

**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)

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**SOUTHERN NEVADA WATER AUTHORITY'S OBJECTION TO EXPERT WITNESSES
HEILWEIL, HURLLOW, JONES, MAYO, AND ROUNDY AND EXPERT REPORTS BY
HEILWEIL (MILL EX. 10), HURLLOW (MILL EX. 11), MYERS (CTGR EX. 14), AND JONES
AND MAYO (CPB EX. 2011)**

The Southern Nevada Water Authority ("SNWA") objects to Millard and Juab Counties Exhibits 10 and 11 (MILL Ex. 10, MILL Ex. 11), Corporation of the Presiding Bishop Exhibit 11 (CPB Ex. 11), and Confederated Tribes of the Goshute Reservation (CTGR Ex. 14) as beyond the scope of rebuttal. SNWA also objects to the designation of the corresponding expert witnesses Victor Heilweil, Hugh Hurlow, Norman Jones, Alan Mayo, and Bruce Roundy. This objection 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).

On August 26, 2011, SNWA received MILL Ex. 10 and 11 and CTGR Ex. 14. However, due to a Federal Express error, SNWA did not receive CPB Ex. 11 until August 29, 2011, three days after the deadline for the rebuttal exchange. There has been inadequate time to complete a comprehensive review of these exhibits. However, SNWA and its counsel have been able to conduct a cursory review and quickly note that they include content that is not a rebuttal of SNWA evidence. To the extent the information and evidence to be presented through these

reports is not rebuttal information, then the exhibits and the related witnesses should have been disclosed on July 1, 2011 with the initial evidence exchange. The late disclosure has not afforded an opportunity for a detailed review by counsel or the corresponding experts designated by SNWA. Nevertheless, SNWA wishes to comply with the State Engineer's September 2, 2011 deadline for pre-hearing motions and, through this motion, preserve its right to object to these exhibits as beyond the scope of rebuttal and preserve its right to request appropriate remedies to be determined at the hearing or a later date.

I. STATEMENT OF FACTS.

On April 1, 2011, the State Engineer, through his Chief Hearing Officer, issued an order which set forth the rules and procedure for the exchange of evidence and witness lists to be utilized for this hearing. *In re Apps. 53987-53992 & 54003-54021*, Notice of Pre-Hearing Conf. & Hearing, at page 4 (April 1, 2011). The State Engineer ordered the parties to conduct an initial evidence exchange by July 1, 2011. *Id.* 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 unidentified topic in his or her direct testimony.” *Id.* He also ordered that “[i]f 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.” *Id.*

The State Engineer also ordered the parties to conduct a second evidentiary exchange by August 26, 2011 as “may be necessary in response to the other parties’ first evidentiary

exchange.” *Id.* This second exchange was “meant only to provide evidence that becomes necessary in rebuttal to the original exchange.” *Id.*

In the State Engineer’s Notice of Pre-Hearing Conference and Hearing, the State Engineer provided a list of issues that would be considered at the hearing: (1) justification of need to import water; (2) if the water is necessary and reasonably required for the beneficial use; (3) the applicant’s good faith intent to put the water to beneficial use with reasonable diligence; (4) the applicant’s financial ability to construct the works needed to put the water to beneficial use; (5) the conservation plan in the basin of use; (6) whether there is unappropriated water in the basins of origin; (7) impacts to existing rights and protectable interests in basins of origin; (8) whether the proposed use of water threatens to prove detrimental to the public interest; (9) whether the proposed action is environmentally sound; and (10) whether the proposed action is an appropriate long-term use of water which will not unduly limit the future growth of the basins of origin. *Id.* at 2. The State Engineer also invited the parties to suggest other issues. *Id.* At the pre-hearing conference, the parties discussed other potential issues. *In re Apps. 53987–53992 & 54003–54021*, Transcript of Pre-Hearing Conf., at 31:6–36:3 & 52:8–56:11 (May 11, 2011). Thus, even at the time of the Pre-Hearing Conference in May, all parties were aware of the issues that would need to be addressed by their evidence.

