

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

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STATE ENGINEERS OFFICE

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. )  
\_\_\_\_\_ )

SE	'S EXHIBITS 153
DATE:	

**CPB'S REPLY IN SUPPORT OF MOTION IN LIMINE  
TO EXCLUDE TESTIMONY OF DON A. BARNETT**

The Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints, on behalf of the Cleveland Ranch ("CPB" or the "Cleveland Ranch") makes this reply in support of its Motion in Limine to Exclude Testimony of Don A. Barnett. Based on its Motion and the reasons set forth below, the Cleveland Ranch respectfully requests that the State Engineer grant its Motion in its entirety.

***SNWA's Conclusory Statements Fail to Show Compliance with the Interim Order***

The State Engineer's Interim Order mandated expert witnesses to "... submit written reports with citations to the information upon which their opinions are based..." Interim Order at p. 3. The expert disclosures "...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, and exhibits to be used as a summary of or in support of the opinions and a statement of qualifications of the witness." Interim Order at p. 8.

In response to this clear and unambiguous guidance, SNWA solely relies on the sparse references within SNWA Exhibits 595, 608, and 609 to claim that its disclosure of Mr. Barnett as an expert witness was appropriate. Although it may not be worth squabbling about the title of Mr. Barnett's purported "expert report," it noticeably comes in the form of a "declaration", rather than a "rebuttal report" similar to the other "reports" produced by SNWA at the time of the second evidentiary exchange. *See* Rebuttal Report to Jones and Mayo (2017) authored by Burns, Drici, Prieur, and Watrus (SNWA Exh. 597); *see also* Rebuttal Report to Roundy (2017) authored by Marshall, Prieur, Beecher, and Luptowitz (SNWA Exh. 598).

The title of Mr. Barnett's "report", however, is not the only readily apparent difference between it and SNWA's other "rebuttal reports." These differences clearly evidence SNWA's failure to comply with the Interim Order relative to Mr. Barnett's status as an expert witness. Although the Cleveland Ranch reserves its right to object to testimony and evidence offered by SNWA at the time of hearing, including raising objections to SNWA Exhibits 597 and 598, those specific rebuttal reports appear to meet the standards of the Interim Order so as to not require a pre-hearing motion in limine. In comparison to the Barnett Declaration, those reports provide a clear statement of the witnesses' opinions, identify the analysis and/or conclusions of Aquaveo and Roundy with which the SNWA witnesses take issue, and provide a basis for their rebuttal opinions. On the other hand, the disclosures relative to Mr. Barnett's testimony are abundantly obtuse.

#### ***Claiming Vast Experience Fails to Meet the Interim Order's Standards***

The Interim Order required: (1) 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, (2) exhibits to be used as a summary of or in support of the opinions, and (3) a statement of qualifications of the witness. *See* Interim Order at p. 8.

SNWA provided Mr. Barnett's curriculum vitae (SNWA Exh. 608). His CV sets forth his general experience and qualifications. SNWA provided a summary of its rebuttal witness testimony as SWNA Exhibit 595, identifying four areas upon which Mr. Barnett may testify: (1) in rebuttal to any testimony and evidence regarding calculation of perennial yield, safe yield or sustainable yield; (2) rebuttal testimony comparing the methodology used in Nevada and Utah for analyzing the amount of water available for appropriation; (3) regarding the use of the water budget method and groundwater modeling results for capture of evapotranspiration in determining the amount of water available for use; and (4) direct rebuttal to items including, but not limited to, CPB Exhibit 19 and GBWN/WPC Exhibit 281. *See* SNWA Exhibit 595 at pp. 1-2. SNWA then offered SNWA Exhibit 609, a nine (9) paragraph Declaration of Mr. Barnett.

Although the Declaration makes conclusory statements that Mr. Barnett has "extensive experience" and familiarity with "processes, laws, rules and regulations regarding the appropriation of groundwater in Utah" it offers no specific analysis as to his review of evidence relative to calculation of perennial yield, safe yield, or sustainable yield. It does not set forth Mr. Barnett's conclusions on those topics, let alone the basis for any such conclusions, beyond his "extensive experience." The Declaration also fails to provide any actual comparison of the methodology used in Nevada and Utah for analyzing the amount of water available for appropriation, let alone the basis used by Mr. Barnett to make such a comparison. Furthermore, the Declaration does not identify any analysis regarding the use of the water budget method and groundwater modeling for capture of ET, but rather makes simple conclusions as to how Utah presumably uses those tools, with no reference to statutes, case law, or other literature to support his conclusions. As an aside, the Declaration also describes Mr. Barnett's familiarity with scientific and professional literature regarding the calculation of water budgets, perennial yield,

safe yield and sustainable yield, but does not specifically identify any scientific or professional literature that Mr. Barnett has read, analyzed, or authored.

Most strikingly, the Declaration fails to identify whether Mr. Barnett has reviewed any documents in these proceedings, let alone the documents referenced in SNWA Exhibit 595, particularly CPB Exhibit 19. It fails to identify any particular analysis, statements, or conclusions made in CPB Exhibit 19, or GBWN/WPC Exhibit 281 for that matter, with which Mr. Barnett disagrees, let alone offers a basis for his differing opinion.

