

**IN THE OFFICE OF THE STATE ENGINEER OF THE
STATE OF NEVADA**

IN THE MATTER OF APPLICATIONS)
53987 THROUGH 53992, INCLUSIVE,)
AND 54003 THROUGH 54021,)
INCLUSIVE FILED TO APPROPRIATE)
THE UNDERGROUND WATERS OF)
SPRING VALLEY, CAVE VALLEY,)
DELAMAR VALLEY AND DRY LAKE)
VALLEY HYDROGRAPHIC BASINS)
(180, 181, 182 AND 184), LINCOLN)
COUNTY AND WHITE PINE COUNTY,)
NEVADA.)

**INTERIM ORDER ON PRE-
HEARING MOTIONS**

State 'S EXHIBITS <u>90</u>
DATE: _____

I.

ADMINISTRATIVE NOTICE OF EVIDENCE FROM PRIOR HEARINGS

This is the second time the State Engineer is holding a hearing on the above-referenced protested water right applications. Two separate hearings have already been held; one for the applications in Spring Valley and a second for the applications in Delamar, Dry Lake and Cave Valleys. Large records of testimony and evidence were developed during the course of those hearings. Expert and non-expert factual reports were admitted into evidence, including those being challenged by the current motions in limine filed by the Southern Nevada Water Authority (SNWA) addressed below.

On May 11, 2011, the State Engineer held a pre-hearing conference for this hearing on remand on the Southern Nevada Water Authority's (SNWA) protested water right applications in Spring, Delamar, Dry Lake and Cave Valleys. During the pre-hearing conference, the State Engineer raised the issue of whether the entire record from the previous hearings should be incorporated into this hearing. Protestant Great Basin Water Network, et al. urged admission of the entire record indicating their belief that any testimony and evidence already admitted would be admissible in the hearing on remand. Some of the other Protestants supported incorporation of the entire previous records, but wanted to preserve the opportunity to rebut them.

The SNWA did not agree to incorporation of the entire record arguing this is an entirely new hearing and indicated its position that any use of the prior record could potentially be objectionable by a person who did not have the opportunity to participate in the prior hearing. It did not agree that documents that were part of the prior record should automatically be placed

into the record in this case without the new parties having an opportunity to object to those documents.

During the pre-hearing conference, it was determined that any evidence previously admitted into the record had to be listed on the exhibit lists prepared for the first evidentiary exchange on July 1, 2011, and discussion was had regarding whether the document had to actually be offered into evidence again or whether the exercise of re-admitting was not an efficient way of proceeding unless there were grounds for objection.¹ Every Protestant at the pre-hearing conference is on the record as agreeing to incorporation of the previous exhibits and thus waives any objection to the use of the previous exhibits. Pursuant to Chapter 533 of the Nevada Administrative Code and NAC § 533.170, as amended by LCB File No. R129-08 sec. 16 (eff. Feb. 11, 2009), those Protestants who did not attend the pre-hearing conference have waived any objection to any ruling regarding this issue.

As set forth in Chapter 533 of the Nevada Administrative Code and NAC § 533.180, as amended by LCB File No. R129-08 sec. 17 (eff. Feb. 11, 2009), the objective of a protest hearing is to develop a record upon which the State Engineer may rely to make a sound decision without causing unnecessary delay and expense to the participating parties or to the Office of the State Engineer. As set forth in NRS § 533.365(6), the technical rules of evidence do not apply to a hearing on a protested water right application held before the State Engineer. This hearing on remand is an administrative hearing, it is not a civil trial before the district courts and the rules of those courts are only generally applicable. The State Engineer's concern is a full and fair hearing with due process for all and without unnecessary delay; however, it is also a proceeding that requires some flexibility for efficiency purposes and to accommodate the many parties of varying skill levels and efficiency, some of whom are not represented by legal counsel.

