BEFORE THE STATE ENGINEER, STATE OF NEVADA
DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES

IN THE MATTER OF APPLICATIONS 53987 THROUGH 53992, INCLUSIVE, AND 54003 THROUGH 54021, INCLUSIVE FILED TO APPROPRIATE THE UNDERGROUND WATERS OF SPRING VALLEY, CAVE VALLEY, DELAMAR VALLEY, AND DRY LAKE VALLEY HYDROGRAPHIC BASINS (180, 181, 182 AND 184), LINCOLN COUNTY AND WHITE PINE COUNTY, NEVADA.	)	**WRITTEN CLOSING ARGUMENT ON REMAND OF PROTESTANTS WHITE PINE COUNTY, GBWN, ET AL.[1]**

INTRODUCTION

Protestants White Pine County, Great Basin Water Network, et al., ("Protestants") respectfully submit this written closing argument following the remand hearing held on the above-captioned applications of the Southern Nevada Water Authority ("SNWA") to appropriate groundwater in Spring, Cave, Dry Lake, and Delamar Valleys. For the reasons explained in greater detail below, SNWA has failed for a third time to present substantial evidence that meets the requirements of NRS 533.370(2) and NRS 533.370(3)(c). Therefore, Protestants respectfully urge the State Engineer to deny SNWA's applications being reviewed on remand.

More particularly, SNWA's evidence on remand has not remedied the deficiencies found by the district court's *Decision* in *White Pine County, et al., v. King*, Case No. CV1204049,

[1]This *Written Closing Argument* is submitted on behalf of White Pine County, the Great Basin Water Network ("GBWN"), and a group of over 300 individuals and entities who either filed protests in their own names or joined Great Basin Water Network's protests to the Southern Nevada Water Authority's applications in Spring, Cave, Dry Lake, and Delamar Valleys. The list of individuals and entities who filed protests in their own names can be found on the first page of White Pine County, GBWN, et al.'s 2011 written closing statement. The list of those who joined GBWN's protests can be found at Exhibit A to White Pine County, GBWN, et al.'s 2011 written closing statement.

(Seventh Judicial Dist. Ct., Dec. 13, 2013) [hereinafter "*Remand Decision*"], concerning the availability of water in Spring Valley and SNWA's ability to capture ET in Spring Valley without causing impermissible conflicts with existing water rights or unreasonable environmental effects. Similarly, SNWA's evidence on remand was not even responsive to and failed to cure the deficiencies found by the district court with regard to what, if any, amount of water may be available for SNWA to appropriate from Cave, Dry Lake, and Delamar Valleys ("the CDD Valleys") without causing either overappropriations or conflicts with existing water rights downgradient in the White River Flow System ("WRFS"). Finally, SNWA's evidence on remand does not come close to curing the deficiencies with regard to SNWA's monitoring, management, and mitigation plans ("3M Plans") for any of the four targeted basins or the downgradient areas that will be affected by SNWA's proposed groundwater pumping project.

Despite the fact that the Nevada Supreme Court has held in analogous circumstances that an applicant is not entitled to a "second bite at the apple" or "do-over" when that applicant has failed to produce substantial evidence to meet the requirements of NRS 533.370 in the first instance, *State Engineer v. Eureka County*, 402 P.3d 1249, 1250, 1251 (Nev. 2017) [hereinafter "*Eureka II*"], this has been SNWA's third bite at the apple in terms of opportunities to present substantial evidence that its applications and project can satisfy the requirements of NRS 533.370(2) and NRS 533.370(3)(c). And despite the fact that it has now been nearly 30 years since SNWA's applications were filed in 1989, and more than a decade since SNWA's first attempt to present such substantial evidence in four separate hearings on these applications, SNWA has repeatedly failed to present substantial evidence that meets the requirements plainly set forth in the cited statutory provisions, the district court's 2013 *Remand Decision*, and the Nevada Supreme Court's *Eureka County v. State Engineer*, 359 P.3d 114 (Nev. 2015)

[hereinafter *Eureka I*] and *Eureka II* decisions in 2015 and 2017. In view of this repeated failure on SNWA's part to demonstrate with substantial evidence that its applications and groundwater pumping project can satisfy these basic legal requirements under Nevada's water law, Protestants respectfully urge the State Engineer to comply with the law and deny SNWA's applications.

I. The Binding Nature of District Court Rulings as Law of the Case on Remand:

On remand from the Protestants' successful petitions for judicial review of Rulings 6164, 6165, 6166, and 6167, the district court stands in relation to the State Engineer as an appellate court. NRS 533.450 (providing for judicial review of State Engineer rulings in the nature of an appeal). Thus, "where an appellate court deciding an appeal states a principle or rule of law, necessary to the decision, the principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress both in the lower court and upon subsequent appeal." *Eureka II*, 402 P.3d 1249, 1251 (Nev. 2017) (quoting *LoBue v. State ex reel. Dep't of Highways*, 554 P.2d 258, 260 (Nev. 1976)). And "[w]hen an appellate court remands a case, the district court 'must proceed in accordance with the mandate and the law of the case as established on appeal.'" *Eureka II*, 402 P.3d at 1251 (quoting *E.E.O.C. v. Kronos Inc.*, 694 F.3d 351, 361 (3d Cir. 2012)).

II. What the District Court's Remand Decision Required on Remand:

In considering what issues should be addressed on remand, the State Engineer should begin with Judge Estes's own words. At the beginning of the district court's opinion, Judge Estes characterized the scope of the issues on remands as follows: "the State Engineer's rulings is remanded for recalculation of water available from the respective basins; for additional hydrological study of Delamar, Dry Lake and Cave Valley; and to establish standards for

mitigation in the event of a conflict with existing water rights or unreasonable effects to the environment or the public interest." *Remand Decision*, at 1-2.

The December 13, 2013, *Remand Decision* requires the State Engineer to recalculate the available water from Spring, Cave, Dry Lake, and Delamar Valleys such that SNWA's appropriations would reach equilibrium between recharge and discharge within a reasonable amount of time without causing unreasonable impacts or conflicts with existing rights. *Remand Decision*, at 10-13, 16, 23. In other words, the *Remand Decision* requires the State Engineer to consider evidence that relates to the factors involved in determining how much water properly can be considered available for SNWA's proposed pumping, taking into account the constraints or limitations placed on the availability of water by Nevada law, particularly the prohibition against conflicts with existing water rights and threats to the public interest, including unreasonable environmental impacts. *Remand Decision*, at 12 - 13, 16, 23. These bright line constraints in the statutory law have long been reflected in Nevada water policy that perennial yield ultimately is 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). Thus, where it cannot be demonstrated that an application actually will capture ET, the State Engineer has denied the application. *E.g.*, State Engineer Ruling 3486 (Jan. 11, 1988).

