

1 Case No.:

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6 **IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
7 **IN AND FOR THE COUNTY OF WHITE PINE**  
8

9 SOUTHERN NEVADA WATER AUTHORITY,  
10 a political subdivision of the State of Nevada,

11 Petitioner,

12 vs.

13 JASON KING, P.E., Nevada State Engineer,  
14 DIVISION OF WATER RESOURCES,  
15 DEPARTMENT OF CONSERVATION AND  
16 NATURAL RESOURCES,

17 Respondent.

**PETITION FOR JUDICIAL REVIEW**

18 COMES NOW Petitioner SOUTHERN NEVADA WATER AUTHORITY, a political  
19 subdivision of the State of Nevada (hereinafter "SNWA"), by and through its counsel, PAUL G.  
20 TAGGART, ESQ., DAVID H. RIGDON, ESQ., and TIMOTHY D. O'CONNOR, ESQ., of the law firm  
21 of TAGGART & TAGGART, LTD., and STEVEN C. ANDERSON, ESQ., of the SOUTHERN  
22 NEVADA WATER AUTHORITY, to hereby file this petition for judicial review of Nevada State  
23 Engineer Ruling 6446.

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## JURISDICTIONAL STATEMENT

Under NRS 533.450(1), State Engineer orders are subject to judicial review "in the proper court of the county in which the matters affected or a portion thereof are situated." The water right applications at issue in this appeal have proposed points of diversion located in both White Pine and Lincoln counties. White Pine and Lincoln Counties are within the Seventh Judicial District of the State of Nevada. The previous cases in this matter were consolidated within the Seventh Judicial District Court of Nevada in and for the County of White Pine<sup>1</sup> and the remand order that led to the issuance of Ruling 6446 was issued by that Court. Therefore, the Seventh Judicial District Court of the State of Nevada in and for the County of White Pine is the proper venue for judicial review of Ruling 6446.

## FACTUAL BACKGROUND

In 1989, SNWA's predecessor-in-interest applied for permits to appropriate heretofore unappropriated water from Spring Valley, Delamar Valley, Dry Lake Valley, and Cave Valley and use that water in Las Vegas valley for municipal purposes. Several parties protested the applications.

On March 22, 2012, the State Engineer issued Rulings 6164-6167. Ruling 6164 (Spring Valley) denied Applications 54016, 54017, 54018, and 54021 and approved Applications 54003 to 54015, 5401, and 54020 with a duty of 61,127 acre-feet/annually ("afa") to be developed in three stages. Ruling 6165 (Cave Valley) approved Applications 53987 and 53988 with a duty of 5,235 afa. Ruling 6166 (Dry Lake Valley) approved Applications 53989 and 53990 with a duty of 11,584 afa. Finally, Ruling 6167 (Delamar Valley) approved Applications 53391 and 53392 with a duty of 6,042 afa. Together the four rulings authorized the issuance of water rights permits with a combined duty of 83,988 afa.

Several of the protestants appealed Rulings 6164-6167 to the district court in accordance with the provisions of NRS 533.450. The various cases were consolidated and, on December 13, 2013, the Court entered its Decision with respect to all four rulings. In that Decision, the Court upheld most of the State Engineer's findings and legal conclusions including the finding that water is available for appropriation in the respective basins. However, the Court remanded the case to the State Engineer with instructions to address the following issues:

<sup>1</sup> Order to Consolidate Cases, Change Venue, and Set Briefing Schedule, *Millard County v. State Engineer*, Fifth Judicial District Court of the State of Nevada, Case No. CV1204049 (October 22, 2012).

1           1.       The addition of Millard and Juab counties, Utah, in the mitigation  
2 plan so far as water basins in Utah are affected by pumping of water from  
3 Spring Valley Basin, Nevada;

4           2.       A recalculation of water available for appropriation from Spring  
5 Valley assuring that the basin will reach equilibrium between discharge  
6 and recharge in a reasonable time;

7           3.       Define standards, thresholds or triggers so that mitigation of  
8 unreasonable effects from pumping of water are neither arbitrary nor  
9 capricious in Spring Valley, Cave Valley, Dry Lake Valley and Delamar  
10 Valley, and;

11          4.       Recalculate the appropriations from Cave Valley, Dry and  
12 Delamar Valley to avoid over appropriations of conflicts with down-  
13 gradient, existing water rights.<sup>2</sup>