At the pre-hearing conference, the Hearing Officer ruled that the State Engineer would take administrative notice of all the exhibits, but not the transcripts from the previous hearings. While the State Engineer took notice of those exhibits that were admitted during the course of those hearings for efficiency purposes, he did not preclude the pre-hearing objection to any particular exhibit in this new hearing. The State Engineer took notice of all the previously admitted exhibits, which will not require the exercise of re-admitting those exhibits if they are listed on the exhibits lists exchanged during the first evidentiary exchange in this hearing on

¹ *Id.* at 24.

remand and not subject to challenge in the SNWA's motions. Exhibits that were not admitted during the prior hearings are not considered admitted during this hearing as they are not part of the official records of the previous hearings. Merely exchanging proposed exhibits prior to the actual hearing does not make them an official record of that hearing.

The SNWA, in the motions in limine, moves to exclude nine exhibits that were previously admitted during the prior hearings. Motions to exclude were filed as to Delamar, Dry Lake and Cave Valleys (DDC) Exhibits 501, 539, 559, 609, 1150, 1230, Spring Valley (SV) Exhibits 3030, 3040 and 3064.

II.

SNWA 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)

On September 1, 2011, the SNWA filed a 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) from evidence in this hearing on remand. The exhibits at issue are:

- Timothy Mayer, *Hydrologic Assessment of SNWA Water Right Applications for Delamar, Dry Lake, and Cave Valleys in the White River Flow System* (Nov. 14, 2007) (DDC Ex. 501)
- Jeri Krueger, *Status of Southwestern Willow Flycatcher in the White River Drainage, Nevada* (Nov. 13, 2007) (DDC Ex. 539)
- Jeri Krueger, *Migratory Birds on Pahrnagat National Wildlife Refuge, Nevada* (Nov. 3, 2007) (DDC Ex. 559)
- G. Gary Scoppettone, *Ichthyologic Assessment of SNWA Water Right Applications for Delamar, Dry Lake, and Cave Valley in the White River Flow System* (Nov. 15, 2007) (DDC Ex. 609)

The SNWA argues that these exhibits should be excluded because:

1. the authoring witnesses will not testify and thus not be subject to cross-examination;
2. that admission without a witness to cross-examine deprives the SNWA of its right to due process;
3. these exhibits are hearsay prepared in anticipation of litigation and do not fall within a recognized hearsay exception such as the learned treatise or business records exception;
4. that admission would violate the State Engineer's regulations, specifically NAC § 533.380(2) failure to comply with a pre-hearing order; and
5. the reports are not subject to administrative notice as set forth in NAC § 533.300.

The SNWA indicates that at the prior hearing on the SNWA's applications in Spring Valley (SV) these exhibits were submitted during the evidentiary exchange by Protestant agencies within the U.S. Department of Interior (DOI). When those agencies entered into a settlement agreement with the SNWA and withdrew their protests, part of the settlement was an agreement that certain of the DOI's documents would be allowed into evidence. These four exhibits were not any of the documents agreed upon for admission into the hearing record. In the prior hearing on the SNWA's applications in Dry Lake, Delamar and Cave Valleys, these exhibits were exchanged during the evidentiary exchange process. During the course of examination of Protestants' witness Dr. Thomas Myers, he testified that he relied on Mayer DDC Ex. 501 in forming his opinion. Dr. James Deacon testified that he relied on DDC Ex. 539, 559 and 609. Because they had been provided during the initial evidentiary exchange and relied on by others prior to the time the offering party settled and withdrew its protests, they were admitted into the administrative hearing record over objection by the SNWA as public records in the Office of the State Engineer. However, the Hearing Officer ruled that the documents would not carry much weight and they were not accepted as expert witness reports, but admitted as documents relied on the Protestant's experts who were testifying at the Spring Valley hearing.

In this hearing on remand, these four documents (DDC Ex. 501, DDC Ex. 539, DDC Ex. 559, and DDC Ex. 609) are listed on the Protestant Great Basin Water Network's (GBWN) pre-hearing exhibit list that was provided during the evidentiary exchanges; however, the authors are not identified as witnesses in this hearing on remand. Additionally, the SNWA argues that none of these documents are identified as being relied on by the GBWN's experts at this hearing on remand as they are not identified as references in any of the expert reports prepared for the hearing on remand.