Judge Estes's *Remand Decision* made clear that any amount of water rights approved under SNWA's applications must be an amount that could be pumped from the points of diversion in SNWA's pending applications and reach equilibrium within a reasonable time without causing overappropriations, conflicts with existing water rights, or unreasonable environmental effects. The amount of water approved for pumping and export from the subject basins must be limited to the amount of ET that actually can be salvaged, or captured under the

pending applications. SNWA has argued that equilibrium and the avoidance of groundwater mining are not principles in Nevada's water law or policy, but the State Engineer has long recognized that reaching equilibrium and avoiding groundwater mining are fundamental principles underpinning Nevada's water law and policy. *See* State Engineer Ruling 3486 (Pahrump Valley 1988); Ruling 6256, at 13, 24, 25 (Garnet Valley 2014); Ruling 5621, at 17, 20 (Three Lakes-Tikapoo Valleys 2006); Water Resources Bulletin, Nevada's Water Resources, Report No. 3, at 13 (1971).

In addition, in recalculating the amount of water available, if any, from Cave, Dry Lake, and Delamar Valleys ("the CDD Valleys"), Judge Estes directed the State Engineer to reexamine or further study the hydrology of those valleys and basins downgradient from them in the White River Flow System ("WRFS"). *Remand Decision* at 1-2, 19-20. The purpose of requiring a reexamination of the hydrology of the CDD Valleys and the downgradient basins in the WRFS was to avoid either overappropriations from those valleys and the WRFS or any conflicts with existing water rights in downgradient areas of the WRFS. *Remand Decision* at 23.

Judge Estes also made clear that the award of any water under SNWA's applications requires a monitoring, management, and mitigation plan ("3M Plan") with definite objective standards in order to ensure that SNWA's proposed pumping does not lead to conflicts with existing water rights, cause unreasonable effects to the environment, or otherwise threaten the public interest. *Remand Decision* at 2. As discussed more fully below, in the *Eureka I* case the Nevada Supreme Court has further held that prior to permitting, an applicant must present substantial evidence demonstrating that it will actually and effectively mitigate impacts from its proposed use if those impacts may result in conflicts with existing water rights.

III. Additional Legal Standards Guiding Consideration of Issues on Remand:

In *Eureka I*, a case that is closely analogous to this case on the issue of the uncertainty, or indefiniteness, of the applicant's plan to mitigate potential conflicts, the Nevada Supreme Court reversed the State Engineer's grant of the applicant's applications on the basis of the conclusion that it would be able to mitigate any conflicts because that conclusion was not based on substantial evidence. 359 P.3d at 1121. In *Eureka II*, the Court affirmed the district court's decision to vacate the applicant's permits because "the State Engineer relied on insufficient facts before granting [the applicant's] applications, . . . and [the applicant] is not entitled to a do-over after failing to provide substantial mitigation evidence . . . ." 402 P.3d at 1251; *see also id*. at 1250 ("[the applicant] is not entitled to a second bite at the apple after previously failing to present sufficient evidence of mitigation.").

In *Eureka I* the Nevada Supreme Court noted that NRS 533.370(2) uses mandatory language requiring that the State Engineer "shall reject the application and refuse to issue the requested permit" where the proposed use of water or change of existing water rights conflicts with existing rights. 359 P.3d at 1115, 1117. Although the Court noted that there was doubt as to whether the State Engineer could grant an application on the basis of a determination that the applicant will be able to mitigate conflicts with existing rights, *id.* at 1115-1116, it did not rule on that basis. Rather, the Court in *Eureka I* examined and specifically rejected evidence of a variety of mitigation techniques that could be implemented because "they did not specify what techniques would work, much less techniques that could be implemented to mitigate the conflict with the existing rights in this particular case." *Id*. at 1119. In the *Eureka I* and *Eureka II* decisions the Court made clear that an applicant must identify the specific mitigation measures it will implement in order to eliminate or avoid conflicts between its proposed use and existing

water rights, and that the applicant must produce substantial evidence demonstrating that the specific mitigation measures identified actually will be effective at avoiding or eliminating any such conflict. *Id.*; *Eureka II*, 402 P.3d at 1250.

In the remand hearing on SNWA's applications, SNWA failed to present evidence that satisfied either of these requirements. While SNWA offered a menu, or list, of possible mitigation measures that might be used, and added general catchall language about potentially using other unidentified mitigation techniques, SNWA_507 at Table 3-1, SNWA failed to specify any particular mitigation measure or technique that it definitely will implement to avoid or eliminate conflicts with existing rights. What is more, SNWA offered no evidence to demonstrate that any of the possible mitigation measures it alluded to in its 3M plan would actually be effective or able to mitigate (i.e., avoid or eliminate) any conflict with existing water rights or unreasonable environmental effects in any of the areas in Spring Valley or the White River Flow System that would be affected by SNWA's proposed groundwater pumping. Thus, SNWA has failed to present substantial evidence that satisfies the 3M requirements articulated by Judge Estes in the *Remand Decision* and the Supreme Court in *Eureka I*.

To the extent that SNWA presented evidence that it actually intends to use any particular mitigation technique, SNWA's 3M Plan emphasized and relied on the notion that it could mitigate conflicts with so-called replacement or substitute water. However, the Court in *Eureka I* expressed profound skepticism about the effectiveness or acceptability of relying on such substitute water as a mitigation technique. To begin with, the Court held that merely invoking the use of substitute water did not qualify as substantial evidence to support a finding that mitigation actually would be feasible or effective. The Court noted the lack of evidence that the applicant had "applied for or committed certain of its already obtained water rights to mitigation

or where the substituted water would otherwise come from." 359 P.3d at 1119. The Court also noted the inherent problem that arises with proposed reliance on substitute water where, as here, the applicant's proposed groundwater pumping is likely to reduce the groundwater in the basin being pumped to such a degree that "there may not be any water left to use for mitigation after [the applicant's] appropriation." *Id.*

In addition, the Court attacked the "specious assumption that water from a different source would be a sufficient replacement," noting that even assuming that substitution water is available there are significant potential problems with piping water in from another location that may render substitute water insufficient to replace the water effectively lost by a senior water right holder due to an applicant's proposed use. 359 P.3d at 1119-1120. The Court also noted that reliance on unspecified substitute water fails to take into account or adequately address the potential problems that may arise in terms of abandonment issues faced by the senior water right holder or permitting issues that may arise with obtaining the substitute water. *Id.* at 1120.

