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	)))))))))

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)

The Southern Nevada Water Authority ("SNWA") requests that the State Engineer issue a pre-hearing order excluding DDC Ex. 1150, DDC Ex. 1230, Spring Valley Ex. 3030, and Spring Valley Ex. 3064 (collectively, the "Non-Testifying Expert Reports") from evidence. This motion is made pursuant to the State Engineer's hearing regulations (LCB File No. R129-08 sec. 2 (eff. Feb. 11, 2009)) and the State Engineer's Third Amended Informational Statement (June 6, 2011).

The State Engineer should exclude the Non-Testifying Expert Reports because the authoring witnesses will not testify and thus will not be subject to cross-examination. These reports are hearsay prepared in anticipation of litigation and do not fall within a recognized hearsay exception. Admission of the Non-Testifying Expert Reports without witnesses to cross-examine deprives SNWA of its right to due process and violates the State Engineer's regulations. The reports are not subject to administrative notice. Furthermore, Spring Valley Ex. 3064 is not fit as an expert report on water rate structures because the author was not a qualified expert.

SNWA asks that the State Engineer issue an order excluding the Non-Testifying Expert Reports before the hearing rather than withhold a decision until the exhibits are offered into evidence. SNWA must present its witnesses first and is not guaranteed a rebuttal case. Without a pre-hearing ruling of exclusion, SNWA will be placed in the untenable position of either having its witnesses discuss the very exhibits SNWA is trying to exclude or risk losing the opportunity to rebut the exhibits at all should they come into evidence during the protestants' cases over SNWA's objection.

Though SNWA will have no opportunity to cross-examine the authors of the Non-Testifying Expert Reports at the upcoming hearing, SNWA recognizes that it cross-examined the witnesses on the Non-Testifying Expert Reports at prior hearings. Therefore, if the State Engineer decides not to exclude the Non-Testifying Expert Reports, SNWA asks that the State Engineer admit the transcript of SNWA's cross-examination of the report authors from the prior hearings.

I. STATEMENT OF FACTS.

A. The Administrative Hearing.

For the upcoming hearing, the State Engineer ordered the parties to exchange initial exhibit lists and witness lists no later than July 1, 2011. *In re Apps. 53987–53992 & 54003–54021*, Notice of Pre-Hearing Conf. & Hearing, at 4 (April 1, 2011). The State Engineer ordered that "[i]f a witness is not identified in the exchanges as testifying on direct as to a certain topic, the witness will not be allowed to testify to the un-identified topic in his or her direct testimony." *Id.* He also ordered 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 . . . ." *Id.*

On July 1, 2011, Protestant Great Basin Water Network ("GBWN") submitted its exhibit list. *In re Apps. 53987–53992 & 54003–54021*, GBWN Ex. 077 (July 1, 2011). GBWN's disclosure included the following exhibits:

- David Charlet, *Effects of Interbasin Water Transport on Ecosystems of Spring Valley, White Pine County, Nevada* (June 24, 2006), Spring Valley Ex. 3030 ("Charlet 2006")
- 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 ("Charlet 2007a")
- 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 ("Charlet 2007b")
- Taryn Hutchins-Cabibi, *Water Rate Structures in the Southwest: How Southwestern Cities Compare Using This Important Water Use Efficiency Tool* (July 2006), Spring Valley Ex. 3064 ("Hutchins-Cabibi 2006")

GBWN, however, did not disclose David Charlet or Taryn Hutchins-Cabibi as witnesses. *See In re Apps. 53987–53992 & 54003–54021*, GBWN Ex. 076 (July 1, 2011).

Charlet 2007a is listed as a reference in the expert report of GBWN's testifying expert Duncan Patten. *See* 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 ("Patten 2011"). Charlet 2006 is listed as a reference in the expert report of GBWN's testifying expert Maureen Kilkenny. *See* 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 ("Kilkenny 2011"). Charlet 2007b and Hutchins-Cabibi 2006 are not listed as references in the reports of GBWN's testifying experts.

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B. Charlet 2006.

David Charlet was a Professor of Biology at the College of Southern Nevada when he prepared the reports at issue. In Charlet 2006, Dr. Charlet describes the vegetation and wildlife in Spring Valley. He predicts that SNWA's proposed pumping project will negatively impact the Swamp Cedars in Spring Valley, which he believes may be a unique ecotype or even on their way to becoming a new species. Charlet 2006 at 9–12, 14, 18. He also predicts negative effects on Parish Phacelia and other vegetation. *Id.* at 18-21.

C. Charlet 2007a.

In Charlet 2007a, Dr. Charlet describes the vegetation and wildlife in Cave, Dry Lake, and Delamar Valleys ("DDC"). He notes that DDC have few springs and lack "ecologically valuable vegetation." Charlet 2007a at 1. However, he predicts negative impacts in DDC and the adjacent valleys of Pahroc, Pahranagat, and White River due to the proposed pumping in DDC. *Id.* at 11, 18, 21.

D. Charlet 2007b.

Charlet 2007b is a rebuttal report responding to SNWA's exhibits in the first DDC hearing. Dr. Charlet asserts that SNWA failed to anticipate effects in the systems in the valleys of origin and downgradient valleys, failed to consider indirect effects on species that do not directly depend on groundwater, and failed to mention mitigation measures. Charlet 2007b at 2–5.

E. Hutchins-Cabibi 2006.

Hutchins-Cabibi 2006 was prepared by Western Resource Advocates and signed by Ms. Hutchins-Cabibi. In the report, she opines that inclining block water rate structures are the most effective at communicating the value of water and that where steep inclining block rates are

used, water consumption per capita is low. Hutchins-Cabibi 2006 at 1, 5, 17, 18. She concludes that though most Nevada municipalities, including SNWA member agencies, use this structure, there is a lot of room for improvement. *Id.* at 2.

F. The prior Spring Valley hearing.

In the first Spring Valley hearing, the State Engineer required an evidentiary exchange and, as in the upcoming hearing, ordered that all testifying witnesses be indentified along with the topics of their testimony and that expert witnesses must provide signed expert reports. *In re Apps. 54003–54021*, Intermediate Order & Hearing Notice, at 11 (March 8, 2006).

On June 29, 2006, Western Environmental Law Center ("WELC") submitted its exhibit and witness lists. *In re Apps. 54003–54021*, WELC Witness & Ex. Lists (June 29, 2006). This list disclosed that David Alan Charlet would testify as an expert on the effects SNWA's proposed project would have on terrestrial ecology in Spring Valley. *Id.* at 1. The list also disclosed Charlet 2006 as Exhibit 3030. *Id.* at 2.

On August 3, 2006, WELC submitted its rebuttal exhibit and witness lists. *In re Apps. 54003–54021*, WELC Witness & Ex. Lists (Aug. 3, 2006). This list disclosed that Taryn Hutchins-Cabibi would testify as an expert and as a factual witness on water rates in southwestern cities. *Id.* at 1. The list also disclosed Hutchins-Cabibi 2006 as Exhibit 3064. *Id.* at 2.

Dr. Charlet testified at the Spring Valley hearing. *In re Apps. 54003–54021*, X Spring Valley Hearing 1753 (Sept. 22, 2006). WELC offered Charlet 2006 into evidence and it was admitted without objection. *Id.* at 1773:25–1774:5. SNWA cross-examined Dr. Charlet. *Id.* at 1775.

Ms. Hutchins-Cabibi also testified at the Spring Valley hearing. *In re Apps. 54003–54021*, IX Spring Valley Hearing 1584 (Sept. 21, 2006). The Hearing Officer did not qualify her as an expert witness, noting her lack of experience, but allowed her to testify as a factual witness. *Id.* at 1586:25–1587:11. The Hearing Officer admitted Hutchins-Cabibi 2006, noting that it was a factual report. *Id.* at 1587:10–13. SNWA cross-examined Ms. Hutchins-Cabibi. *Id.* at 1596. On cross-examination, she testified that she prepared Hutchins-Cabibi 2006 for the hearing. *Id.* at 1597:21–1598:3.

G. The prior DDC hearing.

In the first DDC hearing, the State Engineer required an evidentiary exchange and, as in the upcoming hearing, ordered that all testifying witnesses be indentified along with the topics of their testimony and that expert witnesses must provide signed expert reports. *In re Apps. 53987–53992*, Intermediate Order No. 1 & Hearing Notice, at 16 (Oct. 4, 2007).

