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Steyer

7 **IN THE SEVENTH JUDICIAL DISTRICT COURT**
8 **OF THE STATE OF NEVADA**

9 **IN AND FOR THE COUNTY OF WHITE PINE**

10 WHITE PINE COUNTY, et al., and)
11 CONSOLIDATED CASES,)
12)
13 Petitioners,)
14)
15 vs.)
16)
17 TIM WILSON, P.E., Nevada State Engineer,)
18 DIVISION OF WATER RESOURCES,)
19 DEPARTMENT OF CONSERVATION AND)
20 NATURAL RESOURCES,)
21)
22 Respondent.)
23)
24)
25)
26)
27)
28)

**PETITIONERS WHITE PINE
COUNTY, ET AL.
OPENING BRIEF**

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27 Petitioners White Pine County, et al. Opening Brief

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STATEMENT OF THE ISSUES

The issues collectively presented in these consolidated petitions for judicial review of the Nevada State Engineer’s (“SE’s”) August 17, 2018, Ruling 6446 on Remand from this Court’s December 13, 2013, *Decision* are: (1) whether the SE properly denied the Southern Nevada Water Authority’s (“SNWA’s”) Spring Valley pipeline applications on the ground that the applicant failed to produce substantial evidence demonstrating that there is sufficient available water at the source of supply, because SNWA did not present any evidence that its proposed pumping would reach a new equilibrium, or steady state, in a reasonable timeframe as required by law and as directed by this Court in its December 13, 2013, *Decision* (“*Remand Decision*”) in this case; (2) whether the SE properly denied SNWA’s pipeline applications in Cave, Dry Lake, and Delamar Valleys (“CDD Valleys”) on the ground that the applicant did not present substantial evidence that sufficient water is available in the subject basins such that the applications would not conflict with downgradient rights as required by law and as directed by this Court in its *Remand Decision*; (3) whether the SE’s misconstruction of the law and mischaracterization of the evidence related to the standard governing availability of water determinations, which directly contradicted the standards articulated by the Nevada Supreme Court, Nevada district courts, this Court’s *Remand Decision*, the State Engineer’s own prior previous practice, and the evidence in the record, was unsupported by substantial evidence, contrary to law, and arbitrary and capricious; (4) whether the SE’s approval of SNWA’s inchoate monitoring, management, and mitigation plans (“3M Plans”) for Spring Valley and the CDD Valleys as a substitute for a meaningful evaluation of impacts to, and feasibility of protection of, existing rights and the environment was contrary to law, unsupported by substantial evidence,

1 arbitrary and capricious, and contrary to the *Remand Decision's* direction to define objective
2 standards, thresholds, or triggers for the mitigation of unreasonable effects such that mitigation
3 would be effective; (5) whether the State Engineer erred in approving SNWA's Spring Valley
4 3M Plan which does not comply with the *Remand Decision's* directive that the 3M Plan include
5 adequate protections for Millard and Juab Counties, Utah; and (6) whether the State Engineer
6 erred in denying the Tribes' October 13, 2016, *Motion to Dismiss for Failure to Join United*
7 *States Department of Interior Bureaus* as necessary parties. White Pine County, et al. petitioned
8 for judicial review of issue numbers three and four, above, and have addressed those issues in
9 this Opening Brief. White Pine County, et al. will address other issues as appropriate in their
10 Answering Brief.
11

12 INTRODUCTION

13
14 The undersigned counsel respectfully submit this Opening Brief on behalf of a broad,
15 diverse coalition of Petitioners – including members of longstanding rural Nevada ranching and
16 farming families, rural governmental entities and businesses, and citizens' organizations
17 dedicated to responsible stewardship and balanced, sustainable use of Nevada's water resources
18 – led by White Pine County, Nevada, and the Great Basin Water Network ("Petitioners" or
19 "White Pine County, et al."). This brief is submitted in support of the petition for judicial review
20 that this coalition filed in September of 2018. Petitioners challenge certain findings of fact and
21 conclusions of law contained in the Nevada State Engineer's August 17, 2018, Ruling 6446 on
22 Remand ("Ruling 6446") from this Court's *Remand Decision*.
23
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26 _____
27 Petitioners White Pine County, et al. Opening Brief

1 Ruling 6446 properly denied 25 applications to appropriate groundwater in four rural
2 Nevada valleys (“Pipeline Applications”),¹ which were intended to supply water to one
3 mammoth, unified groundwater development and pipeline project proposed by SNWA (“SNWA
4 Pipeline Project” or “Pipeline Project”). This denial was based on a finding by the SE that there
5 is not sufficient water available in the subject groundwater basins to serve the Pipeline
6 Applications. Because SNWA’s hydrologic evidence on the issue of water availability was
7 unresponsive to the *Remand Decision* and deficient at the most basic levels, the SE properly
8 denied SNWA’s Pipeline Applications in Spring, Cave, Dry Lake, and Delamar Valleys.
9 Accordingly, Petitioners respectfully urge this Court to uphold those denials.
10

11 However, following his denial of SNWA’s applications, the SE in Ruling 6446 lodged a
12 direct challenge to the standards governing water availability under Nevada law. Unfortunately,
13 the State Engineer questioned those longstanding standards, which required the denial of
14 SNWA’s applications, and argued that they should not have to be applied in this case.
15 Petitioners, therefore, must challenge the State Engineer’s misstatements of law and fact with
16 regard to the standard under Nevada law governing water availability to ensure that an erroneous
17 precedent is not set by Ruling 6446 and to correct the record in this case.
18

19 Additionally, despite the fact that the SE denied SNWA’s applications, Ruling 6446 went
20 on to gratuitously approve SNWA’s 3M Plans, even though the deficiencies found by this Court
21

22
23 ¹ SNWA’s groundwater applications in Spring, Cave, Dry Lake, and Delamar Valleys
24 (applications 54003 through 54021 in Spring Valley, 53991 and 53992 in Delamar Valley; 53989
25 and 53990 in Dry Lake Valley; and 53988 and 53897 in Cave Valley) were the subject of Ruling
26 6446 on Remand. *See* ROA 000809 – 000846, 002729-002740.

1 in its *Remand Decision* had not been remedied and even though the Plans fail to comply with the
2 requirements governing the use of 3M Plans articulated by the Nevada Supreme Court in *Eureka*
3 *County v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015) (“*Eureka I*”). Although
4 Ruling 6446 properly denied SNWA’s applications, as the law required, the SE’s flawed findings
5 of fact and conclusions of law with regard to SNWA’s 3M Plans must be corrected to ensure that
6 an erroneous precedent is not set by Ruling 6446 and to correct the record should the SE’s denial
7 of SNWA’s Pipeline Applications on water availability grounds be reversed on appeal.

8 Accordingly, Petitioners also seek judicial review of Ruling 6446 and reversal of the State
9 Engineer’s approval of SNWA’s 3M Plans.
10

11 As explained below, prior to the issuance of Ruling 6446, the SE had repeatedly and
12 improperly approved SNWA’s Pipeline Applications in substantially the same amounts as
13 SNWA sought in the 2017 Remand Hearing, all of which improper approvals were voided by
14 this Court and the Nevada Supreme Court in three separate decisions.² As a result, the SE’s
15 2017 Remand Hearing that followed this Court’s *Remand Decision* and resulted in Ruling 6446
16 was the third State Engineer hearing on each of SNWA’s Pipeline Applications, which occurred
17 over an eleven year period, and it was the fourth time SNWA presented evidence regarding its
18 3M approach to the State Engineer. Specifically, SNWA’s applications were the subject of State
19 Engineer hearings in September of 2006 on the Spring Valley applications, February of 2008 on
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22
23 ² Exhibit A, Order Vacating and Remanding State Engineer's Ruling, *Carter-Griffin v. Taylor*,
24 CV-830008 (Nev. Dist. Ct., Oct. 19, 2009); *Great Basin Water Network v. Taylor*, 126 Nev.
25 Adv. Op. 2, 222 P.3d 665 (2010), *modified on petition for rehearing* 126 Nev. 187, 234 P.3d 912
(2010); ROA 039051-73.

1 the Cave, Dry Lake, and Delamar Valleys applications, a unified, comprehensive rehearing on
2 SNWA's applications in all four valleys during the fall of 2011 ("2011 SCDD Rehearing"), and a
3 second unified remand hearing during the fall of 2017 ("2017 SCDD Remand Hearing" or
4 "Remand Hearing"). See State Engineer Ruling 5726 (Spring Valley 2007) ("Spring Valley
5 Ruling"); ROA 39354-40067, 46059-46098. Despite having had twenty-eight years to prepare
6 sufficient evidence to justify its applications, and despite the fact that the 2017 Remand Hearing
7 was SNWA's third opportunity to present evidence supporting each of its applications, SNWA
8 again failed to present substantial evidence that meets the requirements of NRS 533.370(2) and
9 NRS 533.370(3)(c). In fact, SNWA's evidence on remand was openly and willfully
10 unresponsive to, and therefore did not even attempt to remedy, the deficiencies found by this
11 Court's *Remand Decision* concerning the availability of water in Spring Valley and SNWA's
12 ability to capture evapotranspiration in Spring Valley without causing impermissible conflicts
13 with existing water rights or unreasonable environmental effects. Similarly, SNWA's evidence
14 on remand was not even responsive to, and thus failed to cure, the deficiencies found by this
15 Court with regard to what, if any, amount of water may be available for SNWA to appropriate
16 from Cave, Dry Lake, and Delamar Valleys ("the CDD Valleys") without causing either over-
17 appropriation or conflicts with existing water rights downgradient in the White River Flow
18 System ("WRFS"). Finally, SNWA's evidence on remand did not come close to curing the
19 deficiencies with regard to its 3M Plans for any of the four targeted basins or the downgradient
20 areas that would be affected by SNWA's proposed groundwater pumping project.

21
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23
24 It has been nearly 30 years since SNWA's applications were filed in 1989, and SNWA
25 has more than a decade to present, supplement, and re-present its evidence on these applications.

1 Yet, despite all that time and all those repeated opportunities, SNWA has repeatedly failed in
2 four separate hearings to present substantial evidence that meets either the plain, longstanding
3 requirements set forth in NRS 533.370 or the parameters for the use of monitoring, management,
4 and mitigation plans by the State Engineer that have been explained in multiple court orders.³ In
5 view of SNWA's repeated failure though more than a decade of hearings to demonstrate with
6 substantial evidence that its applications and groundwater export project can satisfy these basic
7 legal requirements under Nevada's water law, Petitioners respectfully urge this Court to uphold
8 the State Engineer's denial of SNWA's applications, correct the State Engineer's misstatements
9 of law related to the standards governing water availability, and vacate his gratuitous approval of
10 SNWA's still woefully inadequate 3M Plans, consistent with NRS 533.370, this Court's *Remand*
11 *Decision*, and the Nevada Supreme Court's decisions in *Eureka I* and *Eureka II*.

12 STATEMENT OF THE CASE

13
14
15 The long saga of the ill-advised water right applications to support SNWA's massive
16 groundwater pumping and export project has been going on for nearly 30 years now. So, it is
17 worth reviewing the history of SNWA's repeated failures to develop and produce the necessary
18 evidence to support those applications, which has resulted in repeated judicial reversals of the
19 State Engineer's previous erroneous approvals of those applications and, finally, this time around
20

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22
23 ³³ This Court's 2013 *Remand Decision*, the Nevada Supreme Court's *Eureka County v. State*
24 *Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015) ("*Eureka I*"), *State Engineer v. Eureka*
25 *County*, 133 Nev. Adv. Op. 71, 402 P.3d 1249 (Nev. 2017) ("*Eureka II*") decisions, and this
26 Court's 2009 decision by the late Judge Robison in *Carter-Griffin v. Taylor*, CV-830008, at 7, 8
27 (Nev. Dist. Ct., Oct. 19, 2009) (holding that a decision to grant more water than is available
28 cannot be supported by a plan to monitor, manage, and mitigate).

1 in the State Engineer’s recognition of the fact that the law requires denial of SNWA’s
2 unsupported and insupportable applications. In addition, the history of the administrative and
3 judicial proceedings on SNWA’s Pipeline Applications is directly relevant to the legal and
4 factual issues before the Court on this third round of judicial review. Since it has been several
5 years since this case was before the Court, and since a comprehensive view of the history of
6 these applications will be helpful to the Court’s evaluation of the issues before it, Petitioners
7 have provided below an overview of that history before advancing their arguments.

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

11 As part of a massive, unprecedented effort to acquire more water for greater Las Vegas,
12 on October 17, 1989, the Las Vegas Valley Water District (“LVVWD”) filed 146 applications
13 with the State Engineer to pump approximately 800,000 acre-feet per year (“af/y” or “afa”) of
14 groundwater from twenty-six rural basins in east-central and southern Nevada. Record on
15 Appeal (“ROA”) 022412. In response, over 800 individual protests were filed, a number of
16 which were filed by Petitioners in this case. *See* ROA 000847-002681, 002741-003404.
17 Subsequently, the quantity of groundwater sought was reduced to approximately 190,000 afa in
18 seventeen basins. ROA 022412. In 1991, SNWA was created and inherited the LVVWD’s
19 rights to these groundwater applications as a successor-in-interest. *See* ROA 000006, 000221,
20 000390-391, 000554-555. For over a decade and a half the State Engineer took no action to
21 adjudicate those applications and the protests thereto.

22
23 SNWA’s applications in Spring, Cave, Dry Lake, and Delamar Valleys, applications
24 54003 through 54021 in Spring Valley, 53991 and 53992 in Delamar Valley; 53989 and 53990
25

26
27 Petitioners White Pine County, et al. Opening Brief

1 in Dry Lake Valley; and 53988 and 53897 in Cave Valley, *see* ROA 000809 – 000846, 002729-
2 002740, represented two of three main prongs of its planned massive groundwater export project,
3 and together requested 174 cubic feet per second (“cfs”) (125,976 afa) of groundwater from
4 those four basins.⁴ *See id.* Between the three major prongs of the proposed Pipeline project,
5 SNWA asked the State Engineer to effectively grant it every last drop of water that it claimed
6 was available in a total of five groundwater basins.⁵ *See* ROA 000006, 000220, 000390, 000554.
7 These applications included requests to dramatically increase the previously published perennial
8 yields of the targeted basins so as to increase the amount of water arguably available for SNWA
9 to export. *See* ROA 000090, 024419, Exhibit A, Order Vacating and Remanding State
10 Engineer's Ruling, *Carter-Griffin v. Taylor*, CV-830008 (Nev. Dist. Ct., Oct. 19, 2009) (“CDD
11 Valleys Remand Order”).
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13
14 If approved, SNWA’s applications would have permitted the development and export of
15 groundwater from rural Nevada on a scale and quantity far in excess of any previous
16 undertaking, requiring a vast and tremendously costly infrastructure of wells, pipelines, pumping
17 stations, storage reservoirs, and power stations. *See* ROA 049908, 051663-709. Indeed,
18 SNWA’s proposed project likely would have been the biggest groundwater pumping project ever
19 built in the United States, resulting in “*hundreds of feet of simulated water-level declines*
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22 ⁴ The third prong of the proposed project, SNWA’s water rights applications in Snake Valley, has
23 not yet been set for a hearing by the State Engineer.

24 ⁵ As part of its overall planned groundwater export project, SNWA also applied for water from
25 Three Lakes Valley and Tikapoo Valley. The State Engineer approved a portion of these
26 requests. Nevada State Engineer Ruling No. 5465, at 61-62 (Three Lakes Tikapoo 2005),
<http://images.water.nv.gov/images/rulings/5465r.pdf>.

1 throughout a large area of the aquifer system.” ROA 022456 (emphasis added). The potential
2 economic, social, and environmental effects of SNWA’s massive and unprecedented
3 groundwater mining and export project are therefore of great local, state, regional, and national
4 significance.

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6 **II. FIRST ROUND OF STATE ENGINEER HEARINGS ON SNWA’S
7 PIPELINE APPLICATIONS, AND JUDICIAL REVIEW OF STATE
8 ENGINEER DECISIONS**

9
10 **A. January 5, 2006: State Engineer Holds Pre-Hearing Conference on
11 SNWA’s Then Sixteen-Year-Old Applications**

12 On January 5, 2006, the State Engineer held a pre-hearing conference to schedule and
13 discuss issues related to protest hearings on SNWA’s Pipeline Applications in Spring, Snake,
14 Cave, Dry Lake, and Delamar Valleys. *See* ROA 000007, 000221, 000391, 000555. Following
15 the pre-hearing conference, the State Engineer issued an “Intermediate Order and Hearing
16 Notice” setting dates for hearings, procedures for pre-hearing motions, and for the exchange of
17 evidence. *See* Nevada State Engineer, Spring Valley Intermediate Order and Hearing Notice, at
18 9 (March 3, 2006).⁶

19 That order scheduled hearings on SNWA’s Spring Valley Pipeline Applications for
20 September 11, 2006, with subsequent hearings for the Snake and CDD Valleys applications to be
21 scheduled at some later date. *See id.* The Spring Valley Intermediate Order and Hearing Notice
22 also made the following statement, which is relevant to SNWA’s decision to present evidence
23 related to pumping at different points of diversion (“PODs”) than the application PODs during
24 the State Engineer’s 2017 Remand Hearing.

25 _____
26 ⁶ http://water.nv.gov/Hearings/past/Spring%20Valley%202006/exhibits/NDWR/Exhibit_1.pdf.

1 The State Engineer is very concerned about the expenditure of
2 significant amounts of time and resources being spent on hearings
3 on applications that are not a true expression of the intent of the
4 Applicant. These hearings are going to be extremely costly and will
5 require the dedication of large amounts of time and energy on the
6 part of all participants. If the Applicant intends to file change
7 applications to move the points of diversion, it would seem prudent
8 that such applications be filed before ever proceeding to hearing.
9 The State Engineer would hope, in the interest of economy for all,
10 if change applications were going to be filed, such applications
11 would be filed and become ready for action before any hearing is
12 scheduled. However, the State Engineer has before him a request to
13 proceed on the applications as filed. These applications must be
14 evaluated as they are filed and will be analyzed for impacts at the
15 identified points of diversion and not on some un-identified
16 proposed future well field.

17 *Id.* at 9.

18 **B. July 6, 2006: Broad Coalition Led by the Great Basin Water Network
19 Files Due Process Petition to Reopen Protest Period on SNWA's
20 Applications**

21 Following the 2006 prehearing conference, a number of petitioners filed a petition with
22 the State Engineer seeking to have the protest period for SNWA's then 16-year-old Pipeline
23 Project applications re-opened and to allow successors-in-interest, such as heirs, to original
24 protestants to step into the shoes of original protestants, just as SNWA had been permitted to
25 step into the shoes of its predecessor-in-interest, the LVVWD, and participate in these hearings.
26 *See* ROA 000007-08, 000221, 000391, 000555. On July 27, 2006, the State Engineer denied that
27 petition, and on August 22, 2006, those petitioners filed a petition for judicial review in this
28 District Court challenging that denial. *See* ROA 000007-08, 000221, 000391, 000555. 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,

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1 and also that the State Engineer had violated a statutory obligation to process the applications
2 within a year or obtain consent to further delay from all parties, which would have avoided the
3 due process problems. On May 30, 2007, the District Court denied the Due Process Petition, and
4 the petitioners appealed to the Nevada Supreme Court. *See* ROA 000008, 000221-22, 000391-
5 92, 000555-56.
6

7 **C. September 11 through 25, 2006: State Engineer Holds Hearing on**
8 **SNWA's Applications in Spring Valley and Issues Ruling Which Was**
9 **Vacated by the Supreme Court**

9 While the Due Process Petition was pending, from September 11, 2006, through
10 September 29, 2006, the State Engineer held an administrative hearing on SNWA's applications
11 in Spring Valley, applications 54003 through 54021 ("Spring Valley Hearing").⁷ ROA 000007.
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14 ⁷ On September 8, 2006, and on January 7, 2008, just prior to the Spring Valley Hearing and
15 CDD Hearing, respectively, the Department of the Interior, on behalf of the Bureau of Indian
16 Affairs, National Park Service, Bureau of Land Management, and US Fish and Wildlife Service,
17 entered into stipulated agreements with SNWA and abandoned their protests to SNWA's
18 applications in Spring Valley and in Cave, Dry Lake, and Delamar Valleys. *See* ROA 002682 –
19 002728, 006427-006464. SNWA also entered into a stipulated agreement with the Moapa Band
20 of Paiute Indians that resulted in the abandonment of their protests in Cave, Dry Lake, and
21 Delamar Valleys. *See* ROA 000418-000426. These stipulated agreements purport to protect
22 federal resources potentially impacted by SNWA's proposed groundwater export project, but do
23 nothing to protect any other water rights, uses, or resources. ROA 002684-93. The Stipulated
24 Agreements set up three committees or panels that would carry out the stipulated agreement: a
25 Biological Resources Team; a Technical Review Panel, and an Executive Committee. ROA
26 002687. Notably, decisionmaking would be by consensus, meaning that any decision to mitigate
27 or cease pumping activity would have to be agreed upon by everyone who sits on the particular
28 decisionmaking body. *See* ROA 002710, 002719. At least one SNWA representative would sit
on each of these bodies, *see id.*, and thus, SNWA would have an effective veto of any decision to
investigate or mitigate pumping impacts. The stipulated agreements' reference to potential third
party intervention in a situation where consensus is not reached was not mandated by any
provision in the stipulation agreements, and it was unclear exactly how a dispute would be

1 A number of individuals, businesses, governmental or quasi-governmental entities, and nonprofit
2 citizens organizations presented evidence at the Spring Valley Hearing. On April 16, 2007, the
3 State Engineer issued Ruling No. 5726, permitting SNWA to export up to 60,000 afa from
4 Spring Valley, with a requirement that 40,000 afa initially be pumped and exported for 10 years
5 to assess impacts at that level of development before the full permitted amount would be
6 approved. *See* SE Ruling 5726, at 56 (Apr. 16, 2007) (“Spring Valley Ruling”).⁸ Additionally,
7 the State Engineer denied applications 54016, 54017, 54018 and 54021 as conflicting with
8 existing rights and required the establishment of “[a] monitoring and mitigation program
9 approved by the State Engineer a minimum of five years prior to the export of any water.” *Id.* at
10 56.
11

12 **D. February 4 through 15, 2008: State Engineer Holds Hearing on**
13 **SNWA’s Applications in Cave, Dry Lake, and Delamar Valleys, and**
14 **Issues Ruling Which Is Reversed by the District Court**

15 With the Due Process Petition still pending, the State Engineer next held an
16 administrative hearing on SNWA’s applications in Cave, Dry Lake, and Delamar Valleys from
17 February 4 through February 15, 2008 (“CDD Hearing”). *See* ROA 000222, 000392, 000556. A
18 number of protestants, who were individuals, businesses, governmental and quasi-governmental
19 entities, and nonprofit citizens organizations, presented evidence at the hearing. *See* Exhibit A,
20 CDD Valleys Remand Order, at 3. During the CDD Hearing, SNWA argued for an increase in
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23 handled and resolved, if at all. Thus, the federal agencies would have had little, if any, power to
24 enforce any of the as yet undefined monitoring or mitigation measures contemplated by the
25 Agreements. Moreover, the committees contained no representation for protestants, affected
26 communities or counties of origin, or the environmental conservation community.

