

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

SE	'S EXHIBITS <u>157</u>
DATE: _____	

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, DRY)
LAKE VALLEY, AND DELAMAR VALLEY,)
(HYDROGRAPHIC BASINS 184, 180, 181 AND)
182), LINCOLN COUNTY AND WHITE PINE)
COUNTY, NEVADA.)

**INTERIM ORDER
ON MOTIONS IN LIMINE**

By decision dated December 10, 2013, the District Court remanded State Engineer's Ruling Nos. 6164, 6165, 6166 and 6167 ("District Court's Decision")¹ concerning the granting of water rights to the Southern Nevada Water Authority ("SNWA") in Spring, Cave, Dry Lake and Delamar valleys to the State Engineer for:

1. The addition of Millard and Juab counties, Utah in the mitigation plan so far as water basins in Utah are affected by pumping of water from Spring Valley Basin, Nevada;
2. A recalculation of water available from Spring Valley assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time;
3. Defining standards, threshold 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, and;
4. Recalculation of the appropriations from Cave Valley, Dry Lake Valley and Delamar Valley to avoid over appropriation or conflicts with down-gradient, existing water rights.

On November 28, 2016, the State Engineer issued a Notice of Hearing and Interim Order ("Interim Order"). The Interim Order required that by June 30, 2017, the parties were to serve on each other and the State Engineer an exhibit list, a witness list, a reasonably detailed summary of the testimony of each witness, and copies of any documentary evidence they intend to introduce into the hearing record. The Interim Order also required that if a witness is to be presented to provide expert testimony, the evidentiary exchange must include a written report prepared and signed by the

¹ Decision, December 10, 2013, *White Pine County v. King*, Case No. CV1204049, In the Seventh Judicial District Court of the State of Nevada in and for the County of White Pine. SE Exhibit No. 118, official records in the Office of the State Engineer.

witness. Pursuant to the Interim Order, the report was to contain a complete statement of all opinions expressed and the basis and reasons for those opinions, the data or other information considered by the witness in forming the opinion, any exhibits to be used as a summary of or in support of the opinions and a statement of quantifications of the witness. A second exchange required the parties to serve on each other and the State Engineer by August 11, 2017, an additional exhibit list, witness list, witness testimony summaries and documentary evidence intended to be introduced at the administrative hearing that may be necessary in response to the other parties' first evidentiary exchange.

Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints
Motion in Limine to Exclude Testimony and Evidence
Relating to Theoretical ET-Capture Wells

On August 28, 2017, the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints, on behalf of Cleveland Ranch ("CPB"), filed a Motion in Limine to Exclude Testimony and Evidence Relating to Theoretical ET-Capture Wells.² In its motion, the CPB requests the State Engineer preclude the SNWA from presenting SNWA Exhibit No. 475. It asserts that the evidence pertains to wells or well fields not specifically described in the pending applications, but rather describes a new well field of 101 wells, which are not the points of diversion described in the 15 water right applications that are the subject of the remand hearing in Spring Valley. The CPB asserts that the well field is not relevant and consideration of such theoretical points of diversion deprives it of its due process rights. The CPB indicates that evidence on this proposed well field violates a prior ruling in these proceedings in which the Hearing Officer already indicated that the State Engineer is not considering anything but the specific applications before him. *See*, Transcript of Proceedings, Vol. 11 (October 10, 2011) at p. 2507. The CPB argues that NAC § 533.260(1) provides that all evidence offered in a hearing, including the testimony of a witness, must be relevant to the subject matter of the proceeding; thus, since the 101 wells are theoretical, they are not relevant to the proceeding and any evidence and testimony regarding them should be excluded.

The SNWA opposes the motion arguing that, because the District Court arrived at its conclusion referencing the results of a groundwater model scenario created during the U.S.

² Pre-marked exhibit, State Engineer ("SE") Exhibit No. 146, official records in the Office of the State Engineer.