On November 15, 2007, Advocates for the Community and Environment ("ACE") submitted its exhibit and witness lists. *In re* Apps. *53987–53992*, ACE Witness & Ex. Lists (Nov. 15, 2007). This list disclosed that Dr. Charlet would testify as an expert on the effects SNWA's proposed project would have on terrestrial ecology in DDC and surrounding valleys. *Id.* at 2. This list also disclosed Charlet 2007a. *Id.* at 6.

On December 20, 2007, ACE submitted its rebuttal exhibit and witness lists. *In re Apps. 53987–53992*, ACE Rebuttal Witness & Ex. Lists (Dec. 20, 2007). This list again disclosed that Dr. Charlet would testify and disclosed Charlet 2007b. *Id.* at 2, 4.[1]

[1] On November 15, 2007, the U.S. Department of the Interior, on behalf of its Bureau of Land Management, Bureau of Indian Affairs, National Park Service, and Fish and Wildlife Service, (collectively, the "DOI Protestants") submitted its exhibit and witness lists. *In re Apps. 53987–53992*, DOI Witness & Ex. Lists, Ex. 500 (Nov. 15, 2007). This list disclosed Charlet 2006 as Exhibit 519. *Id.* at 6. On January 7, 2008, SNWA and the DOI Protestants entered into a settlement agreement by which the DOI Protestants agreed to withdraw their protests and not present a case, witnesses, exhibits, or statements, nor assist any other party in presenting the same. DOI & SNWA Stip. 5, 7 (Jan. 7, 2008). Thus, Charlet 2006 was not offered or admitted at the DDC hearing.

Dr. Charlet testified at the DDC hearing. *In re Apps. 53987–53992*, VIII DDC Hearing 1612. (Feb. 13, 2008). ACE offered Charlet 2007a and Charlet 2007b into evidence and they were admitted without objection. 1613:22–1614:7. SNWA cross-examined Dr. Charlet. *Id.* at 1639.

H. The Pre-Hearing Conference.

On May 11, 2011, the State Engineer conducted a prehearing conference for the upcoming hearing. During the prehearing conference, the State Engineer denied the protestants' request to incorporate the record from the prior hearings into the administrative record for the current proceedings. *In re Apps. 53987–53992 & 54003–54021*, Amended Third Informational Statement, at 3 (June 6, 2011). To make an exhibit from the prior Spring Valley and DDC hearings part of the administrative record in the upcoming hearing, a party must identify the exhibit as part of an evidentiary exchange. Then the exhibit can be offered into evidence, but its admission will be subject to challenge by the opposing party. Accordingly, the admissibility of Non-Testifying Expert Reports is again ripe for consideration because the State Engineer has not taken administrative notice of the exhibits from the prior hearing and is requiring each prior exhibit to be offered into evidence and subject to the type of objection contained herein.

II. ARGUMENT.

A. Admission of the Non-Testifying Expert Reports without appearances by the authors to undergo cross-examination violates SNWA's right to due process.

Since water rights are property, the administration of water rights hearings is subject to the due process clauses of the Nevada and U.S. Constitutions. *See Mineral Cnty. v. State, Dept. of Conservation & Natural Resources*, 117 Nev. 235, 244, 20 P.3d 800, 806 (Nev. 2001) ("Nevada law treats water rights as real property."); *Engelmann v. Westergard*, 98 Nev. 348, 352, 647 P.2d 385, 388 (1982) (per curiam) (holding permittee's due process rights were not

violated when he did not receive notice of cancellation of his water permits, thereby implicitly recognizing that water rights are property subject to due process). The due process clause prohibits State deprivation of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1; *see also* Nev. Const. art. I § 8 cl. 5. When important decisions such as the approval or denial of water rights are being made, due process requires that parties in administrative hearings be given an opportunity to cross-examine adverse witnesses if it is reasonably necessary for a full and true disclosure of the evidence. *Solis v. Schweiker*, 719 F.2d 301, 302 (9th Cir. 1983); *see also Richardson v. Perales*, 402 U.S. 389, 402 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and examine adverse witnesses."). "[B]asic notions of fundamental fairness and due process" require the State Engineer to provide full and fair administrative hearings. *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264–65 (1979). The right to cross examination is of fundamental importance. *Bivens Constr. v. State Contractors' Bd.*, 107 Nev. 281, 283, 809 P.2d 1268, 1270 (1991) (reversing decision of administrative agency based on agency's limitation of cross examination).[2]

"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 participating parties or to the Office of the State Engineer." Nev. Admin. Code § 533.180, *as*

[2] *See also Eureka Cnty. v. State Eng'r*, Nos. CV-0904-122, CV-0904-123, & CV-0908-127, slip op. (Nev. 7th Judicial Dist. Ct. April 21, 2010), attached as **Exhibit A**. In *Eureka County*, the judicial district court reviewed the State Engineer's decision to approve several water permit applications filed by Kobeh Valley Ranch, LLC ("KVR") over Eureka County's protest. *See id.* at 3–4. The State Engineer had ordered pre-hearing disclosures. *Id.* at 5. As part of its disclosures, KVR disclosed a groundwater model. *Id.* After the disclosure period closed, the U.S. Bureau of Land Management modified the groundwater model. *Id.* KVR sought to introduce the original model and the modified model. *Id.* at 5–6. Eureka County objected because it was not prepared to conduct cross-examination on the undisclosed model. *Id.* at 6 & 8. The State Engineer's Hearing Officer ruled that the modified model would be part of the record, but that the State Engineer would not consider it. *Id.* at 8. Despite this, the State Engineer cited the modified model in his ruling. *Id.* at 8–9. On review, the district court noted that due process and fair play include the opportunity for meaningful cross-examination and that the lack of pre-hearing notice that the modified model would be used in the hearing and ruling violated Eureka County's right to due process. *Id.* at 10 & 14–15. The court vacated the ruling and remanded to the State Engineer for a new hearing. *Id.* at 16.

amended by LCB File No. R129-08 sec. 17 (eff. Feb. 11, 2009). Protest hearings before the State Engineer are not subject to the same formal procedural requirements as proceedings before courts of law. *See* Nev. Rev. Stat. § 533.365(6). However, in order to develop a record upon which the State Engineer may make a sound decision, due process requires the State Engineer provide SNWA a full and fair opportunity to confront witnesses and evidence offered against it.

SNWA is not asserting that it has the due process right to cross-examine the authors of *all* documents that the State Engineer may rely on in reaching his decision. Many of the documents the State Engineer is expected to rely on, such as peer-reviewed USGS publications and learned treatises, have special indicia of reliability. Cross-examination of their authors is not reasonably necessary to develop a full and true record. The four documents at issue, however, do not fall within this category. When experts offer opinions specifically developed to oppose SNWA's water right applications, the contents of reports containing the expert opinions are highly prejudicial and lack indicia of trustworthiness. The admission of such documents without the opportunity to cross-examine the authoring experts violates SNWA's right to due process.

While the rules of evidence do not technically apply in an administrative hearing before the State Engineer, Nev. Rev. Stat. § 533.365(6), the State Engineer may informally follow those rules at his discretion. However, since the State Engineer is required to comply with the Due Process Clause, to the extent the rules of evidence have a constitutional dimension, the State Engineer must comply with them. For this reason, the rules of evidence that govern hearsay represent a convenient standard against which to judge whether the admission of highly prejudicial expert reports that lack indicia of trustworthiness violates SNWA's due process right to reasonable cross-examination.

In a court of law, expert reports—whether accompanied by live testimony of the author or not—are hearsay. *See* Fed. R. Evid. 801(c); Nev. Rev. Stat. § 51.035. As hearsay, they are inadmissible absent special indicia of reliability that place them within a hearsay exemption or an exception to the hearsay rule. *See* Fed. R. Evid. 801(d), 802; Nev. Rev. Stat. §§ 51.035, 51.065. Hearsay is primarily inadmissible because the declarant is not subject to cross examination.[3] V Wigmore, Evidence § 1362 at 3–10 (Chadbourn rev. 1974).

