Case No.: CV1204049 (and consolidated cases)

Dept. No.: 1

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WHITE PINE

WHITE PINE COUNTY and CONSOLIDATED CASES, et al.,

Petitioner,

vs.

TIM WILSON, P.E., Nevada State Engineer, STATE OF NEVADA, DIVISION OF WATER RESOURCES,

Respondent.

SOUTHERN NEVADA WATER AUTHORITY'S OPENING BRIEF

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Petitioner SOUTHERN NEVADA WATER AUTHORITY, a political subdivision of the State of Nevada (hereinafter "SNWA"), by and through its counsel, PAUL G. TAGGART, EVAN J. CHAMPA, and TIMOTHY D. O'CONNOR, of the law firm of TAGGART & TAGGART, LTD., and STEVEN C. ANDERSON, of SNWA, hereby files its opening brief. This opening brief is based on all papers and pleadings that are on file with this Court relating to this matter.

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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STATEMENT OF THE CASE

This petition for judicial review arises from State Engineer Ruling 6446, which was issued following this Court's December 10, 2013, decision regarding State Engineer Rulings 6164-6167 on the same water rights applications ("Remand Order").[1] This Court upheld many of the State Engineer's findings and conclusions from Rulings 6164-6167. The Remand Order, however, identified four issues where the State Engineer erred. Pursuant to the Remand Order, the State Engineer scheduled and held a hearing in September 2017, to obtain evidence related to this Court's remand instructions. After the hearing, the State Engineer issued Ruling 6446, which completely denied SNWA's applications in Spring Valley (the "Spring Valley Applications") and in Delamar, Dry and Cave valleys (the "DDC Applications"). All parties sought judicial review of various aspects of Ruling 6446.

The State Engineer made three mistakes in Ruling 6446 that require reversal. First, the State Engineer refused to consider competent evidence of whether Spring Valley can reach equilibrium in a reasonable time. Every expert agreed the project will have far more than 15 wells, this Court's analysis in the Remand Order was based on an 81-well scenario, and limiting the analysis in this way leads to absurd results and an unworkable rule. This led him to deny the Spring Valley Applications erroneously. Second, the State Engineer improperly concluded that this Court *presumed* a conflict exists between the DDC Applications and existing rights. The State Engineer then found SNWA failed to present new evidence to rebut that presumption and erroneously denied the DDC Applications. The fact was that SNWA demonstrated no conflicts, and that was not disturbed. Third, the State Engineer did not adequately review the triggers and thresholds included in the Spring Valley 3M Plan and wrongly concluded the plan would allow unreasonable adverse effects to occur to the Swamp Cedars – vegetation considered sacred by Native Americans – in Spring Valley. This, too, was in error, as the 3M Plan provides adequate protections.

Explicit in the State Engineer's decision, however, was his opinion that this Court's remand instructions conflict with Nevada law, and should be reconsidered. In fact, the State Engineer wrote

[1] After the Remand Order was issued, appeals were filed in the Supreme Court, but that Court did not review the propriety of this Court's Remand Order because it determined that the Remand Order was not a final order for purposes of appeal. Accordingly, SNWA has not waived its right to challenge the propriety of the Remand Order by appeal.

Ruling 6446 with the extraordinary, if not unprecedented, intent to appeal it.[2] In the State Engineer's view, this Court's remand instructions were contrary to Nevada's water law and left him no choice but to completely deny the SNWA Applications, even though substantial amounts of unappropriated water remain in the basins where the applications were filed, and even though SNWA is entitled to the water under the law as it has been applied until now. Ruling 6446 was manifestly written not to abide by this Court's Remand Order, but rather to maximize the State Engineer's chances of eviscerating it. Unfortunately, in the apparent effort to tee up successful appeal issues, the State Engineer construed the Remand Order in ways that could only lead to absurd results, and has now put at risk a project that is terribly important to Nevada's long-term well-being. Ruling 6446 should be reversed, and the relief requested herein, granted.

BACKGROUND

I. This Court's Remand Order

In the Remand Order, this Court found, "[a]fter an in-depth review of the record this Court will not disturb the findings of the Engineer save those findings that are the subject of this [Remand] Order."[3] The Remand Order then contained four remand instructions. Otherwise, this Court upheld the findings of fact and conclusions of law that were made by the State Engineer when he granted the SNWA Applications in Rulings 6164-67. This Court's four remand instructions were as follows:

> 1. The addition of Millard and Juab counties, Utah in the mitigation plan so far as water basins in Utah are affected by pumping of water from Spring Valley Basin, Nevada;
>
> 2. A recalculation of water available for appropriation from Spring Valley assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time;
>
> 3. Define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious in Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley; and

[2] *See* Press Release, Department of Conservation and Natural Resources Division of Water Resources, *Nevada Division of Water Resources issues ruling regarding water rights applications for Southern Nevada Water Authority's pipeline project*, (August 17, 2018), http://dcnr.nv.gov/uploads/press_releases/SNWA_Ruling_August_17_2018_Final.pdf (under NRS 52.135, the Press Release is an Official Publication of the Nevada Division of Water Resources, and "documents obtained from administrative agencies are subject to judicial notice as public records." *Tsagris v. Washington Mut. Bank, FA*, 2013 WL 212612 (2013) (citing *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994)).

[3] ROA 039073.

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4. Recalculate the appropriations from Cave Valley, Dry Lake and Delamar Valley to avoid over appropriation or conflicts with down-gradient, existing water rights.4

SNWA's opening brief addresses remand instructions 2, 3, and 4.

II. Hearing on Remand and Ruling 6446

The remand hearing was held between September 25, 2017, and October 6, 2017.[5] The parties then submitted closing briefs and proposed rulings.[6] On August 17, 2018, the State Engineer issued Ruling 6446.[7]

With respect to this Court's second remand instruction, all hydrogeology experts agreed that significant amounts of unappropriated water exist in Spring Valley.[8] Those experts also agreed that SNWA's project, at full build-out, would have far more than just the initial 15 wells, [9] and that SNWA had demonstrated the effective capture of all groundwater evapotranspiration ("ET"). Nonetheless, the State Engineer refused to consider SNWA's evidence related to the second remand instruction.[10] The State Engineer's refusal was premised on the fact that this evidence included analysis of the SNWA project at full build-out, while he believed he could only review the initial 15 wells identified in the Spring Valley Applications.[11]

With respect to this Court's third remand instruction, the State Engineer found for the most part that the 3M plans contain objective triggers and thresholds that satisfy this Court's remand instruction.[12] However, the State Engineer denied two of the Spring Valley Applications based solely on speculation about impacts to a specific location of trees (referred to as Swamp Cedars) in a terrestrial woodland area.[13] In doing so, the State Engineer misinterpreted key aspects of the Spring Valley 3M plan.

Finally, with respect to this Court's fourth remand instruction, the State Engineer found SNWA's expert credible and reliable.[14] Specifically, the State Engineer found that SNWA's water rights expert

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[4] ROA 039073.
[5] ROA 038945.
[6] ROA 040211-621.
[7] ROA 039048.
[8] ROA 055053:9-15 (Mayo), 055712:13-15 (Myers).
[9] ROA 054792:9-21 (Burns), 055068:2-8 (Jones), 055765:1-5 (Myers), 039062.
[10] ROA 038951-52.
[11] ROA 038951-52.
[12] ROA 039042-43.
[13] ROA 039042.
[14] ROA 038971.

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used proper methods and reached reasonably accurate results.[15] Those results demonstrated the same water was not awarded twice in the White River Flow System ("WRFS"), even with the issuance of the DDC Applications. The State Engineer, however, went beyond the scope of the fourth remand instruction and required more than just a showing that water would not be appropriated twice. Instead, the State Engineer determined that this Court *presumed* a conflict will exist, and that SNWA did not present evidence to rebut that presumption.[16]

For these reasons, the State Engineer denied SNWA's Spring Valley and DDC Applications. This appeal followed.

STANDARD OF REVIEW

A party aggrieved by an order or decision of the State Engineer is entitled to have the same reviewed in the nature of an appeal.[17] The State Engineer's order or decision must include "findings in sufficient detail to permit judicial review"[18] and "must clearly resolve all the crucial issues presented" to him.[19] With regard to factual findings, this Court must determine whether substantial evidence exists in the record to support the State Engineer's decision.[20] A reviewing court must consider whether an agency's decision was based on a consideration of the relevant factors and "whether there has been a clear error of judgment."[21] This Court must also determine if the State Engineer's decision was arbitrary, capricious, or an abuse of discretion, or if it was otherwise affected by prejudicial legal error.[22]

A reviewing court is also required to "decide pure legal questions without deference to an agency determination."[23] When interpreting a statute, if the statutory language is "facially clear," this Court must give that language its plain meaning.[24] A statute must also be construed in a manner that gives meaning to all of its parts and language.[25] Accordingly, a court should read each sentence, phrase, and

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[15] ROA 038972.
[16] ROA 038974-75.
[17] NRS 533.450(1).
[18] *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 265 (1979).
[19] *Revert*, 95 Nev. at 787, 603 P.2d at 264-265.
[20] *Revert*, 95 Nev. at 787, 603 P.2d at 264-265; *Off. of State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991).
[21] *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 894, 59 P.3d 1212, 1216 (2002).
[22] *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996) (citing *Jim L. Shetakis Distrib. Co. v. State, Dep't of Tax'n*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992)).
[23] *Felton v. Douglas County*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d 991, 994 (2018).
[24] *D.R. Horton, Inc. v. Eighth Jud. Dist. Court*, 125 Nev. 449, 456, 215 P.3d 697, 702 (2009).
[25] *V & S Ry. LLC v. White Pine County*, 125 Nev. 233, 239, 211 P.3d 879, 882 (2009) (internal citations omitted).