Bureau of Land Management Environmental Impact Statement (“EIS”) process, the evidence and testimony is relevant.³ It says that this EIS model scenario indicated that after 200 years of pumping the full quantity requested in the original applications, 84% of the water estimated to be discharged from the basin via evapotranspiration (“ET”) would be captured by project pumping. The SNWA indicates it is important to note that the EIS pumping scenario relied upon by the District Court simulated pumping from 81 wells distributed throughout the Spring Valley basin and was not limited to the 15 points of diversion identified in the SNWA applications.

Based on the District Court’s instructions, the SNWA says that it updated the Central Carbonate-Rock Province (“CCRP”) groundwater model used to run the EIS model scenario so that the model would accurately reflect findings made by the State Engineer, such as the perennial yield, the amount of water granted and staged development. It asserts that in order to assist the State Engineer with carrying out the District Court’s Decision, it is demonstrating that a project pumping scenario can be developed to accomplish the objective of ET capture, a requirement with which the SNWA still takes issue. The SNWA asserts that if ET capture had been a requirement of Nevada water law when it filed its applications, the proposed well configuration would have looked different. It argues that SNWA Exhibit No. 475 specifically addresses the complex issue of ET capture and the time it will take the basin to reach a new equilibrium in response to project pumping and the fact that it includes wells distinct from those in the 15 applications does not render the exhibit irrelevant.

The SNWA argues that the CPB’s motion requests the State Engineer blind himself to the realities of developing a large groundwater project. It argues that because the State Engineer ordered staged development, real-world information will be gathered from actual pumping and that the State Engineer will have the ability to order the SNWA to move pumping around before allowing the next stage of development to proceed. Finally, the SNWA points out that the State Engineer has already accepted into evidence model simulations, such as Great Basin Water Networks (“GBWN”) Exhibit No. 110, that include wells outside of the points of diversion found in the 15 applications. The SNWA argues that SNWA Exhibit No. 475 was provided for the purpose of showing that if ET capture is required, a well field can be designed to meet that

³ Pre-marked exhibit, SE Exhibit No. 152, official records in the Office of the State Engineer.

objective and that if change applications are required, due process will be afforded when those applications are filed, published and a protest period opened.

In reply,⁴ the CPB argues that it is simply asking the State Engineer to limit this hearing to the applications that are actually pending and to exclude evidence of hypothetical groundwater projects that could be developed to accomplish what SNWA apparently concedes the pending applications cannot, that is achieve equilibrium within a reasonable time without unreasonably lowering the water table. The CPB asserts that the District Court's Decision required the SNWA to show that pumping under the proposed applications has some prospect of reaching equilibrium. It also asserts that the SNWA's proposed 3M Plan only references the 15 wells under consideration.

The State Engineer is fully aware that several times throughout these proceedings it has been stated that it is the specific applications before the State Engineer that are under consideration and not some un-identified well field. This fact has not changed. However, the District Court's Decision turns the policy of how groundwater is appropriated in Nevada on its head and the State Engineer still takes issue with the District Court's Decision on whether actual ET capture is a part of Nevada water law. Nevertheless, the State Engineer is obligated to carry out the remand instruction and must now address how the parties choose to present evidence in accordance with the remand order. The parties are in obvious disagreement with what the remand instructions entail. SNWA Exhibit No. 475 is its attempt to show that if ET capture is a requirement of Nevada water law, an ET-Capture project can be designed. As discussed below, the SNWA similarly moves to exclude expert reports submitted by the CPB and GBWN on that basis that they challenge the approach used in Nevada regarding the issue of water availability. They too are approaching the remand instructions in the manner they believe is correct.

