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

Affirmation pursuant to NRS 239B.030
The undersigned affirms that this document does not contain the personal information of any person.

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. REPLY BRIEF

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SUMMARY OF ARGUMENT

Petitioners White Pine County, et al. ("White Pine County" or "WPC")[1] respectfully submit this Reply Brief and urge the Court to reject SNWA and the State Engineer's ("SE") attempts to abandon basic foundational principles of Nevada's longstanding water law and uphold the State Engineer's denial, in Ruling 6446, of the Southern Nevada Water Authority's ("SNWA's") Groundwater Development Project Applications ("pipeline applications") in Spring, Cave, Dry Lake, and Delamar Valleys. WPC also respectfully requests the Court to overturn the State Engineer's gratuitous approval of SNWA's monitoring, management, and mitigation plans for the pipeline applications ("3M Plans") despite glaring deficiencies in those plans and in the record.

In essence, the State Engineer's and SNWA's position in their Answering Briefs is that SNWA's applications in all four basins should be granted even though there is no substantial evidence showing that they will salvage, or capture, any significant amount of the natural discharge from those groundwater systems that is not already subject to prior appropriations. In other words, they take this position despite the fact that substantial uncontroverted evidence in the record shows that SNWA's proposed withdrawal of groundwater from these basins either will fail to capture natural discharge or will intercept groundwater currently that supplies existing senior water rights. As a result of this failure to capture discharge, uncontroverted evidence in

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[1] Both the State Engineer and SNWA, in their briefs, refer to Petitioners White Pine County, et al. as "GBWN." While GBWN is a co-petitioner with White Pine County in this case, White Pine County was listed as the leading petitioner on both the petition for judicial review filed in these consolidated cases in 2012 and on the petition filed in 2018, and so the coalition of petitioners is referred to herein as White Pine County or WPC.

the record also indicates that SNWA's proposed withdrawals of groundwater from these basins will deplete the targeted groundwater basins and systems over the long term (i.e., result in unsustainable groundwater mining).

Because this position cannot be squared with either the plain language of NRS 533.370(2) or the requirements of Nevada's longstanding definition of perennial yield, SNWA and the State Engineer mischaracterize the reasoning and remand instructions in this Court's *Remand Decision*. Instead they argue issues that do not represent either the Court's holdings or the positions of WPC and other Protestant-Petitioners.

To begin with, the State Engineer and SNWA try to confuse the Court by arguing that the Court's *Remand Decision* and WPC's briefs impose a supposedly new, "ET Capture Rule" that is unrelated to and at odds with the longstanding definition and standard of perennial yield that guides determinations regarding how much water is available for withdrawal from a groundwater basin or system. In fact, as explained below and in WPC's Opening and Answering Briefs, under Nevada's longstanding definition of perennial yield the amount of water that properly can be determined to be available for withdrawal from a groundwater basin or system is limited to the amount of natural discharge that can be captured by the proposed withdrawal and that has not already been subject to a prior appropriation. WPC OB at 73-77; WPC AB at 3-7. Even SNWA's own hydrology expert testified that uncaptured ET discharge must be subtracted from the calculation of the perennial yield. ROA 039062. Confronted with the fact that there is no substantial evidence in the record that supports a finding that any of SNWA's applications at issue here meet this standard, the State Engineer and SNWA argue that limiting the amount of water available for withdrawal to the amount of natural discharge that can be captured by the

proposed withdrawal and is not subject to a prior appropriation would be a radical new standard if applied to SNWA's applications. SE AB at 20-24; SNWA AB at 26-31.

A return to some basic principles of Nevada water law and policy makes apparent the elementary nature of the error in SNWA's and the State Engineer's argument. As explained in the State Engineer's 1971 Water for Nevada Report No. 3, the amount of water in a groundwater system that is available for withdrawal must be limited to the amount of natural discharge that can be salvaged[2] annually over the long term without depleting the ground water reservoir. State Engineer's Office, Water Planning Report, Water for Nevada: Nevada's Water Resources, Report No. 3, at 13 (1971) ("Water for Nevada Report No. 3").[3] As the State Engineer himself has stated, the reason for limiting a proposed withdrawal of groundwater to the amount of unappropriated natural discharge that can be captured by the proposed withdrawal is to prevent depleting the groundwater basin, or system, over the long term, because such a long-term depletion (known as groundwater mining) is unsustainable and causes a host of serious harms. SE Ruling No. 3486, at 3-4 (1988);[4] SE Ruling No. 5726, at 26-27 (2007).[5]

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[2] Salvage and capture are synonymous in the context of groundwater hydrology because salvage means to save from loss or waste and capture of natural discharge refers to the saving of groundwater in the system from loss, or waste, to natural discharge. In addition, any portion of the natural discharge that already has been subjected to a prior withdrawal is unavailable for withdrawal under the most basic tenet of the prior appropriation doctrine in Nevada law.

[3] http://images.water.nv.gov/images/publications/water%20planning%20reports/water%20for%20nevada%203.pdf.

[4] http://images.water.nv.gov/images/rulings/3486r.pdf.

[5] http://images.water.nv.gov/images/rulings/5726r.pdf.

With regard to SNWA's 3M Plans, SNWA failed to establish an objective standard regarding impermissible environmental impacts by advancing an unacceptably low standard for unreasonable effects without stakeholder input. The Plans then purport to monitor groundwater levels and impacts using a grossly inadequate monitoring network which is not based on a proper analysis of flow paths in the project area and therefore is not able to detect drawdown caused by SNWA's pumping with any reliability. The fundamental deficiency of this wholly inadequate approach to monitoring program is compounded by the Plans' reliance on a statistically derived baseline condition that is scientifically unsupported and biased. These fundamental defects made it impossible for the State Engineer to confirm that SNWA's 3M Plans will detect impacts from SNWA's pumping in a timely manner or ensure that effective management and mitigation measures of taken. To compound the problem, the investigation and mitigation triggers included in the 3M Plans were not developed on the basis of a localized impacts analysis, which prevented SNWA or the State Engineer from evaluating the efficacy of the Plans' variable triggers. Moreover, once a mitigation trigger is reached, SNWA's 3M Plans provide only a menu of potential mitigation options without a plan for which tool would be used and in what circumstance and without an assessment of the feasibility of any of them. Finally, SNWA's 3M Plans do not contain any analysis of how the affected groundwater systems are likely to respond to management and mitigation actions, and so it is impossible to assess whether management and mitigation actions taken once a trigger is reached would be effective at avoiding or remedying unreasonable effects. The lack of a site-specific impacts analysis, lack of a concrete plan for specified mitigation actions, and failure to model the system's response to management and mitigation all deprived the State Engineer of the ability to assess the effectiveness of SNWA's

3M Plans, because it is unknown how much mitigation will be required, where it will be required, which mitigation action would be appropriate or effective, and whether, given lag time, the mitigation triggers are set conservatively enough to ensure that unreasonable effects are avoided. Thus, while SNWA's 3M Plans and supporting evidence may be voluminous, they are fundamentally unsound and all but guarantee a failure to protect against conflicts with existing rights and impermissible impacts to the environment, which uncontroverted evidence in the record confirms would occur absent a genuinely effective 3M Plan. As such, the State Engineer's approval of those plans is unsupported by substantial evidence and should be overturned.

ARGUMENT

I. INTRODUCTION: SNWA AND THE STATE ENGINEER RELY ON MISCHARACTERIZATIONS OF THE SCOPE OF THE ISSUES ON REMAND, THE EVIDENCE IN THE RECORD REGARDING THE PIPELINE PROJECT'S PREDICTED IMPACTS, AND THE BURDEN OF PROOF ON REMAND

Much of the dispute between the parties stems from a fundamental disagreement about the scope of the issues and burden of proof on remand. Based on a misunderstanding of both the *Remand Decision* and burden of proof on remand, SNWA has attacked the facts section presented by WPC in its Opening Brief. That recitation of the facts is reflective of the fact that a proper reading of the Court's 2013 *Decision* in this case ("*Remand Decision*") necessarily required the SE on remand, and this Court on appeal, to consider evidence relevant to water availability, conflicts, and the public interest. *See* WPC Answering Brief ("AB") at 10-11, 50-51. On remand, the burden was on SNWA to present evidence to cure the deficiencies identified by the Court in its *Remand Decision*. That SNWA did not do. WPC's presentation of evidence

in the record merely exposes this fact and confirms that the record remains insufficient to support the State Engineer's findings with regard to SNWA's 3M Plans under NRS 533.370.

A. SNWA Argues for an Inappropriately Narrow Construction of the *Remand Decision* and Scope of the Issues on Remand

In an attempt to restrict the Court's review of Ruling 6446, SNWA offers an absurdly narrow construction of the 2013 *Remand Decision*, arguing that the *Decision* did not disturb the State Engineer's findings in Rulings 6164, 6165, 6166, and 6167 related to water availability, conflicts with existing rights, and the public interest. SNWA AB at 5, 8. SNWA then argues that because those findings were undisturbed by the Court, portions of WPC's water availability and conflicts discussions are irrelevant and constitute an attempt to reweigh evidence and re-litigate issues already decided. SNWA AB at 1-2. SNWA argues that the *Remand Decision* required a mere recalculation of water availability and the addition of nominal triggers and thresholds to its 3M Plans without regard to the Court's rationale for those remand instructions or the requirements of NRS 533.370. Tellingly, SNWA submitted voluminous evidence to support its remand case, but now insists that what it once characterized as an impossible task was merely a simple and exceedingly limited remand proceeding before the State Engineer. *See* WPC Opening Brief ("OB") at 84 (citing SNWA Petition for Writ of Mandamus or, in the Alternative, Prohibition at 44, *SNWA v. Seventh Judicial District Court*, No. 65775, 2015 WL 2452803 (Nev., May 30, 2014)).[6] A serious minded reading of the *Remand Decision*, however,

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[6] The State Engineer's objection to the attachment of judicially noticeable briefing and orders from previous District Court and Nevada Supreme Court proceedings in this case is misplaced

reflects the Court's substantial concerns and supports WPC's more thoroughgoing approach to the issues on appeal, as described below.

SNWA's cavalier approach to the issues on remand is illogical and inconsistent with the clear language of the Court's 2013 *Remand Decision*, in which the Court remanded SNWA's applications back to the State Engineer to (1) recalculate the water available for appropriation from Spring Valley assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time; (2) recalculate the appropriations from Cave Valley, Dry Lake Valley and Delamar Valley to avoid over appropriations or conflicts with down-gradient, existing water rights; and (3) define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious in Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley. ROA 039073. Indeed, had the Court upheld all of the State Engineer's findings with regard to water availability, conflicts with existing rights, and the public interest, there would have been no need for a remand, and the Court would simply have upheld the State Engineer's Rulings 6164 through 6167. The *Decision* and remand

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and merely reflects the State Engineer's discomfort with his Office's contorted legal positions over the course of these proceedings. After refusing to include the requested briefing in the administrative record, despite acknowledging that those filings are publically records that can be judicially noticed, the State Engineer now attacks WPC for referencing and attaching those filings to its Opening Brief. *See* SE AB at 64-66; ROA 039302. WPC's reference to this briefing, which undeniably is a part of the history of this case, was entirely appropriate as its content is both relevant to the issues on review and, as the State Engineer himself acknowledges, judicially noticeable. WPC attached the documents themselves for the convenience of the Court. Moreover, WPC merely attached that material to its Opening Brief for the Court's convenience and did not request that the Court add those documents to the administrative record. So, the State Engineer's objection to WPC's citation to and attachment of exhibits to its Opening Brief is misplaced and gratuitous.

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instructions necessarily were based on the fact that the Court found it necessary to disturb the State Engineer's findings that the there was sufficient water available to supply SNWA's project and that the project would not conflict with existing rights or prove detrimental to the public interest.

Specifically, the Court in the *Remand Decision* clearly found that the State Engineer's Spring Valley perennial yield finding was unsupported by substantial evidence, noting that "SNWA's expert certified that uncaptured E.T. would have to be deducted from the perennial yield. ROA 34928. This, the Engineer did not do." ROA 039062. Further, with regard to impacts, the Court questioned the State Engineer's finding on the issue of a reasonable lowering of the water table and held that allowing continued lowering indefinitely into the future was arbitrary and capricious. ROA 039062-63. The Court further held that "[g]ranting water to SNWA is premature without knowing the impacts to existing water right holders...." ROA 039063. Finally, with regard to conflicts with existing rights and the public interest in Cave, Dry Lake, and Delamar Valleys, the Court found that the State Engineer had effectively awarded a double appropriation of water already appropriated in downgradient basins within the White River Flow System. ROA 039069. So there is little question that the issues of availability of water, conflicts with existing rights, and the public interest were within the scope of the Remand Hearing and are properly before the Court in the current petitions for judicial review.

The State Engineer, in his Answering Brief, acknowledges that the *Remand Decision* required consideration of both water availability and impacts to existing rights and the environment on remand. SE AB at 62. Specifically, the State Engineer stated that "in the Remand Order, this Court completely vacated the award of water to SNWA under Ruling Nos.

6164-6167, and specifically ordered a recalculation of water available for appropriation in Spring Valley." *Id.* (citing ROA 039051-039073). The State Engineer also acknowledged that, in addition to satisfying the *Remand Decision*, the evidence presented by SNWA in the 2017 Remand Hearing must satisfy the requirements of NRS 533.370. *Id.* Thus, the State Engineer's position also confirms that SNWA's implausibly and self-servingly narrow reading of the *Remand Decision* is illogical and ignores the purpose of the *Remand Decision*.

