

ADVOCATES FOR COMMUNITY AND ENVIRONMENT

Empowering Local Communities to Protect the Environment and their Traditional Ways of Life

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September 13, 2011

State of Nevada
Division of Water Resources
Attn: Susan Joseph-Taylor
901 S. Stewart St., Suite 2002
Carson City, NV 89701

State	'S EXHIBITS	89
DATE:	9/26/11	

Re: In the Matter of Applications 53987 through 53992, inclusive, and 54003 through 54021, inclusive - Response to SNWA Motions in Limine

Dear Ms. Joseph-Taylor:

Enclosed for filing in the above-captioned matter, please find one original and one copy of GBWN et al.'s **Response to Southern Nevada Water Authority Motions In Limine to Exclude Expert Reports By Charlet, Hutchins-Cabibi, Mayer, Krueger, Scoppettone, and Lanner, Identified By Gbwn, et al. in July 1, 2011 Evidentiary Exchange**. The response is intended to address the arguments made by SNWA in the following motions in limine filed on September 1:

- Southern Nevada Water Authority's Motion in Limine to Exclude Expert Reports by Charlet (DDC Ex. 1150, DDC Ex. 1230, Spring Valley Ex. 3030) and Hutchins-Cabibi (Spring Valley Ex. 3064),
- Southern Nevada Water Authority's Motion in Limine to Exclude Expert Reports by Mayer (DDC Ex. 501), Krueger (DDC Ex. 539 and DDC Ex. 559), and Scoppettone (DDC Ex. 609), and
- Southern Nevada Water Authority's Motion in Limine to Exclude Expert Reports by Lanner (Spring Valley Ex. 3040).

Please let me know if you have any questions about this filing.

Sincerely,



Noel Simmons

Encl.

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2011 SEP 14 AM 10:43
STATE ENGINEERS OFFICE

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

IN THE MATTER OF APPLICATIONS	)	RESPONSE TO SOUTHERN
53987 THROUGH 53992, INCLUSIVE, AND	)	NEVADA WATER AUTHORITY
54003 THROUGH 54021, INCLUSIVE	)	MOTIONS IN LIMINE TO
FILED TO APPROPRIATE THE	)	EXCLUDE EXPERT REPORTS BY
UNDERGROUND WATERS OF SPRING	)	CHARLET, HUTCHINS-CABIBI,
VALLEY, CAVE VALLEY, DELAMAR	)	MAYER, KRUEGER,
VALLEY, AND DRY LAKE VALLEY	)	SCOPPETTONE, AND LANNER,
HYDROGRAPHIC BASINS (180, 181, 182	)	IDENTIFIED BY GBWN, ET AL. IN
AND 184, LINCOLN COUNTY AND	)	JULY 1, 2011 EVIDENTIARY
WHITE PINE COUNTY, NEVADA.	)	EXCHANGE

Protestants Great Basin Water Network,¹ 2nd Big Springs Irrigation Company, Keith Anderson, Craig Baker, Dean Baker, Thomas Baker, Baker GID, Baker Ranches, James & Donna Bath, Bath Lumber Company, Govert Bassett, Walter Benoit, Border Inn, Carter-Griffin, Inc. Max & Diane Chipman, Citizens Education Project, Louis Cole, Defenders of Wildlife, Kristine Fillman, Patrick Fillman, Gardner's Quarter Circle 5 Ranch, Jo Anne Garrett, Kena Gloeckner, Patrick Gloeckner, Great Basin Business & Tourism Council, Kathy Hiatt, County of Inyo, Abigail Johnson, Linda Johnson, League of Women Voters of Salt Lake City, Robert Lewis, Lund Irrigation & Water Company, Orvan Maynard, Roderick McKenzie, Nevada Farm Bureau, Panaca Irrigation Company, Gary & Jo Ann Perea, Preston Irrigation Company, Launce Rake, William & Kathy Rountree, Toiyabe Chapter Sierra Club, Amelia Sonnenberg, Sportsworld, Terrance & Debra Steadman, Utah Audubon Council, Mildred Valencia, David Von Seggren, Mark Wadsworth, Lois Weaver, County of White Pine and City of Ely, and Debra Whipple ("GBWN et al."), by and through their attorneys, Advocates for Community and Environment, and pursuant to the State Engineer's Amended Third Informational Statement Regarding Southern Nevada Water Authority Water Right Applications in Spring, Cave, Dry

¹ An additional 251 individuals and entities signed onto the Great Basin Water Network's protest.

