IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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

With Supporting Points and Authorities

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NRAP 26.1 Disclosure

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

DATED this 2nd day of September, 2014,

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

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

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

RELEVANT FACTS

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

As part of a massive, unprecedented effort to acquire more water for greater Las Vegas, the Las Vegas Valley Water District ("LVVWD") filed 146 applications with the Nevada State Engineer on October 17, 1989, to pump approximately 800,000 acre-feet per year (acre-ft/yr) of groundwater from twenty-six rural basins in eastern, central and southern Nevada. 8 White Pine County, et al. Appendix at WPC_0634 (hereinafter X App. at WPC_XXX).[2] In response, over 800 individual protests were filed, many of which were filed by Real Parties in Interest in this case. *See* http://water.nv.gov/data/permit/.[3] Subsequently, the quantity of groundwater sought was reduced to approximately 190,000 acre-ft/yr in seventeen basins. 8 App. at WPC_0634. For over a decade and a half the State Engineer took no action to adjudicate those applications and the protests thereto.

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[2] For consistency's sake, in this brief Respondents will use a similar citation form when citing to the Petitioners' appendices (e.g., __ SNWA App. at ___).
[3] Protests are listed on the State Engineer's website by application or permit number.

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

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

[4] The third prong of the proposed project, SNWA's water rights applications in Snake Valley, has not yet been set for a hearing by the State Engineer.
[5] *See* 1 SNWA App. at 000029; 1 SNWA App. at 000223; 2 SNWA App. at 000413; 3 SNWA App. at 000577. As part of its overall planned groundwater export project, SNWA has also applied for water from Three Lakes Valley and Tikapoo Valley, The State Engineer has already approved a portion of these

published perennial yields of the subject basins, in effect, increasing the amount of water available to SNWA for export. *See* 1 SNWA App. at 113; 4 App. at WPC_0772, Exhibit A, Order Vacating and Remanding State Engineer's Ruling, *Carter-Griffin v. Taylor*, CV-830008 (N.V. Dist. Ct., Oct. 19, 2009).

If approved, SNWA's applications would permit the development and export of groundwater from rural Nevada on a scale and quantity far in excess of any previous undertaking, requiring a vast and tremendously costly infrastructure of wells, pipelines, pumping stations, storage reservoirs, and power stations.[6] Indeed, SNWA's proposed project would be the biggest groundwater pumping project ever built in the United States. The BLM projects that SNWA's planned project would result in hundreds of feet of groundwater decline in the subject basins. 6 App. at WPC_01269-77. The potential economic, social, and environmental effects of this massive and unprecedented groundwater mining and export project are therefore of great local, state, regional, and national significance.

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

[6] SNWA applied to the BLM for a right of way to construct approximately 306 miles of pipeline up to 96 inches in diameter that would connect the water rights they are seeking in these and eventually Snake Valley and would deliver that water to the City of Las Vegas. 5 App. at WPC_1240; 5 App. at WPC_1244.

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

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

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

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

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

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

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

During the Spring Valley Hearing, SNWA presented steady state groundwater modeling evidence, or in other words a model of current conditions prior to pumping. 8 App. at WPC_1950-53. SNWA claimed that it could not present a model that would predict impacts given the limited availability of pumping data, despite the fact that in 2006 SNWA had already had almost 20 years to prepare for the Spring Valley Hearing. 8 App. at WPC_1952. However, it would come out later, during the State Engineer's 2008 Cave, Dry Lake, and Delamar Valleys hearing that SNWA had in fact produced, and had run actual predictions using, a predictive model, developed by their hydrologist Timothy Durbin, but chose not to present it during the Spring Valley Hearing. 9 App. at

WPC_2169-71. It is assumed that it was not presented because the predicted impacts were too extensive and devastating. *See* 8 App. at WPC_1952.

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

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

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

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

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

the Spring Valley Hearing, but was not permitted to present. *See* Nevada State Engineer Ruling No. 5875 at 20-21.[8] Hydrologist John D. Bredehoeft, PhD, also testified and presented evidence for protestants about Mr. Durbin's model and model runs. 9 App. at WPC_2169-86. And again during the 2008 hearing, SNWA attempted to evade presentation of true predictive hydrologic modeling evidence by inappropriately relying on simple theis equation analysis in lieu of a calibrated predictive groundwater model. *See* 9 App. at WPC_2165-68.

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

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

[8] http://images.water.nv.gov/images/rulings/5875r.pdf.

[9] http://images.water.nv.gov/images/rulings/5875r.pdf.

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

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

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

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

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

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

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

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

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

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

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

On May 11, 2011, the State Engineer held a prehearing conference on the SNWA Pipeline Project applications in Spring, Cave, Dry Lake, and Delamar Valleys, and scheduled a hearing on all of them for September 26, 2011, through November 18, 2011. 1 App. at WPC_0022. Many protestants participated in the six week long hearing, including White Pine County, Nevada, Great Basin Water Network, Millard County, Utah, Juab County, Utah, the Confederated Tribes of the Goshute Reservation, Duckwater Shoshone Tribe, Ely Shoshone Tribe, Eskdale Center, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints on behalf of Cleveland Ranch, the Long Now Foundation, Nye County, Nevada, Henry Vogler, and a broad coalition of hundreds of ranchers, farmers,

businesses, governmental or quasi-governmental entities, and nonprofit citizens organizations led by the Great Basin Water Network and White Pine County, many of whom are Real Parties in Interest in this case.[10] 1 App. at WPC_0017-18.

