Case No. CV-1204049
Dept. No. 1
(Senior District Judge Robert E. Estes)

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WHITE PINE

White Pine County, Nevada; Great Basin Water Network; 2d Big Springs Irrigation Company; Baker GID; Baker Ranches, Inc.; Bath Lumber Company; Border Inn, LLC; Carter-Griffin, Inc.; Center for Biological Diversity; Central Nevada Regional Water Authority; Citizens Education Project; Cole Ranch; D Bar X Meats; Elko County, Nevada; Eureka County, Nevada; Great Basin Business and Tourism Council; Indian Springs Civic Association; County of Inyo, California; League of Women Voters of Salt Lake City; Lund Irrigation and Water Company; N4 Grazing Board; Nevada Farm Bureau Federation; Panaca Irrigation Company; Preston Irrigation Company; Progressive Leadership Alliance of Nevada; Rafter Lazy C Ranch; School of the Natural Order; Sierra Club; Sportsworld; Utah Audubon Council; Utah Physicians for a Healthy Environment; Utah Rivers Council; White Pine Chamber of Commerce; Craig F. Baker; Thomas D. Baker; David A. Baker; Donna Bath; James H. Bath; Kristine P. Fillman; Kena Gloeckner; Patrick J. Gloeckner; Kathy C. Hiatt; Abigail C. Johnson; Linda G. Johnson; Orvan Maynard; Roderick G. McKenzie; Gary Perea; Jo Ann Perea; Launce Rake; Katherine A. Rountree; William R. Rountree; Amelia Sonnenberg; Terrance Steadman; Debra Steadman; Henry C. Vogler; David H. Von Seggern; John Wadsworth; Mark Wadsworth; and Matthew Wadsworth.

Petitioners,

v.

UPDATED NOTICE OF AND PETITION FOR JUDICIAL REVIEW FOLLOWING REMAND

Jason King, in his official capacity as the Nevada State Engineer; and the Nevada Department of Conservation and Natural Resources, Division of Water Resources,	)
Respondents.	)

COME NOW, White Pine County, Nevada, Great Basin Water Network, 2d Big Springs Irrigation Company, Baker GID, Baker Ranches, Inc., Bath Lumber Company, Border Inn, LLC, Carter-Griffin, Inc., Center for Biological Diversity, Central Nevada Regional Water Authority, Citizens Education Project, Cole Ranch, D Bar X Meats, Elko County, Nevada, Eureka County, Nevada, Great Basin Business and Tourism Council, Indian Springs Civic Association, County of Inyo, California, League of Women Voters of Salt Lake City, Lund Irrigation and Water Company, N4 Grazing Board, Nevada Farm Bureau Federation, Panaca Irrigation Company, Preston Irrigation Company, Progressive Leadership Alliance of Nevada, Rafter Lazy C Ranch, School of the Natural Order, Sierra Club, Sportsworld, Utah Audubon Council, Utah Physicians for a Healthy Environment, Utah Rivers Council, Craig F. Baker, Thomas D. Baker, David A. Baker, Donna Bath, James H. Bath, Kristine P. Fillman, Kena Gloeckner, Patrick J. Gloeckner, Kathy C. Hiatt, Abigail C. Johnson, Linda G. Johnson, Orvan Maynard, Roderick G. McKenzie, Gary Perea, Jo Ann Perea, Launce Rake, Katherine A. Rountree, William R. Rountree, Amelia Sonnenberg, Terrance Steadman, Debra Steadman, Henry C. Vogler, David H. Von Seggern, John Wadsworth, Mark Wadsworth, and Matthew Wadsworth ("Petitioners"), by and through their attorneys of record, Simeon Herskovits and Iris Thornton of Advocates for Community and Environment, and Michael A. Wheable, White Pine County District Attorney, and hereby give notice to Respondents of their *Updated Notice of and Petition for Judicial Review Following*

Remand of the State Engineer's Ruling on Remand from Senior District Judge Robert E. Estes' December 13, 2013, *Decision* in this case, and request this Honorable Court, pursuant to NRS § 533.450, to review Ruling 6446 issued out of the Office of the Nevada State Engineer ("SE") on August 17, 2018. As directed by Judge Estes' December 13, 2013, Decision in this case, Ruling 6446 addresses 25 water right applications of the Southern Nevada Water Authority ("SNWA"), which were filed in 1989 for the purpose of supplying groundwater to SNWA's massive proposed Groundwater Development and Pipeline Project ("Pipeline Project"). Petitioners hereby further allege as follows:

I

PARTIES

1. Respondent Jason King is the State Engineer of the State of Nevada, Department of Conservation and Natural Resources, Division of Water Resources, and is sued in his official capacity.

2. Respondent State of Nevada, Department of Conservation and Natural Resources, Division of Water Resources is a governmental division of the State of Nevada.

3. Petitioners are protestants to the applications that are the subject of Ruling 6446 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:

(a) they have existing water rights, protected interests in domestic wells, community water systems, or businesses in Spring Valley, Cave Valley, Dry Lake Valley, Delamar Valley, or a hydrologically connected or downwind valley that will be negatively affected

and seriously harmed by the SE's decision to approve SNWA's Spring Valley Monitoring, Management, and Mitigation Plan and Cave, Dry Lake, and Delamar Valleys Monitoring, Management, and Mitigation Plan ("3M Plans") to support its planned export of an excessive, unsustainable, amount of groundwater from Spring, Cave, Dry Lake, and Delamar Valleys because, should SNWA obtain sufficient water rights for its Pipeline Project at some future date (as anticipated by State Engineer Ruling 6446), the decision approving SNWA's 3M Plans will allow SNWA to engage in large scale groundwater mining which would draw down the groundwater system in a pervasively and seriously damaging manner;