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word in such a way as to render it meaningful within the context and purpose of the legislation.[26] Even a reasonable agency interpretation of an ambiguous statute may be stricken by a court if the agency's interpretation conflicts with legislative intent.[27] "Whenever possible, [the court will] interpret statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result."[28]

"Upon remand, the lower [tribunal] can only take such actions as conform to the judgment of the appellate tribunal.[29] A lower tribunal "has a duty to follow [the] court's instructions as to how the case is to proceed."[30] The tribunal must implement both "the letter and the spirit of the mandate, taking into account the [court's] opinion and the circumstances it embraces."[31] A court may reverse when an agency, on remand, "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence."[32] A lower tribunal "has no authority to deviate from the mandate issued by [a court]. Proceedings contrary to the mandate are null and void, and failure to conform to the ruling justifies a new review."[33] "The [Court] may enforce compliance with its mandate which the [lower tribunal] has failed to obey, or has misconstrued."[34] A "[f]ailure to follow [a] court's instructions on remand is grounds for the case to be remanded for compliance with [those] instructions."[35] Also, when "the resulting administrative decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion," a district court should not hesitate to intervene.[36]

SUMMARY OF THE ARGUMENT

All parties, the State Engineer, and this Court have acknowledged that Spring Valley has a vast amount of unappropriated water. Nevada's water law, found within NRS Chapters 533 and 534 and associated case law, is not in dispute either. For more than a century, those who were first in time to use water beneficially or, after the permitting system was put in place, apply for a permit to do so, were

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[26] *V & S Ry. LLC*, 125 Nev. at 239, 211 P.3d at 882 (internal citations omitted).
[27] *State, Div. of Ins. v. State Farm Mut. Auto. Ins.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000).
[28] *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010) (internal citations omitted).
[29] *Wickliffe v. Sunrise Hosp. Inc.*, 104 Nev. 777, 780, 766 P.2d 1322, 1324 (1988).
[30] *United States v. Montgomery*, 462 F.3d 1067, 1072 (9th Cir. 2006).
[31] *Montgomery*, 462 F.3d at 1072 (citing *Vizcaino v. U.S. Dist. Court for the W. Dist. of Wash.*, 173 F.3d 713, 719 (9th Cir. 1999)).
[32] *County of Los Angeles v. Leavitt*, 521 F.3d 1073, 1078 (9th Cir. 2008).
[33] *Wickliffe*, 104 Nev. at 781, 766 P.2d at 1325.
[34] *Wickliffe*, 104 Nev. at 781-782, 766 P.2d at 1325.
[35] *Montgomery*, 462 F.3d at 1072.
[36] *Revert*, 95 Nev. at 787, 603 P.2d at 265.

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entitled to make use of the water. SNWA was first to apply for the water at issue in Spring Valley, had valid reasons to do so, and is entitled to make use of it under the doctrine of prior appropriation. Under those circumstances, any construction of the Remand Order that causes a wholesale denial of every one of the Spring Valley Applications is unreasonable, contrary to law, and must be rejected.

The State Engineer granted the Spring Valley Applications on two prior occasions – in 2007 and 2012 – each time finding that large amounts of water are available for appropriation.[37] In the Remand Order, this Court agreed that a substantial amount of water is available for appropriation in Spring Valley, while noting that the question of reaching equilibrium "is not a valid reason to deny the grant of water, but it may very well be a reason to limit the appropriation."[38] Nevertheless, in Ruling 6446, the State Engineer denied each of the Spring Valley Applications despite his conclusion that SNWA "demonstrated that a conceptual plan could be developed to capture ET within a reasonable time."[39] The State Engineer in his Ruling did not take actions that conformed with the judgment of this Court, and therefore acted arbitrarily and capriciously.[40] Because this Court expressly ordered a recalculation of the water to award for the Spring Valley Applications, not a complete denial, Ruling 6446 should be reversed.

While the Protestants' goal on remand was to secure complete denial of the project, and the State Engineer interpreted the Remand Order in ways that would maximize his chance to have it overturned on appeal, SNWA complied with this Court's Remand Order and satisfied this Court's concerns. SNWA provided new evidence showing that if the applications were approved, the basin will have "some prospect of reaching equilibrium" in a reasonable period of time.[41] The State Engineer, however, wrongly refused to consider SNWA's equilibrium evidence based on an erroneous interpretation of Nevada law and an unreasonable application of the Remand Order. These decisions led to the State Engineer's non-sensical conclusion that SNWA could not appropriate *any* amount of water in a basin where he has simultaneously concluded there is at least 60,000 acre-feet available for appropriation.[42]

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[37] ROA 038940.
[38] ROA 039061.
[39] ROA 038949.
[40] *Wickliffe*, 104 Nev. at 780, 766 P.2d at 1324.
[41] ROA 039063:5.
[42] *See* ROA 038955.

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The State Engineer's decision led to not only a failure to conform to the remand ruling, resulting in a ruling that must be overturned,[43] but also caused an absurd outcome which is contrary to the legislative intent of maximum beneficial use of water.[44]

This Court also expressed a concern about conflicts with existing water rights in the WRFS caused by awarding the same water to two different applicants. On remand, all parties agreed that the record from the prior hearing contained sufficient evidence regarding hydrologic conflicts.[45] Regarding this Court's double-appropriation concern, the State Engineer found in Ruling 6446 that "the methods used by [SNWA] to calculate committed groundwater resources were reasonably accurate" and supported the conclusion that "sufficient water was available in the [WRFS] to fulfill all groundwater commitments."[46] This resolved this Court's question and should have ended the matter. However, the State Engineer nevertheless denied the DDC Applications in full based on a manipulation of the Remand Order into something it was not – a request for further conflicts/interference analysis together with a presumption of conflict caused by the DDC Applications rather than a confirmation that the same water was not appropriated more than once. The State Engineer went beyond "tak[ing] such actions as conform the judgment" of this Court, and therefore, Ruling 6446 should be overturned.[47]

In Ruling 6446, the State Engineer also verified that SNWA's 3M Plan satisfied the remand instructions and would be effective in protecting existing rights and environmental resources.[48] However, the State Engineer speculated that there might be unreasonable impacts within the Swamp Cedar Area of Critical Environmental Concern ("ACEC").[49] The State Engineer relied on a purely hypothetical scenario that is not scientifically reasonable and does not take the entire 3M Plan into account. In reality, the revised 3M Plan is fully responsive to the Remand Order. The 3M Plan is more comprehensive than before, will better protect resources, and leaves ample room for protecting the ACEC when considered in a holistic, rather than piecemeal, manner.

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[43] *Wickliffe*, 104 Nev. at 781, 766 P.2d at 1325.
[44] *State Farm Mut. Auto. Ins.*, 116 Nev. at 293, 995 P.2d at 485.
[45] ROA 056082-84, 056100.
[46] ROA 038971-72.
[47] *Wickliffe*, 104 Nev. at 781, 766 P.2d at 1325.
[48] ROA 039044.
[49] ROA 039042.

The State Engineer's misreading and misapplication of this Court's remand instructions effectively killed decades worth of SNWA efforts because the State Engineer desired to prove a point. The State Engineer explained when he issued Ruling 6446 that he "intend[ed] to appeal two of the District Court's mandated instructions" because the "methodology required by this Court sets a precedent inconsistent with the long-standing application of Nevada water law."[50] This motivation led to prejudicial error and resulted in the issuance of a ruling that disregarded key evidence, is not scientifically sound, and does not comply with the "letter and spirit of the mandate, taking into account the [Court]'s opinion and the circumstances it embraces."[51]

For these reasons, Ruling 6446 must be reversed and, since SNWA fully complied with this Court's remand instructions, Rulings 6164-6167 should be upheld.

ARGUMENT

I. The State Engineer Erred in Denying SNWA's Applications.

The Remand Order announced a new rule in Nevada's water law that requires an applicant to demonstrate the possibility of capturing ET within a reasonable time. Recognizing Spring Valley had abundant water available for appropriation, this Court did not deny the Spring Valley Applications, but remanded them for a recalculation of the award based on ET capture. SNWA complied with this direction, but the State Engineer did not. The State Engineer's erroneous interpretation of the Remand Order is not entitled to deference, and should be reviewed de novo by this Court.[52] Even if the State Engineer's interpretation is deemed "reasonable" it cannot stand because it conflicts with the intent of the legislature to put available water to beneficial use.[53] Here, the State Engineer did not comply with the letter or spirit of the mandate, and therefore Ruling 6446 must be overturned on appeal.[54]

A. SNWA complied with the Remand Order regarding ET capture.

This Court's second remand instruction required, "[a] recalculation of water available for appropriation from Spring Valley assuring that the basin will reach equilibrium between discharge and

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[50] *See* Press Release at 2.
[51] *Montgomery*, 462 F.3d at 1072 (internal citations omitted).
[52] *Felton*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d at 994.
[53] *State Farm Mut. Auto. Ins.*, 116 Nev. at 293, 995 P.2d at 485.
[54] *Montgomery*, 462 F.3d at 1072 (internal citations omitted).

