

1 Case No.: CV1204049 (and consolidated cases)

2 Dept. No.: 1

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6 IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

8 IN AND FOR THE COUNTY OF WHITE PINE

9

10 WHITE PINE COUNTY and CONSOLIDATED)
11 CASES, et al.,)

12

13 Petitioner,)

14

15 vs.)

16

17 JASON KING, P.E., Nevada State Engineer,)
18 STATE OF NEVADA, DIVISION OF WATER)
19 RESOURCES,)

20

21 Respondent.)

22

23

24

25 **OPENING BRIEF OF THE CORPORATION OF THE**
26 **PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST**
27 **OF LATTER-DAY SAINTS ON BEHALF OF THE**
28 **CLEVELAND RANCH**

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1 sites were chosen to *avoid* ET capture.³ It is no surprise, then, that the undisputed evidence
2 shows that SNWA's proposed system would mine millions of acre feet of water from permanent
3 storage without ever reaching equilibrium. And that is why the outcome of this proceeding was
4 preordained in 1989 when SNWA chose its points of diversion.

5 The District Court recognized this problem on the first appeal and remanded for an award
6 of "less than the calculated E.T. for Spring Valley" with the requirement that, whatever amount
7 was awarded, the evidence had to show that the system had "some prospect of reaching
8 equilibrium"⁴ SNWA made no effort make this showing.⁵ The undisputed evidence on
9 remand showed that the system would not reach equilibrium, no matter how much water SNWA
10 was awarded. SNWA conceded that its project was not designed to capture ET or to ever reach
11 equilibrium.⁶

12 Instead, acknowledging its project would never reach equilibrium as designed, SNWA
13 tried a different approach on remand. SNWA introduced a hypothetical 101-well field that it
14 argued could achieve substantial ET capture and approach equilibrium. SNWA's hypothetical
15 101-well field is irrelevant. The statutory scheme does not allow the State Engineer to grant
16 applications that do not satisfy the statutory criteria based on the possibility that some other
17 design could satisfy the statutory criteria. For these reasons, the State Engineer had no choice
18 but to deny SNWA's remaining 15 applications, which he did.

19 Denial of SNWA's 15 applications should have rendered discussion of the 3M plan moot
20 because there were no longer any wells to which it could apply. Surprisingly, however, the State
21 Engineer devotes half of his 111 page Ruling 6446 to dealing with the 3M Plan!

22 // // // //

23 _____
24 ³ Transcript, Vol. 5, pp. 1082:17-1083:23 (Burns) (Sept. 29, 2017), ROA pp 54803-4.

25 ⁴ Remand Decision, p. 13.

26 ⁵ Transcript Vol 5, pp. 1069:18-1070:21 (Watus) (Sept. 29, 2017), ROA pp 54790-91;
27 *see also* Transcript, Vol. 4, 990:6-13 (Burns) (Sept. 28, 2017) ROA p 54675.

28 ⁶ Exhibit SNWA 597, p. 6, ROA p 48161; Transcript, Vol. 4, pp 990:6-992:11 (Burns)
(Sept. 28, 2017), ROA p 54675, Ruling 6646 at p 17, ROA p 38954.

1 BACKGROUND

2 Cleveland Ranch, owned by the Corporation of the Presiding Bishop of The Church of
3 Jesus Christ of Latter-Day Saints (“CPB”), is in the center of Spring Valley. It has very
4 substantial water rights there consisting of surface water (streams, springs, seeps) and
5 groundwater rights (wells).

6 SNWA applied to appropriate water from 19 points of diversion in Spring Valley. CPB
7 protested 12 of those applications. In 2011, CPB’s experts, Norm Jones and Alan Mayo, used
8 SNWA’s own groundwater model to show that SNWA’s system had no chance of reaching
9 equilibrium and that, before it could ever do so, it would cause drastic drawdowns and annihilate
10 existing water rights.⁷ SNWA disputed this evidence by questioning the usefulness of the model
11 and raising the possibility of human driven management decisions to monitor, manage, and
12 mitigate these inevitable conflicts.

13 Ruling 6164 granted 15 of the 19 applications. The Ruling refused to consider evidence
14 of drawdowns beyond 75 years.⁸ And it noted that “the model cannot account for human-driven
15 management decisions to reduce, relocate, or stop pumping to prevent impacts to existing water
16 rights or environmental areas of interest.”⁹ The Ruling adopted SNWA’s 3M Plan with a
17 promise to oversee and enforce that plan to protect existing rights and the environment.