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 STATE ENGINEER'S OFFICE

Lake, and Delamar Valleys (“Amended Third Informational Statement”), hereby respond to the Southern Nevada Water Authority’s Motion in Limine to Exclude Expert Reports by Charlet (DDC Ex. 1150, DDC Ex. 1230, Spring Valley Ex. 3030) and Hutchins-Cabibi (Spring Valley Ex. 3064) (“SNWA Charlet and Hutchins-Cabibi Motion in Limine”); Southern Nevada Water Authority’s Motion in Limine to Exclude Expert Reports by Mayer (DDC Ex. 501), Krueger (DDC Ex. 539 and DDC Ex. 559), and Scopettone (DDC Ex. 609) (“SNWA DOI Motion in Limine”); Southern Nevada Water Authority’s Motion in Limine to Exclude Expert Reports by Lanner (Spring Valley Ex. 3040) (“SNWA Lanner Motion in Limine”) (collectively “SNWA Motions in Limine”). As explained below, these exhibits were admitted in the previous Spring Valley or Cave, Dry Lake, and Delamar Valleys hearing, and already have been incorporated in the record for this hearing, and have been identified by GBWN et al. in their July 1, 2011 evidentiary exchange materials, pursuant to the State Engineer’s Amended Third Informational Statement. Accordingly, SNWA’s motions are without merit and should be denied.

FACTUAL BACKGROUND

The Spring, Cave, Dry Lake, and Delamar Valleys hearing is essentially a rehearing of the Southern Nevada Water Authority’s (“SNWA’s”) 1989 applications in those valleys required by the Supreme Court’s decision in *GBWN v. Taylor*, 234 P.3d 912, 126 Nev. Adv. Op. 20 (June 17, 2010). Thus, there are extensive records from both the Spring Valley and the Cave, Dry Lake, and Delamar Valleys hearings that provide valuable tools and information for the parties and the State Engineer in the current hearing. During both of those hearings, multiple expert reports were admitted into evidence, including those that are the subject of SNWA’s current motions in limine, and multiple experts testified. These reports all have been incorporated into the record in this hearing.

SNWA's Motions in Limine contain significant misrepresentations, distortions, and omissions from the procedural history and record of these proceedings, even going so far as to incorrectly suggest that the State Engineer has not taken administrative notice of the exhibits from previous hearings. As a corrective, GBWN et al. provide the following factually correct summary of the relevant procedural history of the Spring, Cave, Dry Lake, and Delamar Valleys hearing and the previous Spring Valley and Cave, Dry Lake, and Delamar Valleys hearings.

A. SPRING VALLEY HEARING:

The State Engineer's March 8, 2006 Spring Valley Intermediate Order and Hearing Notice set a schedule for the exchange of evidence to be introduced at the September 2006 hearing on SNWA's applications in Spring Valley. Spring Valley Intermediate Order and Hearing Notice, at 11 (March 8, 2006).

After evidence exchanges in the summer of 2006, during the September hearing the State Engineer admitted protestants' Exhibit 3030 (Charlet Report), page 1 of protestants' Exhibit 3040 (Lanner Report), and protestants' Exhibit 3064 (Hutchins-Cabibi Report) into evidence. *In re Apps 54003-54021*, Hearing Transcript at vol. X, 1773:25-1774:5 (Sept. 22, 2006) (Charlet Report); *id.* at vol. X, 1774:6-14 (Sept. 22, 2006) (Lanner Report); *id.* at vol. IX, 1587:10-13 (Sept. 21, 2006) (Hutchins-Cabibi Report). Dr. Charlet and Ms. Hutchins-Cabibi both testified and were cross-examined by the Southern Nevada Water Authority during that hearing. Dr. Lanner was ill at the time and did not testify. As SNWA notes, only the first page of his expert report was admitted into evidence.

