

**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 THE 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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STATE ENGINEERS OFFICE

**MOTON REGARDING DISCOVERY AND MANDATORY  
PRESENTATIONS OF PROPOSED WRITTEN TESTIMONY**

Cleveland Ranch moves the State Engineer to issue a pre-hearing order (1) authorizing the interested parties to undertake prehearing discovery as provided by NAC 533.160 (“Prehearing discovery”); and (2) directing the presentation of direct testimony by written submittal as authorized by NAC 533.250 (“Hearings: Written testimony”).

**I. INTRODUCTION**

The District Court’s remand obviously anticipates the State Engineer’s receipt of considerable scientific and technical evidence in forms of written studies and projections and oral testimony. Ruling #6164 notes that in the 2011 proceedings, SNWA and the Protestants “submitted thousands of pages of information, evidence and testimony for consideration during a record long six weeks of administrative hearing.” *Id.*, p. 29 (“This area has been under study for decades and voluminous published scientific reports were made available as evidence for review.”). Now, as with the 2011 proceedings, it is anticipated that the parties will be allowed to file written opening arguments and closing briefs and to present and examine witnesses at the hearing. As explained further below, Cleveland Ranch believes that the anticipated hearings

before the State Engineer can be made more “just, speedy and economical,” as is the goal of NAC Chapter 533, if the parties are allowed to proceed with prehearing discovery as authorized by NAC 533.160 and are required to present written testimony as authorized by NAC 533.250.

## II. THE NEVADA ADMINISTRATIVE CODE AUTHORIZES THE STATE ENGINEER TO APPROVE PRE-HEARING DISCOVERY AND THE PRESENTATION OF PREPARED OR WRITTEN TESTIMONY IN PROTEST HEARINGS

According to NAC 533.010(1)(a) and (b), Chapter 533 governs “the practice and procedure of hearings before the State Engineer on protests against applications to appropriate water” and is “intended to be liberally construed to secure the just, speedy and economical determination of all issues presented to the State Engineer.” Months have been consumed in prior record-setting hearings on SNWA’s pending Applications.<sup>1</sup>

NAC 533.160 authorizes pre-hearing discovery upon order of the State Engineer, stating:

*Prehearing discovery* is not a matter of right, but *may be conducted* in compliance with a stipulation between the parties or *upon order of the State Engineer*. [Emphasis added.]

A limited number of permitted depositions of some experts (perhaps subject to prior approval by the Hearing Officer) would allow the parties to shorten cross-examination at the formal hearing.

NAC Chapter 533 also authorizes the State Engineer to allow the parties’ use of “prepared” or “written testimony.”<sup>2</sup> NAC 533.170 authorizes the State Engineer, upon 15 days’

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<sup>1</sup> Ruling #6164 observes that hearings on SNWA’s Spring Valley Applications lasted from September 11-29, 2006, and after remand from the Supreme Court in July, 2010, occupied a record-setting six weeks between September 26 and November 18, 2011. Ruling #6164, at pp. 9-10.

<sup>2</sup> *Black’s Law Dictionary* (10<sup>th</sup> ed. 2014), defines “written testimony” as follows:

1. Testimony given out of court by deposition or affidavit. • The recorded writing, signed by the witness, is considered testimony. 2. In some administrative agencies and courts, direct narrative testimony that is reduced to writing, to which the witness swears at a hearing or trial before cross-examination takes place in the traditional way.

notice, to hold a prehearing conference, and, at subsection (f), to arrange for the exchange of (1) Proposed exhibits; (2) *Prepared testimony of experts*; (3) Lists of witnesses; (4) Lists of exhibits; or (5) Other materials the State Engineer deems to be relevant and necessary to understand the issues....” [Emphasis added.]

According to NAC 533.250, the State Engineer may approve the use of written testimony, with the witness also available and subject to cross-examination at the hearing in the State Engineer’s discretion, as follows:

1. When the particular facts of an application and protest indicate that many witnesses will appear at the hearing or that a considerable amount of technical testimony will be necessary, the State Engineer may require parties and witnesses to submit their testimony in written form before the hearing date.
2. If written testimony is submitted, the witness shall also appear at the hearing to:
  - (a) Affirm that his or her written testimony is true and correct and that he or she personally prepared it or directed its preparation; and
  - (b) Submit to cross examination.
3. Written testimony will not be read into the record, but must be entered into evidence as an exhibit. The State Engineer may, however, require a witness who has submitted written testimony to summarize it at the hearing.

The State Engineer’s approval of prehearing discovery and the parties’ required use of prepared or written testimony in these proceedings will ensure that the parties are afforded as “just, speedy and economical” a determination of the issues presented in these proceedings as possible. The use of such procedural devices can result in resolution of challenges to expert testimony before the hearing so that they did not occupy hearing time. And, review of an expert’s prepared testimony in advance of the hearing will promote more meaningful examinations and cross-examinations at the hearing, thereby saving time for all involved and resulting in the best possible examinations of the expert and other witnesses.