Exemptions and exceptions to the hearsay rule are carved out when circumstances furnish other guaranties of trustworthiness and live testimony is impractical. Fed. R. Evid. 807; Nev. Rev. Stat §§ 51.075, 51.315; *see also* 29 Am. Jur. 2d Evidence § 668; V Wigmore, Evidence § 1420 at 251–52. When such an exception or exemption does not apply, it is a good indication that cross-examination is reasonably necessary to develop a full and true record. Further, when hearsay does not fall into a recognized exemption or exception to the hearsay rule, it lacks special indicia of reliability, and therefore cross-examination is necessary for a fair hearing and is required by due process.

Exceptions to the hearsay rule demonstrate how the rules of evidence protect against due process violations by limiting admission of testimony not subject to cross-examination to strictly circumscribed situations. For example, under the learned treatise exception to the hearsay rule,

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, a statement contained in a published treatise, periodical or pamphlet on a subject of history, medicine or other science or art, is not inadmissible under the hearsay rule *if such book is established as a reliable authority* by the testimony or admission of the witness or by other expert testimony or by judicial notice.

[3] Other reasons justifying exclusion of hearsay are that the declarant was not under oath and that the trier of fact cannot observe the declarant's demeanor. *See* 29 Am. Jur. 2d *Evidence* § 668 (2011); V Wigmore, Evidence § 1362 at 3–10 (Chadbourn rev. 1974).

Nev. Rev. Stat. § 51.255 (emphasis added). The justification for the learned treatise exception is that the trier of fact may need to be educated on sciences and established published materials have been vetted by the scientific community and are therefore reliable. *See* VI Wigmore, Evidence § 1690, at 2 (Chadbourn rev. 1976).

The rules of evidence also recognize that scientific and technical experts often rely on facts and data to develop their expert opinions that would normally be inadmissible in courts of law. An expert may base his opinion on facts or data "of a type reasonably relied upon by experts in forming opinions or inferences upon the subject" even if those facts or data are not admissible in evidence. Nev. Rev. Stat. § 50.285(2); *see* Fed. R. Evid. 703. Though the expert need not disclose the underlying facts and data supporting his expert opinion, he may be required to by the judge or by the adverse party during cross-examination. Fed. R. Evid. 705; Nev. Rev. Stat. § 50.305.

Under the Federal Rules of Evidence, inadmissible underlying facts may even be disclosed to the jury, but only if "the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703. In Nevada, admission is governed by the less-restrictive balancing test of Section 48.035, which states:

> 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
>
> 2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.
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> . . .

Nev. Rev. Stat. § 48.035; *see Everett v. Town of Bristol*, 674 A.2d 1275, 1277 (Vt. 1996) (holding that Vermont's version of Rule 703 "is not a 'backdoor' to circumvent the restrictions

of other rules of evidence" and testimony regarding evidence relied on by experts is still subject to the balancing test for probative value versus unfair prejudice). Thus, though the exact balancing test varies by court, inadmissible evidence relied on by an expert witness does not automatically become admissible. Otherwise, parties would be encouraged to smuggle inadmissible evidence into the record through expert reliance on it. *See* David H. Kaye et al., The New Wigmore, A Treatise on Evidence: Expert Evidence § 4.7, 4.8, at 170–71 (2d ed. 2010).

Courts have applied balancing tests like Nevada's to exclude evidence relied on by an expert witness that would be prejudicial. *See Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1270–71 (7th Cir. 1988) (affirming exclusion of testimony regarding prior accident under Rule 403 even though expert witness relied on it to form opinion). Courts have also applied the less-restrictive balancing test to hold that it is error to allow a testifying expert to testify that a non-testifying expert reached essentially the same conclusions. *See United States v. Tran Trong Cuong*, 18 F.3d 1132, 1143–44 (4th Cir. 1994) (holding it was error to allow testifying physician to testify that another physician made the same conclusions).

Although the Non-Testifying Expert Reports cover scientific and technical material, the learned treatises exception to the hearsay rule does not apply here. First, as determined in the Spring Valley hearing, Ms. Hutchins-Cabibi was not a qualified expert. Therefore, the opinions in her report are unreliable and would normally be inadmissible lay opinions. Second, though the Non-Testifying Expert Reports became public when they were submitted to the State Engineer as part of the previous hearings, they have not been published in the traditional sense and therefore are not "learned treatises." The reports have not gone through traditional peer review and editing processes. Nor have they been established as authoritative in their respective

fields. They have not been circulated to the community of experts in the fields and subject to review and criticism.

The Non-Testifying Expert Reports were prepared for the administrative hearing before the State Engineer. They are advocacy pieces that lack indicia of trustworthiness. *See State v. Tapia*, 108 Nev. 494, 497, 835 P.2d 22, 24 (1992) (per curiam) (holding documents prepared in anticipation of trial do not fall under regularly kept casino records exception to hearsay rule); *see also Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971, (9th Cir. 2009) (holding that a letter did not fall under the regularly kept business records exception to the hearsay rule because it was prepared in anticipation of litigation); *Paddock v. Dave Christensen Inc.*, 745 F.2d 1254, 1258–59 (9th Cir. 1984) (holding that audit reports did not fall under the regularly kept business records exception to the hearsay rule because they were prepared for the purposes of litigation and thus lacked indicia of trustworthiness); *People v. Lonsby*, 707 N.W.2d 610, 619 n.9 (Mich. Ct. App. 2005) ("Because, for the reasons explained above, the disputed documents are both adversarial and were prepared in anticipation of litigation, they do not qualify under the business or public records exceptions to the hearsay rule.").

As noted, Dr. Patten references Charlet 2007a in his report and Dr. Kilkenny references Charlet 2006 in her report. Both Dr. Patten and Dr. Kilkenny are set to testify at the upcoming hearing. However, the mere fact that other experts relied on a report does not render it admissible. To find otherwise would encourage parties to "smuggle" inadmissible evidence into State Engineer hearings by simply listing the evidence as a reference. When the dangers of prejudice outweigh the probative value, the report must be excluded. *See* Fed. R. Evid. 703; Nev. Rev. Stat. § 48.035.

In this case, Charlet 2007a and Charlet 2006 contain opinion and conclusion rather than mere recitations of fact. The only way for SNWA to determine the underlying basis for Dr. Charlet's opinion, and to ensure full and true disclosure of evidence, is through cross-examination. Though the other Non-Testifying Expert Reports are not referenced in GBWN's testifying experts' reports, they likewise contain opinions and conclusions that require an opportunity for SNWA to cross-examine the authors in order to explore the bases and scope of the opinions. SNWA will be greatly prejudiced if the Non-Testifying Expert Reports are admitted.

Charlet 2006 elevates the status of Swamp Cedars as well as the potential threat to Swamp Cedars and other vegetation due to groundwater pumping. Chalet 2007a presupposes an ecological connection between pumping in DDC and plant species in White River and Pahranagat Valleys and opines that pumping in DDC threatens these species. Charlet 2007b directly attacked SNWA's prediction of effects and proposed mitigation and monitoring plans. However, Charlet 2007b responded to SNWA's plans and the known scientific understanding of the valleys in 2007. It is not clear to what extent, if any, Dr. Charlet would hold the same opinions about the current plans that are now before the State Engineer. Further, Dr. Charlet's opinion was not informed by the analysis contained in the Draft Environmental Impact Statement for the pipeline alignment and could not have taken into account the significant monitoring and management activities that SNWA are agreed to through the Applicant Committed Measures that are included therein. SNWA needs to be able to cross-examine Dr. Charlet to determine whether he still holds the opinions in his reports and to what extent they apply to the current proposed SNWA development and monitoring, management, and mitigation plan.

Hutchins-Cabibi 2006, like Charlet 2007b, contains data and opinions that do not reflect the current circumstances before the State Engineer. Hutchins-Cabibi 2006 takes a negative view of SNWA's water conservation measures and is thus prejudicial. The prejudice is amplified by the fact that the conclusion is based on out-of-date data and that it was propounded by a non-expert.

