

EXHIBIT A

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Case No. CV-0830008

Dept. No. II

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LINCOLN COUNTY CLERK  
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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF LINCOLN

CARTER-GRIFFIN, INC., et al.,  
and CAVE VALLEY RANCH, LLC,

Petitioners,

vs.

TRACY TAYLOR, Nevada State  
Engineer; STATE OF NEVADA  
DIVISION OF WATER RESOURCES;  
DOES I through X; and ROE  
CORPORATIONS I through X,  
inclusive,

Respondents,

SOUTHERN NEVADA WATER  
AUTHORITY,

Real Party in  
Interest.

ORDER VACATING AND REMANDING  
STATE ENGINEER'S RULING

Petitioner Carter-Griffin, Inc. has requested judicial review of the Nevada State Engineer's Ruling Number 5875 issued July 9, 2008. That ruling granted a transfer of 18,755 acre feet of water annually to the Real-Party-in-Interest from the Cave, Dry Lake, and Delamar Valleys in eastern Nevada, pursuant to the Real-Party-in-Interest's applications 53987, 53988, 53989, 53990, 53991, and 53992. This matter has been fully

1 briefed and oral arguments held. Having examined all relevant  
2 pleadings and papers on file herein, having considered the  
3 arguments of counsel presented during the hearing, and good  
4 cause appearing, the Court now enters the following order:

5 I. Summary of the Case

6 In 1989, the Las Vegas Valley Water District ("LVVWD")  
7 filed multiple applications to transfer ground water from  
8 several rural basins in east-central and southern Nevada.  
9 Administrative Record at 7087. Thereafter, the Southern Nevada  
10 Water Authority ("SNWA") was created and acquired rights to  
11 pursue these applications. AR at 2. The petition before the  
12 Court deals with only some of those applications, specifically  
13 Cave Valley: applications 53988 and 53897; Delamar Valley:  
14 applications 53991 and 53992; and Dry Lake Valley:  
15 applications 53989 and 53990. AR at 2545-56. Through these  
16 applications, SNWA sought to acquire rights to 34,752 acre feet  
17 of water annually within the three basins. AR at 6393.

18  
19 Certain applications for water rights in Spring Valley not  
20 subject to this petition were ruled upon by the State Engineer  
21 on or about April 16, 2007. AR at 6252. On January 7, 2008,  
22 SNWA entered into a stipulated agreement with several  
23 governmental agencies whereby the agencies abandoned their  
24 protests against the applications included in this matter,  
25 among others, provided that SNWA entered into a three-body  
26 board to oversee and mitigate pumping impacts on east-central  
27 and southern Nevada. AR at 2446-83.  
28

1           Thereafter, in February 2008, the State Engineer held a  
2 two week hearing on the applications concerning Cave, Delamar,  
3 and Dry Lake Valleys. Multiple protestants, including but not  
4 limited to the petitioners in this case, appeared and presented  
5 evidence. See AR at 11544-579, 12185-87, 12170, 12248-249,  
6 12209-219, 12676-701, 12651-670, 12704-705, 12707-12711. SNWA  
7 presented evidence regarding the perennial yields of the  
8 subject valleys. AR at 23, 1190-92, 1236-40, 1251. The  
9 protestants meanwhile also presented impact evidence,  
10 referencing a model which SNWA declined to present as evidence.  
11 AR at 1236-1240, 1524-50, 12675-702.

13           Approximately five months later, the State Engineer issued  
14 Ruling No. 5875 partly granting SNWA's applications regarding  
15 the Cave, Delamar, and Dry Lake Valleys. AR at 2-41. In his  
16 decision, the State Engineer changed the published perennial  
17 yields for each of the basins. AR at 9. In each case, SNWA  
18 was granted most of the newly created amounts. AR at 40.  
19 Regarding the remainder, among other things the State Engineer  
20 reserved 0.5 acre-feet per year per projected residential  
21 house, although 2 acre-feet per year is the allowable  
22 residential use. AR at 36-37; NRS 534.180.

## 23           II. Standard of Law

24           Upon a petition for judicial review, the Court is confined  
25 to considering the administrative record. NRS 533.450(1). The  
26 proceedings in every case must be heard by the Court, and must  
27 be informal and summary, but full opportunity to be heard must  
28

1 be had before judgment is pronounced. NRS 533.450(2).

2 In reviewing the record, the Court must treat the State  
3 Engineer's decision as "prima facie correct, and the burden of  
4 proof shall be upon the party" challenging the decision.  
5 NRS 533.450(9). The Court may not substitute its judgment for  
6 that of the State Engineer, but is limited to determining  
7 whether there is substantial evidence in the record to support  
8 the decision. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262,  
9 264 (1979). Substantial evidence is "that which a reasonable  
10 mind might accept as adequate to support a conclusion." *Bacher*  
11 *v. Office of the State Eng'r of Nev.*, 122 Nev. 1110, 1121, 146  
12 P.3d 793, 800 (2006).  
13

14 [A] conclusion that substantial evidence supports the  
15 findings of the State Engineer does not, however, dispose of  
16 the . . . appeal. The applicable standard of review of the  
17 decisions of the State Engineer, limited to an inquiry as to  
18 substantial evidence, presupposes the fullness and fairness of  
19 the administrative proceedings: all interested parties must  
20 have had a "full opportunity to be heard," see NRS 533.450(2);  
21 the State Engineer must clearly resolve all the crucial issues  
22 presented, see *Nolan v. State Dep't of Commerce*, 86 Nev. 428,  
23 470 P.2d 124 (1970) (on rehearing); the decisionmaker must  
24 prepare findings in sufficient detail to permit judicial  
25 review, *id.*; *Wright v. State Insurance Commissioner*, 449 P.2d  
26 419 (Or. 1969); see also NRS 233B.125. When these procedures,  
27 grounded in basic notions of fairness and due process, are not  
28 followed, and the resulting administrative decision is  
arbitrary, oppressive, or accompanied by a manifest abuse of  
discretion, this court will not hesitate to intervene. *State*  
*ex rel. Johns v. Gragson*, 89 Nev. 478, 515 P.2d 65 (1973).

22 *Revert*, 95 Nev. at 786, 603 P.2d at 264.

23 The Court is free to decide purely legal questions *de*  
24 *novo*. *Town of Eureka v. Office of the State Eng'r of Nev.*, 108  
25 Nev. 163, 165, 826 P.2d 948, 949 (1992). A purely legal  
26 question is one that is not dependant upon, and must  
27 necessarily be resolved without reference to, any fact in the  
28

1 case. *Beavers v. Department of Motor Vehicles & Pub. Safety*,  
2 109 Nev. 435, 438 n.1, 851 P.2d 432, 434 n.1 (1993). While the  
3 State Engineer's interpretation of law is persuasive, and the  
4 court should give it great deference when it is within the  
5 language of the applicable statutory provisions, it is not  
6 controlling. *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 950;  
7 *Andersen Family Assocs. v. Ricci*, 124 Nev. Adv. Rep. 17, 179  
8 P.3d 1201, 1203 (2008).

9  
10 III. The State Engineer's Decision was Arbitrary,  
11 Oppressive, and a Manifest Abuse of Discretion.

12 The State Engineer acknowledged within his Ruling that all  
13 water rights previously available in the three basins at issue  
14 had already been fully distributed. The State Engineer then  
15 declared that the perennial yields available within the three  
16 basins had increased, thereby creating additional acre-feet  
17 annually ("afa") eligible for distribution.

18 In the process, the State Engineer reserved some of the  
19 new afa for future growth in the basins. However, no evidence  
20 was cited by the State Engineer in reaching his conclusions  
21 regarding how much water should be retained for future use  
22 within those basins. Instead, his conclusory findings were  
23 simply allowed to speak for themselves. For instance, the  
24 State Engineer uttered the following within the Ruling:

25  
26 the State Engineer does not believe that hundreds or thousands  
27 of homes will be built within the next 50 to 60 years as argued  
28 by Cave Valley Ranch. The State Engineer finds if the entire  
4,692 acres of potentially developable land was parceled into  
5-acre lots this would equate to 938 lots; however, he does not  
believe it is reasonable to think that all 938 lots will be

1 developed. Therefore, the State Engineer finds that it is  
2 reasonable to consider that up to one half of these 938 lots or  
3 469 lots has the possibility of a second-home/vacation-home  
4 being built on them in the future.

5 Under NRS §534.180(1) the allocation of a domestic well  
6 is 2.0 acre-feet per year and while it is true that any  
7 domestic well drilled in Cave Valley will have the statutory  
8 authority to withdraw the stated 2.0 acre-feet per year, from a  
9 management perspective it is highly unlikely this would be the  
10 case. If a property is occupied 60 days per year this equates  
11 to the prorated equivalent of 0.33 acre-feet per year. To  
12 account for some permanent residences and to ensure sufficient  
13 unappropriated water is left in Cave Valley, an allocation of  
14 0.5 of an acre-foot per year will be used for each potential  
15 lot. The State Engineer finds it is reasonable to leave 0.5  
16 afa for each of the 469 lots for future growth and development  
17 for a total of 235 afa. the State Engineer finds water should  
18 also be left in the basin for other uses, such as stock-  
19 watering and minor commercial uses; therefore, an additional 40  
20 afa will be left in the basin for other uses such as stock-  
21 watering and minor commercial for a total of 275 afa total  
22 being left in the basin of origin for future growth and  
23 development.

24 AR at 36-37.

25 As described by the State Engineer, these conclusions and  
26 findings were simply based upon his belief. No evidence was  
27 cited for the conclusions, let alone substantial evidence, with  
28 the State Engineer citing instead to his management  
perspective. Thus the State Engineer's conclusion about the  
proper amount of afa to be reserved within Cave Valley was his  
best guess as the State Engineer. This by definition was  
arbitrary, particularly where only 0.5 acre-feet per year per  
projected residential house was reserved for future growth,  
even though 2 acre-feet per year is the allowable residential  
use.

Similarly, in a prior ruling, the State Engineer declined  
to allow the distribution of greater amounts of water annually  
without significant studies being undertaken to demonstrate

1 that existing use was not already stressing the aquifers at  
2 issue, AR at 5794-5804, yet here, the State Engineer simply  
3 decided that the applicant's proffered models were sufficient  
4 to increase the perennial yields, with monitoring and  
5 mitigation plans referenced as sufficient in the event the  
6 State Engineer was wrong.

7         This solution portends a water rights manager seeking a  
8 resolution to a problem that has been pending since the  
9 applications at issue were first tendered in 1989, namely the  
10 competition for water between the urban landscape of Southern  
11 Nevada and its rural brethren. In the past, the State Engineer  
12 required specific empirical data before taking the significant  
13 step of allowing existing water to be transferred out of basin.  
14 In Ruling No. 5875 however, the State Engineer was satisfied by  
15 normative, predictive data without detailing why that change  
16 was acceptable. While this may have resolved the water  
17 management problem presented by the applications, the sudden  
18 resolution of simply 'printing more money' or mining for water  
19 by declaring that more afa was available when viewed through a  
20 new prism, without explanation as to what changed to allow the  
21 new approach, presents the essence of an arbitrary decision.

22         As acknowledged by the State Engineer, "in dry valleys it  
23 takes an exceedingly long time to reach equilibrium and effects  
24 will eventually spread out from the basin of origin and will  
25 affect the down-gradient basins of White River Valley and  
26 Pahranaagat Valley." AR at 22. Despite this statement, the  
27  
28



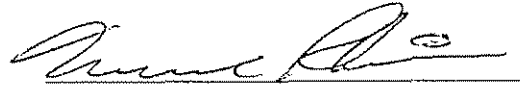
1 State Engineer both changed the method by which the existing  
2 perennial yields were measured and granted the applications  
3 without a clear understanding of the consequences, simply  
4 relying upon the eventual outcome as the measure in the form of  
5 a monitoring and mitigation program. Thus, the State  
6 Engineer's ruling results in an oppressive consequence for the  
7 basins affected, with the State Engineer simply hoping for the  
8 best while committing to undo his decision if the worst occurs  
9 despite the exceedingly long time required to reach equilibrium  
10 and the effects which will eventually spread out from the basin  
11 of origin and affect the down-gradient basins. Capriciousness  
12 by the State Engineer is the reasonable conclusion.  
13

14 In effect, the State Engineer's ruling that there was  
15 newly unappropriated water available for export from Cave  
16 Valley, Dry Lake Valley and Delamar Valley led to the further  
17 conclusions that the applicant's proposed use will not conflict  
18 with existing rights or protectible interests in existing  
19 domestic wells, nor threaten to prove detrimental to the public  
20 interest. Without those impediments, according to the State  
21 Engineer NRS 533.370(5) mandated the granting of the water  
22 rights applications. AR at 40. However, having acted  
23 arbitrarily, capriciously and oppressively regarding the base  
24 conclusion pertaining to the perennial yields and the further  
25 conclusions flowing therefrom, the Court finds that the  
26 required burden of proof has been met. The State Engineer  
27 abused his discretion. Accordingly, the State Engineer's  
28

1 Ruling Number 5875 is VACATED AND REMANDED for further  
2 proceedings consistent with this decision.

3 IT IS SO ORDERED.

4 Dated this 15<sup>th</sup> day of October, 2009.



NORMAN C. ROBISON  
SENIOR DISTRICT JUDGE

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EXHIBIT B

# EXHIBIT B

EXHIBIT B

Case No. \_\_\_\_\_

In the Supreme Court of Nevada

SOUTHERN NEVADA WATER AUTHORITY, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 THE SEVENTH JUDICIAL DISTRICT COURT of the )  
 State of Nevada, in and for the County of White )  
 Pine; and THE HONORABLE ROBERT E. ESTES, )  
 )  
 Respondents, )  
 )  
 and, )  
 )  
 MILLARD COUNTY, UTAH; JUAB COUNTY, UTAH, *et* )  
*al.*, )  
 )  
 Real Parties in Interest. )  
 )  
 (*Full caption on the following three pages*) )

Electronically Filed  
May 30 2014 04:11 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

**PETITION FOR WRIT OF MANDAMUS  
OR, IN THE ALTERNATIVE, PROHIBITION**  
*With Supporting Points and Authorities*

District Court Case Nos. CV-1204050, CV-1204051, CV-1204052,  
CV-1204053, CV-1204054, CV-1204055, CV-0418012, CV-0419012

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*Attorneys for Petitioner*

Case No. \_\_\_\_\_

*In the Supreme Court of Nevada*

SOUTHERN NEVADA WATER AUTHORITY,

Petitioner,

vs.

THE SEVENTH JUDICIAL DISTRICT COURT of the State of Nevada,  
in and for the County of White Pine; and THE HONORABLE  
ROBERT E. ESTES,

Respondents,

and,

MILLARD COUNTY, UTAH; JUAB COUNTY, UTAH; JASON KING,  
P.E., in his official capacity as the NEVADA STATE ENGINEER;  
NEVADA DEPARTMENT OF CONSERVATION AND NATURAL  
RESOURCES, DIVISION OF WATER RESOURCES; CORPORATION OF  
THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS ON BEHALF OF CLEVELAND RANCH; ELY  
SHOSHONE TRIBE; CONFEDERATED TRIBES OF THE GOSHUTE  
RESERVATION; DUCKWATER SHOSHONE TRIBE; WHITE PINE  
COUNTY, NEVADA; ELKO COUNTY, NEVADA; EUREKA COUNTY,  
NEVADA; NYE COUNTY, NEVADA; NYE COUNTY WATER  
DISTRICT; CITY OF ELY, NEVADA; CENTRAL NEVADA REGIONAL  
WATER AUTHORITY; GREAT BASIN WATER NETWORK; SIERRA  
CLUB; CENTER FOR BIOLOGICAL DIVERSITY; 2<sup>ND</sup> BIG SPRINGS  
IRRIGATION COMPANY; LUND IRRIGATION COMPANY; PRESTON  
IRRIGATION COMPANY; ALAMO SEWER & WATER GID; BAKER  
GID; MCGILL-RUTH SEWER & WATER GID; GREAT BASIN  
BUSINESS & TOURISM COUNCIL; WHITE PINE CHAMBER OF  
COMMERCE; NEVADA FARM BUREAU; N-4 STATE GRAZING  
BOARD; BAKER RANCHES INC.; BATH LUMBER; PANACA  
FARMSTEAD ASSOCIATION; BORDER INN; PEARSON FARMS;  
RAFTER LAZY C RANCH; SPORTSWORLD; PROGRESSIVE  
LEADERSHIP ALLIANCE OF NEVADA; LEAGUE OF WOMEN VOTERS  
OF SALT LAKE CITY; UTAH AUDUBON COUNCIL; UTAH  
PHYSICIANS FOR A HEALTHY ENVIRONMENT; POST CARBON SALT  
LAKE; UTAH RIVERS COUNCIL; BRISTLECONE ALLIANCE; CITIZENS  
EDUCATION PROJECT; INDIAN SPRINGS CIVIC ASSOCIATION;  
SCHOOL OF THE NATURAL ORDER; VAUGHN M. HIGBEE & SONS;  
ARMANDO AGUILEW; CHRIS ADLER; BART ANDERSON; AMY  
ASPERHEIM; MICHELE AUSTRIA; CRAIG & GRETCHEN BAKER,  
individually and on behalf of their minor children, MATTHEW &  
EMMA; DAVID A. & TANA R. BAKER, individually and on behalf  
of their minor children, CLAYTON F. DEAN & BARBARA BAKER;  
TOM & JANILLE BAKER, individually and on behalf of their minor  
children ALYSHIA, CALEB, MEGAN & KAYLI; JERALD BATES;

EXHIBIT B

JAMES & DONNA BATH; SHANNON BARKER; CHRISTIA BARLOW; )  
MARGARET BARLOW; RICHARD A. BARR; BRIAN BEACHER; )  
ELIZABETH BEDELL; CYNTHIA LEE BELL; "ROBIN" EDWARD JOHN )  
BELL III; LOUIS BENEZET; KATHY BINGLEY; MICHAEL BIVINS; )  
GARY BODELL; SEAN BONNELL; BOBBY BONNELL; LUKE )  
BOTTICHE; JOHN BOWMAN; D. DANIE BRADFIELD; JAMES E. )  
BRADY; ANN & JIM BRAUER; JOEL BRISCOE; WALTER FRANKLIN )  
BROWN; TOM E. BROWN; BERNARD & EVA BUSWELL; MICHELE R. )  
BUTLER; WILLIAM BUTTS; ART CAMERON; KAREN CAMPBELL; )  
DALE CANEPA; RACHEL CARLISLE; BEAU CARLSON; DAVID )  
CARLSON; LOUISE CARLSON; MARIE A. CARRICK; MELISSA )  
CHEENEY; STEVE CHOUQUER; BRANDON CHRISTIAN; CRAIG )  
CHRISTIANSON; LENE CLAY; WILLIAM COFFMAN; PETER COROON; )  
JOHN S. COLE; KATHLEEN M. COLE; LANDON COLE; DAWNE )  
COMBS; JOHN CONDIE; WILLIAM & GENIEL CONNOR; KATHY )  
COOK; DAVID & HALLI COX; ROBERT CRAGER; PATRICIA J. )  
CROSTHAIAIT; DUSTIN CROWTHER; CARY CURCIO; KELLEY )  
DABEL; BRAD & ROBIN DALTON; GARY DAVIS; PETE TONY )  
DELMUE; LUDELL DEUTCHER; ROM DiCIANNO; TRAVIS DORMINA; )  
ANTHONY PAUL DONOHUE; ORRIN DOTSON; DENNIS DOTSON JR.; )  
JOSEPH A. DUNNE; JERRI ELLIOT; VELDA EMBRY; JERRY )  
ETCHART; JAMES R. FERRELL; JODY FINICUM; MIKE & JO )  
FOGLIANI; PAULA J. FOHT; MELISSA JO FREE; JUSTIN FREHNER; )  
PATRICK FULLER; VERONICA GARCIA; BRENT GARDNER; )  
ANNETTE & CECIL GARLAND; JO ANNE GARRETT; PATRICIA J. )  
GLADMAN; DONALD GENT; ANNA E. GLOECKNER; PAUL & )  
NANCY GLOECKNER; PAT & KENA GLOECKNER, individually and )  
on behalf of their minor children, KYLEE, KORI, & KOURTNEY; )  
TAMI GUBLER; CHARLES HAFEN; DENNIS HAFEN; LAVOY HAFEN; )  
FREDRICK HAMMEL; RELENA HANLEY; MICHAEL HANLEY; BART )  
HANSEN; DANIEL & JUNE HANSEN; RICK HANSEN; BILLIE )  
HARKER; CAROL HARKER; DELSA NAIA HARKER; EVE HARKER; )  
JOSETT HARKER; THORA HARKER; DAVID HARTLEY; ROCKY & )  
LYNDA HATCH STEVEN HEISELBETZ; AARON CARL HGFELDT; )  
KATHY HIATT; EDWIN E. HIGBEE; KENNETH F. & KATHRYN A. )  
HILL; JANICE HILTON; BRANDON HOLTON; N. PETER HORLACHER; )  
ANDREW M. HORSCH; CAROL HULLINGER; RAY HULSE; DON )  
HUNT; MARIAN K. HUNT; MERLENE HURD; JENNIFER JACK; )  
ROBERT JENNINGS; JERONE A. JENSEN; AARON JESSOP; CARL )  
JESSOP; JESSICA JESSOP; KEVIN J. JESSOP; LORIN JESSOP; LORIN Z. )  
JESSOP; MIKE JESSOP; VIVIAN JESSOP; ABIGAIL C. JOHNSON; HOPE )  
JOHNSON; KIRK JOHNSON; LAURA JOHNSON; LINDA G. JOHNSON; )  
MARK D. JONES; WILLIAM JORDAN; DENNIS JURGENSEN; PATRICK )  
M, KELLEY; ROSE DIANE KELLEY; BECKY KLEIM; JESS KLOTZ; )  
MICHAEL KNIPES; RONALD KOZAK; WILLIAM KRAMER; )  
KATHLEEN LAJOIE; LARRY LAJOIE; ROBERT LAUBACH; LEAH R. )  
LAWSON KYLE LEANY; JACK T. LEE; JIMMIE SUE LEE; MERRILEE )  
LEE; ROLLIN KIM LEE; JACOB LESTER; SARAH LESTER; WESLEY )  
R. & ELAINE R. LEWIS; BEVAN LISTER; BRAD LLOYD; JO & JASON )  
LLOYD; MICK & LYNN LLOYD; TERESA LLOYD; WILLIAM LONG; )  
D.L. LUCCHESI; FARRELL & MANETTA LYTLE; KEN & DONNA )  
LYTLE; LISA L. LYTLE; CHRYSTAL MALLOY; DIANNE E. MASON; )  
MARK A. MASON; BARBARA J. MASON-WANKET; MAJOR MASTIN; )

---

EXHIBIT B

NEVIN MAYGARY MCBRIDE; MARIE MCBRIDE; JOHN T. )  
MCCLELLAN; NATHAN MCCLURE; KATHERINE MCCROSKY; )  
MELINDA MCCROSKY; STEVE MCCROSKY; RODERICK MCKENZIE, )  
PAULA & PARKER MCMANUS; AARON MCRORY; NATALIE )  
MELLEM; LAUREL ANN MILLS; AMANDA MOORE; JOE MORROW; )  
KARI MORTENSEN; DEAN MOSSGR; LISA M. NIELSEN; ALLAN K. )  
NYBERG; DENNIS O'CONNOR; MARK OLSON; TERRY OLSON; )  
CARLOS PALENCIA; JANICE PALMERI; AXEL PEARSON; KEITH A. & )  
LACIE PEARSON; LEE PEARSON; MARGARET PENSE; GARY & JO )  
ANN PEREA; GRANT PERKINS; CLIFFORD PETE PETERSON; INDIA )  
PHILLIPS; KEVIN PHILLIPS; RACHELLE PHILLIPS; TERRYLE H. )  
PHILLIPS; TONI PINKHAM; ARLA PRESTWICH; RICHARD PRINCE; )  
MERLE RAWLINGS; PHILLIP REEVES; MERLIN RHODE; JANIE )  
RIPPETOE; MARK RIPPETOE; RONALD JEREMY ROBINSON; )  
DONALD RODRIGUEZ; LARENE & CHUCK ROGERS; DANILE ROHR; )  
KEITH & MARY ROSE; GARY ROSONLUND; KATHERINE & )  
WILLIAM ROUNTREE; ROBERT ROWE; RICHARD A. RULLO; )  
DAMIAN SANDOVAL; GREG SCHATZLE; TREY SCOTT; TOM H. )  
SEARS; VAUGHAN E. SEEBEN JR.; JOHN SETTLES; CHRIS SHINKLE; )  
AARON SHOWELL; DAN & CONNIE SIMKINS; RANDY & SHARLAN )  
SIMKINS; SUMMER & SHANE SIMKINS; SAMMYE L. SKINNER; JIM )  
SLOUGH; WILLIAM SMITH; SARAH SOMERS; DEVIN )  
SONNENBERG; ED SPEAR; SHANNON SPENDLOVE; MARSHALL )  
STACKHOUSE; THEODORE STAZESKI; TERRANCE & DEBRA )  
STEADMAN; PAUL STEED; RACHEL STEED; MICHELLE STEPHENS; )  
KEITH STEVER; LARRY STEVER; JACKIE STEWART; KARL C. )  
STEWART; BEVERLY STRICKLAND; SHELBY TAYLOR; SIDNEY )  
TAYLOR; RUSS & CHEYENNE THOMPSON; REX & GRACIE )  
THOMPSON; LAURA TIBBETTS; RYAN TIMMONS; ANNA M. )  
TROUSDALE; DEB UMINA; DENNIS VANWINKLE; ED VINCENT; )  
ALEX, NICHOLAS & JOSEPH VINCENT; EDWARD & STEPHANIE )  
VINCENT; MIKE VITT; HENRY C. & DANA VOGLER, individually )  
and on behalf of their minor children; STINSON VOGLER; DUANE )  
E. & BRYNLEE WADSWORTH; JAYCEE, TYLER & KATHY )  
WADSWORTH; JOHN WADSWORTH; MARCIA WADSWORTH; MARK )  
WADSWORTH; TYLER WADSWORTH; BRADLEY WALCH; ACHIEL E. )  
WANKET; EDITH B. WARREN; JO WELLS; SUSAN WETMORE; B.J. )  
WHITNEY; SHARON WILLIAMS; WILLIAM & HOLLY M. WILSON; )  
EDWARD E. WRIGHT; MARGARET JOYCE & GORDON F. YACH; )  
MICHELLE YOSAI; and DONALD ZOOK, )  
)  
)  
Real Parties in Interest. )  
)  
)

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**NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the Southern Nevada Water Authority is governmental agency and a political subdivision of the State of Nevada.

DATED this 29th day of May 2014.

LEWIS ROCA ROTHGERBER LLP

By: /s/ Daniel F. Polsenberg

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**PETITION FOR WRIT OF MANDAMUS  
OR, IN THE ALTERNATIVE, PROHIBITION**

Southern Nevada Water Authority (“SNWA”) petitions this Court for a writ of mandamus or, in the alternative, a writ of prohibition to challenge the district court’s December 13, 2013 decision, which effectively reversed and remanded the State Engineer’s grant of SNWA’s applications to appropriate unused ground water from Spring, Delamar, Dry Lake , and Cave Valleys in Eastern Nevada.

Specifically, the district court erred in directing the State Engineer to authorize a lesser quantity of pumping in Spring Valley. (1 App. 13.) Substituting its opinions for the State Engineer’s factual findings, the district court fashioned from whole cloth a requirement that “standards, thresholds or triggers” to mitigate impacts be set concurrently with permit approval. (1 App. 23.) The order also compels the State Engineer to calculate again the unappropriated water in the Delamar, Dry Lake, and Cave Valleys based on the court’s opinion that those groundwater basins are akin to a river flowing on the surface. (1 App. 23.)

This Court should vacate the district court's December 13, 2013 decision and affirm State Engineer Rulings 6164, 6165, 6166, and 6167.

Dated this 29th day of May, 2014.

LEWIS ROCA ROTHGERBER LLP

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VERIFICATION

STATE OF NEVADA )  
  ) ss.  
COUNTY OF CLARK )

Under penalties of perjury, the undersigned declares that he is counsel for the petitioners named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true.


This verification is made under NRS 15.010.

DATED this 29th day of May 2013.

  
\_\_\_\_\_  
DANIEL F. POLSENBERG

Subscribed and sworn to before me  
this 29th day of May 2013

  
\_\_\_\_\_  
NOTARY PUBLIC

 **JESSICA M. HELM**  
Notary Public State of Nevada  
No: 08-8522-1  
My appt. exp. November 5, 2016

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**MEMORANDUM OF POINTS AND AUTHORITIES**

In 1989, the predecessor-in-interest to Southern Nevada Water Authority (“SNWA”) applied for permits to transfer unappropriated water from Spring Valley, Delamar Valley, Dry Lake Valley, and Cave Valley. Several parties objected to the approval of the permits, including federal agencies such as the National Park Service, the Bureau of Fish and Wildlife, the Bureau of Land Management (“BLM”), and the Bureau of Indian Affairs. The federal agencies withdrew their objections to SNWA’s applications. (1 App. 25-36; 3 App. 738-822.)

Between 1989 and 2011, numerous studies and reports were produced on the probable impact of SNWA’s appropriation request which resulted in the State Engineer’s approval of a plan to monitor, manage and mitigate impacts from the Project (“3M Plan”). (3 App. 823–6 App 1496.) The 3M Plan prohibits the development of SNWA’s permits from conflicting with existing water rights or causing unreasonable adverse effects on the environment. Pursuant to the 3M Plan, the State Engineer will monitor water levels and changes in water movement, monitor any effects that pumping has on the environment, collect data to develop better models to predict the effects of pumping and require mitigation of unreasonable impacts from the Project. (1 App. 126; 4 App. 857-861, 911-15.)

For multiple reasons, including a previous trip to this Court, the hearing that led to the ruling that is the subject of this appeal was not held until 2011. The State Engineer held six weeks of hearings on the applications from September 26, 2011 until November 18, 2011. The State Engineer concluded that Southern Nevada needs the water requested by SNWA. Specifically, the State Engineer found that “Southern Nevada is almost entirely dependent on the Colorado River, as it supplies 90% of Southern Nevada’s water.” (1 App. 55.) Due to drought conditions, between 2000 and 2010, the average flow in the Colorado River was dramatically lower than normal, and Lake Mead’s water level dropped between 130 and 140 feet – a reduction of about 55-60%. (1 App. 56.) The State Engineer found that Southern Nevada’s ability to rely on Colorado River water in future years was likely to decline dramatically as a result of both the reduced flow of the river and the increased water use by upstream states that do not yet use all of their allocated Colorado River water. (1 App. 57-60.) In other words, Southern Nevada needs the water requested in SNWA’s applications not to support increased growth, but to protect Southern Nevada from shortages to its dwindling water supply.

At the six-week hearing on SNWA’s applications, SNWA and numerous protestants submitted thousands of pages of scientific evidence. At the conclusion of the hearing, the State Engineer approved most, but not all, of SNWA’s

applications. The State Engineer calculated the water available for appropriation by SNWA by applying the same methods of calculating the “perennial yield” that his office has used for over fifty years. The State Engineer awarded SNWA a total of 61,127 acre-feet annually in Spring Valley, 5,235 acre-feet annually in Cave Valley, 11,584 acre-feet annually in Dry Lake Valley, and 6,042 acre-feet annually in Delamar Valley. (1 App. 239; 2 App. 410, 574, 736.)

The State Engineer required SNWA to comply with the 3M Plan, and as another layer of protection, the State Engineer did not allow SNWA to immediately pump all the water it was awarded in Spring Valley. (1 App. 239-240.) Pumping is only authorized in stages. SNWA can only pump approximately 62% of the total amount for eight years, after which it must seek authorization from the State Engineer to pump more. And even then SNWA is not allowed to pump the full amount – it may only pump about 82% of the total award for eight years and then seek authorization to pump the full amount. During those sixteen years, the State Engineer will monitor pumping, evaluate the effects of pumping on existing water rights and the environment, improve groundwater models that predict the effects of future pumping and require mitigation of unreasonable impacts. (1 App. 126; 4 App. 857-861, 911-915.)

The district court agreed with the State Engineer that water is available, the water is needed in Southern Nevada, and the project can be built. The district court

agreed large amounts of water are available for appropriation in Spring Valley.

The district court also stated there is “no real question” that substantial evidence supports the State Engineer’s finding that Southern Nevada needs additional water “independent of the Colorado River,” and that “current available supplies [are] insufficient to meet projected future water demands.” (1 App. 7.) The district court also upheld the State Engineer’s conclusion that SNWA has the financial ability, technical capacity and intent to develop the water. (1 App. 23.)

But the court disagreed with the State Engineer’s calculation for water appropriations. Specifically, the district court directed the State Engineer to authorize a lesser quantity of pumping in Spring Valley so that the basin “reaches equilibrium” more quickly. (1 App. 23.) The district court also believed there is “insubstantial evidence” to support the 3M Plan because the 3M Plan does not include *triggers*, and the State Engineer should recalculate the unappropriated water in the Delamar, Dry Lake and Cave Valleys. (1 App. 23.) The district court acknowledged that the State Engineer’s conclusions are subject to significant deference by the courts and that the State Engineer’s decision must be affirmed if it is supported by “substantial evidence.” (1 App. 5.) But the district court nevertheless substituted its judgment for the State Engineer’s and decided that its view of the science was better than the State Engineer’s. The district court acted arbitrarily and capriciously by substituting its judgment and adding new

requirements to Nevada water law that are not supported by either legal authority or the sound science that the State Engineer relied on.

This case presents legal questions of statewide importance that are critical for this Court to review, not only because of Southern Nevada's pressing need for water, but because the issues presented are confronted often by the State Engineer. Everyone in Nevada will benefit from this Court's guidance.

### **ISSUES PRESENTED**

This case requires the Court to determine whether the district court substituted its judgment for the conclusions reached by the State Engineer after the State Engineer held six weeks of hearings, considered thousands of pages of documentary evidence, and issued four lengthy rulings, including a 218-page decision with 186 pages of factual findings.

The issues presented are:

1. Whether a new, unprecedented, method for calculating water available for appropriation should be applied across Nevada instead of the State Engineer's proven and historic method.
2. Whether the efficacy of the monitoring, management and mitigation plan ordered by the State Engineer is supported by substantial evidence.
3. Whether the State Engineer's conclusions that unappropriated water exists in Delamar, Dry Lake, and Cave Valleys and that the diversion of that water

will not significantly impact flow into the White River system are supported by substantial evidence.

**A WRIT OF MANDAMUS OR PROHIBITION  
IS APPROPRIATE IN THIS CASE**

SNWA has filed a separate appeal of the district court's order because it believes that the order is a final judgment. *See* Case No. 64815. One of the parties that protested SNWA's applications filed a motion to dismiss the appeal for lack of jurisdiction, which has been fully briefed. If SNWA is incorrect about this Court's jurisdiction, the Court should issue a writ of mandamus or prohibition.

Writ petitions should be considered “‘when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition.’” *Westpark Owners' Ass'n v. District Court*, 123 Nev. 349, 357, 167 P.3d 421, 426 (2007) (quoting *State of Nevada v. District Court (Ducharm)*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002)). Judicial economy and public policy is served by consideration of writ petitions when the questions presented are legal in nature and are of statewide significance. *See Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051, 1053-54 (2014); *Falcke v. Douglas County*, 116 Nev. 583, 586, 3 P.3d 661, 662-63 (2000) (“[W]here an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified.”).



This Court has previously concluded that “land use and development are important public policy issues” that justify addressing the issues raised in a writ petition. *Falcke*, 116 Nev. at 586, 3 P.3d at 663. Water use and development is even more important because in Nevada, water is “a precious and increasingly scarce resource.” *Bacher v. Office of State Eng’r*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006); *see also United States v. State Eng’r*, 117 Nev. 585, 591, 27 P.3d 51, 55 (2001) (Becker, J., concurring in part and dissenting in part) (water is the “most precious of natural resources”).

This case presents issues of statewide importance because the district court fundamentally altered the way that the State Engineer is required to analyze applications for appropriation of water. The district court required the State Engineer to determine when the Spring Valley basin will reach equilibrium, which has never been a part of Nevada water law. (1 App. 23.) The district court also required the State Engineer to set “triggers” now for determining when mitigation of potential unreasonable effects would occur. (1 App. 23.) This requirement, again, has never been a part of Nevada water law. The district court required the State Engineer to regulate groundwater as if it were flowing through a river, which is flatly contradicted by the scientific evidence. (1 App. 23.) Given the paramount importance of water to Nevada, this case cries out for review by this Court.

This is especially true because the issues presented are legal issues. The district court did not simply remand the matter to the State Engineer to conduct a more thorough inquiry or to consider overlooked evidence. Instead, the district court divined new standards for the State Engineer to apply, and rejected the State Engineer's historic standards. The remand is purely procedural for application of the district court's new standards.

Much time and expense will be saved if this Court reviews the matter now. Requiring the State Engineer to apply erroneous rules will result in a wasted proceeding. Review by the Court now will prevent this matter from bouncing back and forth between the State Engineer and the district court numerous times before reaching this Court. Nothing will be gained by requiring the State Engineer to perform the extra-statutory duties the district court required of him. Sound public policy and judicial economy support review of this case now.

Additionally, a writ of mandamus is available "to control a manifest abuse or an arbitrary or capricious exercise of discretion." *Cote H. v. District Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008); *Washoe County District Attorney v. District Court*, 116 Nev. 629, 635, 5 P.3d 562, 566 (2000). The district court's decision in this case was arbitrary and capricious because it does not give the State Engineer the deference due under this Court's decisions. "The decision of the State Engineer is prima facie correct, and the burden of proof is on the party

attacking the decision.” *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. Adv. Op. 48, 245 P.3d 1145 (2010) (citing NRS 533.450(9)) (internal quotation marks omitted). The district court’s review was “limited to ‘a determination of whether substantial evidence in the record supports the State Engineer’s decision.’” (*Id.*) (quoting *Office of State Eng’r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991)). “Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion.” (*Id.*) (internal quotation marks omitted) (quoting *Bacher v. State Eng’r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006)). The court “will not pass upon the credibility of the witnesses nor weigh the evidence . . . .” *Morris*, 107 Nev. at 701, 819 P.2d at 205.

As explained in detail below, the district court substituted its judgment for the State Engineer’s and required the State Engineer to do things that have never been required by Nevada water law. The Court should therefore review the district court’s decision for the additional reason that it is flat wrong.

### **BACKGROUND**

The State Engineer must refuse to approve an application for water if “there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights . . . .” NRS 533.370(2). The State Engineer has traditionally used the calculation of the “perennial yield” as a metric for determining whether unappropriated water exists. The State Engineer’s

definition of perennial yield is the “maximum amount of groundwater that can be salvaged each year over the long term without depleting the groundwater reservoir.” (1 App. 79.) This Court has used a similar definition: “The perennial yield of a hydrological basin is the equilibrium amount or maximum amount of water that can safely be used without depleting the source.” *See Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. Adv. Op. 48, 245 P.3d 1145, 1147 (2010).

By determining the upper limit on the amount of water that can be sustainably used (*i.e.* the perennial yield), and then subtracting the amount of water that is subject to existing rights, the State Engineer ensures that there is, in fact, unappropriated water in the supply source. The difference between the perennial yield and the amount of water that is subject to existing rights is generally equal to the amount of water that is available to an applicant. (*See id.* at 1147 (upholding permit for appropriation of an amount of water equal to the difference between perennial yield and amount of existing permanent use).)

**A. The Science-Based Method of Calculating Perennial Yield**

For decades, the State Engineer has calculated the perennial yield using the “groundwater budget method.” Water enters a hydrological basin through precipitation and groundwater flow from surrounding basins. (1 App. 79.) This is called “recharge.” (*Id.*) Water leaves a basin through evaporation from the soil, “transpiration” (which is the consumption of groundwater by plants), or by flowing

to a surrounding basin. (1 App. 79-80.) This is called “discharge.” (1 App. 79.)

When determining a basin’s discharge, evaporation and transpiration are often referred to collectively as “evapotranspiration” (ET). A groundwater system is presumed to be in a steady state before it is developed by humans, which means that the amount of water entering a basin is equal to the amount of water leaving the basin. (1 App. 80.) The groundwater budget is therefore “balanced” before it is developed. (*Id.*)

When humans develop a water source through pumping, a large portion of the water is initially captured from the “transitional storage” of the basin and very little is captured from ET. (7 App. 1513.) Transitional storage is “the quantity of water in storage in a particular ground water reservoir that is extracted during the transition period between natural equilibrium conditions and new equilibrium conditions under the perennial-yield concept of ground water development.” (7 App. 1513.) Over time, this gradually reverses, and most of the capture comes from ET. In a large basin like Spring Valley, equilibrium will take a long time and the water level will go down while equilibrium is being re-established. (1 App. 113; 25 App. 5688.) The Nevada Legislature has recognized that this phenomenon is unavoidable and provided that “[i]t is a condition of each appropriation of groundwater acquired under this Chapter that the right of the appropriator relates to

a specific quantity of water and that the right must allow for a reasonable lowering of the static water level at the appropriator's point of diversion." NRS 534.110(4).

**B. Calculation of Perennial Yield for Spring Valley**

The Spring Valley basin is recharged through precipitation that percolates through the soil and into the underground aquifer. (1 App. 80.) The water in the Spring Valley basin is discharged almost exclusively through ET because there is relatively little transfer of water between basins. (1 App. 10; 1 App. 80.) The perennial yield cannot exceed the recharge amount, and the perennial yield in Spring Valley is at least equal to the estimated ET discharge. (*Id.*)

The State Engineer considered the testimony of multiple expert witnesses regarding the perennial yield in Spring Valley, including expert witnesses offered by the protestants. The evidence resulted in a 34-page discussion in the State Engineer's ruling. (1 App. 79-113.) The State Engineer first noted that, as a general principle of hydrology, ET "can be more accurately measured than groundwater recharge or subsurface flow." (1 App. 81.) Turning to the Spring Valley evidence, the State Engineer considered data derived from SNWA's "state-of-the-art" data collection towers that measure the density and health of vegetation using ground-level sensors and satellite data. (1 App. 81; 7 App. 1589-8 App. 1975.) This data was "independently evaluated and approved by Dr. Travis Huxman of the University of Arizona," who has "extensive experience in locating ET measurement sites in complex ecosystems." (1 App. 84; 15 App. 3101.) The

protestants' expert "did not question [SNWA's] measurement of ET rates." (1 App. 85.) Indeed, he "testified that [SNWA's] estimates are probably as accurate as they can be." (1 App. 87; 24 App. 5328.) And the State Engineer concluded that SNWA's expert's error-correction techniques provided for a more accurate assessment that was "scientifically sound and represent[ed] an improvement over past studies, and validate[d] the accuracy of [SNWA's] ET estimates." (1 App. 86.)

The State Engineer also consulted several reports published by the United States Geological Survey, although he concluded that those reports were less accurate than SNWA's studies because SNWA's data was collected over a longer period of time and used more measurement sites. (1 App. 80, 98.) The State Engineer did not accept either side's evidence completely, and accepted the protestants' expert testimony when it was based on the best available science. (*See* 1 App. 94 ("The State Engineer finds that Applicant's method is a mass balance approach to determine groundwater ET, and by ignoring a portion of the water budget their groundwater ET estimation method is flawed. The State Engineer also finds that the annual average groundwater-ET over-estimation error attributable to this cause is approximately 3,000 acre-feet."); 1 App. 96 ("The State Engineer finds that Applicant over-estimated groundwater ET for the five-year period 2006

to 2010 by approximately 7,700 afa . . . . Therefore, the State Engineer subtracts 10,700 afa from the Applicant's estimated 94,800 afa of groundwater ET.”.)

The State Engineer concluded that the most accurate measure of perennial yield was ET and that estimates of recharge or interbasin flow would be excluded. (1 App. 113.) The State Engineer found that the perennial yield for Spring Valley is 84,000 acre-feet annually. (*Id.*)

The State Engineer calculated existing water rights at 18,873 acre-feet per year (a finding the district court did not disturb) and subtracted that number from the total perennial yield. (1 App. 237-38.) The State Engineer also set aside 4,000 acre-feet annually to provide for future uses in Spring Valley. *See* NRS 533.370(3)(d). Thus, the State Engineer determined that the full amount of water available to SNWA is 61,127 acre-feet annually.

**C. Conflicts Analysis and Groundwater Modeling**

The State Engineer also conducted a comprehensive analysis of whether any actual conflicts with existing water rights are likely to develop. The State Engineer first assessed potential conflicts based on water right ownership, geographical location, and the priority of the water rights. He then looked to groundwater models. And finally, he looked at some site-specific analyses. (1 App. 143-86.) The protestants focused only on modeling projections.

SNWA's model was developed in conjunction with the Bureau of Land Management. (1 App. 145-46; 8 App. 1983.) SNWA's model was based on 75



years of historical data. (1 App. 169.) Under the theory of “history matching,” a model can only make predictions with confidence for a period of time equal to the period of time that provided the data used to calibrate the model. (1 App. 169; 25 App. 5738-40.) The protestants’ model projected 200 years into the future – more than the time period for which there is available data. (*Id.*) The State Engineer found that both models were useful, but that SNWA’s model was better because it was more comprehensive, better documented, and peer reviewed. (1 App. 169-170, 174.) The State Engineer noted that both models contained uncertainties, but he considered both models and merely gave more weight to SNWA’s model. (1 App. 154.) The State Engineer concluded that the predicted drawdown in the water table of 50 feet over 75 years was reasonable, but that adverse impacts were likely without monitoring, management and mitigation and that more information would be useful to ensure that there are no adverse impacts on existing water rights or the environment. (1 App. 155, 174, 209, 240.)

Accordingly, the State Engineer did not authorize SNWA to immediately begin pumping the full 61,127 acre-feet annually, but instead required development in stages and compliance with the 3M Plan. (1 App. 239-240.) The 3M Plan began life as a stipulation to settle objections to SNWA’s applications that were lodged by the National Park Service, the Bureau of Fish and Wildlife, the

Bureau of Land Management, and the Bureau of Indian Affairs (the “Federal Stipulation”). (1 App. 126-27; App. 738–4 App. 822.)

**D. Staged Development and the 3M Plan**

In the first stage of the 3M Plan, SNWA may not pump more than 38,000 acre-feet annually (62% of the total award to SNWA) for eight years. (1 App. 239.) SNWA is not permitted to pump more than 38,000 acre-feet annually until the State Engineer approves additional pumping. (*Id.*) During stage one, SNWA is required to collect data to update and improve its modeling results and submit reports to the State Engineer. (*Id.*) During stage two, SNWA may not pump more than 50,000 acre-feet annually for another eight years and must continue to collect data to improve its groundwater model. (*Id.*) The State Engineer must approve SNWA’s transition to stage three, which is when it will be able to pump the full 61,127 acre-feet annually. SNWA must provide annual reports to the State Engineer in perpetuity.

Under the 3M Plan, SNWA will collect large amounts of data from many test wells drilled at many points within the basin, most of which are clustered near the proposed points of water diversion for the SNWA project. (4 App. 844, 889; 14 App. 2939, 2955.) Pumping while monitoring and managing will increase the data that can be used in the groundwater models so that the models will improve over time. (1 App. 140; 4 App. 859, 913.) Pumping will yield unique data that will allow more precise and accurate predictions of potential impacts on existing

rights and the environment. (1 App. 130, 142-43; 4 App. 894.) If environmental problems or conflicts with existing rights arise, the mitigation plan provides for (1) cessation of pumping, (2) modifying the pumping regime, (3) changing the location of pumping, (4) drilling new wells, (5) lowering pumps, or (6) providing alternative sources of water. (1 App. 141; 4 App. 861, 946.) Protestants' own witness testified that he has had success with similar 3M Plans. (1 App. 205; 25 App. 5635-38.)

Managed succession of plant communities is part of the 3M Plan. Succession is the process by which plant communities can gradually transition and adapt to altered conditions. (1 App. 210-11; 9 App. 2007-73.) Testimony indicated that managed succession can be used as a tool in Spring Valley for existing plant communities to adapt to changing water levels and remain healthy ecosystems. (17 App. 3549, 3631.) The key to effective plant succession is that the pace of water level changes must be slow enough for plants to adapt. (17 App. 3553.) The State Engineer's staged development requirements and 3M Plan are designed to control the time periods over which water level changes occur.

The State Engineer's 3M Plan is incorporated into the terms of the SNWA pumping permits. (1 App. 196, 216, 240.) The State Engineer relied on voluminous reports and expert testimony that was introduced during six weeks of hearings before he approved the 3M Plan. (1 App. 112; 2 App. 259.) The

evidence was submitted to support the efficacy of the 3M Plan, and the conclusion that objective standards can be developed in the future to ensure protection of existing water rights and environment. That evidence included existing baseline data, a system of collaborative governmental oversight, adaptive management and ongoing monitoring.

**1. Baseline Data**

Spring Valley, Dry Lake Valley, Delamar Valley, and Cave Valley have been under study for decades. (1 App. 112; 2 App. 259.) SNWA has been collecting data since the applications were filed in 1989 and has been systematically collecting groundwater hydrology data since 2007. (1 App. 126; 9 App. 2074–11 App. 2703.) SNWA has also established environmental baseline data for biotic communities within Spring Valley and nearby, including aquatic ecosystems, amphibians, birds, mammals, bats, reptiles, fish, invertebrates, and vegetation such as cactus, yucca, and weeds. (1 App. 198-99; 2 App. 377-78; 10 App. 2310–11 App. 2703.) SNWA has studied endangered, threatened, and sensitive plant and animal species, focusing on groundwater-influenced habitats. Protestants' expert witnesses testified that they had no criticism of the environmental baselines. (2 App. 317; 22 App. 4912-13; 23 App. 5059-62.)

SNWA presented a large amount of baseline data to federal and state resource managers to ensure environmental protection through permitting and other processes. (1 App. 200.) SNWA has also worked with many governmental

agencies to obtain numerous environmental permits and ensure that SNWA's project complies with various regulatory requirements, including the National Environmental Policy Act ("NEPA"). (1 App. 200-01; 2 App. 376, 378-80; 11 App. 2718; 12 App. 2815, 2847.) NEPA requires full consideration of environmental impacts resulting from SNWA's project. (1 App. 200; 2 App. 376.)

## ***2. Collaborative Governmental Oversight***

The State Engineer is not the only person protecting existing rights holders and the environment. The 3M Plan had its origin in a stipulation among SNWA, the U.S. Bureau of Indian Affairs, the U.S. National Park Service, the U.S. Bureau of Land Management, and the U.S. Fish and Wildlife Service. The Federal Stipulation was adopted to ensure federal laws are complied with, as well as Nevada state law as it relates to federal resources. (3 App. 738-4 App. 822.) The 3M Plan that was approved by the State Engineer incorporates the Federal Stipulation, including the hydrologic and biologic components. (4 App. 82-6 App. 1496.) Like the Federal Stipulation, the 3M Plan's goals are to manage the development of groundwater by SNWA without causing injury to all existing water rights or unreasonable adverse effects to Federal resources by scientifically characterizing the hydrology in Spring Valley. (1 App. 127; 4 App. 881-85.)

The 3M Plan includes a Technical Review Panel ("TRP") to implement the 3M Plan's hydrologic component and a Biological Work Group ("BWG") to implement the biologic component. (1 App. 881; 4 App. 932.) Scientists with

expertise over hydrology, biology and the environment are members of TRP and BWG. (*Id.*) An executive committee oversees implementation and execution of the 3M Plan. (*Id.*) TRP and BWG evaluate groundwater model results and make recommendations to the executive committee. (*Id.*)

The 3M Plan, while based on the Federal Stipulation, was expanded to include non-federal water rights. (1 App. 129; 4 App. 838-39, 882; 18 App. 3765-66.) A key attribute of the 3M Plan is the collection of data and the provision of annual reports to the State Engineer. The reports will be available on the State Engineer's website so that the public can view them. There are already reports from 2008-2011 available to the public. (1 App. 132.)

### **3. *Adaptive Management***

The 3M Plan incorporates the accepted scientific method of adaptive management. Adaptive management is almost universally embraced by the people who develop natural resources because it deals with uncertainty in a way that permits natural resources to be developed responsibly. (12 App. 2826; 18 App. 3755-56.) If adaptive management is not available, society would be paralyzed and unable to develop natural resources. "The adaptive management philosophy in natural resource conservation is based upon the unremarkable notion that resource managers should evaluate the results of their efforts and adjust their actions according to what they have learned from experiences with the natural resource system being managed." *W. Watersheds Project v. Salazar*, 766 F. Supp. 2d 1095,

1110 (D. Mont. 2011). “This natural resource management philosophy emphasizes learning from experience to better manage complexity and uncertainty.” (*Id.*) The “learning while doing” concept is central to adaptive management, and that is exactly what SNWA and the State Engineer intend to do with this project.

The State Engineer’s practice has been to utilize 3M Plans and adaptive management in the approval of other water right applications. (14 App. 2965-68.) For instance, to facilitate large-scale water development for important mining projects, the State Engineer often requires applicants to comply with adaptive management requirements. (1 App. 126.) The State Engineer applied his historic experience and knowledge with 3M Plans to his review of the 3M Plan for this project.

The State Engineer’s review of the 3M Plan was evenhanded. Despite competing evidence, the State Engineer found that adaptive management and the 3M Plan could not protect certain existing rights. For example, the State Engineer denied four SNWA applications because he found they would have impacted existing rights near Cleve Creek based on the evidence provided by protestant Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, Utah (“CPB”). (1 App. 163-65.)

**4. Ongoing Monitoring.**

Effective adaptive management requires thorough monitoring. The State Engineer relied on extensive evidence that the monitoring plan for the project will

be effective when he approved the 3M Plan. SNWA has spent over \$10,000,000 to develop a monitoring network throughout Spring Valley, Delamar Valley, Dry Lake Valley, and Cave Valley. (1 App. 130; 2 App. 328-30, 495-96; 18 App. 3772.) The network consists of, among other things, numerous monitoring and testing wells that are spread out across the pumping area. (1 App. 130; 2 App. 328, 496; 14 App. 2939, 2942, 2955.) Most of the monitoring wells in Spring Valley are clustered near sites where water will be pumped in order to detect changes in water level quickly. (1 App. 130; 14 App. 2939.) The placement of the DDC wells is intended to assess the relationship between the DDC valleys and adjacent basins. (2 App. 328; 14 App. 2955.)

