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No. CV-1204-049 (And Consolidated Cases)
Dept. No. 1

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The undersigned affirms that this document does not contain the personal information of any person.

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

IN AND FOR THE COUNTY OF WHITE PINE

WHITE PINE COUNTY, et al., and
CONSOLIDATED CASES,

Petitioners,

vs.

TIM WILSON, P.E., Nevada State Engineer,
DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES,

Respondent.

PETITIONERS WHITE PINE COUNTY, ET AL. ANSWERING BRIEF

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SUMMARY OF ARGUMENT

Petitioners White Pine County, et al. ("WPC") respectfully submit this Answering Brief and urge the Court to reject the misleading and disrespectful arguments advanced by the Southern Nevada Water Authority's ("SNWA's") Opening Brief, which seek to overturn this Court's rulings in its 2013 *Decision* ("*Remand Decision*") as well as the State Engineer's correct, if grudging, application of those rulings to reject SNWA's water right applications for its controversial and destructive groundwater export and pipeline project ("Pipeline Project"). As explained in greater detail below, on remand before the State Engineer SNWA chose to flout the directives contained in this Court's *Remand Decision* and presented no evidence whatsoever that addressed let alone met the essential requirements of Nevada water law that this Court held had not been complied with during the State Engineer's 2011 Rehearing on SNWA's Pipeline Project water right applications. Accordingly, this Court should affirm the State Engineer's denial of SNWA's Pipeline Project water right applications in Spring, Cave, Dry Lake, and Delamar Valleys.

SNWA's Opening Brief is littered with misstatements of both law and fact, misrepresenting evidence introduced at the 2017 Remand Hearing, mischaracterizing Ruling 6446, and distorting this Court's *Remand Decision*. SNWA's arguments on this appeal are consistent with the approach it took before the State Engineer on remand, where SNWA submitted a large volume of evidence and testimony to support a case that did not comply with or respond to the requirements set forth in this Court's *Remand Decision*. Rather, SNWA's approach was, as it has been in previous hearings on its water right applications for its massive, controversial Pipeline Project, one of obfuscation, distortion, and misdirection. Quantity is not a

substitute for quality when it comes to evidence, and both quality and completeness were sorely lacking in SNWA's case before the State Engineer.

As the Court can see from reviewing the record below, SNWA's case on remand amounted to a game of distorting the law, refusing to present evidence addressing the *Remand Decision's* requirements regarding availability of water, capturing evapotranspiration, reaching equilibrium, or potential conflicts with existing rights. Instead, SNWA chose once again to ignore or mask the actual impacts of its proposed pumping, and point to a monitoring and mitigation program as a fix-it-all response, despite the plain fact that SNWA's 3M program still lacks objective, definite thresholds or triggers and has no concrete enforceable protections, or "teeth," that could provide a valid basis for meaningful evaluation of whether the plan would be effective or even has any hope of success. This approach is exemplified by the 3M Plan's conspicuous inadequacy with regard to the sacred Spring Valley swamp cedars and applications 54014 and 54015, which the State Engineer correctly denied in Ruling 6446.

The reason for SNWA's evasive and disrespectful approach to this Court's *Remand Decision* is plain. SNWA understands that its applications and proposed groundwater export and pipeline project do not and cannot meet the simple, longstanding requirements of Nevada water law; the evidence and the science simply do not meet the standard under the plain language of NRS 533.370(2) as articulated by this Court and the Nevada Supreme Court. So, SNWA's only hope is to attempt to overwhelm, distract, and confuse protestants, the State Engineer, and the courts in the hope that all will throw up their hands and allow SNWA's destructive and unsustainable project to proceed. A scientifically sound account of the Project's projected impacts to existing water rights, the environment, and the economy of the vast affected area

confirms that SNWA's Pipeline Project would result in a long-term disaster for the State of Nevada and is impermissible under the law. Accordingly, the State Engineer's decisions in Ruling 6446 to deny SNWA's applications based on SNWA's failure to present any evidence demonstrating that its proposed pumping of groundwater would allow Spring Valley to come to equilibrium in a reasonable, or any, amount of time and SNWA's failure to present evidence that its proposed pumping in Cave, Dry Lake, and Delamar Valleys would not capture water already appropriated by downgradient senior existing water rights in the White River Flow System were the only decisions that are consistent with the evidence in the record and the law, and WPC respectfully urges this Court to affirm those decisions.

ARGUMENT

I. The State Engineer Properly Denied SNWA's Applications in Spring Valley, Because SNWA Failed to Demonstrate that Its Project Would Not Mine Groundwater in Violation of Nevada Law

A. The Prohibition Against Groundwater Mining Is a Longstanding Principle of Nevada Water Law That Properly Was Followed By This Court's *Remand Decision* and Ruling 6446

SNWA's attempt in its Opening Brief to mischaracterize as a new rule this Court's requirement that pumping capture discharge to reach a new equilibrium in a reasonable timeframe is both inconsistent with Nevada law and logically incoherent. Moreover, SNWA's argument already was rejected by the Court in its 2013 *Remand Decision*. ROA 039061-62. As the Court noted in that *Decision*, for over one hundred years the State Engineer has recognized that groundwater mining is prohibited in Nevada. ROA 039060. SNWA does not dispute that fact. ROA 040360, 040362. Yet, SNWA nonetheless argues that never before has the capture of

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discharge to reach a new equilibrium between pumping and recharge been required in Nevada.[1] SNWA Opening Brief at 8-9. SNWA's position is directly contradicted by State Engineer precedent which predates SNWA's applications and clearly confirms that the State Engineer always has required that discharge actually be captured to achieve a new equilibrium to prevent groundwater mining. *See* State Engineer Ruling 3486, at 3-4 (Pahrump 1988);[2] State Engineer Supplemental Ruling on Remand 3607, at 3, 8 (Pahrump 1989);[3] State Engineer Ruling 3462 (Pahrump 1987);[4] Nevada State Engineer's Office, Water Planning Report, Water for Nevada: Nevada's Water Resources, Report No. 3, at 13 (1971) ("Water for Nevada Report 3") (perennial yield is limited by capture or salvage of ET discharge); *see also Office of the State Engineer v. Morris*, 107 Nev. 699, 703, 819 P.2d 203, 206 (1991). Additionally, simple hydrology confirms that requiring that pumping reach a new equilibrium and preventing groundwater mining are one in the same. ROA 048790; *see also* ROA 024418, 024716. So, not only is SNWA's position inconsistent with State Engineer precedent, it also is nonsensical, because as explained in WPC's Opening Brief, until discharge is captured such that equilibrium is reached, stored groundwater is mined and water levels will decline, which is the very definition of groundwater mining. White Pine County, et al. Opening Brief, at 62-68; ROA 024418, 024618, 024716, 048790, 055489,

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[1] Oddly enough, in direct contradiction to its position, SNWA concedes that capture of discharge is required under Nevada law. SNWA Opening Brief at 12 (citing ROA 039060, 039062) (stating that the State Engineer's review "often requires the review of evidence not contained in an application —namely the amount of discharge that can ultimately be salvaged for beneficial use through the life of the project.").
[2] Available at http://images.water.nv.gov/images/rulings/3486r.pdf.
[3] Available at http://images.water.nv.gov/images/rulings/3607r.pdf.
[4] Available at http://images.water.nv.gov/images/rulings/3462r.pdf.

0555551. If equilibrium is never reached, as would be the case with SNWA's proposed project, groundwater mining and water level decline will continue perpetually. *Id.* That simple scientific fact is not a policy decision or "new rule" imposed by this Court, as SNWA suggests. SNWA cannot logically agree on the one hand that groundwater mining is prohibited by Nevada law and yet take the position on the other hand that capture of discharge to reach equilibrium is not required. The two concepts are necessary corollaries to each other.

Refusing to recognize that capture of discharge to reach equilibrium always has been required under Nevada law, SNWA complains that its Spring Valley applications were not designed to capture evapotranspiration ("ET") discharge.[5] SNWA misleadingly cites the testimony on cross-examination of one of the protestants' experts that ET capture has not always been required in the United State for the false assertion that all experts in the 2017 Remand Hearing agreed that ET capture has never been required anywhere in the United States.[6] SNWA

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[5] The fact that SNWA's experts were not able to apply sound science to satisfy the prohibition against groundwater mining when siting the project's wells in 1989 is not the fault of the Court or the State Engineer, but rather a reflection of a fundamental flaw in the project. SNWA was on notice as were all water appropriators that groundwater mining is prohibited in Nevada. And yet, SNWA filed applications that amount to a classic example of a groundwater mining project. As SNWA's own evidence demonstrates, it could have sited its wells in such a way as to avoid groundwater mining, but chose not to do so because that would have required that SNWA pump far less groundwater to avoid impermissible conflicts with existing rights.. ROA 041812. Because SNWA was unable to demonstrate that its project won't mine groundwater, and substantial evidence in the record clearly demonstrates that it will, the State Engineer properly denied its applications.

[6] In its Opening Brief, SNWA references the San Luis Valley, Colorado, ET capture project for the proposition that ET capture shouldn't be required. But this argument assumes that, if ET capture is a requirement under the law, SNWA would have to be permitted to capture all of the ET in Spring Valley. This assumption is consistent with SNWA's sense of entitlement to all of

1 Opening Brief at 9 (citing ROA 05508-11). While SNWA may have been able to confuse a
2 hydrology expert on cross-examination with regard to questions of law in an effort to persuade
3 this Court to change its interpretation of the law, State Engineer precedent makes it clear that
4 capturing discharge to reach equilibrium and avoid groundwater mining is not a new concept in
5 Nevada and was applied by the State Engineer prior to the filing of SNWA's applications. *See*
6 State Engineer Ruling 3486 (Pahrump 1988) (reducing perennial yield of Pahrump Basin to the
7 amount of natural discharge that could be feasibly captured); State Engineer Supplemental
8 Ruling on Remand 3607, at 3, 8 (Pahrump 1989); State Engineer Ruling 3462 (Pahrump 1987);
9 Water for Nevada Report 3, at 13.
10
11 The pumping addressed in the State Engineer's 1988 Pahrump Ruling shares similarities
12 with SNWA's applications, where capture of discharge has proven difficult. In the Pahrump
13 Ruling the State Engineer described the problem and applicable law as follows:
14
15 ---
16 the water it seeks, whether the law permits the withdrawals or not. The law need not bend to
17 accommodate SNWA's ill-conceived project. Protestants have never argued that SNWA should be required, or even permitted, to capture every drop of the ET in Spring Valley, as was
18 attempted in Colorado's San Luis Valley. Rather, the project should be limited to the amount of ET SNWA can capture sustainably without causing impermissible conflicts with existing rights
19 or environmental harms that would threaten to prove detrimental to the public interest. Those are two vastly different concepts. Wells should be located and pumping rates adjusted such that
20 pumping will reach equilibrium and impermissible conflicts and impacts can be avoided. It likely is true that following the law would require a very large reduction in the amount that
21 SNWA could pump and a change in the location of SNWA's points of diversion. But that is not
22 due to a shortcoming in the law or in the Court's *Remand Decision*. Rather, it is evidence that SNWA's project is simply scientifically unsound and therefore impermissible under the law as a
23 groundwater mining project which would have devastating environmental, social, and economic consequences. SNWA's attempt to use the unsuccessful San Luis Valley project as an example
24 demonstrating why it should be allowed to pump without regard to whether its pumping ever will capture ET discharge is nothing more than an attempted diversion of the Court from the actual
25 issue before the Court and from WPC's actual position.
26

> The perennial yield of a ground water reservoir may be defined as the maximum amount of water of usable chemical quality that can be withdrawn and consumed economically each year for an indefinite period of time, and can be determined by a comparison analysis of ground water recharge (inflow) and the maximum amount of natural discharge (outflow) available for recapture … Based upon the scientific analysis of natural conditions observed, it would be very difficult to capture appreciable amounts of the subsurface out flow from Pahrump Valley … The capture of all ground water evapotranspiration by pumping will probably not occur in the foreseeable future because some remaining areas of active evapotranspiration are too remote from the concentrated pumping areas. Consequently, the State Engineer finds that the maximum amount of natural discharge available for capture and therefore the perennial yield does not exceed 19,000 acre-feet annually . . . Overdraft may be defined as the amount by which the net pumping draft exceeds the perennial yield. A substantial basin-wide overdraft exists on the ground water reservoir. Overdraft on the system in 1985 was approximately 11,000 acre-feet and, under the present conditions, no new equilibrium is possible.