The State Engineer finds the purpose of the remand hearing is to gather evidence related to the District Court's four remand issues. The District Court's Decision added an unforeseen requirement into the analysis of water availability and whether the perennial yield analysis used for nearly 100 years by the Office of the State Engineer will be the future standard for appropriating groundwater in Nevada. The State Engineer does not agree with the SNWA when it argues that the only evidence relevant to the remand instruction is evidence related to the

⁴ Pre-marked exhibit, SE Exhibit No. 154, official records in the Office of the State Engineer.

quantity of water that can be pumped while allowing the basin to reach a new equilibrium within a reasonable period of time. The District Court's Decision remanded the matter for an award less than the calculated ET and the amended award must have some prospect of reaching equilibrium in the reservoir.⁵

The State Engineer finds, because the parties disagree with how to carry out the remand instructions and SNWA Exhibit No. 475 is the argument SNWA chooses to present to address the District Court's Decision, the State Engineer will allow the SNWA to present its argument and the CPB's motion in limine is denied. SNWA's Exhibit No. 475 touches on the issues presented in the remand and whether or not it is an accurate interpretation of the District Court's Decision is to be determined by the State Engineer as he reviews all the evidence. What weight, if any, it will be given is not determined at this time. The State Engineer finds it is not a violation of CPB's due process as the evidence was presented as part of the first evidentiary exchange and any change to the locations of wells will require the filing of change applications, which will then implicate the notice and protest process affording all interested persons due process.

**Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day
Saints Motion in Limine to Exclude Testimony of Don A. Barnett**

The CPB also filed a Motion in Limine to Exclude Testimony of Don A. Barnett.⁶ The CPB asserts that any verbal testimony from Mr. Barnett, or any written evidence authored by him, including SNWA Exhibit No. 608 (Barnett CV) and SNWA Exhibit No. 609 (Declaration of Don A. Barnett),⁷ should be excluded because the SNWA failed to adhere to the State Engineer's Interim Order. The CPB argues that the rules set out for expert witness testimony were not followed regarding the testimony of Mr. Barnett.

The Interim Order provides that, if a witness is being presented to provide expert testimony, the evidentiary exchange shall include a written report prepared and signed by the witness, which shall contain a complete statement of all opinions expressed, including the basis and reasons for those opinions, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or in support of the opinions and

⁵ SE Exhibit No. 118, District Court's Decision at p. 13, official records in the Office of the State Engineer.

⁶ Pre-marked exhibit, SE Exhibit No. 146, official records in the Office of the State Engineer.

⁷ In the electronic copies of the exhibits submitted, the SNWA title SNWA Exhibit No. 609 as "Barnett Expert Declaration."

a statement of qualifications of the witness. The CPB argues that SNWA designated Mr. Barnett as a witness in SNWA Exhibit No. 608, and one cannot conclude that SNWA Exhibit No. 609 (Mr. Barnett's Declaration) is a written report containing a complete statement of all opinions of the witness, which contains the basis and reasons for the witness's opinions, along with the necessary data and information that was considered by the witness in forming his opinions.

The SNWA in opposition⁸ argues that in the initial evidentiary exchange, two exhibits were submitted by Protestants that raise issues that appeared to be outside the scope of the issues on remand because the exhibits delve into policy considerations that were already ruled upon by the District Court. Mr. Barnett was named as a rebuttal witness to address those issues raised by the Myers' Report and the Aquaveo Report. It asserts that this is rebuttal evidence and should be allowed and, if he is not allowed as an expert witness, he should be allowed as a factual witness.

The CPB in reply⁹ notes that Mr. Barnett's "expert report" noticeably comes in the form a "declaration," which does not comport with the order for expert witness reports and that his resume merely claims that he has vast experience and fails to meet the standards for qualifying as an expert witness.

The State Engineer finds that the resume of Mr. Barnett (SNWA Exhibit No. 608) is lacking in specificity as to what area of expertise he might be qualified in as an expert. However, the State Engineer denies the request to exclude the resume. It is just a resume. The State Engineer finds that Mr. Barnett's Declaration does contain opinions that rise to those of expert testimony and the Declaration does not comport with the standard established in the Interim Order to present expert testimony and the motion is granted as to SNWA Exhibit No. 609. Mr. Barnett may testify as a factual witness, but will not be allowed to offer expert opinions.