SNWA will be collecting data such as water-level measurements, surface water measurements, precipitation measurements, and water chemistry. (1 App. 129; 14 App. 2937-47, 2953-2961.) Tracking water levels allows scientists to understand actual pumping impacts and develop better pumping regimes. (1 App. 130; 14 App. 2948, 2959.) SNWA's expert testified that the location of the monitoring wells was appropriate and that the results of monitoring can help determine how much water to pump, where to pump, and when to pump. (1 App. 129-31; 2 App. 328, 495-97; 19 App. 4004-5.)

Here are a few illustrative examples of the types of monitoring that will occur under the 3M Plan in Spring Valley:



- The 3M Plan will monitor drawdowns at Unnamed Spring #7 and #8, South Bastian Spring, South Bastian Spring 2, and Layton Spring. (1 App. 162.) Monitoring at these sites will help determine the aquifer characteristics and determine whether they are even connected to a larger groundwater basin. (*Id.*)
- The 3M Plan will monitor four valley floor areas where SNWA's initial analysis predicted possible impacts – Swamp Cedar North, Unnamed #5 Spring, Four Wheel Drive Spring, and South Millick Spring. (1 App. 209; 18 App. 3794; 20 App. 4500–21 App. 4502.) The status of species such as the northern leopard frog, birds, and bats will be monitored and unreasonable adverse effects will be mitigated if they occur. (*Id.*) The 3M Plan provides for mitigation through irrigation with surface water and fencing out animals that might graze on swamp cedars. (*Id.*)
- The 3M Plan will monitor the Shoshone Ponds site to determine whether there are any unreasonable effects on the Pahrump pool fish, the relict dace (a kind of fish), and the leopard frog. (1 App. 209; 21 App. 4504.)
- The 3M Plan will monitor the aquatic and wetland communities that are most sensitive to change, even though the wet meadows and

grasslands are sustained by irrigation and surface water runoff and are unlikely to be affected by a lowering in the groundwater levels.

(1 App. 211; 17 App. 3582, 3584.) The 3M Plan will monitor swamp cedars and, if adverse impacts occur, they will be mitigated by regulation of grazing or using irrigation. (1 App. 212; 21 App. 4503.)

- The 3M Plan will monitor local springs in southern Cave Valley and regional springs in White River Valley. (2 App. 329; 14 App. 2955.)
- The 3M Plan will monitor water elevation in several wells near Dry Lake Valley and Pahrnagat Valley and water samples will be verify the State Engineer's conclusion regarding their sources. (2 App. 496-97; 19 App. 4042.)

The State Engineer ordered SNWA to monitor all the sites that were included in the Federal Stipulation, and also ordered the installation of wells and monitoring equipment at Cleveland Ranch, Turnley Spring, Shoshone Ponds, and the "Interbasin Monitoring Zone" ("Zone"), which surrounds the area where Spring Valley, Hamlin Valley, and Snake Valley come together. (1 App. 134-39.) SNWA will also conduct a study to determine whether pumping has an effect on surface water. (1 App. 129.) Surface springs will be monitored throughout Spring Valley and the DDC Valleys. (1 App. 130-31; 2 App. 329-30.)

SNWA will even be monitoring sites where the State Engineer found no adverse impact will occur. For example, the State Engineer concluded that certain of the wells at Cleveland Ranch are either deep enough that they can accommodate a significant lowering of the water level, or that the wells were completed at shallow depths and can be deepened if the water level drops. *See* NRS 534.100(4) (existing water rights “must allow for a reasonable lowering of the static water level at the appropriator’s point of diversion”). The State Engineer concluded that there will consequently be no impact on those rights. (1 App. 157.) These wells still will be monitored.

SNWA presented voluminous evidence regarding monitoring in 3M Plans across the United States, and the effectiveness of the monitoring network in the 3M Plan for this project. (14 App. 2965-68.) The protestants’ expert attempted to discredit the efficacy of SNWA’s monitoring system. He acknowledged, however, that his analysis did not replicate the conditions in Spring Valley. (1 App. 133; 26 App. 5767-69.) He also relied on a hypothetical concept where the monitoring well was located far from the pump site (up to 48 miles). (*Id.*) He contended that his hypothetical monitoring site (which was nothing like the actual monitoring program) would not identify problems in time to mitigate them. (*Id.*) The State Engineer rejected this testimony after weighing it against contrary expert testimony from SNWA’s that indicated the closer proximity of actual monitoring wells to

pumping sites will allow for quicker detection and reaction to any indication of potential adverse impacts. (*Id.*)

**5. *Effective Management and Mitigation***

SNWA has already collected data in Spring Valley and the DDC Valleys for four years, and has provided that data to the State Engineer. (9 App. 2074–11 App. 2703.) The State Engineer found that this data “will provide scientifically sound baseline information from which changes to the system and potential impacts can be diagnosed, assessed, and, if necessary, mitigated.” (1 App. 134; 2 App. 332.)

The State Engineer relied in part on the testimony of the protestants’ own witnesses when determining that implementation of the 3M Plan would avoid interference with existing rights and unreasonable environmental impacts:

The [3M Plan] provides flexibility for future modifications to the monitoring plan based on new information and technologies and future management considerations. In addition, the monitoring methodology instituted by the [3M Plan] provides an adaptive management framework, in other words, instituting the steps of setting goals and priorities, developing monitoring and conservation strategies, taking needed action, measuring results, and refining the plan. Protestants’ expert Dr. Patten emphasized that monitoring is a critical element of adaptive management, which can result in the successful management of systems if resource managers adhere to the steps of researching, learning, testing ideas, adapting, reconsidering conceptual ideas, and trying again. A central component of the [3M Plan], adaptive management calls for continual evaluation of the [3M Plan] and its success, and it provides for alteration of the [3M Plan] as necessary to achieve environmental soundness-related goals.

Protestants assert adaptive management plans are not learn-as-you-go plans, and criticize [SNWA’s] [3M Plan] on this ground. However, Dr. Patten testified that learning, and adapting to what

scientists learn through monitoring, is an important part of understanding the ecological function of systems and managing those systems. Dr. Patten further testified that monitoring programs can achieve ecological sustainability of spring areas through appropriate water management. Protestants' witness, Dr. Robert Harrington, Director of the Inyo County Water Department, acknowledged that the adaptive management process is one he employs in the Owens Valley, and that adaptive management has had success there.

The State Engineer finds the adaptive management approach incorporated in the [3M Plan] is an accepted scientific approach that is appropriate and advisable for managing a long-term Project such as this one. The State Engineer finds that adaptive management is a critical component in ensuring water development occurs in a manner that is environmentally sound.

(1 App. 204-05.)

The State Engineer identified multiple ways to mitigate any problems that arise from pumping, including grazing management, irrigation, water substitution, deepening wells, drilling new wells, monetary compensation, changing the location and amount of pumping, replacement of water by SNWA, and termination of pumping. (1 App. 141, 213-16; 4 App. 861, 915.) After considering testimony from GBWN's expert and SNWA's expert, the State Engineer concluded as follows:

[SNWA] has presented a comprehensive monitoring, management and mitigation plan. The State Engineer finds that the monitoring network is scientifically sound and designed in such a manner to provide monitoring coverage, from a basin-wide scale to a site-specific scale, from groundwater to surface water, and from the valley floor to the mountain block. The State Engineer finds that the data collection efforts of [SNWA] demonstrate a commitment to sustainable development of the resource. The State Engineer finds

that mitigation options, together with the required Mitigation Plan and stage development, will ensure the development of the Applications in a sustainable manner that will avoid conflicts with existing rights. While the State Engineer is not a party to the Applicant's Stipulation with the Federal Agencies, the State Engineer finds that it provides a forum through which critical information can be collected from hydrological experts, and used to assure development of the Applications will not conflict with existing water rights or with protectable interests in existing domestic wells. The State Engineer finds that mitigation measures listed in the Management Plan will be effective, and that [SNWA] is required to perform any mitigation activities that may be necessary to avoid conflicts with existing rights.

(1 App. 142-43.)

### **6. *Triggers***

The State Engineer relied on the protestants' own witnesses when he found it is premature to set "triggers" for mitigation until pumping occurs:

The [3M Plan] lays out a process for developing triggers for action in the event an unreasonable adverse impact to a resource is anticipated. The process includes the identification of conservation targets and their key ecological attributes and indicators and the development of adequate baseline data. The BWG agreed to collect at a minimum seven years of baseline data prior to groundwater development in Spring Valley. The BWG has already collected two years of data. The BWG is fully engaged in the process of data development.

Protestants argue that [3M Plan] provides inadequate assurances of the Project's environmental soundness because it has not yet identified the specific quantifiable standards that will be used to provide early warning to impacts in the ecosystem. However, under the [3M Plan], the BWG is working to develop suitable conservation targets and parameters that in concert with hydrologic monitoring will provide early warning of impacts to the ecosystem. Factors such as natural variation in the environmental resources must be understood before any standards or triggers are set.

Selecting specific standards before a full baseline is developed would be premature. It would not lead to sound scientific decisions. Indeed, Protestants' expert Cliff Landers stated, "[Y]ou really have to have baseline data in order to be able to make intelligent decisions." Dr. Robert Harrington agreed the collection of baseline data prior to groundwater withdrawal makes the Project far better positioned to ensure water development occurs in a sustainable manner than was the case in the Owens Valley.

The State Engineer finds that the [3M Plan] establishes a sound process for developing triggers and decisional thresholds to be employed in the adaptive management plan for the Project. Furthermore, it is premature to set management triggers and decisions thresholds until additional years of data have been collected and natural variation and other factors are thoroughly understood. The State Engineer finds that failure to set triggers or thresholds at this time does not invalidate the [3M Plan] or undercut the development of an effective adaptive management plan; to the contrary, it demonstrates [SNWA's] determination to proceed in a scientifically informed, environmentally sound manner.

(1 App. 205-06.)

**E. Perennial Yield Calculation for the DDC Valleys**

The State Engineer calculated the perennial yield for the DDC Valleys (Dry Lake, Delamar, and Cave Valleys) the same way he did for Spring Valley – by preparing a groundwater budget. (2 App. 286-87.) Spring Valley is almost completely separate from other groundwater basins. (2 App. 288.) But the DDC Valleys are not completely separate, so the State Engineer evaluated the groundwater budget differently. (*Id.*)

The DDC Valleys are part of the "White River Flow System" ("WRFS"), which includes ten other groundwater basins. (*Id.*) The phrase "White River Flow

System” can be somewhat misleading to the layperson because it sounds like a place to go white-water rafting. Indeed, the protestants urged the State Engineer to treat the entire WRFS as though it were a flowing river under the “one river” theory. But in reality, the flow among the underground basins in the WRFS is extremely slow and does not resemble a river at all. (7 App. 1624-26; 14 App. 2978-84.) The water in the WRFS moves through rock and other materials of various permeability and is often impeded by the geological structure. (14 App. 2982-84; 15 App. 3026-27.) It is not free-flowing like river water. River water flow is measured in miles per day, but groundwater movement is measured in feet per day. (14 App. 2982-84; 15 App. 3026-27; 7 App. 1626.)

The State Engineer recognized this when he rejected the one river theory and stated that “comparing a groundwater flow system to a river is flawed by ignoring the time frames and geological uncertainties involved.” (2 App. 289.) No State Engineer has ever managed Nevada’s groundwater using a one river theory. (*Id.*) Rather, the State Engineer has always maintained that in systems like the WRFS, “up-gradient use will not, if at all, measurably affect down-gradient supply for hundreds of years.” (*Id.*) Thus, the State Engineer uses a basin-by-basin approach because “that there [is] groundwater available for appropriation in each basin, and the amount available is related to the annual supply of the basin, i.e., the perennial yield.” (*Id.*)



The State Engineer consulted a groundwater flow model that SNWA submitted to the BLM for an Environmental Impact Statement (“EIS”) analysis. The model helped determine the effect that pumping in the DDC Valleys would have on the WRFS’ discharge. (2 App. 289; 8 App. 1983.) The WRFS discharges at three main locations: Regional springs in White River and Pahranaagat Valley, and the Muddy River Springs Area. (*Id.*) The model showed that “after 200 years of pumping, the regional warm springs in the White River Valley, Pahranaagat Valley, and the Muddy River Springs Area are virtually unaffected. The State Engineer [found] that if no measurable impacts to existing rights occur within hundreds of years, then the statutory requirement of not conflicting with existing rights is satisfied.” (*Id.*; 14 App. 2985-88.) The modeling results showed that the groundwater basins are not connected enough to treat as one river.

After properly rejecting the protestants’ “one river” theory, the State Engineer calculated the perennial yield for the entire WRFS by relying on United States Geological Survey (“USGS”) reports, expert testimony and expert reports, and computer-based analyses. (2 App. 291.) The perennial yield for the entire WRFS had to be calculated because many of the basins have no ET and independent analyses of the groundwater budgets for those basins are not feasible. (*Id.*) The State Engineer therefore developed a groundwater budget for the entire WRFS and allocated perennial yields to the appropriate basins. (*Id.*) The USGS

had previously estimated the perennial yield of each basin in this manner. (2 App. 290-91.)

For the few WRFS basins that have ET, the State Engineer calculated ET using many of the same techniques he used for Spring Valley. He relied on SNWA's expert testimony regarding data that SNWA obtained from its state-of-the-art system for measuring vegetation. (2 App. 292.) He also relied on the model SNWA prepared for the EIS. (*Id.*) Protestants' expert witnesses did not disagree with SNWA's ET calculations, and they were consistent with USGS reports. (2 App. 292, 299; 24 App. 5328; 7 App. 1676.)

The State Engineer then calculated the total recharge for WRFS using a mathematical groundwater balance formula, and subtracted precipitation. (2 App. 312-13.) The total recharge was then allocated among the WRFS basins using a computer program and the results were compared to earlier studies. (2 App. 313-15; 482-85; 3 App. 646-48.) The recharge number was adjusted based on the particular basin's ET and interbasin flows. (2 App. 317-21, 486-89; 3 App. 650-53.)

- Delamar Valley perennial yield. The State Engineer concluded that groundwater flows from Dry Lake Valley into Delamar Valley and that water originating in Dry Lake Valley had already been included in the perennial yield for Dry Lake Valley. (3 App. 653.) Thus,

groundwater originating in Dry Lake Valley was not included in the perennial yield. The State Engineer concluded, based on expert testimony and analyses provided by SNWA, that flows out of Delamar Valley did not support Flag or Butterfield Springs or any other existing rights. The State Engineer thus concluded that the perennial yield for Delamar Valley is 6,100 acre-feet annually. (*Id.*)

- Dry Lake Valley perennial yield. The State Engineer concluded that there would be no impacts to existing down-gradient rights for hundreds of years, and that the perennial yield for Dry Lake Valley was equal to the estimated recharge of 15,000 acre-feet annually. (2 App. 489-90.)
- Cave Valley perennial yield. Some of the water that is discharged from Cave Valley flows to two small springs – Flag and Butterfield Springs – where it is then used by existing rights holders. SNWA argued that only 3,800 acre-feet of the basin total of 12,900 acre-feet discharges as flows at the two springs. (2 App. 320-21.) The State Engineer disagreed and found that 7,300 acre-feet discharges as flow at the springs. To fully protect Flag and Butterfield Springs, the State Engineer reduced the 12,900 acre feet available in Cave Valley by

7,300 acre feet, thereby reducing the perennial yield in Cave Valley to 5,600 acre-feet annually. (*Id.*)

The State Engineer's calculations of perennial yield were based on numerous studies and reports, as well as the testimony of several expert witnesses called by both SNWA and the protestants.

## ARGUMENT

### I.

#### THE STATE ENGINEER'S CALCULATION OF THE AMOUNT OF WATER AVAILABLE TO SNWA FROM SPRING VALLEY WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

The district court turned well-settled principles of Nevada water law on their head when it imposed brand new rules requiring the State Engineer to determine a firm timeline for the basin to return to equilibrium once pumping began, and by requiring an appropriator to capture all of the ET.

#### A. Standard of Review

The State Engineer's calculation of the amount of water available to SNWA was largely a question of fact. The standard of review is the same in this Court as it was in the trial court. *See Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. Adv. Op. 48, 245 P.3d 1145, 1147-48 (2010). "The decision of the State Engineer is prima facie correct, and the burden of proof is on the party attacking the decision." *Id.* (citing NRS 533.450(9)). This Court's "review is limited to 'a determination of whether substantial evidence in the record supports the State

Engineer's decision.”” (*Id.*) (quoting *Office of State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991)).

“Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion.” (*Id.* (internal quotation marks omitted) (quoting *Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006)).) The court “will not pass upon the credibility of the witnesses nor weigh the evidence . . . .” *Morris*, 107 Nev. at 701, 819 P.2d at 205; *City of N. Las Vegas v. Pub. Serv. Comm'n*, 83 Nev. 278, 281, 429 P.2d 66, 68 (1967). And “just because there was conflicting evidence does not compel interference with the [State Engineer's] decision so long as the decision was supported by substantial evidence.” *Clark County Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96, 98, 787 P.2d 782, 783 (1990) (citing *O'Donnell v. Buhl*, 266 P.2d 668, 669 (Idaho 1954)) .

The complicated scientific and technical disputes that the State Engineer resolved highlight the fundamental reasons why courts defer to agency determinations. Those reasons have been fleshed out to a significant degree by the federal courts, which use the same “substantial evidence” standard as this Court. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619-20 (1966) (“We have defined ‘substantial evidence’ as ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’”).

The substantial evidence standard “frees the reviewing courts of the time consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote uniform application” of the law. (*Id.* at 620.) Courts should be at their ““most deferential” when reviewing scientific judgments and technical analyses within the agency’s expertise.” *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (citing *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)); *see also Env’tl. Def. Fund, Inc. v. Costle*, 578 F.2d 337, 339 (D.C. Cir. 1978) (“Where administrative judgment plays a key role, as is unquestionably the case here, this court must proceed with particular caution, avoiding all temptation to direct the agency in a choice between rational alternatives.”). The same extreme deference is appropriate “where an agency is ‘making predictions, within its area of special expertise, at the frontiers of science . . . as opposed to simple findings of fact . . . .’” *See Petal Gas Storage, L.L.C. v. F.E.R.C.*, 496 F.3d 695, 702 (D.C. Cir. 2007) (quoting *Balt. Gas & Elec.*, 462 U.S. at 103); *see also Costle*, 578 F.2d at 339 (noting difficult task in determining “whether the agency has exceeded the bounds of its permissible discretion, in an area characterized by scientific and technological uncertainty”).

A reviewing court is “not to ‘act as a panel of scientists, instructing the agency, choosing among scientific studies, and ordering the agency to explain

every possible scientific uncertainty.’” *Northern Plains Resource v. Surface Transp. Bd.*, 668 F.3d 1067 at 1074 (9<sup>th</sup> Cir. 2011) (quoting *Lands Council v. McNair*, 537 F.3d 981, 988 (9<sup>th</sup> Cir. 2008)). “Where expert witnesses dispute a factual issue the resolution of which implicates substantial agency expertise, [the court’s] role is only to verify that the agency has relied upon sufficient expert evidence to establish a rational connection between the facts and the choice made.” *See Petal Gas*, 496 F.3d at 702 (internal quotation marks omitted) (quoting *Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 746-47 (D.C. Cir. 2001)).

The Nevada Legislature implicitly incorporated these ideas into NRS 533.024(1)(c), which only requires the State Engineer to use the “best available science in rendering decisions concerning the available surface and underground sources of water in Nevada.” Thus, the Legislature has codified the common sense notion that the State Engineer’s duty does not require him to go beyond the limits of human knowledge. As the Nevada Legislature has done for the State Engineer, the United States “Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency.” *Consolo*, 383 U.S. at 621.

**B. The District Court Admitted that the State Engineer’s Calculation of Perennial Yield Was Supported by Substantial Evidence**

The district court agreed that for Spring Valley, the “State Engineer relied on substantial evidence, produced from numerous sources, when determining the amount of water available for the Spring Valley appropriation granted to SNWA.” (1 App. 9.) That was correct. The State Engineer considered the testimony of multiple witnesses and documentary evidence. The State Engineer has always used the perennial yield to determine the amount of water available for appropriation. And this Court has approved of this approach. In *Ricci*, the Court upheld the State Engineer’s ruling determining that “[o]f the 2,100 afa perennial yield, 672 afa had already been committed to permanent, permitted use. The remaining 1,428 afa was *unappropriated water available for permanent use.*” See *Ricci*, 245 P.3d at 1149.

Thus, the district court’s conclusion that the State Engineer relied on substantial evidence would have been the end of the inquiry if the district court had applied the appropriate standard.

**C. Nothing in Nevada Law Requires SNWA to Show when a Basin Will Reach a New Equilibrium or that all Evapotranspiration Can Be Captured**

Instead of accepting that the State Engineer’s ruling was supported by substantial evidence, the district court substituted its judgment, reweighed the evidence and then grafted new requirements onto the perennial yield calculation. The court required the State Engineer to determine exactly when the groundwater



would reach 100% equilibrium and required SNWA to show that it could capture all of the ET.

***1. The State Engineer's Tried and True Method Has Been the Way Appropriation Applications Have Been Processed for Decades***

Neither of these judgments have ever been required in Nevada. For more than fifty years, the State Engineer has applied the methodology described above. The statute itself, and this Court's opinions, clearly allow up to 100% of the available unappropriated water to be developed. *See* NRS 533.370(2) (permitting appropriation of all "unappropriated water"); *Ricci*, 245 P.3d at 1149 (noting that all perennial yield above the water appropriated for existing use was "available for permanent use"). Every groundwater appropriation in Nevada has required some period of time during which the transient storage was depleted. (7 App. 1513.) But the State Engineer has never required that any appropriator, no matter how large or small the appropriation, determine precisely when the basin will return to equilibrium. And no authority has ever held that the State Engineer is required to determine when a basin will return to equilibrium.

The district court also erroneously concluded that the State Engineer's own standard requires salvage of all ET and erroneously stated that SNWA's expert "certified that uncaptured E.T. would have to be deducted from the perennial yield." (1 App. 12; 19 App. 4208; 20 App. 4311, 4348.) SNWA's expert never conceded that uncaptured ET must be deducted from the perennial yield. The

standards cited by the district court are: (1) “Perennial yield is ultimately limited to the maximum amount of natural discharge that can be salvaged for beneficial use,” and (2) that perennial yield is an “assumption that water lost to natural E.T. can be captured by wells and placed to beneficial use.” (1 App. 12.) Neither of these statements even hints that all ET must be captured. The first statement merely reiterates that the perennial yield is *capped* at the maximum amount of discharge that can be salvaged. And the second statement just acknowledges that ET that would otherwise be lost can instead be diverted for beneficial use by appropriators.

ET is merely a proxy, or a metric, for determining perennial yield. ET is not a means to develop water. In other words, the purpose of calculating ET is to determine *how much water is available*, not to determine how water must be captured. ET is the maximum amount of water available, not the minimum.

This is critical because the determination of perennial yield works in tandem with the other sections of NRS 533.370 to ensure that existing rights, the public interest and the environment are protected. The Nevada legislature has tasked the State Engineer with ensuring that no appropriations conflict with existing rights or “threaten[] to prove detrimental to the public interest,” and that interbasin transfers are “environmentally sound as it relates to the basin from which the water is exported.” *See* NRS 533.370(2); NRS 533.370(3)(c). The statutes require independent evaluation of those criteria, regardless of the calculation of perennial

yield. The proper protection of existing rights and the environment are afforded through the application of these latter provisions, not the criteria related to whether unappropriated water exists.

The State Engineer's unappropriated water decision was properly based solely on the groundwater balance method and a deduction for the quantity of existing water rights. If there is water available, the unappropriated water criterion is satisfied. Since impacts to existing rights and the environment are considered under separate statutory criteria, the unappropriated water consideration should not be used, as the district court directed, to analyze harm to existing rights or the environment. The district court's rule leads to an absurd result: unappropriated water exists, no conflicts exist with existing rights, and the development is environmentally sound, but the project still cannot be developed.

**2. *The District Court Improperly Reweighed the Evidence***

The district court improperly focused solely on its view, unsupported by the record, that equilibrium would never be reached and then improperly substituted its judgment for the State Engineer's. The district court was troubled by the lack of certainty in the data because SNWA's best data showed that the basin would only be about 84% of the way toward equilibrium after 200 years. But SNWA's models showed a clear trend toward equilibrium and that there would consequently be no groundwater mining. (14 App. 2988A-C.) The State Engineer is "compelled to exercise [his] judgment in the face of scientific uncertainty unless that uncertainty

is *so profound* that it precludes any reasoned judgment.” *Miami-Dade County v. EPA*, 529 F.3d 1049, 1065 (11th Cir. 2008) (emphasis added). The State Engineer can “apply his expertise to draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as ‘fact,’ and the like.” *See Upper Blackstone Water Pollution Abatement Dist. v. United States EPA*, 690 F.3d 9, 24 (1st Cir. 2012) (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976)).

An agency is allowed to rely on models to help fill gaps in data. *See Natural Res. Def. Council v. E.P.A.*, 529 F.3d 1077, 1085 (D.C. Cir. 2008). “Any model is an abstraction from and simplification of the real world. Nevertheless, administrative agencies have undoubted power to use predictive models.” *Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 535 (D.C. Cir. 1983) (citing *Sierra Club v. Costle*, 657 F.2d 298, 332-35 (D.C. Cir. 1981)). Courts “look for evidence that the agency is conscious of the limits of the model.” (*See id.*) And courts “generally defer to an agency’s decision to proceed on the basis of imperfect scientific information, rather than to invest the resources to conduct the perfect study.” *Natural Res. Def. Council*, 529 F.3d at 1086 (quoting *Sierra Club v. EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999)); *see also Native Village of Elim v. State*, 990 P.2d 1, 8 (Alaska 1999) (holding that, particularly when there

is “substantial scientific uncertainty,” “[c]ourts are singularly ill-equipped to make natural resource management decisions” and that they should “not substitute [their] judgment for that of the” entity tasked with making decisions based on existing science).

The State Engineer repeatedly acknowledged that hydrological science is inherently uncertain and that he was aware of the limits of the models presented by SNWA and the protestants. (1 App. 185, 187.) The State Engineer is not hamstrung by the lack of precise science. The State Engineer’s candid recognition that science is uncertain is a virtue, not a flaw. *See Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 535 (agency acts properly when it recognizes the limits of a model). In the exercise of his scientific and professional judgment, the State Engineer is capable of making informed predictions, including predictions about when equilibrium will be reached.

The model that the State Engineer relied upon reflects the best scientific evidence and the district court should not have acted as a scientist instructing the State Engineer to choosing among scientific studies and “explain every possible scientific uncertainty.” *Northern Plains*, 668 F.3d at 1074 (quoting *Lands Council v. McNair*, 537 F.3d 981, 988 (9th Cir. 2008)). The district court improperly substituted its ad hoc bright line test for the State Engineer’s decision. The State Engineer’s decision was based on modeling evidence showing that the Spring

Valley basin will trend toward equilibrium over time, which a reasonable mind could have considered adequate to support the conclusion that equilibrium would eventually be reached. That determination is entitled to deference.

**3. *The District Court Gave SNWA and the State Engineer an Impossible Task***

The district court's ruling recognized that "[o]bviously, any water-well [sic] cannot capture all the E.T. . . ." (1 App. 18.) The State Engineer similarly noted that it is just as unrealistic for multiple water users to be able to collectively capture all of the ET. (1 App. 114.) If the district court is right that all ET must be captured, it would be impossible for any source of groundwater to be fully developed. But the Nevada Legislature and this Court have authorized development of groundwater sources up to the amount of the perennial yield and have declared that the preeminent public policy in the state with regard to water is beneficial use. *See* NRS 533.035; *Preferred Equities Corp. v. State Eng'r*, 119 Nev. 384, 389, 75 P.3d 380, 383 (2003); *see also* NRS 533.030(1) ("Subject to existing rights, . . . *all water* may be appropriated for beneficial use . . . ." (emphasis added)). This new limitation on the full beneficial use of groundwater is contrary to that public policy and has no basis in law, reality, or science. The district court's ruling imposes an impossible burden on SNWA, which cannot possibly be what the legislature intended when it enacted NRS 355.370(2).

Ironically, the district court's requirement that all ET be captured could lead to the conclusion that *more* pumping should be done, despite the fact that the district court's opinion reflects its worry that SNWA wanted to do *too much* pumping. Accelerated pumping also runs contrary to managed succession, which the State Engineer recognized requires slow changes in water levels which lead to the healthy adaption and transition of plant communities. The district court's failed to appreciate the requirements of managed succession, the concept of transitional storage, or that equilibrium in a large basin like Spring Valley takes a very long time.

4. ***If the State Engineer Had Required a Date Certain for Equilibrium and Proof of Total ET Capture, That Would Have Been Arbitrary and Capricious***

If the State Engineer had suddenly flip-flopped from his decades-old technique and applied the method that the district court is now requiring, the State Engineer would have had to explain why he was departing from the tried and true method of calculating ET that he and his predecessors had consistently used. *Atchison, Topeka & Santa Fe Rwy. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (plurality opinion) (noting that an agency has a "duty to explain its departure from prior norms"). In other words, if the State Engineer had done in the first instance what the district court has now required him to do, the State Engineer's actions would have been arbitrary and capricious because he had no reason to alter his normal method of evaluating appropriation applications. When

an agency changes its normal course of action, it must explain that a change is being made and “that there are good reasons for the new policy.” *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

“[L]aw does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, and another for Tuesday, a rule for general application, but denied outright in a specific case.” *Frozen Food Express, Inc. v. United States*, 535 F.2d 877, 880 (5th Cir. 1976) (quoting *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964)). “[U]nder some circumstances and agency’s shifting of the policy goalpost (e.g., the evidentiary requirements for a particular statutory or regulatory standard) may lead [a court] to conclude that the agency has acted arbitrarily or capriciously.” *Qwest Corp. v. F.C.C.*, 689 F.3d 1214, 1228 (10th Cir. 2012). The district court faults the State Engineer for doing what he could not do in the first place and provides no reason backed by legitimate science why the State Engineer erred in doing what his office has always done. The district court’s ruling was therefore arbitrary and capricious and should be reversed.

**D. The Very Existence of NRS 335.3705 Shows that the District Court Was Wrong**

The district court’s analysis was distorted because it assumed that SNWA would be pumping the full amount of the award from day one, despite the fact that it upheld the staged development under NRS 335.3705. That statute expressly



permits the State Engineer to “limit the initial use of water to a quantity that is less than the total amount approved for the application.” This is yet another reason that the district court’s ruling should be reversed.

More interesting, however, is how NRS 335.3705 helps illuminate the meaning of the other water statutes. Several of the protestants argued below that NRS 533.3705 did not apply in this case. And one of the protestants, the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, on Behalf of Cleveland Ranch, has filed a petition with this Court for limited writ review of whether NRS 533.3705 applies. It is strange why the protestants would make this argument, and so forcefully. One would assume the protestants would advance the argument that NRS 533.3705 *does* apply and that the State Engineer should exercise his discretion to approve smaller amounts of water.

One way to explain this curious strategy is that the protestants’ argument on this point, dovetailed with their argument that SNWA is required to do the impossible and capture all ET (which they, in turn, claim will kill all of the plants and animals that they are concerned with saving), is just part of their agenda to oppose the SNWA project in every possible way. Their only goal is to put SNWA into an impossible position no matter the consistency of their arguments.

But perhaps the protestants' objection to the application of NRS 533.3705 make sense for another reason. The statute eviscerates their arguments. If NRS 533.3705 permits stepped up appropriation over time, it cannot possibly be the legislature's intent that before approving any application, the State Engineer must establish with absolute certainty that the full amount of pumping after a phase-in period will result in equilibrium over time. Rather, NRS 533.3705 can only be understood to recognize that monitoring, management, and mitigation plans are a vital part of the statutory framework by which the State Engineer administers Nevada's water pursuant to his express grant of authority by the Nevada Legislature. *Cf.* NRS 533.353 (permitting counties to be part of monitoring, management, and mitigation plans for applications filed after January 1, 2012). The only reason for authorizing water development to be stepped-up over time is to evaluate impacts at each stage and avoid or mitigate unwanted consequences. The Legislature has prescribed caution and measured development, not roadblocks.

## II.

### **THE STATE ENGINEER'S DECISION THAT THE MONITORING, MANAGEMENT, AND MITIGATION PLAN WOULD BE EFFECTIVE IN AVOIDING ANY CONFLICTS OR ENVIRONMENTAL EFFECTS IN SPRING VALLEY WAS SUPPORTED BY SUBSTANTIAL EVIDENCE**

The State Engineer relied on substantial evidence to determine the SNWA applications will not conflict with existing water rights and will be environmentally sound. These findings are buttressed by the phased-in development of pumping

over decades, and the 3M Plan adds yet another layer of protection. The 3M Plan allows the State Engineer to (1) evaluate the effects of pumping; (2) improve the groundwater model; (3) receive the assistance of scientists to set site-specific and unique triggers for when mitigation should be implemented; and (4) order specific mitigation methods if unreasonable adverse effects occur. With the support of expert testimony submitted by protestants and SNWA, the State Engineer specifically found that the 3M Plan will be effective, and that triggers for mitigation action can be effectively incorporated into the 3M Plan in the future.

The District Court substituted its judgment for the State Engineer and found that triggers must be established now. The district court based its judgment on its belief that “if there is insubstantial evidence and it is premature to set triggers and thresholds, it is premature to grant water rights.” The district court’s substitution of judgment was improper and demonstrates a lack of understanding of the complexity and variability of natural system and the uncertainty of projecting environmental responses to conditions affecting aquifers and biological resources. The State Engineer, on the other hand, has the knowledge and experience to apply adaptive management principles and the State Engineer properly determined that sufficient information exists to approve the applications. The State Engineer relied on voluminous reports and expert testimony that were introduced during six weeks of hearings before he approved the 3M Plan. (1 App. 112; 2 App. 259.) The State

Engineer’s decision was also supported by evidence of baseline data, collaborative governmental oversight, adaptive management, ongoing monitoring and retained enforcement powers that will ensure objective triggers will be set in the future to properly protect existing water rights and the environment.

**A. The State Engineer Is Not Required to Set Triggers Before Authorizing Pumping**

The district court’s holding that the State Engineer must identify triggers to determine when mitigation would be implemented *before* approving appropriation applications is another new requirement that the court created. The district court erred because no statute requires triggers to be set before an appropriation application is approved and because the 3M Plan, in conjunction with the phased-in development, adequately protects existing rights and the environment.

**1. *The State Engineer Has Broad Discretion to Impose Appropriate Conditions on Permits that Make Sense for a Particular Project***

“The Nevada State Engineer has the inherent authority to condition his approval of an application to appropriate based on his statutory authority to deny applications if they impair existing water rights.” *United States v. Alpine Land & Reservoir Co.*, 919 F. Supp. 1470, 1479 (D. Nev. 1996); *see also* NRS 534.110(5) (authorizing the State Engineer to set forth conditions of approval of an application to ensure that “the rights of holders of existing appropriations can be satisfied”).

Accordingly, the State Engineer's authority to place conditions on the approval (*i.e.* a 3M Plan) arises out of his ultimate authority to deny an application.

In addition to his inherent power, the Nevada Legislature authorized the State Engineer to manage the state's water to ensure that the resource is being developed consistent with the Nevada statutes. The State Engineer is authorized to adopt monitoring, management, and mitigation plans. *See* NRS 534.110(5); 533.353;<sup>1</sup> *see also* *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 747, 918 P.2d 697, 699 (1996) (one factor that defines "public interest" under NRS 533.370(2) is that "[w]ithin an area that has been designated, the State Engineer may monitor and regulate the water supply"). The State Engineer may include express conditions in any groundwater permit to protect existing water rights. NRS 534.110(5). Even if there is no formal adaptive management plan, the State Engineer may "[r]equire periodical statements of water elevations, water used, and acreage on which water was used from all holders of permits and claimants of vested rights." NRS 534.110(2)(a). He has the express authority to order that withdrawals from a basin "be restricted to conform to priority rights." NRS 534.110(6).

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<sup>1</sup> Section 533.353 requires the State Engineer to consider the views of a county from which water is being diverted when formulating a monitoring, management, and mitigation plan. That statute only applies to applications filed on or after January 1, 2012, but it reflects the State Engineer's existing authority to implement monitoring, management, and mitigation plans by placing conditions on a permit.

No statute requires a plan to take any particular form. And not one of these statutes, or any other statute, requires the State Engineer to establish “objective standards” for determining when mitigation will go into effect before issuing a permit. The district court created this requirement, along with the other new requirements that it imposed on the State Engineer, out of thin air.

The district court decision is also in conflict with another decision from the same judicial district in a case that is presently under review in this Court. *Eureka County v. State Engineer*, Case No. 61324. There, a Seventh Judicial District Court Judge ruled that the State Engineer *did not* need to establish triggers in a 3M Plan that was required for the approval of water rights for a mining project. In that case, the district court described that 3M Plan as requiring the subsequent “establishment of quantitative thresholds or ‘action criteria’ which, if triggered, serve as early warnings of potential impacts to existing rights. These thresholds will be set at appropriate levels to provide advance warning of potential impacts to existing water rights that might result from KVR's pumping.” (26 App. 5954.) The court relied on NRS 534.110(5) and held that, “[a]lthough [the appellants] would require the State Engineer to include express measures for mitigating existing water rights, NRS 534.110(5) requires only that the State Engineer include express conditions to ensure that existing water rights are satisfied. The 3M Plan is an express condition to monitor the effects of KVR's pumping, to detect and

identify potential impacts, and to prevent them from adversely affecting existing water rights through management and mitigation measures recommended by the advisory committees and ordered by the State Engineer.” (26 App. 5954-55.)

Accordingly, the district court found “the 3M Plan contains appropriate standards to protect existing water rights” and it concluded “the State Engineer's approval of the 3M Plan is reasonable, within his area of expertise, and supported by substantial evidence in the record.” (26 App. 5955.) For these same reasons, the 3M Plan under review in this case should have been approved by the district court.

Under the district court’s rationale that triggers are needed now, the Nevada Legislature’s own statutory scheme would be arbitrary and capricious. For example, NRS 534.250(2)(e), which governs a project to recharge water to aquifers or store water underground, requires the State Engineer to determine that the project “will not cause harm to users of land or other water within the area of hydrologic effect of the project.” That language is similar to the requirement that the State Engineer find that SNWA’s use will not “conflict[] with existing rights.” *See* NRS 533.370(2).

But the Nevada Legislature has not required that any triggers be established before a recharge project is approved. Rather, the required monitoring is far less comprehensive than the 3M Plan. For example, NRS 534.250(5) states that the “State Engineer shall require the holder of a [recharge] permit to monitor the

operation of the project and the effect of the project on users of land and other water within the area of hydrologic effect of the project. In determining any monitoring requirements, the State Engineer shall cooperate with all government entities which regulate or monitor, or both, the quality of the water.” And NRS 534.250(6) provides that “[t]he State Engineer, on his or her initiative or at the request of the holder of the permit, may modify the conditions of the permit *if monitoring demonstrates that modifications are necessary*. In determining whether modifications are necessary, the State Engineer shall consider uses of land or water which were not in existence when the permit was issued.” (Emphasis added.) Like the 3M Plan, NRS 534.820(1) requires the operator of a recharge project to file annual reports describing the operation of the project and other information that the State Engineer requires. And the State Engineer is authorized to review a recharge project to determine whether the permit holder is complying with the terms and conditions of the permit and the public interest is “properly guarded.” NRS 534.320.

These statutes conspicuously refer only to “monitoring,” and leave it to the State Engineer to determine how to “properly guard[]” the public interest. If the State Engineer need only modify the conditions of a permit “if monitoring demonstrates that modifications are necessary,” then objective standards for



determining when mitigation is necessary need not be established at the time the permit is approved.

Under the district court's rationale, however, this statutory scheme would be considered arbitrary and capricious because the recharge statutes would not be enough to prevent harm in the absence of triggers for mitigation. But the legislature recognized that triggers can be set after a water permit is granted, and provided the State Engineer with discretion to set those action levels based on his expertise. In this case, not only is the State Engineer monitoring the project and cooperating with all government entities that regulate water and the environment, he has already identified mitigation measures and will be working with scientists to develop triggers at the proper time. The 3M Plan goes beyond the requirements of the recharge statutes, and likewise satisfies the appropriation statutes.

**2. *Triggers Should and Will Be Set After Pumping Begins***

As a matter of law, there is no conflict between the State Engineer's decision that he has sufficient information to determine that SNWA's applications should be approved and the State Engineer's decision to defer setting triggers until the future. The best evidence available indicates impacts from the project can be managed to avoid conflicts with existing rights and can be environmentally sound. While the State Engineer found that unique, site-specific, data is insufficient to prudently set triggers now, substantial evidence exists that such pumping can occur, and triggers can be set, without irreversible impacts from pumping. Based on that evidence, the

State Engineer specifically found that the “failure to set triggers or thresholds at this time does not invalidate the [3M Plan] or undercut the development of an effective adaptive management plan.” (1 App. 205-06.)

The State Engineer explained exactly why triggers should not be set now and the district court should have deferred to the State Engineer:

Protestants GBWN and CPB assert that the absence of quantitative standards or triggers in [SNWA’s] Plan will limit its effectiveness. In order to set quantitative standards, well locations and other variables, such as pumping timing and duration, must be known. Stress placed on the system through pumping also helps determine these standards because it shows how the aquifer responds to pumping. Additionally, the natural variability in the system must be documented to ensure that any observed changes are due to pumping, rather than natural fluctuations due to seasonal recharge or other factors. The high volume of pumping activity prior to adoption of the monitoring and management plan allowed quantitative standards to be set in monitoring plans for the Owens Valley project. The same situation is not present in Spring Valley. Further, because [SNWA’s] proposed pumping will not begin for many years, there is ample time for studies to be conducted to determine a baseline as well as quantitative thresholds. Dr. Harrington [protestants’ expert witness] agreed that the collection of baseline data prior to groundwater withdrawal makes the Project far better positioned than the Owens Valley project to ensure water development occurs in a sustainable manner. The proper place to address pumping management concerns is in an operation plan for pumping management.

The State Engineer finds that it is premature to attempt to set quantitative standards for mitigation actions in the Management Plan at this time.

(1 App. 140-41.)

Setting triggers later makes sense for environmental purposes too. Based on SNWA's expert testimony, the State Engineer concluded that there will be a gradual transition in plant life over time to healthy ecosystems that survive on precipitation rather than groundwater. (1 App. 210-11.) To determine how to manage this succession and mitigate any unreasonable effects, an analysis of the increase in the distance from the surface to groundwater (the "depth to water") is needed. (1 App. 210-12.) But "there is no one-to-one relationship between [depth to water] and plant function." (1 App. 210.) "This means that impacts to plant function cannot be predicted based solely on projected water table declines." (*Id.*) Other factors such as precipitation (which is obviously variable) and irrigation also have an impact on the location and type of vegetation. (*See id.*)

Thus, there is no dispute that triggers will be set for this project in the future. (1 App. 140-41; 8 App. 1983-84; 17 App. 3546; 18 App. 3838.) But pumping should occur to establish the empirical relationships between existing water levels, plant function and pumping. And pumping must be of a sufficient volume to stress the system in order to obtain meaningful data. The expert testimony of protestant Great Basin Water Network ("GBWN") acknowledged that pumping stress data is necessary for the model to be calibrated so that SNWA's groundwater model can predict local-scale impacts from pumping. (1 App. 140; 24 App. 5485-86.) To that end, the State Engineer required SNWA to pump between 85% and 100% of

the 38,000 acre-feet annually that is authorized for the first eight years. (1 App. 239.) The same percentage is required in stage two. (1 App. 240.)

The State Engineer followed the proper order of events. First, he relied on the best available evidence to determine the project can be developed without conflicting with existing rights, and in an environmentally sound manner. Then he required development in a staged fashion to further refine the data regarding impacts from pumping. Pumping will define the unique relationship between each pumping stress and existing water levels. A trigger can then be set. Triggers must be site specific. One cannot utilize a single definition of an adverse effect, and therefore a single value as a trigger for management action and/or mitigation. What is deemed an adverse effect at one site might not be at another site. The reason for this stems from the fact that the basins are large and conditions (geologic, hydrologic and biologic) are not only highly diverse over space, but also highly variable over time. Before one assesses if an observed change is “abnormal,” one must have a good understanding of what “normal” conditions are at the site. Normal conditions are not represented by a single value, but are defined by a range of values representing the state of the system at the site in response to pre-existing stressors. If a trigger is set before pumping occurs, the trigger could underestimate the impact that pumping has on the water level, and an inappropriate trigger might

result. In contrast, waiting until there is more data to support the trigger is good science and good common sense.

From a policy perspective, if the State Engineer was required to set triggers before approving SNWA's applications, water development in this state would come to a standstill. The entire point of adaptive management is to provide the flexibility that resource managers need to develop and intelligently manage natural resources. The district court's decision rejects the State Engineer's amply supported conclusions and deprives the State Engineer of the ability to use this well-accepted technique for dealing with the uncertainty inherent in natural resource science.

**B. Even if the 3M Plan Didn't Exist, the State Engineer Would Still Have the Obligation to Mitigate Unreasonable Adverse Impacts**

The district court was too quick to discount the State Engineer's continuing regulatory role in the SNWA project. The State Engineer has already implemented one regulatory control – phased-in pumping. After the first eight years of pumping, the State Engineer will have a significant amount of data and dramatically improved modeling. He will then decide whether approval of increased pumping is consistent with Nevada law. *See* NRS 533.3705 (“The use of an additional amount of water that is not more than the total amount approved for the application may be authorized by the State Engineer at a later date *if additional evidence demonstrates to the satisfaction of the State Engineer that the additional*

*amount of water is available* and may be appropriated in accordance with this chapter and chapter 534 of NRS. In making that determination, the State Engineer may establish a period during which additional studies may be conducted or additional evidence provided to support the application.” (Emphasis added.) In other words, the State Engineer will have to redetermine whether the requirements of NRS 533.370 are still met before approving additional pumping. The district court completely ignored this and focused entirely on the 3M Plan.

The State Engineer also has a duty to order mitigation independent of the 3M Plan. Under NRS 533.430, every permit approved by the State Engineer is “subject to existing rights.” The State Engineer is required to administer the water statutes and prescribe regulations for their administration. NRS 533.110(1). Ordering mitigation is necessary to ensure that the water statutes are properly administered. And the State Engineer is required to designate preferred uses of water if it appears that the groundwater basin is being depleted. NRS 533.120(2). He can seek injunctive relief for the violation of a permit (including non-compliance with the 3M Plan) and may seek penalties of up to \$10,000 per day for violation of the terms of a permit. NRS 534.193(1)(a); NRS 534.195(1). Thus, the State Engineer’s approval of an application is never the end of the story under Nevada law. This again demonstrates that the Nevada Legislature has given the

State Engineer the flexibility to address the water needs of Nevada through adaptive management.

**C. The Extinction of the Endangered Species at Devil's Hole Was Prevented with a Bright-Line Test Because Objective Data Had Been Obtained After Pumping**

The district court stated that the management plan at Devil's Hole was properly considered because it has an objective "trigger." At Devil's Hole, mitigation must occur when the water level falls 2.7 feet below a copper washer that is attached to the walls of the hole. The district court's reference to the Devil's Hole washer doesn't support the district court's reasoning; it instead further demonstrates why triggers would be premature here.

The Devil's Hole washer was the subject of the United States Supreme Court's attention in *Cappaert v. United States*, 426 U.S. 128 (1976). President Truman had issued a proclamation to preserve the Devil's Hole pool and the Devil's Hole pupfish. (*Id.* at 132.) The Cappaerts were pumping water that made the water level at Devil's Hole drop to 3.93 feet below the washer. (*Id.* at 133.) When the water level in the pool was more than 3 feet below the water, a rock shelf in the pool was above water and algae would not grow on the shelf. (*Id.* at 133.) If algae could not grow on the rock shelf, the Devil's Hole pupfish's spawning area decreased and they were threatened with extinction. (*Id.* at 133-34.) *Cappaert* upheld an injunction that prohibited pumping that would lower the water level more than 3 feet below the washer. 426 U.S. at 136. The triggering

threshold has changed to 2.7 feet since the Supreme Court's decision, but the idea is the same.

As the district court recognized, the Devil's Hole area is a "small fraction of area" compared to the SNWA project. Obviously, setting standards for the SNWA project are more complex than the Devil's Hole standard by innumerable orders of magnitude. The State Engineer cannot simply place a washer somewhere and obtain any meaningful data. Moreover, in *Cappaert*, there was existing, objective data that appears to have been generated only after pumping began. If the water level was more than three feet below the washer, no algae could grow on the shelf and the pupfish would die. That data justified a prohibition on pumping that dropped the water table below a particular level. (26 App. 5940-41.)

Here, data can be developed if water is pumped, and the data will then be put into the models by the State Engineer. The State Engineer and the members of TRP and BWG will be able to determine appropriate triggers and tie the already-identified mitigation methods to a particular trigger. The fact that the district court used Devil's Hole to suggest the kind of standards that the State Engineer should set indicates that the court did not fully appreciate the magnitude and complexity of the SNWA project.

**D. Other Courts Have Approved Plans Like the 3M Plan**

In addition to the district court in *Eureka County v. State Engineer*, Case No. 61324, federal courts have also approved the use of adaptive management plans to



identify specific mitigation measures. A flexible management plan that monitors “the real effects of the development it authorizes, and adapt[s] its mitigation measures . . . in response to trends observed” is “certainly not arbitrary or capricious.” *Theodore Roosevelt Conseration P’ship v. Salazar*, 616 F.3d 497, 517 (D.C. Cir. 2010); *Navickas v. Conroy*, 2013 WL 686825 (D. Or. Feb. 25, 2013) (“adaptive management can ‘provide the agency with the flexibility to respond to on-the-ground circumstances when they arise’”).

The State Engineer identified multiple ways to mitigate any problems that arise from pumping, including grazing management, irrigation, water substitution, deepening wells, monetary compensation, changing the location and amount of pumping, replacement of water by SNWA, and termination of pumping. SNWA is required to prepare annual reports and deliver them to the State Engineer. SNWA is required to update its models with the data that it obtains from monitoring. This is enough. The State Engineer is not required to select a water level as a “trigger” at this time. *See Salazar*, 616 F.3d at 515-17; *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 983 (9th Cir. 1985) (holding that when agency “acknowledged methodological limitations,” issuance of a permit was not arbitrary and capricious when the permit was “expressly made subject to revocation and reconsideration based upon data that might be revealed from the continued monitoring called for under the Plan”).

In *Salazar*, the Bureau of Land Management created an adaptive management plan that outlined various performance goals for the Bureau to strive for, such as “maintain functional migration routes,” “maintain adequate water quality,” and “minimize deaths and injuries to livestock due to development.” *Salazar*, 616 F.3d at 516. The monitoring and mitigation measures were “not fixed, but flexible,” and mitigation would be evaluated annually. (*Id.*) The Bureau intended to modify them as appropriate after consulting with other agencies, natural gas well operators, and other interested parties. (*Id.*) The court held, as this court should in this case, that “[a]llowing adaptable mitigation measures is a responsible decision in light of the inherent uncertainty of environmental impacts.” (*Id.* at 517.)

Courts have similarly rejected arguments made by parties such as the protestants that an adaptive management plan is merely a “plan to make a plan.” See *Defenders of Wildlife v. Salazar*, 698 F. Supp. 2d 141, 149 (D.D.C. 2010); *Wilderness Soc’y v. U.S. Bureau of Land Mgmt.*, 822 F. Supp. 2d 933, 941-944 (D. Ariz. 2011). This Court should do the same.

**E. The State Engineer Did Not “Cede” His Monitoring Responsibilities to SNWA**

The district court claimed that “impliedly,” the State Engineer “has ceded the monitoring responsibilities to SNWA.” (1 App. 18.) That is not true. The State Engineer has the sole authority to evaluate SNWA’s annual reports and has

complete control over ensuring that SNWA's project complies with Nevada law. And only the State Engineer can authorize increased pumping after the first eight years. He expressly stated that the incorporation of the 3M Plan "in the permit terms for the Applications, *and the State Engineer's continued regulatory control over pumping under the Applications*, will ensure proper monitoring and oversight of the Project and its environmental soundness as it relates to groundwater-influenced resources." (1 App. 204 (emphasis added).) He further confirmed that "the regulation of water rights is in the State Engineer's purview, and the State Engineer proactively monitors impacts to existing rights and the environment. *The State Engineer always retains the authority to monitor water rights and any impact to them . . . .*" (1 App. 206 (emphasis added).) Despite these statutory duties, however, the Nevada Legislature has not put the burden of overseeing a project entirely on the State Engineer's shoulders. It is difficult to see how the State Engineer could accomplish anything if he was not authorized to rely on data collected by others. The State Engineer has not "ceded" his responsibilities to SNWA just because SNWA will be doing much of the leg work on the ground. The State Engineer still must make ongoing determinations of whether the SNWA project meets the requirements of Nevada law based on the information gathered by SNWA and the other participants in the 3M Plan and Federal Stipulation.

### III.

#### **THE STATE ENGINEER DID NOT AWARD WATER IN THE DDC VALLEY THAT HAD ALREADY BEEN APPROPRIATED**

The district court concluded that the water SNWA wanted to pump from the DDC Valleys was already appropriated because, in its view, pumping would reduce the water available to water-rights holders in basins that were down-gradient from the DDC Valleys. (1 App. 19-20.) In so doing, the district court again substituted its judgment for the State Engineer and required him to do something that no State Engineer has done before – treat adjacent groundwater basins as though they are a flowing river. (*See id.* at 19.)