Perhaps most fundamentally the Supreme Court in *Eureka I* held that the State Engineer may not leave for a later day the determination of what an applicant's mitigation actually will entail or whether the applicant's proposed mitigation actually will be feasible and effective. As the Court stated: "the State Engineer's decision to grant an application, which requires a determination that the proposed use or change would not conflict with existing rights, NRS 533.370(2), *must be made upon presently known substantial evidence, rather than information to be determined in the future . . . .*" *Id.* (emphasis added).

IV. Recalculation of Amount of Water Available from Spring Valley:

One of the holdings of Judge Estes was that SNWA had to demonstrate that its proposed Spring Valley pumping would reach equilibrium within a reasonable time. The Protestants

presented detailed analyses showing that SNWA's proposed pumping from the application points of diversion cannot reach equilibrium at any time at any pumping rate.[2] SNWA presented no evidence to dispute that fact. Instead, in the remand hearing SNWA presented information concerning a hypothetical ET well field of 101 wells that is not part of the pending applications, and that SNWA has acknowledged it has no intention of pursuing. That approach is problematic because the State Engineer may only consider SNWA's pending applications. So, SNWA's hypothetical ET capture well field is not properly before the State Engineer.

While SNWA presented model runs for this hypothetical ET capture scenario, SNWA_475, it did not present any model runs of ET capture from the actual points of diversion in the pending applications because SNWA knew that its own model runs would confirm the evidence contained in the Protestants' model runs and analyses of ET capture. GBWN_001, 002, 003 (Myers Reports); CPB_19 (Jones and Mayo Report). Thus, the only substantial evidence on the issue of reaching equilibrium in Spring Valley from the points of diversion in SNWA's applications is the evidence presented by the Protestants. And that evidence uniformly shows that SNWA's proposed pumping from the well sites in the pending applications will not approach equilibrium even after thousands of years.[3] Therefore, the substantial evidence in the

[2] *See* Transcript Vol. 18, at 4121-26 (Nov. 2, 2011) (Myers Direct); Transcript Vol. 19, at 4207-45 (Nov. 3, 2011) (Myers Direct); Transcript Vol. 24, at 5353-5411 (Nov. 10, 2011) (Bredehoeft Direct); Transcript Vol. 27, at 5973-6148 (Nov. 16, 2011) (Mayo & Jones Direct); Transcript Vol. 27, at 6149-6216 (Nov. 16, 2011) (Drew & Scott Direct); Transcript Vol. 28, at 6222-59 (Nov. 17, 2011) (Drew & Scott Direct); GBWN_003 at 7-28; GBWN_009 at 6-7, 10, GBWN_105; GBWN_109 at 5-8; CPB_19 (Jones and Mayo Report).

[3] While the State Engineer indicated in Ruling 6164 that he only considers model predictions out to 75 years reliable, the parties, the State Engineer, and the federal agencies, have considered modeling evidence up to 200 years. In the 2011 rehearing on SNWA's applications, Protestants witness Dr. Myers has presented evidence from SNWA's own model indicating that it predicts no prospect of reaching equilibrium even out to 2,000 years. While predictions of specific effects in specific locations may not be reliable far into the future, absolutely no evidence or

record on which the State Engineer is bound to base his ruling shows that SNWA's applications fail the test of reaching equilibrium within a reasonable amount of time.[4]

Meanwhile, SWNA limited its presentation on impacts and mitigation to a scenario involving pumping from the actual application points of diversion, for which no equilibrium analysis was done. SNWA_475; SNWA_507; GBWN_297 at 7, 10, 13. SNWA has acknowledged, that an ET capture project such as the redesigned hypothetical ET capture scenario would result in vastly different impacts than were analyzed for the project based on the actual points of diversion in the applications before the State Engineer, as presented in the 2011 hearing. *Compare* Southern Nevada Water Authority, Reply Brief at 39, *SNWA, et al. v. Seventh Judicial District Court, et al.,* No. 65775 (Nev. May 30, 2014) (citing CPB Answering Brief at 13 n5, 23) (noting that ET Capture project would result in devastating effects), *with* SNWA_475, at 21 (2017) (noting that the 2011 project was designed to minimize impacts).

Compounding the problems raised by this improper disjunction of the analysis required by NRS 533.370(2) between two disparate projects or scenarios, SNWA chose not to provide the State Engineer with drawdown maps for its new hypothetical ET capture scenario, asking the State Engineer instead to rely on those presented in the 2011 hearing for SNWA's actual project and pending applications, which SNWA suggests was designed to minimize impacts and not to capture ET. SNWA_475 at 21. This separation of the analysis of the availability of water and impacts from SNWA's actual proposed pumping as the basis for a permitting decision from the

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rationale has been presented to suggest any reason why the general consistent trend of drawdown shown throughout a given basin or interbasin flow system would suddenly stop in the future.

[4] SNWA's choice to present evidence on numerous hypothetical wells that are different form the well sites identified in SNWA's pending applications raises significant due process problems because a State Engineer decision based on such new speculative potential points of diversion would deprive the Protestants of a full opportunity to present evidence challenging a project based on those points of diversion. *See Eureka I,* 359 P.3d at 1120.

actual pending applications that are subject to review is contrary to Nevada law, which requires a project to satisfy all of the requirements of NRS 533.370 including the limitations placed on appropriations by the availability of water, conflict with existing rights, public interest, and environmentally sound criteria of NRS 533.370(2) & (3). So, even assuming that the ET capture project presented by SNWA in 2017 would reach equilibrium within a reasonable time, the State Engineer cannot base the grant of any water rights to the Applicant on that hypothetical project or its equilibrium analysis because no conflicts or impacts analysis was performed on SNWA's new hypothetical ET capture scenario. Thus, the State Engineer must base this ruling on evidence of ET capture and equilibrium based on the application points of diversion, which SNWA presented in the 2011 hearing and for which SNWA has presented 3M Plans that it claims will eliminate impermissible conflicts and impacts.

Unfortunately for SNWA, as the district court found in the *Remand Decision*, that evidence is insufficient to justify granting SNWA's applications because SNWA has not demonstrated that equilibrium will be reached in a reasonable period of time when pumping from the application points of diversion. SNWA simply has not presented a unified body of evidence or analysis concerning its actual applications and project that satisfies the *Remand Decision's* equilibrium and mitigation requirements. In other words, SNWA has not presented the State Engineer with substantial evidence that its groundwater pumping project can be constructed and operated in a manner which will both reach equilibrium and not result in impermissible conflicts or environmental impacts. Accordingly, because SNWA's evidence is not responsive to the requirements of the *Remand Decision* and fails to satisfy the requirements of NRS 533.370(2) under the law of the case, the *Remand Decision* requires that the State Engineer deny SNWA's applications in Spring Valley.

