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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WHITE PINE

WHITE PINE COUNTY and CONSOLIDATED CASES, et al., Petitioner, v. TIM WILSON, P.E., Nevada State Engineer, STATE OF NEVADA, DIVISION OF WATER RESOURCES, Respondent.	)	Case No. CV-1204049 Dept. No. 1 **PETITIONERS CONFEDERATED GOSHUTE, DUCKWATER, AND ELY TRIBES' OPENING BRIEF** Affirmation pursuant to NRS 239B.030 The undersigned affirms that this document does not contain personal information of any person

COME NOW, the Confederated Tribes of the Goshute Reservation, Duckwater Shoshone Tribe, and Ely Shoshone Tribe ("Tribes"), by and through counsel Aaron Waite and Paul C. Echo Hawk of ECHO HAWK LAW OFFICE, and hereby submit their opening brief.

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STATEMENT OF THE CASE

The Confederated Tribes of the Goshute Reservation, Duckwater Shoshone Tribe, and Ely Shoshone Tribe ("Tribes") respectfully submit this Opening Brief in support of the Tribes' Petition for Judicial Review, whereby the Tribes contest the part of SE Ruling 6446 that approved SNWA's 3M Plans. The Tribes also assign error to the State Engineer's ("SE") denial of the Tribes' Motion to Dismiss for Failure to Join United States Department of Interior Bureaus. *See* ROA 038975-039048.

The SNWA groundwater applications ("Applications") at issue in this case have a long history. Initially submitted to the SE in 1989, the SNWA Applications endured a prolonged dry spell. They lied dormant in the SE's Office for a decade and a half. It wasn't until January 5, 2006, that the SE finally acted on the Applications, setting a pre-hearing conference and later denying protestants' due process rights to re-notice the long-dormant Applications. The SE set the hearing for the Spring Valley Applications for September 2006 and the hearing for Cave, Dry Lake, and Delamar Valley Applications for February 2008,[1] even as Great Basin Water Network challenged in court the SE's denial of due process rights to protestants.

On or about July 6, 2006, SNWA and U.S. Department of Interior Agencies including the National Park Service, Fish and Wildlife Service, Bureau of Land Management, and the Bureau of Indian Affairs ("Federal Agencies") signed the Spring Valley Stipulation where the Federal Agencies withdrew their protests to SNWA's Applications in Spring Valley in exchange for a 3M Plan, which was attached to the Spring Valley Stipulation as Exhibits A and B and were made a part thereof.[2] ROA 002682-002728. Amid that process, the Federal Agencies failed in their trust

[1] Additional background can be found in SE Rulings 6164 for Spring Valley (SE Exh 140, ROA 039360-039362), but also see SE Ruling 6165 (Cave Valley, SE Exh 141, ROA 039574-039577), SE Ruling 6166 (Dry Lake Valley, SE Exh 142, ROA 039744-039747), and SE Ruling 6167 (Delamar Valley, SE Exh 143, ROA 039908-039911).
[2] Spring Valley Stipulation is marked as SE Exh 41 (ROA 002682-002728).

responsibility to undergo any Government-to-Government Consultation with the Tribes. *See* Steele Decl. ¶ 6-13 at ROA 039241-039243.

From September 11-29, 2006, the SE held the Spring Valley hearing for Applications 54003-54021. In the subsequent Ruling 5726, the SE approved these Applications in the amount of 40,000 acre-feet annually (afa) of groundwater for pumping and interbasin transfer, with an additional 20,000 afa for staged development over ten years, and subject to monitoring and mitigation requirements.

On January 7, 2008, SNWA and the Federal Agencies signed the Stipulation for Cave, Dry Lake, and Delamar Valleys ("DDC Stipulation") whereby the Federal Agencies withdrew their protests to SNWA's Applications 53987-53992 in the DDC Valleys in exchange for a 3M Plan, which was attached to the DDC Stipulation as Exhibit A and was made a part thereof.[3] The Federal Agencies again failed to consult with the Tribes. *See* Steele Decl. ¶ 6-13 at ROA 039241-039243.

In February 2008, the SE held a hearing on the DDC Applications and later approved 18,755 afa of groundwater for pumping and interbasin transfer. In the subsequent Ruling 5875, the SE approved the DDC Applications subject to monitoring and mitigation requirements.

On January 28, 2010, the Nevada Supreme Court vacated the SE's Rulings 5726 and 5875, remanding the Applications for further proceedings, and instructing the SE to re-notice and reopen the protest period for the Applications. *See Great Basin Water Network et al., v. Taylor I,* 126 Nev. Adv. Op. 2. 222 P.3d 665 (2010). The Supreme Court's decision upended the SE's dodging of protestants' due process rights and vacated or otherwise voided Rulings 5726 and 5875. *See also Great Basin Water Network et al., v. Taylor II,* 126 Nev. Adv. Op. 20. 234 P.3d 912 (2010). Hundreds of protests were filed with the re-noticing and reopening of the protest period early in

[3] The DDC Stipulation is marked as SE Exh 80, ROA 006427-006464.

2011. A six-week hearing followed in from late September to early November 2011. Following the hearing, the SE issued Rulings 6164-6167 that approved most Applications but denied Applications 54016, 54017, 54018, and 54021 based on the finding that these four Applications would conflict with existing rights. ROA 000216-000217.

Appeals from those SE Rulings to this Court ultimately resulted in this Court's Decision on December 10, 2013 (filed December 13). ROA 03051-03073 [sic] 39051-39073. As the Court stated: "this Court will not disturb the findings of the Engineer save those findings that are the subject of this Order. This Court remands orders 6164, 6165, 6166 and 6167 for:

1. The addition of Millard and Juab counties, Utah in the mitigation plan so far as water basins in Utah are affected by pumping 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."

Decision dated December 13, 2013 at pg. 23. SNWA appealed, taking the matter to the Nevada Supreme Court. That Court ruled that the District Court's Remand Decision was not an appealable, final decision.

On June 17, 2016, the SE's Office issued a Notice of Status Conference. ROA 03074-03087 [sic] 39074-39087. On October 3, 2016, the SE's Office issued in Interim Order for Pre-Hearing Scheduling, finding that the Tribes could file a motion regarding federal agency hearing participation and party status on or before October 14, 2016. ROA 03090 [sic] 39090.

On October 14, 2016, the Tribes submitted a Motion to Dismiss for Failure to Join United States Department of Interior Bureaus, dated October 13, 2016. ROA 39114-39246. The Tribes argued that the proceeding should be dismissed for failure to join the Federal Agencies, or in the alternative to stay the proceeding or take no action on the Applications until such time that the Federal Agencies are joined in the proceeding. More specifically, the Tribes argued the following:

A. Proceeding without the Federal Agencies violates the plain terms of the Stipulations for Withdrawal of Federal protests. ROA 039120-039122.

B. Where the Federal Agencies play a central role in the 3M Plans' Executive Committee, TRP, and BWG, it is impossible to establish objective standards for mitigation or amend the 3M Plans in any reasonable way without the participation of the Federal Agencies. ROA 039122.

C. Proceeding without the Federal Agencies violates the due process rights of the Tribal Protestants and is inconsistent with the role of the federal government in fulfilling its trust responsibility to the Tribes. ROA 039122-039126.

ROA 39114-39246. White Pine County, et al. filed a joinder to the Tribes' Motion to Dismiss on October 14, 2016. ROA 039247.

The SE's Office denied the Tribes' Motion to Dismiss on November 28, 2016. ROA 039299-039302. The SE stated that the "Stipulations are a matter between the SNWA and DOI Bureaus [Federal Agencies] . . . [and] The State Engineer finds he is not restricted or governed by the Stipulations in what he will require under the 3M Plans." ROA 039300-039301.

From September 25 – October 6, 2017, the SE held the hearing on remand to address the four issues in Judges Estes' Remand Decision. The Tribes submitted seven new exhibits, including the Swamp Cedars National Historic Property Registration and Determination of Eligibility.[4] ROA 052978-053026. This particular exhibit provided a more up-to-date and a more comprehensive historical and cultural summary on the significance of Swamp Cedars (*Bahsahwahbee*) than

[4] Marked as CTGR Exh 21.

previously available in this case. ROA 052979-053022. The exhibit describes three massacres in and around Swamp Cedars, including the Spring Valley Massacre of 1859, the Swamp Cedars Massacre of 1863, and the Swamp Cedars Massacre of 1897. ROA 052995-053000. But also, the exhibit describes the Tribes' cultural and religious practices that rely on the spring water and the swamp cedar trees. ROA 052982-052988, 053000-053008. The water and the trees are critical components of Swamp Cedars and to the Tribes' continued traditional and religious practices at this site. *Id*. The spatial extent of the Swamp Cedars National Historic Property includes the Swamp Cedars Area of Critical Environmental Concern (ACEC). *See* ROA 053056. The State of Nevada and the National Park Service determined that Swamp Cedars was eligible for listing on the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966.[5] 54 U.S.C. 300101 et seq. The National Park Service, in conjunction with the Nevada State Historic Preservation Office, determined that the property meets National Register Criterion A in the areas of Ethnic Heritage-Native American, Religion, Military and Politics/Government. ROA 053024. Swamp Cedars was listed on the National Register under its tribal traditional name *Bahsahwahbee*, White Pine County, on May 1, 2017. ROA 053025-053026.