#### **A. The District Court Substituted its Judgment for the State Engineer when it Adopted the One River Theory and Ordered More Studies**

The district court accepted the protestant’s “one river” theory, substituting its own judgment for the State Engineer’s and making a finding of fact on appeal. That was improper. *See Northern Plains*, 668 F.3d at 1074 (courts are “not to ‘act as . . . scientists, instructing the agency, choosing among scientific studies’”). As support for its finding of fact, the district court quoted – completely out of context – a portion of SNWA’s expert report stating that “[j]ust like water in streams, groundwater moves from areas of higher hydraulic heads to areas of lower hydraulic heads.” (1 App. 19.) But the district court ignored the other portion of that report that stated, “*the belief that groundwater occurs in underground rivers*

*resembling surface streams . . . is a common misperception.*” (7 App. 1624 (emphasis added).) The idea that water travels from higher areas to lower areas is common sense. Extrapolating that idea to conclude that underground water behaves like a river is a huge leap in logic unsupported by science or the evidence. Not only did the district court improperly reweigh the evidence and choose which pieces it liked better, it cited evidence that doesn’t even support its conclusion.

The district court’s decision is fundamentally at odds with the State Engineer’s expertise because, although the district court remanded for recalculation, the implication of the district court’s ruling is that *no* water is available from the DDC Valleys simply because water has been appropriated in separate basins that are far away. The validity of the State Engineer’s long-standing practice, and the error in the district court’s appellate fact-finding, was confirmed through groundwater modeling.

After adopting the “common misperception” that the WRFS should be treated as one river, the district court remanded for “additional hydrological study of” the DDC Valleys. (1 App. 2.) Yet again, the district court overstepped its bounds. NRS 533.368(1) “is the only statutory authority discussing the need for studies.” *United States v. Alpine Land & Reservoir Co.*, 341 F.3d 1172, 1184 (9th Cir. 2003). “[T]he determination of whether to require a study—be it cumulative, hydrological, environmental, or any other form—is left to the sound discretion of

the State Engineer.” (*Id.*) The State Engineer decided that, after considering multiple hydrological studies, SNWA’s state-of-the-art technology, and expert testimony, there was no need for additional hydrological study. The district court erred by ordering more studies when the studies already showed that there was no possibility of conflict.

**B. The District Court Erred By Reweighing the Evidence and Determining that there Was the Potential for a Conflict with Existing Rights**

The district court held that the State Engineer’s conclusion that “up-gradient use will not, if at all, measurably affect down-gradient supply for hundreds of years,” somehow meant that there was a conflict with existing rights. (1 App. 20.) The district court’s holding is perplexing because the plain language of the State Engineer’s ruling states that he concluded, as a matter of fact, that there would be no measurable effect on down-gradient supply. Without a down-gradient effect, there is no conflict.

In any event, as noted above, SNWA presented evidence derived from a model that was developed for the BLM to prepare an EIS. (18 App. 3811.) It took 18 months for the model to be developed after intense collaboration with an independent contractor and the BLM’s Hydrology Technical Group. (2 App. 339; 18 App. 3827.) Some members of the State Engineer’s staff participated as observers. (*Id.*) Several experts in groundwater modeling were involved in developing the model, including Dr. Keith Halford, who works for the United

States Geological Survey and is an international authority in groundwater modeling. (*Id.*)

SNWA used a 75-year prediction to model any adverse impacts on existing rights or the environment. (2 App. 345.) The State Engineer found that this was a reasonable time frame because uncertainty increases as projections go further into the future. (*Id.*) The model predicted that only Flag Springs and Butterfield Springs would experience a reduction in spring discharge of more than 15%. (2 App. 348; 3 App. 514-15, 677.) Any potential effects on existing rights or the environment at Flag Springs and Butterfield Springs were addressed when the State Engineer set aside 7,300 acre-feet annually in Cave Valley to protect the springs. The State Engineer found that no other impacts would occur, whatsoever, on existing rights or the environment in down gradient basins. (2 App. 354; 14 App. 2986, 2988.) The district court not only substituted its judgment for the State Engineer, it was demonstrably wrong about the facts and the science. Because the State Engineer held back ample water to cover any potential impacts at Flag Springs and Butterfield Springs, the State Engineer relied on substantial evidence that there will be no conflict anywhere in the WRFS, even after hundreds of years.

The protestants attempted to use a model called the Regional Aquifer System Analysis (“RASA”) to show that there would be effects on existing rights

in the down gradient basins in the WFRS. (2 App. 349.) That model was thoroughly discredited and the State Engineer was justified in giving it less weight than SNWA's model. *See Clark County Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96, 98, 787 P.2d 782, 783 (1990) (“[J]ust because there was conflicting evidence does not compel interference with the [State Engineer’s] decision so long as the decision was supported by substantial evidence.”) For example, SNWA’s expert witness testified that the RASA model was never intended to predict drops in water levels or reduced flow in springs, and written authorities stated that the model was inadequate to predict changes in discharge after pumping. (2 App. 349-50.) The State Engineer found that the RASA model was not properly calibrated and failed to account for geological structures. (2 App. 349.) SNWA’s experts testified that the RASA model was imprecise and the protestants’ expert agreed. (2 App. 351.) The State Engineer consequently found that “there is no reason to use the RASA model instead of [SNWA’s model] to make predictions of impacts due to pumping in Delamar, Dry Lake, and Cave Valleys. The RASA model was never intended to be used to make such predictions. It is very coarse and has many limitations, which its original authors and Dr. Meyers [protestants’ expert witness] acknowledge.” (*Id.*)

The State Engineer found that SNWA’s model was “the best scientific tool he ha[d] to evaluate potential impacts due to pumping in the DDC Valleys.” (2



App. 352.) That tool informed the State Engineer that there would be no impacts in the DDC valleys or elsewhere in the WRFS. The district court should be reversed because it second-guessed this conclusion and relied on the protestant's evidence after the State Engineer had properly discounted the weight of that evidence.

**C. The District Court Improperly Imposed a Beyond-All-Doubt Burden of Proof on SNWA**

Perhaps the district court's ruling means that if there is any *potential* impact on existing rights, no matter how far in the future or how improbable, an application must be denied. This is either another substitution of the district court's judgment for the State Engineer's or the application of an incorrect burden of proof. "Agency adjudication should use the standard of proof set out in the agency's governing statutes." *See Nassiri v. Chiropractic Physicians' Board*, \_\_\_ P.3d \_\_\_, \_\_\_, 2014 WL 1325754, at \*3 (Nev. Apr. 3, 2014). "On appeal, the reviewing court should then determine whether substantial evidence supports the agency's factual determinations." (*Id.*)

Nevada's water statutes do not establish a burden of proof. So the burden was preponderance of the evidence. *See Nassiri*, 2014 WL 1325754, at \*3 (holding that in the absence of a specific statute, preponderance standard applies). Under the preponderance of the evidence standard, the fact finder need only

determine whether the existence of a contested fact is more probable than not. (*Id.* at \*4.)

The contested fact<sup>2</sup> here was whether SNWA's pumping would "conflict[] with existing rights." The State Engineer concluded that SNWA's 75-year model showed that it was more probable than not that there would be no impact on downstream basins. That conclusion was supported by substantial evidence. The district court's ruling, however, would require the State Engineer to find that there was no possible way whatsoever that the pumping would have an impact on existing rights before that ruling could be found to be supported by substantial evidence. The district court effectively placed a beyond-all-doubt burden of proof on SNWA. No adjudicative system requires proof beyond all doubt that a fact is true. Even criminal trials only require proof beyond reasonable doubt. The district court's standard is impossible to meet, like the district court's other requirements. That standard is also not the law.

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<sup>2</sup> The State Engineer's determination that SNWA's pumping would not "conflict[] with existing rights" was either a question of fact, or a mixed question of fact and law. When a finder of fact must consider a legal definition "in context with the factual circumstances," it is resolving a mixed question of fact and law. *See Garman v. State, Employment Sec. Dept.*, 102 Nev. 563, 565, 729 P.2d 1335, 1336 (1986). In any event, whether the State Engineer was resolving a question of fact or a mixed question of fact and law, the State Engineer's determination regarding conflicts was subject to the "substantial evidence" review in an appellate court. (*See id.*)

The district court also failed to recognize that NRS 533.370(2) only requires that the State Engineer determine that there will be no conflict with “*existing* rights.” The district court has required the State Engineer to predict hundreds of years into the future. That is not what the statute requires. A decision today based on the hypothetical situation hundreds of years from now has no grounding in the statute. The district court erred by requiring the State Engineer to have a perfectly calibrated crystal ball. The State Engineer is only required to rely on the best available science, which he did. NRS 533.024(1)(c).

**D. The “Paper Rights” the District Court Refers to Were Pending Applications Which Were Later Denied**

The district court claimed that the State Engineer “tacitly acknowledge[d] the double appropriation of the same water,” because counsel referred to rights in Coyote Springs (which is down-gradient from the DDC Valleys) as “paper water rights” in a hearing before the district court. (1 App. 19.) The district court said that it presumed that those rights were valid, and “[i]f the rights were invalid, there would be no over appropriation.” (*Id.*) The “paper water rights” that counsel referred to were pending applications for appropriation of water. In separate proceedings, those applications were later denied and the “paper water rights” are invalid. (26 App. 5880, 5909.) So under the district court’s own theory, there was no overappropriation.

**E. The District Court Did Not Defer to the State Engineer Despite its Lip Service to the Contrary**

Although the district court recited the proper standards, it did not apply them properly. The district court made this quite clear when it stated that “it is also unseemly to this court, that one transitory individual may simply defer serious water problems and conflict to later generations, whether in seventy-five (75) years or ‘hundreds,’ especially when the ‘hundreds’ of years is only a *hoped* for resolution.” (1 App. 20.) The Nevada Legislature has designated the State Engineer as the steward of water in Nevada. The district court’s apparent disagreement with the Legislature’s decision does not somehow make the State Engineer an illegitimate public authority. And, in any event, the State Engineer decided that there would be no impact on existing rights within 75 years or 200 years based on the evidence presented at the hearing. The State Engineer is not “hoping” that there will be no impact on existing rights – the evidence demonstrated that there would be no impact. The district court improperly usurped the State Engineer’s authority and put itself in the State Engineer’s shoes.

**IV.**

**THE DISTRICT COURT SUBSTITUTED ITS JUDGMENT FOR THE STATE ENGINEER’S BY CALLING THE STATE ENGINEER’S RULINGS “ARBITRARY AND CAPRICIOUS”**

Although all of the parties agree that the standard of review is “substantial evidence,” the district court often concluded that the State Engineer’s rulings were

“arbitrary and capricious.” Under the arbitrary and capricious standard, the Court determines whether there were full and fair administrative proceedings, whether all interested parties had a “full opportunity to be heard,” whether the State Engineer has “clearly resolve[d] all the crucial issues presented,” and whether the State Engineer has “prepare[d] findings in sufficient detail to permit judicial review.” *See Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264-65 (1979).

There can be no real dispute that hearings lasting six weeks were full and fair. After this Court’s ruling in *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 20, 234 P.3d 912 (2010), the State Engineer re-noticed SNWA’s applications and reopened the protest period. All protestants were offered a full opportunity to be heard at the six-week hearing. The State Engineer resolved all of the issues presented (albeit not to the protestants’ liking) and issued a 218-page ruling for Spring Valley, a 162-page ruling for Delamar Valley, a 164-page ruling for Dry Lake, and a 170-page ruling for Cave Valley. The State Engineer did not act arbitrarily or capriciously. Rather, the district court, faced with the fact that the State Engineer’s ruling was based on substantial evidence, added requirements to Nevada law and said that the State Engineer acted arbitrarily and capriciously by not following these new, unknown requirements. This was the mechanism by which the district court substituted its judgment for the State Engineer’s. Whether the standard is substantial evidence or arbitrary and capricious, however, the

district court is not permitted to substitute its judgment for the State Engineer's decision. *See Revert*, 95 Nev. at 786, 603 P.2d at 264.

**CONCLUSION**

For the foregoing reasons, this Court should vacate the district court's December 13, 2013 decision and affirm State Engineer Rulings 6164, 6165, 6166, and 6167.

DATED this 29<sup>th</sup> day of May 2014.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14 point, double-spaced Times New Roman font.

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada

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DATED this 29<sup>th</sup> day of May 2014.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 29, 2014, I served a copy of the foregoing PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PROHIBITION by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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EXHIBIT C

# EXHIBIT C

EXHIBIT C

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON KING, P.E., in his official capacity as the NEVADA STATE ENGINEER, and the NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES,

Petitioner,

vs.

THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WHITE PINE and THE HONORABLE ROBERT E. ESTES, SENIOR DISTRICT COURT JUDGE,

Respondents.

and

MILLARD COUNTY, UTAH; JUAB COUNTY, UTAH; WHITE PINE COUNTY, NEVADA; ELKO COUNTY, NEVADA; EUREKA COUNTY, NEVADA; NYE COUNTY, NEVADA; NYE COUNTY WATER DISTRICT; CITY OF ELY, NEVADA; CENTRAL NEVADA REGIONAL WATER AUTHORITY; GREAT BASIN WATER NETWORK; SIERRA CLUB; CENTER FOR BIOLOGICAL DIVERSITY; 2ND BIG SPRINGS IRRIGATION COMPANY; LUND IRRIGATION COMPANY; PRESTON IRRIGATION COMPANY; ALAMO SEWER & WATER GID; BAKER GID; MCGILL-RUTH SEWER & WATER GID; GREAT BASIN BUSINESS & TOURISM COUNCIL; WHITE PINE

Case No. \_\_\_\_\_

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CV-1204050  
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CV-1205053  
CV-1204054  
CV-1204055  
CV-0418012  
CV-0419012

PETITION FOR WRIT OF  
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STATE GRAZING BOARD; BAKER  
RANCHES, INC.; BATH LUMBER;  
PANACA FARMSTEAD  
ASSOCIATION; BORDER INN;  
PEARSON FARMS; RAFTER LAZY C  
RANCH; SPORTSWORLD;  
PROGRESSIVE LEADERSHIP  
ALLIANCE OF NEVADA; LEAGUE  
OF WOMEN VOTERS OF SALT  
LAKE CITY; UTAH AUDUBON  
COUNCIL; UTAH PHYSICIANS FOR  
A HEALTHY ENVIRONMENT; POST  
CARBON SALT LAKE; UTAH  
RIVERS COUNCIL; BRISTLECONE  
ALLIANCE; CITIZENS EDUCATION  
PROJECT; INDIAN SPRINGS CIVIC  
ASSOCIATION; SCHOOL OF THE  
NATURAL ORDER; VAUGHN M.  
HIGBEE & SONS; ARMANDO  
AGUILEW; CHRIS ADLER; BART  
ANDERSON; AMY ASPERHEIM;  
MICHELE AUSTRIA; DAVID A. AND  
TANA R. BAKER, individually and on  
behalf of their minor child, CLAYTON  
F. BAKER; DEAN & BARBARA  
BAKER; TOM & JANILLE BAKER,  
individually and on behalf of their  
minor children, ALYSHIA, CALEB,  
MEGAN & KAYLI BAKER; JERALD  
BATES; JAMES & DONNA BATH;  
SHANNON BARKER; CHRISTIA  
BARLOW; MARGARET BARLOW;  
RICHARD A. BARR; BRIAN  
BEACHER; ELIZABETH BEDELL;  
CYNTHIA LEE BELL; "ROBIN"  
EDWARD JOHN BELL III; LOUIS  
BENEZET; KATHY BINGLEY;  
MICHAEL BIVINS; GARY BODELL;  
SEAN BONNELL; BOBBY  
BONNELL; LUKE BOTTCHE; JOHN  
BOWMAN; D. DANE BRADFIELD;  
JAMES E. BRADY; ANN & JIM

BRAUER; JOEL BRISCOE; WALTER  
FRANKLIN BROWN; TOM E.  
BROWN; BERNARD & EVA  
BUSWELL; MICHELE R. BUTLER;  
WILLIAM BUTTS; ART CAMERON;  
KAREN CAMPBELL; DALE  
CANEPA; RACHEL CARLISLE;  
BEAU CARLSON; DAVID CARLSON;  
LOUISE CARLSON; MARIE A.  
CARRICK; MELISSA CHEENEY;  
STEVE CHOUQUER; BRANDON  
CHRISTIAN; CRAIG  
CHRISTIANSON; LENE CLAY;  
WILLIAM COFFMAN; PETER  
COROON; JOHN S. COLE;  
KATHLEEN M. COLE; LANDON  
COLE; DAWNE COMBS; JOHN  
CONDIE; WILLIAM & GENIEL  
CONNOR; KATHY COOK; DAVID &  
HALLI COX; ROBERT CRAGER;  
PATRICIA J. CROSTHAIAIT;  
DUSTIN CROWTHER; CARY  
CURCIO; KELLEY DABEL; BRAD &  
ROBIN DALTON; GARY DAVIS;  
PETE TONY DELMUE; LUDELL  
DEUTCHER; ROM DICIANNO;  
TRAVIS DORMINA; ANTHONY  
PAUL DONOHUE; ORRIN DOTSON;  
DENNIS DOTSON JR.; JOSEPH A.  
DUNNE; JERRI ELLIOT; VELDA  
EMBRY; JERRY ETCHART; JAMES  
R. FERRELL; JODY FINICUM; MIKE  
& JO FOGLIANI; PAULA J. FOHT;  
MELISSA JO FREE; JUSTIN  
FREHNER; PATRICK FULLER;  
VERONICA GARCIA; BRENT  
GARDNER; ANNETTE & CECIL  
GARLAND; JO ANNE GARRETT;  
PATRICIA J. GLADMAN; DONALD  
GENT; ANNA E. GLOECKNER;  
PAUL & NANCY GLOECKNER; PAT  
and KENA GLOECKNER,  
individually and on behalf of their  
minor children, KYLEE, KORI, and

KOURTNEY; TAMI GUBLER;  
CHARLES HAFEN; DENNIS HAFEN;  
LAVOY HAFEN; FREDRICK  
HAMMEL; RELENA HANLEY;  
MICHAEL HANLEY; BART  
HANSEN; DANIEL & JUNE  
HANSEN; RICK HANSEN; BILLIE  
HARKER; CAROL HARKER;  
DELSANAIA HARKER; EVE  
HARKER; JOSETT HARKER;  
THORA HARKER; DAVID HARTLEY;  
ROCKY HATCH & LYNDA HATCH;  
STEVEN HEISELBETZ; AARON  
CARL HGFELDT; KATHY HIATT;  
EDWIN E. HIGBEE; KENNETH F. &  
KATHRYN A. HILL; JANICE  
HILTON; BRANDON HOLTON; N.  
PETER HORLACHER; ANDREW M.  
HORSCH; CAROL HULLINGER; RAY  
HULSE; DON HUNT; MARLAN K.  
HUNT; MERLENE HURD;  
JENNIFER JACK; ROBERT  
JENNINGS; JERONE A. JENSEN;  
AARON JESSOP; CARL JESSOP;  
JESSICA JESSOP; KEVIN J.  
JESSOP; LORIN JESSOP; LORIN Z.  
JESSOP; MIKE JESSOP; VIVIAN  
JESSOP; ABIGAIL C. JOHNSON;  
HOPE JOHNSON; KIRK JOHNSON;  
LAURA JOHNSON; LINDA G.  
JOHNSON; MARK D. JONES;  
WILLIAM JORDAN; DENNIS  
JURGENSEN; PATRICK M,  
KELLEY; ROSE DIANE KELLEY;  
BECKY KLEIM; JESS KLOTZ;  
MICHAEL KNIPES; RONALD  
KOZAK; WILLIAM KRAMER;  
KATHLEEN LAJOIE; LARRY  
LAJOIE; ROBERT LAUBACH; LEAH  
R. LAWSON; KYLE LEANY; JACK T.  
LEE; JIMMIE SUE LEE; MERRILEE  
LEE; ROLLIN KIM LEE; JACOB  
LESTER; SARAH LESTER; WESLEY  
R. & ELAINE R. LEWIS; BEVAN

LISTER; BRAD LLOYD; JO & JASON  
LLOYD; MICK & LYNN LLOYD;  
TERESA LLOYD; WILLIAM LONG;  
D.L. LUCCHESI; FARRELL &  
MANETTA LYTLE; KEN & DONNA  
LYTLE; LISA L. LYTLE; CHRYSTAL  
MALLOY; DIANNE E. MASON;  
MARK A. MASON; BARBARA J.  
MASON-WANKET; MAJOR MASTIN;  
NEVIN MAY; GARY MCBRIDE;  
MARIE MCBRIDE; JOHN T.  
MCCLELLAN; NATHAN MCCLURE;  
KATHERINE MCCROSKY;  
MELINDA MCCROSKY; STEVE  
MCCROSKY; PAULA & PARKER  
MCMANUS; AARON MCRORY;  
NATALIE MELLEME; LAUREL ANN  
MILLS; AMANDA MOORE; JOE  
MORROW; KARI MORTENSEN;  
DEAN MOSSGR; LISA M. NIELSEN;  
ALLAN K. NYBERG; DENNIS  
O'CONNOR; MARK OLSON; TERRY  
OLSON; CARLOS PALENCIA;  
JANICE PALMERI; AXEL PEARSON;  
KEITH A. & LACIE PEARSON; LEE  
PEARSON; MARGARET PENSE;  
GARY & JO ANN PEREA; GRANT  
PERKINS; CLIFFORD PETE  
PETERSON; INDIA PHILLIPS;  
KEVIN PHILLIPS; RACHELLE  
PHILLIPS; TERRYLE H. PHILLIPS;  
TONI PINKHAM; ARLA  
PRESTWICH; RICHARD PRINCE;  
MERLE RAWLINGS; PHILLIP  
REEVES; MERLIN RHODE; JANIE  
RIPPETOE; MARK RIPPETOE;  
RONALD JEREMY ROBINSON;  
DONALD RODRIGUEZ; LARENE &  
CHUCK ROGERS; DANILE ROHR;  
KEITH & MARY ROSE; GARY  
ROSONLUND; KATHERINE &  
WILLIAM ROUNTREE; ROBERT  
ROWE; RICHARD A. RULLO;  
DAMIAN SANDOVAL; GREG

SCHATZLE; TREY SCOTT; TOM H.  
SEARS; VAUGHAN E. SEEBEN JR.;  
JOHN SETTLES; CHRIS SHINKLE;  
AARON SHOWELL; DAN & CONNIE  
SIMKINS; RANDY & SHARLAN  
SIMKINS; SUMMER & SHANE  
SIMKINS; SAMMYE L. SKINNER;  
JIM SLOUGH; WILLIAM SMITH;  
SARAH SOMERS; DEVIN  
SONNENBERG; ED SPEAR;  
SHANNON SPENDLOVE;  
MARSHALL STACKHOUSE;  
THEODORE STAZESKI; TERRANCE  
& DEBRA STEADMAN; PAUL  
STEED; RACHEL STEED;  
MICHELLE STEPHENS; KEITH  
STEVER; LARRY STEVER; JACKIE  
STEWART; KARL C. STEWART;  
BEVERLY STRICKLAND; SHELBY  
TAYLOR; SIDNEY TAYLOR; RUSS &  
CHEYENNE THOMPSON; REX &  
GRACIE THOMPSON; LAURA  
TIBBETTS; RYAN TIMMONS; ANNA  
M. TROUSDALE; DEB UMINA;  
DENNIS VANWINKLE; ED  
VINCENT; ALEX, NICHOLAS &  
JOSEPH VINCENT; EDWARD &  
STEPHANIE VINCENT; MIKE VITT;  
HENRY C. & DANA VOGLER,  
INDIVIDUALLY AND ON BEHALF  
OF THEIR MINOR CHILDREN;  
STINSON VOGLER; DUANE E. &  
BRYNLEE WADSWORTH; JAYCEE  
TYLER AND KATHY WADSWORTH;  
JOHN WADSWORTH; MARCIA  
WADSWORTH; MARK  
WADSWORTH; TYLER  
WADSWORTH; BRADLEY WALCH;  
ACHIEL E. WANKET; EDITH B.  
WARREN; JO WELLS; SUSAN  
WETMORE; B.J. WHITNEY;  
SHARON WILLIAMS; WILLIAM &  
HOLLY M. WILSON; EDWARD E.  
WRIGHT; MARGARET JOYCE &



GORDON F. YACH; MICHELLE  
YOSAI; AND DONALD ZOOK;  
CORPORATION OF THE  
PRESIDING BISHOP OF THE  
CHURCH OF JESUS CHRIST OF  
THE LATTER-DAY SAINTS, on  
behalf of Cleveland Ranch;  
CONFEDERATED TRIBES OF THE  
GOSHUTE RESERVATION;  
DUCKWATER SHOSHONE TRIBE;  
THE ELY SHOSHONE TRIBE; and  
SOUTHERN NEVADA WATER  
AUTHORITY,

Real Parties in Interest.

PETITION FOR WRIT OF MANDAMUS

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PETITION FOR WRIT OF MANDAMUS

Pursuant to NRAP 21, Jason King, P.E., in his official capacity as the Nevada State Engineer, and the Nevada Department of Conservation and Natural Resources, Division of Water Resources (“State Engineer”), requests writ review as to three important issues of Nevada water law addressed in the District Court’s December 10, 2013 Decision (App. A, Vol. 1 at SE 000002-24.) The Decision remands four State Engineer Rulings granting the applications of Southern Nevada Water Authority to appropriate groundwater from Spring, Cave, Dry Lake, and Delamar Valleys.

First, whether the State Engineer’s practice of calculating the amount of water available for appropriation from a groundwater basin based on total basin evapotranspiration<sup>1</sup> (“ET”) is arbitrary and capricious, and whether the State Engineer is required to show that the groundwater basin will reach equilibrium within a given period of time in order to grant a water right?

---

<sup>1</sup> Evapotranspiration is the process by which groundwater is transferred from the land to the atmosphere by evaporation from the soil and transpiration from plants.

Second, if the State Engineer chooses to utilize the tool of a monitoring, management and mitigation plan (“3M Plan”), whether specific thresholds for mitigation are required to be identified as part of the 3M Plan before a water right may be granted?

Third, whether the State Engineer’s methodology used to determine that appropriations from the Cave, Dry Lake, and Delamar Valleys would not conflict with existing water rights downgradient in the White River Flow System is reasonable, and his determination is supported by substantial evidence?

The District Court’s remand instructions turn the State Engineer’s practice of managing water in Nevada upside down. The calculations ordered by the District Court, if required throughout Nevada, will affect the amount of water available for appropriation in almost every basin in the state. This significant change in practice and policy is not within the purview of the District Court and should be reviewed by this Court before the State Engineer is forced to comply.

In addition, the remand instruction related to the 3M Plans directly conflicts with another Seventh Judicial District Court Decision that is currently before this Court in the case of *Eureka County, et al. v.*

*State Engineer*, Case No. 61324 (consolidated with Case No. 63258). Writ review will resolve this division within the Seventh Judicial District, as well as settle important issues of water law necessary for the State Engineer to consistently and appropriately perform his statutory duties. This Petition is supported by the following Memorandum of Points and Authorities.

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Attorney General

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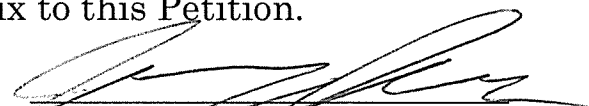
VERIFICATION

1. I am a Senior Deputy Attorney General at the Nevada Attorney General's Office and am counsel of record for the Nevada State Engineer in Nevada Supreme Court Case No. 64815. I am one of the attorneys principally responsible for handling this matter on behalf of the State Engineer.


2. This verification is made by me pursuant to NRS 15.010, NRS 34.030, NRS 34.170, and NRS 34.300, rather than the Nevada State Engineer because the facts relevant to this Petition for Writ of Mandamus are within my knowledge as the State Engineer's attorney.

3. I know the contents of the Petition and the facts stated therein are true of my own knowledge based on the proceedings and papers filed by the parties in the coordinated cases below.

4. True and correct copies of all papers served and filed by the parties in the case below that are relevant to the issues raised in the Petition are contained in the Appendix to this Petition.

  
Jerry M. Snyder

SUBSCRIBED and SWORN to before me this 29<sup>th</sup> day of May, 2014.

  
Notary Public

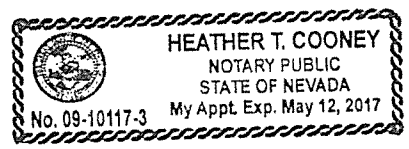


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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

The State Engineer seeks writ review of three important issues concerning the management of water in Nevada. Each of the issues is addressed in the District Court's December 10, 2013 Decision regarding State Engineer Ruling Nos. 6164, 6165, 6166, and 6167 (the "Rulings"). Appendices B–E. The Rulings concern the Applications of Southern Nevada Water Authority ("SNWA") to appropriate groundwater from Spring, Cave, Dry Lake, and Delamar Valleys for beneficial use in Clark and Lincoln Counties ("Applications").

Prior to approval of the SNWA Applications, the State Engineer conducted an extensive investigation, reviewed thousands of pages of expert reports, and held a six-week hearing to listen to witness and expert testimony, public comment, and legal argument. Upon careful consideration of this evidence, the State Engineer granted permits for the appropriation of groundwater for up to 61,127 acre-feet annually ("afa") in Spring Valley, 5,235 afa in Cave Valley, 11,584 afa in Dry Lake Valley, and 6,042 afa in Delamar Valley ("Permits"). In order to issue the Permits, the State Engineer determined that SNWA met all

statutory requirements for an interbasin transfer of the groundwater in question. The State Engineer conditioned the Permit for Spring Valley on staged development pursuant to NRS 533.3705 (three stages of maximum amounts of water allowed to be withdrawn if no conflicts or unreasonable adverse impacts from withdrawal result after each stage), and conditioned all of the Permits on the implementation of 3M Plans.

The Respondents sought judicial review of the Rulings. The District Court upheld all findings of the State Engineer except for the following:

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 [is] neither arbitrary nor capricious in Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley, and;
4. Recalculate the appropriations from Cave Valley, Dry Lake [Valley] and Delamar Valley to avoid over appropriations or conflicts with down-gradient, existing water rights.

App. A, Vol. 1 at SE 000024:15-22.

In remanding Ruling 6164 concerning Spring Valley, the District Court created a requirement that the State Engineer may only grant a

water right upon showing that equilibrium of the groundwater basin will be achieved within a “reasonable” time frame—here, the District Court apparently set that time frame at less than two hundred years. The “reasonable” time frame set by the District Court is arbitrary and it is not required by law. Further, the calculations conducted by the District Court in determining that the State Engineer acted arbitrarily and capriciously are based on evidence that the State Engineer found unreliable.

Similarly, by requiring that 3M Plans include thresholds or “triggers” for mitigation before a water right is granted, the District Court abused its discretion. There is no statutory requirement that water permits be conditioned on a 3M Plan. In addition, expert testimony at the hearing supported the State Engineer’s finding that a 3M Plan based on adaptive management, rather than on a rigid set of predetermined triggers, is more appropriate under the circumstances.<sup>2</sup>

Finally, the District Court abused its discretion and erred in interpreting the evidence by concluding that the appropriations in

---

<sup>2</sup> The Court did not explain how the State Engineer might have jurisdiction over events occurring in Utah. While the State Engineer does not object to the inclusion of Millard and Juab Counties in the 3M Plans, guidance as to the State Engineer’s ability to exercise jurisdiction is needed.

Cave, Dry Lake, and Delamar Valleys conflict with existing rights in downgradient groundwater basins. The District Court came to this conclusion by substituting its own judgment for that of the State Engineer regarding evidence and methodology for calculating the amount of water available for appropriation in a given groundwater basin.

The State Engineer respectfully submits that the District Court manifestly abused its discretion by going well beyond the scope of determining whether substantial evidence supported the State Engineer's Rulings. The District Court reweighed the relevant evidence and substituted its own judgment for the administrative expertise of the State Engineer. The District Court imposed legal requirements on the State Engineer that are not found anywhere in Nevada law, upsetting reasonable practices of the State Engineer in the management of water throughout Nevada. For these reasons, and in order to resolve these important issues, the State Engineer respectfully requests that this Court grant this Petition and issue a writ of mandamus vacating the District Court's remand instructions and ordering the District Court to affirm State Engineer Ruling Nos. 6164, 6165, 6166, and 6167.

## II. ISSUES PRESENTED

1. Whether the State Engineer's practice of calculating the amount of groundwater available for appropriation from a groundwater basin based on total basin ET is arbitrary and capricious, and whether the State Engineer is required to show that the groundwater basin will reach equilibrium within a given period of time in order to grant a water right?
2. Whether, if the State Engineer chooses to utilize the tool of a 3M Plan, specific thresholds for mitigation are required to be identified as part of the 3M Plan before a water right may be granted?
3. Whether the State Engineer's methodology used to determine that appropriations from the Cave, Dry Lake, and Delamar Valleys would not conflict with existing water rights downgradient in the White River Flow System is reasonable, and his determination is supported by substantial evidence?

## III. STATEMENT OF FACTS

### A. Summary of Past Proceedings

On October 17, 1989, SNWA's predecessor, Las Vegas Valley Water District ("LVVWD"), filed 146 applications for the appropriation of water in Nevada. In September 2006, the State Engineer held hearings on the Applications for Spring Valley, and on April 16, 2007, issued Ruling 5726 granting permits for up to 60,000 afa, conditioned upon staged development and the implementation of 3M Plans. In February 2008, the State Engineer held hearings on the Applications

for Cave, Dry Lake, and Delamar Valleys, and on July 9, 2008, issued Ruling 5875 granting permits for up to 18,755 afa, conditioned upon the implementation of 3M Plans.

In 2010, this Court vacated Ruling 5726 for procedural reasons, and ordered the State Engineer to re-notice the Applications, re-open the protest period and hold new hearings. *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 20, 234 P.3d 912, 914 (2010). Similarly, Ruling 5875 was vacated and remanded based on the ruling in *Great Basin Water Network. Southern Nevada Water Authority v. Carter-Griffin, Inc.*, 2010 WL 3605907 (Nev. Sept. 13. 2010).

The State Engineer held a second round of hearings on the Applications between September 26 and November 18, 2011. On March 22, 2012, the State Engineer issued Ruling Nos. 6164, 6165, 6166 and 6167 which are the subject of this Petition.

**B. Summary of Facts Relating to the Calculation of Water Available in Spring Valley**

Perennial yield is “the maximum amount of groundwater that can be salvaged each year over the long term without depleting the groundwater reservoir.” App. B, Vol. 1 at SE 000081. The State Engineer’s Ruling 6164 contains an extensive analysis of the scientific



evidence of the perennial yield of Spring Valley. The State Engineer confirmed that “the estimated time a pumping project takes to reach equilibrium does not affect the perennial yield of a basin.” *Id.* Based on this analysis, the State Engineer found that the perennial yield of Spring Valley was approximately 84,000 afa. App. B, SE 000115. The District Court did not disturb this finding. App. A, Vol. 1 at SE 000024:11-12.

After concluding that the perennial yield of the basin was 84,000 afa, the State Engineer analyzed whether the requested use of water would conflict with existing water rights. The State Engineer examined models and other evidence developed both by SNWA and by the Protestants in evaluating potential conflicts. Based on this detailed review (*see* App. B, Vol. 1 at SE 000145-176), the State Engineer determined that four of the Applications would, if granted, conflict with Protestants’ water rights, and therefore denied those Applications. App. B, Vol. 1 at SE 000166-167.

The State Engineer reviewed long term predictions made by Protestants’ expert, Dr. Myers. The State Engineer noted that “one can use a model to make predictions with confidence for a period into the

future equal to the period of time available to calibrate the model.” App. B, Vol. 1 at SE 000171. Consequently, the State Engineer concluded that any predictions made by the models were uncertain at time scales beyond seventy-five years. *Id.* In spite of this, the State Engineer reviewed and considered Dr. Myers’ predictions regarding the effect the project would have on groundwater over a 200 year time frame. App. B, Vol. 1 at SE 000171-176. The State Engineer concluded that “predictions of effects after hundreds of years carry little weight.” Accordingly, the State Engineer placed greater reliance on SNWA’s model, which was “more comprehensive, better documented and peer reviewed, and will carry more weight in impacts analyses.” *Id.* at SE 000176.

The State Engineer concluded that, with the seventy-five year period for which reliable models exist, the water rights permitted would not conflict with other rights. *Id.* However, because of the uncertainty involved in basing predictions on models that inherently incorporate unknown variables, the State Engineer concluded that “staged development, in conjunction with an updated and more comprehensive management plan is also necessary to assure the Applications will not

conflict with existing rights or domestic wells, and to assure pumping is environmentally sound.” *Id.* at SE 000176.

Based on this analysis, the State Engineer approved a total of 61,127 afa in Permits for the Spring Valley, with a maximum of 38,000 afa to be withdrawn for eight years. App. B, Vol. 1 at SE 00241-242. The State Engineer will evaluate the effects of pumping during the first stage, and only if no conflicts or unreasonable adverse impacts occur will he allow the second stage of pumping to begin. *Id.* The second stage permits a maximum of 50,000 afa to be withdrawn for eight years, after which the full 61,127 afa may be withdrawn if approved by the State Engineer after evaluating the effects of the second stage of pumping. *Id.* The Permits are conditioned upon SNWA’s compliance with the Hydrologic Monitoring and Mitigation Plan and upon the Biologic Monitoring Plan. *Id.* at SE 00241-00242.

**C. Summary of Facts Relating to the 3M Plans**

The State Engineer conditioned SNWA’s Permits on the implementation of hydrological and biological 3M Plans for Spring, Cave, Dry Lake and Delamar Valleys. App. F, Vol. 3 at SE 000744-797, App. G, Vol. 3 at SE-000799-842, App. I, Vol. 4 at SE 000903-1286, App.

J, Vol. 4 at SE 001288-1478, App. H, Vol. 3 at SE 000844-901. These 3M Plans (collectively referred to hereinafter as “the 3M Plans”) were developed in cooperation with the BLM, National Park Service, Bureau of Indian Affairs, U.S. Fish and Wildlife Service, and Southern Nevada Water Authority. The 3M Plans include three principal components: monitoring, management, and mitigation. *Id.*

1. Monitoring

The monitoring component of the hydrological 3M Plans requires installation of monitoring wells throughout Spring, Cave, Dry Lake and Delamar Valleys and surrounding areas. App. F, Vol. 3 at SE 000744-791, App. G, Vol. 3 at SE 000799-836. Under the hydrological 3M Plans, approximately 60 groundwater monitoring wells and piezometers and about 30 surface water devices will be installed throughout the valleys and surrounding areas to measure groundwater levels and surface water flows. App. F, Vol. 3 at SE 000760-766, App. G, Vol. 3 at 000815-817, App. H, Vol. 3 at SE 000887. With most of these wells, piezometers and devices currently installed, substantial hydrological data has already been collected, reviewed, analyzed, and reported to the State Engineer. *Id.* In addition, under the biological 3M Plans, monitoring of

dozens of plant and animal species is required for the collection of important biological baseline data. App. I, Vol. 4 at SE 000914-915, App. J, Vol. 4 at SE 001322-1346. The biological monitoring focuses on special status species (such as endangered and threatened species) and other ecological components that are believed to be good indicators of ecosystem health, including those that may provide early warning of adverse impacts. App. I, Vol. 4 at SE 000924; App. J, Vol. 4 at SE 001334-1336. The data collected as part of the 3M Plans is analyzed and interpreted by technical teams established by the 3M Plans, and reported to the State Engineer on at least an annual basis. App. F, Vol. 3 at SE-000756, App. G, Vol. 3 at SE 000811, App. I, Vol. 4 at SE 001011-1012, App. J, Vol. 4 at SE 001303-1304. Monitoring provides critical information that will be used to help detect early warning signs of impacts as pumping begins, so that unreasonable adverse impacts can be avoided through proper management. App. F, Vol. 3 at SE 000758, App. G, Vol. 3 at SE 000813-814, App. I, Vol. 4 at SE 000923. If necessary, the information will also be used to implement specific and effective mitigation measures to protect existing water rights and natural resources. *Id.*

## 2. Management

The management component of the 3M Plans include a hydrologic Technical Review Panel (TRP) and a Biological Working Group (BWG) (or Biological Resource Team (BRT)), which report to an Executive Committee for final decision making when consensus is not reached. App. H, Vol. 3 at SE 000855-857, App. F, Vol. 3 at SE 000758-59, App. G, Vol. 3 at SE 000813-814, App. I, Vol. 4 at SE 000914-916, App. J, Vol. 4 at SE 001300-1304, App. K, Vol. 4 at SE 001508-1509, SE 001523-1524. The technical and management teams and committees include representatives from the Nevada State Engineer's Office, Bureau of Indian Affairs, Bureau of Land Management, National Park Service, U.S. Fish and Wildlife Service, U.S. Forest Service, Nevada Department of Wildlife, Utah Division of Wildlife Resources and Southern Nevada Water Authority. *Id.* The TRP and BWG/BRT provide the technical and scientific expertise necessary for collection, evaluation and analysis of data. *Id.* The TRP and BWG/BRT will use baseline data gathered during the pre-withdrawal phase to develop action criteria (i.e., hydrological and biological standards or thresholds) that indicate when particular management or mitigation actions should be implemented.

*Id. See also* App. I, Vol. 4 at SE 000925, App. J, Vol. 4 at SE 001321. As the experts, the TRP and BWG/BRT are tasked with determining and implementing site-specific actions related to monitoring, management and mitigation under the 3M Plans. App. F, Vol. 3 at SE 000758-759, App. G, Vol. 3 at SE 000813-814, App. I, Vol. 4 at SE 000914-916, App. J, Vol. 4 at SE 001300-1304, App. K, Vol. 4 at SE 001508-1509, SE 001517-1524.

### 3. Mitigation

The 3M Plans require SNWA to mitigate against unreasonable adverse impacts to existing water rights and water-dependent ecosystems. App. F, Vol. 3 at SE 000758-759, App. G, Vol. 3 at SE 000813-814, App. I, Vol. 4 at SE 000914-916, App. J, Vol. 4 at SE 001300-1304, App. K, Vol. 4 at SE 001508-1509, SE 001517-1524. The 3M Plans dictate that if indicators found in the monitoring information show an adverse impact is expected, then management and mitigation measures will be instituted before the adverse impacts are realized. *Id.* The 3M Plans list potential mitigation measures, including but not limited to “reduction or cessation in groundwater withdrawals, geographic redistribution of groundwater withdrawals, augmentation of

water supply . . . using surface and groundwater sources, acquisition of real property and/or water rights dedicated to the recovery of Special Status Species.” App. F, Vol. 3 at SE 000793, App. G, Vol. 3 at SE 000837. As the State Engineer noted in his Rulings, he has full authority to review and approve the mitigation measures conducted, and at any time may order additional mitigation measures separate and apart from the technical teams as appropriate. App. B, Vol. 1 at SE 000143, App. C, Vol. 1 at SE 000338, App. D, Vol. 2 at SE 000506, App. E, Vol. 2 at SE 000670; NRS 534.110(5)-(6) and (8).

**D. Summary of Facts Relating to the Appropriations In Cave, Dry Lake and Delamar Valleys**

The State Engineer’s conclusions as to the perennial yield of the Cave, Dry Lake, and Delamar Valley basins (the “CDD basins”) have not been challenged. However, the Protestants argued that because the CDD basins are part of the White River Flow System (the “WRFS”), any withdrawal of water from those basins would have an effect on downgradient basins in that flow system.

The State Engineer considered Protestant’s “one-river” flow argument in considering whether or not it was appropriate to alter his methodology for calculating the amount of water available for



appropriation in a given basin. The State Engineer concluded that “comparing a groundwater flow system to a river is flawed by ignoring the time frames and geological uncertainties involved. Up-stream use of a river will affect down-stream supply in days to weeks. In this groundwater flow system, up-gradient use will not, if at all, measurably affect down-gradient supply for hundreds of years.” App. E, Vol. 2 at SE 000627-628.

The State Engineer relied on testimony regarding the groundwater flow model submitted by SNWA as part of its Environmental Impact Statement. App. E, Vol. 2 at SE 00628. The model showed that after 200 years of withdrawal in the CDD basins, springs and other water sources downgradient were virtually unaffected. *Id.* Based on this undisputed evidence, the State Engineer determined that granting the Permits for the CDD valleys would not conflict with existing rights in the downgradient valleys in the WRFS. *Id.*

#### IV. LEGAL ARGUMENT

Writ of mandamus is an extraordinary remedy and will only issue where “there is not a plain, speedy, and adequate remedy in the

ordinary course of law.” NRS 34.170. “A writ of mandamus may be issued to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion.” *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 93, 993 P.2d 50, 53 (2000). Writ of mandamus is an appropriate means to vacate a district court order that constitutes a manifest abuse of discretion. *Washoe County Dist. Attorney v. Second Jud. Dist. Ct.* 116 Nev. 629, 635, 5 P.3d 562, 566 (2000).

A petition for writ of mandamus may be considered where there are important legal issues that need clarification and public policy is served by the Nevada Supreme Court’s exercise of jurisdiction. *Diaz*, 116 Nev. at 93, 993 P.2d at 54. Mandamus is also appropriate where district courts are divided as to how an important statewide issue should be decided. *State v. Eighth Judicial District Court (Hedland)*, 116 Nev. 127, 134, 994 P.2d 692, 697 (2000).

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**A. Writ Review Is Appropriate Here Because Extraordinary Relief Is Necessary to Correct a Manifest Abuse of Discretion and to Prevent Unwarranted Delay and Expenditure of Judicial and Administrative Resources, and Resolve Important Legal Issues of Statewide Importance**

**1. Standard of Review**

Petitions for Judicial Review of State Engineer orders and decisions are governed by NRS 533.450. Pursuant to this statute, “[t]he decision of the State Engineer is *prima facie correct* and the burden of proof is on the party attacking the same.” NRS 533.450(10) (emphasis added). Findings of the State Engineer will not be set aside unless they are arbitrary and capricious. *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996).

In reviewing decisions on petitions for judicial review, the Nevada Supreme Court uses the same substantial evidence standard employed by the district court. *Elizondo v. Hood Mach. Inc.*, 129 Nev. \_\_, \_\_, 312 P.3d 479, 482 (2013). As such, this Court’s review is limited to a determination of whether the State Engineer’s decision is supported by substantial evidence. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262 (1979). Substantial evidence is “that which a reasonable mind might accept as adequate to support a conclusion.” *Bacher v. State Engineer*,

122 Nev. 1110, 1121, 146 P. 3d 793, 800 (2006). Thus, in evaluating the present Petition, this Court may not “pass upon the credibility of the witness nor reweigh the evidence.” *Id.* at n.33. In reviewing the present matter, this Court “like the district court, may not substitute its judgment for the State Engineer’s judgment.” *Id.*

Decisions of the State Engineer are entitled not only to deference with respect to factual determinations, but also with respect to legal conclusions. The Nevada Supreme Court has explained that “an agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action,” and therefore “great deference should be given to the agency’s interpretation when it is within the language of the statute.” *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (citing *Clark Co. Sch. Dist. v. Local Gov’t*, 90 Nev. 332, 446, 530 P.2d 114, 117 (1974)). Thus, the State Engineer’s interpretation of the Nevada statutory scheme for adjudication of vested water rights and appropriation of public waters is, while not controlling, persuasive. *Id.* Because the State Engineer has “a special familiarity and expertise with water rights issues,” his interpretation of a statute may only be

disregarded if “an alternate reading is compelled by the plain language of the provision.” *United States v. State Engineer*, 117 Nev. 585, 589-90, 27 P.3d 51, 53 (2001).

**2. The District Court’s Decision Constitutes a Manifest Abuse of Discretion**

Writ review is appropriate because the District Court’s order constitutes a manifest abuse of discretion. As set forth below, the District Court’s review of the State Engineer’s Rulings should have been limited to a determination of whether that decision was based on substantial evidence and is not arbitrary or capricious. Instead of confining itself to an analysis of these questions, the District Court reweighed the evidence that the State Engineer considered, reevaluated the technical standards used by the State Engineer, and imposed legal requirements on the State Engineer that have no basis in statute or case law. Accordingly, the District Court has substituted its judgment for that of the State Engineer. For these reasons, the Decision constitutes a manifest abuse of discretion and is appropriate for writ review.

**3. There Is No Plain, Speedy, and Adequate Remedy at Law and Writ Promotes Judicial Economy**

On January 9, 2014, the State Engineer filed a Notice of Appeal from the District Court's Decision. On May 15, 2014, Cross-Appellant Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, on behalf of Cleveland Ranch ("CPB"), filed a Motion to Dismiss the appeal on the grounds that the District Court's Decision is not final and appealable because the District Court remanded the case for further proceedings before the State Engineer. The State Engineer has opposed this motion, asserting that because the District Court did not remand for any substantive action, the Decision is functionally final and appealable. SNWA separately opposed CPB's Motion to Dismiss.

In the event that this Court agrees with CPB and grants the pending Motion to Dismiss, the State Engineer will have no plain, speedy, and adequate remedy at law. If the State Engineer is required to go forward on remand from the District Court, it will be obliged to (1) issue rulings which are legally improper, (2) seek judicial review by the district court to overturn its own rulings, and then (3) pursue a direct appeal of any district court decision upholding those rulings. This

process would obviously put the State Engineer in the ludicrous position of seeking reversal of his own rulings. As such, if the pending motion to dismiss is granted, review of the District Court's decision on writ offers the most appropriate procedural route to appellate review.

Indeed, CPB, while arguing that the matter is not appealable, has also asserted that certain issues raised by the Decision should be decided through a writ in order to "avoid waste of substantial time, effort, and expense in additional state administrative and judicial proceedings." CPB's April 14, 2014 Petition for Limited Writ Review at 10. CPB requests writ review of a limited issue—whether the District Court properly allowed staged development of the approved water permit under NRS 533.3705.<sup>3</sup> However, the reasoning used in CPB's Petition—that writ review would conserve judicial resources and avoid piecemeal litigation—apply to the issues raised in the State Engineer's Petition as well. In order to avoid piecemeal litigation and to avoid

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<sup>3</sup> As will be addressed in any opposition to CPB's Petition for Writ if requested by this Court, if NRS 533.3705 does not apply to these Applications as asserted by CPB in its Petition, then neither does NRS 533.370(3) setting forth criteria for interbasin transfers, because both statutes were enacted after the Applications were filed.

procedural delay, the issues raised in both petitions should be considered on writ.

**4. This Case Presents Important Legal Issues That Need Clarification**

Writ is also appropriate here because this case presents important, statewide issues which should be decided as a matter of judicial economy and efficient administration of the courts. The legal issues raised by the Decision should be examined as quickly as practicable because they represent a significant change in the State Engineer's existing practices. Because the legal issues raised by the District Court's Decision will have a significant impact on the manner in which the State Engineer decides applications for water rights across the state, writ review is appropriate.

**B. The District Court Abused Its Discretion by Requiring New Standards For Calculating the Amount of Water Available for Appropriation In Spring Valley and by Failing to Limit Its Review to the Substantial Evidence Standard**

The District Court held that the State Engineer's decision to allow up to 61,127 afa to be withdrawn from Spring Valley was arbitrary and capricious because it violated the State Engineer's own policy against groundwater mining. Decision at App. A, Vol. 1 at SE-00011. However,



in reaching this conclusion, the District Court redefined the State Engineer's policy by including an arbitrary timeframe for reaching equilibrium and relied entirely on evidence the State Engineer found unreliable. The District Court erroneously determined that Ruling 6164 violated the State Engineer's policy because one of the models predicted that after 200 years, only 84% of the ET would be captured, thus equilibrium would not yet be reached. Accordingly, the Court determined that "simple arithmetic shows after two hundred years, SNWA pumping and evapotranspiration removes 70,977 afa from the basin with no equilibrium in sight. That is 9,780 more than SNWA's grant." Decision at App. A, Vol. 1 at SE 000012. For the reasons set forth below, the District Court's Decision is a manifest abuse of discretion.

- 1. The District Court Abused Its Discretion by Imposing Novel Legal Requirements on the State Engineer**

The District Court essentially held that where the calculation of perennial yield is based on ET, the State Engineer may only approve permits upon an explicit factual determination that the basin will reach equilibrium in an undefined "reasonable" time period. This legal

requirement is not found in Nevada statutory authority or the policies and practices of the State Engineer.

The Nevada Supreme Court has held that perennial yield is “the equilibrium amount or the maximum amount of water that can be safely used without depleting the source.” *Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. \_\_, \_\_, 245 P.3d 1146, 1147 (2010). The State Engineer has consistently held perennial yield is the “amount of groundwater that can be salvaged *over the long term* without depleting the groundwater reservoir.” Ruling 6164 at App. B, Vol. 1 at SE 000081. Nevada law specifically contemplates that when a new well begins to operate, it will result in the water table lowering at the point of diversion: “the right of the appropriator relates to a specific quantity of water and that the right must allow for a reasonable lowering of the static water table at the appropriator’s point of diversion.” NRS 534.110(4).

Following these guidelines, the State Engineer held that substantial evidence supported, for the timeline within which reliable predictions could be made, that the static water table would likely be drawn down by less than 50 feet at the points of diversion. The State

Engineer further determined that in a basin as large and complex as Spring Valley, where the first 100 feet of the aquifer contains an estimated 4.2 million acre feet, this transitional pumping was reasonable. App V, Vol. 5, at SE 001690. As summarized above, and set forth in the lengthy analysis contained in Ruling 6164, it is entirely consistent for the State Engineer to allow pumping from transitional storage while the system arrives at a new equilibrium, even if that takes a substantial amount of time. There was no deviation from the State Engineer's policy against groundwater mining and practice of analyzing perennial yield in Ruling 6164.

The State Engineer confirmed that where "the amount of water pumped does not exceed perennial yield, then a new equilibrium will be reached." App. B, Vol. 1 at SE 000172. Here, the State Engineer permitted 61,127 afa, which is substantially less than the perennial yield of 84,000 afa (a finding the District Court did not disturb), and takes into consideration existing rights and future development. App. B, Vol. 1 at SE 000115. Therefore, the Ruling simply does not permit groundwater mining and does not violate the State Engineer's policy against groundwater mining, as the District Court incorrectly found.

App. A, Vol. 1 at SE 000014:1-2. If the State Engineer had permitted groundwater mining, he would have granted more water than the perennial yield—not less.

