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IN THE MATTER OF APPLICATIONS 53987)	
THROUGH 53992, INCLUSIVE, AND)	SNWA'S OPPOSITION TO MOTION
APPLICATIONS 54003 THROUGH 54021,)	REGARDING DISCOVERY AND
INCLUSIVE, FILED TO APPROPRIATE THE)	MANDATORY PRESENTATION OF
UNDERGROUND WATERS OF CAVE)	PROPOSED WITNESS TESTIMONY
VALLEY, DELAMAR VALLEY, DRY LAKE)	
VALLEY, AND SPRING VALLEY)	
(HYDROGRAPHIC BASINS 180, 181, 182)	
AND 184), LINCOLN COUNTY AND WHITE)	
PINE COUNTY, NEVADA.)	

The Southern Nevada Water Authority ("SNWA") submits this Opposition and requests that the State Engineer deny the Corporation for the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints a/k/a Cleveland Ranch's ("CPB") Motion Regarding Discovery and Mandatory Presentation[s] of Proposed Witness Testimony.

I. SNWA OPPOSES THE USE OF WRITTEN PRE-PREPARED TESTIMONY

During the September 14, 2016, Status Conference ("Status Conference"), CPB requested that all direct testimony presented at the upcoming hearing be submitted in writing as pre-prepared testimony, rather than as live testimony during the hearing.¹ CPB further requested live cross-examination of the witnesses during the hearing.² While CPB presents its motion for written pre-prepared testimony as a way to promote "just, speedy and economical" determination of issues during the hearing, at the Status Conference CPB acknowledged that this method may not save the State Engineer time or resources in the long run.³

NAC 533.160 states "[p]rehearing 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." SNWA does

¹ Status Conference Tr. at 53:10-25 (Sept. 14, 2016).
² *Id.* at 53:19-20.
³ *Id.* at 54:9-11.

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1 not stipulate to CPB's request for prehearing discovery or to the use of written or prepared testimony
2 of any witness in this matter.

3 The State Engineer historically holds live testimony for multiple reasons. This method: (1)
4 allows the State Engineer to surmise and clarify issues immediately via live questioning, (2)
5 streamlines the State Engineer's ability to understand and probe all the evidence the witness relied
6 upon, (3) allows the parties to immediately understand the evidence and reports, (4) provides an
7 extended opportunity for the State Engineer to gauge witness credibility, and (5) cultivates public
8 understanding of the proceedings as the public benefits from the witnesses' live verbal explanation of
9 complex technical written reports.

10 During the administrative hearings, the State Engineer and his staff are present to hear all
11 testimony. The State Engineer's historic method of holding a hearing in front of he and his staff
12 allows the State Engineer to immediately investigate his concerns, or his staff's concerns. This
13 allows all the experts on his staff to consider live testimony and weigh the expertise of witnesses in a
14 fully integrated and interactive forum. Furthermore, live testimony allows the State Engineer to
15 clarify any issues immediately and efficiently. Thus, the effect of the State Engineer's ability to hear
16 live testimony is a streamlined process for probing the evidence immediately, with all parties present.
17 The entire panel of staff, collected for their individual expertise, is also able to immediately weigh
18 and consider the testimony presented before them.

19 Experts are already required to submit a written expert report to the State Engineer before the
20 hearing.⁴ Delivering live testimony allows the expert to efficiently summarize their report and
21 explore areas that the panel may question immediately. SNWA submits that the addition of written
22 testimony will add little that is not already available from the written expert reports.

23 The public also benefits from live testimony in ways that would be lost, at least in part, by
24 submission of written testimony. The public may not have engineers or attorneys to summarize or

25 ⁴ NAC 625.613, *see also* Fed. R. Civ. P. 801(d), Fed. R. Civ. P. 802, Fed. R. Civ. P. 703, Fed. R. Civ. P. 705 NRS
26 533.365(6), NRS 51.255, NRS 50.825(2), NRS 51.035, NRS 51.065, *See* David H. Kaye et al, *The New Wigmore, A*
27 *Treatise on Evidence: Expert Evidence* § 4.7,4.&, at 170-71 (2d ed. 2010), *See United States v. Tran Trang Cuong*, 18 F.3d
28 1132, 1143-44 (4th Cir. 1994) (holding it was error to allow testifying physician to testify that another physician made the
same conclusions).

1 explain the written testimony generated by the experts. However, live testimony presents the expert's
2 portion of the case in a manner that is not impeded with written terms of art or technical applications
3 without explanation or definitions. This live presentation format requires the expert to explain his or
4 her theories in a manner that will better be understood by all parties and the public.

5 **II. SNWA OPPOSES THE REQUEST FOR PRE-HEARING DISCOVERY**

6 To the extent CPB's Motion requests other forms of pre-hearing discovery, SNWA objects.
7 Although it is unclear precisely the discovery CPB contemplates, SNWA also objects to this request
8 to the extent it seeks discovery beyond that which has been historically utilized by the State Engineer.
9 Contrary to CPB's contention at the status conference, discovery would severely increase the cost of
10 this proceeding. Further, depositions are costly procedures with the parties paying the costs of the
11 court reporter, attorney time, and then the time for attorneys to review the transcripts after the fact.
12 These challenges are compounded by the number of parties in this matter. By the time the hearing
13 occurs, costs for all parties may substantially increase due to discovery activities.