(b) they are individuals or groups whose members live in or near to Spring Valley, Cave Valley, Dry Lake Valley, Delamar Valley, or a hydrologically connected valley within the same interbasin flow system or a downwind valley and use groundwater and groundwater dependent resources in one or more of those valleys 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 SE's approval of SNWA's 3M Plans to support its planned export of an excessive amount of groundwater from Spring Valley because, should SNWA obtain sufficient water rights for its Pipeline

Project at a future date (as anticipated by Ruling 6446), the decision approving SNWA's 3M Plans will allow SNWA to engage in large scale groundwater mining which would draw down the groundwater system in a pervasively and seriously damaging manner;

(c) they are people who reside in Spring Valley, Cave Valley, Dry Lake Valley, Delamar Valley, or a downwind valley whose air quality and public health will be jeopardized by the SE's decision approving SNWA's 3M Plans because, should SNWA obtain sufficient water rights for its Pipeline Project at a future date (as anticipated by Ruling 6446), the decision approving SNWA's 3M Plans will allow SNWA to engage in large scale groundwater mining which would draw down the groundwater system in a pervasively and seriously damaging manner causing increased dust emissions and associated air quality and public health impacts;

(d) 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 and the deviations from prior practice and policy in this Ruling; and/or

(e) 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 and the deviations from prior practice and policy in this Ruling.

II

JURISDICTION AND VENUE

4. This Court has jurisdiction of this action pursuant to NRS § 533.450 (Orders and decisions of the State Engineer subject to judicial review).

5. The Court has the authority to review the State Engineer's Ruling 6446, and grant the relief requested, pursuant to NRS § 533.450. All requirements for judicial review have been satisfied.

6. The relief sought is authorized by NRS § 533.450.

7. Venue is properly before this Court pursuant to NRS § 533.450. The Seventh Judicial District Court for the State of Nevada includes White Pine County. White Pine County is a "county in which the matters affected or a portion thereof are situated." NRS § 533.450(1).

8. Venue in this Court is proper because Ruling 6446 is a ruling on remand from this Court pursuant to the December 13, 2013, *Decision* ("*Remand Decision*") issued by Senior Judge Robert E. Estes, which reversed and remanded the State Engineer's 2012 Rulings 6164 (SNWA Spring Valley Pipeline Applications), 6165 (SNWA Cave Valley Pipeline Applications), 6166 (SNWA Dry Lake Valley Pipeline Applications), and 6167 (SNWA Delamar Valley Pipeline Applications). Judge Estes's *Remand Decision* directed the State Engineer to make additional findings regarding the sufficiency of the evidence to establish certain basic requirements under NRS § 533.370, which is what Ruling 6446 purports to do.

9. There is a present and actual controversy between the parties. The State Engineer's Ruling 6446 has, and continues, to adversely affect Petitioners' interests.

III

FACTS AND PROCEDURAL HISTORY

10. This Petition seeks judicial review of the Nevada State Engineer's Ruling 6446 on a number of applications that are intended to serve the Southern Nevada Water Authority's (SNWA's) massive groundwater development and pipeline project in eastern Nevada (the "SNWA Pipeline Project"). As explained below, these applications were the subject of State Engineer hearings in 2006 and 2008 as well as a unified, comprehensive hearing on remand during the fall of 2011 and a second unified hearing on remand during the fall of 2017.

11. The petitioners are seeking judicial review of Ruling 6446 because, while the Ruling correctly denied SNWA's water rights applications, as further explained below, it also contains serious legal errors and approves SNWA's 3M Plans which are not substantively different from the 3M Plans which were found insufficient by this Court in its December 13, 2013, *Remand Decision*, and which therefore would fail to provide any concrete protection for existing, or senior, water rights, the environment, the economy, and the public health of communities across a broad swath of eastern Nevada and western Utah were SNWA and the State Engineer able to successfully persuade this Court to overturn its prior rulings and grant to SNWA sufficient water rights to support its project as anticipated by Ruling 6446 itself.

12. The complete list of applications that were dealt with in the 2011 and 2017 Hearings on Remand is Application Nos. 53987 – 53992 and 54003 – 54021, inclusive. These applications seek water rights from proposed points of diversion in four eastern Nevada valleys.

Application Nos. 53987 – 53988 seek groundwater from points of diversion in Cave Valley, which lies in White Pine and Lincoln Counties. Application Nos. 53989 – 53990 seek groundwater from points of diversion in Dry Lake Valley, which lies in Lincoln County. Application Nos. 53991 – 53992 seek groundwater from points of diversion in Delamar Valley, which lies in Lincoln County. And application Nos. 54003 – 54021 seek groundwater from points of diversion in Spring Valley, which lies in White Pine and Lincoln Counties.

13. In order to understand Ruling 6446, it is necessary to understand the history and inextricable nature of all of these applications, the vast project they are intended to serve, and the procedural history that led to them being the subject of a first Hearing on Remand in the fall of 2011 from both the Nevada Supreme Court and this Court and then resulted in a second remand hearing in the fall of 2017 from this Court, which remand hearing was the third hearing on the merits of each individual application and the fourth hearing on SNWA's 3M approach in all of these valleys and hydrologically connected valleys.

14. These applications are part of a massive, unprecedented effort to acquire more water for greater Las Vegas, and are a subset of the 146 applications filed by the Las Vegas Valley Water District ("LVVWD") with the State Engineer on October 17, 1989, to pump approximately 800,000 acre-feet per year ("acre-ft/yr" or "afa") of groundwater from twenty-six rural groundwater basins in east-central and southern Nevada.

15. In response to those 1989 applications, over 800 individual protests were filed, many of which were filed by Petitioners in this case.

16. Subsequently, the quantity of groundwater sought was reduced to approximately 190,000 acre-ft/yr in seventeen groundwater basins.