The SNWA argues these four exhibits are hearsay and do not fall under any hearsay exception (i.e., learned treatise exception, official statement exception, exception for facts or data of a type reasonably relied upon by experts in forming opinions or inferences upon a subject), do not have a special indicia of reliability or trustworthiness, are highly prejudicial and admission would violate the SNWA's right to due process. The SNWA asserts that the probative value does not substantially outweigh the prejudicial effect; therefore, the exhibits should be excluded or cross-examination allowed prior to consideration of admission into evidence in the hearing on remand.

The SNWA also argues that the State Engineer should not take administrative notice of these documents under the hearing rules provided for under Chapter 533 of the Nevada Administrative Code and that NAC § 533.300, as amended by LCB File No. R129-08 sec. 26 (eff. Feb. 11, 2009) should not be used to admit documents that present due process concerns.

The relevant regulation provides that:

The state engineer may take administrative notice of or accept into evidence by reference to their contents:

1. Files and records of the office of the state engineer;
2. Public records that have been prepared by other governmental agencies;
3. Facts of which judicial notice may be taken by the courts of this state; and
4. Technical or scientific data that:
 - (a) Have generally been accepted by the relevant scientific community; and
 - (b) Are within the field of expertise of the Office of the State Engineer.

The SNWA asserts that the non-testifying expert reports do not qualify as any of the types of documents that are allowed to be admitted through administrative notice. They are not files or records of the Office of the State Engineer because they do not officially record the State Engineer's activities, they were simply documents submitted in a prior evidentiary exchange and not properly admitted through administrative notice and do not fall under the other provisions of the regulation.

Finally, the SNWA asserts that the exhibits violate the rules for hearing and the State Engineer's pre-hearing order issued pursuant to those rules. When the State Engineer issued the Notice of Pre-hearing Conference and Hearing, it was ordered that if a witness was going to be presented to provide expert testimony, the evidentiary exchange had to include a written report prepared and signed by the witness. In essence, SNWA asserts that the State Engineer required a witness and the expert witness report become part of the hearing record together. These four documents, which were prepared as expert witness reports, have no corresponding authoring witness thereby violating the State Engineer's Order.

In response, the GBWN asserts these exhibits were admitted during the previous Spring Valley or Dry Lake, Delamar and Cave Valley hearings and have already been incorporated into

the record for this hearing on remand. The GBWN argues that the referenced exhibits were exchanged during the initial evidentiary exchange by the DOI and Moapa Paiute Tribe of Indians, which was prior to the DOI and the Moapa Tribe stipulating to withdraw their protests and were documents reasonably relied on by the GBWN's witnesses in preparing their rebuttal reports. The State Engineer denied the SNWA's prior motion in limine seeking to exclude these four exhibits because they were reports relied on by the Protestants' experts in forming their expert reports prior to the time the other Protestants stipulated to settle and withdraw their protests.

The GBWN argues that it complied with the State Engineer's ruling made at the pre-hearing conference, as reflected in the June 6, 2011, Amended Informational Statement and therefore the exhibits should not be excluded. The GBWN asserts the information will assist the State Engineer in his decision making, were relied on by the GBWN's experts, consideration of the subject expert witness reports does not raise due process concerns and does not unfairly prejudice the SNWA. The GBWN's argument is made in reference to all the motions in limine.

The State Engineer has gone back and reviewed the hearing transcript and exhibits from the prior DDC hearing without the pressure of action required during the actual course of the hearing. He has reviewed the exhibits presented through Dr. Deacon (DDC Ex. 1140 and 1142) and finds that nowhere in those documents did Dr. Deacon reference these as documents he relied on in his report.