Similarly, SNWA's attack on WPC for allegedly asking the Court to reweigh evidence, attempting re-litigate issues, or seeking an evidentiary do-over, is mistaken and misplaced. *See* SNWA AB at 1-2. Because the Court remanded to the State Engineer precisely due to the fact that the State Engineer's findings with regard to water availability, conflicts with existing rights, and the public interest were not supported by substantial evidence, ROA 039062-63, 039069, 039073, absent additional evidence curing these deficiencies, the record remains insufficient to support SNWA's applications. WPC's discussion, in its Opening Brief, of evidence in the record concerning the conflicts with existing rights and impacts to the environment caused by SNWA's proposed pumping does not constitute a request for the Court to reweigh the evidence. Rather, it was intended to present the uncontroverted record evidence of the conflicts that necessitated the Court's remand, and that SNWA was required to overcome during the 2017 Remand Hearing in order to cure the evidentiary deficiencies the *Remand Decision* found in the State Engineer's 2012 Rulings. WPC's factual presentation and arguments are directly supportive of its position that the State Engineer's legal conclusions and factual findings with regard to the issues on remand are either arbitrary or capricious, unsupported by substantial evidence, or in many instances by no evidence at all. WPC has not requested the Court to reweigh evidence related to

findings it upheld in the *Remand Decision*. In fact, far from requesting the Court to reweigh evidence, the vast majority of WPC's arguments expose the complete lack of evidence responsive to the *Remand Decision*. Where WPC has directed the Court's attention to the opinions of various expert witnesses it is to expose the fact that the State Engineer's findings with regard to some of the issues on remand lack any evidentiary basis whatsoever.

The Nevada Supreme Court has made it clear that, while the State Engineer "may use his experience to inform his decision making, his decisions must be supported by substantial evidence in the record before him," and his findings "must be sufficiently explained and supported to allow for judicial review." *Eureka County v. State Engineer*, 131 Nev. 846, 856, 359 P.3d 1114, 1120-21 (2015). Rather than pointing to substantial evidence supporting the State Engineer's findings, SNWA throughout its briefs merely contradicts WPC's arguments by citing to the State Engineer unsupported assertions that are the subject of judicial review. However, SNWA fails in its briefing, as the State Engineer failed in Ruling 6446, to point to the necessary supporting evidence, which, as WPC has correctly pointed out, is missing from the record. So, while SNWA relies on the State Engineer's conclusory and unsupported findings as the basis for its response to WPC's arguments, the Court's review is not restricted to the absurdly narrow scope asserted by SNWA. Where the State Engineer's findings are not supported by substantial evidence or are not sufficiently explained to allow for judicial review, the Court should overturn them.

B. SNWA's and the State Engineer's Attempt to Minimize Predicted Impacts and Mischaracterize WPC's Argument as Alarmist Is Belied by the Modeling Evidence in the Record, Which Uniformly Predicts that SNWA's Proposed Pipeline Project Would Cause Massive Groundwater Drawdown Over a Vast Area of Impact

SNWA, in its Answering Brief, attacks WPC's discussion of the predicted impacts of SNWA's proposed groundwater development project.[7] SNWA AB at 1-2, 8, 14. This attack is nothing more than an empty rhetorical attempt to paint WPC as alarmist and to minimize the severity of the predicted environmental impacts of SNWA's proposed project. Despite clear and uncontroverted evidence in the record to the contrary, and despite this Court's holdings related to conflicts and environmental impacts in the *Remand Decision*, SNWA simply denies that impacts will be severe and uses this unsupported denial as a basis for its argument that its 3M Plans are sufficient. SNWA AB at 1-2, 8. However, even a simple review of the drawdown maps associated with the project confirms that WPC's discussion of impacts is both accurate and supported by the record. ROA 020179, 024515, 024718-19, 025888 -025891, 026027-026030, 026094 – 026096, 026943-45, 031153-031159, 031306-031314, 037812-14, 049658 (describing modeled pumping scenarios depicted in FEIS Appendix F3.3.7), 051968-992 (FEIS Appendix F3.3.7 (drawdown maps)).

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[7] SNWA also attacks WPC's recitation of the history of this case, but provides only minor and largely irrelevant rebuttals to WPC's introductory section. SNWA's only real reason for attacking WPC for reviewing the history of this case is that the history of the case is not favorable to SNWA, but WPC's presentation of the history was appropriate to assist the Court in its judicial review. As explained in WPC's Opening Brief, it is necessary to review the history of the case due to the complex and lengthy nature of the proceedings. WPC believes that a full consideration of those facts and history can only aid the Court in reaching a sound decision on the issues before it.

While SNWA argues that the record does not support WPC's argument concerning impacts, SNWA AB at 2, SNWA does not cite to any evidence in the record at all in support of its assertion that the impacts will not be as severe as indicated by the uncontroverted record evidence identified by WPC. That is because there is no evidence in the record that supports SNWA's assertion. The only parts of the record that the State Engineer and SNWA can point to in support of their head-in-the-sand approach to impacts and conflicts is the State Engineer's own unsupported conclusory findings, which were overturned by this Court and which are the subject of this appeal, and a couple of isolated excerpted testimony of protestant expert witnesses on heavily controlled cross-examination that was transparently designed to confuse and manipulate those witnesses into seemingly contradicting the otherwise clear testimony and uncontroverted evidence in the record concerning the harmful impacts of SNWA's proposed groundwater pumping. *See* SNWA AB at 1-2 (citing ROA 038968).

There is no real evidentiary dispute as to the predicted drawdown in this case, and WPC is not suggesting that the Court reweigh any evidence. The evidence, including that prepared by SNWA for both the State Engineer's and the Bureau of Land Management's environmental review processes, is crystal clear. SNWA's project would cause significant drawdown across a broad affected area within the first 75 years, hundreds of feet of drawdown over an even vaster area of Eastern Nevada and Western Utah in the first 200 years of pumping, and steadily worsening drawdown thereafter. ROA 020179 (limiting presentation of drawdown to 75 years), 024685, 024718-19, 026027-026030, 026094-96, 026943-45, 028631, 031306-314, 036546, 036593-944, 037812-14, 031501-14, 051969-992. Given that even a ten foot drawdown could dry up numerous springs in the area, ROA 053044, 055643, it is unsurprising that this drawdown

is predicted to impact hundreds of existing water rights and environmental resources, including springs and perennial streams. ROA 049706-07, 049710-17, 049721, 051952-67. These are the types of conflicts and impacts that the Nevada Supreme Court in the *Eureka County* case held were impermissible in the absence of substantial evidence in the record of an effective mitigation plan. *Eureka County*, 131 Nev. at 852-53, 359 P.3d at 1118-19. SNWA has not disputed the impacts evidence contained in the Bureau of Land Management's Final Environmental Impact Statement ("FEIS") for the pipeline project, yet SNWA tries to dismiss WPC's reference to these impacts as alarmist in an attempt to persuade the Court to ignore this very clear evidence of predicted impacts. Even a cursory review of the impacts evidence in the record makes clear that it is SNWA's position that is wholly inconsistent with that evidence. It is not WPC's presentation of the evidence that is extreme, but rather is the nature and extent of the project's projected impacts that are extreme.

In its *Remand Decision*, the Court already has effectively rejected SNWA's attempt to downplay the significance of its project's predicted impacts when it remanded Rulings 6164, 6165, 6166, and 6167 to the State Engineer to ensure that predicted conflicts with existing rights and impermissible impacts would be avoided by an effective 3M Plan. The Court's 2013 *Remand Decision* remanding these Rulings necessarily was premised on a holding that the project would cause impermissible impacts absent an effective 3M Plan, as the purpose of requiring an effective 3M Plan is to avoid impermissible impacts under NRS 533.370. *See Eureka County*, 131 Nev. at 855, 359 P.3d at 1120. Nothing about the Pipeline Project has changed since the Court's 2013 *Remand Decision*, and it is undisputed that SNWA did not present any additional impacts evidence during the 2017 Remand Hearing. Thus, the impacts

evidence in the record remains clear and is the same evidence that resulted in the Court's *Remand Decision* overturning the State Engineer's findings with regard to the project's impacts. As explained above, the issue on remand was whether the 3M Plans presented by SNWA are adequate to avoid predicted impermissible impacts, not whether the project would cause such impacts in the absence of such a plan. While this question necessarily required a consideration of the nature, location, and severity of the predicted impacts in order to evaluate whether the proposed 3M Plans would be effective at preventing those predicted impacts, there was no question that those impacts would be severe. Thus, it is SNWA that is attempting to re-argue the conflicts issue which it lost in 2013.

The State Engineer himself inadvertently recognizes that absent an effective 3M Plan, SNWA's proposed project would cause impermissible impacts. SE AB at 2. The State Engineer's denial of applications 54014 and 54015, which are in close proximity to the Spring Valley Swamp Cedar ACEC, was the result of his recognition that absent an effective 3M Plan, SNWA's project would cause impermissible impacts to the Swamp Cedar ACEC. SE AB at 2, 9 (citing ROA 039042, 039047); ROA 039023. Drawdown maps for the project make clear that the drawdown predicted at the Swamp Cedar ACEC is consistent with drawdown throughout a much greater expanse in Spring Valley, the CDD Valleys, and eventually in downgradient basins within the White River Flow System ("WRFS"). ROA 020179, 024515, 024718-19, 025888 - 025891, 026027-026030, 026094 – 026096, 026943-45, 031153-031159, 031306-031314, 037812-14, 049658 (describing modeled pumping scenarios depicted in FEIS Appendix F3.3.7), 051968-992 (FEIS Appendix F3.3.7 (drawdown maps)). Thus, the State Engineer's recognition that absent an adequate 3M Plan, impermissible impacts would occur at the Swamp Cedar

ACEC, is equally applicable throughout the drawdown area in Spring Valley, the CDD Valleys, and downgradient basins in the WRFS, where impacts are predicted to be similar. The only distinction is that the Spring Valley 3M Plan's approach to mitigation of those impacts at the ACEC and the higher level of protection the State Engineer held was necessary at that location led the State Engineer to deny applications 54014 and 54015. So, SNWA's attack on WPC for supposedly exaggerating the project's predicted impacts is inconsistent with the *Remand Decision*, Ruling 6446, the uncontroverted evidence in the record, and the State Engineer's briefing in this case.

In reality, it is SNWA that mischaracterizes the history of this case and the *Remand Decision*. SNWA asserts that WPC had a chance in 2011 and failed to persuade the State Engineer or the Court that the project's impacts would be impermissible. SNWA AB at 1. SNWA fails to acknowledge that the impacts evidence in the record in fact did persuade this Court, which resulted in the *Remand Decision*'s instruction nos. 3 and 4. For SNWA to deny that basic history and attack WPC for addressing record evidence directly relevant to the issues on appeal is misguided, and seems to be designed to distract the Court from engaging in meaningful judicial review and considering relevant record evidence that is detrimental to SNWA's case.

C. SNWA and the State Engineer Misunderstand the Burden of Proof on Remand and on Appeal

Both the State Engineer and SNWA confuse the burden of proof on remand in an attempt to improperly restrict the scope of the Court's review of Ruling 6446. Despite the fact that the State Engineer acknowledges that the applicant "had the burden of proof to show that it met the

statutory standards for approval," SE AB at 30, the State Engineer suggests that he always has placed the burden of demonstrating a conflict on protestants, the apparent position being that unless such a conflict is demonstrated by a protestant, an application may be granted regardless of whether record evidence demonstrates that it would cause a conflict. SE Answer 28. The State Engineer is mistaken. As the State Engineer himself concedes, it is the applicant who must demonstrate that the requirements of NRS 533.370 are satisfied. *See Bacher v. State Engineer*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006). Regardless of whether an application is protested, the State Engineer still must support findings under NRS 533.370 with substantial evidence, including a finding of no conflicts. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); *see also Town of Eureka v. Office of the State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992); *Bacher v. Office of State Engineer*, 122 Nev. 1110, 146 P.3d 793, 800 (2006).

Moreover, the State Engineer's focus on the burden of proof is misleading, because regardless of where the burden of proof lies, evidence in the record introduced by both SNWA and the protestants uniformly confirms that absent an adequate 3M Plan SNWA's proposed pipeline project would cause impermissible conflicts and impacts. ROA 020179, 024685, 026027-026030, 026943-45, 049706-07, 049710-17, 049721, 051952-992. In recognition of this fact, the Court, in its *Remand Decision*, remanded to the State Engineer to cure the deficiencies in his 2012 rulings related to water availability, conflicts with existing rights, and the public interest precisely because they were either arbitrary or capricious or were not supported by substantial evidence in the record. *See* ROA 039062, 63, 69, 73. Thus, absent additional evidence from SNWA during the 2017 Remand Hearing curing those deficiencies, the State

Engineer still is without substantial evidence to grant SNWA's applications. WPC's discussion of the limitations of the evidence in the record merely highlights SNWA's failure to provide the required evidence, which deprived the State Engineer of any valid basis to grant SNWA's applications in Ruling 6446. Given that the record going into the Remand Hearing was insufficient to justify granting SNWA's applications, any supposed burden placed on WPC and other protestants already had been satisfied, and the burden was on SNWA during the Remand Hearing to provide the required evidence that this Court found lacking. As WPC has pointed out in our briefing, SNWA did not even attempt to meet that burden. As such, the record remains insufficient to support SNWA's applications.

The State Engineer recognizes that the burden on remand was SNWA's by noting in his discussion of applications 54014 and 54015 that "[b]ecause of the probability that Applications 54014 and 54015 may cause a significant, if not total, loss of the Swamp Cedars ACEC, and because SNWA did not provide adequate evidence to disprove this possibility, the State Engineer correctly denied Applications 54014 and 54015 pursuant to NRS 533.370(2)." SE AB at 61. Thus, the State Engineer's argument that the burden of proof was on protestants to demonstrate that SNWA's proposed Pipeline Project would cause conflicts with existing rights or impermissible impacts or that the *Remand Decision* arbitrarily imposed a new presumption of conflict with regard to the CDD Valleys simply is not credible, and appears to be an attempt to distract the Court from the issues before it. The evidence in the 2011 record already demonstrates that without an effective 3M plan SNWA's project would cause conflicts with regard to all four valleys, and the burden was on SNWA on remand to rebut that evidence and cure the deficiencies in the record.

SNWA and the State Engineer both attack WPC for a failure to provide counter proposals to SNWA's evidence on remand. SNWA AB at 1; SE AB at 45, 46. SNWA and the State Engineer appear to suggest that WPC must introduce its own evidence to counter that which SNWA presented during the 2017 Remand Hearing. In fact, WPC did introduce its own evidence on a number of the issues before the Court. However, where the applicant itself presents no evidence at all responsive to an issue of remand, it is not necessary for a protestant to present evidence on that issue, because the applicant's failure to present evidence that cures the deficiencies found by the Court in the *Remand Decision* by definition fails to provide the State Engineer with substantial evidence to support the approval of an application. Nothing more is necessary or required of the protestant. As a protestant, it is appropriate for WPC to point out the obvious deficiencies in SNWA's applications, using either the WPC's or SNWA's evidence where necessary, but there was no requirement that WPC present additional evidence to cure those deficiencies for SNWA. That was SNWA's burden, as the applicant, to bear. Because SNWA chose to present a case that was not responsive to the *Remand Decision*, SNWA itself deprived the State Engineer of substantial evidence necessary to support the approval of its applications.