B. CAVE, DRY LAKE, AND DELAMAR VALLEYS HEARING:

On October 4, 2007, the State Engineer issued Intermediate Order No. 1 and Hearing Notice that set a schedule for the exchange of evidence to be introduced at the February 2008 hearing on

SNWA's applications in Cave, Dry Lake, and Delamar Valleys ("CDD hearing"). Pursuant to that Order, the Department of Interior (DOI) Agencies and the Moapa Tribe each submitted to the State Engineer and exchanged with parties a witness and exhibit list and copies of evidence on November 15, 2007, that included significant biological and hydrologic testimony and information. In their rebuttal reports, submitted on December 21, 2007, protestants' experts Dr. Jim Deacon, Dr. Tom Myers, Dr. John Bredehoeft, and Dr. David Charlet, relied on and made use of some of scientific materials that had been submitted by DOI.

In early January, 2008, the DOI Agencies and the Moapa Tribe ("Tribe") signed stipulated agreements with SNWA agreeing to withdraw their protests to SNWA's applications in Cave, Dry Lake, and Delamar Valleys.

On January 18, 2008, SNWA filed a motion in limine seeking to exclude from evidence the DOI exhibits relied on by protestants' experts in their rebuttal reports, including CDD Ex 501 (Mayer Report), CDD Exhibits 539 and 559 (Krueger reports), and CDD Exhibit 609 (Scoppettone Report) complained of in SNWA's current motions in limine. During the hearing, the Hearing Officer ruled that SNWA's motion in limine was premature until the subject exhibits were offered. *In re Apps. 53987-53992, Cave, Dry Lake, and Delamar Valleys hearing Transcript at vol. I, 67:19-22 (Feb. 4, 2008)*. When the exhibits were offered by protestants in that hearing, the State Engineer denied SNWA's motion and admitted the exhibits as material that protestants' experts relied on in forming their expert opinions. *Id.* at vol. VI, 1263:3-9, 1265:5-13 (Feb. 11, 2008); *id.* at vol. VIII, 1575:11-1579:16 (Feb. 13, 2008).

C. SPRING, CAVE, DRY LAKE, AND DELAMAR VALLEYS HEARING:

On April 1, 2011, the State Engineer issued a Notice of Pre-Hearing Conference and Hearing ("Notice") for the rehearing of SNWA's applications in Spring, Cave, Dry Lake, and Delamar

Valleys (“SCDD hearing”). The Notice provided for two evidentiary exchanges, an initial exchange which occurred on July 1, 2011, and a rebuttal exchange, which occurred on August 26, 2011.

At the prehearing conference on May 11, 2011, there was discussion about incorporation of the administrative records from the previous Spring Valley and Cave, Dry Lake, and Delamar Valleys hearings. SNWA argued that the records should not be incorporated, and that each exhibit from the previous hearings, even if it was previously admitted, should be resubmitted for potential objection and admission into the current hearing record. GBWN et al. argued that it did not make sense to go through the exercise of resubmitting exhibits already admitted in the previous hearings and that the State Engineer should simply take notice of those exhibits. *In re Apps. 53987 – 53992 and 54003 – 54021*, Prehearing Conference Transcript at 23:21-25, 24:1-3 (May 11, 2011). In response, the State Engineer ruled that he was incorporating and taking notice of all the exhibits from the previous hearings, but not the entire transcripts. The State Engineer further directed the parties to identify those exhibits from the previous hearings that they intended to use in this hearing on their exhibit lists during the July 1 evidentiary exchange. *Id.* at 25:10-18.

This fact is underscored in the State Engineer’s Amended Third Informational Statement, in which the State Engineer ordered that, while he was not incorporating the transcript from the previous hearings into this hearing on remand, “he will take administrative notice of the exhibits from the prior hearings and any party wanting to use an exhibit from either of these prior hearings must specifically identify the exhibit on its exhibit list during the first evidentiary exchange.” *In re Apps. 53987-53992 and 54003-54021*, Amended Third Informational Statement, at 3 (June 6, 2011).