18 CPB and other Protestants appealed and the District Court reversed Ruling 6164. The
19 District Court accepted the State Engineer’s long-standing definition of *perennial yield*.¹⁰ The
20 District Court then described the process of sustainable groundwater development, whereby
21 natural discharge is eliminated in response to new pumping so that, over time, the system reaches
22 a new equilibrium.¹¹ The District Court accepted that this process requires a “reasonable

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24 ⁷ Exhibit CPB 011 (2011), ROA p 32103.

25 ⁸ State Engineer’s Ruling 6164 pp. 129-30, ROA pp 129-130.

26 ⁹ State Engineer’s Ruling 6164, p. 130, ROA p 130.

27 ¹⁰ Remand Decision, p.10, ROA p 39060.

28 ¹¹ Remand Decision, pp.10-11, ROA pp 39060-61.

1 lowering of the water table and the death of most of the phreatophytes¹² And the District
2 Court agreed with the State Engineer that “the time to reach equilibrium is not a valid reason to
3 deny the grant of water,” but explained that it “may very well be a reason to limit the
4 appropriation below the calculated E.T.”¹³ The District Court rejected the argument that ET
5 capture is not required.¹⁴

6 The District Court reversed Ruling 6164 because SNWA failed to submit “valid
7 evidence” that its groundwater project would capture ET and reach equilibrium. The District
8 Court remanded “for an award less than the calculated E.T.” with the requirement that the
9 amended award have “some prospect of reaching equilibrium in the reservoir.”¹⁵

10 The District Court also remanded for reconsideration of the 3M Plan, finding it was
11 “flawed in several respects.”¹⁶ The District Court remanded for the State Engineer to “[d]efine
12 standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of
13 water are neither arbitrary nor capricious in Spring Valley”¹⁷ CPB challenges the 3M plan
14 as approved by the State Engineer in Ruling 6446.

15 **THE 3M PLAN VIOLATES THE REMAND DECISION**
16 **AND THE NEVADA SUPREME COURT EUREKA**
17 **COUNTY DECISION**

18 The Monitoring, Mitigation and Management Plan (“3M Plan”) was critical to the
19 pending applications because it is the means by which SNWA proposes to address conflicts and
20 avoid unreasonable effects.¹⁸ However, the current 3M Plan falls far short of the mandate of the

21 ¹² Remand Decision, p.10, ROA p 39060.

22 ¹³ Remand Decision, p. 11, ROA p 39061.

23 ¹⁴ Remand Decision, p. 12, ROA p 39062.

24 ¹⁵ Remand Decision, p. 13, ROA p 39063.

25 ¹⁶ Remand Decision, p. 15, ROA p 39065.

26 ¹⁷ Remand Decision, p. 23, ROA p 39073.

27 ¹⁸ The current 3M Plan entirely replaces the prior version introduced in 2011. SNWA
28 Ex. 592 at pp. 1-2, ROA p 47823.

1 Remand Decision and a recent Nevada Supreme Court decision. The Remand Decision was
2 critical of the prior 3M Plan in several respects:

3 There are no objective standards to determine when mitigation will be required
4 and implemented.¹⁹

5 The 3M Plan listed mitigation efforts that *could* be made but did not state what
6 mitigation *would* be made and *when*.²⁰

7 Without a stated objective standard of when mitigation *would* be implemented,
8 the Ruling was arbitrary and capricious.²¹

9 There was no plan presented as to how the State Engineer will be able to monitor
10 an area as large as Spring Valley.²²

11 Impliedly, the State Engineer has delegated his monitoring responsibilities to the
12 Applicant.²³

13 “[M]atter must be remanded to the State Engineer until objective standards can be
14 established and stated – as to when mitigation must occur.”²⁴

15 Less than two years after the Remand Decision, the Nevada Supreme Court issued its *en*
16 *banc* decision in *Eureka County v. State Engineer*.²⁵ *Eureka* overturned a State Engineer
17 decision on the principal grounds that:

18 [E]ven assuming that under NRS 533.370(2) the State Engineer has authority to
19 grant an application that conflicts with existing rights based upon a determination
20 that the applicant will be able to mitigate the State Engineer’s decision to approve
21 the applications and issue the permits at issue here is not supported by sufficient

22 ¹⁹ Remand Decision, p. 15, ROA p 39065.