V. Recalculation of Amount of Available Water from Cave, Dry Lake and Delamar Valleys to Avoid Overappropriations or Conflicts With Existing Water Rights in Downgradient Areas of the White River Flow System:

The *Remand Decision* requires the State Engineer to further study the hydrology of Cave, Dry Lake, and Delamar Valleys ("the CDD Valleys") and recalculate what, if any, amount of water is available for appropriation by SNWA from those valleys that will not cause either overappropriations or conflicts with existing water rights in downgradient areas of the White River Flow System ("WRFS"). *Remand Decision*, at 1-2, 19-20, 23. This amount necessarily must be less than the amount granted in Rulings 6165, 6166, and 6167 given that the *Remand Decision* overturned as arbitrary and capricious the State Engineer's decision to grant water in an amount that he found likely would conflict with existing downgradient rights at an undetermined point in the futures. *Id.* at 20. Despite this binding ruling of the district court, SNWA failed to present any evidence on remand regarding the hydrology of the CDD Valleys or the WRFS, requested an increased amount of groundwater from Cave Valley than was granted in Ruling 6165, and requested the same amounts of groundwater from Dry Lake and Delamar Valleys as was granted in Rulings 6166 and 6167, even though the amounts granted in Rulings 6165, 6166, and 6167 were found to be unsupported by substantial evidence in the *Remand Decision*. SNWA_507, at 8-4; Transcript Vol. 1, at 22 (Sept. 25, 2017) (Stanka Direct).

During the remand hearing, the only evidence presented by SNWA concerning the hydrology, potential for overappropriations, and amount of water that could be appropriated from the CDD Valleys without causing conflicts with existing water rights or unreasonable environmental effects was SNWA's evidence of what it characterized as an existing rights accounting exercise. This accounting exercise was designed to demonstrate that sufficient water may be available in the CDD Valleys to support SNWA's requested appropriations, so long as 39,000 afa would hypothetically remain somewhere in the WRFS to hopefully satisfy the

required outflow to the fully appropriated downgradient basins in the WRFS. SNWA_483, at 1-10. However, SNWA treated the WRFS as a simple, large proverbial black box (without considering where recharge occurs, where interbasin flow exits, enters, and flows through the hydrologically connected basins in the WRFS, or where recharge and water in interbasin flow pathways could actually be captured), and SNWA presented no evidence that its pumping in the CDD Valleys could or would actually capture any water that is separate from the required interbasin flow supplying those downgradient basins. Transcript Vol. 1, at 138-142 (Sept. 25, 2017) (Stanka Staff Questions); Transcript Vol. 8, at 1786, 1793-94, 1818, 1821 (Oct. 4, 2017) (Myers Direct); GBWN_297, at 18.

In other words, SNWA presented no evidence that its pumping would not, in fact, capture the very water that the WRFS's hydrology indicates does, in fact, flow into the downgradient fully appropriated basins and supply existing water rights in those basins. SNWA presented no conceptual flow model to justify its accounting exercise or to demonstrate that it would not, in fact, capture water that actually flows from the CDD Valleys into downgradient fully appropriated basins, including Coyote Springs Valley and the Muddy River Springs Area. In fact, Mr. Stanka, the only expert through whom SNWA presented its analysis of available water in the CDD Valleys, is not a hydrologist, and is not qualified to provide competent testimony or evidence about which part of the water constituting the interbasin flows through the WRFS actually would be captured by SNWA's pumping would actually capture or to perform any evaluation of the groundwater flow paths in that System. Mr. Stanka is merely a water rights surveyor and only is qualified to perform an accounting of whatever categories of water rights SNWA has directed him to tally in the basins selected by SNWA. SNWA_482.

Accordingly, Mr. Stanka's analysis and conclusion that there is water available for appropriation in the CDD Valleys is based on flawed flow path analyses and assumptions he is not qualified to make, which significantly biased his analysis in favor of a finding that water is available for appropriation in the CDD Valleys. *See* SNWA_483, at 1-3 through 1-10; SNWA_482. For example, Mr. Stanka inappropriately limited the analysis of existing groundwater rights representing committed groundwater resources to 11 of the 13 WRFS basins despite the fact that the two excluded basins, Coyote Spring Valley and the Muddy River Springs Area, are downgradient, are hydrologically connected, are fully appropriated, and would be impacted by SNWA's proposed pumping. Transcript Vol. 8, at 1787-88 (Oct. 4, 2017) (Myers Direct); GBWN_297, at 15-16; Transcript Vol. 1, at 138-142 (Sept. 25, 2017) (Stanka Staff Questions). Not only is Mr. Stanka unqualified to make this hydrologic judgment, but it is based on a misinterpretation of State Engineer Ruling 6255, and is inconsistent with the hydrologic evidence in the record which clearly demonstrates that Coyote Spring Valley and the Muddy River Springs Area are hydrologically connected to and downgradient from the CDD basins, and therefore eventually will be impermissibly impacted, as recognized by the *Remand Decision*. Transcript Vo. 8, at 1787-89 (Oct. 4, 2017) (Myers Direct). Mr. Stanka also inappropriately allocated 33,700 acre feet per year of Muddy River stream flow to California Wash, outside the WRFS, effectively removing the Muddy River Springs from their place as the final discharge from the WRFS. *See* SNWA_483, at 1-4; GBWN_297, at 15. This approach is inconsistent with the evidence in the record presented by SNWA in 2011 and inconsistent with the State Engineer's previous findings in this and other cases. GBWN_291, at 15. Finally, as pointed out by Protestants witness Dr. Myers, Mr. Stanka failed to consider that Tikapoo Valley South is part of the Death Valley Flow System and thus failed to consider whether water flowing through it is

appropriated and uncommitted downgradient, a point on which SNWA presented no evidence. (Transcript Vol. 8, at 1784 (Oct. 4, 2017) (Myers Direct); Transcript Vol. 1, at 138-142 (Sept. 25, 2017) (Stanka Staff Questions).

Consequently, Mr. Stanka's report and testimony do not constitute substantial evidence capable of supporting a finding that any amount of water is available for appropriation from the CDD Valleys without causing conflicts with existing downgradient water rights or unreasonable environmental effects in downgradient areas of the WRFS. And Mr. Stanka's ill-informed accounting exercise is the only evidence SNWA presented to satisfy the requirements of the *Remand Decision*. Thus, there is no substantial evidence to support a finding that any water is available for appropriation by SNWA from the CDD Valleys under the terms of the *Remand Decision*, and under the law of the case SNWA's application in those valleys must be denied.