Many Nevada statutes and portions of the Nevada Administrative Code approve the use of written or prepared testimony as probative evidence, *e.g.*:

- **NRS 6.132**, authorizing petitioners consisting of five registered voters to commence a proceeding to summon a grand jury by filing with the Clerk of the District Court. If the Clerk finds the petition insufficient, the committee may request judicial review, and the court may, in its discretion “allow the introduction of oral or written testimony.”
- **NRS 171.198**, authorizing a magistrate presiding over a preliminary hearing to consider a prisoner’s “[t]estimony reduced to writing and authenticated.”
- **NRS 278.02053**, as to cooperative agreements among public agencies, any interested person may give oral or “written testimony” to the appropriate governing body.
- **NRS 463.424**, as to licensing horse racing and sporting events, the Board’s hearing panel may allow any disseminator or user to present oral or “written testimony.”
- **NRS 609.501**, in approving contracts with minors, the court may hear all competent, material and relevant evidence, including, without limitation, “oral and written testimony and reports....”
- **NAC 455.355**, in administrative hearings for excavations and demolitions, a witness may present “prepared testimony” if he or she is otherwise made available for cross-examination at the hearing.
- **NAC 638.315**, in hearings before the Nevada State Board of Veterinary Medical Examiners, a notarized statement that prepared testimony of an expert is true and submitted under penalty of perjury is received as if given in person is admissible.
- **NAC 703.27136**, requiring prepared testimony in support of proposed rate changes be presented to Nevada’s PUC.
- **NAC 703.5276**, as to information determined to be confidential, directing that prepared testimony will not be disclosed except as specified in a protective agreement or protective order issued by the PUC or presiding officer.
- **NAC 703.710**, authorizing in PUC proceedings the use of prepared testimony, supported by a signed affirmation by the witness, and, if circumstances require, read into the record by the witness upon direct examination.
- **NAC 703.712**, in hearing before the PUC, a motion to strike prepared testimony must be filed within 3 days of the hearing.

- **NAC 704.580363**, in hearing before the PUC, each party shall file with the presiding officer its prepared testimony and exhibits.
- **NAC 706.3951**, preserving confidentiality of portions of prepared testimony determined by the Nevada Transportation Authority or its presiding officer to contain confidential information.
- **NAC 706.3991**, authorizing, at the discretion of the presiding officer, a party to present a copy of prepared testimony and accompanying exhibits in a hearing before the Nevada Transportation Authority.
- **NAC 706.948**, in hearings before the Taxicab Authority, authorizing the presiding officer to permit a witness to read into the record any prepared testimony, and should the presiding officer determine it would result in “a substantial saving in time” and the parties agree, the prepared testimony may be copied into the record, provided copies are served on all parties and the Authority at least five days before the hearing.
- **Nev. Gaming Reg. 2A.010**, defining “prepared testimony” as including the board’s analysis of any issue raised by a petition for a declaratory ruling without taking a position in opposition to or in support of the petition.

As set forth below, courts have also approved the use of written or prepared testimony to alleviate delay in proceedings.

### **III. COURTS APPROVE THE USE OF WRITTEN OR PREPARED TESTIMONY TO SHORTEN TRIALS**

Courts have considered the use of written or prepared testimony to be not only acceptable, but to be encouraged in shortening the time for trials. For example, in *In re Hall*, 2011 WL 3300942 (9<sup>th</sup> Cir. BAP 2011), the Ninth Circuit Bankruptcy Court of Appeal held that the Nevada Bankruptcy Court had acted properly in approving a settlement based on written testimony presented before the hearing where the parties were apprised that the matter would be handled in that manner. The Ninth Circuit BAP explained that “‘The use of written testimony is an accepted and encouraged technique for shortening bench trials.’” *Id.*, at \*4, quoting *Adair v. Sunwest Bank (In re Adair)*, 965 F.2d 777, 779 (9<sup>th</sup> Cir. 1992) (quoting *Phonetele, Inc. v. AT & T*, 889 F.2d 224, 232 (9<sup>th</sup> Cir. 1989)). In *Kuntz v. Sea Eagle Diving Adventures Corp.*, 199 F.R.D.

655 (D. Haw. 2001), the federal District Court refused to deviate from its Declarations Procedure requiring that direct testimony in nonjury trials before her be submitted by affidavit or declaration, explaining that when it came to expert witnesses, the procedure was particularly appropriate in saving time and narrowing the issues:

Physicians are usually deposed before trial, so the attorneys can draft the physician’s declarations based on the deposition testimony and medical records. The time required of a physician to read and revise a declaration drafted by counsel should take less of the physician’s time than a meeting or telephone conversation to prepare for trial testimony. Even when a physician declines to meet with counsel to prepare for testifying at trial, the physician saves time by reviewing a declaration, as the trial time for the physician is considerably shortened. And, of course, the physician is compensated for his or her time in any event.

199 F.R.D. at 670; *see also, id.*, at p. 667 (“The accuracy of each witness statement is assured by the declarant’s review and signing of the statement on penalty of perjury. The Declarations Procedure also permits oral cross-examination and oral redirect examination, during which the court can evaluate the declarant’s appearance, demeanor, and credibility.”).

**IV. CONCLUSION**

The matters remaining for the State Engineer’s determination will be the subject of the highly-technical testimony and presentation of experts in various fields. The testimony will rely on various demonstrative exhibits and presentations. Cleveland Ranch believes that the use of discovery and of written or prepared testimony of the witnesses involved will not only shorten the time required for the presentations, but allow better preparation to present a given position

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and to challenge it. This process will benefit the State Engineer by more cogent, direct and succinct presentations by SNWA and by the Protestants.

Respectfully submitted this 14<sup>th</sup> day of October, 2016.

KAEMPFER CROWELL

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **MOTION REGARDING DISCOVERY AND MANDATORY PRESENTATIONS OF PROPOSED WRITTEN TESTIMONY** was served on the following counsel of record by depositing the same for mailing, at Carson City, Nevada, with the United States Postal Service, postage prepaid, addressed to the following:

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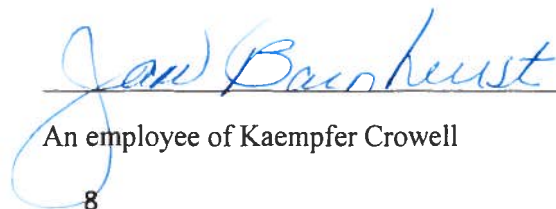
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