

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioner,

vs.

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

Respondents.

and

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

Case No. _____

Electronically Filed
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Related to Supreme Court Case
No. 64815 Tracie K. Lindeman
Clerk of Supreme Court
District Court Case No. CV-1204049
Consolidated with

CV-1204050
CV-1204051
CV-1204052
CV-1205053
CV-1204054
CV-1204055
CV-0418012
CV-0419012

PETITION FOR WRIT OF
MANDAMUS

CHAMBER OF COMMERCE;
NEVADA FARM BUREAU; N-4
STATE GRAZING BOARD; BAKER
RANCHES, INC.; BATH LUMBER;
PANACA FARMSTEAD
ASSOCIATION; BORDER INN;
PEARSON FARMS; RAFTER LAZY C
RANCH; SPORTSWORLD;
PROGRESSIVE LEADERSHIP
ALLIANCE OF NEVADA; LEAGUE
OF WOMEN VOTERS OF SALT
LAKE CITY; UTAH AUDUBON
COUNCIL; UTAH PHYSICIANS FOR
A HEALTHY ENVIRONMENT; POST
CARBON SALT LAKE; UTAH
RIVERS COUNCIL; BRISTLECONE
ALLIANCE; CITIZENS EDUCATION
PROJECT; INDIAN SPRINGS CIVIC
ASSOCIATION; SCHOOL OF THE
NATURAL ORDER; VAUGHN M.
HIGBEE & SONS; ARMANDO
AGUILEW; CHRIS ADLER; BART
ANDERSON; AMY ASPERHEIM;
MICHELE AUSTRIA; DAVID A. AND
TANA R. BAKER, individually and on
behalf of their minor child, CLAYTON
F. BAKER; DEAN & BARBARA
BAKER; TOM & JANILLE BAKER,
individually and on behalf of their
minor children, ALYSHIA, CALEB,
MEGAN & KAYLI BAKER; JERALD
BATES; JAMES & DONNA BATH;
SHANNON BARKER; CHRISTIA
BARLOW; MARGARET BARLOW;
RICHARD A. BARR; BRIAN
BEACHER; ELIZABETH BEDELL;
CYNTHIA LEE BELL; "ROBIN"
EDWARD JOHN BELL III; LOUIS
BENEZET; KATHY BINGLEY;
MICHAEL BIVINS; GARY BODELL;
SEAN BONNELL; BOBBY
BONNELL; LUKE BOTTCHE; JOHN
BOWMAN; D. DANE BRADFIELD;
JAMES E. BRADY; ANN & JIM

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

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

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

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

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

Real Parties in Interest.

PETITION FOR WRIT OF MANDAMUS

CATHERINE CORTEZ MASTO
Nevada Attorney General
CASSANDRA P. JOSEPH
Senior Deputy Attorney General
Nevada State Bar # 9845
JERRY M. SNYDER
Senior Deputy Attorney General
Nevada State Bar # 6830
100 N. Carson Street
Carson City, Nevada 89701
(775) 684-1216
cjoseph@ag.nv.gov
jsnyder@ag.nv.gov

PETITION FOR WRIT OF MANDAMUS

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

First, whether the State Engineer’s practice of calculating the amount of water available for appropriation from a groundwater basin based on total basin evapotranspiration¹ (“ET”) is arbitrary and capricious, and whether the State Engineer is required to show that the groundwater basin will reach equilibrium within a given period of time in order to grant a water right?

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

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

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

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

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

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

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Cassandra P. Joseph
CASSANDRA P. JOSEPH
Senior Deputy Attorney General
Nevada State Bar # 9845
JERRY M. SNYDER
Senior Deputy Attorney General
Nevada State Bar # 6830
100 N. Carson Street
Carson City, Nevada 89701
(775) 684-1216
(775) 684-1103 fax
cjoseph@ag.nv.gov
jsnyder@ag.nv.gov
*Attorneys for Petitioner
Nevada State Engineer*

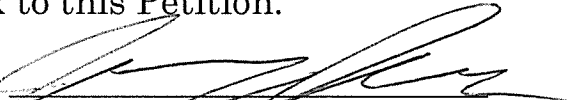
VERIFICATION

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

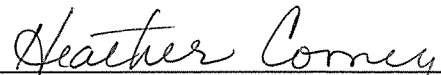
2. This verification is made by me pursuant to NRS 15.010, NRS 34.030, NRS 34.170, and NRS 34.300, rather than the Nevada State Engineer because the facts relevant to this Petition for Writ of Mandamus are within my knowledge as the State Engineer's attorney.

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

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


Jerry M. Snyder

SUBSCRIBED and SWORN to before
me this 29th day of May, 2014.



Notary Public

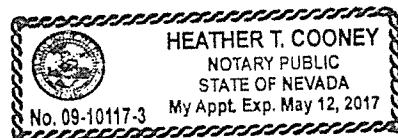


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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

II. ISSUES PRESENTED

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

III. STATEMENT OF FACTS

A. Summary of Past Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Summary of Facts Relating to the 3M Plans

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

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

1. **Monitoring**

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

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

2. Management

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

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

3. Mitigation

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

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

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

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

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

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

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

IV. LEGAL ARGUMENT

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

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

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

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

1. Standard of Review

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

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

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

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

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

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

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

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

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

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

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

Indeed, CPB, while arguing that the matter is not appealable, has also asserted that certain issues raised by the Decision should be decided through a writ in order to "avoid waste of substantial time, effort, and expense in additional state administrative and judicial proceedings." CPB's April 14, 2014 Petition for Limited Writ Review at 10. CPB requests writ review of a limited issue—whether the District Court properly allowed staged development of the approved water permit under NRS 533.3705.³ However, the reasoning used in CPB's Petition—that writ review would conserve judicial resources and avoid piecemeal litigation—apply to the issues raised in the State Engineer's Petition as well. In order to avoid piecemeal litigation and to avoid

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

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

4. This Case Presents Important Legal Issues That Need Clarification

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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V. CONCLUSION

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

RESPECTFULLY SUBMITTED this 29th day of May, 2014.

CATHERINE CORTEZ MASTO
Nevada Attorney General

By: /s/ Cassandra P. Joseph
CASSANDRA P. JOSEPH
Senior Deputy Attorney General
Nevada State Bar # 9845
JERRY M. SNYDER
Senior Deputy Attorney General
Nevada State Bar # 6830
100 N. Carson Street
Carson City, Nevada 89701
(775) 684-1216
(775) 684-1103 fax
cjoseph@ag.nv.gov
jsnyder@ag.nv.gov
*Attorneys for Respondent
Nevada State Engineer*

CERTIFICATE OF COMPLIANCE

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

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

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

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

/s/ Cassandra P. Joseph
Cassandra P. Joseph

CERTIFICATE OF MAILING

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

Paul EchoHawk
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Paul Taggart
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I further certify that on the 29th day of May, 2014, I served, via United States Post Service first class mail, a copy of the foregoing **PETITION FOR WRIT OF MANDAMUS** on the following attorneys of record who are not registered for electronic service as follows:

Paul R. Hejmanowski, Esq.
LIONEL SAWYER & COLLINS
1700 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

J. Mark Ward
Utah Association of Counties
5397 South Vine Street
Murray, Utah 84107

/s/ Ginny Brownell
Ginny Brownell, an employee of the
Office of the Nevada Attorney General