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recharge in a reasonable time."[55] This Court explained that "the amended award [should have] *some prospect* of reaching equilibrium."[56] This Court was clear that time to reach equilibrium "may very well be a reason to *limit* the appropriation below the calculated ET,"[57] but "is not a valid reason to *deny* the grant of water."[58] In turn, this Court directed the State Engineer to determine what quantity of water can be awarded to SNWA based on how much ET could be captured. This Court did not *deny* the applications, but remanded them for a recalculation.[59]

In the 2011 administrative hearing, the State Engineer awarded SNWA 61,127 afa in Spring Valley.[60] In reviewing the State Engineer's conclusion, this Court determined that after 200 years with the grant of 61,127 afa, "SNWA will likely capture . . . 84 [percent] of the ET."[61] The calculation of 84 percent ET capture rate was based on the BLM's Draft Environmental Impact Statement ("DEIS") model simulation of pumping from 81 wells distributed throughout Spring Valley.[62] To the extent initial proof of ET capture is required, this Court correctly approached its own question by reviewing ET capture from more than just the 15 wells listed in the applications. ET capture should consider the life of the project, not just the starting point of the project. Given the circumstances of the case, and that ET capture is a new rule, SNWA correctly proceeded during the remand hearing by following this Court's instructions on how to proceed.[63]

Notably, SNWA's original applications were not designed to target ET, as there was no Nevada precedent for doing so and the State Engineer did not consider ET capture as a factor for granting or denying applications prior to the Remand Order. All experts agreed that ET capture has never been required in Nevada, or elsewhere in the western United States.[64] Thus, no other applicant in Nevada, or

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[55] ROA 039073 (this instruction has been referred to as the "ET capture rule" or "equilibrium analysis" during the remand proceedings).
[56] ROA 039063 (emphasis added).
[57] ROA 039061 (emphasis added).
[58] ROA 039061 (emphasis added).
[59] ROA 039073.
[60] ROA 000215.
[61] ROA 039062 (on remand, evidence was introduced demonstrating that the average capture rate for pumping in groundwater basins throughout the United States is 85 percent, *see* ROA 048753, meaning SNWA's 84 percent capture value is well within the average range for groundwater development projects in the United States).
[62] SNWA's Answering Br. to CPB, p. 20, *Millard Cty., Utah, et al. v. King*, CV-1204048 (Seventh Jud. Dist. Ct. Nev. Apr. 12, 2013); *see also* ROA 026216, 054667:2-4 (Burns) (discussing DEIS points of diversion).
[63] *Montgomery*, 462 F.3d at 1072.
[64] *See* ROA 05508-11 (Jones).

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throughout the West, has been asked to do what the Remand Order required of SNWA. Rather than targeting ET with its well locations, SNWA initially targeted fault structures found near the base of mountains that are high-yielding for water development. This approach is common for water development.

In comparison to SNWA's project, the San Luis Project, located in Southern Colorado, is an example of a project that was designed to capture ET. The San Luis project consisted of 170 wells located within the ET area of the basin, drilled to shallow depths to better capture total, not just groundwater, ET.[65] Both SNWA and CPB experts considered the San Luis project to be "a total disaster."[66] An additional factor that weighs against ET capture is Nevada's basin geography. CPB's expert noted that because Spring Valley is a long and narrow basin, full capture of groundwater used by plants, while possible, may be impractical.[67]

Plainly, this Court's requirement to calculate captured ET prior to granting an application for groundwater is a new rule. SNWA attempted to comply with that rule as best as possible, understanding this Court's goals and "the spirit of the mandate."[68] Because of this Court's new rule, SNWA presented new evidence of its ability to capture ET.[69] The State Engineer found in Ruling 6446 that SNWA's "conceptual plan could be developed to capture ET within a reasonable time."[70] The evidence demonstrated that SNWA could achieve 96 percent ET capture after 75 years, and 98 percent ET capture after 200 years, which the experts agreed was, effectively, equilibrium.[71] This evidence was not contested and was directly responsive to this Court's remand instruction. Despite SNWA's efforts, the State Engineer "entirely failed to consider an important aspect of the problem"[72] and determined that he would not consider SNWA's ET capture evidence in his ultimate opinion. The State Engineer's decision must be overturned as it failed to adequately follow the Remand Order.

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[65] ROA 048543.
[66] ROA 054976:23 (Mayo).
[67] ROA 054939:6-11 (Jones).
[68] *Montgomery*, 462 F.3d at 1072 (internal citations omitted).
[69] ROA 048537-46.
[70] ROA 038949.
[71] ROA 040812.
[72] *County of Los Angeles*, 521 F.3d at 1078.

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B. The State Engineer's decision to consider only 15 points of diversion for determining ET Capture was arbitrary and capricious.

In the Remand Order, this Court noted that the question of reaching equilibrium "is not a valid reason to deny the grant of water, but it may very well be a reason to limit the appropriation."[73] Given this clear order, the State Engineer should have simply recalculated the award based on SNWA's ET capture evidence because he "ha[d] a duty to follow [the] court's instructions as to how the case is to proceed."[74] In spite of the Remand Order, the State Engineer deviated from the mandate, and therefore acted arbitrarily and capriciously.[75] The State Engineer relied on his interpretation of a single Nevada statute to conclude he could not look beyond the 15 points of diversion listed on the applications when determining the extent of ET capture.[76] This Court should not award any deference to this interpretation, as it is a question of law.[77] The State Engineer's needlessly narrow scope of review did not conform to the Remand Order, and was therefore arbitrary and capricious for several reasons.

The State Engineer's claim that he is restricted to considering only the points of diversion on the applications is only appropriate for a hydrologic conflicts analysis, not an analysis of long-term water availability. To properly analyze hydrologic conflicts, well locations are necessary because conflicts can change depending on the wells' location. Indeed, in Ruling 6446, the State Engineer's rationale for limiting his review to only the 15 wells listed on the applications relied on a case involving a hydrologic conflicts analysis, and not the question of water available for appropriation.[78] In contrast, the ET capture analysis relates to the determination of whether water is available for appropriation. The new ET capture rule must be considered as a long-term measurement because it will take decades (if not centuries) to achieve. During the intervening time, a pumping project will undoubtedly evolve. Therefore, ET capture cannot be fairly assessed by looking at the contents of initial applications.

The 15 well limitation is erroneous and unrealistic because in 200 years, the time this Court used to evaluate ET capture in the Remand Order, there will be far more wells than the 15 currently identified

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[73] ROA 039061:8-9.
[74] *Montgomery*, 462 F.3d at 1072.
[75] *Wickliffe*, 104 Nev. at 781, 766 P.2d at 1325.
[76] ROA 038949-52.
[77] *Felton*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d at 994.
[78] ROA 038951.

in the Spring Valley Applications. All protestants recognized this fact.[79] The State Engineer recognized that the original 15 points of diversion were not the full extent of the SNWA project "at full build-out."[80] Even this Court's review, indicating 84 percent ET capture, included wells beyond the initial 15 wells included in the applications.[81] Furthermore, no due process issues are implicated if future well locations are considered in the ET capture analysis because SNWA "would still be required to file any change applications, giving [protestants] notice and affording interested parties the opportunity to protest."[82] Analysis of only the immediate points of diversion is simply not the best way to address this Court's question when the reality would be much different. Therefore, the State Engineer committed reversible error by interpreting the Remand Order to limit him to reviewing only 15 points of diversion because he did not consider "the letter and the spirit of the mandate," [83] and he "entirely failed to consider an important aspect of the problem" – i.e., ET capture at full build-out. [84]

Next, the State Engineer incorrectly claimed that NRS 533.335 prevented him from considering anything other than the 15 applications before him.[85] However, NRS 533.370 governs the granting of applications, not NRS 533.335. Under NRS 533.370, the State Engineer is required to consider whether water is available for appropriation from the proposed source of supply.[86] The plain language of the statute demonstrates that the State Engineer is empowered to look beyond the four corners of the application when determining whether to grant an application.[87] The State Engineer's review often requires the review of evidence not contained in an application – namely the amount of discharge that can *ultimately* be salvaged for beneficial use through the life of the project.[88] The State Engineer has ample authority to consider the life of the project and the long-term effects and outcomes of a project – well beyond the face of the applications.[89]

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[79] ROA 054792:9-21 (Burns), 055068:2-8 (Jones), 055765:1-5 (Myers), 039062.
[80] ROA 000129-30.
[81] ROA 039062:25-28.
[82] ROA 038952.
[83] *Montgomery*, 462 F.3d at 1072 (internal citations omitted).
[84] *County of Los Angeles*, 521 F.3d at 1078.
[85] ROA 038949-50.
[86] NRS 533.370(2).
[87] *See D.R. Horton, Inc.*, 125 Nev. at 456, 215 P.3d at 702.
[88] ROA 039060, 039062.
[89] *See* NRS 533.370.