23 ²⁰ Remand Decision, pp. 15-16 (emphasis added), ROA pp 39065-6.

24 ²¹ Remand Decision, p. 17 (emphasis added), ROA p 39067.

25 ²² Remand Decision, p. 17, ROA p 39067.

26 ²³ Remand Decision, p. 18, ROA p 39068.

27 ²⁴ Remand Decision, p. 18, ROA p 39068.

28 ²⁵ 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015).

1 evidence that successful mitigation efforts may be undertaken so as to dispel the
2 threat to the existing rights holders. We thus reverse the district court's decision
3 denying judicial review of the State Engineer's decisions and remand.²⁶

4 *Eureka* went on to articulate these important principles that must govern the current proceedings:

- 5
- 6 1. The Applicant must show by substantial evidence what *specific* mitigation
7 technique will be used and that such technique *will actually work*.
 - 8 2. It is specious to assume that water from a different source would be an
9 adequate or effective mitigation technique.
 - 10 3. A decision to grant an application must be made upon *presently known*
11 *substantial evidence*, rather than information to be determined in the future,
12 for important reasons.²⁷

13 One reason for the third principle is that due process demands that Protestants have an
14 opportunity to meaningfully challenge the evidence *before* the State Engineer makes a decision
15 on the applications.²⁸ Furthermore, all of the relevant evidence must be made part of the record
16 in advance of the State Engineer's decision in order to allow for fully informed judicial review.

17 **A. Recognizable, Objective Investigation Triggers Are Still Lacking.**

18 The Remand Decision made clear that there should be objective triggers to implement
19 mitigation measures. SNWA's revised 3M Plan²⁹ still fails to provide definite and objective
20 standards at critical junctures.

21 The 3M Plan deliberately eschewed an objective or recognized standard in favor of
22 describing a *process* by which SNWA can employ formulas to compute when *it* thinks an
23 investigation has been triggered. It is a process, not an objective standard. It provides for
24 SNWA to make the calculation when it deems it appropriate to do so. The calculation itself is

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²⁶ 131 Nev. Adv. Op. at 84, 359 P.3d at 1115-6.

²⁷ 131 Nev. Adv. Op. at 84, 359 P.3d at 1119-1120 (emphasis added).

²⁸ In matters before the State Engineer: "Procedural due process requires that parties receive 'notice and an opportunity to be heard!' Eureka County v. Seventh Judicial District Court, 134 Nev. Adv. Op. 37, 417 P.3d 1121, 1124 (2018).

²⁹ Exhibit SNWA 592 at pp 1-2, ROA p 47823. The exhibit makes clear that it is intended to completely replace the 3M Plan produced at the 2011 hearing.

1 based on a moving baseline of six months data. None of the conditions that initiated the
2 calculation, the moving baseline or the activation of an investigation trigger is required to be
3 timely shared with the owner of the impacted water rights or the State Engineer. The trigger can
4 scarcely be considered an “objective and recognized standard” if it is known only to SNWA.

5 Here is how SNWA described the operation of an investigation trigger:

6 The activation conditions assigned to a specific investigation trigger location are
7 dependent on the length, quality, and characteristics of the baseline record. The
8 primary investigation trigger is a decrease in the measured parameter (such as
9 water level or spring flow) that is collected after SNWA GDP pumping begins,
10 which for six continuous months is below the 99.7 percent lower control limit
11 using the seasonally adjusted linear regression (SALR) method for the baseline
12 data collected prior to SNWA GDP pumping.

13 The SNWA GDP 3M Plan uses the SALR method to identify a lower control limit
14 for the baseline dataset. A linear regression is a simple method that can be used
15 to construct a model to fit time-series data (Chandler and Scott, 2011). The
16 method uses ordinary least-squares, which calculates a best-fit line for the observed
17 data by minimizing the sum of the squares of the vertical deviations from each
18 data point to the line. “Linear least squares regression is by far the most widely
19 used modeling method. It is what most people mean when they say they have
20 used “regression”, “linear regression” or “least squares” to fit a model to their
21 data” (NIST/SEMATECH, 2017).

22 Evaluating hydrologic time-series data using a multiple linear regression model
23 provides the ability to assess the trend of the data over a period of time and
24 captures the aggregate effects of the natural and human induced processes on the
25 baseline measurement data. The SALR method also evaluates recurring seasonal
26 variability in the record. A description of the SALR method is presented in the
27 3M Plan analysis report (Marshall et al., 2017, in Appendix A). An example
28 demonstrating the activation of an investigation trigger is presented below.