17. For over a decade and a half the State Engineer took no action to adjudicate those applications and the protests thereto.

18. In 1991, the Southern Nevada Water Authority ("SNWA") was created and acquired the LVVWD's rights to these groundwater applications as a successor-in-interest.

19. The applications were left dormant until 2005, when SNWA requested that the State Engineer schedule a hearing on these applications – along with an additional set of applications that had been filed simultaneously in 1989 seeking groundwater from Snake Valley for the same Pipeline Project purpose – to be held in 2006.

20. On January 5, 2006, the State Engineer held a prehearing conference on all of these applications, at which SNWA pressed for the applications to heard in one hearing during the summer of 2006, with one portion of the hearing to focus on the Spring Valley applications, one portion to be devoted to the Cave, Dry Lake, and Delamar Valleys applications, and one portion of the hearing to focus on the Snake Valley applications. Instead, for reasons of practicality the SE ordered that the applications would be considered in three hearings, following the same division proposed by SNWA for the original proposed comprehensive hearing.

21. The first of these connected hearings, to deal with the Spring Valley applications, was held from September 11, 2006, through September 29, 2006. However, before that hearing commenced a number of petitioners filed a petition with the State Engineer seeking to have the protest period for SNWA's Pipeline Project applications re-opened and to allow successors-in-interest, including heirs, to original protestants to step into the shoes of their predecessors-in-interest who were original protestants, just as SNWA had been permitted to step into the shoes of its predecessor-in-interest, and participate in these hearings. The SE denied that petition, and a

petition for judicial review was filed in this District Court challenging the SE's denial. That 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, but 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. While that petition for judicial review was pending, the original Spring Valley hearing was held and the State Engineer issued Ruling 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.

22. On May 30, 2007, the District Court denied the Due Process Petition, and the petitioners appealed to the Nevada Supreme Court.

23. While the Due Process appeal was pending, the State Engineer moved forward with the next hearing, which dealt with the Cave, Dry Lake, and Delamar ("CDD") Valleys applications and was held from February 4, 2008, through February 15, 2008. On July 9, 2008, the SE issued Ruling 5875 ("CDD Ruling"), granting SNWA a total of 18,755 afa of groundwater rights from these three valleys, 4,678 afa in Cave Valley, 11,584 afa in Dry Lake Valley, and 2,493 afa in Delamar Valley, for its Pipeline Project. While the appeal of the Due Process Petition still was pending, the protestants in the CDD Hearing and other parties aggrieved by Ruling 5875 appealed the CDD Ruling to this District Court.

24. On October 19, 2009, this Court reversed Ruling 5875 in an order issued by Senior Judge Robison, which held that the State Engineer had acted arbitrarily and capriciously,

abused his discretion, and that the SE's findings in Ruling 5875 on the issues of availability of water, the public interest, conflicts with existing rights, and monitoring and mitigation of those conflicts were not supported by substantial evidence in the record. The SE and SNWA appealed the District Court's CDD Order to the Supreme Court.

25. On January 28, 2010, the Supreme Court reversed the District Court and State Engineer as to the Due Process Petition, vacating both of the State Engineer's rulings on the Spring Valley and CDD Valleys applications for the SNWA Pipeline Project, 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.[1] *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 2, 222 P.3d 665 (2010), *modified on petition for rehearing* 126 Nev. 187, 234 P.3d 912 (2010).

26. Subsequently, SNWA's 1989 Pipeline Project applications in the SCDD Valleys were re-published and subjected to a new protest period in early 2011.

27. The re-published applications prompted many new and renewed protests by numerous individuals and entities, some of whom are the Petitioners in this case.

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[1] In response to perceived ambiguity about whether SNWA's Pipeline Project applications had been voided by the Supreme Court's opinion, SNWA and the SE 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 SE'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

28. On May 11, 2011, the SE held a prehearing conference on all of these SNWA Pipeline Project applications in Spring Valley, Cave Valley, Dry Lake Valley, and Delamar Valley, and scheduled a six-week hearing on all of them for September 26, 2011, through November 18, 2011.

29. On March 22, 2012, following the six week hearing and post-hearing briefing, the State Engineer issued Rulings 6164, 6165, 6166, and 6167, addressing SNWA's Pipeline Project applications in the four SCDD Valleys. In Ruling 6164, the Spring Valley Ruling, the SE 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. In Ruling 6165, the Cave Valley Ruling, the SE granted SNWA 5,235 afa of groundwater under Applications 53987 and 53988. In Ruling 6166, the Dry Lake Valley Ruling, the SE granted SNWA 11,584 afa of groundwater under Applications 53989 and 53990. In Ruling 6167, the Delamar Valley Ruling, the SE granted SNWA 6,042 afa of groundwater under Applications 53991 and 53992. Together, the four Rulings granted SNWA a total of 83,988 afa of groundwater to support its pipeline from the SCDD Valleys.

30. Because the State Engineer's approval of SNWA's Applications in Rulings 6164, 6165, 6166, and 6167 was predicated on a number of findings and conclusions that were unsupported by sufficient evidence, inconsistent with prior practice of the State Engineer, internally inconsistent, and contrary to law, a number of protestants and aggrieved persons and

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remand by the State Engineer. *Great Basin Water Network v. Taylor*, 126 Nev. 187, 234 P.3d 912 (2010).

entities jointly filed petitions for judicial review of all four Rulings in this Court. Those petitions were later consolidated with Petitions for Judicial Review of the Spring Valley Ruling 6164 filed by Millard County, Utah, the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints on behalf of Cleveland Ranch, the Confederated Tribes of the Goshute Reservation, the Ely Shoshone Tribe, and the Duckwater Shoshone Tribe under case number cv-1204049. Intervention was granted for the Southern Nevada Water Authority.

