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2017 AUG 18 PM 4:55

*** STATE ENGINEERS OFFICE

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.)

**MOTION IN LIMINE TO EXCLUDE
PORTIONS OF EXHIBIT CPB 19 AND
RELATED TESTIMONY**

The Southern Nevada Water Authority (“SNWA”) requests that the State Engineer issue a pre-hearing order excluding from evidence certain portions of the Expert Report of Aquaveo, LLC (hereinafter “Aquaveo Report”)¹ that are outside of the scope of remand and to bar any testimony at the hearing related to them. This Motion in Limine (“Motion”) is made pursuant to the State Engineer’s hearing regulations (NAC 533.142 and NAC 533.260), the State Engineer’s Interim Order on Pre-Hearing Scheduling (October 2, 2016), the State Engineer’s Notice of Hearing and Interim Order (November 28, 2016), and the Hearing Officer’s letter regarding scheduling for motions in limine (August 8, 2017).

The State Engineer should exclude certain portions of the Aquaveo Report because the topics raised within that report are outside the specific scope of the issues that the District Court ordered the State Engineer to consider on remand.² Because these certain portions of the Aquaveo Report relate to matter that are not within the scope of the remand hearing, they are irrelevant and unduly repetitious and should be excluded under NAC 533.260.

SNWA requests that the State Engineer issue an order excluding these portions of the Aquaveo Report and related testimony before the hearing begins, rather than withholding a decision until the

¹ CPB Exhibit 19.
² See *Office of State Eng’r, Div. of Water Res. v. Curtis Park Manor Water Users Ass’n*, 101 Nev. 30, 32, 392 P.2d 495, 497 (1985) (A lower tribunal’s failure to follow the limited remand instructions of the appellate court violated the law of the case doctrine).

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1 exhibits and testimony are offered into evidence. SNWA must present its witnesses first during the
2 hearing and is not guaranteed a rebuttal case. Without a pre-hearing ruling of exclusion, SNWA will
3 be placed in the awkward position of either (1) having its witnesses discuss the very exhibit SNWA is
4 trying to exclude during its case in chief, or (2) risk losing the opportunity to rebut the exhibit at all
5 should the Aquaveo Report come into evidence during the protestants' cases, and over SNWA's
6 objection.

7 In the event SNWA's Motion is denied, SNWA respectfully requests an additional five days of
8 hearing time to present evidence and witnesses to address the topics SNWA argues are outside the
9 scope of the remand hearing. SNWA has carefully planned its four and one-half days of testimony to
10 address just the four remand topics. In the event SNWA's Motion is denied, SNWA will need
11 additional hearing time to address the extraneous topics identified in the CPB exhibits that are the
12 subject of this Motion.

13 **STATEMENT OF FACTS**

14 **I. The District Court Remand Order.**

15 On December 13, 2013, the Seventh Judicial District Court (the "Court") remanded portions of
16 the State Engineer's Rulings for Spring Valley, Cave Valley, Dry Lake Valley, and Delamar Valley
17 (Rulings 6164 through 6167, respectively) ("Remand Order"). The Court's remand order directed the
18 State Engineer to address only the following four topics:

- 19 1. The addition of Millard and Juab counties, Utah in the mitigation
20 plan so far as water basins in Utah are affected by pumping of
water from Spring Valley Basin, Nevada;
- 21 2. A recalculation of water available for appropriation from Spring
22 Valley assuring that the basin will reach equilibrium between
discharge and recharge in a reasonable time;
- 23 3. Define standards, threshold or triggers so that mitigation of
24 unreasonable effects from pumping of water are neither arbitrary
and Delamar Valley; and,
- 25 4. Recalculate the appropriations from Cave Valley, Dry Lake
26 Valley, and Delamar Valley to avoid over appropriations or
27 conflicts with down-gradient, existing water rights.

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

11 **II. Pre-Hearing Conference.**

12 On September 14, 2016, the State Engineer held a Status Conference regarding the Court's
13 remand order. The purpose of the Status Conference was "to discuss how and when to proceed with
14 the issues remanded for the State Engineer's consideration and decision."³ A primary question at the
15 status conference was whether the State Engineer could issue a new ruling based solely on the existing
16 record or whether a new hearing was needed to provide the parties the opportunity to present
17 additional evidence. Many parties, including counsel for CPB, agreed that if an additional
18 administrative hearing was to be held that it should be restricted only to the matters subject to
19 remand.⁴ The hearing officer agreed that the scope of the remand included only the four issues and
20 said that attempts to go beyond the scope of remand would not be allowed.⁵

21 **III. Interim Order on Pre-hearing Scheduling**

22 On October 3, 2016, the State Engineer issued his Interim Order on Pre-hearing Scheduling
23 ("October Interim Order"). In the October Interim Order, the State Engineer found that "[a]n
24 additional administrative hearing is necessary to provide the parties the opportunity to fully address
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26 ³ Transcript of Proceedings, September 14, 2016, Status Conference at 3:11-13.