The State Engineer finds that DDC Ex. 501, DDC Ex. 539, DDC Ex. 559, and DDC Ex. 609 were admitted over the objection of the SNWA; however, the State Engineer ruled they would not carry much weight and they were not accepted as expert witness reports, but admitted as documents relied on by the Protestant's expert Dr. James Deacon who was testifying at the Spring Valley hearing. The State Engineer finds that Dr. Deacon did not list DDC Ex. 539, 559 and 609 as references he relied on in his expert witness report (DDC Ex. 1140) and finds they should not have been admitted in the prior hearing. The State Engineer finds Dr. Myers did not list DDC Ex. 501 as a reference he relied on in his previous expert witness report (DDC Ex. 1101) and finds the exhibit should not have been admitted in the prior hearing. The State Engineer finds Dr. Myers did not reference DDC Ex. 501 in any of his new reports for this hearing on remand (GBWN Ex. 001, 002, 003 and 004).

The State Engineer finds the exhibits were given very little weight in the previous hearing, they were not accepted as expert witness reports, and have little value in this hearing on remand. The SNWA's motion in limine is granted as to exhibits Mayer (DDC Ex. 501), Krueger (DDC Ex. 539 and DDC Ex. 559), and Scoppettone (DDC Ex. 609) as they are expert reports and the authoring witnesses will not testify, will not be subject to cross-examination and admission without a witness to cross-examine deprives the SNWA of its right to due process.

III.

SNWA Motion in Limine to Exclude Expert Reports by Charlet (DDC Ex. 1150, DDC Ex. 1230, SV Ex. 3030), and Hutchins-Cabibi (SV Ex. 3064)

On September 1, 2011, the SNWA filed a 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) from evidence in this hearing on remand. If the reports are not excluded, the SNWA requests that the State Engineer also admit the transcript of the SNWA's cross-examination of the report authors from the prior hearings.

The exhibits at issue are:

- David Charlet, *Effects of Interbasin Water Transport on Ecosystems of Spring Valley, White Pine County Nevada* (June 24, 2006), SV Ex. 3030
- David Charlet, *Effects of Groundwater Transport from Cave, Delamar and Dry Lake Valleys on Terrestrial Ecosystems of Lincoln and Adjacent Nye and White Pine Counties, Nevada* (Nov. 12, 2007), DDC Ex. 1150
- David Charlet, *Response to Evidence on Terrestrial Ecosystem Presented by SNWA In the Matter of the Groundwater Development in Cave Valley, Dry Lake Valley, and Delamar Valley, Applications 53987 through 53992, Inclusive* (Dec. 20, 2007), DDC Ex. 1230
- Taryn Hutchins-Cabibi, *Water Rate Structures in the Southwest: How Southwestern Cities Compare Using This Important Water Use Efficiency Tool* (July 2006), SV Ex. 3064

The SNWA argues that these exhibits should be excluded because:

1. the authoring witnesses will not testify and thus not be subject to cross-examination, additionally, Hutchins-Cabibi was not qualified as an expert in the Spring Valley hearing and SV Ex. 3030 is not an expert report;
2. that admission without a witness to cross-examine deprives the SNWA of its right to due process;
3. these exhibits are hearsay prepared in anticipation of litigation and do not fall within a recognized hearsay exception such as the learned treatise or business records exception;

4. that admission would violate the State Engineer's regulations, specifically NAC § 533.380(2) failure to comply with a pre-hearing order; and
5. the reports are not subject to administrative notice as set forth in NAC § 533.300.

Neither David Charlet nor Taryn Hutchins-Cabibi is listed as witnesses for the GBWN in this hearing on remand. DDC Ex. 1150 is listed as a reference in the GBWN's expert report prepared by Duncan Patten, *Comments on Effects of Proposed Groundwater Withdrawal in Eastern Nevada on Desert Springs and Associated Ecosystems* (June 27, 2011) (GBWN Ex. 57 at 18). SV Ex. 3030 is listed as a reference in the GBWN's expert report prepared by Maureen Kilkenny, *Report on the Known Economic Market and Non-Market Values of Water in Nevada's Spring, Cave, Dry Lake, and Delamar Valleys* (June 30, 2011) (GBWN Ex. 66 at 18). Neither DDC Ex. 1230 nor SV Ex. 3064 is listed as a reference in the reports of the GBWN's testifying experts in this hearing on remand.