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

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

[10]The U.S. Forest Service signed a stipulated agreement with the Southern Nevada Water Authority dated September 15, 2011, in which the Forest Service agreed to withdraw its protests to SNWA's applications in the SCDD valleys. *See* 1 App. at WPC_0001-15. Prior to the 2011 hearing, the Department of the Interior agencies and SNWA decided that the stipulations signed prior to the 2006 Spring Valley Hearing and 2008 DDC Hearing would remain in force.

would have devastating hydrologic and biological impacts to vast areas of eastern Nevada and western Utah. 5 App. at WPC_1210-13; 10 App. at WPC_2317-30; 23 SNWA App. at 005002; 23 SNWA App. at 005049-5400; 25 SNWA App. at 005705 - 5707. Indeed, SNWA's model produces projections that are broadly strikingly similar to those produced by protestants' witness Dr. Myers' as well as other models. 10 App. at WPC_2317-30; 23 SNWA App. at 005144-5145; 25 SNWA App. at 005705-5707. The drawdown numbers are indeed alarming; the proposed pumping would lower the water table by hundreds of feet over a vast and continually expanding area, causing devastating environmental, social, and economic consequences in eastern Nevada and western Utah, and would foreclose the opportunity for future economic development in the target basins and communities in surrounding region that depend on these basins.

With regard to Spring Valley, the models all concur that there would be a significant magnitude of drawdown which would spread throughout the valley, eventually resulting in the drying up of springs and wetlands through most if not all of Spring Valley. 5 App. at WPC_1210-13; 6 App. at WPC_1485-87; 3 App. at WPC_00628; 10 App. at WPC_2317-30; 23 SNWA App. at 005144-5145; 25 SNWA App. at 005705-5707. The proposed pumping would amount to a devastating groundwater mining project, under which the groundwater system would not even begin to approach equilibrium for thousands of years, with the

potential of never reaching equilibrium. *See* 4 App. at WPC_0771-73; 10 App. at WPC_ 2317-30; 22 SNWA App. at 004987-005000; 23 SNWA App. at 005001-02. SNWA's proposed pumping would draw down the water table by hundreds of feet, eventually drying out most if not all of the non-perched springs that gave the valley its name and that sustain a variety of wildlife species. 4 App. at WPC_0789; 8 App. at WPC_1907. Along with the springs, wetlands and riparian areas will be dried out, destroying additional crucial wildlife habitat. As the water table drops, the depth to water will increase to such a degree that even the hardiest of phreatophytes (groundwater dependent plants) will be killed off throughout much of the valley. *See* 4 App. at WPC_0788; 5 App. at WPC_1049; 5 App. at WPC_1056. The drawdown from SNWA's proposed pumping will give rise to conflicts with existing water rights in Spring Valley and in downgradient valleys, and will eventually become so severe that the prior existing rights will be destroyed for all practical purposes. 4 App. at WPC_0792; 10 App. at WPC_2458. In addition, the drawdown caused by SNWA's proposed use would create an increased risk of dust emissions from both the presently moist playa areas in the valley and other areas where current vegetation is killed off. *See* 13 App. at WPC_3043-105. These impacts are far too severe and massive in scale to be effectively managed or mitigated. 4 App. at WPC_0968-71; 25 SNWA App. at 005717-5718; 25 SNWA App. at 005726-5730.

With regard to Cave, Dry Lake, and Delamar Valleys, the evidence in the record indicates that there will be serious and catastrophic impacts to the water levels in both the subject basins and in down-gradient hydrologically connected basins. 4 App. at WPC_0852-54; 4 App. at WPC_0868. Moreover, the evidence in the record clearly demonstrates that the water sought under SNWA's applications already is allocated downgradient and is unavailable for appropriation. Cave, Dry Lake, and Delamar Valleys are part of the upgradient portion of the White River Flow System, a system of hydrologically interconnected geographic basins. *See* 4 App. at WPC_ 0853. Evidence was presented and the records of the State Engineer show that many of the basins in the White River Flow System that are hydrologically connected to and down-gradient from the targeted basins already are fully appropriated. *See* 4 App. at WPC_0852-54; 4 App. at WPC_ 0868. SNWA's proposed points of diversion in the targeted valleys are all up-gradient of these fully appropriated basins. *See* 1 SNWA App. at 000243; 2 SNWA App. at 000413; 3 SNWA App. at 000577. These fully appropriated basins include White River Valley, the center of significant ranching activity and the location of the Kirch Wildlife Management Area, Pahranagat Valley, home to the Pahranagat Valley National Wildlife Refuge and Key Pittman Wildlife Management Area, Lake Valley, Muddy River Springs Valley, Lower Moapa Valley, and Coyote Spring Valley. Nevada State Engineer Order No. 1219 (July 5,

