

In the Supreme Court of Nevada

SOUTHERN NEVADA WATER AUTHORITY,)
)
 Petitioner,)
)
 vs.)
)
 THE SEVENTH JUDICIAL DISTRICT COURT of the)
 State of Nevada, in and for the County of White)
 Pine; and THE HONORABLE ROBERT E. ESTES,)
 Senior District Judge)
)
 Respondents,)
)
 and,)
)
 MILLARD COUNTY, UTAH; JUAB COUNTY, UTAH, *et*)
al.,)
)
 Real Parties in Interest.)
)
 (*Full caption on the following three pages*))

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**SNWA’S REPLY BRIEF
TO ANSWERING BRIEFS OF CPB, CTGR AND GBWN PROTESTANTS**

District Court Case Nos. CV-1204050, CV-1204051, CV-1204052,
CV-1204053, CV-1204054, CV-1204055, CV-0418012, CV-0419012

DANIEL F. POLSENBERG
 Nevada Bar No. 2376
 JOEL D. HENRIOD
 Nevada Bar No. 8492
 JUSTIN J. HENDERSON
 Nevada Bar No. 13349
 LEWIS ROCA ROTHGERBER LLP
 3993 Howard Hughes Parkway, Suite 600
 Las Vegas, Nevada 89169
 (702) 949-8200
DPolsenberg@LRRLaw.com
JHenriod@LRRLaw.com
JHenderson@LRRLaw.com

PAUL G. TAGGART
 Nevada Bar No. 6136
 TAGGART & TAGGART, LTD.
 108 North Minnesota Street
 Carson City, Nevada 89703
 (775) 882-9900
Paul@LegalTNT.com

GREGORY J. WALCH
 Nevada Bar No. 4780
 DANA R. WALSH
 Nevada Bar No. 10228
 SOUTHERN NEVADA WATER AUTHORITY
 1001 South Valley View Boulevard
 Las Vegas, Nevada 89153
 (702) 258-7166
Greg.Walch@lvvwd.com
Dana.Walsh@lvvwd.com

Attorneys for Petitioner

In the Supreme Court of Nevada

SOUTHERN NEVADA WATER AUTHORITY,

Petitioner,

vs.

THE SEVENTH JUDICIAL DISTRICT COURT of the State of Nevada,
in and for the County of White Pine; and THE HONORABLE
ROBERT E. ESTES,

Respondents,

and,

MILLARD COUNTY, UTAH; JUAB COUNTY, UTAH; JASON KING,
P.E., in his official capacity as the NEVADA STATE ENGINEER;
NEVADA DEPARTMENT OF CONSERVATION AND NATURAL
RESOURCES, DIVISION OF WATER RESOURCES; CORPORATION OF
THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS ON BEHALF OF CLEVELAND RANCH; ELY
SHOSHONE TRIBE; CONFEDERATED TRIBES OF THE GOSHUTE
RESERVATION; DUCKWATER SHOSHONE TRIBE; WHITE PINE
COUNTY, NEVADA; ELKO COUNTY, NEVADA; EUREKA COUNTY,
NEVADA; NYE COUNTY, NEVADA; NYE COUNTY WATER
DISTRICT; CITY OF ELY, NEVADA; CENTRAL NEVADA REGIONAL
WATER AUTHORITY; GREAT BASIN WATER NETWORK; SIERRA
CLUB; CENTER FOR BIOLOGICAL DIVERSITY; 2ND BIG SPRINGS
IRRIGATION COMPANY; LUND IRRIGATION COMPANY; PRESTON
IRRIGATION COMPANY; ALAMO SEWER & WATER GID; BAKER
GID; MCGILL-RUTH SEWER & WATER GID; GREAT BASIN
BUSINESS & TOURISM COUNCIL; WHITE PINE CHAMBER OF
COMMERCE; NEVADA FARM BUREAU; N-4 STATE GRAZING
BOARD; BAKER RANCHES INC.; BATH LUMBER; PANACA
FARMSTEAD ASSOCIATION; BORDER INN; PEARSON FARMS;
RAFTER LAZY C RANCH; SPORTSWORLD; PROGRESSIVE
LEADERSHIP ALLIANCE OF NEVADA; LEAGUE OF WOMEN VOTERS
OF SALT LAKE CITY; UTAH AUDUBON COUNCIL; UTAH
PHYSICIANS FOR A HEALTHY ENVIRONMENT; POST CARBON SALT
LAKE; UTAH RIVERS COUNCIL; BRISTLECONE ALLIANCE; CITIZENS
EDUCATION PROJECT; INDIAN SPRINGS CIVIC ASSOCIATION;
SCHOOL OF THE NATURAL ORDER; VAUGHN M. HIGBEE & SONS;
ARMANDO AGUILEW; CHRIS ADLER; BART ANDERSON; AMY
ASPERHEIM; MICHELE AUSTRIA; CRAIG & GRETCHEN BAKER,
individually and on behalf of their minor children, MATTHEW &
EMMA; DAVID A. & TANA R. BAKER, individually and on behalf
of their minor children, CLAYTON F. DEAN & BARBARA BAKER;
TOM & JANILLE BAKER, individually and on behalf of their minor

children ALYSHIA, CALEB, MEGAN & KAYLI; JERALD BATES;)
JAMES & DONNA BATH; SHANNON BARKER; CHRISTIA BARLOW;)
MARGARET BARLOW; RICHARD A. BARR; BRIAN BEACHER;)
ELIZABETH BEDELL; CYNTHIA LEE BELL; "ROBIN" EDWARD JOHN)
BELL III; LOUIS BENEZET; KATHY BINGLEY; MICHAEL BIVINS;)
GARY BODELL; SEAN BONNELL; BOBBY BONNELL; LUKE)
BOTTICHE; JOHN BOWMAN; D. DANIE BRADFIELD; JAMES E.)
BRADY; ANN & JIM BRAUER; JOEL BRISCOE; WALTER FRANKLIN)
BROWN; TOM E. BROWN; BERNARD & EVA BUSWELL; MICHELE R.)
BUTLER; WILLIAM BUTTS; ART CAMERON; KAREN CAMPBELL;)
DALE CANEPA; RACHEL CARLISLE; BEAU CARLSON; DAVID)
CARLSON; LOUISE CARLSON; MARIE A. CARRICK; MELISSA)
CHEENEY; STEVE CHOUQUER; BRANDON CHRISTIAN; CRAIG)
CHRISTIANSON; LENE CLAY; WILLIAM COFFMAN; PETER COROON;)
JOHN S. COLE; KATHLEEN M. COLE; LANDON COLE; DAWNE)
COMBS; JOHN CONDIE; WILLIAM & GENIEL CONNOR; KATHY)
COOK; DAVID & HALLI COX; ROBERT CRAGER; PATRICIA J.)
CROSTHAIAIT; DUSTIN CROWTHER; CARY CURCIO; KELLEY)
DABEL; BRAD & ROBIN DALTON; GARY DAVIS; PETE TONY)
DELMUE; LUDELL DEUTCHER; ROM DiCIANNO; TRAVIS DORMINA;)
ANTHONY PAUL DONOHUE; ORRIN DOTSON; DENNIS DOTSON JR.;)
JOSEPH A. DUNNE; JERRI ELLIOT; VELDA EMBRY; JERRY)
ETCHART; JAMES R. FERRELL; JODY FINICUM; MIKE & JO)
FOGLIANI; PAULA J. FOHT; MELISSA JO FREE; JUSTIN FREHNER;)
PATRICK FULLER; VERONICA GARCIA; BRENT GARDNER;)
ANNETTE & CECIL GARLAND; JO ANNE GARRETT; PATRICIA J.)
GLADMAN; DONALD GENT; ANNA E. GLOECKNER; PAUL &)
NANCY GLOECKNER; PAT & KENA GLOECKNER, individually and)
on behalf of their minor children, KYLEE, KORI, & KOURTNEY;)
TAMI GUBLER; CHARLES HAFEN; DENNIS HAFEN; LAVOY HAFEN;)
FREDRICK HAMMEL; RELENA HANLEY; MICHAEL HANLEY; BART)
HANSEN; DANIEL & JUNE HANSEN; RICK HANSEN; BILLIE)
HARKER; CAROL HARKER; DELSA NAIA HARKER; EVE HARKER;)
JOSETT HARKER; THORA HARKER; DAVID HARTLEY; ROCKY &)
LYNDA HATCH STEVEN HEISELBETZ; AARON CARL HGFELDT;)
KATHY HIATT; EDWIN E. HIGBEE; KENNETH F. & KATHRYN A.)
HILL; JANICE HILTON; BRANDON HOLTON; N. PETER HORLACHER;)
ANDREW M. HORSCH; CAROL HULLINGER; RAY HULSE; DON)
HUNT; MARIAN K. HUNT; MERLENE HURD; JENNIFER JACK;)
ROBERT JENNINGS; JERONE A. JENSEN; AARON JESSOP; CARL)
JESSOP; JESSICA JESSOP; KEVIN J. JESSOP; LORIN JESSOP; LORIN Z.)
JESSOP; MIKE JESSOP; VIVIAN JESSOP; ABIGAIL C. JOHNSON; HOPE)
JOHNSON; KIRK JOHNSON; LAURA JOHNSON; LINDA G. JOHNSON;)
MARK D. JONES; WILLIAM JORDAN; DENNIS JURGENSEN; PATRICK)
M, KELLEY; ROSE DIANE KELLEY; BECKY KLEIM; JESS KLOTZ;)
MICHAEL KNIPES; RONALD KOZAK; WILLIAM KRAMER;)
KATHLEEN LAJOIE; LARRY LAJOIE; ROBERT LAUBACH; LEAH R.)
LAWSON KYLE LEANY; JACK T. LEE; JIMMIE SUE LEE; MERRILEE)
LEE; ROLLIN KIM LEE; JACOB LESTER; SARAH LESTER; WESLEY)
R. & ELAINE R. LEWIS; BEVAN LISTER; BRAD LLOYD; JO & JASON)
LLOYD; MICK & LYNN LLOYD; TERESA LLOYD; WILLIAM LONG;)
D.L. LUCCHESI; FARRELL & MANETTA LYTLE; KEN & DONNA)
LYTLE; LISA L. LYTLE; CHRYSTAL MALLOY; DIANNE E. MASON;)

MARK A. MASON; BARBARA J. MASON-WANKET; MAJOR MASTIN;)
NEVIN MAYGARY MCBRIDE; MARIE MCBRIDE; JOHN T.)
MCCLELLAN; NATHAN MCCLURE; KATHERINE MCCROSKY;)
MELINDA MCCROSKY; STEVE MCCROSKY; RODERICK MCKENZIE,)
PAULA & PARKER MCMANUS; AARON MCRORY; NATALIE)
MELLEM; LAUREL ANN MILLS; AMANDA MOORE; JOE MORROW;)
KARI MORTENSEN; DEAN MOSSGR; LISA M. NIELSEN; ALLAN K.)
NYBERG; DENNIS O'CONNOR; MARK OLSON; TERRY OLSON;)
CARLOS PALENCIA; JANICE PALMERI; AXEL PEARSON; KEITH A. &)
LACIE PEARSON; LEE PEARSON; MARGARET PENSE; GARY & JO)
ANN PEREA; GRANT PERKINS; CLIFFORD PETE PETERSON; INDIA)
PHILLIPS; KEVIN PHILLIPS; RACHELLE PHILLIPS; TERRYLE H.)
PHILLIPS; TONI PINKHAM; ARLA PRESTWICH; RICHARD PRINCE;)
MERLE RAWLINGS; PHILLIP REEVES; MERLIN RHODE; JANIE)
RIPPETOE; MARK RIPPETOE; RONALD JEREMY ROBINSON;)
DONALD RODRIGUEZ; LARENE & CHUCK ROGERS; DANILE ROHR;)
KEITH & MARY ROSE; GARY ROSONLUND; KATHERINE &)
WILLIAM ROUNTREE; ROBERT ROWE; RICHARD A. RULLO;)
DAMIAN SANDOVAL; GREG SCHATZLE; TREY SCOTT; TOM H.)
SEARS; VAUGHAN E. SEEBEN JR.; JOHN SETTLES; CHRIS SHINKLE;)
AARON SHOWELL; DAN & CONNIE SIMKINS; RANDY & SHARLAN)
SIMKINS; SUMMER & SHANE SIMKINS; SAMMYE L. SKINNER; JIM)
SLOUGH; WILLIAM SMITH; SARAH SOMERS; DEVIN)
SONNENBERG; ED SPEAR; SHANNON SPENDLOVE; MARSHALL)
STACKHOUSE; THEODORE STAZESKI; TERRANCE & DEBRA)
STEADMAN; PAUL STEED; RACHEL STEED; MICHELLE STEPHENS;)
KEITH STEVER; LARRY STEVER; JACKIE STEWART; KARL C.)
STEWART; BEVERLY STRICKLAND; SHELBY TAYLOR; SIDNEY)
TAYLOR; RUSS & CHEYENNE THOMPSON; REX & GRACIE)
THOMPSON; LAURA TIBBETTS; RYAN TIMMONS; ANNA M.)
TROUSDALE; DEB UMINA; DENNIS VANWINKLE; ED VINCENT;)
ALEX, NICHOLAS & JOSEPH VINCENT; EDWARD & STEPHANIE)
VINCENT; MIKE VITT; HENRY C. & DANA VOGLER, individually)
and on behalf of their minor children; STINSON VOGLER; DUANE)
E. & BRYNLEE WADSWORTH; JAYCEE, TYLER & KATHY)
WADSWORTH; JOHN WADSWORTH; MARCIA WADSWORTH; MARK)
WADSWORTH; TYLER WADSWORTH; BRADLEY WALCH; ACHIEL E.)
WANKET; EDITH B. WARREN; JO WELLS; SUSAN WETMORE; B.J.)
WHITNEY; SHARON WILLIAMS; WILLIAM & HOLLY M. WILSON;)
EDWARD E. WRIGHT; MARGARET JOYCE & GORDON F. YACH;)
MICHELLE YOSAI; and DONALD ZOOK,)

Real Parties in Interest.)

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SUMMARY OF ARGUMENT

Part One: The Propriety of Writ Review

If the Court does not hear the appeals in Case 64815, it is imperative that this Court hear these writ petitions, because they present important issues of statewide concern involving water, a precious and increasingly scarce resource. Hearing these petitions will allow this Court to correct the district court's manifest abuse of discretion and legal errors in applying the wrong standard of review to the State Engineer's determinations and to establish correct standards for the guidance of the courts and parties in this and other cases.

Part Two: The Standard of Review

Courts are obligated to give significant deference to determinations by the State Engineer, an expert in hydrology, who has been legislatively designated as the primary steward of the state's water and whose determinations are presumed by statute to be correct. A court may not simply reweigh the evidence to reach a different result but can overturn a State Engineer decision only if there is no substantial evidence to support it. Protestants ignore this standard, however, and their factual arguments questioning the State Engineer's findings and conclusions ask this Court to improperly reweigh the evidence. As the agency determinations are supported by substantial evidence, this Court must affirm.