The Tribes also submitted into evidence a report that detailed several other tribal cultural areas in or near Spring Valley. ROA 053058-053077. Other than Swamp Cedars, these cultural areas included Big Spring Tribal Cultural Area, North Spring Valley Tribal Cultural Area, North Snake Range Tribal Cultural Area, and Swallow Creek Tribal Cultural Area. These areas are not all of the tribal cultural areas within and adjacent to Spring Valley. *See* footnote at ROA 053058. The Tribes' report also demonstrated that the Swallow Creek area was of particularly unique

[5] The National Register program was authorized under Public Law 89-665 (54 U.S.C. 300101 et seq.) and is administered under 36 CFR Part 60, and eligibility under 36 CFR 63.4.

importance for tribal spiritual journeys, historically and currently. ROA 053063-053065. But none of these cultural areas were addressed in the SNWA's new 3M Plans, only Swamp Cedars ACEC.

The SNWA entered into evidence 151 new exhibits, including the 2017 Spring Valley 3M Plan,[6] the 2017 DDC 3M Plan,[7] and the Technical Analysis Report companion document.[8] These new 2017 3M Plans (SNWA Exh 592 and 593) replaced the prior 2011 3M Plans (SNWA Exh 148, 149, 365, 366). ROA 047823 and 048009. These 2017 3M Plans were intended to address the Remand Decision. ROA 047822-047823 and ROA 048008-048009. SNWA's witness James Prieur asked the SE: "To accept the two 3M Plans [SNWA Exh 592 and 593] as a component of the permit terms so that the compliance of these plans are part of the permit terms for the permits." ROA 053940. Accordingly, the 2017 3M Plans are those that the SE considered in the hearing and approved in Ruling 6446.

Following the hearing, proposed rules and closing arguments were submitted by the Tribes, White Pine County, et al, The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints (CPB), and Millard and Juab Counties, Utah.[9] On August 17, 2018, the SE issued Ruling 6446. ROA 38938-39048. The SE's ruling had four determinations:

1. Applications 54003 through 54015 and 54019 and 54020 were denied on the ground that the SNWA failed to demonstrate evapotranspiration (ET) capture had some prospect of reaching equilibrium in a reasonable time.

2. Protests to Applications 54014 and 54015 were upheld in part, and the Applications were denied on the ground that granting the applications would threaten to prove detrimental to the public interest, specifically as it relates to protecting Swamp Cedars.

3. Applications 53987 through 53992 were denied on the ground that the Applicant's methodology failed to provide satisfactory proof that any groundwater appropriated to the Applicant in the DDC Valleys would not conflict with down-gradient, existing rights.

[6] Spring Valley 3M Plan, 2017. SNWA Exh 592. ROA 47810-47997.
[7] DDC Valleys 3M Plan, 2017. SNWA Exh 593. ROA 47998-48116.
[8] Technical Analysis Report Supporting the 3M Plans, 2017. SNWA Exh 507. ROA 43011-43496.
[9] *See* Summary of Record on Appeal, page 4, for citations specific to various protestants/petitioners.

4. The Spring Valley 3M Plan and the DDC 3M Plan were approved, subject to reinstatement of any water appropriated under Applications 53987 through 53992; Applications 54003 through 54013; or Applications 54019 and 54020.

ROA 039047.

STANDARD OF REVIEW

This Court previously established the standards of review in this case. *See* ROA 039055-039056. These standards include: the provisions for judicial review under NRS 533.450; determining whether there is substantial evidence to support the SE's decision; determining whether the SE's decision is arbitrary or capricious; and determining whether the SE's decision properly addresses issues specified in the Remand Decision. The standard of review also includes the Nevada Supreme Court decision in *Eureka County v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015).

A. NRS 533.450

An aggrieved party is entitled to judicial review of the SE's decision. NRS 533.450. The Court is confined to considering the administrative record. NRS 533.450(1). An aggrieved party has must have a full opportunity to be heard by the Court before a judgment is made. NRS 533.450(2). The burden of proof is on the party challenging the SE's decision. NRS 533.450(9).

B. NRS 533.370(1) and 533.379(2)

In consideration of the Applications, which by definition include potential permit terms and conditions and attachments like the subject SNWA 3M Plans, the SE is required to determine "If the appropriation threatens to prove detrimental to the public interest." NRS 533.370(1)(2)(a). The subject Applications are for an interbasin transfer. ROA 038940. This requires that the SE "must also consider" in whether to reject the Applications—which again by definition includes potential permit terms and conditions and attachments—"[w]hether the proposed action is

environmentally sound as it relates to the basin from which the water is exported". NRS 533.370(3)(c).

C. Substantial Evidence

The Court must determine whether there is substantial evidence in the record to support the SE's decision. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); *see also Town of Eureka v. Office of the State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992). Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." *Bacher v. Office of the State Eng'r of Nev*., 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006). Where the Court determines that the SE's findings were "clearly erroneous in the view of the reliable, probative and substantial evidence on the whole record and incident thereto constitute an arbitrary and capricious abuse of discretion," those findings are not entitled to deference. *Office of the State Engineer v. Morris*, 107 Nev. 699, 701-702, 819 P.2d 203, 205 (1991). Furthermore, on appeal, this Court is free to decide purely legal issues without deference to State Engineer's decision. *Town of Eureka v. Office of State Engineer*, *supra,* at 949.

D. SE Must Resolve Critical Issues and Decisions Cannot be Arbitrary or Capricious

The above standard of review regarding substantial evidence "presupposes the fullness and fairness of the administrative proceedings: all interested parties must have had a 'full opportunity to be heard; . . . the State Engineer must clearly resolve all the crucial issues presented. *See Nolan v. State Dep't of Commerce*, 86 Nev. 428, 470 P.2d 124 (1970) (on rehearing). The decisionmaker must prepare findings in sufficient detail to permit judicial review. *Id.*; *see also Wright v. State Insurance Commissioner*, 449 P.2d 419 (Or. 1969); NRS 233B.125. When these procedures, grounded in basic notions of fairness and due process, are not followed, and the resulting administrative decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion,

[the] court [should] not hesitate to intervene. *State ex rel. Johns v. Gragson*, 89 Nev. 478, 515 P.2d 65 (1973); *Revert* at 787, 603 P.2d at 265.

The burden of proof is on SNWA to demonstrate that they have both complied with the District Court's remand order and met applicable statutory requirements. The SE's determinations cannot be arbitrary. *State ex rel. Johns v. Gragson*, 85 Nev. 478, 515 P.2d 65 (1973) (quoting from Judge Estes December 10, 2013 Decision at 6, CV-1204049 (7th Jud. Dist.)). And "speculative evidence . . . is not sufficient to survive a substantial evidence inquiry." *Bacher v. Office of the State Engineer*, 122 Nev. At 1123, fn. 37, 146 P.3d at 801, fn. 37.

E. *Eureka County v. State Engineer*

The unanimous *en banc* decision in *Eureka County v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015) provides additional legal standards that must also inform and govern this Court's review of the SE's decision. *Eureka* overturned a State Engineer decision, saying:

> [E]ven assuming that under NRS 533.370(2) the State Engineer has authority to grant an application that conflicts with existing rights based upon a determination that the applicant will be able to mitigate the State Engineer's decision to approve the applications and issue the permits at issue here is not supported by sufficient evidence that successful mitigation efforts may be undertaken so as to dispel the threat to the existing rights holders. We thus reverse the district court's decision denying judicial review of the State Engineer's decisions and remand.

Eureka, 359 P.3d at 1115.

Eureka made clear "allowing the State Engineer to grant applications conditioned upon development of a future 3M Plan . . . could potentially violate protestant's rights to a full and fair hearing on the matter, a rule rooted in due process." *Id.* at 1120 (citing *Revert*, 95 Nev. at 787, 603 P.2d at 264).

F. The Remand Decision

This Court remanded SE Rulings 6164-6167 in part to "Define standards, thresholds, or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious in Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley". ROA 03073 [sic] 039073. For the 3M Plans, this was the task at hand and a critical standard for SNWA to meet on remand.

The Court also emphasized that "Nevada water law requires the Engineer to oversee an environmentally sound stewardship of the water, the same goal as the [Public Trust] doctrine." ROA 030059 [sic] 039059. The Court has a duty to review the SE's decision as a public trustee to allocate and supervise water rights so that the appropriations do not substantially impair the public interest in the lands and waters remaining. *See Lawrence v. Clark County*, 127 Nev. Adv. Op. 32, 254 P.2d. 606, 611 (2011).

The Remand Decision identified specific requirements the 3M Plans must have before any approval by the SE. These came as the Remand Decision identified a slurry of flaws: (1) There are no objective standards to determine when mitigation will be required and implemented. ROA 03065-03066 [sic] 039065-039066; (2) If there is enough data to make informed decisions, setting standards and "triggers" is not premature. If there is not enough data, granting the appropriation is premature. ROA 03066 [sic] 039066; (3) It should be recognized when unreasonable impacts to the environment or existing rights occur, and the SE or SNWA should make a decision to mitigate. ROA 03067 [sic] 039067; (4) There is no mention of what an unreasonable impact is, nor mention of how monitoring will be accomplished or what constitutes an impact. *Id*.; (5) With jurisdiction to oversee the "environmental soundness" of SNWA's groundwater pumping project, the SE does not state how it will be accomplished. *Id*. (6) There is no standard of how impacts may be

recognized. ROA 03068 [sic] 039068; (7) There are no specifics as to when SNWA would be required to modify pumping. *Id*. On remand, the SE was required to ensure the 3M Plans properly addressed these specific problems identified in the Remand Decision.