State Engineer Ruling 3486 (Pahrump 1988); *see also Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 524, 245 P.3d 1145, 1147 (2010) ("The perennial yield of a hydrological basin is the equilibrium amount or maximum amount of water that can safely be used without depleting the source.").

Here, where the applicant has applied for the entire remaining amount of a groundwater basin's perennial yield, calculation of the perennial yield and the water available to the applicant are essentially one and the same when existing rights are accounted for. So while the State Engineer may not routinely have expressly required proof that pumping under each and every small application filed in Nevada will reach equilibrium, the State Engineer always has prohibited groundwater mining by requiring that basin-wide pumping capture discharge to reach a new equilibrium. The State Engineer has never before considered a project of such massive

scale which would pump the entire unappropriated perennial yield of a groundwater basin. In order to determine how much water is available in the context of such a project, it is necessary for the State Engineer to calculate the perennial yield of the groundwater basin: the amount of water that can be salvaged over the long term without depleting the groundwater reservoir to avoid groundwater mining. *See, e.g.,* ROA 000056. SNWA mischaracterizes the enforcement in this case of the longstanding requirement that pumping and discharge achieve a new equilibrium within a reasonable timeframe as the imposition of a new rule. This misrepresentation is nothing more than an attempt to distract the Court from the fundamental issue in this case, which is that its applications were denied because they would not capture available unappropriated water from Spring Valley, but rather would be textbook example of unsustainable and impermissible groundwater mining.

SNWA argues as a fallback that the State Engineer's interpretation of the *Remand Decision* to require capture of discharge in order to reach equilibrium and avoid groundwater mining conflicts with legislative intent because, SNWA insists, the prospect of some proposed beneficial use should trump all other requirements of Nevada water law including the prohibition against groundwater mining. SNWA Opening Brief at 8. Such a self-serving position is inconsistent with both Nevada law and State Engineer precedent, and it reflects SNWA's entitled approach to water in Spring Valley since its applications were filed 30 years ago. SNWA's argument is belied by the clear language of both NRS 533 and 540. The legislature has made clear that it is the policy of the State of Nevada to

> continue to recognize the critical nature of the State's limited water resources. It is acknowledged that many of the State's surface water resources are committed to existing uses, under existing water rights, and that in many areas of the State the available groundwater supplies have been appropriated for current uses. It is the policy of

> the State of Nevada to recognize and provide for the protection of these existing water rights. It is the policy of the State to encourage efficient and nonwasteful use of these limited supplies.

NRS 540.011. Thus, maximization of beneficial use is one of a number of policy goals the legislature has adopted with regard to the management of Nevada's limited water resources. Maximization of beneficial use is expressly limited by those other policy choices and statutory provisions, including the fundamental prudential limitations placed on the use of water long ago by the Legislature in NRS 533.370, namely mandatory protection of existing rights and the public interest (including protection of environmental resources from unreasonable harm).

The mere fact that water flows through a groundwater system does not mean that it can be captured and put to beneficial use under the law, and SNWA's simplistic assertion to the contrary is nothing more than a naked misreading of the law in the service of SNWA's self-interest. The presence of water somewhere in a groundwater basin or system is not alone sufficient to support the grant of an application. The applicant bears the burden of demonstrating that the water it seeks is amenable to capture without depleting the source open-endedly, without conflicting with existing rights, and without threatened to prove detrimental to the public interest. *See Bacher v. State Engineer*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006); NRS 533.370(2); State Engineer Ruling 3486, at 3-4. As noted below, SNWA presented no evidence whatsoever during the 2017 Remand Hearing that its applications and proposed pumping could capture any amount of groundwater from Spring Valley consistent with these prudential legal constraints. As a result, there is no evidence in the record on which to base a calculation of a reduced award of groundwater. So while at first glance a finding by the State Engineer that some water may be available in the basin as a whole, on the one hand, and the denial of SNWA's applications, on the other hand, may appear inconsistent, it was SNWA itself that tied the State Engineer's hands in an apparent attempt to support its argument that the Court's *Remand*

Decision should be disregarded because it would lead to an absurd result. If SNWA had complied with the *Remand Decision* and introduced evidence demonstrating that a reduced amount of water that could satisfy the requirements of NRS 533.370 as explicated in the *Remand Decision*, the State Engineer could have approved SNWA's applications for that reduced amount.[7] It was SNWA's decision not to do that, and it was SNWA's refusal to even attempt to comply with the requirements of NRS 533.370(2) that put the State Engineer in the position of having to deny SNWA's applications. That decision, being compelled by the law, plainly was proper.

The Court in its *Remand Decision* and the State Engineer in Ruling 6446 correctly applied Nevada water law's longstanding prohibition against groundwater mining, which resulted in the denial of SNWA's applications. SNWA's attempt to characterize this rule as newly created is directly contradicted by both State Engineer Rulings and sound science. Accordingly, Ruling 6446's denial of SNWA's Spring Valley applications should be upheld.

B. SNWA Did Not Comply With This Court's *Remand Decision* Which Required SNWA to Demonstrate that Its Applications in Spring Valley Would Not Result in Groundwater Mining, and So the State Engineer Properly Denied SNWA's Applications

Despite the fact that it presented no evidence whatsoever on remand to support a grant of any water under its applications, SNWA now argues that the State Engineer erred by denying its applications instead of reducing the amount of water allowed to be pumped from Spring Valley. SNWA Opening Brief at 9. In support of this contention, SNWA cites the *Remand Decision's*

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[7] It is true that evidence in the record demonstrates that no significant amount of water could be pumped from the application points of diversion and allow the system to reach equilibrium in any reasonable time. However, as noted above, the fact that SNWA improperly sited its wells is SNWA's burden to bear.

directive to the State Engineer to "recalculate" the available water in Spring Valley along with the Court's suggestion that while failure to reach equilibrium is not a valid reason to deny an application, it may be a reason to limit the appropriation. *Id.* at 8-9 (citing ROA 039073). Contrary to SNWA's mischaracterization, that directive from the Court did not mandate that the State Engineer approve an arbitrarily reduced amount of groundwater pumping without evidence to support approval of that amount. At its core, the *Remand Decision* required SNWA to demonstrate on remand what amount of groundwater could be pumped under its Spring Valley applications that would allow the system to reach equilibrium within a reasonable timeframe and avoid impermissible groundwater mining, conflicts with existing rights, and impermissible impacts to the environment. ROA 039060-63, 039066, 039073. SNWA presented no evidence on remand supporting any reduced amount of water which could have satisfied Nevada law's prohibitions against both groundwater mining and conflicts with existing rights. Thus, despite the fact that the *Remand Decision* allowed for SNWA to demonstrate a reduced amount of water that could be pumped consistent with the law's requirements, the State Engineer had no choice but to deny SNWA's Spring Valley applications because SNWA willfully failed to introduce evidence into the record which would have supported approval of any such reduced amount. This failure to provide evidence responsive to the *Remand Decision* was SNWA's choice, and the State Engineer's resulting denial of SNWA's applications was compelled by that choice.

Having refused to present evidence responsive to the *Remand Decision*, SNWA now advances an absurdly contorted construction of that *Decision* which would support SNWA's transparent and clumsy attempt to skirt Nevada law and the clear instructions from the Court. Specifically, SNWA hopes the Court will find that its fragmented presentation of incomplete evidence concerning two very different projects can be assumed to satisfy the requirements of Nevada law for the project as presented in its actual applications. During the 2017 Remand

Hearing SNWA presented evidence regarding a hypothetical 101-well ET capture project which would reach equilibrium but for which no impacts ever were analyzed because, as SNWA conceded, its impacts would be impermissible. ROA 038592; Southern Nevada Water Authority, Reply Brief at 39, *SNWA, et al. v. Seventh Judicial District Court, et al.*, No. 65775 (Nev. May 30, 2014) (citing CPB Answering Brief at 13 n.5, 23) (noting that ET Capture project would result in devastating effects). Separately, SNWA presented incomplete evidence regarding a different project based on its actual application points of diversion which SNWA claimed could be adequately mitigated but for which it refused to analyze the prospect of reaching equilibrium in any amount of time.[8] *See* ROA 038955, 043011-043496. SNWA's deliberate failure to present evidence to demonstrate that its actual project, or any permutation of that project, satisfies the requirements of NRS 533.370 as explicated in the *Remand Decision*, made the denial of its Spring Valley applications mandatory under the law.

Denial of SNWA's Spring Valley applications was required because: (1) the State Engineer only may grant water rights based on evidence introduced into the record;[9] and (2) SNWA's project may not proceed unless evidence in the record satisfies the requirements of NRS 533.370 as explained in this Court's *Remand Decision*. SNWA did not even attempt to introduce evidence showing that any amount of pumping under either its actual project or its

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[8] Uncontradicted evidence in the record introduced by protestants demonstrates that equilibrium cannot be achieved in a reasonable timeframe when even a dramatically reduced amount of water is pumped from the points of diversion identified in SNWA's Spring Valley applications or from other plausible locations in the Valley. ROA 038952, 040812, 043038, 043088-89.

[9] *See Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); *Town of Eureka v. Office of the State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992); *Bacher v. Office of State Engineer*, 122 Nev. 1110, 146 P.3d 793, 800 (2006).

hypothetical alternative project could satisfy all of NRS 533.370's requirements. In the context of SNWA's willful failure to introduce evidence that either its actual or its hypothetical alternative project could satisfy NRS 533.370, denial of SNWA's applications was the only rational or lawful decision the State Engineer could have made, and the only one supported by substantial evidence in the record. Had the State Engineer, instead, simply reduced the award, his decision would have been unsupported by substantial evidence in the record and, thus, arbitrary.

Protestants do not dispute that during the 2017 Remand Hearing SNWA introduced evidence demonstrating that pumping from its alternative hypothetical 101-well field could reach equilibrium in a reasonable timeframe. Nonetheless, the State Engineer was correct in refusing to consider that hypothetical project as the basis for permitting, because SNWA performed no impacts analysis for this 101-well project and acknowledged it had no intention of pursuing the project. *See* ROA 038952. SNWA has acknowledged that an ET capture project such as the hypothetical 101-well ET capture scenario would result in more immediately severe impacts than were analyzed for the actual proposed project for the 2011 Rehearing.[10] *Compare* Southern Nevada Water Authority, Reply Brief at 39, *SNWA, et al. v. Seventh Judicial District Court, et al.*, No. 65775 (Nev. May 30, 2014) (citing CPB Answering Brief at 13 n.5, 23) (conceding that

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[10] As noted in our opening brief, during the 2011 Rehearing (which already was the second hearing on SNWA's pipeline project applications), SNWA only came forward with a cursory review of impacts on a regional scale and over an abbreviated timeframe in order to obscure the extent to which SNWA's proposed pumping would cause severe conflicts and harmful environmental impacts over the long term. White Pine County Opening Brief at 16-20.