Part Three: The Merits

On the merits, the protestants' arguments fail because they rely on their own interpretation of Nevada law and a reweighing of the evidence. First, unappropriated water has never been defined the way the protestants advocate, while the State Engineer's historic practice has properly interpreted the definition of unappropriated water and is entitled to deference. Second, while triggers and thresholds for mitigation plans need to be set, substantial evidence supports the State Engineer's finding that they can be effectively set later, if still before the initiation of pumping. The protestants reweigh the evidence to conclude triggers must be set now. Third, the State Engineer properly defined unappropriated water for each groundwater basin at issue instead of defining it based on an enormous flow system. This practice is also entitled to deference because it is based on factual findings that are supported by substantial evidence and which informed his definition of unappropriated water in those basins.

Part Four: Issues Outside the Scope of the Petitions

In their answers to SNWA's petition, protestants attempt to raise new issues. This is improper, as a party can seek relief from this Court only through a notice of appeal or a petition seeking an extraordinary writ. This Court should summarily reject their requests for relief as beyond the Court's jurisdiction. Even if the Court

were to address the merits, however, protestants are not entitled to the relief they seek.

PART ONE:
THE PROPRIETY OF WRIT RELIEF

The State Engineer and the Southern Nevada Water Authority (“SNWA”) filed notices of appeal from the district court’s decision in the underlying action, and those appeals are before this Court in case 64815. One protestant moved to dismiss that appeal, although all other protestants expressly took no position. SNWA opposed the motion to dismiss, arguing that its appeal is valid. Because of the importance of the issues presented in the case, SNWA also suggested that if this Court did not have jurisdiction to address the direct appeal, it should hear the case as a writ petition. The State Engineer and SNWA then filed these petitions in cases 65775 and 65776, seeking that alternative review through this Court’s writ process.

SNWA maintains that the appeals in case 64815 are valid and that this Court should hear that case. If the Court disagrees on the jurisdictional issue, however, it should nonetheless address these important issues by hearing and deciding these petitions.

I.

THIS CASE PRESENTS IMPORTANT ISSUES

This case involves an issue of the utmost public concern, whether Nevadans have water.

A. This Court Hears Writ Petitions Presenting Important Issues

An important issue of state-wide concern is reason enough for this Court to consider a writ petition. *See Lorton v. Jones*, 130 Nev. ___, ___, 322 P.3d 1051, 1053-54 (2014); *Westpark Owners' Ass'n v. Eighth Jud. Dist. Ct.*, 123 Nev. 349, 356, 167 P.2d 421, 426 (2007) (holding that this Court may “intervene ‘under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition.’” (quoting *State v. Second Jud. Dist. Ct.*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002))).

The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints on Behalf of Cleveland Ranch (“CPB”) and the Confederated Tribes of the Goshute Reservation (“CTGR”) are simply wrong when they contend that writ review is impermissible because SNWA has a right to appeal. This Court’s discretionary jurisdiction is not limited to cases where a party has “no ‘plain, speedy and adequate remedy in the ordinary course of law;’” this Court will also intervene when “there are either urgent circumstances or important legal

issues that need clarification in order to promote judicial economy and administration.” *Cheung v. Eighth Jud. Dist. Ct.*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005).

This Court has addressed writ petitions on multiple occasions where an important legal issue needed clarification even though the petitioner had an appellate remedy. *See, e.g., Diaz v. Eighth Jud. Dist. Ct.*, 116 Nev. 88, 993 P.2d 50 (2000) (addressing writ petition even though petitioner had an available post-judgment appellate remedy where the petition raised an issue of first impression that implicated a matter of public importance); *Barngrover v. Fourth Jud. Dist. Ct.*, 115 Nev. 104, 110, 979 P.2d 216, 220 (1999) (“[D]espite a legal remedy, this court may exercise its discretion to entertain a petition for mandamus relief where the circumstances reveal urgency and strong necessity.”); *Business Computer Rentals v. State Treasurer*, 114 Nev. 63, 67, 953 P.2d 13, 15-16 (1998) (holding that *mandamus* was appropriate, even though petitioner had effective alternative remedies, because an important issue of law needed clarification and public policy was served by this Court’s invoking original jurisdiction); *Falcke v. Douglas County*, 116 Nev. 583, 585, 586, 3 P.3d 661, 662, 663 (2000) (this Court granted *mandamus*, even though the petitioner could have obtained a declaratory judgment in the district court, concluding that the petition raised “an urgent and important

issue of law,” as the parties admitted that “land use and development are important public policy issues”).

B. Water Issues Are Important

Legal issues dealing with water are among the most important this Court addresses, because water is a “precious and increasingly scarce resource.” *See Bacher v. Office of State Eng’r*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006); *United States v. State Eng’r*, 117 Nev. 585, 591, 27 P.3d 51, 55 (2001) (BECKER, J., concurring in part and dissenting in part) (water is the “most precious of natural resources”). And driving the point home here, Lake Mead, the source of nearly all of Southern Nevada’s water, was recently at its lowest level since the Hoover Dam was built in 1935 due to an unprecedented drought. U.S. Dep’t of the Interior, *Lake Mead at Hoover Dam, Elevation (Feet)*, available at <http://www.usbr.gov/lc/region/g4000/hourly/mead-elv.html> (last visited on Oct. 7, 2014); (1 SNWA App. 000053-60).¹

Here, as in *Falke*, the protestants do not dispute that the petition raises legal issues that are important. No doubt water issues of the magnitude involved in this case are more important than the land use issues presented in *Falcke* or the \$646 tax payment in *Business Computer Rentals*. And the worsening drought conditions

¹ This Court can take judicial notice of this fact. *See Itcaina v. Marble*, 56 Nev. 420, 55 P.2d 625 (1936) (holding that this Court “ha[s] a right to take judicial notice of matters of public knowledge, such as the climatic . . . conditions in this

(continued)

in the West generally, and the Colorado River Basin in particular, do not afford the luxury of time. This Court should hear this petition, and resolve these issues, now.

II.

WRIT RELIEF IS AVAILABLE BECAUSE THE DISTRICT COURT MANIFESTLY ABUSED ITS DISCRETION BY APPLYING THE WRONG STANDARD OF REVIEW

This Court can and should exercise its discretionary review powers, not only because the issues involve Southern Nevada’s dwindling water supply, but also because the district court manifestly abused its discretion by applying the wrong standard of review when resolving the legal issues.

A. Writ Review is Available where the District Court Manifestly Abuses Its Discretion

Writ review is available “to control a manifest abuse or an arbitrary or capricious exercise of discretion.” *Cote H. v. Eighth Jud. Dist. Ct.*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008).

B. Applying the Wrong Legal Standard Is an Abuse of Discretion

A district court abuses its discretion when it is simply wrong about the law. *See DR Partners v. Bd. of Cnty. Comm’rs*, 116 Nev. 616, 620-21, 627-28, 6 P.3d 465, 467-68, 472-73 (2000); *see also Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) (“[W]here a trial court exercises its discretion in clear disregard of the guiding legal principles, this action may constitute an abuse of discretion.”). Applying an incorrect legal standard is an abuse of discretion.

state”);

Bergmann, 109 Nev. at 674, 856 P.2d at 563; *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990) (stating that a lower court “would necessarily abuse its discretion if it based its ruling on an erroneous view of the law” (emphasis added)). REX A. JEMISON, *A Practical Guide to Judicial Discretion*, § 29.05, 2 NEVADA CIVIL PRACTICE MANUAL at 29-6 (5th ed. 2007) (“An abuse of discretion can be an error of law in determining the factors which govern discretion”) citing *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 598 P.2d 1147 (1979)

Great Basin Water Network protestants (GBWN)² cite *State v. Eighth Jud. Dist. Ct. (Armstrong)*, 127 Nev. ___, ___, 267 P.3d 777, 780 (2011), for the proposition that “[m]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, bias or ill will.” GBWN Answering Brief (AB) at 48.) Here, the district court misapplied the law. And in *State v. Eighth Jud. Dist. Ct. (Armstrong)*, the case on which GBWN relies, this Court chose to hear the writ petition because it “raise[d] an important issue of law that needs clarification.” *Armstrong*, 127 Nev. at ___, 267 P.3d at 780.

² This phrase is used to describe White Pine County, *et al.*

III.

OTHER FACTORS THAT CALL FOR THIS COURT TO HEAR THIS PETITION

A. The Conflict Among Divisions of the District Courts Calls for Clarification from this Court

Another reason this Court should hear this petition is that divisions of the district courts have applied the water statutes differently. This Court has addressed writ petitions when there is a conflict in the decisions among district courts. *See Williams v. Eighth Jud. Dist. Ct.*, 127 Nev. ___, ___, 262 P.3d 360, 364-65 (2011); *State v. Eighth Jud. Dist. Ct. (Bonaventure)*, 116 Nev. 127, 134, 994 P.2d 692, 696-97 (2000); *see also Sandpointe Apartments, LLC v. Eighth Jud. Dist. Ct.*, 129 Nev. ___, ___, 313 P.3d 849, 825 (2013) (addressing writ petition where there were conflicting decisions in the lower courts and case raised issues that “affect many people in this state”). Review under such circumstances is especially appropriate when the petition presents “a significant issue of statewide concern that would otherwise escape [the court’s] review.” *Amezcuca v. Eighth Jud. Dist. Ct.*, 130 Nev. ___, ___, 319 P.3d 602, 603-04 (2014).

In *Michael & Margaret Ann Etcheverry Family, LP v. State Engineer of Nevada*, one division of the Seventh Judicial District Court concluded that mitigation triggers are unnecessary before permits are issued. (26 App. 005954-55.) In this case, another division of that district reached the opposite conclusion. Protestants argue that there is no “inter-court dispute that requires clarification”

because there are factual differences between the monitoring, management and mitigation (“3M Plan”) in the *Etcheverry* case and the 3M Plan in this case.

(CTGR AB at 23; CPB AB at 54-66.) But the factual differences between the 3M Plans that the CTGR and CPB identify (assuming they are true) don’t matter.

What matters is that, as CTGR recognizes, “Nevada law does not set out a specific standard for mitigation plans.” (CTGR AB at 23.) That is why this Court should consider SNWA’s writ petition – so that the State Engineer and lower courts have a standard by which to assess 3M Plans, especially as such plans will inevitably vary. *See Falcke*, 116 Nev. at 587, 3 P.3d at 663 (“[P]ublic policy would be best served by reaching the merits of the instant petition in order to provide guidance to Douglas County, and other counties, in properly following the dictates of NRS Chapter 278.”). If this Court does not intervene and establish the standard for what evidence the State Engineer needs to approve a 3M Plan, this case may simply bounce back and forth between the district court and the State Engineer for years – or decades more – without being resolved. *See Amezcua*, 130 Nev. at ___, 319 P.3d at 603-04 (writ review appropriate when the lower courts are in conflict and issue would escape court’s review).

B. Southern Nevada’s Water Situation is Urgent and Resolution Should Not Wait for Remand and an Appeal

1. *Southern Nevada’s Dwindling Water Supply Is Reason to Hear this Petition*

CTGR argues that urgency does not justify the issuance of writs. (CTGR AB at 22.) But this Court has held that writs are appropriate “where circumstances reveal urgency or strong necessity.” *See, e.g., Falcke*, 116 Nev. at 586, 3 P.3d at 662.

There is urgency and necessity here because Southern Nevada’s water supply has been dwindling for years, and the situation is only getting worse. *Falcke*, *Cheung*, and multiple other cases decided by this Court make clear that this, alone, is a basis for addressing a writ petition.

2. *Contentions of Delay Do Not Change the Urgency of the Situation*

CTGR wrongly contends there is no urgency because consideration of SNWA’s applications has been delayed. SNWA has been proceeding quickly since at least 2006, when the now 14-year-old unprecedented drought in the Colorado River Basin was just six years old. *See Great Basin Water Network v. State Eng’r*, 126 Nev. ___, ___, 234 P.3d 912, 915 (2010) (describing history of litigation); *see also id.* at 920 (remanding for the State Engineer to re-notice hearings and reopen protest period, which led to the hearings before the State Engineer that are the subject of this writ petition).

Any alleged delay before 2006 does not make the current situation less urgent for the two million citizens who are SNWA's customers, as the drought plaguing Southern Nevada's main water supply has become exponentially worse in the past several years. These water rights need to be permitted now. Instead of remedying any harm caused by alleged prior delay, protestants' suggestion for further proceedings before both the State Engineer and the district court would cause only further delay.

3. *Urgency Does Not Require Irreparable Harm*

CTGR is simply incorrect, moreover, when it argues that this Court has heard petitions only when "the issues were so pressing that intervention was necessary to avoid irreversible error or there was literally no adequate alternative remedy." (CTGR AB at 21.) Writ relief is not limited only to such "doomsday" scenarios where no other alternative exists to prevent irreparable harm; instead, this Court intervenes when the circumstances indicate that such an effort benefits the parties and the public. In *Falcke*, for example, this Court heard the petition even though the petitioner had merely requested approval of a master plan amendment and a zoning change; there was no indication that irreversible harm would otherwise result or that there was no possible alternative remedy.³ Under all the circumstances, it made sense for this Court to hear the case at that juncture. So,

³ The petitioner in that case also could have obtained a declaratory judgment from

(continued)

too, in *Williams*, 127 Nev. at ___, 262 P.3d at 364-65, where the underlying endoscopy cases could have been tried under the wrong expert evidentiary standards and then retried after a reversal on appeal. The Court served the best interests of the parties and the justice system by hearing the issue before necessitating needless trials and retrials, tying up the case in the court system for years, even though the error was capable of correction on appeal. In both cases, this Court addressed the writ petitions because of the benefit created by the early intervention, combined with the fact that the legal issue presented was important and required clarification. Truly irreparable harm is not a *sine qua non* of discretionary review. Instead, this Court can and should intervene when to do so will better serve the interests of the parties, the courts and the public.

C. Hearing this Petition Will Serve Judicial Economy

This Court also considers “whether judicial economy and sound judicial administration militate for or against issuing the writ.” *Redeker v. Eighth Jud. Dist. Ct.*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006); *Armstrong*, ___ Nev. at ___, 267 P.3d at 779. Judicial economy is served when this Court clarifies an important legal issue, because the lower courts do not waste time struggling to find the right answer. *Armstrong*, ___ Nev. at ___, 267 P.3d at 779. As such, this Court should resolve the dispute between SNWA and the protestants now.

the district court. *Falcke*, 116 Nev. at 586, 3 P.3d at 662-63.

If this Court were not to hear this petition now, the parties will likely end up in this Court eventually, making the same arguments and seeking the same clarifications of the law. There is no reason to cause further proceedings before the State Engineer and the district court when the important legal issues are presented now. SNWA has been actively pursuing approval of its applications in the Nevada court system for nearly a decade. It is time for this case to move toward a final resolution.

PART TWO:
THE STANDARD OF REVIEW

I.