SNWA also suggests that WPC has not met its burden to demonstrate on appeal that substantial evidence does not support SNWA's applications, and suggests that WPC's case amounts to requesting the Court to reweigh evidence. While WPC recognizes that the burden of proof on appeal is on Petitioners, NRS 533.450(10), WPC has met this burden and SNWA's attack is simply meritless. As noted above, this Court in its *Remand Decision* held that the evidence in the record prior to the Remand Hearing was insufficient to support the State

Engineer's decision to grant SNWA's applications. Thus, it was incumbent on SNWA to introduce evidence to cure the deficiencies in the record identified by the Court. Additionally, the State Engineer's Ruling may not rest on conclusory findings, but "must be sufficiently explained and supported to allow for judicial review." *Eureka County*, 131 Nev. at 856, 359 P.3d at 1120-21. WPC clearly has demonstrated in briefing where the evidence and the State Engineer's conclusory findings remain insufficient, and that with regard to most issues such evidence and explanation is nonexistent, to support the granting of SNWA's applications. *See generally* WPC OB at 89-107; WPC AB at 3-55; *see also, infra*. Thus, far from requesting the Court to reweigh the evidence in this case, WPC on appeal simply has exposed the fact that on the remand issues the evidence is lacking and the deficiencies that the Court in its *Remand Decision* directed the SE to cure have not been adequately addressed.

II. THE COURT SHOULD AFFIRM THE STATE ENGINEER'S DENIAL OF SNWA'S SPRING VALLEY APPLICATIONS BECAUSE SNWA FAILED TO INTRODUCE EVIDENCE DEMONSTRATING THAT ITS PUMPING WOULD CAPTURE DISCHARGE TO AVOID GROUNDWATER MINING AS PROPERLY REQUIRED BY THE COURT'S *REMAND DECISION*

On remand SNWA did not present any substantial evidence showing that its proposed groundwater pumping, or withdrawal, from Spring Valley would capture any considerable amount of water from Spring Valley's natural discharge that is not already subject to prior appropriations or required to prevent unreasonable environmental harms. As explained above and in WPC's Opening and Answering Briefs, the evidence in the 2011 Rehearing record demonstrated that SNWA's proposed pumping in Spring Valley would result in the long-term depletion, or groundwater mining, of Spring Valley and lead to the harms that the longstanding limitation of perennial yield to the amount of natural discharge that can be captured was intended

to prevent. *See, supra*, Argument Section I(B); WPC OB at 18-24. That is what the Court correctly identified as the problem with the State Engineer's approval of SNWA's Spring Valley applications, and what the Court ordered the State Engineer to correct on remand. ROA 039060-039063, 039073. As the State Engineer concedes, however, SNWA failed to present any evidence from which the State Engineer could determine what if any amount of natural discharge from Spring Valley (which in this case means ET) can be captured, or salvaged. SE AB at 32, ROA 038955. This deprived the State Engineer of any evidence on which to base a determination of what amount of groundwater is available for SNWA's proposed withdrawal from Spring Valley under Nevada's definition of perennial yield. Accordingly, the State Engineer was required to deny SNWA's Spring Valley applications and properly did so.

However, in both his Ruling and Answering Brief the State Engineer argues that he should not have to comply with the standard under Nevada's longstanding definition of perennial yield for determining whether water is available for a proposed withdrawal. Instead, the State Engineer joins SNWA in seeking to persuade the Court to reverse its own correct explication of Nevada water law and remand instruction directing the State Engineer to make a proper determination of how much natural discharge SNWA's proposed Spring Valley pumping can capture.

A. The Definition of Perennial Yield and the Determination of What Amount of Water is Available for a Proposed Withdrawal Is a Longstanding Principle of Nevada Water Law that Serves to Prevent Groundwater Mining

The State Engineer's long-applied definition of perennial yield, and the limit it places on the amount of water that properly can be considered available for withdrawal from a groundwater basin or system, is the necessary result of applying simple logic and common sense

to the inherent way groundwater systems function. They receive inputs of water through recharge (which can be precipitation or interbasin inflow from other basins) and they discharge water naturally through evapotranspiration ("ET") and interbasin outflow to other basins. SE Ruling 3486, at 3. Under natural conditions, the recharge and the discharge balance each other, and the system is in equilibrium. If an amount of water is withdrawn from the system, say by pumping and export as SNWA proposes to do, and the withdrawal does not capture a corresponding amount of the natural discharge, then the system will be depleted by that amount of water. This is so because the natural discharge will continue to occur while the withdrawal of additional water also is occurring. The result is that the groundwater basin or system will be thrown out of balance and continuously depleted unless the natural discharge is captured and the system can return to equilibrium. If the withdrawal is not coming from captured natural discharge then continuous depletion of the groundwater system, what is called groundwater mining, will occur and will lead to a host of serious harms that have been recognized by the State Engineer. SE Ruling 3486, at 3-4; SE Ruling 5726, at 26-27.

Similarly, when some or all of the discharge from a basin occurs through interbasin flow to other basins where it is subject to prior appropriations or where that inflow is necessary to maintain in order to prevent unreasonable environmental harms, then that amount of the natural discharge is, by definition, not available for withdrawal.

As Water for Nevada Report No. 3 makes clear, the determination of perennial yield along the lines we have just laid out is intrinsically involved in the establishment of a water budget for a groundwater basin or system and in the determination of how much groundwater is available for a proposed withdrawal from that groundwater basin or system. Water for Nevada

Report 3, at 13. For SNWA and the State Engineer to argue that a water budget approach is completely different to and unrelated to the question of how much natural discharge from the groundwater system can be captured by a proposed withdrawal of groundwater from the system is inconsistent with the definition of perennial yield in Report No. 3 and the State Engineer's consistent reaffirmation of that definition as the standard governing his determination of available water over the ensuing decades. *See* SE AB at 19-20; SNWA AB at 27-31.

At times the State Engineer's and SNWA's argument against applying that straightforward perennial yield standard to SNWA's applications in this case boils down to their assertion that the State Engineer has not always fully, or properly, performed the analysis required under the perennial yield standard in every decision on groundwater applications. *See* SE AB at 22; SNWA AB at 27-28. In short, this argument amounts to an assertion that the State Engineer has not always properly applied the perennial yield standard despite his repeated reaffirmation that it is the standard governing the determination of how much water is available for a proposed withdrawal. *See, e.g.,* ROA 000056; *see also* Water for Nevada Report 3, at 13. This is an odd position to take. That the State Engineer may not always have properly applied the controlling perennial yield definition that he always has acknowledged should control his determination of whether there is sufficient water available for a proposed withdrawal does not change either the fact that perennial yield is the controlling standard or the limitation imposed by that standard.

As we have seen, the language and logic of Nevada's long-recognized definition of perennial yield limits the amount of water available for withdrawal to the amount of natural discharge that the proposed withdrawal can capture, and neither the State Engineer nor SNWA

has advanced any sound basis for seeking to depart from that longstanding standard. Tellingly, the State Engineer concedes that the evidence in the record shows that allowing pumping SNWA to pump even 10% of the amount originally approved by the State Engineer under SNWA's Spring Valley applications would not capture enough natural discharge to bring the basin into equilibrium within a reasonable amount of time, or in other words to comply with the proscription of groundwater mining. SE AB at 17. Since the evidence shows that even a small percentage of SNWA's proposed pumping, or withdrawal, of groundwater under its Spring Valley applications will not capture the basin's natural discharge, it is indisputable that approving those applications and allowing SNWA's proposed Spring Valley pumping would deplete the groundwater reservoir over the long-term, resulting in groundwater mining and the harms caused by groundwater mining, in violation of Nevada's perennial yield standard.

B. The State Engineer's Longstanding Definition of Perennial Yield and Prohibition Against Groundwater Mining, By Definition, Require the Capture of Discharge

As the State Engineer concedes, the record evidence shows that because the well sites chosen in SNWA's Spring Valley applications are so remote from areas of ET discharge, SNWA's proposed pumping will not capture much, if any, of the natural discharge from Spring Valley even after hundreds of years. SE AB at 22-23; ROA 038955. As the State Engineer previously has recognized, Nevada's perennial yield standard for determining the amount of water available for withdrawal does not allow such remote pumping sites to escape the requirement that only the amount of natural discharge that can be captured may be considered available for withdrawal. SE Ruling 3486, at 3. The State Engineer and SNWA complain that under this controlling standard the evidence does not support allowing SNWA to withdraw any

amount of groundwater under its Spring Valley applications. But that is the result of the applicant's choice of those locations in the applications and the applicant's failure to present any evidence showing how much, if any, natural discharge its proposed pumping can capture. Contrary to the State Engineer's and SNWA's complaints, there is nothing about Nevada's longstanding prudential perennial yield standard for determining the amount of water available for withdrawal that is inconsistent with Nevada water law or policy. Indeed it is a longstanding statement reflecting a fundamental component of Nevada water policy. The State Engineer focuses solely on the aspect of water policy that encourages the beneficial use of Nevada's water supplies, SE AB at 33, but completely ignores the equally fundamental policy requiring that the state's limited groundwater resources be managed so as to protect them from being unsustainably depleted over the long term and preserve those limited resources for the long-term benefit of future as well as present Nevadans. Water for Nevada Report No. 3 at 13; SE Ruling 3486, at 3; SE Ruling 5726, at 26-27.

So, what the State Engineer and SNWA try to cast as a new "ET Capture Rule" actually always has been an integral component of Nevada's longstanding definition of perennial yield that simply happens to be inconvenient for SNWA in this particular instance. Where an applicant fails to comply with or satisfy a basic requirement, such as demonstrating the availability of water for the application's proposed use under NRS 533.370(2), the correct conclusion is that the application must be denied, not that the law must be negated to allow the State Engineer to approve the application and permit the groundwater system to be depleted over the long term. Accordingly, Nevada water law required the State Engineer to deny SNWA's Spring Valley applications, and there is no valid basis for the State Engineer's and SNWA's

arguments that this Court should reverse its own proper interpretation of and order for the State Engineer to comply with the requirements of Nevada water law.

Moreover, the Court correctly found that the record showed a fundamental contradiction between the State Engineer's own evidentiary findings regarding the long-term depletion of the Spring Valley groundwater reservoir that would result from SNWA's proposed pumping and the SE's unsupported decision nevertheless to approve the pumping, or withdrawal, of over 60,000 acre-feet per year under SNWA's Spring Valley applications. ROA 039062-039063. This fundamental contradiction required the reversal of the State Engineer's approval of SNWA's Spring Valley applications, and the Court properly instructed the State Engineer to make a proper determination on remand of the amount of natural discharge that SNWA's proposed withdrawal can capture and that therefore properly can be considered available for withdrawal under Nevada's definition of perennial yield and NRS 533.370(2). ROA 039073.

The State Engineer attempts to confuse the Court by repeatedly asserting that all parties agree that there is groundwater available for appropriation from Spring Valley without acknowledging that the Protestant-Petitioners have introduced uncontroverted evidence that indicates the amount that is available is far smaller than the amount that the State Engineer seeks to award to SNWA. *Compare* SE AB at 22 *with* WPC OB at 19. The State Engineer's assertion in this regard also fails to acknowledge that the protestant petitioners always have maintained that the amount that can be approved as available for a proposed withdrawal must be limited to the amount of this "available" natural discharge that the proposed withdrawal will capture. As explained above, the State Engineer's own perennial yield definition makes clear that this limitation is necessary to ensure that the Spring Valley groundwater reservoir is not subjected to

groundwater mining and depleted over the long term. Since SNWA chose not to present any evidence to show what, if any, amount of natural discharge its proposed pumping can capture, there simply was no substantial evidence to support any determination regarding what, if any, amount of natural discharge could be captured by SNWA's proposed pumping under its Spring Valley applications, and therefore there was not substantial evidence in the record to support the approval of any amount of groundwater pumping under those applications. The fact that this failure by the applicant to present competent evidence required denial of its applications under the proper application of Nevada water law does not constitute any sort of injustice or miscarriage of justice. Rather it merely reflects the applicant's willful failure to satisfy the requirements of Nevada water law despite the applicant's enormous financial resources and more than 25 years to gather and prepare such evidence.

Throughout their Answering Briefs the State Engineer and SNWA repeatedly try to confuse the Court by asserting that perennial yield and the amount of natural discharge that can be captured are unrelated and opposed concepts. However, Nevada Water Report No. 3 and past State Engineer Rulings make it clear that, in considering a proposed withdrawal, the perennial yield of a groundwater basin or system that can be considered available for withdrawal is limited to the amount of natural discharge that can be captured. *See* Water for Nevada Report No. 3, at 13; SE Ruling No. 3486, at 3; SE Ruling No. 5726, at 26-27.

Finally, neither the State Engineer nor SNWA addresses the fundamental point that regardless of how the calculation of available water is determined, all modeling confirms that SNWA's proposed Pipeline Project would cause impermissible groundwater mining, or a permanent lowering of the groundwater table. This fundamental fact is unavoidable, and neither

SNWA nor the State Engineer has addressed it in briefing, instead to attempt to distract the Court by focusing on ET capture. While trying to confuse the Court with arcane technical arguments may have been their best strategy, the State Engineer's and SNWA's arguments do not affect the simple fact that SNWA's project is, at its core, an impermissible groundwater mining project.

C. Requiring that SNWA's Applications Capture Discharge to Avoid Groundwater Mining Is Fundamental to the Prior Appropriation Doctrine and Is Unrelated to Riparianism

In order to make his unreasonable argument sound plausible the State Engineer advances a simplistic and gross mischaracterization of this Court's *Remand Decision* as "reintroducing principles of riparianism" into Nevada water law. SE AB at 2. On the basis of this baldly self-serving mischaracterization the State Engineer claims that the Court's *Remand Decision* was "clearly erroneous" and would work a "manifest injustice." SE AB at 12. The State Engineer also makes the farfetched claim that because SNWA's wells are poorly located to capture natural discharge (via ET in the case of Spring Valley), the application of Nevada's longstanding perennial yield standard limiting the amount of water available for withdrawal to the amount that can be captured from natural discharge amounts to an improper imposition of riparian water law. SE AB at 16. This argument is based on a plainly incorrect characterization of the Court's *Remand Decision* requiring the State Engineer to apply Nevada's longstanding standard for determining the availability of groundwater to SNWA's applications.

