

IN THE OFFICE OF THE STATE ENGINEER  
OF THE STATE OF NEVADA

\*\*\*

IN THE MATTER OF APPLICATIONS 53987 )  
THROUGH 53992, INCLUSIVE, AND )  
APPLICATIONS 54003 THROUGH 54021, )  
INCLUSIVE, FILED TO APPROPRIATE THE )  
UNDERGROUND WATERS OF CAVE )  
VALLEY, DELAMAR VALLEY, DRY LAKE )  
VALLEY, AND SPRING VALLEY )  
(HYDROGRAPHIC BASINS 180, 181, 182 )  
AND 184), LINCOLN COUNTY AND WHITE )  
PINE COUNTY, NEVADA. )

**OPPOSITION TO CPB'S MOTION IN LIMINE TO EXCLUDE TESTIMONY AND EVIDENCE RELATING TO THEORETICAL ET-CAPTURE WELLS**

STATE ENGINEERS OFFICE  
2017 AUG 28 PM 4:54  
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The Southern Nevada Water Authority ("SNWA") hereby opposes the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, on behalf of the Cleveland Ranch ("CPB")'s Motion in Limine to Exclude Testimony and Evidence Relating to Theoretical ET-Capture Wells ("Motion"). CPB's Motion is without merit and should be denied because it seeks to exclude highly relevant evidence that directly relates to the issues to be decided by the State Engineer during the upcoming remand hearing.

**RELEVANT BACKGROUND**

**I. The District Court Remand Order**

On December 10, 2013, the Seventh Judicial District Court (the "Court") remanded portions of the State Engineer's Rulings for Spring Valley, Cave Valley, Dry Lake Valley, and Delamar Valley (Rulings 6164 through 6167, respectively) ("Remand Order"). The Court's Remand Order directed the State Engineer, among other things, to address the following issue:

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.<sup>1</sup>

This remand instruction was based on the District Court's finding that the "[State] Engineer is correct that the time to reach equilibrium *is not a valid reason to deny the grant of water*, but it may

<sup>1</sup> December 10, 2013, Decision at 23, *White Pine County v. Jason King, P.E.*, Seventh Judicial District Court of Nevada Case No. CV1204049.

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SE 'S EXHIBITS 152  
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1 very well be a reason to limit the appropriation below the calculated E.T.”<sup>2</sup> In arriving at this  
2 conclusion the District Court referenced the results of a groundwater model scenario that was created  
3 during the U.S. Bureau of Land Management’s Environmental Impact Statement (“EIS”) process. The  
4 EIS model scenario indicated that after 200 years of pumping the full quantity of water requested in  
5 SNWA’s original applications, 84% of the water then estimated to discharge from the basin via  
6 evapotranspiration (“ET”) will be captured by project pumping.<sup>3</sup> Importantly, the EIS pumping  
7 scenario relied upon by the District Court simulated pumping from 81 wells distributed throughout the  
8 Spring Valley basin and was not limited to the 15 points of diversion (“PODs”) specifically identified  
9 in SNWA’s applications.<sup>4</sup> After reviewing this evidence, the District Court remanded this matter to  
10 the State Engineer to consider whether an award can be issued with *some prospect* of reaching  
11 equilibrium.<sup>5</sup>

## 12 **II. SNWA Exhibit 475**

13 Based on the District Court’s remand instruction, SNWA updated the Central Carbonate-Rock  
14 Province (“CCRP”) groundwater model that was used to run the EIS model scenario so that the model  
15 would accurately reflect the factual findings made by the State Engineer in Ruling 6164.<sup>6</sup> Specifically,  
16 SNWA increased ET from the previous estimate of 77,000 afa to the State Engineer’s estimate of  
17 84,100 afa and decreased the project pumping from the requested 91,224 afa to the approved 61,127  
18 afa.<sup>7</sup> The quantity of pumping was also adjusted to reflect the staged development process approved  
19 by the State Engineer in Ruling 6164. The CPB’s own experts have indicated that SNWA’s changes  
20 to the CCRP groundwater model “are appropriate and result in a more accurate simulation.”<sup>8</sup>

21 SNWA then devised a model scenario with the primary goal of locating wells in such a manner  
22 as to maximize ET capture, and show *some prospect* of reaching equilibrium. Importantly, SNWA

23 <sup>2</sup> December 10, 2013, Decision at 11, *White Pine County v. Jason King, P.E.*, Seventh Judicial District Court of Nevada  
Case No. CV1204049.