However, the following witnesses and exhibits were untimely disclosed because they do not contain rebuttal evidence and should have been disclosed on July 1, 2011:

- Expert Witness Victor Heilweil
- Expert Witness Hugh Hurlow
- Expert Witness Norman Jones
- Expert Witness Alan Mayo
- Expert Witness Bruce Roundy
- Dr. Heilweil’s expert report, MILL Ex. 10 (“Heilweil 2011”)
- Dr. Hurlow’s expert report, MILL Ex. 11 (“Hurlow 2011”)

- Thomas Myers's report on impacts to Tippet and Deep Creek Valley, CTGR Ex. 14 ("Myers 2011")
- Aquaveo, LLC, *Impacts of Proposed SNWA Wells on CPB Water Rights*, CPB Ex. 11 ("Aquaveo 2011")

On August 25, 2011, Protestants Millard County and Juab County submitted their second lists of potential witnesses and exhibits. *In re Apps. 53987-53992 & 54003-54021*, Millard & Juab 2d Witness & Exhibit List, MILL Ex. 9 (August 25, 2011). The witness list disclosed that Victor Heilweil and Hugh Hurlow will testify as expert witnesses on the topic of the hydrological impact of SNWA's applications and monitoring and management. *Id.* at 1-2. The exhibit list disclosed Heilweil 2011 and Hurlow 2011. *Id.* at 3.

The Confederated Tribes of the Goshute Reservation also submitted a second list of exhibits. *In re Apps. 53987-53992 & 54003-54021*, CTGR 2d Exhibit List (August 25, 2011). The list disclosed Myers 2011, a report by Thomas Myers on impacts to Tippet and Deep Creek Valley. *Id.* at 1.

The Corporation of the Presiding Bishop of the Church of Latter Day Saints ("CPB") also submitted a second list of witness. *In re Apps. 53987-53992 & 54003-54021*, CPB 2d Witness List, CPB Ex. 5 (August 25, 2011). Because of a Federal Express error, SNWA did not receive Aquaveo 2011 until August 29, 2011, three days after the deadline and only two days before pre-hearing motions are to be served. The CPB witness list disclosed that Norman Jones will testify on the impacts of SNWA proposed wells on CPB's water rights, Alan Mayo will testify on the hydrologic effects of SNWA's proposed wells, and Bruce Roundy will testify on the effects of SNWA's proposed pumping on vegetation. *Id.* at 1-2. CPB's exhibit list disclosed Aquaveo 2011, discussing the impacts of SNWA's proposed wells on CPB existing rights. *In re Apps. 53987-53992 & 54003-54021*, CPB 2d Witness List, CPB Ex. 4, at 2 (August 25, 2011). Dr. Jones and Dr. Mayo co-authored Aquaveo 2011. *In re Apps. 53987-53992 & 54003-54021*,

CPB 2d Witness List, CPB Ex. 5, at 1–2 (August 25, 2011). CPB did not provide an expert report for Dr. Roundy.¹

SNWA has not had time to carefully review Aquaveo 2011, Heilweil 2011, Hurlow 2011, and Myers 2011 (collectively, the “Expert Reports”). However, many of the opinions contained in the Expert Reports do not appear to rebut SNWA’s submissions. Instead, they offer new expert opinions bearing on obvious issues that should have been disclosed in the initial evidentiary exchange.

II. ARGUMENT.

Millard County, Juab County, CPB, and the Confederated Tribes of the Goshute Reservation (collectively, the “Protestants”) have improperly designated Dr. Heilweil, Dr. Hurlow, Dr. Jones, Dr. Mayo, and Dr. Roundy as witnesses and submitted their Expert Reports as rebuttal when they are really providing independent expert opinions that should have been disclosed in the initial evidentiary exchange. This is in violation of the State Engineer’s order and regulations, as well as general principles of fair litigation procedure.