14           On remand, the State Engineer held a two-week hearing to consider evidence related to these  
15 remand instructions. To address remand instructions 1 and 3, SNWA presented an updated monitoring,  
16 management, and mitigation plan ("3M Plan"), which included empirically based thresholds and  
17 triggers. Expert testimony at the hearing verified that these thresholds and triggers will operate in such  
18 a manner that appropriate management or mitigation actions are initiated *before* any negative effects  
19 occur. Because of this, SNWA's proposed pumping will not conflict with either existing water rights  
20 or harm sensitive environmental resources. In addition, the 3M Plan includes thresholds and triggers  
21 specifically designed to protect water rights and resources within Millard and Juab counties.

22           To address remand instruction 2, SNWA presented extensive testimony and evidence indicating  
23 that, if the full evapotranspiration capture that is required by the district court's remand is upheld on  
24 appeal to the Supreme Court, a pumping scenario can be designed to accomplish this goal. Groundwater  
25 modeling shows that under that scenario SNWA will achieve a 96% evapotranspiration capture rate  
26 within 75 years, and a 98% capture rate by the end of the 200-year simulation period. Expert testimony  
27 confirmed that such high capture rates mean that the basin will achieve a new equilibrium between  
28 recharge and discharge within a reasonable period of time. SNWA also presented evidence that in this  
unique case, when the State Engineer is required by a remand instruction that is neither a desirable public  
policy nor consistent with the existing practices of water managers throughout the western United States,  
the State Engineer can and should consider the potential for different points of diversion to accomplish  
the new requirement of the remand instruction.

<sup>2</sup> Decision, p. 23:15-23, Case No. CV1204049 (December 13, 2013).

1 Finally, to address remand instruction 4, SNWA performed a full survey and accounting of water  
2 rights within the White River Flow System (“WRFS”). Testimony presented at the hearing verified that  
3 this survey and accounting demonstrates that the previously approved appropriations in the Cave, Dry  
4 Lake, and Delamar Valleys will not result in an over-appropriation of water within the WRFS. In other  
5 words, the same water has not been appropriated by more than one water user. This evidence indicated  
6 that SNWA’s proposed pumping will not conflict with existing down-gradient water rights.

7 After the hearing, on August 17, 2018, the State Engineer issued Ruling 6446 denying all of  
8 SNWA’s applications. In Ruling 6446, the State Engineer noted that remand instructions 2 and 4  
9 conflict with Nevada’s established rules and system for considering applications for new appropriations  
10 of water. The State Engineer also reiterated his prior finding that unappropriated water exists in the  
11 respective basins that can be placed to beneficial use without creating conflicts with existing rights.  
12 However, the State Engineer indicated he was constrained, based on the law of the case doctrine, to deny  
13 the applications outright.

#### 14                     **GROUNDS FOR PETITION**

15 Under NRS 533.370 the State Engineer is required to approve a water rights application *unless*  
16 there is no unappropriated water in the source or the proposed use of the water will conflict with existing  
17 rights or protectable interests in domestic wells. In addition, NRS 533.370(3) provides additional  
18 criteria that the State Engineer must *consider* when authorizing an interbasin transfer of groundwater,  
19 including whether the proposed project is “environmentally sound as it relates to the basin from which  
20 the water is exported.” All State Engineer decisions must be supported by substantial evidence.<sup>3</sup>

21 Substantial evidence in the record demonstrates that (1) there is water available for appropriation  
22 in the respective basins, (2) with the approval of SNWA’s 3M Plan adequate safeguards are in place to  
23 assure that the proposed appropriations will not conflict with existing water rights, (3) the approved 3M  
24 Plan includes empirically-based thresholds and triggers to ensure the protection of environmental  
25 resources within the respective basins, (4) the approved 3M Plan includes protections for water resources  
26 in Millard and Juab counties, (5) the proposed appropriations will not result in an over-appropriation of  
27 the WRFS or harm to existing down-gradient water rights, and (6) if required, a new equilibrium  
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<sup>3</sup> *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

1 between discharge and recharge can be established in Spring Valley within a reasonable period of time  
2 using a realistic pumping scenario that is specifically designed to fully capture the evapotranspiration of  
3 groundwater by existing phreatophytic plant communities – all as required by the Court’s remand  
4 instructions.