SUMMARY OF ARGUMENT

The State Engineer ("SE") correctly denied Southern Nevada Water Authority's ("SNWA") applications[10] but erred in: 1) approving the SNWA's Monitoring, Management, and Mitigation Plans ("3M Plans"); and 2) denying the Tribes' Motion to Dismiss for Failure to Join the Department of Interior Agencies in the proceeding below. *See* Motion to Dismiss at ROA 39114-39246; Ruling 6446 at ROA 038975-039048.

Substantial evidence from the 2017 hearing on remand and presented in this Opening Brief demonstrate the following problems with respect to the 3M Plans:

1. The 3M Plans violate requirements of the Federal Stipulations.
2. The unreasonable effects standard is set irrationally as catastrophic harm.
3. Mitigation triggers allow for complete elimination of environmental resources.
4. Proposed mitigation for Swamp Cedars is an adverse effect.
5. SNWA failed to include many Tribal cultural areas in the 3M Plans.

During the 2017 hearing before the State Engineer, SNWA explained or otherwise entered into evidence 151 exhibits, comprising about 8,004 pages. And yet, the evidence presented failed to meet the requirements of Nevada water law and policy, and especially failed to comply with this Court's Remand Decision because SNWA did not "define standards, thresholds or triggers so

[10] Applications 54003-54021 and 53987-53992 ("Applications") in Spring, Cave, Dry Lake, and Delamar Valleys. The State Engineer previously denied SNWA Applications 54016, 54017, 54018, and 54021 in Ruling 6164, because they would conflict with existing rights. *See* SE Exh 140, Ruling 6164, p. 216. The Remand Decision did not disturb this finding.

that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious."[11]

On the surface, SNWA's 3M Plans look impressive, especially with a 486-page technical analysis companion document.[12] But closer examination sheds light on who would be the sole decisionmakers for unspecified future mitigation, what actions or nonactions would be taken as part of the 3M scheme, when monitoring and mitigation would or would not occur, and how mitigation abounds with options but lacks foundation in substantial evidence and falls into the realm of being arbitrary and capricious.

The SE approved the Spring Valley 3M Plans—in the event the SNWA Applications get reinstated—that would require **zero** mitigation until every last swamp cedar tree was dead. If all the trees died within four years, no mitigation would be required for another year. And if the SNWA found that all the trees died but it wasn't due to their groundwater pumping, then they still wouldn't mitigate. So, it was this type of 3M Plan that was approved despite the denied Applications. Even still, the 3M Plans fall a far distance from complying with the Remand Decision to ensure objective thresholds and triggers were in place so that mitigation of unreasonable effects was not arbitrary and capricious.

The SE erred in denying the Tribes Motion to Dismiss for Failure to Join the Department of Interior Agencies. As is detailed more fully below, the SE found "[t]he Stipulations are a matter between the SNWA and DOI Bureaus . . . [and] The State Engineer finds he is not restricted or governed by the Stipulations in what he will require under the 3M Plans." ROA 039300-039301.

[11] Judge Estes' Remand Decision, December 10, 2013 Decision, CV-1204049 (7th Jud. Dist.). (Filed December 13, 2013).
[12] Two 2017 3M Plans: the Spring Valley 3M Plan (SNWA Exh 592, ROA 47810-47997) and the DDC 3M Plan (SNWA Exh 593, ROA 47998-48116). The companion document is the Technical Analysis Report (SNWA Exh 507, ROA 43011-43496).

The Tribes' disagree and maintain that the proceeding below could not comply with the Remand Decision without the participation of the Federal Agencies.

ARGUMENT

I.
THE STATE ENGINEER'S APPROVAL OF THE 3M PLANS FAILED TO MEET REQUIREMENTS OF NEVADA WATER LAW AND POLICY, AND ESPECIALLY FAILED TO COMPLY WITH THE REMAND DECISION

The Remand Decision was clear: "define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious in Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley." ROA 03073 [sic] 039073. The order pertained to all four Rulings: 6164-6167—and specifically to the 3M Plans approved by the SE in Rulings 6164-6167 and that were a stipulation(s) between the SNWA and Federal Agencies.[13] ROA 03064 [sic] 039064.

SNWA submitted two new 3M Plans, dated June 2017, with the request that the SE make these new 3M Plans a component of the permit terms of SNWA's Applications. ROA 053940. The Spring Valley 3M Plan was marked as SNWA Exhibit 592, and the Cave, Dry Lake, Delamar Valleys (DDC) 3M Plan was marked as SNWA Exhibit 593 (collectively, the "3M Plans"). These 2017 3M Plans replace the previous 2011 3M Plans.[14] And these new 2017 3M Plans are deficient as a matter of law, and they fail to meet the requirements of the Remand Decision.

A. The 3M Plans Violate the Requirements of the Stipulations

Initially in this case, the Federal Agencies filed protests to the SNWA Applications. Their protests were filed pursuant to the agencies' responsibility to protect Federal water rights and water-dependent resources—many of which are vital for the Tribes' continued survival. SNWA

[13] The Stipulations are marked as SE Exh 41 and 80.
[14] The 2011 3M Plans are marked as SNWA Exh 365, 366, 148, 149.

and the Federal Agencies executed two stipulations: the 2006 Spring Valley Stipulation and the 2008 DDC Stipulation.[15] Both Stipulations conditioned the withdrawal of the Federal Agencies protests to Applications with certain specific requirements, including monitoring, management and mitigation plans (3M Plans) which were attached as exhibits to the Stipulations and made a part thereof. As the State Engineer found in Ruling 6164, "By its terms, the Stipulation[s], and its exhibits, set forth the guidelines for the elements of the monitoring plan [3M Plans]."[16] These requirements apply directly to the 2017 3M Plans at issue in this case and the District Court's instructions on remand.

As a matter of Nevada law, the Stipulations are binding on SNWA and the Federal Agencies, but the State Engineer has the authority to enforce the terms of the Stipulations. Pursuant to Nevada Administrative Code (NAC) 533.310 on stipulations:

> 1. With the approval of the State Engineer, the parties may stipulate to any fact in issue, either by a written stipulation introduced into evidence as an exhibit or by an oral statement entered in the record.
> 2. Such a stipulation is binding only upon the parties to the stipulation and is not binding on the State Engineer.
> 3. The State Engineer may require proof by independent evidence of the stipulated facts. (Added to NAC by St. Engineer, eff. 2-8-95.)

As to the specific requirements of the Stipulations, SNWA has violated the terms in several ways. First, SNWA prejudiced the Tribes with the Stipulations and the 3M Plans, violating Paragraph 1 of the Spring Valley Stipulation and Paragraph 2 of the DDC Stipulation which states in part that the Parties (SNWA in particular) "shall not seek to . . . prejudice any other Parties or protestants, including any Indian Tribe." ROA 002687 and 006433. Second, during the 2017 hearing on remand, SNWA explained and defended the 3M Plans—a component

[15] The Spring Valley Stipulation is marked as SE Exh 41. The DDC Stipulation (or Stipulation for Delamar, Dry Lake, and Cave valleys) is marked as SE Exhibit 80.
[16] SE Exh 140, Ruling 6164, p. 104. This statement was also used in Rulings 6165, 6166, and 6167.

of the Stipulations—in the absence of Federal Agencies, e.g. ROA 053870-054124, violating Paragraph 9 of the Spring Valley Stipulation which states in part that the Federal Agencies and SNWA "shall **jointly** explain or defend this stipulation and Exhibits A and B to the State Engineer." ROA 002690 (emphasis added). The Federal Agencies were absent both at the 2011 hearing and the 2017 hearing. *See* ROA 000013 and 038945. Third, SNWA provided the new 2017 3M Plans with neither written agreement of Federal Agencies nor input from Federal Agencies, which violated Paragraph 17 of the Stipulation.

The Tribes attorney, Mr. Echo Hawk, asked SNWA's witness, Mr. Zane Marshall, whether there been any written agreement between the Parties or any input from the Federal Agencies as to the new 2017 3M Plans. ROA 054564-054065.

> Q (Mr Echo Hawk). And this is the stipulated agreement for Spring Valley; correct?
>
> A (Mr. Marshall). Let me just double-check. Yes, it is.
>
> Q. Okay. Let me refer you to page 6, number 2. You see there the first sentence where it says, "The parties agree to implement the monitoring management mitigation plans attached hereto Exhibits A and B, which are expressly incorporated into this stipulation as if set forth in full herein"; do you see that?
>
> A. Yes, I do.
>
> Q. All right. Has this stipulated agreement for Spring Valley been amended?
>
> A. Give me a second. I have to think about it. I don't believe it has.
>
> Q. Okay. Let me refer you to page 12, the top of page 12, there's a numeral 17. Did you read that, number 17 sentence, please?
>
> A. It says, "This stipulation may be amended by mutual written agreement of the parties."
>
> Q. And who are the parties to the stipulation?
>
> A. The Southern Nevada Water Authority and the Department of Interior Agencies.
>
> Q. And which agencies are those?
>
> A. The Bureau of Land Management, U.S. Fish & Wildlife Service, U.S. Park Service and Bureau of Indian Affairs.
>
> Q. And to your knowledge, there hasn't been any – how is it said, mutual written agreement of the parties to amend the stipulation?
>
> A. I honestly don't remember. I don't believe there has been.
>
> Q. Is it fair to say that the 3M Plans that are presented at this hearing,

> Exhibits 592 and 593, are different than the exhibits that are attached to the original stipulations?
>
> A. ***Yes, they are***.

ROA 054564-054565 (emphasis added). Because the 2017 3M Plans were developed and submitted in direct violation of the clear requirements of the Stipulations, they are deficient as a matter of law and therefore must be rejected. The stipulations required mutual agreement and participation of the Federal Agencies before the incorporated 3M Plans could be amended or changed. It is undisputed the 3M Plans now submitted are different that the original plans. This fact requires rejection of those 3M Plans by this Court.