24 <sup>3</sup> GBWN Exhibit 110 at ES-51 (Table ES-11).

25 <sup>4</sup> GNWN Exhibit 110 at ES-15 (Table ES-4).

26 <sup>5</sup> December 10, 2013, Decision at 13, *White Pine County v. Jason King, P.E.*, Seventh Judicial District Court of Nevada  
Case No. CV1204049.

27 <sup>6</sup> SNWA Exhibit 475 at 2-1 to 2-4.

28 <sup>7</sup> SNWA Exhibit 475 at 2-1.

<sup>8</sup> CPB Exhibit 25 at 10.

1 does not agree that Nevada law requires a project to demonstrate that project pumping will fully  
2 capture ET.<sup>9</sup> Such an interpretation would invalidate the basis upon which almost all existing  
3 groundwater permits in the State have been issued. The unique topography of Nevada, coupled with  
4 the relatively small percentage of privately-owned land, makes it almost impossible for any water  
5 appropriator seeking to place a well on private property to fully capture ET discharge within a  
6 particular basin. This is not mere conjecture but rather is confirmed by the results of the baseline  
7 model simulation showing that even the relatively small amount of existing groundwater development  
8 in Spring Valley fails to fully capture ET within the 200-year model timeframe.<sup>10</sup> The District Court  
9 recognized this reality when it acknowledged that “[o]bviously, any water-well cannot capture all of  
10 the E.T.”<sup>11</sup> In fact, SNWA is unaware of any water project in Nevada that has previously been  
11 required to demonstrate full capture of ET of project pumping during the approval process.

12 However, in order to assist the State Engineer with carrying out the District Court’s remand  
13 instruction, SNWA was required to demonstrate that, if ET capture is going to be a requirement of  
14 Nevada law going forward, a project pumping scenario can be devised to accomplish that objective.  
15 Such a scenario requires a large quantity of wells to be spatially distributed across the ET discharge  
16 area of Spring Valley.<sup>12</sup> To be clear, if ET capture had been a requirement of Nevada law when  
17 SNWA filed its applications, the proposed well configuration would have looked quite different.  
18 However, given the District Court’s remand instruction, SNWA’s evidence shows that this is a type of  
19 project that could be constructed if ET capture is the primary objective. Under this project pumping  
20 scenario, the model results indicate that SNWA will be able to achieve 97% capture of project  
21 pumping from ET discharge within 75 years, and 99% capture within 200 years.<sup>13</sup>

22 ///

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24 <sup>9</sup> SNWA reserves its right on any future appeal to argue that ET capture is not a reason to limit a water appropriation. For  
25 purposes of this Opposition, SNWA respects the decision of the District Court at the trial court level and understands that  
26 the District Court’s interpretation of Nevada water law has not been confirmed on appeal.

27 <sup>10</sup> SNWA Exhibit 475 at 5-2.

28 <sup>11</sup> December 10, 2013, Decision at 10, *White Pine County v. Jason King, P.E.*, Seventh Judicial District Court of Nevada  
Case No. CV1204049.

<sup>12</sup> SNWA Exhibit 475 at 4-4 (Figure 4-2).

<sup>13</sup> SNWA Exhibit 475 at 6-2 (Table 6-1).

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**LEGAL STANDARD**

Evidence offered at a hearing before the State Engineer “must be relevant to the subject matter of the proceeding.”<sup>14</sup> Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.”<sup>15</sup> A tribunal has broad discretion in determining whether proffered evidence is relevant to the proceedings before it.<sup>16</sup> Relevant evidence is admissible *unless* it is specifically barred by: (1) the rules of evidence, (2) the Constitution of the United States or the State of Nevada, or (3) by a statute limiting the review of an administrative determination to the administrative record.<sup>17</sup>

**ARGUMENT**

CPB argues that SNWA Exhibit 475 is irrelevant based solely on the fact that the reported model scenario simulated pumping from 101 wells rather than the 15 PODs identified in SNWA’s applications. Importantly, CPB offers no argument that SNWA Exhibit 475 is otherwise barred by any provision of the Nevada Rules of Evidence or the State or Federal Constitutions. Accordingly, if the Hearing Officer determines that SNWA Exhibit 475 is, in any way, relevant to the issues to be decided during the remand hearing, CPB’s Motion must be denied.