31. On December 13, 2013, Senior Judge Estes Issued a *Decision* ("*Remand Decision*") in *White Pine County v. King*, reversing Rulings 6164, 6165, 6166, and 6167, and holding that: (1) "losing 9,780 afa from the basin, over and above E.T. after 200 years is unfair to following generations of Nevadans, and is not in the public interest. In violating the Engineer's own standards, the award of 61,127 afa [in Spring Valley] is arbitrary and capricious." In other words, the State Engineer, in Ruling 6164 sanctioned groundwater mining in violation of Nevada law; (2) the State Engineer sanctioned a double appropriation of water that was already appropriated downgradient of the CDD Valleys in violation of his duty to prevent conflicts with existing rights; and (3) "[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" ..."[a]bsent a thorough plan and comprehensive standards for mitigation, any mitigation, (or lack thereof) is subjective, unscientific, arbitrary and capricious." *White Pine County v. King*, Case No. CV1204049 (Nev. Dist. Ct. Dec. 13, 2013).

32. As a result of these fundamental deficiencies, the *Remand Decision* remanded to the State Engineer "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." *Id.* at 1-2.

33. Specifically, the *Remand Decision* remanded SNWA's Spring, Cave, Dry Lake, and Delamar Valleys applications to the State Engineer to perform four tasks consistent with the *Decision*: (1) The addition of Millard and Juab counties, Utah in the mitigation plan so far as water basins in Utah are affected by pumping of water from Spring Valley Basin, Nevada; (2) A recalculation of water available for appropriation from Spring Valley assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time; (3) Define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious in Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley; and (4) Recalculate the appropriations from Cave Valley, Dry Lake and Delamar Valley to avoid over appropriations or conflicts with down-gradient, existing water rights. *Id.* at 23.

34. On January 23, 2014, the Southern Nevada Water Authority and State Engineer appealed the *Remand Decision* to the Nevada Supreme Court.

35. Those appeals were dismissed by the Nevada Supreme Court on February 6, 2015, which found that the Supreme Court lacked jurisdiction, because the *Remand Decision* was not a final, appealable, order. Order Dismissing Appeal, *King v. Corporation of the Presiding Bishop,* Case No. 64815 (Nev. 2015).

36. On May 30, 2014, with their appeals still pending before the Nevada Supreme Court and in apparent coordination with one another, the Southern Nevada Water Authority and State Engineer filed Petitions for Writ of Mandamus and Prohibition with the Supreme Court of

Nevada requesting that the Supreme Court vacate this Court's December 13, 2013, *Remand Decision* and affirm State Engineer Rulings 6164, 6165, 6166, and 6167. In its Petition, SNWA acknowledged that its project could not satisfy the requirements of the *Remand Decision*. SNWA Petition for Writ of Mandamus or, in the Alternative, Prohibition, at 44, *SNWA v. Seventh Judicial District Court*, No. 65775, 2015 WL 2452803 (Nev. May 30, 2014).

37. The Petitions for Writ of Mandamus and Prohibition filed by State Engineer and SNWA were denied by the Nevada Supreme Court by Orders issued on May 21, 2015 on the ground that a petition for judicial review of the State Engineer's ruling on remand would provide an adequate remedy at law. *SNWA v. Seventh Judicial District Court*, No.65775, 2015 WL 2452803 (Nev. 2015); *King v. Seventh Judicial District Court*, No. 65776, 2015 WL 2452825 (Nev. 2015).

38. In the fall of 2015, the Nevada Supreme Court issued an *en banc* decision in *Eureka County v. State Engineer* (*Eureka I*) which had important implications for SNWA's pipeline applications. In *Eureka I*, the Court held that "the State Engineer's decision to grant an application, which requires a determination that the proposed use or change would not conflict with existing rights, NRS 533.370(2), must be made upon presently known substantial evidence, rather than information to be determined in the future, for important reasons…the finding must be based upon evidence in the record to support that mitigation would be successful and adequate to fully protect those existing rights." *Eureka County v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1120-21 (2015) ("*Eureka I*"). Further, the Court called into question the assumption that reliance on replacement water would ever constitute sufficient mitigation. *Id.* at 1119-20.

39. On June 17, 2016, the State Engineer issued a *Notice of Status Conference*, which set a status conference for the remand hearing on SNWA's Spring, Cave, Dry Lake, and Delamar Valleys applications for September 14, 2016, in Carson City, Nevada. The status conference addressed the following issues: (1) Whether an additional administrative hearing is necessary or whether the matters can be reconsidered based on the evidence already in the record; (2) Whether additional work needs to be accomplished or evidence developed prior to reconsideration by the State Engineer or any additional administrative hearing; (3) Timing for the exchange of additional evidence, if necessary; and (4) If necessary, scheduling of any additional administrative hearing.

40. Prior to the status conference, on September 12, 2016, Petitioners White Pine County, Great Basin Water Network, et al. delivered a letter to the State Engineer which recommended that given the ample opportunity SNWA already has had to develop and present evidence on the remanded issues, and given the fact that the reviewing courts, the State Engineer, and SNWA all have agreed that the existing record contains sufficient evidence for the State Engineer to rule on the remanded issues, a fourth hearing on SNWA's applications was not necessary on remand..

41. On September 14, 2016, the State Engineer nonetheless held a status conference on SNWA's Spring, Cave, Dry Lake, and Delamar Valleys applications. In addition to SNWA, appearances were made by counsel for the Confederated Tribes of the Goshute Reservation, the Ely Shoshone Tribe, the Duckwater Shoshone Tribe, the Cleveland Ranch, Millard and Juab Counties, Utah, and a broad coalition of protestants led by White Pine County and Great Basin

Water Network and represented by Advocates for Community and Environment, many of whom are above-named petitioners.