27 ⁸ <http://images.water.nv.gov/images/rulings/5726r.pdf>.

1 the published perennial yields, or assessments of available water, for the CDD Valleys to justify
2 its applications. Exhibit A, CDD Valleys Remand Order.

3 On July 9, 2008, the State Engineer issued Ruling No. 5875, in which he increased the
4 perennial yields of the CDD Valleys and granted SNWA 4,678 afa of water under Applications
5 53987 and 53988 in Cave Valley, 11,584 afa of water under Applications 53989 and 53990 in
6 Dry Lake Valley; and 2,493 afa of water under Applications 53991 and 53992 in Delamar
7 Valley, for a total grant of 18,755 afa of water from the three Valleys. *See* ROA 046098.

8 On August 8, 2008, protestants in the CDD Hearing and other parties aggrieved by the
9 ruling filed a petition for judicial review of Ruling 5875 in Nevada's Seventh Judicial District
10 Court. On October 19, 2009, the district court reversed Ruling 5875, holding that in increasing
11 the published perennial yields in the CDD Valleys, sanctioning groundwater mining, permitting a
12 double appropriation of water, relying on an undeveloped monitoring and mitigation program to
13 protect against impacts, and reserving insufficient water in the basins of origin for future
14 economic development, the State Engineer had acted arbitrarily and capriciously, abused his
15 discretion, and that the State Engineer's findings were not supported by substantial evidence in
16 the record. *See* Exhibit A, CDD Valleys Remand Order. The State Engineer and SNWA
17 appealed the district court's order to the Nevada Supreme Court.
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III. JANUARY 28, 2010, AND JUNE 17, 2010: SUPREME COURT GRANTS PROTESTANTS' DUE PROCESS PETITION, VACATES STATE ENGINEER'S FIRST RULINGS ON SNWA'S APPLICATIONS IN SPRING AND CDD VALLEYS AND DIRECTS STATE ENGINEER TO REPUBLISH AND RE-OPEN THE PROTEST PERIOD ON SNWA'S PIPELINE APPLICATIONS

On January 28, 2010, while the SE and SNWA appeals in *Carter-Griffin v. Taylor* were pending before the Nevada Supreme Court, the Court decided the earlier filed due process case in favor of the petitioners, vacating both the State Engineer’s Spring Valley Ruling and CDD Ruling, remanding SNWA’s Spring, Cave, Dry Lake, and Delamar Valleys (“SCDD Valleys”) applications for further proceedings, and requiring the State Engineer to re-publish notice of and re-open the protest period both for the SCDD Valleys applications and 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*, 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 the 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 by the State Engineer. See *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 20, 234 P.3d 912 (2010). As a result of the Supreme Court’s decision requiring that the applications be re-noticed, SNWA and the State Engineer’s appeal of the district court’s ruling in *Carter-Griffin v. Taylor* was

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1 subsequently dismissed as moot and Ruling 5875 was vacated, along with Ruling 5726.
2 *Southern Nevada Water Authority v. Carter-Griffin*, 126 Nev. 758, 367 P.3d 821 (2010).

3 Subsequently, SNWA's 1989 Pipeline Project applications in the SCDD Valleys were re-
4 published and subjected to a new protest period in early 2011. Hundreds of additional
5 individuals and entities filed protests. ROA 003405 - 006417.

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7 **IV. SECOND ROUND OF STATE ENGINEER HEARINGS ON SNWA'S
8 PIPELINE APPLICATIONS, AND JUDICIAL REVIEW OF STATE
9 ENGINEER DECISIONS**

10 **A. September 26 through November 18, 2011: State Engineer Rehearing
11 on SNWA's Water Rights Applications in Spring, Cave, Dry Lake,
12 and Delamar Valleys**

13 On May 11, 2011, the SE held a prehearing conference on SNWA's Pipeline Project
14 applications in the SCDD Valleys, and scheduled a unified rehearing on all of them for
15 September 26, 2011, through November 18, 2011 ("2011 SCDD Rehearing"). ROA 007221.
16 Many protestants participated in the six-week long hearing, including all of the petitioners in this
17 case. ROA 007216-17. Because the evidence presented during the 2011 SCDD Rehearing is
18 part of the record for the 2017 SCDD Remand Hearing and for the consolidated cases before this
19 Court, and because neither the proposed application points of diversion nor proposed pumping
20 amounts have changed since SNWA presented modeling evidence in 2011, a review of the
21 evidence presented during the 2011 SCDD Rehearing that is relevant to the *Remand Decision's*
22 directives to the State Engineer is necessary to a thorough discussion of the issues that are now
23 before this Court. Additionally, because SNWA chose not to present evidence responsive to the
24 *Remand Decision* on the issues of pumping to equilibrium at its application points of diversion,
25 impacts to existing rights in fully appropriated basins downgradient of the CDD Valleys, or an

1 impacts analysis associated with either the Spring Valley pumping or the CDD pumping during
2 the 2017 Remand Hearing, the evidence related to those issues that was presented during the
3 2011 hearing is essential in addressing the issues on remand.

4 In 2011, SNWA presented its own new estimates of the perennial yield for the CDD
5 Valleys. Substantial evidence demonstrated that these estimates lie at the high end of the range
6 of previous estimates for the four basins. ROA 036202-05, 025857, 025871, 025873, 025874,
7 026897, 026900, 026901. In an effort to support its perennial yield estimates, SNWA presented
8 testimony and documentary evidence reflecting SNWA's opinion regarding precipitation,
9 recharge, evapotranspiration ("ET"), geology, and interbasin flow within and affecting the
10 SCDD Valleys. In 2011, Protestants White Pine County, et al. presented substantial evidence
11 that SNWA's estimates of precipitation, recharge, and evapotranspiration were inflated and that
12 the data and analysis used by SNWA to arrive at these estimates was flawed and suspect. *See*
13 ROA 036203-05, 036244, 036247, 036324-25, 036508-10, 036636-702, 037777-835, 024301-
14 03, 024305, 024419, 024682, 025860, 026897, 026900-01. Protestants White Pine County, et al.
15 further presented substantial evidence that SNWA's interpretation of the relevant geology was
16 skewed beyond what the data supported in a manner that distorted both potential intrabasin and
17 interbasin flow patterns in an attempt to support the amounts of water that the applications seek.
18 ROA 036514, 025857, 025861-71, 025911.

19 On top of the skewed interpretation of evidence described above, SNWA's 2011
20 hydrology presentation was most fundamentally undermined by SNWA's witnesses' attempts to
21 distance themselves from SNWA's own model and the results of its own modeling efforts. On
22 the one hand, SNWA's witnesses testified that the predictive model they developed for use in
23 preparing the Environmental Impact Statement for the same Groundwater Development Project
24 was superior to all other models, and argued in particular that Dr. Myers' Spring Valley model
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1 should not be relied on because it was not as elaborately documented as SNWA's model. *See*
2 ROA 034319-23. Yet on the other hand, they repeatedly tried to persuade the State Engineer and
3 his staff to disregard the predictions of SNWA's own model. ROA 010704-09, 020064, 020069-
4 70, 020082. SNWA's witnesses even argued that the State Engineer could not use SNWA's
5 model for the very purpose it was developed and used in the BLM's EIS process, namely to
6 predict likely hydrologic impacts and drawdown of the water table throughout the hydrologically
7 connected basins in the region affected by SNWA's proposed pumping. ROA 034323-26.

9 SNWA attempt to have it both ways with regard to its own modeling is analytically
10 invalid. The evidence in the record from the 2011 Rehearing plainly demonstrates that, while it
11 is flawed in some regards and has certain limitations, SNWA's model and other models
12 (including Dr. Myers's) that have been developed to project the impacts of SNWA's proposed
13 pumping in part or all of the affected region are useful tools that the State Engineer should
14 employ to predict in at least general terms impacts that are likely to occur and the order of
15 magnitude or rough degree of severity of such impacts in the affected areas. The irony of
16 SNWA's inconsistent and blatantly skewed approach to the use of its own model is that the
17 evidence shows that SNWA's model produces projections that are broadly similar to those
18 produced by Dr. Myers's model and other models, including the model prepared for the BLM's
19 EIS. ROA 020179, 026027-026030, 026943-45, 031501-14, 036542-46, 036593-944, 036688-
20 89, 037812-14. The clear implication of this general consensus among different models about
21 the geographic scope and magnitude of impacts from SNWA's proposed pumping is that the
22 State Engineer and this Court can rely with some degree of confidence on those projected
23 impacts. And it would be irrational to disregard those predictions.

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1 In the same vein, SNWA's refusal, in the 2011 hearing, to present any model runs
2 extending beyond 75 years plainly was an attempt to hide from the uniform evidence of
3 progressively and continuously worsening impacts the longer SNWA's proposed groundwater
4 development project is allowed to operate. This prospect of increasingly severe drawdown of the
5 groundwater table throughout the affected region, and increasingly severe effects from that
6 drawdown, over the long term future is particularly concerning because SNWA's applications
7 are for perpetual water rights to pump the groundwater sought indefinitely into the future.
8 Indeed, SNWA's witness Patricia Mulroy likened SNWA's supposed entitlement to this project
9 to ancient Rome's entitlement to build and rely on its aqueduct system, a water supply system
10 that has been in continuous operation for two millennia. ROA 032497. Reinforcing the fact that
11 this proposed project and its impacts must be viewed over a longer term than 75 years, is the fact
12 that no witness for SNWA was willing to commit to any limit whatsoever on the duration of
13 SNWA's proposed pumping, and the fact that SNWA itself openly considers the Groundwater
14 Development Project to be a source for a "permanent" supply of water. See ROA 032526-27,
15 032658, 032769-70. Accordingly, SNWA's refusal to offer any evidence whatsoever concerning
16 potential impacts beyond 75 years completely undercuts its case concerning both the availability
17 of water and the proposed use's likely environmental impacts and conflicts with existing rights.
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20 Further, the evidence introduced in 2011 clearly demonstrated that there is a general
21 consensus from all the groundwater modeling which has been done that the system in Spring
22 Valley will not approach any reasonable definition of equilibrium between pumping and
23

1 recharge for over a thousand years and quite possibly not for several millennia.⁹ *See* ROA
2 020179, 026967-30, 026941-45, 026980, 026990, 026995, 036531-46, 036688-89, 037812-14,
3 031501-14. In 2011, protestants presented substantial evidence demonstrating that SNWA's
4 existing applications in Spring Valley will not be able to capture a great deal of the groundwater
5 ET in Spring Valley, meaning that SNWA's proposed groundwater pumping would not reach
6 equilibrium and would amount to groundwater mining that would draw a large proportion of
7 groundwater from storage for at least many centuries and likely millennia, resulting in an
8 essentially perpetual decline in the groundwater table. *See* ROA 024418-20, 024430-02,
9 024439-43, 024688, 025858, 025924-26, 025945, 025953, 026941, 031501-14, 036310, 036495-
10 554, 036636-702, 037777-835, 038400-575. Protestants also presented substantial evidence that
11 whether the present application locations or other locations in Spring Valley are pumped at even
12 the reduced rate of 30,000 afa, SNWA's proposed pumping would not reach equilibrium within a
13 reasonable timeframe and would cause impermissible impacts to existing water rights and
14 environmental resources throughout Spring Valley and in southern Snake Valley. *See* ROA
15 036549-54, 036636-74, 037777-835, 038400-643, 038650-87, 024422-43, 024684-85, 024688,
16 025920-85, 026027-30. Thus, under any reasonable interpretation of Nevada water law and
17 longstanding Nevada water policy, it is clear that SNWA's proposed use would constitute
18 unsustainable and impermissible groundwater mining resulting in devastating conflicts with
19 existing water rights and environmental impacts.

20 Groundwater modeling evidence presented by both SNWA and all protestants during the
21 2011 SCDD Rehearing also confirms that there is no question that the proposed groundwater
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24 ⁹ For a discussion of the mechanics of pumping a groundwater development project to
25 equilibrium, *see* testimony of Protestants' hydrology expert Dr. John Bredehoeft. ROA 037791-
26 802.

1 mining project would have devastating hydrological and biological impacts over vast areas of
2 eastern Nevada and western Utah. ROA 026027-026030, 036546, 036593-944, 037812 -14,
3 031501-14. The model presented by SNWA during that hearing produces projections that are
4 broadly similar to those produced by Protestants' hydrology expert, Dr. Myers', as well as other
5 models. ROA 036688-89, 037812-14, 031501-14. The drawdown numbers are indeed alarming;
6 the proposed pumping would lower the water table by hundreds of feet over a vast and
7 continually expanding area, causing devastating environmental, social, and economic
8 consequences in eastern Nevada and western Utah, and would foreclose the opportunity for
9 future economic development in the target basins and the surrounding communities that depend
10 on those basins.
11

12 With regard to Spring Valley, the models all concur that there would be a significant
13 magnitude of drawdown which would spread throughout the valley, eventually resulting in the
14 drying up of springs and wetlands throughout most if not all of Spring Valley. ROA 020179,
15 026027-026030, 026943-45, 031501-14, 036546, 036593-944, 036688-89, 037812-14. SNWA's
16 proposed pumping would draw down the water table by hundreds of feet, eventually drying out
17 most if not all of the non-perched springs that gave the Valley its name and that sustain a variety
18 of wildlife species. ROA 024436, 028637. SNWA hydrology expert James Watrus agreed in
19 testimony that hundreds of feet of drawdown should be considered a significant drawdown.
20 ROA 035090. Along with the springs, wetlands and riparian areas would be dried out,
21 destroying additional crucial wildlife habitat. ROA 024443, 024730-34. The depth to water
22 would increase to such a degree that even the hardiest of phreatophytes (groundwater dependent
23 plants) will be killed off throughout much of the valley. *See* ROA 024435, 025497, 025504.
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1 The drawdown from SNWA's proposed pumping would give rise to conflicts with existing water
2 rights in Spring Valley and downgradient valleys, eventually becoming so severe that those
3 existing rights would be destroyed for all practical purposes. ROA 024439, 032177. In addition,
4 the drawdown caused by SNWA's proposed use would create an increased risk of dust emissions
5 from both the presently moist playa areas in Spring Valley and other areas where groundwater
6 dependent vegetation is killed off. *See* ROA 038704- 038766. Despite SNWA's blanket
7 unsupported statements to the contrary, no actual analysis was performed of the susceptibility of
8 affected soils to increased dust emissions after SNWA's pumping draws the water table down,
9 and the evidence clearly suggests a risk that these impacts could be too widespread and massive
10 in scale to be effectively managed or mitigated. ROA 024685-024688, 037824-25, 037833-35.

12 With regard to Cave, Dry Lake, and Delamar Valleys, the evidence presented during the
13 2011 SCDD Rehearing indicates that there would be serious and catastrophic impacts to the
14 water levels in both the subject basins and in down-gradient hydrologically connected basins
15 within the White River Flow System ("WRFS"), a system of hydrologically interconnected
16 geographic basins. ROA 024499-501, 024515. Substantial evidence was presented which
17 demonstrated that the recharge in Cave Valley is accounted for by interbasin outflow into other
18 basins within the White River Flow System, specifically White River Valley, Pahroc Valley, and
19 Dry Lake Valley. *See* ROA 024468, 024470-500, 024685-86, 026891, 026900, 036206, 036250-
20 61, 036516-17, 036636-702. Dry Lake Valley and Delamar Valley do not have any significant
21 natural groundwater ET discharge, rather all groundwater discharge from those valleys occurs as
22 subsurface outflow to adjacent downgradient basins in the WRFS. *See* ROA 026894, 026901.
23 Moreover, the evidence in the record clearly demonstrates that the water sought under SNWA's
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1 applications already is allocated downgradient and, as such, is unavailable for appropriation.
2 Cave, Dry Lake, and Delamar Valleys are a major part of the upgradient segment of the WRFS.
3 *See* ROA 024500. Evidence was presented, and the records of the State Engineer show, that
4 many of the basins in the WRFS that are down-gradient from SNWA's points of diversion in the
5 CDD Valleys already are fully appropriated. *See* ROA 002729-40, 024499-501, 024515. These
6 fully appropriated basins include: White River Valley, a center of significant ranching activity
7 and the location of the Kirch Wildlife Management Area; Pahrnagat Valley, home to the
8 Pahrnagat Valley National Wildlife Refuge and Key Pittman Wildlife Management Area, Lake
9 Valley; Muddy River Springs Valley; Lower Moapa Valley, home to the Moapa Valley National
10 Wildlife Refuge; and Coyote Spring Valley. Nevada State Engineer Order No. 1219 (July 5,
11 2012) (White River Valley);¹⁰ Nevada State Engineer Order No. 1199 (Apr. 20, 2009)
12 (Pahrnagat Valley);¹¹ Nevada State Engineer Order No. 1023 (Apr. 24, 1990) (Muddy River
13 Springs Valley);¹² Nevada State Engineer Order No. 798 (Sept. 16, 1982) (Lower Moapa
14 Valley);¹³ Nevada State Engineer Order No. 726 (June 11, 1979) (Lake Valley);¹⁴ Nevada State
15 Engineer Order No. 905 (Aug. 21, 1985) (Coyote Spring Valley);¹⁵ *see also* ROA 024497.
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18 Rather than provide meaningful evidence or analysis related to the projected impacts to
19 the basins that would be affected by SNWA's proposed pumping, during the 2011 SCDD
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22 ¹⁰ <http://images.water.nv.gov/images/orders/1219o.pdf>.

23 ¹¹ <http://images.water.nv.gov/images/orders/1199o.pdf>.

24 ¹² <http://images.water.nv.gov/images/orders/1023o.pdf>.

25 ¹³ <http://images.water.nv.gov/images/orders/798o.pdf>.

26 ¹⁴ <http://images.water.nv.gov/images/orders/726o.pdf>.

27 ¹⁵ <http://images.water.nv.gov/images/orders/905o.pdf>.

1 Rehearing SNWA relied on technically and structurally deficient 3M Plans it claimed were
2 designed to detect and prevent impacts to existing rights protect environmental resources. *See*
3 ROA 013289-386. Protestants presented substantial evidence that SNWA’s proposed 3M Plans
4 could not be effective for SNWA’s massive project and would only mask impacts in the short
5 term. ROA 036593, 036600, 037822-25. Moreover, the plans presented by SNWA in 2011
6 contained no definitively quantified, objective goals, thresholds, or triggers, which are critical to
7 the success of any monitoring and mitigation program, and which must be established up front.
8 ROA 037705-06, 036486-87, 036592-93, 036599-600. Further, under the 2011 3M Plans the
9 Technical Review Panel, Biologic Resources Team, and Executive Committee – the
10 decisionmaking bodies set up by the 2006 and 2008 stipulated agreements – were to determine
11 appropriate management and mitigation measures to respond to any an injury or unreasonable
12 adverse effects in the future, and all decisions of these bodies would be consensus based. ROA
13 002710, 002719, 013304, 013347, 013354. SNWA was represented on each and every one of
14 these consensus-based governing bodies and thus had veto power over any decision to
15 investigate, manage, or mitigate adverse impacts. ROA 002710, 002719. The plans did not
16 provide for the involvement of any of the affected communities or other stakeholders in any of
17 the decisionmaking under the plans, or for any compensation for affected communities in the
18 event of impairment. ROA 037747-49, 037757-58, 037932-33, 037969. Thus, the plans
19 provided no protection for interests of the Petitioners in this case, the Nevada public, or the
20 environment.
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24 The weight of the evidence presented during the 2011 SCDD Rehearing clearly
25 demonstrated that SNWA’s proposed groundwater project would constitute groundwater mining

1 on an unprecedented scale in violation of Nevada law, *see* ROA 024420, 036531- 036546, and
2 would result in devastating environmental, social, and economic impacts to the eastern part of
3 rural Nevada and western Utah in violation of both state and federal law. *See* ROA 025490-511,
4 025661-81, 027942-43, 036593- 601, 036401-402, 036410-11. The groundwater models all
5 agree that drawdown would be severe, would spread over a vast area of eastern rural Nevada,
6 and would extend into western Utah. ROA 037812-14. There is no way to escape the fact that
7 these drawdowns would have catastrophic impacts to wildlife and plant communities in the
8 affected region, including those in national wildlife refuges and state wildlife management areas,
9 and would have the potential to cause serious additional dust emissions in a number of the
10 affected valleys that would create serious air quality issues possibly extending as far as the
11 Wasatch front. Significant harmful impacts to Great Basin National Park, a pristine and
12 irreplaceable national resource, also would be unavoidable.

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15 **B. March 22, 2012: State Engineer Issues Rulings 6164, 6165, 6166, and**
16 **6167 Re-Approving Essentially the Same Amounts of Water for**
17 **SNWA's Applications in Spring, Cave, Dry Lake, and Delamar**
18 **Valleys**

19 On March 22, 2012, the State Engineer issued Ruling Nos. 6164, 6165, 6166, and 6167,
20 addressing all of SNWA's Pipeline Project applications in the SCDD Valleys. Despite the fact
21 that modeling evidence presented at the hearing clearly demonstrated that SNWA's applications
22 would not come close to reaching equilibrium for thousands of years and as such amounted to a
23 blatant case of groundwater mining, in Ruling 6164, the Spring Valley Ruling, the State
24 Engineer granted SNWA 61,127 afa of groundwater in staged development under Applications
25

1 54003 through 54015, 54019, and 54020.¹⁶ ROA 000216-18. The Spring Valley staged
2 development plan was as follows:

3 A. Stage 1 Development: Pumping pursuant to the Applications initially was to be limited to
4 38,000 afa, to provide for a pumping stress that would allow for collection of transient-state data
5 and effective calibration of a groundwater flow model. Before the increase in pumping
6 associated with Stage 2 development could occur, the Applicant would be required to pump at
7 least 85% but not more than 100% of the Stage 1 development amount (32,300 afa - 38,000 afa)
8 for a minimum of eight years. Data from those eight years of pumping and updated modeling
9 results was to be submitted to the State Engineer as part of the annual hydrologic monitoring
10 report. The State Engineer would then make a determination as to whether the Applicant could
11 proceed to Stage 2.
12

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14 B. Stage 2 Development: Pumping pursuant to the Applications was to be limited to a total of
15 50,000 afa. This pumping was to provide additional pumping stresses that would allow for
16 collection of transient state data and continued calibration of a groundwater flow model. The
17 Applicant would be required to pump at least 85% but not more than 100% of the Stage 2
18 development amount (42,500 afa - 50,000 afa) for a minimum of eight years. Data from those
19 eight years of pumping and updated modeling results was to be submitted to the State Engineer
20 as part of the annual hydrologic monitoring report. The State Engineer would then make a
21 determination as to whether the Applicant can proceed to Stage 3.
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25 ¹⁶ The State Engineer also denied Applications 54016, 54017, 54018 and 54021 as conflicting
26 with existing rights. ROA 000216.