2012) (White River Valley);[11] Nevada State Engineer Order No. 1199 (Apr. 20, 2009) (Pahranagat Valley);[12] Nevada State Engineer Order No. 1023 (Apr. 24, 1990) (Muddy River Springs Valley);[13] Nevada State Engineer Order No. 798 (Sept. 16, 1982) (Lower Moapa Valley);[14] Nevada State Engineer Order No. 726 (June 11, 1979) (Lake Valley);[15] Nevada State Engineer Order No. 905 (Aug. 21, 1985) (Coyote Spring Valley); [16] *see also* 4 App. at WPC_0850.

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

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[11] http://images.water.nv.gov/images/orders/1219o.pdf.
[12] http://images.water.nv.gov/images/orders/1199o.pdf.
[13] http://images.water.nv.gov/images/orders/1023o.pdf.
[14] http://images.water.nv.gov/images/orders/798o.pdf.
[15] http://images.water.nv.gov/images/orders/726o.pdf.
[16] http://images.water.nv.gov/images/orders/905o.pdf.

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

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

Protestants presented substantial evidence at the 2011 Hearing on the resources and water uses that would be affected by SNWA's proposed project in both the targeted basins and in downstream basins. In particular, Spring Valley supports significant economic activity, which is dependent on its water and ecological resources. The Valley is home to substantial ranching activity including both irrigated cropland for alfalfa and livestock production, and produces 20% and 60% of White Pine County's cattle and sheep, respectively. 8 App. at WPC_1942-43; *see also* 8 App. at WPC_1913-1941. Hank Vogler, a Real Party in Interest in this case, operates a sheep ranch in Spring Valley where he owns vested, certificated, and permitted water rights. 1 App. at WPC_0016; 12 App. at WPC_2767; 12 App. at WPC_2770. There currently are water dependent gold mines actively working the placer deposits of Hog and Osceola as they have since the 1870s. 11 App. at WPC_2720. Spring Valley is also home to a number of small businesses, 11 App. at WPC_2721, and construction of a wind farm is under way. 11 App. at WPC_2525, 11 App. at WPC_2721. Recreational uses attract visitors to Spring Valley for hunting and fishing, bird, bat and other wildlife viewing, hiking, mountaineering, off-road vehicle use, visits to Great Basin National Park, and recreation on Bureau of Land Management and U.S. Forest Service lands. 8 App. at WPC_1942; 8 App. at WPC_1944-48. The Confederated Tribes of the Goshute Reservation ("CTGR") presented substantial evidence

through witness Rupert Steele that CTGR has unclaimed federal reserved water rights in the project drawdown area which could be affected by the proposed use. 12 App. at WPC_2796-97.

Spring Valley is also home to numerous water dependent plant and animal species, which depend on the Valley's wet meadows and springs, and supports a variety of water dependent economic activities, all of which stand to be impacted by the proposed groundwater development project. In particular, Spring Valley provides some of the last remaining habitat for a number of water dependent endangered or imperiled fish and springsnail species. 4 App. at WPC_0998; 8 App. at WPC_1905, 8 App. at WPC_1907. Three populations of an unusual Rocky Mountain juniper, or swamp cedar, occur in Spring Valley, which are groundwater dependent. 7 App. at WPC_1604. The drawdown predicted by the modeling presented by both SNWA and protestants confirms that drawdown of the water table is likely to be severe enough to cause the loss of these species. 8 App. at WPC_1907. In addition, the project "could adversely affect three federally listed birds (southwestern willow flycatcher and yellow-billed cuckoo), greater sage-grouse (federal candidate), and other special status bird and bat species, pygmy rabbit, and invertebrates," all of which occur in Spring Valley, Cave, Dry Lake, and Delamar Valleys or in downgradient valleys. 6 App. at WPC_1286, 7 App. at WPC_1664-65; 11 App. at WPC_2718, 12 App. at WPC_2788-89. Spring

Valley is also home to ceremonial and burial sites for the Goshutes, who are Real Parties in Interest in this case. 12 App. at WPC_2788. Spring Valley is the western viewshed for Great Basin National Park and as such is critical to the mission of the Park. 11 App. at WPC_2648. The Valley is also part of the Great Basin National Heritage Area, which has been formally recognized by Congress as nationally significant because of the unique topography, classic western landscapes, isolated high desert valleys, mountain ranges, ranches, mines, historic railroads, archeological sites, and Tribal communities. 11 App. at WPC_2510-11.