Southern Nevada Water Authority Motion in Limine to Exclude Portions of Exhibit CPB 19 and Related Testimony

The SNWA requests the State Engineer exclude certain portions (nearly all) of the Expert Report of Aquaveo, LLC (CPB Exhibit No. 19 "Aquaveo Report") asserting those portions identified are outside of the scope of the remand issues and requests the State Engineer bar any

⁸ Pre-marked exhibit, SE Exhibit No. 151, official records in the Office of the State Engineer.

⁹ Pre-marked exhibit, SE Exhibit No. 153, official records in the Office of the State Engineer.

testimony relating to them.¹⁰ It requests the State Engineer exclude evidence or testimony presented by Aquaveo with respect to: (1) water budgets, sustainability, safe yield and the State Engineer's prior calculation of the perennial yield of Spring Valley; (2) whether ET Capture is required under Nevada law; and (3) alleged impacts that SNWA's pumping might have on Cleveland Ranch. The SNWA argues the matters are outside of the scope of the remand and requests that the State Engineer exclude them pursuant to NAC § 533.260 as irrelevant and unduly repetitious. If the State Engineer denies its request, the SNWA asked for another five days of hearing time to present witnesses and evidence to address the topics.

The SNWA argues that with respect to Spring Valley, that the remand instruction specifically limits the State Engineer's review to a determination of how much water is available for appropriation based on the length of time it will take for the basin to reach equilibrium conditions in response to project pumping. It says that nothing in the remand instruction directs the State Engineer to consider whether Nevada's long-established approach to water budgeting should be overturned nor does the remand instruction direct the State Engineer to re-evaluate his prior analysis related to whether project pumping will conflict with existing rights in the basin. Accordingly, the SNWA asserts that only evidence relevant to the remand instruction is evidence related to the quantity of water that can be pumped while allowing the basin to reach a new equilibrium within a reasonable period of time. It asserts that the Aquaveo Report provides little to no data or analysis that will assist the State Engineer in making this determination.

The SNWA points to the pre-hearing conference where the parties agreed that if an additional hearing was held that it be restricted to only the matters subject of the remand order. It further indicates that the Hearing Officer agreed that the scope of the remand included only the four issues and stated that attempts to go beyond the scope of the remand would not be allowed. Additionally, it points to the State Engineer's October 3, 2016, Interim Order on Pre-hearing Scheduling where the State Engineer's Hearing Officer re-affirmed that the scope of the remand hearing will be limited to specific issues identified in the District Court Decision (a.k.a. Judge Estes' Ruling) and only new evidence relating to those issues will be considered in addition to the existing record.

¹⁰ Pre-marked exhibit, SE Exhibit No. 144, official records in the Office of the State Engineer.

The SNWA also alleges that the portions of the Aquaveo Report it seeks to exclude fail to comply with the directive that requires expert witness reports to include within them a complete statement of all the 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 any exhibits to be used as a summary of or in support of the opinions. The SNWA asserts that the matter was not remanded for re-litigating the impacts of SNWA's pumping on the CPB's water rights; therefore, any discussion related to potential impacts to water rights appurtenant to Cleveland Ranch is outside the scope of the remand proceedings.

The CPB responds¹¹ that the SNWA ignores the overarching principles of the District Court's Decision, which is an explicit repudiation of the idea that a water budget analysis alone can succeed without taking into account the ET salvage. It argues that the District Court's Decision says that if the authorized withdrawals exceed the ET capture over a long period of time, the result is perpetual groundwater mining with permanent damage to the aquifer and that the discussion of safe yield and the water budget provide the technical foundation for why this is so. The CPB asserts that the Aquaveo Report provides the analysis that the well field design is fatally flawed due to well locations and the hydrologic properties of that part of the groundwater basin and this discussion is consistent with the District Court's Decision. The CPB says that the District Court's Decision specifically stated that estimated perennial yield through a simple water budget is insufficient in establishing how much of the perennial yield will be recovered through ET-salvage and required the State Engineer to address that specific issue, which the Aquaveo Report does.