The State Engineer also objects that adherence to the longstanding perennial yield standard means that an applicant's choice of a well site may have an impact on the amount of natural discharge that the well can capture and therefore on the amount of groundwater that may be considered available for the proposed withdrawal. SE AB at 16, 24. This objection is not

well-founded because the fact that the remoteness of the areas of ET discharge from the proposed site of groundwater pumping may limit the amount of discharge that can be captured, and therefore the amount of groundwater that is available for withdrawal, at that site always has been a recognized part of Nevada's perennial yield approach. *E.g.*, SE Ruling No. 3486, at 3.

Both the State Engineer and SNWA attempt to create a distinction between riparianism and prior appropriation based on access to water where there is none. The distinction between the two doctrines relates not to proximity of the user to a water source, but rather to how the water right is obtained. Under both systems, actual access to the water is critical. However under the riparian doctrine ownership is by virtue of ownership of the land, while in the prior appropriation doctrine, a water right is obtained by diversion and use. The deficiencies in the State Engineer's argument is made especially clear when applied in the context of surface water. There can be no debate that in order to appropriate surface water, the appropriator must have access to the source of supply. In other words, an appropriator could not appropriate from one stream what is available in a second, unconnected, stream but not in the source sought. This access to the surface water source of supply may be obtained via easement or land ownership. But in either case, access to the actual source is critical. Access to the source is not a distinguishing characteristic of riparianism or prior appropriation, and the State Engineer and SNWA's attempt to focus on that point is meritless and an attempt to distract by creating a supposed distinction where there is none.

As explained in WPC's Opening and Answering Briefs, there is an obvious and sound basis for Nevada water law's requirement that a proposed withdrawal of groundwater be limited to an amount that satisfies the standard set forth in Nevada's longstanding definition of perennial

yield. WPC OB at 62-68; WPC AB at 3-10. The fact that SNWA's applications did not take this long-recognized limitation on withdrawals of groundwater into account in locating the well sites in its Spring Valley applications does not convert this standard under Nevada's definition of perennial yield into a radical reintroduction of riparian law. Similarly, the fact that on remand SNWA chose not to present any evidence to demonstrate what amount of natural discharge would be captured by its proposed pumping, which is what Nevada's perennial yield standard requires, does not provide a valid basis for abandoning Nevada's long-established standard for establishing what amount of water is available for withdrawal just to allow SNWA to proceed with its proposed pumping.

The State Engineer's assertion that the Court's logical requirement that he adhere to Nevada's longstanding perennial yield standard in determining what amount of groundwater is available for SNWA's proposed Spring Valley withdrawal somehow improperly reintroduces principles of riparianism into Nevada water law is plainly mistaken. SE AB at 21. As the Court recognized, NRS 533.370(2) requires that the State Engineer make a determination regarding the availability of groundwater for a proposed withdrawal, and Nevada's perennial yield definition has long been recognized as the controlling standard for determining how much groundwater is available for withdrawal and as a necessary limitation to protect senior water rights. ROA 039054, 039062. Thus, the Court's instruction to the State Engineer to apply that standard to the evidence on remand was entirely consistent with longstanding Nevada water law and the doctrine of prior appropriation, and does not in any way reintroduce riparianism into Nevada water law.

D. The Court's *Remand Decision* Recognized and Properly Applied Longstanding State Engineer Practice With Regard to ET Capture, Perennial Yield, and the Prohibition Against Groundwater Mining and the State Engineer's Attempted Arbitrary Departure from Prior Practice Should Not be Entertained

Notwithstanding clear statements confirming the State Engineer's own perennial yield standard cited by the Court in its *Remand Decision*, the State Engineer and SNWA attempt to argue that the perennial yield standard for determining the amount of water that is available for withdrawal is not actually applied by the State Engineer in making determinations on groundwater applications, despite his frequent recitation of the standard in his rulings on groundwater applications. Oddly, they fault WPC and other protestant-petitioners for referencing the State Engineer's 1988 Pahrump Valley Ruling, Ruling No. 3486, as an illustrative example of the State Engineer's reliance on Nevada's perennial yield standard for determining the amount of water available for withdrawal. Implausibly, they argue that the decision in Ruling No. 3486 rested solely on a finding that the Pahrump basin already was overappropriated and did not involve any meaningful consideration of perennial yield or the amount of water available for withdrawal under the definition of perennial yield. *See* SE AB at 17-18; SNWA AB at 28; ROA 038960-038961. However, a reading of Ruling No. 3486 reveals that the State Engineer devoted considerable attention to the determination of how much water could properly be considered available for withdrawal from Pahrump Valley under the requirement that only natural discharge (whether in the form of ET or subsurface outflow from the basin) that can be captured is included in determining the amount of available water that constitutes the perennial yield. Ruling No. 3486, at 3. The State Engineer in the Ruling 3486 also described the harms that result from permitting withdrawals of groundwater in excess of the

perennial yield, namely depletion of the reservoir, water quality degradation, land subsidence, possible reversal of ground water gradients which could result in significant changes in the recharge/discharge relationship itself – and acknowledged that these problems already had developed in the Pahrump Valley and several other groundwater basins in Nevada. *Id.* at 3-4.

Of particular note, in the 1988 Pahrump Valley Ruling the State Engineer excluded amounts of natural discharge in the form of subsurface outflow that would not be captured within a little more than 50 years from his determination of the perennial yield of water available for withdrawal. SE Ruling 3486, at 3. The State Engineer also excluded from the perennial yield amounts of ET discharge that he found would not be captured "in the foreseeable future because some . . . areas of active evapotranspiration are too remote from the . . . pumping areas," *id.*, which is essentially the same situation in this case with SNWA's applications in Spring Valley.

What Ruling No. 3486 illustrates is that in 1988, as in 1971, the State Engineer considered it unremarkable to acknowledge the fact that the amount of a groundwater system's natural discharge, be it in the form of ET or subsurface outflow, that can be captured is the obvious limitation of the amount of water available for withdrawal under the accepted definition of perennial yield. The State Engineer's past rulings cited in WPC's Opening Brief, WPC OB at 65-66, reflect his understanding that this limitation is required by logic and common sense to protect Nevada's limited groundwater resources from the dangers of overappropriation and long-

term depletion and to preserve those limited water resources for the long-term benefit of future as well as present Nevadans.[8]

The State Engineer tries to evade this limitation on available water by claiming that perennial yield equates with a basin-wide water budget approach that is devoid of any consideration of whether a proposed withdrawal of groundwater actually will capture any of the natural discharge of that basin or system within a reasonable timeframe or the foreseeable future. SE AB at 19. This position does not square with the State Engineer's own repeated past statements regarding the importance and necessity of limiting groundwater withdrawals to the amount of discharge that can be captured in order to prevent groundwater mining and protect the state's limited groundwater resources from the grave harms that would result from long-term overdraft and depletion. SE Ruling 3486, at 3; SE Ruling 5726, at 26-27.

The State Engineer attempts to justify his proposed abandonment of the limitation on available water to natural discharge that can be captured by simultaneously arguing that stare decisis does not apply to bind him to his past practice and that this novel redefinition of perennial yield does not represent a deviation from his prior practice despite its obvious inconsistency with the longstanding definition of perennial yield. SE AB at 18. The contention that this redefinition

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

of perennial yield is not a deviation from the original and long accepted definition of perennial yield in Nevada water law and policy is implausible because the State Engineer's new interpretation would eliminate the express limitation of water available for withdrawal to natural discharge that can be captured despite the original definition's plain language imposing exactly that limitation. While White Pine County never has argued that stare decisis is applicable to past State Engineer decisions, the State Engineer's previously consistent reaffirmation of the original 1971 definition of perennial yield and explanation of the importance of the way it limits the amount of water that is available for withdrawal exposes the arbitrary and irrational nature of the State Engineer's and SNWA's proposed approach in this case.[9]

The State Engineer and SNWA avoid addressing the reasoning that underlies Nevada's longstanding definition of perennial yield, which has been affirmed and explained in past State Engineer rulings, because there is not a sound rationale for abandoning that definition and opening the floodgates to unsustainable groundwater mining. Instead the State Engineer and

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

SNWA assert that because the State Engineer at times may have neglected to enforce the limitation on groundwater withdrawal contained in Nevada's definition of perennial yield, the Court should condone the State Engineer's desire to disregard the perennial yield definition's limitation on available groundwater in this case. In other words, the State Engineer and SNWA invoke the State Engineer's supposed past improper failure to always properly apply and abide by the definition of perennial yield when making determinations regarding comparatively small groundwater applications as a supposed justification for disregarding that fundamental tenet of Nevada water law and policy with regard to SNWA's unprecedentedly vast applications, which seek to withdraw virtually all groundwater from Spring Valley and the other targeted basins.

No statutory provision or case law supports such an irresponsible attempt to disregard Nevada's longstanding and controlling limitation on the amount of groundwater that properly can be considered available for withdrawal. *Pyramid Lake Paiute Tribe v. Ricci*, which the State Engineer cites as if it supported his proposed arbitrary abandonment of the longstanding standard, SE AB at 19, actually reaffirms that Nevada's definition of perennial yield limits the amount of water that may be considered available for withdrawal to "the *equilibrium amount* or maximum amount of water that can safely be used *without depleting the source*." 126 Nev. 521, 524, 245 P.3d 1145, 1147 (2010) (emphasis added).[10] By the same token, SNWA's assertion that *State Engineer v. Morris*, 107 Nev. 699, 819 P.2d 203 (1991), supports its contention that the limitation of available water to the amount of natural discharge that can be captured is

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[10] As explained in WPC's Opening Brief, it is a simple scientific fact that pumping only reaches equilibrium by capturing discharge. *See* WPC OB at 62-68.

different than and has no part in the determination of perennial yield is belied by the actual text of that decision. In *Morris* the Nevada Supreme Court explained that the State Engineer refers to "the maximum amount of natural discharge that can be feasibly captured" as the perennial yield, and "uses it as the maximum amount of withdrawal above which overappropriation occurs." 107 Nev. at 703, 819 P.2d at 206. As explained above, and as the State Engineer previously has recognized, the limitation of available water to the amount that can be captured from natural discharge was designed to ensure the sustainability of the state's limited groundwater resources and protect them from long-term depletion, which necessarily requires a balance between the amount of natural discharge that can be captured and the amount of groundwater that properly may be withdrawn. WPC OB at 62-68; WPC AB at 3-10.

SNWA's unwillingness to comply with the requirements of Nevada's longstanding definition of perennial yield, which limits the amount of groundwater available for withdrawal to the amount of natural discharge that can be captured, required the State Engineer to deny SNWA's Spring Valley applications. But the fact that SNWA would not or could not produce evidence to support its proposed withdrawal does not make the application of that long-established standard a change in the law. Nor does it amount to any kind of injustice. It simply is the necessary result of SNWA's inability or unwillingness to comply with the established, applicable legal standard. As such, this Court should reject both the State Engineer's and SNWA's request that the Court reverse its own proper explication and application of the law in the Court's *Remand Decision*.

E. Application of the Longstanding Definitions of Perennial Yield and Groundwater Mining Does Not Result In Unfairness or Uncertainty, But Properly Protects Nevada's Limited Water Resources for Use by Current and Future Generations of Nevadans

Contrary to SNWA's and the State Engineer's protestations, while it may be inconvenient for SNWA, the Court's mere application of the controlling standard that has been long established in Nevada water law and policy does not create any new uncertainty for water rights applicants. Under NRS 533.370(2) and the longstanding perennial yield definition, the State Engineer always has been required to make an individual determination in every case as to what amount of groundwater is available, consistent with the definition of perennial yield, for a proposed withdrawal. The State Engineer's current litigation position, which favors dispensing with that longstanding standard would deprive future and present Nevadans of the protection against long-term depletion of the state's limited groundwater resources that the perennial yield standard was designed to ensure. As discussed above, the fact that the State Engineer may not always have properly fulfilled his duty to comply with that standard, and thus may have inadvertently contributed to the overappropriation of some of Nevada's groundwater basins, does not provide any justification for a court-sanctioned abandonment of the state's longstanding prudential standard limiting the amount of groundwater available for withdrawal.

F. The Longstanding Definition of Perennial Yield Applied by the State Engineer When Evaluating Applications for Water Appropriation Has Not Been Altered By Legislation Governing Water Planning

SNWA's contention that NRS 532.167 supports its specious contention that the requirement to examine a proposed groundwater withdrawal's ability to capture ET, or other natural discharge, is not a part of the analysis required under NRS 533.370(2) and the definition

of perennial yield is misplaced. SNWA AB at 27 n. 158. First, that provision is not even a part of the NRS chapter that governs the process and standards for determining whether an application to appropriate water may be granted. Rather, Chapter 532 pertains to the general duties and data gathering responsibilities with which the State Engineer is charged, and section 532.167 appears to be an elaboration of the more general provision that directs the State Engineer to conduct studies and inventories, map water resources, and evaluate water-related proposals from other agencies. Second, NRS 532.167 merely directs the State Engineer prepare a general overall water budget for every hydrographic basin the state, and does not address how the availability of water should be determined at all, either in the context of a general water budget or in the context of determining whether there is water available for a particular proposed withdrawal. Nothing in NRS 532.167 or any other statutory provision in any way contradicts the plain language of Nevada's definition of perennial yield, which by its own terms requires that the ability to capture a groundwater reservoir or system's natural discharge be considered in determining whether and how much groundwater is available for the proposed withdrawal.