Thus, just as in the case of Spring Valley, because on remand SNWA chose not to present evidence on the issue of available water that was responsive to the *Remand Decision* the State Engineer must rely on the evidence presented by SNWA in 2011 and the conceptual flow modeling evidence presented by the Protestants in both the 2011 hearing and the remand hearing. In the remand hearing, Protestants witness Dr. Myers testified that it is more likely than not that SNWA's pumping would, in fact, capture the outflow from the CDD Valleys to downgradient basins which already are fully appropriated. Transcript Vol. 8, at 1818-19 (Oct. 4, 2017) (Myers Direct); GBWN_297, at 23. He further testified that no water is available for appropriation in the CDD Valleys, because the outflow from those valleys all is fully appropriated downgradient. Transcript Vol. 8, at 1790-91 (Oct. 4, 2017) (Myers Direct). Because SNWA provided no hydrologic evidence that it can feasibly capture unappropriated water in the CDD Valleys, despite the *Remand Decision*'s explicit direction to do so, *Remand Decision,* at 1-2, the State

Engineer does not have substantial evidence to support a finding that SNWA's pumping will not capture water that already is appropriated in downgradient basins and conflict with downgradient existing rights. Thus, the evidence in the record and the *Remand Decision* require the State Engineer to deny SNWA's groundwater applications in Cave, Dry Lake, and Delamar Valleys.

Additionally, the State Engineer found in Rulings 6165, 6166, and 6167 that SNWA's appropriations in the CDD Valleys would impact existing rights based on the evidence in the record, but because such impacts potentially would not be felt for hundreds of years, the State Engineer found them to be permissible under the law. Ruling 6165, at 48; Ruling 6166, at 47-48; Ruling 6167 at 47-48; Remand Decision, at 20. The *Remand Decision* expressly held that finding to be contrary to Nevada law and arbitrary and capricious because NRS 533.320(2) provides that applications "shall" be rejected if a finding of a conflict is made, regardless of whether that conflict will take a long time to manifest itself. *Remand Decision*, at 20. That ruling of the district court is now the law of the case, to which the State Engineer is obliged to adhere. Thus, because SNWA's points of diversion have not changed since 2011 and because no new hydrologic evidence on the CDD Valleys or the WRFS has been presented by SNWA on remand, in order to comply with the *Remand Decision* the State Engineer must deny SNWA's applications in Cave, Dry Lake, and Delamar Valleys.

VI. No Substantial Evidence that SNWA's Pumping Will Not Be Detrimental to the Public Interest:

SNWA presented no new evidence on remand related to the public interest criterion under NRS 533.370(3) and instead relied on its 3M Plans, which it asserted would mitigate the potential unreasonable impacts its proposed groundwater pumping will have on the environment in the WRFS, Spring Valley, and Snake Valley.. However, as discussed below, the 3M approach proposed by SNWA is deficient in a number of fundamental ways and cannot support a finding

that SNWA's proposed pumping does not threaten to prove detrimental to the public interest by causing unreasonable environmental effects.

Further, the evidence presented in the remand hearing revealed that SNWA did not adequately consider the likely impacts of its proposed pipeline on Native American cultural resources, sacred sites, or water uses. Such an evaluation of impacts to these resources is necessary in order for the State Engineer to evaluate the public interest implications of SNWA's proposed project. During the remand hearing, witnesses for Protestants Confederated Tribes of the Goshute Reservation, Ely Shoshone Tribe, and Duckwater Shoshone Tribe testified that the Tribes were not consulted about SNWA's Spring Valley 3M Plan and the Plan's provision to allow the sacred Swamp Cedars in Spring Valley to be killed by drawdown of the groundwater table caused by SNWA's pumping, and further that to mitigate that impact by planting new replacement trees was culturally inappropriate, profoundly offensive, and absolutely inadequate. Transcript Vol. 7, at 1588, 1594, 1602 (Oct. 3, 2017) (Johnson Direct); Transcript Vol. 7, at 1598-1602 (Oct. 3, 2017) (Steele Direct). The Spring Valley Swamp Cedars site is designated by the Federal Government as a Traditional Cultural Property listed on the National Register of Historic Places. CTGR_22, at 2; Transcript Vol. 7, at 1497 (Oct. 3, 2017) (Sanford Direct); CTGR_21. SNWA's responses on cross-examination about Tribal involvement in its 3M Plan and its proposed management and mitigation approach for the Swamp Cedars confirmed that SNWA considers the Tribes to have an adequate opportunity for involvement in the protection of their sacred lands under SNWA's proposed 3M plans by pursuing litigation against SNWA. Transcript Vol. 4, at 861-61 (Sept. 28, 2017) (Marshall Cross).

Despite the *Remand Decision's* clear direction that SNWA's 3M Plans must provide definite protection against such unreasonable impacts, SNWA failed on remand to present

substantial evidence demonstrating that its groundwater pumping will not cause unreasonable environmental effects and unreasonable impacts to important Native American cultural and spiritual resources. Consequently, there is not substantial evidence in the record to demonstrate that SNWA's proposed groundwater pumping does not threaten to prove detrimental to the public interest, and the State Engineer must deny SNWA's applications on this ground as well.

VII. There is Not Substantial Evidence that SNWA's Proposed Pumping and Interbasin Transfer of Groundwater Satisfies the Environmental Soundness Criterion:

NRS 533.370(3)(c) provides that in determining whether an application for an interbasin transfer of ground water must be rejected the State Engineer shall consider whether the proposed action is environmentally sound as it relates to the basin from which the water is to be exported. The State Engineer may not, as SNWA has suggested, simply rely on the BLM's compliance with NEPA as the basis for either his public interest or environmental soundness determination. Rather, a thorough examination of these criteria by the State Engineer is necessary to fulfill the statutory requirements under Nevada law. NRS 533.370(2); NRS 533.370(3)(c); *Remand Decision*, at 14-18, 21.