**UNDER THE CORRECT STANDARD OF REVIEW,
THE COURTS MUST DEFER TO THE STATE ENGINEER**

A. The Courts Must Give Significant Deference to the State Engineer

1. The State Engineer’s Decision, by Statute, is Deemed Prima Facie Correct

The Nevada Legislature created the position of State Engineer, an expert in hydrology, to be the primary steward of this state’s water. *See* NRS 532.010, 532.030. “The decision of the state engineer shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same.” NRS 533.450(9).

2. ***The Limited Judicial Role in Reviewing a State Engineer's Decision for "Substantial Evidence"***

Under this standard, the courts' role in water management is much more limited than the State Engineer's. Judicial review is limited to "a determination of whether substantial evidence in the record supports the State Engineer's decision." *Pyramid Lake Paiute Tribe v. State Eng'r*, 126 Nev. __, __, 245 P.3d 1145, 1148 (2010) (quoting *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991)); *Office of State Eng'r v. Curtis Park Manor Water Users Ass'n.*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985) (stating that the Court reviews only the evidence "upon which the Engineer based his decision and ascertain[s] whether that evidence supports the order").

3. ***No Deference to the District Court***

This Court reviews the State Engineer's decision directly, and it gives no deference to the district court's review of the State Engineer's decision. *See Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006) ("[T]his court affords no deference to the district court's ruling in judicial review matters."); *Pyramid Lake Paiute Tribe*, 126 Nev. at __, 245 P.3d at 1147-48; *Curtis Park Manor*, 101 Nev. at 32, 692 P.2d at 497 ("When an order of the State Engineer is challenged, this court is bound by the same standard of review as the lower court."); *Gandy v. State ex rel. Division of Investigation & Narcotics*, 96 Nev. 281, 282, 607 P.2d 581, 582 (1980) ("When a decision of an administrative body is challenged, the function of this court is identical to that of the district court."); *Nev. Tax. Comm'n v. Hicks*, 73

Nev. 115, 125, 310 P.2d 852, 857 (1957) (“As we conceive our appellate function in this type of proceeding it is not to review the determinations of the court below, but to undertake afresh a review of the [agency’s] determinations to ascertain whether, as a matter of law, they are supported by substantial evidence.”), *overruled on other grounds as recognized in M & R Inv. Co. v. Nev. Gaming Comm’n*, 93 Nev. 35, 559 P.2d 829 (1977). “With respect to a limited review ‘in the nature of an appeal,’ neither the district court nor this court will substitute its judgment for that of the State Engineer: we will not pass upon the credibility of the witnesses nor reweigh the evidence, but limit ourselves to a determination of whether substantial evidence in the record supports the State Engineer’s decision.” *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

4. *The “Substantial Evidence” Standard Prevents Reweighing the Evidence*

The term “substantial evidence” “does not mean a large or considerable amount of evidence.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). It also does not mean “justified to a high degree.” *Id.* It merely means evidence “which a reasonable mind might accept as adequate to support a conclusion.” *Pyramid Lake Paiute Tribe*, 126 Nev. at ___, 245 P.3d at 1148. The substantial evidence standard is even more deferential to the fact finder than the “clearly erroneous” standard applicable to review trial court findings. *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999). It is analogous to the “sufficiency of the evidence standard applied in

judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred.” *Semper v. Inland Wetlands Agency*, 628 A.2d 1286, 1292 (Conn. 1993); 2 Richard J. Pierce, *ADMINISTRATIVE LAW TREATISE* 976-77 (5th ed. 2010) (noting that the “substantial evidence” test had its genesis in appellate review of jury verdicts and that “[t]he clearly erroneous test authorizes broader review than does the substantial evidence test”).

Evaluating whether evidence is substantial enough to support a conclusion does not involve weighing the credibility of witnesses or the strength of the evidence. In fact, in deference to agencies making such determinations on a regular basis, such assessments are proscribed. The substantial evidence test thus “frees the reviewing courts of the time consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute.” *Consolo v. Fed. Maritime Comm’n*, 383 U.S. 607, 620 (1966).

B. The Court Must Also Defer to the State Engineer under the Legislature’s Policy of Encouraging the State Engineer to Consider the “Best Available Science”

1. Deference to the State Engineer under the “Best Available Science” Standard

The requirement of judicial deference to the State Engineer is all the more rigorous in light of the Nevada Legislature’s stated public policy “encourag[ing]” the State Engineer to use the “best available science in rendering decisions

concerning the available surface and underground sources of water in Nevada.” NRS 533.024(1)(c). But even when the agency uses the best available science, a reviewing court must defer to an agency’s decision to select a particular scientific model even if the model does not generate a completely certain result. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (applying the “best scientific and commercial data available” standard in the Endangered Species Act and noting that “[t]he fact that the [agency] chose one flawed model over another flawed model is the kind of judgment to which we must defer”). After all, an agency is not permitted to “ignore evidence simply because it falls short of absolute scientific certainty.” *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1147 (9th Cir. 2007) (applying “best scientific and commercial data” standard).

It is not the State Engineer’s “duty to satisfy all of the concerns of potentially affected or aggrieved parties.” *Cent. Ariz. Water Conservation Dist. v. U.S. E.P.A.*, 990 F.2d 1531, 1544 (9th Cir. 1993). An agency is not required to “calculate risk with mathematical precision, nor does the substantial evidence standard require it to support a risk finding ‘with anything approaching certainty.’” Furthermore, the ‘best available evidence’ requirement affords latitude [to the agency]. . . .” *Pub. Citizen Health Research Grp. v. U.S. Dep’t of Labor*, 557 F.3d 165, 176 (3d Cir. 2009) (quoting *AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607,

655-56 (1980) (plurality opinion)). Rather, the State Engineer is only required to determine whether the statutory prerequisites for an application to appropriate water have been met.

2. *The Similar “Best Available Evidence” Standard*

Under the similar “best available evidence” standard used in federal courts, the agency has “some leeway where [its] findings must be made on the frontiers of scientific knowledge.” *Am. Petroleum Inst.*, 448 U.S. at 656 (plurality opinion); *Public Citizen Health Research Grp. v. Tyson*, 796 F.2d 1479, 1486 (D. C. Cir. 1986). The State Engineer may extrapolate on the available science, so long as the extrapolation is based on reliable evidence. *See Cent. Ariz. Water Conservation Dist.*, 990 F.2d at 1543 (agency may extrapolate from evidence, especially when agency acknowledges weakness of expert report and does not rely exclusively on that report); *Natural Res. Defense Council v. Thomas*, 805 F.2d 410, 432 (D.C. Cir. 1986) (even if evidence relied on by agency is “not totally reassuring” to interested parties, the court’s “task stops with an assessment of the reasonableness of the agency’s decision given the evidence it had before it,” and the agency can extrapolate from reliable evidence); *N.M. Mining Ass’n v. N.M. Water Quality Control Comm’n*, 150 P.3d 991, 1001 (N.M. Ct. App. 2006) (agency’s determination was supported by substantial evidence and “based on credible scientific data” where expert methodology “documented uncertainty factors that were used to correct for uncertainties resulting from various extrapolations”).

C. The State Engineer’s Legal Conclusions Are Also Entitled to Deference because they Grew out of His Factual Findings

“[A]n agency’s conclusions of law which are closely related to the agency’s view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence.” *State Indus. Ins. Sys. v. Khweiss*, 108 Nev. 123, 126, 825 P.2d 218, 220 (1992). This is so even though a court on judicial review ordinarily “may decide pure legal questions without deference to an agency determination” *Id.* (“an agency’s conclusions of law which are closely related to the agency’s view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence”); *see also Campbell v. Nev. Tax Comm’n*, 109 Nev. 512, 515-16, 853 P.2d 717, 719 (1993).

In this case, too, the State Engineer’s factual findings informed and brought about his legal conclusions, so those conclusions are also entitled to deference. The legal conclusions naturally followed once the State Engineer determined the factual issues of how much water was available in each basin, whether there would be environmental impacts, whether there would be conflicts, whether the 3M Plan would be effective to mitigate any adverse impacts that might arise, and whether water underneath the Delamar, Dry Lake, and Cave Valleys behaved as though it were an above-ground river. Those conclusions are entitled to deference. *See Khweiss*, 108 Nev. at 126, 825 P.2d at 220.

II.

THE PROTESTANTS' WRONG STANDARD: ARGUING THE FACTS

Protestants raise a litany of factual arguments, GBWN for 39 pages and CPB for 29. *See* GBWN AB at 5-43; CPB AB at 12-41. In those 68 pages, they urge that the “weight of the evidence” supports their view of the facts and not the State Engineer’s. *See, e.g.*, GBWN AB at 35. They are simply asking this Court to substitute their factual positions for the findings of the State Engineer.

Such a factual approach is not appropriate on appeal. This is especially so given this Court’s required deference to the State Engineer’s hydrological expertise in resolving factual disputes in water cases. *See In re Nev. State Eng’r Ruling No. 5823*, 128 Nev. ___, ___, 277 P.3d 449, 453 (2012); *see also Marsh v. Or. Nat. Resources Council*, 490 U.S. 360, 377 (1989) (“Because analysis of the relevant documents ‘requires a high level of technical expertise,’ we must defer to ‘the informed discretion of the responsible federal agencies.’” (citations omitted)).

The protestants advocated, and the district court adopted, an incorrect standard of review. Applying the correct standard, this Court should affirm the State Engineer’s determinations.

III.

IN THEIR CLAIMS ABOUT IMPACTS, PROTESTANTS APPLY THE WRONG STANDARD OF REVIEW AND REWEIGH THE EVIDENCE

Throughout their arguments, the protestants misapply the standard of review, with their most egregious effort involving allegations about the impacts of the SNWA project. These same claims were made to and rejected by the State Engineer. The State Engineer properly resolved these factual claims based on substantial evidence, and this Court should not reweigh that evidence.

A. Obvious Flaws in the Evidence Presented by Protestants

The State Engineer observed obvious flaws in the evidence presented by the protestants. GBWN's primary witness on the environment based his opinions on the assumption that *all* surface water sources would *disappear* in Spring Valley. (1 SNWA App. 208.) GBWN now relies on this discredited witness to claim the SNWA project will ruin the biodiversity in Spring Valley. (GBWN AB at 71.) The State Engineer properly discounted any evidence from this witness because GBWN's own hydrologic expert agreed his assumptions were false and many springs and wetlands are not connected to groundwater at all, thus disproving the base assumption for GBWN's environment witness. (1 SNWA App. 208-209.)

GBWN's economic expert similarly went so far as to predict the complete destruction of all economic activity in all of White Pine County and Lincoln County based on her assumption that *all water in both counties* would disappear.

(1 SNWA App. 221.) Again, however, GBWN’s own hydrologic expert agreed that assumption is false. (1 SNWA App. 208.) In a like vein, CTGR also claimed the SNWA project would devastate the water *on its reservation*, yet the same GBWN hydrologic expert admitted that no model run predicted *any* impact from Spring Valley pumping at the CTGR reservation. (1 SNWA App. 166.)

Such a partisan and distorted presentation of the evidence is improper on judicial review from a State Engineer decision. This Court may not adopt a partisan’s result-oriented view of some of the evidence. Instead, courts must give deference to the expertise of the agency that considered *all* the evidence and whose task it is to work out these issues while protecting Nevada’s water resources. This Court should reject the protestants’ invitation to reweigh the evidence.

B. Substantial Evidence Supports the State Engineer’s Thorough Analysis of Potential Conflicts with Existing Water Rights

GBWN asserts that neither SNWA nor the State Engineer analyzed potential harms to existing water rights. *See* GBWN AB at 72. That is not true.

1. *The State Engineer Considered Extensive Evidence, Not Just the One-sided Presentation of the Protestants*

SNWA presented at least five expert reports and 12 expert witnesses to analyze the potential impacts from the project. (27 SNWA App. 6170-6208, 28 SNWA App. 6209-6227; 27 SNWA App. 6139-6169; 28 SNWA App. 6228-6378; 9 SNWA App. 2007-2073; 11 SNWA App. 2704-2750, 12 SNWA App. 2751-2856; 14 SNWA App. 2979-3000; 15 SNWA App. 3001-3250; 16 SNWA App.

3251-3500; 17 SNWA App. 3501-3750; 18 SNWA App. 3751-4000; 19 SNWA App. 4001-4250; 20 SNWA App. 4251-4500; 21 SNWA App. 4501-4635; 29 SNWA App. 6558-6708; 30 SNWA App. 6709-6802; 30 SNWA App. 6803-6929.)

The protestants presented competing experts. The State Engineer and his staff read all the reports, heard all the testimony and independently asked questions of witnesses.

As the legislature directed, the State Engineer applied his expertise to resolve the complex scientific disputes that arose below. He and his office considered all the evidence. He then made extensive findings in a section of his decision that exceeded 100 pages. (1 SNWA App. 125, 143-174, 196-232; 2 SNWA App. 323-324, 336-354, 491-492; 3 SNWA App. 503-519, 541-554, 654-655, 666-682, 703-716.) In the analysis, the State Engineer considered all water rights in the valleys of interest, then used the best available groundwater model and other qualitative measures to determine if any impact would occur.

2. *Permit Nos. 18841-43 Show the Thoroughness of the Review*

That the State Engineer's factual review was thorough and even-handed is demonstrated by his analysis of potential impacts to Permit Nos. 18841-43. (1 SNWA App. 161-162.) These existing rights, which are for just nine acre-feet of water annually for 400 head of cattle, come from wells that were identified in the groundwater models and analyzed in a site-specific manner by SNWA.

CPB presented model predictions related to these water rights. Stratigraphic evidence at the location of this well showed potentially confining clay layers that SNWA concluded could limit the impact of SNWA pumping. *Id.* CPB countered that the confining clay layers may not be laterally extensive and the source of water may not be completely isolated from the source of the SNWA well. *Id.* CPB contended that, if all 19 SNWA applications were granted, water levels would drop over 100 feet in 200 years; if only 15 of the 19 SNWA applications were approved, however, even CPB's evidence indicated that the estimated drawdown would be cut in half. The State Engineer relied on CPB's evidence, denied four of SNWA's applications and protected those water rights, even though they total less than 10 acre-feet annually and despite that the impact could easily be mitigated.

This detailed fact finding demonstrates that the State Engineer acted in an even-handed and thorough manner and was not callous, arbitrary or capricious. This Court should properly defer to the State Engineer's decision making.

C. The State Engineer Properly Weighed Evidence of Potential Environmental Impacts

The State Engineer considered experts' opinions regarding the environment, including their evaluation of biotic communities within the project and surrounding basins. (1 SNWA App. 197-198, 207-214; 9 SNWA App. 2007-2073; 11 SNWA App. 2704-2750; 12 SNWA App. 2751-2856.) He reviewed data on groundwater-influenced habitats and special-status species and evidence of compliance with

federal environmental law. *Id.* He examined the expert report “Environmental Evaluation of SNWA Groundwater Development in Spring, Cave, Dry Lake, and Delamar Valleys,” which included specific qualitative and quantitative analyses for sensitive environmental areas. (1 SNWA App. 207-210, 11 SNWA App. 2704-2750, 12 SNWA App. 2751-2856.)