1 The example shown in Figure 3-2, uses the SALR method applied to a
2 hypothetical baseline dataset which exhibits a strong reoccurring seasonal
3 behavior. The example illustrates the activation of an investigation trigger for the
4 hypothetical dataset. An artificial water-level record was constructed for the
5 period 2006 through 2026 to demonstrate hypothetical hydrologic conditions over
6 an assumed 20 year baseline monitoring period at the hydrologic monitoring
7 location.³⁰

8 A “standard” that only SNWA can see and interpret is essentially arbitrary and not an objective
9 or recognized standard.

10 **B. Recognizable Mitigation Triggers Are Lacking**

11 An example of inadequate standards is Table 3-2 of SNWA Ex. 592, which shows on p.
12 3.21 that each of the four potential mitigation triggers is predicated on a determination that a
13 decline in water level is the result of the GDP pumping. There are no objective or recognizable
14 standards proffered by the 3M Plan about how that determination will be made. The 3M Plan
15 appears to contemplate that the determination of whether a decline is caused by the GDP
16 pumping is a determination to be made by SNWA whenever and however it may choose. There
17 is no timeline and there are no objective standards. Nor was there any requirement to notify the
18 owner of the impacted water rights about what determinations are being made.

19 As an example, consider the phrasing for a mitigation trigger contained in Table 3-2 of
20 Exhibit 592:

21 **Senior Underground Water Rights:**

22 Mitigation actions for senior underground water rights will include one of the
23 following or an effective alternative action:

- 24
- 25 • Lowering of the pump if the well has the depth and capacity to produce the water
26 right.

27

³⁰ Exhibit SNWA 592 at p 3-5, ROA p 47886.

- 1 • Compensate well owners for the incremental increase in power usage if the usage
2 increase is greater than 25 percent to produce a similar volume of water.
3 • Deepen the well if the aquifer has the ability to yield the water right.
4 • Rehabilitate the well to increase well efficiency.
5 • Drill and equip a replacement well.
6 • Convey water to the site from an SNWA water right POD to the effected [sic]
7 site.
8 • Transfer or exchange of the impacted senior water right for an SNWA water right
9 of an equal or better priority at another location.
10 • Modify SNWA pumping rates, duration, and/or distribution.
11 • Temporary storage tank to supplement the well production until other mitigation
12 action is implemented. Water supplying the tank can be sourced by pumping the
13 impacted well for a longer period of time at a lower pumping rate, by a truck
14 delivering water, or other sources.³¹

15 Additional management and mitigation actions are presented in the 3M Plan
16 analysis report (Marshall et al., 2017 at Sections 3.2.4 and 3.2.8).

17 In each instance, the mitigation trigger is predicated upon a determination by SNWA that the
18 draw is caused by SNWA's pumping. That is much more subjective than objective.

19 **C. Definitive and Effective Mitigation Action is Lacking**

20 After the investigation trigger is activated and after a mitigation trigger is activated, then
21 the 3M Plan simply provides the smorgasbord of possible actions listed above. It is noteworthy
22 that this list of potential mitigation measures does not include any standard for deciding which
23 measure(s) should or will be implemented.

24 Neither did SNWA present substantial evidence that any of these measures can achieve
25 effective mitigation. The Nevada Supreme Court's *en banc* decision in *Eureka*³² explains that
26 merely identifying possible mitigation techniques is insufficient. The 3M Plan must specify

27 ³¹ Exhibit SNWA 592, Table 3-2 at p 3-22, ROA p 47903.

28 ³² 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015)

1 which techniques will be implemented and provide substantial evidence that those techniques
2 will work. And that must be *presently known* substantial evidence, not information to be
3 determined in the future.

4 The State Engineer thus may not defer the determination of what mitigation
5 would encompass to a later date; even if he may grant applications where the
6 resulting appropriations would conflict with existing rights based upon the finding
7 that the applicant would be able to successfully mitigate that deleterious effect, an
8 assumption we do not adopt today, the finding must be based upon evidence in
9 the record to support that mitigation would be successful and adequate to fully
10 protect those existing rights.³³

11 Here, the record is wholly devoid of any substantial evidence whatsoever as to what mitigation
12 method will work or what method must be chosen.