It is clear, then, that the State Engineer has taken administrative notice of and incorporated the exhibits from the previous hearings into this hearing. Any party in this hearing wanting to make use of any of those exhibits was only required to identify that exhibit in its July 1 exhibit list. Thus, SNWA plainly is wrong to suggest that the State Engineer has not taken administrative notice of the exhibits from the previous hearings and that these exhibits must be re-offered by GBWN et al. See SNWA DOI Expert Reports Motion in Limine, at 8; SNWA Charlet, and Hutchins-Cabibi Motion in Limine, at 7; SNWA Lanner Motion in Limine, at 5. That assertion is clearly and directly contradicted by the Prehearing Conference Transcript and the State Engineer's Amended Third Informational Statement.

ARGUMENT

The reports that SNWA's motions in limine seek to exclude are exhibits that were admitted in the previous Spring Valley and Cave, Dry Lake, and Delamar Valleys hearings, that already have been incorporated into this hearing record by the State Engineer, and that were identified by GBWN et al. in the July 1, 2011 evidentiary exchange as required by the Amended Third Informational Statement. As explained below, SNWA's attempt to distort the Notice of Pre-Hearing Conference and Hearing and the Amended Third Informational Statement to suggest that already admitted, highly relevant and probative evidence should now be excluded from the hearing record is at odds with both the State Engineer's prior ruling in this proceeding and the law. Thus, SNWA's motions in limine are without merit and should be denied.

The State Engineer has incorporated the subject exhibits into the record for this hearing pursuant to the ruling made at the Prehearing Conference and in the subsequent Amended Third Informational Statement. Thus, these previously admitted exhibits already have been incorporated in this hearing. SNWA received GBWN et al.'s July 1 exhibit list, which listed

these exhibits as required by the State Engineer's Amended Third Informational Statement. Further, SNWA will have the opportunity to cross-examine all of GBWN et al.'s experts who rely on or testify about these exhibits from the previous hearings. So, the incorporation and use of these previously admitted expert reports in this hearing would not present any due process concern or in any way prejudice SNWA. Accordingly, there is no basis for their exclusion.

Because there is no valid justification for excluding these already admitted and incorporated expert reports, and because these materials will substantially assist the State Engineer in determining the potential impacts of SNWA's proposed groundwater pumping project, the State Engineer should reject SNWA's baseless request to exclude this highly relevant evidence from the upcoming hearing on remand.

A. EXPERT REPORTS IDENTIFIED BY GBWN ET AL. CLEARLY CAN BE CONSIDERED IN THE HEARING BY THE STATE ENGINEER, BECAUSE THEY ALREADY HAVE BEEN ADMITTED INTO THE RECORD FOR THIS HEARING

SNWA bases its motions in limine on the mistaken premise that the subject expert reports have not yet been introduced into evidence, when, in fact, the State Engineer admitted them in either the previous Spring Valley hearing or the previous Cave, Dry Lake, and Delamar Valleys hearing, and already has incorporated them into the administrative record for this hearing.

Amended Third Informational Statement, at 3. At the May 11 prehearing conference, the State Engineer rejected SNWA's argument that exhibits admitted in the previous hearings should not be incorporated in this hearing, and instead incorporated exhibits from the previous hearings into the record for this hearing and required only that parties identify them in the July 1 evidentiary exchange. The State Engineer's decision only makes common sense, since these exhibits were admitted in the previous hearings that have been remanded to the State Engineer on other grounds to be reconsidered in this hearing. In the context of the State Engineer's ruling at the

pre-hearing conference and reiteration of that ruling in the Amended Third Informational Statement, it makes no sense for SNWA to file motions in limine to prevent introduction of already admitted exhibits. For this reason, as well as the others discussed below, SNWA's motions in limine should be denied.

B. THE EXPERT REPORTS IDENTIFIED BY GBWN ET AL. SHOULD BE CONSIDERED IN THE HEARING, BECAUSE GBWN ET AL. COMPLIED WITH THE STATE ENGINEER'S NOTICE OF PRE-HEARING CONFERENCE AND HEARING AND THE AMENDED THIRD INFORMATIONAL STATEMENT

Because the State Engineer already has incorporated the complained of exhibits into this hearing record and because GBWN et al. complied with the State Engineer's April 1, 2011 Notice of Pre-Hearing Conference and Hearing and June 6, 2011 Amended Third Informational Statement, NAC § 533.280(2) provides no basis for exclusion of the subject expert reports. The State Engineer's April 1, 2011 Notice of Pre-hearing Conference and Hearing requires the parties to file and serve "an exhibit list, witness list, a reasonably detailed summary of the testimony of each witness, and copies of any documentary evidence intended to be introduced into the hearing record." Notice of Pre-Hearing Conference and Hearing, at 4. The State Engineer's Amended Third Information Statement incorporates exhibits from the previous hearings into the record for this hearing on remand, and requires each party to identify any of those exhibits that it intends to use in the hearing in its July 1 evidentiary submission. Amended Third Informational Statement, at 3 (June 6, 2011).