ET capture project would result in devastating effects), *with* SNWA_475, at 21 (2017) (acknowledging that the 2011 project was designed not to capture ET effectively, but rather to delay the manifestation of the project's harmful impacts).[11]

The only hydrologic modeling evidence presented by SNWA on remand was a model run to demonstrate that its hypothetical alternative 101-well project could reach equilibrium within a reasonable time. ROA 040799 – 040858. SNWA did not present any model run, or other evidence, showing time to ET capture or equilibrium from its actual pending application points of diversion. SNWA avoided presenting any evidence regarding its actual applications' ability to capture ET or reach equilibrium because SNWA knew that its own model runs would confirm the evidence contained in the Protestants' model runs and analyses of ET capture. Thus, the only substantial evidence in the record on the issue of whether pumping any amount of water from the points of diversion in SNWA's water rights applications could reach equilibrium in Spring Valley is the evidence presented by Protestants. And that evidence, which is in the record from both the 2011 and 2017 hearings, uniformly demonstrates that SNWA's proposed pumping from the well sites in the pending applications would not approach equilibrium even after thousands of years. [12]

Additionally, Protestant Corporation of the Presiding Bishop's ("CPB's") 2017 run of SNWA's model using SNWA's actual application points of diversion demonstrated that after 200 years SNWA's pumping still would be capturing only 69% of annual ET. ROA 038953,

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[11] In fact, during the 2017 Remand Hearing, SNWA again presented no site-specific impacts analysis for any well configuration and limited its presentation on conflicts to its mitigation program which was based loosely on a scenario involving pumping from the 15 application points of diversion, for which no equilibrium analysis was presented on remand. *See* ROA 040799 – 040858, 043011 – 043496, 049588, 049591, 049594.

[12] *See* ROA 024439, 024684-85, 024688, 025926, 036549-554, 036636-674, 037777-7835, 038400-8575, 038576-8643, 038650-687, 048791-92, 053118, 053142, 053153.

053284. This means that the evidence in the record shows that the actual rate of ET capture based on the applications that are before the State Engineer and the Court will be considerably lower than the 84% rate of capture achievable at potential alternative well sites, which was considered in an optimistic best case projection in the BLM's Environmental Impact Statement and which SNWA relies on. ROA 026095, 049706. SNWA presented no evidence in either 2011 or 2017 to dispute these ET capture numbers. Instead SNWA falls back on its previously rejected position that the BLM's optimistic projection of potentially reaching 84% capture of ET after 200 years should be considered sufficient to satisfy Nevada law's prohibition against groundwater mining. SNWA Opening Brief at 9, n.61. The Court in its 2013 *Remand Decision* rejected that argument and recognized the grave implications of capturing only 84% of the annual ET in Spring Valley even after two centuries of continuous pumping. "Simple arithmetic shows that after two hundred (200) years, SNWA pumping and evapotranspiration removes 70,977 afa from the basin with no equilibrium in sight. That is 9,780 more than SNWA's grant." ROA 039061. Further, the Court found that "losing 9,780 afa from the basin, over and above E.T. after 200 years is unfair to following generations of Nevadans, and is not in the public interest." ROA 039062-63. Thus, it was incumbent on SNWA to introduce evidence in the 2017 Remand Hearing that supported the granting of water in an amount that has some prospect of reaching equilibrium in a reasonable timeframe without causing conflicts with existing rights or threatening to be detrimental to the public interest by causing impermissible impacts to the environment. This SNWA failed to do. Therefore, the substantial evidence in the record, on which the State Engineer was bound to base his findings in Ruling 6446, shows that SNWA's

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applications fail the test of reaching equilibrium within a reasonable amount of time and instead would lead to a textbook case of impermissible groundwater mining.[13]

So, SNWA presented wholly separate analyses of, on the one hand, the potential for a hypothetical alternative project with dramatically divergent points of diversion to capture ET and, on the other hand, the potential short-term impacts of pumping only from the much smaller number of points of diversion in SNWA's actual applications. But only those partial, one-dimensional analyses of certain aspects of each alternative scenario were presented. Neither scenario was subjected to the comprehensive analysis of the criteria required to be analyzed under NRS 533.370(2), which means there was no basis under the law for approving any of SNWA's Spring Valley applications. As noted above, this was the result of SNWA's willful choice to flout the clear directives of this Court's *Remand Decision* by intransigently refusing to come forward with the evidence required by NRS 533.370, despite having had nearly 30 years to produce such evidence and having gone through two previous hearings on these applications. In the end, the bottom line is that even after being given a third bite at the apple, SNWA failed to demonstrate that its project will reach equilibrium in a reasonable period of time without causing conflicts with existing rights or threatening to prove detrimental to the public interest by causing impermissible environmental impacts. Because SNWA's evidence was not responsive to the

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[13] SNWA's choice to present evidence on numerous hypothetical wells that are different from the well sites identified in SNWA's pending applications raises significant due process problems because a State Engineer decision based on such new speculative potential points of diversion would deprive the Protestants of a full opportunity to present evidence challenging a project based on those points of diversion. *See Eureka County v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1120 (2015) ("*Eureka I*").

Court's directives in the *Remand Decision* and failed to satisfy the requirements of NRS 533.370(2), and because SNWA presented no evidence that could justify a recalculated or reduced award of water under its applications, the State Engineer was required by law to deny SNWA's Spring Valley applications, and his correct decision in Ruling 6446 to deny those applications should be upheld.

C. The State Engineer Properly Denied SNWA's Applications Based on a Failure to Reach Equilibrium at the Application Points of Diversion

Regardless of whether the State Engineer was required to limit his equilibrium analysis to the points of diversion specified in SNWA's applications, as explained above, SNWA failed to perform a conflicts analysis for its hypothetical 101-well ET capture project. ROA 038952. So, as the State Engineer explained in Ruling 6446, SNWA's equilibrium analysis of its hypothetical alternative 101-well ET capture project is essentially irrelevant to the determination the State Engineer was required to make under NRS 533.370(2). *See* ROA 038952. Because of SNWA's cynical refusal to present evidence sufficient to support an analysis of the required criteria for approval or denial of an application under NRS 533.370, the State Engineer was deprived by SNWA of substantial evidence that could support the approval of its Spring Valley applications for any amount of water under any scenario. Under these circumstances, it was proper for the State Engineer to base his denial of SNWA's applications on the simple fact that SNWA failed to provide any evidence that there was sufficient water available at the points of diversion in the pending applications to support approval of any amount of water. So, the Court need not rule on whether it was proper for the State Engineer to limit his review to SNWA's application points of diversion, because that limitation was not necessary to his decision.

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Moreover, Nevada law requires the State Engineer to consider an application as filed, which must include, among other things, a substantially accurate description of the location of the place at which the water is to be diverted from its source, a description of the proposed works, and the cost of such works. *See* NRS 533.335. On the basis of this information, the State Engineer must make findings that the applicant has the financial ability to construct the project, that water is available at the proposed source of supply, and that the appropriation will not conflict with existing rights or threaten to prove detrimental to the public interest. NRS 533.370. There can be no debate that SNWA's hypothetical 101-well project would have a vastly different description, cost, and impacts than the project described in SNWA's applications.[14] This fact exposes a clear due process problem which would arise were an applicant allowed to change its entire project after its applications are filed and noticed but before they are permitted by the State Engineer.

Consistent with Nevada law, early on in the application review process, and throughout that process, the State Engineer made clear that he was required to base his decision on the points of diversion specified in SNWA's pending applications, and he suggested to SNWA that it file change applications sooner rather than later if it anticipated that they would be necessary.[15] *See*

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[14] The State Engineer in Ruling 6446 noted that findings with regard to some of these statutory criteria already were made and were undisturbed by the Court. So not only does Nevada law prevent consideration of SNWA's 101-well field scenario, a permitting decision based on that scenario would be inconsistent with, and require reconsideration of, previous State Engineer findings that were upheld by the Court in 2013. ROA 038949-50.

[15] SNWA attempts to confuse the Court by making much of the State Engineer's 2012 suggestion that changes in points of diversion might be a necessary component of staged

ROA 034926-27, 038951, 39503; Nevada State Engineer, Spring Valley Intermediate Order and Hearing Notice, at 9 (March 3, 2006).[16] So while evidence was presented during the 2011 Rehearing that SNWA's applications could not reach equilibrium even at alternative well locations, and while SNWA relied on that evidence before this Court in 2013, such evidence does not alter the fact that the State Engineer is required to base his decision on the applications and evidence actually before him. As explained above, runs of SNWA's own hydrologic model to simulate pumping at the application points of diversion demonstrate that after 200 years of pumping, only 69% of the water pumped would come from a reduction in ET. ROA 038953, 053148. Those model runs are the only substantial evidence in the record addressing the question of whether pumping Spring Valley groundwater at any amount under SNWA's applications would reach equilibrium in a reasonable time. The answer plainly was that no amount of pumping has been demonstrated to reach equilibrium under those pending applications. Instead the evidence reflects that pumping even reduced amounts of groundwater under SNWA's applications will result in groundwater mining.

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development. *See* SNWA Opening Brief, at 13. That remark was not a finding or holding and it was made in the context of the State Engineer's erroneous approval of the Spring Valley applications without substantial evidence that SNWA's proposed pumping could comply with NRS 533.370(2), which was reversed by the *Remand Decision*. So, it established nothing, and did not affect the State Engineer's decision on remand in Ruling 6446.

[16] http://water.nv.gov/Hearings/past/Spring%20Valley%202006/exhibits/NDWR/Exhibit_1.pdf.

D. SNWA's Proposed New Water Availability Rule Would Eliminate the Perennial Yield Standard and Permit Groundwater Mining and Severe Unsustainable Overappropriation of Nevada's Water Resources

In its Opening Brief, SNWA urges the Court to disregard the letter of Nevada water law and decades of Nevada water law and policy, and to abandon the concept of perennial yield and prohibition against groundwater mining in favor of a new essentially standardless approach to the crucial criterion of water availability that would not require the State Engineer to make a determination of whether there actually is unappropriated water available to supply an application without causing impermissible conflicts or impacts. Instead, SNWA's novel approach would allow an application to be approved so long as the applicant presents a plan to monitor the groundwater level going forward. SNWA Opening Brief at 15-16. Such a departure from the rule that has held in Nevada for over a century and has served the State well for generations, in favor of a new approach that has not been adopted by the Legislature and that on its face permits groundwater mining and overappropriation, would turn longstanding Nevada water law and policy on its head and would be catastrophic for the State of Nevada, which already faces groundwater overdraft and necessary cutbacks on use in places. SNWA even goes so far as to suggest that Nevada should follow the State of California's riparian reasonable use approach to groundwater management, which after the recent enactment of California's Sustainable Groundwater Management Act focuses on the management of groundwater decline. SNWA Opening Brief at 15 (citing Cal. Assemb. 1739, 2013-2014 Reg. Sess. 0347 (Sept. 16, 2014); Cal. Sen. 1168, 2013-2014, Reg. Sess. 0346 (Sept. 16, 2014); Cal. Sen. 1319, 2013-20 14, Reg. Sess. 0348 (Sept. 16, 2014)); *see also Tehachapi-Cummings County Water Dist., v. Armstrong*, 49 Cal. App. 3d 992, 1001-02 (1975); *City of Barstow v. Mojave Water Agency*, 23

Cal. 4th 1224 (2000). SNWA's attempt to persuade this Court to abandon the prudential standard enacted long ago by our Legislature and to introduce a new California approach to Nevada is ironic because California's adoption of this loose, adaptive approach in its recent Groundwater Management Act was that state's only viable option for dealing with the chronic overappropriation of its groundwater that already had resulted from its historical failure to impose a limiting standard on groundwater pumping such as Nevada has had in place for many decades. SNWA's suggestion that Nevada should follow California's approach to groundwater management is tantamount to arguing that Nevada should abandon the longstanding doctrine of prior appropriation in favor of a "reasonable use" doctrine. Such a departure from longstanding Nevada law would upset prior appropriative property rights and lead to widespread overappropriation of groundwater, as long has occurred in California where the deleterious economic and environmental consequences have been severe. *See* James W. Borchers & Michael Carpenter, California Water Foundation, Land Subsidence from Groundwater Use in California (2014);[17] Michelle Sneed, Justin T. Brandt, & Mike Solt, USGS, Land Subsidence Along the California Aqueduct in West-Central San Joaquin Valley, California, 2003–10, Scientific Investigations Report 2018–5144 (2018).[18] Nevada's more forward-looking, scientifically sound approach is far better suited to Nevada's arid climate, because it is prudentially designed to protect water rights owners and ensure that the State's limited and

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[17] Available at https://water.ca.gov/LegacyFiles/waterplan/docs/cwpu2013/Final/vol4/groundwater/13Land_Subsidence_Groundwater_Use.pdf.
[18] Available at https://pubs.usgs.gov/sir/2018/5144/sir20185144.pdf.

precious water resources will remain available for future generations of Nevadans and for the environment while permitting the greatest sustainable beneficial use possible.