13 The failure to adhere to the *Eureka County* requirements is particularly puzzling because
14 that decision was rendered in 2015, two years before the current 3M Plan was submitted to the
15 State Engineer.

16 Moreover, there is the permitting issue identified in *Eureka County*:

17 Requiring that existing holders use water other than from the source that they
18 currently have rights in might mean the existing rights holder would need to
19 obtain a new permit to appropriate that new water. *See* NRS 533.060(5) ('Any
20 such right to appropriate any of the water must be initiated by applying to the
21 State Engineer for a permit to appropriate the water as provided in this
22 chapter.').³⁴

23 Not only does this introduce another layer of delay and uncertainty for the affected water rights
24 holder, there is the additional problem of seniority. If the affected water rights holder is forced
25 to accept mitigation water from another source, then the previously senior water rights holder

26 _____
27 ³³ 131 Nev. Adv. Op. 84 at 15-16, 359 P.3d at 1121

28 ³⁴ 131 Nev. Adv. Op. 84, 359 P.3d at 1120.

1 may have been “mitigated” into a newly permitted and very junior water right. This could have
2 significant implications in a time of curtailment.

3 **D. Habitat and Species Protection is Lacking**

4 SNWA’s 3M Plan takes the position that the protection of senior water rights will
5 automatically protect habitats and species. In his testimony, Zane Marshall acknowledged that
6 this approach is “a foundation of the 3M Plan.”³⁵

7 There are at least two fundamental problems with this approach. First, although the
8 contention has logical appeal, there is a total dearth of substantial evidence that this approach
9 will work dependably. If a spring dries up, there is no evidence in the record that supplying
10 water to the same area by truck or pipe will necessarily preserve the existing ecosystem and its
11 constituent parts.

12 Second, the 3M Plan is focused only on the preservation of senior water rights. In an
13 area as big as Spring Valley, there may well be important ecosystems dependent on junior water
14 rights. The 3M Plan does not address junior water rights. Instead, SNWA addresses junior
15 water rights this way:

16 In the event it is determined that SNWA is responsible for mitigation to junior
17 water rights, those rights may be included in the 3M Plans by reference to their
18 location and the Management Categories described in Section 3.2.5.³⁶

19 Saying that you can address junior rights in the future is not the same thing as saying you will
20 address them, nor does it confirm how they will be addressed. This does not provide an
21 assurance of avoiding conflicts with junior water rights, or the habitats dependent on junior water
22 rights. Under NRS 533.370(2), the State Engineer is directed to reject an application which
23 conflicts “with [any] existing rights . . . or threatens to prove detrimental to the public interest.”³⁷
24

25 _____
³⁵ Transcript, Vol. 2, pp. 371-72 (Marshall) (Sept. 26, 2017), ROA pp 53977-78.

26 ³⁶ Exhibit SNWA_507 p.4-5 fn.1, ROA p 43084.

27 ³⁷ NRS 533.370(2).
28

1 SNWA has not presented any conflict analysis to show that the proposed 15 wells will not
2 conflict with junior water rights and any related habitats. Although SNWA generally proposes to
3 avoid conflicts through the 3M Plan implementation, it has not brought junior rights and related
4 habitats within the penumbra of the 3M Plan. Even if the 3M Plan could somehow adequately
5 protect all those water rights, there is not enough substantial evidence to ensure that that
6 approach will adequately protect important habitats and ecosystems.

7 Throughout the 3M Plan, SNWA reserves for itself the calculation of investigation
8 triggers, the assessment of mitigation triggers and the choice of what mitigation method will be
9 used and when it will be used. In most cases, there are no deadlines. There is no substantial
10 evidence that any or all of the proposed mitigation techniques will actually work. This unilateral
11 non-public evaluation and assessment process does not satisfy the requirement of the Remand
12 Decision that the standards be objective and recognizable.

13 **E. Conflicts with Existing Rights**

14 The undisputed evidence submitted through the analysis of Drs. Jones and Mayo
15 demonstrated that trying to achieve equilibrium with the 15 wells under consideration would
16 result in major conflicts with existing water rights, such as those held by the Cleveland Ranch:

17 We've also noted that the only way the system could theoretically come to
18 equilibrium would be by generating an aggregate cone of depression which starts
19 in the south and migrates to the north and, in doing so, it would have to essentially
20 dewater the aquifer beneath the Cleveland Ranch properties which lies directly
21 between the wells in the south and the main ET discharge zone in the north part of
22 the valley.³⁸

23 This is because the 15 wells are located at the south end of a relatively long, narrow
24 valley and a substantial portion of the target ET is located to the north and on the other side of
25 the Cleveland Ranch.