1 C. Stage 3 Development: The Applicant was to be permitted to pump the full amount granted,
2 61, 127 afa. The annual hydrologic monitoring report would continue to be submitted and
3 reviewed by the State Engineer. ROA 000216-17.

4 The Spring Valley Ruling's staged development process made no provision for the involvement
5 of any protestants or stakeholders at any of the decision points. *See* ROA 000216-18.

6
7 In Ruling 6165, the Cave Valley Ruling, the State Engineer granted SNWA 5,235 afa of
8 groundwater under Applications 53987 and 53988. ROA 000387-88. In Ruling 6166, the Dry
9 Lake Valley Ruling, the State Engineer granted SNWA 11,584 afa of groundwater under
10 Applications 53989 and 53990. ROA 000551-52. In Ruling 6167, the Delamar Valley Ruling,
11 the State Engineer granted SNWA 6,042 afa of groundwater under Applications 53991 and
12 53992. ROA 000713-14. Undisputed evidence in the record demonstrated that hydrologically
13 connected downgradient basins from Cave, Dry Lake, and Delamar Valleys already were fully
14 appropriated. *See* ROA 024499-501, 024515. The State Engineer also found in Rulings 6165,
15 6166, and 6167 that appropriations in Cave, Dry Lake, and Delamar Valleys would impact
16 existing rights based on the evidence in the record, but because the impacts might not be felt for
17 hundreds of years, they were permissible. ROA 039070, 039619, 039788-89, 039952-53.

18
19 In all four of these 2012 Rulings the State Engineer also limited the evaluation of impacts
20 of the project to an artificial seventy-five year timeframe, ROA 000129-30, 000322, 000489,
21 000652, despite the anticipated water permits' perpetual duration, to support his finding that the
22 project would not conflict with existing rights or protectable interests in domestic wells and
23 would not threaten to be detrimental to the public interest. This limitation operated to mask
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25

1 impacts, which all models predict would be significant and worsen over time.¹⁷ *See* ROA
2 020179, 026027-026030, 026943-45, 037812 -14. The State Engineer justified this artificially
3 limited consideration of impacts by noting that as the timeframe for examination of impacts
4 lengthens, models become more uncertain. The State Engineer's focus on increased uncertainty
5 ignored the fact that, despite the increased uncertainty about how severe particular impacts
6 would be at a specific location and at a specific given time as the modeling timeframe gets
7 longer, there is no uncertainty that impacts on the whole, including at all specific locations,
8 would continue to worsen over time as pumping continues. *See* ROA 024420, 024430-02,
9 024439-43, 024688, 025858, 025924-26, 025945, 025953, 026941, 031501-13, 036310, 036495-
10 554, 036636-702, 037777-835, 038400-575.

11
12 In addition to limiting the consideration of impacts to an artificially short timeframe, the
13 State Engineer limited his consideration of impacts to a regional scale and deferred meaningful
14 consideration of site-specific predicted impacts and conflicts to an unspecified later time, and
15 delegated the evaluation and decision concerning how to address those impacts to the procedures
16 and committees set up under SNWA's proposed 3M Plans for the project. *See* ROA 000217.
17 The management regime proposed by SNWA's 3M Plans would not have adequately protected
18 existing rights, the public interest, economies dependent on the basins of origin, or the
19 environment in the affected area, because it provided no assurance that effective action would be
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23 ¹⁷ The State Engineer also limited consideration of impacts to a 50 foot drawdown contour and
24 15% decline in springflow. These limitations further masked predicted impacts because
25 drawdowns that do not reach those thresholds likely also would result in significant impacts
26 which, under Rulings 6164, 6165, 6166, and 6167, went unevaluated. ROA 000184-87, 000363-
27 65, 000528-30, 000690-92.

1 taken in a timely fashion. *See* ROA 013303-07, 013327, 013348-51, 013381. Specifically, the
2 Plans contained no triggers or thresholds that would require changes in management or
3 mitigation and no information about what management tools would be used or when. *See id.*, *see*
4 *also* ROA 035641-42. Most importantly the Plans contained no evaluation of whether they
5 would or could be effective at preventing conflicts with existing rights or impermissible impacts
6 to the environment. *See id.* Moreover, as described above, the models presented by both SNWA
7 and protestants during the 2011 Rehearing agreed that the proposed project would cause
8 significant drawdowns over a vast area of Nevada and western Utah. ROA 036688-89, 037812-
9 14, 031501-14; *see also* ROA 020179, 026027-026030, 026943-45, 031501-14, 036546, 036593-
10 944, 036688-89, 037812-14. Thus, there was substantial evidence demonstrating that the Project
11 would have massive and potentially devastating impacts and that there needed to be a serious
12 scientifically-grounded approach designed to ensure management of Nevada's water resources in
13 a responsible manner. Despite that evidence, the State Engineer did not conduct or require
14 SNWA to conduct a meaningful evaluation of the Project's likely impacts, but instead approved
15 a loosely defined and poorly designed plan for a plan which lacked concrete, objective standards,
16 thresholds, or triggers to guide management decisions.

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19 The State Engineer, in Rulings 6164, 6165, 6166, and 6167, also found that SNWA had
20 satisfied its obligations under NRS 533.370 to demonstrate a need to import water under the
21 applications, a good faith intention and financial ability to construct the project and put the water
22 to beneficial use, that an acceptable conservation plan was being carried out in SNWA's service
23 area, that the project would be environmentally sound as it related to the basins of origin, and
24

1 that the project would not cause undue economic harm to or limit future growth and development
2 in the basins of origin. ROA 000215-16, 000387, 000550-51, 000712-13.

3 **C. April 2012: A Broad Range of Protestants File Petitions for Judicial**
4 **Review of State Engineer Rulings 6164, 6165, 6166, and 6167**

5 Because Rulings 6164, 6165, 6166, and 6167 blatantly disregarded the weight of
6 evidence in the record and merely parroted the proposed rulings submitted by SNWA, a broad
7 coalition of numerous protestants led by White Pine County and Great Basin Water Network
8 filed petitions for judicial review of those Rulings with this Court. Additionally, the
9 Confederated Tribes of the Goshute Reservation, the Ely Shoshone Tribe, the Duckwater
10 Shoshone Tribe, the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-
11 day Saints, and Juab and Millard Counties, Utah filed petitions for judicial review of Ruling
12 6164 on SNWA's applications in Spring Valley.

14 Specifically, Petitioners White Pine County, et al. challenged as arbitrary and capricious,
15 contrary to law, and unsupported by substantial evidence, the SE's: (1) determination of the
16 perennial yield and/or amount of water available for appropriation and export from Spring
17 Valley; (2) decision to permit unsustainable groundwater mining, which has long been held to be
18 impermissible under Nevada water law and policy; (3) findings and/or failure to make findings
19 regarding, and proper allowances for, intrabasin and interbasin flow systems and patterns; (4)
20 finding that SNWA's proposed export of water would not conflict with existing water rights or
21 protected interests in domestic wells; (5) findings that SNWA's proposed export of water would
22 not cause unreasonable harm to the environment so as to threaten to prove detrimental to the
23 public interest or so as to be environmentally unsound; (6) refusal to consider the impacts of
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1 SNWA's proposed export of water on economic or socioeconomic conditions in local
2 communities; (7) use of an artificial, arbitrary, unjustified, and irrationally short time frame for
3 impacts analysis with regard to conflicts with existing rights and domestic wells, environmental
4 impacts, and economic impacts; (8) use of an artificial, unjustified, arbitrary, and irrationally
5 excessive level of drawdown and spring flow decline as the threshold for determining whether
6 the proposed water use would conflict with existing water rights and domestic wells or threaten
7 to be detrimental to the public interest as a result of unreasonable harmful impacts to the
8 environment or to the local economy; (9) failure to adequately consider air quality impacts due to
9 potential dust emissions caused by lowering the water table, drying out moist playa areas and
10 wetlands and killing off phreatophytic plant communities in the affected area; (10) decision to
11 forego actual consideration of likely, and certain, impacts on existing water rights and the
12 environment on the basis of SNWA's deficient monitoring, management, and mitigation plans;
13 (11) decision to approve the applications while deferring decisions on the ultimate amount of
14 water to allow SNWA to export and on the permissibility of impacts due to that export without
15 providing any meaningful opportunity for protestants, other water rights owners, or affected
16 members of the public to be heard on those issues prior to their being decided; (12) finding that
17 SNWA has the good faith intention, financial ability, and reasonable expectation to actually
18 construct the work and apply the water to the intended use; and (13) finding that SNWA
19 demonstrated a genuine need to import water from this basin.
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1 **D. December 13, 2013: This Court Issues a *Decision* Remanding Rulings**
2 **6164, 6165, 6166, and 6167 for a Recalculation of Available Water,**
3 **Additional Hydrological Study of CDD Valleys, and to Establish**
4 **Standards, Thresholds, or Triggers for Mitigation Such That**
5 **Mitigation Would Be Effective**

6 On December 13, 2013, this Court issued a *Decision* holding that the State Engineer's
7 findings in Rulings 6164, 6165, 6166, and 6167 related to availability of water, conflicts with
8 existing rights, the public interest, and the environmental soundness criteria were unsupported by
9 substantial evidence and were arbitrary and capricious. ROA 039062-63, 039066. Specifically,
10 this Court remanded Rulings 6164, 6165, 6166, and 6167 to the State Engineer for:

- 11 1. The addition of Millard and Juab counties, Utah in the mitigation
12 plan so far as water basins in Utah are affected by pumping of water
13 from Spring Valley Basin, Nevada;
- 14 2. A recalculation of water available for appropriation from Spring
15 Valley assuring that the basin will reach equilibrium between
16 discharge and recharge in a reasonable time;
- 17 3. Define standards, thresholds or triggers so that mitigation of
18 unreasonable effects from pumping of water are neither arbitrary nor
19 capricious in Spring Valley, Cave Valley, Dry Lake Valley and
20 Delamar Valley, and;
- 21 4. Recalculate the appropriations from Cave Valley, Dry Lake and
22 Delamar Valley to avoid over appropriations or conflicts with down-
23 gradient, existing water rights.

24 ROA 039073.

25 The *Remand Decision* found that a failure to capture evapotranspiration ("ET") and reach
26 equilibrium between pumping and recharge in a reasonable timeframe under SNWA's Spring
27 Valley applications, which would result in groundwater mining of thousands of acre feet of
28 groundwater, would be "unfair to following generations of Nevadans, and is not in the public
interest." ROA 039062-63. In fact, the *Decision* noted that there was "no valid evidence of
when SNWA will capture E.T., if ever." ROA 039061. Thus, this Court recognized that

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1 SNWA's proposed project amounts to a groundwater mining project, which is impermissible
2 under Nevada law. ROA 039060. As a result, the *Remand Decision* reversed Ruling 6164's
3 calculation of available water in Spring Valley and remanded SNWA's Spring Valley
4 applications to the State Engineer to recalculate the available water from Spring Valley such that
5 SNWA's appropriations would reach equilibrium between recharge and discharge within a
6 reasonable amount of time without causing unreasonable impacts or conflicts with existing
7 rights. ROA 039060-63, 039066, 039073.

9 The *Remand Decision* also found that the State Engineer erred in granting water to
10 SNWA in Cave, Dry Lake, and Delamar Valleys ("the CDD Valleys") in Rulings 6165, 6166,
11 and 6167 that was already appropriated in hydrologically connected fully appropriated
12 downgradient basins. ROA 039069-70. This Court's finding that the State Engineer permitted a
13 double appropriation in the CDD Valleys was the second such finding made by a Nevada court.
14 See Exhibit A, CDD Valleys Remand Order. In the course of striking down the State Engineer's
15 admitted double appropriation, the *Remand Decision* rejected the State Engineer's reliance on
16 the time lag associated with predicted impacts resulting from such double appropriation as a
17 rationale for overallocation, noting that "it is also unseemly to this court, that one transitory
18 individual may simply defer serious water problems and conflict to later generations, whether in
19 seventy-five (75) years or "hundreds," especially when the "hundreds" of years is only a *hoped*
20 for resolution." ROA 039070. In addition to requiring a recalculation of water available, if any,
21 in the CDD Valleys, this Court's *Remand Decision* directed the State Engineer to reexamine or
22 further study the hydrology of those valleys and basins downgradient from them in the White
23 River Flow System ("WRFS"). ROA 039051-52, 039069-70. The purpose of requiring a

1 reexamination of the hydrology of the CDD Valleys and the downgradient basins in the WRFS
2 was to avoid either overappropriations from those valleys and the WRFS or any conflicts with
3 existing water rights in downgradient portions of the WRFS. *See* ROA 039073.

4 Finally, the *Remand Decision* exposed fatal flaws in SNWA's proposed 3M Plans,
5 including SNWA's decision to postpone mitigation planning to a later date when more
6 information on predicted impacts would become available. ROA 039065. The Court contrasted
7 the arbitrary and capricious nature of the State Engineer's finding on the one hand that "the
8 applicant [SNWA] gathered and presented substantial environmental resource baseline material
9 and that the environmental resource baseline information provides a platform for sound,
10 informed decision making" to support the SE's decision to grant SNWA's applications with his
11 inconsistent findings on the other hand that it was "premature to attempt to set quantitative
12 standards or triggers for mitigation actions" and that "[s]electing specific standards before a
13 full baseline is developed would be premature." ROA 039066.

16 If SNWA, and thereby the Engineer, has enough data to make
17 informed decisions, setting standards and "triggers" is not
18 premature. Curiously, the Engineer has made the finding that a
19 failure to even make "Mitigation" a part of the current MMM plan
20 "demonstrates Applicant's determination to proceed in a
21 scientifically informed, environmentally sound manner." ROA
22 000183. It seems that if there is enough data to make informed
23 decisions, exactly when an unreasonable impact to either the
environment or existing rights occurs, the Engineer or SNWA
should recognize it and make the decision to mitigate. 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.

24 ROA 039066. Thus, the *Remand Decision* made clear that the award of any water under
25 SNWA's applications requires a 3M Plan with definite objective standards, thresholds, and

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1 triggers in order to ensure that SNWA’s proposed pumping does not lead to conflicts with
2 existing water rights, cause unreasonable effects to the environment, or otherwise threaten the
3 public interest. ROA 039052. In addition to striking down the State Engineer’s failure to require
4 concrete mitigation triggers and thresholds, the *Remand Decision* also found that the monitoring
5 contained in the 3M Plan was insufficient to support the State Engineer’s finding that SNWA’s
6 applications would not conflict with existing rights. ROA 039067. The *Remand Decision*
7 further found that the State Engineer failed to define what constitutes an impermissible impact.
8 *Id.* (noting that “[e]ssentially, the Engineer is simply saying, ‘we can’t define adverse impacts,
9 but we will know it when we see it.’”). Finally, the *Remand Decision* stated that “[g]ranting
10 water to SNWA is premature without knowing the impacts to existing water right holders and
11 not having a clear standard to identify impacts, conflicts or unreasonable environmental effects
12 so that mitigation may proceed in a timely manner.” ROA 039068.¹⁸

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15 **E. 2014 through 2015: SNWA and State Engineer Appeal this Court’s**
16 **December 13, 2013, *Remand Decision* to the Nevada Supreme Court**
17 **and File Coordinated Petitions for Writs of Mandamus and**
18 **Prohibition, All of Which Are Denied**

19 On January 9, 2014, SNWA and the SE appealed the *Remand Decision* to the Nevada
20 Supreme Court. SNWA Notice of Appeal, *White Pine County, et al. v. King*, cv 1204-049 (Nev.
21 Dist. Jan. 9, 2014); State Engineer Notice of Appeal, *White Pine County, et al. v. King*, cv 1204-

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23 ¹⁸ This Court left undisturbed the State Engineer’s determinations under NRS 533.370 that
24 SNWA had the intention, good faith, and financial ability to construct the project and put the
25 water to beneficial use, SNWA demonstrated a need for the project, SNWA had an adequate
26 conservation plan in place, and the project would be an appropriate long-term use which would
27 not unduly limit future growth and development in the basins of origin. ROA 039073.

1 049 (Nev. Dist. Jan. 9, 2014). On May 30, 2014, with their appeals still pending before the
2 Nevada Supreme Court, and in apparent coordination with one another, SNWA and the SE filed
3 Petitions for Writs of Mandamus and Prohibition with the Supreme Court of Nevada requesting
4 that the Supreme Court vacate this Court’s December 13, 2013, *Remand Decision* and affirm
5 State Engineer Rulings 6164, 6165, 6166, and 6167. Exhibit B, SNWA Petition for Writ of
6 Mandamus or, in the Alternative, Prohibition (“SNWA Mandamus Petition”), *SNWA v. Seventh*
7 *Judicial District Court*, No. 65775, 2015 WL 2452803 (Nev., May 30, 2014); Exhibit C, State
8 Engineer Petition for Writ of Mandamus (“State Engineer Mandamus Petition”), *King v. Seventh*
9 *Judicial District Court*, Case No. No. 65776, 2015 WL 2452825 (Nev., May 30, 2014). In its
10 Petition, SNWA acknowledged that its project could not satisfy the requirement of the *Remand*
11 *Decision* that its pumping reach equilibrium. SNWA Mandamus Petition, at 44. In doing so,
12 SNWA mischaracterized this Court’s *Remand Decision*, suggesting that it would require that all
13 ET in a basin be captured. SNWA Mandamus Petition, at 44. The *Remand Decision* said
14 nothing of the sort, however. It merely suggested that a failure to capture ET was a reason to
15 limit an appropriation below the calculated ET to avoid perpetual groundwater mining in
16 violation of Nevada law. ROA 039061. Rather than acknowledge that its project amounts to
17 groundwater mining and as such is impermissible under Nevada law, as pointed out by White
18 Pine County, et al. in their Answering Brief filed in support of this Court’s *Remand Decision*,¹⁹
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23 ¹⁹ See Exhibit D, White Pine County, et al., Answer to Southern Nevada Water Authority
24 Petition for Writ of Mandamus, or in the Alternative, Prohibition, *SNWA v. Seventh Judicial*
25 *District Court*, No. 65775, 2015 WL 2452803, at 56-68 (Nev., Sept. 3, 2014).

1 SNWA chose in the mandamus case to arrogantly criticize this Court for imposing an
2 “impossible” task on SNWA, as if an applicant should be entitled to proceed with a project that
3 does not comply with Nevada law, and Nevada law must yield. SNWA Mandamus Petition, at
4 44. In effect, SNWA’s misinterpretation of the law in the mandamus case and in the remand
5 proceedings that followed amounts to an assertion that the Court should disregard the mandatory
6 requirements that water be available, not conflict with existing rights, and not be detrimental to
7 the public interest, which have been established for over a century under NRS 533.370(2) and
8 are supported by clear precedent. Rather, SNWA would have this Court cast aside those bedrock
9 principles of Nevada water law in favor of an uncritical approach mandating approval of even
10 unsound and unsustainable applications like SNWA’s in the name of maximizing short-term
11 beneficial use of water at the expense of future generations of Nevadans.
12

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14 The appeals of the *Remand Decision* were dismissed by the Nevada Supreme Court’s
15 Order of February 6, 2015, which found that the Supreme Court lacked jurisdiction, because the
16 *Remand Decision* was not a final, appealable, order. Order Dismissing Appeal, *King v.*
17 *Corporation of the Presiding Bishop*, Case No. 64815, 2015 WL 528134 (Nev., Feb. 6, 2015).
18 The Petitions for Writ of Mandamus filed by State Engineer and SNWA similarly were denied
19 by the Nevada Supreme Court by Orders issued on May 21, 2015, on the ground that a petition
20 for judicial review of the State Engineer’s ruling on remand would provide an adequate remedy
21 at law. Order Denying Petition for Writ of Mandamus or Prohibition, *SNWA v. Seventh Judicial*
22 *District Court*, No.65775, 2015 WL 2452803 (Nev., May 21, 2015); Order Denying Petition for
23 Writ of Mandamus or Prohibition, *King v. Seventh Judicial District Court*, No. 65776, 2015 WL
24 2452825 (Nev., May 21, 2015).
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1 Tribe, the Duckwater Shoshone Tribe, the Cleveland Ranch, Millard and Juab Counties, Utah,
2 and the broad White Pine County, et al., coalition of protestants. ROA 039089. Following that
3 status conference, on October 3, 2016, the State Engineer issued an *Interim Order on Pre-*
4 *Hearing Scheduling* finding that a remand hearing was necessary to address the *Remand*
5 *Decision*, defining the scope of that hearing, and setting deadlines for the filing of various pre-
6 hearing filings related to scheduling, evidence, discovery, and participation by protestants. ROA
7 039088-91.
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9 On November 28, 2016, the State Engineer issued a *Notice of Hearing and Interim Order*
10 scheduling the Remand Hearing for September 25, 2017, through October 6, 2017, in Carson
11 City. ROA 039297-305. The *Notice of Hearing and Interim Order* also denied the Cleveland
12 Ranch's October 14, 2016, *Motion Regarding Discovery and Mandatory Presentations of*
13 *Proposed Written Testimony* and the *Motion to Dismiss for Failure to Join United States*
14 *Department of Interior Bureaus* filed by the Confederated Tribes of the Goshute Reservation,
15 Ely Shoshone Tribe, and Duckwater Shoshone Tribe ("Tribes") and joined by White Pine
16 County, et al. ROA 039298-302. Lastly, the Order set deadlines for simultaneous initial and
17 rebuttal evidence and witness list exchanges for the June 30, 2017, and August 11, 2017,
18 respectively. ROA 039304-05. On June 30, 2017, SNWA and the protestants submitted
19 evidence to the State Engineer. *See id.* On August 11, 2017, the parties submitted rebuttal
20 evidence to the State Engineer. *See id.* Following this exchange, SNWA sought but failed to
21 exclude from the record evidence submitted by various protestants. *See* ROA 40191-207.
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1 *id.* at 1250 (“[the applicant] is not entitled to a second bite at the apple after previously failing to
2 present sufficient evidence of mitigation.”). In other words, the Court in *Eureka II* held that after
3 having failed to present sufficient evidence of a valid mitigation plan in its first hearing before
4 the State Engineer, the applicant was not entitled to a remand proceeding for the purpose of
5 presenting additional mitigation evidence. *Id.* at 1250.