The State Engineer's reference to Senate Bill 140 during the 2019 Legislative Session also is unavailing, as that bill did not in any way change the definition of perennial yield or address the perennial yield limitation on what amount of groundwater may be considered available for withdrawal from a groundwater basin. SE AB at 19-20. Rather, SB 140 merely set a minimum floor of 10% of remaining uncommitted groundwater to be reserved in basins that have not already been fully appropriated without any reference or regard to what amount of groundwater properly may be considered available for withdrawal under the perennial yield standard. As such, SB 140 has no bearing on the standard established by the perennial yield

definition for what amount of groundwater properly is considered available for withdrawal under a groundwater application. Thus, contrary to the State Engineer's assertions, SE AB at 20, the Court's application of Nevada's longstanding definition of perennial yield, which limits the amount of groundwater available for withdrawal to the amount of natural discharge that can be captured, to SNWA's Spring Valley applications does not change the law in any way and certainly does not prevent or interfere with the establishment of water budgets for groundwater basins or systems in any case, let alone on a statewide basis.

III. THE COURT SHOULD AFFIRM THE STATE ENGINEER'S DENIAL OF SNWA'S CDD APPLICATIONS BECAUSE THERE IS NO SUBSTANTIAL EVIDENCE THAT SNWA'S PROPOSED PUMPING IN THE CDD VALLEYS CAN CAPTURE ANY AMOUNT OF GROUNDWATER WITHOUT CONFLICTING WITH EXISTING WATER RIGHTS AND UNREASONABLY HARMING ENVIRONMENTAL RESOURCES IN DOWNGRADIENT BASINS WITHIN THE WRFS THAT DEPEND ON SUBSURFACE OUTFLOW FROM THE CDD BASINS

As explained in WPC's Opening and Answering Briefs, there is no merit to the State Engineer's and SNWA's request that the Court reverse its remand instruction directing the State Engineer to determine what amount of the Cave, Dry Lake, and Delamar Valleys' ("CDD Valleys'") subsurface outflow to downgradient basins within the White River Flow System ("WRFS") is available for SNWA to withdraw without conflicting with senior existing water rights in those downgradient basins and without causing unreasonable harm to downgradient environmental resources that depend on that subsurface interbasin flow. That is the standard imposed by NRS 5323.370(2), and the Court properly required the State Engineer to comply with that standard by determining whether there is substantial evidence in the record to support SNWA's ability to pump some amount of groundwater from the CDD Valleys without causing

impermissible conflicts or effects in the fully appropriated downgradient valleys within the WRFS that depend on the existing subsurface outflow from the CDD Valleys. As explained in WPC's Opening and Answering Briefs, substantial uncontroverted evidence in the record indicates that SNWA's CDD applications would capture outflow from the CDD Valleys that currently supplies existing senior rights and supports groundwater-dependent environmental resources in those downgradient basins. WPC OB at 21-22, 26-27; WPC AB at 27-30, 32-34. Thus, it was incumbent upon SNWA, on remand, to present evidence to overcome the evidence in the record demonstrating that SNWA's pumping would cause conflicts and impermissible environmental impacts, which resulted in the *Remand Decision*. *See, supra*, Argument Section I.

SNWA never presented any evidence showing that its proposed withdrawals from the CDD Valleys will capture any amount of the natural discharge, which occurs via subsurface interbasin flow to downgradient basins in the WRFS, that is not already subject to prior appropriation by senior existing water rights, or required to prevent unreasonable environmental harms to groundwater dependent resources including wildlife refuges and management areas, in those downgradient basins. This was the case in the record from the 2011 remand hearing. Consequently, the Court properly reversed the State Engineer's approval of those applications on that ground and instructed the State Engineer on remand to make a determination whether there was substantial evidence demonstrating an amount of groundwater that was available for appropriation from the CDD Valleys without violating the requirements of NRS 533.370(2) prohibiting conflicts with existing senior downgradient rights and impermissible environmental impacts. Despite the Court's instruction, SNWA failed to present any substantial evidence to demonstrate what, if any, amount of water its proposed withdrawals from the CDD Valleys

would capture that is not part of the interbasin flow from those basins required to supply existing senior water rights in the downgradient basins of the WRFS and to prevent unreasonable environmental harms to environmental resources like the Pahranagat Valley and Moapa Valley NWRs and the Kirch and Key-Pitman WMAs in those downgradient basins. WPC OB at 22.

The question on remand was whether there is sufficient evidence to support a determination of what, if any, amount of groundwater is available for SNWA to withdraw from the CDD Valleys without creating conflicts with existing downgradient rights or causing unreasonable harmful impacts on downgradient environmental resources. ROA 039070. As the State Engineer correctly found, the answer to this question is a straightforward no, because SNWA failed to present evidence that showed any ability to pump groundwater from the CDD Valleys without capturing the existing subsurface outflow from the CDD Valleys on which senior downgradient rights and environmental resources depend. ROA 038973-038974; WPC AB at 27 n. 22, 29-42. Consequently, as the State Engineer properly found, there was no substantial evidence in the record to support the approval of any amount of water to be withdrawn under SNWA's applications in the CDD Valleys. Accordingly, the Court should reaffirm its findings and remand instruction in the *Remand Decision* and affirm the State Engineer's denial of SNWA's CDD applications on remand.

Notwithstanding SNWA's failure to present any such evidence, despite having had repeated opportunities to do so in three separate hearings on its CDD applications over the course of a decade, WPC OB at 39, 43-47; WPC AB at 27-29, 42, the State Engineer seeks to persuade the Court to reverse its correct application of NRS 533.370(2)'s plain and straightforward language. In that endeavor, the State Engineer attempts to reformulate this issue

by arguing that the Court improperly imposed a new legal presumption that every water right application conflicts with existing rights unless it is proven not to. In fact, it is plain from the *Remand Decision* that the Court neither assumed nor presumed anything about conflicts. Rather, the Court simply recognized the disconnect between the State Engineer's decision to approve large scale pumping of groundwater from the CDD Valleys, on the one hand, and the substantial uncontroverted evidence in the record, on the other hand, that showed SNWA's CDD applications would intercept subsurface outflow from the CDD Valleys that is subject to prior appropriation under senior existing water rights in fully appropriated downgradient basins within the WRFS, and on which environmental resources in those downgradient basins also depends. ROA 039068-70; WPC OB at 21-22, 26, 85-88; WPC AB at 25-43.

In an effort to evade the clear requirement under NRS 533.370(2) to deny applications in the face of uncontroverted evidence that SNWA's proposed pumping conflicts with existing rights and threatens to be detrimental to the public interest, the State Engineer focuses on the length of time it may take for the harmful impacts of those conflicts to become apparent at the downgradient locations. SE AB at 27-28. In essence, the State Engineer's position is that he should not be required to deny applications even where the evidence demonstrates conflicts between the proposed use and existing rights, if it appears likely that it will take many decades and possibly centuries for the effects of those conflicts to become manifest at the location of the existing rights. *Id.*

As WPC explained in its Answering Brief, neither the State Engineer nor SNWA can plausibly deny that substantial uncontroverted evidence in the record demonstrates that SNWAs' proposed pumping, or withdrawal, of groundwater from the CDD Valleys will capture, or

intercept subsurface outflow from the CDD Valleys that existing water rights and environmental resources in downgradient basins within the WRFS depend on. WPC AB at 27-43. That evidence plainly indicates that SNWA's proposed pumping of groundwater from the CDD Valleys will conflict with existing rights in those downgradient basins and will threaten to be detrimental to the public welfare by causing unreasonable environmental harm in those downgradient basins. *Id.* In addition, as the State Engineer found in Ruling No. 6446 and concedes in his Answering Brief, on remand SNWA did not present evidence that would support a determination that SNWA's proposed pumping from the CDD Valleys would capture any groundwater that was not part of the subsurface outflow from those basins that is subject to prior appropriation under senior existing rights in downgradient basins within the WRFS and that is required to supply protected environmental resources, including National Wildlife Refuges and State Wildlife Management Areas, in those downgradient basins. ROA 038973; SE AB at 26-27. Thus, the evidence demonstrates that SNWA's proposed CDD pumping would violate NRS 533.370(2), and SNWA presented no new evidence that demonstrates that SNWA's proposed CDD pumping would capture any amount of outflow from the CDD Valleys that is not required to supply existing downgradient rights and groundwater dependent environmental resources.

The State Engineer and SNWA seek to distract the Court from these conclusive facts by attacking the Court's remand instruction requiring a determination based on evidence showing what, if any, amount of groundwater can be withdrawn from the CDD Valleys without violating NRS 533.370(2), which they mischaracterize as the Court's imposition of a new presumption of a conflict in all cases. SE AB at 27-28; SNWA AB at 31-32. However, as the Court properly found in the *Remand Decision*, the evidence indicates a conflict and there is no evidence

showing that SNWA's proposed pumping will capture any water other than outflow that is required to supply existing downgradient rights. ROA 039069-039070. The State Engineer does not dispute this finding but argues that when the evidence does not demonstrate precisely when the effects of that conflict will become manifest at the site of the affected water rights and environmental resources, but indicates that it will take decades and perhaps centuries for the harmful effect to become manifest, he should be permitted to disregard the conflict and approve the application. SE AB at 27-28.

There is no legal authority that supports the State Engineer's and SNWA's contention that a conflict may be disregarded because of the length of time it may take for the conflict's harmful effects to become apparent at the site of the affected senior water right or environmental resource. Nor does the State Engineer's proposed approach comport with Nevada's prior appropriation doctrine, as it would allow new junior rights to be approved despite evidence showing that they will undermine and impair senior existing water rights. The State Engineer's and SNWA's approach also would be inconsistent with Nevada's long established policy prohibiting overappropriation and depletion of a groundwater system over the long-term. Accordingly, the Court should reaffirm its findings and application of the law with regard to SNWA's CDD applications in the *Remand Decision*, and should affirm the State Engineer's denial of SNWA's CDD applications on remand.

IV. THE STATE ENGINEER'S APPROVAL OF SNWA'S 3M PLANS IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD

Given that absent an effective 3M Plan conflicts with existing rights and impermissible impacts are predicted to occur, and given the clear instructions in the Court's *Remand Decision,*

it was incumbent upon SNWA to demonstrate on remand that it could effectively avoid or mitigate predicted conflicts with existing rights and impermissible environmental impacts. *See Eureka County*, 131 Nev. at 855, 359 P.3d at 1120. On remand, SNWA submitted substantial quantities of evidence with regard to its 3M approach. However, as explained by WPC over the course of these proceedings, quantity is no substitute for quality, and SNWA's 3M approach remains fundamentally flawed and designed merely to help SNWA avoid accountability for impacts caused by its proposed pipeline project. While SNWA's plans may appear to be quite detailed in some respects, obvious fundamental deficiencies in critical components of SNWA's plans make it impossible for the State Engineer or anyone to confirm that those plans have any reasonable prospect of effectively avoiding or mitigating impermissible conflicts with existing water rights or unreasonable harmful environmental impacts.

At their most basic level, by advancing an unreasonably low standard of environmental protection, SNWA's 3M Plans do not even set out to provide protections that would be consistent with the Nevada law. This fundamental deficiency combined with the failure to provide critical scientific information that might justify 3M Plan components and strategies, which rather seem designed to mask impacts and avoid effective mitigation, render SNWA's plans insufficient. These combined deficiencies led to an inability on the part of the State Engineer to make an assessment of whether the 3M Plans would be effective at preventing conflicts with existing rights or impermissible environmental impacts. SNWA could have chosen to approach the 3M Plans in a scientifically sound manner by setting appropriate standards for unreasonable impacts, setting management goals for inventoried resources, designing a monitoring network based on localized conceptual flow models, modeling predicted

impacts for specific locations, modeling predicted responses to mitigation, and setting appropriate resource-specific triggers based on those modeling results. SNWA did none of these things. Instead, at each step, SNWA introduced a large quantity of evidence intended to justify its flimsy approach, which is designed to mask impacts and which does not even set out to prevent anything short of an environmental disaster. Therefore, the State Engineer's approval of those plans in Ruling 6446 was unsupported by substantial evidence in the record, was arbitrary and capricious, and must be overturned.

A. The Purpose of the 3M Plans is to Avoid Impermissible Conflicts with Existing Rights and Impermissible Impacts to the Environment Predicted by Uncontroverted Modeling Evidence in the Record

Despite clear and uncontroverted modeling evidence in the record demonstrating that there can be no doubt that SNWA's proposed pipeline project would cause conflicts with existing rights and impermissible environmental impacts, SNWA suggests that the purpose of its 3M Plans is to address "uncertainty and unforeseen issues" or "unanticipated impacts." SNWA AB at 5, 9.[11] SNWA's disingenuous assertion of supposed uncertainty regarding predicted impacts and conflicts misses the mark. First, in support of its position SNWA improperly relies on the State Engineer's finding in Ruling 6164 that SNWA's applications would not cause conflicts with existing rights, a finding that was overturned by the Court in the *Remand Decision*. *See* SNWA AB at 8, n. 32 (citing ROA 000187). Second, there is no uncertainty with regard to

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[11] While the State Engineer characterizes conflicts caused by SNWA's applications in Cave, Dry Lake, and Delamar Valleys as uncertain, *see* SE AB at 34-35, the State Engineer appears to concede in briefing that SNWA's Spring Valley applications would cause conflicts and impermissible impacts absent an adequate 3M Plan. SE AB at 61.

the fact that, as a general matter, in the absence of an effective 3M plan SNWA's proposed project will cause extensive groundwater drawdown which will result in severe and ever worsening impacts and conflicts over the vast drawdown area. *See, supra,* Argument Section I(B); *see also* WPC OB at 19-24. As the Court has recognized, any uncertainty relates not to whether those conflicts will occur, but only to when the will occur and what their precise character will be at specific locations. *See* ROA 039072. Additionally, any uncertainty as to the timing and nature of conflicts at specific locations is a direct result of SNWA's failure to provide a site-specific conflicts analysis, despite consistent criticism of this hole in the record by protestants, and despite the fact that the BLM has directed SNWA to prepare such evidence in the context of the federal environmental review process. ROA 051304. Given the undisputed evidence that SNWA's proposed pumping would cause conflicts with existing rights and impermissible environmental impacts over the predicted drawdown area, and given that this Court remanded Rulings 6164, 6165, 6166, and 6167 to ensure that the 3M Plans would be effective at preventing those conflicts and impermissible impacts, the 3M Plans must be sufficient to guard against those predicted impacts and are not simply offered as general protection against uncertainty and unforeseen impacts. Notwithstanding SNWA's obfuscation, the Court should not lose sight of the fact that absent a demonstrably effective 3M plan, the project's conflicts and impermissible impacts would be a given.