Like Spring Valley, Cave Valley also supports economic and recreational activity. The Valley is used as summer rangeland by eight active ranching operations in White Pine County. 11App. at WPC_2526. Steven Carter, of Carter-Griffin, Inc., and his family have been ranching in Cave Valley and White River Valley for five generations, and own 100 year lease on water rights in Cave Valley. 9 App. at WPC_2192-96; 11 App. at WPC_2547, 11 App. at WPC_2549-552. Cave Valley is also a hunting and recreational destination with half of White Pine County's elk population, 11 App. at WPC_2684-85, and supports numerous guiding and outfitting businesses. 11 App. at WPC_2684_85. The Valley also has the potential to be the site of future mining operations, which historically have been central to White Pine County's economy. 8 App. at WPC_1958; 8 App. at WPC_1972.

Dry Lake Valley supports a number of ranching operations. In the winter, Pat Gloeckner and Kena Gloeckner run 1500 head of cattle and own rights to three wells in Dry Lake Valley. 11 App. at WPC_2672, 2673, 2677-78. Their family has been ranching in Dry Lake Valley for more than 100 years. 11 App. at WPC_2673. Pete Delmue and his family have been ranching in Dry Lake Valley for six generations. 11 App. at WPC_2509.

Cave, Dry Lake, and Delamar Valleys all support hunting and guiding activity. 11 App. at WPC_2684-84. And all three valleys are the subjects of exploratory mining activity. 11 App. at WPC_2685-86. These three valleys are also home to the Congressionally-designated Silver State Trail, a 300-mile off-highway vehicle pathway which attracts people from across the United States each year, who use it to view the surrounding historic mining sites, wildlife, old ranching structures, and wild horses. 11 App. at WPC_2685. All of these interests stand to be significantly and adversely impacted by SNWA's proposed groundwater export project.

Additionally, White River Valley, down-gradient from Cave Valley, is the center of significant farming and ranching activity, including the ranching operation of Jeff Gardner of Quarter Circle 5 Ranch, who owns significant water rights dating to the late 1800's. 9 App. at WPC_2197. Steven Carter, of Carter-Griffin, Inc., and his family have been ranching in White River Valley for five

generations, over one hundred years. 9 App. at WPC_2192-96; 11 App. at WPC_2547; 11 App. at WPC_2550. The Carters irrigate and farm approximately 1700 acres of land and have grazing and substantial water rights in White River Valley, including approximately 5400 acres of wet meadows. 11 App. at WPC_2551-52. Steven Carter testified that hundreds of feet of drawdown would in effect put him out of business. 11 App. at WPC_2551. Indeed, significant drawdowns in water level could spell the end of ranching in all of the affected valleys. Both the Lund and Preston Irrigation Companies, which rely on springs as their primary source of water, also have a substantial amount of water rights at stake. *See* 9 App. at WPC_2198-201, 11 App. at WPC_2549. The communities of White River Valley were settled as agricultural communities in the early 1900's and have a strong history and tradition of farming and ranching. 11 App. at WPC_2550.

Pahranagat Valley's springs create a stunning series of oases that support ranching, farming, and water related recreation, including hunting and fishing. 11 App. at WPC_2605; 11 App. at WPC_2627. The town of Alamo supports a number of businesses, including restaurants, bed and breakfasts, and RV parks. 11 App. at WPC_2605-06. Growth in the Valley is steady, with increases in tourism and the possibility of an Industrial Park. 11 App. at WPC_2605-06. The Alamo Sewer and Water GID represents a substantial number of water rights holders in

the area, 5 App. at WPC_1064-73, and has seen a 10% increase in connections in the past 5 years, in contrast to the growth drop off in Southern Nevada during that same time period. 11 App. at WPC_2501, 11 App. at WPC_2605.

Downgradient basins from Cave, Dry Lake, and Delamar Valleys are also home to numerous environmental resources, including the Kirch Wildlife Management Area, managed by the Nevada Department of Wildlife, and located in White River Valley, down-gradient from Cave Valley, Pahranagat National Wildlife Refuge and Key Pittman Wildlife Management Area, in Pahranagat Valley, which is down-gradient from Dry Lake and Delamar Valleys, and the Moapa National Wildlife Refuge, in Moapa Valley, at the base of the White River Flow system. *See* 4 App. at WPC_0850, 11 App. at WPC_2605, 2614. All of these preserves are dependent on current groundwater flows to sustain the health of the ecosystems and the biodiversity they support. *See* 4 App. at WPC_0842. Further, Pahranagat, White River, Muddy Springs, and Moapa Valleys all contain springs that depend on interbasin flow and thus would be impacted, and Pahranagat and White River Valleys contain large phreatophyte zones. 4 App. at WPC_0838-39, 0842, 0842-43. These downgradient basins are also home to a number of state and federally listed endangered, threatened, or otherwise protected species. 8 App. at WPC_1885-1891; 9 App. at WPC_2107-2114

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

provide for the involvement of any of the affected communities in decisionmaking or compensation for affected communities in the event of impairment. 25 SNWA App. at 005640-42, 005650-51; 11 App. at WPC_2679-80, 2716. Thus, the plans provide no protection for interests of the Real Parties in Interest in this case, the Nevada public, or environment.