The State Engineer should consider NRCP 56(e) for guidance, as that rule too requires that an affidavit be made on personal knowledge, setting forth specific facts that would be admissible in evidence, and that the declarant is competent to testify as to the matters stated therein. Mere conclusions are forbidden.

SNWA's opposition claims that Mr. Barnett's expert opinion is set forth in his Declaration, "primarily in Paragraph 8 where it stated that 'water budgets are valuable and appropriate method to evaluate applications to appropriate water rights'" [sic]. See Opposition at p. 2, l. 23 – p. 3, ll. 1-2. Beyond Mr. Barnett offering his "experience with water budgets", his Declaration, again, offers no other basis for his conclusions.

***The Prejudice to The Cleveland Ranch and Other Protestants is Obvious***

SNWA conveniently states that the Cleveland Ranch has not demonstrated any prejudice from allowing Mr. Barnett to testify as an expert witness, claiming that Cleveland Ranch does not describe "what is so confusing or hard to understand about the scope of Mr. Barnett's opinion" (Opposition at p. 3, ll. 8-11). What is so confusing or hard to understand is SNWA's disclosure of Mr. Barnett and his Declaration which only provide conclusory statements, without providing any references or basis for his opinions. The Declaration is silent as to any reports offered by the Cleveland Ranch, any reports in these proceedings, citations to specific analysis or

conclusions made by the Cleveland Ranch's experts with which Mr. Barnett disagrees, let alone a basis for his presumed differing opinion, beyond his self-purported "extensive experience."

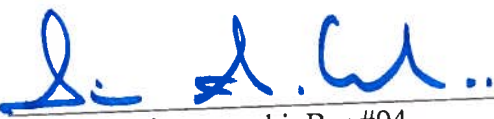
The intent of the State Engineer's Interim Order is to have experts pre-disclose their expert opinions and the basis for those opinions in a signed report and to limit the experts' testimony to the contents of the reports. Neither CPB nor the other Protestants have been afforded an adequate opportunity to understand the scope of Mr. Barnett's opinion, let alone the basis for his opinion.

***Conclusion***

For the reasons stated above, SNWA should be precluded from offering Mr. Barnett as a witness in these proceedings.

DATED this 5<sup>TH</sup> day of September, 2017.

HEJMANOWSKI & McCREA LLC and  
KAEMPFER CROWELL

By:   
Paul Hejmanowski, Bar #94  
Severin A. Carlson, Bar #9373

**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 5<sup>th</sup> day of September, 2017, a true and correct copy of the foregoing CPB'S REPLY IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE TESTIMONY OF DON A. BARNETT 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:

Paul G. Taggart, Esq.  
Taggart & Taggart, Ltd.  
108 North Minnesota Street  
Carson City, Nevada 89703  
[Paul@legaltnt.com](mailto:Paul@legaltnt.com)  
[Tammy@legaltnt.com](mailto:Tammy@legaltnt.com)

Paul Echo Hawk  
Echo Hawk Law Office  
P.O. Box 4166  
Pocatello, Idaho 83205  
[paul@echohawklaw.com](mailto:paul@echohawklaw.com)  
[aaronw@w-legal.com](mailto:aaronw@w-legal.com)

Rob Dotson  
Dotson Law  
One East First Street, 16<sup>th</sup> Floor  
Reno, Nevada 89501  
[rdotson@dotsonlaw.legal](mailto:rdotson@dotsonlaw.legal)  
[hcampbell@dotsonlaw.legal](mailto:hcampbell@dotsonlaw.legal)

Attention, Jerald Anderson  
EskDale Center  
1100 Circle Drive  
EskDale, Utah 84728  
[geraldanderson@hotmail.com](mailto:geraldanderson@hotmail.com)

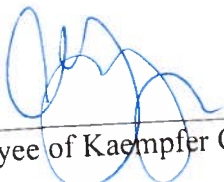
John Rhodes  
Rhodes Law Offices, Ltd.  
P.O. Box 18191  
Reno, Nevada 89511  
[johnbrhodes@yahoo.com](mailto:johnbrhodes@yahoo.com)

Dana R. Walsh, Esq.  
Southern Nevada Water Authority  
1001 South Valley View Boulevard, MS #485  
Las Vegas, Nevada 89153  
[dana.walsh@lvvwd.com](mailto:dana.walsh@lvvwd.com)  
[Denise.Derossett@snwa.com](mailto:Denise.Derossett@snwa.com)

Scott W. Williams  
Curtis Berkey  
Williams & Weathers, LLP  
2030 Addison Street, Suite 410  
Berkeley, California 94704  
[swilliams@berkeywilliams.com](mailto:swilliams@berkeywilliams.com)

Simeon Herskovits  
Iris Thornton  
Advocates for Community & Environment  
P.O. Box 1075  
El Prado, New Mexico 87529  
[simeon@communityandenvironment.net](mailto:simeon@communityandenvironment.net)  
[iris@communityandenvironment.net](mailto:iris@communityandenvironment.net)

J. Mark Ward  
Balance Resources  
3004 Sweet Blossom Drive  
South Jordan, UT 84095  
[wardjmark@gmail.com](mailto:wardjmark@gmail.com)

  
An Employee of Kaempfer Crowell