As noted above, GBWN et al. identified the subject expert reports pursuant to and in compliance with the Notice of Pre-Hearing Conference and Hearing and Amended Third Informational Statement, giving all parties the intended notice. Nowhere in the Notice of Pre-hearing Conference and Hearing is it stated that expert witnesses are required to cite supporting

or relied on materials in their reports. The notice simply requires that any documents that will be used in support of an expert's opinions must be submitted by GBWN et al. in order to provide notice to other parties of the intent to make use of them.

SNWA's convoluted arguments relating to whether or not GBWN et al.'s experts have adequately referenced the expert reports from the previous hearings in their 2011 reports are inapposite here. GBWN et al. identified the expert reports from the previous hearings in the July 1 evidentiary exchange as required by the Order contained in the Amended Third Informational Statement. Nowhere in the Notice of Pre-hearing Conference and Hearing did the State Engineer require that the 2011 expert reports cite all materials relied on. The Notice only required that these materials be included in the evidentiary exchange, which GBWN et al. have done. If there is any properly cognizable objection to these previously admitted and incorporated exhibits, and GBWN et al. do not believe there is, such an objection only could be appropriate raised at the time that GBWN et al.'s experts testify about their consideration of these exhibits. This approach is in line with NRS § 50.305, which provides that an expert need not disclose the underlying facts and data supporting his expert opinion, but may be required to do so during cross-examination.

While the referencing of particular exhibits in expert reports may have been relevant to SNWA's motion in limine during the Cave, Dry Lake, and Delamar Valleys hearing, where the referenced reports were not previously admitted exhibits, here GBWN et al. identified these exhibits in compliance with the Amended Third Informational Statement, which permits GBWN to use them in this hearing on remand. Similarly, SNWA's allusion to the protestants' request in the previous Spring Valley Hearing that the State Engineer take administrative notice of DOI exhibits that had never been submitted or referenced by the protestants or their witnesses is

inapposite to the situation here, where the subject expert reports previously have been admitted, already have been incorporated in this hearing, and have been identified for use by GBWN et al..

The bottom line is that GBWN et al. have complied with the Notice and Amended Third Informational Statement, and SNWA received proper notice in the July 1 evidentiary exchange of GBWN et al.'s intent to make use of the subject expert reports. Therefore, SNWA will not be prejudiced by the State Engineer's consideration of the evidence. The State Engineer should not be deprived of consideration of these previously admitted exhibits just because SNWA is discomfited by them. NAC § 533.280(2) provides no basis for exclusion of the expert reports, which were admitted in previous hearings and have been incorporated into this record, because they contain relevant, highly probative evidence that would aid the State Engineer in making a well-informed, sound decision, as contemplated in NAC § 533.180.

C. USEFUL, RELEVANT SCIENTIFIC INFORMATION WILL ASSIST THE STATE ENGINEER IN MAKING A WELL REASONED SCIENTIFICALLY GROUNDED DECISION

SNWA's argument over the admissibility of the exhibits at issue here are misplaced because these exhibits already were admitted in the previous hearings and have been properly incorporated by the State Engineer into this hearing. Nonetheless, it is worth noting that relevant evidence generally is admissible unless specifically precluded by the rules of evidence. NRS § 48.025. In Nevada, courts have held that the district court as the trier of fact has broad discretion to admit evidence. *Krause, Inc. v. Little*, 117 Nev. 929, 933-934 (2001). The State Engineer has especially broad discretion in the admission of evidence because the purpose of State Engineer hearings is to create a solid record on which the state engineer may rely to make a sound decision. See NAC § 533.180. This is the reason why, as noted by the April 1, 2011 Notice of Pre-Hearing Conference and Hearing, at 5, the technical rules of evidence do not apply to

proceedings before the State Engineer. NRS § 533.365(6). This is because the liberal admission of scientific evidence is appropriate, as it furthers the goal of creating a solid record and promoting well-informed decisions. Excluding such evidence on technicalities is precisely the outcome that Nevada law and policy seek to avoid.