On the other hand, the probative value of the Non-Testifying Expert Reports is small. GBWN has other expert witnesses who can provide their own opinions on environmental soundness and potential impacts, as well as on SNWA member agency water rate structures. Furthermore, the Non-Testifying Expert Reports are several years old and do not respond to the present circumstances surrounding SNWA's proposed pumping and monitoring, management and mitigation plans or the current state of scientific knowledge regarding the basins. The probative value of Hutchins-Cabibi 2006, given the fact that Ms. Hutchins-Cabibi was not an expert, is minimal, especially when it is based on outdated water rates. The dangers of prejudice substantially outweigh the probative value of the reports and they should therefore be excluded.

Furthermore, "[r]eports specifically prepared for purposes of litigation are not, by definition, 'of a type reasonably relied upon by experts in the particular field.'" *Tran Trong Cuong*, 18 F.3d at 1143. Charlet 2007a and Charlet 2006 were prepared for litigation and are not the type of evidence reasonably relied on by economists like Dr. Kilkenny and botanists like Dr. Patten. Likewise, the other Non-Testifying Expert Reports were prepared for litigation and are not reasonably relied on by experts in water rates or conservation. Therefore, the admission of the Non-Testifying Expert Reports as reports relied on by experts is inappropriate. GBWN should not be able to smuggle the Non-Testifying Expert Reports into the record without cross-examination through the backdoor of reliance by another expert.

In sum, the Non-Testifying Expert Reports are hearsay without any special guarantees of reliability. The opinions contained in the Non-Testifying Expert Reports were not made under oath and were made in anticipation of the adversarial hearings before the State Engineer. As noted, the Non-Testifying Expert Reports are essentially advocacy pieces. SNWA cannot receive a fair hearing without the opportunity to cross-examine Dr. Charlet and Ms. Hutchins-Cabibi in order to develop a full and true record. SNWA will not have this opportunity in the upcoming hearing. There is no provision in the State Engineer's regulations that would allow SNWA to request that the State Engineer issue a subpoena to obtain the appearance of authors and subject them to cross-examination. *See* Nev. Rev. Stat. § 533.454 (granting State Engineer the power to issue subpoenas, but not providing a procedure for hearing participants to request issuance of a subpoena); LCB File No. R129-08 sec. 29 (eff. Feb. 11, 2009) (repealing Section 533.270 of the Nevada Administrative Code, which formerly authorized parties to request that the State Engineer issue a subpoena). Due process therefore requires that the State Engineer exclude the Non-Testifying Expert Reports.

SNWA did have an opportunity to cross-examine Dr. Charlet and Ms. Hutchins-Cabibi in the prior hearings. The issues and circumstances of those prior hearings, however, are not identical to those now before the State Engineer. The State Engineer is now considering the DDC and Spring Valley applications together and the scientific understanding of the areas has changed since the prior hearings. In any case, if the State Engineer determines that the prior opportunity to cross-examine these witnesses was adequate and admits the Non-Testifying Expert Reports, SNWA requests that the State Engineer also admit the transcript of the past cross-examinations of Dr. Charlet and Ms. Hutchins-Cabibi in order to create a full and fair record.

B. The Non-Testifying Expert Reports are not subject to administrative notice.

The State Engineer's ability to take administrative notice must be narrowly construed because SNWA's due process rights entitle it to a full and fair opportunity to confront evidence presented against it at an administrative hearing. Administrative notice should not be used to admit documents that present due process concerns and otherwise do not qualify under traditional exceptions to the hearsay rule. In this instance, the State Engineer should narrowly construe the applicability of administrative notice to the Non-Testifying Expert Reports and rule that these documents are not properly subject to administrative notice. The relevant regulation states:

> 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 been generally accepted by the relevant scientific community; and
> (b) Are within the field of expertise of the Office of the State Engineer.

Nev. Admin. Code § 533.300, as amended by LCB File No. R129-08 sec. 26 (eff. Feb. 11, 2009).

The Non-Testifying Expert Reports do not qualify as any of the types of documents that are allowed to be admitted through administrative notice. First, these documents are not files or records *of* the State Engineer's Office because they do not officially record the State Engineer's activities. The protestants' simple act of submitting the documents to the State Engineer during a prior evidentiary exchange only placed the Non-Testifying Expert Reports *in* the files or records of the State Engineer. Unlike the official documents that record the State Engineer's activities—such as rulings, orders, applications, permits, and certificates issued by the State Engineer that are properly admitted through administrative notice—documents contained in the hearing files of

the State Engineer do not qualify for administrative notice simply because they are *in* the State Engineer's files. Otherwise, a party could submit any document to the State Engineer during an evidentiary exchange, and, even if the document is never admitted into evidence, it could be admitted through administrative notice. Further, even exhibits that were previously excluded from evidence in a prior hearing would then be admissible via administrative notice. Accordingly, the Non-Testifying Expert Reports cannot be admitted through administrative notice as records *of* the State Engineer simply because they were delivered to the State Engineer by protestants during a prior administrative hearing.

Second, The Non-Testifying Expert Reports do not qualify for administrative notice as public records because they were not prepared by other governmental agencies.

Third, the Non-Testifying Expert Reports do not qualify for administrative notice because they are not documents for which judicial notice could be taken by the courts of Nevada. Nevada courts can take judicial notice of facts that are:

> (a) Generally known within the territorial jurisdiction of the trial court; or
> (b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute.

Nev. Rev. Stat. § 47.130(2). These documents contain expert opinions that are clearly not facts generally known within Nevada. The asserted facts and opinions in these documents are also not capable of a ready determination of accuracy because they present one position on a disputed issue that is before the State Engineer.

Fourth, the Non-Testifying Expert Reports cannot qualify for the administrative notice exception because they do not solely contain technical and scientific data. Instead, these documents contain opinions regarding disputed issues.

Finally, the decision to take administrative notice is discretionary. The State Engineer is not required to take administrative notice. Even if the Non-Testifying Expert Reports were subject to administrative notice, the State Engineer should decline to take such notice for all the reasons mentioned above. The Non-Testifying Expert Reports are hearsay and lack any special indicia of reliability.

C. Admission of the Non-Testifying Expert Reports without appearances by the authors to affirm the reports and undergo cross-examination violates the State Engineer's regulations.

The State Engineer's regulations require exclusion of the Non-Testifying Expert Reports because there is no testimony from expert witnesses to support the reports. Pursuant to the State Engineer's regulations,

> 1. The State Engineer may require in advance of the hearing:
> (a) Identification of each exhibit that a party intends to use; and
> (b) Exchange of exhibits between certain designated parties.
>
> 2. If a party fails to comply with a prehearing order to identify or exchange exhibits, the State Engineer may refuse to accept the exhibit into evidence.

Nev. Admin. Code § 533.280, *as amended by* LCB File No. R129-08 sec. 24 (eff. Feb. 11, 2009). The State Engineer may refuse to accept evidence submitted in violation of his order even if no prejudice is shown. *See* LCB File No. R129-08 sec. 24 (eff. Feb. 11, 2009).

In the initial evidentiary exchange, the State Engineer ordered that "[i]f a witness is not identified in the exchanges as testifying on direct as to a certain topic, the witness will not be allowed to testify to the un-identified topic in his or her direct testimony." *In re Apps. 53987–53992 & 54003–54021*, Notice of Pre-Hearing Conf. & Hearing, at 4 (April 1, 2011). He also ordered 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*

. . . ." *Id.* (emphasis added). The intent of the State Engineer's order is to have experts pre-disclose their expert opinions and the basis for those opinions in a signed report and limit the experts' testimony to the contents of the reports. The order suggests that an expert witness and his expert report become part of the hearing record together. A party submitting an expert witness must submit an accompanying expert report and vice versa.

GBWN submitted the Non-Testifying Expert Reports without accompanying disclosures of the authoring witnesses. This violates the State Engineer's order regarding the identification and exchange of exhibits, and under the regulations SNWA is not required to make a showing of prejudice in order to request that these documents be excluded. Kilkenny 2011 references Charlet 2006 and Patten 2011 references Charlet 2007a. GBWN may intend to have Dr. Kilkenny and Dr. Patten provide testimony regarding these reports. However, Dr. Kilkenny is not qualified to testify regarding the ecological issues contained in Charlet 2006 and GBWN's experts may not act as mouthpieces for other non-testifying experts in order to circumvent the hearsay rules. Allowing GBWN's experts to testify regarding the Non-Testifying Expert Reports violates the State Engineer's order. Thus, the State Engineer should exclude the Non-Testifying Expert Reports pursuant to Section 533.280(2) of the Nevada Administrative Code.