As to the CPB's evidence regarding impacts to its existing water rights, the SNWA asserts that it is obvious that the District Court's Decision, which requires the establishment of standards, thresholds and triggers so that mitigation of unreasonable effects from the pumping are neither arbitrary or capricious, requires analysis of the pumping from the 15 wells that are the subject of the applications under consideration. The CPB asserts that the Aquaveo Report demonstrates that, without capturing the ET in the northern part of the basin, the water table in the southern portion of the basin will be permanently and irretrievably lowered thereby damaging Cleveland Ranch water rights.

¹¹ Pre-marked exhibit, SE Exhibit No. 150, official records in the Office of the State Engineer.

In its Reply,¹² the SNWA notes that it is important that the State Engineer follow the specific remand instructions; however, there is a disagreement between the SNWA and CPB that arises from each party's interpretation of what those remand instructions require. The SNWA repeats its argument that the water budget, sustainability, safe yield and perennial yield of Spring Valley are outside the scope of the remand hearing. As to the CPB's new impacts analysis, the SNWA argues that the District Court's Decision did not reverse the State Engineer's decision on conflicts. The Court's concern was the 3M Plan lacked objective standards and triggers for identifying, managing and mitigating any impacts that arise.

The State Engineer finds that the District Court's Decision found that the "State Engineer relied on substantial evidence, produced from numerous sources, when determining the amount of water available for the Spring Valley appropriation granted to SNWA. Considering the evidence of evapotranspiration, inter-basin flow and recharge, the Engineer found 84,000 afa available."¹³ However, as already noted, the State Engineer finds, because the parties disagree with how to carry out the remand instructions, and CPB Exhibit No. 19 is the evidence by which the CPB addresses the District Court's Decision, the State Engineer will allow it to present that argument and the motion in limine is denied. The exhibit touches on the issues presented in the remand, and whether or not it is an accurate interpretation of the District Court's Decision is to be determined by the State Engineer as he reviews all the evidence. The State Engineer finds that he was not instructed to reject Nevada's long-established use of perennial yield as the basis for groundwater availability for a new concept of safe yield or sustainable yield, yet uncertainty was unquestionably introduced by the District Court's Decision. The State Engineer finds the District Court's Decision did not reverse the decision as to the perennial yield of Spring Valley; however, the District Court's Decision said that it was being remanded for an award less than the calculated ET and the amended award has some prospect of reaching equilibrium in the reservoir¹⁴ and the State Engineer was instructed to recalculate the water available for

¹² Pre-marked exhibit, SE Exhibit No. 155, official records in the Office of the State Engineer.

¹³ SE Exhibit No. 118, District Court's Decision at p. 9, official records in the Office of the State Engineer.

¹⁴ SE Exhibit No. 118, District Court's Decision at p. 13, official records in the Office of the State Engineer.

appropriation from Spring Valley assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time.¹⁵

The State Engineer finds it appears that the CPB believes the discussion as to time to reach equilibrium requires discussion of these concepts and he will not at this time exclude those sections of the Aquaveo Report. What weight, if any, it will be given is not determined at this time. The SNWA also alleges that the portions of the Aquaveo Report it seeks to exclude fail to comply with the directive that requires expert witness reports to include within them a complete statement of all the 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 any exhibits to be used as a summary of or in support of the opinions. The State Engineer is unable to determine the specific provisions of the report that the SNWA asserts fail to comply with the Interim Order. The State Engineer finds he intends to allow the parties to present the evidence they believe supports their positions, which is in conformity with the Interim Ruling.

The State Engineer finds that the proceedings on these applications have been given an unprecedented 13 weeks of hearing: three weeks in 2006 (September 11 – 29 Spring Valley), two weeks in 2008 (February 4- 15 Cave, Dry Lake and Delamar), six weeks in 2011 (September 26 - October 30, October 31- November 18 Spring, Cave, Dry Lake and Delmar) and two weeks 2017 (September 25 – October 6). The Applicant and Protestants are being provided an additional 4½ days for each side to provide the evidence they believe is important to their position. The State Engineer encourages them to use their time wisely. No additional hearing time will be granted on this remand hearing.

