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.	)
	)

CPB'S OPPOSITION TO MOTION IN LIMINE TO EXCLUDE PORTIONS OF CPB EXHIBIT 19 AND RELATED TESTIMONY

I

PRELIMINARY STATEMENT

SNWA contends that "any part of the Aquaveo Report or Aquaveo Rebuttal Report related to water budgets, sustainability, safe yield, or the State Engineer's prior calculation of the perennial yield of Spring Valley should be excluded from evidence and stricken from the record" because they are allegedly outside the scope of the remand (SNWA's Motion at pg. 8, lns. 4-6). This remarkable contention wholly ignores the overarching principles of Judge Estes' thoughtful decision which is an explicit repudiation of the idea that a water budget analysis alone can succeed without taking into account the E.T. salvage. If the authorized withdrawals exceed the E.T. capture over a long period, the result is perpetual groundwater mining with permanent damage to the aquifer.

SNWA's Motion argues at page 3 that the Aquaveo Reports provide little or no data or analysis to assist the Engineer in determining whether equilibrium can be reached in a reasonable amount of time. In actuality, the Aquaveo Reports demonstrate through careful and

comprehensive models that the well field under consideration will never[1] reach equilibrium, even if pumping is reduced to 10% of the rate authorized by Ruling 6164. The discussion of safe yield and the water budget myth provide the technical foundation for why this is so. That analysis concluded that the well field design is fatally flawed due to well locations and the hydrologic properties of that part of the basin. That discussion is wholly consistent with the directive of Judge Estes.

II

ULTIMATELY, IN SPRING VALLEY, PERENNIAL YIELD MEANS THE AMOUNT OF E.T. CAPTURED

The Aquaveo Reports do not denounce the use of a water budget analysis. In fact, CPB recognizes that a water budget analysis is a vital first step. The "myth" critique[2] simply points out that one must then go on to account for how much of the perennial yield can be safely salvaged for beneficial use.[3] In his decision, Judge Estes found:

> Perennial yield has been for many years defined by the Engineer as:
>
> > The perennial yield of a groundwater reservoir may be defined as the maximum amount of groundwater that can be salvaged each year over the long term without depleting the groundwater reservoir. Perennial yield is ultimately limited to the maximum amount of natural discharge that can be salvaged for beneficial use. The perennial yield cannot be more than the natural recharge to a groundwater basis and in some cases is less.[4]

The Decision went on to caution that groundwater mining has been, and remains, against the policy of Nevada.

> If more water comes out of a reservoir than goes into the reservoir, equilibrium can never be reached. This is known as water mining and '[w]hile there is no

[1] Even SNWA would have to agree that "never" is an unreasonably long period of time.

[2] In a widely cited article, the "myth" label was appended by Bredehoft to arguments already made by Theis and others. For a fuller discussion on the many articles on this point, *See* http://bit.ly/2wKwlnb

[3] Estes' Decision, pg. 10, lns 3-8.

[4] This is the same concept that the Engineer espoused in Ruling #5726 when he wrote that "Perennial yield 'relies on the capture of ground-water E.T.,' which 'establishes the limit of the perennial yield.'"

> statute that specifically prevents groundwater mining, the policy of the Engineer for over one hundred (100) years has been to disallow groundwater mining. This policy remains today. Id.[5]

The policy against groundwater mining is the law of this case (to borrow a phrase from SNWA's motion).

Judge Estes found that natural discharge in Spring Valley is almost entirely caused by E.T. This, he found, is the water available for beneficial use.

> Natural discharge in Spring Valley is almost exclusively E.T. . . . E.T. occurs by plants and phreatophytes discharging the groundwater from the basin through use. In Spring Valley, this is the water sought for beneficial use. Of course, to do so, the phreatophytes must be completely eliminated. . . .

He noted, however, that recovery of the E.T. will require a reasonable lowering of the water table:

> Obviously, any water-well cannot capture all of the E.T., and while pumping and E.T. are both occurring, the water table drops.[6]

This is sometimes called "transitional storage" which can be viewed as an expedient exception to the policy against groundwater mining, so long as the water table stops dropping and equilibrium is reached within a reasonable time.

When the case came before Judge Estes, the Engineer's attorney argued that the Engineer had concluded it was not appropriate to require an E.T. salvage project and SNWA argued:

> SNWA stated that '[t]he whole question of groundwater mining and E.T. capture and timed equilibrium are not part of the water law and they are not necessary.'[7]

In rejecting those arguments, Judge Estes quoted the Engineer's attorney:

> '[i]t is unclear where [Cleveland Ranch] got the impression that groundwater development in Nevada is required to be an E.T. salvage project, which is certainly not contained in statutory law.' Engineer Ans. Brief, p. 54.