The previously admitted expert reports that SNWA seeks to remove from the record are highly relevant, useful evidence that will assist the State Engineer in making a well-reasoned and scientifically grounded decision, especially because much of the materials focus on the biological effects of SNWA's proposed groundwater pumping project and add meaningful information to the other evidence submitted by GBWN et al. and other protestants. SNWA's attempt to belatedly exclude such relevant and helpful scientific evidence is merely an attempt to suppress evidence that does not favor the granting of SNWA's applications. Clearly, these exhibits should be considered by the State Engineer as relevant to the State Engineer's determination and should not be excluded on technicalities as argued for in SNWA's motions in limine. The State Engineer has already recognized this fact by admitting these exhibits in previous hearings and incorporating them into this hearing.

D. CONSIDERATION OF THE SUBJECT EXPERT REPORTS WOULD NOT RAISE DUE PROCESS CONCERNS AND WOULD NOT UNFAIRLY PREJUDICE SNWA

The purpose of the evidentiary exchange outlined in the Notice of Pre-Hearing Conference and Hearing was to provide the parties with sufficient notice of the evidence that could be presented at the hearing. SNWA concedes that it received notice of the previously admitted expert reports challenged in its motions in limine and of GBWN et al.'s intent to use them. Because it received adequate notice, SNWA cannot plausibly argue that its due process rights would be violated by the consideration of such evidence.

Without citation to any Nevada case, SNWA assumes that the NRS § 48.035 balancing test applies to admission of evidence under NRS § 50.285(2). SNWA proceeds to get lost in the balancing test required by Nevada rule 48.035, and 'other jurisdictions' corollaries, which provides that "relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice . . ." NRS § 48.035. SNWA glosses over the inconvenient facts that: (1) NRS § 50.285 provides for the admission of otherwise inadmissible evidence to support an expert's opinion; and (2) the consideration of these previously admitted expert reports by the State Engineer is not likely to unfairly prejudice SNWA or require exclusion under the rule 48.035 balancing test in the first place.

A motion in limine is generally filed for the purpose of excluding evidence before trial that might tend to confuse or unfairly prejudice a jury. Indeed, the cases cited by SNWA are all jury cases. Unlike a jury, the State Engineer has the requisite expertise to adequately weigh the reliability and persuasiveness of the evidence presented at the upcoming hearing and will not be prejudiced by introduction of the evidence at issue here (which, of course, already has been admitted). In keeping with this fact, the technical rules of evidence do not apply to State Engineer proceedings, NRS § 533.365(6), and neither the Notice of Prehearing Conference and Hearing nor the Amended Third Informational Statement suggested that evidence should be precluded on the basis urged by SNWA. If SNWA is of the opinion that the subject expert reports do not constitute persuasive evidence, cross-examination of ACE experts who will testify about the reports, rather than the preemptive exclusion of information that could be helpful to the State Engineer, is the appropriate response.

E. THESE PREVIOUSLY ADMITTED EXPERT REPORTS PROPERLY WERE RELIED ON BY GBWN ET AL.'S EXPERTS AND MAY BE REFERENCED IN THEIR TESTIMONY DURING THE UPCOMING HEARING ON REMAND

Nothing in either the Notice of Amended Third Informational Statement precludes a party from identifying and making use of exhibits that already have been admitted in the previous hearings and incorporated in the record for this hearing on remand. In fact, the Notice acknowledges that evidence that supports an expert's opinion may be introduced and the Amended Third Informational Statement takes administrative notice of the Spring Valley and Cave, Dry Lake, and Delamar Valley exhibits. Notice of Pre-Hearing Conference and Hearing, at 4; Amended Third Informational Statement, at 3. At the very least, these previously admitted reports may be used by and referenced by GBWN et al.'s experts because those experts evaluated them and used them in forming their opinions, and those reports contain factual information and data of a type typically and reasonably relied by experts in their respective fields. See Edward W. Cleary et al., *McCormick on Evidence* (3rd ed. 1984) § 324.2 (Basis for Expert Opinion as a Hearsay Exception). The reports contain relevant facts and data that assisted GBWN et al.'s experts in forming their expert opinions and that will assist the State Engineer. It was on this basis that the State Engineer accepted into evidence all of the complained of Cave, Dry Lake, and Delamar Valleys exhibits, with the result that they are part of the record for that previous hearing and have been incorporated into this hearing on remand.