26 The end result is that trying to pursue ET capture and equilibrium with the 15 wells under
27
28

1 consideration necessarily results in very material conflict with the water rights of Cleveland
2 Ranch and others in Spring Valley. Therefore, because the 15 wells under consideration would
3 conflict with existing rights, the applications must be rejected and permits refused pursuant to
4 NRS 533.370.

5 **F. The 3M Plan and Adaptive Management**

6 A critical component of the 3M Plan is the adaptive management program. The essence
7 of the 3M Plan is that it will utilize adaptive management to react to changing conditions in order
8 to avoid conflicts and other unreasonable impacts. SNWA acknowledged that adaptive
9 management is a key element to the 3M Plan.

10 A. MR. PRIEUR: Yes, it's a key element.... [A]s we're getting more
11 baseline data, we're getting a better understanding of the variability in the system.
12 That is incorporated in several ways. First, in terms of updating the formula for
13 the investigation trigger, to incorporate that additional baseline data. As part of
14 the monitoring investigation and management actions, once there's aquifer
15 response data, which is so important to have in an effective predictive tool, that
16 data is then incorporated into these predictive tools to better assess projection or
17 simulations for changing in water level with time and distance. So, throughout
18 the process, that active management's in place.³⁹

19 As Zane Marshall described it for Mr. Taggart:

20 A. MR. MARSHALL: Well, adaptive management is a process of
21 structured decision-making. It's a process that the Department of Interior
22 recommends in long-term projects, large projects that have uncertainty. And any
23 time we manage natural resources, there is uncertainty in that. And the
24 Department of Interior recommends that -- that their agencies use adaptive
25 management to manage natural resources. And so we apply, in this 3M Plan, the

26 ³⁸ Transcript, Vol. 6, p. 1196:18-1197:1 (Jones) (Oct. 2, 2017), ROA pp 54940-41.

27 ³⁹ Transcript, Vol. 2, pp. 345:16-346:12 (Prieur) (Sept. 26, 2017), ROA pp 53951-52.
28 This is consistent with Mr. Prieur's 2011 testimony in which he said:

So this adaptive management is a critical element of the management program in
terms of using monitoring data to improve and refine predictive tools; using that to then
refine the operations plan accordingly.

Transcript, Vol. 11, p. 2381:10-13 (Prieur) (Oct. 10, 2011), ROA p 34800.

1 use of adaptive management to ensure that we are achieving the objectives with
2 the plan, avoiding unreasonable adverse effects, implementing effective
3 mitigation with adaptive management.⁴⁰

4 In other words, SNWA bases investigation triggers, as well as the monitoring and management
5 actions, upon adaptive management. Unfortunately, that key element is fundamentally flawed.

6 The adaptive management program appears to be a recognized tool in the field of natural
7 resources management.⁴¹ However, it is not a one-size-fits-all solution. It only works in
8 carefully tailored situations.

9 Mr. Marshall explained to Mr. Taggart that the adaptive management program was
10 derived from SNWA Ex. 541 entitled *Adaptive Management: The U.S. Department of the*
11 *Interior Technical Guide*. This is the document on which Mr. Marshall and his colleagues relied
12 in developing the 3M Plan.

13 A. MR. MARSHALL: Well, this document lays out the framework for
14 the Department of Interior in terms of what adaptive management is and how it
15 should be applied to natural resource management. And so this is the – *this*
16 *document is the foundation of our concept for adaptive management application*
17 *in the 3M Plan.*⁴²

18 This key element and foundation of the 3M Plan was not followed in a very critical aspect. At
19 page 4 of SNWA Ex. 541 appears the cautionary *Problem-Scoping Key for Adaptive*
20 *Management*.

21 The following key can help in dissecting a particular management problem
22 and determining whether adaptive management is an appropriate approach to
23 decision making. If the answer to any question in the key is negative, then an
24

25 ⁴⁰ Transcript, Vol. 2, p. 376:5-16 (Marshall) (Sept. 26, 2017), ROA p 53982.

26 ⁴¹ SNWA Ex 149, ROA pp 13333-86.