The District Court’s remand instructions order an entirely new practice for the calculation of the amount of water available for appropriation based on an arbitrary “reasonable” timeframe for when equilibrium will be met. This novel requirement is scientifically and legally unsupported. The District Court disregarded the State Engineer’s statutory authority and expertise in favor of creating a rule that is not supported by Nevada law. This is a manifest abuse of discretion. *See Washoe Co. v. John A. Dermody, Inc.*, 99 Nev. 608, 612, 668 P.2d 280, 282 (1983) (“[T]he district court should not foreclose the exercise of the administrative agency’s independent judgment on matters within its competence.”).

**2. The District Court Abused Its Discretion by Disregarding the State Engineer’s Factual Findings**

The District Court not only created a new rule of law, but disregarded the State Engineer’s factual findings. The District Court held that the evidence in the case shows that “equilibrium will never be reached.” App. A, Vol. I at SE 000013:18. The District Court apparently

found that after 200 years, 84% of ET would be captured. App. A, Vol. I at SE 000012:14-16. However, the evidence at the hearing indicated that a model could only reliably predict future events for “a period into the future equal to the period of data available to calibrate the model.” App. B, Vol. 1 at SE 000171, App T, Vol. 5 at SE 001636-1637, App. U, Vol. 5 at SE 001644-1648. Accordingly, the State Engineer determined that projections beyond 75 years were less reliable. While both the Applicant and the Protestants adduced evidence of projections beyond 75 years, the State Engineer concluded that these predictions were less certain. For this reason, the State Engineer found that given existing data, a seventy-five year simulation period was appropriate. App. B, Vol. 1 at SE 000171.

In spite of the evidence indicating that 200 year projections were less reliable, the District Court expressly relied on those projections. The District Court did not point to any evidence contradicting the State Engineer’s finding that projections beyond 75 years were less reliable, or explain why it elected to rely on evidence that the State Engineer had determined was less reliable. Instead, it simply disregarded the State Engineer’s view of the evidence. In so doing, the District Court

performed well beyond the boundaries of substantial evidence review and reweighed the evidence before the State Engineer. *Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P. 3d 793, 800 (2006) (Substantial evidence is “that which a reasonable mind might accept as adequate to support a conclusion.”). *See also Nassiri v. Chiropractic Physicians’ Bd.*, 130 Nev. Adv. Op. 27, 2014 WL 1325754, at \*2 (April 3, 2014) (The substantial evidence standard “contemplates deference to [administrative] determinations on review, asking only whether the facts found by the administrative fact finder are reasonably supported by sufficient, worthy evidence in the record.”).

**3. The District Court’s Decision is Founded on a Misinterpretation of Ruling 6164**

The State Engineer determined that because of the complexity of the system and the lack of reliable projections beyond 75 years, the long term effects of the project could not be determined. For this reason, the State Engineer provided for a staged development plan, coupled with 3M Plans, in order to “alleviate any uncertainty associated with the current analyses related to conflict to existing rights, domestic wells, environmental soundness, as well as the perennial yield of the resource.” App. B, Vol. 1 at SE 000176.

The District Court simply disregards the fact that the Ruling provides for ongoing monitoring and adjustment of the withdrawal. Instead, the District Court's analysis depends on an assumption that SNWA will begin pumping at a rate of 61,127 afa and continue to do so in perpetuity without regard for the effects of that pumping. This is clearly not what is provided for in Ruling 6164. The State Engineer's Rulings recognize concerns expressed by the District Court for the long term sustainability of the project, and provide a comprehensive plan for ongoing collection of data and management of the State's water resources. By usurping the State Engineer's ability to consider the best scientific evidence and the most appropriate techniques in managing water resources, the District Court's Decision has hampered the State Engineer's ability to manage those resources in an effective and sustainable manner.

**C. The District Court's Decision Regarding the 3M Plans Constitutes a Manifest Abuse and Conflicts With Other District Court Decisions Currently on Appeal Before This Court**

The District Court determined that the State Engineer's Rulings granting Permits to SNWA were arbitrary and capricious, in part, because it determined that the 3M Plans ordered by the State Engineer

as part of the Permits did not identify “triggers” for when to apply specific mitigation measures. App. A, Vol. 1 SE 000017:26-28, SE 000018:13-15, SE 000023:7-9. The District Court further held that the State Engineer improperly delegated his authority by leaving the monitoring and development of triggers for technical teams established under the 3M Plans. App. A, Vol. 1 at SE 000019:1-3, SE 000022:21-26, SE 000024:1-3. The District Court ordered the State Engineer to “[d]efine standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are [sic] neither arbitrary nor capricious in Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley.” App. A, Vol. 1 at SE 000024:19-21.

The District Court’s Decision erroneously establishes a new requirement for the permitting of water rights, namely that 3M Plans implemented in connection with those water rights must include triggers—specific quantitative criteria or thresholds—for when potential mitigation efforts should begin. Moreover, the Decision demands that those triggers be set *before* the State Engineer grants the water permits, instead of waiting for technical teams established under the 3M Plans to cooperatively develop those triggers, with State



Engineer oversight, after monitoring has established appropriate baseline data and the tangible effects of pumping are known. This Decision conflicts with the statutory requirements of NRS 533.370 for the appropriation of water under Nevada water law. It also conflicts with the weight of the scientific evidence supporting that robust monitoring combined with an adaptive management approach is the best method for effectively safeguarding resources against any adverse impacts due to groundwater withdrawals.

In addition, the District Court's Decision conflicts with the May 17, 2013 Decision of Seventh Judicial District Court Judge J. Charles Thompson on appeal in the case of *Eureka County et al. v. State Engineer*, Supreme Court Case No. 63258 (consolidated with Supreme Court Case No. 61324). App. M, Vol. 5 at SE 001567-1583. In that case, Judge Thompson rejected arguments by Petitioners that the 3M Plan ordered by the State Engineer was too vague because it did not include triggers or thresholds before water rights were granted. App. M, Vol. 5 at SE 001577-1579. Judge Thompson also rejected arguments by Petitioners that the 3M Plan constituted an improper delegation of the State Engineer's authority. App. M, Vol. 5 at SE 001574-1576. Thus,

the Decision by Judge Estes at issue in this case directly conflicts with the decision by Judge Thompson on at least those two points, creating a division within the Seventh Judicial District that must be settled before the State Engineer should be required to conduct further proceedings.

**1. The District Court's Decision Regarding the 3M Plans Constitutes Manifest Abuse**

The State Engineer must deny an application for the appropriation of water where no water is available, the proposed use conflicts with existing rights or threatens to prove detrimental to the public interest. NRS 533.370(2). Additionally, where an interbasin transfer is contemplated, as is in this case, the proposed use must be environmentally sound for the basin of origin. NRS 533.370(3). The State Engineer found that substantial evidence supported granting some of SNWA's Applications because water was available, the proposed use would not conflict with existing rights nor threaten to prove detrimental to the public interest and was environmentally sound. *See* NRS 533.370(2)-(3); App. B, Vol. 1 at SE 000240-241, App. C, Vol. 1 at 000412-413, App. D, Vol. 2 at SE 000577-578, App. E, Vol. 2 at SE 000740-741. The District Court agreed with the State Engineer's findings and did not remand or reverse the State Engineer's Rulings on

these grounds. App. A, Vol. 1 at SE 000024:11-14 (“This Court will not disturb the findings of the Engineer save those findings that are the subject of this Order.”). Therefore, the District Court agreed that SNWA met the statutory requirements for granting the water rights under NRS 533.370, assuming sufficient water was available, and nothing contained in (or absent from) the 3M Plans can affect that Decision.

Although not statutorily required, the State Engineer ordered the 3M Plans as a condition to SNWA’s Permits to provide additional protection to existing water rights and water-dependent ecosystems. App. B, Vol. 1 at SE 000240, App. C, Vol. 2 at SE 000412-413, App. D, Vol. 2 at SE 000578, App. E, Vol. 2 at SE 000741-742, App. F, Vol. 3 at SE 000744-797, App. G, Vol. 3 at SE 000799-842, App. I, Vol. 4 at SE 000903-1017, App. J, Vol. 4 at SE 001288-1478, App. H, Vol. 3 at SE 000844-901. Given the complexities of the naturally evolving ecosystems in Nevada, the State Engineer recognized the 3M Plans as valuable tools for cooperatively collecting important hydrological and biological information and implementing effective management of the natural resources. *Id.* Because the 3M Plans provide additional safeguards over the long term above and beyond that required by the

law, any alleged deficiencies of the 3M Plans cannot be a basis for the District Court to find that the State Engineer's Rulings are arbitrary and capricious.

**a. The District Court's Finding That the 3M Plans Must Define Triggers Before Granting Water Permits in Order to be Effective Contradicts the Overwhelming Weight of the Evidence**

The 3M Plans are designed to “manage the development of groundwater by SNWA . . . in order to avoid unreasonable adverse effects to [existing water rights,] wetlands, wet meadow complexes, springs, streams and riparian and phreatophytic communities (Water-Dependent Ecosystems) and to maintain biologic integrity and ecological health of the Area of Interest over the long term.” App. F, Vol. 3 at SE 000758, App. G, Vol. 3 at SE 000813. The 3M Plans focus on establishing an extensive monitoring network, which will provide at least seven years of essential data for the biological and hydrological technical teams—the TRP and BWG/BRT—to evaluate and analyze in advance of withdrawal of any water from the hydrologic basins. App. F, Vol. 3 at SE 000764, App. I, Vol. 4 at SE 001015. The data collected will provide important baseline information that the technical teams need in order to understand naturally occurring variations in hydrological

and biological factors, and to establish scientifically based triggers—or the points at which particular mitigation measures will be implemented. App. I, Vol. 4 at SE 001016. (“A major purpose of the [3M Plans] is to provide additional information and tools that can be used to better understand the dynamics of the indicators and ecosystems under conditions approaching their tolerance limits (i.e., threshold levels).” Once the information needed to determine tolerance limits of individual attributes of the ecosystem is available, threshold levels will be developed by consensus from the teams of technical experts. App. H, Vol. 3 at SE 000855-857, App. F, Vol. 5 at SE 000758-759, App. G, Vol. 3 at SE 000813-814, App. I, Vol. 4 at SE 000914-916, SE 001016, App. J, Vol. 4 at SE 001300-1304, App. K, Vol. 4 at SE 001508-1509, SE 001523-1524, App. I, Vol. 4 at SE 100925, App J, Vol. 4 at SE 001321.

Thus, the State Engineer determined that triggers cannot be set until baseline information is complete. *Id.* Baseline information cannot be complete until years of monitoring is conducted, which begins when the State Engineer grants a permit and orders the implementation of a 3M Plan. Without a permit, an applicant cannot begin monitoring pursuant to a 3M Plan ordered as part of the permit or begin to

withdraw water. Therefore, the District Court's remand instructions directly conflict with the State Engineer's finding—based on the weight of the evidence—that it is scientifically unsound to set triggers before water permits are granted.

**b. The 3M Plans Contain a Framework for Establishing Appropriate Triggers for Mitigation Once the Necessary Information Is Available**

The District Court's Decision ignored that the 3M Plans include a framework for a team of experts to establish thresholds, standards and triggers for applying mitigation measures once all of the data necessary to make any decision about possible mitigation is available. The District Court also ignored substantial evidence upon which the State Engineer found that the 3M Plans would be effective, and instead applied its own erroneous opinion about how water resources should be managed.

The State Engineer found that the 3M Plans establish a sound process for developing triggers and thresholds once the necessary information is available. App. B, Vol. 1 at SE 000206-208, App. C, Vol. 1 at SE 000337. The State Engineer noted that “[t]he [technical team] lays out a process for developing triggers for action in the event an unreasonable adverse impact to a resource is anticipated.” App. B, Vol.

1 at SE 000207. “The process includes the identification of conservation targets and their key ecological attributes and indicators and the development of adequate baseline data.” *Id.*

Indeed, the TRP and BWG/BRT were established by the respective 3M Plans to collect and evaluate the data and set acceptable ranges in variation. App. I, Vol. 4 at SE 001016. The BMP provides that by the end of the pre-withdrawal period, which includes a minimum of seven years of biological data collection (App. I, Vol. 4 at SE 001015), the Biological Working Group (BWG) will use the data collected to establish an acceptable range in variation, thresholds, and criteria for each indicator and groundwater influenced ecosystem. App. I, Vol. 4 at SE 001015. Once the variation is established at the end of the pre-withdrawal phase, the information will be used during the withdrawal phase to determine if an adverse effect is likely to occur. *Id.* “An adverse effect occurs if an indicator or suite of indicators falls outside the acceptable range of variation.” App. I, Vol. 4 at SE 001017.

Further, allowing the TRP and BWG/BRT to manage the monitoring and set triggers once the necessary information is available does not constitute an improper delegation of authority, as the District

Court stated. App. A, Vol. 1 at SE 000019:1-3, SE 000022:21-26, SE 000024:1-3. The State Engineer maintains authority over the 3M Plans and reserves the right to order any action separate and apart from the technical teams. App. B, Vol. 1 at SE 000143, App. C, Vol. 2 SE 000338, App. D, Vol. 3 at SE 000506, App. E, Vol. 4 at SE 000670; NRS 534.110(5) - (6) and (8). The State Engineer's Rulings were supported by substantial evidence establishing that a flexible, adaptive management approach based on complete monitoring data is the most effective combination for protecting water rights and natural resources. App. B, Vol. 1 at SE 000205-208; Vol. 18 at App. N, Vol. 5 at SE 001587:1-1592:24 (Patten); App. O, Vol. 5 at SE 001602, App. P, Vol. 5 at SE 001607:4-16, SE 001608:16-1609:22, App. Q, Vol. 5 at SE 001613:14-1616:9 (Marshall); App. R, Vol. 5 at SE 001620:1-8, SE 001621:20-1625:11 (Deacon); App. S, Vol. 5 at SE 001629:10-11, SE 001630:25-1631:8 (Landers).

The District Court found it curious that the State Engineer could have sufficient data to make informed decisions about the appropriation of water, but not sufficient data to make decisions about precisely when mitigation should occur. App. A, Vol. 1 at SE 000017:19-28; SE



000022:27-23:8. There is nothing remarkable or contradictory about the fact that different information is necessary to make informed decisions about appropriation, versus about when to apply specific mitigation measures. The information needed to make decisions about appropriation was available and relied on for that analysis. Indeed, as discussed above, the District Court did not upset the findings of the State Engineer that the statutory standard for granting a water right was met. *See* NRS 533.370(2)-(3). However, the information needed to develop thresholds for each attribute of the ecosystem is not known because monitoring is not complete. There is no contradiction in having sufficient information to find the statutory requirement for appropriation of water and not having sufficient information for establishing precisely when and what mitigation is appropriate for every attribute of the ecosystem. The information necessary to determine the two issues is simply different.

**2. The Division Within the Seventh Judicial District Must Be Addressed Before the State Engineer Is Required to Follow an Erroneous Standard**

Where a division among district courts lies on an important, statewide issue, writ of mandamus is appropriate. *State v. Eighth*

*Judicial District Court*, 116 Nev. 127, 134, 994 P.2d 692, 697 (2000). Here, a division within the Seventh Judicial District exists. Judge Thompson concluded in another water rights case, *Eureka County et al. v. State Engineer*, that a 3M Plan need not set triggers in advance of the monitoring data where it includes a framework for management and mitigation measures as determined by technical teams. Judge Thompson ruled that “[t]he 3M Plan is an express condition to monitor the effects of KVR’s pumping, to detect and identify potential impacts, and to prevent them from adversely affecting existing rights through management and mitigation measures recommended by the advisory committees and ordered by the State Engineer.” App. M, Vol. 5 at SE 001580:1-4. He found that the State Engineer did not err in granting the water permits conditioned upon implementation of the 3M Plan. He also found that the State Engineer did not improperly delegate his authority because he maintained ultimate authority over the 3M Plans. The District Court’s Decision in the present case is directly at odds with Judge Thompson’s decision in *Eureka v. State Engineer*.

Accordingly, the State Engineer respectfully requests that this Court accept this Petition and issue a writ in order to provide the

district courts and the State Engineer a clear understanding of the law on this issue.

**D. The District Court Abused Its Discretion by Erroneously Interpreting the Evidence Regarding the Effect of Appropriation From Cave, Dry Lake, and Delamar Valleys and By Substituting Its Own Methodology for Calculating the Amount of Water Available For Appropriation**

The District Court held that the State Engineer erred in calculating the amount of water available for appropriation in the CDD basins. The District Court concluded that because these basins were part of the White River Flow System (“WRFS”), any appropriation of groundwater in the upper basins of that system (i.e., the CDD basins) will conflict with rights in separate lower basins. The District Court based this determination on an implicit factual finding that water pumped from the upper basins in the WRFS would necessarily result in a reduction of the water available in the lower basins. Essentially, the District Court accepted the Protestant’s “one river” theory—an assumption that the underground aquifers within the WRFS act just as an above-ground river would act. App. A, Vol. 1 at SE 000020:2-21:19.

The District Court’s conclusion is an abuse of discretion for two reasons. First, the factual basis for the District Court’s conclusion is not

supported by the evidence in this case. To the contrary, substantial evidence supports the State Engineer's conclusion that the Permits for the CDD basins will not affect existing water rights in the downgradient basins, if at all, for hundreds of years, and that projections beyond that time frame are less reliable. Second, the District Court's "one river" theory is contrary to the State Engineer's methodology for calculating the amount of water available for appropriation.

**1. The District Court Abused Its Discretion By Making Erroneous Factual Determinations**

After considering "the best science available, evidence and testimony," the State Engineer concluded that the available groundwater models show that after 200 years of pumping, no appreciable impact on the lower basins was projected. App. E, Vol. 2 at SE 000628. The District Court apparently interpreted these models to mean that effects from pumping would materialize after 200 years and create conflicts in downgradient basins. However, the evidence does not support that interpretation. As the State Engineer noted, a pumping model prepared for the environmental impact statement shows that it is simply not possible to provide accurate projections beyond 200 years. *Id.*

The model predictions, even though less certain than short term analyses, showed no measurable effects on downgradient water rights after 200 years. While the State Engineer considered evidence relating to impacts that the pumping would have on existing rights 200 years in the future, he determined that little weight should be given to these projections. App. E, Vol. 2 at SE 000686-687. Thus, the State Engineer found no reliable evidence suggesting that measurable impacts will be felt after 200 years.

The State Engineer concluded that because the effects of pumping would not be felt—if at all—for hundreds of years, there was no statutory conflict with existing rights. This finding is sound and well within the State Engineer’s discretion. *United States v. State Engineer*, 117 Nev. 585, 589-90, 27 P.3d 51, 53 (2001) (because the State Engineer has “a special familiarity and expertise with water rights issues,” his interpretation of a statute may only be disregarded if “an alternate reading is compelled by the plain language of the provision”). The State Engineer’s conclusions are supported by substantial evidence and represent a reasonable and effective way to allow for the development of scarce water resources while, at the same time, protecting the ongoing

sustainability of those resources. *See Bacher v. State Engineer*, 122 Nev. 1110, 1116, 146 P. 3d 793, 797 (2006) (acknowledging the need for balance of interests, such that existing rights and the long term sustainability of the resources are protected while allowing for the maximum use of the resource for the benefit of the state).

On the other hand, the District Court based its conclusion that impacts would be felt after 200 years on a factual inference that directly contradicts the State Engineer's factual determination. Because the State Engineer's determination is based on substantial evidence, the District Court abused its discretion in setting it aside. *Bacher*, 122 Nev. at 1121, 146 P. 3d at 800 (on judicial review of State Engineer rulings, the district court "may not substitute its judgment for the State Engineer's judgment.").

**2. The District Court Abused Its Discretion By Substituting the "One-River" Theory for the State Engineer's Reasonable Method of Calculating the Amount of Water Available for Appropriation**

The District Court's remand instruction regarding appropriations in CDD basins is contrary to the State Engineer's reasonable method of calculating the amount of water available for appropriation for the basins. Unlike Spring Valley, where ET is the best estimate of

perennial yield, there is no significant ET in the CDD basins, so the State Engineer used another common technique whereby the perennial yield is equal to recharge. App. C, Vol. 1 at SE 000294-324. In calculating the perennial yield of the CDD basins, the State Engineer utilized the best estimates of recharge from precipitation within the basins. *Id.* Protestants did not dispute these calculations and the District Court did not upset this finding. App. C, Vol. 1 at SE-000303; App. A, Vol. 1 at SE 000024:11-14.

Next, in calculating the amount of water available for appropriation in the CDD basins, the State Engineer examined evidence of subsurface outflow from the basins. App. E, Vol. 2 at SE 000658. The State Engineer recognized that approximately 7,300 afa of spring flow and water rights in adjacent White River Valley derived its water from Cave Valley. App. C, Vol. 1 at SE 000322-324. Further, he recognized that conflicts would occur within decades if that water supply was captured by pumping in Cave Valley and therefore reduced the amount of water available for appropriation in Cave Valley by that amount. *Id.* No other evidence of conflicts was presented.

By ordering that the State Engineer recalculate the amount of water appropriated from the CDD basins to account for rights in the downgradient basins where no evidence showed a conflict would occur, the District Court improperly overruled the State Engineer's reasonable methodology in favor of its own arbitrary and capricious methodology not based in law or fact. The District Court abused its discretion in conducting a wholesale revision of the manner in which the State Engineer discharges his statutory obligation to "consider the best available science in rendering decisions concerning the available surface and underground sources of water in Nevada." NRS 533.024(1)(c); *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) ("great deference should be given to the agency's interpretation when it is within the language of the statute.").

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V. CONCLUSION

For the foregoing reasons, the State Engineer respectfully requests that this Court issue a writ of mandamus vacating the District Court's remand instructions and ordering the District Court to affirm State Engineer Ruling Nos. 6164, 6165, 6166 and 6167.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of May, 2014.

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**CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 with 14-point, double spaced complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6).

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more and contains 9,610 words.

I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable portions of the Nevada Rules of Appellate Procedure.

I understand I may be subject to sanctions in the event the brief does not conform with the requirement of the Nevada Rules of Civil Procedure.

/s/ Cassandra P. Joseph  
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CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 29<sup>th</sup> day of May, 2014, the foregoing **PETITION FOR WRIT OF MANDAMUS**, was filed electronically with the Nevada Supreme Court. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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EXHIBIT D

EXHIBIT D

EXHIBIT D

IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN NEVADA WATER AUTHORITY, )  
 )  
 Petitioner, )  
 vs. )  
 )  
 THE SEVENTH JUDICIAL DISTRICT COURT )  
 of the State of Nevada, in and for the County of )  
 White Pine; and THE HONORABLE ROBERT )  
 E. ESTES, )  
 )  
 Respondents, )  
 and, )  
 )  
 MILLARD COUNTY, UTAH; JUAB COUNTY, )  
 UTAH, *et al.*, )  
 )  
 Real Parties in Interest. )  
 \_\_\_\_\_ )

Case Nos. 65775, 65776

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ANSWER TO SOUTHERN NEVADA WATER AUTHORITY PETITION FOR WRIT  
 OF MANDAMUS, OR IN THE ALTERNATIVE, PROHIBITION

*With Supporting Points and Authorities*

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

SOUTHERN NEVADA WATER	)	
AUTHORITY,	)	
	)	<b>Case Nos. 65775, 65776</b>
Petitioner,	)	
vs.	)	District Court Case No.
	)	
THE SEVENTH JUDICIAL DISTRICT	)	CV-1204049
COURT of the State of Nevada, in and for	)	
the County of White Pine; and THE	)	Consolidated with:
HONORABLE ROBERT E. ESTES,	)	
	)	CV-1204050
Respondents,	)	CV-1204051
and,	)	CV-1204052
	)	CV-1204053
MILLARD COUNTY, UTAH; JUAB	)	CV-1204054
COUNTY, UTAH, <i>et al.</i> ,	)	CV-1204055
	)	CV-0418012
Real Parties in Interest.	)	CV-0419012
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NRAP 26.1 Disclosure

The undersigned counsel of record for Real Parties In Interest White Pine County, et al. hereby certify that no real party in interest represented by the undersigned counsel has a parent corporation and that there are no parent corporations or publicly held companies that own more than 10% or more of any of those parties' stock. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

DATED this 2nd day of September, 2014,



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**ANSWER TO SOUTHERN NEVADA WATER AUTHORITY PETITION  
FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE,  
PROHIBITION**

Pursuant to the Court's July 2, 2014, Orders in the above-captioned related cases this Answer to the Southern Nevada Water Authority's *Petition for Writ of Mandamus or, in the Alternative, Prohibition* and the Nevada State Engineer's *Petition for Writ of Mandamus* is hereby respectfully submitted by Real Parties in Interest: White Pine County, Nevada; Elko County, Nevada; Eureka County, Nevada; Nye County, Nevada; Nye County Water District; City of Ely, Nevada; Central Nevada Regional Water Authority; Great Basin Water Network; Sierra Club; Center for Biological Diversity; 2nd Big Springs Irrigation Company; Lund Irrigation Company; Preston Irrigation Company; Alamo Sewer & Water GID; Baker GID; McGill-Ruth Sewer & Water GID; Great Basin Business & Tourism Council; White Pine Chamber of Commerce; Nevada Farm Bureau; N-4 State Grazing Board; Baker Ranches Inc.; Bath Lumber; Panaca Farmstead Association; Border Inn; Pearson Farms; Rafter Lazy C Ranch; Sportsworld; Progressive Leadership Alliance of Nevada; League of Women Voters of Salt Lake City; Utah Audubon Council; Utah Physicians for a Healthy Environment; Post Carbon Salt Lake; Utah Rivers Council; Bristlecone Alliance; Citizens Education Project; Indian Springs Civic Association; School of The Natural Order; Vaughn M. Higbee & Sons; Armando Aguilew; Chris Adler; Bart Anderson; Amy Asperheim;

Michele Austria; David A. & Tana R. Baker, individually and on behalf of their minor children, Clayton F. Dean & Barbara Baker; Tom & Janille Baker, individually and on behalf of their minor children Alyshia, Caleb, Megan & Kayli; Jerald Bates; James & Donna Bath; Shannon Barker; Christia Barlow; Margaret Barlow; Richard A. Barr; Brian Beacher; Elizabeth Bedell; Cynthia Lee Bell; “Robin” Edward John Bell Iii; Louis Benezet; Kathy Bingley; Michael Bivins; Gary Bodell; Sean Bonnell; Bobby Bonnell; Luke Bottche; John Bowman; D. Danie Bradfield; James E. Brady; Ann & Jim Brauer; Joel Briscoe; Walter Franklin Brown; Tom E. Brown; Bernard & Eva Buswell; Michele R. Butler; William Butts; Art Cameron; Karen Campbell; Dale Canepa; Rachel Carlisle; Beau Carlson; David Carlson; Louise Carlson; Marie A. Carrick; Melissa Cheeney; Steve Chouquer; Brandon Christian; Craig Christianson; Lene Clay; William Coffman; Peter Coroon; John S. Cole; Kathleen M. Cole; Landon Cole; Dawne Combs; John Condie; William & Geniel Connor; Kathy Cook; David & Halli Cox; Robert Crager; Patricia J. Crosthaiait; Dustin Crowther; Cary Curcio; Kelley Dabel; Brad & Robin Dalton; Gary Davis; Pete Tony Delmue; Ludell Deutcher; Rom Dicianno; Travis Dormina; Anthony Paul Donohue; Orrin Dotson; Dennis Dotson Jr.; Joseph A. Dunne; Jerri Elliot; Velda Embry; Jerry Etchart; James R. Ferrell; Jody Finicum; Mike & Jo Fogliani; Paula J. Foht; Melissa Jo Free; Justin Frehner; Patrick Fuller; Veronica Garcia; Brent Gardner; Annette & Cecil Garland;

Jo Anne Garrett; Patricia J. Gladman; Donald Gent; Anna E. Gloeckner; Paul & Nancy Gloeckner; Pat & Kena Gloeckner, individually and on behalf of their minor children, Kylee, Kori, & Kourtney; Tami Gubler; Charles Hafen; Dennis Hafen; Lavoy Hafen; Fredrick Hammel; Relena Hanley; Michael Hanley; Bart Hansen; Daniel & June Hansen; Rick Hansen; Billie Harker; Carol Harker; Delsa Naia Harker; Eve Harker; Josett Harker; Thora Harker; David Hartley; Rocky & Lynda Hatch; Steven Heiselbetz; Aaron Carl Hgfeldt; Kathy Hiatt; Edwin E. Higbee; Kenneth F. & Kathryn A. Hill; Janice Hilton; Brandon Holton; N. Peter Horlacher; Andrew M. Horsch; Carol Hullinger; Ray Hulse; Don Hunt; Marian K. Hunt; Merlene Hurd; Jennifer Jack; Robert Jennings; Jerone A. Jensen; Aaron Jessop; Carl Jessop; Jessica Jessop; Kevin J. Jessop; Lorin Jessop; Lorin Z. Jessop; Mike Jessop; Vivian Jessop; Abigail C. Johnson; Hope Johnson; Kirk Johnson; Laura Johnson; Linda G. Johnson; Mark D. Jones; William Jordan; Dennis Jurgensen; Patrick M, Kelley; Rose Diane Kelley; Becky Kleim; Jess Klotz; Michael Knipes; Ronald Kozak; William Kramer; Kathleen Lajoie; Larry Lajoie; Robert Laubach; Leah R. Lawson Kyle Leany; Jack T. Lee; Jimmie Sue Lee; Merrilee Lee; Rollin Kim Lee; Jacob Lester; Sarah Lester; Wesley R. & Elaine R. Lewis; Bevan Lister; Brad Lloyd; Jo & Jason Lloyd; Mick & Lynn Lloyd; Teresa Lloyd; William Long; D.L. Lucchesi; Farrell & Manetta Lytle; Ken & Donna Lytle; Lisa L. Lytle; Chrystal Malloy; Dianne E. Mason; Mark A. Mason; Barbara

J. Mason-Wanket; Major Mastin; Nevin Maygary McBride; Marie McBride; John T. McClellan; Nathan McClure; Katherine McCrosky; Melinda McCrosky; Steve McCrosky; Paula & Parker McManus; Aaron Mcrory; Natalie Mellem; Laurel Ann Mills; Amanda Moore; Joe Morrow; Kari Mortensen; Dean Mossgr; Lisa M. Nielsen; Allan K. Nyberg; Dennis O'Connor; Mark Olson; Terry Olson; Carlos Palencia; Janice Palmeri; Axel Pearson; Keith A. & Lacie Pearson; Lee Pearson; Margaret Pense; Gary & Jo Ann Perea; Grant Perkins; Clifford Pete Peterson; India Phillips; Kevin Phillips; Rachelle Phillips; Terryle H. Phillips; Toni Pinkham; Arla Prestwich; Richard Prince; Merle Rawlings; Phillip Reeves; Merlin Rhode; Janie Rippetoe; Mark Rippetoe; Ronald Jeremy Robinson; Donald Rodriguez; Larene & Chuck Rogers; Danile Rohr; Keith & Mary Rose; Gary Rosonlund; Katherine & William Rountree; Robert Rowe; Richard A. Rullo; Damian Sandoval; Greg Schatzle; Trey Scott; Tom H. Sears; Vaughan E. Seeben Jr.; John Settles; Chris Shinkle; Aaron Showell; Dan & Connie Simkins; Randy & Sharlan Simkins; Summer & Shane Simkins; Sammie L. Skinner; Jim Slough; William Smith; Sarah Somers; Devin Sonnenberg; Ed Spear; Shannon Spendlove; Marshall Stackhouse; Theodore Stazeski; Terrance & Debra Steadman; Paul Steed; Rachel Steed; Michelle Stephens; Keith Stever; Larry Stever; Jackie Stewart; Karl C. Stewart; Beverly Strickland; Shelby Taylor; Sidney Taylor; Russ & Cheyenne Thompson; Rex & Gracie Thompson; Laura Tibbetts; Ryan Timmons; Anna M.

Trousdale; Deb Umina; Dennis Vanwinkle; Ed Vincent; Alex, Nicholas & Joseph Vincent; Edward & Stephanie Vincent; Mike Vitt; Henry C. & Dana Vogler, individually and on behalf of their minor children; Stinson Vogler; Duane E. & Brynlee Wadsworth; Jaycee, Tyler & Kathy Wadsworth; John Wadsworth; Marcia Wadsworth; Mark Wadsworth; Tyler Wadsworth; Bradley Walch; Achiel E. Wanket; Edith B. Warren; Jo Wells; Susan Wetmore; B.J. Whitney; Sharon Williams; William & Holly M. Wilson; Edward E. Wright; Margaret Joyce & Gordon F. Yach; Michelle Yosai; and Donald Zook (collectively referred to hereinafter as “White Pine County, et al.”).<sup>1</sup>

### **INTRODUCTION**

This case involves the Southern Nevada Water Authority’s massive, unprecedented proposal to unsustainably extract and export enormous quantities of groundwater from a number of rural valleys in eastern Nevada on a permanent basis in order to provide a new supply of water for the greater Las Vegas area. As explained below, the district court properly found that the State Engineer’s

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<sup>1</sup> The Southern Nevada Water Authority’s *Petition for Writ of Mandamus or, in the Alternative, Prohibition* erroneously listed Craig and Gretchen Baker, individually, and on behalf of their minor children Matthew and Emma, and Roderick McKenzie as real parties in interest. Those individuals were dismissed from this case pursuant to a notice of voluntary dismissal of claims that was filed with the district

approval of SNWA's applications for groundwater rights in Spring, Cave, Dry Lake, and Delamar Valleys to supply that project, were arbitrary and capricious, and not supported by substantial evidence. More particularly, after carefully reviewing the four joint rulings in which the State Engineer approved those applications and the administrative record that supposedly supported those approvals, the district court correctly found that the State Engineer arbitrarily deviated from sound, prudent longstanding methodology and policy in order to approve SNWA's applications for its massive groundwater extraction and export project despite the fact that SNWA, the applicant, did not demonstrate that there was unappropriated water available for the project on a sustainable basis or that the proposed use of water would not conflict with existing water rights or threaten to prove detrimental to the public interest, as required by NRS § 533.370.

Although the State Engineer and SNWA seek extraordinary writ review from the Court in this case, in reality their Petitions for writ review merely reassert the same alleged errors in the district court's Decision below as were asserted as grounds for Petitioners' earlier filed ordinary appeals of the same Decision.

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court on May 18, 2012. Accordingly those people are not Real Parties in Interest in this case and their names should be deleted from that list.

For the reasons set forth in detail in this Answer, the Court should deny the Petitions for writ review or in the alternative deny the writs and affirm the district court's Decision because Petitioners have failed to meet either the standard for writ review or the standard for reversal of the district court's well-grounded decision reversing the State Engineer's irrational rulings approving SNWA's applications for its patently unsustainable massive proposed groundwater extraction and export project. As further explained below, the Court should not only affirm the district court's careful findings and holdings but also should order the Nevada State Engineer to deny SNWA's applications on the grounds that, more than twenty years after these applications were filed, SNWA still has categorically failed to demonstrate either: (1) that there is sufficient water available in these four valleys to approve any of SNWA's applications for groundwater to supply its groundwater extraction and pipeline project; (2) that the long-term (i.e., in perpetuity) proposed use of water under SNWA's applications will not conflict with existing water rights in either the four valleys in which the water rights are sought or any of the hydrologically connected, downgradient valleys that ultimately will be affected by SNWA's proposed permanent groundwater extraction and export scheme; or (3) that the proposed use of water under SNWA's applications will not threaten to prove detrimental to the public interest by causing unreasonable environmental

effects in the area likely to be affected by SNWA's proposed extraction and export of the groundwater.

**RELEVANT FACTS**

I. OCTOBER 17, 1989: THE LVVWD FILES 146 APPLICATIONS TO EXPORT GROUNDWATER FROM RURAL NEVADA TO LAS VEGAS

As part of a massive, unprecedented effort to acquire more water for greater Las Vegas, the Las Vegas Valley Water District ("LVVWD") filed 146 applications with the Nevada State Engineer on October 17, 1989, to pump approximately 800,000 acre-feet per year (acre-ft/yr) of groundwater from twenty-six rural basins in eastern, central and southern Nevada. 8 White Pine County, et al. Appendix at WPC\_0634 (hereinafter X App. at WPC\_XXX).<sup>2</sup> In response, over 800 individual protests were filed, many of which were filed by Real Parties in Interest in this case. *See* <http://water.nv.gov/data/permit/>.<sup>3</sup> Subsequently, the quantity of groundwater sought was reduced to approximately 190,000 acre-ft/yr in seventeen basins. 8 App. at WPC\_0634. For over a decade and a half the State Engineer took no action to adjudicate those applications and the protests thereto.

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<sup>2</sup> For consistency's sake, in this brief Respondents will use a similar citation form when citing to the Petitioners' appendices (e.g., \_\_ SNWA App. at \_\_).

<sup>3</sup> Protests are listed on the State Engineer's website by application or permit number.



In 1991, the Southern Nevada Water Authority (“SNWA”) was created and acquired the LVVWD’s interest in these groundwater applications as a successor-in-interest. *See* 1 SNWA App. at 000029; 1 SNWA App. at 000244; 2 SNWA App. at 000413-14; 3 SNWA App. at 000577-78.

SNWA’s applications in Spring, Cave, Dry Lake, and Delamar Valleys, applications 54003 through 54021 in Spring Valley, 53991 and 53992 in Delamar Valley; 53989 and 53990 in Dry Lake Valley; and 53988 and 53897 in Cave Valley (“SNWA’s applications”), *see* 1 SNWA App. at 000025-30; 1 SNWA App. at 000243; 2 SNWA App. at 000413; 3 SNWA App. at 000577, represent two of three main prongs of its planned massive groundwater export project from rural Nevada and together request 174 cubic feet per second (“cfs”) (125,976 acre-feet per annum (“afa”)) of groundwater from those four basins.<sup>4</sup> *See id.* Between the three major prongs of the project, SNWA has asked the State Engineer to effectively grant it every last drop of available water in a total of five groundwater basins.<sup>5</sup> This request includes a request to dramatically increase previously

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<sup>4</sup> The third prong of the proposed project, SNWA’s water rights applications in Snake Valley, has not yet been set for a hearing by the State Engineer.

<sup>5</sup> *See* 1 SNWA App. at 000029; 1 SNWA App. at 000223; 2 SNWA App. at 000413; 3 SNWA App. at 000577. As part of its overall planned groundwater export project, SNWA has also applied for water from Three Lakes Valley and Tikapoo Valley, The State Engineer has already approved a portion of these

published perennial yields of the subject basins, in effect, increasing the amount of water available to SNWA for export. *See* 1 SNWA App. at 113; 4 App. at WPC\_0772, Exhibit A, Order Vacating and Remanding State Engineer's Ruling, *Carter-Griffin v. Taylor*, CV-830008 (N.V. Dist. Ct., Oct. 19, 2009).

If approved, SNWA's applications would permit the development and export of groundwater from rural Nevada on a scale and quantity far in excess of any previous undertaking, requiring a vast and tremendously costly infrastructure of wells, pipelines, pumping stations, storage reservoirs, and power stations.<sup>6</sup> Indeed, SNWA's proposed project would be the biggest groundwater pumping project ever built in the United States. The BLM projects that SNWA's planned project would result in hundreds of feet of groundwater decline in the subject basins. 6 App. at WPC\_01269-77. The potential economic, social, and environmental effects of this massive and unprecedented groundwater mining and export project are therefore of great local, state, regional, and national significance.

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requests. Nevada State Engineer Ruling No. 5465, at 61-62 (Three Lakes Tikapoo), <http://images.water.nv.gov/images/rulings/5465r.pdf>.

<sup>6</sup> SNWA applied to the BLM for a right of way to construct approximately 306 miles of pipeline up to 96 inches in diameter that would connect the water rights they are seeking in these and eventually Snake Valley and would deliver that water to the City of Las Vegas. 5 App. at WPC\_1240; 5 App. at WPC\_1244.

II. JANUARY 5, 2006: THE STATE ENGINEER HOLDS A PRE-HEARING CONFERENCE ON THE LVVWD'S THEN SIXTEEN-YEAR-OLD APPLICATIONS

On January 5, 2006 the State Engineer held a pre-hearing conference to schedule and discuss issues related to protest hearings on the LVVWD's (now SNWA's) applications in Spring, Snake, Cave, Dry Lake, and Delamar Valleys. *See* 1 SNWA App. at 00030; 1 SNWA App. at 000224; 2 SNWA App. at 000414, 3 SNWA App. at 000578. Following the pre-hearing conference, the State Engineer issued an "Intermediate Order and Hearing Notice" setting dates for hearings, procedures for pre-hearing motions, and for the exchange of evidence. *See id.* That order scheduled hearings on SNWA's applications in Spring Valley for September 11, 2006, with subsequent hearings for the Snake Valley applications and for Delamar, Dry Lake, and Cave Valley applications to be scheduled at some later date. *See id.*

### III. DUE PROCESS PETITION TO REOPEN PROTEST PERIOD ON SNWA'S PIPELINE APPLICATIONS

Following the 2006 prehearing conference, a number of petitioners filed a petition with the State Engineer seeking to have the protest period for SNWA's then 16-year-old Pipeline Project applications re-opened and to allow successors in interest, such as heirs, to original protestants to step into the shoes of original protestants, just as SNWA had been permitted to step into the shoes of its predecessor in interest, the LVVWD, and participate in these hearings. *See id.* The State Engineer denied that petition on July 27, 2006, and on August 22, 2006, a number of protestants filed a petition for judicial review in the seventh judicial district court challenging that denial. *See* 1 SNWA App. at 000030-31; 1 SNWA App. 000224; 2 SNWA App. at 000414; 3 SNWA App. at 000578. This petition for judicial review (the "Due Process Petition") argued at length that the State Engineer's denial amounted to an unconstitutional denial of the petitioners' due process rights, and also included an argument that the State Engineer had violated a statutory obligation to process the applications within a year or obtain consent to further delay from all parties, which would have avoided the due process problems. On May 30, 2007, the district court denied the Due Process Petition, and the petitioners appealed to the Nevada Supreme Court. *See* 1 SNWA App. at 000031;

1 SNWA App. at 000224-45; 2 SNWA App. at 000414-15; 3 SNWA App. at 000578-79.

IV. 2006 STATE ENGINEER HEARING ON SNWA'S APPLICATIONS IN SPRING VALLEY

While the Due Process Petition was pending, the State Engineer held an administrative hearing on SNWA's applications in Spring Valley from September 11, 2006 through September 29, 2006. 1 SNWA App. at 000030. A number of individuals, businesses, governmental or quasi-governmental entities, and nonprofit citizens organizations presented evidence the hearing.

During the Spring Valley Hearing, SNWA presented steady state groundwater modeling evidence, or in other words a model of current conditions prior to pumping. 8 App. at WPC\_1950-53. SNWA claimed that it could not present a model that would predict impacts given the limited availability of pumping data, despite the fact that in 2006 SNWA had already had almost 20 years to prepare for the Spring Valley Hearing. 8 App. at WPC\_1952. However, it would come out later, during the State Engineer's 2008 Cave, Dry Lake, and Delamar Valleys hearing that SNWA had in fact produced, and had run actual predictions using, a predictive model, developed by their hydrologist Timothy Durbin, but chose not to present it during the Spring Valley Hearing. 9 App. at

WPC\_2169-71. It is assumed that it was not presented because the predicted impacts were too extensive and devastating. *See* 8 App. at WPC\_1952.

On April 16, 2007, the State Engineer issued Ruling No. 5726, permitting SNWA to export up to 60,000 afa from Spring Valley, with a requirement that 40,000 afa initially be pumped and exported for 10 years to see what the impacts were at that level of development before the full permitted amount would be approved. *See* Nevada State Engineer Ruling No. 5726, at 56 (Apr. 16, 2007) (Spring Valley).<sup>7</sup>

V. 2008 STATE ENGINEER HEARING ON SNWA'S APPLICATIONS IN CAVE, DRY LAKE, AND DELAMAR VALLEYS

With the Due Process Petition still pending, the State Engineer then held a two week administrative hearing on SNWA's applications in Cave, Dry Lake, and Delamar Valleys from February 4 through February 15, 2008. *See* 1 SNWA App. at 000225; 2 SNWA App. 000415; 3 SNWA App. at 000579. A number of individuals, businesses, governmental or quasi-governmental entities, and nonprofit citizens organizations presented evidence at the hearing.

During the 2008 Hearing, former SNWA hydrologist Timothy Durbin came forward and testified for protestants about the predictive model he developed for

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<sup>7</sup> <http://images.water.nv.gov/images/rulings/5726r.pdf>.

the Spring Valley Hearing, but was not permitted to present. *See* Nevada State Engineer Ruling No. 5875 at 20-21.<sup>8</sup> Hydrologist John D. Bredehoeft, PhD, also testified and presented evidence for protestants about Mr. Durbin's model and model runs. 9 App. at WPC\_2169-86. And again during the 2008 hearing, SNWA attempted to evade presentation of true predictive hydrologic modeling evidence by inappropriately relying on simple theis equation analysis in lieu of a calibrated predictive groundwater model. *See* 9 App. at WPC\_2165-68.

On July 9, 2008, the State Engineer issued Ruling No. 5875, in which he granted SNWA 4,678 afa of water under Applications 53987 and 53988 in Cave Valley, 11,584 afa of water under Applications 53989 and 53990 in Dry Lake Valley; and 2,493 afa of water under Applications 53991 and 53992 in Delamar Valley, for a total grant of 18,755 afa of water from the three Valleys. *See* Nevada State Engineer Ruling No. 5875, at 40 (July 9, 2008) (Cave, Dry Lake, and Delmar Valleys).<sup>9</sup>

On August 8, 2008, Protestants in the CDD Hearing and other parties aggrieved by the ruling filed a petition for judicial review of the ruling in Nevada's Seventh Judicial District Court. On October 19, 2009, while the appeal of the Due

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<sup>8</sup> <http://images.water.nv.gov/images/rulings/5875r.pdf>.

<sup>9</sup> <http://images.water.nv.gov/images/rulings/5875r.pdf>.

Process Petition was still pending in the Supreme Court, the district court ruled on the Cave, Dry Lake, and Delamar Valleys petition for judicial review and reversed Ruling 5875, holding that in increasing the published perennial yields in the basins, sanctioning groundwater mining, relying on an undeveloped monitoring and mitigation program to protect against impacts, and reserving insufficient water in the basins of origin for future economic development, the State Engineer had acted arbitrarily and capriciously, abused his discretion, and that the State Engineer's findings in Ruling 5875 were not supported by substantial evidence in the record. *See* Exhibit A, Order Vacating and Remanding State Engineer's Ruling, *Carter-Griffin v. Taylor*, CV-830008 (N.V. Dist. Ct., Oct. 19, 2009). The State Engineer and SNWA appealed the district court's Order to the Nevada Supreme Court.



VI. FEDERAL AGENCIES SIGN STIPULATED AGREEMENTS  
ABANDONING THEIR PROTESTS TO SNWA'S PIPELINE  
APPLICATIONS

On September 8, 2006, several days prior to the Spring Valley hearing, the Department of the Interior, on behalf of the Bureau of Indian Affairs, National Park Service, Bureau of Land Management, and US Fish and Wildlife Service, entered into a stipulated agreement with the Southern Nevada Water Authority and abandoned their protests to SNWA's applications in Spring Valley. *See* 3 SNWA App. 000738-000750; 4 SNWA App. at 000751-84. This stipulated agreement purports to protect federal resources potentially impacted by SNWA's proposed groundwater export project, but does nothing to protect any other water rights, uses, or resources. 3 SNWA App. at 000740-49. The Stipulated Agreement sets up three committees or panels that will carry out the stipulated agreement: a Biological Resources Team, Technical Review Panel, and Executive Committee. 3 SNWA App. at 00743. Notably, decisionmaking will be by consensus, meaning that any decision to mitigate or cease pumping activity will have to be agreed upon by everyone who sits on the particular decisionmaking body. *See* 4 SNWA App. at 000766, 00775. Further, a SNWA representative sits on each of these bodies, *see id.*, and thus, SNWA has an effective veto of any decision to mitigate pumping impacts. The stipulated agreement's reference to third party intervention in a situation where consensus is not reached is not mandated by any provision in the

stipulations and it is unclear exactly how a dispute would be handled and resolved, if at all. Thus, the federal agencies have little, if any, power to enforce the monitoring or mitigation measures included in the Agreement. Moreover, the committees contain no representation for protestants, affected communities or counties of origin, or from the environmental community.

On January 7, 2008, less than one month prior to the hearing, the Department of the Interior, on behalf of the Bureau of Indian Affairs, National Park Service, Bureau of Land Management, and US Fish and Wildlife Service, entered into a another stipulated agreement with the Southern Nevada Water Authority and abandoned their protests to SNWA's applications in Cave, Dry Lake, and Delamar Valleys, just as they had done in the proceedings on SNWA's Spring Valley applications. *See* 4 SNWA App. at 000785-822. The Cave, Dry Lake, and Delamar Valleys stipulated agreement mirrors the stipulated agreement signed prior to the Spring Valley Hearing in all regards and particulars. *See id.*

**VII. SUPREME COURT DECIDES DUE PROCESS PETITION:  
VACATES STATE ENGINEER'S RULINGS IN SPRING AND  
CDD VALLEYS AND DIRECTS STATE ENGINEER TO  
REPUBLISH SNWA'S APPLICATIONS AND RE-OPEN THE  
PROTEST PERIOD**

On January 28, 2010, the Supreme Court reversed the district court and State Engineer in the due process case, *supra*, vacating the State Engineer's rulings on both the Spring Valley and DDC Valleys applications for the SNWA Pipeline

Project, Rulings 5726 and 5875, remanding those applications for further proceedings, and requiring the State Engineer to re-publish notice of and re-open the protest period for SNWA's other 1989 Pipeline Applications in Snake Valley before proceeding to a hearing on those applications in the future. *See Great Basin Water Network v. Taylor I*, 126 Nev. Adv. Op. 2, 222 P.3d 665 (2010). In response to perceived ambiguity about whether SNWA's Pipeline Project applications had been voided by the Supreme Court's opinion, SNWA and the State Engineer filed petitions for rehearing to clarify the ruling. On June 17, 2010, the Supreme Court issued an amended opinion clarifying that SNWA's 1989 pipeline applications were not voided by the Court's decision, but rather that the State Engineer's rulings on those applications in Spring, Cave, Dry Lake and Delamar ("SCDD") Valleys were voided, and those applications were being remanded with directions that they be subject to re-publication of notice and a new protest period before being scheduled for re-hearing on remand by the State Engineer. *See Great Basin Water Network v. Taylor II*, 126 Nev. Adv. Op. 20, 234 P.3d 912 (2010). As a result of the Supreme Court's decision requiring that the applications be renoticed, SNWA and the State Engineer's appeal of the district court's ruling in the appeal of the Cave, Dry Lake, and Delamar Valleys State Engineer Ruling 5875 was subsequently dismissed as moot and Ruling 5875 was

vacated. Exhibit B, Order Dismissing Appeal, *Southern Nevada Water Authority v. Carter-Griffin*, Case No. 54986 (N.V. S. Ct., Sept. 13, 2010).

Subsequently, SNWA's 1989 Pipeline Project applications in the SCDD Valleys were re-published and subjected to a new protest period in early 2011. Hundreds of additional individuals and entities filed protests. 1 SNWA App. at 00033-35; 1 SNWA App. at 00247-49; 2 SNWA App. at 00417-18; 3 SNWA App. at 581-82.

VIII. SEPTEMBER 26, 2011, THROUGH NOVEMBER 18, 2011: THE STATE ENGINEER HOLDS REHEARING ON SNWA'S WATER RIGHTS APPLICATIONS IN SPRING, CAVE, DRY LAKE, AND DELAMAR VALLEYS

On May 11, 2011, the State Engineer held a prehearing conference on the SNWA Pipeline Project applications in Spring, Cave, Dry Lake, and Delamar Valleys, and scheduled a hearing on all of them for September 26, 2011, through November 18, 2011. 1 App. at WPC\_0022. Many protestants participated in the six week long hearing, including White Pine County, Nevada, Great Basin Water Network, Millard County, Utah, Juab County, Utah, the Confederated Tribes of the Goshute Reservation, Duckwater Shoshone Tribe, Ely Shoshone Tribe, Eskdale Center, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints on behalf of Cleveland Ranch, the Long Now Foundation, Nye County, Nevada, Henry Vogler, and a broad coalition of hundreds of ranchers, farmers,

businesses, governmental or quasi-governmental entities, and nonprofit citizens organizations led by the Great Basin Water Network and White Pine County, many of whom are Real Parties in Interest in this case.<sup>10</sup> 1 App. at WPC\_0017-18.

Consistent with its approach in the previous two hearings on SNWA's applications, SNWA attempted to downplay and conceal groundwater modeling evidence that confirms the catastrophic nature of their groundwater development project. SNWA refused to present any model runs extending beyond 75 years despite the fact that the DEIS model, which SNWA created, was run to 200 years. Because of the massive nature of the project, many of the devastating impacts are masked in a model run of only 75 years, because the impacts worsen in severity over time. SNWA also claimed that its model was not useful in predicting site specific impacts, despite the fact that the very same model was used to predict site specific impacts in the DEIS. *See* 18 SNWA App. at 003835.

Groundwater modeling evidence presented by both SNWA and protestants in the 2011 hearing confirms that the proposed groundwater development project

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<sup>10</sup>The U.S. Forest Service signed a stipulated agreement with the Southern Nevada Water Authority dated September 15, 2011, in which the Forest Service agreed to withdraw its protests to SNWA's applications in the SCDD valleys. *See* 1 App. at WPC\_0001-15. Prior to the 2011 hearing, the Department of the Interior agencies and SNWA decided that the stipulations signed prior to the 2006 Spring Valley Hearing and 2008 DDC Hearing would remain in force.

would have devastating hydrologic and biological impacts to vast areas of eastern Nevada and western Utah. 5 App. at WPC\_1210-13; 10 App. at WPC\_2317-30; 23 SNWA App. at 005002; 23 SNWA App. at 005049-5400; 25 SNWA App. at 005705 - 5707. Indeed, SNWA's model produces projections that are broadly strikingly similar to those produced by protestants' witness Dr. Myers' as well as other models. 10 App. at WPC\_2317-30; 23 SNWA App. at 005144-5145; 25 SNWA App. at 005705-5707. The drawdown numbers are indeed alarming; the proposed pumping would lower the water table by hundreds of feet over a vast and continually expanding area, causing devastating environmental, social, and economic consequences in eastern Nevada and western Utah, and would foreclose the opportunity for future economic development in the target basins and communities in surrounding region that depend on these basins.