At the prior hearing on the SNWA's applications in Spring Valley, Dr. Charlet testified, was subject to cross-examination by the SNWA and SV Ex. 3030 was admitted without objection. Ms. Hutchins-Cabibi also testified at the Spring Valley hearing and was subject to cross-examination by the SNWA; however, she was not qualified as an expert witness, but was allowed as a factual witness. SV Ex. 3064 was admitted as a factual report only and any opinions made were given no weight by the State Engineer. In the prior hearing on the SNWA's applications in Dry Lake, Delamar and Cave Valleys, Dr. Charlet testified and was subject to cross-examination by the SNWA and DDC Ex. 1230 was admitted without objection.

In its Motion in Limine, the SNWA presented nearly identical arguments as raised in Section II. It argues that SV Ex. 3030 is referenced in Maureen Kilkenny's report GBWN Ex. 66 and DDC Ex. 1150 is referenced in Duncan Patten's report GBWN Ex. 57 and are being relied on by the GBWN's experts at the upcoming hearing. Since they offer expert opinions specifically developed as advocacy documents to oppose the SNWA's water right applications, the SNWA argues they are hearsay and do not fall under any hearsay exception (i.e., learned treatise exception or the hearsay exception for facts or data of a type reasonably relied upon by experts in forming opinions or inferences upon a subject), do not have a special indicia of reliability or trustworthiness, are highly prejudicial and admission would violate the SNWA's right to due process.

The SNWA asserts that the other two reports DDC Ex. 1230 and DDC Ex. 3064 are not listed as references in any of the witness reports presented in the hearing on remand, but contain expert opinions. The SNWA asserts that the probative value does not substantially outweigh the prejudicial effect; therefore, the exhibits should be excluded or cross-examination allowed prior to consideration of admission into evidence in the hearing on remand.

The SNWA presents the same argument as in Section II that the State Engineer should not take administrative notice of these documents under the hearing rules provided for under Chapter 533 of the Nevada Administrative Code and that NAC § 533.300, as amended by LCB File No. R129-08 sec. 26 (eff. Feb. 11, 2009) should not be used to admit documents that present due process concerns. Finally, the SNWA asserts that the exhibits violate the rules for hearing and the State Engineer's pre-hearing order issued pursuant to those rules.

In response, the GBWN asserts these exhibits were admitted during the previous Spring Valley or Dry Lake, Delamar and Cave Valley hearings and have already been incorporated into the record for this hearing on remand. The GBWN notes that SV Ex. 3030 and SV Ex. 3064 were admitted into evidence and that both Dr. Charlet and Ms. Hutchins-Cabibi were cross-examined during the Spring Valley hearing. The GBWN asserts that DDC Ex. 1150 and 1230 and SV Ex. 3030 were provided to and relied on by Dr. Patten and indicates it expects Dr. Patten to refer to all three reports in his testimony.

The State Engineer finds that the Notice of Pre-Hearing Conference and Hearing dated April 1, 2011, required that if a witness is to be presented to provide expert testimony, the evidentiary exchange shall include a written report prepared and signed by the witness, which shall contain a complete statement of all opinions to be expressed and the basis and reasons for those opinions, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or in support of the opinions and a statement of qualifications of the witness. Dr. Patten only references DDC Ex. 1150 in GBWN Ex. 57.

As to DDC Ex. 1230 and SV Ex. 3030, the State Engineer finds that the SNWA already cross-examined these witnesses and the exhibits were admitted during the course of the previous hearing. The State Engineer has already ruled that he would not incorporate the transcript from the previous hearing into this record; however, the GBWN indicates it has no objection to the SNWA's request that if these exhibits are admitted, that the transcripts of its cross-examination of those experts be admitted as well.

As to DDC Ex. 1230 and SV Ex. 3030 (Charlet), the Motion in Limine is granted in part and denied in part. The Motion is denied as to DDC Ex. 1230 and SV Ex. 3030 and the exhibits will not be excluded as the witnesses were subject to full cross-examination during the previous hearing. However, the State Engineer will allow the incorporation of the previous cross-examination into the record in this case. The SNWA is to provide the State Engineer and other parties to this hearing with copies of the exact pages it seeks to incorporate and they will be marked as SNWA_Ex_438_Charlet cross-examination SV 2006 hearing and SNWA_Ex_439_Charlet cross-examination DDC 2008 hearing. As to DDC Ex. 1150, the exhibit was admitted in the previous hearing, the witness was subject to cross-examination and the exhibit is referenced in Dr. Patten's report pre-filed as GBWN Ex. 057. The Motion in Limine is denied as to DDC Ex. 1150.