7 i. Spring Valley Hydrologic Evidence

8 During the 2017 Remand Hearing, SNWA introduced hydrologic evidence in the form of
9 a report which at the outset criticized the *Remand Decision's* requirement that SNWA’s Project
10 actually capture ET discharge from Spring Valley to reach equilibrium within a reasonable time
11 period. SNWA’s hydrology report on remand then presented a hypothetical 101 well ET capture
12 project based on new points of diversion that are not covered by its applications, which it
13 claimed would reach equilibrium within a reasonable time period in compliance with that
14 *Remand Decision*. ROA 040814-23, 040828-39, 040837. SNWA has acknowledged that an ET
15 capture project such as this redesigned project would result in vastly different and greatly
16 worsened impacts from those that were analyzed for the Project in the 2011 hearing. *See* Exhibit
17 E, Southern Nevada Water Authority, Reply Brief, at 39, *SNWA, et al. v. Seventh Judicial*
18 *District Court, et al.*, No. 65775 (Nev. Dec. 12, 2014) (noting that an ET Capture project would
19 result in devastating effects, and claiming that SNWA’s project would leave water for
20 vegetation), ROA 040820 (asserting that the Project as presented in previous hearings was
21 purportedly designed to minimize impacts). Despite this inescapable fact, SNWA chose not to
22 provide the State Engineer with drawdown maps for its new ET capture scenario, instead asking
23 the State Engineer to rely on inapposite maps for the Project in its original form that were
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1 presented in the 2011 remand hearing. *See generally* ROA 040799-858. Separately, SNWA
2 presented hydrologic and biological monitoring and mitigation plans for an entirely different
3 pumping scenario under the application points of diversion for which neither ET capture,
4 equilibrium, nor predicted impacts were analyzed or introduced into evidence. *See* ROA 43011-
5 496. Thus, SNWA effectively presented two projects: one which it claimed would reach
6 equilibrium but for which impermissible impacts could not be mitigated, and a second separate
7 project, which it claimed it could monitor, manage, and mitigate, but which would not reach
8 equilibrium and would therefore constitute groundwater mining. SNWA did not even attempt to
9 present evidence that its actual Project premised on the points of diversion identified in the
10 applications would reach equilibrium, as required by the *Remand Decision*. ROA038947-
11 038953. The State Engineer acknowledged in Ruling 6446 that SNWA did not present evidence
12 that any version of its Project could satisfy the four requirements of the *Remand Decision*. ROA
13 038952. Indeed, SNWA's approach appeared to be in direct defiance of this Court's *Remand*
14 *Decision* and in blatant disregard of the clear requirements of Nevada law that a project neither
15 result in groundwater mining nor result in impermissible impacts to existing rights or the
16 environment.
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19 Despite the fact that this Court's *Remand Decision* sent SNWA's Pipeline Applications
20 back to the State Engineer to approve only an amount of water that will reach equilibrium in a
21 reasonable period of time and for which it can be demonstrated by substantial evidence that
22 impacts and conflicts can be effectively mitigated, SNWA chose not to present additional
23 evidence related to the capture of ET or estimates of when equilibrium would be reached at the
24 application points of diversion. Rather, SNWA chose to present evidence of equilibrium and
25

1 impacts in a disjointed fashion, evaluating equilibrium for a hypothetical ET capture project
2 which is not before the State Engineer, while limiting its discussion of impacts and mitigation of
3 those impacts to the application points of diversion, for which no equilibrium analysis was done.
4 *See generally* ROA 040799-858, 43011-496, 049588, 049591, 049594. This internally
5 inconsistent approach to the requirements under NRS 533.370 flies in the face of Nevada law,
6 which requires a project to satisfy all of its requirements, including the limitations placed on
7 appropriations by the availability of water, conflict with existing rights, public interest, and
8 environmentally sound criteria of NRS 533.370(2) & (3). Thus, even assuming that the ET
9 capture project presented by SNWA in 2017 could satisfy the *Remand Decision's* equilibrium
10 requirement, because no impacts analysis was performed on that hypothetical ET capture project,
11 SNWA did not present sufficient evidence to the State Engineer to support granting its
12 applications.
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15 Protestants, on the other hand, did present substantial evidence relating to pumping
16 SNWA's proposed Project at the points of diversion in SNWA's applications which was
17 responsive to the *Remand Decision's* direction regarding equilibrium. Cleveland Ranch's
18 Hydrology Experts ran SNWA's own model out 2,000 years in an attempt to reach equilibrium.
19 *See* ROA 053118. That model run demonstrated that after 2,000 years the system does not even
20 approach equilibrium, and 10 million acre-feet has been mined from storage. ROA 053142,
21 053153. Similarly, Petitioners' hydrology expert Dr. Tom Myers introduced evidence based on
22 the model runs SNWA developed during the EIS process, which demonstrated that SNWA's
23 pumping, even at reduced rates, would not reach equilibrium for thousands of years. ROA
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1 048791-92. Thus, substantial evidence in the record demonstrates that SNWA's project is a
2 classic example of an impermissible groundwater mining project. See ROA 053153.

3 ii. Cave, Dry Lake, and Delamar Valleys Hydrologic Evidence

4 As explained above, the *Remand Decision* required the State Engineer to recalculate
5 what, if any, amount of water is available for appropriation by SNWA in Cave, Dry Lake, and
6 Delamar Valleys that will not conflict with down-gradient existing water rights. ROA 039070,
7 039073. This amount necessarily must be less than the amount granted in Rulings 6165, 6166,
8 and 6167, given that the *Remand Decision* overturned as arbitrary and capricious the State
9 Engineer's decision to grant water in an amount that he found would conflict with existing
10 downgradient rights in the future. Despite this inescapable fact, SNWA arrogantly requested an
11 additional 3,500 afa of groundwater from Cave Valley than was granted in Ruling 6165 without
12 providing any hydrologic evidence supporting this request, ROA 055591, and also requested the
13 exact same amounts from Dry Lake and Delamar Valleys as was found to be unsupported by
14 substantial evidence in the *Remand Decision*. ROA 043263, 053591. On January 30, 2018, after
15 the Remand Hearing and the submission of written closing arguments, in which White Pine
16 County, et al. argued that SNWA's request for additional water from Cave Valley was in direct
17 conflict with the *Remand Decision*, SNWA submitted a letter to the State Engineer withdrawing
18 its request for additional water from Cave Valley. ROA 040210; 040308.

19 During the 2017 Remand Hearing, SNWA failed to present any evidence whatsoever
20 related to the hydrology of Cave, Dry Lake, and Delamar Valleys and whether its applications
21 would capture water that already is appropriated downgradient in the WRFS. Rather, SNWA
22 chose to present evidence that amounted to a general water rights accounting exercise, which
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1 was designed to demonstrate in the abstract that sufficient water hypothetically may be available
2 in Cave, Dry Lake, and Delamar Valleys for SNWA's applications so long as 39,000 afa is
3 hypothetically assumed to be available in the White River Flow System ("WRFS") to potentially
4 account for the outflow from the CDD Valleys that is required to meet the needs of the fully
5 appropriated downgradient basins. ROA 041734-43. However, SNWA treated the WRFS as a
6 large black box, without considering where recharge occurs, how and where interbasin water
7 flows occur in the affected valleys, or whether it could actually be captured at SNWA's proposed
8 points of diversion, and SNWA presented no evidence at all related to whether its pumping could
9 or would actually capture water other than water that is flowing to those downgradient basins.
10 ROA 049599, 053707-09, 055602, 055609-10, 055634, 055637. In other words, SNWA
11 presented no hydrologic evidence that its pumping would not, in fact, capture the very water that
12 currently flows out of the CDD Valleys into the fully appropriated downgradient valleys and
13 must continue to flow into those downgradient valleys to prevent impermissible conflicts with
14 existing rights and harmful impacts to protected environmental resources. *Id.* SNWA presented
15 no conceptual flow model or hydrologic analysis to justify its accounting exercise or to
16 demonstrate that it would not, in fact, capture water that flows to downgradient fully
17 appropriated basins. *Id.* In fact, Michael Stanka, the only SNWA witness who presented any
18 evidence or analysis that supposedly addressed the availability of water in the Cave, Dry Lake,
19 and Delamar Valleys, is not a hydrologist and is not qualified to provide testimony or evidence
20 about what water SNWA's pumping actually would capture or to perform a hydrologic
21 evaluation of groundwater flow paths. ROA 041696, 041702. Rather, he is a water rights
22 surveyor and is qualified only to perform a basic arithmetical comparison between the amount of
23

1 water subject to existing water rights that represent committed water resources in the subject
2 basins and the total amount of water he was told by SNWA to assume was hypothetically and
3 generally available for appropriation in the subject valleys. *Id.* And that is exactly what he did.
4 *See* ROA 041730, 041732. Plainly put, Mr. Stanka's analysis and conclusion that there is water
5 available for appropriation in Cave, Dry Lake, and Delamar Valleys amounts to a simple
6 accounting exercise, and as such is invalid, and indeed incompetent with regard to the issue on
7 remand, because it is based on assumptions and flawed flow path analyses that he simply and
8 plainly is not qualified to make and does not assess what water SNWA's applications propose to
9 capture and whether or not it is water that already is appropriated in downgradient basins. *See*
10 ROA 041696, 041702-03, 041736-43.

12 Because he is unqualified to assess any of the hydrologic conditions or groundwater flow
13 paths in any CDD basin or the WRFS as a whole, the assumptions on which Mr. Stanka based
14 his analysis are completely unsupported by any competent evidence and transparently
15 predetermined that his simplistic water rights accounting would conclude that water is available
16 for appropriation in Cave, Dry Lake, and Delamar Valleys. For example, Mr. Stanka arbitrarily
17 and inappropriately limited the analysis of available water to eleven of the thirteen
18 hydrologically interconnected White River Flow System basins despite the fact that the excluded
19 two basins, Coyote Spring Valley and the Muddy River Springs Area, are directly downgradient
20 from and hydrologically connected to the CDD Valleys, and thus are predicted to be impacted by
21 SNWA's proposed project. ROA 041731-32, 049596-97, 055603-04. Mr. Stanka was
22 unqualified to make any hydrologic judgment about which basins to include in his accounting or
23 where the groundwater flow paths are likely to be in any of the WRFS basins. In addition, the

1 assumptions he accepted as the basis for his accounting were based on a misinterpretation of
2 State Engineer Ruling 6255 and are inconsistent with the hydrologic evidence in the record,
3 which clearly demonstrates that Coyote Spring Valley and the Muddy River Springs Area are
4 hydrologically connected to and downgradient from the CDD basins, and thus eventually will be
5 impermissibly impacted as recognized by the *Remand Decision*. ROA 055603-04. Mr. Stanka
6 also inappropriately assumed without evidence that 33,700 acre feet per year of Muddy River
7 stream flow comes from the California Wash, outside the WRFS, effectively contradicting all of
8 the hydrologic evidence on record, which designates the Muddy River Springs as the final
9 discharge from the WRFS. *See* ROA 041737, 049596. This approach also is inconsistent with
10 the evidence in the record presented by SNWA in 2011. *See* ROA 049596. Finally, as pointed
11 out by protestant hydrology expert Dr. Myers, Mr. Stanka failed to consider that Tikapoo Valley
12 South is part of the Death Valley Flow System and consequently failed to consider whether the
13 water flowing from the WRFS to Tikapoo Valley South is appropriated or otherwise committed
14 downgradient. ROA 053710-11, 055600.

17 Not only were Mr. Stanka's conclusions based on these invalid assumptions, SNWA
18 introduced no hydrologic evidence whatsoever with regard to what water its CDD Valleys
19 Pipeline Applications actually would capture, and so SNWA failed to demonstrate that its
20 applications would not capture the water that flows to downgradient fully appropriated valleys as
21 required by the *Remand Decision*. ROA 038973-74. In the 2017 Remand Hearing, Protestants'
22 hydrology expert Dr. Tom Myers testified that, based on the only conceptual flow model
23 considered in the 2017 Remand Hearing, it is more likely than not that SNWA's pumping would,
24 in fact, capture the actual outflow from the CDD Valleys to downgradient basins that already are

1 fully appropriated. ROA 049604, 055634-35. Dr. Myers further testified that no water is
2 available for appropriation in the Cave, Dry Lake, and Delamar Valleys, because it all is fully
3 appropriated downgradient. ROA 055606-07. Thus, SNWA presented no hydrologic evidence
4 during the 2017 Remand Hearing that was responsive to this Court's directive to further study
5 the CDD Valleys to determine whether they contain any water that is available for appropriation,
6 and in fact the only hydrologic evidence in the 2017 Remand Hearing record on this topic
7 demonstrates that there is no water available for appropriation by SNWA in the CDD Valleys.
8

9 iii. Monitoring, Management, and Mitigation Evidence

10 In the 2017 Remand Hearing SNWA presented evidence reflecting modest revisions of
11 its 3M Plans that purported to add specificity to how the plans would effectively monitor,
12 manage, and mitigate impacts of its proposed groundwater development project. Protestants,
13 however, presented substantial evidence that the monitoring, management, and mitigation plans
14 presented by SNWA on remand remain fatally flawed and deficient, and therefore cannot be
15 used as the basis for finding that there will be no impermissible conflicts with existing rights or
16 unreasonable effects on the environment.

17 SNWA's proposed 3M Plans use as a basis for the future establishment of actual
18 definitively quantified triggers, an arbitrary and inadequate definition of unreasonable effects
19 that allows for widespread destruction of the area of impact and would not prevent conflicts with
20 existing rights or unreasonable impacts to the environment. *See* ROA 053033-35, 055297-98,
21 055302-03, 055305, 055320-21. Thus, even if SNWA could demonstrate that its 3M program
22 would be effective in preventing what it has defined as unreasonable impacts, the impacts the
23 program would allow are not permitted under Nevada law as they would amount to widespread
24 devastation of the affected water resources and ecosystems. *See* NRS 533.370(2), (3)(c).
25 Specifically, SNWA's program defines unreasonable effects as effects to hydrologic or

1 environmental resources that conflict with senior existing rights or protectable interests in
2 existing domestic wells, jeopardize the continued existence of federally listed threatened or
3 endangered species, cause the extirpation of native aquatic-dependent special status animal
4 species from a hydrographic basin's groundwater discharge areas, cause the elimination of
5 habitat types from a hydrographic basin's groundwater discharge areas, or cause excessive loss
6 of shrub cover that results in extensive bare ground. ROA 043043.

7 The Plans' approach to the protection of environmental resources is disjointed and fails to
8 manage the system in a holistic manner, instead identifying various groundwater-dependent
9 environmental resources that SNWA has unilaterally determined are worthy of being artificially
10 maintained, or propped up, with the use of replacement water, while the resources not
11 specifically identified will be dependent on any mitigation that is provided for existing water
12 rights. ROA 053043-45. SNWA simply assumes, without any evidence or analysis, that its 3M
13 Plans' provisions for protecting existing water rights from conflicts will by extension provide
14 adequate protection against unreasonably harmful impacts to the environment of the affected
15 areas. ROA 053043-45. Thus, the Plans' disjointed approach to protections for the environment
16 combined with the unreasonably permissive definition of unreasonable effects does not even
17 aspire to anything more than artificially propping up select resources while allowing the rest of
18 the affected area to be destroyed.

19 Second, the 3M Plans include a monitoring regime that is not based on evidence of a
20 conceptual flow model which would support the effective siting of monitoring wells. ROA
21 055596; *see also* 054950, 055535-605, 055589-90. In other words, the siting of monitoring
22 wells in the 3M Plans is arbitrary and has no scientific basis in the record. Because there is no
23 evidence in the record of a conceptual flow model, or any flow model, that was used to site the
24 3M Plans' monitoring wells, the State Engineer was unable to assess whether those wells would
25 be effective at detecting drawdown in sufficient time to effectively manage or mitigate impacts.

1 Third, the baseline conditions presented in the 3M Plans are biased in a way that would
2 mask impacts of SNWA's pumping and result in a delayed response. So-called triggers for the
3 2017 3M Plans actually are merely defined as numerical values that will be established by
4 calculations to be performed in the future using a seasonally adjusted linear regression ("SALR")
5 equation, or algorithm, to project expected baseline conditions, which was demonstrated by
6 protestant witnesses to bias the assumed baseline conditions by projecting an artificial downward
7 trend in groundwater levels, thereby masking impacts that properly should be attributed to
8 SNWA's groundwater development project. ROA 0055575-81, 054956-57. As a result, declines
9 in water levels likely would be artificially and inappropriately attributed to the projected
10 declining baseline water levels instead of to SNWA's pumping. *Id.* This biased baseline
11 combined with a presumption that SNWA pumping is not the cause of drawdown sufficient to
12 trigger an investigation, let alone necessary management and mitigation measures, all but ensures
13 that any mitigation will not be initiated in time to protect the resource. *See* ROA 036600,
14 037822-25.

15 Fourth, while superficially, the 3M Plans presented by SNWA in 2017 appear to contain
16 triggers as directed by this Court, SNWA provided no scientific basis for setting those triggers.
17 The investigation and mitigation triggers contained in the 3M Plans are, in effect, arbitrary
18 because they are not based on, or set using, a localized site-specific groundwater model that
19 could be used to predict impacts and potential resource responses to mitigation. ROA 053034,
20 053040-41, 054950, 055305-06, 055334, 055535-605. For example, since baseline assessments
21 still have not been completed for water resources (more than 28 years after the applications were
22 filed), true quantitative triggers have not been set for senior water rights. ROA 053041, 054035,
23 054055-56. As a result, the plan also does not, and could not, include any evaluation of the
24 feasibility or effectiveness of the triggers' ability to detect an impact in sufficient time to protect
25 existing rights or environmental resources. ROA 053040, 055583-84. Without an assessment of

1 the feasibility and effectiveness of triggers, which necessarily must be based on a site specific
2 assessment of predicted impacts, SNWA was unable to provide substantial evidence to support a
3 finding that conflicts with existing rights, threats to the public interest, or unreasonable harms to
4 environmental resources would be prevented or effectively mitigated, as required by NRS
5 533.370 and the *Remand Decision*.

6 Similarly, SNWA provided no feasibility analysis related to potential mitigation
7 measures listed in the plan. SNWA could not and did not provide any analysis of the
8 effectiveness of any of the laundry list of potential mitigation measures that SNWA
9 noncommittally proposed to choose from because there was no site specific predictive
10 information provided that could have supported such an analysis. With regard to the one
11 proposed mitigation measure that SNWA seems to have relied on as its true backstop for
12 impermissible conflicts and impacts, replacement water, there is no feasibility analysis related to
13 its use or availability in the future or whether such an approach would be effective in mitigating
14 conflicts or impacts to the environment. ROA 055583-86. Additionally, protestants presented
15 evidence documenting the difficulty of reseeding as mitigation. ROA 055203-04. SNWA
16 provided no feasibility analysis related to reseeding, despite listing it among the mitigation
17 measures that should be relied on as a basis for approving the 3m Plans.

18 SNWA's 3M Plans also include no accountability provision to ensure that mitigation
19 measures actually will be taken or will be effective. The plans, in effect, amount to a "trust us"
20 approach to management of the groundwater systems to which the 3M Plans will be applied by
21 SNWA with no built-in oversight. See ROA 055209, 054950. SNWA witness James Prieur
22 testified that if a water rights holder feels that their senior water right is being impacted by
23 SNWA's pumping, their available recourse would be to perform an independent investigation
24 and contact the State Engineer, an approach which places the burden of demonstrating an impact
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1 wholly on the senior water rights holder who is in a vulnerable position compared to SNWA, the
2 junior appropriator. ROA 054418-19. SNWA witness Zane Marshall further confirmed that a
3 water rights owner's only recourse against SNWA in the event of a conflict is to pursue litigation
4 against SNWA. ROA 054546-47. This "trust us or sue us" approach, which places the burden
5 on senior water rights holders to demonstrate that they are being impacted, is not appropriate
6 especially in the context of substantial evidence in the record that SNWA does not have a track
7 record of responsible environmental stewardship in the affected area or of working with local
8 communities or tribes that will be impacted by its proposed project. ROA 053478, 053502,
9 054818-054827, 055365-94.
10

11 Finally, despite the fact that protestant witness Steve Reich testified that it is standard
12 practice to consult stakeholders when setting goals of projects subject to adaptive management
13 plans, and the fact that the United States Department of Interior's authoritative adaptive
14 management manual emphasizes the need for such stakeholder involvement, there is no evidence
15 in the record that SNWA consulted any stakeholder or any agency with expertise in managing
16 the impacted resources when SNWA formulated its definition of unreasonable effects, and in fact
17 the 3M Plans' jeopardy standard sets a lower bar for mitigation than would be set by the U.S.
18 Fish and Wildlife Service. ROA 052936, 054546-47, 055297-98, 055302-03, 055305, 055320-
19 21. Thus, on their face SNWA's 3M Plans do not even set out to comply with the protections for
20 existing rights and the environment that are guaranteed by Nevada law.