B. The 3M Plans Cut Out Review Committees Required Under the Stipulations

The Stipulations require the formation and continued existence of a Technical Review Panel (TRP), a Biological Working Group (BWG), and an Executive Committee (EC) to be a part of the 3M Plans. *See* ROA 002687-002689, 002702-002728. By the Stipulations' own terms, the inclusion of Federal Agencies in the 3M Plans is required. Curiously, these group and committees appeared in the 2011 3M Plans but were excluded from the 2017 3M Plans. In SNWA Exhibit 365—the 2011 3M Plan entitled "Biological Monitoring Plan for the Spring Valley Stipulations"—even the cover page references the Parties to the Stipulations as including the Federal Agencies. Section 1.1 of that 3M Plan (SNWA Exh 365) states:

> The Stipulations requires that SNWA implement hydrologic and biological monitoring, management, and mitigation plans (Exhibits A and B of the Stipulation; Appendix A). For development and implementation of the monitoring, management, and mitigation plans, the Stipulation requires the formation of a Biological Work Group (BWG) and hydrologic Technical Review Panel (TRP). The Stipulation also requires creation of an Executive Committee (EC) to review recommendations of the BWG and TRP, seek negotiated resolutions of issues, and implement actions as needed. Membership in each group (BWG, TRP, and EC) consists of one representative from SNWA and one representative from each of the DOI Bureaus, with designated agency backups.

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also specifically referenced these groups (BWG, TRP, EC) as requirements of the Stipulations, so these groups may make decisions about monitoring and mitigation. ROA 051776-051783.

It is worth repeating that these groups (BWG, TRP, EC) were ***not*** included in the 2017 3M Plans. When the Tribes' attorney Mr. Echo Hawk questioned SNWA's witness Mr. Marshall about this, Marshall admitted that the TRP, BWG, and EC were not a part of the new 2017 3M Plans for Spring Valley and DDC Valleys.

> Q (Mr. Echo Hawk) And in the original 3M Plans there were . . . a technical group, a biological working group and an executive committee that were established; is that accurate?
>
> A (Mr Marshall) Yes, that's true.
>
> Q. And who were members of those entities?
>
> A. The specific individuals or?
>
> Q. Well, just what were their positions? What agencies were they from?
>
> A. From the – from the parties. So they represented . . . Southern Nevada Water Authority, the Department of Interior Agencies I just mentioned.
>
> Q. Okay. So, the – this technical review panel, this biological working group and the executive committee that involved a representative from federal agencies, are those panels and working group and executive committee, are those included in the currently proposed 3M Plan?
>
> A. ***No, they are not***.

ROA 054565-054566 (emphasis added).

The new 3M Plans approved by the SE cut out Federal Agencies from the 3M process. And with the TRP/BWG/EC groups cut out, review and oversight is left to SNWA. It's a classic case of the fox in the hen house. And this issue alone renders the 2017 3M Plans unsound, subjective, and capricious.

The primary problem with the original 3M Plans was that there were no standards, thresholds, or triggers so that mitigation measures would not be arbitrary and capricious. Even now, the central problem persists. SNWA is now left to define the standards and triggers all alone—with no stakeholder input and no review. SNWA's 3M Plans cut out the Federal Agencies and did away with the TRP/BWG/EC components of the 3M Plans. Excluding from oversight

and the input from public servants charged with protecting public interests is unacceptable.

C. Failure to Obtain Input from Tribes in the 3M Process Fails to Meet Objective Standards Required by the Remand Decision, Runs Counter to *Eureka* Principles, and Violates Due Process Rights

The 3M Plans bore no provision to invite tribal participants or representatives to be a part of the 3M process. SNWA's witness Mr. Marshall testified to this:

> Q (Mr. Echo Hawk) Was there a provision in the original 3M Plans to invite tribal representatives to participate; do you recall?
> A (Mr. Marshall) I do not recall.
> Q. Is there a provision in the current proposed 3M Plans to invite the participation of tribal representatives?
> A. The current plan is in response to the District Court's remand. So I do not believe it is. There is a provision to invite the Tribes, other than the process that we have here today.
> Q. So there's not?
> A. Not that I'm aware of.

ROA 054566-054567. Testimony from Tribal Elder Mr. Steele validated the fact that the Tribes were not consulted as to the 2017 3M Plans:

> Q (Mr. Echo Hawk) Were the tribes consulted about the proposed 3M Plans that the subject of this hearing?
> A (Mr. Steele) No, they weren't.
> Q. And was the tribe involved, in any way, in establishing any standards, triggers or thresholds under the proposed 3M plans?
> A. (Mr. Steele) No.

ROA 055386. See also ROA 054507-054508.

In a more specific line of questioning, the Tribes asked SNWA's witness Judith Brandt who was all involved in setting certain mitigation triggers:

> Q (Mr. Echo Hawk) Okay. I just had some questions about that. Who sets that trigger [for Swamp Cedars] or who set that trigger?
> A (Judith Brandt) Dr. Beecher.
> Q. Okay. He works for SNWA?
> A. It's Dr. Nancy Beecher, yes, works for SNWA.
> Q. Okay. Did any of the federal agencies, the BLM or the Bureau of Indian Affairs, have any input in setting that trigger point?
> A. I do not have any knowledge of that.

Q. Do you know whether any of the Indian Tribes had an[y] input into setting that trigger point?

A. I do not have any knowledge of that.

ROA 053913. Mr. Marshall conceded that SNWA was the sole decisionmaker in crafting the definition of unreasonable effects and that SNWA neither met with nor sought input from any Tribal representatives in the development of the 2017 3M Plans.

Q (Mr. Echo Hawk) Okay. I [] want to refer you now to Exhibit 507, the technical report. And if we could go to Section 2.2, the definition of unreasonable effect.

A (Mr. Marshall) Okay.

Q. And I'm going to attempt not to ask questions that have been asked and answered already, Mr. Hejmanowski's done a good job of covering some of my questions.

There wasn't any tribal input into developing this definition; correct?

A. Not directly, no.

Additional testimony from Mr. Marshall revealed the sole decisionmakers of thresholds and triggers for Swamp Cedars:

Q (Mr. Echo Hawk) Okay. And who selected the 25 percent baseline number?

A (Mr. Marshall) So this was an internal process and ultimately it was my – my decision in the process. . . .

Q. Okay. Let me try to ask a few questions as yes or no questions if you could answer them with a yes and no.

A. Okay.

Q. SNWA was the sole decision maker of selecting the 25 percent number; correct?

A. Yes, we were.

Q. And SNWA was the sole selector of the five percent range number?

A. For the – the investigation trigger?

Q. Yes.

A. Yes.

Q. And SNWA was the sole decision maker with respect to what mitigation options would be included for the Swamp Cedars' ACEC; correct?

A. Yes, we were. And these are consistent with our experience in other areas for restoration.

Q. This may have been asked and answered, but there was no tribal input into any of this process with the Swamp Cedars' ACEC; correct?

A. Like I said earlier, we – as part of this plan we contemplated the Tribe' previous testimony regarding the importance of the ACEC and the Swamp Cedars

there. And so that – that information was used to focus our monitoring and mitigation plan on that specific area.

ROA 054578-054579. Similarly, the SNWA/SE never discussed with the Tribes mitigation options for Swamp Cedars, as conceded by Mr. Marshall.

> Q (Mr. Echo Hawk) But SNWA didn't meet with tribal representatives in developing this particular 3M Plan or share a draft of this plan with tribal representatives or seek to get input on any of these numbers or mitigation options; correct?
>
> MR. TAGGART (SNWA): Objection.
> HEARING OFFICER JOSEPH-TAYLOR: Overruled.
> THE WITNESS: No, we did not.

ROA 054579.

The 3M Plan lists numerous mitigation options for Swamp Cedars, or what SNWA has called "Terrestrial Woodland Habitat." These options include: seeding or planting trees, irrigation using replacement water, aquifer recharge, modified grazing practices, and modified groundwater pumping. ROA 047927, 043224. The subjective nature of these options is rather apparent. There is no evidence as to whether any of these mitigation options will actually work—a key principle identified in *Eureka County v. State Engineer*. And, there was no input from the Tribes as to what they considered would be acceptable mitigation. SNWA's Mr. Marshall lacked basic information about the tribal cultural aspects of the Swamp Cedar trees and conceded that SNWA did not ask the Tribes about the mitigation options SNWA was proposing:

> Q (Mr. Echo Hawk) SNWA includes as a mitigation measure replanting Swamp Cedar trees, that's correct?
> A (Mr. Marshall) Yes, it is.
> Q. Are you – do you agree that some of these Swamp Cedar trees in the ACEC are around 300 years old?
> A. I don't know the age of those trees.
> Q. Are you familiar with the prior hearing or generally with the tribal cultural belief that a Swamp Cedar tree grew where a tribal man, woman, or child was massacred by the U.S. Cavalry?
> A. I'm not – I'm not aware of that specific belief sir, I understand that the Swamp Cedar area represents locations where massacres occurred, locations, but I'm not familiar with that specific belief.

Q. Have you asked the Tribes whether planting a new tree in replacement of a dead tree from pumping would be acceptable mitigation?

A. No, we have not.

ROA 054580-054581.