The State Engineer is concerned with the Hutchins-Cabibi report. SV Ex. 3064. Even though the SNWA cross-examined the witnesses, the State Engineer did not qualify the witness as an expert, the data is more than five years old and the report does include opinions that have not been redacted, even though the State Engineer did not accept the opinions. SV Ex. 3064 was admitted as a factual report only, but without a witness to update those facts, the State Engineer does not believe the report should be administratively noticed into the evidence in the hearing on remand on the grounds that the probative value is outweighed by the prejudicial effect. The Motion in Limine is granted as to SV Ex. 3064.

IV.

SNWA Motion in Limine to Exclude Expert Reports by Lanner (SV Ex. 3040)

On September 1, 2011, the Applicant Southern Nevada Water Authority ("SNWA") filed a Motion in Limine to Exclude Expert Report by Lanner (SV Ex. 3040) from evidence in this hearing on remand. The exhibit at issue is:

- Ronald M. Lanner, *The Effect of Groundwater Pumping Proposed by the Southern Nevada Water Authority on the "Swamp Cedars" (Juniperus scopulorum) of Spring Valley, Nevada* (June 20, 2006) (SV Ex. 3040)

The SNWA argues that the exhibit should be excluded because:

1. the authoring witness will not testify and thus not be subject to cross-examination;
2. that admission without a witness to cross-examine deprives the SNWA of its right to due process;

3. the exhibit is hearsay prepared in anticipation of litigation and does not fall within a recognized hearsay exception such as the learned treatise or business records exception;
4. that admission would violate the State Engineer's regulations, specifically NAC § 533.380(2) failure to comply with a pre-hearing order; and
5. the report is not subject to administrative notice as set forth in NAC § 533.300;
6. without a witness to examine the report is unfit as an expert report.

Dr. Lanner is not listed as witness for the GBWN in this hearing on remand. SV Ex. 3040 is listed as a reference in the GBWN's expert report prepared by Maureen Kilkenny, *Report on the Known Economic Market and Non-Market Values of Water in Nevada's Spring, Cave, Dry Lake, and Delamar Valleys* (June 30, 2011) (GBWN Ex. 66 at 18).

In the first Spring Valley hearing, Dr. Lanner was a proposed expert witness; however, he was unable to attend the hearing for health reasons. Ex. 3040 is a two page report, but only the first page was admitted during the Spring Valley hearing; the second page, which is the page that contains Dr. Lanner's opinions, was not admitted into evidence.

In its Motion in Limine, the SNWA presented nearly identical arguments as raised in Section II and III. The SNWA argues that due process requires that parties in an administrative hearing be given the opportunity to cross-examine an adverse witness if it is reasonably necessary for a full and true disclosure of the evidence. The SNWA argues that since the opinions expressed in the original report are being relied on by GBWN's expert witness at the upcoming hearing (SV Ex. 3040 is referenced in Maureen Kilkenny's report GBWN Ex. 66) and since they offer expert opinions specifically developed as advocacy documents to oppose the SNWA's water right applications, the SNWA argues they are hearsay and do not fall under any hearsay exception (i.e., learned treatise exception, business records exception, public records exception or the hearsay exception for facts or data of a type reasonably relied upon by experts in forming opinions or inferences upon a subject), do not have a special indicia of reliability or trustworthiness, are highly prejudicial, the probative value is small and admission would violate the SNWA's right to due process.

The SNWA argues that Dr. Kilkenny is an economist and cites to the Lanner reports for propositions on snow melt, soil conditions, surface water sources and cedar trees in the valley

and that to allow her to use the Lanner report is an attempt to smuggle the opinions of non-testifying experts into this hearing on remand through her report.