But GBWN now claims that SNWA submitted “no real evidence” whatsoever to predict long term effects of the project. (GBWN AB at 72.) This bald assertion is simply wrong. Not only was there a specific report on this subject, but SNWA also submitted the U.S. Bureau of Land Management’s Environmental Impact Statement model report that described projected impacts 200 years into the future. (32 SNWA App. 7325-26.) While protestants attempt to depict the situation as SNWA hiding behind 75-year predictions, this is because GBWN disagrees with the State Engineer’s factual findings that predicted that the impacts are manageable and reasonable. Protestants do not attempt to engage in the appropriate debate whether those findings are supported by substantial evidence, because they know they will lose that argument. Instead, GBWN is simply in denial about certain evidence and advances its selective view focusing on other evidence. This is not the proper framework for this Court’s review.

D. The SNWA Project Will Not Create a Dust Bowl

GBWN, CTGR and CPB jump to the conclusion that the Project will denude Spring Valley by killing every single plant and causing a dust bowl. No evidence supported these claims.

To the contrary, the State Engineer reviewed SNWA's report entitled "The Potential Effects of Change in Depth to Water on Vegetation in Spring Valley," which analyzed how plant communities could respond to changes in depth to water. (9 SNWA App. 2007-2073.) As that report concluded, managed succession in plant communities can allow groundwater dependent ecosystems to transition to healthy systems that are independent of ground water. (1 SNWA App. 211; 9 SNWA App. 2058.) SNWA is clearly not taking all the water for valley floor plants; those plants in Spring Valley use an average of 174,500 acre-feet annually of water, while SNWA's permits authorize pumping of only 61,127 acre-feet annually. (1 SNWA App. 87, 238.) Because a healthy transition of plant communities requires gradual changes in water levels, the State Engineer limited initial development of SNWA water rights to just 38,000 acre-feet annually to assure slow and managed changes in the depth to water.

The State Engineer also properly considered other evidence that managed succession will work, as SNWA owns thousands of acres of land with thousands of

acre-feet annually of water rights and grazing rights.⁴ (1 SNWA App. 142.) The State Engineer found that SNWA’s land holdings and water rights will ensure Spring Valley does not become a barren wasteland. (1 SNWA App. 210-16.)

As the State Engineer observed, GBWN environmental experts simply *assumed* all springs and surface water sources would completely dry up, regardless of their connection to the groundwater aquifer or the potential for any actual impact. (1 SNWA App. 208.) GBWN environment experts even assumed mountain block springs and streams that rely solely on precipitation would somehow dry up because of groundwater development on the valley floor. *Id.*

These assumptions were in conflict with GBWN’s own hydrologic expert, who did not agree that these springs would dry up. *Id.* One million acre-feet annually of rain will continue to fall annually on Spring Valley and will supply springs and streams even after SNWA begins pumping. (7 SNWA App. 1640.) Despite all this, CTGR asks this Court to ignore the State Engineer’s review of the evidence and agree with it that the SNWA project will cause “the disappearance of every remaining spring, wetland, and all current forms of plant life” in Spring Valley. (CTGR AB at 14-15.)

⁴ SNWA publicly acquired these ranches long after the applications were filed and not secretly or prior to 1989 as CTGR erroneously alleges. CTGR AB at 7-8.

The State Engineer had substantial evidence to support his rejection of these hyperbolic claims. Applying the proper standard of review in this case, this Court should affirm the State Engineer's decision.

E. Drawdown Evidence Alone Does Not Prove Devastation

Any groundwater development will cause some drawdown in groundwater levels. Some level of drawdown is certainly reasonable and legal. NRS 534.110(4). That is beyond dispute. Nonetheless, the protestants cling to drawdown evidence as some sort of smoking gun.

The debate here, instead, should center on whether the State Engineer properly concluded that the predicted drawdowns are reasonable. (*See* 1 SNWA App. 214.) (“the State Engineer finds that despite any increase in depth to water, viable plant and wildlife communities will remain, and the Project, as developed and described in this ruling, will be environmentally sound.”) (1 SNWA App. 238.) GBWN simply concludes that drawdown will harm playas. (GBWN AB at 65-66.) But when the State Engineer reviewed GBWN's evidence, he commented that GBWN's own witness could not make the conclusion GBWN now claims about the playas in Spring Valley. (1 SNWA App. 216.)

GBWN also alleges that drawdown evidence, alone, proves springs and wetlands will dry up. But the State Engineer actually reviewed the level of predicted drawdown and found that it would not have this result, but would instead

be reasonable. He did not “disregard those predicted impacts,” as GBWN alleges. (GBWN AB at 67.)

Rather than challenge the evidence supporting the State Engineer’s conclusions, the protestants refer to a prior district court decision that reviewed the first rulings the State Engineer entered for SNWA water rights in the Delamar, Dry Lake and Cave Valleys. That ruling was vacated, however, and the parties presented a completely new record upon which the State Engineer made the determinations at issue here. Reference to that decision is simply irrelevant and thus inappropriate.

In an argument characteristic of a party seeking to have a court reweigh evidence, CPB also claims that the State Engineer granted the SNWA applications in spite of the evidence. (CPB AB at 36.) This, too, is not so; the State Engineer acted, not in spite of CPB’s evidence, but because of it. The State Engineer approved only 61,127 acre-feet annually at 15 wells based on CPB’s own model runs, which demonstrated that the CPB’s prediction of 100 feet of drawdown after 200 years was cut in half when four wells were excluded (“the Minus4 pumping scenario”). (1 SNWA App. 161, 164-65.) *Id.* As a result of CPB’s evidence, the State Engineer then denied pumping at those four wells. *Id.*

The State Engineer was also justified in making modifications, although not to the same extent, based on another CPB model run, which depicted pumping of

only 33,304 acre-feet annually of pumping. This “Minus12 pumping scenario” yielded only “negligible” impacts to the CPB water rights. (2 CPB App. 266; 12 GBWN App. 2845.) This evidence was nonetheless still a foundation for staged development, and the first stage of water development is 32,000-38,000 acre-feet annually, the level that CPB’s model shows has “negligible” impacts to its rights. Correspondingly, the second stage of development is 50,000 acre-feet annually, which compares to the amount of evapotranspiration (ET) capture CPB agrees can be achieved. (12 GBWN App. 2875; CPB AB at 23.) The final stage is less than the 65,797 acre-feet annually CPB agreed is unappropriated in Spring Valley, and is still less than the amount in CPB’s Minus4 pumping scenario. (2 CPB App. 256.)

1. “What the Evidence Actually Showed” and the Breadth of the State Engineer’s Understanding of the Issues

In seven pages of findings, the State Engineer reviewed “what the evidence actually showed.” (1 SNWA App. 144, 160-165; *see* CPB AB at 35.) He discerned that little weight should be given to CPB’s model predictions that springs will go dry around their ranch, because most of those springs were *already dry* in the model before SNWA pumped any water. (2 CPB App. 286.) (all but four of the referenced springs were “dry at beginning of simulation”). The State Engineer then concluded the predicted lowering of the water table would not swallow up CPB’s water rights and was not unreasonable.

CPB just disagrees with how the State Engineer weighed the evidence, and tries to confuse this Court about the evidence. When his judgment is viewed through the proper standard of review, the State Engineer's staged development approval was clearly proper.

The State Engineer fully understood the limits of model predictions and the danger that exists when predictions are used like the protestants use them here. The State Engineer understood the current model is the best available science, and it is best used qualitatively in regional circumstances. SNWA had 75-year predictions and 200-year predictions, but the State Engineer reasonably concluded predictions are less certain when they look out farther into the future. When SNWA's model was used by CPB, SNWA did not run from its model, it just pointed out the limited validity of quantitative predictions. With the benefit of all the evidence, the State Engineer agreed. Nor did SNWA scuttle model predictions as GBWN implies. (GBWN AB at 13-14.) GBWN's wild speculation is wholly unsupported and is inconsistent with the State Engineer's judgment that the model SNWA presented below was the best available evidence.

The truth is that groundwater models, alone, simply cannot predict "environmentally devastating impacts." (GBWN AB at 66, 70-71.) Humans have to interpret the model output and put it into context to see if predicted drawdowns would actually cause unreasonable effects. Here, under the correct standard of

review, the State Engineer’s interpretation of the model evidence deserves the highest deference.

**PART THREE:
THE MERITS**

I.

**THE COURT SHOULD NOT
REDEFINE “UNAPPROPRIATED WATER”**

**A. The State Engineer Properly Interpreted the
Meaning of “Unappropriated Water” in NRS 533.370**

No one disputes that vast amounts of water are available in Spring Valley. Among Nevada’s groundwater basins, Spring Valley has the highest amount of perennial yield. (7 SNWA App. 1515-1526.) In 1971, the State Engineer concluded the perennial yield in Spring Valley is 100,000 acre-feet annually. (7 SNWA App. 1523.) The USGS made the same conclusion in 1965. (27 SNWA App. 5965.) In Ruling 6164, the State Engineer reduced the perennial yield in Spring Valley to 84,000 acre-feet annually, which still makes it one of Nevada’s highest. (1 SNWA App. 113.) The district court agreed with this conclusion. (1 SNWA App. 23.)

Yet, little of this perennial yield is allocated for use by current water rights holders. No protestant challenged the State Engineer’s determination that only

about 14,000 acre-feet annually is used by existing groundwater rights.

Conventionally, this would leave about 70,000 acre-feet annually unappropriated.

But the State Engineer also set aside almost 5,000 acre-feet annually of groundwater for *springs* that in prior practice wouldn't have been deducted from the groundwater yield. (1 SNWA App. 125.) He also reserved 4,000 acre-feet annually for future uses in Spring Valley. (1 SNWA App. 231-232.) No protestant challenged these conclusions either. But even after the State Engineer reduced the perennial yield below his previous estimate, deducted water for existing groundwater *and spring* water rights, and left water for future growth, about 61,000 acre-feet annually remains unappropriated.

Clearly, the State Engineer properly interpreted the plain language of NRS 533.370(2) by concluding there is significant “unappropriated water in the proposed source of supply” in Spring Valley. That interpretation is entitled to deference.

B. The State Engineer's Interpretation of NRS 533.370 Is Consistent with Prior Practice that Has Been Upheld by this Court

The protestants cannot dispute the State Engineer's contention that, aside from his protection for springs and future uses, he used the same method his office has always used to determine unappropriated water.⁵ Even with all the

⁵ Of Course, the State Engineer is more familiar with the past practice of his office than are the real parties of interest. (SE Writ at 23-26.)

interpretations the protestants make of prior rulings, they cannot change the State Engineer's history and practice.

There is simply no debate. The protestants are asking this Court to add novel legal requirements to how the State Engineer defines unappropriated water. If this Court adopts this new definition of unappropriated water, it will change a half century of groundwater management that successfully balanced water development with existing rights, the environment and the public interest. More importantly, the new legal definition will bar use of a large part of Nevada's remaining water.

***1. Prior Rulings of the State Engineer
Support His Decision Here***

All of the rulings to which the protestants cite prove that the State Engineer in this case followed his prior practice. *See* CPB AB at 15-16, 19-20, 30; GBWN AB at 59-61. He has always defined unappropriated water by determining the perennial yield of a basin. In basins like Spring Valley, perennial yield has been set based on groundwater evapotranspiration (ET). As they were in this case, groundwater ET values have historically been based on USGS estimates or specific studies in a particular basin.

Ruling 3486

CPB cites to Ruling 3486 from the Pahrump Basin as an example of when the State Engineer limited perennial yield based on the ability to capture ET. A

closer look at the findings under Ruling 3486 and the supporting USGS report, however, shows the opposite.

In Ruling 3486, the State Engineer concluded that the perennial yield was 19,000 acre-feet annually, citing to a USGS report. (1 SNWA Pamphlet 61). This value excluded groundwater flowing in and out of the Pahrump Basin, as the State Engineer did here in Spring Valley, because that groundwater feasibly could not be captured. (1 SNWA Pamphlet 52) (“Consequently, the maximum amount of natural discharge that feasibly can be captured by pumping is estimated as the total natural discharge (37,000 acre-ft/yr; table 7) minus subsurface outflow (18,000 acre-ft/yr), or about 19,000 acre-ft/yr.”) The resulting 19,000 acre-feet annually in that case included all remaining water, including groundwater ET, in the basin. *Id.* While the USGS and the State Engineer noted that some ET may not be captured by the proposed wells, they *did not*, as CPB claims, reduce the perennial yield because of that fact.⁶

⁶ CPB is also wrong when it asserts that the State Engineer in Ruling 3486 concluded perennial yield was less than ET. The perennial yield and the ET in that case both happened to be 19,000 acre-feet. CPB misreads the word “consequently” in Ruling 3486. That term did not refer only to the last sentence before it; instead, the word summarized the entire preceding paragraph, which includes a discussion of subsurface inflows and outflows. (1 SNWA Pamphlet 61) This is made clear by the footnote reference in that sentence to the USGS report which specifically mentions outflow and not ET. *Id.*

Even though protestants refer to scores of prior State Engineer rulings, they cannot cite to any ruling that actually reduced perennial yield to how much ET would actually be captured.

2. *This Court's Precedent Supports the State Engineer's Prior Practice*

It has been the State Engineer's practice to calculate perennial yield without a reduction based on ET capture, a reduction protestants request here. This Court has consistently upheld the State Engineer's practice without requiring such a reduction.

In *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. ___, ___, 245 P.3d 1145 (2010), for example, this Court upheld the State Engineer's determination of perennial yield, which was based on a USGS study, without requiring a reduction for ET. Again in *Griffin v. Westergard*, 96 Nev. 627, 615 P.2d 235, 236-38 (1980), this Court reviewed the USGS calculations of groundwater ET and upheld the State Engineer's decision to reject an application, without mentioning ET capture. Yet another example is seen in *State Engineer v. Morris*, 107 Nev. 699, 819 P.2d 203 (1991), where this Court did not disturb the State Engineer's finding that 19,000 acre-feet annually was the perennial yield of the Pahrump Basin (the same basin addressed in Ruling 3486). *Id.* at 703, 819 P.2d at 206. The simple fact is that the State Engineer does not reduce the perennial yield based on a prediction of how much ET can be captured, and this

Court has not found fault with the State Engineer’s usual method for calculating perennial yield.

C. The Protestants’ Interpretation of NRS 533.370, which Was Adopted by the District Court, Is Wrong

The protestants and the district court both interpret the unappropriated water requirement in NRS 533.370 to mean only water that is actually captured from plants. Unlike the State Engineer’s legal interpretation, their construction of NRS 533.370 is not entitled to deference. It is also incorrect.

1. *CPB’s Idea of ET Capture Is Far Different from the SNWA Project and Would Not be Permissible under Nevada Law*

CPB’s legal perspectives are based on the testimony of Dr. Mayo, who had almost no experience in Nevada, and his definition of ET capture differs from Nevada law. (31 SNWA App. 7024-7031, 2 CPB App. 256-57, 382.) For instance, Dr. Mayo thought SNWA should have an ET salvage project, and to him an ET salvage project is one that captures shallow groundwater or “young water” that fell as rain in the last year or two. (31 SNWA App. 6985-6987, 7030, 2 CPB App. 257, 370, 379-82.) Under his definition, an ET salvage project in Spring Valley should capture groundwater *and all precipitation* that plants use (that is, 174,500 acre-feet annually (1 SNWA App. 87, 94-95).)