Even more disconcerting, the 3M Plans do not specify who makes the final decision on mitigation. In testimony by SNWA witness Mr. Prieur, he stated that: "Well, the State Engineer is the regulator and it's their – basically their plan." ROA 054602. The 3M Plans are for the SE but were developed in **complete absence** of the SE's input. When asked whether SNWA consulted with the SE's Office, SNWA witness Mr. Marshall testified: "We did not." ROA054507-054508. The 3M Plans also do not specifically identify who will make final decisions on mitigation. Asking SNWA witness Mr. Marshall whether he was aware of any place in the 3M Plans where it stated that the SE makes the final decision on mitigation, he said: "I'm not aware that that specific language exists. But again, our intention is that this is the State Engineer's Plan." ROA 054603.

At no time in the 3M process do the 3M Plans require SNWA and/or the SE to notify the Tribes or other stakeholders once the investigation, management, or mitigation triggers are reached. And, as described below, that the 3M Plans do not even say what specific mitigation would be implemented and whether it would actually work. This cuts off the Tribes due process rights. This is counter to the principles highlighted in *Eureka County v. State Engineer,* and it does not address the Remand Decision for objective standards. Under the updated 3M Plans, SNWA will solely determine the mitigation for Swamp Cedars at some future time.

D. SNWA Set the Unreasonable Effects Standard as Catastrophic Harm, and the Reasonable Effects Standard is Also Catastrophic Harm

The Remand Decision required SNWA to "define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious." ROA 03073 [sic] 039073. The Court previously found that the State Engineer "avoided any

mention of what is unreasonable. Nor did he state how monitoring will be accomplished, or what constitutes an impact, potential or otherwise. There is no standard to know how much of an impact is unreasonable . . . before mitigation is necessary." ROA 03067 [sic] 039067.

Responding to this, SNWA—and SNWA alone—defined "unreasonable effects" in the new 2017 3M Plans to be "effects to hydrologic and environmental resources that:

a. conflict with senior water rights or protectable interests in existing domestic wells;
b. jeopardize the continued existence of federally threatened and endangered species;
c. cause extirpation of native aquatic-dependent special status animal species from a hydrographic basin's groundwater discharge area;
d. cause elimination of habitat types from a hydrographic basin's groundwater discharge area; or
e. cause excessive loss of shrub cover that results in extensive bare ground."

ROA 047823 and 048009. More explanation of and justification for these effects is provided in the 3M Plans' companion document, "Technical Analysis Report Supporting the Spring Valley and Delamar, Dry Lake, and Cave Valleys, Nevada, 3M Plans," dated June 2017. ROA 043043-043044. SNWA asserted in the 3M Plans themselves that the definitions of unreasonable effects are "protective of . . . public interest," "incorporate the NSE's interpretation of environmental soundness," and are "thus in accordance with the Remand Order and Nevada water law." ROA 047824 and 048010.

To a rational mind, they most certainly are not. But before expounding on that critical point, it is helpful to first examine the origin of use of the term "unreasonable effects," as it relates to SNWA's Applications.

1. The Origin of "Unreasonable Effects"

In the beginning, there were Stipulations. The Spring Valley Stipulation at Recital H provides important components as to what was intended by "unreasonable effects":

> […] to avoid unreasonable adverse effects to wetlands, wet meadow complexes, springs, streams, and riparian and phreatophytic communities (hereafter referred to

> as Water-dependent Ecosystems) and maintain the biological integrity and ecological health of the Area of Interest [shown in Figure 1 of the Stipulation] the over the long term, and 2) to avoid any effects to Water-dependent Ecosystems within the boundaries of Great Basin National Park.

ROA 002684 and 006432. The Spring Valley Stipulation at Exhibit B, under the paragraph labeled Common Goal, provides other components:

> […] to avoid unreasonable adverse effects caused by such [SNWA] groundwater development to Water-dependent Ecosystems and maintain and/or enhance the baseline biological integrity and ecological health of the Area of Interest over the long term and 2) avoid any effects to Water-dependent Ecosystems within the boundaries of Great Basin National Park . . . The Parties have determined it is in their best interests to cooperate in data collection and analysis related to groundwater levels and the maintenance of Water-dependent Ecosystems within the Area of Interest;

See ROA 002718 and 006447. Also in Exhibit B of the Spring Valley Stipulation, under paragraph 5 Mitigation Requirements,

> The goal of the Parties is to avoid the aforementioned Water-dependent Ecosystem Effects. The Parties shall make all reasonable efforts to achieve this goal. In the event that this goal is not achieved, SNWA shall mitigate any Water-dependent Ecosystem Effects so as to ensure the baseline biological integrity and ecological health of Water-dependent Ecosystem are maintained and/or enhanced over the long term.[17]

ROA 002726. The Spring Valley Stipulation, under Exhibit B's Introduction at the paragraph on Mitigation Requirements, footnoted the significant aspect of what constituted the goal to ensure biological integrity and ecological health:

> Included in Karr (1991), these terms were defined as the ability to support and maintain "a balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of natural habitat of the region;" and "a biological system…can be considered healthy when its inherent potential is realized, its condition is stable, its capacity for self-repair when perturbed is preserved, and minimal external support for management is needed."

ROA 002718. Quite clearly, the Stipulations provide essential information about what constitutes

[17] SE Exh 41, Exhibit B therein at pp. 2 and 10.

an unreasonable effect. In part, the Stipulations foresaw an unreasonable effect to be **any** effect, reasonably attributable to SNWA's GDP pumping, below baseline conditions of Federal Water Rights, Federal Resources, Water-dependent Ecosystems, and the maintenance of biological integrity and ecological health of not just Spring Valley and the DDC Valleys but the entire Area of Interest delineated on Figure 1 of the Stipulations. *See* Figure 1 at ROA 002701 and 006445. These unreasonable effects in the Stipulations stand in stark contrast to those SNWA provided and the SE approved.

As the SE said: he's "hard-pressed to agree that the Stipulations . . . provide a solid foundation for defining what an unreasonable effect is." ROA 038982. Yet, the standard of review in this proceeding is one of "substantial evidence." Substantial evidence as to what constitutes an unreasonable effect is rooted in the Stipulations. Because the 3M Plans are a stipulation, ROA 030064 [sic] 039064, 000103-000120, which birthed the term "unreasonable effects" in this case, it is the very repository of information from which to gauge what "unreasonable effects" are. To do otherwise is subjective and ignores the substantial evidence standard in this proceeding.

While the SE approved the 3M Plans, and SNWA's solo effort to define "unreasonable effects," this solo endeavor violates the requirements of the Stipulations. Under Exhibit B of the Spring Valley Stipulation, paragraph A Common Goal, it specifically required:

> Determination of what constitutes a Water-dependent Ecosystem Effect [which are unreasonable effects] that requires action as described in Section 4. B shall be made ***by the Executive Committee*** with recommendations from the BWG, as described below.

ROA 002718 (emphasis added). Similarly, identifying and defining mitigation was not supposed to be a solo-effort. Under the Spring Valley Stipulation at Exhibit B, Introduction, Mitigation Requirements: "Mitigation may also include restoration . . . in a mutually agreed upon location . . ." ROA 002718.

Thus, SNWA's first mistake in defining unreasonable effects was that they ignored the Stipulations, just as they did with regard to their aforementioned violations of the Stipulations and just as the SE did when the Tribes called attention to specific requirements and violations of the Stipulations. SNWA also ignored the Remand Decision where the Court specifically highlighted the three principal components of the 3M Plans attached as Exhibits to the Stipulations, ROA 002702, which referenced the goals set forth in Recital H of the Stipulations. ROA 002685. In doing so, the Remand Decision was clear in highlighting the first steps to define unreasonable effects. Ignoring the remand instructions and conjuring arbitrary standards fails the test of substantial evidence and it fails to meet requirements in the Remand Decision.

2. Unreasonable Effects Standard Set as Catastrophic Harm

In no uncertain terms, SNWA set unreasonable effects as catastrophic harm. The greatest possible impact, or the most extreme effect possible. From this standard SNWA would base all of the monitoring and mitigation. This is the standard the SE approved. Before SNWA would classify an impact to be an unreasonable effect, SNWA or the State Engineer would have to demonstrate that SNWA pumping caused an endangered species to be in jeopardy of extinction, or caused the extirpation of a water-dependent species, or caused the complete elimination of habitat areas like Swamp Cedars from Spring Valley, or some other extreme effects. Regarding habitat areas, SNWA expert witness Mr. Zane Marshall testified that the 3M Plans' "standard is a basin-wide standard that's intended to ensure that we don't lose habitats . . ." ROA 053975. However, for habitat areas like Swamp Cedars, which SNWA termed "terrestrial woodland habitat" in their Spring Valley 3M Plan, SNWA defined an unreasonable effect to be "elimination of terrestrial woodland habitat from Spring Valley groundwater discharge area."[18] ROA 047922

[18] SNWA Exh 592, pp. 3-41 and 3-43 and 3-45; SNWA Exh 507, Section 2.2.

and 047924.

Why SNWA defined unreasonable effects for Swamp Cedars to be the total elimination of Swamp Cedars defies reason and is capricious. The Tribes' witness Dr. Monte Sanford provided substantial evidence that Swamp Cedars is an Indian ceremonial gathering area and Tribal cultural use area, a site to remember the largest massacre of Indian people in US history, a site of three Indian massacres at times of their ceremonial gatherings, a site where the swamp cedar trees are the spiritual embodiment of their slain ancestors, a place where the spring waters is for special medicine and healing, and also a site now listed on the National Register of Historic Places as a Traditional Cultural Property.[19] ROA 055266-055269 and ROA 052978-053026. Goshute Tribal Elder Rupert Steele and Chairman Virgil Johnson testified as to the impact of the potential "elimination" of Swamp Cedars.