27 ⁴² Transcript, Vol. 2, p. 381:13-18 (Marshall) (Sept. 26, 2017) (emphasis added), RIA p
28 53987.

1 approach other than adaptive management is likely to be more appropriate.

2 ****

3 2. Can stakeholders be engaged?

4 ****

5 [If] *No – without active stakeholder involvement an adaptive management process*
6 *is unlikely to be effective.*

7 In other words, failure to engage the various shareholders dooms adaptive management and,
8 therefore, the 3M Plan.

9 Mr. Marshall admitted that SNWA *failed to engage any of the stakeholders* in drafting
10 the 3M Plan. Consequently, the stakeholders such as the Tribes, Great Basin Water Network, the
11 Cleveland Ranch, Millard and Juab Counties and the other Protestants were not engaged and,
12 therefore, the critical adaptive management process is not going to be effective.

13 The failure to engage the other stakeholders was a significant oversight. The record
14 discloses that, if SNWA had engaged with the Tribes, SNWA would have learned that the
15 cultural significance of the swamp cedars attaches to each individual tree rather than the grove as
16 a whole. Thus, this led to the dichotomy by which the 3M Plan defines an unreasonable effect
17 on the swamp cedars as the extirpation of all of the swamp cedars.⁴³ Whereas, to the Tribes, the
18 loss of one swamp cedar, with its association to the massacres, is wholly unacceptable. Had
19 SNWA engaged with the Tribes, it might also have discovered that the springs associated with
20 the swamp cedars are considered by the Tribes to be sacred and the provision of water from
21 alternate sources would never have been sufficient.

22 If SNWA had engaged with Millard and Juab Counties, it might have learned that the
23 pumping regime will cause interbasin flow from Snake and Hamlin Valleys into Spring Valley.
24 There is no provision in the 3M Plan to monitor that undesirable effect.

25 If SNWA had engaged in conversation with the Cleveland Ranch, it might have learned

26 _____
27 ⁴³ Exhibit SNWA_592 p.3-41, ROA p 47922; Transcript, Vol. 4, pp. 881:15-22, 890:9-14
(Marshall) (Sept. 28, 2017), ROA pp 54566 & 54575.

1 more about the concerns over the source of water for the Ranch's springs and sub-irrigated
2 pasture. It might have learned about the need to investigate and react quickly in order to prevent
3 the loss of a forage season.

4 If SNWA had engaged with the Great Basin Water Network, it might have learned about
5 concerns over whether simply promising to ultimately protect senior water rights would
6 necessarily preserve the habitats for flora and fauna.

7 Adaptive management is the key element of the 3M Plan. The critical "bible" to guide
8 the adaptive management program is SNWA Ex. 541. The failure to follow the dictate of Ex.
9 541 renders the adaptive management program ineffective which, in turn, undercuts the
10 purported validity of the 3M Plan.

11 The State Engineer responds to this criticism by arguing everything will be okay because
12 the 3M Plans will be under the supervision and jurisdiction of the State Engineer. Although the
13 State Engineer is willing to take on this additional role, he has not said how it will be done and
14 that is a problem, as noted in the Remand Decision at page 17:

15 The Engineer pointed out in *Great Basin Water Network v. State Engineer*, 126
16 Nev. Adv. Op. 20; 234 P.3d 912 (2010), that he is short staffed. There are
17 172,605 acres in Spring Valley alone. ROA 18788. Without a plan to monitor
18 that large of an area, a statement that the Engineer will monitor the area is also
19 arbitrary and capricious.

20 Ruling 6446 goes on to say at page 49 that:

21 [T]he State Engineer is adding a requirement that the office of the State Engineer
22 will promptly convene a mandatory meeting between the State Engineer or his
23 designee, the Applicant, and legally interested parties, to review the mitigation
24 strategies included in the 3M Plans.

25 Reviewing the mitigation strategies included in the Plans is not of much value when the
26 applicant has failed to present the evidence required by *Eureka County* to show that the
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1 mitigation strategies will actually work.

2 If SNWA had engaged with all the stakeholders when constructing the current 3M Plan,
3 as required by the “bible” of adaptive management, then those stakeholders, such as CPB, would
4 have had the opportunity to weigh in on investigative triggers, mitigation triggers or mitigation
5 measures. Instead, those stakeholders are compelled by Ruling 6446 to accept all of those
6 measures as fait accompli.