21 **C. August 17, 2018: State Engineer Issues Ruling 6446 Denying SNWA's SCDD**
22 **Applications for Lack of Water Availability, but Approving SNWA's 3M**
23 **Plans**

24 On August 17, 2018, the State Engineer issued Ruling 6446 correctly denying all of
25 SNWA's applications in Spring, Cave, Dry Lake, and Delamar Valleys on the ground that there

1 is not sufficient water available to support the applications. ROA 38938-39048. Specifically, in
2 Ruling 6446 the SE denied SNWA's Spring Valley Applications (54003 through 54015 and
3 Applications 54019 and 54020) on the ground that SNWA did not present any evidence that
4 pumping at the application points of diversion would capture existing groundwater discharge
5 from evapotranspiration or reach equilibrium within any reasonable time period as required by
6 Nevada law and the *Remand Decision*. See ROA 038949-53. Because SNWA presented no
7 such evidence, the State Engineer relied on evidence presented by protestants on the issue of
8 capturing ET and reaching equilibrium in a reasonable period of time. ROA 038953-55. This
9 evidence, presented in both 2011 and 2017, clearly demonstrated that SNWA's pumping would
10 not even approach equilibrium for thousands of years. See ROA 024420, 024430-02, 024439-
11 43, 024688, 025858, 025924-26, 025945, 025953, 026941, 036310, 036495-554, 036636-702,
12 037777-835, 038400-575, 048791, 053118, 054938. In other words, the State Engineered denied
13 SNWA's Spring Valley applications because SNWA presented no evidence whatsoever that its
14 proposed groundwater pumping at the application points of diversion would not result in
15 groundwater mining, while protestants presented substantial evidence that it would, and therefore
16 there was insufficient evidence in the record to demonstrate that any amount of groundwater is
17 available for appropriation at SNWA's points of diversion. ROA 038949-55. The State
18 Engineer also denied SNWA Spring Valley applications 54014 and 54015 for the additional
19 reason that it is uncertain whether swamp cedar habitat can be maintained with surface water,
20 and additionally that pumping those applications could result in an unreasonable impact to the
21 swamp cedars prior to an investigation trigger being reached, and therefore those applications
22 threaten to prove detrimental to the public interest. ROA 039042.
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1 Finally, State Engineer Ruling 6446 correctly denied SNWA's applications 53987
2 through 53992 in Cave, Dry Lake, and Delamar Valleys on the ground that SNWA did not
3 present evidence that the applications would not conflict with existing water rights in fully
4 appropriated down-gradient groundwater basins. ROA 039042. Specifically, SNWA did not
5 present any evidence regarding where recharge occurs, how and where interbasin groundwater
6 flows, or whether the groundwater its applications would capture in Cave, Dry Lake, and
7 Delamar Valleys presently flows down-gradient and supplies existing water rights. ROA
8 038973. Thus, there is no evidence whatsoever in the record to support a finding that SNWA's
9 pumping would not capture water already appropriated downgradient from SNWA's points of
10 diversion. *Id.* Petitioners do not challenge the State Engineer's correct denial of SNWA's water
11 rights applications, as this denial was supported and required by substantial evidence in the
12 record and was consistent with the *Remand Decision* and Nevada water law.
13

14
15 However, in the course of denying SNWA's applications in Spring Valley and in Cave,
16 Dry Lake, and Delamar Valleys, the State Engineer asserted a direct challenge to the *Remand*
17 *Decision's* application of Nevada water law and accompanying directions to the State Engineer
18 on remand and suggested that this Court should reconsider its *Remand Decision*. ROA 038955-
19 969. Specifically, the State Engineer argued that this Court should reconsider the requirement
20 articulated in the *Remand Decision* that an applicant demonstrate that its proposed appropriation
21 actually will capture discharge and that its pumping will reach equilibrium within a reasonable
22 timeframe. *Id.* In the course of making this argument, the State Engineer suggested that the
23 office has never required that appropriations actually capture discharge or that pumping reach
24 equilibrium and that such a requirement would be unworkable. *Id.* The State Engineer also
25

1 lodged a direct challenge to both this Court's *Remand Decision* and the late Judge Robison's
2 holding in *Carter-Griffin v. Taylor*, CV-830008 (Nev. Dist. Ct., Oct. 19, 2009), that by granting
3 water to SNWA in the CDD Valleys that already was appropriated in down-gradient basins in
4 the White River Flow System the State Engineer had sanctioned a double appropriation of water
5 which would conflict with existing rights. In Ruling 6446 the State Engineer argued yet again
6 that because impacts of the double appropriation would not be felt in the short term the law
7 ought to permit SNWA's requested double appropriation of water. ROA 038975.

9 Further, just as he did in the 2012 Rulings, the State Engineer erroneously approved
10 SNWA's deficient 3M Plans as a substitute for the required findings that SNWA's applications
11 will not conflict with existing rights or threaten to be detrimental to the public interest or cause
12 unreasonable harmful impacts to the environment. ROA 038975-9034.

13
14 **D. September 2018: SNWA and Protestants File Petitions for Judicial Review
with this Court Challenging Different Portions of State Engineer Ruling 6446**

15 On September 17, 2018, a broad coalition of protestants including White Pine County,
16 Nevada, Great Basin Water Network, 2d Big Springs Irrigation Company, Baker GID, Baker
17 Ranches, Inc., Bath Lumber Company, Border Inn, LLC, Carter-Griffin, Inc., Center for
18 Biological Diversity, Central Nevada Regional Water Authority, Citizens Education Project,
19 Cole Ranch, D Bar X Meats, Elko County, Nevada, Eureka County, Nevada, Great Basin
20 Business and Tourism Council, Indian Springs Civic Association, County of Inyo, California,
21 League of Women Voters of Salt Lake City, Lund Irrigation and Water Company, N4 Grazing
22 Board, Nevada Farm Bureau Federation, Panaca Irrigation Company, Preston Irrigation
23 Company, Progressive Leadership Alliance of Nevada, Rafter Lazy C Ranch, School of the
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1 Natural Order, Sierra Club, Sportsworld, Utah Audubon Council, Utah Physicians for a Healthy
2 Environment, Utah Rivers Council, Craig F. Baker, Thomas D. Baker, David A. Baker, Donna
3 Bath, James H. Bath, Kristine P. Fillman, Kena Gloeckner, Patrick J. Gloeckner, Kathy C. Hiatt,
4 Abigail C. Johnson, Linda G. Johnson, Orvan Maynard, Roderick G. McKenzie, Gary Perea, Jo
5 Ann Perea, Launce Rake, Katherine A. Rountree, William R. Rountree, Amelia Sonnenberg,
6 Terrance Steadman, Debra Steadman, Henry C. Vogler, David H. Von Seggern, John
7 Wadsworth, Mark Wadsworth, and Matthew Wadsworth (“Petitioners”) filed an *Updated Notice*
8 *of and Petition for Judicial Review Following Remand* with this Court in Case CV-1204-049
9 (and consolidated cases). Petitioners all have concrete interests in Spring Valley, Cave Valley,
10 Dry Lake Valley, Delamar Valley, and/or adjacent, hydrologically connected down-gradient
11 valleys. Petitioners are protestants to the applications that are the subject of Ruling No. 6446 and
12 other persons, businesses, governmental or quasi-governmental entities, and nonprofit citizens
13 organizations who are aggrieved by the State Engineer’s ruling in one or more of the following
14 ways: (1) they have existing water rights, protected interests in domestic wells, community
15 water systems, or businesses in Spring Valley, the CDD Valleys, or a hydrologically connected
16 or downwind valley that will be negatively affected and seriously harmed if the SE’s request that
17 the legal standard be changed is granted so that he can approve SNWA’s applications to export
18 an excessive amount of groundwater from Spring Valley and the CDD Valleys because that
19 decision will allow SNWA to engage in large scale groundwater mining which will draw down
20 the groundwater system in a pervasively and seriously damaging manner; (2) they are individuals
21 or groups whose members live in or near to Spring Valley, the CDD Valleys, or a hydrologically
22 connected valley within the same interbasin flow system or a downwind valley and use
23

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1 groundwater and groundwater dependent resources of Spring Valley, the CDD Valleys, and/or
2 hydrologically connected valleys within the same interbasin flow system for business purposes
3 (including but not limited to ranching, farming, mining, lodging, food service, commercial
4 outfitting, or supplying one or more of the preceding types of business), recreational purposes
5 (including but not limited to hunting, fishing, bird and wildlife watching, sightseeing and
6 aesthetic enjoyment, hiking, camping, water sports, and snow sports), and/or spiritual purposes
7 (including worship at burial and other sacred sites and ritual practice utilizing groundwater
8 and/or groundwater-dependent resources), which uses will be negatively affected and seriously
9 harmed by the SE's intended decision to permit SNWA to export an excessive amount of
10 groundwater from Spring Valley and the CDD Valleys because that decision will allow SNWA
11 to engage in large scale groundwater mining which will draw down the groundwater system in a
12 pervasively and seriously damaging manner; (3) they are people who reside in Spring Valley, the
13 CDD Valleys, or a downwind valley whose air quality and public health will be jeopardized by
14 the SE's intended decision to permit SNWA to export an excessive amount of groundwater from
15 Spring Valley and the CDD Valleys because that decision will allow SNWA to engage in large
16 scale groundwater mining which will draw down the groundwater system causing increased dust
17 emissions and associated air quality and public health impacts; (4) they are governmental or
18 quasi-governmental entities, business entities, citizens groups, or individuals with rights to or
19 interests in the groundwater systems of other rural Nevada valleys in which SNWA has related
20 1989 water rights applications pending, which rights and interests will be jeopardized by the
21 precedents set if the State Engineer's approval of SNWA's 3M Plans is affirmed and the legal
22 standards are changed to allow him to approve SNWA's Pipeline Applications; and/or (5) they
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1 are citizens organizations whose mission or purpose is to advance sound, sustainable water
2 management decisions affecting Nevada and/or Utah, protect the environment, wildlife, wildlife
3 habitat, biodiversity, and public health in Nevada and/or Utah and/or promote long-term
4 sustainability in natural resource and community planning, and the ability of these organizations
5 to fulfill their missions or purposes will be jeopardized and their members will be negatively
6 impacted by the precedents set if the State Engineer's approval of SNWA's 3M Plans is affirmed
7 and the legal standards are changed to allow him to approve SNWA's Pipeline Applications.
8

9 The petition filed by Petitioners White Pine County, et al. urges this Court to uphold the
10 State Engineer's denial of SNWA's Pipeline Applications in Ruling 6446. The petition also
11 requests that this Court correct the State Engineer's misstatements of law in Ruling 6446 with
12 regard to the standard governing the availability of water criterion contained in NRS 533.370(2),
13 and requests that this Court reverse the State Engineer's approval of SNWA's blatantly deficient
14 3M Plans.
15

16 Additional petitions for judicial review challenging these and other issues also were filed
17 by: (1) a coalition of Indian tribes, including the Confederated Tribes of the Goshute
18 Reservation, Ely Shoshone Tribe, and Duckwater Shoshone Tribe; (2) the Corporation of the
19 Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints dba Cleveland Ranch; and
20 (3) Millard and Juab Counties, Utah. Finally, the Southern Nevada Water Authority filed a
21 petition for judicial review of Ruling 6446 challenging the State Engineer's denial of its
22 applications in Ruling 6446 and requesting that this Court uphold the State Engineer's approval
23 of its 3M Plans.
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Petitioners White Pine County, et al. Opening Brief

1 ARGUMENT

2 I. STANDARD OF REVIEW

3 A party aggrieved by a decision of the State Engineer may petition for judicial review to
4 state district court. NRS 533.450(1). Judicial review shall be “in the nature of an appeal” with
5 review generally confined to the administrative record. *See* NRS 533.450(1), (2); *see Revert v.*
6 *Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). In reviewing the record, the Court shall treat
7 the State Engineer’s decision as “prima facie correct, and the burden of proof shall be upon the
8 party attaching the same.” NRS 533.450(9).

9
10 With questions of fact, the Court is not to “substitute its judgment for that of the State
11 Engineer . . . [nor] reweigh the evidence, but limit [itself] to a determination of whether
12 substantial evidence in the record supports the State Engineer’s decision.” *Revert*, 95 Nev. at
13 786, 603 P.2d at 264; *see also Town of Eureka v. Office of the State Engineer*, 108 Nev. 163,
14 165, 826 P.2d 948, 949 (1992). Substantial evidence is that which a “reasonable mind might
15 accept as adequate to support a conclusion.” *Bacher v. Office of State Engineer*, 122 Nev. 1110,
16 146 P.3d 793, 800 (2006). Consistent with this standard, courts in Nevada and elsewhere also
17 have held that an agency’s decision is arbitrary and capricious where the agency’s decision is
18 internally inconsistent. *See e.g., Escobar v. Green Valley Ranch Casino/Station Casinos, Inc.*,
19 No. 70166, 2017 WL 636427 (Nev. Ct. App. 2017); *Ramos v. State*, 158 P.3d 670, 676 (Wy.
20 2007); *Ohio Historical Society v. State Employment Relations Bd.*, 613 N.E.2d 591, 595 (Oh.
21 1993). Where the Court determines that the findings of the State Engineer were “clearly
22 erroneous in view of the reliable, probative and substantial evidence on the whole record and
23 incident thereto constitute an arbitrary and capricious abuse of discretion,” those findings are not
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1 entitled to deference. *Office of State Engineer v. Morris*, 107 Nev. 699, 701-702, 819 P.2d 203,
2 205 (1991).

3 Under this standard of review, the Court “presupposes the fullness and fairness of the
4 administrative proceedings: all interested parties must have had a ‘full opportunity to be heard; . .
5 . the State Engineer must clearly resolve all the crucial issues presented; . . . [and] the
6 decisionmaker must prepare findings in sufficient detail to permit judicial review.” *Revert*, 95
7 Nev. at 787, 603 P.2d at 264-65 (citations omitted). When “these procedures are not followed,
8 and the resulting administrative decision is arbitrary, oppressive, or accompanied by a manifest
9 abuse of discretion, [the] court [should] not hesitate to intervene.” *Id.* at 787, 603 P.2d at 265.

11 The Court is “free to decide purely legal questions . . . without deference to the agency’s
12 decision.” *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949. While “the State Engineer’s
13 interpretation of a statute is persuasive, it is not controlling.” *Id.* at 165-66, 826 P.2d at 950
14 (citing *State v. Morros*, 104 Nev. 709, 713 (1988)). Although the State Engineer has implied
15 authority to construe the state’s water law, *Andersen Family Assoc. v. Ricci*, 124 Nev. Adv. Op.
16 No. 17, 179 P.3d 1201, 1203 (2008), the reviewing court should “undertake independent review
17 of the construction of a statute.” *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949 (citing
18 *Nevada Emp. Sec. Dep’t v. Capri Resorts*, 104 Nev. 527, 763 P.2d 50 (1988)).

20 **II. BURDEN OF PROOF**

21 The burden of meeting all the statutory conditions to support the granting of an
22 application to appropriate water is on the Applicant, here SNWA. *Bacher v. State Engineer*, 122
23 Nev. 1110, 1116, 146 P.3d 793, 797 (2006). Thus, it was SNWA’s burden to present evidence
24 showing that its Applications should be granted. To the extent that there are any gaps or
25

1 deficiencies in the Applications or the evidence, the Applications must be denied as a matter of
2 law as the requirements of Nevada's water laws are to be construed strictly. *Preferred Equities*
3 *Corp. v. State Engineer*, 119 Nev. 384, 390, 75 P.3d 380, 383-84 (2003).

4 **III. STANDARDS GOVERNING REVIEW OF WATER RIGHTS**
5 **APPLICATIONS**

6 It is critical to remember that when assessing the adequacy or validity of SNWA's
7 Pipeline Applications and the State Engineer's Ruling 6446 on those applications, that, first and
8 foremost, in Nevada all water belongs to the public. NRS 533.025. The use of that public water
9 is governed by the doctrine of prior appropriation, and thus, an appropriator such as SNWA may
10 file with the State Engineer an application to put unappropriated water to beneficial use. *See*
11 *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1051 n.1 (1997); NRS 533.030; NRS 532.010.
12 The legislature has mandated that the State Engineer, as the steward of this public resource,
13 apply the best available science in coming to decisions about whether to grant appropriative
14 rights to the use of the public's water. NRS 533.024(1)(c). The legislature long ago sagely
15 drafted the permitting requirements contained in Nevada's water law to ensure that the resource
16 will be managed in a responsible manner over the long term to ensure its availability for future
17 generations.
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20 **A. Statutory Standard to Approve**

21 The relevant portion of NRS 533.370(1) provides that the State Engineer shall approve an
22 application submitted in proper form which contemplates the application of water to beneficial
23 use if the applicant, here SNWA, provides proof satisfactory to the State Engineer of the
24 applicant's (1) good faith intention to construct any work necessary to apply the water to the
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1 intended beneficial use with reasonable diligence; and (2) financial ability and reasonable
2 expectation to actually construct the work and apply the water to the intended beneficial use with
3 reasonable diligence.

4 **B. Statutory Standard to Deny**

5 NRS 533.370(2) provides that the State Engineer shall reject an application and refuse to
6 issue the permit where there is no unappropriated water in the proposed source of supply, or
7 where the proposed use conflicts with existing rights or with protectable interests in existing
8 domestic wells as set forth in NRS 533.024, or where the proposed use threatens to prove
9 detrimental to the public interest. Nevada law prohibits an unreasonable lowering of the water
10 table. *See* NRS 534.110(4). While the law does permit a reasonable lowering of the water table
11 at the appropriator's point of diversion, it also requires that in the event of such lowering the
12 rights of existing appropriations must be satisfied. NRS 534.110(4) & (5). Further, "[i]n
13 determining a reasonable lowering of the static water level in a particular area, the State Engineer
14 shall consider the economics of pumping water for the general type of crops growing and may
15 also consider the effect of using water on the economy of the area in general." NRS 534.110(4).
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18 The public interest criterion of 533.370(2) has evolved over time, and by the time
19 hearings were held on SNWA's applications the findings relevant to the public interest criterion
20 included consideration of socioeconomic impacts and impacts to environmental resources,
21 including a consideration of the protection of endangered species, habitat, and water quality. *See*
22 *Spring Valley Ruling*, at 37-43.
23

1 **C. Statutory Standard for Interbasin Transfers**

2 NRS 533.370(3) provides that in determining whether an application for an interbasin
3 transfer of groundwater must be rejected, the State Engineer shall consider: (1) whether the
4 applicant has justified the need to import the water from another basin; (2) if the State Engineer
5 determines a plan for conservation of water is advisable for the basin into which the water is
6 imported, whether the applicant has demonstrated that such a plan has been adopted and is being
7 effectively carried out; (3) whether the proposed action is environmentally sound as it relates to
8 the basin from which the water is exported; (4) whether the proposed action is an appropriate
9 long-term use which will not unduly limit the future growth and development in the basin from
10 which the water is exported; and (5) any other factor the State Engineer determines to be
11 relevant. The State Engineer has defined environmental soundness as water use that is
12 “sustainable over the long-term without unreasonable impacts to the water resources and the
13 hydrologic-related natural resources that are dependent on those resources.” Spring Valley
14 Ruling, at 47.

17 **D. Standard for Water Availability Determinations**

18 While NRS 533.370 itself does not articulate a standard governing the State Engineer’s
19 required determination of water availability, the Supreme Court, this Court, and the State
20 Engineer clearly have articulated a standard that consistently has guided State Engineer
21 decisionmaking for almost a century. The bright line statutory requirement that the State
22 Engineer grant water only where there is water available for appropriation has long been
23 reflected in the State Engineer’s prohibition against groundwater mining, or in other words
24 prohibition against overappropriation of Nevada’s groundwater resources, which prohibition has
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1 been confirmed by Nevada courts. *See, e.g.*, ROA 039060, 039409-50; *see also Pyramid Lake*
2 *Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 524 (2010); Spring Valley Ruling, at 27. The
3 term groundwater mining is a hydrologic term that “typically refers to a prolonged and
4 progressive decrease in the amount of water stored in a groundwater system.” ROA 024603, *see*
5 *also* ROA 048790. Groundwater mining is more specifically defined as a failure to capture
6 discharge to reach a new equilibrium, or steady state, between pumping and recharge in a basin
7 such that water levels in the basin decline continually. ROA 048790; *see also* ROA 024418,
8 024716. Groundwater mining contributes to adverse conditions such as water quality
9 degradation, storage depletion, diminishing yield of wells, increased economic pumping lifts,
10 land subsidence, and possible reversal of groundwater gradients which could result in significant
11 changes in the recharge-discharge relationship. Spring Valley Ruling, at 27; State Engineer’s
12 Office, Water Planning Report, Water for Nevada: Nevada’s Water Resources, Report No. 3, at
13 13 (1971) (“Water for Nevada Report 3”).²⁰

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15
16 In order to prevent overappropriation of Nevada’s groundwater basins, or groundwater
17 mining, it has long been the policy and practice of the State Engineer to set a perennial yield for
18 each hydrographic basin which constitutes an estimate of water availability in the basin. *See*
19 ROA 038596. The State Engineer’s longstanding policy of “limiting groundwater development
20 to a basin’s perennial yield ensures sustainable development of the groundwater resource.” ROA
21 039409-10. The perennial yield of a groundwater basin, according to the State Engineer, is “the
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25 ²⁰<http://images.water.nv.gov/images/publications/water%20planning%20reports/water%20for%20nevada%203.pdf>.

1 maximum amount of groundwater that can be salvaged each year over the long term without
2 depleting the groundwater reservoir.” *See, e.g.*, ROA 000056. Put slightly differently, perennial
3 yield may be defined as the “maximum amount of natural discharge that can be feasibly captured
4 [or in other words the] maximum amount of withdrawal beyond which overappropriation
5 occurs.” *See State Engineer v. Morris*, 107 Nev. 699, 703 (1991); *see also* ROA 000056,
6 039607, Water for Nevada Report 3, at 13; *see also* ROA 039607, Spring Valley Ruling, at 26.
7 Thus, while perennial yield cannot be more than the natural recharge to a groundwater basin, in
8 some cases it is less. *See* ROA 039409; Spring Valley Ruling, at 26-27; Water for Nevada
9 Report 3, at 13; *see also* ROA 024725.

11 The Nevada Supreme Court has recognized that the perennial yield of a groundwater
12 basin is limited by the ability of pumping to capture discharge to reach equilibrium, or a steady
13 state, noting that “[t]he perennial yield of a hydrological basin is the equilibrium amount or
14 maximum amount of water that can safely be used without depleting the source.” *Pyramid Lake*
15 *Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 524 (2010). Thus, perennial yield and the ability
16 of pumping in a basin to capture discharge to reach a new equilibrium, or steady state,²¹ are
17 essentially one and the same. In fact both logic and science dictate that this is the case, because a
18 failure to reach equilibrium, by definition, results in groundwater mining, which is simply
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22 ²¹ “Generally, groundwater systems are thought to be in steady state prior to human development
23 of the resource. Steady state means that recharge to the groundwater system equals discharge;
24 thereby resulting in a balanced groundwater budget.” ROA 039410; 024714. When pumping
25 occurs, it must reach a new balance between recharge and discharge, or steady state, within a
26 reasonable timeframe, or the water table will continue to decline indefinitely as pumping draws
27 water from storage rather than recharge. ROA 048790. This is known as groundwater mining.
28 *Id.*

1 another way of describing pumping in excess of the perennial yield that results in continual
2 decline in water levels. ROA 024418, 024618, 024716, 048790, 055489. The State Engineer
3 also has recognized that “[i]n general, if groundwater is developed such that the amount pumped
4 does not exceed perennial yield, a new equilibrium will be reached.” ROA 039500. On the
5 other hand, if the perennial yield of a groundwater basin is exceeded, groundwater levels will
6 continually decline and steady state will not be achieved, or in other words groundwater mining
7 will occur.²² *See, e.g.*, ROA 000056; State Engineer Ruling No. 2453 (1979);²³ State Engineer
8 Ruling No. 3486 (1988);²⁴ State Engineer Ruling No. 5621, at 17, 20 (2006);²⁵ State Engineer
9 Ruling No. 5750 (2007);²⁶ State Engineer Ruling No. 6151 (2011);²⁷ State Engineer Ruling No.
10 6256, at 13, 24, 25 (2014).²⁸ Consistent with this elementary hydrologic principle, the State
11 Engineer has long recognized that pumping of groundwater must not exceed the perennial yield
12 of a basin, or in other words pumping within a basin must reach equilibrium with recharge within
13 a reasonable timeframe to avoid impermissible perpetual groundwater mining. *See* State
14 Engineer Ruling 3486 (Pahrump Valley 1988); Ruling 6256, at 13, 24, 25 (Garnet Valley 2014);
15 Ruling 5621, at 17, 20 (Three Lakes-Tikapoo Valleys 2006); Water for Nevada Report 3, at 13.
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21 ²² Additionally, in confirmation of this point, SNWA’s hydrology witness Mr. Watrus testified in
22 2011 that if pumping exceeds perennial yield, a system will take longer to reach equilibrium than
23 if pumping does not exceed perennial yield. ROA 035085.