Southern Nevada Water Authority Motion in Limine to Exclude Exhibits GBWN/WPC 281, 282, 290, 292 or Parts Thereof, and Related Testimony

The SNWA requests the State Engineer exclude the majority of the evidence presented in GBWN Exhibit No. 281 (Myers' Report titled *Hydrogeology of Spring, Cave, Dry Lake, and Delamar Valleys, Impacts of Developing Southern Nevada Water Authority's Clark, Lincoln, and White Pine Counties Groundwater Development Project*), except for the "Monitoring, Management and Mitigation Plans" section found on pages 66 through 80, and all of GBWN

¹⁵ SE Exhibit No. 118, District Court's Decision at p. 23, official records in the Office of the State Engineer.

Exhibit Nos. 282, 290 and 292.¹⁶ The SNWA asserts that GBWN Exhibit No. 281, Myers' Report, should be excluded because the topics raised in the report, except for the 3M Plan section found in pages 66 through 80, are outside the specific issues on remand. Likewise, the SNWA asserts that GBWN Exhibit Nos. 282 (Article titled *Groundwater-dependent ecosystems in Oregon: as assessment of their distribution and associated threats*), 290 (Article titled *Rapid transport pathways for geothermal fluids in active Great Basin fault zone*), and 292 (Article titled *Mapping Groundwater Dependent Ecosystems in California*) should also be excluded pursuant to NAC § 533.260, because the exhibits are referenced to address issues that are also outside of the specific issue on remand, and therefore are irrelevant and unduly repetitious. Additionally, the SNWA argues that GBWN Exhibit Nos. 282 and 292 should be excluded because they contain opinions related to groundwater dependent ecosystems and other biological matters that are outside the expertise of Dr. Myers. Because they are outside of the scope of the remand, the SNWA requests that the State Engineer exclude them and if the State Engineer denies its request, the SNWA asked for another five days of hearing time to present witnesses and evidence to address the topics.

The SNWA argues that the doctrine of the law of the case prohibits the consideration of issues that have been decided by the same tribunal in a prior proceeding in the same case. It asserts that the State Engineer made many factual findings and ruled on many issues in State Engineer's Ruling Nos. 6164-6167, which were not disturbed by the District Court's Decision, thus, making those decisions the law of the case. Accordingly, anything other than the four remand issues are outside the scope of the remand and thus are irrelevant and duly repetitious and should be excluded. Additionally, the SNWA asserts that all the parties agreed that the scope of the remand hearing was limited to the four issues remanded and the State Engineer has so ordered that the remand hearing will be limited to those issues.

The SNWA argues that Myers' Report indicates his assumption that the original applications are the starting point for the remand hearing and begins with a new analysis on arguments and evidence on such topics as recharge and discharge estimates, projected drawdown and model impacts, numerical and conceptualized model construction, equilibrium analysis in the White River Flow System and interbasin flow calculations. It alleges that the Myers' Report

¹⁶ Pre-marked exhibit, SE Exhibit No. 145, official records in the Office of the State Engineer.

attempts to have the State Engineer re-determine the recharge and discharge estimates for Spring, Cave, Dry Lake, and Delamar valleys, discusses perceived errors with calculating perennial yields, claims impacts caused by modeled drawdown in Spring Valley, takes issue with the CCRP model and model construction, explores the issue of time to equilibrium in the White River Flow System, interbasin flows, and discusses modeling projections for different alternatives in the Bureau of Land Management Environmental Impact Statement. The SNWA also takes issue with Dr. Myers' unsubstantiated opinions on water rights quantification and environmental resources in the section relating to the 3M Plans asserting they are outside his area of expertise as Dr. Myers was qualified as an expert in hydrology and groundwater modeling. He has not demonstrated any qualification to offer an expert opinion on water right quantification and environmental resource analysis. Finally, the SNWA requests exclusion of several articles on the ground that Dr. Myers cannot be utilized as a witness to lay the foundation for the admission of these articles.