In Nevada, however, only groundwater—not precipitation—is subject to appropriation (84,000 acre-feet annually in Spring Valley (*Id.*)). And that is all SNWA aims to do – and all it is allowed to do under the permits.

CPB's idea of ET salvage, in sharp contrast to the SNWA project, would kill all plants and literally create a dust bowl. This is not allowed in Nevada. NRS 533.370(3)(c), *see* 1 SNWA Pamphlet 185-186 (shallow groundwater is not included in Nevada's groundwater perennial yield); 14 SNWA App. 2983 (USGS recognizes underground water in "unsaturated zone" is not a part of groundwater available to wells).

The SNWA project simply does "not look like an ET Salvage project." (2 CPB App. 382.) Fifty to 100 additional wells would be needed for an actual ET salvage project, and an operation of that type really "would result in devastating effects." *See* CPB AB at 13 n5, 23. Far from that devastation, the SNWA project will leave almost 100,000 acre-feet annually for plants to use.

2. CPB's Definition of Groundwater Mining Is Not Nevada Law

Similarly, Dr. Mayo's idea of groundwater mining is also different from Nevada law. (31 SNWA App. 7020-7023.) Groundwater mining under Nevada law is controlled by limiting water right allocations to a set cap based on perennial yield. (20 SNWA App. 4308-4311; SE Writ at 25.) In contrast, Dr. Mayo incorrectly defined groundwater mining as pumping groundwater from a deeper aquifer which is recharged slower than a shallow aquifer. (31 SNWA App. 7000; *See* 31 SNWA App 6985, 6987, 6989-6990, 6997-6998, 7003, 7022, 7030; 2 CPB App. 257.)

Dr. Mayo's proposal is not how groundwater mining is defined by the State Engineer. The State Engineer properly rejected CPB's argument that the SNWA was mining groundwater, understanding that CPB's allegation was based on Dr. Mayo's improper definition. Under the proper definition in Nevada, the State Engineer did not allow groundwater mining, because he granted less water to SNWA (61,127 acre-feet annually) than is available for appropriation in Spring Valley (65,797 acre-feet annually, even according to CPB). (2 CPB App. 256.)

CPB now asserts that SNWA somehow conceded to the district court that pumping must literally capture ET by causing "an equivalent reduction in . . . ET." (CPB AB at 17.⁷) This assertion is false. SNWA was asserting the *opposite* of what CPB alleges. SNWA took the same position in the district court that it takes here, that pumping *does not, and need not*, cause an equivalent reduction in ET. Initially pumped water comes from storage and not ET. (7 SNWA App. 1513; 24 SNWA App. 5485.) As more ET is captured, over the long term, a balanced groundwater system is established. Until that time, pumping properly captures transitional storage, and groundwater mining does not occur, as CPB alleges. *See* CPB AB at 27 n14. Over the long term, equilibrium will be reached if pumping volumes are lower than the original groundwater ET volumes. (1 SNWA App.

⁷ CPB cites to the "SNWA Ranch" answering brief which does not exist, and the quote CPB refers to does not exist on the page CPB cites. *Id.*, citing to 7 CPB App. 1262-63. Instead, the quote is found at 7 CPB App. 1398.

170; 24 SNWA App. 5483-5485; 26 SNWA App. 5760.) SNWA never acknowledged uncaptured ET should be deducted from perennial yield. *See* CPB AB at 25. As such, this Court should not adopt the interpretation of NRS 533.370 that is advanced by the protestants.

D. The State Engineer Properly Interpreted NRS 533.370 to Allow Long Time Periods for Equilibrium to Be Achieved

The State Engineer's interpretation of the unappropriated water provision in NRS 533.370 includes the understanding that if pumping is less than perennial yield, over the long term equilibrium will be achieved. (1 SNWA App. 79.) This conclusion is entitled to deference and is supported by legislative history and the facts of this case.

1. *Legislative History of NRS 533.370(1)*

Nevada statutes have always directed that the State Engineer should allow Nevada's precious water resources to be put to beneficial use. In 1999, the legislature responded to the filing of the SNWA's applications by adding requirements to the water law. NRS 533.370(3); (1 SNWA Pamphlet 109-110). The legislature directed that while water can be developed in one basin and beneficially used in another, the development must be environmentally sound. Since then, the dual directive to the State Engineer is to allow beneficial use *alongside* environmental soundness. Then in 2009, the legislature clarified that the State Engineer has the power to implement staged development of a water right by

studying the development of a portion of the right and then allowing the full right to be used if studies support it. NRS 533.3705.

To achieve the legislature's dual directives, groundwater pumping must sometimes occur slowly. Staged development allows that slow development, but it also slows the attainment of a new equilibrium. Contrary to what the district court concluded, longer periods to reach equilibrium are *not* "a reason to limit the appropriation below the calculated ET." (1 SNWA App. 11.) If it were, the beneficial use directive could not be met. (1 SNWA App. 52-53, 113-114.) Instead, the legislature expects the State Engineer to strike a sensible balance and use staged development as a tool. One result of this expectation is that it will take longer to reach a new equilibrium. *See Bacher v. State Engineer*, 122 Nev. 1110, 1117-1118, 146 P.3d 793, 798 (2006); (1 SNWA App. 52.)

The protestants wrongly claim that NRS 533.370 requires equilibrium in less than 200 years. Yet their own witnesses admitted that in large hydrologic systems it will "take longer to get to equilibrium than [in] very small aquifers," and 200 to 300 years to reach equilibrium is not unreasonable. (24 SNWA App. 5413; 26 SNWA App. 5760-63.) This is particularly true when the health of plant species is considered. As such, any judicially imposed cutoff at 200 years is simply arbitrary

and inconsistent with legislative intent and delegation of authority to the State Engineer.⁸

2. *Substantial Evidence Indicates Equilibrium Will Be Reached Over the Long Term*

a. MORE WATER GOING INTO SYSTEM THAN IS BEING PUMPED OUT

If less water is pumped from a system than is placed into it every year, the system will reach equilibrium over the long term. The State Engineer understood that he was awarding rights to less water than the system naturally gains each year. The State Engineer also understood, and GBWN's witness agreed, that if less water was being awarded to SNWA than the models simulated, the "lower pumping rates [will] approach equilibrium faster and remove less water from storage." (1 SNWA App. 173; 24 SNWA App. 5483-5484.)

Model predictions indicated that while only 7 percent of ET is captured after 75 years, after 200 years 84 percent is captured. CTGR itself points this out. (CTGR AB at 13.) This is clearly a trend toward equilibrium, and models are good for determining trends, not quantitative absolutes.

⁸ Long periods to equilibrium are not unlawful under NRS 533.371 as CPB alleges. See CPB AB at 30, 40. That statute only applies to applications that are issued for a "specific period," like a mining water right. NRS 533.371. CTGR reliance on a bill that did not pass in the legislature and which addressed only over-appropriated basins is equally unavailing. CTGR AB at 31 n.6.

b. THE PROPER AND IMPROPER USE OF MODEL PREDICTIONS

Instead of such a reasonable approach, protestants utilize model predictions to make preposterous statements, such as claiming that the “evidence showed the system will not even begin to approach equilibrium for thousands of years.” (*See* GBWN AB at 22.) The only basis for such statements is the mathematical impossibility of models to achieve absolute equilibrium. GBWN’s own witnesses admitted this asymptotic phenomenon makes 100% equilibrium a “sticky point” because, mathematically, it “almost takes infinite time” and you have to “cut the thing off somewhere” and say “we’re close enough.” (25 SNWA App. 5531-5532; 26 SNWA App. 5765.) The State Engineer understood that the only basis for the protestants to claim equilibrium will *never* be reached are these synthetic ghosts in the groundwater model.

The district court did not understand that models cannot be used quantitatively and, improperly took the prediction of 84 percent equilibrium after 200 years to be an absolute value. Based on this misunderstanding, the district court directed perennial yield to be reduced by that absolute value. As pointed out even by testimony presented by the protestants, models may yield an exact number, but “you have to take it as a general tendency rather than an exact number.” (24 SNWA App. 5357-5358.) Projections of the exact percentage of capture are not terribly accurate. (25 SNWA App. 5532.) As GBWN witness Bredehoeft testified, “the thing will ultimately reach a new steady state,” and

ninety percent, or something of that order, would be “good enough” and you “maybe want to relax that a little more.” (26 SNWA App. 5789.)

**3. *Staged Development Requirements
Will Aid in Reaching Equilibrium***

Under the State Engineer’s staged development requirements, SNWA can pump only 50,000 acre-feet annually for the first 16 years after pumping begins. Even evidence from CPB indicated the SNWA project can capture at least 50,000 acre-feet annually from ET. (CPB AB at 23.) So under CPB’s understanding of the law, the State Engineer properly allowed pumping to Stage 2.⁹

These factors indicate that equilibrium will be reached over the long term, particularly in light of the quantity and staging limitations the State Engineer placed on the SNWA’s permits. Accordingly, remand is not needed to show “some prospect of reaching equilibrium,” within a specific timeframe deemed reasonable as the district court required. (1 SNWA App. 13.)

⁹ Ample time exists for SNWA to pump what CPB concedes can be captured, and then locate new wells to capture remaining ET using the change application process provided for in Nevada water law.

II.

THE STATE ENGINEER PROPERLY CONCLUDED THAT 3M PLANS WILL BE EFFECTIVE BECAUSE TRIGGERS AND THRESHOLDS WILL BE SET BEFORE GROUNDWATER PUMPING BEGINS

After weighing the evidence and making clear findings pursuant to NRS 533.370, the State Engineer concluded SNWA's pumping will not conflict with existing rights and will be environmentally sound. (1 SNWA App. 125, 143-145, 151-167, 196-198, 207-214; 9 SNWA App 2007-2073; 11 SNWA App 2704-2750; 12 SNWA App. 2751-2856.) The State Engineer did not side-step his statutory responsibilities by using 3M plans. He interpreted NRS 533.370(1) to allow these plans, and he used them to protect existing water rights and the environment. The State Engineer implemented the 3M plan requirements only after he made all required NRS 533.370 findings.¹⁰

A. Triggers and Thresholds Will Be Set in the Future

No one contests that triggers and thresholds must be set for a 3M Plan to be effective. The disagreement in this case is over when they must be set. The State Engineer concluded that, while triggers and thresholds need to be established before groundwater is pumped, they must be developed and refined in the future

¹⁰ The State Engineer's use of 3M Plans is also consistent with prior practice, including the decision he made in Ruling 5621. (GBWN AB at 73.) Each ruling included a thorough analysis of the NRS 533.370 factors before consideration of a 3M plan. The difference between the rulings is simply that in Ruling 5621, the

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based on further information advanced during the staged development of the project. Protestants contend that if the information cannot be fully determined now, the project cannot go forward.

The State Engineer's approach is more reasonable. The State Engineer concluded that existing rights and the environment will be protected if triggers and thresholds are set before a single drop of water can be withdrawn from Spring Valley. (1 SNWA App. 141, 205-206.) GBWN's witnesses agreed that "objective, verifiable triggers or thresholds and targets or goals [should be set] *prior to development* of any water." (GBWN AB at 75.)

For example, the State Engineer requires triggers in the biological 3M Plan. That plan defines the pre-withdrawal phase of the project as the time "prior to groundwater withdrawal by SNWA." (4 SNWA App. 941.) For environmentally sensitive areas, the plan requires specific standards to be set during the pre-withdrawal period. (4 SNWA App. 947.) Seven years of comprehensive baseline data will be collected and used to establish acceptable ranges of variation (*i.e.* thresholds) in biologic health indicators. Unreasonable adverse effects will be defined during the pre-withdrawal phase and used to establish criteria for initiating management and mitigation actions (*i.e.* triggers). *Id.* SNWA witnesses testified that thresholds and triggers are not in the current plan, not because of a flaw in the

NRS 533.370 findings could not be made, and here they could. In neither case was

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plan, but because they will be set after these pre-withdrawal tasks are complete.

See GBWN AB at 75. Then, during the withdrawal phase of the project, thresholds and triggers will control the project. (5 SNWA App. 1035.)

The protestants are way off the mark when they claim the 3M plan is just a statement of good intentions and “has no goals to ensure that any future management or mitigation will be possible or capable of effective implementation.” (GBWN AB at 75.)

1. Triggers and Thresholds for Swamp Cedars and Other Sensitive Environmental Areas

The way triggers and thresholds are established for the Swamp Cedars demonstrates how the biological 3M plan will set such standards for 15 areas of environmental concern, as well as any others the State Engineer may identify in the future. The Swamp Cedars are sacred and important to the culture and traditions of CTGR.

The 3M plan describes the Swamp Cedars as groundwater-influenced ecosystems, but indicates that the probable source of groundwater for these areas is a *perched* system that is not connected to the valley floor aquifer. (4 SNWA App. 959.) The 3M plan identifies the Swamp Cedars as one of 15 monitoring sites, because it is a nested target (biota of special interest). (4 SNWA App. 982, 966.) Key Ecological Indicators (KEA) identified for the Swamp Cedars include water

a 3M plan used to *avoid* making NRS 533.370 findings.

supply, the density of saplings, and stem length. (4 SNWA App. 990-991.) These KEAs were selected because they can serve as an early warning of stress on the Swamp Cedars.

The 3M plan then details the monitoring requirements for the Swamp Cedars, which include annual counts of KEAs at 16 separate transects. (5 SNWA App. 1013-1014.) Before the end of the pre-withdrawal phase of the project, acceptable ranges in natural variation of the Swamp Cedars KEAs, and thresholds, will be established. (5 SNWA App. 1034.) This same process is outlined in the biological 3M plan for wetlands, Shoshone Ponds, meadows, and plants on the valley floor (phreatophytic shrublands), as well as for springsnails, fishes, and frogs. (4 SNWA App. 977-992.)

2. ***The State Engineer's Approach to Setting Triggers Is Consistent with Case Law Cited by CPB***

While CPB cites to *Theodore Roosevelt Conservation v. Salazar*, 616 F.3d 497 (D.C. Cir. 2010) for the proposition that SNWA's permits should include triggers now, that case actually supports the State Engineer's position. In that case, even though federal law specifically required triggers to be set, a BLM Record of Decision (ROD) did not contain precise mitigation measures. Like the 3M Plans in this case, however, the ROD required an adaptive management plan, set various goals for continued monitoring, and required mitigation of the project's adverse impacts. *Id.* at 506. The D.C. Circuit upheld the ROD because it required triggers

to be included in a later developed plan of development. *Id.* This is analogous to the situation here, as the 3M Plan requires specific measures for monitoring, managing and mitigation to be delineated in an operations plan before any pumping commences.