7 CONCLUSION

8 SNWA, and the State Engineer, have acknowledged that the pending applications can
9 never achieve equilibrium or sustainability. Accordingly, the State Engineer was required to
10 deny all of the applications. That left the 3M Plan dangling in the wind, untethered to any
11 approved applications. Nonetheless, Ruling 6446 devotes many pages to a 3M Plan that has no
12 role to fulfill.

13
14 Despite the bulk of the 3M Plan and its supporting documents, the plan is woefully
15 lacking in objective certainty and substantial evidence. In the absence of truly objective
16 standards, the State Engineer has ceded to SNWA effective control over both the investigatory
17 and mitigation processes. First, the 3M Plan effectively only triggers an investigation when
18 SNWA unilaterally wields its complicated formula process. Second, SNWA must determine that
19 any conflicts were caused by SNWA. Third, SNWA will choose a mitigation method from an
20 unlimited list, none of which have been proven to work.

21
22 The 3M Plan is woefully lacking in substantial evidence that the mitigation method
23 chosen by SNWA, at SNWA’s expense, is appropriate for the particular conflict and will actually
24 work. As the Nevada Supreme Court said in a recent case:

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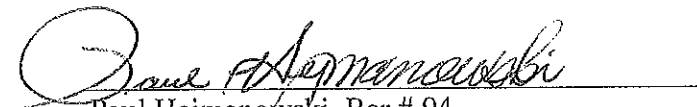
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[W]e determined that the State Engineer’s determination that [the applicant] could mitigate any conflicts to preexisting water rights was not based upon substantial evidence and could not stand.⁴⁴

The Court took pains to point out that, because the applicant had failed to produce substantial evidence, it was not entitled to a do-over mitigation plan. Neither is SNWA.

Dated this 28th day of March, 2019.

HEJMANOWSKI & McCREA LLC and
KAEMPFER CROWELL



Paul Hejmanowski, Bar # 94
Hejmanowski & McCrea LLC
520 S. 4th Street, Suite 320
Las Vegas, Nevada 89101
prh@hmlawlv.com

Severin A. Carlson, Bar # 9373
Kaempfer Crowell
50 W Liberty Street, Suite 700
Reno, Nevada 89501
scarlson@kcnvlaw.com

Attorneys for **Protestant
Corporation of the Presiding Bishop of The Church
of Jesus Christ of Latter-day Saints, a Utah
corporation on behalf of the Cleveland Ranch**

⁴⁴ *State Engineer v. Eureka County*, 133 Nev Adv. Op. 71, 402 P.3d 1249, 1251 (2017).

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CERTIFICATE OF SERVICE

I certify that on this 28 day of March, 2019, I served counsel of record with a copy of the foregoing Opening Brief of the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints on Behalf of the Cleveland Ranch as follows:

Paul G. Taggart, Esq.
Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
Paul@legaltnt.com
Tammy@legaltnt.com

Steven C. Anderson
Southern Nevada Water Authority
1001 South Valley View Boulevard, MS #485
Las Vegas, Nevada 89153
steven.anderson@lvvwd.com

Paul Echo Hawk
Echo Hawk Law Office
P.O. Box 4166
Pocatello, Idaho 83205
paul@echohawklaw.com
aaronw@w-legal.com

Kristy Pickering, Esq.
457 Fifth Street
Ely, Nevada 89301

Simeon Herskovits
Advocates for Community & Environment
P.O. Box 1075
El Prado, New Mexico 87529
simeon@communityandenvironment.net

Rob Dotson
Dotson Law
One East First Street, 16th Floor
Reno, Nevada 89501
rdotson@dotsonlaw.legal
hcampbell@dotsonlaw.legal


Office of the State Engineer
901 S. Steward St. #2002
Carson City, NV 89701

Paul Tsosie, Esq.
Tsosie Law PLLC
5912 Feldspar Way
West Jordan, UT 84081
paul@tsosielaw.com

J. Mark Ward
Balance Resources
3004 Sweet Blossom Drive
South Jordan, UT 84095
wardjmark@gmail.com

James N. Bolotin, Deputy
Nevada Attorney General's Office
100 N. Carson Street
Carson City, NV 89701

John Rhodes
Rhodes Law Offices, Ltd.
P.O. Box 18191
Reno, Nevada 89511
johnbrhodes@yahoo.com


An Employee of Hejmanowski & McCrea LLC