With regard to Spring Valley, the models all concur that there would be a significant magnitude of drawdown which would spread throughout the valley, eventually resulting in the drying up of springs and wetlands through most if not all of Spring Valley. 5 App. at WPC\_1210-13; 6 App. at WPC\_1485-87; 3 App. at WPC\_00628; 10 App. at WPC\_2317-30; 23 SNWA App. at 005144-5145; 25 SNWA App. at 005705-5707. The proposed pumping would amount to a devastating groundwater mining project, under which the groundwater system would not even begin to approach equilibrium for thousands of years, with the

potential of never reaching equilibrium. *See* 4 App. at WPC\_0771-73; 10 App. at WPC\_2317-30; 22 SNWA App. at 004987-005000; 23 SNWA App. at 005001-02. SNWA's proposed pumping would draw down the water table by hundreds of feet, eventually drying out most if not all of the non-perched springs that gave the valley its name and that sustain a variety of wildlife species. 4 App. at WPC\_0789; 8 App. at WPC\_1907. Along with the springs, wetlands and riparian areas will be dried out, destroying additional crucial wildlife habitat. As the water table drops, the depth to water will increase to such a degree that even the hardiest of phreatophytes (groundwater dependent plants) will be killed off throughout much of the valley. *See* 4 App. at WPC\_0788; 5 App. at WPC\_1049; 5 App. at WPC\_1056. The drawdown from SNWA's proposed pumping will give rise to conflicts with existing water rights in Spring Valley and in downgradient valleys, and will eventually become so severe that the prior existing rights will be destroyed for all practical purposes. 4 App. at WPC\_0792; 10 App. at WPC\_2458. In addition, the drawdown caused by SNWA's proposed use would create an increased risk of dust emissions from both the presently moist playa areas in the valley and other areas where current vegetation is killed off. *See* 13 App. at WPC\_3043-105. These impacts are far too severe and massive in scale to be effectively managed or mitigated. 4 App. at WPC\_0968-71; 25 SNWA App. at 005717-5718; 25 SNWA App. at 005726-5730.

With regard to Cave, Dry Lake, and Delamar Valleys, the evidence in the record indicates that there will be serious and catastrophic impacts to the water levels in both the subject basins and in down-gradient hydrologically connected basins. 4 App. at WPC\_0852-54; 4 App. at WPC\_0868. Moreover, the evidence in the record clearly demonstrates that the water sought under SNWA's applications already is allocated downgradient and is unavailable for appropriation. Cave, Dry Lake, and Delamar Valleys are part of the upgradient portion of the White River Flow System, a system of hydrologically interconnected geographic basins. *See* 4 App. at WPC\_0853. Evidence was presented and the records of the State Engineer show that many of the basins in the White River Flow System that are hydrologically connected to and down-gradient from the targeted basins already are fully appropriated. *See* 4 App. at WPC\_0852-54; 4 App. at WPC\_0868. SNWA's proposed points of diversion in the targeted valleys are all up-gradient of these fully appropriated basins. *See* 1 SNWA App. at 000243; 2 SNWA App. at 000413; 3 SNWA App. at 000577. These fully appropriated basins include White River Valley, the center of significant ranching activity and the location of the Kirch Wildlife Management Area, Pahrnagat Valley, home to the Pahrnagat Valley National Wildlife Refuge and Key Pittman Wildlife Management Area, Lake Valley, Muddy River Springs Valley, Lower Moapa Valley, and Coyote Spring Valley. Nevada State Engineer Order No. 1219 (July 5,



2012) (White River Valley);<sup>11</sup> Nevada State Engineer Order No. 1199 (Apr. 20, 2009) (Pahranagat Valley);<sup>12</sup> Nevada State Engineer Order No. 1023 (Apr. 24, 1990) (Muddy River Springs Valley);<sup>13</sup> Nevada State Engineer Order No. 798 (Sept. 16, 1982) (Lower Moapa Valley);<sup>14</sup> Nevada State Engineer Order No. 726 (June 11, 1979) (Lake Valley);<sup>15</sup> Nevada State Engineer Order No. 905 (Aug. 21, 1985) (Coyote Spring Valley);<sup>16</sup> *see also* 4 App. at WPC\_0850.

Real parties in interest White Pine County, et al. all have concrete interests in Spring Valley, Cave Valley, Dry Lake Valley, Delamar Valley, and/or adjacent, hydrologically connected down-gradient valleys. Real parties in interest are protestants to the applications that are the subject of Ruling No. 6164 and other persons, businesses, governmental or quasi-governmental entities, and nonprofit citizens organizations who are aggrieved by the State Engineer's ruling in one or more of the following ways: (1) they have existing water rights, protected interests in domestic wells, community water systems, or businesses in Spring Valley or a hydrologically connected or downwind valley that will be negatively affected and

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<sup>11</sup> <http://images.water.nv.gov/images/orders/1219o.pdf>.

<sup>12</sup> <http://images.water.nv.gov/images/orders/1199o.pdf>.

<sup>13</sup> <http://images.water.nv.gov/images/orders/1023o.pdf>.

<sup>14</sup> <http://images.water.nv.gov/images/orders/798o.pdf>.

<sup>15</sup> <http://images.water.nv.gov/images/orders/726o.pdf>.

<sup>16</sup> <http://images.water.nv.gov/images/orders/905o.pdf>.

seriously harmed by the State Engineer's decision to permit SNWA to export an excessive amount of groundwater from Spring Valley because that decision will allow SNWA to engage in large scale groundwater mining which will draw down the groundwater system in a pervasively and seriously damaging manner; (2) they are individuals or groups whose members live in or near to Spring Valley or a hydrologically connected valley within the same interbasin flow system or a downwind valley and use groundwater and groundwater dependent resources of Spring Valley and/or hydrologically connected valleys within the same interbasin flow system for business purposes (including but not limited to ranching, farming, mining, lodging, food service, commercial outfitting, or supplying one or more of the preceding types of business), recreational purposes (including but not limited to hunting, fishing, bird and wildlife watching, sightseeing and aesthetic enjoyment, hiking, camping, water sports, and snow sports), and/or spiritual purposes (including worship at burial and other sacred sites and ritual practice utilizing groundwater and/or groundwater-dependent resources), which uses will be negatively affected and seriously harmed by the State Engineer's decision to permit SNWA to export an excessive amount of groundwater from Spring Valley because that decision will allow SNWA to engage in large scale groundwater mining which will draw down the groundwater system in a pervasively and seriously damaging manner; (3) they are people who reside in Spring Valley or a

downwind valley whose air quality and public health will be jeopardized by the SE's decision to permit SNWA to export an excessive amount of groundwater from Spring Valley because that decision will allow SNWA to engage in large scale groundwater mining which will draw down the groundwater system causing increased dust emissions and associated air quality and public health impacts; (4) they are governmental or quasi-governmental entities, business entities, citizens groups, or individuals with rights to or interests in the groundwater systems of other rural Nevada valleys in which SNWA has related 1989 water rights applications pending, which rights and interests will be jeopardized by the precedents set in the Rulings and by the State Engineer's deviations from prior practice and policy; and/or (5) they are citizens organizations whose mission or purpose is to advance sound, sustainable water management decisions affecting Nevada and/or Utah, protect the environment, wildlife, wildlife habitat, biodiversity, and public health in Nevada and/or Utah and/or promote long-term sustainability in natural resource and community planning, and the ability of these organizations to fulfill their missions or purposes will be jeopardized and their members will be negatively impacted by the precedents set in the Rulings on SNWA's applications and by the State Engineer's deviations from prior practice and policy.

Protestants presented substantial evidence at the 2011 Hearing on the resources and water uses that would be affected by SNWA's proposed project in both the targeted basins and in downstream basins. In particular, Spring Valley supports significant economic activity, which is dependent on its water and ecological resources. The Valley is home to substantial ranching activity including both irrigated cropland for alfalfa and livestock production, and produces 20% and 60% of White Pine County's cattle and sheep, respectively. 8 App. at WPC\_1942-43; *see also* 8 App. at WPC\_1913-1941. Hank Vogler, a Real Party in Interest in this case, operates a sheep ranch in Spring Valley where he owns vested, certificated, and permitted water rights. 1 App. at WPC\_0016; 12 App. at WPC\_2767; 12 App. at WPC\_2770. There currently are water dependent gold mines actively working the placer deposits of Hog and Osceola as they have since the 1870s. 11 App. at WPC\_2720. Spring Valley is also home to a number of small businesses, 11 App. at WPC\_2721, and construction of a wind farm is under way. 11 App. at WPC\_2525, 11 App. at WPC\_2721. Recreational uses attract visitors to Spring Valley for hunting and fishing, bird, bat and other wildlife viewing, hiking, mountaineering, off-road vehicle use, visits to Great Basin National Park, and recreation on Bureau of Land Management and U.S. Forest Service lands. 8 App. at WPC\_1942; 8 App. at WPC\_1944-48. The Confederated Tribes of the Goshute Reservation ("CTGR") presented substantial evidence

through witness Rupert Steele that CTGR has unclaimed federal reserved water rights in the project drawdown area which could be affected by the proposed use. 12 App. at WPC\_2796-97.

Spring Valley is also home to numerous water dependent plant and animal species, which depend on the Valley's wet meadows and springs, and supports a variety of water dependent economic activities, all of which stand to be impacted by the proposed groundwater development project. In particular, Spring Valley provides some of the last remaining habitat for a number of water dependent endangered or imperiled fish and springsnail species. 4 App. at WPC\_0998; 8 App. at WPC\_1905, 8 App. at WPC\_1907. Three populations of an unusual Rocky Mountain juniper, or swamp cedar, occur in Spring Valley, which are groundwater dependent. 7 App. at WPC\_1604. The drawdown predicted by the modeling presented by both SNWA and protestants confirms that drawdown of the water table is likely to be severe enough to cause the loss of these species. 8 App. at WPC\_1907. In addition, the project "could adversely affect three federally listed birds (southwestern willow flycatcher and yellow-billed cuckoo), greater sage-grouse (federal candidate), and other special status bird and bat species, pygmy rabbit, and invertebrates," all of which occur in Spring Valley, Cave, Dry Lake, and Delamar Valleys or in downgradient valleys. 6 App. at WPC\_1286, 7 App. at WPC\_1664-65; 11 App. at WPC\_2718, 12 App. at WPC\_2788-89. Spring

Valley is also home to ceremonial and burial sites for the Goshutes, who are Real Parties in Interest in this case. 12 App. at WPC\_2788. Spring Valley is the western viewshed for Great Basin National Park and as such is critical to the mission of the Park. 11 App. at WPC\_2648. The Valley is also part of the Great Basin National Heritage Area, which has been formally recognized by Congress as nationally significant because of the unique topography, classic western landscapes, isolated high desert valleys, mountain ranges, ranches, mines, historic railroads, archeological sites, and Tribal communities. 11 App. at WPC\_2510-11.

Like Spring Valley, Cave Valley also supports economic and recreational activity. The Valley is used as summer rangeland by eight active ranching operations in White Pine County. 11 App. at WPC\_2526. Steven Carter, of Carter-Griffin, Inc., and his family have been ranching in Cave Valley and White River Valley for five generations, and own 100 year lease on water rights in Cave Valley. 9 App. at WPC\_2192-96; 11 App. at WPC\_2547, 11 App. at WPC\_2549-552. Cave Valley is also a hunting and recreational destination with half of White Pine County's elk population, 11 App. at WPC\_2684-85, and supports numerous guiding and outfitting businesses. 11 App. at WPC\_2684\_85. The Valley also has the potential to be the site of future mining operations, which historically have been central to White Pine County's economy. 8 App. at WPC\_1958; 8 App. at WPC\_1972.

Dry Lake Valley supports a number of ranching operations. In the winter, Pat Gloeckner and Kena Gloeckner run 1500 head of cattle and own rights to three wells in Dry Lake Valley. 11 App. at WPC\_2672, 2673, 2677-78. Their family has been ranching in Dry Lake Valley for more than 100 years. 11 App. at WPC\_2673. Pete Delmue and his family have been ranching in Dry Lake Valley for six generations. 11 App. at WPC\_2509.

Cave, Dry Lake, and Delamar Valleys all support hunting and guiding activity. 11 App. at WPC\_2684-84. And all three valleys are the subjects of exploratory mining activity. 11 App. at WPC\_2685-86. These three valleys are also home to the Congressionally-designated Silver State Trail, a 300-mile off-highway vehicle pathway which attracts people from across the United States each year, who use it to view the surrounding historic mining sites, wildlife, old ranching structures, and wild horses. 11 App. at WPC\_2685. All of these interests stand to be significantly and adversely impacted by SNWA's proposed groundwater export project.

Additionally, White River Valley, down-gradient from Cave Valley, is the center of significant farming and ranching activity, including the ranching operation of Jeff Gardner of Quarter Circle 5 Ranch, who owns significant water rights dating to the late 1800's. 9 App. at WPC\_2197. Steven Carter, of Carter-Griffin, Inc., and his family have been ranching in White River Valley for five

generations, over one hundred years. 9 App. at WPC\_2192-96; 11 App. at WPC\_2547; 11 App. at WPC\_2550. The Carters irrigate and farm approximately 1700 acres of land and have grazing and substantial water rights in White River Valley, including approximately 5400 acres of wet meadows. 11 App. at WPC\_2551-52. Steven Carter testified that hundreds of feet of drawdown would in effect put him out of business. 11 App. at WPC\_2551. Indeed, significant drawdowns in water level could spell the end of ranching in all of the affected valleys. Both the Lund and Preston Irrigation Companies, which rely on springs as their primary source of water, also have a substantial amount of water rights at stake. *See* 9 App. at WPC\_2198-201, 11 App. at WPC\_2549. The communities of White River Valley were settled as agricultural communities in the early 1900's and have a strong history and tradition of farming and ranching. 11 App. at WPC\_2550.

Pahranagat Valley's springs create a stunning series of oases that support ranching, farming, and water related recreation, including hunting and fishing. 11 App. at WPC\_2605; 11 App. at WPC\_2627. The town of Alamo supports a number of businesses, including restaurants, bed and breakfasts, and RV parks. 11 App. at WPC\_2605-06. Growth in the Valley is steady, with increases in tourism and the possibility of an Industrial Park. 11 App. at WPC\_2605-06. The Alamo Sewer and Water GID represents a substantial number of water rights holders in



the area, 5 App. at WPC\_1064-73, and has seen a 10% increase in connections in the past 5 years, in contrast to the growth drop off in Southern Nevada during that same time period. 11 App. at WPC\_2501, 11 App. at WPC\_2605.

Downgradient basins from Cave, Dry Lake, and Delamar Valleys are also home to numerous environmental resources, including the Kirch Wildlife Management Area, managed by the Nevada Department of Wildlife, and located in White River Valley, down-gradient from Cave Valley, Pahrangat National Wildlife Refuge and Key Pittman Wildlife Management Area, in Pahrangat Valley, which is down-gradient from Dry Lake and Delamar Valleys, and the Moapa National Wildlife Refuge, in Moapa Valley, at the base of the White River Flow system. *See* 4 App. at WPC\_0850, 11 App. at WPC\_2605, 2614. All of these preserves are dependent on current groundwater flows to sustain the health of the ecosystems and the biodiversity they support. *See* 4 App. at WPC\_0842. Further, Pahrangat, White River, Muddy Springs, and Moapa Valleys all contain springs that depend on interbasin flow and thus would be impacted, and Pahrangat and White River Valleys contain large phreatophyte zones. 4 App. at WPC\_0838-39, 0842, 0842-43. These downgradient basins are also home to a number of state and federally listed endangered, threatened, or otherwise protected species. 8 App. at WPC\_1885-1891; 9 App. at WPC\_2107-2114

Rather than provide meaningful evidence related to impacts to these down-gradient basins, SNWA relies on a hydrologic and biologic monitoring and mitigation program it claims is designed to detect and prevent impacts to existing rights and manage impacts to water dependent species in an environmentally sound manner. Protestants presented substantial evidence that a monitoring and mitigation program has no hope of being effective for a project of the scale proposed by SNWA and even the best plan can only mask impacts in the short term. 23 SNWA App. at 005049, 005056; 25 SNWA App. at 005715-18. Moreover, the plans presented by SNWA contain no goals, thresholds, or triggers, which are critical to the success of any monitoring and mitigation program, and must be set up front. 25 SNWA App. at 005598-99, 22 SNWA App. at 004942-43, 23 SNWA App. at 005048-49, 005055-56. Further, the Monitoring and Mitigation plan's Technical Review Panel, Biologic Resources Team, and Executive Committee, the stipulated agreement decisionmaking bodies, will determine appropriate management and mitigation measures to respond to any an injury or unreasonable adverse effects, and all decisions of these bodies will be consensus based. 4 SNWA App. at 000766, 000775, 000838, 4 SNWA App. at 00837; 4 SNWA App. at 00846. SNWA is represented on each and every one of these consensus based governing bodies and thus has veto power over any decision to mitigate adverse impacts. 4 SNWA App. at 000766, 000775. The plans do not

provide for the involvement of any of the affected communities in decisionmaking or compensation for affected communities in the event of impairment. 25 SNWA App. at 005640-42, 005650-51; 11 App. at WPC\_2679-80, 2716. Thus, the plans provide no protection for interests of the Real Parties in Interest in this case, the Nevada public, or environment.

The weight of the evidence presented clearly demonstrates that SNWA's proposed groundwater project would constitute groundwater mining on an unprecedented scale in violation of Nevada law, *see* 4 App. at WPC\_0773, 22 SNWA App. at 004987-5000; 23 SNWA App. at 005000-5002, and would result in devastating environmental, social, and economic impacts to the eastern part of rural Nevada and western Utah in violation of both state and federal law. *See* 5 App. at WPC\_1042-63, 8 App. at WPC\_1892-1893, 23 SNWA App. at 005049 - 57, 22 SNWA App. at 004857-58, 22 SNWA App. at 004866-67. The groundwater models all agree that drawdown will be severe and will spread over a vast area of eastern rural Nevada and will extend into western Utah. 25 SNWA App. at 5705-07. There is no way to escape the fact that these drawdowns will have catastrophic impacts to wildlife and plant communities in the affected region, including those in national wildlife refuges and state wildlife management areas, and have the potential to cause serious additional dust emissions in a number of the affected valleys that will create serious air quality issues possibly extending as far

as the Wasatch front. Impacts to Great Basin National Park, a pristine and irreplaceable national resource, will also be likely.

Permitting such a costly, unnecessary, and environmentally and economically devastating project is not in the best interest of the State of Nevada and its citizens, and is a clear violation of Nevada law.

IX. STATE ENGINEER ISSUES RULINGS 6164, 6165, 6166, AND 6167 PARTIALLY APPROVING SNWA'S WATER RIGHTS APPLICATIONS IN SPRING, CAVE, DRY LAKE, AND DELAMAR VALLEYS

On March 22, 2012, the State Engineer issued Ruling Nos. 6164, 6165, 6166, and 6167, addressing all of SNWA's Pipeline Project applications in the SCDD Valleys. In Ruling 6164, the Spring Valley Ruling, the State Engineer granted SNWA 61,127 afa of groundwater in staged development under Applications 54003 through 54015, 54019, and 54020, and denied Applications 54016, 54017, 54018 and 54021. 1 SNWA App. at 000239-41. The Spring Valley Ruling's staged development process makes no provision for the involvement of protestants at any of the decision points.

In Ruling 6165, the Cave Valley Ruling, the State Engineer granted SNWA 5,235 afa of groundwater under Applications 53987 and 53988. 2 SNWA App. at 000410-411. In Ruling 6166, the Dry Lake Valley Ruling, the State Engineer granted SNWA 11,584 afa of groundwater under Applications 53989 and 53990. 3

SNWA App. at 000574-575. In Ruling 6167, the Delamar Valley Ruling, the State Engineer granted SNWA 6,042 afa of groundwater under Applications 53991 and 53992. 3 SNWA App. at 000736-737. The State Engineer's rulings in the CDD Valleys result in a double appropriation of water in violation of Nevada law, because they grant so SNWA water that is already appropriated by existing users in downgradient basins.

All four Rulings blatantly misconstrue and misapply Nevada water law, are a departure from long standing State Engineer practice, and disregard the weight of evidence in the record in favor of parroting the proposed rulings submitted by SNWA. All of the Rulings rely on a technically and structurally deficient Monitoring and Mitigation Plan, 1 SNWA App. at 000239-241, 2 SNWA App. at 000410-411, 3 SNWA App. at 000574-575, 3 SNWA App. at 000736-737, and in effect postpone any real or meaningful evaluation of impacts under NRS § 533.370(2) to a date at which impacts are seen. This approach amounts to kicking the can down the road, while shutting the public out of the future decisionmaking process in violation of the public's due process rights guaranteed by Nevada law and the United States Constitution. The Rulings are an arbitrary and capricious abuse of the State Engineer's discretion under the law, are not supported by substantial evidence, and are contrary to law.

X. PROTESTANTS APPEAL RULINGS 6164 THROUGH 6167 TO DISTRICT COURT

On April 21, 2012, Protestants in the SCDD Hearing, White Pine County, et al. filed petitions for judicial review of Rulings 6164, 6165, 6166, and 6167 in Nevada's Seventh Judicial District Court in White Pine and Lincoln Counties. Other parties aggrieved by the rulings, including Millard and Juab Counties, Utah, Confederated Tribes of the Goshute Reservation, Ely Shoshone Tribe, Duckwater Shoshone Tribe, and Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints, on behalf of Cleveland Ranch, also filed petitions for judicial review. The petitions for judicial review were later consolidated into one case, CV 1204049, in White Pine County. On December 13, 2013, the district court ruled on the petitions for judicial review and reversed and remanded Rulings 6164, 6165, 6166, and 6167, directing the State Engineer to:<sup>17</sup>

1. Recalculate the water available for appropriation from Spring Valley assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time, in order to avoid groundwater mining, which is in violation of Nevada law;

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<sup>17</sup> The District Court also ordered the State Engineer to add Juab and Millard Counties in Utah to the Monitoring and Mitigation plan. 1 SNWA App. at 000023. This issue is not on appeal.

2. Define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water is neither arbitrary nor capricious in Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley, and;
3. Recalculate the appropriations from Cave Valley, Dry Lake Valley, and Delamar Valley to avoid over appropriations or conflicts with down-gradient, existing water rights.

*See* 1 SNWA App. at 00023.

On the issue of groundwater mining in Spring Valley, the district court found that State Engineer Ruling 6164 was arbitrary and capricious, in violation of the State Engineer's own standards for calculating perennial yield, not in the public interest, and unfair to future generations of Nevadans, because according to the State Engineer's own calculations and findings, equilibrium will never be reached at the quantity of water granted in Ruling 6164, and therefore the State Engineer has permitted groundwater mining in violation of his own standards and practice, which define groundwater mining as pumping exceeding the perennial yield over time such that the system never reaches equilibrium. *See* 1 SNWA App. at 00010-13.

On the issue of monitoring and mitigation, the district court found that “[g]ranting water to SNWA is premature without knowing the impacts to existing

water right holders and not having a clear standard to identify impacts, conflicts or unreasonable environmental effects so that mitigation may proceed in a timely manner.” 1 SNWA App. at 00018. The court noted that “[t]here are no objective standards to determine when mitigation will be required and implemented . . . Not knowing where or how bad an impact is, is not the same thing as defining what an adverse impact [sic].” 1 SNWA App. at 000016. In other words, just because SNWA and the State Engineer do not know what the impacts will be does not mean that it is premature to define what level of impact would require mitigation. It may mean, however, that it is premature to grant the water right. *See* 1 SNWA App. at 00016. Indeed, the Court pointed out that “if SNWA, and thereby the Engineer, has enough data to make informed decisions [as they have suggested], setting standards and ‘triggers’ is not premature . . . If there is not enough data (as shown earlier, no one really knows what will happen with large scale pumping in Spring Valley), granting the appropriation is premature. The ruling is arbitrary and capricious.” 1 SNWA App. at 00016 (citing AR at 000183 (1 SNWA App. at 000206)). Moreover, the court noted inconsistencies in the State Engineer’s approach. For example the mitigation plan includes the following language: “Mitigation planning is not part of this plan but will be handled separately when impact location and magnitude are better understood.” 1 SNWA App. at 00015 (quoting AR at 020648 (4 SNWA App. at 000944 )). Further, “[t]he Engineer



gives a vague statement of how mitigation can be done, but has no real plan or standard of when mitigation would be implemented. Without a stated, objective standard, the ruling is arbitrary and capricious.” 1 SNWA App. at 00017.

Finally, on the issue of conflict with existing rights in basins down-gradient from Cave, Dry Lake, and Delamar Valleys, the district court held that the State Engineer had misinterpreted NRS § 533.370(2), which states that an application “shall” be rejected if it conflicts with existing rights. The Court noted that on the one hand, the State Engineer acknowledged that there would be a double appropriation of water upstream in the CDD basins that already is appropriated in downgradient basins. Yet the State Engineer found that because the effects of the double appropriation might not become problematic for hundreds of years, there was no conflict with existing rights under NRS § 533.370(2). With regard to the State Engineer’s approach, the court stated that it is “unseemly to this court, that one transitory individual may simply defer serious water problems and conflict to later generations, whether in seventy-five (75) years or ‘hundreds,’ especially when the ‘hundreds’ of years is only a *hoped* for resolution.” 1 SNWA App. at 00020.

#### XI. STATE ENGINEER AND SNWA APPEAL TO SUPREME COURT

In early 2014, the State Engineer and SNWA appealed the district court’s Decision to the Nevada Supreme Court where the appeals are currently pending as

a consolidated appeal.<sup>18</sup> *See* Nevada Supreme Court Case No. 64815. On April 15, 2014, Cleveland Ranch filed a motion to dismiss the consolidated appeals for lack of subject matter jurisdiction, arguing that the district court's December 13, 2013, Decision was not a final appealable order. *Motion to Dismiss Consolidated Appeals for Lack of Jurisdiction (No Final Judgment)*, Case No. 64815 (April 15, 2014). On June 5, 2014, the Court suspended the briefing schedule in that appeal pending resolution of Cleveland Ranch's motion to dismiss. *Order Suspending Briefing Schedule, Disapproving As Moot Stipulation to Extend Deadlines, and Granting Motion to Withdraw As Counsel*, Case No. 64815 (June 5, 2014). In the hope of preserving their issues on appeal in the event that the Court were to grant Cleveland Ranch's motion to dismiss, SNWA and the State Engineer each filed petitions for writs of mandamus, designated case numbers 65775 and 65776, respectively. *See* SNWA's *Petition for Writ of Mandamus or, in the Alternative, Prohibition*, Case No. 65775 (May 30, 2014); State Engineer's *Petition for Writ of Mandamus*, Case No. 65776 (May 30, 2014).

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<sup>18</sup> Cleveland Ranch also appealed the district court's decision on a statutory construction issue not addressed by the petitions for writs of mandamus filed by SNWA and the State Engineer.

**STATEMENT OF THE ISSUES**

Shorn of their self-serving mischaracterization by the Petitioners, the actual issues on appeal are:

1. Whether the district court properly found that the State Engineer acted arbitrarily and capriciously in “violating his own standards” by permitting SNWA to engage in unsustainable groundwater mining in Spring Valley at the expense of following generations of Nevadans.
2. Whether the district court properly found that the State Engineer acted arbitrarily and capriciously in prematurely granting SNWA’s applications, relying on a so-called monitoring, management, and mitigation plan (“3M plan”) devoid of “objective standards” to prevent or mitigate impacts “without knowing the impacts to existing water right holders and [without] a clear standard to identify impacts, conflicts or unreasonable environmental effects so that mitigation may proceed in a timely manner.”
3. Whether the district court properly found that the State Engineer acted arbitrarily and capriciously in allowing a “double appropriation” by permitting SNWA to appropriate groundwater in three upgradient basins in the White River Flow System that already is appropriated by existing water rights holders in the downgradient basins of the same interbasin flow system.

**SUMMARY OF ARGUMENT**

Although SNWA and the State Engineer articulate them in somewhat varying ways, their Petitions raise the same three basic legal issues questions that were raised by the State Engineer's and SNWA's original ordinary appeals from the district court's ruling. For the reasons set forth below, the district court properly reversed the State Engineer's ruling below on the following grounds.

First, the district court properly found that the State Engineer abused his discretion by granting SNWA's applications in Spring Valley, despite the fact that the uncontroverted evidence showed that: (1) SNWA's proposed extraction and export of groundwater out of Spring Valley would not capture the evapotranspiration (ET) that the State Engineer relied on as the basis for his determination of the amount of water that supposedly is available for appropriation; and (2) that the basin will not approach equilibrium at any foreseeable time in the future if SNWA is allowed to pump and export the amount of water that the State Engineer approved. As the district court correctly found, the State Engineer departed from longstanding Nevada policy that limits the amount of water considered available for appropriation to what can be captured from a groundwater source's natural discharge and to an amount that has been described as the "equilibrium amount" which will not subject the groundwater source to long-term depletion.

Second, the district court properly found that the State Engineer acted arbitrarily and capriciously by approving SNWA's applications in these four valleys without performing the evaluation required and making the determinations required by NRS 533.370(2) & (3) as to whether SNWA's proposed extraction and export of groundwater from these valleys will result in conflicts with existing water rights or will threaten to prove detrimental to the public interest by causing unreasonable environmental impacts in the affected area. As the district court recognized, because SNWA failed to present any evidence regarding what the actual likely impacts of its proposed pumping would be over the long term, or what standards would be applied to determine what will be considered an unreasonable impact, or whether unreasonable impacts were likely to occur, or what objective and verifiable measures would be implemented to prevent or mitigate such impacts, the State Engineer could not make informed, reasoned determinations that the proposed use would not conflict with existing rights or cause unreasonable environmental impacts, as required under NRS 533.370(2) & (3). Rather, the State Engineer decided to approve SNWA's applications in the absence of evidence that would allow an actual evaluation of potential conflicts and environmental impacts, and chose to rely on SNWA's proposed 3M plans to counteract any potential conflicts or unreasonable environmental impacts, despite the fact that those plans

are devoid of any objective verifiable standards, thresholds, or specific mitigation measures to be implemented under defined circumstances.

Finally, the district court properly found that the State Engineer acted arbitrarily and capriciously, and failed to fulfill his statutory duties, by granting SNWA's applications in upgradient valleys within the White River Flow System despite the fact that the uncontroverted evidence showed that all the groundwater from those valleys sought by SNWA's applications flows into downgradient valleys within the same unified groundwater flow system, where it already has been appropriated. Despite the fact that such a double appropriation of the same groundwater necessarily will result in a massive long-term overdraft, or drawdown, of the groundwater in the entire flow system, and inevitably will lead to eventual conflicts with existing rights and unreasonable environmental impacts in downgradient valleys, the State Engineer chose to grant SNWA's applications because there was not clear evidence that such impermissible impacts would occur within a matter of decades. This arbitrary limit on the time frame within which the State Engineer is willing to recognize impacts is especially illogical given the fact that the water rights approved by the State Engineer are granted in perpetuity and SNWA's proposed extraction and export of groundwater under those rights is intended to be a permanent supply for Las Vegas comparable, by SNWA's own testimony, to Rome's two thousand year-old aqueduct system. Again, rather than

address whether the ultimate impacts of SNWA’s proposed extraction and export of groundwater from these valleys would violate the standards established by the Legislature in NRS 533.370(2), the State Engineer merely relied on SNWA’s vague 3M plans to protect against such impacts, despite the fact that those plans lack any objective, quantified, or otherwise verifiable standards or thresholds for determining what impacts will be deemed unreasonable, when mitigation will be required, and are devoid of any commitment to implement concrete identified mitigation measures when mitigation is triggered.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

#### **A. Standard for Writ Review:**

Generally, a writ of mandamus may issue only when there is no plain, speedy, and adequate remedy at law, *see* NRS § 34.170, but where circumstances reveal urgency or strong necessity, the Supreme Court may grant extraordinary writ relief. *Falcke v. Douglas County*, 116, Nev. 583, 3 P.3d 661, 662 (2000). “Whether to consider a petition for mandamus is entirely within the discretion of this court.” *Nevada v. District Court (Ducharm)*, 118 Nev. 609, 55 P.3d 420, 423 (2002) (granting writ review but denying petition for writ of mandamus or prohibition). However, unless a district court manifestly abused its discretion, writ of mandamus relief generally is not appropriate. *E.g., Cote H. v. District Court*,

175 P.3d 906, 910 (Nev. 2008). Further, a “[m]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.” *State v. District Court (Armstrong)*, 127 Nev. Adv. Op. 84, 267 P.3d 777, 780 (2011) (quoting *Blair v. Zoning Hearing Bd. of Tp. of Pike*, 676 A.2d 760, 761 (Pa. Commw. Ct. 1996)).

A writ of prohibition is an even more extraordinary remedy than mandamus and generally only is appropriate where a higher court must intercede to nullify a lower court’s decision on the basis that the lower court lacked jurisdiction. *See, e.g., Diaz v. District Court*, 116 Nev. 88, 993 P.2d 50, 54 (2000); *Trump v. District Court*, 109 Nev. 687, 857 P.2d 740, 742 (1993)(denying petition where district court did not err in exercising personal jurisdiction).

The Petitioners have failed to show that this case is an appropriate one for writ review, let alone writ relief. The errors they allege on the part of the district court below are merely the same alleged errors that serve as the grounds for the ordinary appeals that they filed prior to filing these Petitions. Apart from attaching the phrase “abuse of discretion” to their arguments as to why the district court supposedly erred, they do not actually assert any unusual act or ruling of the district court that could even remotely be characterized as a “manifest abuse of discretion” or that otherwise would justify writ review in this case.



Further, while SNWA styles its petition as one alternatively seeking a writ of prohibition, SNWA offers not a single word of explanation as to how this case could conceivably be appropriate for a writ of prohibition. In this case, there has never been any dispute that the State Engineer rulings in question were subject to judicial review by the district court pursuant to NRS § 533.450, that the petitions for judicial review that the district court consolidated were properly, and that the district court had jurisdiction to consider and rule on those petitions for judicial review. Indeed, there never has been any contention by any party in the history of this case that the district court lacked jurisdiction to hear the petitions for judicial review or to exercise judicial review of the State Engineer rulings at issue in this case.

Accordingly, White Pine County, et al., respectfully suggest that the State Engineer and SNWA have failed to make necessary showing to justify writ review in this case. Should the Court nevertheless decide to exercise its discretion to take up the merits of the issues on this appeal in response to the Petition, White Pine County, et al., address the appropriate standard of review pertaining to the State Engineer's rulings below and explain why the district court did not err in reversing those rulings.

B. Standard of Appellate Review of State Engineer Rulings:

In their Petitions SNWA and the State Engineer attempt to frame the scope of judicial review applicable to the State Engineer's rulings incorrectly as one that only permits the reviewing court to consider whether there was some quantity of evidence that the State Engineer has labeled substantial and claimed supports his rulings. The Petitioners' self-serving characterization of this Court's and the district court's role on appeal is a transparent attempt to avoid the meaningful judicial review of the State Engineer's administrative rulings that the Nevada Legislature provided for in NRS § 533.450. In overstating the degree of judicial deference owed to the State Engineer's administrative decision-making the Petitioners seek to persuade this Court to undercut the district court's proper exercise of judicial authority under NRS § 533.450 and to neglect its own duty to critically examine the administrative decision below and assess whether it is supported by adequate reasoning and whether its ultimate conclusions are, in fact, consistent with the law, the evidence in the record, the decision-maker's own prior practice and methodology, and with reason itself.

In short, the Petitioners would have the Court adopt a denuded form of review that would not allow for the Court to examine whether the State Engineer's decisions below were coherently reasoned or truly supported by the evidence on which he purported to rely. Such a distorted diminution of the Court's role in

judicially reviewing the administrative ruling below is inconsistent with the intent of the law providing for judicial review and represents an extreme effort to shield the State Engineer's decisions from the safeguard established by the Legislature when it provided for thorough, meaningful judicial review of such decisions.

While the district court owed, and gave, substantial deference to certain types of factual determinations and interpretations of the administrative agency whose decision it was reviewing, that deference is not without limits. With questions of fact, the Court is not to “substitute its judgment for that of the State Engineer . . . [nor] reweigh the evidence, but limit [itself] to a determination of whether substantial evidence in the record supports the State Engineer’s decision.” *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); *see also Town of Eureka v. Office of the State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992). Substantial evidence is that which a “reasonable mind might accept as adequate to support a conclusion.” *Bacher v. Office of the State Engineer*, 122 Nev. 1110, 146 P.3d 793, 800 (2006). While Nevada courts have not fully fleshed out the definition of what kind of an evidentiary record satisfies the standard of “substantial evidence,” the courts of sister states with the same standard of review have refined the definition so as to find that an administrative decision is not supported by substantial evidence where the agency’s conclusion is internally inconsistent with its evidentiary interpretations. *E.g., Ramos v. State*, 158 P.3d

670, 676 (Wy. 2007); *Ohio Historical Society v. State Employment Relations Bd.*, 613 N.E.2d 591, 595 (Oh. 1993). In addition, where the reviewing court determines that the findings of the State Engineer were “clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and incident thereto constitute an arbitrary and capricious abuse of discretion,” those findings are not entitled to deference. *Office of State Engineer v. Morris*, 107 Nev. 699, 701-702, 819 P.2d 203, 205 (1991).

In reviewing decisions of the State Engineer Nevada courts are “free to decide purely legal questions . . . without deference to the agency’s decision,” *Town of Eureka*, 826 P.2d at 949, and will reverse the SE on factual grounds where they determine his conclusions are not supported by the evidence in the record, *Bacher*, 122 Nev. 1110, 146 P.3d at 800. While “the State Engineer’s interpretation of a statute is persuasive, it is not controlling.” *Id.* at 165-66, 826 P.2d at 950 (citing *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)). Although the State Engineer has implied authority to construe the state’s water law, *Andersen Family Assoc. v. Ricci*, 124 Nev. Adv. Op. No. 17, 179 P.3d 1201, 1203 (2008), the reviewing court should “undertake independent review of the construction of a statute.” *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949 (citing *Nevada Emp. Sec. Dep’t v. Capri Resorts*, 104 Nev. 527, 763 P.2d 50 (1988)).

The State Engineer and SNWA also fail to acknowledge the commonly recognized principle of administrative law that an agency must have a reasoned basis for deviating or departing from its own previous line of reasoning, or methodology, when addressing the same or a similar issue. *United States v. Nixon*, 418 U.S. 683, 696 (1974); *FCC v. Fox Television*, 556 U.S. 502, 515 (2009); *Committee for Community Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984). Both federal and sister state jurisdictions generally have recognized the rule that agencies must explain a departure from previous rulings or policy. *See Bankamerica v. US*, 462 U.S. 122, 149 (1983); *Ala. PIRG v. State*, 167 P.3d 27 (Alaska 2007) (while not strictly subject to the doctrine of stare decisis, administrative agencies must act consistently with their prior adjudications or explain why they did not, lest decision appear arbitrary); *Rosebud Enterprises, Inc. v. Idaho Public Utilities Comm'n*, 917 P.2d 766 (Id. 1996) (agency not rigidly bound by stare decisis but must explain departure from previous rulings); *R.G. Vergeyle v. Employment Security Dep't*, 623 P.2d 736, 404 (Wash. App. 1981) (overruled on other grounds) (although not inflexibly bound by stare decisis, agencies must either act consistently or provide reasons for departure from previous rulings). Thus, under both Nevada law and general principles of administrative law a reviewing court has the authority, and a responsibility, to engage in meaningful judicial review of the State Engineer's rulings.

On balance, then, it is clear that a reviewing court has not only the authority but the duty to examine whether the decision below is rational, internally consistent, and founded on appropriate evidence. For the reasons set forth below, the district court properly found that the State Engineer's approval of SNWA's water rights applications in Spring, Cave, Dry Lake, and Delamar Valleys for its massive groundwater extraction and export project failed to meet this standard in the following regards.

## **II. BURDEN OF PROOF FOR GRANT OF WATER RIGHTS APPLICATIONS**

The burden of meeting all the statutory conditions for grant of an application to appropriate water was on the Applicant. *Bacher*, 122 Nev. 1110, 1116, 146 P.3d at 797. Thus, it was SNWA's burden to present evidence showing that its Applications should be granted. To the extent that there are any gaps or deficiencies in the Applications or the evidence, SNWA did not meet its burden and its Applications should have been denied as a matter of law. According to the Nevada Supreme Court, Nevada's water laws are to be construed strictly. *Preferred Equities Corp. v. State Engineer*, 119 Nev. 384, 390, 75 P.3d 380, 383-84 (2003).

### **III. STATUTORY STANDARD FOR DENIAL OF WATER RIGHTS APPLICATIONS**

NRS § 533.370(2) provides that the State Engineer shall reject an application and refuse to issue the permit where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS § 533.024, or where the proposed use threatens to prove detrimental to the public interest.

### **IV. ADDITIONAL STATUTORY STANDARDS FOR INTERBASIN TRANSFERS**

NRS § 533.370(3) provides that in determining whether an application for an interbasin transfer of groundwater must be rejected, the State Engineer shall consider: (1) whether the applicant has justified the need to import the water from another basin; (2) if the State Engineer determines a plan for conservation of water is advisable for the basin into which the water is imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out; (3) whether the proposed action is environmentally sound as it relates to the basin from which the water is exported; (4) whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and (5) any other factor the State Engineer determines to be relevant.

**V. THE DISTRICT COURT PROPERLY FOUND THAT THE STATE ENGINEER HAD ARBITRARILY AND CAPRICIOUSLY DEVIATED FROM LONGSTANDING SOUND PRIOR PRACTICE AND METHODOLOGY IN ORDER TO INFLATE THE AMOUNT OF GROUNDWATER CONSIDERED AVAILABLE FROM SPRING VALLEY FOR SNWA'S GROUNDWATER EXTRACTION AND EXPORT PROJECT**

The most basic finding the State Engineer was required to make in determining whether to grant SNWA's applications is whether there is sufficient unappropriated water available in the source of supply to support the proposed use that the applications are intended to establish. If there is not sufficient available unappropriated water in the proposed source of supply, then the State Engineer must deny the applications. NRS § 533.370(2). Additionally, if granting the applications and permitting the proposed use would result in conflicts with existing water rights or cause impacts that would threaten to prove detrimental to the public interest, then the State Engineer must deny the applications. *Id.*

As the District Court correctly recognized, in the four connected rulings at issue in this case the State Engineer departed from and abandoned his past practice and methodology without adequate justification to reach speculative, unsound conclusions about the amount of available water that could be pumped and exported from these four valleys without causing conflicts with existing water rights or unreasonable impacts that would threaten the public interest. The State Engineer's systematic abandonment of sound first principles of groundwater



management that have governed his past decisionmaking concerning groundwater development was arbitrary, capricious, and not supported by substantial evidence. Accordingly, all four of the State Engineer's SNWA Pipeline Rulings properly were reversed by the District Court.

Nevada Revised Statutes § 533.370(2) requires the State Engineer to determine whether there is sufficient unappropriated water in the proposed source to support the applications in question and requires the State Engineer to reject an application where there is insufficient unappropriated water in the proposed source. With regard to the applications at issue here, the overwhelming balance of the credible evidence demonstrated that there is insufficient unappropriated water available in the proposed sources to support the applications in question. The proposed sources are: the Spring Valley Hydrographic Basin (No. 184); Cave Valley Hydrographic Basin (No. 180); Dry Lake Valley Hydrographic Basin (No. 181); and Delamar Valley Hydrographic Basin (No. 182).

In determining the amount of groundwater available for appropriation in a given hydrographic basin, the State Engineer relies on all available hydrologic studies to provide relevant data to determine the perennial yield for a basin. Both this Court and the State Engineer himself have long defined perennial yield of a groundwater reservoir as the maximum amount of groundwater that can be salvaged each year over the long term without depleting the groundwater reservoir.

*Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. Adv. Op. 48, 245 P.3d 1146, 1147 (2010); State Engineer Ruling No. 6255 at 24 (2014); 1 SNWA App. at 000079.

Perennial yield is ultimately limited to the maximum amount of the natural discharge that can be salvaged for beneficial use. Water Resources Bulletin, Nevada's Water Resources, Report No. 3, at 13 (1971); 1 SNWA App. at 000079.

Perennial yield cannot be more than the natural recharge to a groundwater basin and in some cases is less. 1 SNWA App. at 000079; 2 SNWA App. at 000287; 2 SNWA App. at 000456; 3 SNWA App. at 000620; *see also* Water Resources Bulletin, Nevada's Water Resources, Report No. 3, at 13 (1971).<sup>19</sup> If the perennial yield is exceeded, groundwater levels will decline and steady state conditions will not be achieved, a situation commonly referred to as groundwater mining. 1 SNWA App. at 000079; State Engineer Ruling No. 6255, at 24. The term groundwater mining typically refers to a prolonged and progressive decrease in the amount of water stored in a groundwater system, as may occur, for example, in heavily pumped aquifers in arid and semiarid regions. 4 App. at WPC\_0886.

Withdrawals of groundwater in excess of the perennial yield contribute to adverse conditions such as water quality degradation, storage depletion, diminishing yield

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<sup>19</sup><http://images.water.nv.gov/images/publications/water%20resources%20bulletins/Bulletin3.pdf>.

of wells, increased economic pumping lifts, land subsidence and possible reversal of groundwater gradients which could result in significant changes in the recharge-discharge relationship. Water Resources Bulletin, Nevada's Water Resources, Report No. 3, at 13 (1971). In view of the problems that groundwater mining causes, it has long been the policy of the State Engineer to prohibit groundwater mining and deny applications that would result in groundwater mining. *See e.g.*, Nevada State Engineer Ruling No.707 (July 9, 1964);<sup>20</sup> Nevada State Engineer Ruling No. 2453 (April 10, 1979);<sup>21</sup> Nevada State Engineer Ruling No. 3486 (Jan. 11, 1988);<sup>22</sup> Nevada State Engineer Ruling No. 5750 (July 16, 2007);<sup>23</sup> and Nevada State Engineer Ruling No. 6151 (Oct. 14, 2011).<sup>24</sup>

Permanent groundwater mining has long been considered impermissible under Nevada law and public policy. *See* Nevada State Engineer Ruling No. 2453, at 4-5 (Apr. 10, 1979) (additional withdrawal of water not permitted because it would result in groundwater mining); Nevada State Engineer Ruling No. 3486, at 6 (Jan. 11, 1988) (additional withdrawal of water denied because it would result in groundwater mining and “conflict with existing rights and be detrimental to the

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<sup>20</sup> <http://images.water.nv.gov/images/rulings/707r.pdf>.

<sup>21</sup> <http://images.water.nv.gov/images/rulings/2453r.pdf>.

<sup>22</sup> <http://images.water.nv.gov/images/rulings/3486r.pdf>.

<sup>23</sup> <http://images.water.nv.gov/images/rulings/5750r.pdf>.

public interest”); Nevada State Engineer Ruling No. 3679, at 11-13 (Jan. 23, 1990) (“Withdrawals of ground water in excess of the perennial yield contribute to adverse conditions such as water quality degradation, storage depletion, diminishing yield of wells, increased economic pumping lifts, land subsidence and reversal of ground water gradients which could result in significant changes in the recharge/discharge relationship. These conditions have developed in several other ground water basins within the State of Nevada where storage depletion and declining water tables have been recorded and documented”);<sup>25</sup> Nevada State Engineer Ruling No. 5750, at 21-22 (July 16, 2007) (withdrawal of substantial amounts of groundwater in excess of perennial yield would adversely affect existing rights and would threaten to prove detrimental to the public interest”); Nevada State Engineer Ruling No. 6134, at 4 (Aug. 3, 2011) (denying permits where basin was already over-appropriated and increased withdrawals would constitute groundwater mining with “significant impact” on both the quality of water and existing rights);<sup>26</sup> Nevada State Engineer Ruling No. 6151, at 4 (Oct. 14, 2011) (application denied because approval would result in withdrawal of groundwater in substantial excess of perennial yield and the resulting groundwater

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<sup>24</sup> <http://images.water.nv.gov/images/rulings/6151r.pdf>.

<sup>25</sup> <http://images.water.nv.gov/images/rulings/3679r.pdf>.

mining “would conflict with existing rights and would threaten to prove detrimental to the public interest”).<sup>27</sup>

In Nevada basins in which groundwater is discharged primarily through evapotranspiration (“ET”), the perennial yield generally has been found to be approximately equal to the estimated groundwater ET; the assumption being that water lost to natural ET can be captured by wells and placed to beneficial use. However, other factors may make the capture of ET discharge within a basin impractical or otherwise problematic, which would result in a lower perennial yield amount than ET discharge amount for the basin.

The Spring Valley Hydrographic Basin has a significant amount of discharge via ET and an uncertain amount of subsurface flow to adjacent basins. During the State Engineer’s 2011 hearing on SNWA’s applications in Spring, Cave, Dry Lake, and Delamar Valleys, the Protestants presented substantial evidence demonstrating that SNWA’s applications in Spring Valley will not be able to capture a great deal of the groundwater ET in Spring Valley, meaning that Applicant’s proposed groundwater pumping would amount to groundwater mining that would draw a large proportion of groundwater from storage for at least many

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<sup>26</sup> <http://images.water.nv.gov/images/rulings/6134r.pdf>.

<sup>27</sup> <http://images.water.nv.gov/images/rulings/6151r.pdf>.

centuries and likely millennia. *See generally*, 3 App. at WPC\_0365-750; 4 App. at WPC\_0751-808; 5 App. at WPC\_1206-07; 5 App. at WPC\_1121-1139; 4 App. at WPC\_0962-73; 5 App. at WPC\_1074-1120; 21 SNWA App. at 004671-750; 22 SNWA App. at 004957-5000; 23 SNWA App. at 005001-10; 22 SNWA App. at 004751-804; 23 SNWA App. at 005098-5120. That evidence was not controverted, but rather was responded to by SNWA's proposed monitoring and mitigation plans. *See infra* at Section VI.

Protestants also presented substantial evidence that, whether SNWA's proposed pumping is conducted at the present application locations or other locations in Spring Valley, and even if the rate is reduced to 30,000 afa, SNWA's proposed pumping over the long term will cause unreasonable drawdown and impacts to existing water rights and environmental resources throughout Spring Valley and in southern Snake Valley. *See generally*, 22 SNWA App. at 004951-5000; 23 SNWA App. at 005001-5010; 23 SNWA App. at 005092-158; 25 SNWA App. at 005670-728; 12 App. at WPC\_2808-983; 12 App. at WPC\_2989-3000; 13 App. at WPC\_3001-026, 3007; 3 App. at WPC\_0643-698, 0699-750; 4 App. at WPC\_0751-765; 0766-0808; 4 App. at WPC\_0962-973; 5 App. at WPC\_1074-120; 5 App. at WPC\_1121-139; 5 App. at WPC\_1140-205, 1206-017; 5 App. at WPC\_1218-250; 6 App. at WPC\_1251-1500; 7 App. at WPC\_1501-1750; 8 App. at WPC\_1751-1884; 9 App. at WPC\_2202-250; 10 App.

at WPC\_2251-316, 2317-330, 2331-379. There was no substantial evidence that contradicted either of those conclusions, which should have led the State Engineer to deny SNWA's Spring Valley applications.

Instead, the State Engineer departed from longstanding practice, and did not require SNWA to actually capture ET in Spring Valley,<sup>28</sup> instead relying on a seriously flawed and only partially developed monitoring and mitigation program in order to circumvent the requirements of NRS § 533.370(2) and (3).

Additionally, the State Engineer permitted SNWA's applications knowing that it was unlikely that the basin will ever reach equilibrium, thereby sanctioning unsustainable groundwater mining in violation of Nevada law and longstanding State Engineer practice. Therefore, the District Court properly found that the State Engineer acted arbitrarily and capriciously in calculating the perennial yield for Spring Valley, and the district court's order should be upheld.

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<sup>28</sup> For more than half a century the concept of capture has been recognized as a core component of the sound management of aquifers and groundwater withdrawals. *See* S.W. Lohman, et al., *Definitions of Selected Ground-Water Terms – Revisions and Conceptual Refinements*, US Geological Survey Water-Supply Paper 1988, at 3 (1960) (“Capture may occur in the form of decreases in the ground-water discharge into streams, lakes, and the ocean, or from decreases in that component of evapotranspiration derived from the saturated zone. After a new artificial withdrawal from the aquifer has begun, the head in the aquifer will continue to decline until the new withdrawal is balanced by capture.”), [http://pubs.usgs.gov/wsp/wsp\\_1988/html/pdf.html](http://pubs.usgs.gov/wsp/wsp_1988/html/pdf.html), last visited August 29, 2014.

The unavoidable problem that the State Engineer failed to acknowledge is that there is no way to avoid the fact that SNWA's proposed permanent groundwater pumping project must either capture ET and destroy the environmental resources that SNWA and the State Engineer have agreed must be protected, or result in large scale devastating groundwater mining in perpetuity. The uncontroverted evidence in the record demonstrated that there is a general consensus among all the groundwater modeling presented that the system in Spring Valley will not approach any reasonable definition of equilibrium for over a thousand years and quite possibly not for several millennia. 22 SNWA at App. 004986-5000; 23 SNWA at App. 005001-002. In practical terms SNWA's proposed use would throw the water budget of Spring Valley out of balance in dramatic fashion, causing severe drawdowns through most of the central region of Spring Valley along with a range of the adverse conditions that Nevada's policy against groundwater mining is designed to prevent. Thus, under any reasonable interpretation of Nevada water law and water policy, all of the evidence showed that over the long term SNWA's proposed permanent extraction and export of groundwater from Spring Valley would constitute unsustainable and impermissible groundwater mining.