Additionally, the purpose of the longstanding rule in Nevada prohibiting groundwater mining is to prevent an unreasonable lowering of the groundwater table, which is impermissible under Nevada law. *See* NRS 534.110(4). By definition, a failure to reach equilibrium results in a continuous lowering of the groundwater table, which could not under any accepted definition rationally be considered reasonable, especially in the context of a project as massive as SNWA's which proposes to remove over 60,000 acre feet of groundwater annually from Spring Valley. Thus, not even SNWA's proposed new rule would save its project. It is worth noting that embedded in SNWA's argument for a standardless approach to the question of water availability is the assumption that SNWA's project would not be considered to result in an unreasonable lowering of the groundwater table under its proposed new standard. *See* SNWA Opening Brief at 15. SNWA claims this despite the fact that its own model confirms that its project would lower the groundwater table steadily and continuously without any foreseeable end, lowering the water table by hundreds of feet over a vast area of Spring Valley in the first 200 years of pumping alone, ROA 024425, 051974, 051977, 053148, and decoupling the water table from the roots of all plants in the vast drawdown area. ROA 050932. The evidence is clear that groundwater levels would continue to decline for thousands of years, essentially in perpetuity. ROA 024443, 053142. Under no definition of "reasonable" would SNWA's project be permitted, for if a perpetual lowering of the groundwater level were to be considered reasonable, no project ever could be rejected under SNWA's proposed new approach to water availability. As this Court held in its 2013 *Remand Decision*, the perpetual removal of stored groundwater and lowering of the groundwater table as planned by SNWA's project would be "unfair to following generations of Nevadans, and is not in the public interest." ROA 039062-63. In

effect, then, the Court already has found that SNWA's project's open-ended lowering of the groundwater table is not reasonable under the law, and thus even under SNWA's proposed new standard its project would be impermissible.

In addition, SNWA's argument in support of its proposed new rule is built on a number of misleading and inaccurate assumptions and mischaracterizations of the evidence in the record. For instance, SNWA assumes that the State Engineer should have granted it all unappropriated water in Spring Valley, despite the fact that SNWA has repeatedly failed to demonstrate that it can actually capture and pump even a fraction of that groundwater without causing conflicts with existing rights and impermissible impacts to the environment. *See* SNWA Opening Brief at 16. In essence, what SNWA requests is permission to pump groundwater without regard to whether it is available at the points of diversion, and without regard to the long-term drawdown and impacts of its groundwater pumping, because there may be ET discharge elsewhere in the basin that won't be captured but theoretically could be. That simply is not the way the law works or ever was intended to work. The water must be available in the source of supply. NRS 533.370(2). Water is required to be sustainably available at the point of diversion because pumping from a location where water is not available will result in perpetual lowering of the groundwater table. *See* State Engineer Ruling 3486, at 3-4. In connection with this argument, SNWA misleadingly states that not only is 60,000 afa of water available in Spring Valley, but also that "development of the water in Spring Valley will capture nearly all groundwater ET." SNWA Opening Brief at 16. It is unclear whether SNWA here is referring to the hypothetical alternative 101-well ET capture project that it admittedly does not intend to pursue or the very limited amount of ET that its actual planned project is projected to capture according to SNWA's own model. However, because no impacts analysis was performed for the purely hypothetical 101-well ET capture project and because pumping at its application points of diversion would result in only 69% ET capture after 200 years, there is no evidence that supports the approval of

any amount of water under SNWA's Spring Valley applications. Thus, contrary to SNWA's conclusory and misleading assertions, SNWA Opening Brief at 16, the State Engineer's finding that there is over 60,000 afa of groundwater ET discharge available in Spring Valley in a general sense and his finding that SNWA's Spring Valley applications must be denied because SNWA failed to present any evidence that its applications would capture the ET and allow the system to come into equilibrium within a reasonable timeframe are perfectly consistent with one another, and his decision in Ruling 6446 to deny SNWA's applications was proper.

SNWA also argues that equilibrium is an unworkable standard across the board, suggesting that it essentially is a mathematical impossibility and citing CPB's experts' confirmation that regardless of the amount of water granted to SNWA at the points of diversion specified in its applications equilibrium may never be approached if the pumping is done in those locations. *Id.* at 16-17. However, at the same time, SNWA acknowledges that model runs simulating pumping from its hypothetical 101-well ET capture project did show equilibrium being achieved to the satisfaction of all protestant expert witnesses. *Id.* The protestants never have taken the position that absolute mathematical equilibrium is required, and the State Engineer acknowledged in Ruling 6446 that SNWA's 101-well ET capture project would successfully reach equilibrium. ROA 038952. However, for the reasons explained in Ruling 6446 and above, the equilibrium analysis of SNWA's hypothetical 101-well ET capture project is insufficient by itself to justify granting SNWA's applications in any amount. As stated previously, the fact that SNWA did not site its wells properly is not a reason to grant water rights applications that simply do not satisfy the law. It was SNWA's failure to introduce an honest or complete presentation of its project over the course of four State Engineer hearings on its applications, spanning more than a decade, and SNWA's intransigent refusal to adduce any evidence that was responsive to the *Remand Decision*'s directives concerning the requirements of NRS 533.370 that led to the denial of SNWA's applications, which SNWA now attacks as an

"absurd outcome."[19] *See* SNWA Opening Brief at 18. The juxtaposition between SNWA's persistent, willful failure to produce evidence showing its applications will comply with the law's straightforward requirements, on the one hand, and SNWA's current outrage that the scant evidence supporting its applications has been found insufficient under the law, on the other hand, illustrates the impropriety and untenability of SNWA's arrogant sense of entitlement to water which it has not even attempted to demonstrate can be withdrawn from the targeted basins consistent with Nevada law.

II. The State Engineer Properly Denied SNWA's Applications in Cave, Dry Lake, and Delamar Valleys, Because Substantial Evidence in the Record Demonstrates that They Would Conflict With Existing Rights in Downgradient Fully Appropriated Basins

A. The *Remand Decision* Required the State Engineer to Reexamine the Hydrology of the WRFS and Recalculate What Water, if Any, Is Available for Appropriation in Cave, Dry Lake, and Delamar Valleys in Order to Avoid Conflicts with Downgradient Existing Rights

In ordering the State Engineer to recalculate the amount of water available, if any, from Cave, Dry Lake, and Delamar Valleys ("the CDD Valleys"), the Court in its *Remand Decision* directed the State Engineer to further study the hydrology of those valleys and basins downgradient from them in the White River Flow System ("WRFS"). ROA 039051-52, 039069-70. The purpose of requiring a reexamination of the hydrology of the CDD Valleys and the fully appropriated hydrologically connected downgradient basins in the WRFS was to avoid double

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[19] SNWA cites *United States v. Montgomery*, 462 F.3d 1067 (9th Cir. 2006) for the proposition that a lower court must follow the remand instructions of the appellate court. However, it is SNWA's self-serving interpretation of Nevada law and refusal to comply with the *Remand Decision*'s directives that would lead to an absurd result if its applications had been approved. The State Engineer properly followed the directives provided in this Court's *Remand Decision* and properly applied Nevada law to deny SNWA's applications. The *Montgomery* case is simply inapposite and has no application here.

appropriations, and thereby to avoid resulting conflicts with existing water rights in downgradient areas of the WRFS. ROA 039073. Any amount of water granted on remand necessarily must be less than the amount granted in Rulings 6165, 6166, and 6167 given that the *Remand Decision* overturned as arbitrary and capricious the State Engineer's decision to grant water in an amount that he had found would conflict with existing downgradient rights in the future.[20] ROA 039070.

The *Remand Decision* did not, as SNWA suggests, require the State Engineer to presume on remand that a conflict exists unless otherwise demonstrated, or introduce the concept of a "*per se*" conflict.[21] SNWA Opening Brief, at 22 (citing ROA 038974). What SNWA refers to as

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[20] Despite this binding ruling of the Court, and even though the amounts granted in Rulings 6165, 6166, and 6167 were found to be unsupported by substantial evidence in the *Remand Decision*, on remand SNWA requested an increased amount of groundwater from Cave Valley over what was granted by the State Engineer in 2012 in Ruling 6165, and requested exactly the same amounts of groundwater from Dry Lake and Delamar Valleys as were granted in Rulings 6166 and 6167. ROA 043263, 053591. Perhaps sensing how outrageous its completely unsupported request for even more water from Cave Valley than before, in the wake of the 2017 Remand Hearing SNWA withdrew its request for additional water from Cave Valley. ROA 040210.

[21] In Ruling 6446, the State Engineer misrepresented the analysis contained in the *Remand Decision* to suggest that it held that conflicts are presumed if uncertain. ROA 038974, 038975. The *Remand Decision* made no such conclusion or finding, but rather held that where conflicts are predicted to occur, albeit in the future, NRS 533.370(2) requires that the State Engineer deny the application. In other words, NRS 533.370(2) prohibits both immediate and future conflicts with existing rights. The State Engineer's statements are in direct contradiction of the *Remand Decision* and NRS § 533.370's unequivocal requirement that the State Engineer must deny water rights applications where the proposed use would conflict with existing rights. These and other similar statements made throughout Sections II and III of Ruling 6446 are an improper attempt to rewrite Nevada water law for the purpose of allowing SNWA's deficient pipeline applications to be approved despite the fact that they do not comply with the requirements of NRS 533.370(2), and should not be allowed to stand uncorrected by the Court.

a *per se* conflict actually is a factually demonstrated conflict that may take a relatively long time to manifest. The Court, in finding that SNWA's applications would result in conflicts with existing rights in downgradient basins, relied on the State Engineer's own findings as well as the modeling evidence in the record, which demonstrated that conflicts with existing rights in fully appropriated downgradient basins would occur, albeit those conflicts might not become manifestly problematic for decades or perhaps centuries into the future.[22] ROA 039069-70. The *Remand Decision* held that the State Engineer's decision to permit double appropriations in the CDD Valleys was arbitrary and capricious, because NRS 533.320(2) provides that applications "shall" be rejected if a finding of a conflict is made, regardless of whether that conflict will take a long time to manifest itself. ROA 039070. Thus, in 2013 the Court rejected the argument SNWA now makes, stating that it is "unseemly to this court, that one transitory individual may simply defer serious water problems and conflict to later generations, whether in seventy-five (75) years or 'hundreds,' especially when the 'hundreds' of years is only a *hoped* for resolution."

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[22] SNWA's suggestion that protestants bear the burden of establishing protest grounds, and so a presumption of conflicts is inappropriate, misses the mark. *See* SNWA Opening Brief at 22. First, as noted, the *Remand Decision* did not presume conflicts exist. Second, it is SNWA's burden to demonstrate that its applications satisfy the requirements of NRS 533.370(2), including the provision prohibiting conflicts with existing downgradient rights. *See Bacher v. State Engineer*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006); NRS 533.370(2). Finally, regardless of which party bears the burden of demonstrating that conflicts with existing rights would occur, the Court in its *Remand Decision* held that evidence in the record, which includes evidence submitted by protestants, demonstrates that SNWA's applications will, in fact, conflict with existing rights in downgradient fully appropriated basins, although it may take many years for the effects of those conflicts to become manifest. ROA 039069-70. SNWA never adduced any evidence to demonstrate that its proposed pumping in the CDD Valleys would not cause impermissible conflicts with existing downgradient water rights. Therefore, in the absence of evidence from SNWA to the contrary, substantial evidence in the record required the State Engineer to deny SNWA's applications in the CDD Valleys.