Further, the State Engineer may require witnesses to submit written testimony before the hearing when many witnesses will appear or considerable technical testimony is necessary. Nev. Admin. Code § 533.250(1), *as amended by* LCB File No. R129-08 sec. 22 (eff. Feb. 11, 2009).

> If written testimony is submitted, the witness shall also appear at the hearing to:
>
> (a) Affirm that his written testimony is true and correct and that he personally prepared it or directed its preparation; and
> (b) Submit to cross-examination.

Id. at § 533.250(2). The regulation requires that if a witness does not appear to affirm his written testimony and submit to cross-examination, then he shall not submit his written testimony. *Id.*

Even though the regulation refers to "written testimony," it should be understood to also apply to written evidence in the form of expert reports. *See* Black's Law Dictionary 1476 (6th ed. 1990) ("In common parlance, 'testimony' and 'evidence' are synonymous."). Pursuant to the State Engineer's regulations and order, the Non-Testifying Expert Reports should be considered written testimony. The reports must be excluded because the authoring experts will not appear to affirm their written testimony and undergo cross-examination.

D. Hutchins-Cabibi 2006 is not fit as an expert report on water rate structures because it contains opinions of a non-expert.

The regulations of the State Engineer require all evidence to be relevant "to the subject matter of the proceeding." Nev. Admin. Code § 533.260(1), as amended by LCB File No. R129-08 sec. 13 (eff. Feb. 11, 2009). In addition, the regulations authorize the State Engineer to "exclude testimony that is irrelevant, incompetent or unduly repetitious" by requesting a party to cease a line of examination or narrative or by refusing to consider the testimony. *Id.* at § 533.260(2). Though this regulation only expressly covers "testimony," logically, the State Engineer has discretion to exclude documentary evidence that is incompetent or unduly repetitious as well. *See* Black's Law Dictionary 1476 (6th ed. 1990) ("In common parlance, 'testimony' and 'evidence' are synonymous."). "[E]vidence is competent if it is fit for the purpose for which it is offered." *United States v. De Lucia*, 256 F.2d 487, 491 (7th Cir. 1958).

Hutchins-Cabibi 2006 purports to be an expert report. Beyond merely describing water rate structures in various southwestern cities, it offers opinions regarding the effectiveness that different rate structures have in communicating the cost of water to users and regarding the relative efficacy of different cities' rate structures. However, Ms. Hutchins-Cabibi was found to lack the experience to be qualified as an expert. *In re Apps. 54003–54021*, IX Spring Valley Hearing 1586:25–1587:11 (Sept. 21, 2006); *see* Fed. R. Evid. 702 ("a witness *qualified as an*

expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise" (emphasis added)). In addition, Hutchins-Cabibi 2006 is several years old and does not take into account current water rate structures used by SNWA's member agencies and other cities throughout the southwest. Finally, without cross-examination, there will be no full opportunity to explore Ms. Hutchins-Cabibi's lack of qualifications and the stale nature of her data and conclusions. Hutchins-Cabibi 2006 is not fit for its purpose and should be excluded as incompetent. In the alternative, the State Engineer should redact all opinions contained within Hutchins-Cabibi 2006.

III. CONCLUSION.

For the foregoing reasons, SNWA asks that the State Engineer issue a pre-hearing order excluding the Non-Testifying Expert Reports from evidence, or in the alternative allowing the admission of the previous transcript of SNWA's cross examination of the non-testifying experts.

Respectfully submitted this 1 day of September, 2011.

By: _____ for

PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900 – Telephone
(775) 883-9900 – Facsimile

DANA R. WALSH, ESQ.
Nevada State Bar No. 10228
SOUTHERN NEVADA WATER AUTHORITY
1001 South Valley View Boulevard, MS # 485
Las Vegas, Nevada 89153
(702) 875-7080 – Telephone
(702) 862-7444 – Facsimile

ROBERT A. DOTSON, ESQ.
Nevada State Bar No. 5285
LAXALT & NOMURA, LTD.
9600 Gateway Drive
Reno, Nevada 89521
(775) 322-1170 – Telephone
(775) 322-1865 – Facsimile

STEVEN O. SIMS, ESQ.
Colorado State Bar No. 9961, *admitted pro hac vice*
BROWNSTEIN HYATT FARBER
SCHRECK, LLP
410 Seventeenth Street, Suite 2200
Denver, Colorado 80202
(303) 223-1100 – Telephone
(303) 223-1111 – Facsimile
Attorneys for SNWA

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September 2011, a true and correct copy of 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) was served on the following by Fed Ex overnight delivery:

Simeon Herskovits
Advocates for Community and Environment
94 Hwy 150, Suite 8
El Prado, New Mexico 87529

Laura Welcher, Director of Operations
Long Now Foundation
Fort Mason Center
Building A
San Francisco, California 94123

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

Mark Muir
Jeanne A. Evenden
U.S. Department of Agriculture
Forest Service
324 25th Street
Ogden, Utah 84401

Mark EchoHawk
V. Aaron Contreras
EchoHawk Law Office
505 Pershing Avenue, Suite 100
Pocatello, Idaho 83205

Jerald Anderson
EskDale Center
1100 Circle Drive
EskDale, Utah 84728

Severin A. Carlson
Kaempfer Crowell Renshaw Gronauer & Fiorentino
50 West Liberty Street, Suite 900
Reno, Nevada 89501

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

George Benesch
190 West Huffaker Lane, Suite 408
Reno, Nevada 89511-2092

Aaron Waite
The Cooper Castle Law Firm, LLC
5275 South Durango Drive
Las Vegas, Nevada 89113

DATED this 1st day of September, 2011.

Employee of TAGGART & TAGGART, LTD.

Exhibit "A"

Case No. CV0904-122
[consolidated with CV0904-123]

Dept. No.: 2

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

IN RE STATE ENGINEER RULING NO. 5966

TIM HALPIN; EUREKA PRODUCERS' COOPERATIVE, a Nevada Non-Profit; CEDAR RANCHES, LLC, a Nevada Limited Liability Company,

Petitioners,

vs.

TRACY E. TAYLOR, P.E., NEVADA STATE ENGINEER, NEVADA DIVISION OF WATER RESOURCES,

Respondent.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on April 21, 2010, the above-referenced Court entered a Findings of Fact, Conclusions of Law, and Order Granting Petition for Judicial Review, Vacating Ruling #5966, and Remanding Matter for Hearing. A copy of said Order is attached hereto and made a part hereof by reference. Pursuant to NRS § 239B.030, the undersigned does hereby affirm that this document does not contain the social security number of any person.

RESPECTFULLY SUBMITTED this 23rd day of April, 2010.

ROBERTSON & BENEVENTO
50 West Liberty Street, Suite 600
Reno, Nevada 89501
775-329-5600 (t)
775-348-8300 (f)

By: _____
Jarrad C. Miller, Esq.
Attorneys for Petitioners

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson & Benevento, 50 West Liberty Street, Ste. 600, Reno, Nevada 89501, and that on the 23rd day of April, 2010, I deposited in the U.S. Mail with first-class postage fully prepaid, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER,** addressed to the following:

Bryan L. Stockton, Esq.
Nevada Attorney General's Office
100 North Carson Street
Carson City, NV 89701

Karen Peterson, Esq.
Allison, MacKenzie, et al.
402 N. Division Street
Carson City, NV 89702

Theodore Beutel
Eureka County District Attorney
P.O. Box 190
Eureka, NV 89316

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson & Benevento, 50 West Liberty Street, Ste. 600, Reno, Nevada 89501, and that on the 23rd day of April, 2010, I caused to be hand-delivered, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER,** addressed to the following:

Ross E. de Lipkau, Esq.
Parsons, Behle & Latimer
50 West Liberty St., Suite 750
Reno, NV 89501

An Employee of Robertson & Benevento

NO.

FILED

APR 21 2010

Eureka County Clerk

BY Joanna Cantrell Deputy

Case No. CV-0904-122
CV-0904-123
CV-0908-127

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF EUREKA

****

EUREKA COUNTY, a political subdivision of the State of Nevada,

Petitioner,

v.