24 ²³ <http://images.water.nv.gov/images/rulings/2453r.pdf>.

25 ²⁴ <http://images.water.nv.gov/images/rulings/3486r.pdf>.

26 ²⁵ <http://images.water.nv.gov/images/rulings/5621r.pdf>.

27 ²⁶ <http://images.water.nv.gov/images/rulings/5750r.pdf>.

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

²⁸ <http://images.water.nv.gov/images/rulings/6256r.pdf>.

1 In basins such as Spring Valley where groundwater is discharged primarily through ET,
2 the perennial yield often has been found to be approximately equal to the estimated groundwater
3 ET, the assumption being that water lost to natural ET can be captured by wells and placed to
4 beneficial use. *See* Spring Valley Ruling, at 27; *see also* ROA 039410. However, other factors
5 may make the capture of ET discharge within a basin impractical or otherwise problematic,
6 which would result in a lower perennial yield amount than the ET discharge amount for the
7 basin. According to the State Engineer, “[a]n example of such a condition is Pahrump Valley
8 (162). In Pahrump the average annual recharge is estimated to be 22,000 acre feet, however,
9 because of the difficulty in salvaging the subsurface outflow from the deep carbonate-rock
10 reservoir, the perennial yield is only 12,000 acre feet.” *Water for Nevada Report 3*, at 13. In
11 other words, the perennial yield is limited by the amount of ET discharge that can actually be
12 captured. *State Engineer Ruling 3486 (Pahrump Valley 1988)*; *see also* *State Engineer Ruling*
13 *6256*, at 13, 24, 25 (*Garnet Valley 2014*);²⁹ *State Engineer Ruling No. 5621*, at 17, 20 (*Three*
14 *Lakes-Tikapoo Valleys 2006*);³⁰ *Spring Valley Ruling*, at 27; *Water for Nevada Report 3*, at 13;
15 *see also* ROA 024725. Thus, in Pahrump Valley, where salvage of deep carbonate-rock water is
16 difficult, the State Engineer has denied applications that are not able to capture discharge to
17 reach equilibrium in a reasonable timeframe. *See* *State Engineer Ruling 3486 (Pahrump Valley*
18 *1988)*.
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24 ²⁹ <http://images.water.nv.gov/images/rulings/6256r.pdf>.

25 ³⁰ <http://images.water.nv.gov/images/rulings/5621r.pdf>.

1 In addition, many of the basins in the Carbonate Aquifer terrain, including Cave, Dry
2 Lake, and Delamar Valleys, discharge their groundwater mostly via subsurface flow to adjacent
3 basins, and thus there is little or no ET that can be captured in those basins. The State Engineer
4 has recognized that the amount of subsurface discharge that can be captured in those basins is
5 highly variable and uncertain. ROA 00289-90, 000458, 000622, 039659, 046072-75. Perennial
6 yields for these basins have historically been set at one-half of the subsurface discharge. *See*
7 ROA 046066. However, when conditions are such that there is subsurface flow through several
8 basins, the State Engineer has acknowledged that there is a potential for double accounting and
9 over appropriation of water that already may be appropriated downgradient. ROA 046066-67.
10 Therefore, downward adjustments may be required to the perennial yields of basins in these
11 “flow systems” so that overappropriation or double counting of water does not occur. ROA
12 046066.
13

14
15 Consistent with the law and the State Engineer’s practice and policy, this Court, in its
16 *Remand Decision*, noted that “the Engineer defines groundwater mining as pumping exceeding
17 the perennial yield over time such that the system never reaches equilibrium.” ROA 039060.
18 Further, “[i]f more water comes out of a reservoir than goes into the reservoir, equilibrium can
19 never be reached. This is known as water mining and while there is no statute that specifically
20 prevents groundwater mining, the policy of the Engineer for over one hundred (100) years has
21 been to disallow groundwater mining. This policy remains today.” *Id.* Following its discussion
22 of the requirements of Nevada law with regard to capture and equilibrium, this Court noted that
23

1 “the time to reach equilibrium is not a valid reason to deny the grant of water, but it may very
2 well be a reason to limit the appropriation below the calculated E.T.” ROA 039061.

3 **E. Standard for Approval of Monitoring, Management, and Mitigation**
4 **Plans**

5 On October 29, 2015, the Nevada Supreme Court issued an *en banc* decision in *Eureka*
6 *County v. State Engineer* (“*Eureka I*”), a case closely analogous to this one on the issue of
7 uncertainty, or indefiniteness, of an applicant’s proposed plan to mitigate potential conflicts, as it
8 relates the plan’s sufficiency to support the State Engineer’s findings that the application would
9 not conflict with existing rights or be detrimental to the public interest in violation of NRS
10 533.370(2). In *Eureka I*, the Court held that:

11
12 the State Engineer's decision to grant an application, which requires
13 a determination that the proposed use or change would not conflict
14 with existing rights, NRS 533.370(2), must be made upon presently
15 known substantial evidence, rather than information to be
16 determined in the future, for important reasons ... the finding must
be based upon evidence in the record to support that mitigation
would be successful and adequate to fully protect those existing
rights.

17 *Eureka County v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1120-21 (2015)
18 (“*Eureka I*”).³¹ The Court noted that NRS 533.370(2) uses mandatory language requiring that
19 the State Engineer “shall reject the application and refuse to issue the requested permit” where
20 the proposed use of water or change of existing water rights conflicts with existing rights. 359
21 P.3d at 1115, 1117 (quoting NRS 533.370(2)). Perhaps most fundamentally the Supreme Court
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23 _____
24 ³¹ Although the Court noted that there was doubt as to whether the State Engineer could grant an
25 application at all on the basis of a determination that the applicant will be able to mitigate
26 conflicts with existing rights, *id.* at 1115-1116, it did not rule on that basis. *See id.*

1 in *Eureka I* held that the State Engineer may not leave for a later day the determination of what
2 an applicant’s mitigation actually will entail or whether the applicant’s proposed mitigation
3 actually will be feasible and effective. The Court in *Eureka I* examined and specifically rejected
4 evidence of a variety of mitigation techniques that could be implemented because “they did not
5 specify what techniques would work, much less techniques that could be implemented to
6 mitigate the conflict with the existing rights in this particular case.” *Id.* at 1119.

7
8 As the Court stated: “the State Engineer’s decision to grant an application, which requires a
9 determination that the proposed use or change would not conflict with existing rights, NRS
10 533.370(2), *must be made upon presently known substantial evidence, rather than information to*
11 *be determined in the future” Id.* (emphasis added).

12 In addition, and of particular relevance to the 3M Plan proposed by SNWA in this case,
13 the Court attacked the “specious assumption that water from a different source would be a
14 sufficient replacement,” noting that even assuming that substitution water is available there are
15 significant potential problems with piping water in from another location that may render
16 substitute water insufficient to replace the water effectively lost by a senior water right holder
17 due to an applicant’s proposed use. 359 P.3d at 1119-1120. The Court also noted that reliance
18 on unspecified substitute water fails to take into account or adequately address the potential
19 problems that may arise in terms of abandonment issues faced by the senior water right holder or
20 permitting issues that may arise with obtaining the substitute water. *Id.* at 1120. Thus, the
21 Nevada Supreme Court has made it crystal clear that the State Engineer may not support a
22 finding that an application will not conflict with existing rights, be detrimental to the public
23 interest, or have unreasonable impacts to the environment with a 3M plan unless substantial

1 evidence in the record supports a finding that the plan will be effective at avoiding or eliminating
2 the conflict or impermissible impact.

3 This Court in its 2013 *Remand Decision* employed the same reasoning as the Supreme
4 Court in *Eureka I* to overturn the State Engineer’s 2012 approval of SNWA’s 3M Plans in
5 Rulings 6164, 6165, 6166, and 6167. This Court noted that that SNWA’s 3M Plans were
6 inadequate because they lacked a plan for monitoring the project, failed to define what
7 constitutes an unreasonable adverse impact requiring mitigation, and failed to include objective
8 standards to determine when mitigation would be implemented. ROA 039065. The *Remand*
9 *Decision* explained that the lack of definite objective standards, thresholds, or triggers made it
10 impossible for the State Engineer to make an informed determination about whether
11 unreasonable effects of SNWA's proposed pumping on the environment or existing rights could
12 be prevented or effectively mitigated. ROA 039063-68. As a result, this Court held that
13 effectiveness of the 3M Plans presented by SNWA could not be evaluated, and consequently the
14 State Engineer’s approval of those Plans to support a finding that SNWA’s applications would
15 not conflict with existing rights, be detrimental to the public interest, or result in unreasonable
16 impacts to the environment was arbitrary and capricious. ROA 039063-68. Specifically, the
17 court remanded to the State Engineer to “[d]efine standards, thresholds or triggers so that
18 mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious in
19 Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley.” ROA 039073.
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23 After *Eureka I* and *Eureka II* and this Court’s *Remand Decision*, therefore, it is clear that
24 an applicant must identify the specific mitigation measures it will implement in order to
25 eliminate or avoid conflicts between its proposed use and existing water rights, that the applicant
26

1 must produce substantial evidence demonstrating that the specific mitigation measures identified
2 actually will be effective at avoiding or eliminating any such conflict, and that the applicant is
3 not entitled to numerous opportunities or State Engineer hearings in which to present this
4 evidence. ROA 039063-68, 039073; *Eureka I*, 131 Nev. Adv. Op. 84, 359 P.3d at 1120-21;
5 *Eureka II*, 133 Nev. Adv. Op. 71, 402 P.3d at 1250.
6

7 **IV. THE STATE ENGINEER'S REQUESTS IN RULING 6446 THAT THIS**
8 **COURT REVERSE ITS FINDINGS RELATED TO WATER**
9 **AVAILABILITY DETERMINATIONS UNDER NEVADA LAW REFLECT**
10 **A MISINTERPRETATION OF NEVADA WATER LAW AND AS SUCH**
11 **ARE CONTRARY TO LAW, ARBITRARY AND CAPRICIOUS, AND**
12 **CONTRARY TO THIS COURT'S *REMAND DECISION***

13 After complying with the *Remand Decision's* direction and correctly denying SNWA's
14 SCDD applications for lack of water availability, the State Engineer argued in Ruling 6446 that
15 this Court should reexamine the findings it made in the *Remand Decision* on the longstanding
16 requirement that the perennial yield of a basin must be limited to the amount of ET discharge
17 that can be captured over the long term without depleting the groundwater reservoir. ROA
18 038955. The State Engineer further argued, essentially, that double appropriations of water
19 should be, or are, permitted under Nevada law as long as impacts will not be felt for a long time
20 in the future. ROA 038975.

21 In the 2017 Remand Hearing before the State Engineer, the *Remand Decision's*
22 construction of Nevada water law and resulting direction to the State Engineer regarding water
23 availability determinations are law of the case, which the State Engineer acknowledged he must
24 follow. *See Hsu v. Clark County*, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007) (under the
25 law of the case doctrine, when an appellate court states a principle or rule of law necessary to a

1 decision, the principle or rule becomes the law of the case and must be followed throughout its
2 subsequent progress, both in the lower court and upon subsequent appeal, as long as the facts
3 remain substantially unchanged); ROA 038995. Nevada courts will depart from prior holdings
4 only when they determine that they are so clearly erroneous that continued adherence to them
5 would work a manifest injustice, but in this case the *Remand Decision's* articulation of the law
6 clearly was correct and so, notwithstanding the State Engineer's argument in Ruling 6446, no
7 reconsideration of that *Decision* is warranted. Because the sections of Ruling 6446 that argue for
8 such a reconsideration are based on a misconstruction of Nevada law and advocate a departure
9 from longstanding State Engineer policy and practice, those parts of the Ruling should be
10 vacated and corrected by this Court.³²

12 As noted above, NRS 533.370(2) requires the State Engineer to determine whether there
13 is available water in the proposed source of supply to support SNWA's applications and requires
14 the State Engineer to reject an application where there is insufficient unappropriated water in the
15 proposed source. To satisfy this statutory requirement, this Court's *Remand Decision* required
16 the State Engineer on remand to recalculate the available water from Spring Valley such that
17 SNWA's appropriations would capture Spring Valley discharge to reach equilibrium between
18 recharge and discharge within a reasonable amount of time without causing unreasonable
19 impacts or conflicts with existing rights. ROA 039060-63, 039066, 039073. The *Remand*
20 *Decision* further required on remand additional hydrologic study to recalculate the available
21
22

24 ³² Ruling 6446 Findings of Fact Sections II(c) and III(c) are the sections that misconstrue Nevada
25 law on water availability and should be reversed. See ROA 038955-038969, 038975; see also
26 ROA 039042.

1 water in Cave Valley, Dry Lake, and Delamar Valleys to avoid overappropriations or conflicts
2 with existing water rights in down-gradient fully appropriated basins. ROA 039051-52, 039073.

3 In other words, the *Remand Decision's* directions required the State Engineer to evaluate
4 how much water can be considered available for SNWA's proposed pumping, taking into
5 account the constraints or limitations placed on the availability of water by Nevada law such as
6 the requirements that applications not conflict with existing water rights or threaten to prove
7 detrimental to the public interest. ROA 039062-63, 039066, 039073. The *Remand Decision's*
8 articulation of the law was consistent with NRS 533 and 534, Nevada Supreme Court precedent,
9 and the State Engineer's previous policy and practice, and accordingly should not be
10 reconsidered or reversed. Instead, the State Engineer's blatant mischaracterization of Nevada
11 water law and the facts related to ET capture, pumping to equilibrium, perennial yield, and
12 conflicts with downgradient rights in Ruling 6446 should be corrected by the Court to prevent
13 any unsound precedent from being set that could misdirect future State Engineer rulings.
14
15

16 **A. The State Engineer's Proposed Departure from Previous Policy and**
17 **Practice With Regard to the Longstanding Prohibition Against**
18 **Groundwater Mining Would Permit Overappropriation in Spring**
19 **Valley and Set Dangerous Precedent**

20 In Ruling 6446 the State Engineer argues, in contradiction to the *Remand Decision* and
21 contrary to his own previous practice and precedent, that the *Remand Decision* imposed a new
22 standard on the office that never before had been applied, namely requiring capture of ET to
23 reach a new equilibrium, or steady state, between recharge and pumping to avoid groundwater
24 mining. ROA 038957. In support of this argument the State Engineer claims that Nevada water
25 law does not require groundwater applications such as SNWA's to capture ET discharge or to
26

1 reach equilibrium between pumping and recharge in any reasonable timeframe, effectively
2 arguing that, contrary to his consistent previous pronouncements, Nevada water law does
3 condone groundwater mining.³³ ROA 038957-61. This clearly erroneous misinterpretation of
4 law would represent a 180 degree reversal of Nevada's previous longstanding policy, which
5 would have drastic implications for Nevada water law, Nevada's water resources, and Nevada's
6 environment if it were adopted or allowed to stand. The arbitrary and capricious nature of the
7 State Engineer's desire to overturn longstanding Nevada water law and policy is reflected in his
8 attempt to support this radical change with repeated mischaracterizations of the evidence,
9 Nevada water law and policy, and the State Engineer's own previous practice and precedent.
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13 ³³ The State Engineer's mischaracterization of the history of these proceedings to suggest that the
14 Court had and failed to take the opportunity to require the State Engineer to follow his
15 longstanding precedent prohibiting groundwater mining is incorrect. Spring Valley is the only
16 valley of the four subject valleys that discharges primarily through ET. The 2007 Spring Valley
17 Ruling was not appealed, and so the Courts never had the opportunity to hold the State Engineer
18 accountable for findings on the issue of capture of ET discharge made in that ruling until 2013 in
19 the *Remand Decision* which reviewed the State Engineer's findings in Ruling 6164, the second
20 Ruling on SNWA's Spring Valley applications. The first CDD Ruling, which the district court
21 did overturn in 2009, Exhibit A, CDD Valleys Remand Order, did not involve ET capture as
22 there is virtually no ET in the CDD Valleys and calculation of perennial yield in valleys with
23 only subsurface outflow always has been based on a different method, discussed above. Thus,
24 the first time the State Engineer's determinations with regard to equilibrium and water
25 availability in Spring Valley were reviewed was the appeal of Ruling 6164, when this Court
26 properly articulated the requirements under Nevada law in its 2013 *Remand Decision*. The fact
27 that the 2013 *Decision* occurred 24 years after the applications were filed is a result of SNWA's
28 failure to move forward on its applications and the State Engineer's failure to act on the
29 applications for almost 20 years after they were filed; it is not the result of any failure to act on
30 the part of the courts. Further, as noted above, those requirements reflect longstanding State
31 Engineer precedent and practice under Nevada law and are not newly articulated standards or
32 requirements, as the State Engineer misleadingly suggests. As such, the State Engineer should
33 have been well aware of the standards the Court would hold his office to in review of Ruling
34 6164 since they are his own longstanding standards, however inconvenient that might be in the
35 context of SNWA's politically freighted proposed groundwater mining project.

1 i. Nevada Law’s Prohibition Against Groundwater Mining Mandates
2 That Pumping in a Basin Capture Discharge to Reach Equilibrium
3 in a Reasonable Timeframe to Avoid Perpetual Water Level
4 Decline

5 It is undisputed that Nevada law prohibits groundwater mining. *See, e.g.,* ROA 039060,
6 039409-50; *see also* *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 524 (2010);
7 Spring Valley Ruling, at 27. The State Engineer’s transparent attempt to distance himself from
8 his previous policy and practice of requiring the capture of ET to reach a new equilibrium so as
9 to avoid groundwater mining, as described in Argument Section III(D), above, is in direct
10 conflict with the inescapable scientific fact that the only way to avoid impermissible perpetual
11 groundwater mining in a basin is to require that pumping in the basin reach a new equilibrium
12 with recharge, or in other words a new steady state, within a reasonable timeframe. ROA
13 024418, 024618, 024716, 048790, 0448822, 055489. Reaching equilibrium between recharge
14 and pumping in a basin is important because the point at which a new equilibrium is reached is
15 also the point at which the groundwater level stabilizes, or ceases to decline. *See id.* Until that
16 point is reached pumping will continue to capture stored water, the water table will continue to
17 decline, and the groundwater will be mined. *Id.* By definition, then, a failure to reach
18 equilibrium between recharge and pumping results in continual decline in water levels (i.e.,
19 groundwater mining) in violation of Nevada law. *See id.* This first principle, it is said, “contains
20 the essence of quantitative groundwater hydrology.” ROA 024708.

21
22 The simple scientific fact is that a failure to capture discharge by definition results in a
23 failure to reach equilibrium between recharge and pumping, which results in a continual
24 lowering of the groundwater table, which in other words constitutes impermissible groundwater
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1 mining. ROA 024418, 024628 (leading hydrologist William M. Alley, stating in USGS Circular
2 1186, that, “Equilibrium is reached only when pumping is balanced by capture”), 024716,
3 048790, 048822, 055489. Thus, it simply is not possible to reach the required equilibrium
4 necessary to halt groundwater level decline without capturing discharge. ROA 024418, 055489.
5 This is because ET discharge that is not captured by pumping continues to be discharged through
6 plants. *See* ROA 024607. In other words, reaching a balance between the captured water and
7 recharge such that the groundwater table does not decline perpetually, or amount to groundwater
8 mining, is the definition of reaching equilibrium. ROA 024418, 055489, 0555551. As a result,
9 any uncaptured ET discharge must be accounted for as part of a basin’s discharge in the water
10 budget such that there is a balance between recharge and discharge to avoid double counting
11 water and creating a groundwater mining condition. *See* Water For Nevada, Report 3, at 13.
12 Thus, where it cannot be demonstrated that an application actually will capture ET, or discharge,
13 the State Engineer has denied the application as exceeding the perennial yield. *See* State
14 Engineer Ruling 3486 (Pahrump Valley 1988).
15

16
17 The time to equilibrium, or a new steady state, is critically important in the case of large
18 withdrawals such as those proposed by SNWA because if equilibrium is not reached for a long
19 period of time, then in the interim, the aquifer will continuously lose substantial amounts of
20 stored water, which will lead to severe harmful impacts to existing water rights holders, future
21 water users and residents of the basin, and the environment.¹ ROA 054907. In this case, for
22 example, a 2,000-year run by protestant CPB’s hydrology experts of SNWA’s own model at the
23 application points of diversion resulted in a total of ten million acre feet of mined groundwater
24 caused by SNWA’s pumping, and the system still had not come close to equilibrium. ROA
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1 053124, 053142; *see also* ROA 055636. Because recharge is limited, even after pumping ceases,
2 the resulting decline in the water table is considered unrecoverable and will result in drawing
3 water from adjacent basins to fill the cone of depression. ROA 053124, 053142, 053302. It is
4 clear then that here, where SNWA has applied for water from the carbonate system from which
5 capture has proven elusive, the perennial yield of Spring Valley must be limited so as to avoid
6 serious, chronic overappropriation and groundwater mining.
7

8 There is a clear internal inconsistency between the State Engineer's agreement on the one
9 hand that groundwater mining is prohibited under Nevada law, *see* ROA 039060, 039409, and
10 his argument on the other hand that his office should not be required to apply the concept of ET
11 capture to reach equilibrium in a reasonable timeframe. ROA 038956. The longstanding
12 principle requiring ET capture to reach equilibrium is the only way to ensure that groundwater
13 mining does not occur. ROA 024418, 024716, 048790, 048822, 055489. For the State Engineer
14 now to deviate from his past position and argue that the choice to apply this principle is purely a
15 policy decision rather than a straightforward application of sound science, is not only
16 inconsistent, it is scientifically unsound, contrary to law, and arbitrary and capricious. The State
17 Engineer's position is tantamount to sanctioning groundwater mining for the first time in
18 Nevada's history. A failure to require that the State Engineer limit the perennial yield of a basin
19 to the amount of discharge that actually can be captured such that pumping reaches a new
20 equilibrium with recharge, or a new steady state, would, in effect, give the State Engineer a blank
21 check to grant as much water from groundwater basins as he likes with no requirement that the
22 water actually be available. Such a novel approach would reverse Nevada law's longstanding
23 prohibition against groundwater mining.
24
25

1 In an attempt to divert attention from the conundrum he faces, the State Engineer
2 attempts to recharacterize his approach to setting the perennial yield for groundwater basins as a
3 simple accounting exercise. The State Engineer oversimplifies the water availability discussion
4 in Ruling 6446 based on the suggestion that “[i]t is undisputed that there is only 22,873 acre-feet
5 committed in the basin, leaving over 60,000 acre-feet uncommitted.” ROA 038956. Based on
6 this simple math, the State Engineer appears to conclude that 60,000 afa of groundwater is
7 available for appropriation in Spring Valley. *See id.* However, as explained above, in order to
8 support a finding that the water is available, the applicant must still show that it can actually
9 capture that 60,000 acre feet of unused water and that it won’t be capturing water that already is
10 subject to existing rights. If this Court were to accept the State Engineer’s novel spreadsheet-like
11 analysis, severe overappropriation of Nevada’s groundwater would become more widespread,
12 because despite the fact that the State Engineer ought to have the expertise to evaluate water
13 availability and always has relied on hydrologic analysis to support water allocation decisions,
14 *see, e.g.,* Spring Valley Ruling, at 26-27, the simple, bare water budget accounting approach
15 referenced in Ruling 6446 is not based on the hydrology of the system, but rather embodies an
16 oversimplified non-scientific results-oriented approach.