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In addition, the models all concur that there will be a significant magnitude of drawdown which will spread throughout the Spring Valley, eventually resulting in the drying up of springs and wetlands through most if not all of Spring Valley. As the witnesses for Protestant Long Now Foundation testified, this drawdown will affect playa areas in Spring Valley that presently are moist, and could well give rise to substantially greater dust emissions in the valley, affecting human and animal health, as well as Spring Valley's important scenic and recreational values. *See* 13 App. at WPC\_3043-105. By the same token, the drawdown caused by the SNWA's proposed pumping will create irreconcilable conflicts with existing rights such as those owned by Protestant CPB and associated with the Cleveland Ranch, and other existing rights associated with privately owned ranching operations such as the Eldridge family's ranching operations in Spring Valley. As explained *infra* at Section VI, the evidence in the record also showed that SNWA's proposed hydrologic monitoring and mitigation plan for Spring Valley would do nothing more than mask these long-term effects for a few decades.

Perhaps the most blatant obfuscation at the heart of SNWA's hydrology case was SNWA's attempt to run away from its own model and the results of its own modeling efforts. On the one hand, the SNWA's witnesses testified that the predictive model they developed for use in preparing the Environmental Impact Statement for the same Groundwater Development Project was superior to other

models, and argued in particular that Dr. Myers' Spring Valley model should not be relied on because it was not as elaborately documented as SNWA's model. 8 SNWA App. at 003831-835; 18 SNWA App. at 003878. In its Petition, SNWA makes much of the fact that the State Engineer gave more weight to their model than to the models presented by Protestants. The irony of this position and statement is that SNWA's model yielded very similar results to the model produced by the Protestants, and all the models tended to show that this project will have environmentally devastating impacts. 5 App. at WPC\_1210-13; 6 App. at WPC\_1485-87; 3 App. at WPC\_00628; 25 SNWA App. at 005705-5707.

Perhaps this is why, at the same time as they touted the quality of their own model over protestants' models, SNWA's witnesses repeatedly urged the State Engineer and his staff to disregard the predictions of their own model. SNWA's witnesses even argued that the State Engineer could not use the SNWA's model for the very purpose it was developed and used in the BLM's Draft EIS, namely to predict likely hydrologic impacts and drawdown of the water table throughout the hydrologically connected basins in the region affected by the Applicant's proposed pumping. *See* 18 SNWA App. at 003835.

It was neither rational nor reasonable to allow SNWA to have it both ways with its model. The evidence in the record plainly demonstrates that, while it is flawed in some regards and has certain limitations, SNWA's model and the other

models, including Dr. Myers', that were developed to project the impacts of SNWA's proposed pumping in part or all of the affected region are useful tools for the State Engineer to employ to predict in at least general terms the impacts that are likely to occur and the order of magnitude or general degree of severity of such impacts across the affected areas. SNWA's inconsistent and blatantly self-serving approach to the use of its own model is belied by the fact that the uncontroverted evidence in the record shows that SNWA's model produces projections that are broadly similar to those produced by Dr. Myers' model and the other models that were presented by Protestants during the hearing. 25 SNWA App. at 05705-707; 23 SNWA App. at 005144-145. The clear implication of this general consensus among different models as to the geographic scope and magnitude of impacts from SNWA's proposed long-term pumping is that those projected impacts can be relied on to occur with a high degree of confidence. 25 SNWA App. at 005707-708. In the face of such evidence, it was arbitrary, capricious, and irrational for the State Engineer to disregard those predicted impacts.

In the same vein, SNWA's refusal to present any model runs extending beyond 75 years was nothing more than a patent attempt to hide from the uniform evidence of continually worsening impacts as SNWA's proposed groundwater development project continues to operate into the long-term future, which is what the water rights SNWA has applied for would permit and which the overwhelming

weight of the evidence indicates. Indeed, SNWA's General Manager, Patricia Mulroy, likened SNWA's supposed entitlement to this project to Rome's ability to build and permanently rely on its aqueduct system, a water supply system that has been in operation for two millennia. 10 App. at WPC\_2495. Reinforcing the fact that this proposed project must be viewed as much longer term than 75 years, no witness for SNWA was willing to commit to any limit whatsoever on the duration of SNWA's proposed pumping. SNWA's refusal to offer any evidence whatsoever concerning potential impacts beyond 75 years completely undercuts its case, and the State Engineer's temporally truncated analysis and findings, concerning both the availability of water and the proposed use's likely environmental impacts and conflicts with existing rights.

**VI. THE DISTRICT COURT PROPERLY HELD THAT IT WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE FOR THE STATE ENGINEER TO APPROVE SNWA'S APPLICATIONS IN RELIANCE ON SNWA'S VAGUE 3M PLANS WITHOUT HAVING MADE THE REQUIRED DETERMINATIONS REGARDING POTENTIAL CONFLICTS WITH EXISTING RIGHTS AND ENVIRONMENTAL IMPACTS UNDER NRS 533.370(2)**

The Nevada Legislature has required the State Engineer to identify and analyze whether conflicts with existing rights and economic and environmental impacts will, or are likely to, occur as a result of the proposed use, and if so to deny the applications as conflicting with existing rights, contrary to the public interest, or environmentally unsound. NRS § 533.370(2) and (3). Under NRS §

533.370(2) the public interest is a broad criterion that comprises a range of concerns and that has evolved over time. Nevada State Engineer Ruling No. 5726, at 37-43 (Apr. 16, 2006) (Spring Valley). As SNWA has conceded and the State Engineer previously has held, the public interest includes a requirement that the proposed use not cause unreasonable environmental harm resulting from hydrologic depletion as a result of the appropriation and export of the water, including effects on downgradient basins - such as White River Valley, Pahranaagat Valley, Moapa Valley, and Snake Valley - that depend on inflow from the basins of origin as well as those basins of origin themselves. 19 SNWA App. at 004010; *see also* Nevada State Engineer Ruling No. 5875, at 23- 25 (July 9, 2008) (Cave, Dry Lake, and Delamar Valleys Ruling). Such unreasonable environmental effects include undue impacts on wildlife populations and habitat and on air quality that would harmfully affect human health and significant recreational and aesthetic values in the affected areas as a result of the drawdown of groundwater tables and spring flows in both the basins of origin and those basins that are hydrologically connected and downgradient from the basins of origin. *See* Nevada State Engineer Ruling No. 5726, at 37-43; Nevada State Engineer Ruling No. 5875, at 23-25. For the basins of origin, Nevada's interbasin transfer provision articulates the standard as "whether the proposed action would be environmentally sound," but that phrase has not been defined with any more precision than the general language concerning

what would be unreasonable in terms of environmental impacts outside the basins of origin.

As discussed in other sections of this Answer, all the model projections agree that there will be significant drawdown in the water table over vast areas of the target basins as well as in hydrologically connected basins after just 200 years with a large percentage of water being drawn from storage. 5 App. at WPC\_1210-13; 23 SNWA App. at 005049; 24 SNWA App. at 005400; 23 SNWA App. at 005002; 25 SNWA App. at 005705-07. Substantial evidence in the record indicates that the drawdown will ultimately contribute to a long-term decline of biotic diversity throughout the affected area in eastern Nevada and western Utah, damage federal resources in the stipulated areas of interest, and cause devastating environmental effects. 4 App. at WPC\_0966-1000; 5 App. at WPC\_1001; 23 SNWA App. at 005049. The decline of spring discharge, stream flow, and wetland area predicted by the models of Protestants, the Bureau of Land Management, and SNWA itself will be the principle cause of this loss in biotic diversity. 4 App. at WPC\_0966-1000, 23 SNWA App. at 005050. As the water table drops, the depth to water will increase to such a degree that even the hardiest of phreatophytes (groundwater dependent plants) will be killed off throughout much of the valley. See 4 App. at WPC\_0788; 5 App. at WPC\_1049; 5 App. at WPC\_0056.

Such a loss of biodiversity will adversely affect state, federal, and private interests, special status species, and species that are presently undesignated. *Id.* If the long-term drawdown of the water table predicted by all of the models is allowed to unfold, the resulting decline in biodiversity will extend beyond the four valleys targeted by the applications presently under consideration into Snake Valley and the southern portion of the White River flow system. *Id.* In particular, 157 endemic wetland species (20 listed by USFWS as endangered or threatened) have been identified as likely to be adversely affected by the reduced spring discharge and wetland area caused by SNWA's proposed groundwater development project. 4 App. at WPC\_0998. In addition, five bird and one mammal species listed under NRS Chapter 501 and in the Nevada Natural Heritage Database also are likely to be adversely affected by the reduced wetland area that would result from SNWA's long-term groundwater extraction and export project. *Id.*

If the long-term drawdown predicted by all models is allowed to occur, the evidence in the record establishes that the result would be the disappearance of wetlands, sub-irrigated meadows, swamp cedars, resulting in the potential for invasion by nonnative species and increased dust emissions from bare ground and dried playas. 13 App. at WPC\_3043-3105; 22 SNWA App. at 004857-67. Impacts to Great Basin National Park air quality will also be likely. *Id.*

In the face of the uniformly damning groundwater modeling evidence, SNWA, consistent with its approach in other areas of its case, sidestepped the issue of environmental impact by presenting no real evidence on long-term predicted environmental effects, by unrealistically limiting any projections it did choose to make to 75 years, and by basing its entire so-called environmental impact analysis on a monitoring and mitigation program that is devoid of any objective, verifiable standards defining what impacts will be considered unreasonable or what thresholds of drawdown or other measurable criteria will trigger action, and equally devoid of any commitment to implement any particular concrete mitigation measure under any identified circumstances. In other words, SNWA presented no actual evidence to demonstrate that the proposed operation of the project over the long term on would not cause unreasonable environmental impacts or conflicts with existing rights. Accordingly, the State Engineer should have denied the applications for that reason alone.

Instead, rather than meaningfully evaluate the uncontroverted evidence suggesting SNWA's proposed use will lead to widespread significant, and steadily worsening, drawdown over the long term, the State Engineer deferred any real analysis of those impacts and conflicts to future processes under SNWA's monitoring and mitigation plans in order to avoid having to make the determination that NRS § 533.370(2) and (3) requires denial of SNWA's



applications. *See* 1 SNWA App. at 000156-65; 2 SNWA App. at 000335, 000348.

This deferred impact analysis is contrary to the State Engineer’s previous practice, is contrary to law, and is unsupported by substantial evidence in the record. *See* State Engineer Ruling No. 5621, at 25 (June 15, 2006) (Three Lakes Valley),<sup>29</sup> (rejecting proposal by SNWA to bypass the statutorily required review of potential impacts on the basis of a Monitoring and Mitigation Plan and stipulated agreement with federal agencies on the ground that “the offered mitigation may not be adequate to protect all existing water rights and resources and any such mitigation plan does not alleviate the State Engineer’s statutory requirements regarding review of the change applications in accordance with [NRS §§ 533.370(2) and (3)]”). *See also* Exhibit A, Order Vacating and Remanding State Engineer's Ruling, *Carter-Griffin v. Taylor*, CV-830008 (N.V. Dist. Ct., Oct. 19, 2009) (Senior District Judge Robison’s earlier decision independently reviewing and vacating the State Engineer’s 2008 Ruling No. 5875 granting SNWA’s Cave, Dry Lake and Delamar Valley applications in part because the Ruling ignored inevitable impacts, relying instead on monitoring and mitigation “with the State Engineer simply hoping for the best while committing to undo his decision if the worst occurs”).

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<sup>29</sup> <http://images.water.nv.gov/images/rulings/5621r.pdf>.

Even assuming the best monitoring and mitigation program, there simply was no substantial evidence showing that SNWA could develop the requested quantity of water in a long-term environmentally sound way given the scale and planned permanent duration of the proposed groundwater extraction and export project. As White Pine County, et al.'s witness Dr. John Bredehoeft, a leading authority on groundwater hydrology, testified, given the enormous quantity of water that will be pumped and the immense geographic scope and long-term duration of the project, managing pumping rates based on measured impacts is problematic, because there is considerable lag time in the system's measurable response to drawdown. Thus, by the time impacts are measured, it will be too late to prevent further impact. 25 SNWA App. at 005714-718; *see also* 23 SNWA App. at 005057. As explained in the preceding and following sections dealing with the hydrology of the affected groundwater systems, the reality is that all the available models showed that SNWA's proposed pumping will lead to inescapable, increasingly severe drawdown of the water tables thousands of years into the future (as far as has been modeled) in basins with very limited annual recharge, and there is simply no way to escape impacts when the long-term scale of the impacts is so massive.

Even if the Court were to accept that some management and mitigation plan could be effective in the face of such challenges, SNWA's so-called adaptive

management approach has set no goals to ensure that any future management or mitigation will be possible or capable of effective implementation. As explained in the uncontroverted testimony of White Pine County et al.'s expert witnesses Professors Duncan Patten and James Deacon, and Dr. Robert Harrington, best practices require that an applicant must establish objective, verifiable triggers or thresholds and targets or goals prior to development of any water in order to provide meaningful assurance that a management plan is capable of being effectively implemented. 25 SNWA App. at 005598-599; 22 SNWA App. at 004942-943; 23 SNWA App. at 005048-049, 005055-056. Yet both of the Applicant's witnesses on monitoring and mitigation, Mr. Prieur and Mr. Marshall, conceded that no such site specific goals or triggers have been identified and that specific monitoring sites have yet to be identified to protect environmental resources. 19 SNWA App. at 004124-130, 004135-136.

Thus, on its face, SNWA's 3M plans provided the State Engineer with very little concrete information about any actual monitoring and mitigation tools for the water rights and project being pursued by SNWA: limited existing site and resource specific baseline information; no information about the specifics of a proposed monitoring regime (such as type and location of wells, the frequency of measurements, the type or degree of detail and accuracy of measurements to be conducted); no information about the thresholds or trigger levels to be established

for particular mitigation action; no information about the specific mitigation measures that would be provided for in the plan; no information to demonstrate whether any of the proposed mitigation measures would be effective in mitigating the potential harms; no information, in short, that would permit or support a reasoned, informed decision as to whether such a supposed monitoring and mitigation plan will have any reasonable likelihood of being effective. Merely reciting this catalogue of essential information that is completely missing from the record below should suffice – on the level of common sense and logic – to demonstrate that the State Engineer’s decision to permit SNWA’s applications on this basis was unreasoned, irrational, and unsupported by substantial evidence.

But the Court need not rely solely on common sense and logic. There is a substantial body of case law that addresses what sort of information, or evidence, is required in analogous situations to sustain an administrative decision-maker’s approval of applications or a project on the basis of a monitoring and mitigation plan. This decisional law and statutory requirements in neighboring states clearly illustrate that far more than the speculative promise found in the record below is required to sustain a decision premised on the implementation of a monitoring and mitigation plan. Courts generally require mitigation plans to be detailed and supported by sufficient data to enable the agency to adequately evaluate potential impacts. *Western Land Exchange Project v. BIA*, 315 F. Supp.2d 1068, 1095-96

(D. Nev. 2004); *Oregon Natural Desert Ass'n v. Singleton*, 47 F. Supp. 2d 1182, 1193 (D. Or. 1998) (citing *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir.1998)). Indeed, when the State Engineer was confronted with an application for water from the carbonate aquifer system that was supported by little or no pumping data, he properly ordered further studies that would provide the necessary data before granting the applied for water. See Nevada State Engineer Order No. 1169 at 6,<sup>30</sup> In *Oregon Natural Desert Ass'n*, the court held that an agency must analyze mitigation measures in detail and explain how effective the measures would be. 47 F. Supp. 2d at 1193 (citing *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 (9th Cir.1986), *rev'd on other grounds*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)); Colo. Rev. Stat. § 37-92-103 (“‘Plan for augmentation’ means a detailed program, which may be either temporary or perpetual in duration, to increase the supply of water available for beneficial use in a division or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water, or by any other appropriate means”); Mont. Code Ann. § 85-2-362 (outlining detailed requirements for

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<sup>30</sup> <http://images.water.nv.gov/images/orders/1169o.pdf>.

monitoring and mitigation plans). Finally, courts have consistently held that approvals of applications or projects on the basis of a mitigation plan will be upheld only when the mitigation measures significantly compensate for the proposed action's adverse environmental impacts. *See Siskiyou Regional Educ. Project v. Rose*, 87 F. Supp. 2d 1074, 1101 (D. Or. 1999).

The SNWA 3M plans relied on by Ruling Nos. 6164, 6165, 6166, and 6167 satisfy none of these criteria. Not only do SNWA's 3M plans lack objective, measurable and verifiable goals or triggers, concrete commitments to implement particular mitigation measures under specified conditions, or any of the specificity required by law, the program's decisionmaking regime is constructed in a manner likely to render the program ineffective, because it is consensus driven requiring unanimous consent on the committees that will make decisions about standards, goals, triggers, the assignment of causation, and whether to implement mitigation. Consequently, SNWA has veto authority at the stages of the process that determine whether to monitor, what data to collect, how to interpret it, and what ranges of responses are contemplated. 19 SNWA App. at 004195. SNWA's monitoring and mitigation program includes no clear process for implementation of mitigation measures, no definite dispute resolution mechanism, no timeframe or concrete procedure for decisionmaking to ensure that action will be taken in a timely fashion, and does not specify how conflicts will be resolved or what specific

management or mitigation measures will be used. 8 App. at WPC\_1895-597; 25 SNWA App. at 005595-597. The plans do not even *require* that SNWA report any perceived problems. It only requires that *if* a problem is reported, the parties will begin the potentially long process of talking about it. The program's reference to third party intervention in the event that consensus cannot be reached is not concretely mandated by any provision in the program, and it is unclear exactly how a dispute would be handled and resolved, if at all. Moreover, the third party will receive only the data that a group of committees effectively controlled by SNWA sees fit to generate and will receive reports and recommendations only from the same SNWA-controlled bodies.

As a result of SNWA's plans' vagueness and deferral of critical decisions to opaque processes and committees, no reasonable mind could be assured that effective action will be taken in a timely fashion if necessary. Thus, the State Engineer arbitrarily and capriciously relied on legally insufficient monitoring and mitigation plans as a substitute for the statutorily required thorough evaluation of potential conflicts and impacts. Accordingly, the district court did not err in finding that the State Engineer's reliance on SNWA's monitoring and mitigation program as a substitute for a meaningful evaluation of potential conflicts with existing rights and unreasonable environmental impacts is arbitrary, irrational, not supported by substantial evidence in the record, and contrary to law.

Further, given that more than twenty years after the applications in question were filed SNWA continues to avoid coming forward with concrete evidence as to the long-term impacts of its proposed use, and refuses to commit to any concrete, objectively verifiable set of mitigation plans or measures, White Pine County, et al., respectfully urge the Court to go further than the district court and direct the State Engineer on remand to enter a ruling denying SNWA's applications on the ground that SNWA has failed to demonstrate that its proposed use will conform with the requirements of NRS 533.370(2) and (3).

**VII. THE DISTRICT COURT PROPERLY FOUND THAT THE STATE ENGINEER ACTED ARBITRARILY AND CAPRICIOUSLY AND VIOLATED HIS STATUTORY OBLIGATIONS BY APPROVING SNWA'S APPLICATIONS IN CAVE, DRY LAKE, AND DELAMAR VALLEYS DESPITE UNCONTROVERTED EVIDENCE AND PRIOR STATE ENGINEER RULINGS AND ORDERS SHOWING THERE WAS NOT SUFFICIENT REMAINING UNAPPROPRIATED WATER AVAILABLE IN THE WHITE RIVER FLOW SYSTEM**

With regard to the reversal of the State Engineer's approval of SNWA's applications in Cave, Dry Lake, and Delamar Valleys – the three upgradient valleys in the interbasin White River Flow System – notwithstanding the Petitioners' mischaracterizations, the district court neither reweighed the evidence below nor substituted its judgment for the State Engineer's. Rather, the District Judge saw through the obfuscations of SNWA and focused on the obvious contradiction between the State Engineer's radical, inconsistent ad hoc approach to



determining the availability of water in these three upgradient valleys in the rulings below and his previous careful, logically coherent, approach to and findings regarding the basins in the lower, downgradient, portion of the same White River Flow System in his prior Order No. 1169.

Although he did not acknowledge it in this second round of rulings on SNWA's applications in these three basins, in his earlier 2008 ruling on them the State Engineer acknowledged his long-standing, previous practice of setting one-half of the subsurface discharge as the maximum perennial yield that could be used in determining the amount of unappropriated water available in basins that discharge most of their groundwater via subsurface flow to hydrologically connected down-gradient basins. Nevada State Engineer Ruling No. 5875, at 8 (July 9, 2008 ruling on SNWA's Cave, Dry Lake, and Delamar Valleys Pipeline Applications).<sup>31</sup> As the State Engineer acknowledged in his 2008 ruling, however, the amount of subsurface discharge that can be captured in such interbasin flow systems is highly variable and uncertain and even the ceiling of one-half of subsurface discharge may be excessive in some circumstances. *Id.* at 8-9.

Thus, the State Engineer has recognized that even using the conservative one-half of subsurface discharge methodology to account for the uncertainty

concerning the amount and path of such interbasin flow may not be sufficient to protect against over-appropriation. For, “when conditions are such that there is subsurface flow through several basins, there is a potential for double accounting and overappropriating the resource if the perennial yield of each basin is equal to one half of the subsurface outflow and basin subsurface inflows are not adjusted accordingly. Therefore, allowances and adjustments are required to the perennial yields of basins in these ‘flow systems’ so that over appropriation does not occur.” *Id.* at 9-10. In this recognition, he was echoing earlier rulings that had similarly explained the State Engineer’s methodology for determining perennial yield in basins with a substantial amount of subsurface outflow, such as his Granite Springs Valley ruling, in which he noted the need to reinforce the conservatism of the “one-half of subsurface outflow” methodology by considering “local hydrology, as well as prior rights appropriated in other basins within the same ground-water flow system.” Nevada State Engineer Ruling No. 5782, at 10 (Sept. 17, 2007) (Granite Springs Valley).<sup>32</sup> *Cf.* Nevada State Engineer Ruling No. 5712, at 14-15 (Feb. 2, 2007) (Kane Springs Valley) (carefully accounting for inflow from up-gradient

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<sup>31</sup> <http://images.water.nv.gov/images/orders/5875r.pdf>.

<sup>32</sup> <http://images.water.nv.gov/images/rulings/5782r.pdf>.

basins, outflow to down-gradient basins, and senior appropriated water rights in down-gradient basins within the White River Flow System).<sup>33</sup>

The necessity of employing a prudent, conservative methodology for estimating the perennial yield of basins within interbasin flow systems like the White River Flow System (“WRFS”), in which Cave, Dry Lake, and Delamar valleys are situated, is further underscored by the State Engineer’s in-depth discussion of and findings with regard to the carbonate aquifer system in his Carbonate-Rock Aquifer<sup>34</sup> Order. Nevada State Engineer Order No. 1169.<sup>35</sup> In Order 1169, the State Engineer found: that “many persons or entities have filed water right applications requesting permission to appropriate substantial quantities of underground water from the carbonate-rock aquifer system,” that “a significant period of study would be required” “to arrive at some reasonable understanding of the carbonate-rock aquifer system”; and that “unless this understanding is reached, the development of carbonate water is risky and the resultant effects may be

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<sup>33</sup> <http://images.water.nv.gov/images/rulings/5712r.pdf>.

<sup>34</sup> In Order 1169 the State Engineer discussed the complexity and profound uncertainties of the Carbonate Terrane’s geology and hydrology, and he referred to the deep interbasin aquifer system running through that terrane as the “carbonate-rock aquifer system.” That same deep interbasin aquifer system is now more commonly referred to simply as the “carbonate aquifer system.” Both appellations refer to the same system and may be used interchangeably.

<sup>35</sup> <http://images.water.nv.gov/images/orders/1169o.pdf>.

disastrous for the developers and current users.” *Id.* at 1-2 (citation omitted). The State Engineer next discussed some of the challenges of understanding the carbonate system and the research that had been performed, noting the significant harms that would result from allowing large-scale sustained withdrawals of water from the system. *Id.* at 2-3. He then found that very substantial amounts of carbonate aquifer water flow from up-gradient basins in the White River Flow System into Coyote Spring Valley and the Muddy Springs Area at the lower end of that flow system. *Id.* at 5. He went on to review the extensive senior water rights already existing in those lower portions of the flow system, noting that as a result of the Muddy River Decree and previously issued water right permits those lower basins in the White River Flow System were, in effect, already fully appropriated. *Id.* at 5-6. So, the flow into these basins at the bottom of the flow system, which comes out of the basins in the upgradient area of the flow system, including the subsurface discharge from Cave, Dry Lake, and Delamar valleys, already has been appropriated by senior water rights holders in those lower basins. In light of the potentially “disastrous” results of allowing that already appropriated water to be appropriated farther upstream in the system in an inconsistent manner by junior applicants, the State Engineer concluded that it would not be prudent to issue any more water rights from the carbonate aquifer system until a significant period of study and test pumping of the rights that already had been issued was completed

“to determine if the pumping of those [already existing] water rights will have any detrimental impacts on existing water rights or the environment.” *Id.* at 7. Only after the completion of that study period would the State Engineer “make a determination if he has sufficient information to proceed with ruling on . . . other applications pending for the appropriation of water from the carbonate-rock aquifer system.” *Id.* at 8.

Given the complexity of the carbonate aquifer system, the potentially vast scope and severe nature of the detrimental effects and the “havoc that could be created” by permitting it to be overappropriated, few would argue with the prudence, and obvious rationality, of proceeding in so careful, deliberate, and informed a fashion as was called for in the State Engineer’s Carbonate-Rock Aquifer System Order. Given the fact that the test pumping and subsequent analysis of the resulting data required by Order 1169 had not yet been completed at the time the State Engineer issued the rulings below, the rational, prudent way for the State Engineer to have proceeded in the Rulings at issue here would have been to follow a consistent and conservative approach to SNWA’s applications for carbonate aquifer water from Cave, Dry Lake, and Delamar valleys which are important upgradient sources of supply for the downgradient basins in the WRFS. This is especially true because the down-gradient basins in the WRFS that depend on outflow from Cave, Dry Lake, and Delamar Valleys all are already fully

appropriated. *See* Nevada State Engineer Order No. 1219 (July 5, 2012) (White River Valley); Nevada State Engineer Order No. 1199 (Apr. 20, 2009) (Pahranagat Valley); Nevada State Engineer Order No. 1023 (Apr. 24, 1990) (Muddy River Springs Valley); Nevada State Engineer Order No. 798 (Sept. 16, 1982) (Lower Moapa Valley); Nevada State Engineer Order No. 726 (June 11, 1979) (Lake Valley); Nevada State Engineer Order No. 905 (Aug. 21, 1985) (Coyote Spring Valley); *see also* 4 App. at WPC\_0850.

Further, in the hearing below the only substantial evidence presented concerning water rights and the level of appropriation in down-gradient basins in the WRFS all tended to demonstrate that the down-gradient basins in the White River Flow System were fully appropriated, if not already over-appropriated, and that the effects of the drawdown that eventually will result from permitting SNWA to effectively double-appropriate that same water from the up-gradient basins in the same flow system would be devastating. 4 App. at WPC\_0850-56; 25 SNWA App. at 005723; *see also*, 4 App. at WPC\_0838-839, 0842-43; 11 App. at WPC\_2605, 2614; 9 App. at WPC\_2197; 9 App. at WPC\_2192-96; 11 App. at WPC\_2547; 11 App. at WPC\_2550-02; 9 App. at WPC\_2198-201; 11 App. at WPC\_2549-50. 11 App. at WPC\_2605; 11 App. at WPC\_2627; 11 App. at WPC\_2605-06; 5 App. at WPC\_1064-73, *see also supra*, Statement of the Facts and Procedural History Section.

As noted above, in Order No. 1169 the State Engineer prudently held that, because of the vast, interconnected, and poorly understood nature of the carbonate aquifer system and the White River Flow System, which contains the three valleys at issue here, it would be irresponsible to permit any additional appropriative water rights from that flow system without first conducting appropriate hydrologic studies. The rationale underlying Order No. 1169 was straightforward and logical. Because the basins at the lower end of this flow system already appear to be fully appropriated, permitting additional water rights applications from the system would pose an unacceptable risk of causing cascading harmful impacts throughout the system, imperiling both existing downgradient senior water rights and environmental resources throughout the system. *See* Nevada State Engineer Order No. 1169, at 1, 2, 6, & 7. Accordingly, the State Engineer reached the only logical conclusion he could in Order No. 1169 by requiring that more studies be conducted and more conclusive information be obtained thereby to demonstrate reliably whether there was any additional unappropriated water available in the system *before* the SE would grant any additional water rights from the system.

The essential question raised by the applications being considered under both Order No. 1169 and Ruling Nos. 6165, 6166, and 6167 is identical: Whether there is any additional unappropriated water in the connected basins within the White River Flow System, beyond the historic estimates of each basin in isolation,

that properly would permit additional water rights to be granted from the connected basins within that Flow System. In Order No. 1169 the State Engineer sanely held that he could not answer that question with any reasonable assurance until additional study had been conducted to provide more information concerning the capacity of the Flow System in relation to the full extent of already existing rights in the Flow System.

In Ruling Nos. 6165, 6166, and 6167, despite the fact that the study required by Order No. 1169 had not been completed, the State Engineer arbitrarily abandoned that prudent approach and proceeded to grant just such additional rights from three basins within the same Flow System on an ad hoc basis. The State Engineer's decision below to grant SNWA very large additional water rights from the very same flow system as was at issue in Order No. 1169, without considering the results of the study required under Order No. 1169, constitutes one of the most fundamentally irrational and arbitrary aspects of his rulings below.

The State Engineer's radical departure from his previous methodology for estimating perennial yield in basins characterized by substantial outflow was not based on any adequate rationale. *See Western States Petroleum Ass'n v. E.P.A.*, 87 F.3d 280, 284 (9th Cir. 1996). The State Engineer's adoption of such a radically permissive and inconsistent approach to perennial yield in Dry Lake Valley appears to be even more arbitrary and irrational given the fact that he chose to



follow a different approach when it came to Cave Valley. 2 SNWA App. at 00319-22. Thus, the State Engineer's decision to permit all of the recharge and subsurface outflow of Dry Lake Valley to be appropriated are arbitrary and irrational on their face, contrary to the express requirements of NRS § 533.370(2), and not supported by any substantial evidence in the record. *See Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

Accordingly, the district court below properly found that the State Engineer's rulings as to the amount of water available for SNWA to appropriate from Cave, Dry Lake, and Delamar Valleys was illogical, arbitrary, capricious, and not supported by substantial evidence. *See* 1 SNWA App. at 000018-20; *see also* Exhibit A, Order Vacating and Remanding State Engineer's Ruling, *Carter-Griffin v. Taylor*, CV-830008 (N.V. Dist. Ct., Oct. 19, 2009) (independently coming to the same conclusion with regard to State Engineer Ruling No 5875 (the first Cave, Dry Lake, and Delamar Valleys Ruling)).

In their Petitions SNWA and the State Engineer do not address the substance of Order No. 1169 or the clear implications of that order for the management of water in other portions of the White River Flow System. Instead they erect and argue against a more convenient, but inapposite, straw man argument about the fact that a groundwater flow system is not a surface river. This diversionary tactic is ineffective, however, because Order No. 1169 made factual findings and adopted

a clear logical approach to the White River Flow System that have plain implications concerning the outflow from the upgradient basins in that flow system, including Cave, Dry Lake, and Delamar Valleys.

As explained above, there is no dispute that the vast majority of recharge in Cave, Dry Lake, and Delamar Valleys is discharged as subsurface outflow to downgradient basins in the White River Flow System. Pursuant to Order No 1169 and other orders of the State Engineer, all the groundwater in those downgradient valleys, including the subsurface inflow from upstream valleys such as Cave, Dry Lake, and Delamar Valleys, already is subject to prior existing water rights. The State Engineer has recognized the dangers of allowing water in the White River Flow System that already has been appropriated to be double appropriated in Order No. 1169. Therefore, it plainly would be incompatible with existing water rights in and the environment soundness of those hydrologically connected downgradient basins to allow SNWA to appropriate and export any part of the interbasin subsurface outflow from Cave, Dry Lake, or Delamar Valley, because that interbasin flow is subject to existing water rights in the down-gradient valleys within the same flow system.

The Petitioners' contentions about a groundwater flow system not being a surface river, and having slower rates of water flow and less certainty about the precise path the water takes from its point of origin to its destination, all are

unavailing because they do not address the fundamental problem of allowing duplicative appropriation and consumptive use of water that already is subject to prior appropriation and use elsewhere in the same system, regardless of whether the flow system is above or below ground. Water may flow more slowly through a groundwater flow system than a surface stream system, but it still is subject to the law of gravity and it still can only be appropriated and consumptively used once from the same system. Because the groundwater recharge in these three upgradient basins within the White River Flow System is discharged from these basins as subsurface interbasin outflow to downgradient basins in the same flow system, where it already is subject to prior existing water rights, that recharge is not available for duplicative appropriation and consumption, as the State Engineer's rulings below illogically permit.

The State Engineer's sharp deviation from methodology underpinning his previous orders pertaining to the same interbasin flow system was not supported by any adequate rationale. *See Western States Petroleum Ass'n v. E.P.A.*, 87 F.3d 280, 284 (9th Cir. 1996). As explained above, the State Engineer's adoption of such a radically permissive and inconsistent approach to perennial yield appears to be even more arbitrary and irrational given the fact that he followed different approaches even within these three Valleys. Accordingly, the State Engineer's rulings as to the perennial yield and availability of groundwater for appropriation

from Cave, Dry Lake, and Delamar Valleys were arbitrary and irrational, contrary to the express requirements of NRS § 533.370(2), and not supported by substantial evidence. *See Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

Following the district court decision below the State Engineer issued Ruling No. 6255,<sup>36</sup> which followed up on Order No. 1169. In Ruling No. 6255, even on the basis of a lesser level of pumping than was originally required under Order No. 1169, the State Engineer found “the evidence is overwhelming that unappropriated water does not exist” in any of the basins in the lower, or downgradient portion of the White River Flow System. Ruling No. 6255 at 26. In Ruling No. 6255 the State Engineer acknowledged that the water that already was fully appropriated in the lower portion of the Flow System, including the discharge at Muddy River Springs, includes groundwater flowing from Cave, Dry Lake, and Delamar Valleys downgradient through the System into the lower portion of the System. *Id.* at 27. He also held that, with regard to the basins in the lower portion of the Flow System, “[s]ubsurface inflow is appropriated as well.” *Id.* Thus, this latest Carbonate Rock Aquifer Ruling only serves to confirm the fundamental fact that the groundwater subject to SNWA’s applications in Cave, Dry Lake, and Delamar Valleys, which is discharged from those upgradient valleys in the WRFS as

subsurface inflow to the downgradient basins in the WRFS, already is appropriated.

The State Engineer's attempt to circumvent the obvious illogical contradiction between his findings and conclusions in Ruling No. 6255, which are based on actual concrete evidence, and his inconsistent, duplicative grant of massive new water rights to SNWA in the upgradient basins in the WRFS is a transparent post hoc rationalization, which does not hold up to even a modicum of rational scrutiny. To begin with, the State Engineer attempts to explain away the contradiction inherent in the duplicative new appropriations in the upgradient basins by stating that the outflow in those basins is the result of recharge that occurs in those basins. But that, of course, in no way changes the fact that all of the recharge which discharges into the lower, downgradient, portion of the Flow System has been found to be already appropriated. Thus, there necessarily is a direct conflict between the new duplicative appropriations in Cave, Dry Lake, and Delamar Valleys and the existing rights to all of that water as subsurface inflow to the downgradient basins.

The State Engineer's only other excuse for the stark contradiction between the duplicative appropriations he approved in the upgradient basins and his finding

---

<sup>36</sup> <http://images.water.nv.gov/images/rulings/6255r.pdf>

that all of the subsurface outflow from those basins into the downgradient basins already is fully appropriated is to assert speculatively that he believes it will take “hundreds of years” for the inevitable conflicts and unreasonable impacts of that double appropriation to become manifest. Leaving aside the uncertainty about how long it will take before the inevitable conflicts and unreasonable effects become problematic in an immediate sense, it is illogical for the State Engineer to approve applications for patently duplicative rights in perpetuity for a proposed use that is concededly intended to be as permanent as the two thousand year-old Roman aqueduct system on the grounds that it may take a couple of hundred years for the devastating consequences of that duplicative, conflicting appropriation to become obvious. This is especially true because as explained earlier, the resulting long-term conflicts with existing rights and environmental harms will only be all the more difficult for future Nevadans to cope with when so much momentum has built up behind them in this vast interbasin flow system.

For all these reasons, the district court properly found that the State Engineer’s approval of SNWA’s applications in Cave, Dry Lake, and Delamar Valleys was arbitrary, capricious, and not supported by substantial evidence. While the district court deferentially remanded those applications back to the State Engineer so that he could conduct further study to determine whether the proposed new appropriation from those valleys would conflict with existing rights or cause

unreasonable effects in downgradient basins, the findings and clear implications of Ruling No. 6255 now make it apparent that there is an unavoidable, direct conflict between SNWA's proposed use and existing rights in the fully appropriated downgradient basins of the White River Flow System. Accordingly, this Court should not only affirm the district court's finding that the State Engineer's approval of SNWA's application Cave, Dry Lake and Delamar Valleys was arbitrary, capricious and unsupported by substantial evidence, but also should issue an Order directing the State Engineer on remand to deny those applications on the grounds that there is no unappropriated water available to satisfy those applications and that the proposed use will conflict with existing rights and threaten to prove detrimental to the public interest by causing unreasonable environmental impacts in downgradient basins in the White River Flow System.

### **CONCLUSION**

For the reasons set forth above, Real Parties in Interest White Pine County, et al., respectfully urge the Court to deny the Petitions for Writs of Mandamus or, In the Alternative, Prohibition, and to affirm the District Court's Decision in all regards.

In addition, as explained above, the history of this case and the multiple proceedings that have led to it evinces a stubborn, arbitrary, and capricious determination on SNWA's part to conceal the real evidence regarding the

unsustainability and inevitable impacts of its proposed water use and on the State Engineer's part to grant SNWA's long-pending groundwater extraction and export applications in Spring, Cave, Dry Lake, and Delamar Valleys regardless of the evidence. In light of that history of intransigent refusal of both SNWA and the State Engineer to abide by the requirements established by the Legislature, White Pine County, et al., further respectfully request the Court to issue an Order directing the State Engineer on remand to issue new rulings denying those applications on the grounds:

(1) that the applicant has failed to demonstrate that there is sufficient unappropriated water available on a sustainable basis to grant the Southern Nevada Water Authority's applications for rights to pump groundwater in perpetuity from Spring Valley, Cave Valley, Dry Lake Valley, and Delamar Valley, as required by NRS 533.370(2); and

(2) that the applicant has failed to demonstrate that its proposed water use would neither conflict with existing water rights nor threaten to prove detrimental

///

///

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to the public interest by causing unreasonable environmental impacts, as required by NRS 533.370(2) and (3).

Respectfully submitted this 2nd day of September, 2014,



---

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*Attorneys for Real Parties in Interest White Pine County,  
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 with 14-point, double spaced Times New Roman font.

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions the event that the

///

///

///

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 2nd day of September, 2014,



---

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*Attorneys for Real Parties in Interest White Pine County,  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **ANSWER TO SOUTHERN NEVADA WATER AUTHORITY PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, PROHIBITION** was filed electronically with the Nevada Supreme Court on the 2nd day of September, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Paul EchoHawk

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Aaron Waite

Paul Taggart

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Gregory Walch

Dana Walsh

Joel Henriod

John Rhodes

Jerry Snyder

Paul More

Cassandra Joseph

Daniel Polsenberg

I further certify that on the 2nd day of September, 2014, I caused to be served, via USPS first class mail, a complete copy of the foregoing **ANSWER TO SOUTHERN NEVADA WATER AUTHORITY PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, PROHIBITION** on the following attorneys of record who are not registered for electronic service:

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EXHIBIT D

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The Honorable Robert E. Estes  
Senior District Judge  
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Yerington, Nevada 89449

/s/ Noel Simmons  
Noel Simmons

**Exhibit A**

Order Vacating and Remanding State Engineer's Ruling, *Carter Griffin, et al. v. Taylor* (October 19, 2009)

**Exhibit A**

Order Vacating and Remanding State Engineer's Ruling, *Carter Griffin, et al. v. Taylor* (October 19, 2009)

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Case No. CV-0830008

Dept. No. II

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LINCOLN COUNTY CLERK  
JMS

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF LINCOLN

CARTER-GRIFFIN, INC., et al.,  
and CAVE VALLEY RANCH, LLC,

Petitioners,

vs.

TRACY TAYLOR, Nevada State  
Engineer; STATE OF NEVADA  
DIVISION OF WATER RESOURCES;  
DOES I through X; and ROE  
CORPORATIONS I through X,  
inclusive,

Respondents,

SOUTHERN NEVADA WATER  
AUTHORITY,

Real Party in  
Interest.

ORDER VACATING AND REMANDING  
STATE ENGINEER'S RULING

Petitioner Carter-Griffin, Inc. has requested judicial review of the Nevada State Engineer's Ruling Number 5875 issued July 9, 2008. That ruling granted a transfer of 18,755 acre feet of water annually to the Real-Party-in-Interest from the Cave, Dry Lake, and Delamar Valleys in eastern Nevada, pursuant to the Real-Party-in-Interest's applications 53987, 53988, 53989, 53990, 53991, and 53992. This matter has been fully

1 briefed and oral arguments held. Having examined all relevant  
2 pleadings and papers on file herein, having considered the  
3 arguments of counsel presented during the hearing, and good  
4 cause appearing, the Court now enters the following order:

5 I. Summary of the Case

6 In 1989, the Las Vegas Valley Water District ("LVVWD")  
7 filed multiple applications to transfer ground water from  
8 several rural basins in east-central and southern Nevada.  
9 Administrative Record at 7087. Thereafter, the Southern Nevada  
10 Water Authority ("SNWA") was created and acquired rights to  
11 pursue these applications. AR at 2. The petition before the  
12 Court deals with only some of those applications, specifically  
13 Cave Valley: applications 53988 and 53897; Delamar Valley:  
14 applications 53991 and 53992; and Dry Lake Valley:  
15 applications 53989 and 53990. AR at 2545-56. Through these  
16 applications, SNWA sought to acquire rights to 34,752 acre feet  
17 of water annually within the three basins. AR at 6393.

18  
19 Certain applications for water rights in Spring Valley not  
20 subject to this petition were ruled upon by the State Engineer  
21 on or about April 16, 2007. AR at 6252. On January 7, 2008,  
22 SNWA entered into a stipulated agreement with several  
23 governmental agencies whereby the agencies abandoned their  
24 protests against the applications included in this matter,  
25 among others, provided that SNWA entered into a three-body  
26 board to oversee and mitigate pumping impacts on east-central  
27 and southern Nevada. AR at 2446-83.  
28



1           Thereafter, in February 2008, the State Engineer held a  
2 two week hearing on the applications concerning Cave, Delamar,  
3 and Dry Lake Valleys. Multiple protestants, including but not  
4 limited to the petitioners in this case, appeared and presented  
5 evidence. See AR at 11544-579, 12185-87, 12170, 12248-249,  
6 12209-219, 12676-701, 12651-670, 12704-705, 12707-12711. SNWA  
7 presented evidence regarding the perennial yields of the  
8 subject valleys. AR at 23, 1190-92, 1236-40, 1251. The  
9 protestants meanwhile also presented impact evidence,  
10 referencing a model which SNWA declined to present as evidence.  
11 AR at 1236-1240, 1524-50, 12675-702.

13           Approximately five months later, the State Engineer issued  
14 Ruling No. 5875 partly granting SNWA's applications regarding  
15 the Cave, Delamar, and Dry Lake Valleys. AR at 2-41. In his  
16 decision, the State Engineer changed the published perennial  
17 yields for each of the basins. AR at 9. In each case, SNWA  
18 was granted most of the newly created amounts. AR at 40.  
19 Regarding the remainder, among other things the State Engineer  
20 reserved 0.5 acre-feet per year per projected residential  
21 house, although 2 acre-feet per year is the allowable  
22 residential use. AR at 36-37; NRS 534.180.

## 23           II. Standard of Law

24           Upon a petition for judicial review, the Court is confined  
25 to considering the administrative record. NRS 533.450(1). The  
26 proceedings in every case must be heard by the Court, and must  
27 be informal and summary, but full opportunity to be heard must  
28

1 be had before judgment is pronounced. NRS 533.450(2).

2 In reviewing the record, the Court must treat the State  
3 Engineer's decision as "prima facie correct, and the burden of  
4 proof shall be upon the party" challenging the decision.  
5 NRS 533.450(9). The Court may not substitute its judgment for  
6 that of the State Engineer, but is limited to determining  
7 whether there is substantial evidence in the record to support  
8 the decision. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262,  
9 264 (1979). Substantial evidence is "that which a reasonable  
10 mind might accept as adequate to support a conclusion." *Bacher*  
11 *v. Office of the State Eng'r of Nev.*, 122 Nev. 1110, 1121, 146  
12 P.3d 793, 800 (2006).  
13

14 [A] conclusion that substantial evidence supports the  
15 findings of the State Engineer does not, however, dispose of  
16 the . . . appeal. The applicable standard of review of the  
17 decisions of the State Engineer, limited to an inquiry as to  
18 substantial evidence, presupposes the fullness and fairness of  
19 the administrative proceedings: all interested parties must  
20 have had a "full opportunity to be heard," see NRS 533.450(2);  
21 the State Engineer must clearly resolve all the crucial issues  
22 presented, see *Nolan v. State Dep't of Commerce*, 86 Nev. 428,  
23 470 P.2d 124 (1970) (on rehearing); the decisionmaker must  
24 prepare findings in sufficient detail to permit judicial  
25 review, *id.*; *Wright v. State Insurance Commissioner*, 449 P.2d  
26 419 (Or. 1969); see also NRS 233B.125. When these procedures,  
27 grounded in basic notions of fairness and due process, are not  
28 followed, and the resulting administrative decision is  
arbitrary, oppressive, or accompanied by a manifest abuse of  
discretion, this court will not hesitate to intervene. *State*  
*ex rel. Johns v. Gragson*, 89 Nev. 478, 515 P.2d 65 (1973).

22 *Revert*, 95 Nev. at 786, 603 P.2d at 264.

23 The Court is free to decide purely legal questions *de*  
24 *novo*. *Town of Eureka v. Office of the State Eng'r of Nev.*, 108  
25 Nev. 163, 165, 826 P.2d 948, 949 (1992). A purely legal  
26 question is one that is not dependant upon, and must  
27 necessarily be resolved without reference to, any fact in the  
28

1 case. *Beavers v. Department of Motor Vehicles & Pub. Safety*,  
2 109 Nev. 435, 438 n.1, 851 P.2d 432, 434 n.1 (1993). While the  
3 State Engineer's interpretation of law is persuasive, and the  
4 court should give it great deference when it is within the  
5 language of the applicable statutory provisions, it is not  
6 controlling. *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 950;  
7 *Andersen Family Assocs. v. Ricci*, 124 Nev. Adv. Rep. 17, 179  
8 P.3d 1201, 1203 (2008).

9  
10 III. The State Engineer's Decision was Arbitrary,  
11 Oppressive, and a Manifest Abuse of Discretion.

12 The State Engineer acknowledged within his Ruling that all  
13 water rights previously available in the three basins at issue  
14 had already been fully distributed. The State Engineer then  
15 declared that the perennial yields available within the three  
16 basins had increased, thereby creating additional acre-feet  
17 annually ("afa") eligible for distribution.

18 In the process, the State Engineer reserved some of the  
19 new afa for future growth in the basins. However, no evidence  
20 was cited by the State Engineer in reaching his conclusions  
21 regarding how much water should be retained for future use  
22 within those basins. Instead, his conclusory findings were  
23 simply allowed to speak for themselves. For instance, the  
24 State Engineer uttered the following within the Ruling:

25  
26 the State Engineer does not believe that hundreds or thousands  
27 of homes will be built within the next 50 to 60 years as argued  
28 by Cave Valley Ranch. The State Engineer finds if the entire  
4,692 acres of potentially developable land was parceled into  
5-acre lots this would equate to 938 lots; however, he does not  
believe it is reasonable to think that all 938 lots will be

1 developed. Therefore, the State Engineer finds that it is  
2 reasonable to consider that up to one half of these 938 lots or  
3 469 lots has the possibility of a second-home/vacation-home  
4 being built on them in the future.

5 Under NRS §534.180(1) the allocation of a domestic well  
6 is 2.0 acre-feet per year and while it is true that any  
7 domestic well drilled in Cave Valley will have the statutory  
8 authority to withdraw the stated 2.0 acre-feet per year, from a  
9 management perspective it is highly unlikely this would be the  
10 case. If a property is occupied 60 days per year this equates  
11 to the prorated equivalent of 0.33 acre-feet per year. To  
12 account for some permanent residences and to ensure sufficient  
13 unappropriated water is left in Cave Valley, an allocation of  
14 0.5 of an acre-foot per year will be used for each potential  
15 lot. The State Engineer finds it is reasonable to leave 0.5  
16 afa for each of the 469 lots for future growth and development  
17 for a total of 235 afa. the State Engineer finds water should  
18 also be left in the basin for other uses, such as stock-  
19 watering and minor commercial uses; therefore, an additional 40  
20 afa will be left in the basin for other uses such as stock-  
21 watering and minor commercial for a total of 275 afa total  
22 being left in the basin of origin for future growth and  
23 development.

24 AR at 36-37.

25 As described by the State Engineer, these conclusions and  
26 findings were simply based upon his belief. No evidence was  
27 cited for the conclusions, let alone substantial evidence, with  
28 the State Engineer citing instead to his management  
perspective. Thus the State Engineer's conclusion about the  
proper amount of afa to be reserved within Cave Valley was his  
best guess as the State Engineer. This by definition was  
arbitrary, particularly where only 0.5 acre-feet per year per  
projected residential house was reserved for future growth,  
even though 2 acre-feet per year is the allowable residential  
use.

Similarly, in a prior ruling, the State Engineer declined  
to allow the distribution of greater amounts of water annually  
without significant studies being undertaken to demonstrate

1 that existing use was not already stressing the aquifers at  
2 issue, AR at 5794-5804, yet here, the State Engineer simply  
3 decided that the applicant's proffered models were sufficient  
4 to increase the perennial yields, with monitoring and  
5 mitigation plans referenced as sufficient in the event the  
6 State Engineer was wrong.

7         This solution portends a water rights manager seeking a  
8 resolution to a problem that has been pending since the  
9 applications at issue were first tendered in 1989, namely the  
10 competition for water between the urban landscape of Southern  
11 Nevada and its rural brethren. In the past, the State Engineer  
12 required specific empirical data before taking the significant  
13 step of allowing existing water to be transferred out of basin.  
14 In Ruling No. 5875 however, the State Engineer was satisfied by  
15 normative, predictive data without detailing why that change  
16 was acceptable. While this may have resolved the water  
17 management problem presented by the applications, the sudden  
18 resolution of simply 'printing more money' or mining for water  
19 by declaring that more afa was available when viewed through a  
20 new prism, without explanation as to what changed to allow the  
21 new approach, presents the essence of an arbitrary decision.

22         As acknowledged by the State Engineer, "in dry valleys it  
23 takes an exceedingly long time to reach equilibrium and effects  
24 will eventually spread out from the basin of origin and will  
25 affect the down-gradient basins of White River Valley and  
26 Pahranaagat Valley." AR at 22. Despite this statement, the  
27  
28

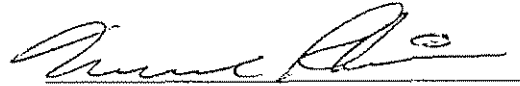
1 State Engineer both changed the method by which the existing  
2 perennial yields were measured and granted the applications  
3 without a clear understanding of the consequences, simply  
4 relying upon the eventual outcome as the measure in the form of  
5 a monitoring and mitigation program. Thus, the State  
6 Engineer's ruling results in an oppressive consequence for the  
7 basins affected, with the State Engineer simply hoping for the  
8 best while committing to undo his decision if the worst occurs  
9 despite the exceedingly long time required to reach equilibrium  
10 and the effects which will eventually spread out from the basin  
11 of origin and affect the down-gradient basins. Capriciousness  
12 by the State Engineer is the reasonable conclusion.  
13

14 In effect, the State Engineer's ruling that there was  
15 newly unappropriated water available for export from Cave  
16 Valley, Dry Lake Valley and Delamar Valley led to the further  
17 conclusions that the applicant's proposed use will not conflict  
18 with existing rights or protectible interests in existing  
19 domestic wells, nor threaten to prove detrimental to the public  
20 interest. Without those impediments, according to the State  
21 Engineer NRS 533.370(5) mandated the granting of the water  
22 rights applications. AR at 40. However, having acted  
23 arbitrarily, capriciously and oppressively regarding the base  
24 conclusion pertaining to the perennial yields and the further  
25 conclusions flowing therefrom, the Court finds that the  
26 required burden of proof has been met. The State Engineer  
27 abused his discretion. Accordingly, the State Engineer's  
28

1 Ruling Number 5875 is VACATED AND REMANDED for further  
2 proceedings consistent with this decision.

3 IT IS SO ORDERED.

4 Dated this 15<sup>th</sup> day of October, 2009.



NORMAN C. ROBISON  
SENIOR DISTRICT JUDGE

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**Exhibit B**

Order Dismissing Appeal, *Southern Nevada Water Authority v. Carter-Griffin*,  
Case No. 54986 (N.V. S. Ct., Sept 13, 2010)

**Exhibit B**

Order Dismissing Appeal, *Southern Nevada Water Authority v. Carter-Griffin*,  
Case No. 54986 (N.V. S. Ct., Sept 13, 2010)



IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN NEVADA WATER AUTHORITY; THE STATE OF NEVADA; AND TRACY TAYLOR, IN HIS OFFICIAL CAPACITY AS STATE ENGINEER,  
Appellants,

No. 54986

vs.