The SNWA again argues that the State Engineer should not take administrative notice of this document under the hearing rules provided for under Chapter 533 of the Nevada Administrative Code and that NAC § 533.300, as amended by LCB File No. R129-08 sec. 26 (eff. Feb. 11, 2009) should not be used to admit documents that present due process concerns. Finally, the SNWA asserts that the exhibit violates the rules for hearing and the State Engineer's pre-hearing order issued pursuant to those rules.

In response, the GBWN asserts only the first page of SV Ex. 3040 was admitted into evidence and is the reference found in Dr. Kilkenny's report GBWN Ex. 66. It asserts that Dr. Patten relied on the report in forming his opinion; however, the document is not identified as a reference in Dr. Patten's work.

The State Engineer finds only page 1 of SV Ex. 3040 was admitted into evidence. Dr. Kilkenny identified it as a reference in her report and the SNWA can explore on cross-examination of Dr. Kilkenny whether she used the second page that was excluded from the prior hearing record. If she did, the SNWA can move to exclude the exhibit at that time. For the present, the Motion in Limine is denied.

V.

SNWA Objection to Expert Witnesses Heilweil, Hurlow, Jones, Mayo, and Roundy and Expert Reports by Heilweil (Mill Ex. 10), Hurlow (Mill Ex. 11), Myers (CTGR Ex. 14), and Jones and Mayo (CPB Ex. 2011) [sic].

On September 1, 2011, the SNWA filed an Objection to Expert Witnesses Heilweil, Hurlow, Jones, Mayo, and Roundy and Expert Reports by Heilweil (Mill Ex. 10), Hurlow (Mill Ex. 11), Myers (CTGR Ex. 14), and Jones and Mayo (CPB Ex. 2011) [sic]. At this time, it is not requesting any specific remedy, but simply lodges its objection. It indicates that due to a Federal Express error, CPR Ex. 11 did not arrive until Monday, August 29, 2011, when it should have been received on Friday, August 26, 2011, which was the deadline for the exchange of rebuttal evidence. It asserts that it has inadequate time to review the document and argues that it is not rebuttal evidence.

In response, the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints (CPB) agrees that Federal Express misdirected its evidentiary package to San

Francisco instead of to SNWA in Las Vegas. Legal counsel for both SNWA and CPB discussed the matter on Friday and some portions of the evidentiary exchange were made by email on that day; however, this specific report was rejected by the SNWA server.

The State Engineer finds this is a relatively minor error that does not result in significant prejudice to the SNWA. It was deprived of one weekend of document review. The objection is overruled. The State Engineer accepts the CPB's argument that this document is rebuttal in nature and is based on its review of the SNWA's groundwater model. The objection as to the witnesses identified to testify in support of this exhibit is also overruled.

The Confederated Tribes of the Goshute Reservation (CTGR) responded to the SNWA's objection to its expert witness report (CTGR Ex. 14) and witness Dr. Thomas Myers. It indicates that after the initial evidentiary exchange, the U.S. Bureau of Land Management issued its Draft Environmental Impact Statement, which indicates a distribution of pumping different from those identified in the SNWA's evidence that required analysis of impacts of this potential change. The State Engineer finds this is rebuttal evidence and overrules the objection to the CTGR's witnesses and proposed exhibit.

Millard and Juab Counties responded to the SNWA's objection to its expert witness reports (Mill. Ex. 10 and 11) and witnesses Dr. Heilweil and Dr. Hurlow and provides convincing argument that its evidence is rebuttal in nature as it responds to the SNWA's assertions provided in its initial evidentiary exchange and the objection is overruled.

Respectfully Submitted,


JASON KING, P.E.
State Engineer

Dated this 19TH day of
SEPTEMBER, 2011.

SERVICE LIST

Interim Order on Pre-Hearing Motions
In the Matter of Protested Applications 53987 – 53992, 54003 - 54021
SOUTHERN NEVADA WATER AUTHORITY 1989 APPLICATIONS IN
SPRING VALLEY, CAVE VALLEY, DRY LAKE VALLEY AND DELAMAR VALLEY

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