1 ROA 039070. SNWA's adoption of a litigation position that conflicts which take a long time to
2 become manifest are exempted from NRS 533.370(2)'s absolute proscription of any conflict did
3 not relieve SNWA of its duty to comply with the *Remand Decision's* direction to introduce
4 hydrologic evidence demonstrating that the predicted double appropriations of water already
5 committed in fully appropriated downgradient basins could be avoided.
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7 Contrary to SNWA's unsupported assertion, the Court's *Remand Decision* reversed the
8 State Engineer's erroneous findings that SNWA's applications would not conflict with
9 downgradient rights. *Compare* SNWA Opening Brief, at 23, *with* ROA 039069-70 (Noting that
10 the State Engineer "found that 'if no measurable impacts to existing rights occur within hundreds
11 of years, then the statutory requirement of not conflicting with existing water rights is satisfied,'
12 [and stating further that] this Court cannot agree with the Engineer's interpretation of NRS
13 533.370(2). The statute is unequivocal, if there is a conflict with existing rights, the applications
14 'shall' be rejected"). Despite this Court's clear holding, SNWA suggests that the Court "did not
15 question" the hydrologic evidence presented during 2011, and therefore no new hydrologic
16 evidence was necessary on remand. SNWA Opening Brief at 20. SNWA's insistence that there
17 was no need for additional hydrologic evidence unintentionally confirms the prescience of White
18 Pine County's longstanding argument that no hearing on remand was necessary because the
19 evidence already in the record demonstrated that SNWA's applications in the CDD Valleys
20 would cause impermissible conflicts with existing downgradient water rights in violation of NRS
21 533.370(2), and that therefore the State Engineer should simply have denied SNWA's CDD
22 applications on remand, which is the only rational decision supported by the evidence in the
23 record and Nevada water law as explicated in the *Remand Decision*. ROA 039049-50.
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SNWA concedes that it failed to present any evidence to demonstrate what amount, if any, could be pumped under its CDD applications without causing conflicts with existing downgradient rights. But SNWA misleadingly suggests that it did not need to present such evidence because all parties agreed that no new hydrologic evidence was necessary on remand, SNWA Opening Brief, at 23. In reality, as White Pine County clearly explained in its letter to the State Engineer of September 12, 2016, ROA 039049-50, prior to the 2017 Remand Hearing, no new evidence was required and no remand hearing was required because the clear and uncontroverted hydrologic evidence in the record from the 2011 Rehearing mandated the denial of SNWA's applications. More specifically, the uncontroverted evidence in the record showed that downgradient basins in the WRFS already are fully appropriated and that those downgradient basins depend on inflow from the CDD Valleys to make up a significant portion of their fully appropriated perennial yield. It necessarily follows that if SNWA pumps and exports most or all of the annual groundwater recharge amounts from the CDD Valleys, as it proposes to do under its CDD applications, then it will eliminate the outflow from the CDD Valleys that already is appropriated in the downgradient basins. Thus, SNWA's proposed pumping from the CDD Valleys unavoidably will conflict with existing rights in the downgradient basins within the WRFS. If SNWA wanted to prove anything to the contrary, it did indeed have to adduce new evidence showing that SNWA's pumping under its CDD applications would not in fact capture water that presently flows from the CDD Valleys to downgradient basins where that water is needed to supply existing water rights. By failing to present any such evidence SNWA effectively has conceded that the proposed pumping under its applications in the CDD Valleys would conflict with existing downgradient rights.

Because the Court held that the conflicts predicted by uncontroverted evidence in the 2011 record are impermissible under NRS 533.370(2), absent additional hydrologic evidence that controverts the evidence in the 2011 record and demonstrates that SNWA's applications would *not* in fact capture water currently flowing to and supplying existing rights in fully appropriated downgradient basins, the uncontroverted evidence in the record clearly shows that SNWA's CDD applications would result in the impermissible double appropriation of water and impermissible conflicts with existing downgradient water rights.[23] SNWA admits that it introduced no such new evidence. SNWA Opening Brief, at 7. Thus, the record from 2011 and the conclusions based on that evidence in the Court's *Remand Decision* stand unchallenged and unchanged, and under NRS 533.370(2) the State Engineer was required to deny SNWA's CDD applications in Ruling 6446.

In an attempt to justify its decision not to present evidence that complied with the *Remand Decision's* instruction to the State Engineer to recalculate the award of water to SNWA in the CDD Basins to a reduced amount which would not conflict with existing rights in fully appropriated downgradient basins, SNWA self-servingly mischaracterizes and misapplies the *Remand Decision's* findings and remand instructions. First, SNWA makes the unsupported

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[23] SNWA cites WPC's 2013 Opening Brief before this Court in an attempt to mischaracterize WPC's position as arguing for an enlarged scope of water rights accounting. But the point actually made in that brief is that, regardless of its scope, a simple mathematical water rights accounting exercise like the one presented by SNWA in the 2017 Remand Hearing by itself is insufficient to support a finding that SNWA's applications will not conflict with existing rights because such an accounting does nothing to demonstrate that SNWA's pumping will not capture water that currently flows to and supplies existing rights in downgradient fully appropriated basins.

statement that the Court's *Remand Decision* required only a new accounting of existing water rights in the CDD basins and did not require additional hydrologic analysis. SNWA Opening Brief at 18-19. This position is directly contradicted by the clear language of the *Remand Decision* itself and the State Engineer's discussion of that *Decision* in Ruling 6446. ROA 038972, 039051-52. While the *Remand Decision* did suggest that a new accounting was necessary, it also clearly stated that State Engineer Rulings 6164, 6165, 6166, and 6167 were remanded "for recalculation of water available from the respective basins; *for additional hydrological study* of Delamar, Dry Lake and Cave Valley; and to establish standards for mitigation in the event of a conflict with existing water rights or unreasonable effects to the environment or the public interest." ROA 039051-52 (emphasis added). So while a proper accounting of committed water resources in the CDD Valleys was appropriate on remand, as the State Engineer recognized, that accounting alone was insufficient to satisfy the no conflict requirement of NRS 533.370(2), as the Court explained in the *Remand Decision*.

B. SNWA Did Not Comply With the *Remand Decision's* Clear Instructions, Which Mandated Further Hydrologic Analysis and Recalculation of Water Awarded Under SNWA's CDD Applications to Avoid Conflicts With Existing Rights in Downgradient Fully Appropriated Basins

SNWA's presentation of evidence to support its water availability case in the CDD Valleys in the State Engineer's 2017 Remand Hearing suffers from the same flaw as the evidence it presented on remand to support its Spring Valley applications. SNWA has not demonstrated, or even attempted to demonstrate, that its applications will actually capture water other than interbasin flow from the CDD Valleys that is required to supply existing rights in

downgradient basins within the WRFS.[24] Specifically, in the case of the CDD Valleys, SNWA introduced no evidence to demonstrate that its applications will not, in fact, capture water that currently flows to fully appropriated downgradient basins and supplies existing rights in those basins. Indeed it introduced no new hydrologic evidence whatsoever on remand to support its CDD Valleys applications. ROA 038973. The State Engineer's finding on this point in Ruling 6446 was clear: "The Applicant presented no new hydrologic evidence demonstrating that upgradient pumping would not capture the water required to satisfy existing rights in downgradient basins, including the required 39,000 afa of subsurface flow leaving the 11-basin WRFS and entering Coyote Spring Valley." ROA 038973. In other words, SNWA openly disregarded the Court's conclusion that SNWA's CDD Valleys applications would conflict with downgradient rights and, by choosing to introduced no evidence whatsoever that was responsive to the *Remand Decision*, SNWA flouted the Court's directive to present evidence on remand showing what, if any, amount of water could be pumped from the CDD Valleys without causing impermissible conflicts.

As explained at length in the protestants' briefing before this Court during its 2013 review of State Engineer Rulings 6164, 6165, 6166, and 6166, the evidence in the record clearly demonstrates that the groundwater recharge in these three upgradient basins within the White River Flow System is not available for appropriation because it already has been appropriated in downgradient basins within the WRFS to which the CDD Valleys discharge their perennial yield

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[24] Despite the fact that Protestants consistently have pointed out this fact, SNWA's Opening Brief is silent on the issue.

via subsurface flow. *See White Pine County Opening Brief* at 61-68 (Jan. 31, 2013) (explaining the inconsistency between the State Engineer's approach in Order 1169 and Rulings 6165, 6166, and 6167); *White Pine County Reply Brief* at 12-15 (May 30, 2013); AR at 024494-95; 024500; 024515; Nevada State Engineer Order 1169a (Dec. 21, 2012); Nevada State Engineer Order 1169 (Mar. 8, 2002); Nevada State Engineer Order No. 1219 (July 5, 2012) (White River Valley);[25] Nevada State Engineer Order No. 1199 (Apr. 20, 2009) (Pahranagat Valley);[26] Nevada State Engineer Order No. 1023 (Apr. 24, 1990) (Muddy River Springs Valley);[27] Nevada State Engineer Order No. 798 (Sept. 16, 1982) (Lower Moapa Valley);[28] Nevada State Engineer Order No. 726 (June 11, 1979) (Lake Valley);[29] Nevada State Engineer Order No. 905 (Aug. 21, 1985) (Coyote Spring Valley).[30] This set of circumstances properly should be reflected in a finding that the perennial yield of Cave, Dry Lake, and Delamar Valleys effectively is zero acre feet per year. In the alternative, the unavailability of groundwater for appropriation in those basins may be expressed as a finding that, whatever the perennial yields of those basins might be in the absence of downgradient development, because the recharge in those basins makes up the interbasin flow out of those basins and into the downgradient portions of the WRFS where it is subject to existing water rights, approval of SNWA's CDD applications in any amount would impermissibly conflict with those prior existing rights. Under either formulation, as the Court

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[25] http://images.water.nv.gov/images/orders/1219o.pdf.
[26] http://images.water.nv.gov/images/orders/1199o.pdf.
[27] http://images.water.nv.gov/images/orders/1023o.pdf.
[28] http://images.water.nv.gov/images/orders/798o.pdf.
[29] http://images.water.nv.gov/images/orders/726o.pdf.
[30] http://images.water.nv.gov/images/orders/905o.pdf.

explained in the *Remand Decision*, granting SNWA's applications in Cave, Dry Lake, and Delamar Valleys would violate NRS 533.370(2) would conflict with existing rights, would be detrimental to the public interest, and would be environmentally unsound. ROA 039069-70. As a result, the State Engineer properly denied SNWA's applications in the CDD Valleys.

SNWA's points of diversion have not changed since 2011 and no new hydrologic evidence was presented by SNWA in 2017 that would change the *Remand Decision's* holding that impermissible conflicts with existing water rights would occur in downgradient basins. Because SNWA provided no evidence that it can feasibly capture unappropriated water in Cave, Dry Lake, and Delamar Valleys, SNWA has not provided any evidence, let alone substantial evidence, that its pumping would not capture water that already is appropriated in downgradient basins. Thus, as this Court held in the *Remand Decision*, the evidence in the record from the 2011 Rehearing required denial of SNWA's groundwater applications in Cave, Dry Lake, and Delamar Valleys under NRS 533.370(2). Consequently, SNWA's refusal to present additional hydrologic evidence on the issue of available water that was responsive to the *Remand Decision's* clear instructions left the State Engineer with no choice but to deny SNWA's CDD applications under NRS 533.370(2) following the 2017 Remand Hearing.