B. SNWA's Definition of Unreasonable Effects Does Not Comply with Nevada Law and Would Permit Devastating Impacts Over a Vast Area of Eastern Nevada and Western Utah

Despite the fact that the clear language contained in SNWA's 3M Plans confirms WPC's criticism, both SNWA and the State Engineer complain that WPC is unreasonable to point out

that the definition of unreasonable effects contained in SNWA's 3M Plans prevents nothing short of the complete basin-wide extirpation of certain species or habitats. SNWA AB at 17; SE AB at 43. The State Engineer and SNWA do not, in fact, counter WPC's contention that the 3M Plans, on their face, permit severely harmful impacts so long as they do not amount to basin-wide extirpation of species. Rather, they focus on arguments that: (1) management provisions contained in the plans would avoid such a result; (2) the State Engineer has found that impacts would not occur even absent the plans, a finding that is the subject of this appeal and already has been overturned by this Court once; and (3) the other three definitions of unreasonable effects would prevent basin-wide extirpation of species despite the fact that there is no evidence supporting this conclusion. SNWA AB at 17-18; *see also* SE AB at 44; ROA 038983.

However, SNWA's definition of unreasonable effects is critical, as it is represents the level of harm up to which the 3M Plans would permit impacts to occur. Despite SNWA and the State Engineer's claims in briefing that impermissible impacts will not occur even absent the plans, the truth is that uncontroverted modeling in the record predicts hundreds of feet of drawdown in the first 200 years of pumping alone. *See, supra*, Argument Section I(B). If the long-term drawdown predicted by all models is allowed to occur, the evidence in the record establishes that the result would be the disappearance of wetlands, sub-irrigated meadows, and swamp cedars, resulting in the potential for invasion by nonnative species and increased dust emissions from bare ground and dried playas. ROA 036401-11; 038709-766. SNWA and the State Engineer's argument that the Court not to focus on SNWA's definitions of unreasonable effects, because they claim impacts would never reach that level, clearly is misplaced.

Moreover, as explained by WPC, the 3M Plan provisions SNWA cites to assure the Court that unreasonable impacts would never be reached generally do not require any mandatory management or mitigation action and have not even been evaluated for effectiveness. *See infra* Argument Sections IV(E), (F), & (H); *see also* SNWA AB at 17. Additionally, despite the fact that it is best practice to build management goals or objectives into adaptive management regimes, ROA 028090-91, 045628, SNWA has included no management goals beyond avoidance of unreasonable effects in its 3M Plans. Therefore, it is reasonable to conclude that the impacts predicted will rise to the level of what SNWA has defined as an unreasonable effect, which the plans set as the standard to guide management decisions. There are no other standards for ecosystem health articulated in the plans which could be used to guide decisionmakers. Standards set with regard to mitigation triggers guarantee only that mitigation will occur, not that such mitigation will prevent harmful impacts other than what SNWA has defined as an unreasonable effect. It is undisputed that while mitigation actions may be required prior to reaching what SNWA calls an unreasonable impact, nothing in SNWA's 3M Plans ensures the prevention or mitigation of harmful impacts short of those unreasonable impacts. While the various components of the 3M Plans are designed to work together to prevent what SNWA defines as unreasonable impacts, the relevant question for the Court is whether the 3M Plans will prevent conflicts with existing rights and legally impermissible impacts to the environment. Thus, it is critical that the definition of unreasonable effects is properly grounded and is consistent with Nevada law. Otherwise, SNWA and the State Engineer are once more simply expecting the Court and the public to simply trust SNWA to manage the project in the public interest with no real requirement that such management be achieved.

It is clear, and SNWA recognizes, that the *Remand Decision* required the SNWA on remand to include in its 3M Plans definitions of what would constitute an unreasonable effect such that mitigation of conflicts with existing rights and impermissible impacts would be neither arbitrary nor capricious. ROA 039072, 039073, 043042. A proper definition of unreasonable effects is critical to ensuring that SNWA's 3M Plans would prevent conflicts with existing rights or impermissible impacts to the environment. Under the 3M Plans, the definition of unreasonable effects both forms the basis for triggers chosen by SNWA and acts as the limit beyond which harmful impacts will not be allowed to get more severe. As such, the definition of unreasonable effects is the only standard in the 3M Plans concerning harmful effects that is mandatory and cannot be violated. ROA 043042, 043045 ("The thresholds, triggers, and monitoring, management, and mitigation actions identified in this report are designed to avoid the unreasonable effects defined above."). While SNWA and the State Engineer argue that the 3M Plans contain provisions designed to manage the area of impact such that conditions do not approach these unreasonable effects, on their face the 3M Plans would permit impacts up to what SNWA has defined as an unreasonable effect. Thus, it is critical that the definition of unreasonable effects comply with the law and be consistent with the public interest and environmental soundness criteria of NRS 533.370. In the absence of an adequate enforceable standard, a finding that the 3M Plans would prohibit impermissible impacts is based on a mere promise by SNWA rather than a requirement imposed at permitting. Absent such a requirement, by their own terms the Plans, permit conflicts with existing rights and impermissible impacts to the environment, rendering them insufficient, and SNWA has not met what the Court has

confirmed is its "'heavy burden' of ensuring that its project is environmentally sound." ROA 039068.

SNWA suggests that its definitions of unreasonable effects are rooted in current legal standards, but has offered no justification in briefing or in the record supporting its definition of an unreasonable effect to allow impacts that are severely harmful but fall short of basin wide extirpation of species and habitats. SNWA AB at 17. The State Engineer in Ruling 6446 and in his Answering Brief also points to SNWA's citation to NRS Chapter 533 and the Endangered Species Act in support of SNWA's chosen definition, but neither of those laws have any relationship to SNWA's chosen standard preventing basin-wide extirpation of species and habitats, and the State Engineer's record citations provide no support for that definition whatsoever. *See* SE AB at 43-44; *see also* ROA 053974-75 (SNWA Biology expert Zane Marshall testifying with regard to the definitions of unreasonable effects). Moreover, in contravention of standard adaptive management protocols, uncontroverted evidence shows that SNWA did not involve stakeholders with expertise necessary to establish definitions for unreasonable effects, like the State Engineer, Nevada Department of Wildlife, Federal Agencies, or affected Indian Tribes. ROA 045628, 055319-22.

Permitting harmful impacts that verge on but do not reach the complete elimination of a species or habitat is patently unsound and does not comply with any definition of the public interest used by any court or agency, including the State Engineer's Office. The State Engineer has defined the public interest to include the provisions of 533.370, which includes the

environmental soundness criterion of the interbasin transfer statute.[12] NRS 533.370(3)(c); *see* *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 918 P.2d 697, 700 (1996). The definition of environmental soundness was not discussed in either Ruling 6164 or 6446, but was discussed by the State Engineer in the first Spring Valley Ruling, Ruling 5726 in the context of water withdrawals from Owens Valley, California. The State Engineer, in Ruling 5726, stated that: "The State Engineer believes that the legislative intent of [the environmental soundness criterion] was to protect the natural resources of the basin of origin and prevent a repeat of the Owens Valley while at the same time allowing for responsible use of the available water resources by the citizens of Nevada." SE Ruling 5726, at 47 (Spring Valley 2007). The problem in Owens Valley was the direct result of the elimination of vegetation from the surface of the Valley as a result of water withdrawal. *See* ROA 025600-601, 025613-15. SNWA's proposed standard of allowing any impact short of complete basin-wide extirpation of vegetation is the type of impact the State Engineer envisioned when discussing the problem of Owens Valley in Ruling 5726. It is clear, then, under the State Engineer's own definition, which is referenced by SNWA in its Technical Analysis Report offered in support of its 3M Plans, ROA 043043, that SNWA's proposed definition of unreasonable effects falls far short of what the law requires. Thus, far from "moving the goalpost" or adopting a "scorched earth" mentality, *see* SE AB at 43,

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[12] Under that standard, unreasonable environmental effects include undue impacts on wildlife populations and habitat and on air quality that would harmfully affect human health and significant recreational and aesthetic values in the affected areas as a result of the drawdown of groundwater tables and spring flows in both the basins of origin and those basins that are hydrologically connected and downgradient from the basins of origin. *See* SE Ruling No. 5726, at 37-43; SE Ruling No. 5875, at 23-25 (2008), available at http://images.water.nv.gov/images/rulings/5875r.pdf.

WPC's argument simply exposes a severe and fundamental flaw in the 3M Plans that renders them inadequate at the most basic level and unable to ensure even a minimally reasonable level of environmental protection.

SNWA's refusal to include a sufficiently protective definition of unreasonable effects is reflective of the fact that SNWA understands that absent a 3M Plan its proposed pipeline project would indeed cause the level of the unreasonable effects it has defined and does not wish to be held to a more protective standard. If SNWA truly believed that its pipeline project would not cause significant environmental harms, and if it truly believed that it could manage the basins in an environmentally responsible way, SNWA would have chosen a more reasonable definition of unreasonable effects that would comply with Nevada law. Instead it chose to set the definition of unreasonable effects at a level that would permit its project to devastate the area of impact while only propping up certain special status species at a limited number of specified locations. *See* ROA 053044-45.

C. The Monitoring Network Arbitrarily Chosen By SNWA Is Not Supported By Substantial Evidence in the Record

Consistent with the approach taken in the rest of its Answering Brief, SNWA again launches an aggressive attack on WPC for exposing the basic and obvious fact that SNWA's monitoring approach is not supported by substantial evidence in the record. However, beyond these ad hominem attacks, SNWA and the State Engineer do not counter WPC's point that without evidence that SNWA's monitoring network is based on a localized conceptual flow model, the State Engineer is without evidence necessary to assess its potential effectiveness at detecting drawdown. *See* ROA 049613, 049615, 049616, 055537-39; 055543-48, 055589-90,

055596, 055637-38. In response to WPC's argument, SNWA references no conceptual flow analysis justifying the siting of its wells, because no such analysis was introduced into the record. ROA 055543 (pointing out that SNWA did not use a model to site monitoring wells). This failure to introduce evidence that siting of monitoring wells was based on a conceptual flow path model or analysis is especially alarming given SNWA's hydrology expert's admission on direct examination that "monitoring needs to be representative of the primary flow path that water moves through." ROA 054322. While the State Engineer acknowledges protestants' point that monitoring wells will detect drawdown only if located in the correct flow path, and his Answering Brief references numerous record citations he alleges support his finding as to the adequacy of SNWA's chosen monitoring sites, none of these citations includes the use of a conceptual flow path model, and the listed citations consist only of conclusory or irrelevant statements by SNWA experts, surface maps of SNWA monitoring well locations, and conclusory unsupported statements of the State Engineer in Ruling 6446 that a particular location is proper. *See* SE AB at 46. Thus, the State Engineer's Answering Brief makes WPC's point. As a result of SNWA's failure to tie its monitoring well locations to a localized conceptual flow model, the State Engineer did not base his approval of the monitoring well locations on any analysis of whether the monitoring wells were sited in proper relation to groundwater flow paths in the affected basins. Moreover, evidence in the record introduced by protestants indicates that the chosen locations likely are not sufficient to intercept flow paths in the project area. ROA 049613-20, 049635, 055642; *see also* ROA 024713; WPC OB at 93. Therefore, the State Engineer in Ruling 6446 did not, and could not, rely on substantial evidence to support his

finding that the modeling regime proposed by SNWA would be effective or sufficient to detect drawdown caused by SNWA's pumping.

WPC does not dispute that conceptual flow models exist. However, their existence alone is insufficient, especially considering that they were introduced into the record during the 2011 hearing for an entirely different purpose and that there is no evidence that monitoring well locations in SNWA's current 3M Plans are connected to them in any way. Without introduction into the record of evidence demonstrating that the monitoring well locations chosen by SNWA are based on or tied to a conceptual flow model of the area, or in other words, are located in modeled flow paths and designed to effectively detect drawdown, the State Engineer is without substantial evidence in the record to support a finding that the monitoring well location is sufficient and any finding is arbitrary. Additionally, Ruling 6446 contains no reference to any such evaluation by either SNWA or the State Engineer. The State Engineer's failure, in Ruling 6446, to evaluate whether, or make a finding that, the monitoring well locations are tied to the modeled flow paths in the area renders the approval of the monitoring well locations unsupported by substantial, or any, evidence in the record.

D. SNWA's Reliance on Mitigation Measures to Protect Senior Water Rights as a Substitute for Providing Appropriately Targeted and Resource Specific Protection for Groundwater-Dependent Habitat Is Not Supported by Substantial Evidence in the Record or an Analysis of Feasibility or Effectiveness

SNWA attacks WPC for allegedly "mislead[ing] this Court" in the context of WPC's argument that there is no evidence in the record to support the 3M Plans' approach to protecting environmental resources by protecting nearby water rights, but SNWA does not point to any evidence in the record that supports the effectiveness of this approach or otherwise rebuts WPC's

critique. *See* SNWA AB at 14-15. Instead, SNWA alludes to, but does not cite, "hundreds of pages of evidence" considered by the State Engineer and the testimony of SNWA's witnesses in general. SNWA AB at 15. However, none of that evidence contained an evaluation of the feasibility or effectiveness of such an approach, but rather only established the mere existence of a number of water rights in the drawdown area that support mesic habitat. ROA 039011. The State Engineer's findings with regard to effectiveness were unsupported by substantial evidence as they relied on SNWA's own conclusory statements that the approach would be effective, which statements were not backed up by any analysis or evidence whatsoever. *See id.*; *see also* ROA 043191. If the evidence justifying, and supporting the effectiveness of, SNWA's proposal to protect environmental resources indirectly by protecting nearby existing water rights were in the record, SNWA and the State Engineer would have and should have cited to it. They did not, and WPC has reviewed the record and found no such evidence. The truth is that there is no evidence in the record beyond the conclusory statements of SNWA's witnesses to support a finding that SNWA's approach to the protection of these environmental resources will be effective, and SNWA performed no evaluation of whether such an approach would be appropriate or effective. In fact, protestants introduced evidence into the record indicating that the protection of nearby existing water rights as a substitute for direct protection of the ecosystems in the same area is a flawed approach. ROA 053044, 055540-41; *see also* ROA 049165, 049167-77. Because SNWA's reliance on mitigation of existing water rights to protect groundwater dependent habitat is unsupported by any evidence that it would be effective, there was no substantial evidence to support the SE's finding that SNWA's approach would be effective. *See also* WPC OB at 98-99.