The State Engineer is authorized to issue pre-hearing orders regarding the exchange of evidence. Nev. Admin. Code § 533.280(1), *as amended by* LCB File No. R129-08 sec. 24 (eff. Feb. 11, 2009). “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.” *Id.* at § 533.280(2), *as amended by* LCB File No. R129-08 sec. 24 (eff. Feb. 11, 2009); *see also Hansen v. Universal Health Servs. of Nev., Inc.*, 115 Nev. 24, 28, 974 P.2d 1158, 1160–61 (1999) (affirming trial court’s exclusion of expert witness that was not timely disclosed). The State Engineer may

¹ SNWA notes that dependent upon the actual scope of Dr. Roundy’s testimony as an expert, the failure to provide a written expert report and the information that was to accompany such a report is a separate basis for objection to his testimony and by this reference SNWA seeks to preserve its rights to object to Dr. Roundy’s testimony. While CPB states that Dr. Roundy may testify regarding CPB Ex. 7, he is not listed as an author of that report and the report does not contain the signature of any expert.

refuse to accept evidence submitted in violation of his order even if no prejudice to the other parties is shown. *See* LCB File No. R129-08 sec. 24 (eff. Feb. 11, 2009).

The State Engineer clearly ordered that the secondary evidentiary exchange “is meant only to provide evidence that becomes necessary in rebuttal to the original exchange.” *In re Apps. 53987–53992 & 54003–54021*, Notice of Pre-Hearing Conf. & Hearing, at 4 (April 1, 2011). Pursuant to the State Engineer’s regulations, “[i]f the State Engineer authorizes rebuttal evidence, the party may offer in its rebuttal only evidence that directly explains, counteracts or disproves facts offered into evidence by other parties of record.” LCB File No. R129-08 sec. 6 (eff. Feb. 11, 2009).

The State Engineer’s order mirrors language from Rule 16.1 of the Nevada Rule of Civil Procedure. Rule 16.1 governs expert witnesses and requires any witness designated to provide expert testimony to submit a signed written report containing a complete statement of his opinions, the basis for the opinions and any and all data or information considered by the witness in forming those opinions. Nev. R. Civ. P. 16.1(a)(2)(B) (“ The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions”).

Rule 16.1 provides for deadlines to disclose expert witnesses and their reports. *Id.* at 16.1(a)(2)(C). Initial disclosures must be made by a certain deadline. *Id.* After that, expert disclosures may only be made if the expert is “intended solely to contradict or rebut evidence on the same subject matter identified by another party.” *Id.* The courts may exclude any evidence not disclosed pursuant to Rule 16.1. *Id.* at 16.1(e)(3) & 37(c)(1). Generally, the party failing to make a required expert disclosure may not use the expert at the trial or hearing “unless such

failure is harmless.” *Id.* at 37(c)(1); *see also Hansen*, 115 Nev. at 28, 974 P.2d at 1161; *Andrews v. Harley Davidson, Inc.*, 106 Nev. 533, 539, 796 P.2d 1092, 1096 (1990).²

“The test for determining what constitutes rebuttal evidence is whether the evidence offered tends to contradict *new* matters raised by the adverse party.” *Id.* In *Andrews*, the Supreme Court of Nevada affirmed the trial court’s denial of a plaintiff’s request to have a rebuttal witness testify as to the position of a gas tank because the plaintiff had already introduced evidence of the tank’s position in his case-in-chief. *Id.* Since the proposed rebuttal testimony concerned matters already raised, the court held it was “not proper rebuttal testimony.” *Id.*

In this case, the State Engineer issued an order for a pre-hearing evidence exchange in order to provide each party with the opportunity to review the other parties’ experts’ opinions and to prepare to effectively respond to them. The evidence exchange procedure implemented by the State Engineer minimizes surprise and ambush in order to give each party a fair hearing. This procedure is also designed to allow the State Engineer to have fair and balanced information upon which to rely in making his determination. Thus, compliance with the deadlines and procedures set forth is critical to the administration of justice before the State Engineer. This exchange procedure is particularly important considering the lack of procedures for the parties to request discovery from each other and the absence of any redundant system or procedure to ensure that evidence is disclosed in a timely and comprehensive manner.