During the 2017 Remand Hearing, the only evidence presented by SNWA concerning the amount of water that SNWA claimed could be appropriated from the CDD Valleys was what

SNWA characterized as an existing rights accounting exercise.[31] This accounting exercise was designed to demonstrate that sufficient water might be available somewhere in the CDD Valleys or other basins within the WRFS to support SNWA's requested appropriations, on the premise that so long as 39,000 afa of unappropriated water hypothetically would remain somewhere in the WRFS it could be assumed to be a satisfactory substitute for the present outflow from the CDD Valleys to the fully appropriated downgradient basins in the WRFS, which is required to supply existing water rights in those basins. ROA 041743. In seeking to address the availability of water and conflicts issues for its CDD applications through the use of such a simple mathematical accounting exercise, however, SNWA treated the entire vast WRFS as a simple proverbial black box (without considering where recharge occurs, where interbasin flow exits, enters, and flows through the hydrologically connected basins in the WRFS, or where recharge and water in interbasin flow pathways could actually be captured). Compounding the inadequacy of such an oversimplified approach, SNWA presented no evidence whatsoever that its pumping in the CDD Valleys could or would actually capture any water that is separate from the interbasin flow from the CDD Valleys that is required to supply those downgradient basins.

[31] SNWA appears to suggest in its Opening Brief that in 2013 White Pine County and the Court focused only on SNWA's failure to perform such an accounting, and that by implication Mr. Stanka's testimony should have satisfied that criticism and justified SNWA's applications in the CDD Valleys. *See* SNWA Opening Brief, at 20. However, while the lack of accounting was one shortcoming in SNWA's 2011 evidence, the accounting exercise alone is woefully insufficient to demonstrate that SNWA's pumping will not conflict with downgradient rights, which always has been the core concern with SNWA's CDD applications, as reflected in the Court's *Remand Decision*.

ROA 049599, 053707-711, 055602, 055609-10, 055634, 055637. In Ruling 6446, the State Engineer explained that:

> to satisfy the direction of the Remand Order, it must be demonstrated that the Applicant's appropriations will not decrease flow that is already appropriated downgradient, regardless of how long that might take. The Applicant's evidence failed to make this demonstration. The Applicant's evidence did not consider where recharge occurs, how and where interbasin flows occur in the affected valleys, or whether it could actually be captured. No analysis was done showing that 39,000 afa of subsurface flows leaving the 11-basin WRFS and entering Coyote Spring Valley would remain to satisfy downgradient appropriations. Similarly, no evidence was presented to demonstrate that interbasin subsurface flow that occurs from the WRFS to the DVFS is available to appropriate without conflicting with existing rights in downgradient basins.

ROA 038973.

In other words, SNWA presented no evidence that its pumping would not, in fact, capture the very water that the hydrologic evidence in the record indicates does, in fact, flow into the downgradient fully appropriated basins and supplies existing water rights in those basins. *See id.* SNWA presented no conceptual flow model to justify its accounting exercise or to demonstrate that it would not, in fact, capture water that actually flows from the CDD Valleys into downgradient fully appropriated basins, including Coyote Springs Valley and the Muddy River Springs Area. In the Remand Hearing, WPC's expert hydrology witness, Dr. Tom Myers, testified that it is more likely than not that SNWA's pumping would, in fact, capture the outflow from the CDD Valleys to downgradient basins which already are fully appropriated. ROA 049604; 055634-35. He further testified that no water is available for appropriation in the CDD

Valleys, because the outflow from those valleys is fully appropriated downgradient. ROA 055606-07.

Michael Stanka, the expert through whom SNWA presented its water rights accounting as an analysis of available water in the CDD Valleys, is not a hydrologist and is not qualified to provide competent testimony or evidence about which part of the water constituting the interbasin flows through the WRFS actually would be captured by SNWA's pumping, or to perform any evaluation of the groundwater flow paths in that system. Mr. Stanka is a water rights surveyor and consequently only is qualified to perform a simple arithmetic accounting of whatever categories of water rights SNWA directed him to tally and only in the basins selected by SNWA.[32] ROA 041696-705.

Accordingly, Mr. Stanka's analysis and conclusion that there is water available for appropriation in the CDD Valleys was based on flawed flow path analyses and assumptions he was not qualified to make, which significantly biased his analysis in favor of a finding that water is available for appropriation in the CDD Valleys. *See* ROA 041696-705, 041736-43. For example, Mr. Stanka inappropriately limited the analysis of existing groundwater rights

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[32] While SNWA's Opening Brief cites the first page of its hydrology expert's testimony to suggest that its presentation on the CDD Valleys was supported by a hydrologist, James Watrus did not in fact testify about or present evidence as to the capture of water from, or hydrology of, the CDD Valleys, and there is no evidence that he participated in or signed on to Mr. Stanka's Report. *See* ROA 041706. So while Mr. Watrus did participate in the decisionmaking process with regard to the inclusion of various water sources in Mr. Stanka's accounting exercise, ROA 053715, he did not provide the technical expertise necessary to produce evidence of what water SNWA's pumping actually will capture for the purpose of rebutting evidence already in the record which confirms that SNWA's applications will conflict with existing rights in fully appropriated downgradient basins in the WRFS. Indeed, SNWA did not even attempt to present such evidence.

representing committed groundwater resources to 11 of the 13 WRFS basins despite the fact that the two excluded basins, Coyote Spring Valley and the Muddy River Springs Area, are downgradient, are hydrologically connected, are fully appropriated, and would be impacted by SNWA's proposed pumping. ROA 049596-97; 053707-711; 055603-04. Not only is Mr. Stanka unqualified to make this hydrologic judgment, but it is based on a misinterpretation of State Engineer Ruling 6255, and is inconsistent with the hydrologic evidence in the record which clearly demonstrates that Coyote Spring Valley and the Muddy River Springs Area are hydrologically connected to and downgradient from the CDD basins, and therefore eventually will be impermissibly impacted, as was recognized by the *Remand Decision*. ROA 055603-05. Without any supporting evidence, Mr. Stanka also arbitrarily and incorrectly allocated 33,700 acre feet per year of Muddy River stream flow to California Wash, outside the WRFS, effectively removing the Muddy River Springs from their actual place as the final discharge point in the WRFS. *See* ROA 041737, 049596. Finally, as pointed out by Dr. Myers, Mr. Stanka failed to consider that Tikapoo Valley South is part of the Death Valley Flow System ("DVFS") and consequently failed to consider whether water flowing through that valley is appropriated and committed downgradient in the DVFS, a point on which SNWA presented no evidence. ROA 053707-711, 055600.

In a further flight of fancy, SNWA goes so far as to suggest that Mr. Stanka's testimony demonstrates that the basins comprising the Lower White River Flow System are not, in fact, fully appropriated. SNWA Opening Brief at 21 (citing ROA 048572). Such a blatant misstatement is directly contradicted by numerous State Engineer Rulings as well as the Order 1169 pump testing results, all of which confirm that the basins in the LWRFS are either fully

appropriated or overappropriated. Nevada State Engineer Order 1169a (Dec. 21, 2012); Nevada State Engineer Order 1169 (Mar. 8, 2002); Nevada State Engineer Order No. 1219 (July 5, 2012) (White River Valley);[33] Nevada State Engineer Order No. 1199 (Apr. 20, 2009) (Pahranagat Valley);[34] Nevada State Engineer Order No. 1023 (Apr. 24, 1990) (Muddy River Springs Valley);[35] Nevada State Engineer Order No. 798 (Sept. 16, 1982) (Lower Moapa Valley);[36] Nevada State Engineer Order No. 726 (June 11, 1979) (Lake Valley);[37] Nevada State Engineer Order No. 905 (Aug. 21, 1985) (Coyote Spring Valley); [38] *see also* ROA 024497.

Consequently, Mr. Stanka's report and testimony were not actually responsive to the deficiency of SNWA's evidence regarding conflicts under NRS 533.370(2), as pointed out in the *Remand Decision*, and therefore his written and oral testimony do not constitute substantial evidence capable of supporting a finding that any amount of water is available for appropriation under SNWA's applications in the CDD Valleys without causing conflicts with existing downgradient water rights or unreasonable environmental effects in downgradient areas of the WRFS. [39] Mr. Stanka's ill-informed and off point accounting exercise is the only evidence

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[33] http://images.water.nv.gov/images/orders/1219o.pdf.
[34] http://images.water.nv.gov/images/orders/1199o.pdf.
[35] http://images.water.nv.gov/images/orders/1023o.pdf.
[36] http://images.water.nv.gov/images/orders/798o.pdf.
[37] http://images.water.nv.gov/images/orders/726o.pdf.
[38] http://images.water.nv.gov/images/orders/905o.pdf.
[39] SNWA suggests that on remand protestants did not offer an alternative accounting exercise. First, it is SNWA's burden to demonstrate that its appropriation will not conflict with existing rights. Second, the fact that protestants did not engage in a competing accounting exercise is irrelevant, because SNWA's water rights accounting exercise failed utterly to demonstrate that its applications will not capture water that already is appropriated in downgradient basins, and it

SNWA presented to satisfy the requirements of NRS 533.370(2), as explicated by the *Remand Decision*. In essence, SNWA's approach presumed that if there may be water available somewhere in the vast interbasin White River Flow System, SNWA ought to be entitled to pump groundwater from any other location in the flow system regardless of how remote that location might be from the water that may be available and regardless of whether the pumping will intercept water from flow paths unrelated to the water that may be available elsewhere in the system, all without having to consider evidence that the proposed pumping actually will conflict with existing downgradient rights. There simply is no support for such an unprecedented and speculative approach to water availability and conflicts analysis in Nevada water law. Thus, it was perfectly consistent for the State Engineer to find that SNWA's accounting exercise evidence was credible on its own terms, while also finding that that exercise was not responsive to, and did not cure, the evidentiary deficiency regarding conflicts under NRS 533.370(2), as explicated in the *Remand Decision*. Accordingly, the State Engineer's denial of SNWA's applications in the CDD Valleys in Ruling 6446 was not only proper but required under NRS 533.370(2), and should be affirmed by this Court.

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was that failure on SNWA's part that mandated the denial of its applications in the CDD Valleys. On the issue of capturing water that already is appropriated downgradient, protestants did introduce evidence in 2011, which the Court relied on in its *Remand Decision* and which remains uncontroverted because SNWA failed to produce any new evidence actually pertaining to that issue in the 2017 Remand Hearing.

C. <u>The Court Should Not Be Distracted from the Issues on Remand By SNWA's Attempt to Mischaracterize the 2011 Evidentiary Record and to Re-litigate An Issue on which it Lost in the 2013 *Remand Decision*</u>

In an apparent acknowledgement of the consequences of its failure to present evidence supporting approval of any water from the CDD Valleys during the 2017 Remand Hearing, SNWA attempts to reargue the Court's 2013 determination of the conflicts issue in the *Remand Decision*, claiming that the 2011 evidence supports a finding that its CDD Valleys applications will not conflict with existing rights in fully appropriated downgradient WRFS Basins. SNWA Opening Brief at 23. SNWA bases this re-argument of an issue it lost on in 2013 entirely on the State Engineer's previous erroneous conflicts findings in Rulings 6165, 6166, and 6167, which were overturned by the Court in its *Remand Decision*. SNWA Opening Brief at 25. As noted above, consistent with the plain language of NRS 533.370(2) this Court correctly overturned the State Engineer's erroneous finding that conflicts which may take many years to manifest their harmful effects do not need to be considered conflicts under NRS 533.370(2). ROA 039069-70. Thus, the issue presented to the Court by the 2011 evidentiary record was not whether conflicts would occur, but rather whether conflicts that the State Engineer had found would occur could be ignored under NRS 533.370(2) simply because the problems resulting from such conflicts might not manifest themselves for many years. The Court held that NRS 533.370(2) proscribes approval of applications that will result in conflicts with existing rights, even if the harmful effects of those conflicts may take many years to become manifest. ROA 039070. Having lost on that issue, SNWA now attempts to mischaracterize the evidence in the record to support its contention that no conflicts are reasonably anticipated or likely to occur. SNWA Opening Brief at 24. SNWA's attempt to change the subject and argue an issue not presented by the record

below is unavailing because the 2011 evidence did not raise any doubt about whether SNWA's CDD applications would remove water that otherwise would flow along interbasin flow paths to provide the required supply to satisfy existing downgradient rights in the WRFS. Rather the question that was raised in 2012 and resolved by the Court in 2013 is the question of whether conflicts can be ignored and an application can be granted under NRS 533.370(2) where the conflicts' harmful effects will take many years to become apparent. In the 2013 *Remand Decision* the Court properly was guided in its resolution of that question by the plain letter of the law when it overturned the State Engineer's refusal to consider conflicts resulting from SNWA's proposed pumping under its applications in the CDD Valleys because the harmful effects of those conflicts may not become manifest for many years. ROA 039069-70. As discussed above, SNWA produced no hydrologic evidence either in 2011 or on remand in 2017 demonstrating that its proposed pumping under its CDD Valleys applications feasibly could avoid capturing water already required to flow to downgradient basins in the WRFS to supply existing downgradient water rights, which is the kind of evidence needed to rebut the otherwise uncontroverted evidence in the record demonstrating that SNWA's proposed pumping under its CDD applications will in fact cause conflicts with senior existing rights in downgradient basins. In failing to even attempt to present evidence controverting the substantial record evidence of conflicts, SNWA willfully disregarded the clear directive in the Remand Decision about the type of showing that needed to be made on remand. ROA 039051-52. Thus, after having nearly 30 years to develop its evidence, SNWA has only itself to blame for failing to create a record that could support granting its CDD applications consistent with the requirements of NRS 533.370(2), and for putting the State Engineer in a position where compliance with NRS

533.370(2) required denial of SNWA's applications in those Valleys.[40] ROA 038973-74. Accordingly, White Pine County respectfully urges the Court to affirm the State Engineer's denial of SNWA's applications in the CDD Valleys.