CARTER-GRIFFIN, INC. D/B/A CARTER CATTLE CO.; COUNTY OF WHITE PINE, NEVADA; GARDNER'S QUARTER CIRCLE 5 RANCH; FRANK DELMUE; DEBRA WHIPPLE; JAMES I. LEE; LUND IRRIGATION & WATER CO.; LEOTA JOHNSON; PRESTON IRRIGATION COMPANY; TOWN OF ALAMO WATER AND SEWER BOARD; JOHN M. WADSWORTH; MICK & LYNN LLOYD; GREAT BASIN WATER NETWORK; FARREL W. & MANETTA B. LYTLE; KENNETH LYTLE; PATRICK & KENA GLOEOKNER; MATT BULLOCK; AND CAVE VALLEY RANCH, LLC,  
Respondents.

**FILED**

SEP 13 2010

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BY: *[Signature]*  
DEPUTY CLERK

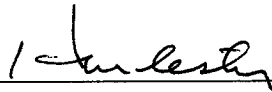
ORDER DISMISSING APPEAL

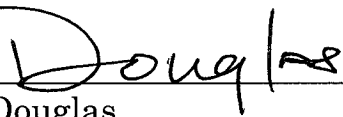
This is an appeal from a district court order vacating a water law decision and remanding the matter for further administrative proceedings. Seventh Judicial District Court, Lincoln County; Norman C. Robison, Judge.


In their responses to this court's January 27, 2010, order to show cause why this appeal should not be dismissed for lack of jurisdiction, appellant Southern Nevada Water Authority and respondents

acknowledged that the issues raised in this appeal would be rendered moot if this court, on rehearing in a related case, Great Basin Water Network v. State Engineering, Docket No. 49718, instructed the State Engineer to undertake further proceedings. On June 17, 2010, this court issued an opinion in that matter, granting rehearing in part and reversing and remanding so that the State Engineer could renotice water permit applications and reopen the protest period. 126 Nev. \_\_\_, 222 P.3d 648 (2010). As a result, the State Engineer must decide the permits at issue in this appeal, rendering this appeal moot. NCAA v. University of Nevada, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). Accordingly, we

ORDER this appeal DISMISSED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Pickering

cc: Chief Judge, Seventh Judicial District  
Hon. Norman C. Robison, Senior Judge  
Dana R. Walsh  
Attorney General/Carson City  
Holland & Hart LLP/Reno  
Taggart & Taggart, Ltd.  
Simeon M. Herskovits  
Leah R. Wigren  
Santoro, Driggs, Walch, Kearney, Holley & Thompson  
Lincoln County Clerk

EXHIBIT E

# EXHIBIT E

EXHIBIT E

Case No. 65775

In the Supreme Court of Nevada

SOUTHERN NEVADA WATER AUTHORITY, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 THE SEVENTH JUDICIAL DISTRICT COURT of the )  
 State of Nevada, in and for the County of White )  
 Pine; and THE HONORABLE ROBERT E. ESTES, )  
 Senior District Judge )  
 )  
 Respondents, )  
 )  
 and, )  
 )  
 MILLARD COUNTY, UTAH; JUAB COUNTY, UTAH, *et* )  
*al.*, )  
 )  
 Real Parties in Interest. )  
 )  
 (*Full caption on the following three pages*) )

Electronically Filed  
Dec 12 2014 11:39 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

**SNWA’S REPLY BRIEF  
TO ANSWERING BRIEFS OF CPB, CTGR AND GBWN PROTESTANTS**

District Court Case Nos. CV-1204050, CV-1204051, CV-1204052,  
CV-1204053, CV-1204054, CV-1204055, CV-0418012, CV-0419012

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In the Supreme Court of Nevada

SOUTHERN NEVADA WATER AUTHORITY,

Petitioner,

vs.

THE SEVENTH JUDICIAL DISTRICT COURT of the State of Nevada,  
in and for the County of White Pine; and THE HONORABLE  
ROBERT E. ESTES,

Respondents,

and,

MILLARD COUNTY, UTAH; JUAB COUNTY, UTAH; JASON KING,  
P.E., in his official capacity as the NEVADA STATE ENGINEER;  
NEVADA DEPARTMENT OF CONSERVATION AND NATURAL  
RESOURCES, DIVISION OF WATER RESOURCES; CORPORATION OF  
THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS ON BEHALF OF CLEVELAND RANCH; ELY  
SHOSHONE TRIBE; CONFEDERATED TRIBES OF THE GOSHUTE  
RESERVATION; DUCKWATER SHOSHONE TRIBE; WHITE PINE  
COUNTY, NEVADA; ELKO COUNTY, NEVADA; EUREKA COUNTY,  
NEVADA; NYE COUNTY, NEVADA; NYE COUNTY WATER  
DISTRICT; CITY OF ELY, NEVADA; CENTRAL NEVADA REGIONAL  
WATER AUTHORITY; GREAT BASIN WATER NETWORK; SIERRA  
CLUB; CENTER FOR BIOLOGICAL DIVERSITY; 2<sup>ND</sup> BIG SPRINGS  
IRRIGATION COMPANY; LUND IRRIGATION COMPANY; PRESTON  
IRRIGATION COMPANY; ALAMO SEWER & WATER GID; BAKER  
GID; MCGILL-RUTH SEWER & WATER GID; GREAT BASIN  
BUSINESS & TOURISM COUNCIL; WHITE PINE CHAMBER OF  
COMMERCE; NEVADA FARM BUREAU; N-4 STATE GRAZING  
BOARD; BAKER RANCHES INC.; BATH LUMBER; PANACA  
FARMSTEAD ASSOCIATION; BORDER INN; PEARSON FARMS;  
RAFTER LAZY C RANCH; SPORTSWORLD; PROGRESSIVE  
LEADERSHIP ALLIANCE OF NEVADA; LEAGUE OF WOMEN VOTERS  
OF SALT LAKE CITY; UTAH AUDUBON COUNCIL; UTAH  
PHYSICIANS FOR A HEALTHY ENVIRONMENT; POST CARBON SALT  
LAKE; UTAH RIVERS COUNCIL; BRISTLECONE ALLIANCE; CITIZENS  
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Real Parties in Interest. )

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**SUMMARY OF ARGUMENT**

**Part One: The Propriety of Writ Review**

If the Court does not hear the appeals in Case 64815, it is imperative that this Court hear these writ petitions, because they present important issues of statewide concern involving water, a precious and increasingly scarce resource. Hearing these petitions will allow this Court to correct the district court's manifest abuse of discretion and legal errors in applying the wrong standard of review to the State Engineer's determinations and to establish correct standards for the guidance of the courts and parties in this and other cases.

**Part Two: The Standard of Review**

Courts are obligated to give significant deference to determinations by the State Engineer, an expert in hydrology, who has been legislatively designated as the primary steward of the state's water and whose determinations are presumed by statute to be correct. A court may not simply reweigh the evidence to reach a different result but can overturn a State Engineer decision only if there is no substantial evidence to support it. Protestants ignore this standard, however, and their factual arguments questioning the State Engineer's findings and conclusions ask this Court to improperly reweigh the evidence. As the agency determinations are supported by substantial evidence, this Court must affirm.

**Part Three: The Merits**

On the merits, the protestants' arguments fail because they rely on their own interpretation of Nevada law and a reweighing of the evidence. First, unappropriated water has never been defined the way the protestants advocate, while the State Engineer's historic practice has properly interpreted the definition of unappropriated water and is entitled to deference. Second, while triggers and thresholds for mitigation plans need to be set, substantial evidence supports the State Engineer's finding that they can be effectively set later, if still before the initiation of pumping. The protestants reweigh the evidence to conclude triggers must be set now. Third, the State Engineer properly defined unappropriated water for each groundwater basin at issue instead of defining it based on an enormous flow system. This practice is also entitled to deference because it is based on factual findings that are supported by substantial evidence and which informed his definition of unappropriated water in those basins.

**Part Four: Issues Outside the Scope of the Petitions**

In their answers to SNWA's petition, protestants attempt to raise new issues. This is improper, as a party can seek relief from this Court only through a notice of appeal or a petition seeking an extraordinary writ. This Court should summarily reject their requests for relief as beyond the Court's jurisdiction. Even if the Court

were to address the merits, however, protestants are not entitled to the relief they seek.

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**PART ONE:**  
**THE PROPRIETY OF WRIT RELIEF**

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The State Engineer and the Southern Nevada Water Authority (“SNWA”) filed notices of appeal from the district court’s decision in the underlying action, and those appeals are before this Court in case 64815. One protestant moved to dismiss that appeal, although all other protestants expressly took no position. SNWA opposed the motion to dismiss, arguing that its appeal is valid. Because of the importance of the issues presented in the case, SNWA also suggested that if this Court did not have jurisdiction to address the direct appeal, it should hear the case as a writ petition. The State Engineer and SNWA then filed these petitions in cases 65775 and 65776, seeking that alternative review through this Court’s writ process.

SNWA maintains that the appeals in case 64815 are valid and that this Court should hear that case. If the Court disagrees on the jurisdictional issue, however, it should nonetheless address these important issues by hearing and deciding these petitions.

I.

**THIS CASE PRESENTS IMPORTANT ISSUES**

This case involves an issue of the utmost public concern, whether Nevadans have water.

**A. This Court Hears Writ Petitions Presenting Important Issues**

An important issue of state-wide concern is reason enough for this Court to consider a writ petition. *See Lorton v. Jones*, 130 Nev. \_\_\_, \_\_\_, 322 P.3d 1051, 1053-54 (2014); *Westpark Owners' Ass'n v. Eighth Jud. Dist. Ct.*, 123 Nev. 349, 356, 167 P.2d 421, 426 (2007) (holding that this Court may “intervene ‘under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition.’” (quoting *State v. Second Jud. Dist. Ct.*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002))).

The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints on Behalf of Cleveland Ranch (“CPB”) and the Confederated Tribes of the Goshute Reservation (“CTGR”) are simply wrong when they contend that writ review is impermissible because SNWA has a right to appeal. This Court’s discretionary jurisdiction is not limited to cases where a party has “no ‘plain, speedy and adequate remedy in the ordinary course of law;’” this Court will also intervene when “there are either urgent circumstances or important legal

issues that need clarification in order to promote judicial economy and administration.” *Cheung v. Eighth Jud. Dist. Ct.*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005).

This Court has addressed writ petitions on multiple occasions where an important legal issue needed clarification even though the petitioner had an appellate remedy. *See, e.g., Diaz v. Eighth Jud. Dist. Ct.*, 116 Nev. 88, 993 P.2d 50 (2000) (addressing writ petition even though petitioner had an available post-judgment appellate remedy where the petition raised an issue of first impression that implicated a matter of public importance); *Barngrover v. Fourth Jud. Dist. Ct.*, 115 Nev. 104, 110, 979 P.2d 216, 220 (1999) (“[D]espite a legal remedy, this court may exercise its discretion to entertain a petition for mandamus relief where the circumstances reveal urgency and strong necessity.”); *Business Computer Rentals v. State Treasurer*, 114 Nev. 63, 67, 953 P.2d 13, 15-16 (1998) (holding that *mandamus* was appropriate, even though petitioner had effective alternative remedies, because an important issue of law needed clarification and public policy was served by this Court’s invoking original jurisdiction); *Falcke v. Douglas County*, 116 Nev. 583, 585, 586, 3 P.3d 661, 662, 663 (2000) (this Court granted *mandamus*, even though the petitioner could have obtained a declaratory judgment in the district court, concluding that the petition raised “an urgent and important

issue of law,” as the parties admitted that “land use and development are important public policy issues”).

**B. Water Issues Are Important**

Legal issues dealing with water are among the most important this Court addresses, because water is a “precious and increasingly scarce resource.” *See Bacher v. Office of State Eng’r*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006); *United States v. State Eng’r*, 117 Nev. 585, 591, 27 P.3d 51, 55 (2001) (BECKER, J., concurring in part and dissenting in part) (water is the “most precious of natural resources”). And driving the point home here, Lake Mead, the source of nearly all of Southern Nevada’s water, was recently at its lowest level since the Hoover Dam was built in 1935 due to an unprecedented drought. U.S. Dep’t of the Interior, *Lake Mead at Hoover Dam, Elevation (Feet)*, available at <http://www.usbr.gov/lc/region/g4000/hourly/mead-elv.html> (last visited on Oct. 7, 2014); (1 SNWA App. 000053-60).<sup>1</sup>

Here, as in *Falke*, the protestants do not dispute that the petition raises legal issues that are important. No doubt water issues of the magnitude involved in this case are more important than the land use issues presented in *Falcke* or the \$646 tax payment in *Business Computer Rentals*. And the worsening drought conditions

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<sup>1</sup> This Court can take judicial notice of this fact. *See Itcaina v. Marble*, 56 Nev. 420, 55 P.2d 625 (1936) (holding that this Court “ha[s] a right to take judicial notice of matters of public knowledge, such as the climatic . . . conditions in this

(continued)

in the West generally, and the Colorado River Basin in particular, do not afford the luxury of time. This Court should hear this petition, and resolve these issues, now.

## II.

### **WRIT RELIEF IS AVAILABLE BECAUSE THE DISTRICT COURT MANIFESTLY ABUSED ITS DISCRETION BY APPLYING THE WRONG STANDARD OF REVIEW**

This Court can and should exercise its discretionary review powers, not only because the issues involve Southern Nevada’s dwindling water supply, but also because the district court manifestly abused its discretion by applying the wrong standard of review when resolving the legal issues.

#### **A. Writ Review is Available where the District Court Manifestly Abuses Its Discretion**

Writ review is available “to control a manifest abuse or an arbitrary or capricious exercise of discretion.” *Cote H. v. Eighth Jud. Dist. Ct.*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008).

#### **B. Applying the Wrong Legal Standard Is an Abuse of Discretion**

A district court abuses its discretion when it is simply wrong about the law. *See DR Partners v. Bd. of Cnty. Comm’rs*, 116 Nev. 616, 620-21, 627-28, 6 P.3d 465, 467-68, 472-73 (2000); *see also Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) (“[W]here a trial court exercises its discretion in clear disregard of the guiding legal principles, this action may constitute an abuse of discretion.”). Applying an incorrect legal standard is an abuse of discretion.

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state . . . .”);



*Bergmann*, 109 Nev. at 674, 856 P.2d at 563; *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990) (stating that a lower court “would *necessarily* abuse its discretion if it based its ruling on an erroneous view of the law” (emphasis added)).

REX A. JEMISON, *A Practical Guide to Judicial Discretion*, § 29.05, 2 NEVADA CIVIL PRACTICE MANUAL at 29-6 (5<sup>th</sup> ed. 2007) (“An abuse of discretion can be an error of law in determining the factors which govern discretion”) citing *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 598 P.2d 1147 (1979)

Great Basin Water Network protestants (GBWN)<sup>2</sup> cite *State v. Eighth Jud. Dist. Ct. (Armstrong)*, 127 Nev. \_\_\_, \_\_\_, 267 P.3d 777, 780 (2011), for the proposition that “[m]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, bias or ill will.” GBWN Answering Brief (AB) at 48.) Here, the district court misapplied the law. And in *State v. Eighth Jud. Dist. Ct. (Armstrong)*, the case on which GBWN relies, this Court chose to hear the writ petition because it “raise[d] an important issue of law that needs clarification.” *Armstrong*, 127 Nev. at \_\_\_, 267 P.3d at 780.

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<sup>2</sup> This phrase is used to describe White Pine County, *et al.*

**III.****OTHER FACTORS THAT CALL FOR THIS  
COURT TO HEAR THIS PETITION****A. The Conflict Among Divisions of the District Courts Calls for Clarification from this Court**

Another reason this Court should hear this petition is that divisions of the district courts have applied the water statutes differently. This Court has addressed writ petitions when there is a conflict in the decisions among district courts. *See Williams v. Eighth Jud. Dist. Ct.*, 127 Nev. \_\_\_, \_\_\_, 262 P.3d 360, 364-65 (2011); *State v. Eighth Jud. Dist. Ct. (Bonaventure)*, 116 Nev. 127, 134, 994 P.2d 692, 696-97 (2000); *see also Sandpointe Apartments, LLC v. Eighth Jud. Dist. Ct.*, 129 Nev. \_\_\_, \_\_\_, 313 P.3d 849, 825 (2013) (addressing writ petition where there were conflicting decisions in the lower courts and case raised issues that “affect many people in this state”). Review under such circumstances is especially appropriate when the petition presents “a significant issue of statewide concern that would otherwise escape [the court’s] review.” *Amezcuca v. Eighth Jud. Dist. Ct.*, 130 Nev. \_\_\_, \_\_\_, 319 P.3d 602, 603-04 (2014).

In *Michael & Margaret Ann Etcheverry Family, LP v. State Engineer of Nevada*, one division of the Seventh Judicial District Court concluded that mitigation triggers are unnecessary before permits are issued. (26 App. 005954-55.) In this case, another division of that district reached the opposite conclusion. Protestants argue that there is no “inter-court dispute that requires clarification”

because there are factual differences between the monitoring, management and mitigation (“3M Plan”) in the *Etcheverry* case and the 3M Plan in this case.

(CTGR AB at 23; CPB AB at 54-66.) But the factual differences between the 3M Plans that the CTGR and CPB identify (assuming they are true) don’t matter.

What matters is that, as CTGR recognizes, “Nevada law does not set out a specific standard for mitigation plans.” (CTGR AB at 23.) That is why this Court should consider SNWA’s writ petition – so that the State Engineer and lower courts have a standard by which to assess 3M Plans, especially as such plans will inevitably vary. *See Falcke*, 116 Nev. at 587, 3 P.3d at 663 (“[P]ublic policy would be best served by reaching the merits of the instant petition in order to provide guidance to Douglas County, and other counties, in properly following the dictates of NRS Chapter 278.”). If this Court does not intervene and establish the standard for what evidence the State Engineer needs to approve a 3M Plan, this case may simply bounce back and forth between the district court and the State Engineer for years – or decades more – without being resolved. *See Amezcua*, 130 Nev. at \_\_\_, 319 P.3d at 603-04 (writ review appropriate when the lower courts are in conflict and issue would escape court’s review).

**B. Southern Nevada’s Water Situation is Urgent and Resolution Should Not Wait for Remand and an Appeal**

**1. *Southern Nevada’s Dwindling Water Supply Is Reason to Hear this Petition***

CTGR argues that urgency does not justify the issuance of writs. (CTGR AB at 22.) But this Court has held that writs are appropriate “where circumstances reveal urgency or strong necessity.” *See, e.g., Falcke*, 116 Nev. at 586, 3 P.3d at 662.

There is urgency and necessity here because Southern Nevada’s water supply has been dwindling for years, and the situation is only getting worse. *Falcke*, *Cheung*, and multiple other cases decided by this Court make clear that this, alone, is a basis for addressing a writ petition.

**2. *Contentions of Delay Do Not Change the Urgency of the Situation***

CTGR wrongly contends there is no urgency because consideration of SNWA’s applications has been delayed. SNWA has been proceeding quickly since at least 2006, when the now 14-year-old unprecedented drought in the Colorado River Basin was just six years old. *See Great Basin Water Network v. State Eng’r*, 126 Nev. \_\_\_, \_\_\_, 234 P.3d 912, 915 (2010) (describing history of litigation); *see also id.* at 920 (remanding for the State Engineer to re-notice hearings and reopen protest period, which led to the hearings before the State Engineer that are the subject of this writ petition).

Any alleged delay before 2006 does not make the current situation less urgent for the two million citizens who are SNWA's customers, as the drought plaguing Southern Nevada's main water supply has become exponentially worse in the past several years. These water rights need to be permitted now. Instead of remedying any harm caused by alleged prior delay, protestants' suggestion for further proceedings before both the State Engineer and the district court would cause only further delay.

**3. *Urgency Does Not Require Irreparable Harm***

CTGR is simply incorrect, moreover, when it argues that this Court has heard petitions only when "the issues were so pressing that intervention was necessary to avoid irreversible error or there was literally no adequate alternative remedy." (CTGR AB at 21.) Writ relief is not limited only to such "doomsday" scenarios where no other alternative exists to prevent irreparable harm; instead, this Court intervenes when the circumstances indicate that such an effort benefits the parties and the public. In *Falcke*, for example, this Court heard the petition even though the petitioner had merely requested approval of a master plan amendment and a zoning change; there was no indication that irreversible harm would otherwise result or that there was no possible alternative remedy.<sup>3</sup> Under all the circumstances, it made sense for this Court to hear the case at that juncture. So,

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<sup>3</sup> The petitioner in that case also could have obtained a declaratory judgment from

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too, in *Williams*, 127 Nev. at \_\_\_, 262 P.3d at 364-65, where the underlying endoscopy cases could have been tried under the wrong expert evidentiary standards and then retried after a reversal on appeal. The Court served the best interests of the parties and the justice system by hearing the issue before necessitating needless trials and retrials, tying up the case in the court system for years, even though the error was capable of correction on appeal. In both cases, this Court addressed the writ petitions because of the benefit created by the early intervention, combined with the fact that the legal issue presented was important and required clarification. Truly irreparable harm is not a *sine qua non* of discretionary review. Instead, this Court can and should intervene when to do so will better serve the interests of the parties, the courts and the public.

**C. Hearing this Petition Will Serve Judicial Economy**

This Court also considers “whether judicial economy and sound judicial administration militate for or against issuing the writ.” *Redeker v. Eighth Jud. Dist. Ct.*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006); *Armstrong*, \_\_\_ Nev. at \_\_\_, 267 P.3d at 779. Judicial economy is served when this Court clarifies an important legal issue, because the lower courts do not waste time struggling to find the right answer. *Armstrong*, \_\_\_ Nev. at \_\_\_, 267 P.3d at 779. As such, this Court should resolve the dispute between SNWA and the protestants now.

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the district court. *Falcke*, 116 Nev. at 586, 3 P.3d at 662-63.

If this Court were not to hear this petition now, the parties will likely end up in this Court eventually, making the same arguments and seeking the same clarifications of the law. There is no reason to cause further proceedings before the State Engineer and the district court when the important legal issues are presented now. SNWA has been actively pursuing approval of its applications in the Nevada court system for nearly a decade. It is time for this case to move toward a final resolution.

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**PART TWO:**  
**THE STANDARD OF REVIEW**

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**I.**

**UNDER THE CORRECT STANDARD OF REVIEW,  
THE COURTS MUST DEFER TO THE STATE ENGINEER**

**A. The Courts Must Give Significant Deference to the State Engineer**

***1. The State Engineer’s Decision, by Statute, is Deemed Prima Facie Correct***

The Nevada Legislature created the position of State Engineer, an expert in hydrology, to be the primary steward of this state’s water. *See* NRS 532.010, 532.030. “The decision of the state engineer shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same.” NRS 533.450(9).

2. ***The Limited Judicial Role in Reviewing a State Engineer's Decision for "Substantial Evidence"***

Under this standard, the courts' role in water management is much more limited than the State Engineer's. Judicial review is limited to "a determination of whether substantial evidence in the record supports the State Engineer's decision." *Pyramid Lake Paiute Tribe v. State Eng'r*, 126 Nev. \_\_\_, \_\_\_, 245 P.3d 1145, 1148 (2010) (quoting *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991)); *Office of State Eng'r v. Curtis Park Manor Water Users Ass'n.*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985) (stating that the Court reviews only the evidence "upon which the Engineer based his decision and ascertain[s] whether that evidence supports the order").

3. ***No Deference to the District Court***

This Court reviews the State Engineer's decision directly, and it gives no deference to the district court's review of the State Engineer's decision. *See Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006) ("[T]his court affords no deference to the district court's ruling in judicial review matters."); *Pyramid Lake Paiute Tribe*, 126 Nev. at \_\_\_, 245 P.3d at 1147-48; *Curtis Park Manor*, 101 Nev. at 32, 692 P.2d at 497 ("When an order of the State Engineer is challenged, this court is bound by the same standard of review as the lower court."); *Gandy v. State ex rel. Division of Investigation & Narcotics*, 96 Nev. 281, 282, 607 P.2d 581, 582 (1980) ("When a decision of an administrative body is challenged, the function of this court is identical to that of the district court."); *Nev. Tax. Comm'n v. Hicks*, 73



Nev. 115, 125, 310 P.2d 852, 857 (1957) (“As we conceive our appellate function in this type of proceeding it is not to review the determinations of the court below, but to undertake afresh a review of the [agency’s] determinations to ascertain whether, as a matter of law, they are supported by substantial evidence.”), *overruled on other grounds as recognized in M & R Inv. Co. v. Nev. Gaming Comm’n*, 93 Nev. 35, 559 P.2d 829 (1977). “With respect to a limited review ‘in the nature of an appeal,’ neither the district court nor this court will substitute its judgment for that of the State Engineer: we will not pass upon the credibility of the witnesses nor reweigh the evidence, but limit ourselves to a determination of whether substantial evidence in the record supports the State Engineer’s decision.” *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

**4. *The “Substantial Evidence” Standard Prevents Reweighing the Evidence***

The term “substantial evidence” “does not mean a large or considerable amount of evidence.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). It also does not mean “justified to a high degree.” *Id.* It merely means evidence “which a reasonable mind might accept as adequate to support a conclusion.” *Pyramid Lake Paiute Tribe*, 126 Nev. at \_\_\_, 245 P.3d at 1148. The substantial evidence standard is even more deferential to the fact finder than the “clearly erroneous” standard applicable to review trial court findings. *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999). It is analogous to the “sufficiency of the evidence standard applied in

judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred.” *Semper v. Inland Wetlands Agency*, 628 A.2d 1286, 1292 (Conn. 1993); 2 Richard J. Pierce, *ADMINISTRATIVE LAW TREATISE* 976-77 (5th ed. 2010) (noting that the “substantial evidence” test had its genesis in appellate review of jury verdicts and that “[t]he clearly erroneous test authorizes broader review than does the substantial evidence test”).

Evaluating whether evidence is substantial enough to support a conclusion does not involve weighing the credibility of witnesses or the strength of the evidence. In fact, in deference to agencies making such determinations on a regular basis, such assessments are proscribed. The substantial evidence test thus “frees the reviewing courts of the time consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute.” *Consolo v. Fed. Maritime Comm’n*, 383 U.S. 607, 620 (1966).

**B. The Court Must Also Defer to the State Engineer under the Legislature’s Policy of Encouraging the State Engineer to Consider the “Best Available Science”**

**1. Deference to the State Engineer under the “Best Available Science” Standard**

The requirement of judicial deference to the State Engineer is all the more rigorous in light of the Nevada Legislature’s stated public policy “encourag[ing]” the State Engineer to use the “best available science in rendering decisions

concerning the available surface and underground sources of water in Nevada.” NRS 533.024(1)(c). But even when the agency uses the best available science, a reviewing court must defer to an agency’s decision to select a particular scientific model even if the model does not generate a completely certain result. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (applying the “best scientific and commercial data available” standard in the Endangered Species Act and noting that “[t]he fact that the [agency] chose one flawed model over another flawed model is the kind of judgment to which we must defer”). After all, an agency is not permitted to “ignore evidence simply because it falls short of absolute scientific certainty.” *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1147 (9th Cir. 2007) (applying “best scientific and commercial data” standard).

It is not the State Engineer’s “duty to satisfy all of the concerns of potentially affected or aggrieved parties.” *Cent. Ariz. Water Conservation Dist. v. U.S. E.P.A.*, 990 F.2d 1531, 1544 (9th Cir. 1993). An agency is not required to “calculate risk with mathematical precision, nor does the substantial evidence standard require it to support a risk finding ‘with anything approaching certainty.’” Furthermore, the ‘best available evidence’ requirement affords latitude [to the agency]. . . .” *Pub. Citizen Health Research Grp. v. U.S. Dep’t of Labor*, 557 F.3d 165, 176 (3d Cir. 2009) (quoting *AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607,

655-56 (1980) (plurality opinion)). Rather, the State Engineer is only required to determine whether the statutory prerequisites for an application to appropriate water have been met.

## 2. *The Similar “Best Available Evidence” Standard*

Under the similar “best available evidence” standard used in federal courts, the agency has “some leeway where [its] findings must be made on the frontiers of scientific knowledge.” *Am. Petroleum Inst.*, 448 U.S. at 656 (plurality opinion); *Public Citizen Health Research Grp. v. Tyson*, 796 F.2d 1479, 1486 (D. C. Cir. 1986). The State Engineer may extrapolate on the available science, so long as the extrapolation is based on reliable evidence. *See Cent. Ariz. Water Conservation Dist.*, 990 F.2d at 1543 (agency may extrapolate from evidence, especially when agency acknowledges weakness of expert report and does not rely exclusively on that report); *Natural Res. Defense Council v. Thomas*, 805 F.2d 410, 432 (D.C. Cir. 1986) (even if evidence relied on by agency is “not totally reassuring” to interested parties, the court’s “task stops with an assessment of the reasonableness of the agency’s decision given the evidence it had before it,” and the agency can extrapolate from reliable evidence); *N.M. Mining Ass’n v. N.M. Water Quality Control Comm’n*, 150 P.3d 991, 1001 (N.M. Ct. App. 2006) (agency’s determination was supported by substantial evidence and “based on credible scientific data” where expert methodology “documented uncertainty factors that were used to correct for uncertainties resulting from various extrapolations”).

**C. The State Engineer's Legal Conclusions Are Also Entitled to Deference because they Grew out of His Factual Findings**

“[A]n agency’s conclusions of law which are closely related to the agency’s view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence.” *State Indus. Ins. Sys. v. Khweiss*, 108 Nev. 123, 126, 825 P.2d 218, 220 (1992). This is so even though a court on judicial review ordinarily “may decide pure legal questions without deference to an agency determination . . . .” *Id.* (“an agency’s conclusions of law which are closely related to the agency’s view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence”); *see also Campbell v. Nev. Tax Comm’n*, 109 Nev. 512, 515-16, 853 P.2d 717, 719 (1993).

In this case, too, the State Engineer’s factual findings informed and brought about his legal conclusions, so those conclusions are also entitled to deference. The legal conclusions naturally followed once the State Engineer determined the factual issues of how much water was available in each basin, whether there would be environmental impacts, whether there would be conflicts, whether the 3M Plan would be effective to mitigate any adverse impacts that might arise, and whether water underneath the Delamar, Dry Lake, and Cave Valleys behaved as though it were an above-ground river. Those conclusions are entitled to deference. *See Khweiss*, 108 Nev. at 126, 825 P.2d at 220.

**II.****THE PROTESTANTS'  
WRONG STANDARD:  
ARGUING THE FACTS**

Protestants raise a litany of factual arguments, GBWN for 39 pages and CPB for 29. *See* GBWN AB at 5-43; CPB AB at 12-41. In those 68 pages, they urge that the “weight of the evidence” supports their view of the facts and not the State Engineer’s. *See, e.g.*, GBWN AB at 35. They are simply asking this Court to substitute their factual positions for the findings of the State Engineer.

Such a factual approach is not appropriate on appeal. This is especially so given this Court’s required deference to the State Engineer’s hydrological expertise in resolving factual disputes in water cases. *See In re Nev. State Eng’r Ruling No. 5823*, 128 Nev. \_\_\_, \_\_\_, 277 P.3d 449, 453 (2012); *see also Marsh v. Or. Nat. Resources Council*, 490 U.S. 360, 377 (1989) (“Because analysis of the relevant documents ‘requires a high level of technical expertise,’ we must defer to ‘the informed discretion of the responsible federal agencies.’” (citations omitted)).

The protestants advocated, and the district court adopted, an incorrect standard of review. Applying the correct standard, this Court should affirm the State Engineer’s determinations.

### III.

#### **IN THEIR CLAIMS ABOUT IMPACTS, PROTESTANTS APPLY THE WRONG STANDARD OF REVIEW AND REWEIGH THE EVIDENCE**

Throughout their arguments, the protestants misapply the standard of review, with their most egregious effort involving allegations about the impacts of the SNWA project. These same claims were made to and rejected by the State Engineer. The State Engineer properly resolved these factual claims based on substantial evidence, and this Court should not reweigh that evidence.

#### **A. Obvious Flaws in the Evidence Presented by Protestants**

The State Engineer observed obvious flaws in the evidence presented by the protestants. GBWN's primary witness on the environment based his opinions on the assumption that *all* surface water sources would *disappear* in Spring Valley. (1 SNWA App. 208.) GBWN now relies on this discredited witness to claim the SNWA project will ruin the biodiversity in Spring Valley. (GBWN AB at 71.) The State Engineer properly discounted any evidence from this witness because GBWN's own hydrologic expert agreed his assumptions were false and many springs and wetlands are not connected to groundwater at all, thus disproving the base assumption for GBWN's environment witness. (1 SNWA App. 208-209.)

GBWN's economic expert similarly went so far as to predict the complete destruction of all economic activity in all of White Pine County and Lincoln County based on her assumption that *all water in both counties* would disappear.

(1 SNWA App. 221.) Again, however, GBWN's own hydrologic expert agreed that assumption is false. (1 SNWA App. 208.) In a like vein, CTGR also claimed the SNWA project would devastate the water *on its reservation*, yet the same GBWN hydrologic expert admitted that no model run predicted *any* impact from Spring Valley pumping at the CTGR reservation. (1 SNWA App. 166.)

Such a partisan and distorted presentation of the evidence is improper on judicial review from a State Engineer decision. This Court may not adopt a partisan's result-oriented view of some of the evidence. Instead, courts must give deference to the expertise of the agency that considered *all* the evidence and whose task it is to work out these issues while protecting Nevada's water resources. This Court should reject the protestants' invitation to reweigh the evidence.

**B. Substantial Evidence Supports the State Engineer's Thorough Analysis of Potential Conflicts with Existing Water Rights**

GBWN asserts that neither SNWA nor the State Engineer analyzed potential harms to existing water rights. *See* GBWN AB at 72. That is not true.

**1. *The State Engineer Considered Extensive Evidence, Not Just the One-sided Presentation of the Protestants***

SNWA presented at least five expert reports and 12 expert witnesses to analyze the potential impacts from the project. (27 SNWA App. 6170-6208, 28 SNWA App. 6209-6227; 27 SNWA App. 6139-6169; 28 SNWA App. 6228-6378; 9 SNWA App. 2007-2073; 11 SNWA App. 2704-2750, 12 SNWA App. 2751-2856; 14 SNWA App. 2979-3000; 15 SNWA App. 3001-3250; 16 SNWA App.



3251-3500; 17 SNWA App. 3501-3750; 18 SNWA App. 3751-4000; 19 SNWA App. 4001-4250; 20 SNWA App. 4251-4500; 21 SNWA App. 4501-4635; 29 SNWA App. 6558-6708; 30 SNWA App. 6709-6802; 30 SNWA App. 6803-6929.)

The protestants presented competing experts. The State Engineer and his staff read all the reports, heard all the testimony and independently asked questions of witnesses.

As the legislature directed, the State Engineer applied his expertise to resolve the complex scientific disputes that arose below. He and his office considered all the evidence. He then made extensive findings in a section of his decision that exceeded 100 pages. (1 SNWA App. 125, 143-174, 196-232; 2 SNWA App. 323-324, 336-354, 491-492; 3 SNWA App. 503-519, 541-554, 654-655, 666-682, 703-716.) In the analysis, the State Engineer considered all water rights in the valleys of interest, then used the best available groundwater model and other qualitative measures to determine if any impact would occur.

**2. *Permit Nos. 18841-43 Show the Thoroughness of the Review***

That the State Engineer's factual review was thorough and even-handed is demonstrated by his analysis of potential impacts to Permit Nos. 18841-43. (1 SNWA App. 161-162.) These existing rights, which are for just nine acre-feet of water annually for 400 head of cattle, come from wells that were identified in the groundwater models and analyzed in a site-specific manner by SNWA.

CPB presented model predictions related to these water rights. Stratigraphic evidence at the location of this well showed potentially confining clay layers that SNWA concluded could limit the impact of SNWA pumping. *Id.* CPB countered that the confining clay layers may not be laterally extensive and the source of water may not be completely isolated from the source of the SNWA well. *Id.* CPB contended that, if all 19 SNWA applications were granted, water levels would drop over 100 feet in 200 years; if only 15 of the 19 SNWA applications were approved, however, even CPB's evidence indicated that the estimated drawdown would be cut in half. The State Engineer relied on CPB's evidence, denied four of SNWA's applications and protected those water rights, even though they total less than 10 acre-feet annually and despite that the impact could easily be mitigated.

This detailed fact finding demonstrates that the State Engineer acted in an even-handed and thorough manner and was not callous, arbitrary or capricious. This Court should properly defer to the State Engineer's decision making.

**C. The State Engineer Properly Weighed Evidence of Potential Environmental Impacts**

The State Engineer considered experts' opinions regarding the environment, including their evaluation of biotic communities within the project and surrounding basins. (1 SNWA App. 197-198, 207-214; 9 SNWA App. 2007-2073; 11 SNWA App. 2704-2750; 12 SNWA App. 2751-2856.) He reviewed data on groundwater-influenced habitats and special-status species and evidence of compliance with

federal environmental law. *Id.* He examined the expert report “Environmental Evaluation of SNWA Groundwater Development in Spring, Cave, Dry Lake, and Delamar Valleys,” which included specific qualitative and quantitative analyses for sensitive environmental areas. (1 SNWA App. 207-210, 11 SNWA App. 2704-2750, 12 SNWA App. 2751-2856.)

But GBWN now claims that SNWA submitted “no real evidence” whatsoever to predict long term effects of the project. (GBWN AB at 72.) This bald assertion is simply wrong. Not only was there a specific report on this subject, but SNWA also submitted the U.S. Bureau of Land Management’s Environmental Impact Statement model report that described projected impacts 200 years into the future. (32 SNWA App. 7325-26.) While protestants attempt to depict the situation as SNWA hiding behind 75-year predictions, this is because GBWN disagrees with the State Engineer’s factual findings that predicted that the impacts are manageable and reasonable. Protestants do not attempt to engage in the appropriate debate whether those findings are supported by substantial evidence, because they know they will lose that argument. Instead, GBWN is simply in denial about certain evidence and advances its selective view focusing on other evidence. This is not the proper framework for this Court’s review.

**D. The SNWA Project Will Not Create a Dust Bowl**

GBWN, CTGR and CPB jump to the conclusion that the Project will denude Spring Valley by killing every single plant and causing a dust bowl. No evidence supported these claims.

To the contrary, the State Engineer reviewed SNWA's report entitled "The Potential Effects of Change in Depth to Water on Vegetation in Spring Valley," which analyzed how plant communities could respond to changes in depth to water. (9 SNWA App. 2007-2073.) As that report concluded, managed succession in plant communities can allow groundwater dependent ecosystems to transition to healthy systems that are independent of ground water. (1 SNWA App. 211; 9 SNWA App. 2058.) SNWA is clearly not taking all the water for valley floor plants; those plants in Spring Valley use an average of 174,500 acre-feet annually of water, while SNWA's permits authorize pumping of only 61,127 acre-feet annually. (1 SNWA App. 87, 238.) Because a healthy transition of plant communities requires gradual changes in water levels, the State Engineer limited initial development of SNWA water rights to just 38,000 acre-feet annually to assure slow and managed changes in the depth to water.

The State Engineer also properly considered other evidence that managed succession will work, as SNWA owns thousands of acres of land with thousands of

acre-feet annually of water rights and grazing rights.<sup>4</sup> (1 SNWA App. 142.) The State Engineer found that SNWA's land holdings and water rights will ensure Spring Valley does not become a barren wasteland. (1 SNWA App. 210-16.)

As the State Engineer observed, GBWN environmental experts simply *assumed* all springs and surface water sources would completely dry up, regardless of their connection to the groundwater aquifer or the potential for any actual impact. (1 SNWA App. 208.) GBWN environment experts even assumed mountain block springs and streams that rely solely on precipitation would somehow dry up because of groundwater development on the valley floor. *Id.*

These assumptions were in conflict with GBWN's own hydrologic expert, who did not agree that these springs would dry up. *Id.* One million acre-feet annually of rain will continue to fall annually on Spring Valley and will supply springs and streams even after SNWA begins pumping. (7 SNWA App. 1640.) Despite all this, CTGR asks this Court to ignore the State Engineer's review of the evidence and agree with it that the SNWA project will cause "the disappearance of every remaining spring, wetland, and all current forms of plant life" in Spring Valley. (CTGR AB at 14-15.)

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<sup>4</sup> SNWA publicly acquired these ranches long after the applications were filed and not secretly or prior to 1989 as CTGR erroneously alleges. CTGR AB at 7-8.

The State Engineer had substantial evidence to support his rejection of these hyperbolic claims. Applying the proper standard of review in this case, this Court should affirm the State Engineer's decision.

**E. Drawdown Evidence Alone Does Not Prove Devastation**

Any groundwater development will cause some drawdown in groundwater levels. Some level of drawdown is certainly reasonable and legal. NRS 534.110(4). That is beyond dispute. Nonetheless, the protestants cling to drawdown evidence as some sort of smoking gun.

The debate here, instead, should center on whether the State Engineer properly concluded that the predicted drawdowns are reasonable. (*See* 1 SNWA App. 214.) (“the State Engineer finds that despite any increase in depth to water, viable plant and wildlife communities will remain, and the Project, as developed and described in this ruling, will be environmentally sound.”) (1 SNWA App. 238.) GBWN simply concludes that drawdown will harm playas. (GBWN AB at 65-66.) But when the State Engineer reviewed GBWN's evidence, he commented that GBWN's own witness could not make the conclusion GBWN now claims about the playas in Spring Valley. (1 SNWA App. 216.)

GBWN also alleges that drawdown evidence, alone, proves springs and wetlands will dry up. But the State Engineer actually reviewed the level of predicted drawdown and found that it would not have this result, but would instead

be reasonable. He did not “disregard those predicted impacts,” as GBWN alleges. (GBWN AB at 67.)

Rather than challenge the evidence supporting the State Engineer’s conclusions, the protestants refer to a prior district court decision that reviewed the first rulings the State Engineer entered for SNWA water rights in the Delamar, Dry Lake and Cave Valleys. That ruling was vacated, however, and the parties presented a completely new record upon which the State Engineer made the determinations at issue here. Reference to that decision is simply irrelevant and thus inappropriate.

In an argument characteristic of a party seeking to have a court reweigh evidence, CPB also claims that the State Engineer granted the SNWA applications in spite of the evidence. (CPB AB at 36.) This, too, is not so; the State Engineer acted, not in spite of CPB’s evidence, but because of it. The State Engineer approved only 61,127 acre-feet annually at 15 wells based on CPB’s own model runs, which demonstrated that the CPB’s prediction of 100 feet of drawdown after 200 years was cut in half when four wells were excluded (“the Minus4 pumping scenario”). (1 SNWA App. 161, 164-65.) *Id.* As a result of CPB’s evidence, the State Engineer then denied pumping at those four wells. *Id.*

The State Engineer was also justified in making modifications, although not to the same extent, based on another CPB model run, which depicted pumping of

only 33,304 acre-feet annually of pumping. This “Minus12 pumping scenario” yielded only “negligible” impacts to the CPB water rights. (2 CPB App. 266; 12 GBWN App. 2845.) This evidence was nonetheless still a foundation for staged development, and the first stage of water development is 32,000-38,000 acre-feet annually, the level that CPB’s model shows has “negligible” impacts to its rights. Correspondingly, the second stage of development is 50,000 acre-feet annually, which compares to the amount of evapotranspiration (ET) capture CPB agrees can be achieved. (12 GBWN App. 2875; CPB AB at 23.) The final stage is less than the 65,797 acre-feet annually CPB agreed is unappropriated in Spring Valley, and is still less than the amount in CPB’s Minus4 pumping scenario. (2 CPB App. 256.)

***1. “What the Evidence Actually Showed” and the Breadth of the State Engineer’s Understanding of the Issues***

In seven pages of findings, the State Engineer reviewed “what the evidence actually showed.” (1 SNWA App. 144, 160-165; *see* CPB AB at 35.) He discerned that little weight should be given to CPB’s model predictions that springs will go dry around their ranch, because most of those springs were *already dry* in the model before SNWA pumped any water. (2 CPB App. 286.) (all but four of the referenced springs were “dry at beginning of simulation”). The State Engineer then concluded the predicted lowering of the water table would not swallow up CPB’s water rights and was not unreasonable.



CPB just disagrees with how the State Engineer weighed the evidence, and tries to confuse this Court about the evidence. When his judgment is viewed through the proper standard of review, the State Engineer's staged development approval was clearly proper.

The State Engineer fully understood the limits of model predictions and the danger that exists when predictions are used like the protestants use them here. The State Engineer understood the current model is the best available science, and it is best used qualitatively in regional circumstances. SNWA had 75-year predictions and 200-year predictions, but the State Engineer reasonably concluded predictions are less certain when they look out farther into the future. When SNWA's model was used by CPB, SNWA did not run from its model, it just pointed out the limited validity of quantitative predictions. With the benefit of all the evidence, the State Engineer agreed. Nor did SNWA scuttle model predictions as GBWN implies. (GBWN AB at 13-14.) GBWN's wild speculation is wholly unsupported and is inconsistent with the State Engineer's judgment that the model SNWA presented below was the best available evidence.

The truth is that groundwater models, alone, simply cannot predict "environmentally devastating impacts." (GBWN AB at 66, 70-71.) Humans have to interpret the model output and put it into context to see if predicted drawdowns would actually cause unreasonable effects. Here, under the correct standard of

review, the State Engineer’s interpretation of the model evidence deserves the highest deference.

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**PART THREE:  
THE MERITS**

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**I.**

**THE COURT SHOULD NOT  
REDEFINE “UNAPPROPRIATED WATER”**

**A. The State Engineer Properly Interpreted the  
Meaning of “Unappropriated Water” in NRS 533.370**

No one disputes that vast amounts of water are available in Spring Valley. Among Nevada’s groundwater basins, Spring Valley has the highest amount of perennial yield. (7 SNWA App. 1515-1526.) In 1971, the State Engineer concluded the perennial yield in Spring Valley is 100,000 acre-feet annually. (7 SNWA App. 1523.) The USGS made the same conclusion in 1965. (27 SNWA App. 5965.) In Ruling 6164, the State Engineer reduced the perennial yield in Spring Valley to 84,000 acre-feet annually, which still makes it one of Nevada’s highest. (1 SNWA App. 113.) The district court agreed with this conclusion. (1 SNWA App. 23.)

Yet, little of this perennial yield is allocated for use by current water rights holders. No protestant challenged the State Engineer’s determination that only

about 14,000 acre-feet annually is used by existing groundwater rights.

Conventionally, this would leave about 70,000 acre-feet annually unappropriated.

But the State Engineer also set aside almost 5,000 acre-feet annually of groundwater for *springs* that in prior practice wouldn't have been deducted from the groundwater yield. (1 SNWA App. 125.) He also reserved 4,000 acre-feet annually for future uses in Spring Valley. (1 SNWA App. 231-232.) No protestant challenged these conclusions either. But even after the State Engineer reduced the perennial yield below his previous estimate, deducted water for existing groundwater *and spring* water rights, and left water for future growth, about 61,000 acre-feet annually remains unappropriated.

Clearly, the State Engineer properly interpreted the plain language of NRS 533.370(2) by concluding there is significant "unappropriated water in the proposed source of supply" in Spring Valley. That interpretation is entitled to deference.

**B. The State Engineer's Interpretation of NRS 533.370 Is Consistent with Prior Practice that Has Been Upheld by this Court**

The protestants cannot dispute the State Engineer's contention that, aside from his protection for springs and future uses, he used the same method his office has always used to determine unappropriated water.<sup>5</sup> Even with all the

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<sup>5</sup> Of Course, the State Engineer is more familiar with the past practice of his office than are the real parties of interest. (SE Writ at 23-26.)

interpretations the protestants make of prior rulings, they cannot change the State Engineer's history and practice.

There is simply no debate. The protestants are asking this Court to add novel legal requirements to how the State Engineer defines unappropriated water. If this Court adopts this new definition of unappropriated water, it will change a half century of groundwater management that successfully balanced water development with existing rights, the environment and the public interest. More importantly, the new legal definition will bar use of a large part of Nevada's remaining water.

***1. Prior Rulings of the State Engineer  
Support His Decision Here***

All of the rulings to which the protestants cite prove that the State Engineer in this case followed his prior practice. *See* CPB AB at 15-16, 19-20, 30; GBWN AB at 59-61. He has always defined unappropriated water by determining the perennial yield of a basin. In basins like Spring Valley, perennial yield has been set based on groundwater evapotranspiration (ET). As they were in this case, groundwater ET values have historically been based on USGS estimates or specific studies in a particular basin.

***Ruling 3486***

CPB cites to Ruling 3486 from the Pahrump Basin as an example of when the State Engineer limited perennial yield based on the ability to capture ET. A

closer look at the findings under Ruling 3486 and the supporting USGS report, however, shows the opposite.

In Ruling 3486, the State Engineer concluded that the perennial yield was 19,000 acre-feet annually, citing to a USGS report. (1 SNWA Pamphlet 61). This value excluded groundwater flowing in and out of the Pahrump Basin, as the State Engineer did here in Spring Valley, because that groundwater feasibly could not be captured. (1 SNWA Pamphlet 52) (“Consequently, the maximum amount of natural discharge that feasibly can be captured by pumping is estimated as the total natural discharge (37,000 acre-ft/yr; table 7) minus subsurface outflow (18,000 acre-ft/yr), or about 19,000 acre-ft/yr.”) The resulting 19,000 acre-feet annually in that case included all remaining water, including groundwater ET, in the basin. *Id.* While the USGS and the State Engineer noted that some ET may not be captured by the proposed wells, they *did not*, as CPB claims, reduce the perennial yield because of that fact.<sup>6</sup>

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<sup>6</sup> CPB is also wrong when it asserts that the State Engineer in Ruling 3486 concluded perennial yield was less than ET. The perennial yield and the ET in that case both happened to be 19,000 acre-feet. CPB misreads the word “consequently” in Ruling 3486. That term did not refer only to the last sentence before it; instead, the word summarized the entire preceding paragraph, which includes a discussion of subsurface inflows and outflows. (1 SNWA Pamphlet 61) This is made clear by the footnote reference in that sentence to the USGS report which specifically mentions outflow and not ET. *Id.*

Even though protestants refer to scores of prior State Engineer rulings, they cannot cite to any ruling that actually reduced perennial yield to how much ET would actually be captured.

**2. *This Court's Precedent Supports the State Engineer's Prior Practice***

It has been the State Engineer's practice to calculate perennial yield without a reduction based on ET capture, a reduction protestants request here. This Court has consistently upheld the State Engineer's practice without requiring such a reduction.

In *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. \_\_\_, \_\_\_, 245 P.3d 1145 (2010), for example, this Court upheld the State Engineer's determination of perennial yield, which was based on a USGS study, without requiring a reduction for ET. Again in *Griffin v. Westergard*, 96 Nev. 627, 615 P.2d 235, 236-38 (1980), this Court reviewed the USGS calculations of groundwater ET and upheld the State Engineer's decision to reject an application, without mentioning ET capture. Yet another example is seen in *State Engineer v. Morris*, 107 Nev. 699, 819 P.2d 203 (1991), where this Court did not disturb the State Engineer's finding that 19,000 acre-feet annually was the perennial yield of the Pahrump Basin (the same basin addressed in Ruling 3486). *Id.* at 703, 819 P.2d at 206. The simple fact is that the State Engineer does not reduce the perennial yield based on a prediction of how much ET can be captured, and this

Court has not found fault with the State Engineer’s usual method for calculating perennial yield.

**C. The Protestants’ Interpretation of NRS 533.370, which Was Adopted by the District Court, Is Wrong**

The protestants and the district court both interpret the unappropriated water requirement in NRS 533.370 to mean only water that is actually captured from plants. Unlike the State Engineer’s legal interpretation, their construction of NRS 533.370 is not entitled to deference. It is also incorrect.

**1. *CPB’s Idea of ET Capture Is Far Different from the SNWA Project and Would Not be Permissible under Nevada Law***

CPB’s legal perspectives are based on the testimony of Dr. Mayo, who had almost no experience in Nevada, and his definition of ET capture differs from Nevada law. (31 SNWA App. 7024-7031, 2 CPB App. 256-57, 382.) For instance, Dr. Mayo thought SNWA should have an ET salvage project, and to him an ET salvage project is one that captures shallow groundwater or “young water” that fell as rain in the last year or two. (31 SNWA App. 6985-6987, 7030, 2 CPB App. 257, 370, 379-82.) Under his definition, an ET salvage project in Spring Valley should capture groundwater *and all precipitation* that plants use (that is, 174,500 acre-feet annually (1 SNWA App. 87, 94-95).)

In Nevada, however, only groundwater—not precipitation—is subject to appropriation (84,000 acre-feet annually in Spring Valley (*Id.*)). And that is all SNWA aims to do – and all it is allowed to do under the permits.

CPB's idea of ET salvage, in sharp contrast to the SNWA project, would kill all plants and literally create a dust bowl. This is not allowed in Nevada. NRS 533.370(3)(c), *see* 1 SNWA Pamphlet 185-186 (shallow groundwater is not included in Nevada's groundwater perennial yield); 14 SNWA App. 2983 (USGS recognizes underground water in "unsaturated zone" is not a part of groundwater available to wells).

The SNWA project simply does "not look like an ET Salvage project." (2 CPB App. 382.) Fifty to 100 additional wells would be needed for an actual ET salvage project, and an operation of that type really "would result in devastating effects." *See* CPB AB at 13 n5, 23. Far from that devastation, the SNWA project will leave almost 100,000 acre-feet annually for plants to use.

## **2. CPB's Definition of Groundwater Mining Is Not Nevada Law**

Similarly, Dr. Mayo's idea of groundwater mining is also different from Nevada law. (31 SNWA App. 7020-7023.) Groundwater mining under Nevada law is controlled by limiting water right allocations to a set cap based on perennial yield. (20 SNWA App. 4308-4311; SE Writ at 25.) In contrast, Dr. Mayo incorrectly defined groundwater mining as pumping groundwater from a deeper aquifer which is recharged slower than a shallow aquifer. (31 SNWA App. 7000; *See* 31 SNWA App 6985, 6987, 6989-6990, 6997-6998, 7003, 7022, 7030; 2 CPB App. 257.)