The weight of the evidence presented clearly demonstrates that SNWA's proposed groundwater project would constitute groundwater mining on an unprecedented scale in violation of Nevada law, *see* 4 App. at WPC_0773, 22 SNWA App. at 004987-5000; 23 SNWA App. at 005000-5002, and would result in devastating environmental, social, and economic impacts to the eastern part of rural Nevada and western Utah in violation of both state and federal law. *See* 5 App. at WPC_ 1042-63, 8 App. at WPC_ 1892-1893, 23 SNWA App. at 005049 - 57, 22 SNWA App. at 004857-58, 22 SNWA App. at 004866-67. The groundwater models all agree that drawdown will be severe and will spread over a vast area of eastern rural Nevada and will extend into western Utah. 25 SNWA App. at 5705-07. There is no way to escape the fact that these drawdowns will have catastrophic impacts to wildlife and plant communities in the affected region, including those in national wildlife refuges and state wildlife management areas, and have the potential to cause serious additional dust emissions in a number of the affected valleys that will create serious air quality issues possibly extending as far

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

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

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

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

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

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

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

X. PROTESTANTS APPEAL RULINGS 6164 THROUGH 6167 TO DISTRICT COURT

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

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

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

2. Define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water is neither arbitrary nor capricious in Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley, and;

3. Recalculate the appropriations from Cave Valley, Dry Lake Valley, and Delamar Valley to avoid over appropriations or conflicts with down-gradient, existing water rights.

See 1 SNWA App. at 00023.

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

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

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

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

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

XI. STATE ENGINEER AND SNWA APPEAL TO SUPREME COURT

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

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

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

STATEMENT OF THE ISSUES

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

1. Whether the district court properly found that the State Engineer acted arbitrarily and capriciously in "violating his own standards" by permitting SNWA to engage in unsustainable groundwater mining in Spring Valley at the expense of following generations of Nevadans.

2. Whether the district court properly found that the State Engineer acted arbitrarily and capriciously in prematurely granting SNWA's applications, relying on a so-called monitoring, management, and mitigation plan ("3M plan") devoid of "objective standards" to prevent or mitigate impacts "without knowing the impacts to existing water right holders and [without] a clear standard to identify impacts, conflicts or unreasonable environmental effects so that mitigation may proceed in a timely manner."

3. Whether the district court properly found that the State Engineer acted arbitrarily and capriciously in allowing a "double appropriation" by permitting SNWA to appropriate groundwater in three upgradient basins in the White River Flow System that already is appropriated by existing water rights holders in the downgradient basins of the same interbasin flow system.

SUMMARY OF ARGUMENT

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

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

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

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

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

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

ARGUMENT

I. STANDARD OF REVIEW

A. Standard for Writ Review:

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

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

A writ of prohibition is an even more extraordinary remedy than mandamus and generally only is appropriate where a higher court must intercede to nullify a lower court's decision on the basis that the lower court lacked jurisdiction. *See, e.g., Diaz v. District Court*, 116 Nev. 88, 993 P.2d 50, 54 (2000); *Trump v. District Court*, 109 Nev. 687, 857 P.2d 740, 742 (1993)(denying petition where district court did nor err in exercising personal jurisdiction).

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

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

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

B. Standard of Appellate Review of State Engineer Rulings:

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

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

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

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

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

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

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

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

II. BURDEN OF PROOF FOR GRANT OF WATER RIGHTS APPLICATIONS

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

III. STATUTORY STANDARD FOR DENIAL OF WATER RIGHTS APPLICATIONS

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

IV. ADDITIONAL STATUTORY STANDARDS FOR INTERBASIN TRANSFERS

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

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

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

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

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

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

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

Pyramid Lake Paiute Tribe v. Ricci, 126 Nev. Adv. Op. 48, 245 P.3d 1146, 1147 (2010); State Engineer Ruling No. 6255 at 24 (2014); 1 SNWA App. at 000079. Perennial yield is ultimately limited to the maximum amount of the natural discharge that can be salvaged for beneficial use. Water Resources Bulletin, Nevada's Water Resources, Report No. 3, at 13 (1971); 1 SNWA App. at 000079. Perennial yield cannot be more than the natural recharge to a groundwater basin and in some cases is less. 1 SNWA App. at 000079; 2 SNWA App. at 000287; 2 SNWA App. at 000456; 3 SNWA App. at 000620*; see also* Water Resources Bulletin, Nevada's Water Resources, Report No. 3, at 13 (1971).[19] If the perennial yield is exceeded, groundwater levels will decline and steady state conditions will not be achieved, a situation commonly referred to as groundwater mining. 1 SNWA App. at 000079; State Engineer Ruling No. 6255, at 24. The term groundwater mining typically refers to a prolonged and progressive decrease in the amount of water stored in a groundwater system, as may occur, for example, in heavily pumped aquifers in arid and semiarid regions. 4 App. at WPC_0886. Withdrawals of groundwater in excess of the perennial yield contribute to adverse conditions such as water quality degradation, storage depletion, diminishing yield

[19]http://images.water.nv.gov/images/publications/water%20resources%20bulletins/Bulletin3.pdf.