42. Following that status conference, on October 3, 2016, the State Engineer issued an *Interim Order on Pre-Hearing Scheduling* finding that a remand hearing was necessary to address the *Remand Decision*, defining the scope of that hearing, and setting deadlines for the filing of various pre-hearing filings related to scheduling, evidence, discovery, and participation by protestants.

43. On November 28, 2016, the State Engineer issued a *Notice of Hearing and Interim Order* scheduling the Remand Hearing for Monday, September 25, 2017, through Friday, September 29, 2017, and Monday, October 2, 2017, through Friday, October 6, 2017, in Carson City. The *Notice of Hearing and Interim Order* also denied the Cleveland Ranch's October 14, 2016, *Motion Regarding Discovery and Mandatory Presentations of Proposed Written Testimony* and the *Motion to Dismiss for Failure to Join United States Department of Interior Bureaus* filed by the Confederated Tribes of the Goshute Reservation, Ely Shoshone Tribe, and Duckwater Shoshone Tribe ("Tribes") and joined by the Great Basin Water Network, White Pine County, et al. Lastly, the Order set deadlines for simultaneous initial and rebuttal evidence and witness list exchanges for the June 30, 2017, and August 11, 2017, respectively.

44. On June 30, 2017, SNWA and protestants submitted evidence to the State Engineer. SNWA submitted hydrologic evidence in response to the *Remand Decision* in the form of a report which at the outset criticized the *Remand Decision*'s requirement that its project reach equilibrium within a reasonable time period, but nonetheless presented a hypothetical ET capture project which it claimed would reach equilibrium within a reasonable time period in

compliance with that *Remand Decision*. Separately, SNWA presented hydrologic and biological monitoring and mitigation plans based on an entirely different pumping scenario for which neither ET capture, equilibrium, nor impacts were analyzed or introduced into evidence. Thus, as the State Engineer acknowledged in Ruling 6446, SNWA did not present one unified project which would satisfy the four requirements of the *Remand Decision*. Additionally, despite the *Remand Decision*'s direction to the State Engineer to grant a lesser amount of water from the CDD Valleys, SNWA's evidentiary exchange included a request for an additional 3,500 afa of groundwater from Cave Valley above and beyond what had been granted in Ruling 6165.

45. On August 11, 2017, the parties submitted rebuttal evidence to the State Engineer.

46. Following pre-hearing motion practice in which SNWA sought but failed to exclude protestant evidence, from September 25, 2017, through Friday, September 29, 2017, and Monday, October 2, 2017, through Friday, October 6, 2017, the State Engineer held a remand hearing on SNWA's SCDD applications. During the remand hearing, evidence relevant to the *Remand Decision* was presented by SNWA and by all protestants who had entered appearances at the September 14, 2016, status conference.

47. During the Remand Hearing, the Nevada Supreme Court issued a decision in *State Engineer v. Eureka County*, 402 P.3d 1249 (Nev. 2017) ("*Eureka II*"), which has direct implications for the SNWA pipeline case in which SNWA has now been afforded three separate State Engineer hearings on each of its pipeline applications in the SCDD Valleys, with four opportunities to present its mitigation plans. In *Eureka II*, the Nevada Supreme Court held that after having failed to present sufficient evidence of a valid mitigation plan in its first hearing before the State Engineer, the applicant was not entitled to a remand proceeding for the purpose

of presenting additional mitigation evidence, because it wasn't entitled to "a second bite at the apple." Thus, the district court's decision to vacate the applications without further remand to the State Engineer was proper and was upheld.

48. Following the remand hearing, on January 19, 2018, written closing arguments and proposed rulings were submitted to the State Engineer by SNWA and protestants.

49. Following the submission of written closing arguments and proposed rulings, SNWA submitted a letter to the State Engineer withdrawing its request for the additional 3,500 afa of groundwater from Cave Valley.

50. On August 17, 2018, the State Engineer issued Ruling 6446 on Remand, in which he correctly denied all of SNWA's Spring, Cave, Dry Lake, and Delamar Valleys applications, but nonetheless gratuitously and unlawfully approved SNWA's patently deficient monitoring, management and mitigation plans for those Valleys.

RULING 6446 DENIAL OF SNWA'S SCDD VALLEYS APPLICATIONS

51. Specifically, in Ruling 6446 the SE denied SNWA's Spring Valley Applications (54003 through 54015 and Applications 54019 and 54020) on the ground that SNWA did not present any evidence that pumping the applications would capture existing groundwater discharge from evapotranspiration or reach equilibrium within any reasonable time period as required by Nevada law and the *Remand Decision*. In other words, the State Engineered denied SNWA's Spring Valley applications because SNWA presented no evidence whatsoever that its proposed groundwater pumping would not result in groundwater mining, and therefore there was insufficient evidence in the record to demonstrate that any amount of groundwater is available for appropriation at SNWA's points of diversion.

52. The State Engineer also denied SNWA Spring Valley applications 54014 and 54015 for the additional reason that it is uncertain whether swamp cedar habitat can be maintained with surface water, and additionally that pumping those applications could result in an unreasonable impact to the swamp cedars prior to an investigation trigger being reached, and thus the applications threaten to prove detrimental to the public interest.

53. Finally, State Engineer Ruling 6446 denied SNWA's applications 53987 through 53992 in Cave, Dry Lake, and Delamar Valleys on the ground that SNWA did not present evidence that the applications would not conflict with existing water rights in fully appropriated down-gradient groundwater basins. Specifically, SNWA did not present any evidence regarding whether the groundwater its applications would capture supplies existing water rights. Thus, there was no evidence in the record to support a finding that SNWA's pumping would not capture water already appropriated downgradient from SNWA's points of diversion.