In particular, CDD Exhibit 501 (Mayer Expert Report) was introduced and accepted into evidence in the CDD Hearing, and thus the State Engineer has taken administrative notice of it pursuant to the Amended Third Informational Statement. Exhibit 501 was also cited by Dr. Myers in his Cave, Dry Lake, and Delamar Valleys expert report, which he cited in his 2011

SCDD report, and which GBWN et al. identified in their exhibit list along with the Mayer Expert Report. Dr. Myers has relied on the Mayer Report from the beginning of this process, and in fact, made it clear to GBWN et al.'s attorneys that he wanted it to be identified for use in the SCDD hearing.

Similarly, CDD hearing DOI Exhibits 539, 559, and 609 were introduced and accepted into evidence in the CDD hearing, and pursuant to the Amended Third Informational Statement the State Engineer has taken administrative notice of them. These exhibits also were cited by Dr. Deacon in his CDD rebuttal report, which is cited in his 2011 report and included in the SCDD July 1, 2011 evidentiary exchange. Like Dr. Myers, Dr. Deacon has relied on these exhibits in forming his expert opinion. Just as in the previous Cave, Dry Lake, and Delamar Valleys hearing, SNWA will have ample opportunity to cross-examine Dr. Deacon and Dr. Myers and may cross-examine them on these previously admitted reports and their reliance on them.

CDD Exhibits 1150 and 1230 and Spring Valley Exhibit 3030 (Dr. Charlet's expert reports from the previous hearings), were introduced and accepted into evidence in the CDD and Spring Valley hearings, and thus, pursuant to the Amended Third Informational Statement, the State Engineer has taken administrative notice of them. Additionally, the reports were provided to and relied on by Dr. Patten in forming his expert opinion. Indeed, he cited to exhibit 1150 in his expert report. GBWN et al. expect Dr. Patten to refer to his consideration of all three reports in his testimony on the stand. So, at the very least, the reports may be considered as materials Dr. Patten relied on in forming his expert opinion. Further, SNWA had the opportunity and did, in fact, cross-examine Dr. Charlet during both the Spring Valley and Cave, Dry Lake, and Delamar Valleys hearings. So, SNWA cannot possibly claim that introduction of the report would be

prejudicial or that it has not had an opportunity to defend against it.² SNWA may also cross-examine Dr. Patten as to the previously admitted Charlet reports.

Spring Valley Exhibit 3064 (Hutchins-Cabibi Report), was introduced and accepted into evidence in the Spring Valley Hearing, and thus, the State Engineer has taken administrative notice of it in the Amended Third Informational Statement. Although they did not expressly refer to it, Dr. Gleick and Ms. Cooley considered Ms. Hutchins-Cabibi's Spring Valley report in forming some of the expert opinions contained in their July 1, 2011 expert report. In addition, Ms. Hutchins-Cabibi was a co-author of the Hidden Oasis report submitted by GBWN et al., which was expressly referenced and relied on in Dr. Geick's and Ms. Cooley's July 1 report and which added to the analysis of rate structures contained in Ms. Hutchins-Cabibi's Spring Valley report. GBWN et al. expect Dr. Gleick or Ms. Cooley to refer to Ms. Hutchins-Cabibi's Spring Valley report in their testimony during the hearing. SNWA had the opportunity and did, in fact, cross-examine Ms. Hutchins-Cabibi during the Spring Valley hearing, and so SNWA cannot possibly claim that introduction of the report would be prejudicial or that it has not had an opportunity to defend against it. SNWA also may cross-examine Dr. Gleick or Ms. Cooley as to the Hutchins-Cabibi Report during this hearing.