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Similarly, the State Engineer is required to consider a project's environmental soundness. This consideration is not limited to the sparse information on the application or the application's well locations, but requires an assessment of the anticipated impacts over a project's full operational period. The interbasin transfer factors, which are particularly applicable in the present litigation, also allow for consideration of "any other factor the State Engineer determines to be relevant," which would include the ET capture at full build-out.[90] Thus, NRS 533.370 grants the State Engineer specific authority to consider documents and models beyond what is contained in an application because the State Engineer is required to consider the effects of the project as a whole, and not just the project as it appears on paper.

ET capture calculations are much more akin to the long-term considerations outlined in NRS 533.370, because the extent of ET capture will not be realized for decades after the project is running. Thus, the State Engineer should have considered the long-term ET capture evidence as requested in the Remand Order. The State Engineer's deviation from this Court's mandate to recalculate – not deny – the award of water based on SNWA's ability to capture ET was arbitrary and should be reversed by this Court.[91]

Lastly, pursuant to NRS 533.3705, which addresses staged development, the State Engineer has already considered factors outside the limited information contained in the Spring Valley Applications, which demonstrates his ability to do so regarding the ET capture question. SNWA proposed the project be built through staged development. State Engineer Ruling 6164, and the State Engineer's approval of the 3M Plans in Ruling 6446, relied on the staged development and the considerations in NRS 533.3705.[92] The State Engineer recognized that the 15 points of diversion listed on the applications would not be the full build-out of the project. Rather, the 15 points of diversion would only be part of the first step of the project, diverting approximately 38,000 acre-feet.[93] While SNWA has indicated that it intends to use the 15 wells in the initial applications for stage one pumping, aquifer response data and other information will determine the ultimate project design. The remaining award will only be developed after additional wells are distributed in the basin. Because the State Engineer has authority pursuant to NRS 533.3705 to review staged development factors, such as staged build-out of the project

[90] NRS 533.370(3)(e).
[91] *Wickliffe*, 104 Nev. at 781, 766 P.2d at 1325.
[92] ROA 000119-20.
[93] ROA 000216-17.

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and the potential to add wells, the State Engineer was arbitrary and capricious when he declined to consider such evidence in Ruling 6446.

In sum, the State Engineer's decision to determine available water and ET capture rates through only the initial 15 wells was arbitrary. The reasoning behind his intentionally-narrow scope of review was erroneous. The State Engineer regularly reviews grants of water through more than just the four corners of an application. Here, however, because the State Engineer was looking to ensure this Court's rule was unworkable, he capriciously narrowed his review. The State Engineer's absurd interpretation of the Remand Order conflicts with the principal objective of the legislature in NRS Chapter 533 – that Nevada maximize the beneficial use of its limited water resources.[94] As such, the State Engineer's ruling should be overturned.

C. The State Engineer's decision to review only 15 points of diversion is not a reasonable application of this Court's rule regarding ET capture.

In the Remand Order, this Court determined the equilibrium issue based on a possible configuration of the project at full build-out, specifically using models that included more than 15 wells. This Court referenced the 81-well model relied upon in the DEIS and discussed in detail that this 81-well model demonstrated that equilibrium was not reached. This Court then instructed the State Engineer to do a "recalculation of water available for appropriation."[95] This Court never directed the recalculation to be based on only the original 15 wells. In fact, this Court's own calculations were not limited by an arbitrary decision to be bound by the initial applications for a project that, when complete decades later, will look much different. The State Engineer should have addressed the issue in the same fashion, as the State Engineer is required to implement both "the letter and the spirit of the mandate, taking into account the [court's] opinion and the circumstances it embraces."[96]

In the Remand Order, this Court found that there was insufficient evidence in the record to decide the question of how much water SNWA should be awarded, because the calculations of equilibrium were incomplete. Thus, the spirit of the mandate was clear – this Court needed to know how much ET could be captured over 200 years. This Court's inquiry into a calculation of water available for

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[94] *State Farm Mut. Auto. Ins.*, 116 Nev. at 293, 995 P.2d at 485.
[95] ROA 039073.
[96] *Montgomery*, 462 F.3d at 1072 (internal citations omitted).

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appropriation through the lens of ET capture authorized the State Engineer to review the information and return to this Court a calculation regardless of the purported lack of statutory support for an ET capture rule. The State Engineer was not asked to authorize particular points of diversion, which would be more consistent with looking at only the 15 applications. He was, rather, asked for a mathematical calculation based on potential future well placements that simulated ET capture, a process that necessarily projects decades into the future. The State Engineer was directed and required to consider evidence and take actions that conformed to the Remand Order.[97] The State Engineer acted arbitrarily by not considering that evidence during the remand proceedings.

The State Engineer recognized that the new rule, coupled with the State Engineer's view that he can only review the 15 points of diversion listed on the applications, "is manifestly unfair" to SNWA.[98] But instead of interpreting the rule to be workable, the State Engineer applied an approach that would create an unworkable rule, which is not consistent with the Remand Order's directive to *recalculate* the award. The State Engineer should have recognized that the new rule and his view of statutory construction for NRS 533.370 must work together, and therefore revise his own statutory interpretation to comply with the letter and spirit of the Remand Order.[99]

D. The only workable interpretation of this Court's remand instruction is to award a quantity of water based on projected ET capture, not only equilibrium.

Hydrologically, the equilibrium in a groundwater basin is usually monitored by considering changes in groundwater levels. For instance, groundwater management plans in California focus on monitoring groundwater levels to manage water level declines.[100] Nevada law focuses on a reasonable lowering of the water table,[101] and the State Engineer previously found that the Spring Valley Applications can be developed without an unreasonable lowering of the water table.[102] But when this

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[97] *See Wickliffe*, 104 Nev. at 780, 766 P.2d at 1324.
[98] ROA 038959.
[99] *See State Farm Mut. Auto. Ins.*, 116 Nev. at 293, 995 P.2d at 485 (a reasonable agency interpretation of a statute may be stricken by a court if the agency's interpretation conflicts with legislative intent); *see also Montgomery*, 462 F.3d at 1072 (the [lower] tribunal must implement both "the letter and spirit of the mandate, taking into account the [court's] opinion and the circumstances it embraces").
[100] Cal. Assemb. 1739, 2013-2014 Reg. Sess. 0347 (Sept. 16, 2014); Cal. Sen. 1168, 2013-2014, Reg. Sess. 0346 (Sept. 16, 2014); Cal. Sen. 1319, 2013-2014, Reg. Sess. 0348 (Sept. 16, 2014).
[101] NRS 534.110(4).
[102] ROA 000132-34, 000151.

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Court described equilibrium in the Remand Order, it focused on ET capture and not water levels.[103] This Court cited the State Engineer's definition of perennial yield, holding "[p]erennial yield is ultimately limited to the maximum amount of natural discharge that can be salvaged for beneficial use."[104] Therefore, in its evidence submittal, SNWA also focused on a projection of the quantity of ET capture that can ultimately be awarded in the Spring Valley Applications.

The critical facts that should have controlled the State Engineer's interpretation of this remand instruction are that significant amounts of unused groundwater are undisputedly available in Spring Valley, and evidence projected that development of the water in Spring Valley will capture nearly all groundwater ET. The fact that Spring Valley has a substantial amount of water available for appropriation is not in doubt. SNWA, the experts, the State Engineer, and even this Court have acknowledged Spring Valley has over 60,000 acre-feet of unappropriated water.[105] That is why this Court ultimately remanded the matter to the State Engineer for an "amended award" that "has some prospect of reaching equilibrium in the reservoir."[106] Even in *denying* SNWA's applications on remand, the State Engineer stated, "[i]t is undisputed that there is . . . over 60,000 acre-feet [of water] uncommitted" in Spring Valley.[107] Therefore, any interpretation of this Court's Remand Order that yields no award of water for the Spring Valley Applications is absurd in light of the "spirit of the [Court's] mandate."[108]

CPB's experts proved why this Court's remand instruction is unworkable if too much focus is placed on a solving a mathematical equation for equilibrium. CPB ran a series of model simulations based on the initial 15-well configuration with fractional levels of project pumping.[109] CPB's experts concluded that "no matter how much the pumping is reduced, none of the fractional pumping scenarios reach equilibrium."[110] CPB's experts thus concluded that "changing the pumping rate has little impact

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[103] *See* ROA 039061:10-20.
[104] ROA 039062:7-8.
[105] *See, e.g.*, ROA 039060, where the Court upheld the State Engineer's prior finding that 84,000 acre-feet of water is available for appropriation and 61,127 acre-feet is not committed to existing rights in Spring Valley.
[106] ROA 039063:4-5.
[107] ROA 038956.
[108] *Montgomery*, 462 F.3d at 1072 (internal citations omitted).
[109] ROA 053285-86.
[110] ROA 053286.

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on the outcome."[111] The protestants' expert witnesses explained that equilibrium may never occur, regardless of the amount of water granted to SNWA.[112]

The evidence was neither novel nor unexpected because the ET capture curve is asymptotic – meaning the proportion of ET capture increases over time and can exceed 90 percent or even 95 percent under the right circumstances and given enough time, but will never actually hit 100 percent (mathematical equilibrium). Because this remains the case regardless of whether water levels in the system have fully stabilized – "real world" equilibrium – the Remand Order cannot be construed as requiring mathematical equilibrium without also reaching the conclusion that water rights can never be granted.