B. Existing Evidence Is Sufficient Enough for a Proper Conflicts Analysis But Not to Set Triggers

The district court simply could not understand how enough evidence can exist to make NRS 533.370 findings, but not to set triggers. In basing its decision on its failure to understand the State Engineer's findings, the district court essentially substituted its judgment for that of the State Engineer. (1 SNWA App. 16, 23.)

Put simply, regional information is sufficient to support NRS 533.370 findings, but the State Engineer was justified in calling for local, site-specific evidence to set quantitative triggers to protect certain water rights or environmental areas. (1 SNWA App. 212.) Substantial evidence supports the State Engineer's conclusion that it can develop more information to set quantitative standards or triggers at a later time. (1 SNWA App. 141.)

1. *The State Engineer Was within His Discretion in Calling for More Information on Local Conditions to Set Triggers*

The State Engineer concluded that he wanted more information on natural changes in groundwater levels and biological systems before setting triggers, and the 3M Plans require collecting seven years of baseline data before pumping. (1

SNWA App. 205-206.) This information will help the State Engineer determine if subsequent changes are caused naturally or by pumping. (1 SNWA App. 205.)

In the Swamp Cedars area, for instance, the regional model cannot simulate how drawdown may be limited if the area is perched on a layer of rock that disconnects shallow groundwater from deeper groundwater. When pumping begins, local groundwater conditions will be better understood based on the response in the Swamp Cedars area to the pumping well. When that response is known, quantitative triggers will be refined to protect the Swamp Cedars based on their biological requirements.

2. Enough Time Exists to Set Triggers

Moreover, as the State Engineer found, because the “proposed pumping will not begin for many years, there is ample time for studies to be conducted to determine a baseline as well as *quantitative thresholds*.” (1 SNWA App. 141 (emphasis added).) Ample evidence supports the reasonableness of the State Engineer’s finding, and even GBWN’s own witness agreed with this timing. That witness agreed that quantitative triggers can be set in an operations plan for the project when pumping begins and that triggers can be included in an operations plan when well locations and variables like pumping timing and duration are known. (1 SNWA App. 140-141, 206.) GBWN’s unreasoned departure from its own expert’s admissions is merely an attempt to delay the project through remands and appeals.

C. The State Engineer Properly Proceeded with Caution and Sought Greater Certainty

The State Engineer adopted a balanced approach that is both supported by substantial evidence and cautiously seeks greater certainty. That is both proper and within his discretion.

Uncertainty is often present in important societal decisions and almost always in connection with the permitting, planning and building of great public works. That does not mean that civilization should or must stand still. The proper answer in such situations is not paralysis and fear; it is to rely on the best available evidence and adopt a reasoned and prudent approach, even if the process must be accomplished in steps, checking along the way. In this case, the State Engineer and experts in hydrology, geochemistry, geology and biology used the best available evidence to conclude that the SNWA project can proceed without the devastation hypothesized and hyperbolized by the protestants. While absolute certainty is not available, the evidence here is sufficient to sustain the State Engineer's approach to proceed with the project, albeit cautiously, rather than refuse to take action. *See AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 655-56 (1980) (plurality opinion) (agencies are not required to support risk findings "with anything approaching scientific certainty"); *Pub. Citizen Health Research Grp. v. U.S. Dep't of Labor*, 557 F.3d 165, 176 (3d Cir. 2009) (substantial evidence

standard does not require risk finding “with anything approaching certainty”).

That is within the State Engineer’s sound discretion.¹¹

1. *The Protestants Advocate Paralysis*

By contrast, the protestants advocate inaction until absolute certainty is achieved. GBWN, CPB and CTGR seized on any uncertainty to convince the district court that “no one really knows what will happen with large scale pumping in Spring Valley.” (1 SNWA App. 13, 16.) They continue their “no one knows” argument here, combining it with a parade of hypothetical horrors about how the project may devastate Spring Valley. These insubstantial arguments are insufficient to overrule the State Engineer.

2. *The State Engineer’s Approach Is Scientifically Sound*

An authority cited by CTGR supports the State Engineer’s approach. “[F]ear need not be paralyzing and [] action need not mean the complete loss of regulatory control.” Holly Doremus, *Precaution, Science, and Learning While Doing in Natural Resource Management*, 82 WASH. L. REV. 547, 554, 563 (2007). This is because even “the decision to act does not end the opportunity for caution” and an incremental approach can properly focus on information gathering and analysis. *Id.* Caution is practiced by “[a]cting incrementally with attention to the feasibility and potential value of learning.” *Id.* at 579.

¹¹ Indeed, the refusal to act would itself have been an abuse of discretion.

The stepwise approach has great potential to achieve conservation objectives with the lowest practical socio-political cost. *Id.* The State Engineer properly implemented this approach by requiring staged development and the 3M Plans.

D. The State Engineer Will Not Lose Control of the Project

1. Nevada Water Law Will Always Apply

The protestants claim that if triggers are not set now the State Engineer will lose control over the project. This is not so, as the State Engineer's retained powers are provided in Nevada statutes and retained through permit conditions.

United States v. Alpine Land and Reservoir Company, 919 F.Supp. 1470, 1479 (D. Nev. 1996) (State Engineer has power to deny application or condition approval).

The absence of triggers and thresholds at this time does not change that, especially as the State Engineer ordered baseline data to be collected so triggers and thresholds can be established and limited initial pumping. (1 SNWA App. 239-240.)

Despite these express permit terms, protestants speculate that the State Engineer will lose his resolve. This speculation is unsupported. The State Engineer in the future will require the law to be followed. Protestants' surreal dystopian forecasts to the contrary are not sufficient to overcome this Court's standard presumption that parties will follow the law. *See Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. 669, 699-700 & n.122, 191 P.3d 1138, 1157 & n.122 (2008) (noting that the Attorney General has the affirmative duty to enforce

the Open Meeting Law and that the Secretary of State has the affirmative duty to enforce Nevada election laws); *University of Nev. v. State Emps. Ass'n*, 90 Nev. 105, 111, 520 P.2d 602, 606 (1974) (“[M]ost states presume the regularity of official action.”); *State v. Sweeney*, 24 Nev. 350, 350 55 P. 88, 90 (1898) (there is a presumption that a government official “did his official duty”); NRS 47.250(9) (providing rebuttable presumption “[t]hat official duty has been regularly performed”). It is true that Las Vegas residents will desperately need this water, but that will not change this state into a lawless society. Throughout the West, administrative and judicial decisions regularly limit and control the amount of water allowed to municipalities. At the time of the hearing, water supplies to Albuquerque and Los Angeles had been limited, up to 85%, due to environmental factors, and cuts have been created since. (29 SNWA App. 6507-08.) Water supplies to those cities are even more restricted now. This is because “in the real world [] western utilities have to comply” with the law. *Id.* The same will be true here. As the State Engineer observed, the ongoing regulatory control of state and federal agencies “demonstrates redundancies in environmental regulation” and “will ensure continuous oversight regardless of the resolve of a future State Engineer.” (1 SNWA App. 201.) Any notion that the State Engineer will lose resolve or cede unfettered control of the project to SNWA is hypothetical nonsense

that has no place in evaluating whether substantial evidence supports the State Engineer's decision.

2. *The 3M Plans Do Not Limit State Engineer Power Over the Project*

The 3M Plans do not absolve SNWA of the responsibility to comply with Nevada law. “If it becomes obvious that corrective action must be taken,” the permit terms for SNWA’s water rights and Nevada law will require SNWA to take whatever action is directed by the State Engineer. *See* CPB AB at 62.

The 3M Plans do not give SNWA a veto power over mitigation activities, nor is SNWA permitted to refrain from reporting impacts. *See* CPB AB at 61-62; GBWN AB 34 and 78, 79. The State Engineer is party to all discussions on the 3M plan technical committees, and SNWA must regularly submit all pumping and impact data to the State Engineer. (1 SNWA App. 132; 4 SNWA App. 835, 857, 879, 911.) SNWA is also expressly required to “perform any mitigation activities that may be necessary to avoid conflicts with existing rights.”¹² (1 SNWA App. 143.)

The 3M plans do not create “opaque processes and committees” that will just sit back and talk while Spring Valley is devastated. *See* GBWN AB at 78. Regardless of any 3M plan, the State Engineer will take action as needed to correct

¹² SNWA never conceded at the hearing that it could not take action if it saw a “disaster looming.” *See* CPB AB at 63. CPB’s mischaracterizes testimony that

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any unreasonable impacts caused by the project. The 3M plan's alternative dispute resolution process does not change that. It seeks consensus among scientists and resource managers to see if issues can be addressed before intervention by the State Engineer. If the committees cannot reach consensus, the State Engineer can himself order corrective action.¹³ The claims that the 3M Plans somehow absolve SNWA of responsibility are baseless.

III.

**THE STATE ENGINEER PROPERLY INTERPRETED
NRS 533.370 AND FOUND UNAPPROPRIATED
WATER IS AVAILABLE IN DELAMAR,
DRY LAKE AND CAVE VALLEYS**

The State Engineer concluded that NRS 533.370 requires unappropriated water to be determined basin by basin. This interpretation is entitled to deference for two reasons. First, the State Engineer is the agency responsible for enforcing the statute, and he has developed the expertise in those legal and regulatory areas. *See In re Nev. State Eng'r Ruling No. 5823*, 128 Nev. ___, ___, 277 P.3d 449, 453 (2012) (“[T]his court recognizes the State Engineer’s expertise and looks to his interpretation of a Nevada water law as persuasive, if not mandatory, authority.”)

actually indicated the decision to take action would be made by the State Engineer.

¹³ This fact distinguishes our situation from *Animal Welfare Institute v. Beech Ridge Energy LLC*, 675 F.Supp.2d 540, 579-580 (D. Md. 2009), cited by CPB, because here the 3M plan is not discretionary, and the State Engineer has the statutory authority to stop all pumping if SNWA does not comply with these requirements. (1 SNWA App. 143.)

Second, the State Engineer’s interpretation in this case was informed by findings of fact that are supported by substantial evidence.

GBWN¹⁴ argues for, and the district court adopted, a new approach that evaluates the availability of unappropriated water on the basis of a “flow system.” This Court should reject such an interpretation of NRS 533.370.

A. Unappropriated Water Should Be Determined Basin by Basin

GBWN and the district court ignore the vast amount of evidence that supports the State Engineer. Rulings 6165-67 explained that evidence. The State Engineer described his methodology for calculating perennial yield in groundwater basins that have no ET and have groundwater inflow from other basins. (2 SNWA App. 287-290.) He described the prior studies that calculated the perennial yield and the expert reports that were submitted in this proceeding. (2 SNWA App. 290-291.) He explained that this approach incorporates “state of the art” techniques of UNR’s Desert Research Institute, as well as estimates within the range of prior scientific publications. (2 SNWA App. 292-302.)

The State Engineer reviewed extensive geologic, geochemical and hydrologic evidence of interbasin flow at five separate locations. (2 SNWA App. 302-312.) He explained the precipitation data that was used to calculate recharge in the Delamar, Dry Lake and Cave (“DDC”) valleys and indicated why he

¹⁴ The protestants referred to as GBWN here are the only parties who challenged

adopted part of the GBWN's evidence to lower SNWA's estimates of recharge.¹⁵

Finally, the State Engineer included a detailed review of local hydrology. (2 SNWA App. 317-321.)

These portions of Rulings 6165-67 demonstrate the type of careful analysis the legislature expects from the State Engineer. Each conclusion that unappropriated water exists was based on substantial evidence that was specific to the basin in question and was tested by cross examination and competing expert testimony. GBWN and the district court simply disagree with the State Engineer's judgment and how he weighed the evidence. *Id.*

1. The Basin-by-Basin Approach Yielded Protective Measures for Cave Valley

GBWN omits any mention of the significant protective actions the State Engineer took when he determined perennial yield in Cave Valley. The State Engineer found the recharge is 12,900 acre-feet annually, but limited the perennial yield to 5,600 acre-feet annually. (2 SNWA App. 321.) Flag and Butterfield springs are local springs in White River Valley that are only a few miles from Cave Valley. These are the only springs outside the DDC valleys where any credible evidence predicted a potential impact. These springs flow approximately 7,300

Rulings 6165-6167 on appeal.

¹⁵ (2 SNWA App. 314) (Cave Valley recharge lowered from 13,700 acre-feet annually to 12,900 acre-feet annually); (2 SNWA App. 484) (Dry Lake Valley recharge lowered from 16,200 acre-feet annually to 15,000 acre-feet annually); (3 SNWA App. 648) (Delamar Valley recharge lowered from 6,600 acre-feet

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acre-feet annually and may have sources of water from areas other than Cave Valley. Yet, the State Engineer conservatively reduced the perennial yield in Cave Valley by 7,300 acre-feet annually to protect these springs. He found that impacts to the springs could not be reasonably or practically mitigated and this water was reserved to prevent any impact. (2 SNWA App. 318-321.) Contrary to GBWN's aspersions that the State Engineer disregarded evidence of impacts, this record tells a different story.

2. ***Best Available Science Supports Basin-by-Basin Approach in Dry Lake and Delamar Valleys***

In Dry Lake and Delamar Valleys, the State Engineer reviewed the best available science regarding groundwater flow between these basins and others. The evidence included detailed hydrologic, geologic and geochemical reports and testimony that was submitted by both sides. (2 SNWA App. 486-489.) Based on that evidence the State Engineer found the groundwater in these basins is isolated from other basins and concluded that only recharge in the basins that comes from precipitation in mountain areas is unappropriated water. He did not include groundwater that reportedly flows *into* the basins from the north. (2 SNWA App. 484, 490; 3 SNWA App. 648, 653.) He also concluded the recharge in these basins is not already appropriated in down-gradient valleys.

annually to 6,100 acre-feet annually).

The State Engineer provided detailed justifications for these unappropriated water determinations and did not rely on “obfuscations by SNWA” or a “radical inconsistent *ad hoc* approach” as GBWN claims. GBWN AB at 80.

3. *The Absence of Flow System Impacts Supports Basin-by-Basin Approach*

The State Engineer found no evidence that the approved pumping in the DDC basins will impact water rights throughout the White River Flow System (“WRFS”). This conclusion was based on geologic, hydrologic and geochemical evidence, and the results of groundwater flow models. (2 SNWA App. 289; 2 SNWA App. 459; 3 App. 623.) If no flow system impacts are predicted, it makes no sense to define unappropriated water based on the flow system and not basin by basin, as GBWN argues should be done.

a. GROUNDWATER MODEL EVIDENCE

The State Engineer reviewed evidence from the model prepared for the U.S. Bureau of Land Management’s Environmental Impact Statement (“BLM model”) for the SNWA project and the Regional Aquifer System Analysis (“RASA”) model that was developed by the USGS in 1995 and was used by GBWN’s expert. According to the State Engineer, the BLM model predictions did not indicate any unreasonable drawdowns at any DDC Valley water rights, or at any regional springs in the WRFS, including the Muddy River and regional springs in Pahrangat and White River Valleys. (3 SNWA App. 622-623.) The only predicted impact was at Flag and Butterfield Springs in White River Valley and the

State Engineer reserved 7,300 acre-feet annually from Cave Valley to protect those springs. (2 SNWA App. 321.)