> Q (Mr. Echo Hawk) And Mr. Steele, I think the chairman answered this question but I want to direct it to you, as well. If SNWA, if their groundwater applications are approved and that pumping lowers the water table and the root system from the Swamp Cedar[s] detach and those Swamp Cedars die, what impact does that have on the Goshute people[?]
>
> A (Mr. Steele) It has adverse effect on our way of life. The effects are the trees ability to heal, the affects of plants ability to heal. It . . . does not have that vigor and life to provide that healing. Healing properties that we call upon when we use those in our medicinal use and ceremonies. It would have an adverse effect on, on our way of living.
>
> Q. Thank you, Mr. Steele. Mr. Chairman.
>
> A. (Mr. Johnson) It would be catastrophic. That's how I would – term that I would use. Once things are catastrophic it changes the balance of life. For example, when the dust storms came down in Oklahoma and Texas many years ago, the 20s, it changed the lives of those people. . . So it was catastrophic. And it would – I would compare that to something similar to what happened back in the 20s. Especially for us Native American people. And we would rather not face that catastrophic event because it will effect us as Native Americans in that area.

ROA 055389-055390.

[19] And see CTGR Exh 21 plus CTGR Exh 22, Appendix A.

It is in no way rational to set the standard of unreasonable effects on Swamp Cedars, and on other habitat areas and species of concern, to be a total die off—elimination, extirpation, jeopardy of extinction. All of these are catastrophic harm. They are also not environmentally sound. SNWA's standard is not reasonable to a rational mind. It is extreme, excessive, and subjective. And it is not grounded in substantial evidence. To the credit of SNWA, their witness Mr. Marshall emphasized that the intentions of the 3M Plans were to avoid those unreasonable effects. Those are good intentions, but what's at issue is what is in the 3M Plans.

Tribal Elder Rupert Steele testified that there were other missing pieces to the 3M Plans. He felt that "traditional knowledge" of the areas was missing. ROA 055392. "The other part is traditional ecological knowledge." (Steele testimony) ROA 055392. "So, I'd like to see those traditional knowledge and the traditional ecological knowledge [be] implemented in [the] 3M plans." (Steele testimony) ROA 055392-055393.

That SNWA gathered no input from the Tribes in determining what constituted an unreasonable effect for Swamp Cedars, among other Tribal cultural use areas and habitat types, reveals SNWA's intensions. They want to be the ones who will determine whether there will ever be mitigation. And they want to be the ones who decide what mitigation will be, absent the Tribes and absent other stakeholders or Federal Agencies. Again, this runs counter to the requirements of the Stipulations.

E. The Proposed Mitigation for Swamp Cedars Is an Adverse Effect

SNWA proposed in the Spring Valley 3M Plan that they can mitigate the die-off of swamp cedar trees. SNWA included in the 3M Plan that they could plant new swamp cedar trees and replace spring water or groundwater with some other source of water from some other place. ROA 047927. And the Goshute tribal elder, Rupert Steele testified about this:

> Q (Mr. Echo Hawk) The chairman touched on this, already, in terms of whether replanting trees would be an adequate substitute if groundwater pumping were to kill older trees. Do you see a difference there between replanted trees and existing Swamp Cedar[s]?
>
> A (Mr. Steele) It would be a direct insult on the Indian people and it would diminish our way of living. It would seriously adversely effect what we have there with our connection with our ancestors that are currently there now.
>
> Q. What about there's been some discussion or suggestion of the 3M Plans replacing original spring water in the Swamp Cedars with mitigation water. Would that be acceptable to the tribes?
>
> A. I feel that is another form of insult because if you're taking away the water that's there, pure in its nature as it is now, . . . No, no it's not acceptable.

ROA 055387-055388. Goshute Tribal Chairman Virgil Johnson's testimony made it crystal clear how he saw SNWA's proposed mitigation:

> Significant to Swamp Cedars is when those massacres took place where those our people fell, after being killed, they were replaced by cedar trees in that area, and that's why that area is very sacred. To cut down cedar trees and try to replace them by some kind of regrowth would be very disrespectful to the native tribe, our tribe. It would be a desecration to uproot those trees. I don't think any water brought in would replant the trees. Trees that are replanted would not represent the same thing that those trees are now representing.
>
> . . .
>
> And to reseed that area would be a disgrace in our opinion. It would be disrespectful of our tribal culture, our tribal traditions and our tribal rights which hooks to the water.

ROA 055382-055383.

Unfortunately, the 3M Plan mitigation options were not rooted in substantial evidence. It was guesswork to propose that reseeding, replanting, and irrigating Swamp Cedars would be acceptable mitigation. SNWA provided no evidence whatsoever that such mitigation would actually work. If the SNWA does not root their mitigation options in something other than another adverse effect and if they do not know whether or not their proposed mitigation will actually work, then it was premature for the SE to approve the 3M Plans. In *Eureka County v. State Engineer*, the Nevada Supreme Court found that substantial evidence is required to demonstrate what specific mitigation will be implemented and that that specific mitigation will actually work.

See Eureka, 359 P.3d at 1121. Since the SE failed to do this in the 3M Plans, the 3M Plans must be rejected.

In addition, the SNWA proposed mitigation options are invalid, just like those in *Eureka County v. State Engineer*. That Court found that the SE may not defer the determination of what mitigation would encompass to a later date, which could violate protestants' rights to a full and fair hearing and which is rooted in due process. *See Eureka*, 359 P.3d at 1120 ("[A]llowing the State Engineer to grant applications conditioned upon development of a future 3M Plan . . . could potentially violate protestant's rights to a full and fair hearing on the matter, a rule rooted in due process.") (citing *Revert*, 95 Nev. at 787, 603 P.2d at 264). The Court in *Eureka* also concluded that to use water from a different source as sufficient mitigation is a specious assumption. And yet, such a mitigation scheme was what the SE approved in SNWA's 3M Plans. And both are invalid.

F. The Thresholds and Triggers in the 3M Plans Are Not Reasonable

Thresholds and triggers for unreasonable effects in the 3M Plans are also not rational and do not comply with the Remand Decision. The examples below make it clear.

1. Mitigation Trigger for Swamp Cedars: 100% Elimination + 1 year

Before explaining the mitigation trigger for Swamp Cedars, it is important to note the 3M Plan would only include the Swamp Cedars Area of Critical Environmental Concern (ACEC) and the SNWA-owned "Osceola Property." About 40% (1,500 acres) of the terrestrial woodland habitat is the Swamp Cedars ACEC. ROA 047922. The Osceola Property is less than half the size of the Swamp Cedars ACEC. ROA 047868. By rough approximation, the total areas both the Swamp Cedars ACEC and Osceola Property is about 2,250 acres. However, the Swamp Cedars National Historic Property, or Traditional Cultural Property ("TCP"), listed on the

National Register of Historic Places is 14,175 acres, ROA 053011, which wholly encompasses the Swamp Cedars ACEC. ROA 053056. And, even though these 14,175 acres are not all swamp cedar woodlands, there are significant areas outside of the ACEC to the north that are swamp cedar woodlands or other sacred and ceremonial areas needed for the continuance of Tribal traditional and ceremonial activities. ROA 05298-052988 and 052995-053008. These were not specifically included in SNWA's 3M Plans, yet the cedar trees and springs and spring-fed meadows are the most vital to the Tribes.

As to the thresholds and triggers for the Swamp Cedars ACEC, two points must be highlighted. First, the Spring Valley 3M Plan states that "the investigation trigger is activated if any tree-covered area for the Swamp Cedar ACEC, compared to the baseline maximum tree cover area, falls within 5% of the lower limit of the baseline percent range in cover." ROA 047923. The maximum baseline tree cover area is 44 acres, and SNWA set the investigation trigger at 35 acres; this is a 20% difference. ROA 047924. But this investigation trigger for Swamp Cedars is not based on substantial evidence and disregards Tribal and public interest of Swamp Cedars as a National Historic Property.

The second point relates to a reasonable effect versus an unreasonable effect. An unreasonable effect for Swamp Cedars is 100% elimination of the swamp cedar trees. A reasonable effect, it therefore seems, could be 99.9% loss of swamp cedar trees. As stated in the Spring Valley 3M Plan, "the mitigation trigger is activated if annual tree-cover area for the Swamp Cedars ACEC, compared to the baseline maximum tree cover area, falls below the lower limit of the baseline percent range in cover for a period of five consecutive years as a result of SNWA GDP pumping." ROA 047923, second paragraph. On cross-exam of Mr. Marshall, the

Tribes demonstrated, with Marshall conceding, that 100% of the swamp cedars woodland could be eliminated before the mitigation trigger was activated. ROA 054570-054576.

> Q (Mr. Echo Hawk) Right. And – but if we got to a hundred percent that would mean there are no more Swamp Cedars in the ACEC; correct?
>
> A (Mr. Marshall) Well, we wouldn't' expect to see a hundred percent range; right? And what we're describing here is the range – the range in cover that we have observed over the period of – of historical period.
>
> Q. I understand. But if we reached a hundred percent that would mean there were no more Swamp Cedars in the ACEC; correct?
>
> A. I believe that's correct, yes.
>
> . . .
>
> Q. On page 3-45 [of SNWA Exh 592] at the bottom there it talks about the mitigation trigger.
>
> Now, when the percent of cover is at the – at the – a certain level it has to stay at that level for a period of five consecutive years for the – for mitigation measure – actions to take place; is that accurate?
>
> A. That is correct.

ROA 054574 and 054576.