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

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

[20] http://images.water.nv.gov/images/rulings/707r.pdf.
[21] http://images.water.nv.gov/images/rulings/2453r.pdf.
[22] http://images.water.nv.gov/images/rulings/3486r.pdf.
[23] http://images.water.nv.gov/images/rulings/5750r.pdf.

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

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[24] http://images.water.nv.gov/images/rulings/6151r.pdf.
[25] http://images.water.nv.gov/images/rulings/3679r.pdf.

mining "would conflict with existing rights and would threaten to prove detrimental to the public interest").[27]

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

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

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[26] http://images.water.nv.gov/images/rulings/6134r.pdf.
[27] http://images.water.nv.gov/images/rulings/6151r.pdf.

centuries and likely millennia. *See generally*, 3 App. at WPC_0365-750; 4 App. at WPC_0751-808; 5 App. at WPC_1206-07; 5 App. at WPC_1121-1139; 4 App. at WPC_0962-73; 5 App. at WPC_1074-1120; 21 SNWA App. at 004671-750; 22 SNWA App. at 004957-5000; 23 SNWA App. at 005001-10; 22 SNWA App. at 004751-804; 23 SNWA App. at 005098-5120. That evidence was not controverted, but rather was responded to by SNWA's proposed monitoring and mitigation plans. *See infra* at Section VI.

Protestants also presented substantial evidence that, whether SNWA's proposed pumping is conducted at the present application locations or other locations in Spring Valley, and even if the rate is reduced to 30,000 afa, SNWA's proposed pumping over the long term will cause unreasonable drawdown and impacts to existing water rights and environmental resources throughout Spring Valley and in southern Snake Valley. *See generally*, 22 SNWA App. at 004951-5000; 23 SNWA App. at 005001-5010; 23 SNWA App. at 005092-158; 25 SNWA App. at 005670-728; 12 App. at WPC_2808-983; 12 App. at WPC_2989-3000; 13 App. at WPC_3001-026, 3007; 3 App. at WPC_0643-698, 0699-750; 4 App. at WPC_0751-765; 0766-0808; 4 App. at WPC_0962-973; 5 App. at WPC_1074-120; 5 App. at WPC_1121-139; 5 App. at WPC_1140-205, 1206-017; 5 App. at WPC_1218-250; 6 App. at WPC_1251-1500; 7 App. at WPC_1501-1750; 8 App. at WPC_1751-1884; 9 App. at WPC_2202-250; 10 App.

at WPC_2251-316, 2317-330, 2331-379. There was no substantial evidence that contradicted either of those conclusions, which should have led the State Engineer to deny SNWA's Spring Valley applications.

Instead, the State Engineer departed from longstanding practice, and did not require SNWA to actually capture ET in Spring Valley,[28] instead relying on a seriously flawed and only partially developed monitoring and mitigation program in order to circumvent the requirements of NRS § 533.370(2) and (3). Additionally, the State Engineer permitted SNWA's applications knowing that it was unlikely that the basin will ever reach equilibrium, thereby sanctioning unsustainable groundwater mining in violation of Nevada law and longstanding State Engineer practice. Therefore, the District Court properly found that the State Engineer acted arbitrarily and capriciously in calculating the perennial yield for Spring Valley, and the district court's order should be upheld.

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

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

In addition, the models all concur that there will be a significant magnitude of drawdown which will spread throughout the Spring Valley, eventually resulting in the drying up of springs and wetlands through most if not all of Spring Valley. As the witnesses for Protestant Long Now Foundation testified, this drawdown will affect playa areas in Spring Valley that presently are moist, and could well give rise to substantially greater dust emissions in the valley, affecting human and animal health, as well as Spring Valley's important scenic and recreational values. *See* 13 App. at WPC_3043-105. By the same token, the drawdown caused by the SNWA's proposed pumping will create irreconcilable conflicts with existing rights such as those owned by Protestant CPB and associated with the Cleveland Ranch, and other existing rights associated with privately owned ranching operations such as the Eldridge family's ranching operations in Spring Valley. As explained *infra* at Section VI, the evidence in the record also showed that SNWA's proposed hydrologic monitoring and mitigation plan for Spring Valley would do nothing more than mask these long-term effects for a few decades.

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

models, and argued in particular that Dr. Myers' Spring Valley model should not be relied on because it was not as elaborately documented as SNWA's model. 8 SNWA App. at 003831-835; 18 SNWA App. at 003878. In its Petition, SNWA makes much of the fact that the State Engineer gave more weight to their model than to the models presented by Protestants. The irony of this position and statement is that SNWA's model yielded very similar results to the model produced by the Protestants, and all the models tended to show that this project will have environmentally devastating impacts. 5 App. at WPC_1210-13; 6 App. at WPC_1485-87; 3 App. at WPC_00628; 25 SNWA App. at 005705-5707. Perhaps this is why, at the same time as they touted the quality of their own model over protestants' models, SNWA's witnesses repeatedly urged the State Engineer and his staff to disregard the predictions of their own model. SNWA's witnesses even argued that the State Engineer could not use the SNWA's model for the very purpose it was developed and used in the BLM's Draft EIS, namely to predict likely hydrologic impacts and drawdown of the water table throughout the hydrologically connected basins in the region affected by the Applicant's proposed pumping. *See* 18 SNWA App. at 003835.