While there is not a statutory definition of what environmentally sound is, there are examples of what environmentally sound is not, such as the effects of the Owens Valley project in California. From the legislative history it appears that the legislative intent of NRS 533.370(3)(c) was to protect the natural resources of the basin of origin and prevent a repeat of impacts like those experienced in Owens Valley. *See* Minutes of the April 21, 1999, Subcommittee meeting of the Senate Committee on Natural Resources (testimony indicating that the greatest concern was that there would be enough water left in the basin from which the water was exported to ensure that the basin of origin's ecosystem would remain environmentally viable and that it was important to protect the future environment of basins in the rural communities to

ensure water would be available for future growth at the local level). This understanding of the environmental soundness criterion is bolstered by the environmental consideration for wildlife found in NRS 533.367, which provides that before a person may obtain a right to the use of water from a spring or water that has seeped to the surface of the ground, he must ensure that the wildlife which customarily uses the water will continue to have access to it. While this provision of the water law does not specifically allude to the appropriation of groundwater, it is a clear demonstration of the public interest in protecting the sources of water for wildlife.

The environmentally sound criterion also is implicated where groundwater pumping will result in groundwater level decline. The development of groundwater from a hydrologic basin with groundwater ET occurs through the capture of that ET by groundwater pumpage and a resulting lowering of groundwater levels. NRS 534.110(4) provides that it is a condition of each appropriation of groundwater that the right must allow for a reasonable lowering of the static water level at the appropriator's point of diversion. While a water-level decline in and of itself may not necessarily be environmentally unsound, the effects of water-level decline on the hydrologic-related natural resources must be considered, and the amount of such a decline must be limited to a level that does not cause unreasonable environmental effects.

Because SNWA provided no new impacts analysis on remand, the State Engineer must base his evaluation of environmental soundness on the record from the 2011 rehearing on SNWA's applications. In the 2011 hearing Protestants witness Dr. James Deacon testified that SNWA's groundwater pumping will threaten to prove detrimental to the public interest because reductions in spring flow would result in the more rapid cooling of the thermal water of the regional springs, which will reduce the habitat for fish and spring snails and subsequently reduce reproductive potential. Dr. Deacon also testified that declines in spring flows or a lowering of

the shallow water tables would reduce wetland areas, adversely impacting migratory birds, aquatic species, and mammals. With respect to the CDD Valleys, which are hydrologically connected to the fully appropriated down-gradient basins in the WRFS, Dr. Deacon testified that there will be unreasonable impacts to the plants and animals dependent on downgradient springs due to a reduction in discharge and that those unreasonable environmental impacts threaten to prove detrimental to the public interest. Dr. Deacon was very concerned about the regional springs in the down-gradient basins of the White River Flow System, and on the basis of his extensive experience with 3M Plans he testified that he did not believe that the non-specific and indefinite approach taken in SNWA's 3M Plan will protect or effectively mitigate impacts on those resources and areas. Transcript Vol. 19, at 4164 – 69 (Nov. 3, 2011) (Deacon Direct).

Protestants White Pine County, GBWN, et al. witness Dr. Patten and Protestant Long Now witness Dr. Robinson presented substantial evidence during the 2011 hearing that the proposed use would result in 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. Transcript Vol. 18, at 3973-83 (Nov. 2, 2011) (Patten Direct); Transcript Vol. 28, at 6276 -338 (Nov. 17, 2011) (Robinson Direct). SNWA presented no evidence in the remand hearing to refute this substantial evidence that SNWA's groundwater pumping will cause these unreasonable impacts or that demonstrated SNWA's 3M Plans actually will mitigate any unreasonable effects on those environmental resources. All of the models of drawdown from SNWA's proposed pumping agree that the drawdown will be severe and over time will spread over a vast area of eastern rural Nevada, ultimately extending into western Utah. *See* Transcript Vol. 24, at 5388-90 (Nov. 10, 2011) (Bredehoeft Direct). This drawdown will have catastrophic impacts to wildlife and plant communities in the affected region, including

those in national wildlife refuges and state wildlife management areas. The drawdown from SNWA's pumping also has the potential to cause serious additional dust emissions in a number of the affected valleys, which poses a substantial risk of creating serious air quality problems extending as far as the Wasatch front. Impacts to Great Basin National Park air quality also are likely. Given the lack of definite objective standards or specified mitigation methods in SNWA's 3M Plan that have been demonstrated to be effective and are certain to be implemented, the State Engineer must deny SNWA's applications on the ground that a project likely to have such devastating impacts would not be environmentally sound.

VIII. SNWA's 3M Plans Do Not Meet the Requirements of the *Remand Decision*:

Because SNWA has not presented substantial evidence that it actually will implement specified mitigation measures that actually will effectively mitigate any conflicts with existing water rights or unreasonable environmental effects caused by its proposed groundwater pumping, the State Engineer must find that SNWA's proposed groundwater pumping would conflict with existing rights, be detrimental to the public interest, and be environmentally unsound. In *Eureka I*, the Nevada Supreme Court held that a finding by the State Engineer that a mitigation plan would be able to adequately and fully mitigate a conflict must be supported by substantial evidence that the applicant actually will effectively mitigate effects so as to avoid or eliminate conflicts with existing water rights. 359 P.3d at 1120, 1121. In other words, the applicant must submit evidence demonstrating the effectiveness and feasibility of specific mitigation methods or techniques in mitigating predicted impacts of the applicant's proposed water use, such that any finding of no conflicts is supported by substantial evidence.

Consistent with the decision in *Eureka I*, the district court in this case held that the State Engineer's decision to rely on SNWA's 2011 monitoring, management, and mitigation plans

("3M Plans") to support findings that SNWA's proposed groundwater pumping satisfied the conflicts, public interest, and environmental soundness criteria of NRS 533.370 was arbitrary and capricious and unsupported by substantial evidence, because the 3M Plans contained neither evidence of effectiveness or feasibility nor definite objective triggers or thresholds to ensure mitigation measures will be taken under specified circumstances. *Remand Decision,* at 15-18, 21-23. The *Remand Decision* explained that the lack of objective standards, thresholds, or triggers made it impossible for the State Engineer to make an informed, or properly supported, determination about whether unreasonable effects of SNWA's proposed pumping to the environment or existing rights could be effectively prevented or mitigated. *Remand Decision,* at 16. As a result, Judge Estes held that the State Engineer' s approval of SNWA ' s applications was arbitrary and capricious with regard to the requirement under NRS 533.370(2) that the State Engineer ensure that the proposed water use neither conflict with existing rights nor threaten the public interest, including unreasonable impacts to the environment. *Id*. Consequently, the district court remanded consideration of SNWA's applications to the State Engineer to, if supported by substantial evidence, "[d]efine standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious in Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley." (*Remand Decision,* at 23.