A quick calculation reveals a serious problem with the 3M Plans. Based on Figure 3-8 of the Spring Valley 3M Plan, ROA 047924, the baseline maximum tree cover area is 44 acres. The lower limit of the baseline percent range in cover is 25%. If the area of swamp cedars woodland (44 acres) drops by 25% for four consecutive years, then that is a 100% loss—SNWA's standard in the 3M Plans. So, reasonable effects could reach 100% elimination of Swamp Cedars and unreasonable effects to Swamp Cedars may also be 100% elimination. SNWA would not be required to mitigate per the 2017 3M Plan and thus the permit terms of the Applications, unless after the fifth year there were still no swamp cedar trees AND unless SNWA found that the loss of the swamp cedars was caused by SNWA GDP pumping.

By this curious threshold or trigger, it is possible that SNWA would not mitigate until all of the swamp cedars were dead. It is also possible that SNWA would NEVER mitigate even after all the swamp cedars died out and SNWA was draining Spring Valley of its water. While there

is "preemptive mitigation" that could be done, there is nothing in the 3M Plans that actually requires it. Thus, mitigation trigger and lack of solid requirements are unsound and subjective.

In fact, these thresholds and triggers for Swamp Cedars run counter to NRS 533.370 in two parts. First, "If the appropriation threatens to prove detrimental to the public interest." NRS 533.370(1)(2)(a). This includes the 3M Plans which would become permit terms and conditions for the subject Applications. The SE already denied Applications 54014 and 54015 on the ground that they would threaten to prove detrimental to the public interest. ROA 039047, 039022-039023. Second, the SE must consider "[w]hether the proposed action is environmentally sound as it relates to the basin from which the water is exported". NRS 533.370(3)(c). It is exponentially unsound to have 3M Plans that allow for complete elimination of Swamp Cedars.

The 3M Plan mitigation trigger that allows for the complete destruction of the Swamp Cedars is detrimental to the public interest. Both Nevada's State Historic Preservation Office and the U.S. National Park Service approved Swamp Cedars as a National Historic Property (as a Traditional Cultural Property), which is undeniably in the public interest to preserve in perpetuity. The historical, cultural, and religious significance of Swamp Cedars has only been brought into the public eye since about 2011. But as the Tribes' witness Dr. Monte Sanford testified, the Tribes are taking steps obtain a higher-level designation for Swamp Cedars, including a National Historic Landmark designation. ROA 055264.

2. Mitigation Triggers for Hamlin and Snake Valleys Are Subjective

In a very similar vein to allow 100% of swamp cedars to die off before mitigation would occur, there is the similar situation in northern Hamlin and Southern Snake Valleys. The Spring Valley 3M Plan calls for monitoring Big Springs, Dearden Springs, and Clayton Springs North for the rare and endemic spring snail *Pyrgulopsis anguina*. ROA 047876. These springs are the

only places where the snail lives. There are several very peculiar aspects about this portion of the 3M Plan. First, the monitoring data that will be collected on this species will be presence/absence data. ROA 047876. Second, the 3M Plan is vacant of any mention of how presence/absence data of the snail will be used to trigger investigations, management actions, or mitigation actions. What happens if the snail populations drop by 50%? What if their populations drop by 99.9%? What if only one snail remains? We do not know because it is not in the 3M Plan. SNWA has left unknown what they will do with the presence/absence data on the spring snail, and they have left us guessing as to how that data will feed into investigation, management, and mitigation efforts.

Investigation and management apparently would not be triggered even if there were no spring snails left in any of the three springs. Investigation of the snail will be triggered only if monitoring well 383533114102901 is triggered—presumably by its water level and no other parameter, just the well. ROA 047932, 043254. "If investigation indicates cause of water level change at monitor well 383533114102901 is the result of SNWA GDP pumping, SNWA will conduct annual presence/absence monitoring of the longitudinal gland pyrg [*Pyrgulopsis anguina*] at Big Springs, Dearden Springs, and Clayton Springs North." ROA 047933, 043254. Curiously, the mitigation trigger then turns back to hydrologic data at some other site known as HAM1008M. ROA 047934, 043254. So, even if 100% of the longitudinal gland pyrg spring snails had vanished, it would not spark the mitigation trigger. ROA 047934, 043254. Instead, SNWA would pivot to the hydrologic data from the monitor well HAM1008M. ROA 047934, 043254. "The mitigation trigger at the monitor well HAM1008M is activated as a result of SNWA GDP pumping as described in Section 7.2.3". ROA047934, 043254. Thus, only if SNWA finds their groundwater pumping to be the cause of hydrologic changes to HAM1008M would it spark

any mitigation requirement. ROA 047934, 043254.

If SNWA finds that their pumping caused hydrologic impacts at the one specific monitor well, then the 3M Plan identifies that they would take "mitigation actions" of "collaboration" and "funding." ROA 047936, 043254. Collaboration and funding for water availability. Collaboration and funding for habitat improvements. Collaboration and funding for habitat expansion and habitat creation. Collaboration and funding for establishing habitat or populations elsewhere. ROA 047936, 043254. According to the Oxford Dictionary, mitigation is defined as "the action of reducing the severity, seriousness, or painfulness of something." Collaboration and funding are not mitigation actions. Collaboration and funding in and of themselves will not bring groundwater levels back up. Funding doesn't make it so dried up springs flow again. Funding does not ensure the survival of the endemic spring snail. SNWA's investigation, management, and mitigation thresholds and triggers lack specifics as required by the Remand Decision. These issues must be specified in order to comply with the order.

And like the proposed mitigation for Swamp Cedars, the mitigation for the pyrg is also amorphous. The 3M Plan reveals mitigation options described above, but it does not say what specific mitigation will be taken. Nor does it say exactly where the all of mitigation will take place for this Hamlin Valley/Southern Snake Management Block. Nor does the 3M Plan provide any substantial evidence that the mitigation will actually work. Here again, the 3M Plans provide a list of amorphous mitigation options, like those that were rejected in *Eureka County v. State Engineer,* 131 Nev. Adv. Op. 84, 359 P.3d 1114 (2015). And the SE erred in approving these mitigation options, as they are not grounded in substantial evidence that the mitigation would actually work.

G. The Areas for 3M Are Being Whittled Down

The areas for the 3M Plans are dwindling. First, the Stipulations identified that the 3M Plans and the 3M process was to cover the Area of Interest delineated in Figure 1 of the Stipulations. ROA 002701 and 006445. In the 2011 3M Plans, the area for 3M truncated many of the adjacent basins beyond the Applications' subject basins. In the new 2017 3M Plans, the areas for 3M are no longer the subject hydrographic basins (Spring, Cave, Dry Lake, and Delamar), but rather a subset area called the "groundwater discharge area" in those basins. ROA 047823 and 048009. It was a key definer for "unreasonable effects" in the 3M Plans. ROA 047823 and 048009. These exact locations of the groundwater discharge areas were not shown until part way another document called the Technical Analysis Report, SNWA Ex. 507. ROA 043011-043496. For the Spring Valley (and lower Snake Valley), the groundwater discharge area location was finally revealed on page 6-57 (Figure 6-24) and page 7-26 of the Technical Report and not the 3M Plan. ROA 043158 and 043253. For DDC Valleys, one groundwater discharge area was in the Technical Report at page 8-24 (Figure 8-17). ROA 043283.

And yet, there are many environmental resources and Tribal customs and traditions beyond the groundwater discharge areas that would be impacted from groundwater drawdown by pumping under the SNWA Applications. For example, the Tribes' witness Dr. Monte Sanford testified and provided evidence that the Tribes have many other cultural areas and traditional practices that extend from the valley bottoms to the high mountains. *See* ROA 053054, 053060-053065, and 053074-053077, 055276-055278. The Swallow Creek tribal cultural area was one example, and it highlights the spiritual journeys of Tribal members. As Dr. Sanford explained in his report, ROA 053058-053079, based on visits to the area with Tribal elders and spiritual leaders:

> The Swallow Creek TCA [tribal cultural area] is a sacred area where individual Tribal members go to ascend physically up the mountain while also ascending

> spiritually. Tribal people may fast for many days as part of this journey. They take the water from the springs up to the high mountain cliffs that overlook Spring Valley. They carry eagle feathers and sacred plants and other items used for spiritual practices. On the high mountain cliffs, they pray for health and healing, for relatives and ancestors, for friends and enemies, and for the continued gifts provided by the earth. They use the spring water and eagle feathers to send their prayers into the sky. And they repeat that ceremony to allow their own spirits to ascend. After that journey, they may leave their sacred items hidden on the cliffs as an offering or use them again the next time they return.

ROA 053063-053064. SNWA pumping would impact other cultural use areas. *See* ROA 053054, 053060-053065, and 053074-053077. SNWA's pumping project would cut off Tribal people's ability to continue a way of life. Unreasonable effects to these cultural areas and to Tribal spiritual and cultural traditions were given no standards, no thresholds, and no triggers as to when the 3Ms would be required. Instead, they are not included.

II
THE STATE ENGINEER ERRED IN DENYING THE TRIBES' MOTION TO DISMISS FOR FAILURE TO JOIN THE DEPARTMENT OF INTERIOR AGENCIES

The Stipulations were entered to protect Federal Water Rights and Federal Water Resources, including Indian reserved water rights. The Stipulations further provide: "The DOI Bureaus and SNWA shall jointly explain or defend this Stipulation and Exhibits A and B to the State Engineer." The Stipulations (which incorporate the 3M Plans) cannot be amended, altered, or varied except by mutual written agreement of SNWA and the DOI Bureaus (Bureau of Land Management, Bureau of Indian Affairs, U.S. Fish and Wildlife Service, and National Park Service).