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

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

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

weight of the evidence indicates. Indeed, SNWA's General Manager, Patricia Mulroy, likened SNWA's supposed entitlement to this project to Rome's ability to build and permanently rely on its aqueduct system, a water supply system that has been in operation for two millennia. 10 App. at WPC_2495. Reinforcing the fact that this proposed project must be viewed as much longer term than 75 years, no witness for SNWA was willing to commit to any limit whatsoever on the duration of SNWA's proposed pumping. SNWA's refusal to offer any evidence whatsoever concerning potential impacts beyond 75 years completely undercuts its case, and the State Engineer's temporally truncated analysis and findings, concerning both the availability of water and the proposed use's likely environmental impacts and conflicts with existing rights.

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

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

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

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

As discussed in other sections of this Answer, all the model projections agree that there will be significant drawdown in the water table over vast areas of the target basins as well as in hydrologically connected basins after just 200 years with a large percentage of water being drawn from storage. 5 App. at WPC_1210-13; 23 SNWA App. at 005049; 24 SNWA App. at 005400; 23 SNWA App. at 005002; 25 SNWA App. at 005705-07. Substantial evidence in the record indicates that the drawdown will ultimately contribute to a long-term decline of biotic diversity throughout the affected area in eastern Nevada and western Utah, damage federal resources in the stipulated areas of interest, and cause devastating environmental effects. 4 App. at WPC_0966-1000; 5 App. at WPC_1001; 23 SNWA App. at 005049. The decline of spring discharge, stream flow, and wetland area predicted by the models of Protestants, the Bureau of Land Management, and SNWA itself will be the principle cause of this loss in biotic diversity. 4 App. at WPC_0966-1000, 23 SNWA App. at 005050. As the water table drops, the depth to water will increase to such a degree that even the hardiest of phreatophytes (groundwater dependent plants) will be killed off throughout much of the valley. *See* 4 App. at WPC_0788; 5 App. at WPC_1049; 5 App. at WPC_0056.

Such a loss of biodiversity will adversely affect state, federal, and private interests, special status species, and species that are presently undesignated. *Id*. If the long-term drawdown of the water table predicted by all of the models is allowed to unfold, the resulting decline in biodiversity will extend beyond the four valleys targeted by the applications presently under consideration into Snake Valley and the southern portion of the White River flow system. *Id*. In particular, 157 endemic wetland species (20 listed by USFWS as endangered or threatened) have been identified as likely to be adversely affected by the reduced spring discharge and wetland area caused by SNWA's proposed groundwater development project. 4 App. at WPC_0998. In addition, five bird and one mammal species listed under NRS Chapter 501 and in the Nevada Natural Heritage Database also are likely to be adversely affected by the reduced wetland area that would result from SNWA's long-term groundwater extraction and export project. *Id*.

If the long-term drawdown predicted by all models is allowed to occur, the evidence in the record establishes that the result would be the disappearance of wetlands, sub-irrigated meadows, swamp cedars, resulting in the potential for invasion by nonnative species and increased dust emissions from bare ground and dried playas. 13 App. at WPC_3043-3105; 22 SNWA App. at 004857-67. Impacts to Great Basin National Park air quality will also be likely. *Id*.

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

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

applications. *See* 1 SNWA App. at 000156-65; 2 SNWA App. at 000335, 000348. This deferred impact analysis is contrary to the State Engineer's previous practice, is contrary to law, and is unsupported by substantial evidence in the record. *See* State Engineer Ruling No. 5621, at 25 (June 15, 2006) (Three Lakes Valley),[29] (rejecting proposal by SNWA to bypass the statutorily required review of potential impacts on the basis of a Monitoring and Mitigation Plan and stipulated agreement with federal agencies on the ground that "the offered mitigation may not be adequate to protect all existing water rights and resources and any such mitigation plan does not alleviate the State Engineer's statutory requirements regarding review of the change applications in accordance with [NRS §§ 533.370(2) and (3)]"). *See also* Exhibit A, Order Vacating and Remanding State Engineer's Ruling, *Carter-Griffin v. Taylor*, CV-830008 (N.V. Dist. Ct., Oct. 19, 2009) (Senior District Judge Robison's earlier decision independently reviewing and vacating the State Engineer's 2008 Ruling No. 5875 granting SNWA's Cave, Dry Lake and Delamar Valley applications in part because the Ruling ignored inevitable impacts, relying instead on monitoring and mitigation "with the State Engineer simply hoping for the best while committing to undo his decision if the worst occurs").

[29] http://images.water.nv.gov/images/rulings/5621r.pdf.

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

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

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

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

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

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

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

[30] http://images.water.nv.gov/images/orders/1169o.pdf.