The State Engineer discounted the weight of RASA model predictions because expert testimony indicated that the model is “not suited to predict accurate water-level declines that would result from pumping groundwater.” (2 SNWA App. 351-352; 3 SNWA App. 517-518; 3 SNWA App. 680-681; 27 SNWA App. 6041, 6119.) Obvious flaws in GBWN’s RASA model predictions were demonstrated in its prediction of impacts at Hot Creek and Moon River Springs. (2 SNWA App. 354.) Even GBWN’s witnesses disagreed with the accuracy of this prediction, and conceded that the RASA model is too coarse and simplistic to yield a good estimate of local impacts. (24 SNWA App. 5435; 25 SNWA App. 5711; 25 SNWA App. 5713; 25 SNWA App. 5737.) The State Engineer concluded these model flaws made the RASA predictions unreliable and he relied on the BLM model where predictions from the two models conflicted. (2 SNWA App. 354; 3 SNWA App. 518; 3 SNWA App. 681-83.)

The State Engineer found that the only credible groundwater model showed that all regional springs in the White River Flow System were “virtually unaffected” after 200 years, and that “if no measureable impacts to existing rights occur within hundreds of years” no evidence can exist that conflicts will occur with water rights at those springs. (2 SNWA App. 289.)

b. OTHER FLOW SYSTEM EVIDENCE

Evidence showed that many flow system water rights will not be impacted because they are not connected to the same aquifer as the SNWA applications (*e.g.* water rights in mountain areas or in shallower aquifers). (3 SNWA App. 668; 3 SNWA App. 677; 19 SNWA App. 4271.) Geologic evidence reviewed whether faults connect the DDC basins with neighboring basins. Except for Flag and Butterfield Springs, the State Engineer concluded the flows from the DDC basins are blocked by faults and mountain ranges. (3 SNWA App. 651-653.) Geochemical evidence indicated that recharge water from the DDC basins does not flow out of regional springs in the Muddy River, Pahranaagat Valley or White River Valley. *Id.*

Water levels in neighboring valleys indicated that water from Delamar Valley is held back from Coyote Spring Valley by the Pahranaagat Shear Zone. This huge underground dam causes water levels in Delamar Valley to be 1,280 feet to 1,550 feet higher than water levels in Coyote Spring Valley. *Id.* Based on this evidence and the groundwater models, the State Engineer properly concluded the approved DDC pumping will not impact the flow system.

**4. *GBWN Reweighs the Flow System
Evidence to Create One River***

GBWN's outrageous claims of flow system impacts can only be supported by its reliance on the flawed RASA model predictions. The State Engineer properly concluded the BLM model evidence was credible and showed virtually no

effect to the Muddy River, Pahranaagat Valley, or the regional springs in White River Valley after 200 years. (2 SNWA App. 289, 27 SNWA App. 6133-6138.) As the State Engineer’s findings regarding credibility and weight of the evidence are entitled to deference, they should not be disturbed.

a. GBWN’S ONE RIVER MYTH

After getting the district court to adopt its one river myth, GBWN now pivots to distance itself from the myth and incredibly accuses SNWA of constructing it as a straw man. (GBWN AB at 89-90.) GBWN hatched the one river myth long ago because facts and evidence cannot support its “no holds barred” opposition to the project. (28 SNWA App. 6382; 21 SNWA App. 4748; 24 SNWA App. 5724-5725.) Since overwhelming evidence shows no flow system impacts, the myth can only stand if the actual evidence in the record is ignored.

But the district court adopted GBWN’s “one river” myth and considered groundwater flow over hundreds of miles and beneath mountain ranges to be “just like water in streams.” (1 SNWA App. 19.) The district court reweighed and misunderstood an expert report that includes several pages explaining why groundwater *does not* flow like a river. (7 SNWA App. 1624-1635.) The report describes multiple factors that influence groundwater behavior, including geology, climate, physiography, and others.

The State Engineer weighed this USGS evidence that addressed misconceptions about groundwater movement. (12 SNWA App 2798-2860; 13

SNWA App. 2861-2984.) The report stated “common misconceptions include the belief that groundwater occurs in underground rivers resembling surface streams.”

Id. This misconception is rooted in the fact the groundwater environment is hidden from view and many conclude that groundwater occurs only in underground rivers and veins. *Id.* With a single sentence plucked out of context, the district court reweighed all of the State Engineer’s factual findings relating to the geologic framework, interbasin flows, and geophysical data and fell into GBWN’s one river trap.

b. THE WRFS IS NOT A RIVER

The State Engineer properly rejected the “one river” argument because it “is flawed by ignoring the time frames and geologic uncertainties involved.” (2 SNWA App. 289.) He properly maintained his basin by basin approach because the limits he placed on the available water in the DDC basins placed “controls on the regional flow system [that] allow groundwater to be available in every basin for beneficial use.” (3 SNWA App. 653.) His decision should be upheld.

B. GBWN’s One-Half Discharge Theory Is Not Appropriate Here

GBWN claims the State Engineer should ignore the volumes of evidence about individual basin hydrology and blindly follow a one-half discharge approach. GBWN theory starts from a faulty premise that prior State Engineer decisions indicate the perennial yield in certain valleys should never be greater than one half the calculated discharge. (GBWN AB at 81-82.) In no instance has the State

Engineer adopted this approach. While GBWN properly states that consideration of local hydrology and local water rights is critical, GBWN conveniently argues that such considerations can only decrease perennial yields below one half the discharge in the DDC basins. *Id.* at 81. The evidence does not support this approach.

1. GBWN's Approach Ignores the Best Available Evidence

Reconnaissance level estimates of perennial yields were made by the USGS in the 1960s and 1970s. At that time, perennial yield in basins with little to no ET was often set at one half the discharge because detailed local data was not available for the hundreds of groundwater basins across Nevada. (7 SNWA App. 1513.) However, the legislature has encouraged the State Engineer to “consider the best available science in rendering decisions concerning the available surface and underground sources of water in Nevada.” NRS 533.024(c). Hence, the one-half discharge rule of thumb has been rejected when the best available science dictates otherwise.

In numerous rulings with which GBWN is no doubt familiar, the State Engineer cautions against blind use of GBWN's approach. GBWN cites Ruling No. 5782 that actually recognized the one-half discharge method is not used when better evidence is available. *See* GBWN AB at 82. As explained in that ruling “there are many exceptions to this general rule-of-thumb based on considerations of local hydrology.” (2 SNWA Pamphlet 260). This was not the first time the

State Engineer cautioned against the one-half discharge idea. In Ruling 5465, the State Engineer rejected the same GBWN arguments made here and GBWN did not appeal. (1 SNWA Pamphlet 232-233). He found the one-half discharge rule is not the best evidence when more detailed information exists and it can lead to double appropriation so he followed the same approach he did in this case. *Id.*

2. *GBWN's Approach Was Not Followed in the Prior DDC Rulings*

GBWN erroneously claims the State Engineer varied from the methodology he used in the prior DDC rulings. (GBWN AB at 81.) In both rulings the State Engineer indicated that perennial yield in the DDC basins can be based on a basin's recharge. In each case the State Engineer had enough specific information to avoid blind adherence to the old reconnaissance level guidepost. Both times his findings indicated why evidence of local hydrology and existing rights form a better basis for determining unappropriated water than the one-half discharge concept.

C. The State Engineer Properly Distinguished the DDC Applications from Order 1169

GBWN argues the State Engineer should have denied SNWA's DDC applications because in Order 1169 he ordered a pump test before concluding whether unappropriated water is available. Whether additional study is needed is a factual question uniquely directed to the State Engineer's expertise and discretion. NRS 533.368(1). The State Engineer has plainly explained the substantial

evidence that supports the exercise of his discretion in this instance. GBWN reweighs that evidence.

1. *Factual Differences between this Case and Order 1169*

GBWN relies on an outright mischaracterization of the contents and purpose of Order 1169. (GBWN AB at 87.) Order 1169 did not involve the DDC basins and never mentioned the DDC valleys. (1 SNWA Pamphlet 169-179). Order 1169 addressed applications in Coyote Spring Valley where existing water rights already exhausted the perennial yield and the State Engineer was asked to issue water rights above that perennial yield. Order 1169 focused on the lower White River Flow System, not the DDC basins, and did not address water availability in the entire flow system. *See id.* By contrast, here SNWA requested water rights in basins where unappropriated water is available because existing water rights are virtually non-existent.

Also, the Order 1169 applicants were claiming additional water rights from the carbonate rock aquifer that they claimed contained more water than the USGS previously estimated. *Id.* Before permits could be granted, the State Engineer required an extensive pump test to better understand the carbonate rock aquifer. Order 1169 never suggested the carbonate rock aquifer must be better understood before applications in the DDC basins can be granted. *Id.*

2. ***The Results of the Order 1169 Pump Test Prove Order 1169 Involved a Different Hydrologic Situation***

After completion of the Order 1169 pump test, the State Engineer issued Ruling 6255 and denied nearly all the applications that were held in abeyance in the Order 1169 basins. (26 SNWA App. 5939.) After existing water rights were pumped and monitored, the State Engineer concluded that five of the Order 1169 basins have a “close hydrologic connection” and pumping in any one basin would almost immediately impact all five basins and the Muddy River. (26 SNWA App. 5936-39 (figure showing that areas of concern in Order 1169 do not include the DDC basins).) According to the State Engineer the unique and close hydrologic connection between these five basins made them *unlike other basins in Nevada*. (26 SNWA App. 5934.)

Order 1169 involved a completely different potential for impacts. Sensitive environmental areas and existing water rights in and around the Muddy River were located as close as one mile from proposed wells and the water table between the proposed wells and areas with existing water rights is flat. The State Engineer concluded that changes in water levels at proposed wells *work in lockstep* with water levels at areas with existing water rights. (26 SNWA App. 5921.) No expert could confirm that the development would not have unreasonable impacts. *Id.*

Here, vast evidence proves the opposite. Contrary to GBWN’s reckless statements, no expert could present competent evidence that the DDC applications

would cause unreasonable impacts. The DDC basins do not *work in lockstep* with the carbonate rock aquifer in Coyote Spring Valley. Applications in the Order 1169 basins would impact existing rights in months or years and applications in the DDC basins will not impact existing rights during at least the next 200 years, if ever. (26 SNWA App. 5935.) Also, unappropriated water from local recharge did not exist in the Order 1169 basins and it does in the DDC basins. *Id.* This evidence proves the State Engineer soundly exercised the discretion granted to him in NRS 533.368 and properly treated the DDC applications differently than Order 1169.

D. The State Engineer Correctly Interpreted His Own Records

GBWN goes so far as to misinterpret the State Engineer's own records to drum up the claim that the evidence below tended to demonstrate all basins in the WRFS are fully appropriated. (GBWN AB at 85-86.) Clearly the State Engineer is best situated to understand that his own records show many basins in the WRFS are not fully appropriated. (8 CPB App. 1534-1540.) He also understood the inconsistency in GBWN's position because he heard its testimony. GBWN members said the DDC basins are not fully appropriated and additional water rights should be granted, but not to SNWA. (11 GBWN App. 2546-2546; 11 GBWN App. 2561; 11 GBWN App. 2619; 11 GBWN App. 2629; 11 GBWN App. 2639; 11 GBWN App. 2691-2693; 11 GBWN 2708-2711; 11 GBWN App. 2726-2728.) GBWN cannot have it both ways. Prior appropriation remains the

foundation of water law in Nevada and the State Engineer properly granted unappropriated water to the next applicant in line: SNWA.

The district court also erred when it reweighed and interpreted the State Engineer's records. Ruling 6255 demonstrates that the district court incorrectly concluded that "paper water rights" in the Order 1169 basins barred the granting of the DDC applications. (*See* 1 SNWA App. 19.) The district court incorrectly considered these "paper water rights" to be valid existing water rights. *Id.* But those "paper rights" were actually only applications, and they were denied in Ruling 6255. The district court should not have relied upon them in erroneously concluding that the State Engineer double appropriated water rights in the DDC valleys. (26 SNWA App. 5938.)

PART FOUR:
ISSUES OUTSIDE THE
SCOPE OF THE PETITIONS

The protestants raise arguments that are outside this Court's jurisdiction. The district court ruled for SNWA and the State Engineer on these issues, and protestants attempt to raise them here without filing their own appeal or writ petition. This Court should simply not consider these issues. Even if this Court were to consider them, these arguments are without merit.

I.

PROTESTANTS IMPROPERLY SEEK AFFIRMATIVE RELIEF ON ISSUES OUTSIDE THE SCOPE OF SNWA'S PETITION

A. The Only Issues Raised in SNWA's Petition

SNWA's writ petition raised three issues:

- (1) whether an unprecedented method for calculating water available for appropriation should be applied across Nevada instead of the State Engineer's proven and historic method;
- (2) whether the efficacy of the monitoring, management and mitigation plan ordered by the State Engineer is supported by substantial evidence; and
- (3) whether there is substantial evidence to support the State Engineer's conclusions that unappropriated water exists in Delamar, Dry Lake, and Cave Valleys, and that the diversion of that water will not significantly impact the White River flow system.

(Writ Petition at 5-6.) These are the only issues over which this Court has jurisdiction and on which it can grant affirmative relief.

B. This Court Does Not have Jurisdiction to Address Issues Not Raised in an Appeal or a Petition for Writ

Instead of filing their own appeals or petitions, protestants impermissibly attempt to add other issues through their answering briefs. The Court does not have jurisdiction to address such issues.

Parties can raise substantive issues on which they seek affirmative relief only by means of an appeal or a writ petition. *See Jitnan v. Oliver*, 127 Nev. ___, ___, 254 P.3d 623, 631 n.4 (2011) (court lacks jurisdiction over issues that were raised only in dismissed cross-appeal); *Langevin v. York*, 111 Nev. 1481, 1483 n.2, 907 P.2d 981, 982 n.2 (1995) (“[A] respondent who seeks to alter the rights of the parties under a judgment must file a notice of cross-appeal.” (quoting *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994))). *See also, United States v. Ramirez-Lara*, 564 Fed. Appx. 214 (6th Cir. 2014) (refusing to consider potential error by trial court where issue was not raised by way of cross-appeal); *Adono v. Wellhausen Landscape Co., Inc.*, 258 Fed. Appx. 12, 16 (7th Cir. 2007) (court lacks jurisdiction to consider issue that was not raised on appeal and for which appellees did not file cross-appeal).

While CPB filed a writ petition on an expressly “limited” issue and a notice of appeal, the other protestants did not file a petition or an appeal. This Court should not address any of the issues raised only in their answering briefs.

SNWA still believes that all issues are best and properly raised through appeal and it has appealed the district court order, although at the time of filing this brief that jurisdictional issue remains pending in a motion to dismiss in Case 64815. To assure review by this Court, as an alternative to the notice of appeal, both the State Engineer and SNWA filed petitions for writ relief (as SNWA also

argued for in its April 25, 2014 opposition to the motion to dismiss in Case 64815).¹⁶ In either case, however, protestants have not affirmatively sought review of these other issues, on which the district court ruled for the State Engineer and SNWA, and they are prohibited from seeking that affirmative relief simply through an answering brief.