54. Petitioners do not challenge the State Engineer's denial of SNWA's water rights applications, as this denial was supported by substantial evidence in the record and was consistent with the *Remand Decision* and Nevada water law.

55. However, in the course of denying SNWA's applications in Spring Valley and in Cave, Dry Lake, and Delamar Valleys, the State Engineer asserted a direct challenge to the *Remand Decision*'s application of Nevada water law and accompanying directions to the State Engineer on remand. The SE further made clear his intent to challenge this Court's application of the law and the *Remand Decision*'s directions, and requirements in an appeal by the SE of his own Ruling 6446. The arbitrary and capricious nature of the State Engineer's determination to reverse longstanding Nevada water law and policy in order to find a way to grant SNWA's water

right applications without regard for the groundwater mining and conflicts that pumping SNWA's applications would cause is reflected in his repeated mischaracterizations of the evidence, Nevada water law and policy, and his own previous practice and precedent.

56. For example, the State Engineer argued, in contradiction of the *Remand Decision* and contrary to his own previous practice and precedent, that Nevada water law does not require groundwater applications such as SNWA's to capture ET discharge or reach equilibrium in a reasonable timeframe, arguing, in effect, that Nevada water law permits groundwater mining. This clearly erroneous statement of law would have drastic implications for Nevada water law if allowed to stand unchallenged. In a similar vein, the State Engineer reversed decades of practice and precedent by stating, again in contradiction of the *Remand Decision*, that water applications such as SNWA's need not capture discharge, but may draw from storage in an open-ended manner – in other words saying that it is permissible to draw down groundwater basins indefinitely and engage in groundwater mining without limit. This clear misstatement of law, and reversal of sound, long-established policy, has equally dangerous implications for Nevada if left unchallenged. Finally, in the context of SNWA's applications in Cave, Dry Lake, and Delamar Valleys, the State Engineer stated, in effect, that double appropriation of groundwater ought to be permitted under Nevada law if impacts may not become obviously harmful within a short time frame. He also misrepresented the analysis contained in the *Remand Decision* to suggest that it held that conflicts are presumed if uncertain. The *Remand Decision* made no such conclusion or finding. The State Engineer's statements are in direct contradiction of the *Remand Decision* and NRS § 533.370's unequivocal requirement that the State Engineer deny water rights that conflict with existing rights. These and other statements scattered throughout Sections

II and III of Ruling 6446 amount to a self-serving rewriting of Nevada water law for the purpose of justifying SNWA's pipeline project and should be corrected by the Court.

RULING 6446 APPROVAL OF SNWA'S 3M PLANS

57. Petitioners challenge the State Engineer's approval of SNWA's monitoring, management and mitigation plans in Ruling 6446. Despite the fact that the State Engineer in Ruling 6446 denied all of SNWA's water rights applications in Spring, Cave, Dry Lake, and Delamar Valleys as stated above, the SE nonetheless approved SNWA's 3M Plans for Spring Valley and Cave, Dry Lake, and Delamar Valleys, in the hope that the SE would obtain a reversal of this Court's previous *Remand Decision*, which the SE said he would seek, and that the SE would have an opportunity to reinstate some approval of SNWA's water rights in the SCDD Valleys at some later date.

58. Strange as it may seem, then, in Ruling 6446 the SE approved SNWA's 3M Plans for a project that was rejected in the same Ruling for lack of water availability and for which as a result there currently are no water rights or defined contours. In effect, the State Engineer has written SNWA a blank check for future water development in these basins, holding that regardless of the amounts, locations, and pumping regimes proposed in a future version of SNWA's Pipeline Project under their applications in the SCDD Valleys, the 3M Plans submitted by SNWA in the 2017 hearing will be considered prospectively sufficient to mitigate whatever that unknown project's impacts may be regardless of their location, severity, or extent. Such a speculative finding clearly is arbitrary and capricious, is unsupported by substantial evidence, is inconsistent with the *Remand Decision* and the Supreme Court's statement of the law in *Eureka I* and in *Eureka II,* and highlights the fact that it was premature for the State Engineer to approve

SNWA's 3M Plans at the same time as he was denying the water rights applications on the ground that SNWA had not demonstrated that water actually is available for the Project.

59. Moreover, these 3M Plans, in substance, are no less deficient than those presented by SNWA in the 2011 remand hearing, or the previous two hearings, on these same applications, which this Court correctly found in its 2013 *Remand Decision* to be insufficient to support findings related to conflicts with existing rights, the public interest, or environmental soundness. Because SNWA's 3M Plans still fail to establish actual quantified triggers and thresholds, or specify which actions will be taken or measures will be implemented when those triggers or thresholds are reached with regard to actual specified existing water rights or environmental resources, there is not adequate evidence on which to base an informed, reasoned determination of whether those triggers, thresholds, actions, or measures would effectively and feasibly prevent the Pipeline Project's predicted impermissible conflicts with existing rights and unreasonable impacts to the environment. So, SNWA's 3M Plans still do not meet the requirements of this Court's *Remand Decision*, and do not comply with the similar standards governing 3M Plans articulated by the Nevada Supreme Court in *Eureka I* and *Eureka II.*

60. Additionally, as alluded to above, the State Engineer's decision in Ruling 6446 to approve SNWA's 3M Plans, which are not based on or responsive to any site-specific conflicts or impacts analysis, was arbitrary and capricious and unsupported by substantial evidence. Specifically, despite the fact that SNWA chose not to introduce any evidence in the 2017 remand hearing explaining what the site-specific impacts of its now-rejected Pipeline Project are expected to be, and chose not to base its 3M Plans on any such impacts analysis, the State Engineer has approved those plans. The approval of SNWA's 3M Plans in the absence of such

basic, necessary evidence amounts to a speculative, or anticipatory, finding that SNWA's Plans will successfully prevent or mitigate any and all potential conflicts regardless of where they might occur and how severe they might be. Just as was the case when this Court rejected SNWA's 3M Plans in its 2013 *Remand Decision*, SNWA's 3M Plans still are not based on an evaluation of what conflicts are likely to occur, whether or how those conflicts could be effectively mitigated, or whether any particular proposed mitigation measure would even be feasible. That fundamental flaw alone required rejection of SNWA's 3M Plans. Therefore, the SE's approval of SNWA's 3M Plans is unsupported by substantial evidence in the record, contrary to the *Remand Decision*, and violative of Nevada law as explained by the Nevada Supreme Court in *Eureka I* and *Eureka II*.