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

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

management or mitigation measures will be used. 8 App. at WPC_1895-597; 25 SNWA App. at 005595-597. The plans do not even *require* that SNWA report any perceived problems. It only requires that *if* a problem is reported, the parties will begin the potentially long process of talking about it. The program's reference to third party intervention in the event that consensus cannot be reached is not concretely mandated by any provision in the program, and it is unclear exactly how a dispute would be handled and resolved, if at all. Moreover, the third party will receive only the data that a group of committees effectively controlled by SNWA sees fit to generate and will receive reports and recommendations only from the same SNWA-controlled bodies.

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

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

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

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

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

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

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

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

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[31] http://images.water.nv.gov/images/orders/5875r.pdf.

[32] http://images.water.nv.gov/images/rulings/5782r.pdf.

basins, outflow to down-gradient basins, and senior appropriated water rights in down-gradient basins within the White River Flow System).[33]

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

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[33] http://images.water.nv.gov/images/rulings/5712r.pdf.

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

[35] http://images.water.nv.gov/images/orders/1169o.pdf.

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

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

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

appropriated. *See* Nevada State Engineer Order No. 1219 (July 5, 2012) (White River Valley); Nevada State Engineer Order No. 1199 (Apr. 20, 2009) (Pahranagat Valley); Nevada State Engineer Order No. 1023 (Apr. 24, 1990) (Muddy River Springs Valley); Nevada State Engineer Order No. 798 (Sept. 16, 1982) (Lower Moapa Valley); Nevada State Engineer Order No. 726 (June 11, 1979) (Lake Valley); Nevada State Engineer Order No. 905 (Aug. 21, 1985) (Coyote Spring Valley); *see also* 4 App. at WPC_0850.

Further, in the hearing below the only substantial evidence presented concerning water rights and the level of appropriation in down-gradient basins in the WRFS all tended to demonstrate that the down-gradient basins in the White River Flow System were fully appropriated, if not already over-appropriated, and that the effects of the drawdown that eventually will result from permitting SNWA to effectively double-appropriate that same water from the up-gradient basins in the same flow system would be devastating. 4 App. at WPC_0850-56; 25 SNWA App. at 005723; *see also*, 4 App. at WPC_0838-839, 0842-43; 11 App. at WPC_2605, 2614; 9 App. at WPC_2197; 9 App. at WPC_2192-96; 11 App. at WPC_2547; 11 App. at WPC_2550-02; 9 App. at WPC_2198-201; 11 App. at WPC_2549-50. 11 App. at WPC_2605; 11 App. at WPC_2627; 11 App. at WPC_2605-06; 5 App. at WPC_1064-73, *see also supra*, Statement of the Facts and Procedural History Section.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[36] http://images.water.nv.gov/images/rulings/6255r.pdf

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

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

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

CONCLUSION

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

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

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

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

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

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

Respectfully submitted this 2nd day of September, 2014,

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CERTIFICATE OF COMPLIANCE

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

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

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

Respectfully submitted this 2nd day of September, 2014,

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CERTIFICATE OF SERVICE

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

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

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Senior District Judge
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/s/ Noel Simmons
Noel Simmons

Exhibit A

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

Exhibit A

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

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Case No. CV-0830008

Dept. No. II

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LINCOLN

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

Petitioners,

vs.

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

Respondents,

SOUTHERN NEVADA WATER AUTHORITY,

Real Party in Interest.

ORDER VACATING AND REMANDING STATE ENGINEER'S RULING

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

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

I. Summary of the Case

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

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

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

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

II. Standard of Law

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

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

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

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

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

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

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

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

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

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

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

> developed. Therefore, the State Engineer finds that it is reasonable to consider that up to one half of these 938 lots or 469 lots has the possibility of a second-home/vacation-home being built on them in the future.
>
> Under NRS §534.180(1) the allocation of a domestic well is 2.0 acre-feet per year and while it is true that any domestic well drilled in Cave Valley will have the statutory authority to withdraw the stated 2.0 acre-feet per year, from a management perspective it is highly unlikely this would be the case. If a property is occupied 60 days per year this equates to the prorated equivalent of 0.33 acre-feet per year. To account for some permanent residences and to ensure sufficient unappropriated water is left in Cave Valley, an allocation of 0.5 of an acre-foot per year will be used for each potential lot. The State Engineer finds it is reasonable to leave 0.5 afa for each of the 469 lots for future growth and development for a total of 235 afa. the State Engineer finds water should also be left in the basin for other uses, such as stock-watering and minor commercial uses; therefore, an additional 40 afa will be left in the basin for other uses such as stock-watering and minor commercial for a total of 275 afa total being left in the basin of origin for future growth and development.

AR at 36-37.

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

Dated this 15th day of October, 2009.

NORMAN C. ROBISON
SENIOR DISTRICT JUDGE

Exhibit B

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

Exhibit B

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 54986

FILED

SEP 13 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DISMISSING APPEAL

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

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

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

ORDER this appeal DISMISSED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

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