Further, in the Remand Hearing, SNWA demonstrated that an award of 61,127 acre-feet in Spring Valley can be developed to capture between 96 percent and 98 percent of ET in 75 and 200 years, respectfully.[113] All witnesses agreed that 96 to 98 percent ET capture is essentially equilibrium. And, as noted by this Court, the State Engineer and CPB, "water lost to natural [groundwater] ET can be captured by wells and placed to beneficial use."[114] Thus, "in the spirit of the [Court's] mandate," the State Engineer should have focused on ET capture and awarded 61,127 acre-feet for the Spring Valley Applications.

Nonetheless, the State Engineer concluded in Ruling 6446 that he could not award any water to SNWA because this Court's *equilibrium* rule was unworkable and "upsets the established state policy for appropriating groundwater."[115] The State Engineer's decision to award SNWA zero water is a far cry from this Court's intent to "recalculate the award" and this Court's finding that "[t]he time to reach equilibrium is not a valid reason to deny the grant of water."[116] No such interpretation should stand. The State Engineer's finding that over 60,000 afa of water is available, coupled with the outcome of SNWA being granted no water because of the narrow interpretation of the Remand Order, demonstrated

[111] ROA 053286.
[112] ROA 54947:20-48:14 (Jones), 053286.
[113] ROA 040812.
[114] ROA 039062:9-10; CPB Opening Brief, App. 1 at 27; State Engineer's Ruling 5726.
[115] ROA 038956.
[116] ROA 039061:7-9.

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a "clear error of judgment."[117] The State Engineer's approach results in an absurd outcome, and therefore should be overturned.[118]

II. The State Engineer Erred by Denying the DDC Applications.

This Court's fourth remand instruction required the State Engineer to "[r]ecalculate the appropriations from Cave Valley, Dry Lake and Delamar Valley to avoid over appropriation or conflicts with down-gradient, existing water rights."[119]

A. The purpose of the remand instruction regarding the DDC basins was to avoid a *per se* conflict that would occur if the same water were awarded twice.

The DDC basins are groundwater basins in the WRFS.[120] Recalculation was needed to address the contention that, after accounting for the water awarded to SNWA in Rulings 6165, 6166, and 6167, insufficient water may remain in the down-gradient basins in the WRFS to fulfill existing water rights.[121] Specifically, this Court's concern was whether "the same water has been awarded twice, once in the upper basins, and again in the lower basins."[122] This Court concluded that if the same water was appropriated twice, that would constitute a *per se* conflict.[123] The recalculation did not require new hydrologic analysis.

The State Engineer's traditional practice under existing water law is to calculate the groundwater resources available in an individual hydrographic basin and make appropriations based upon that analysis.[124] The State Engineer has historically addressed the concern for double-appropriation in hydrologically connected basins by assigning each basin in a flow system a separate perennial yield.[125] The perennial yield of each basin is adjusted to account for water reserved to accommodate the perennial yield of other basins in the system.[126] Once these system-wide considerations are accounted for, the

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[117] *City of Reno*, 118 Nev. at 894, 59 P.3d at 1216.
[118] *See Great Basin Water Network*, 126 Nev. at 196, 234 P.3d at 918.
[119] ROA 039073.
[120] ROA 000265, 041734-35 (citing Eakin Report 1966).
[121] ROA 039068-69.
[122] ROA 039069.
[123] The Court was also concerned with what the State Engineer termed "paper water rights." The State Engineer used this term to describe pending applications that were waiting for action. The State Engineer called them "paper water rights" because no action had been taken on the applications and this not water had been committed or awarded. The issue of "paper water rights" is now moot as the State Engineer denied these pending applications in 2014 under Rulings 6254 through 6258.
[124] ROA 000265-66.
[125] ROA 000265-66.
[126] ROA 000266, 042747, 042753.

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State Engineer then applies a basin-by-basin approach, determining water available for appropriation based on the established perennial yield of each individual basin.[127]

The 2011 rulings followed this standard procedure.[128] The State Engineer first accounted for the total WRFS system yield, then determined what share of the total should be allocated for appropriation in each separate WRFS basin.[129] The State Engineer then conducted his standard accounting of the water available for appropriation in the DDC basins based on their share of the WRFS system yield.[130] This analysis, as incorporated into the rulings, showed there was sufficient water available in each of the DDC basins to supply SNWA the permitted volumes without creating the risk of double-appropriations.

However, as this Court concluded, the 2011 rulings did not include a detailed accounting of all existing rights for the WRFS basins.[131] The 2011 rulings were remanded with instructions to complete that accounting.[132] Specifically, this Court was concerned that "the same water has been awarded twice, once in the upper basins, and again in the lower basins."[133] Importantly, this Court did not reverse the appropriations or order that the applications be denied. Instead, this Court ordered a recalculation of the available water to avoid a potential "double-appropriation."[134]

This Court's remand for a new accounting was based on GBWN's argument that the water awarded in DDC had already been previously appropriated in down-gradient WRFS basins.[135] GBWN claimed the 2011 groundwater accounting should not have been limited to the DDC basins.[136] GBWN argued that down-gradient basins in the WRFS might be over-appropriated, and additional water may need to be set aside in the upgradient DDC basins so the same water is not awarded twice.[137] GBWN also claimed that since some down-gradient surface water rights (springs and spring fed streams) may

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[127] ROA 042747.
[128] ROA 000263-98, 000433-67, 000597-631.
[129] ROA 000263-98, 000433-67, 000597-631.
[130] ROA 000299, 000467, 000631.
[131] ROA 039069-70.
[132] ROA 039073.
[133] ROA 039069:19-23.
[134] ROA 039070:14-19.
[135] ROA 055493:3-15, 055601:19-02:7 (Myers), 048814.
[136] ROA 048888-89.
[137] *See* Pet'rs White Pine Cty., et al., Opening Br. at 15, 62, 105, Jan. 31, 2013.

be supplied from groundwater sources, the existing spring and stream rights should be included in the accounting.

In the Remand Order, this Court did not question the groundwater flow determinations, water budgets, perennial yields, recharge calculations, or the hydrologic conflicts analysis that was in the 2011 rulings. SNWA had previously established in 2011 that the appropriations granted in the individual DDC basin did not hydrologically conflict with any senior water rights in the WRFS, either surface or underground. This Court upheld these determinations, and only remanded to the State Engineer for an accounting of what was not addressed in the 2011 rulings. This Court did not order that a new hydrologic study be performed. All this Court requested was that the prior accounting be expanded to include the full WRFS. SNWA properly addressed this concern.[138]

B. SNWA complied with the Remand Order.

During the 2016 Status Conference before the State Engineer, all parties agreed that the 2011 record contained sufficient evidence relating to the conflicts analysis in DDC.[139] GBWN felt that no additional hearing was necessary to comply with the remand instruction.[140] SNWA argued for a hearing only to recalculate the total appropriations in the entire flow system, since that evidence was not on the record.[141] Ultimately the State Engineer agreed with SNWA that a hearing was necessary, and set a hearing date to address the new issues in the Remand Order.[142]

On remand, SNWA provided the accounting that this Court and GBWN found lacking in Rulings 6165-67. This accounting showed that the sum of WRFS water rights did not exceed the established annual recharge for the WRFS basins. GBWN cross-examined SNWA's experts and offered rebuttal evidence listing additional water rights they contended should have been considered in the accounting. Based on the evidence submitted by GBWN, SNWA revised its accounting and included certain water rights identified by GBWN's expert. The State Engineer accepted and adopted the revised calculations.[143]

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[138] ROA 038972.
[139] ROA 056082-84, 056100.
[140] ROA 039049-50.
[141] ROA 056100.
[142] ROA 039297-305.
[143] ROA 038972.

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Specifically, SNWA presented a report, exhibits, testimony of a professional engineer and expert in water rights, and testimony of an expert hydrologist.[144] The experts completed an accounting to confirm the same water was not awarded twice, or double-appropriated, in the WRFS.[145] The total committed rights for each WRFS basin were compared to the amount of water available for appropriation in the entire flow system.[146] GBWN did not provide a competing water rights accounting, provide a report, or elicit testimony from a water rights expert. GBWN's only witness was Dr. Tom Myers, who conceded that he was not a water rights surveyor and therefore he was not qualified to offer opinions on the quantification of water rights.[147] SNWA's expert concluded that sufficient water is available to supply SNWA's permits in the DDC basins without awarding the same water twice in the WRFS.[148]

SNWA's approach directly responded to this Court's and GBWN's concerns, which formed the basis for the remand instruction. First, SNWA proved that no basin in the WRFS is over-appropriated, and thus, no water needed to be reserved from the DDC perennial yields to make up for over-appropriations in down-gradient basins.[149] Second, SNWA proved that water was available for appropriation in the DDC basins even after accounting for surface water rights that may be hydrologically connected to the groundwater system.[150]

The State Engineer found in Ruling 6446 that "the methods used by [SNWA] to calculate committed groundwater resources were reasonably accurate" for determining that "sufficient water was available in the [WRFS] to fulfill all groundwater commitments."[151] Therefore, substantial evidence in the record demonstrates that the DDC Applications can be granted without awarding the same water twice. SNWA demonstrated during the hearing that no double-appropriation will occur if its applications are granted and GBWN provided no contradictory evidence. Therefore, SNWA met the requirements of the Remand Order, and substantial evidence established that there should be no reduction in the DDC award from the 2011 ruling, and the 2011 award should be upheld.