Dr. Mayo's proposal is not how groundwater mining is defined by the State Engineer. The State Engineer properly rejected CPB's argument that the SNWA was mining groundwater, understanding that CPB's allegation was based on Dr. Mayo's improper definition. Under the proper definition in Nevada, the State Engineer did not allow groundwater mining, because he granted less water to SNWA (61,127 acre-feet annually) than is available for appropriation in Spring Valley (65,797 acre-feet annually, even according to CPB). (2 CPB App. 256.)

CPB now asserts that SNWA somehow conceded to the district court that pumping must literally capture ET by causing "an equivalent reduction in . . . ET." (CPB AB at 17.<sup>7</sup>) This assertion is false. SNWA was asserting the *opposite* of what CPB alleges. SNWA took the same position in the district court that it takes here, that pumping *does not, and need not*, cause an equivalent reduction in ET. Initially pumped water comes from storage and not ET. (7 SNWA App. 1513; 24 SNWA App. 5485.) As more ET is captured, over the long term, a balanced groundwater system is established. Until that time, pumping properly captures transitional storage, and groundwater mining does not occur, as CPB alleges. *See* CPB AB at 27 n14. Over the long term, equilibrium will be reached if pumping volumes are lower than the original groundwater ET volumes. (1 SNWA App.

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<sup>7</sup> CPB cites to the "SNWA Ranch" answering brief which does not exist, and the quote CPB refers to does not exist on the page CPB cites. *Id.*, citing to 7 CPB App. 1262-63. Instead, the quote is found at 7 CPB App. 1398.

170; 24 SNWA App. 5483-5485; 26 SNWA App. 5760.) SNWA never acknowledged uncaptured ET should be deducted from perennial yield. *See* CPB AB at 25. As such, this Court should not adopt the interpretation of NRS 533.370 that is advanced by the protestants.

**D. The State Engineer Properly Interpreted NRS 533.370 to Allow Long Time Periods for Equilibrium to Be Achieved**

The State Engineer's interpretation of the unappropriated water provision in NRS 533.370 includes the understanding that if pumping is less than perennial yield, over the long term equilibrium will be achieved. (1 SNWA App. 79.) This conclusion is entitled to deference and is supported by legislative history and the facts of this case.

**1. *Legislative History of NRS 533.370(1)***

Nevada statutes have always directed that the State Engineer should allow Nevada's precious water resources to be put to beneficial use. In 1999, the legislature responded to the filing of the SNWA's applications by adding requirements to the water law. NRS 533.370(3); (1 SNWA Pamphlet 109-110). The legislature directed that while water can be developed in one basin and beneficially used in another, the development must be environmentally sound. Since then, the dual directive to the State Engineer is to allow beneficial use *alongside* environmental soundness. Then in 2009, the legislature clarified that the State Engineer has the power to implement staged development of a water right by

studying the development of a portion of the right and then allowing the full right to be used if studies support it. NRS 533.3705.

To achieve the legislature's dual directives, groundwater pumping must sometimes occur slowly. Staged development allows that slow development, but it also slows the attainment of a new equilibrium. Contrary to what the district court concluded, longer periods to reach equilibrium are *not* "a reason to limit the appropriation below the calculated ET." (1 SNWA App. 11.) If it were, the beneficial use directive could not be met. (1 SNWA App. 52-53, 113-114.) Instead, the legislature expects the State Engineer to strike a sensible balance and use staged development as a tool. One result of this expectation is that it will take longer to reach a new equilibrium. *See Bacher v. State Engineer*, 122 Nev. 1110, 1117-1118, 146 P.3d 793, 798 (2006); (1 SNWA App. 52.)

The protestants wrongly claim that NRS 533.370 requires equilibrium in less than 200 years. Yet their own witnesses admitted that in large hydrologic systems it will "take longer to get to equilibrium than [in] very small aquifers," and 200 to 300 years to reach equilibrium is not unreasonable. (24 SNWA App. 5413; 26 SNWA App. 5760-63.) This is particularly true when the health of plant species is considered. As such, any judicially imposed cutoff at 200 years is simply arbitrary

and inconsistent with legislative intent and delegation of authority to the State Engineer.<sup>8</sup>

**2. *Substantial Evidence Indicates Equilibrium Will Be Reached Over the Long Term***

**a. MORE WATER GOING INTO SYSTEM THAN IS BEING PUMPED OUT**

If less water is pumped from a system than is placed into it every year, the system will reach equilibrium over the long term. The State Engineer understood that he was awarding rights to less water than the system naturally gains each year. The State Engineer also understood, and GBWN's witness agreed, that if less water was being awarded to SNWA than the models simulated, the "lower pumping rates [will] approach equilibrium faster and remove less water from storage." (1 SNWA App. 173; 24 SNWA App. 5483-5484.)

Model predictions indicated that while only 7 percent of ET is captured after 75 years, after 200 years 84 percent is captured. CTGR itself points this out. (CTGR AB at 13.) This is clearly a trend toward equilibrium, and models are good for determining trends, not quantitative absolutes.

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<sup>8</sup> Long periods to equilibrium are not unlawful under NRS 533.371 as CPB alleges. See CPB AB at 30, 40. That statute only applies to applications that are issued for a "specific period," like a mining water right. NRS 533.371. CTGR reliance on a bill that did not pass in the legislature and which addressed only over-appropriated basins is equally unavailing. CTGR AB at 31 n.6.

## b. THE PROPER AND IMPROPER USE OF MODEL PREDICTIONS

Instead of such a reasonable approach, protestants utilize model predictions to make preposterous statements, such as claiming that the “evidence showed the system will not even begin to approach equilibrium for thousands of years.” (*See* GBWN AB at 22.) The only basis for such statements is the mathematical impossibility of models to achieve absolute equilibrium. GBWN’s own witnesses admitted this asymptotic phenomenon makes 100% equilibrium a “sticky point” because, mathematically, it “almost takes infinite time” and you have to “cut the thing off somewhere” and say “we’re close enough.” (25 SNWA App. 5531-5532; 26 SNWA App. 5765.) The State Engineer understood that the only basis for the protestants to claim equilibrium will *never* be reached are these synthetic ghosts in the groundwater model.

The district court did not understand that models cannot be used quantitatively and, improperly took the prediction of 84 percent equilibrium after 200 years to be an absolute value. Based on this misunderstanding, the district court directed perennial yield to be reduced by that absolute value. As pointed out even by testimony presented by the protestants, models may yield an exact number, but “you have to take it as a general tendency rather than an exact number.” (24 SNWA App. 5357-5358.) Projections of the exact percentage of capture are not terribly accurate. (25 SNWA App. 5532.) As GBWN witness Bredehoeft testified, “the thing will ultimately reach a new steady state,” and

ninety percent, or something of that order, would be “good enough” and you “maybe want to relax that a little more.” (26 SNWA App. 5789.)

**3. *Staged Development Requirements  
Will Aid in Reaching Equilibrium***

Under the State Engineer’s staged development requirements, SNWA can pump only 50,000 acre-feet annually for the first 16 years after pumping begins. Even evidence from CPB indicated the SNWA project can capture at least 50,000 acre-feet annually from ET. (CPB AB at 23.) So under CPB’s understanding of the law, the State Engineer properly allowed pumping to Stage 2.<sup>9</sup>

These factors indicate that equilibrium will be reached over the long term, particularly in light of the quantity and staging limitations the State Engineer placed on the SNWA’s permits. Accordingly, remand is not needed to show “some prospect of reaching equilibrium,” within a specific timeframe deemed reasonable as the district court required. (1 SNWA App. 13.)

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<sup>9</sup> Ample time exists for SNWA to pump what CPB concedes can be captured, and then locate new wells to capture remaining ET using the change application process provided for in Nevada water law.

## II.

### **THE STATE ENGINEER PROPERLY CONCLUDED THAT 3M PLANS WILL BE EFFECTIVE BECAUSE TRIGGERS AND THRESHOLDS WILL BE SET BEFORE GROUNDWATER PUMPING BEGINS**

After weighing the evidence and making clear findings pursuant to NRS 533.370, the State Engineer concluded SNWA's pumping will not conflict with existing rights and will be environmentally sound. (1 SNWA App. 125, 143-145, 151-167, 196-198, 207-214; 9 SNWA App 2007-2073; 11 SNWA App 2704-2750; 12 SNWA App. 2751-2856.) The State Engineer did not side-step his statutory responsibilities by using 3M plans. He interpreted NRS 533.370(1) to allow these plans, and he used them to protect existing water rights and the environment. The State Engineer implemented the 3M plan requirements only after he made all required NRS 533.370 findings.<sup>10</sup>

#### **A. Triggers and Thresholds Will Be Set in the Future**

No one contests that triggers and thresholds must be set for a 3M Plan to be effective. The disagreement in this case is over when they must be set. The State Engineer concluded that, while triggers and thresholds need to be established before groundwater is pumped, they must be developed and refined in the future

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<sup>10</sup> The State Engineer's use of 3M Plans is also consistent with prior practice, including the decision he made in Ruling 5621. (GBWN AB at 73.) Each ruling included a thorough analysis of the NRS 533.370 factors before consideration of a 3M plan. The difference between the rulings is simply that in Ruling 5621, the

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based on further information advanced during the staged development of the project. Protestants contend that if the information cannot be fully determined now, the project cannot go forward.

The State Engineer's approach is more reasonable. The State Engineer concluded that existing rights and the environment will be protected if triggers and thresholds are set before a single drop of water can be withdrawn from Spring Valley. (1 SNWA App. 141, 205-206.) GBWN's witnesses agreed that "objective, verifiable triggers or thresholds and targets or goals [should be set] *prior to development* of any water." (GBWN AB at 75.)

For example, the State Engineer requires triggers in the biological 3M Plan. That plan defines the pre-withdrawal phase of the project as the time "prior to groundwater withdrawal by SNWA." (4 SNWA App. 941.) For environmentally sensitive areas, the plan requires specific standards to be set during the pre-withdrawal period. (4 SNWA App. 947.) Seven years of comprehensive baseline data will be collected and used to establish acceptable ranges of variation (*i.e.* thresholds) in biologic health indicators. Unreasonable adverse effects will be defined during the pre-withdrawal phase and used to establish criteria for initiating management and mitigation actions (*i.e.* triggers). *Id.* SNWA witnesses testified that thresholds and triggers are not in the current plan, not because of a flaw in the

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NRS 533.370 findings could not be made, and here they could. In neither case was

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plan, but because they will be set after these pre-withdrawal tasks are complete.

*See* GBWN AB at 75. Then, during the withdrawal phase of the project, thresholds and triggers will control the project. (5 SNWA App. 1035.)

The protestants are way off the mark when they claim the 3M plan is just a statement of good intentions and “has no goals to ensure that any future management or mitigation will be possible or capable of effective implementation.” (GBWN AB at 75.)

***1. Triggers and Thresholds for Swamp Cedars and Other Sensitive Environmental Areas***

The way triggers and thresholds are established for the Swamp Cedars demonstrates how the biological 3M plan will set such standards for 15 areas of environmental concern, as well as any others the State Engineer may identify in the future. The Swamp Cedars are sacred and important to the culture and traditions of CTGR.

The 3M plan describes the Swamp Cedars as groundwater-influenced ecosystems, but indicates that the probable source of groundwater for these areas is a *perched* system that is not connected to the valley floor aquifer. (4 SNWA App. 959.) The 3M plan identifies the Swamp Cedars as one of 15 monitoring sites, because it is a nested target (biota of special interest). (4 SNWA App. 982, 966.) Key Ecological Indicators (KEA) identified for the Swamp Cedars include water

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a 3M plan used to *avoid* making NRS 533.370 findings.

supply, the density of saplings, and stem length. (4 SNWA App. 990-991.) These KEAs were selected because they can serve as an early warning of stress on the Swamp Cedars.

The 3M plan then details the monitoring requirements for the Swamp Cedars, which include annual counts of KEAs at 16 separate transects. (5 SNWA App. 1013-1014.) Before the end of the pre-withdrawal phase of the project, acceptable ranges in natural variation of the Swamp Cedars KEAs, and thresholds, will be established. (5 SNWA App. 1034.) This same process is outlined in the biological 3M plan for wetlands, Shoshone Ponds, meadows, and plants on the valley floor (phreatophytic shrublands), as well as for springsnails, fishes, and frogs. (4 SNWA App. 977-992.)

2. ***The State Engineer's Approach to Setting Triggers Is Consistent with Case Law Cited by CPB***

While CPB cites to *Theodore Roosevelt Conservation v. Salazar*, 616 F.3d 497 (D.C. Cir. 2010) for the proposition that SNWA's permits should include triggers now, that case actually supports the State Engineer's position. In that case, even though federal law specifically required triggers to be set, a BLM Record of Decision (ROD) did not contain precise mitigation measures. Like the 3M Plans in this case, however, the ROD required an adaptive management plan, set various goals for continued monitoring, and required mitigation of the project's adverse impacts. *Id.* at 506. The D.C. Circuit upheld the ROD because it required triggers

to be included in a later developed plan of development. *Id.* This is analogous to the situation here, as the 3M Plan requires specific measures for monitoring, managing and mitigation to be delineated in an operations plan before any pumping commences.

**B. Existing Evidence Is Sufficient Enough for a Proper Conflicts Analysis But Not to Set Triggers**

The district court simply could not understand how enough evidence can exist to make NRS 533.370 findings, but not to set triggers. In basing its decision on its failure to understand the State Engineer's findings, the district court essentially substituted its judgment for that of the State Engineer. (1 SNWA App. 16, 23.)

Put simply, regional information is sufficient to support NRS 533.370 findings, but the State Engineer was justified in calling for local, site-specific evidence to set quantitative triggers to protect certain water rights or environmental areas. (1 SNWA App. 212.) Substantial evidence supports the State Engineer's conclusion that it can develop more information to set quantitative standards or triggers at a later time. (1 SNWA App. 141.)

**1. *The State Engineer Was within His Discretion in Calling for More Information on Local Conditions to Set Triggers***

The State Engineer concluded that he wanted more information on natural changes in groundwater levels and biological systems before setting triggers, and the 3M Plans require collecting seven years of baseline data before pumping. (1

SNWA App. 205-206.) This information will help the State Engineer determine if subsequent changes are caused naturally or by pumping. (1 SNWA App. 205.)

In the Swamp Cedars area, for instance, the regional model cannot simulate how drawdown may be limited if the area is perched on a layer of rock that disconnects shallow groundwater from deeper groundwater. When pumping begins, local groundwater conditions will be better understood based on the response in the Swamp Cedars area to the pumping well. When that response is known, quantitative triggers will be refined to protect the Swamp Cedars based on their biological requirements.

## ***2. Enough Time Exists to Set Triggers***

Moreover, as the State Engineer found, because the “proposed pumping will not begin for many years, there is ample time for studies to be conducted to determine a baseline as well as *quantitative thresholds*.” (1 SNWA App. 141 (emphasis added).) Ample evidence supports the reasonableness of the State Engineer’s finding, and even GBWN’s own witness agreed with this timing. That witness agreed that quantitative triggers can be set in an operations plan for the project when pumping begins and that triggers can be included in an operations plan when well locations and variables like pumping timing and duration are known. (1 SNWA App. 140-141, 206.) GBWN’s unreasoned departure from its own expert’s admissions is merely an attempt to delay the project through remands and appeals.

**C. The State Engineer Properly Proceeded with Caution and Sought Greater Certainty**

The State Engineer adopted a balanced approach that is both supported by substantial evidence and cautiously seeks greater certainty. That is both proper and within his discretion.

Uncertainty is often present in important societal decisions and almost always in connection with the permitting, planning and building of great public works. That does not mean that civilization should or must stand still. The proper answer in such situations is not paralysis and fear; it is to rely on the best available evidence and adopt a reasoned and prudent approach, even if the process must be accomplished in steps, checking along the way. In this case, the State Engineer and experts in hydrology, geochemistry, geology and biology used the best available evidence to conclude that the SNWA project can proceed without the devastation hypothesized and hyperbolized by the protestants. While absolute certainty is not available, the evidence here is sufficient to sustain the State Engineer's approach to proceed with the project, albeit cautiously, rather than refuse to take action. *See AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 655-56 (1980) (plurality opinion) (agencies are not required to support risk findings "with anything approaching scientific certainty"); *Pub. Citizen Health Research Grp. v. U.S. Dep't of Labor*, 557 F.3d 165, 176 (3d Cir. 2009) (substantial evidence

standard does not require risk finding “with anything approaching certainty”).

That is within the State Engineer’s sound discretion.<sup>11</sup>

**1. *The Protestants Advocate Paralysis***

By contrast, the protestants advocate inaction until absolute certainty is achieved. GBWN, CPB and CTGR seized on any uncertainty to convince the district court that “no one really knows what will happen with large scale pumping in Spring Valley.” (1 SNWA App. 13, 16.) They continue their “no one knows” argument here, combining it with a parade of hypothetical horrors about how the project may devastate Spring Valley. These insubstantial arguments are insufficient to overrule the State Engineer.

**2. *The State Engineer’s Approach Is Scientifically Sound***

An authority cited by CTGR supports the State Engineer’s approach. “[F]ear need not be paralyzing and [] action need not mean the complete loss of regulatory control.” Holly Doremus, *Precaution, Science, and Learning While Doing in Natural Resource Management*, 82 WASH. L. REV. 547, 554, 563 (2007). This is because even “the decision to act does not end the opportunity for caution” and an incremental approach can properly focus on information gathering and analysis. *Id.* Caution is practiced by “[a]cting incrementally with attention to the feasibility and potential value of learning.” *Id.* at 579.

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<sup>11</sup> Indeed, the refusal to act would itself have been an abuse of discretion.

The stepwise approach has great potential to achieve conservation objectives with the lowest practical socio-political cost. *Id.* The State Engineer properly implemented this approach by requiring staged development and the 3M Plans.

**D. The State Engineer Will Not Lose Control of the Project**

***1. Nevada Water Law Will Always Apply***

The protestants claim that if triggers are not set now the State Engineer will lose control over the project. This is not so, as the State Engineer's retained powers are provided in Nevada statutes and retained through permit conditions.

*United States v. Alpine Land and Reservoir Company*, 919 F.Supp. 1470, 1479 (D. Nev. 1996) (State Engineer has power to deny application or condition approval).

The absence of triggers and thresholds at this time does not change that, especially as the State Engineer ordered baseline data to be collected so triggers and thresholds can be established and limited initial pumping. (1 SNWA App. 239-240.)

Despite these express permit terms, protestants speculate that the State Engineer will lose his resolve. This speculation is unsupported. The State Engineer in the future will require the law to be followed. Protestants' surreal dystopian forecasts to the contrary are not sufficient to overcome this Court's standard presumption that parties will follow the law. *See Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. 669, 699-700 & n.122, 191 P.3d 1138, 1157 & n.122 (2008) (noting that the Attorney General has the affirmative duty to enforce

the Open Meeting Law and that the Secretary of State has the affirmative duty to enforce Nevada election laws); *University of Nev. v. State Emps. Ass'n*, 90 Nev. 105, 111, 520 P.2d 602, 606 (1974) (“[M]ost states presume the regularity of official action.”); *State v. Sweeney*, 24 Nev. 350, 350 55 P. 88, 90 (1898) (there is a presumption that a government official “did his official duty”); NRS 47.250(9) (providing rebuttable presumption “[t]hat official duty has been regularly performed”). It is true that Las Vegas residents will desperately need this water, but that will not change this state into a lawless society. Throughout the West, administrative and judicial decisions regularly limit and control the amount of water allowed to municipalities. At the time of the hearing, water supplies to Albuquerque and Los Angeles had been limited, up to 85%, due to environmental factors, and cuts have been created since. (29 SNWA App. 6507-08.) Water supplies to those cities are even more restricted now. This is because “in the real world [] western utilities have to comply” with the law. *Id.* The same will be true here. As the State Engineer observed, the ongoing regulatory control of state and federal agencies “demonstrates redundancies in environmental regulation” and “will ensure continuous oversight regardless of the resolve of a future State Engineer.” (1 SNWA App. 201.) Any notion that the State Engineer will lose resolve or cede unfettered control of the project to SNWA is hypothetical nonsense



that has no place in evaluating whether substantial evidence supports the State Engineer's decision.

**2. *The 3M Plans Do Not Limit State Engineer Power Over the Project***

The 3M Plans do not absolve SNWA of the responsibility to comply with Nevada law. "If it becomes obvious that corrective action must be taken," the permit terms for SNWA's water rights and Nevada law will require SNWA to take whatever action is directed by the State Engineer. *See* CPB AB at 62.

The 3M Plans do not give SNWA a veto power over mitigation activities, nor is SNWA permitted to refrain from reporting impacts. *See* CPB AB at 61-62; GBWN AB 34 and 78, 79. The State Engineer is party to all discussions on the 3M plan technical committees, and SNWA must regularly submit all pumping and impact data to the State Engineer. (1 SNWA App. 132; 4 SNWA App. 835, 857, 879, 911.) SNWA is also expressly required to "perform any mitigation activities that may be necessary to avoid conflicts with existing rights."<sup>12</sup> (1 SNWA App. 143.)

The 3M plans do not create "opaque processes and committees" that will just sit back and talk while Spring Valley is devastated. *See* GBWN AB at 78. Regardless of any 3M plan, the State Engineer will take action as needed to correct

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<sup>12</sup> SNWA never conceded at the hearing that it could not take action if it saw a "disaster looming." *See* CPB AB at 63. CPB's mischaracterizes testimony that

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any unreasonable impacts caused by the project. The 3M plan's alternative dispute resolution process does not change that. It seeks consensus among scientists and resource managers to see if issues can be addressed before intervention by the State Engineer. If the committees cannot reach consensus, the State Engineer can himself order corrective action.<sup>13</sup> The claims that the 3M Plans somehow absolve SNWA of responsibility are baseless.

### III.

**THE STATE ENGINEER PROPERLY INTERPRETED  
NRS 533.370 AND FOUND UNAPPROPRIATED  
WATER IS AVAILABLE IN DELAMAR,  
DRY LAKE AND CAVE VALLEYS**

The State Engineer concluded that NRS 533.370 requires unappropriated water to be determined basin by basin. This interpretation is entitled to deference for two reasons. First, the State Engineer is the agency responsible for enforcing the statute, and he has developed the expertise in those legal and regulatory areas. *See In re Nev. State Eng'r Ruling No. 5823*, 128 Nev. \_\_\_, \_\_\_, 277 P.3d 449, 453 (2012) (“[T]his court recognizes the State Engineer’s expertise and looks to his interpretation of a Nevada water law as persuasive, if not mandatory, authority.”)

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actually indicated the decision to take action would be made by the State Engineer.

<sup>13</sup> This fact distinguishes our situation from *Animal Welfare Institute v. Beech Ridge Energy LLC*, 675 F.Supp.2d 540, 579-580 (D. Md. 2009), cited by CPB, because here the 3M plan is not discretionary, and the State Engineer has the statutory authority to stop all pumping if SNWA does not comply with these requirements. (1 SNWA App. 143.)

Second, the State Engineer's interpretation in this case was informed by findings of fact that are supported by substantial evidence.

GBWN<sup>14</sup> argues for, and the district court adopted, a new approach that evaluates the availability of unappropriated water on the basis of a "flow system." This Court should reject such an interpretation of NRS 533.370.

**A. Unappropriated Water Should Be Determined Basin by Basin**

GBWN and the district court ignore the vast amount of evidence that supports the State Engineer. Rulings 6165-67 explained that evidence. The State Engineer described his methodology for calculating perennial yield in groundwater basins that have no ET and have groundwater inflow from other basins. (2 SNWA App. 287-290.) He described the prior studies that calculated the perennial yield and the expert reports that were submitted in this proceeding. (2 SNWA App. 290-291.) He explained that this approach incorporates "state of the art" techniques of UNR's Desert Research Institute, as well as estimates within the range of prior scientific publications. (2 SNWA App. 292-302.)

The State Engineer reviewed extensive geologic, geochemical and hydrologic evidence of interbasin flow at five separate locations. (2 SNWA App. 302-312.) He explained the precipitation data that was used to calculate recharge in the Delamar, Dry Lake and Cave ("DDC") valleys and indicated why he

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<sup>14</sup> The protestants referred to as GBWN here are the only parties who challenged

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adopted part of the GBWN's evidence to lower SNWA's estimates of recharge.<sup>15</sup>

Finally, the State Engineer included a detailed review of local hydrology. (2 SNWA App. 317-321.)

These portions of Rulings 6165-67 demonstrate the type of careful analysis the legislature expects from the State Engineer. Each conclusion that unappropriated water exists was based on substantial evidence that was specific to the basin in question and was tested by cross examination and competing expert testimony. GBWN and the district court simply disagree with the State Engineer's judgment and how he weighed the evidence. *Id.*

***1. The Basin-by-Basin Approach Yielded Protective Measures for Cave Valley***

GBWN omits any mention of the significant protective actions the State Engineer took when he determined perennial yield in Cave Valley. The State Engineer found the recharge is 12,900 acre-feet annually, but limited the perennial yield to 5,600 acre-feet annually. (2 SNWA App. 321.) Flag and Butterfield springs are local springs in White River Valley that are only a few miles from Cave Valley. These are the only springs outside the DDC valleys where any credible evidence predicted a potential impact. These springs flow approximately 7,300

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Rulings 6165-6167 on appeal.

<sup>15</sup> (2 SNWA App. 314) (Cave Valley recharge lowered from 13,700 acre-feet annually to 12,900 acre-feet annually); (2 SNWA App. 484) (Dry Lake Valley recharge lowered from 16,200 acre-feet annually to 15,000 acre-feet annually); (3 SNWA App. 648) (Delamar Valley recharge lowered from 6,600 acre-feet

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acre-feet annually and may have sources of water from areas other than Cave Valley. Yet, the State Engineer conservatively reduced the perennial yield in Cave Valley by 7,300 acre-feet annually to protect these springs. He found that impacts to the springs could not be reasonably or practically mitigated and this water was reserved to prevent any impact. (2 SNWA App. 318-321.) Contrary to GBWN's aspersions that the State Engineer disregarded evidence of impacts, this record tells a different story.

2. ***Best Available Science Supports Basin-by-Basin Approach in Dry Lake and Delamar Valleys***

In Dry Lake and Delamar Valleys, the State Engineer reviewed the best available science regarding groundwater flow between these basins and others. The evidence included detailed hydrologic, geologic and geochemical reports and testimony that was submitted by both sides. (2 SNWA App. 486-489.) Based on that evidence the State Engineer found the groundwater in these basins is isolated from other basins and concluded that only recharge in the basins that comes from precipitation in mountain areas is unappropriated water. He did not include groundwater that reportedly flows *into* the basins from the north. (2 SNWA App. 484, 490; 3 SNWA App. 648, 653.) He also concluded the recharge in these basins is not already appropriated in down-gradient valleys.

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annually to 6,100 acre-feet annually).

The State Engineer provided detailed justifications for these unappropriated water determinations and did not rely on “obfuscations by SNWA” or a “radical inconsistent *ad hoc* approach” as GBWN claims. GBWN AB at 80.

**3. *The Absence of Flow System Impacts Supports Basin-by-Basin Approach***

The State Engineer found no evidence that the approved pumping in the DDC basins will impact water rights throughout the White River Flow System (“WRFS”). This conclusion was based on geologic, hydrologic and geochemical evidence, and the results of groundwater flow models. (2 SNWA App. 289; 2 SNWA App. 459; 3 App. 623.) If no flow system impacts are predicted, it makes no sense to define unappropriated water based on the flow system and not basin by basin, as GBWN argues should be done.

**a. GROUNDWATER MODEL EVIDENCE**

The State Engineer reviewed evidence from the model prepared for the U.S. Bureau of Land Management’s Environmental Impact Statement (“BLM model”) for the SNWA project and the Regional Aquifer System Analysis (“RASA”) model that was developed by the USGS in 1995 and was used by GBWN’s expert. According to the State Engineer, the BLM model predictions did not indicate any unreasonable drawdowns at any DDC Valley water rights, or at any regional springs in the WRFS, including the Muddy River and regional springs in Pahrangat and White River Valleys. (3 SNWA App. 622-623.) The only predicted impact was at Flag and Butterfield Springs in White River Valley and the

State Engineer reserved 7,300 acre-feet annually from Cave Valley to protect those springs. (2 SNWA App. 321.)

The State Engineer discounted the weight of RASA model predictions because expert testimony indicated that the model is “not suited to predict accurate water-level declines that would result from pumping groundwater.” (2 SNWA App. 351-352; 3 SNWA App. 517-518; 3 SNWA App. 680-681; 27 SNWA App. 6041, 6119.) Obvious flaws in GBWN’s RASA model predictions were demonstrated in its prediction of impacts at Hot Creek and Moon River Springs. (2 SNWA App. 354.) Even GBWN’s witnesses disagreed with the accuracy of this prediction, and conceded that the RASA model is too coarse and simplistic to yield a good estimate of local impacts. (24 SNWA App. 5435; 25 SNWA App. 5711; 25 SNWA App. 5713; 25 SNWA App. 5737.) The State Engineer concluded these model flaws made the RASA predictions unreliable and he relied on the BLM model where predictions from the two models conflicted. (2 SNWA App. 354; 3 SNWA App. 518; 3 SNWA App. 681-83.)

The State Engineer found that the only credible groundwater model showed that all regional springs in the White River Flow System were “virtually unaffected” after 200 years, and that “if no measureable impacts to existing rights occur within hundreds of years” no evidence can exist that conflicts will occur with water rights at those springs. (2 SNWA App. 289.)

b. OTHER FLOW SYSTEM EVIDENCE

Evidence showed that many flow system water rights will not be impacted because they are not connected to the same aquifer as the SNWA applications (*e.g.* water rights in mountain areas or in shallower aquifers). (3 SNWA App. 668; 3 SNWA App. 677; 19 SNWA App. 4271.) Geologic evidence reviewed whether faults connect the DDC basins with neighboring basins. Except for Flag and Butterfield Springs, the State Engineer concluded the flows from the DDC basins are blocked by faults and mountain ranges. (3 SNWA App. 651-653.) Geochemical evidence indicated that recharge water from the DDC basins does not flow out of regional springs in the Muddy River, Pahranaagat Valley or White River Valley. *Id.*

Water levels in neighboring valleys indicated that water from Delamar Valley is held back from Coyote Spring Valley by the Pahranaagat Shear Zone. This huge underground dam causes water levels in Delamar Valley to be 1,280 feet to 1,550 feet higher than water levels in Coyote Spring Valley. *Id.* Based on this evidence and the groundwater models, the State Engineer properly concluded the approved DDC pumping will not impact the flow system.

**4. *GBWN Reweighs the Flow System  
Evidence to Create One River***

GBWN's outrageous claims of flow system impacts can only be supported by its reliance on the flawed RASA model predictions. The State Engineer properly concluded the BLM model evidence was credible and showed virtually no



effect to the Muddy River, Pahranaagat Valley, or the regional springs in White River Valley after 200 years. (2 SNWA App. 289, 27 SNWA App. 6133-6138.) As the State Engineer’s findings regarding credibility and weight of the evidence are entitled to deference, they should not be disturbed.

a. GBWN’S ONE RIVER MYTH

After getting the district court to adopt its one river myth, GBWN now pivots to distance itself from the myth and incredibly accuses SNWA of constructing it as a straw man. (GBWN AB at 89-90.) GBWN hatched the one river myth long ago because facts and evidence cannot support its “no holds barred” opposition to the project. (28 SNWA App. 6382; 21 SNWA App. 4748; 24 SNWA App. 5724-5725.) Since overwhelming evidence shows no flow system impacts, the myth can only stand if the actual evidence in the record is ignored.

But the district court adopted GBWN’s “one river” myth and considered groundwater flow over hundreds of miles and beneath mountain ranges to be “just like water in streams.” (1 SNWA App. 19.) The district court reweighed and misunderstood an expert report that includes several pages explaining why groundwater *does not* flow like a river. (7 SNWA App. 1624-1635.) The report describes multiple factors that influence groundwater behavior, including geology, climate, physiography, and others.

The State Engineer weighed this USGS evidence that addressed misconceptions about groundwater movement. (12 SNWA App 2798-2860; 13

SNWA App. 2861-2984.) The report stated “common misconceptions include the belief that groundwater occurs in underground rivers resembling surface streams.”

*Id.* This misconception is rooted in the fact the groundwater environment is hidden from view and many conclude that groundwater occurs only in underground rivers and veins. *Id.* With a single sentence plucked out of context, the district court reweighed all of the State Engineer’s factual findings relating to the geologic framework, interbasin flows, and geophysical data and fell into GBWN’s one river trap.

b. THE WRFS IS NOT A RIVER

The State Engineer properly rejected the “one river” argument because it “is flawed by ignoring the time frames and geologic uncertainties involved.” (2 SNWA App. 289.) He properly maintained his basin by basin approach because the limits he placed on the available water in the DDC basins placed “controls on the regional flow system [that] allow groundwater to be available in every basin for beneficial use.” (3 SNWA App. 653.) His decision should be upheld.

**B. GBWN’s One-Half Discharge Theory Is Not Appropriate Here**

GBWN claims the State Engineer should ignore the volumes of evidence about individual basin hydrology and blindly follow a one-half discharge approach. GBWN theory starts from a faulty premise that prior State Engineer decisions indicate the perennial yield in certain valleys should never be greater than one half the calculated discharge. (GBWN AB at 81-82.) In no instance has the State

Engineer adopted this approach. While GBWN properly states that consideration of local hydrology and local water rights is critical, GBWN conveniently argues that such considerations can only decrease perennial yields below one half the discharge in the DDC basins. *Id.* at 81. The evidence does not support this approach.

***1. GBWN's Approach Ignores the Best Available Evidence***

Reconnaissance level estimates of perennial yields were made by the USGS in the 1960s and 1970s. At that time, perennial yield in basins with little to no ET was often set at one half the discharge because detailed local data was not available for the hundreds of groundwater basins across Nevada. (7 SNWA App. 1513.) However, the legislature has encouraged the State Engineer to “consider the best available science in rendering decisions concerning the available surface and underground sources of water in Nevada.” NRS 533.024(c). Hence, the one-half discharge rule of thumb has been rejected when the best available science dictates otherwise.

In numerous rulings with which GBWN is no doubt familiar, the State Engineer cautions against blind use of GBWN's approach. GBWN cites Ruling No. 5782 that actually recognized the one-half discharge method is not used when better evidence is available. *See* GBWN AB at 82. As explained in that ruling “there are many exceptions to this general rule-of-thumb based on considerations of local hydrology.” (2 SNWA Pamphlet 260). This was not the first time the

State Engineer cautioned against the one-half discharge idea. In Ruling 5465, the State Engineer rejected the same GBWN arguments made here and GBWN did not appeal. (1 SNWA Pamphlet 232-233). He found the one-half discharge rule is not the best evidence when more detailed information exists and it can lead to double appropriation so he followed the same approach he did in this case. *Id.*

**2. *GBWN's Approach Was Not Followed in the Prior DDC Rulings***

GBWN erroneously claims the State Engineer varied from the methodology he used in the prior DDC rulings. (GBWN AB at 81.) In both rulings the State Engineer indicated that perennial yield in the DDC basins can be based on a basin's recharge. In each case the State Engineer had enough specific information to avoid blind adherence to the old reconnaissance level guidepost. Both times his findings indicated why evidence of local hydrology and existing rights form a better basis for determining unappropriated water than the one-half discharge concept.

**C. The State Engineer Properly Distinguished the DDC Applications from Order 1169**

GBWN argues the State Engineer should have denied SNWA's DDC applications because in Order 1169 he ordered a pump test before concluding whether unappropriated water is available. Whether additional study is needed is a factual question uniquely directed to the State Engineer's expertise and discretion. NRS 533.368(1). The State Engineer has plainly explained the substantial

evidence that supports the exercise of his discretion in this instance. GBWN reweighs that evidence.

**1. *Factual Differences between this Case and Order 1169***

GBWN relies on an outright mischaracterization of the contents and purpose of Order 1169. (GBWN AB at 87.) Order 1169 did not involve the DDC basins and never mentioned the DDC valleys. (1 SNWA Pamphlet 169-179). Order 1169 addressed applications in Coyote Spring Valley where existing water rights already exhausted the perennial yield and the State Engineer was asked to issue water rights above that perennial yield. Order 1169 focused on the lower White River Flow System, not the DDC basins, and did not address water availability in the entire flow system. *See id.* By contrast, here SNWA requested water rights in basins where unappropriated water is available because existing water rights are virtually non-existent.

Also, the Order 1169 applicants were claiming additional water rights from the carbonate rock aquifer that they claimed contained more water than the USGS previously estimated. *Id.* Before permits could be granted, the State Engineer required an extensive pump test to better understand the carbonate rock aquifer. Order 1169 never suggested the carbonate rock aquifer must be better understood before applications in the DDC basins can be granted. *Id.*

2. ***The Results of the Order 1169 Pump Test Prove Order 1169 Involved a Different Hydrologic Situation***

After completion of the Order 1169 pump test, the State Engineer issued Ruling 6255 and denied nearly all the applications that were held in abeyance in the Order 1169 basins. (26 SNWA App. 5939.) After existing water rights were pumped and monitored, the State Engineer concluded that five of the Order 1169 basins have a “close hydrologic connection” and pumping in any one basin would almost immediately impact all five basins and the Muddy River. (26 SNWA App. 5936-39 (figure showing that areas of concern in Order 1169 do not include the DDC basins).) According to the State Engineer the unique and close hydrologic connection between these five basins made them *unlike other basins in Nevada*. (26 SNWA App. 5934.)

Order 1169 involved a completely different potential for impacts. Sensitive environmental areas and existing water rights in and around the Muddy River were located as close as one mile from proposed wells and the water table between the proposed wells and areas with existing water rights is flat. The State Engineer concluded that changes in water levels at proposed wells *work in lockstep* with water levels at areas with existing water rights. (26 SNWA App. 5921.) No expert could confirm that the development would not have unreasonable impacts. *Id.*

Here, vast evidence proves the opposite. Contrary to GBWN’s reckless statements, no expert could present competent evidence that the DDC applications

would cause unreasonable impacts. The DDC basins do not *work in lockstep* with the carbonate rock aquifer in Coyote Spring Valley. Applications in the Order 1169 basins would impact existing rights in months or years and applications in the DDC basins will not impact existing rights during at least the next 200 years, if ever. (26 SNWA App. 5935.) Also, unappropriated water from local recharge did not exist in the Order 1169 basins and it does in the DDC basins. *Id.* This evidence proves the State Engineer soundly exercised the discretion granted to him in NRS 533.368 and properly treated the DDC applications differently than Order 1169.

**D. The State Engineer Correctly Interpreted His Own Records**

GBWN goes so far as to misinterpret the State Engineer's own records to drum up the claim that the evidence below tended to demonstrate all basins in the WRFS are fully appropriated. (GBWN AB at 85-86.) Clearly the State Engineer is best situated to understand that his own records show many basins in the WRFS are not fully appropriated. (8 CPB App. 1534-1540.) He also understood the inconsistency in GBWN's position because he heard its testimony. GBWN members said the DDC basins are not fully appropriated and additional water rights should be granted, but not to SNWA. (11 GBWN App. 2546-2546; 11 GBWN App. 2561; 11 GBWN App. 2619; 11 GBWN App. 2629; 11 GBWN App. 2639; 11 GBWN App. 2691-2693; 11 GBWN 2708-2711; 11 GBWN App. 2726-2728.) GBWN cannot have it both ways. Prior appropriation remains the

foundation of water law in Nevada and the State Engineer properly granted unappropriated water to the next applicant in line: SNWA.

The district court also erred when it reweighed and interpreted the State Engineer's records. Ruling 6255 demonstrates that the district court incorrectly concluded that "paper water rights" in the Order 1169 basins barred the granting of the DDC applications. (*See* 1 SNWA App. 19.) The district court incorrectly considered these "paper water rights" to be valid existing water rights. *Id.* But those "paper rights" were actually only applications, and they were denied in Ruling 6255. The district court should not have relied upon them in erroneously concluding that the State Engineer double appropriated water rights in the DDC valleys. (26 SNWA App. 5938.)

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**PART FOUR:**  
**ISSUES OUTSIDE THE**  
**SCOPE OF THE PETITIONS**

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The protestants raise arguments that are outside this Court's jurisdiction. The district court ruled for SNWA and the State Engineer on these issues, and protestants attempt to raise them here without filing their own appeal or writ petition. This Court should simply not consider these issues. Even if this Court were to consider them, these arguments are without merit.



I.

**PROTESTANTS IMPROPERLY SEEK AFFIRMATIVE RELIEF ON ISSUES OUTSIDE THE SCOPE OF SNWA'S PETITION**

**A. The Only Issues Raised in SNWA's Petition**

SNWA's writ petition raised three issues:

- (1) whether an unprecedented method for calculating water available for appropriation should be applied across Nevada instead of the State Engineer's proven and historic method;
- (2) whether the efficacy of the monitoring, management and mitigation plan ordered by the State Engineer is supported by substantial evidence; and
- (3) whether there is substantial evidence to support the State Engineer's conclusions that unappropriated water exists in Delamar, Dry Lake, and Cave Valleys, and that the diversion of that water will not significantly impact the White River flow system.

(Writ Petition at 5-6.) These are the only issues over which this Court has jurisdiction and on which it can grant affirmative relief.

**B. This Court Does Not have Jurisdiction to Address Issues Not Raised in an Appeal or a Petition for Writ**

Instead of filing their own appeals or petitions, protestants impermissibly attempt to add other issues through their answering briefs. The Court does not have jurisdiction to address such issues.

Parties can raise substantive issues on which they seek affirmative relief only by means of an appeal or a writ petition. *See Jitnan v. Oliver*, 127 Nev. \_\_\_, \_\_\_, 254 P.3d 623, 631 n.4 (2011) (court lacks jurisdiction over issues that were raised only in dismissed cross-appeal); *Langevin v. York*, 111 Nev. 1481, 1483 n.2, 907 P.2d 981, 982 n.2 (1995) (“[A] respondent who seeks to alter the rights of the parties under a judgment must file a notice of cross-appeal.” (quoting *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994))). *See also, United States v. Ramirez-Lara*, 564 Fed. Appx. 214 (6th Cir. 2014) (refusing to consider potential error by trial court where issue was not raised by way of cross-appeal); *Adono v. Wellhausen Landscape Co., Inc.*, 258 Fed. Appx. 12, 16 (7th Cir. 2007) (court lacks jurisdiction to consider issue that was not raised on appeal and for which appellees did not file cross-appeal).

While CPB filed a writ petition on an expressly “limited” issue and a notice of appeal, the other protestants did not file a petition or an appeal. This Court should not address any of the issues raised only in their answering briefs.

SNWA still believes that all issues are best and properly raised through appeal and it has appealed the district court order, although at the time of filing this brief that jurisdictional issue remains pending in a motion to dismiss in Case 64815. To assure review by this Court, as an alternative to the notice of appeal, both the State Engineer and SNWA filed petitions for writ relief (as SNWA also

argued for in its April 25, 2014 opposition to the motion to dismiss in Case 64815).<sup>16</sup> In either case, however, protestants have not affirmatively sought review of these other issues, on which the district court ruled for the State Engineer and SNWA, and they are prohibited from seeking that affirmative relief simply through an answering brief.

## II.

### **EVEN IF THIS COURT HAD JURISDICTION TO ADDRESS THESE OTHER ARGUMENTS, THEY ARE WITHOUT MERIT**

#### **A. The State Engineer Properly Approved the 3M Plans that He Found Will Be Effective**

Protestants claim numerous deficiencies in the 3M Plans. In approving the plans, however, the State Engineer weighed significant expert testimony and reports on the effectiveness of 3M plans in general, and on these specific 3M plans. (1 SNWA App. 214-216; 4 SNWA App 861, 915; 14 SNWA App. 2950-2951, 2960, 2964-2969; 19 SNWA 4081-4092.) The reports summarized how 3M plans are used nationally and what components of 3M plans should be included as a best practice. *Id.* The reports' conclusions are substantial evidence that the 3M plans

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<sup>16</sup> SNWA Opposition at 9, citing *Clark Cnty. Liquor & Gaming Lic. Bd. v. Clark*, 102 Nev. 654, 658, 730 P.2d 443, 446 (1986) (treating appeal from remand order as a petition for a writ of *mandamus*); *Jarstad v. Nat'l Farmers Union Prop. & Cas. Co.*, 92 Nev. 380, 384, 552 P.2d 49, 51 (1976) (treating appeal as a petition for *mandamus*).

contain these best practices and will be effective and that the State Engineer did not abuse his discretion in approving them. (1 SNWA App. 141.)

***1. Substantial Evidence Supports the State Engineer's Conclusion that Monitoring Is Effective***

The protestants reweigh that evidence by belittling the 3M plans as only being monitoring plans. But the State Engineer found that monitoring is the cornerstone of an effective 3M Plan because it explains the hydrologic effects of pumping so management decisions can be made to assure effects are reasonable. (1 SNWA App. 102-103; 18 SNWA App. 3790; 25 SNWA App. 5620.)

Monitoring is not in place to build it “and see what happens,” as CTGR contends. (CTGR AB at 33.) Extensive evidence was submitted regarding the monitoring network in Spring Valley, the management decisions that could be made based on the monitoring network, and the mitigation options that are available to correct unreasonable impacts, if they occur. (1 SNWA App. 214-216.) The plans clearly explain the “specifics of monitoring; type and location of wells, frequency of measurements, types or degree of detail and accuracy of measurements” even though GBWN falsely claims they do not. (14 SNWA App. 2937; 14 SNWA App. 2947; *see* GBWN AB at 75.)

GBWN once again proffers discredited evidence to substitute its judgment for the State Engineer's. GBWN's claim that monitoring cannot work in a 3M plan because “by the time impacts are measured, it will be too late to prevent

further impact” was thoroughly reviewed by the State Engineer. (1 SNWA App. 133; *see* GBWN AB at 74.) GBWN relies on a hypothetical example where monitoring wells are quite obviously in the wrong place. *Id.* GBWN’s expert agreed that monitoring can work to timely prevent impacts if monitoring wells are in the proper place. *Id.* After the State Engineer concluded monitoring wells in the 3M plan are properly located, he found that the difficulties GBWN’s expert pointed out were overcome. *Id.* That decision was reasonable in light of *all* the evidence, including the evidence that 3M plans effectively control the impacts of many current groundwater development projects.

## **2. *The 3M Plans Adequately Address Mitigation***

The protestants cite to *Wilderness Society v. U.S. Bureau of Land Management*, 822 F.Supp.2d 933, 940 (D. Ariz. 2011) and contend the State Engineer’s 3M plan is faulty because it contains a "mere listing" of mitigating measures. *See* CPB AB at 65. However, the difference between adequate and inadequate mitigation discussions “appears to be one of degree,” and proper mitigating measures can be described in general terms and rely on general processes. *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000).

The 3M Plans approved by the State Engineer provide mitigating measures in general terms and general processes. They also provide the specificity necessary for monitoring and adaptive management that allows the flexibility to address

impacts as suggested in *Wilderness Society*. Contrary to GBWN's claims, the State Engineer properly concluded the specific mitigation options listed in the 3M plan are sufficient and can be effective. (1 SNWA App. 143; *see* GBWN AB at 76.)

The protestants imply that a 3M Plan must actually fund mitigation efforts. *See* CPB at 64 *citing Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976 (1985). No such requirement exists. The court in *Friends of Endangered Species* merely recognized that mitigation funding could play an important factor when habitat is threatened. *Id.* at 984. The State Engineer recognized this as well when he reviewed SNWA's \$78 million commitment to mitigation and its water rights and land ownership that can be used for mitigation. (1 SNWA App. 142.) This finding adequately addresses mitigation.

### **3. *The Protestants Helped Develop the 3M Plans***

The claims that protestants could not participate in the 3M plans is misleading. While CPB claims it could not participate in the *federal stipulation*, its witnesses admitted they were directly involved in the *3M plan*. (32 SNWA App. 7220-23.) CPB selected monitoring locations on their property and coordinated monitoring and baseline data collection with the State Engineer and SNWA. (*Id.*, 18 SNWA App. 3775-3777.) SNWA installed monitoring equipment to protect CPB's existing rights in consultation with CPB and the State Engineer. (1 SNWA

App. 134.) The State Engineer ruled that this monitoring is adequate to assess potential impacts in the Cleveland Ranch area. (1 SNWA App. 135.)

GBWN and CTGR did more than just comment on the 3M plans before they were approved. The four proposed 3M plans were submitted by SNWA as evidence at the 2011 hearing. (4 SNWA App. 823-866; 4 SNWA App. 867-920; 4 SNWA App. 921-1000; 5 SNWA App. 1001-1250; 6 SNWA App. 1251-1305; 6 SNWA App. 1306-1496.) GBWN and CTGR presented written and oral evidence challenging the 3M plans and cross examined SNWA's experts on the same topic. This evidence informed the State Engineer's approval of the 3M plans.

#### ***4. The 3M Plans Protect Local Communities***

CPB and GBWN claim the 3M plans are flawed because they do not allow involvement from affected communities. This argument is misplaced. Local communities are protected by the scientific understanding of the State Engineer, federal experts in wildlife and hydrology, and independent experts at the technical meetings. These governmental and private representatives include representatives from Nevada, Utah, and federal agencies. (4 SNWA App. 932.) The public is well-represented at the technical meetings by these governmental stewards who GBWN agreed are statutorily tasked to zealously protect the public interest. (1 SNWA App. 200.)

Local communities and private parties have access to the plans, and can bring any questions, comments, concerns or suggestions to the government

agencies representing their interest. Anyone can review the data that is submitted under the plans on-line (SNWA, BLM and USFWS websites) or from the State Engineer's records. NRS 532.150. Also, "[a]ny person feeling aggrieved by any order or decision of the State Engineer" may challenge that decision. NRS 533.450.

**5. *The Express Protections in the 3M Plans Should Not Be Confused With the Text of the Federal Stipulations***

The effectiveness of the 3M plans is not altered by the protestants' confusing references to the stipulations that led to the withdrawal of federal protests. Those stipulations are not the same as the 3M plans the State Engineer approved,<sup>17</sup> and the protestants deliberately confuse these documents. For instance, the protestants complain that the State Engineer is not a party to the *stipulation*, which is true, but he is in absolute control of the *3M plans*. (1 SNWA App. 126, 143, 204.)

The protestants imply that non-federal water rights are not protected by the 3M plans *because the stipulations* do not protect non-federal rights. (CPB AB at 7.) Yet, the 3M plans the State Engineer approved clearly protect non-federal water rights. (1 SNWA App. 131; 4 SNWA App. 882, 897-898, 903-909, 915.)

As CPB is aware, the 3M plans include specific provisions to protect their water

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<sup>17</sup> The stipulations are dated September 8, 2006 (Spring Valley) and January 7, 2008 (DDC). (3 SNWA App. 738-750; 4 SNWA App. 751-784; 4 SNWA App 785-822.) The 3M plans are dated February 2009, January 2011, and June 2011. (4 SNWA App. 823-866; 4 SNWA App. 867-920; 4 SNWA App. 921-1000; 5 SNWA App. 1001-1250; 6 SNWA App. 1251-1305; 6 SNWA App. 1306-1496.)



rights. And the State Engineer expressly indicated the “stipulation in no way limits the State Engineer’s obligation or authority to protect CPB water rights,” (1 SNWA App. 128, 143), and “if pumping conflicts or impacts *private rights*, . . . SNWA will be required to curtail pumping and/or mitigate the impacts to the satisfaction of the NSE [Nevada State Engineer].” (4 SNWA App. 837-839, 881-882 (emphasis added).)

CPB claims its due process rights were violated because it could not ask certain questions about development of the *stipulation*. See CPB AB at 52-53. But CPB was certainly given due process when it presented witnesses and testimony challenging the effectiveness of the *3M plan* during the six week hearing on SNWA’s applications. At that time CPB asked questions about the actual 3M plans, and continues to exercise its due process rights regarding those plans in this proceeding. Accordingly, the protestants’ arguments regarding 3M plan effectiveness are without merit.

**B. Protestants Try to Raise Other Issues that Are Outside the Scope of this Writ Petition**

***1. Staged Development***

CPB claims the State Engineer could not apply staged development in this case because NRS 533.3705 was adopted after the SNWA applications were filed. This issue is raised in CPB’s limited writ petition, and CPB filed a notice of appeal as part of case 64815. In any case, however, this Court should not consider the issue as part of this writ petition.

**2. *The Anti-Speculation Doctrine***

CPB also claims the SNWA applications should have been denied based on the anti-speculation doctrine, as CPB believes SNWA really needs to drill 50-100 wells. This argument is clearly outside the scope of this writ petition, and this Court should refuse to entertain it.

Even if the Court hears this argument, however, it is without merit, for several reasons. First, the argument depends on CPB's faulty claim that the project must be an ET salvage project, and it should fall along with that argument.

Second, SNWA is simply not engaged in speculation. In fact, even the district court upheld the State Engineer's findings that Southern Nevada needs this water and SNWA has the financial ability to build the project. The State Engineer found that the SNWA applications accurately represent SNWA's intention to develop the project. SNWA will develop the 15 wells that are permitted, and if additional wells are needed, the utility may file change applications, which CPB can protest. This Court should summarily reject CPB's anti-speculation argument.

**3. *State Engineer Did Not Shift the Burden of Proof***

CTGR also claims that the State Engineer improperly placed the burden of proof. This claim is without merit. SNWA presented specific evidence that the project will not harm CTGR resources. CTGR had the opportunity to present competing evidence and could not. The State Engineer did not place an improper burden on CTGR, he simply found that SNWA's evidence outweighed CTGR's.

CONCLUSION

For these reasons, this Court should enter a writ of mandamus, or in the alternative, prohibition, vacating the order of the district court and reinstating the State Engineer's decision.

DATED this 3rd day of December 2014.

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**CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 18,007 words.

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on December 3, 2014, I submitted the foregoing **SNWA'S REPLY BRIEF TO ANSWERING BRIEFS OF CPB, CTGR AND GBWN PROTESTANTS** for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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