II.

EVEN IF THIS COURT HAD JURISDICTION TO ADDRESS THESE OTHER ARGUMENTS, THEY ARE WITHOUT MERIT

A. The State Engineer Properly Approved the 3M Plans that He Found Will Be Effective

Protestants claim numerous deficiencies in the 3M Plans. In approving the plans, however, the State Engineer weighed significant expert testimony and reports on the effectiveness of 3M plans in general, and on these specific 3M plans. (1 SNWA App. 214-216; 4 SNWA App 861, 915; 14 SNWA App. 2950-2951, 2960, 2964-2969; 19 SNWA 4081-4092.) The reports summarized how 3M plans are used nationally and what components of 3M plans should be included as a best practice. *Id.* The reports' conclusions are substantial evidence that the 3M plans

¹⁶ SNWA Opposition at 9, citing *Clark Cnty. Liquor & Gaming Lic. Bd. v. Clark*, 102 Nev. 654, 658, 730 P.2d 443, 446 (1986) (treating appeal from remand order as a petition for a writ of *mandamus*); *Jarstad v. Nat'l Farmers Union Prop. & Cas. Co.*, 92 Nev. 380, 384, 552 P.2d 49, 51 (1976) (treating appeal as a petition for *mandamus*).

contain these best practices and will be effective and that the State Engineer did not abuse his discretion in approving them. (1 SNWA App. 141.)

1. Substantial Evidence Supports the State Engineer's Conclusion that Monitoring Is Effective

The protestants reweigh that evidence by belittling the 3M plans as only being monitoring plans. But the State Engineer found that monitoring is the cornerstone of an effective 3M Plan because it explains the hydrologic effects of pumping so management decisions can be made to assure effects are reasonable.

(1 SNWA App. 102-103; 18 SNWA App. 3790; 25 SNWA App. 5620.)

Monitoring is not in place to build it “and see what happens,” as CTGR contends. (CTGR AB at 33.) Extensive evidence was submitted regarding the monitoring network in Spring Valley, the management decisions that could be made based on the monitoring network, and the mitigation options that are available to correct unreasonable impacts, if they occur. (1 SNWA App. 214-216.) The plans clearly explain the “specifics of monitoring; type and location of wells, frequency of measurements, types or degree of detail and accuracy of measurements” even though GBWN falsely claims they do not. (14 SNWA App. 2937; 14 SNWA App. 2947; *see* GBWN AB at 75.)

GBWN once again proffers discredited evidence to substitute its judgment for the State Engineer's. GBWN's claim that monitoring cannot work in a 3M plan because “by the time impacts are measured, it will be too late to prevent

further impact” was thoroughly reviewed by the State Engineer. (1 SNWA App. 133; *see* GBWN AB at 74.) GBWN relies on a hypothetical example where monitoring wells are quite obviously in the wrong place. *Id.* GBWN’s expert agreed that monitoring can work to timely prevent impacts if monitoring wells are in the proper place. *Id.* After the State Engineer concluded monitoring wells in the 3M plan are properly located, he found that the difficulties GBWN’s expert pointed out were overcome. *Id.* That decision was reasonable in light of *all* the evidence, including the evidence that 3M plans effectively control the impacts of many current groundwater development projects.

2. The 3M Plans Adequately Address Mitigation

The protestants cite to *Wilderness Society v. U.S. Bureau of Land Management*, 822 F.Supp.2d 933, 940 (D. Ariz. 2011) and contend the State Engineer’s 3M plan is faulty because it contains a "mere listing" of mitigating measures. *See* CPB AB at 65. However, the difference between adequate and inadequate mitigation discussions “appears to be one of degree,” and proper mitigating measures can be described in general terms and rely on general processes. *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000).

The 3M Plans approved by the State Engineer provide mitigating measures in general terms and general processes. They also provide the specificity necessary for monitoring and adaptive management that allows the flexibility to address

impacts as suggested in *Wilderness Society*. Contrary to GBWN's claims, the State Engineer properly concluded the specific mitigation options listed in the 3M plan are sufficient and can be effective. (1 SNWA App. 143; *see* GBWN AB at 76.)

The protestants imply that a 3M Plan must actually fund mitigation efforts. *See* CPB at 64 *citing Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976 (1985). No such requirement exists. The court in *Friends of Endangered Species* merely recognized that mitigation funding could play an important factor when habitat is threatened. *Id.* at 984. The State Engineer recognized this as well when he reviewed SNWA's \$78 million commitment to mitigation and its water rights and land ownership that can be used for mitigation. (1 SNWA App. 142.) This finding adequately addresses mitigation.

3. *The Protestants Helped Develop the 3M Plans*

The claims that protestants could not participate in the 3M plans is misleading. While CPB claims it could not participate in the *federal stipulation*, its witnesses admitted they were directly involved in the *3M plan*. (32 SNWA App. 7220-23.) CPB selected monitoring locations on their property and coordinated monitoring and baseline data collection with the State Engineer and SNWA. (*Id.*, 18 SNWA App. 3775-3777.) SNWA installed monitoring equipment to protect CPB's existing rights in consultation with CPB and the State Engineer. (1 SNWA

App. 134.) The State Engineer ruled that this monitoring is adequate to assess potential impacts in the Cleveland Ranch area. (1 SNWA App. 135.)

GBWN and CTGR did more than just comment on the 3M plans before they were approved. The four proposed 3M plans were submitted by SNWA as evidence at the 2011 hearing. (4 SNWA App. 823-866; 4 SNWA App. 867-920; 4 SNWA App. 921-1000; 5 SNWA App. 1001-1250; 6 SNWA App. 1251-1305; 6 SNWA App. 1306-1496.) GBWN and CTGR presented written and oral evidence challenging the 3M plans and cross examined SNWA's experts on the same topic. This evidence informed the State Engineer's approval of the 3M plans.

4. The 3M Plans Protect Local Communities

CPB and GBWN claim the 3M plans are flawed because they do not allow involvement from affected communities. This argument is misplaced. Local communities are protected by the scientific understanding of the State Engineer, federal experts in wildlife and hydrology, and independent experts at the technical meetings. These governmental and private representatives include representatives from Nevada, Utah, and federal agencies. (4 SNWA App. 932.) The public is well-represented at the technical meetings by these governmental stewards who GBWN agreed are statutorily tasked to zealously protect the public interest. (1 SNWA App. 200.)

Local communities and private parties have access to the plans, and can bring any questions, comments, concerns or suggestions to the government

agencies representing their interest. Anyone can review the data that is submitted under the plans on-line (SNWA, BLM and USFWS websites) or from the State Engineer's records. NRS 532.150. Also, "[a]ny person feeling aggrieved by any order or decision of the State Engineer" may challenge that decision. NRS 533.450.

5. *The Express Protections in the 3M Plans Should Not Be Confused With the Text of the Federal Stipulations*

The effectiveness of the 3M plans is not altered by the protestants' confusing references to the stipulations that led to the withdrawal of federal protests. Those stipulations are not the same as the 3M plans the State Engineer approved,¹⁷ and the protestants deliberately confuse these documents. For instance, the protestants complain that the State Engineer is not a party to the *stipulation*, which is true, but he is in absolute control of the *3M plans*. (1 SNWA App. 126, 143, 204.)

The protestants imply that non-federal water rights are not protected by the 3M plans *because the stipulations* do not protect non-federal rights. (CPB AB at 7.) Yet, the 3M plans the State Engineer approved clearly protect non-federal water rights. (1 SNWA App. 131; 4 SNWA App. 882, 897-898, 903-909, 915.)

As CPB is aware, the 3M plans include specific provisions to protect their water

¹⁷ The stipulations are dated September 8, 2006 (Spring Valley) and January 7, 2008 (DDC). (3 SNWA App. 738-750; 4 SNWA App. 751-784; 4 SNWA App 785-822.) The 3M plans are dated February 2009, January 2011, and June 2011. (4 SNWA App. 823-866; 4 SNWA App. 867-920; 4 SNWA App. 921-1000; 5 SNWA App. 1001-1250; 6 SNWA App. 1251-1305; 6 SNWA App. 1306-1496.)

rights. And the State Engineer expressly indicated the “stipulation in no way limits the State Engineer’s obligation or authority to protect CPB water rights,” (1 SNWA App. 128, 143), and “if pumping conflicts or impacts *private rights*, . . . SNWA will be required to curtail pumping and/or mitigate the impacts to the satisfaction of the NSE [Nevada State Engineer].” (4 SNWA App. 837-839, 881-882 (emphasis added).)

CPB claims its due process rights were violated because it could not ask certain questions about development of the *stipulation*. See CPB AB at 52-53. But CPB was certainly given due process when it presented witnesses and testimony challenging the effectiveness of the *3M plan* during the six week hearing on SNWA’s applications. At that time CPB asked questions about the actual 3M plans, and continues to exercise its due process rights regarding those plans in this proceeding. Accordingly, the protestants’ arguments regarding 3M plan effectiveness are without merit.

B. Protestants Try to Raise Other Issues that Are Outside the Scope of this Writ Petition

1. Staged Development

CPB claims the State Engineer could not apply staged development in this case because NRS 533.3705 was adopted after the SNWA applications were filed. This issue is raised in CPB’s limited writ petition, and CPB filed a notice of appeal as part of case 64815. In any case, however, this Court should not consider the issue as part of this writ petition.

2. *The Anti-Speculation Doctrine*

CPB also claims the SNWA applications should have been denied based on the anti-speculation doctrine, as CPB believes SNWA really needs to drill 50-100 wells. This argument is clearly outside the scope of this writ petition, and this Court should refuse to entertain it.

Even if the Court hears this argument, however, it is without merit, for several reasons. First, the argument depends on CPB's faulty claim that the project must be an ET salvage project, and it should fall along with that argument.

Second, SNWA is simply not engaged in speculation. In fact, even the district court upheld the State Engineer's findings that Southern Nevada needs this water and SNWA has the financial ability to build the project. The State Engineer found that the SNWA applications accurately represent SNWA's intention to develop the project. SNWA will develop the 15 wells that are permitted, and if additional wells are needed, the utility may file change applications, which CPB can protest. This Court should summarily reject CPB's anti-speculation argument.

3. *State Engineer Did Not Shift the Burden of Proof*

CTGR also claims that the State Engineer improperly placed the burden of proof. This claim is without merit. SNWA presented specific evidence that the project will not harm CTGR resources. CTGR had the opportunity to present competing evidence and could not. The State Engineer did not place an improper burden on CTGR, he simply found that SNWA's evidence outweighed CTGR's.

CONCLUSION

For these reasons, this Court should enter a writ of mandamus, or in the alternative, prohibition, vacating the order of the district court and reinstating the State Engineer's decision.

DATED this 3rd day of December 2014.

LEWIS ROCA ROTHGERBER LLP

TAGGART & TAGGART, LTD.

By: /s/ Daniel F. Polsenberg
DANIEL F. POLSENBERG
Nevada Bar No. 2376
JOEL D. HENRIOD
Nevada Bar No. 8492
JUSTIN J. HENDERSON
Nevada Bar No. 13349
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169
(702) 949-8200
DPolsenberg@LRRLaw.com
JHenriod@LRRLaw.com

By: /s/ Paul G. Taggart
PAUL G. TAGGART
Nevada Bar No. 6136
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900
Paul@LegalTNT.com

SOUTHERN NEVADA WATER AUTHORITY

By: /s/ Dana R. Walsh
GREGORY J. WALCH
Nevada Bar No. 4780
DANA R. WALSH
Nevada Bar No. 10228
1001 South Valley View Boulevard
Las Vegas, Nevada 89153
(702) 258-7166
Greg.Walch@lvvwd.com
Dana.Walsh@lvvwd.com

Attorneys for Southern Nevada Water Authority

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 18,007 words.

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

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

DATED this 3rd day of December 2014.

LEWIS ROCA ROTHGERBER LLP

TAGGART & TAGGART, LTD.

By: /s/ Daniel F. Polsenberg
DANIEL F. POLSENBERG
Nevada Bar No. 2376
JOEL D. HENRIOD
Nevada Bar No. 8492
JUSTIN J. HENDERSON
Nevada Bar No. 13349
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169
(702) 949-8200
DPolsenberg@LRRLaw.com
JHenriod@LRRLaw.com

By: /s/ Paul G. Taggart
PAUL G. TAGGART
Nevada Bar No. 6136
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900
Paul@LegalTNT.com

SOUTHERN NEVADA WATER AUTHORITY

By: /s/ Dana R. Walsh
GREGORY J. WALCH
Nevada Bar No. 4780
DANA R. WALSH
Nevada Bar No. 10228
1001 South Valley View Boulevard
Las Vegas, Nevada 89153
(702) 258-7166
Greg.Walch@lvvwd.com
Dana.Walsh@lvvwd.com

Attorneys for Southern Nevada Water Authority

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 3, 2014, I submitted the foregoing **SNWA'S REPLY BRIEF TO ANSWERING BRIEFS OF CPB, CTGR AND GBWN PROTESTANTS** for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

Simeon Herskovits
Iris Thornton
Advocates for Community and
Environment
P. O. Box 1075
El Prado, New Mexico 87529-1075

John B. Rhodes
Rhodes Law Offices
P.O. Box 18191
Reno, Nevada 89511

Severin A. Carlson
Kaempfer, Crowell, Renshaw,
Gronauer & Fiorentino
50 West Liberty Street, No. 900
Reno, Nevada 89501

Paul Hejmanowski
Lynda S. Mabry
Lionel, Sawyer & Collins
300 South Fourth Street, Suite 1700
Las Vegas, Nevada 89101

Timothy R. O'Reilly
O'Reilly Law Group
325 South Maryland Parkway
Las Vegas, Nevada 89101

Aaron Waite
Weinstein, Pinson & Riley, P.S.
6785 South Eastern Avenue, Suite 4
Las Vegas, Nevada 89119

Scott Williams
Curtis Berkey
Berkey Williams, LLP
2030 Addison Street, Suite 40
Berkeley, California 94704

Paul C. Echo Hawk
Echw Hawk Law Office
P.O. Box 2634
Kirkland, Washington 98083

Catherine Cortez Masto
Cassandra P. Joseph
Jerry M. Snyder
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701

Richard McCracken
Paul L. More
McCracken, Stemerman & Holsberry
1630 South Commerce Street, Suite A-1
Las Vegas, Nevada 89102

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

John F. O'Reilly
O'Reilly Law Group
325 South Maryland Parkway
Las Vegas, Nevada 89101

J. Mark Ward
Utah Association of Counties
5397 South Vine Street
Murray, Utah 84107

Matthew M. Griffin
Griffin Rowe LLP
401 Curry Street
Carson City, Nevada 89703

Bryce C. Alstead
Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

The Honorable Robert E. Estes
Senior District Judge
911 Harvey Way
Yerington, Nevada 89449

Kelly C. Brown
White Pine County District Attorney
801 Clark Street, Suite 3
Ely, Nevada 89301

/s/ Jessie M. Helm

An Employee of Lewis Roca Rothgerber LLP