The Remand Decision required that there be objective standards as to when mitigation must occur, which cannot possibly be accomplished without amending, altering, or varying the 3M Plans. Because written consent of the DOI Bureaus is required to amend the Stipulations and Plans, their participation of DOI Bureaus in the SE's proceeding was required and necessary. In the absence of the participation, any amendment to the 3M Plans incorporated into the Stipulations

is legally invalid, and any objective standards established without the participation of the DOI Bureaus is arbitrary and capricious. Moreover, setting standards affecting Federal Water Rights in the absence of the DOI Bureaus violated the due process rights of the Tribal Protestants. To adequately protect Federal and Tribal interests and enforce the terms of the Stipulations, the Federal Agencies should have been joined in the SE proceeding. In their absence, SNWA could not possibly meet the purpose of the remand from this Court without the direct participation of the DOI Bureaus.

A. Proceeding Without the United States Violates the Plain Terms of the Stipulations for Withdrawal of Federal Protests

The Remand Decision required the State Engineer to: "Define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious in Spring Valley, Dry Lake Valley, Delamar Valley." ROA 03073 [sic] 039073. Moving forward to attempt to establish "objective standards" for the 3M Plans without the DOI Bureaus violates clear provisions of the Stipulated Agreements.

First, the Spring Valley Stipulated Agreement provides: "The DOI Bureaus and SNWA shall ***jointly*** explain or defend this Stipulation and Exhibits A and B [the 3M Plans] to the State Engineer." ROA 002690 (emphasis added). The Stipulated Agreement states clearly that a defense or explanation of the Stipulation requires both SNWA and the DOI Bureaus. Proceeding in the present hearing process before the State Engineer without the DOI Bureaus is a violation of this provision of the Stipulated Agreement.

Second, paragraphs 17 and 18 of the Spring Valley Stipulation states:

> 17. This Stipulation may be amended by mutual written agreement of the Parties.
>
> 18. This Stipulation sets forth the entire agreement of the Parties and supersedes all prior discussions, negotiations, understandings or agreements. No

> alteration or variation of this Stipulation shall be valid or binding unless contained in an amendment in accordance with paragraph 17.

ROA 002693. Under the plain language of the Stipulation, any amendment, alteration, or variation of the 3M Plans will require the signed agreement of the DOI Bureaus. Establishing "objective standards" for the 3M Plans is an amendment, alteration, and variation of the terms of the 3M Plans, which are exhibits to the Stipulations and incorporated therein by reference. Accordingly, proceeding in the hearing process without the DOI Bureaus was a violation of the plain terms of the Stipulated Agreements.

Paragraph 19 of the Spring Valley Stipulated Agreement provides: "the Parties agree that the Stipulation shall not be offered as evidence or treated as an admission regarding any matter herein and may not be used in proceedings on any other application or protest whatsoever, except that the Stipulation may be used in any future proceeding to interpret and/or enforce its terms." ROA 002693. The SE proceeding on remand was a new proceeding not originally contemplated by the parties and the Stipulations should not have be offered as evidence in support of the SNWA applications. In any case, the SE proceeding on remand is not to "interpret and/or enforce" the terms of the Stipulations. Rather, the purpose of the proceeding below was to establish additional standards to amend the 3M Plans to conform to this Court's December 10, 2013 Decision. Thus, use of the Stipulated Agreements in the proceeding below absent the consent of the DOI Bureaus should not have been permitted and the SE should have granted the Tribes' motion to dismiss for failure to join the Federal Agencies.

B. Where the DOI Bureaus play a central role in 3M Plan Executive Committee, TRP, and BWG, it is impossible to establish objective standards for mitigation or amend the 3M Plans in any reasonable way without the participation of the DOI Bureaus.

The remand order from this Court required amendment, alterations, and variations to the 3M Plans. The DOI Bureaus are a party to the Stipulations and primary members of the

implementing management bodies. Representatives from the DOI Bureaus are members of the Executive Committees, Technical Review Panels (TRP's), and Biological Working Groups (BWG's) established by the 3M Plans to implement their provisions. SNWA and the DOI Bureaus have competing interests. One party to an agreement cannot solely determine "objective" standards. Allowing SNWA to solely determine the objective standards for when mitigation will occur under the 3M Plans was be arbitrary and capricious. This Court correctly observed that "even a cursory examination of the stipulation reveals that between SNWA, the Federal agencies and existing water right holders, the goals and motivations of each party will certainly conflict." (December 10, 2013 Decision at p. 17.). No other party can adequately represent the interests of the United Stated in protecting Federal Water Rights or Federal Resources threatened by SNWA's proposed groundwater pumping. The DOI Bureaus were indeed indispensable parties in the proceeding below to meet this Court's order on remand.

C. Proceeding without the United States DOI Bureaus violated the due process rights of the Tribal Protestants and was inconsistent with the role of the federal government in fulfilling its trust responsibility to the Tribes.

Although the Nevada Rules of Evidence do not strictly apply in this proceeding, Nevada law dictates that the State Engineer's hearing rules must be reasonable. *See* N.R.S. 532.120. To be fair and reasonable, the process for amending the 3M Plans to establish objective standards must include input from the DOI Bureaus, which are parties to the Stipulations and members of the Executive Committees (EC's), Technical Review Panels (TRP's), and Biological Working Groups (BWG's) established under each 3M Plan. Proceeding to establish "objective standards" under the 3M Plans without including the DOI Bureaus is a violation of the due process rights of the Tribes, which rely on the DOI Bureaus to protect Federal Water Rights, including the unadjudicated water rights of the Goshute Tribes.

It is also undisputed that the United States DOI Bureaus have a federal trust responsibility[20] to safeguard the interests of the Tribal Protestants and unadjudicated Indian water rights within the Area of Interest impacted by the SNWA project.[21] There is no dispute that the Goshute Reservation lies well within the Area of Interest for the proposed SNWA groundwater applications.

Although the Rules of Evidence did not strictly apply in this SE proceeding below, constitutional principles of due process do govern this proceeding. *See United States v. Orr Ditch Co.*, 391 F.3d 1077 (9th Cir. 2004). The practice and procedure adopted by the State Engineer cannot conflict with basic due process protected by the United States and Nevada Constitutions. *Cf.* N.R.S. 532.120 ("The State Engineer may adopt regulations, not in conflict with law, governing the practice and procedure in all contests before the Office of the State Engineer.") The Nevada Supreme Court has recognized that judicial relief is available from a manifest abuse of discretion. *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 265 (Nev. 1979). The applicable standard of review of the decisions of the State Engineer presupposes the fullness and fairness of the administrative proceedings. *Id.* All interested parties must have had a full opportunity to be heard, and the State Engineer must have clearly resolved all the crucial issues presented. When these procedures, grounded in basic notions of fairness and due process, are not followed, and the resulting administrative decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion, the Nevada Supreme Court has stated it will not hesitate to intervene. *Id.*

[20] Pursuant to the United States Constitution, the Department of Interior has voluntarily promised to always protect Indian Tribal resources, which includes water. This responsibility is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" whose conduct "should be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286 (1942).

[21] *Winters v. United States*, 426 U.S. 128 (1908); *see also Arizona v. California*, 373 U.S. 546, 576-577 (1963).

The DOI Bureaus were required to be joined in the SE proceeding below under the Stipulations, which require that SNWA and the DOI Bureaus "jointly explain or defend" the Stipulations. *See Stipulation, SE Exhibit 41* at pg. 9, ROA 002690. The Federal Agencies entered a Stipulation stating that they would jointly explain or defend the Stipulation to the State Engineer with SNWA. The State Engineer should have provided notice of the purpose of the proceeding below to the DOI Bureaus and should have invited their participation. It should be the responsibility of the Bureaus to determine whether to join or assert sovereign immunity as a defense to participation. By failing to include the Federal Agencies in the proceeding below, the State Engineer's process on remand could not accomplish the purpose of the remand order from this Court. *Cf. Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 879 (9th Cir. 2004).

A central part of the Tribes' argument in the Motion to Dismiss for Failure to Join the Federal Agencies is that Federal Water Rights and Federal Resources under the 3M Plans cannot be adequately protected without the direct participation of the United States DOI Bureaus. In their absence, who was representing their interests? SNWA does not represent those interests. And it is not the role of Tribal Protestants to protect those interests. Finding otherwise would turn the federal trust responsibility on its head and would result in the unprecedented scenario of forcing Indian tribes to attempt to protect Federal Water Rights and unadjudicated tribal water rights in a State forum. For all the above reasons, the Court should hold that the SE erred in failing to join the Federal Agencies in the proceeding below.

III.
PETITIONER TRIBES INCORPORATE BY REFERENCE ARGUMENTS OF OTHER PROTESTANTS

The Tribes join with and incorporate by reference the arguments provided by other Protestants, including Great Basin Water Network and White Pine County, Millard and Juab Counties, Utah, and the Corporation of the Presiding Bishop of the Church of the Jesus Christ of Latter-Day Saints on behalf of Cleveland Ranch.

CONCLUSION AND REQUESTED RELIEF

For the reasons above, 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. The Court should declare invalid the Monitoring, Management, and Mitigation Plans approved by the SE in Ruling 6446. The Court should also find that the SE erred in denying the Tribes' Motion to Dismiss for Failure to Join the Federal Agencies in the proceeding below.

Dated: March 31, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March 2019, I served counsel of record with a copy of the foregoing by electronic mail pursuant to the parties' stipulation, and addressed as follows:

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