Furthermore, during the May 2011 pre-hearing conference the State Engineer identified the issues for the parties and invited them to suggest any others. Thus, all parties were well aware of the issues for the hearing and were able to prepare all their expert opinions prior to the

² The Federal Rules of Civil Procedure provide for similar procedures and sanctions. *See* Fed. R. Civ. P. 26(a)(2) & 37(c)(1).

first evidentiary exchange. The Expert Reports provide opinions on obvious issues that Protestants have been well aware of since at least March 2011, when they filed their protests to SNWA's applications. For example, Myers 2011 alleges impacts from SNWA pumping to Tippet and Deep Creek Valleys, where CTGR's reservation is located. The allegation of impacts is not new information; indeed, it is a fundamental basis for CTGR to file a protest. Aquaveo 2011 alleges impacts to CPB's existing water rights in Spring Valley, which again is a threshold issue of which CPB has been aware since at least March 2011. Given the similar discussion regarding CPB's existing water rights in CPB Ex. 1 disclosed on July 1, 2011, a large portion of the analysis in Aquaveo 2011 is also cumulative and repetitive. Millard and Juab Counties' expert reports (Heilweil 2011 and Hurlow 2011) allege impacts to Snake Valley from SNWA pumping in Spring Valley. Again, this is a fundamental threshold issue that has long been a contention of Protestants and should therefore have been addressed in the Utah Counties' initial exchange.

By withholding the Expert Reports from disclosure during the initial evidence exchange and then submitting them as "rebuttal" reports in the second evidentiary exchange, the Protestants have directly violated the State Engineer's Order. This is more than a technical violation. Indeed, the judicial process is compromised. By withholding expert opinions from the initial evidentiary exchange, SNWA is prevented from responding to those expert opinions in its own written rebuttal reports. SNWA is not guaranteed a rebuttal case during the hearing itself and may have no opportunity to address the new issues raised by the Expert Reports. Moreover, SNWA is deprived of almost two months of time to review the expert opinions and prepare responses. These untimely expert opinions threaten to deprive SNWA of the ability to meaningfully cross-examine the opposing expert witnesses. *See Solis v. Schweiker*, 719 F.2d

301, 302 (9th Cir. 1983) (holding due process provides for the right to reasonable cross-examination in administrative hearings); *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980) (noting that advance notice of an expert opinion is essential to cross-examination).

At this time SNWA is making no specific remedy request. Indeed, due to the late disclosure and limited time SNWA is not in a position to discuss the appropriate and possible remedies. However, it is acknowledged that the possible remedies for the late disclosure of these Expert Reports range from, at a minimum, allowing SNWA additional time to submit written rebuttal reports to providing SNWA with a day for a rebuttal case during the last week of the hearings. The appropriate remedy should be determined at a later time after SNWA's experts and counsel have had time to read the untimely submitted material, gauge the prejudice to the process and decide whether written rebuttal reports would be beneficial or some other remedy would be more appropriate. Therefore, and to be clear, at this point, SNWA simply lodges its objection and reserves its rights.

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III. CONCLUSION.

For the foregoing reasons, SNWA objects to the Expert Reports and the New Witnesses.

Respectfully submitted this 1 day of September, 2011.

By:



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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 OBJECTION TO EXPERT WITNESSES HEILWEIL, HURLLOW, JONES, MAYO, AND ROUNDY AND EXPERT REPORTS BY HEILWEIL (MILL EX. 10), HURLLOW (MILL EX. 11), MYERS (CTGR EX. 14), AND JONES AND MAYO (CPB EX. 2011), was served on the following by Fed Ex overnight deliver:

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