Spring Valley Exhibit 3040 (Lanner Report) was introduced and the first page was accepted into evidence in the Spring Valley Hearing, and thus, the State Engineer has taken administrative notice of it in the Amended Third Informational Statement. The report was also cited by Dr. Kilkenny in her June 30, 2011 report prepared on behalf of GBWN et al. Additionally, the report was provided to and relied on by Dr. Patten in forming his expert opinion. GBWN et al. expect

² Although it clearly is unnecessary, Protestants have no objection to SNWA's request that the transcripts of SNWA's cross-examination of those experts be admitted as well.

that Dr. Patten and Dr. Kilkenny will refer to the Lanner report in their testimony during the hearing, at which time SNWA may cross-examine them as to the Lanner Report.

Because all of the previously admitted expert reports identified by GBWN et al. contain highly probative, relevant evidence that would cause no undue prejudice to SNWA, because the technical rules of evidence do not apply and liberal admission of evidence is favored, because GBWN et al.'s experts may provide an adequate foundation for the exhibits' introduction, and because the hearsay rule does not prevent their introduction, these reports would be admissible in evidence at the hearing on remand, even if they had not already been admitted in the previous hearings and incorporated into this hearing by the State Engineer. Thus, for these reason too, SNWA's motions in limine should be denied.

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CONCLUSION

For the reasons set forth above, GBWN et al. respectfully request that the State Engineer deny SNWA's motions in limine. The expert reports that SNWA seeks to exclude in those motions in limine all are relevant and reliable evidence, all were admitted in the previous hearings, all already have been incorporated into this hearing on remand by the State Engineer, and all were properly identified at the time of the July 1 evidentiary exchange as required by the Notice of Pre-Hearing Conference and Hearing and the Amended Third Informational Statement. They also were considered and relied on by GBWN et al.'s expert witnesses in forming their opinions. SNWA received adequate notice of GBWN et al.'s intent to make use of the reports, in accord with the Notice and Amended Third Informational Statement, and will have ample opportunity to cross-examine GBWN et al.'s witnesses about the subject reports. Accordingly, SNWA will not be prejudiced by GBWN et al.'s use of the reports and there is no legitimate basis for their exclusion. As there is no valid, let alone compelling, basis for excluding these already admitted exhibits and the evidence they contain would substantially assist the State Engineer in determining the merits and potential impacts of SNWA's above-captioned water rights applications and proposed groundwater pumping project, GBWN et al. respectfully request the State Engineer to deny SNWA's motions in limine.

DATED: September 13, 2011.

Respectfully Submitted,



Simeon Herskovits, Attorney for Protestants
Advocates for Community and Environment, Inc.
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El Prado, NM 87529
Telephone: (575)758-7202
Facsimile: (575)758-7203
Attorney for Protestants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this **RESPONSE TO SOUTHERN NEVADA WATER AUTHORITY MOTIONS IN LIMINE TO EXCLUDE EXPERT REPORTS BY CHARLET, HUTCHINS-CABIBI, MAYER, KRUEGER, SCOPPETTONE, AND LANNER, SUBMITTED BY GBWN, ET AL. IN JULY 1, 2011 EVIDENTIARY EXCHANGE** was served on the following by FedEx, on this 13th day of September, 2011.

Dana Walsh
Southern Nevada Water Authority
1001 S. Valley View Blvd. MS#485
Las Vegas, Nevada 89153

Nye County
George Benesch
190 W. Huffaker Lane, Suite 408
Reno, Nevada 89511-2092

Corporation of the Presiding Bishop of the Church of
Jesus Christ of Latter-day Saints
Severin A. Carlson
Kaemfer Crowell, Renshaw, Gronauer & Fiorentino
50 West Liberty Street, Suite 900
Reno, Nevada 89501

Juab County and Millard County, Utah
J. Mark Ward
Utah Association of Counties
5397 Vine Street
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EskDale Center
Jerald Anderson
1100 Circle Drive
EskDale, Utah 84728

Henry C. Vogler IV
HC 33 Box 33920
Ely, Nevada 89301

Confederated Tribes of the Goshute Reservation,
Duckwater Shoshone Tribe and Ely Shoshone Tribe
Mark Echohawk and V. Aaron Contreras
505 Pershing Ave., Suite 100
Pocatello, Idaho 83205

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