**I. SNWA Exhibit 475 Directly Addresses the Issues of ET Capture and Time to Reach Equilibrium.**

The District Court’s remand instruction requires the State Engineer to consider the issues of ET capture and the time it will take the basin to reach a new equilibrium in response to project pumping. These are complex issues without simple answers. To assist the State Engineer’s analysis of these issues, SNWA Exhibit 475 presents the results of a model scenario specifically designed to address the issues of ET capture and time to equilibrium. The model demonstrates that if ET capture is the primary objective with respect to the development of groundwater in Nevada, a pumping scenario can be developed which meets this goal.

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<sup>14</sup> NAC 533.260.

<sup>15</sup> NRS 48.015.

<sup>16</sup> *Prabhu v. Levine*, 112 Nev. 1538, 1550, 930 P.2d 103, 111 (1996).

<sup>17</sup> NRS 48.025.

1 The fact that the model scenario reported in SNWA Exhibit 475 included wells outside of the  
2 PODs identified in SNWA's applications does not, in and of itself, render the report irrelevant to the  
3 State Engineer's determination. In addition to reporting the results of the modeling scenario, the  
4 exhibit includes valuable information related to the CCRP model, including a discussion on the  
5 inherent limitations of the model and whether it is appropriate to use such a model to calculate the  
6 amount of groundwater available for appropriation in a basin. This is highly relevant information for  
7 the State Engineer to have since the District Court appears to be asking the State Engineer to calculate  
8 the quantity of water awarded to SNWA based on how much ET capture is reported by a model  
9 scenario.

10 Additionally, in Ruling 6164, the State Engineer required SNWA to develop its project in three  
11 distinct phases. In the first phase, pumping will be limited to 38,000 afa or 62% of the total duty of  
12 the permits. During this initial phase the State Engineer and SNWA will be able to gather real-world  
13 data on how the aquifer is responding to actual project pumping. This data will be used to create a  
14 local-scale model whose predictive accuracy will far exceed that of the CCRP regional-scale model.  
15 Depending on what those results show, the State Engineer will have the ability to require SNWA,  
16 before additional pumping levels are approved, to file change applications if such applications are  
17 needed to ensure that the basin will reach a new equilibrium in response to project pumping within a  
18 reasonable time. The results reported in SNWA Exhibit 475 provide the State Engineer with a level of  
19 confidence that if such change applications are required, new PODs can be sited in a manner that will  
20 accomplish this objective.

21 CPB's Motion seeks to have the State Engineer blind himself to the realities of developing  
22 large-scale groundwater projects. When developing such projects, project proponents often submit  
23 initial appropriation applications that identify a limited number of initial PODs. During the initial  
24 stages of project construction and implementation additional site-specific data related to the proposed  
25 PODs is gathered and analyzed. Oftentimes, change applications to allow for additional PODs, or a  
26 change in the location of approved PODs, will be required in order to meet project goals, ensure  
27

1 compliance with regulatory conditions, and accommodate operational needs. For the State Engineer to  
2 ignore this reality would be inappropriate and unnecessary.

3 Because SNWA Exhibit 475 directly addresses the remand instruction provided by the District  
4 Court, and provides valuable information related to issues that must be determined by the State  
5 Engineer on remand, it is, by definition, relevant to the remand proceedings. Accordingly, CPB’s  
6 Motion should be denied.

7 **II. The State Engineer and District Court Have Already Accepted and Deemed Relevant**  
8 **Model Simulations That Include Wells Outside the 15 PODs Identified in SNWA’s**  
9 **Applications.**

10 In these proceedings, the State Engineer and the District Court have already accepted into  
11 evidence, and thereby deemed relevant, model simulations that include wells outside of the PODs  
12 identified in SNWA’s applications. In fact, the very model simulation relied upon by the District  
13 Court to determine that SNWA’s pumping will not fully capture ET simulated pumping from 81 well  
14 locations.<sup>18</sup> If the District Court had wanted the ET capture scenario to be limited to SNWA’s 15  
15 PODs, the remand instructions would have been so limited. CPB’s Motion utterly fails to explain how  
16 SNWA Exhibit 475 differs from these previous simulations that were admitted during the 2011  
17 hearings as GBWN Exhibit 110. Given the State Engineer’s previous acceptance of reports of model  
18 simulations that included wells outside of SNWA’s 15 PODs, it would be inconsistent for the State  
19 Engineer to now exclude SNWA Exhibit 475 based upon a relevancy objection raised by CPB.