61. Because SNWA's 3M Plans are not based on or responsive to an evaluation of predicted impacts, those Plans are fatally flawed and insufficient to support findings that the Pipeline Project will not conflict with existing rights, be contrary to the public interest, or be environmentally unsound, as required by NRS § 533.370 and *Eureka I* and *Eureka II*. Thus, those findings in Ruling 6446 are unsupported by substantial evidence and are contrary to law.

62. Further, the State Engineer's findings with regard to the 3M Plans' definition of unreasonable effects are unsupported by substantial evidence in the record and are arbitrary and capricious, because SNWA's arbitrary definition allows for widespread destruction within the area of impact and clearly would not prevent unreasonable impacts to the environment. In other words, the impacts that the 3M Plans, by their own terms, would allow are not permitted under NRS § 533.370, as recognized by Nevada Courts and the State Engineer's Office itself in numerous previous rulings over many years.

63. The State Engineer's findings with regard to the 3M Plans' approach to preventing and mitigating anticipated conflicts with existing rights are unsupported by substantial evidence in the record and are arbitrary and capricious.

64. The State Engineer's findings with regard to the 3M Plans' approach to the avoidance of impacts to environmental resources via protection of existing rights are unsupported by substantial evidence in the record and are arbitrary and capricious.

65. The State Engineer's findings with regard to the 3M Plans' approach to the prevention and mitigation of anticipated air quality impacts are unsupported by substantial evidence in the record and are arbitrary and capricious.

66. The State Engineer's findings with regard to the adequacy of the 3M Plans' baseline data are unsupported by substantial evidence in the record and are arbitrary and capricious.

67. The State Engineer's findings with regard to the adequacy of the 3M Plans' monitoring well locations, configurations, and construction are unsupported by substantial evidence in the record and are arbitrary and capricious, because the locations and configurations of the monitoring wells were not based on a conceptual flow model, which was needed to guide proper placement and configuration. Thus, there is no evidence in the record that the monitoring wells would adequately detect impacts from pumping in time to actually or effectively manage or mitigate those impacts.

68. The State Engineer's findings with regard to the adequacy or existence of the 3M Plans' purported triggers and thresholds are unsupported by substantial evidence in the record and are arbitrary and capricious. Specifically, SNWA's 3M Plans fail to meet the requirement

that a 3M plan contain definite, objective standards, thresholds, or triggers and information demonstrating specifically how the applicant actually and effectively will mitigate conflicts or unreasonable effects as articulated by this Court in the *Remand Decision* and by the Nevada Supreme Court in *Eureka I* and *Eureka II.* The generic standards that SNWA treats as "triggers" in the 3M Plans are nothing more than an approach, or methodology, that SNWA proposes to use to calculate actual quantified triggers at a later date, and thus cannot be used to support a finding that SNWA's applications will not conflict with existing rights as required by the Supreme Court in *Eureka I.*

69. The State Engineer's findings with regard to the effectiveness and feasibility 3M Plans' list of potential mitigation measures are unsupported by substantial evidence in the record, and are inconsistent with this Court's *Remand Decision* and with the Nevada Supreme Court's articulation of Nevada law in *Eureka I* and *Eureka II.* Specifically, as noted by the *Remand Decision*, the 3M Plans did not have in 2011, and still do not have, information regarding which mitigation measures will be used and when they will be used. So, it is not possible to evaluate whether the listed potential mitigation actions have any reasonable prospect of being effective. The 3M Plans contain no assurance that SNWA will be required to take any particular management action or mitigation measure to prevent or remedy conflicts that are likely to arise or impacts that are likely to occur. The decisions whether to implement actual management actions or mitigation measures, and which actions or measures to implement, appear to be left to the sole discretion of SNWA. In effect, SNWA has yet again presented a broad conceptual plan for an actual concrete and specific plan to be developed later, and SNWA again has attempted to use a voluminous body of indefinite and unspecific material to bury the fact that its approach is

no different than it was in 2011, which was found to be insufficient by this Court. Thus, the State Engineer's findings regarding the effectiveness and feasibility of the listed mitigation measures is not supported by substantial evidence and is arbitrary and capricious.

70. The State Engineer's findings with regard to stakeholder involvement, a critical component of adaptive management plans such as SNWA's 3M Plans, are unsupported by substantial evidence in the record and in fact contradict the evidence that is in the record.

71. For the reasons articulated in Paragraphs 57 through 70, the State Engineer's approval of SNWA's 3M Plans in Ruling 6446 was arbitrary and capricious, unsupported by substantial evidence, contrary to law, and an abuse of discretion.