III. The State Engineer Properly Denied SNWA Spring Valley Applications 54014 and 54015, Because Substantial Evidence in the Record Demonstrates that they Would Cause Impermissible Impacts to Spring Valley Swamp Cedars

The State Engineer's denial of applications 54014 and 54015 was required because SNWA's mitigation triggers are inadequate to protect against unreasonable impacts to the Spring Valley Swamp Cedar Area of Critical Environmental Concern ("ACEC"). The State Engineer's denial of these applications was especially proper given his finding that, in light of the uncertainty with regard to the "dependency of the trees on groundwater and concerning the effects that may be seen from groundwater pumping, it is possible that an unreasonable effect may occur prior to the investigation trigger being activated, posing a threat of loss to the Swamp Cedar ACEC." ROA 039022-23. The State Engineer's finding was directly responsive to evidence presented by the Confederated Tribes of the Goshute Reservation, Ely Shoshone Tribe, and Duckwater Shoshone Tribe that tree die off could occur quickly as a result of SNWA's pumping, and the complete extirpation of the Spring Valley swamp cedars would be possible, if not likely, prior to the activation of a mitigation trigger under SNWA's 3M Plan. ROA 047924; 054570-76; *see also* CTGR Opening Brief at 31.

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[40] SNWA's assertion that protestants were unable to present credible evidence of conflicts is simply untrue. *See* SNWA Opening Brief at 24. As explained above, such evidence was introduced into the record in 2011 and was considered by the Court in its *Remand Decision*.

A. Substantial Evidence in the Record Supports the State Engineer's Finding that the Spring Valley Swamp Cedar ACEC Is Likely to be Impacted by SNWA's Pumping

Despite the fact that SNWA's own modeling confirms that its proposed pumping would result in at least fifty feet, and as much as two hundred feet, of drawdown in the area of the Swamp Cedar ACEC within 200 years of the start of pumping,[41] ROA 051977, SNWA insists that the swamp cedars will not be impacted by its pumping and the State Engineer erred in denying applications 54014 and 54015. SNWA Opening Brief at 30-32. SNWA bases its position solely on an argument that the swamp cedars sit atop a perched aquifer. *See* SNWA Opening Brief at 30. However, that statement is not supported by the evidence in the record, and is conveniently designed to artificially insulate the swamp cedars from predicted impacts of SNWA's pumping. ROA 049716; 049825. SNWA cites to the statements on direct examination by its own experts, one of whom is not a hydrologist, in which they speculated that soils beneath the Swamp Cedar ACEC could retard water movement and protect the swamp cedars from SNWA's pumping. SNWA Opening Brief at 30-31 (citing ROA 054268:4-11 (Prieur), 054274:2-75:11 (Marshall), 039021). Not only is this testimony mere conjecture on the part of

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[41] WPC and SNWA introduced evidence that drawdown associated with the BLM's Alternative B, pumping SNWA's 1989 application quantities at its points of diversion, is predicted to result in one hundred to two hundred feet in drawdown at the Swamp Cedar ACEC after two hundred years of pumping. ROA 011673; 051977. Even the BLM's Alternative A, which would employ distributed pumping at 60,000 afa in an attempt to reduce drawdown, would result in fifty to one hundred feet of drawdown at the Swamp Cedar ACEC. ROA 011673; 051974. So while SNWA has never introduced drawdown maps depicting drawdown associated with pumping 61,127 afa from its application points of diversion, the uncontroverted evidence in the record clearly demonstrates that that SNWA's proposed pumping would harmfully impact the availability of groundwater for the Spring Valley swamp cedars.

SNWA's experts, *see* ROA 054267, it is unsupported by substantial evidence in the record. SNWA concedes that it presented only regional scale hydrologic evidence in the 2011 Rehearing, ROA 034323-26, that it did not present any site specific soil analysis during that hearing, *see* ROA 009830-896; 032366-68, and that it presented no hydrologic analysis whatsoever with regard to drawdown or impacts associated with pumping from its applications' points of diversion during the 2017 Remand Hearing. Its 2017 Spring Valley hydrology report does not even mention the Spring Valley swamp cedars. Thus, despite having had multiple opportunities, the agency chose not to introduce any substantial evidence analyzing either soil composition or hydrologic connectivity in the area of the Swamp Cedar ACEC in support of its perched aquifer argument. In fact, SNWA's only evidence that is even remotely related to this argument was presented by its biologists in the report that accompanies its Spring Valley 3M Plan, which merely confirms that SNWA has not yet conducted the necessary analysis and does not know what relationship clay soils in the area of the Swamp Cedar ACEC will have with regard to predicted impacts on the swamp cedars. *See* ROA 043121 (discussing future monitoring wells in the vicinity of the ACEC and explaining that they will be used to evaluate the relationship between shallow and deep aquifers including the extent of connectivity); 043222 (effectively assuming there is some vertical connectivity across clay layer). Thus, SNWA's argument that some sort of supposed local geological barrier to drawdown would protect the swamp cedars is unsupported by evidence in the record and should be rejected by the Court.

The State Engineer consistently has recognized that SNWA's pumping will impact the Spring Valley swamp cedars. ROA 000186; 039021-22. In Ruling 6446, after thoroughly reviewing SNWA's evidence supporting its argument that the swamp cedars sit atop a perched

aquifer, the State Engineer held that "given the local hydrologic characteristics of the area, it is likely that groundwater pumping will affect the supplemental groundwater utilized by the swamp cedars, and it is uncertain that the habitat can be maintained from surface runoff and precipitation alone."[42] ROA 039022. So there is little question that SNWA's pumping is likely to impact groundwater relied on by the Spring Valley swamp cedars.[43] ROA 051977; 032124; 032176. Thus, given that the State Engineer found in Ruling 6446 that SNWA's 3M Plan provides insufficient protection to the swamp cedars, the State Engineer's disapproval of SNWA's 3M Plan with regard to applications 54014 and 54015 was mandated.

B. The State Engineer's Denial of Applications 54014 and 54015 Was Supported by Substantial Evidence in the Record, Because SNWA's 3M Plan Would Permit Impermissible Impacts to Spring Valley Swamp Cedars

SNWA also suggests that the State Engineer misunderstood the mitigation plan with regard to swamp cedar triggers. SNWA Opening Brief at 32. However, SNWA provides no rebuttal demonstrating that the State Engineer's conclusion as to the inadequacy of SNWA's swamp cedar mitigation trigger was in error. Instead, despite the fact that SNWA's own expert conceded that declines in the water table could result in the complete extirpation of the Spring Valley swamp cedars in the ACEC before a mitigation trigger is reached, ROA 054570-054576,

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[43] Indeed, the question is not whether SNWA's pumping would impact groundwater levels in the Swamp Cedar ACEC, because modeling predicts that it will, but rather whether the trees could survive without groundwater. According to the BLM, it is thought that the trees are at least partially dependent on groundwater for survival and thus would be adversely impacted by SNWA's pumping. ROA 050408; *see also* ROA 039022. Although the BLM included the preparation of a study by SNWA analyzing this question as an applicant committed measure ("ACM") in the EIS process, ROA 050449, SNWA still had no evidence of any such study to present in the 2017 Remand Hearing, five years after the EIS process was completed.

SNWA makes the unsupported assertion that complete extirpation of swamp cedars could never occur under the 3M Plan. SNWA Opening Brief at 32. However, because SNWA's swamp cedar mitigation trigger is based on monitoring tree cover rather than the water levels necessary to sustain the population, ROA 043224, it is quite possible that all swamp cedars could die off before a mitigation trigger is reached. This is, in part, because even a small, incremental decline in the water table could cause a rapid, largescale decline in tree cover once a tipping point is reached, because trees in the same location likely will respond similarly to one another when the water level dips even slightly below the range of their roots. *See* ROA 055208. Expert testimony confirmed that once the swamp cedars do not have access to groundwater they likely will die off quickly. ROA 055208. Thus, the State Engineer's finding as to the inadequacy of the swamp cedar mitigation triggers was supported by substantial evidence that it is at least possible and may be likely, that the loss of all the Spring Valley swamp cedars could occur prior to the activation of a mitigation trigger. *See* ROA 039019-20.

Given the persuasive evidence of this likelihood, SNWA attempts to distract the Court from the State Engineer's bottom line finding of inadequacy by focusing on the mere existence of swamp cedar investigation triggers, none of which are enforceable or mandate any particular management or mitigation action whatsoever. SNWA Opening Brief at 32-33; *see also* White Pine County Opening Brief at 101. As explained in White Pine County's Opening Brief, until a mitigation trigger is reached no management or mitigation actions are required to be taken, and so especially with regard to impacts to swamp cedars where the loss of even a single tree would constitute significant harm to the protected cultural resource, it is critical that the 3M Plan set the mitigation trigger at a point that would require demonstrably effective management or mitigation

measures prior to the occurrence of adverse impacts and at an early enough time to prevent an adverse impact from occurring. *See* White Pine County Opening Brief at 101. Given the evidence showing that no such mitigation trigger has been set, the State Engineer's finding that SNWA's 3M Plan was inadequate to protect the swamp cedars with regard to applications 54014 and 54015 was supported by substantial evidence and should be upheld. For the reasons discussed in White Pine County's Opening Brief, the State Engineer's finding in this context that SNWA's approach of not setting definite or adequate site-specific triggers and not committing to any specific mitigation measures raises an unreasonable risk of harm logically applies to SNWA's 3M Plans in their entirety and exposes their general inability to effectively protect either existing water rights or groundwater dependent environmental resources, and properly should have led the State Engineer to disapprove of those plans in their entirety.

C. Because SNWA's Spring Valley 3M Plan Provides Inadequate Protection to Spring Valley Swamp Cedars, the State Engineer's Approval of SNWA's Entire Spring Valley 3M Plan Is Not Supported by Substantial Evidence

While SNWA is correct in pointing out that the State Engineer's disapproval of the 3M Plan with regard to applications 54014 and 54015 is somewhat inconsistent with his general approval of SNWA's Spring Valley 3M Plan, SNWA Opening Brief at 26, that inconsistency does not justify a reversal of the State Engineer's denial of applications 54014 and 54015 on 3M grounds, but rather requires a reversal of the State Engineer's erroneous overall approval of the 3M Plan, because the flawed swamp cedar mitigation trigger necessarily implicates all Spring Valley applications, which eventually would impact swamp cedar ACEC water levels. The State Engineer's approval of the Spring Valley 3M Plan despite his denial of applications 54014 and 54015 was arbitrary and capricious, because in acknowledging this critical flaw only in the

context of applications 54104 and 54015 the State Engineer effectively held that short-term impacts warrant effective protection, while impacts to swamp cedars that will take longer to accrue effectively are treated as permissible, which contravenes this Court's holding regarding long-term conflicts in the *Remand Decision*. ROA 039069-70.