Addressing this issue on remand necessarily requires that the State Engineer consider evidence concerning, and make as fully informed a determination as possible about, whether the proposed amount of pumping and the proposed "triggers" of SNWA's 3M Plans will allow for effective monitoring and appropriate action to prevent proscribed conflicts and effects from occurring or ensure actual effective mitigation of such conflicts or effects throughout the affected groundwater systems. This in turn requires consideration of whether the model and modeling

evidence presented by SNWA are adequate to reliably set effective definite objective thresholds and triggers and to disclose when and where drawdown effects are likely to occur, when and where effective mitigation measures will need to be implemented, and whether and how those measures actually will mitigate the groundwater drawdown effects caused by SNWA's project.

On remand SNWA presented new iterations of its 3M Plans that purport to monitor, manage, and mitigate impacts of SNWA's proposed groundwater development project. However, from SNWA's own evidence it is apparent that the latest iterations of its 3M Plans continue to lack definite objective standards, thresholds, or triggers sufficient to show under what specific conditions mitigation will occur, and also fail to identify what specific mitigation measures will be implemented or to provide evidence demonstrating that those measures will actually effectively mitigate the effects of SNWA's pumping. During the remand hearing Protestants presented substantial evidence that the latest iterations of SNWA's 3M Plans remain fatally flawed, such that SNWA's 3M Plans still cannot be used as the basis for finding that there will be no impermissible conflicts with existing rights or impacts to the environment.

First, the 3M plans include a monitoring regime that is not based on evidence of a conceptual flow model to support the siting and design of the monitoring wells which SNWA proposes to rely on. Because there is no evidence in the record of a conceptual flow model that would support the siting of monitoring wells, the State Engineer is unable to assess whether those wells would be effective in detecting drawdown in sufficient time to actually and effectively manage or mitigate impacts. Consequently, SNWA's siting of monitoring wells in the 3M Plans has no scientific basis in the record and is arbitrary.

Second, the 3M Plans base the establishment of triggers on an arbitrary, self-serving, definition of unreasonable effects that allows for widespread destruction within the area of

impact and would not prevent unreasonable impacts to the environment. *See* CTGR_22, at 1-3; Transcript Vol. 7, at 1516-17, 1521-22, 1524, 1539-40 (Oct. 3, 2017) (Reich Direct). Thus, even if SNWA could demonstrate that its 3M Plans would prevent what SNWA has defined as unreasonable impacts, by definition the impacts that the Plans would allow are not permitted under Nevada law. *See* NRS 533.370(2), (3)(c). SNWA's 3M plans allow for a level of environmental degradation that far exceeds the level of environmental harm that Nevada law protects against. Accordingly, the 3M Plans presented by SNWA are not sufficient to support findings that SNWA's proposed pumping will not cause unreasonable environmental effect or prove detrimental to the public interest. Therefore, SNWA's applications must be denied.

SNWA also failed to present evidence that met the straightforward requirement articulated by Judge Estes in the *Remand Decision* and by the Nevada Supreme Court in *Eureka I*, 359 P.3d 1114, that a monitoring, management, and mitigation plan must contain definite, objective standards, thresholds, or triggers and information demonstrating specifically how the applicant actually and effectively will mitigate conflicts or unreasonable effects. In the absence of such information there is not substantial evidence on which the State Engineer can base a decision to grant the applications. *Remand Decision*, at 15-18, 21-22 (failure to define what constitutes unreasonable effects, to state under what specific conditions mitigation will be required, or, to specify what mitigation efforts will be made); *Eureka I*, 359 P.3d at 1119-1121; *see also Eureka II*, 402 P.3d 1249, 1250 (2017) (State Engineer "failed to rely on substantial evidence that [the applicant] would be able to actually mitigate the conflicts.").

While the latest iterations of SNWA's 3M Plans superficially appear to contain triggers that could set in motion responses on the part of SNWA, those triggers are arbitrary because the plans are not based on a localized site-specific model that could be used to predict impacts or

evaluate the effectiveness of specific mitigation methods and measures. Consequently, SNWA has not presented a scientific basis for setting effective triggers or identifying which specific mitigation methods will be implemented and confirming the effectiveness of those methods.[5] As a result, the Plans also do not, and indeed could not, include any evaluation of the feasibility of mitigation or the appropriateness of the chosen triggers. CTGR_22, at 8; Transcript Vol. 8, at 1767-68 (Oct. 4, 2017) (Myers Direct). In other words, the triggers included in the Plans are arbitrary and the State Engineer does not have substantial evidence by which to assess their potential effectiveness. As the Nevada Supreme Court held in *Eureka I*, the State Engineer is not permitted to defer until after granting the applications his determination of what mitigation methods will be used and whether those methods actually will mitigate effectively the conflicts and unreasonable effects likely to be caused by SNWA's proposed groundwater pumping. 359 P.3d at 1120-1121. Neither is he permitted to cede such determinations to the control of the applicant. *Remand Decision* at 18, 21. By failing to provide the basis for an assessment of the feasibility and effectiveness of the unspecified and indefinite mitigation promised by its 3M Plans, SNWA has deprived the State Engineer of substantial evidence to support a finding that the granting of SNWA's applications and SNWA's proposed groundwater pumping will not conflict with existing rights, result in unreasonable environmental effects and threaten to prove detrimental to the public interest.

Additionally, SNWA focused most of its presentation on what it refers to as "investigation triggers," which do not require any particular action to be taken but rather initiate a six month period for SNWA to study or investigate what effects are being caused by its

[5] CTGR_22, at 2, 8, 9; Transcript Vol. 6, at 1206 (Oct. 2, 2017) (Mayo Direct); Transcript Vol. 7, at 1426 (Oct. 3, 2017) (Roundy Direct); Transcript Vo. 7, at 1524-25, 1553 (Oct. 3, 2017 (Reich Direct); Transcript Vol. 8, at 1719-89, 1725-28 (Oct. 4, 2017) (Myers Direct).

pumping. At the conclusion of this period, SNWA is to make a report to the State Engineer, but there are no specific requirements for what must be included or addressed in such a report. The contents or the report, like the entire investigation process, is left to SNWA's sole discretion. SNWA is not required to notify or involve the holders of water rights that are or may be impacted from the drawdown that has activated the trigger. Moreover, as Protestants witness Dr. Myers pointed out, once an investigation trigger is crossed there already will be such a high degree of certainty that the effects are being caused by SNWA's pumping that it is the investigation trigger which actually should result in immediate management or mitigation action being taken. GBWN_297, at 43. This point is especially important because in many instances the significant distances between SNWA's wells and the rights or resources that must be protected, along with the long lag times between the drawdown at SNWA's pumping wells and the effects on downgradient rights and resources, means that once drawdown effects are detected at SNWA's monitoring sites it may be too late to take effective mitigation action.