The Judge quickly dispatched that argument:

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[5] Estes' Decision at pg. 10, lns 13-18.
[6] Id. at lns 20-27.
[7] Id. pg. 11, lns 21-28.

> Perhaps Cleveland Ranch and the other protestants 'got the impression' from the Engineer's definition: 'Perennial yield is ultimately limited to the maximum amount of natural discharge that can be salvaged for beneficial use.' ROA 000056. Moreover, in the Engineer's Ruling 5726 he defined perennial yield as an 'assumption that water lost to natural E.T. can be captured by wells and placed to beneficial use.' Cleveland Ranch Opening Brief, App. 1 at 27, citing Ruling 5726. The Nevada Supreme Court stated, '[t]he perennial yield of a hydrological basin is the equilibrium amount or maximum amount of water that can safely be used without depleting the source.' *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. Adv. Op. 48; 245 P.3d 1146, 1147 (2010).[8]

Judge Estes has clearly decreed that perennial yield estimated through a simple water budget analysis is insufficient without establishing how much of the perennial yield will be recovered through E.T. salvage. The Judge held that: "SNWA's expert certified that uncaptured E.T. would have to be deducted from the perennial yield. ROA 34928. This the Engineer did not do." Then, the Judge went on to hold:

> This finding by the court requires that this matter be remanded to the State Engineer for an award less than the calculated E.T. for Spring Valley, Nevada, and that the amended award has some prospect of reaching equilibrium in the reservoir.[9]

The concept remains the same; a system is in balance when discharge is equivalent to recharge. The alternative would be groundwater mining, which is forbidden. The concepts explained in the Aquaveo Reports to which SNWA takes such stringent opposition are perfectly consistent with Judge Estes' Decision and Remand Order. Interestingly, the position advocated by SNWA was coincidentally rejected by the Nevada Legislature when it failed to adopt Assembly Bill 298 earlier this year.

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[8] Id. at pg. 12, lns 4-15.
[9] Id. at pg. 13, lns 1-6.

III

THE REMAND ORDER REQUIRES THE RECALCULATION OF THE WATER AVAILABLE FOR APPROPRIATION CONSISTENT WITH THE PRINCIPLES OUTLINED IN THE ORDER

At page 7 of its motion, SNWA contends that the mandate of the remand order does not contemplate that the Engineer (1) alter the estimate of perennial yield; (2) reformulate the method of calculating perennial yield (i.e., the water budget); (3) adopt "some new and untested concepts of 'safe yield' or 'sustainable yield'"; or (4) reexamine the historical practice of water budgeting. These are remarkable contentions.

The first claim, about altering the previous estimate of perennial yield, seems to be squarely addressed by the language of the second paragraph of Judge Estes' conclusion where he ordered:

> A recalculation of water available for appropriation from Spring Valley assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time.[10] [Emphasis added.]

Items 2 and 4 are essentially the same point, namely: whether water budgets are sacrosanct and an end in themselves or whether they are merely a tool on the way to a full scientific analysis of perennial yield.

Item 3 is simply inexplicable when it refers to safe yield as some new and untested concept. Nevada law expressly required applications to appropriate water to be rejected if the withdrawal will "exceed[] the perennial yield or safe yield of that source." NRS 533.371. SNWA's argument also overlooks the definition of perennial yield as enshrined by the Nevada Division of Water Resources:

> The amount of usable water of a ground water reservoir that can be withdrawn and consumed economically each year for an indefinite period of time. It cannot

[10] Id. at pg. 23, lns 17-19.

> exceed the sum of the Natural Recharge, the Artificial (or induced) Recharge, and the Incidental Recharge without causing depletion of the groundwater reservoir. Also referred to as Safe Yield.

"Safe yield" is not a new or untested concept but an established part of Nevada law. When tested by the principles adopted by the Remand Order, this means that a computation of perennial yield (which is deemed equivalent to total E.T.) must be reduced by the amount of uncaptured E.T.

At page 9 of its motion, SNWA argues that

> The District Court upheld the State Engineer's prior determination that Nevada law does not require an applicant to demonstrate full capture of project pumping from existing sources of discharge, any debate regarding this question is entirely outside the scope of the remand proceedings. . . .

No one argues that it is practicable for any well field to capture 100% of E.T. But what we do argue, and what Judge Estes agreed when he quoted Ruling 5726, was that perennial yield is based on the assumption "that water lost to natural E.T. can be captured by wells and placed to beneficial use." Consequently, complete E.T. capture is not, by itself, reason to deny an application. It does, however, mandate reduction in the withdrawal permitted to avoid perpetual groundwater mining.