5 The State Engineer clearly erred when he claimed that, despite the evidence in the record, he was  
6 required by remand instructions 2 and 4 to deny SNWA’s applications in their entirety. First, the State  
7 Engineer erroneously limited himself to considering only SNWA’s initial 15 points of diversion when  
8 applying remand instruction 2.<sup>4</sup> However, nothing in the remand order or the express language of  
9 remand instruction 2 mandated this approach. In fact, the Court, itself, relied on a model scenario with  
10 81 alternate points of diversion when it determined that SNWA’s appropriations were required to be  
11 recalculated based on the Court’s newly articulated evapotranspiration capture rule. Because the Court  
12 did not restrict its analysis to the points of diversion listed in the applications, there was no reason for  
13 the State Engineer to do so.

14 In addition, all the experts who testified on this subject at the hearing (including the Protestant’s  
15 experts) agreed that it is unreasonable to assume that final build out of the project will be limited to the  
16 initial 15 wells. In fact, specific testimony showed that similar projects managed by large municipal  
17 water providers in other jurisdictions use proportionately more wells than the 15 initial wells identified  
18 in SNWA’s applications. All the relevant experts also testified that evapotranspiration capture and time  
19 to reach equilibrium are more a function of wellfield design and project layout than the quantity of water  
20 pumped. Accordingly, the State Engineer should have considered model scenarios that vary the  
21 locations of project wells to determine whether it is possible for the basin to reach a new equilibrium  
22 within a reasonable timeframe.

23 Furthermore, remand instruction 2 made clear that the State Engineer’s duty on remand was  
24 limited to a “recalculation” the water available for appropriation in Spring Valley. In the remand order  
25 the Court expressly ruled that “[o]bviously, any water-well cannot capture all of the  
26 [evapotranspiration]” and “[t]he Engineer is correct that the time to reach equilibrium is not a valid  
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28 <sup>4</sup> Ruling 6446, p. 12.

1 reason to deny the grant of water.”<sup>5</sup> Accordingly, the Court did not authorize the State Engineer to deny  
2 SNWA’s Spring Valley applications. Instead, the Court only authorized the State Engineer to “limit the  
3 appropriation below the calculated [evapotranspiration]”<sup>6</sup> if the evidence on remand showed that such a  
4 limitation would achieve the goal of ensuring that the basin reaches equilibrium.

5 Second, the express language of remand instruction 4 only mandates the State Engineer analyze  
6 the WRFS basins as a whole to determine whether approval of SNWA’s application will effectively  
7 result in the same water being allocated twice in different basins. In the remand order the Court stated  
8 that it was concerned that “the same water has been awarded twice, once in the upper basins, and again  
9 in the lower basins.”<sup>7</sup> Addressing this concern did not require the State Engineer or SNWA to perform  
10 a full hydrologic study of the WRFS basins. Instead, the Court’s concern was properly addressed by  
11 SNWA’s submittal of an accounting analysis of the perennial yields of the various basins and the  
12 committed water rights therein which clearly showed that the same water was not being allocated twice.

13 Because the State Engineer agrees that substantial evidence in the record supports the approval  
14 of SNWA’s proposed appropriations under NRS 533.370, his denial of the applications in Ruling 6446  
15 is arbitrary, capricious, an abuse of discretion, and contrary to law. The State Engineer also committed  
16 clear error when he ignored the evidence in the record and instead relied on a flawed reading of remand  
17 instructions 2 and 4 to deny SNWA’s applications in their entirety. Finally, in Ruling 6446 the State  
18 Engineer applied legal conclusions from the Court’s remand order that are clearly contrary to Nevada’s  
19 established water law in a manner detrimental to SNWA. Accordingly, Ruling 6446 should be reversed.

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28 <sup>5</sup> Decision pp. 10:25, 11:7-8, Case No. CV1204049 (December 13, 2013).

<sup>6</sup> *Id.*, p. 11:9.

<sup>7</sup> *Id.*, p. 19:19-23.

**CONCLUSION**

For the foregoing reasons, and others that may be discovered during the pendency of this appeal, SNWA respectfully requests that the Court reverse Ruling 6446.

**AFFIRMATION**  
**Pursuant to NRS 239B.030(4)**

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

DATED this 13<sup>th</sup> day of September, 2018.

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this day, I served, or caused to be served, a true and correct copy of the foregoing as follows:

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EXHIBIT INDEX

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State Engineer Ruling 6446, August 17, 2018

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# EXHIBIT 1

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