Further, as SNWA's own evidence established, these investigation triggers are not the objective, definitive quantified standards required by the *Remand Decision*. Triggers for SNWA's latest 3M Plans were set using a seasonally adjusted linear regression ("SALR") equation to simulate baseline conditions, which was demonstrated by Protestants' witnesses to be biased so as to mask the impacts of SNWA's groundwater pumping. Transcript Vol. 8, at 1759-1765 Oct. 4, 2017) (Myers Direct); Transcript Vol. 6, at 1212-13 (Oct. 2, 2017) (Mayo Direct). As a result, declines in water levels that are detected likely would be incorrectly attributed to the improperly contrived constantly declining baseline water levels generated by SNWA's SALR instead of being properly attributed to SNWA's pumping. The problem with assuming an unsupported constant decline in the water table without SNWA pumping is that it will mask the

effects of SNWA's pumping by artificially exaggerating the amount of drawdown that must be reached before a SNWA controlled investigation is triggered.

Another fatal flaw that remains in SNWA's newest iterations of its 3M Plans is that no particular mitigation measures or techniques are specified that SNWA has committed to actually use to mitigate the effects of its pumping. Instead, SNWA's 3M Plans provide a menu or list of possible mitigation measures that may be used, along with catchall language allowing SNWA to use other management or mitigation methods that SNWA may later decide will be sufficiently effective. There are no objective standards provided to determine which mitigation method actually will be chosen or to determine whether any method chosen by SNWA actually will effectively mitigate the effects of its pumping. As in the past, this approach boils down to an assertion by SNWA that the State Engineer and the Protestants should simply trust SNWA to make the correct choices in the future and to ensure that its choices are effective at preventing or mitigating conflicts with existing rights and unreasonable effects on the environment.

SNWA's 3M Plans also rely on the assumption that planning to monitor, manage, and mitigate to protect senior water rights will adequately protect any potentially affected environmental resources from unreasonable effects. However, SNWA presented no evidence to support this assumption. In the absence of substantial evidence supporting this claim the State Engineer cannot make a determination that SNWA's assertion on this point actually will ensure adequate mitigation of unreasonable effects on the environment. The State Engineer's determinations regarding the adequacy of SNWA's 3M Plans, like his determinations regarding the amount of water that actually is sustainably available for appropriation by SNWA from these four basins and the potential for conflicts with existing water rights, "must be supported by substantial evidence in the record before him." *Eureka I*, at 1120-1121. The Nevada Supreme

Court further clarified that the State Engineer's determination that an application meets the requirements of NRS 533.370(2) "must be made upon presently known substantial evidence, rather than information to be determined in the future." *Id.* at 1120. Along consistent lines, Judge Estes repeatedly explained that if the necessary evidence for the determinations required under NRS 533.370(2) has not yet been presented to the State Engineer in the record, then the State Engineer may not grant the applications. *Remand Decision*, at 14, 18, 23.

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

The Plans, in effect, amount to a "trust us" approach to management of the system. This "trust us" approach is not appropriate given the context of evidence in the record that demonstrates that SNWA does not have a good track record of environmental stewardship or of working with senior water rights holders, local communities, or the Tribes who will be impacted by its proposed project. Transcript Vol. 5, at 1097-1106 (Sept. 29, 2017) (Gloeckner Oral Public Comment); Transcript Vol. 7, at 1584-1613 (Oct. 3, 2017) (Johnson and Steele Direct); Henry C. Vogler IV Written Public Comment (Oct. 16, 2017); Patrick and Kena Gloeckner Written Public

Comment (Oct. 19, 2017). Additionally, there is evidence in the record that SNWA has a history of disregarding or threatening senior water rights holders in the areas of impact and of operating in a way that is designed to intimidate senior water rights holders and even to put local ranchers out of business. Transcript Vol. 5, at 1097-1106 (Sept. 29, 2017) (Gloeckner Oral Public Comment); Henry C. Vogler IV Written Public Comment (Oct. 16, 2017); Patrick and Kena Gloeckner Written Public Comment (Oct. 19, 2017).

Finally, the 3M Plans contain no provision for stakeholder involvement, despite the fact that the authoritative guidance on adaptive management declares that stakeholder involvement is a necessary component of any effective adaptive management program. Transcript Vol. 4, at 861-61 (Sept. 28, 2017) (Marshall Cross). Rather than involving stakeholders, SNWA's testimony in the remand hearing indicates that SNWA's position is that stakeholders have adequate opportunity to be involved in and protected by SNWA's 3M Plans by virtue of the fact that they may defend their interests through litigation before the State Engineer or the courts. *Id*. SNWA claims that its 3M Plans are adequate in part because it follows the federal government's guide to adaptive management. SNWA_541. The federal guide states that active participation of the stakeholders is essential for an adaptive management program to succeed. SNWA_541, at iv. But as SNWA witness Zane Marshall conceded, SNWA did not consult with any stakeholders in the areas affected by its proposed groundwater pumping, other than federal land management agencies. Transcript Vol. 4, at 822-23 (Sept. 28, 2017) (Marshall cross). This is especially problematic with regard to the Native American Tribes with deep cultural and spiritual connections to the affected areas.

If SNWA could not be bothered consulting with stakeholders at the outset of the 3M Plans' design, when SNWA is striving to put its best face forward, there is no basis for

concluding that SNWA will consult once it has spent billions of dollars on the project and become reliant on the groundwater being pumped. The 3M Plans do not require or provide for any such consultation. To the contrary, the Plans describe a process by which SNWA alone will conduct any investigation of the potential effects of its pumping once one of its triggers is activated. SNWA_592, at 3-4 through 3-8; SNWA_593, at 3-5 through 3-9. Neither existing water rights holders, Tribes, nor any other stakeholders is required to be involved at any stage of the investigation or even notified that an investigation has been triggered.

SNWA's 3M Plans do not adequately protect existing rights, the public interest, or the environment in the affected area, because they provide no assurance that appropriate or effective action will be taken in a timely fashion when impacts are seen. As a consequence, SNWA's proposed use would conflict with existing rights, would be detrimental to the public interest, and is not environmentally sound. Therefore, SNWA's applications must be denied.

CONCLUSION

For the reasons set forth above Protestants White Pine County, Great Basin Water Network, et al., respectfully urge the State Engineer to deny SNWA's applications in Spring, Cave, Dry Lake, and Delamar Valleys on remand.

Respectfully submitted this 19th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this **DRAFT SUPPLEMENTAL RULING ON REMAND OF PROTESTANTS WHITE PINE COUNTY, GBWN, ET AL.** was served on the following, on this 19th day of January, 2018.

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