STATE ENGINEER, STATE OF NEVADA, Nevada Division of Water Resources,

Respondent,

-and-

KOBEH VALLEY RANCH LLC, a Nevada limited liability company,

Intervenor.

TIM HALPIN; EUREKA PRODUCERS' COOPERATIVE, a Nevada non-profit; CEDAR RANCHES, LLC, a Nevada limited liability company,

Petitioners,

v.

STATE ENGINEER, STATE OF NEVADA, Nevada Division of Water Resources,

Respondent,

-and-

KOBEH VALLEY RANCH LLC, a Nevada limited liability company,

Intervenor.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PETITION FOR JUDICIAL REVIEW, VACATING RULING #5966, AND REMANDING MATTER FOR NEW HEARING

EUREKA COUNTY, a political subdivision of the State of the State of Nevada,

Petitioner,

v.

STATE ENGINEER, STATE OF NEVADA and KOBEH VALLEY RANCH LLC,

Respondents.

THIS MATTER is presently pending before this Court on the Petition For Judicial Review filed by Eureka County on April 21, 2009, in Case No. CV 0904-122, the Petition For Judicial Review filed by Petitioners, Tim Halpin, Eureka Producers Cooperative and Cedar Ranches, LLC (hereafter referred to as "Diamond Valley Petitioners"), on April 24, 2009 in Case No. CV 0904-123, and the Petition For Judicial Review filed by Petitioner, Eureka County, on August 19, 2009 in Case No. CV 0908-127. On June 5, 2009, the Court entered its Order Directing the Consolidation of Case No. CV 0904-123 with Case No. CV 0904-122, and on September 18, 2009, the Court entered its Order Directing the Consolidation of Case No. CV 0908-127 with Case No. CV 0904-122 and Case No. 0904-123. The cases have been fully briefed and oral argument was heard on January 7, 2010. Petitioner Eureka County is represented by and through its counsel Karen Peterson, Esq. and Eureka County District Attorney Ted Beutel, Diamond Valley Petitioners are represented by Jarrad Miller, Esq., Respondent, Nevada State Engineer, State of Nevada Department of Conservation and Natural Resources (hereinafter referred to as "State Engineer") is represented by Deputy Attorney General Bryan Stockton, and Respondent in Intervention, Kobeh Valley Ranch, LLC (hereinafter referred to as "KVR") is represented by

Ross E. de Lipkau, Esq. and John Zimmerman, Esq.

The Court having reviewed the Record on Appeal ("ROA"), and having considered the argument of the parties, the applicable law and facts, and all pleadings and papers on file in this matter, hereby makes the following Findings of Facts, Conclusions of Law and Judgment.

FINDINGS OF FACT

During the period between January, 2004 and April, 2008, KVR filed a number of applications with the Nevada State Engineer seeking to appropriate new groundwater and/or to change the point of diversion, place of use and/or manner of use of existing water rights. The source of supply for the new ground water being sought is the Kobeh Valley Groundwater Basin located in Eureka County and Lander County, Nevada, and the Diamond Valley and Pine Valley Hydrographic Basins located in Eureka County, Nevada. The applications were filed in an effort to provide underground water to support a proposed molybdenum mine project to be located in Eureka County known as the Mount Hope Mine Project. The Applicant, KVR, is a subsidiary of General Moly, Inc. ("GMI"). GMI, acquired a leasehold interest in the Mount Hope Mine in 2005 and has since commenced the permitting process for the mine. Eureka County protested all applications to appropriate and all applications to change except Application to Appropriate 74587. The Diamond Valley Petitioners protested all of the applications except Application to Appropriate 74587.

On March 17, 2008, the State Engineer held a prehearing conference with all interested parties and on May 7, 2008 issued a Pre-Hearing Order. An Administrative Hearing on the applications was held before the State Engineer commencing on October 13, 2008 and continuing through October 18, 2008. The State Engineer issued Ruling No.

5966 (the "Ruling") on March 26, 2009, granting therein a majority of the applications subject to certain terms and conditions.

In his Ruling, the State Engineer found that KVR had provided sufficient proof of need to import water to the Mount Hope Mine Project from Kobeh Valley for a total combined duty of 11,300 afa. The State Engineer also found and allowed KVR to pump 354 afa from Diamond Valley to the Project, provided that any water pumped from Diamond Valley would be limited to existing rights. The State Engineer also found that KVR had not justified a need to import water from Pine Valley to the Project as proposed under Applications 76364 and 76365 and denied those applications. As a condition of the issuance of the permits allowed in the Ruling, the State Engineer ordered that prior to pumping any water allowed in the Ruling, KVR was required to prepare and submit to the State Engineer for approval, a hydrologic monitoring, management and mitigation plan. The State Engineer also found that KVR had provided substantial evidence on all other statutory requirements justifying granting the application.

In their respective Petitions and supporting briefs and materials, Eureka County and Diamond Valley Petitioners recite a number of assignments of error that they argue require this Court to vacate the Ruling and remand the matter back to the State Engineer for a new hearing. Chief among the assignments of error listed by Eureka County is that Eureka County's due process rights were violated by the State Engineer's admission and consideration of evidence not previously provided to Eureka County.[1] Eureka County and Diamond Valley Petitioners also argue that in a number of areas, the Ruling is not

[1]See Eureka County's Opening Brief.

supported by substantial evidence and is therefore arbitrary and capricious.[2] Respondent State Engineer and Respondent in Intervention KVR counter that the State Engineer did not violate Petitioners due process rights by improperly considering evidence not previously disclosed to Petitioners, and further, that the findings of the State Engineer are supported by substantial evidence. The Court will review the issues presented accordingly.

ISSUES PRESENTED

A. Whether Petitioners' Due Process Rights Were Violated By The State Engineer's Admission and Consideration Of Evidence Not Previously Disclosed To Petitioners.

Pursuant to Nevada law,[3] the State Engineer issued a pre-hearing order on May 7, 2008 directing the parties to complete an initial exchange of witness lists and exhibits no later than June 16, 2008. The order further directed the parties to exchange like information the parties intended to use in their rebuttal cases. The second information exchange deadline was August 15, 2008. The ROA indicates that the parties complied with the discovery order and exchanged information in preparation of the evidentiary hearing. As part of the information exchange, KVR provided Petitioners a copy of the Regional Groundwater Model that KVR intended to introduce at the hearing in support of its applications.

During the October, 2008 administrative (evidentiary) hearing before the State Engineer, Petitioners and the State Engineer learned from KVR for the first time that on October 3, 2008, KVR had submitted to the Bureau of Land Management ("BLM") as part of the National Environmental Policy Act ("NEPA") process, a new or updated version of its

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[2] Id.

[3] See NRS 533.365; NAC 533.280.

Regional Groundwater Model. As part of its evidentiary presentation, KVR sought to introduce its original Regional Groundwater Model, Exhibit 116, and have its experts testify as well to the differences between Exhibit 116 and the new or updated version of the Model submitted to the BLM. As KVR had not produced copies of the BLM version of the Model to Petitioners prior to or during the hearing, Petitioners expressed their concern that they would be unable to adequately cross-examine KVR's witnesses on the BLM version or have time to have Petitioners' experts review the new version to determine reliability. Notwithstanding Petitioners' concern about not having had access to and time to review the BLM version prior to the hearing, the parties appeared to have reached an agreement on how the matter would be handled in the remainder of the hearing.[4]

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[4]See Hr'g Tr., Vol. II, pp. 213-218 where the following exchange occurred:

> HEARING OFFICER WILSON: Let's be on the record. We left off with the last witness, Steve Walker, with Eureka County. I was told we might have some preliminary matters to take care of before we continue on?
> MS. PETERSON: Mr. De Lipkau, did you want me to address that or did you want to - -
> MR. De LIPKAU: I'd like you to go first and then we'll respond.
> MS. PETERSON: To our agreement that we came to last night? That's what I'm going to address.
> MR. De LIPKAU: Right. Please do.
> MS. PETERSON: Thank you. The parties, well, mainly Eureka county and the applicant had some discussions last night after the hearing and there is a model that the applicant had submitted to the BLM on October 3rd.
> The protestants have not had an opportunity to review that model. I believe the applicant would like to have that information, that model submitted to the State Engineer's Office for consideration in this proceeding.
> So, We talked about a procedure that would allow the hearing to go forward because everybody is here and we can give you all the information that we have, but also that the technical experts would be able to get together after the hearing when that model is publicly available and they could discuss it and try to come to some consensus on the model.
> I believe it's our understanding that that discussion could include also the State Engineer's technical expert and I think possibly the BLM's technical expert.
> Then if they can come to some consensus, that would be presented to the State Engineer and if there was not complete consensus, then all the parties would be given and opportunity to present written information to the State Engineer to consider as to what changes they think need to be made to the model and why.
> Then the State Engineer obviously would be able to convene any other meeting or anything else he might need to make his decision. But the ultimate goal would be to try to have a decision out as originally planned like mid February.
> I don't know, is that clear or do you need further information?