Both SNWA and the State Engineer endorse protection of co-located ecosystems by virtue of mitigation of impacts to existing water rights based on nothing more than evidence of the ecosystems' proximity to existing rights. While it is true that SNWA presented evidence of co-location as a basis for this approach, that fact alone is insufficient to demonstrate the approach's effectiveness or justify the State Engineer's approval of that approach. Specifically, there is no evidence in the record showing that the mitigation of existing rights will be effective at preventing unreasonable impacts to environmental resources in the same area of the existing right. This flaw is especially problematic in light of the fact that SNWA has not introduced evidence of what mitigation measures will be used to mitigate conflicts with existing rights at particular locations, but has included only a list of potential mitigation options. For example, SNWA includes the possibility of simply deepening wells, which would not, by itself, mitigate the loss of groundwater on which many ecosystems in the area of impact depend. Apart from WPC's criticisms of such an approach, the fact that SNWA presented absolutely no analysis of whether or how such an approach would be effective means that there simply is no substantial evidence in the record to justify the approach or support the State Engineer's approval of the 3M Plans' reliance on this approach to protection of environmental resources.

E. SNWA's Approach to So-Called Investigation and Mitigation Triggers In Its 3M Plans Is Not Based on a Modeled Impacts Analysis That Could Be Used to Quantify Appropriate Thresholds or Evaluate Their Potential Effectiveness

Despite the Court's holding that"[g]ranting water to SNWA is premature without knowing the impacts to existing water right holders," ROA 039063, SNWA chose on remand to present no localized impacts analysis, and there is no evidence in the record that the 3M Plan is

based on or responsive to any such impacts analysis. ROA 053034. In fact, the only impacts evidence introduced into the record by SNWA during the State Engineer's 2011 Rehearing was regional in scale and thus insufficient to make a determination about the character of impacts to particular water rights holders or environmental resources or to guide the development of a 3M Plan. ROA 034300. As such, the deficiency identified by the *Remand Decision* has not been cured. There still is no site-specific information to determine what the specific impacts to existing water rights owners or environmental resources will be, so the Court is left with only the broad, basin scale modeling in the record from 2011, which confirms that as a general matter impacts will be severe.

Despite the fact that it is standard practice to set triggers and thresholds based on modeled impacts and system response, ROA 055549-50, instead of using a model to develop its triggers, SNWA developed its plans in a vacuum, based on current conditions and without regard to the severity and character of the predicted impacts of its pumping project or how the system might respond to various management or mitigation actions.[13] It did not base its water rights

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[13] Contrary to the State Engineer's claims, SE AB at 50, WPC does not challenge the use of resource-based triggers or of a modeled baseline. In fact, the proper non-biased use of both in conjunction with a groundwater conflicts analysis is appropriate to ensure the effectiveness of a 3M Plan. It is the failure of SNWA's modeled baseline to take into account seasonality and the failure to include the underlying data supporting that baseline in the record, *see, infra,* Argument Section IV(F), and the failure of the 3M Plan or supporting documentation to assess the appropriateness of chosen triggers by modeling the system response, which necessarily includes an understanding of what localized impacts are predicted to occur and how they would respond to mitigation, that is problematic. SNWA and the State Engineer simply assume that mitigation of any and all impacts that might occur would be both feasible and effective without any assessment of whether or not the chosen triggers or mitigation options would ensure that to be

management categories or its triggers on any evidence of predicted impacts or conflicts analysis and, perhaps most importantly, did not base its triggers on a model to show whether those triggers and associated mitigation actions would work and would actually protect existing rights and environmental resources. The "lack of a site-specific effect analysis eliminates a quantification of mitigation that can be expected to avoid conflict with senior water right holders." ROA 053050. In other words, without such an analysis, it is not possible to evaluate what kind and how much mitigation will be necessary and whether the 3M Plans would provide feasible or effective mitigation. *See* ROA 055549-50. As a consequence, the record contains no such evaluation. *See, infra*, Argument Section IV(H). As explained above, SNWA had the opportunity to, and was on notice that it must, engage in such analysis, and that it in fact is required to conduct such an analysis by the BLM prior to pumping.[14] *See, supra*, Argument Section IV(A). So, far from "setting an impossible standard" as suggested by the State Engineer, WPC and other protestants simply seek to hold SNWA to the recognized industry standards and the law to ensure that existing rights and the public interest will be adequately protected.

SNWA's approach to investigation triggers exposes the problem associated with setting triggers independent of predicted effects. As pointed out by CTGR experts Stetson Engineers,

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the case. This assumption is unsupported by any, much less, substantial evidence. Protestants do not argue for a modeled approach in lieu of a resource based approach. Both approaches are critical to an effective mitigation plan. SNWA has done half the necessary work and has merely assumed that the other half will follow. SNWA's attempted misrepresentation of WPC's position should not be entertained by the Court.

[14] Thus, SNWA's repeated argument during these proceedings that site-specific modeling is not possible is simply not credible and amounts to nothing more than an attempt by SNWA to evade its duty to critically evaluate and address the conflicts its project would cause.

"An investigation trigger established from the baseline data [rather than informed by the predicted impact] provides no value, since the predicted drawdown is already expected to be 50 feet. In a well that may only be 50 feet in depth, we can only conclude that the mitigation trigger would also be exceeded, given the level of analysis in the TAR and the programmatic modeling." *See* ROA 053047. In other words, given the predicted drawdown in Spring Valley, this scenario is not only possible, it is likely. Because investigation triggers were not set based on predicted impacts, the triggers are completely disconnected from those impacts, undercutting SNWA's and the State Engineer's argument that investigation triggers are designed to provide conservative protection, and underscoring why it is necessary to set triggers based not only on current conditions but also on predicted impacts and potential response of the resource to management and mitigation actions.

SNWA's mitigation triggers suffer from the same deficiency as its investigation triggers. While SNWA has argued that it has set its mitigation triggers adequately at ten percent above the permitted right for spring flow and ten feet or ten percent above the permitted right for groundwater rights, SNWA AB at 14, there is no evidence that this choice was anything but arbitrary. Specifically, there is no evidence that the trigger values SNWA has chosen actually will enable effective mitigation in a timely fashion, because SNWA did not base those triggers on any impacts analysis or model. ROA 055548-50. In fact SNWA didn't even consider system response to mitigation, but simply assumed that mitigation would be effective regardless of the impacts or system response to mitigation. *See id.* There is no evidence in the record that the numbers chosen by SNWA were based on a model or any other sort of analysis which could be used to evaluate the effectiveness or appropriateness of the numbers chosen by SNWA. *Id.* In

effect, SNWA appears to have pulled those numbers out of a hat, relying on its own conclusory statement that they are conservative. Neither SNWA nor the State Engineer knows how much water will be necessary to mitigate impacts that accrue when those triggers are reached or how long the system will take to respond once mitigation actions are initiated when a trigger is reached. So, it is impossible to determine whether actions initiated when mitigation triggers are reached would be timely and effective at preventing unreasonable effects. Consequently, any finding that such a buffer would be effective is unsupported by substantial evidence because SNWA presented no evidence to support its choice of those trigger values.

F. SNWA's Investigation Triggers Are Both Unsupported by Substantial Evidence and Unenforceable, and Thus Are Largely Irrelevant to a Determination of Effectiveness

Both SNWA and the State Engineer focus on the investigation triggers contained in the 3M Plans as supposedly conservative protections that support approval of the 3M Plans. But as explained in WPC's Opening Brief, despite the high likelihood that SNWA pumping would be the cause of drawdown sufficient to reach an investigation trigger, ROA 049624, these triggers require only an investigation into the cause of drawdown and do not provide any guarantee or assurance that any action at all will be taken to mitigate impacts when they are detected. *See generally*, ROA 43011-43496, 047940, 048081, 055641. SNWA is not required to conduct any mitigation until a mitigation trigger is reached. WPC OB at 101; *see also* SE AB at 47.

The fact that significant drawdown could be permitted to occur between the time that an investigation trigger is reached and a mitigation trigger is reached, *see* SNWA AB at 11 (providing an investigation trigger example which would permit 45 feet of drawdown between the investigation trigger and the mitigation trigger), is problematic, especially when lag time

associated with mitigation is considered, which SNWA, by failing to base its triggers on an impacts analysis or modeled system response to mitigation, did not even consider. Essentially, the investigation triggers in SNWA's 3M Plans serve as a delay tactic to avoid immediate initiation of management or mitigation actions once impacts are detected.

In an inadvertent recognition of the fact that his reliance on investigation triggers is misplaced, the State Engineer concedes that an evaluation of the investigation triggers is irrelevant to the adequacy of the 3M Plans. SE AB at 54. The State Engineer can't have it both ways. It is inconsistent to argue on the one hand that unreasonable effects and mitigation triggers shouldn't be the focus of the Court because the Plans contain other supposedly more protective investigation triggers, but then on the other hand confirm that those supposedly more protective investigation triggers actually are irrelevant to an evaluation of the effectiveness and adequacy of the 3M Plans. Reliance on investigation triggers and other discretionary actions as a substitute for meaningful enforceable effective and mandatory management and mitigation is insufficient under the Nevada Supreme Court's decision in the *Eureka County* case. *Eureka County*, 131 Nev. at 855, 359 P.3d at 1120.

SNWA's reliance on its investigation triggers is especially problematic in light of the deficiencies associated with the statistically derived baseline on which those triggers are based. At the outset, it is important to remember that there is absolutely no reason that SNWA could not have adopted a resource-based approach similar to that used for its mitigation triggers, and SNWA has provided no justification for the difference in approach or explanation regarding why such an approach is appropriate. However, even beyond that internal inconsistency in the Plans and regardless of whether a modeled baseline is appropriate, SNWA's application of its

Seasonally Adjusted Linear Regression ("SALR") method is flawed and likely has resulted in an artificially declining baseline that will mask impacts caused by SNWA's pumping and could ensure that an investigation trigger is artificially delayed or never reached despite a declining water table due to SNWA's pumping. *See* WPC OB at 95-96. SNWA provides no scientific explanation for this decreasing baseline. SNWA AB at 18-20. As explained by WPC hydrology expert Dr. Tom Myers, the SALR method is a simple equation which calculates a line through data chosen by SNWA to come up with a baseline. *See* ROA at 055576-79. As such, it is no surprise and the State Engineer is correct that Dr. Myers testified that the use of the SALR method in itself to derive a baseline is reasonable. *See* SE AB at 49 (citing ROA 055579). However, in the case of SNWA's 3M Plans, Dr. Myers also pointed out that as a result of SNWA's failure to account for seasonality, i.e., wet and dry events, it appears that the underlying dataset chosen by SNWA likely has biased the SALR-derived baseline such that it is in continual decline, rather than a more reasonable flat line, which might be expected. ROA 055579-81, 055856-58. In other words, because seasonality isn't accounted for, a wet period at the beginning of the dataset may artificially create a declining slope from that point downward to data depicting more normal, drier years. *Id.* Had SNWA accounted for seasonality, its baseline likely would have been flat. *Id.* Specifically, it is the underlying dataset that SNWA chose which biases the SALR-derived baseline. SNWA could have employed a standard technique to remove that bias, but it refused to do so.

Neither SNWA nor the State Engineer has provided an explanation for this failure to account for seasonality, which likely resulted in the biased baseline. Rather, both simply state that the SALR method itself is sound and moreover, that protestants have not even seen the

dataset. SE AB at 48. However, the fact that protestants have not seen the dataset is the very reason that the State Engineer's findings with regard to the SALR derived baseline is arbitrary and capricious. The protestants have not seen the dataset because the information regarding what data was input into the SALR equation is not in the record. So, just as protestants were unable to adequately evaluate that dataset and whether it results in a biased baseline, so too was the State Engineer unable to make a rational evaluation of the baseline's adequacy or appropriateness. It is not WPC's contention that the baseline must be flat, but that the necessary data to evaluate whether the baseline adequately represents current conditions is not available for assessment by either protestants or the State Engineer. Thus, the State Engineer is without information to evaluate whether the declining baseline is reasonable.[15] Because SNWA's investigation triggers do not force action, and because they likely will detect project-induced drawdown in an artificially delayed manner, the investigation triggers are largely irrelevant to the determination of whether SNWA's 3M Plans are adequate at preventing conflicts with existing rights and impermissible environmental impacts.

G. SNWA's Menu of Potential Mitigation Actions Is Insufficient Under the Nevada Supreme Court's *Eureka County* Decision

The Nevada Supreme Court in the *Eureka County* case held that "the State Engineer's decision to grant an application, which requires a determination that the proposed use or change

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[15] Again, the State Engineer has confused the burden of proof at the administrative level. SE AB at 48. It was not protestants' burden to demonstrate that the baseline is not adequate in the absence of substantial evidence supporting it. It was SNWA's burden to introduce substantial evidence justifying its 3M program, including its baseline. That it did not do, as the data is not in the record.

would not conflict with existing rights, NRS 533.370(2), must be made upon presently known substantial evidence, rather than information to be determined in the future." *Eureka County*, 131 Nev. at 855, 359 P.3d at 1120. In that case, the Court noted that "[w]hile KVR's experts testified as to the existence of a few possible mitigation techniques, they did not specify what techniques would work, much less techniques that could be implemented to mitigate the conflict with the existing rights in this particular case." *Eureka County*, 131 Nev. at 853, 359 P.3d at 1119. While the *Eureka County* case differed in its particulars from this case, the concern articulated by the Court in that case is the same. A simple laundry list of potential mitigation options, without a demonstration of feasibility or modeling evidence demonstrating which of the listed potential actions would be effective in particular instances, is insufficient to support a finding that the 3M Plan would be effective at preventing conflicts with existing rights or impermissible impacts to the environment.[16]

Like SNWA's investigation and mitigation triggers, its list of potential mitigation actions is deficient because those potential mitigation actions are not based on any modeling of impacts or the system's response to mitigation. The State Engineer concedes that SNWA's approach to potential mitigation actions amounts to a simple menu of options. SE AB at 51. Because

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[16] SNWA suggests that WPC misunderstands the 3M Plans and that SNWA's laundry list of mitigation options is sufficient because any number of the listed mitigation options would be effective, the insinuation being that it is not necessary to include in the plans an actual plan for mitigation. *See* SNWA AB at 22-23. However, SNWA provided no evidence of effectiveness for even one of its listed mitigation options. In effect, SNWA is suggesting that the mere inclusion of multiple options ensures that at least one of those options will be effective. That assumption is unsupported by any analysis or evidence whatsoever and constitutes nothing more than a simple hope.