In response,¹⁷ the GBWN argues that the exclusion of the evidence would be inappropriate as the goal of the hearing is to create a fully developed record that contains all the relevant evidence to support a sound decision. NAC § 532.180.¹⁸ The GBWN asserts that the State Engineer has the requisite expertise to evaluate the credibility and weight of the evidence and the technical rules of evidence do not apply in proceedings before the State Engineer. NRS § 533.365(7). It argues that the SNWA had to the opportunity to rebut the evidence in the second evidentiary exchange and can critique it during cross-examination rather than pre-hearing exclusion of the evidence. It points to NAC § 533.260, which provides that:

1. All evidence offered in a hearing, including the testimony of a witness, must be relevant to the subject matter of the proceeding.
2. The State Engineer may exclude testimony that is irrelevant, incompetent or unduly repetitious by:
 - (a) Requesting a party to cease his or her line of examination or narrative; or
 - (b) Refusing to consider the testimony when making his or her final determination.

¹⁷ Pre-marked exhibit, SE Exhibit No. 149, official records in the Office of the State Engineer.

¹⁸ NAC § 532.180 provides “[t]he objective of a protest hearing is to develop a record upon which the State Engineer may rely to make a sound decision, without causing unnecessary delay and expense to participating parties or to the Office of the State Engineer.”

The GBWN proposes that the hearing rules do not even provide for pre-hearing exclusionary motions, but rather provides that that State Engineer can request a party to cease a line of examination or refuse to consider the evidence when making his final determination. The GBWN argues that the language contemplates that the State Engineer will first hear the evidence in question before deciding whether it is relevant, or should even be considered, as part of the basis for the final decision before him. The SNWA argues that this rule allows the State Engineer to refuse to consider evidence by issuing a pre-hearing ruling on exclusion.

The GBWN also argues that the evidence is relevant to the issues remanded in that Dr. Myers' analysis of the issues, and his explanation of the deficiencies that required reversal and remand, necessarily requires reconsideration of the evidence in the record and any additional evidence submitted by the parties that addresses the hydrology, modeling, drawdown, and impacts related to those issues. It asserts that the District Court found that there was not substantial evidence in the record to support findings regarding the availability of water, conflicts with existing rights, the public interest or environmental soundness.

The GBWN argues that the SNWA concedes that Nevada recognizes a broad definition of relevance and generally favors admission of relevant evidence. As to Spring Valley, the recalculation of the amount of water available requires that the State Engineer ensure that equilibrium between recharge and discharge will be reached within a reasonable time period under the pumping proposed in the specific applications without causing impacts to existing rights or unreasonable impacts to the environment. The GBWN asserts that Dr. Myers' report and supporting exhibits relates to the location and amounts of ET discharge and the sources of the recharge to those discharge areas, which is relevant to the determinations the District Court ordered the State Engineer to make. This would include information on the flow of groundwater in and out of Spring Valley.

With regard to the applications in Cave, Dry Lake and Delamar valleys, the GBWN asserts that the District Court's Decision requiring a recalculation of the amount of water that is available for appropriation also requires recalculation of the water in the resource, and includes the same analysis as to whether the system will come to equilibrium within a reasonable time, and that the use of the water will not conflict with existing rights, threaten to prove detrimental to the public interest, including unreasonable impacts to the environment. It argues that, on its face, this direction requires the State Engineer to consider evidence that relates to the factors involved

in determining how much water can properly be considered available for appropriation. The evidence that the SNWA seeks to exclude relates to the amounts and locations of ET discharge and the sources of recharge to that discharge is relevant to the decisions the State Engineer is required to make.

With regard to the 3M Plan, the GBWN argues that whether the proposed standards, thresholds and triggers will allow for effective monitoring and mitigation requires consideration of whether the model and modeling evidence are adequate to set objective thresholds and triggers when and where mitigation measures will need to be implemented and how long it will take for those measures to mitigate the effects caused by the pumping. As to GBWN Exhibit Nos. 282 and 292, it asserts that Dr. Myers' opinions address hydrology implications resulting from the drawdown, including the potential effectiveness of the 3M Plan; thus, they are within the scope of Dr. Myers' expertise and are related to the issues on remand concerning the amount of water that is available for appropriation and go to the effectiveness of any 3M Plan.