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[144] ROA 053610:14-25 (Stanka), 053713:13-20 (Watrus).
[145] ROA 041950, 048572.
[146] ROA 041950, 048572.
[147] ROA 036715:4-8 (Myers).
[148] ROA 041950, 053662:4-6 (Stanka).
[149] ROA 048572.
[150] ROA 048572.
[151] ROA 038972 and 038962, respectively.

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C. The State Engineer erroneously interpreted the Remand Order to create a presumption of conflicts and a heightened burden of proof that is contrary to established water law.

The State Engineer misinterpreted the remand instruction and improperly heightened SNWA's burden of proof beyond what this Court required in the Remand Order, or what is authorized by Nevada water law. The State Engineer erroneously read the Remand Order to require him to "to presume that a conflict exists unless otherwise demonstrated, and irrespective of the time it may take to manifest."[152] The State Engineer then denied the DDC Applications because he claimed SNWA did not effectively meet this new burden by rebutting this presumption.[153] The State Engineer's conclusion was arbitrary and capricious because this Court's instruction did not create a rebuttable presumption that a conflict exists, and such an instruction would violate clear provisions of Nevada water law. In addition, GBWN failed to provide substantial evidence demonstrating that a hydrologic conflict will occur.

Protestants generally bear the burden of establishing their protest grounds. In *Pyramid Lake Paiute Tribe of Indians v. Ricci*, this Court recognized that the protestant's evidence was insufficient to deny water rights applications.[154] Similarly, in forfeiture cases, the State, or the party claiming forfeiture, bears the burden of proving, by clear and convincing evidence, a statutory period of non-use.[155] Also, in abandonment cases, the party asserting abandonment bears the burden of proof by clear and convincing evidence, and evidence of non-use alone is insufficient to shift the burden.[156] Thus, the State Engineer correctly asserts that normally the burden of proof is on the party attacking the appropriation.[157]

For over a century, NRS 533.370(2) has been enforced such that "an application should be granted unless it has been shown there is a conflict with existing rights."[158] The burden of proof for showing a hydrologic conflict is on the party claiming a conflict. The remand instruction did not change or shift this established burden of proof. The State Engineer's misinterpretation of the Remand Order

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[152] ROA 038974.
[153] ROA 038973-74.
[154] *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 527, 245 P.3d 1145, 1149 (2010) (note that in 2010, the three criteria for denial under NRS 533.370(2) were then numbered NRS 533.370(5)).
[155] *Town of Eureka v. Off. of State Eng'r of State of Nev., Div. of Water Res.*, 108 Nev. 163, 169, 826 P.2d 948, 952 (1992).
[156] *King v. St. Clair*, 134 Nev. Adv. Op. 18 at 7, 414 P.3d 314, 317 (2018).
[157] ROA 038974.
[158] ROA 038974.

effectively reversed this century-long presumption which conflicts with the legislative intent and should be reversed.[159]

D. The State Engineer erroneously interpreted the Remand Order to disturb his prior findings regarding the hydrologic analysis of conflicts.

The State Engineer previously found that the DDC appropriations would not hydrologically conflict with existing rights, and all parties agreed that no new hydrologic evidence was necessary.[160] Nevertheless, the State Engineer denied the DDC Applications because SNWA "did not present *new* hydrologic evidence that upgradient pumping would not capture the water required to satisfy existing rights."[161] In doing so, the State Engineer improperly interpreted the Remand Order to require a new hearing on hydrologic evidence, based on his belief that this Court created a presumption that a conflict exists. The State Engineer's incorrect interpretation of the Remand Order is granted no deference on judicial review. [162]

Further, the State Engineer concluded that another conflicts analysis was needed even though the State Engineer's prior determinations of *no conflict* were upheld, and a new hydrologic conflicts analysis was not required by this Court. The State Engineer's 2011 DDC Rulings contained extensive analysis regarding hydrologic conflicts with existing rights.[163] The conflicts analyses contained in the 2011 administrative record specifically evaluated whether pumping of the proposed applications would impact water levels at the location of existing rights in the WRFS. Both SNWA and GBWN witnesses agreed that the Pahranagat Shear Zone acts as a barrier between the upper and lower basins in the WRFS, so impacts to lower WRFS basins will not occur from pumping the DDC basins.[164] Also, the State Engineer already addressed potential impacts to upper WRFS basins by limiting the award to SNWA in the DDC basins.[165] This Court did not disturb those findings. Therefore, the State Engineer's requirement of a new hydrologic effect analysis was improper and Ruling 6446 should be overturned.

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[159] *V & S Ry. LLC*, 125 Nev. at 239, 211 P.3d at 882 (internal citations omitted).
[160] ROA 056082-84.
[161] ROA 038973 (emphasis added).
[162] *Felton*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d at 994.
[163] ROA 000631-89, 000467-96, 000299-331.
[164] ROA 054375:2-7 (Prieur), 055833:11-23 (Myers).
[165] ROA 000298.

E. Hydrologic evidence already established that the DDC applications will not conflict with existing rights.

Even if another hydrologic analysis were needed, no credible evidence exists that SNWA will hydrologically conflict with existing rights. The State Engineer found that the "protestants did not provide an analysis to demonstrate with certainty that conflicts will occur."[166] In fact, evidence in the record shows that no reasonably anticipated conflicts will manifest even thousands of years into the future. Accordingly, existing substantial evidence does not support a claim that conflicts will occur, or are even likely to occur. Therefore, the State Engineer did not have authority to deny the applications on that ground.

In the 2011 hearing, SNWA performed a hydrologic study and conflicts analysis of its proposed groundwater pumping.[167] The timeframe for the analysis was 200 years. The analysis showed that during this 200-year period, down-gradient basins in the WRFS will not be impacted by the SNWA pumping in the DDC basins.[168] GBWN presented additional conflict analysis evidence, including model projections spanning over 2,000 years.[169]

The State Engineer reviewed all of the hydrologic conflicts analyses. He then made findings that impacts were not anticipated to occur in a reasonably foreseeable timeframe, and SNWA had satisfied the statutory requirement of NRS 533.370.[170] This Court only disagreed with this analysis because since the WRFS basins are hydrologically connected, if water was appropriated twice, even in different basins, a *per se* conflict can exist regardless of timeframe.

In Rulings 6165, 6166, and 6167, the State Engineer utilized both the best available science and his professional experience to determine there were no reasonably anticipated conflicts, even using groundwater model projections spanning beyond 2,000 years. On remand, and for the third time, GBWN had the opportunity to present credible evidence of hydrologic conflicts, but could not. As the State Engineer correctly determined for the third time in Ruling 6446, "protestants did not provide an analysis

[166] ROA 038974 (emphasis removed).
[167] ROA 000267-77, 000434-47, 000599-611.
[168] ROA 000266, 000436.
[169] ROA 000329-31, 000495-96, 000658-59.
[170] ROA 000331.

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to demonstrate with certainty that conflicts will occur."[171] Therefore, the State Engineer should have approved the DDC applications.

Further, even if the remand instructions could be interpreted as requiring a completely new hydrologic analysis, SNWA met this burden. SNWA and GBWN supplied additional evidence at the remand hearing, and no evidence in the record supports the notion that hydrologic conflicts are reasonably anticipated, or will ever occur.[172] Further, to address uncertainty for the future, SNWA complied with the third remand instruction and produced a meaningful 3M plan with specific triggers, monitoring, standards, and protections.[173] Accordingly, even though no conflicts are anticipated, a 3M plan will be in place to ensure that any unexpected impacts from pumping will be addressed before they create conflicts with existing rights.

Given this evidentiary record, this Court should make a determination that SNWA complied with the remand instruction, and that SNWA's accounting evidence established that no double-appropriation will occur in the WRFS. The State Engineer's mind-boggling denial of the DDC Applications in Ruling 6446 based on conflicts should be reversed, and the award under Rulings 6165, 6166, and 6167 should be upheld.

III. The State Engineer Improperly Denied Applications 54014 and 54015.

For large water use projects in Nevada, the State Engineer often requires the preparation of 3M plans to better manage the appropriation and protect against uncertainties. SNWA submitted 3M plans in the earlier 2011 proceedings to protect existing rights, cultural resources, and the environment, and requested that the State Engineer include compliance with those plans as part of permit terms.[174] The State Engineer adopted the 2011 3M Plans with amendments the State Engineer required pursuant to his authority under Nevada water law, and his continued right to regulate and modify the plans as conditions warrant.[175] In the Remand Order, this Court upheld nearly all aspects of the 3M Plans.[176] However, this Court remanded the matter to the State Engineer for the limited purpose of incorporating objective

[171] ROA 038974.
[172] ROA 000712, 000550, 000386-87.
[173] *See generally* ROA 047998-048116.
[174] ROA 013289-386.
[175] ROA 000217, 000387-88; *see also* ROA 013470, 013471, 021201-02.
[176] ROA 039073.