SNWA has not evaluated which of the listed mitigation actions would be most appropriate given predicted impacts at impacted rights and resources, the list is nothing more than a set of options that have not been evaluated for potential effectiveness. As was the case in 2011, SNWA has provided a menu of options but has not presented a plan for how conflicts would be addressed when mitigation triggers are reached or any evidence regarding whether the chosen mitigation action would be effective. Additionally, SNWA's failure to provide an actual plan for mitigation once triggers are reached leaves that critical decisionmaking to the future when it will be exclusively in SNWA's hands and beyond any evaluation by protestants, which implicates the due process and substantial evidence concerns articulated by the Nevada Supreme Court in the *Eureka County* case.

Additionally, the mitigation measures listed by SNWA are of doubtful effectiveness. Specifically, SNWA's reliance on replacement water to mitigate conflicts and impacts is problematic for a number of reasons, some of which were explained by the Nevada Supreme Court in the *Eureka County* case. *Eureka County*, 131 Nev. at 854-55, 359 P.3d at 1119-20 (examining the problems associated with simply assuming the use of mitigation water will be feasible without making the demonstration). SNWA's citation to the State Engineer's finding that SNWA's existing water rights are sufficient to mitigate non-SNWA existing water rights impacted by SNWA's project is illustrative of the Supreme Court's concerns. Tellingly, SNWA and the State Engineer focus only on the existence of SNWA's rights in Spring Valley, and simply assume that because SNWA owns those rights and because they are located in Spring Valley, they could be used effectively for mitigation. *See* SNWA AB at 24; SE AB at 53-54; ROA 039003-04. However, the State Engineer did not evaluate: (1) the amount of water that

would be required; (2) whether those Spring Valley rights would be available in the amount required given that they would be impacted by the drawdown in the same manner as non-SNWA existing rights; (3) whether water from another source would be sufficient to mitigate impacts; or (4) whether delivery would be feasible.[17] Protestants presented testimony that the feasibility of using replacement water as a mitigation tool is doubtful for some of the same reasons highlighted by the Nevada Supreme Court in the *Eureka County* case. ROA 055585-86; *Eureka County*, 131 Nev. at 854-55, 359 P.3d at 1119-20. Given that the uncontroverted modeling predicts over 100 feet of drawdown at 50 to 100 existing water rights in the first 200 years alone, it is doubtful that replacement water using SNWA's existing water rights in Spring Valley would be feasible or effective. *See* ROA 049721. Apart from the issue of feasibility, and despite the fact that the BLM has required SNWA to provide evidence sufficient to support an analysis of mitigation action effectiveness, ROA 051304, SNWA presented no evidence whatsoever during the Remand Hearing evaluating the effectiveness of replacement water, or any other listed mitigation action, leaving the State Engineer without the evidence to make that evaluation or to support a finding with regard to conflicts with existing rights or the public interest. Thus, the State Engineer's conclusory finding that SNWA's proposed mitigation actions, including replacement water, would be effective at mitigating conflicts with existing rights and impermissible

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[17] SNWA attacks this assertion as untrue. However, SNWA points to no evidence in the record countering WPC's assertion, and given that triggers and mitigation are not based on a conflicts analysis, it is impossible to know how much mitigation water will be needed. Moreover, the plans include no reference to the amount of water that will be required for mitigation of conflicts. Accordingly, SNWA's claim is devoid of any support in the record.

environmental impacts was not based on any evaluation of the feasibility or effectiveness of using those rights as mitigation, which renders that finding unsupported by substantial evidence.

H. SNWA's 3M Plans and Supporting Evidence Contain No Evaluation of Whether The Plans Would Be Effective at Avoiding Conflicts with Existing Rights and Impermissible Impacts to the Environment

As explained in WPC's Opening Brief, the most glaring deficiency in the State Engineer's approval of SNWA's 3M Plans is the State Engineer's finding that those plans would be effective in mitigating predicted conflicts and impermissible impacts, despite the fact that SNWA performed no analysis of and presented no evidence demonstrating the feasibility or effectiveness of its plans. Such an evaluation is necessary to support a finding that SNWA's applications will not cause conflicts with existing rights or impermissible impacts to the environment. *See Eureka County*, 131 Nev. at 850, 854-55, 359 P.3d at 1117, 119-20. While SNWA's 3M Report includes various conclusory statements that its 3M Plans will be effective, ROA 053040, 055583-8, SNWA introduced no actual evidence or analysis demonstrating this to be the case. Indeed, while SNWA attacks WPC for making this point, SNWA cites no evidence in its Answering Brief to support its conclusory claim that evidence demonstrates that its approach will be effective. *See* SNWA AB at 15, 16, 22. In fact, SNWA exposes this shortcoming in describing its understanding of effectiveness in its Answering Brief. SNWA AB at 23 (arguing that "the effectiveness of mitigation is ensured by the investigations that occur to determine the cause of an observed variation from the baseline condition long before mitigation is required."). SNWA's reliance on a future investigation designed to determine the cause of an impact after that impact has been observed is not sufficient for purposes of analyzing whether a

particular mitigation action would be effective at remedying that impact before the 3M Plans are approved. SNWA has performed no such analysis.

SNWA's citations to the conclusory and unsupported findings of the challenged State Engineer Ruling 6446, and to conclusory statements regarding effectiveness by its own witnesses, coupled with its misleading reliance excerpts of testimony under aggressive cross-examination of protestant experts is unavailing, especially in the absence of any effectiveness analysis whatsoever by SNWA and when compared with the testimony of protestant experts on direct, which uniformly demonstrates that SNWA's approach is unlikely to be effective.[18] *See* SNWA AB at 23; ROA 055558, 055560, 055585-86. If there actually were evidence of such effectiveness, SNWA's Answering Brief would have cited to it. The truth is that there is none, and SNWA's only retort was to make unsupported, conclusory statements that the evidence exists. *See* SNWA AB at 14-15.

While the State Engineer cites his own conclusory finding in Ruling 6446 to support an argument that SNWA introduced evidence demonstrating "why mitigation actions will be effective," SE AB at 39, he inadvertently acknowledges that no such effectiveness analysis was

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[18] Throughout their Answering Briefs, as a catchall, both SNWA and the State Engineer rely on the State Engineer's ability to step in at any time, essentially suggesting that even if the Court finds that the 3M Plans are insufficient to prevent conflicts with existing rights and impermissible impacts to the environment, the State Engineer can require additional mitigation when necessary. *See* SE AB at 46, 49, 53, 55; SNWA AB at 10, 16, 22. That possibility is irrelevant to the Court's review, as such an approach does not comply with the Nevada Supreme Court's decision in *Eureka County*, which held that "the State Engineer's decision to grant an application, which requires a determination that the proposed use or change would not conflict with existing rights, NRS 533.370(2), must be made upon presently known substantial evidence, rather than information to be determined in the future." *Eureka County*, 131 Nev. at 855, 359 P.3d at 1120.

performed or introduced into the record in his recognition that feasibility analyses will not be conducted for existing water rights until after permitting and in some cases not until pumping already has caused an impact. *See* SE AB at 53. Because there is no evidence in the record demonstrating the feasibility of mitigation for existing water rights, by definition, the State Engineer's determination that those plans will be effective at mitigating conflicts and impermissible environmental impacts is unsupported by substantial evidence in the record. This scenario is precisely what the holding of the *Eureka County* case prohibits. The State Engineer's acknowledgment on the one hand that no feasibility analysis has been performed for SNWA's proposed mitigation measures, and his conclusory finding on the other hand that SNWA's laundry list of mitigation measures would be effective, is arbitrary and capricious, unsupported by substantial evidence, and inconsistent with the Nevada Supreme Court's holding in *Eureka County v. State Engineer*. As explained, *supra*, while the State Engineer "may use his experience to inform his decision making, his decisions must be supported by substantial evidence in the record before him" and his findings "must be sufficiently explained and supported to allow for judicial review." *Eureka County*, 131 Nev. at 856, 359 P.3d at 1120-21. Accordingly, SNWA's repeated citations to the State Engineer's unsupported findings with regard to effectiveness and other statutory criteria are unavailing.

Despite SNWA's consistent refusal to do so, SNWA could have and should have modeled impacts at a local level, modeled responsiveness of those impacts to mitigation, set triggers using both modeling and resource-based information, and introduced an effectiveness analysis into the record. SNWA and the were on notice that such an analysis was required after this Court's *Remand Decision* and the Supreme Court's 2015 decision in *Eureka County v. State*

Engineer. Such an approach also is common practice, which is confirmed by the fact that the BLM has required SNWA to do just that in the development of its mitigation plan at the federal level. *See* ROA 051304 (noting that the "basin-specific models would be developed and approved by the BLM prior to BLM's NEPA review of specific groundwater development activities proposed by the SNWA" and would be used "to critically evaluate the effectiveness of the proposed mitigation measures, ACMs, and other proposed adaptive management processes"); *see also* ROA 053042. SNWA chose not to provide such an analysis, not because it was infeasible to do so, but likely because SNWA's project is not amenable to effective mitigation due to the massive scale and devastating nature of its predicted impacts over a vast area of eastern Nevada and western Utah. SNWA presented volumes of evidence and has spent untold quantities of money over a thirty year period in support of its pending applications. Its failure to present this obviously critical evidence is consistent with its persistent approach in this case of introducing voluminous amounts of evidence designed not to assist the State Engineer in evaluating its project but to mask the real problems associated with that project. This blatant failure to perform the clearly required feasibility or effectiveness analysis is especially problematic in the context of the other deficiencies in SNWA's 3M approach described above, and all but guarantees that SNWA's 3M Plans will not be adequate or effective but rather would permit the impacts all models predict would occur in violation of Nevada law.

SNWA, in its Answering Brief, loosely and inaccurately cites to the practice governing the use of mitigation measures in Idaho in support of its argument that simply providing a list of

potential mitigation actions is sufficient to demonstrate that the plans would be effective.[19] SNWA AB at 23. However, Idaho law merely confirms WPC's argument. First, SNWA is wrong that Idaho requires nothing more than a simple list of potential mitigation actions to support a finding of effectiveness. Like Nevada, at the permitting stage of an application Idaho requires that a mitigation plan be supported by technical analysis or modeling demonstrating the effectiveness of the plan. Memorandum, Evaluation of Mitigation Plans for Water Right Permits, Application Processing Memo # 72, Idaho Department of Water Resources (Nov. 4, 2015), available at https://idwr.idaho.gov/files/water-rights/application-process-72-evaluation-of-

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[19] SNWA inaccurately presents Idaho law by relying on the standard governing mitigation plans used in the context of priority calls, found under Idaho's conjunctive management regulations, which are distinct from requirements for mitigation plans in the context the approval of water rights applications in Idaho. *Compare* IDAPA 37.03.11 (the focus of the case cited by SNWA), *with* IDAPA 37.03.08 (water appropriation rules); *see also* Memorandum, Evaluation of Mitigation Plans for Water Right Permits, Application Processing Memo # 72, Idaho Department of Water Resources (Nov. 4, 2015) (making the distinction between mitigation plans under the conjunctive management regulations and at the permitting stage of an application); IDAPA 37.03.08.002 (authorizing written interpretations of IDAPA 37.03.08). Moreover, SNWA's plans do not even meet the criteria referenced in the Idaho priority call case cited by SNWA. SNWA's 3M Plans do not include information about how the replacement water would be provided and from what source for impacts to water rights that SNWA will need to mitigate, nor do they provide for contingency planning should particular forms of mitigation be unavailable. *See In re Dist. of Water to Various Water Rights Held by or for Benefit of A & B Irrigation Dist.*, 315 P.3d 828, 842 (Idaho 2013); *see also* IDAPA 37.03.11.043.03 (listing criteria for priority call mitigation plans).
By the same token, SNWA's citations to California case law is equally unavailing as California's water law is dissimilar to Nevada's, and, in any event, the California case law cited by SNWA is not even on point and does not support SNWA's position. *See* SNWA AB at 23. The actual relevant example of an analogous California mitigation plan is the one used to mitigate the impacts caused by water withdrawals in Owens Valley, a project with many similarities to this one. ROA 028097-256. SNWA's 3M Plans clearly do not comply with the approach taken in that plan. *See* ROA 055548 (noting that modeling of impacts and response to mitigation was used in setting triggers in Owens Valley).

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mitigation-plans-for-water-right-permits.pdf. Additionally, Idaho requires information regarding the timing, location, and quantity of depletions caused by the new appropriation, or in other words the site-specific impacts analysis that SNWA has refused to provide in this case. *See id.*; IDAPA 37.03.08. Finally, a modeled analysis of the effectiveness of the plan is required. Memorandum, Evaluation of Mitigation Plans for Water Right Permits, Application Processing Memo # 72, Idaho Department of Water Resources. Thus, SNWA's inaccurate citation to the approach taken in Idaho, *see* n. 19, *supra*, does nothing more than confirm that an effectiveness analysis based on local scale modeled impacts and modeled system response to mitigation are necessary prerequisites to the approval of a 3M Plan.

As the State Engineer has confirmed, no feasibility or effectiveness analysis has been performed for SNWA's mitigation plan. Indeed, no effectiveness analysis would have been possible given that SNWA refused to perform a localized effects analysis. This failure to introduce even a scintilla of evidence into the record evaluating what conflicts and impacts are predicted to be at a localized scale and whether chosen mitigation strategies would be feasible or effective at mitigating those predicted conflicts and impacts deprived the State Engineer of substantial evidence required to support the approval of SNWA's 3M Plans. Consequently, the State Engineer's approval of those plans is unsupported by substantial evidence and is arbitrary and capricious.

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons and for the reasons articulated in their Opening and Answering Briefs, 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 export of water would be environmentally sound as it relates to the basins of origin; and

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

Respectfully submitted this 27th day of August, 2019,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of August, 2019, I served, via email, a complete copy of the foregoing **PETITIONERS WHITE PINE COUNTY, ET AL. REPLY BRIEF** addressed as follows.

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