The GBWN takes issue with the SNWA's attempt to limit the scope of the remand issue while at the same time itself presenting a completely redesigned project (101 ET-capture wells), which is dramatically different from the wells analyzed from the 2011 hearing. Dr. Myers' Report and supporting exhibits were presented to directly address the issues remanded in the District Court's Decision; therefore, the GBWN argues they are relevant and probative.

The GBWN also takes issue with the SNWA's law of the case argument asserting that the District Court's Decision did disturb the State Engineer's decision finding that the evidence did not support that the project would reach equilibrium and the 3M Plan was lacking. The District Court's Decision found that the State Engineer could not ensure that the water was available, there would be no conflict with existing rights, and the use of the water would not threaten to prove detrimental to the public interest and the project would be environmentally sound for the basin of origin. It argues that there is no question of law being disputed in the remand hearing and that additional evidence and testimony on the topics already considered by the State Engineer in the previous hearing is exactly what is contemplated by the District Court's Decision.

In Reply,¹⁹ the SNWA argues that the GBWN completely exaggerates the District Court's Decision in an effort to re-open and re-litigate the entire 2011 proceedings. It asserts that Dr. Myers' Report completely fails to address the specific and limited remand instructions and offers opinions and conclusions he is not qualified to make rendering the majority of his report inadmissible. It argues that the GBWN is completely wrong in that the District Court's Decision was not a complete reversal and remand, but rather the Court found that it was not disturbing the findings and conclusion of the State Engineer with respect to factual issues not specifically found in the remand instructions. It was not a blanket rejection of the State Engineer's rulings, but instead a limited reversal of certain technical aspects of those rulings.

The State Engineer finds that the District Court's Decision indicated that the Protestants argued that the 3M Plan cannot adequately protect existing rights or the environment and essentially that the award is neither environmentally sound or in the public interest. The District Court's Decision found that substantial evidence supported the State Engineer's determination of the perennial yield of 84,000 afa, but held that uncaptured ET needs to be deducted from the perennial yield. The District Court's Decision instructed the State Engineer to recalculate the appropriations from Cave Valley, Dry Lake Valley and Delamar Valley to avoid over appropriation or conflicts with down-gradient, existing water rights. It touches on the issues presented in the remand, whether or not it is an accurate interpretation of the District Court's Decision is to be determined by the State Engineer as he reviews all the evidence. What weight, if any, it will be given is not determined at this time.

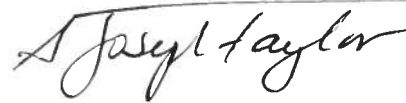
The State Engineer finds the District Court's Decision found that the 3M Plan was flawed, that the State Engineer did not meet his heavy burden of ensuring the project is environmentally sound, and that granting the applications was premature without knowing the impacts to existing rights and not having clear standards to identify those impacts to existing rights, unreasonable environmental effects so that mitigation can proceed in a timely manner. The State Engineer finds there is disagreement as to how to approach the issues on remand. The State Engineer is providing all parties the opportunity to address the remand issues and they have done so as they have seen fit. The State Engineer provides all parties the opportunity to present final additional evidence to address the matters before the State Engineer on remand. The State

¹⁹ Pre-marked exhibit, SE Exhibit No. 156, official records in the Office of the State Engineer.

Engineer finds that with the two evidence exchanges, all had before them what the other parties were going to present and had the opportunity to provide rebuttal evidence. The Motion in Limine to Exclude Exhibits GBWN/WPC 281, 282, 290, 292 or Parts Thereof, and Related Testimony is denied.

As already noted, the State Engineer finds that the proceedings on these applications have been given an unprecedented 13 weeks of hearing and no additional hearing time will be granted on this remand.

Respectfully submitted,

A handwritten signature in cursive script, reading "Susan Joseph-Taylor".

Susan Joseph-Taylor, Hearing Officer
Deputy Administrator

Dated this 13th day of
September, 2017.

SERVICE LIST

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