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19 Because the State Engineer’s attempt to rewrite Nevada water law is unsupported by
20 prior practice, scientific realities, or logic, and because a departure from the prohibition against
21 groundwater mining would result in devastating impacts to Nevada’s water resources, existing
22 rights, and environment, this Court should dismiss it for what it is: a naked attempt to find a way
23 to permit SNWA’s applications despite the fact that there is insufficient water available to
24 support them.
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ii. The State Engineer’s Argument Is Grounded in Mischaracterizations and Red Herrings

In the course of his attempt to distance himself from prior practice and set a new standard for water availability determinations, in Ruling 6446 the State Engineer mischaracterizes arguments presented by Petitioners by suggesting that it is Petitioners who have attempted to introduce a new standard into water availability determinations. ROA 038958. Petitioners have never advocated for a change to Nevada law. Rather, Petitioners’ position always has been that the State Engineer must simply apply the law, including longstanding straightforward policy and practice, which prohibits groundwater mining. In other words, the State Engineer must require that SNWA’s pumping capture ET to reach equilibrium within a reasonable timeframe to avoid perpetual groundwater mining, or a perpetual lowering of the water table.

SNWA’s attempt to misrepresent protestants’ witnesses’ testimony on cross-examination by focusing on extreme hypothetical application of an equilibrium analysis to completely dissimilar small water appropriations does not provide any support for the State Engineer’s attempt to abandon longstanding policy and precedent in Ruling 6446.³⁴ See ROA 038957-60.

³⁴ For example, the State Engineer points to the testimony on cross examination of Petitioners’ hydrology expert Dr. Myers that he was unaware of any previous project that had been subject to the equilibrium requirement. ROA 038960. This is because SNWA’s project is the first project in Nevada of such a massive scale that it requires a basin-wide assessment of equilibrium to prevent groundwater mining. Indeed, as explained herein, requiring a basin to reach equilibrium between recharge and pumping is simply a tool to ensure that the basin will not become overappropriated or in other words that the appropriations in a basin will not result in groundwater mining. When smaller appropriations are before the State Engineer, it may not be feasible to perform an equilibrium analysis because the amount of withdrawal is so small in relation to the basin’s rates of recharge and discharge. But that does not mean that the basin as a

1 Clearly, where an applicant effectively requests the entire perennial yield of a valley, the water
2 budget approach requires a demonstration to be made that the proposed pumping will, in fact,
3 reach equilibrium in a reasonable timeframe. Without such a requirement, as the modeling
4 evidence clearly demonstrates, the project will result in groundwater mining and a perpetual,
5 progressively worsening, decline in the water table in violation of Nevada law.
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7 The State Engineer also attempted to distort the discussion of this issue by suggesting that
8 the *Remand Decision* erroneously required him to apply the perennial yield concept on a case-
9 by-case basis. ROA 038958-60. This argument is misguided. It is uncontroverted that the State
10 Engineer always has defined the perennial yield of a basin as the maximum amount of
11 groundwater that can be salvaged each year over the long term without depleting the
12 groundwater reservoir. Water for Nevada Report 3, at 13. In Ruling 6446, the State Engineer
13 complained that the *Remand Decision* required evidence showing that SNWA's Spring Valley
14 pumping would reach equilibrium and claimed that the *Remand Decision's* application of the law
15 in this extraordinary case would require the same evidentiary showing to be made for each and
16 every groundwater right application in the future (what he described as requiring equilibrium on
17 a case-by-case basis). This argument conveniently ignores the fact that that SNWA has
18 requested the entire unappropriated perennial yield of the subject basins. *See* ROA 000006,
19 000220, 000390, 000554. In this case, where SNWA seeks to divert and consumptively use the
20 entire perennial yield of the basins in question, there is no difference between a basin-wide
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24 whole need not reach equilibrium to avoid groundwater mining. Where SNWA has requested
25 the entire perennial yield, as they have done in the subject basins, an equilibrium analysis is the
26 only apparent way to ensure that the project will not result in impermissible groundwater mining.
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1 perennial yield determination and the “case-by-case” approach. It may be that requiring a basin-
2 wide water budget and perennial yield determination with a demonstration that pumping will
3 come to equilibrium in a reasonable time would be disproportionate where an applicant is
4 requesting only a small amount of water, which would not result in significant water level
5 decline at the point of diversion. But where the applicant has requested the entire unappropriated
6 perennial yield of a basin in an amount that is unprecedented in scale, it is imperative that the
7 applicant demonstrate that its pumping will reach equilibrium in a reasonable time to avoid
8 perpetual groundwater mining on a basin-wide scale. The fact is that the SE has never ruled on a
9 project of the scale of the project SNWA has proposed, and the limited assessments the State
10 Engineer may have performed in the past in the context of smaller applications for local use are
11 not sufficient to assess these applications. The bottom line here is that all of the modeling
12 evidence points to the inescapable fact that if SNWA pumps the water it is requesting the result
13 will be catastrophic groundwater mining, or a perpetual lowering of the groundwater table to the
14 extreme detriment of existing rights and the environment. In effect, the State Engineer in Ruling
15 6446 argues that this result should be permissible under Nevada law.

18 The State Engineer also mischaracterizes the requirement that pumping actually capture
19 ET discharge as tantamount to adopting a riparian doctrine. ROA 038962. Such a comparison
20 ignores the mechanics of prior appropriative rights. While it is true that in a riparian system
21 water rights are held based on proximity to water alone, access to the water source also is
22 required under the prior appropriation doctrine. *See* A. Dan Tarlock, *Law of Water Rights and*
23 *Resources*, at 5:24, 5:26, 5:27 (2009). For example, a prior appropriator who wishes to
24 appropriate water from a surface water source and gain a right to that surface water source must
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1 have access to and divert water from that stream, not from some remote source that may be only
2 tenuously hydrologically connected. Similarly, groundwater pumped from deep wells that are
3 remote from ET discharge zones properly and generally will not be considered available for
4 appropriation because pumping from such wells will not capture ET discharge in a reasonable
5 time and therefore will result in impermissible groundwater mining. *See* State Engineer Ruling
6 3486 (Pahrump Valley 1988); Water for Nevada Report 3, at 13.
7

8 Similarly, the State Engineer’s attempt to characterize Petitioners’ position as
9 unworkable by referring to the San Luis Valley, Colorado, ET capture project is unavailing. *See*
10 ROA 038963. The State Engineer’s argument is essentially that pumping under a groundwater
11 development project must either be designed to minimize impacts or designed to capture ET, but
12 that it can’t be designed to address both components of the law. However, this position is based
13 on the false premise that SNWA ought to be permitted to pump the entire ET of the basin, one
14 way or another. It is not Petitioners’ position that SNWA should be permitted to pump its
15 project to capture the full ET of Spring Valley. Petitioners agree that such an approach is
16 unworkable and is not permitted by Nevada law, because it would be too environmentally
17 devastating. Rather, it is Petitioners’ position that pumping the requested amount of
18 groundwater from Spring Valley will either: (1) fail to capture ET or reach equilibrium as
19 required by Nevada law and therefore result in impermissible groundwater mining; or (2)
20 constitute an ET capture project that would conflict with existing rights and be too
21 environmentally devastating to permit. Indeed, the evidence in the record demonstrates precisely
22 this point. Thus, Petitioners’ position, consistent with this Court’s *Remand Decision*, is simply
23 that SNWA’s appropriations must be limited to the amount of ET discharge that it feasibly can
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25

1 capture without causing conflicts with existing rights and without being detrimental to the public
2 interest by causing impermissible environmental impacts. This is nothing more or different than
3 what Nevada water law long has required.

4 iii. It Is SNWA's Proposed Environmentally Devastating Groundwater
5 Mining Project. Not this Court's Construction of the Law, That Is
6 Deficient

7 The fact that SNWA's proposed pumping is unable to capture sufficient discharge, or ET,
8 at the application points of diversion to reach equilibrium over the long term is not a shortcoming
9 in the law, or evidence that this Court got it wrong in its *Remand Decision*, as suggested by
10 SNWA and the State Engineer. Rather, it is evidence of the fact that SNWA's project is
11 impermissible under the law, because it is an egregious example of a groundwater mining
12 project. While it is undisputed that equilibrium would not be reached by SNWA's project as
13 proposed in its applications, SNWA's evidence regarding a 101 well ET capture version of its
14 project demonstrated that Spring Valley ET discharge can, in fact, be captured and that
15 equilibrium can be reached in a reasonable amount of time.³⁵ ROA 041812. However, Nevada
16 law requires not only that water be available for appropriation, but also that the appropriation not
17 conflict with existing rights or be detrimental to the public interest or environmentally unsound.
18 NRS 533.370(2) & (3). So while water in Spring Valley may be available for appropriation, the
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22 ³⁵ As pointed out in Ruling 6446, however, the applicant has presented this evidence for a project
23 that is not limited to the application points of diversion, and because the State Engineer only
24 considers the applications before him, the State Engineer could not consider it. ROA 038947.
25 Of course this determination by the State Engineer is the only approach that would be consistent
26 with the law and due process. Applicants cannot simply change points of diversion in
27 applications without triggering the need for notice and opportunity to be heard for those who
28 might be impacted by the newly proposed points of diversion.

1 impacts of an ET capture project designed to capture all of that water would be impermissible
2 under Nevada law, as SNWA has acknowledged.

3 Much has been made by SNWA and the State Engineer of the supposed difficulty SNWA
4 faced in having to make a showing of ET capture and equilibrium, which amounts to nothing
5 more than a showing that its proposed pumping will not amount to impermissible groundwater
6 mining as required by Nevada's longstanding water law, before its water right applications could
7 be properly approved. However, far from being the result of any unfairness in applying the law
8 to SNWA's applications, in reality any difficulty arises from the false premise advanced by
9 SNWA that these applications must be granted regardless of the fact that there is no substantial
10 evidence showing that they, or the project they are intended to serve, can comply with the basic
11 requirements of NRS 533.370. It is true that SNWA is unable to meet the requirements of the
12 *Remand Decision*, as SNWA acknowledged in its 2014 Petition for Writ of Mandamus. SNWA
13 Mandamus Petition, at 44. But that is only because SNWA's Project cannot satisfy the most
14 basic of requirements under Nevada water law, not because of any error in the *Remand Decision*.
15 That is because a version of SNWA's Project designed to effectively capture Spring Valley ET
16 and reach equilibrium in a reasonable time would be too environmentally devastating to permit.
17 SNWA has acknowledged as much and did not even bother analyzing impacts for the ET capture
18 project it submitted as evidence in the 2017 Remand Hearing. *See* Exhibit E, Southern Nevada
19 Water Authority, Reply Brief, at 39, *SNWA, et al. v. Seventh Judicial District Court, et al.*, No.
20 65775 (Nev. Dec. 12, 2014); ROA 038952. On the other hand, permitting SNWA's applications
21 at the application points of diversion, as required by law, also would be impermissible because
22 the Project would constitute a groundwater mining project that would deplete the entire
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1 groundwater system of Spring Valley at a massive, catastrophic scale over the long term. ROA
2 053141, 054932. But despite its attacks on this Court and numerous attempts to mischaracterize
3 the law and evidence during the 2017 Remand Hearing, SNWA's dilemma is not due to any
4 shortcoming in the law. Rather, it is a direct result of the fact that SNWA's proposed Project is
5 just the sort of project the law is designed to prevent: a short-sighted environmentally
6 devastating groundwater mining project that would destroy existing water rights in the affected
7 basins and deprive future generations of Nevadans of the water and environmental resources that
8 are vital to their existence.
9

10 **B. The State Engineer's Attempt to Rewrite Nevada Law Would Permit**
11 **Double Appropriations of Water in the CDD Valleys and Set**
12 **Dangerous Precedent**

13 In the context of applying the *Remand Decision's* direction requiring additional
14 hydrologic study of the CDD Valleys to avoid overappropriation and conflicts with
15 downgradient existing rights, *see* ROA 039051-52, 039073, the State Engineer again urged this
16 Court to reconsider its *Decision*, stating in effect, that sanctioning double appropriations of
17 groundwater ought to be permitted under Nevada law if impacts may not become obviously
18 harmful in the near term. ROA 038975. Ruling 6446 even went so far as to suggest that legal
19 constraints are unworkable in the complex field of water management. *Id.* The Ruling also
20 mischaracterized the evidence in the record and the analysis contained in the *Remand Decision* to
21 suggest that the *Remand Decision* held that conflicts are presumed if uncertain. *Id.* First, while
22 SNWA has chosen not to present evidence demonstrating the nature and severity of predicted
23 impacts at specific locations, the evidence in the record clearly demonstrates that there is no real
24 uncertainty regarding the general attributes of the pervasive predicted drawdown that will extend
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1 into downgradient fully appropriated basins in the WRFS, causing conflicts with existing rights
2 in those basins. ROA 048790-91, 048838-39, 048842, 048845-47. Second, the *Remand*
3 *Decision* did not hold that conflicts are presumed if uncertain, but rather held that because NRS
4 533.370(2) is unequivocal and requires denial of an application in the event of a conflict, the
5 SE's Rulings must be remanded to the State Engineer for further study with regard to potential
6 conflicts with existing rights in fully appropriated basins downgradient from the CDD Valleys.
7 ROA 039069-70. So in fact, the Court simply prohibited the State Engineer from granting water
8 rights until he can base a finding that they won't conflict with existing down-gradient rights on
9 substantial evidence. The SE's statements directly contradict the *Remand Decision*, the late
10 Judge Robison's decision in *Carter-Griffin v. Taylor*, CV-830008 (Nev. Dist. Ct., Oct. 19, 2009),
11 and NRS 533.370's unequivocal requirement that the State Engineer deny applications that
12 conflict with existing rights. The SE's proposed standard would flip the burden of proof under
13 NRS 533.370(2) on its head and would permit the State Engineer to grant water rights without
14 substantial evidence that there is water available and the proposed use will not conflict with
15 existing rights. Such an approach would directly contradict the law's plain requirements and
16 likely would result in a proliferation of overappropriations and conflicts with existing rights.

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19 Not only is the State Engineer's position inconsistent with the law, it also appears to be
20 inconsistent with his own previous practice. Although perennial yields for basins such as the
21 CDD Valleys, which discharge their groundwater primarily through subsurface flow to adjacent
22 basins, historically have been set at one-half of the subsurface discharge, *see* ROA 046066, the
23 State Engineer has acknowledged that when conditions are such that there is subsurface flow
24 through several basins, there is a potential for double accounting and overappropriating water
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1 that may already be appropriated downgradient. ROA 046066-67. Therefore, downward
2 adjustments may be required to the perennial yields of basins in these interbasin “flow systems”
3 so that over appropriation or double counting of water does not occur. ROA 046067.

4 Thus, the State Engineer has recognized that due to the interconnectedness of basins in
5 interbasin flow systems like the WRFS, groundwater management on a hydrographic basin scale
6 in the interconnected carbonate rock province may be more complex and is “often dependent on
7 prior management/appropriation decisions.” ROA 039618. Similarly, the State Engineer has
8 stated that , “when conditions are such that there is subsurface flow through several basins, there
9 is a potential for double accounting and overappropriating the resource if the perennial yield of
10 each basin is equal to one half of the subsurface outflow and basin subsurface inflows are not
11 adjusted accordingly. Therefore, allowances and adjustments are required to the perennial yields
12 of basins in these ‘flow systems’ so that over appropriation does not occur.” ROA 046067-68.

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15 In numerous rulings addressing the perennial yield in basins with a substantial amount of
16 subsurface outflow, such as his Granite Springs Valley Ruling, the State Engineer has noted the
17 need to reinforce the conservatism of the “one-half of subsurface outflow” methodology by
18 considering “local hydrology, as well as prior rights appropriated in other basins within the same
19 ground-water flow system.” Nevada State Engineer Ruling No. 5782, at 10 (Sept. 17, 2007)
20 (Granite Springs Valley);³⁶ cf. Nevada State Engineer Ruling No. 5712, at 14-15 (Feb. 2, 2007)
21 (Kane Springs Valley) (carefully accounting for inflow from up-gradient basins, outflow to
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24 ³⁶ <http://images.water.nv.gov/images/rulings/5782r.pdf>.

1 down-gradient basins, and senior appropriated water rights in down-gradient basins within the
2 White River Flow System).³⁷

3 Moreover, as explained above and as this Court has twice held, the plain language of
4 NRS 533.370(2) makes it clear that even where harmful effects may not be detected for some
5 time, double appropriation is nonetheless impermissible under the statutory proscription against
6 conflicts with existing rights. ROA 039069-70, Exhibit A, CDD Valleys Remand Order. Not
7 only does NRS 533.370(2) require such a conclusion, sustainable water management policy also
8 demands it. As this Court stated in its *Remand Decision*, “it is also unseemly to this court, that
9 one transitory individual may simply defer serious water problems and conflict to later
10 generations, whether in seventy-five (75) years or ‘hundreds,’ especially when the ‘hundreds’ of
11 years is only a *hoped* for resolution.” ROA at 039070.
12

13 Because Section III(c) of Ruling 6446 amounts to a self-serving attempt to convince this
14 Court to rewrite Nevada water law for the purpose of permitting SNWA's Pipeline Project in the
15 CDD Valleys and would set a dangerous precedent for the future of water management in
16 Nevada by sanctioning double appropriations of water, it should be rejected and corrected by this
17 Court.
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25 ³⁷ <http://images.water.nv.gov/images/rulings/5712r.pdf>.

1 mining project, the Plans include an arbitrary, self-serving, definition of unreasonable effects that
2 allows for widespread destruction within the area of impact and would not prevent conflicts with
3 existing rights or unreasonable impacts to the environment. See ROA 053033-37, 055297-98,
4 055302-03, 055305, 055320-21. SNWA’s 3M Plans allow for a level of environmental
5 degradation that far exceeds the level of environmental harm that is permitted under any fair
6 reading of the law. For example, the requirement that SNWA avoid jeopardy to federally listed
7 species is “below the standard that is used to require mitigation from the [United States Fish and
8 Wildlife Service].” ROA 053050. Additionally, the standard that would prevent basin-wide
9 extirpation of native aquatic-dependent species “results in a monitoring and mitigation program
10 focused in only one area within Spring Valley, an area that accounts for only 9% of the habitat.”
11 *Id.* The standard of basin-wide elimination of habitat types results in a 3M program that is
12 inadequate for mesic and terrestrial woodland habitat, because both habitats are linked to the
13 health of a single species,³⁹ and are monitored at locations that either are predicted to experience
14 minimal impact or already are afforded protection through special designation. ROA 053050-51.
15 Finally, SNWA’s proposed definition with regard to protection of unreasonable harm to the
16 Spring Valley swamp cedars is inconsistent with their listing on the National Register as well as
17 their cultural and spiritual importance to three Native American Tribes. ROA 053051, 055263-
18 78, 055309, 055369-76, 055378-94. Thus, even if SNWA could demonstrate that its 3M Plans

24 ³⁹ SNWA provided no analysis supporting the use of the Northern leopard frog as an indicator
25 species for mesic habitat ecosystem viability. ROA 054043. In fact, the Northern leopard frog
26 does not even exist in all mesic habitat across Spring Valley. *Id.*

1 would prevent what SNWA has defined as unreasonable impacts, by definition the impacts that
2 the Plans would permit would be environmentally unsound and detrimental to the public interest.

3 Accordingly, the 3M Plans presented by SNWA during the 2017 Remand Hearing are not
4 sufficient to support findings that SNWA's proposed pumping will not cause unreasonable
5 environmental impacts or prove detrimental to the public interest. Because it is based on an
6 arbitrary and unsupported definition of unreasonable impacts designed by the applicant to suit
7 the applicant's convenience rather than an independent assessment of the public interest, Ruling
8 6446's approval of SNWA's 3M Plans is arbitrary and capricious, contrary to law, and
9 unsupported by substantial evidence.
10

11 **B. The Management Categories for Senior Water Rights Fail to Protect**
12 **Against Conflicts With Existing Rights**

13 SNWA's 3M Plans create groundwater management categories for senior water rights
14 based on the distance from SNWA's PODs to a senior water right. ROA 043062. Categories of
15 water rights that are closer to SNWA's proposed PODs receive a higher level of monitoring
16 under the Plan, which in theory makes sense given that they will be impacted most quickly and
17 most severely, as long as the ultimate protections for all existing rights that are predicted to be
18 impacted are sufficient. Given the predicted expansion of the cone of depression with time,
19 water rights farther from SNWA's PODs eventually will be impacted and must be given
20 sufficient protection. However, SNWA's Plans do not provide that assurance. For example, the
21 Plans do not even provide for site specific baseline assessments in the case of senior water rights
22 that are more than ten miles away from SNWA's proposed points of diversion even though it is
23 undisputed that they are within the predicted area of impact, which means that neither SNWA
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1 nor the State Engineer has, or will have, the information necessary to determine whether
2 SNWA's pumping has impacted those rights. ROA 043062-64, 053048. Because the Plans do
3 not provide for adjustments to management categories as the cone of depression expands, they
4 do not provide substantial evidence that conflicts with existing rights will be avoided or
5 effectively mitigated.
6

7 **C. The Monitoring Regime Proposed by SNWA's 3M Plans Is Not Based**
8 **on a Conceptual Flow Model and as Such the Siting of Monitoring**
9 **Wells Is Scientifically Unsound, Unsupported by Substantial**
10 **Evidence, and Arbitrary and Capricious**

11 Third, the 3M Plans include a monitoring regime that is not based on any localized
12 conceptual flow model, or other substantial evidence, to support the siting and design of the
13 monitoring wells which SNWA proposes to rely on. ROA 055558, 055596; *see also* ROA
14 054950, 055535-605, 055589-90. Because there is no evidence in the record of a conceptual
15 flow model that would support the siting of monitoring wells, the State Engineer was unable to
16 assess whether those wells would be effective in detecting drawdown in sufficient time to
17 actually and effectively manage or mitigate impacts on the basis of the evidence in the record.
18 *See* ROA 055558, 055596; *see also* ROA 054950, 055535-605, 055589-90. In fact, without
19 evidence in the Plans to justify the placement of monitoring wells, it is entirely possible that the
20 wells would be located such that detection of impacts would be avoided or delayed. Indeed, as
21 pointed out by Petitioners' hydrology expert Dr. Myers, "the plans leave large distances between
22 monitoring wells through which groundwater drawdown can propagate [undetected]." ROA
23 049635; *see also* ROA 024713. Consequently, SNWA's siting of monitoring wells in the 3M
24 Plans has no scientific basis in the record, is arbitrary, and does not support the State Engineer's
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1 finding in Ruling 6446 that SNWA’s 3M Plans would be effective to monitor and avoid or
2 mitigate predicted impacts of its proposed groundwater development project. This plain
3 deficiency, alone, renders SNWA’s 3M Plans fatally flawed.