While SNWA suggests that it used the best available science in the protection of terrestrial woodlands, as is the case with regard to SNWA's 3M Plans more generally, SNWA's approach to the protection of terrestrial woodlands was fundamentally flawed. As explained in White Pine County's Opening Brief, what SNWA calls triggers and thresholds in its 3M Plans are not, in fact, definite, set quantitative triggers, and SNWA failed to evaluate whether or not those indefinite triggers or any particular resulting management or mitigation actions would be feasible or effective. Therefore, SNWA's approach to monitoring and mitigation across the board, as well as in relation to applications 54014 and 54015, does not meet the standard articulated by the Supreme Court in *Eureka County v. State Engineer,* 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015). ROA 053040; 055583. Perhaps most importantly, SNWA's proposed definition with regard to protection against unreasonable harm to the Spring Valley swamp cedars is inconsistent with the listing of this grove of trees on the National Register and with their cultural and spiritual importance to three Native American Tribes. ROA 053051, 055263-78, 055309, 055369-76, 055378-94. Witnesses for the Confederated Tribes of the Goshute Reservation, Ely Shoshone Tribe, and Duckwater Shoshone Tribe testified during the 2017 Remand Hearing that SNWA's proposed approach to mitigation of impacts to swamp cedars is woefully inadequate. ROA 0f55382. Given that each tree embodies the spirit of a fallen ancestor and is of great cultural significance, the 3M Plan's definition of the threshold for what

constitutes an unreasonable impact to the swamp cedars as the extirpation of all trees and the Plan's allowance for the death and replanting of lost swamp cedars trees as a mitigation measure is a fundamental flaw. ROA 047823; 047922; 047927; 055382. If at any point during the nearly 30 years since its applications were filed SNWA had bothered to consult with the Tribes on this issue, it could have avoided this fundamental flaw in its monitoring and mitigation approach. *See* GBWN Opening Brief at 106. Thus, even if SNWA could demonstrate that its 3M Plans would prevent what SNWA has defined as an unreasonable impact to the Spring Valley swamp cedars, i.e., their complete extirpation, the impacts to the swamp cedars that the Plan permits would be environmentally unsound and detrimental to the public interest.

D. The State Engineer's Evaluation of the Effectiveness of SNWA's 3M Plan With Regard to Spring Valley Swamp Cedars Was Properly Within the Scope of the *Remand Decision*

SNWA argues that State Engineer's denial of applications 54014 and 54015 was not within the scope of remand because the *Remand Decision* did not disturb the State Engineer's previous findings with regard to conflicts, and so, SNWA asserts, the State Engineer should not have analyzed whether or not the 3M plan would be effective at preventing conflicts caused by applications 54014 and 54015. This argument reflects a fundamental misunderstanding of the purpose behind the Court's 3M remand instruction, which was to ensure that SNWA's 3M Plans would be effective in preventing conflicts with existing rights and impermissible impacts to the environment. The Court's remand instruction required the State Engineer to analyze the evidence in the record such that "mitigation of unreasonable effects of pumping of water are neither arbitrary nor capricious." ROA 039073. Addressing this issue on remand necessarily required that the State Engineer evaluate evidence concerning whether the proposed amount of

pumping and the proposed standards, thresholds, or triggers of the 3M Plans would ensure effective monitoring and appropriate action to prevent or timely mitigate such proscribed effects throughout the affected groundwater systems. This in turn required consideration on remand of whether the modeling evidence presented by SNWA was adequate to disclose when and where drawdown effects are likely to occur to support an evaluation of whether thresholds, triggers, and mitigation measures contained in SNWA's 3M Plans would be effective. Because SNWA presented no site-specific conflicts analysis during 2011 and asserted that it could not set triggers and thresholds at that time, it was necessary on remand to evaluate such site-specific impacts for the purpose of evaluating whether the 3M Plans would be effective at mitigating those impacts. On remand SNWA again failed to present any such site-specific impacts analysis, and so its 3M Plans remain fundamentally flawed. *See* White Pine County Opening Brief at 96-97. It is important to recognize that, contrary to SNWA's twisted reasoning, SNWA's willful failure to present site-specific evidence that would have been responsive to the *Remand Decision* directives does not support the conclusion that the State Engineer's consideration of site-specific impacts went beyond the scope of the *Remand Decision*. If accepted, SNWA's absurdly narrow reading of the *Remand Decision* would eviscerate the *Remand Decision's* intent and meaning. Moreover, because SNWA replaced its 2011 3M Plans with completely new plans in 2017, it was necessary for the State Engineer to engage in a fresh comprehensive evaluation of the plans' effectiveness with regard to preventing the predicted impacts to the resources they purport to protect. *See* ROA 47823.

The bottom line is that evidence in the record from both 2011 and 2017, as well as the State Engineer's findings based on that evidence, demonstrate that SNWA's pumping in Spring

Valley would cause impermissibly harmful drawdown at the Swamp Cedar ACEC. ROA 049716; 050408-09; 050446; 051974, 051977. Under the law as explicated by this Court in the *Remand Decision* and by the Nevada Supreme Court in *Eureka I* the State Engineer was required to analyze whether or not SNWA's 3M plan would be effective in preventing impermissible impacts to the Spring Valley swamp cedars, which necessarily included an assessment of the character, severity, and location of predicted impacts. Indeed, it would have been impossible to evaluate the effectiveness of SNWA's proposed triggers and mitigation measures without an examination of the impacts that SNWA proposes to prevent and/or mitigate. Yet that kind of head-in-the-sand, avoid all specifics, approach is precisely the approach SNWA took in developing its 3M Plans.

E. <u>The State Engineer's Denial of Applications 54014 and 54015 Is Consistent With Previous Undisturbed Findings</u>

SNWA next claims that in denying applications 54014 and 54015 the State Engineer effectively reversed a largely irrelevant list of previous State Engineer findings. SNWA Opening Brief at 30. None of these findings, however, is inconsistent with the State Engineer's finding in Ruling 6446 that SNWA's pumping will impermissibly impact the groundwater relied on by the swamp cedars or his resulting denial of applications 54014 and 54015. For example, the State Engineer's finding that SNWA adequately described the potential environmental effects is irrelevant, especially given that the State Engineer already had found in Ruling 6164 that SNWA's pumping could impact the swamp cedars and merely reiterated that finding in Ruling 6446. Second, the State Engineer's finding in Ruling 6164 that a viable plant community would remain was not specific to the swamp cedars, but was a more general statement about Spring

Valley's ecosystem, ROA 000187, and moreover this Court held in its *Remand Decision* that the State Engineer's conclusions with regard to the effectiveness of SNWA's mitigation plan were not supported by substantial evidence. ROA 039065-68. Third, the State Engineer's finding that SNWA has the ability to identify potential impacts through the monitoring plan is irrelevant to the issues concerning these two applications because whether SNWA is able to identify impacts, it was required to demonstrate on remand that it could effectively mitigate those impacts. As the State Engineer found, SNWA did not demonstrate it could do that with regard to applications 54014 and 54015 and the swamp cedars. Finally, the State Engineer's findings that swamp cedars can tolerate drier conditions and may die even where there is standing water has no bearing on whether SNWA's 3M plan adequately protects against impacts due to SNWA's pumping. Additionally, SNWA fails to mention that in Ruling 6164 the State Engineer also found that that "[t]he Applicant's effects analysis predicted possible impacts to four valley floor areas: Swamp Cedar North…" ROA 000186. That was the finding that properly drove the State Engineer's analysis with regard to SNWA's proposed swamp cedar mitigation on remand, and so it was incumbent on the State Engineer and SNWA to ensure that the 3M Plan would effectively prevent or mitigate those predicted impacts.

F. SNWA's Reliance on the Continuing Jurisdiction of the State Engineer as a Substitute for an Effective 3M Plan Violates the Supreme Court's Articulation of Nevada Law in *Eureka County v. State Engineer*

SNWA's final fallback position is that regardless of whether the Spring Valley 3M Plan is sufficiently protective of the swamp cedars, the State Engineer should not have denied applications 54104 and 54105 on the ground that the 3M Plan does not adequately protect the swamp cedars from those applications' impacts because the State Engineer may change the

Plan's requirements in the future. SNWA Opening Brief at 33-34.[44] SNWA essentially requests the Court to reverse the State Engineer's finding as to the inadequacy of its Spring Valley 3M Plan with regard to applications 54104 and 54015 based on the assumption that the State Engineer may intervene to order additional mitigation measures at some later date. If this plainly flawed logic were followed any 3M plan would have to be approved, regardless of how blatantly deficient it might be, because the State Engineer, at least in principle, always has the authority to require a plan to be improved or to order the applicant to mitigate conflicts and harms caused by the applicant's water use in the future. Such a radically permissive and essentially standardless approach to approving 3M plans is directly at odds with the rigorous approach required by the Nevada Supreme Court in *Eureka County v. State Engineer*, which requires that the State Engineer make a finding based on substantial evidence in the record, at the time of permitting, that a proposed mitigation plan will be effective at mitigating predicted conflicts or impacts. *Eureka County v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015).

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[44] SNWA similarly retreats to the position that the purpose behind a 3M plan is to avoid risk and protect against uncertainty, and by implication it does not matter whether modeling predicts an impact on swamp cedars. SNWA Opening Brief at 31. But as the State Engineer found in Ruling 6446, SNWA's triggers with regard to the Swamp Cedar ACEC are inadequate to protect against any risk, so SNWA's argument falls short. ROA 039023. In connection with this argument SNWA also makes the unsupported assertion that "for large water use projects in Nevada, the State Engineer often requires the preparation of 3M plans to better manage the appropriation and protect against uncertainties." SNWA Opening Brief, at 25. White Pine County is aware of only one other proposed 3M program associated with a large water project in Nevada, which was the plan held inadequate by the Supreme Court in the *Eureka County* case. Thus, SNWA's proposal likely is one of the first the State Engineer ever has considered.

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CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons and for the reasons articulated in their Opening Brief, Petitioners White Pine County, et al., respectfully request that this Court issue an order:

1. Denying SNWA's Petition for Judicial Review and affirming the State Engineer's denial of SNWA's applications in Spring, Cave, Dry Lake, and Delamar Valleys;

2. Correcting the misstatements of law and fact contained in State Engineer Ruling 6446 related to ET capture, time to equilibrium, and conflicts with downgradient rights;

3. Vacating the portions of State Engineer Ruling 6446 that approve SNWA's 3M Plans, and directing the State Engineer to enter a new Ruling rejecting SNWA's Pipeline Project applications in Spring, Cave, Dry Lake, and Delamar Valleys on the additional grounds that:

(a) SNWA's 3M Plans are insufficient to support a finding that the Project would not conflict with existing rights;

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

(c) SNWA's 3M Plans are insufficient to support a finding that the proposed

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export of water would be environmentally sound as it relates to the basins of origin; and

For such other and further relief as this Court deems just and equitable.

Respectfully submitted this 9th day of July, 2019,

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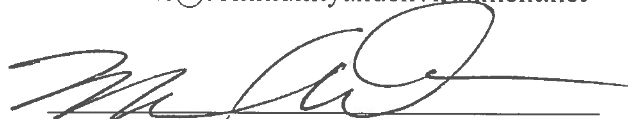

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2019, I served, via email, a complete copy of the foregoing **PETITIONERS WHITE PINE COUNTY, ET AL. ANSWERING BRIEF** addressed as follows.

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