14 The State Engineer is not equipped to manage discovery disputes in the manner of the district
15 court. Furthermore, there are no protocols set forth in the Nevada Administrative Code ("NAC") for
16 discovery disputes. Logically, disputes would loosely follow the Nevada Rules of Civil Procedure
17 ("NRCP"), except that there would be no discovery commissioner or district court judge available to
18 handle disputes arising during depositions related to this proceeding.⁵ The State Engineer and/or the
19 Hearing Officer would instead likely be called upon to manage any pre-hearing discovery disputes.

20 Discovery pursuant to the NRCP may create a more costly and litigious process. For
21 example, written discovery requires responses within thirty (30) days.⁶ However, if one party feels
22 that the discovery requests were not properly responded to, the aggrieved party may submit a motion
23 to compel. Typically, a motion to compel is then submitted to a master of the court or the discovery
24 commissioner who enters a recommendation.⁷ The parties then have the opportunity to object to the
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26 ⁵ Understanding, the State Engineer is not bound by the formal rules of evidence.

27 ⁶ NRCP 33, 34, 36.

28 ⁷ NRCP 37.

1 master's recommendation.⁸ If an objection to the master's recommendation is lodged with the court,
2 briefing requirements and procedure are necessary.⁹ Once briefing is completed and submitted, the
3 judge or judicial officer then hears the objection and makes her ruling.¹⁰ This ruling may be
4 appealable through an interlocutory appeal.¹¹ Further, while the State Engineer has hearing officers,
5 they are not accustomed to reviewing and ruling on all these motions while administrating their
6 normal duties on behalf of the State of Nevada. Even if the State Engineer truncates the discovery
7 process, this does not circumvent the litigious, burdensome and tedious application of discovery to an
8 administrative hearing.

9 Notably, the Ninth Circuit reviewed a similar issue in the context of the Alpine Decree, when
10 certain parties requested the water master to allow discovery in *United States v. Clifford Matley Family*
11 *Trust*.¹² In *Clifford*, the court upheld the water master's decision to not conduct discovery.¹³ The
12 water master analyzed whether formal discovery was required and held it was unnecessary for the
13 *Alpine Decree* issue.¹⁴ The Ninth Circuit held that this decision by the water master was proper,
14 consistent with due process, and should not be disturbed.¹⁵

15 CPB relies on a string of other authority that allows pre-prepared written testimony in other
16 contexts, but provides no analysis to show how (or if) those processes are similar to the State
17 Engineer's. For example, CPB cites to NRS 6.132 as authority for blanket admission of written
18 testimony. This is incorrect. NRS 6.132 only allows written testimony if a petition to summon a grand
19 jury is determined insufficient by the clerk of the court.¹⁶ Although statutory authorities allow for
20 submittal of written testimony, this is a rare and discretionary form that is hardly used by the agencies
21 cited.

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24 ⁸ NRCP 52.

⁹ *Id.*

¹⁰ NRCP 16.1.

¹¹ NRAP 3D.

¹² *United States v. Clifford Matley Family Trust*, 354 F.3d 1154, 1161-2 (9th Cir. 2004), NAC 533.160, NAC 533.250.

¹³ *Clifford*, 354 F.3d at 1162.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ NRS 6.132(8)(b).

1 Finally, CPB relies on *Kuntz v. Sea Eagle Diving Adventures Corp.* to support its position
2 requesting written testimony.¹⁷ In *Kuntz*, the Plaintiff requested to alter the court's historic practice
3 and requested the presentation of live testimony.¹⁸ *Kuntz* fails to support CPB's position on two
4 grounds. First, the Hawai'i court cited by CPB had a historic practice of taking testimony by affidavit
5 or declaration, in direct opposition of the State Engineer's practice. Second, the court denied the
6 plaintiff's request in *Kuntz* due to the plaintiff's failure to explain why the court should vary from its
7 historic practice.¹⁹ Not only is that the opposite of the operations of the State Engineer, the motion in
8 *Kuntz* was denied. Although CPB argues that written testimony would promote the goals of NAC
9 533.010(1)(a), CPB has alternatively admitted that it isn't sure written testimony will save time or
10 resources in the long run.²⁰ CPB's assertion that written testimony and discovery will assist in judicial
11 economy does not have merit. Similar to *Kuntz*, CPB has failed to meet its burden to demonstrate why
12 the State Engineer should vary from his historic practice.

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26 ¹⁷ Motion at 5-6.

27 ¹⁸ *Kuntz v. Sea Eagle Diving Adventures Corp.*, 199 F.R.D. 665, 666 (D. Haw. 2001)

28 ¹⁹ *Id.*

²⁰ Status Conference Tr. at 53:10-25.

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1 **III. CONCLUSION**

2 For these reasons, the CPB's Motion should be denied.

3 Respectfully submitted this 24th day of October, 2016.

6 By: 

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NRS 533.450, I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of the foregoing, as follows:

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By U.S. POSTAL SERVICE: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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DATED this 13th day of October, 2016.


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