4 **D. SNWA’s Proposed 3M Plans Do Not Contain Quantified Objective**
5 **Management and Mitigation Standards, Thresholds, or Triggers as**
6 **Required by the *Remand Decision***

7 SNWA also failed to present evidence that met the straightforward requirement
8 articulated by this Court in its *Remand Decision* and by the Nevada Supreme Court in *Eureka I*,
9 131 Nev. Adv. Op. 84, 359 P.3d at 1121, that a monitoring, management, and mitigation plan
10 must contain definite, objective standards, thresholds, or triggers and information demonstrating
11 specifically how the applicant actually and effectively will avoid or mitigate conflicts or
12 unreasonable effects. In the absence of such information there is not substantial evidence on
13 which the State Engineer can base a decision to grant the applications. ROA 039065-68,
14 039071-72 (noting a failure to define what constitutes unreasonable effects, to state under what
15 specific conditions mitigation will be required, or, to specify what mitigation efforts will be
16 made); *Eureka I*, 131 Nev. Adv. Op. 84, 359 P.3d at 1119-1121; *see also Eureka II*, 133 Nev.
17 Adv. Op. 71, 402 P.3d at 1250 (State Engineer “failed to rely on substantial evidence that [the
18 applicant] would be able to actually mitigate the conflicts.”). Not only did SNWA fail to present
19 evidence that would satisfy the *Remand Decision* and the standard articulated in *Eureka I* and
20 *Eureka II*, the evidence SNWA did present was designed to mask impacts and all but ensure that
21 SNWA would not be required to mitigate impacts of its proposed Project.
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1 i. Baseline Conditions Defined for the Process to Be Used to Set So-
2 Called Triggers in SNWA's Proposed 3M Plans Are Biased So As
3 to Mask Impacts from SNWA's Pumping

4 As SNWA's own evidence established, SNWA's investigation triggers are not objective,
5 definitive quantified standards as required by the *Remand Decision*. Consistent with SNWA's
6 evasive approach in numerous areas of its evidentiary presentation, the baseline conditions on
7 which triggers are to be set and on which the 3M Plans are based are scientifically unsound. So-
8 called "triggers" for SNWA's latest 3M Plans are defined as percentage declines to be measured
9 in relation to projected baseline conditions that were set using a seasonally adjusted linear
10 regression ("SALR") equation to simulate future baseline conditions, which was exposed by
11 Protestants' witnesses as biased in a manner that will mask the impacts of SNWA's groundwater
12 pumping. ROA 054956-57, 055575-81. As a result, declines in water levels that are detected
13 likely would be incorrectly attributed to the improperly contrived constantly declining baseline
14 water levels that are generated by SNWA's SALR, instead of being properly attributed to
15 SNWA's pumping. *See id.* The problem with assuming a scientifically unsupported constant
16 decline in the water table is that such a declining baseline would mask the effects of SNWA's
17 pumping by artificially exaggerating the amount of drawdown that must occur before a (which
18 would be controlled by SNWA) is triggered. In other words, if true baseline conditions are more
19 accurately represented by a flat line, or a relatively stable water table, which is far more likely,
20 then the artificially declining baseline that SNWA's SALR equation projects would allow
21 SNWA's pumping to draw down the water table significantly more than an accurate, neutral
22 baseline projection would before triggering any investigation or response. Moreover, despite the
23 fact that SNWA has had almost thirty years to develop its evidence, the 3M Plans' treatment of
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1 triggers relied on “as little as three years of baseline data.” ROA 053305, 054951. The State
2 Engineer in Ruling 6446 responded to protestants’ criticism of SNWA’s approach to addressing
3 the baseline by suggesting that the combination of existing data and data collected prior to
4 pumping will create a sufficient baseline. ROA 038994. Thus, the State Engineer is on record
5 confirming that there currently is insufficient evidence in the record to justify the baseline on
6 which SNWA’s 3M Plans are based. The State Engineer’s conclusory statements in Ruling 6446
7 that SNWA has sufficient baseline data to set triggers and that SNWA’s methodology in
8 representing baseline conditions was sound, with no accompanying evaluation of the evidence to
9 the contrary presented by Petitioners, is arbitrary, capricious, contrary to law, and unsupported
10 by substantial evidence in the record. *See* ROA 039043, 038994.
11

12 ii. The Approach to So-Called Investigation and Mitigation Triggers
13 Proposed by SNWA’s 3M Plans Is Not Based on a Modeled
14 Impacts Analysis That Could Be Used to Quantify Appropriate
15 Thresholds or Evaluate Their Potential Effectiveness

16 In addition to the fatal flaw produced by SNWA’s scientifically unsound and self-serving
17 baseline simulation, the so-called triggers contained in SNWA’s 3M Plans are arbitrary because
18 they are not based on a localized site-specific model that could be used to predict impacts or
19 evaluate the effectiveness or appropriateness of those triggers to support management and
20 mitigation decisions. ROA 053037-040; *see also* ROA 055548-49 (discussing the standard
21 procedure of basing 3M Plan triggers on groundwater modeling results). In other words, “the
22 Applicant’s investigation triggers, while numerical, are not founded on an effects analysis, and
23 have no value other than to identify that drawdown is occurring outside of the baseline
24 seasonally adjusted linear regression values.” ROA 053040.
25

1 Because the investigation and mitigation triggers in SNWA's Plans are not tied to an
2 impacts analysis and site specific information is still lacking, SNWA was forced to base its
3 investigation and mitigation triggers on a methodology rather than an actual quantitative
4 standard. ROA 053039, 053044. This methodology would be used to set actual triggers at a
5 later date once an impacts analysis has been performed and impacts are better understood. *Id.*
6 As such, the description of so-called triggers in SNWA's 3M Plans still are nothing more than a
7 plan for a plan, or a formula that SNWA would apply, without active supervision, in the future to
8 determine when an investigation is triggered and when management or mitigation actions may or
9 may not be required.

11 Consequently, SNWA has not presented a scientific basis for setting effective triggers or
12 confirming their effectiveness.⁴⁰ ROA 053034, 053037-40, 054950, 055305-06, 055334. As a
13 result, the Plans also do not, and indeed could not, include any evaluation of the feasibility of
14 mitigation or the appropriateness of the chosen triggers. ROA 053040, 055583. In other words,
15 the triggers included in the Plans are arbitrary, and the State Engineer's approval of SNWA's 3M
16 Plans was not supported by substantial evidence in the record, because SNWA presented no
17 evidence that would allow the State Engineer to assess either what impacts are likely to occur or
18 whether the triggers proposed by SNWA would permit or support effective mitigation.

23 ⁴⁰ Failure to base the 3M Plans on a site-specific impacts analysis also is inconsistent with the 3M
24 requirements considered necessary under the federal NEPA review process, in which the BLM
25 has recognized that such an approach is necessary to evaluate the effectiveness of proposed
mitigation measures. *See* ROA 050245, 053042.

1 assumption that planning to monitor, manage, and mitigate to protect senior water rights alone
2 will adequately protect potentially affected environmental resources, including 91% of the mesic
3 habitat covered by the Plan, from unreasonable effects. ROA 053043-45, 055195-96, 055307,
4 055318, 055362-63. However, SNWA presented no evidence to support this assumption and
5 protestants presented testimony that protection of senior water rights “does not, in itself, prevent
6 unreasonable environmental effects.” ROA 055307; *see also* ROA 053044. In the absence of
7 substantial evidence supporting SNWA’s approach the State Engineer could not make an
8 informed determination that protection of senior water rights will prevent unreasonable effects
9 on the environment.
10

11 iii. SNWA’s Reliance on Replacement Water to Mitigate Conflicts
12 and Impacts Is Not Supported by an Analysis of Availability,
13 Feasibility, or Effectiveness

14 SNWA’s 3M Plans also rely heavily on the potential for the use of replacement water to
15 address conflicts with existing rights and impacts to the environment, ROA 043073, 047895,
16 048057, but SNWA provided no feasibility analysis related to the use or availability of
17 replacement water as a mitigation tool and no analysis of whether or not that water would be
18 effective as a mitigation measure. ROA 049626, 055584-86. In fact, SNWA simply made the
19 assumption that mitigation water would be available. *See, e.g.*, ROA 043140, 043148, 043154.
20 SNWA’s failure to evaluate the feasibility of using replacement water to mitigate potential
21 impacts, both in terms of availability and water quality, renders such reliance unsupported by
22 substantial evidence and is inconsistent with the Nevada Supreme Court’s decision in *Eureka*
23 *County I*. 131 Nev. Adv. Op. 84, 359 P.3d at 1120 (citing *e.g.*, *Weibert v. Rothe Bros., Inc.*, 618
24 P.2d 1367, 1373 (Colo. 1980) (“In order to determine the adequacy of the [augmentation] plan to
25

1 accomplish its intended purpose, it is necessary to consider the adequacy of the replacement
2 water rights.”); *see also Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104 Utah 202,
3 135 P.2d 108, 114 (1943) (examining whether the exchange of water deteriorates water quality
4 or quantity to such a degree as to “materially impair[] the use”). Moreover, because SNWA did
5 not base its 3M Plan on a site specific impacts analysis, SNWA was not able to assess how much
6 water might be needed to mitigate impacts to senior water rights. ROA 053034. Given the fact
7 that all the modeling evidence predicts widespread significant drawdown as a result of SNWA’s
8 proposed pumping, which would impact the availability of water over a vast region, the
9 availability of replacement mitigation water is an open question on which SNWA has provided
10 no evidence, and it is highly doubtful that obtaining such replacement water would be feasible.
11 Moreover, because the groundwater declines predicted by SNWA’s proposed pumping likely
12 would be permanent, mitigation water would be needed in perpetuity. ROA 053302. Yet
13 SNWA simply makes the conclusory statement that, “[m]itigation actions for the senior water
14 rights...will be effective because suitable replacement water is available,” citing to SNWA’s
15 relatively small non Pipeline Project water rights in the area. ROA 043140. It simply is not
16 reasonable to expect that SNWA will be able to obtain sufficient replacement water to mitigate
17 impacts of its project when that project, on its face, has requested the entire remaining perennial
18 yield of the subject groundwater basins and will result in drawdowns over an area that far
19 exceeds the basins of origin in geographic scope and will impact their own non-Project rights in
20 the area in the same ways as the drawdown will affect other senior rights that the Plans purport to
21 protect. Even if it were possible, SNWA has presented no evidence related to the availability of
22 such replacement water.
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1 v. SNWA's 3M Plans Do Not Contain Any Enforcement Provision to
2 Ensure That Mitigation Actually Will Be Effectively Implemented

3 SNWA's 3M Plans also do not include any enforcement provision to ensure that
4 mitigation measures actually will be implemented and actually will be effective. The 3M Plans
5 do not compel any specific management or mitigation action to be taken within any definite time
6 frame as a result of SNWA's investigation of the effects of its own pumping. Entrusting this
7 process to SNWA is unreliable because it will be in SNWA's self-interest to ascribe the
8 drawdown being investigated to causes other than SNWA's pumping, a bias which already is
9 built into the 3M Plans due to the artificially declining baseline water levels projected by
10 SNWA's improperly biased SALR. Because the investigations described in the Plans are to be
11 performed by SNWA without stakeholder involvement, water rights holders and other parties
12 whose interests are directly at risk will not have an opportunity to challenge SNWA's
13 assumptions or conclusions in a timely fashion.

14
15 The Plans, in effect, amount to a "trust us" approach to management of the system. This
16 "trust us" approach is not appropriate given SNWA's great financial interest in minimizing any
17 obstacle to its pumping from this enormously costly infrastructure project, and the evidence in
18 the record that demonstrates that SNWA does not have a good track record of environmental
19 stewardship or of working with senior water rights holders, local communities, or the Tribes who
20 will be impacted by its proposed project. ROA 054818-27, 055365-94, 053478-79, 053502.
21 Additionally, there is evidence in the record that SNWA has a history of disregarding or
22 threatening senior water rights holders in the areas of impact and of operating in a way that is
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1 designed to intimidate senior water rights holders and even to put local ranchers out of business.
2 ROA 054818-27, 053478-79, 053502.

3 In Ruling 6446, the State Engineer attempted to address protestants' criticism of the 3M
4 Plans on the issue of stakeholder involvement by requiring that: (1) SNWA notify any affected
5 water right holder or tribe if an investigation or mitigation trigger is reached, (2) a mandatory
6 meeting be held to review mitigation strategies if a management action involves preparing for
7 mitigation actions; (3) the State Engineer be involved in an investigation if an investigation
8 trigger is reached, (4) SNWA to provide impacted water rights owners or tribes with
9 investigation findings; (5) SNWA to send quarterly reports to "noticed parties"; and (6)
10 monitoring under the Plans continue as long as impacts from the GDP pumping are detectable.

11 ROA 039044-45. As explained above, while the State Engineer provided for his own
12 involvement in SNWA's investigation if an investigation trigger is reached, that does not alter
13 the subjective discretion left to SNWA in setting such triggers. Nor do the SE's additional
14 requirements provide stakeholders with any involvement in any aspect of the 3M Plans or
15 address the complete lack of evidence regarding actual mitigation measures to be implemented
16 or the effectiveness of such mitigation measures.

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19 **F. SNWA's 3M Plans Contain No Evaluation of Whether They Would**
20 **Be Effective at Avoiding Conflicts with Existing Rights and**
21 **Impermissible Impacts to the Environment**

22 As a result of SNWA's failure to base its so-called triggers on an impacts analysis, and
23 because the 3M Plans contain no actual plan for mitigation of those as-yet un-modeled impacts,
24 SNWA's 3M Plans failed to evaluate, and indeed could not have evaluated, the effectiveness or
25 appropriateness of specific triggers or the management and mitigation decisions they might result

1 in. ROA 049616; *see also* ROA 053033, 053035, 053040, 055560. Rather, the report purporting
2 to support the 3M Plans merely contains conclusory, circular, one line statements at various
3 junctures that the proposal would be effective with no evidence or justification cited whatsoever.
4 *See, e.g.*, ROA 043112, 043123, 043140, 043148, 043154. In fact, the Report itself makes clear
5 that an actual serious evaluation of the effectiveness of potential management and mitigation
6 decisions wouldn't be made until after those management or mitigation actions are carried out.⁴¹
7
8 ROA 047895. Moreover, evidence in the record demonstrates that it is doubtful that the
9 mitigation measures available to SNWA would have any hope of adequately protecting existing
10 rights and environmental resources given the severity of the predicted impacts of the Project.⁴²
11
12 ROA 037833, 049626, 055584-86, 055636-37.

13
14 ⁴¹ Similarly, in August of 2017, the United States District Court for the District of Nevada, in
15 recognition of the fact that an evaluation of a mitigation plan's effectiveness cannot be postponed
16 until a later date under federal law, remanded the BLM's decision to grant a Right of Way to
17 SNWA for this Project back to the BLM to remedy the agency's failure to fulfill its NEPA duty
18 to analyze whether the Pipeline Project would comply with Clean Water Act mitigation
19 requirements for predicted wetland loss and the mandatory compensatory mitigation of habitat
20 loss requirement contained in the Ely Resources Management Plan. *Center for Biological
21 Diversity v. Bureau of Land Management*, Case No. 2:14-cv-00226-APG-VCF, 2017 WL
22 3667700 (D. Nev. Aug. 23, 2017). While the district court's decision was appealed to the Court
23 of Appeals for the Ninth Circuit, the appeals were dismissed by agreement of the parties, *see
24 Center for Biological Diversity v. Bureau of Land Management*, Nos. 17-17152, 17-17252, 17-
25 17262017 WL 7036679 (9th Cir. Dec. 21, 2017), and the decision is currently on remand to the
26 BLM to remedy the mitigation deficiencies noted by the federal district court.

27 ⁴² Additionally, as Protestant CPB's experts pointed out, "[t]he unwritten but underpinning
28 assumption in the 3M plan is that lowered water levels and reduced creek, spring, and well
discharge fluxes would recover if SNWA groundwater pumping were curtailed. The problem is
that the SNWA GDP relies on groundwater mining where steady state or equilibrium conditions
will not be achieved between groundwater extraction and groundwater recharge. The 15 SNWA
wells are located in a relatively dry portion of Spring Valley. Pumping will lower the water table

1 Consequently, SNWA failed to present the evidence required by this Court and the
2 Supreme Court in *Eureka I* that its 3M Plans will be effective in avoiding the impacts of its
3 proposed project. ROA 054950, 055541-44; *see also* ROA 053033-34, 053040-41; *Eureka I*,
4 131 Nev. Adv. Op. 84, 359 P.3d 1114. Thus, the State Engineer’s approval of SNWA’s 3M
5 Plans was arbitrary and capricious, contrary to law, and unsupported by substantial evidence in
6 the record and should be overturned by this Court.
7

8 **G. In Contravention of Adaptive Management Guidelines, SNWA’s 3M**
9 **Plans Were Not Developed With Stakeholder Involvement and Do Not**
10 **Involve Stakeholders in Implementation**

11 Finally, the 3M Plans contain no provision for tribal, local governmental, or other
12 stakeholder involvement, despite the fact that the authoritative guidance on adaptive
13 management declares that meaningful stakeholder involvement is a necessary component of any
14 effective adaptive management program. ROA 054546-47. After being criticized by protestants
15 during the 2011 SCDD Re Hearing for setting up a 3M decision-making process which included
16 committees that in effect were controlled by SNWA, the 3M Plans presented by SNWA during
17 the 2017 Remand Hearing simply leave all control over monitoring, management, and mitigation
18 decisionmaking to SNWA. ROA 047885-89, 048047-51. Rather than involving stakeholders,
19 SNWA’s testimony in the 2017 Remand Hearing confirms that SNWA’s position is that
20 stakeholders have adequate opportunity to be involved in and protected by SNWA’s 3M Plans by
21 virtue of the fact that they may defend their interests through litigation before the State Engineer
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24 and there is not enough natural recharge in the well area to restore the water table to [its] original
25 level. This has been demonstrated by long-term simulations using the SNWA's own
26 groundwater models.” ROA 053299.

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1 or the courts. ROA 054546-47. SNWA claims that the provisions for stakeholder involvement
2 contained in its 3M Plans are adequate, in part, because they follow the federal government's
3 guide to adaptive management, the document on which SNWA claims the 3M Plans are founded.
4 *See also* ROA 045621-704. But the federal guide states that active participation of stakeholders
5 is essential to the success of an adaptive management program. ROA 045628 ("without active
6 stakeholder involvement an adaptive management process is unlikely to be effective"), 045629,
7 045633. And, as SNWA witness Zane Marshall conceded, SNWA did not consult with any
8 stakeholders in the areas likely to be impacted by its proposed groundwater pumping, other than
9 federal land management agencies, in developing the 3M Plans. ROA 054507-08. This is
10 especially problematic with regard to Native American Tribes with deep cultural and spiritual
11 connections to the affected areas.
12

13 If SNWA could not be bothered consulting with stakeholders at the outset of the 3M
14 Plans' design, when SNWA was striving to put its best face forward, there is no rational basis for
15 assuming that SNWA will consult with those stakeholders once it has spent billions of dollars on
16 the Project and become reliant on the groundwater being pumped. The 3M Plans do not require
17 or provide for any such stakeholder involvement. To the contrary, the Plans describe a process
18 by which, unless the resource is under federal jurisdiction, SNWA will conduct any investigation
19 of the potential effects of its pumping once one of its triggers is activated with only an uncertain
20 level of involvement on the part of the State Engineer, but not any other stakeholders. ROA
21 047885-89, 048047-51, *see also* ROA 054532-34. There simply is no requirement for SNWA to
22 involve existing water rights holders, Tribes, local governments, or any other stakeholder at any
23 stage of the investigation, and the State Engineer has not required that any stakeholders other
24
25

1 than the owners of affected existing water rights even be given notice that an investigation has
2 been triggered. ROA 054526, 054950.

3 SNWA's 3M Plans do not adequately protect existing rights, the public interest, or the
4 environment in the affected area, because they not only fail to provide assurance that appropriate
5 or effective action will be taken in a timely fashion when impermissible impacts are detected,
6 they also contain no analysis of whether avoidance of impermissible impacts is even feasible
7 much less whether the Plans would be effective in avoiding or mitigating those impacts. As a
8 consequence, SNWA's proposed use would conflict with existing rights, would be detrimental to
9 the public interest, and is not environmentally sound. Therefore, the State Engineer's approval
10 of SNWA's 3M Plans was arbitrary and capricious, unsupported by substantial evidence,
11 contrary to law, and contrary to this Court's *Remand Decision*, and it should be overturned by
12 this Court.
13
14

15 CONCLUSION AND REQUESTED RELIEF

16 For the foregoing reasons, Petitioners White Pine County, et al., respectfully request that
17 this Court issue an order:

- 18 1. affirming the State Engineer's denial of SNWA's applications in Spring, Cave,
19 Dry Lake, and Delamar Valleys;
- 20 2. correcting the misstatements of law and fact contained in State Engineer Ruling
21 6446 related to ET capture, time to equilibrium, and conflicts with downgradient rights;
- 22 3. vacating the portions of State Engineer Ruling 6446 that approve SNWA's 3M
23 Plans, and directing the State Engineer to enter a new Ruling rejecting SNWA's Pipeline Project
24 applications in Spring, Cave, Dry Lake, and Delamar Valleys on the additional grounds that:
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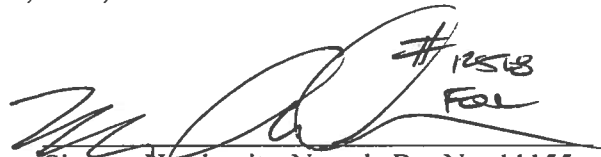
1 (a) SNWA's 3M Plans are insufficient to support a finding that the Project
2 would not conflict with existing rights;

3 (b) SNWA's 3M Plans are insufficient to support a finding that the Project
4 would not be detrimental to the public interest; and

5 (c) SNWA's 3M Plans are insufficient to support a finding that the proposed
6 export of water would be environmentally sound as it relates to the basins of origin; and
7

8 (4) For such other and further relief as this Court deems just and equitable.

9 Respectfully submitted this 1st day of April, 2019,

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2019, I served, via email, a complete copy of the foregoing **PETITIONERS WHITE PINE COUNTY, ET AL., OPENING BRIEF** addressed as follows.

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