MR. FELLING: Well, when were you going to present this model; today?
MS. PETERSON: No. The October 3rd model?
MR. FELLING: Yes.
MS. PETERSON: It's not publically available. The BLM has it, it's part of the EIS Process.
MR. FELLING: Okay. So when would it be available to, for instance, our office?
MR. DeLIPAKAU: I can't answer that question. It depends on when the BLM would release it. It could be as short as two weeks, it could be a matter of months.
What I'm saying if I can have a moment is that we want the hearing to proceed on the evidence submitted to the State Engineer.
The new model, as it's been called, has additional information as required by the BLM under its EIS authority. It does not involve this office.
The conclusion of the model, as submitted to the BLM, is virtually identical to the model before the State Engineer. As Ms. Peterson stated, when this report does in fact come out, again it's virtually identical in effect, we'll be happy to sit down via our computer people and go through it.
We will invite the State Engineer to be there also, as well as perhaps the BLM. What we're checking is that the State Engineer proceed with the hearing based upon the evidence previously submitted by the parties.
MR. FELLING: When you present testimony on the model, will your witness be able to answer questions pertaining to what is the difference between the models?
MR. De LIPKAU: Yes.
MR. FELLING: Okay.
MR. De LIPKAU: And again, the answer is virtually indistinguishable.
MR. FELLING: I'd rather hear it from the person presenting the model. If they were the same, they wouldn't both be necessary.
MR. De LIPKAU: Well, that's our point.
MS. PETERSON: I just think that we need to be very careful about that because we obviously haven't had a chance to review that and concur with that information. We haven't seen it. It's my understanding that some of the changes that we proposed in our testimony have been made to that version of the model.
MR. De LIPKAU: One more comment. We certainly don't want the ruling, this ruling held up by any delay in the BLM in releasing the amended computer report.
HEARING OFFICER WILSON: Mr. Benesch, go ahead.
MR. BENESCH: I guess I'm not understanding. They don't want anything held up, they can't tell you when you're going to get it, they can't tell you how long it's going to take to review it, they can sort of tell you there's some changes in it, but they're turning this into a moving target.
Let's just all go home and come back when they've done their work and reconvene and continue on with the hearing. That seems to make as much sense as anything.
MR. FELLING: Can we talk a few moments?
MR. BENESCH: This is highly unusual, to say the least.
HEARING OFFICER WILSON: Mr. Miller, anything to add?
MR. MILLER: No.
HEARING OFFICER WILSON: Thank you. We're going to talk about this for a few minutes. We'll be off the record and you're welcome to take a break for probably at least ten minutes.
(A short recess was taken.)
HEARING OFFICER WILSON: Let's be back on the record.
MR. KING: We're going to go ahead and go through with the hearing as planned.
Having this new model does present a little bit of a dilemma, but again, we'll go through with the hearing, maybe through questioning, cross-examination and then we can get a better feel for what the differences might be between the two models.
By the end of the hearing we'll decide whether or not we're going to need to keep the hearing open for some amount of time. We'll make that decision through the course of this hearing.

Consistent with the agreement between counsel that testimony regarding the differences between the original Regional Groundwater Model and the October 3, 2008 BLM version would be allowed during the hearing, KVR's witness Dwight Smith offered testimony regarding the differences between the original Model, Exhibit 116, and the BLM version.[5] At the conclusion of Dwight Smith's testimony, counsel for Eureka County again reiterated her position as to the testimony regarding Exhibit 116 and the BLM version of the Model.[6] After a great deal of further discussion on this issue by counsel for Petitioners, counsel for KVR, and the Hearing Officer, the Hearing Officer overruled Petitioners' motion to strike the testimony regarding the BLM version of the Model, stating that the testimony and slides regarding the BLM version would remain a part of the record but would not be considered by the State Engineer in the final ruling on the applications.[7] The Hearing Officer clearly stated that only Exhibit 116 would be considered.[8]

Notwithstanding the State Engineer's decision that the testimony and slides concerning the BLM version of the Model would remain a part of the record but not be considered in the determination of KVR's applications, the BLM version of the Model was noted several times in the Ruling. In the Ruling, the State Engineer stated: "[t]he method

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[5] Hr'g Tr. Vol. V, pp. 931-962.

[6] Hr'g Tr., Vol. V, p. 953.

[7] Id. at p. 962.

[8] *Id.*

the Applicant used to simulate the net effect of mine pumpage was modified for the BLM and not presented at the hearing as discussed above, but the results of the revised simulation would not significantly change the estimated drawdown due to mine pumping."[9] The State Engineer again referenced the BLM version of the Model in the Ruling stating:

> a better method of simulating the net effect of the mine-related pumping on the hydrologic system would have been to simulate the region with and without the mine pumping, and then to compare the results to compute the actual effect of the mine pumping. This was completed for the BLM in the EIS process, but was not completed in time for the hearing. The results relating to inflow to Diamond Valley from Kobeh Valley from this BLM simulation were addressed in the testimony of Smith. He testifies that these will be a net reduction in subsurface flow from Kobeh Bally to Diamond Valley at 62 to 130 afa after 44 years of mine pumping.

See ROA Vol. V, p.33.

Eureka County argues that the State Engineer also referenced the BLM version of the Model in the "Impacts to Existing Rights – Eureka County" section of the Ruling found at ROA Vol. V, pp. 34-35 by referencing model adjustments and meaning without specifically saying adjustments made in the BLM version of the Model. The Court believes Eureka County's contention is correct.

In reviewing the law applicable to these facts, the Court notes that the Nevada Supreme Court has specifically stated that the State Engineer must comply with the basic notions of fair play and due process in issuing any Ruling.[10] Indeed, the Nevada Supreme Court stated in *Revert*:

> The applicable standard of review of the decisions of the State

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[9]ROA, Vol. V, p.34.

[10]*Revert vs. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979).

> Engineer, limited to an inquiry as to substantial evidence, presupposes the fullness and fairness of the administrative proceedings: all interested parties must have had a "full opportunity to be heard," *see* NRS 533.450(2); the State Engineer must clearly resolve all the crucial issues presented, *see Nolan v. State Dep't of Commerce*, 86 Nev. 428, 470 P.2d 124 (1970)(on rehearing); the decision maker must prepare findings in sufficient detail to permit judicial review, *id.*; *Wright v. State Insurance Commissioner*, 449 P.2d 419 (Or. 1969); *see also* NRS 233B.125. When these procedures grounded in basic notions of fairness and due process, are not followed, and the resulting administrative decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion, this court will not hesitate to intervene. *State es rel. Johns v. Gragson*, 89 Nev. 478, 515 P.2d 65 (1973).

95 Nev. 782, 787 (1979).

The Nevada Supreme Court has recognized that due process and fair play include meaningful cross-examination.[11] Fairness and due process in administrative hearings also accepts the notion that "the procedural rights of parties before an administrative body cannot be made to suffer for reasons of convenience or expediency."[12]

The United States Supreme Court has held that "the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."[13] "The action of ... an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing."[14] As has been recognized by other states, a full and fair opportunity to be heard, which is essential to due process,

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[11] *Bivens Const. Vs. State Contractors Bd.*, 107 Nev. 281, 283, 809 P.2d 1268, 1270 (1991). (The Court recognizes that the State Engineer is exempt from the Nevada Administrative Procedures Act).