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standards for when, and under what circumstances, mitigation would occur.[177] Following the Remand Order, SNWA submitted new biological and hydrologic 3M Plans to the State Engineer to, as this Court required, "define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious."[178]

In Ruling 6446, the State Engineer found the updated 2017 3M Plans complied with this Court's remand instruction, but only after he clarified certain requirements in the plans related to stakeholder involvement.[179] He also found that the 3M Plans met the requirements the Nevada Supreme Court established in *Eureka County v. State Engineer*,[180] which identified principles for what a 3M Plan must include to comply with Nevada water law.[181] Therefore, the State Engineer's denial of two Spring Valley Applications (Applications 54014 and 54015) was improper because the denial 1) is inconsistent with the State Engineer's finding that the Spring Valley 3M Plan is sound, 2) relied on matters outside the remand instruction, 3) is not based on substantial evidence and 4) ignored key components of the Spring Valley 3M Plan that fully address the State Engineer's concern.

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A. The protections in the Spring Valley 3M Plan for terrestrial woodlands comply with the remand instruction and are based on the best available science.

On remand, SNWA submitted 3M Plans to the State Engineer that include more detailed procedures for protecting existing water rights, cultural resources, and the environment. The 3M Plans included significant monitoring programs, triggers and thresholds, and objective standards for when action must be taken to avoid or eliminate conflicts with existing water rights and unreasonable adverse effects to environmental resources.

The Spring Valley 3M Plan includes a specific approach to protect terrestrial woodland habitats from unreasonable adverse effects due to groundwater pumping.[182] Terrestrial woodland habitat exists in two primary areas in Spring Valley, but the most culturally significant woodland habitat is in an area

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[177] ROA 039073.
[178] ROA 039073.
[179] ROA 038992, 039044-45 (the State Engineer required public comment periods for any reports submitted to his office pursuant the plans).
[180] *Eureka County v. State Eng'r*, 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015).
[181] ROA 038976, 039044.
[182] ROA 043215-26, 047873-75, 047922-27.

known as the Swamp Cedar ACEC.[183] The Swamp Cedar ACEC contains terrestrial woodlands (the Swamp Cedars) that have special cultural significance to Native Americans, including specifically CTGR.[184] The Swamp Cedar ACEC contains 40 percent of the terrestrial woodland habitat in Spring Valley, and the State Engineer found that "focusing on the swamp cedar ACEC and existing water rights is a sound approach to avoiding unreasonable effects to terrestrial woodland habitat" in Spring Valley.[185]

SNWA specifically included the Swamp Cedar ACEC in the plan to provide careful protection to this culturally significant area, in part due to Native American concerns identified during the 2011 water rights hearing.[186] The plan focuses on conservation of the terrestrial woodlands in the Swamp Cedar ACEC, and the approach is intended to maintain tree cover in the ACEC within the natural range of historic variation.[187] The Spring Valley 3M Plan includes a monitoring approach that starts by establishing a sound baseline. SNWA used satellite remote sensing technology to compile 30 years of data.[188] The data indicated a 25 percent natural variation of tree canopy cover over the 30-year period,[189] and that 25 percent variation resulted in a "baseline percent range in cover."[190] CPB's expert agreed that SNWA used "good science" to develop this baseline.[191]

The Spring Valley 3M Plan also has a management threshold based on existing woodlands – the baseline percent range in tree cover.[192] Monitoring is required to sense any reduction in tree canopy cover below this baseline measurement.[193] Monitoring includes remote sensing and the collection of ground vegetation data to monitor the tree cover in the Swamp Cedar ACEC.[194] Further monitoring includes continuous measurements at four monitor wells (three shallow piezometers and one nested deep monitor well), and one precipitation station adjacent to the ACEC.[195] Additionally, three existing

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[183] ROA 043215-16, 047873.
[184] ROA 043215.
[185] ROA 039022.
[186] ROA 054262:17-63:8 (Marshall), 054599:8-19 (Luptowitz), 038992.
[187] ROA 054262:17-63:8 (Marshall), 054599:8-19 (Luptowitz), 038992.
[188] ROA 053753:14-20 (Huntington), 043216-20.
[189] ROA 047923-24.
[190] ROA 047923-24.
[191] ROA 055206:9-11 (Roundy).
[192] ROA 053883:6-17 (Brandt).
[193] ROA 043220-22.
[194] ROA 047874, 055206:9-11 (Roundy) (this additional planned monitoring will begin at least five years prior to pumping).
[195] ROA 047874, 047876.

monitor wells are located outside the ACEC area.[196] CPB's expert stated that SNWA should be able to detect if tree cover falls below the baseline limit "quite well with their approach."[197]

The State Engineer found that the baseline, and the monitoring plan, are sound for terrestrial woodlands, and specifically the Swamp Cedar ACEC.[198] Specifically, the State Engineer found "the use of remotely-sensed NDVI [Normalized Difference Vegetation Index] data and ground vegetation data, along with hydrologic data, [is] a rational and effective approach for monitoring and managing terrestrial woodland habitat in the groundwater discharge area."[199]

The Spring Valley 3M Plan also has defined and specific triggers for terrestrial woodlands. The mitigation trigger is defined, and the 3M Plan requires SNWA to implement mitigation actions any time SNWA pumping causes the mitigation trigger to be activated.[200] This action must occur within 30 days.[201] Furthermore, an investigation trigger is established above and beyond the mitigation trigger to allow action prior to a mitigation trigger being hit.[202] The goal of an investigation trigger is to avoid activating mitigation triggers and to better inform decisions. The State Engineer ultimately found that the Spring Valley 3M Plan "establishes quantitative investigation and mitigation triggers for terrestrial woodland habitat within the Swamp Cedar ACEC."[203]

The State Engineer found SNWA's 3M Plan "will effectively avoid unreasonable effects to senior water rights and the public interest."[204] The State Engineer found that the triggers were defined "for the environmental resources in an objective and scientifically-founded way."[205] The State Engineer further found that the 3M Plan "will ensure that any mitigation of unreasonable effects will be systematically employed and scientifically based," and that SNWA "has committed to take mitigation actions to ensure that the tree stand [within the ACEC] stays within the historical range of variation."[206] In addition, the State Engineer found that "[i]n areas [of Spring Valley] where terrestrial woodland habitat is influenced

[196] ROA 047847; *see also* ROA 047831-32.
[197] ROA 055206:24-07:1 (Roundy).
[198] ROA 039023.
[199] ROA 039023.
[200] ROA 043066, 047895, 048055.
[201] ROA 043350, 047923.
[202] ROA 043048-49.
[203] ROA 039019.
[204] ROA 039043.
[205] ROA 039023.
[206] ROA 039023.

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by springs, streams or irrigation, the habitat is protected by the triggers and management and mitigation actions for existing water rights."[207] Therefore, the protections in the Spring Valley 3M Plan for terrestrial woodlands fully comply with this Court's remand instruction.

B. The State Engineer improperly denied two Spring Valley applications based on considerations that are outside the scope of the remand.

SNWA agrees that it is in the public interest to preserve Native American cultural resources that are in the Swamp Cedar ACEC, and throughout Spring Valley.[208] However, the scope of the Remand Order was limited. As a result, the State Engineer should not have rehashed issues that had already been resolved and upheld by this Court. While evidence was provided discussing how to protect terrestrial woodlands, and the Swamp Cedar ACEC, no evidence was submitted that showed the State Engineer's prior findings regarding conflicts, or the public interest, were incorrect.

SNWA complied with the remand instruction by preparing new 3M Plans.[209] After reviewing the new 3M Plans, the State Engineer concluded "that the 3M Plans meet the requirements outlined in the Remand Order" and that "the 3M Plans define standards, thresholds, and triggers" that are based on "substantial evidence and sound science."[210] The State Engineer's remand inquiry should have ended there. The Remand Order authorized analysis to design a 3M Plan, but not to re-litigate the approval of certain points of diversion that he had already approved in Rulings 6164-6167.[211] Nonetheless, in Ruling 6446, the State Engineer arbitrarily denied Applications 54014 and 54015 by stating that the points of diversion were too close in proximity to the ACEC. As such, the findings that led the State Engineer to deny Applications 54014 and 54015 are arbitrary, capricious, and an abuse of discretion, and must be overturned.

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[207] ROA 039023.
[208] ROA 054570:3-6 (Marshall).
[209] *See generally* ROA 047810-997, 047998-8116.
[210] ROA 039044.
[211] ROA 039073.

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C. The State Engineer improperly denied two Spring Valley applications based on an inconsistent and incorrect hydrologic basis.

1. The denial of Applications 54014 and 54015 is inconsistent with prior State Engineer findings that were not disturbed by this Court.

Even if this extra-remand inquiry were merited, substantial evidence does not support the State Engineer's denial. In Ruling 6164, the State Engineer performed a complete analysis of potential hydrologic effects to the Swamp Cedar ACEC.[212] The State Engineer also reviewed the occurrence of Swamp Cedars in Spring Valley and made the following findings: 1) the applicant adequately described the potential environmental effects of the project in a manner that allows the State Engineer to make an informed environmental soundness determination;[213] 2) despite any increase in depth to water, viable plant and wildlife communities will remain;[214] 3) the applicant has the ability to identify unknown potential impacts though the monitoring plan;[215] 4) that Swamp Cedars can tolerate drier conditions;[216] and 5) that where standing water occurred, the Swamp Cedars were dying.[217]

In Ruling 6446, the State Engineer ignored his prior findings and the prior evidence. The State Engineer did not perform any new analysis to determine whether or how Applications 54014 and 54015 would affect the Swamp Cedar ACEC, or if pumping would cause any groundwater declines in the perched aquifer at the Swamp Cedar ACEC.