IV

THE REMAND INSTRUCTION TO AVOID UNREASONABLE EFFECTS INCLUDES AVOIDING UNREASONABLE EFFECTS TO CLEVELAND RANCH WATER RIGHTS

At page 9 of its motion, SNWA attacks the Aquaveo Reports for noting the negative impact on the Cleveland Ranch water rights. According to SNWA, those issues are outside the scope of the remand. However, the third paragraph of the conclusion in Judge Estes' Decision states:

> Define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious in Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley, ...[11]

It seems rather obvious that adversely impacting Cleveland Ranch water rights would be an unreasonable effect within the meaning of that third paragraph.

In order to achieve equilibrium, the 15 wells under consideration would have to create a massive cone of depression that extends under the Ranch and all the way into the E.T zone north of the Ranch. Otherwise, SNWA cannot capture sufficient E.T. to achieve equilibrium.

Unfortunately, that massive cone of depression would have huge "unreasonable effects" on the water rights associated with the Cleveland Ranch – and that is what the remand requires us to avoid.

Furthermore, the Aquaveo Reports demonstrate that, without capturing the northern zone E.T., the water table in the southern part of Spring Valley will be permanently and irremediably lowered with concomitant damage to the Cleveland Ranch water rights. The water table will not rebound. The southern part of Spring Valley is relatively arid and does not offer a large amount of E.T. for capture. Although a water budget analysis would suggest it is safe to withdraw significant water, the actuality is different. Because the withdrawals exceed the E.T. capture, the difference would be made up by groundwater mining. Over time, the water table will drop, water rights will be adversely impacted, the aquifer will consolidate and the ground will settle. The decline in the water table will be permanent with permanent, irreversible damage to springs. As the Aquaveo Reports demonstrate, that would be the new permanent reality and the Cleveland Ranch water rights would suffer the "unreasonable effects" prohibited by the Remand Order.

Few legal precepts are as firmly established as the doctrine that "the mandate of a higher court is controlling as to matters within its compass." *Samples v. Colvin*, 103 F.Supp.3d 1227,

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[11] Id. at pg. 23, lns 19-21.

1231-1232 (D. Ore. 2015) (citing *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184 (1939). It is indisputable that a lower court generally is "bound to carry the mandate of the upper court into execution and [may] not consider the questions which the mandate laid at rest." *Id.* Similarly, under the law of the case doctrine, "[t]he decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Id.* (citing *United States v. Cote*, 51 F.3d 178, 181 (9th Cir.1995) (quoting *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir.1993) (internal quotations omitted)). Indeed, "[a]n administrative agency is bound to follow the instructions of the reviewing court on remand." *Nolte v. Astrue*, 2012 U.S. Dist. LEXIS 138940, 2012 WL 4466558, *2 (D.Ariz. Sept. 27, 2012) (citing *Sullivan v. Hudson*, 490 U.S. 877, 886, 109 S. Ct. 2248 (1989), abrogated on other grounds as discussed in *Shalala v. Schaefer*, 509 U.S. 292, 113 S. Ct. 2625, 125 L. Ed. 2d 239 (1993)); *see also United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 406, 85 S. Ct. 1517 (1965) (explaining that the agency must act upon the court's correction on remand). Consequently, "[d]eviation from the court's remand order in the subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review." *Sullivan*, 490 U.S. at 886. Thus, on remand, the agency must follow the specific instructions of the Remand Order.

V

THE REQUEST FOR MORE HEARING TIME SHOULD BE DENIED

At pages 2 and 11 of its motion, SNWA argues that it should be given an additional week to present rebuttal testimony on the issues addressed here. There is no justification to that request. On June 30, 2017, Aquaveo filed its 37-page report which included at pages 9-16, a discussion of the water budget myth, safe yield and perennial yield. On August 11, 2017, Messrs. Burns, Prieur and Watrus, and Ms. Drici, all long-time employees of SNWA, filed

Exhibit 597 rebutting the Aquaveo Report. In other words, the issues and arguments raised were no surprise to SNWA and have already been addressed by SNWA. Nothing was presented by SNWA to justify an extension of time.

V

CONCLUSION

The motion lacks merit and should be denied in its entirety.

DATED this 28TH day of August, 2017.

HEJMANOWSKI & McCREA LLC and
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Attorneys for Attorneys for **Protestant Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints, a Utah corporation on behalf of the Cleveland Ranch**

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2017, a true and correct copy of the foregoing CPB'S OPPOSITION TO MOTION IN LIMINE TO EXCLUDE PORTIONS OF CPB EXHIBIT 19 AND RELATED TESTIMONY was served on the following persons by electronic service according the parties' agreement, and by depositing the same for delivery with the United States Postal Service, first-class postage prepaid, addressed to the following:

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