[12] *Checker Inc. Vs. Public Service Commission*, 84 Nev. 623, 634, 446 P.2d 981, 988 (1968).

[13] *Bowman Transp. Inc.v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288, fn.4 (1974).

[14] *English v. City of Long Beach*, 217 P.2d 22, 24 (Cal. 1950).

requires that all evidence utilized to support a decision be disclosed to the parties so that they may have an opportunity to cross-examine the witnesses with regard to such evidence.[15] "A decision based on evidence not in the record is a procedure not to be condoned."[16]

Respondent KVR argues that no due process violation occurred in this matter for several reasons: (1) that because Eureka County is a participating party in the NEPA process, it should have had knowledge of and information regarding the update to the Regional Groundwater Model at the time of the evidentiary hearing; (2) that if any due process error has occurred in this matter, Eureka County invited such error because it requested the testimony and slide presentation of the BLM version of the Model to be given at the hearing; (3) that no due process violation has occurred because Eureka County, as a participant in the NEPA process, has post-hearing access to all updates of the Model submitted to the BLM; and (4) that even if all testimony and evidence regarding the Regional Groundwater Model and its updated version were withdrawn from the evidence, substantial evidence remains in the record to support the State Engineer's findings.

Regarding KVR's allegation that no due process violation has occurred because Eureka County was a participant in the NEPA process and therefore had access to the October, 2008 Model update, the Court finds that such situation, if accurately stated, did not relieve KVR of its duty to disclose such evidence to Eureka County and Diamond Valley Petitioners prior to the hearing. Although the deadline for exchanging discovery

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[15] *Cook County Federal Sav. & Loan A'ssn v. Griffin*, 391N.E.2d 473, 477 Ill. App. 1979); *In re Amalgamated Food Handlers, Local 653-A*, 70 N.W.2d 267, 272 (Minn. 1955); *English*, 217 P.2d at 24 (Cal. 1950).

[16] *Cook County Federal Sav. & Loan A'ssn*, 391 N.E.2d at 477 (Ill. App. 1979).

information had passed, the Court believes that both sides had a continuing obligation to disclose discovery information. Simple fairness would dictate such a procedure. Even if Eureka County could have availed itself of the updated Model information prior to the hearing, it was not on notice that such evidence would be presented at the hearing. The Court therefore rejects KVR's argument to the contrary.

The second point KVR raises is that Eureka County cannot now complain of a due process error when it invited error itself by requesting that KVR be required to explain the differences during the hearing between the original Region Groundwater Model (Exhibit 116) and the October, 2008 updated BLM version of the Model.[17] KVR suggests that the State Engineer was complicit in the admission of such evidence and that KVR did all that it could to ensure that the BLM version of the Model would not be considered as evidence. KVR argues that at no time did it attempt to rely on the BLM version as evidence supporting its case.[18] KVR contends the only purpose of having its witness discuss the BLM version was to describe the differences between the original and updated version of the Model so that the State Engineer could determine whether to continue the hearing to allow Petitioners additional time to review the updated Model.[19]

In Nevada, the doctrine of invited error applies to both civil and criminal cases and basically states the principle that a party will not be allowed to complain on appeal of errors which that party itself induced or provoked the hearing officer or opposing party to

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[17]See Intervenor's Answering Brief, pp. 18-19.

[18]Id. at p. 19.

[19]*Id.*

commit.[20] The ROA in this case reflects that early on during the evidentiary hearing, Petitioners learned from KVR that it had submitted an updated version of its Regional Groundwater Model to the BLM as part of the NEPA process in early October, 2008. Although not entirely clear, the ROA indicates that Petitioners and KVR had discussions off the record on how such evidence would be treated if presented by KVR given the fact that the updated version had not been disclosed to Petitioners and Petitioners were unprepared to meet such evidence. As previously discussed, the parties appeared to have reached an agreement on how such evidence would conditionally be presented to the hearing officer.[21] After KVR's witness testified to the differences between the two versions of the Model and presented his power point program, Eureka County moved to strike the evidence regarding the BLM version of the Model. Upon inquiry by the hearing officer, KVR requested the hearing officer only to consider Exhibit 116 in support of its applications and not information presented on the BLM version of the Model. The hearing officer stated that the disputed evidence would remain on the record but would not be considered in the final decision on the applications. Unfortunately and contrary to the hearing officer's assertion, reference to the disputed BLM version of the Model appeared at least three times in the Ruling.

From these facts the Court cannot find that Petitioners invited error by insisting or requesting the BLM version of the Model be presented in the hearing. In fact, the record indicates that Petitioners were placed in a tough spot when they learned of the BLM version early on in the hearing and in an effort to accommodate completing the hearing as

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[20] *Clark Co. School District vs. Richardson Construction Inc.*, 123 Nev. 382, 388, 168 P.3d 87 (2007); *Pearson vs. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994).

[21] See Footnote 4, supra.

scheduled, reached an agreement with KVR on how the evidence would conditionally be presented by KVR. By so doing, Petitioners committed no wrong. Accordingly, the Court finds that Petitioners did not invite error in the proceedings.

KVR next argues that Eureka County's claim that it had not reviewed the BLM version of the Model prior to the hearing is baseless because as a participant in the NEPA process, Eureka County continues to have access to the contents and conclusions contained in the BLM version. While KVR's assertion may be true, the fact remains that Eureka County and Diamond Valley Petitioners had not been placed on notice prior to the hearing through discovery exchanges or otherwise that evidence concerning the BLM version would be offered at the hearing by KVR. Because Petitioners were not prepared to meet such evidence, they were denied a full and fair opportunity to examine and/or challenge such evidence. The ability of Petitioners to access such information post-hearing does nothing to cure the deficiency.

Finally, KVR argues that evidence offered at the hearing regarding the groundwater models was merely a part of the evidence it offered to show the possible hydrologic effect of groundwater pumping on nearby surface or groundwater sources. KVR contends that if all evidence concerning the groundwater models including Exhibit 116 and any evidence regarding the BLM version were withdrawn from the evidence, other independent evidence standing alone would support the State Engineer's finding that the development of 11,300 afa of groundwater in Kobeh Valley would not adversely affect existing rights in Diamond Valley.[22]

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[22]Without specifically stating or conceding a due process violation, KVR appears to be requesting the Court to conduct a harmless error analysis in this matter. The Court is unaware of any authority, and KVR has cited no authority that allows a court in Nevada to conduct a harmless error analysis of a due process violation in

Assuming arguendo, that KVR's contention is true, the problem remains that the State Engineer cited the evidence concerning the BLM version of the Model in the Ruling. The Court is unaware how those references can now be undone.

The Court has considered as well whether the references to the BLM version of the Model in the Ruling were merely passing references without reliance thereon, or whether the references provided some of the basis for the findings stated in the Ruling. After a careful and deliberative review of the Ruling, the Court believes that the State Engineer considered such evidence to support the findings in the Ruling. As such, Petitioners' due process rights were violated as they were denied a meaningful opportunity to challenge such evidence.

CONCLUSIONS OF LAW

Based upon the findings hereinabove set forth, the Court hereby concludes:

1. The right to cross-examine witnesses in an adjudicatory proceeding is one of fundamental importance and its denial in this case amounted to a violation of due process.

2. That Petitioners' due process rights were violated because evidence of the BLM version of the Model was not disclosed to Petitioners prior to the hearing nor were Petitioners put on notice that such evidence would be offered at the hearing, thus denying Petitioners a full and fair opportunity to meet or challenge such evidence.

3. That Petitioners' due process rights to a full and fair hearing were violated when the State Engineer considered and relied upon evidence (the BLM version of the Model) in the Ruling when the State Engineer stated such evidence would not be so

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a civil case.

considered.

Good cause appearing;

IT IS HEREBY ORDERED that Petitioners' respective Petitions For Judicial Review are **HEREBY GRANTED**.

IT IS FURTHER ORDERED that State Engineer Ruling 5966 is **VACATED** and this matter is **REMANDED** to the State Engineer for a new hearing.[23]

DATED this 20th day of April, 2010.

Dan L. Papez

DISTRICT JUDGE

DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

[23]The Court's disposition of this matter makes it unnecessary to address the remaining issues on appeal.