2. The evidence presented at the remand hearing does not support the finding that SNWA pumping could impact water needed by Swamp Cedars in ACEC.

The State Engineer's findings in Ruling 6446 are not supported by the evidence that was submitted at the remand hearing. Additional hydrologic evidence was presented regarding the design of the 3M Plans, and the selection of triggers and thresholds regarding hydrology in the Swamp Cedar ACEC area. That evidence centered on the soil conditions, and how various water sources sustain the Swamp Cedar population in the ACEC area. Based on evidence regarding soil composition, hydrogeology, and topographic drainage, SNWA's expert concluded that the soil composition in the

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[212] ROA 000186.
[213] ROA 000187.
[214] ROA 000191.
[215] ROA 000193.
[216] ROA 000189, 034093:19-23 (McLendon).
[217] ROA 000189, 034094:15-95:2 (McLendon)

ACEC creates an underlying, shallow barrier that retains water like a sponge.[218] The surficial soils collect precipitation and surface runoff,[219] providing the trees with supplemental water. This is consistent with the biology of Swamp Cedars (Rocky Mountain juniper), which also occur in a wide range of environments, including drainages with access to supplemental water.[220]

SNWA's expert also testified that tight soils would retard or prevent effects to the trees from groundwater pumping.[221] Experts also agreed that Swamp Cedars require 12 inches of water and because the ACEC is within the 8-inch precipitation zone, 4 more inches of "supplemental water" is required.[222] "Supplemental water" can come from surface runoff, and no evidence exists that pumping from nearby wells would impact that water supply to the trees.

A CPB expert testified that the trees would die quickly if they "run[] out of water," and that "you could potentially [lose] your woodland if all the water quickly went down."[223] But no evidence exists that pumping could cause such rapid groundwater level declines in the ACEC area. Further, on cross examination, the CPB's expert recanted his claim that the trees in the ACEC were "doomed," and admitted he made that claim as hyperbole to "keep people awake," and conceded "maybe I overstated that one."[224]

CPB's expert further testified that the "lack of certainty in what the pumping will do . . . leads to a risk."[225] However, the very intent of the 3M Plans is to avoid this risk and protect against uncertainty. Furthermore, no evidentiary support exists for the State Engineer's speculative belief that groundwater pumping "poses a threat of loss to the Swamp Cedar ACEC."[226] To the contrary, all evidence suggests that groundwater pumping would have limited impact to the Swamp Cedar ACEC, and the 3M Plan is in place to protect against the risks and uncertainties voiced by the protestants.

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[218] ROA 054268:4-11 (Prieur), 054274:2-75:11 (Marshall), 039021.
[219] ROA 054274:18-75:2 (Marshall), 039021.
[220] ROA 054263:11-21, 054274:2-75:11 (Marshall), 043216.
[221] ROA 054268:1-3 (Prieur).
[222] ROA 054275:7-11 (Marshall), 055207:16-20 (Roundy).
[223] ROA 055208:14-15, 055208:24-09:1 (Roundy).
[224] ROA 055244:20-21, 055245:2 (Roundy).
[225] ROA 055209:17-19 (Roundy).
[226] ROA 039023.

Adding to his error, the State Engineer simply selected Applications 54014 and 54015 for denial because they "are located closest to the Swamp Cedar ACEC."[227] The baseless determination that the proximity of a point of diversion to an environmental resource, alone, can result in denial does not rise to a detailed level to permit judicial review.[228] Since denial of the two applications is not necessary to protect the Swamp Cedar ACEC, Ruling 6446 should be reversed because the State Engineer did not consider the best available science,[229] the denial is not supported by substantial evidence, and it represents a clear error of judgment.[230]

D. The State Engineer's denial of Applications 54014 and 54015 was improper because the denial was based on a clear misunderstanding of 3M Plan requirements.

The State Engineer's primary mistake in denying Applications 54014 and 54015 was that he interpreted the terrestrial woodland protections in a vacuum, and ignored the mandates of other relevant aspects of the 3M Plan. The State Engineer based his denial of Applications 54014 and 54015 on his incorrect assumption that the all of the trees in the Swamp Cedar ACEC could perish before a trigger is activated and mitigation actions are taken.[231] The State Engineer's assumption was based on a hypothetical question that was posed to an SNWA witness by CTGR's counsel. The question assumed an unprecedented and sudden decrease in tree cover could cause a 25 percent loss of cover every year for four years, and could result in a complete loss of trees before a mitigation trigger is activated.[232] But that hypothetical scenario could never occur pursuant to the 3M Plan's requirements.

The Swamp Cedar ACEC is protected by layers of various triggers and actions to avoid unreasonable impacts. An investigation trigger is activated immediately upon the tree canopy cover falling within five percent below the minimum baseline range.[233] Then the State Engineer "will be involved in an investigation if an investigation trigger is reached."[234] Also, if an investigation trigger is

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[227] ROA 039022.
[228] *See Revert*, 95 Nev. at 787, 603 P.2d at 265.
[229] NRS 533.024(1)(c).
[230] *See City of Reno*, 118 Nev. at 894, 59 P.3d at 1216.
[231] ROA 039020 (the State Engineer cites to an argument allegedly made by CTGR, stating that "CTGR argued that the swamp cedar woodland habitat could be eliminated before the investigation trigger was activated, and before SNWA would be required to implement mitigation in the fifth consecutive year, as required by the 3M Plan.").
[232] ROA 039020.
[233] ROA 047923.
[234] ROA 039045.

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activated, then management actions include conducting additional monitoring and analysis of the area, preparing for mitigation actions such as purchasing equipment and establishing contracts with the appropriate land owners, and even preemptively implementing mitigation actions before a mitigation trigger is reached.[235] The management actions are designed to avoid activating the mitigation trigger.[236] If data indicate a need for earlier intervention, mitigation actions are preemptively implemented to reverse the trend until tree cover area is at or above the threshold level.[237]

Additionally, the 3M Plan's triggers do not operate in isolation. The 3M Plan includes a systematic measurement of a network of wells, piezometers, springs, streams, precipitation stations, and senior water rights points of diversion, to monitor water levels in the basin.[238] In addition to triggers specifically associated with the Swamp Cedar ACEC, there are triggers related to water levels observed at nearby sentinel wells, monitor wells, and monitored springs that help aid the overall protective approach to the ACEC.[239] Water level declines will be seen at these sentinel wells long before declines are seen in the ACEC. If water levels are observed to deviate outside of the historical variation of the baseline for six months, management actions are triggered.[240] These actions include watching the system more closely and modifying pumping to avoid activating mitigation triggers.[241]

Lastly, the 3M Plan authorizes the State Engineer to change the mitigation trigger. Specifically, Mr. Marshall testified that the 3M Plans were proposals to the State Engineer, and the final determinations are subject to his input.[242] The State Engineer could require mitigation to occur if the tree canopy cover reached the minimum baseline threshold, or any other reasonable threshold the State Engineer determined would be effective. In fact, in Ruling 6446 the State Engineer found that "nothing in the 3M Plans prohibit the State Engineer from ordering necessary actions as authorized and mandated by water law regardless of specific triggers or management actions."[243] Also, under state law, the State

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[235] ROA 047926.
[236] ROA 047923, 047927.
[237] ROA 047923.
[238] ROA 047827-34.
[239] ROA 047901.
[240] ROA 047901.
[241] ROA 047901.
[242] ROA 054580:16-20 (Marshall), 054602:10-24 (Prieur).
[243] ROA 038987.

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Engineer can require further hydrologic studies of the lithology in the ACEC area, and the water sources for Swamp Cedars in that area.[244]

In conclusion, even though no hydrologic evidence supports a finding that a rapid water level decline could occur in the ACEC area, if a rapid decline did occur, the 3M Plan requires action to avoid an unreasonable adverse effect to the Swamp Cedar ACEC long before CTGR's hypothetical scenario could happen.[245] Given the evidence regarding the biology of the species, the soil's characteristics in the area, the investigation trigger and investigation process, the inclusion of preemptive management and mitigation in the 3M Plan, and the State Engineer's authority to intervene, CTGR's dire scenario is not realistic. The 3M Plan will not allow for rapid water level declines in the ACEC.[246] Also, the State Engineer abused his discretion by simply denying Applications 54014 and 54015 instead of modifying the triggers in the 3M Plan to address his concerns. Therefore, the State Engineer's denial of Applications 54014 and 54015 demonstrated a "clear error of judgment" that must be reversed by this Court.[247]

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[244] NRS 533.368.
[245] ROA 039045.
[246] ROA 039022.
[247] *City of Reno*, 118 Nev. at 894, 59 P.3d at 1216.

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CONCLUSION

For the reasons stated herein, Ruling 6446 should be reversed. SNWA fully complied with this Court's remand instructions. Therefore, Ruling 6164-6167 should be affirmed, and the award of water in those rulings for the Spring Valley Applications and DDC Applications should be upheld.

AFFIRMATION
Pursuant to NRS 239B.030(4)

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 29 day of March, 2019.

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Pursuant to NRCP 5(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this day, I served, or caused to be served, a true and correct copy of the foregoing as follows:

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