IV

DAMAGES CLAIMED

72. All of the Petitioners have concrete interests in Spring Valley, Cave Valley, Dry Lake Valley, Delamar Valley, hydrologically connected valleys, and/or downwind valleys that will be negatively affected and jeopardized by the above-listed legal errors in Ruling 6446. Some Petitioners own water rights, homes, and/or businesses in these valleys. Others have environmental, recreational, public health, spiritual, and/or economic interests that would be harmfully impacted. Still others have an interest in protecting their community supply of water. Because Ruling 6446 expressly approves SNWA's 3M Plans, and because Ruling 6446's approval of those 3M Plans is expressly intended to support the ultimate approval SNWA's Pipeline Project despite the fact that the Project would conflict with and impair Petitioners' rights and/or interests and cause serious irreversible damage to the environment in Spring Valley, Cave Valley, Dry Lake Valley, Delamar Valley, hydrologically connected valleys, and downwind

valleys. The SE's approval of SNWA's 3M Plans also would set precedent allowing the use of 3M Plans throughout the state that lack actual quantified triggers or concrete evidence demonstrating that mitigation or avoidance of impermissible impacts is feasible. Absent relief from this Court Petitioners will suffer permanent and irreparable damages. These are actual, concrete injuries caused by the State Engineer's Ruling that will be redressed by the relief sought in this Petition.

V

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Petitioners pray for a Judgment as follows:

1. For an Order setting a briefing schedule;

2. For an Order affirming the State Engineer's denial of SNWA's applications in Spring, Cave, Dry Lake, and Delamar Valleys, and correcting the misstatements of law contained in State Engineer Ruling 6446 related to ET capture, time to equilibrium, and conflicts with downgradient rights;

3. For an Order vacating the portions of State Engineer Ruling 6446 that approve SNWA's 3M Plans, and directing the State Engineer to enter a new Ruling rejecting SNWA's Pipeline Project applications in Spring, Cave, Dry Lake, and Delamar Valleys on the additional ground that: (a) SNWA's proposed appropriation and export of groundwater from Spring Valley, Cave Valley, Dry Lake Valley, and Delamar Valley would conflict with existing water rights and protected interests in existing domestic wells, because SNWA's 3M Plans are insufficient to support a finding that the Project would not conflict with existing rights; (b) SNWA's proposed appropriation and export of groundwater from Spring Valley, Cave Valley,

Dry Lake Valley, and Delamar Valley threatens to prove detrimental to the public interest due to that proposed use's likely severe environmental and socioeconomic impacts, because SNWA's 3M Plans are insufficient to prevent these impacts; and (c) SNWA's proposed appropriation and export of groundwater from Spring Valley, Cave Valley, Dry Lake Valley, and Delamar Valley would be environmentally unsound as it relates to those valleys due to that proposed use's likely severe environmental impacts, because SNWA's 3M Plans are insufficient to ensure that the proposed export of water will be environmentally sound as it relates to the basins of origin; and

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

Respectfully submitted this 17th day of September, 2018.

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Attorneys for Petitioners

AFFIRMATION (Pursuant to NRS § 239B.030)

The Undersigned do hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 17th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2018, in compliance with NRS § 533.450(3), I served, via USPS first class mail, a complete copy of the foregoing **UPDATED NOTICE OF AND PETITION FOR JUDICIAL REVIEW FOLLOWING REMAND** addressed as follows:

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Case No. CV-1204049
Dept. No. 1
(Senior District Judge Robert E. Estes)

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WHITE PINE

White Pine County, Nevada; et al.,

Petitioners,

v.

Jason King, in his official capacity as the Nevada State Engineer; and the Nevada Department of Conservation and Natural Resources, Division of Water Resources,

Respondents.

DISCLOSURE STATEMENT PURSUANT TO NRCP 7.1

COME NOW, White Pine County, Nevada; Great Basin Water Network; 2d Big Springs Irrigation Company; Baker GID; Baker Ranches, Inc.; Bath Lumber Company; Border Inn, LLC; Carter-Griffin, Inc.; Center for Biological Diversity; Central Nevada Regional Water Authority; Citizens Education Project; Cole Ranch; D Bar X Meats; Elko County, Nevada; Eureka County, Nevada; Great Basin Business and Tourism Council; Indian Springs Civic Association; County of Inyo, California; League of Women Voters of Salt Lake City; Lund Irrigation and Water Company; N4 Grazing Board; Nevada Farm Bureau Federation; Panaca Irrigation Company; Preston Irrigation Company; Progressive Leadership Alliance of Nevada; Rafter Lazy C Ranch; School of the Natural Order; Sierra Club; Sportsworld; Utah Audubon Council; Utah Physicians for a Healthy Environment; Utah Rivers Council; White Pine Chamber of Commerce; Craig F. Baker; Thomas D. Baker; David A. Baker; Donna Bath; James H. Bath; Kristine P. Fillman;

Kena Gloeckner; Patrick J. Gloeckner; Kathy C. Hiatt; Abigail C. Johnson; Linda G. Johnson; Orvan Maynard; Roderick G. McKenzie; Gary Perea; Jo Ann Perea; Launce Rake; Katherine A. Rountree; William R. Rountree; Amelia Sonnenberg; Terrance Steadman; Debra Steadman; Henry C. Vogler; David H. Von Seggern; John Wadsworth; Mark Wadsworth; and Matthew Wadsworth (collectively "Petitioners" or "White Pine County et al."), by and through their attorneys of record, Simeon Herskovits and Iris Thornton of Advocates for Community and Environment, and Michael A. Wheable, White Pine County District Attorney, and hereby submit this Disclosure Statement pursuant to NRCP 7.1, and further state that no Petitioner in this matter is owned by a parent corporation and that that no publicly held corporation owns 10% or more of any entity Petitioner's stock.

DATED this 17th day of September, 2018.

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AFFIRMATION (Pursuant to NRS § 239B.030)

The Undersigned do hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 17th day of September, 2018.

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CERTIFICATE OF SERVICE

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I hereby certify that on the 17th day of September, 2018, in compliance with NRS § 533.450(3), I served, via USPS First Class Mail, a complete copy of the foregoing **DISCLOSURE STATEMENT PURSUANT TO NRCP 7.1** addressed as follows:

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