, and on
9 which Dr. Myers relied, as part of the consideration of whether SNWA's proposed 3M plans, and
10 the triggers and thresholds on which they rely, will be effective. Because SNWA's attempt to
11 exclude Dr. Myers' testimony is premature, and because Dr. Myers is qualified to provide all of
12 the testimony included in his expert report, SNWA's request to exclude this relevant, probative
13 evidence should be denied.

14 **E. NO ADDITIONAL TIME FOR A REBUTTAL CASE IS NEEDED OR**
15 **WARRANTED**

16 There is no need for additional time for a rebuttal case because all of the evidence
17 contained in Dr. Myers' reports and supporting exhibits is directly relevant to the issues
18 remanded by Judge Estes. Judge Estes' December 13, 2013, Decision put SNWA on notice that
19 the required recalculation of the amount of available water such that the project will reach
20 equilibrium in a reasonable period of time, together with the required definition of triggers and
21 thresholds such that the grant of water would not be arbitrary and capricious, necessarily requires
22 consideration of whether that recalculation coupled with a 3M plan would satisfy the statutory
23 criteria concerning availability of water, conflicts with existing rights, public interest, and
24 environmental soundness, which includes a consideration of impacts. Indeed, the purpose of
25 those two remand tasks was to ensure compliance with those provisions of the law. Without a
26 consideration of those provisions, the remand would be rendered meaningless. Thus, the
27

1 analyses and observations in Dr. Myers' reports and supporting exhibits are within the scope of,
2 and are directly relevant to factors that the State Engineer must consider in, addressing the issues
3 on remand. This is reflected in SNWA's acknowledgment before the Nevada Supreme Court
4 that such issues necessarily would be implicated on remand. Southern Nevada Water Authority,
5 *Petition for Writ of Mandamus or, in the Alternative Prohibition*, No. 65775, at 44-45, 47-50
6 (Nev. May 30, 2014). SNWA also was on notice that its redesign of the groundwater
7 development project would require a consideration of the changed impacts of the newly designed
8 project under any reasonable reading of the Remand Decision. So, there is no basis for SNWA's
9 complaint that it did not know it would have to address the issues addressed in Dr. Myers' report
10 and supporting exhibits.
11


12 SNWA's complaint that it is not guaranteed a rebuttal case, SNWA Motion in Limine, at
13 2, line 6, does not alter the inquiry on this motion. No party in these water rights applications
14 hearings has ever been given an additional block of time to present a rebuttal case for the simple
15 reason that the two-stage exchange of evidentiary submissions prior to the hearings eliminates
16 any need for a separate rebuttal phase of the hearing itself, which would impose additional
17 substantial unnecessary expense and delay on the State Engineer and the parties. SNWA has
18 been provided with ample opportunity to review and submit rebuttal evidence and to prepare to
19 further rebut Protestants' evidence on cross-examination, for which the schedule already
20 provides an adequate opportunity. The fact that the staged exchange of rebuttal evidence
21 provided SNWA with sufficient opportunity to respond to any evidence that SNWA did not
22 anticipate is borne out by the fact that all ten of SNWA's witnesses are listed as having provided
23 rebuttal to Dr. Myers' report in the August 11, 2017, rebuttal exchange. *See* SNWA, Summaries
24 of Rebuttal Witnesses' Testimony Submitted by the Southern Nevada Water Authority for the
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26
27

1 Hearing Scheduled to Begin on September 25, 2017 (August 10, 2017). Thus, SNWA does not
2 have any genuine for additional time to present a separate rebuttal case, and the State Engineer
3 should deny that request, as well.

4 **III. CONCLUSION**

5 For the reasons set forth above, the White Pine County, GBWN, et al. respectfully
6 request that the State Engineer deny SNWA's *Motion in Limine to Exclude Exhibits*
7 *GBWN/WPC 281, GBWN/WPC 282, GBWN/WPC 290, GBWN/WPC 292, or Parts Thereof, and*
8 *Related Testimony.*

9 Dated: August 28, 2017.

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11 

12
13 _____
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22 *Attorney for Protestants White Pine County, GBWN, et al.*
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of WHITE PINE COUNTY, GREAT BASIN WATER NETWORK, ET AL.'S RESPONSE TO SNWA MOTION IN LIMINE TO EXCLUDE EXHIBITS GBWN/WPC 281, GBWN/WPC 282, GBWN/WPC 290, GBWN/WPC 292, OR PARTS THEREOF, AND RELATED TESTIMONY to be served on the following counsel of record via email on the 28th day of August, 2017.

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