20 Furthermore, nothing in SNWA Exhibit 475 violates any prior ruling or determination of the  
21 Hearing Officer or the State Engineer as alleged by CPB. In a previous hearing the Hearing Officer  
22 correctly noted that the State Engineer is only considering approval of the 19 PODs applied for by  
23 SNWA and not “a different well field.”<sup>19</sup> CPB incorrectly characterizes this statement by the Hearing  
24 Officer as a “ruling.” However, the Hearing Officer’s statement was not an official ruling made in  
25 response to any objection or motion raised by one of the parties. Rather, it was a sua sponte statement

26 <sup>18</sup> GNWN Exhibit 110 at ES-15 (Table ES-4).

27 <sup>19</sup> Transcript of Public Hearing In the Matter of: Division of Water Resources Applications 53987 through 53992, Vol. 11  
28 (October 10, 2011) at p. 2507.

1 of clarification regarding the purpose of the hearing uttered in response to questions CPB’s attorney  
2 was asking of SNWA’s expert witness.

3 Even if the Hearing Officer’s sua sponte statement does somehow constitute an official ruling  
4 in this case, the submittal of SNWA Exhibit 475 does not violate it. SNWA did not submit SNWA  
5 Exhibit 475 for the purpose of asking the State Engineer to consider or approve a different well field.<sup>20</sup>  
6 Rather, the exhibit was provided to show that if ET capture is required, a well field can be designed to  
7 meet that objective. CPB’s due process argument regarding additional well locations was previously  
8 raised by CPB in its appeal to the District Court of Ruling 6164.<sup>21</sup> As SNWA previously noted in  
9 answer to this argument, “even if 50 to 100 additional wells were . . . ultimately needed, each and  
10 every one will need a change application, and due process will be accorded through the notice, protest  
11 and hearing requirements.”<sup>22</sup> Having heard these arguments, the District Court’s order did not disturb  
12 the State Engineer’s reliance on the change application process to address due process concerns on  
13 additional points of diversion that may be required in the future. Because the District Court did not  
14 accept CPB’s due process arguments, such arguments are precluded by the law of the case doctrine  
15 and it is improper for CPB to attempt to re-litigate them here.<sup>23</sup>

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22 <sup>20</sup> Pursuant to Nevada law, a request by SNWA for the State Engineer to approve a different point of diversion would  
23 require a change application. *See* NRS 533.345. SNWA has not submitted any such change application. CPB would have  
24 the opportunity to address any problems it has with the new point of diversion at the time the State Engineer considers any  
25 change application. The change application process provides a venue for any due process concerns CPB may have with  
26 different SNWA PODs.

27 <sup>21</sup> Case No. CV-1204049 (and consolidated Cases) Opening Brief of Petitioner, Corporation of the Presiding Bishop of the  
28 Church of Latter-Day Saints, on behalf of Cleveland Ranch, dated January 28, 2013, pp. 29, 41, 45, 59.

<sup>22</sup> SNWA’s Answering Brief to Corporation of the Presiding Bishop of the Church of Latter-Day Saints, dated April 12,  
2013, p. 23.

<sup>23</sup> *See Geissel v. Galbraith*, 105 Nev. 101, 103, 769 P.2d 1294, 1296 (1989). The law of the case doctrine is explained in  
SNWA’s Motion in Limine to Exclude Exhibits GBWN/WPC 281, GBWN/WPC 282, GBWN/WPC 290, GBWN/WPC  
292, or Parts Thereof, and Related Testimony, filed August 18, 2017.

CONCLUSION

1  
2 Because SNWA Exhibit 475 directly relates to an issue to be decided at the State Engineer's  
3 remand hearing it is, by definition, relevant evidence. CPB's Motion fails to cite a single evidentiary  
4 rule or constitutional prohibition that would bar such relevant evidence from consideration.  
5 Accordingly, CPB's Motion is meritless and should be denied in its entirety.

6 Respectfully submitted this 28 day of August, 2017.

7  
8 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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DATED this 28<sup>th</sup> day of August, 2017.

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