27 ⁴ Transcript, September 17, 2016, Pre-hearing Conference ("Transcript").

28 ⁵ Transcript, p. 70:24-71:6.

1 the issues remanded.”⁶ The State Engineer also reaffirmed the prior direction of the hearing officer
2 that, “[t]he scope of the remand hearing will be limited to the specific issues identified in the [Court’s]
3 ruling, and only new evidence *relating to those issues* will be considered in addition to the existing
4 record.”⁷ Several sections of the Aquaveo Report include comments and opinions on matters that are
5 clearly outside the scope of the District Court’s specific remand instructions. These portions of the
6 report should be excluded from the record and Aquaveo’s experts should be prohibited from
7 discussing them.

8 **IV. Notice of Hearing and Interim Order**

9 On November 28, 2016, the State Engineer’s Notice of Hearing and Interim Order (“November
10 Interim Order”) reiterated the limited scope of the upcoming hearing stating that “the scope of the
11 remand hearing will be limited to the specific issues identified in the Judge Estes’ Ruling, and only
12 new evidence relating to those issues will be considered in addition to the existing record.”⁸

13 In the November Interim Order the State Engineer also decided several motions that had been
14 submitted by the parties. With respect to a motion filed by SNWA related to scheduling, proper
15 parties, and exhibits, the State Engineer commented on the unprecedented size of the record and stated
16 that he would “not add to it documents that will not be relevant to his analysis on remand.”⁹ Then the
17 State Engineer required expert witnesses to write reports that include within them a “complete
18 statement of all opinions to be expressed and the basis and reasons for those opinions, the data or other
19 information considered by the witness in forming the opinions, [and] any exhibits to be used as a
20 summary of or in support of the opinions.”¹⁰ The portions of the Aquaveo Report that SNWA seeks to
21 exclude fail to comply with this directive.

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25 ⁶ October 3, 2016, Interim Order on Pre-Hearing Scheduling at 2.

26 ⁷ October 3, 2016, Interim Order on Pre-Hearing Scheduling at 3 (emphasis added).

27 ⁸ November 28, 2016, Notice of Hearing and Interim Order at 1.

27 ⁹ November 28, 2016, Notice of Hearing and Interim Order at 6.

27 ¹⁰ November 28, 2016, Notice of Hearing and Interim Order at 8.

1 **V. Nevada Administrative Code**

2 The State Engineer’s regulations for protest hearings allow admission of evidence that is
3 “relevant” to the subject matter of the hearing.¹¹ The regulations allow the State Engineer to exclude
4 testimony that is “irrelevant, incompetent or unduly repetitious.”¹² Evidence is relevant if it has “any
5 tendency to make the evidence of any fact that is of consequence to the determination of the action
6 more or less probable than it would be without the evidence.”¹³ Even if evidence is relevant, it can be
7 excluded if its probative value is outweighed by “undue delay, waste of time or needless presentation
8 of cumulative evidence.”¹⁴ Independent of evidentiary determinations, the regulations allow the State
9 Engineer to “define or limit the issues to be considered.”¹⁵

10 **LEGAL STANDARD**

11 The primary purpose of a motion in limine is to promote a smooth and efficient hearing and
12 reduce interruptions during the hearing resulting from arguments between attorneys over complex
13 evidentiary questions.¹⁶ Motions in limine also serve to “limit issues and save the parties time, effort,
14 and cost in trial preparation.”¹⁷

15 The doctrine of the law of the case prohibits consideration of issues which have already been
16 decided in a prior proceeding in the same case. “Where an appellate court states a principal [sic] or
17 rule of law in deciding a case, that rule becomes the law of the case and is controlling both in the
18 lower courts and on subsequent appeals, so long as the facts remain substantially the same.”¹⁸ In other
19 words, courts are loath to revisit prior decisions that were decided at earlier appellate stages of the
20 same litigation.¹⁹ The law of the case doctrine furthers important policy goals of judicial consistency

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¹¹ NAC 533.260(1).

23 ¹² NAC 533.260(2).

24 ¹³ NRS 48.015.

¹⁴ NRS 48.035.

¹⁵ NAC 533.210(2).

25 ¹⁶ Nevada Civil Practice Manual § 18.02[2]; *see also State v. Shadden*, 235 P.3d 436, 446-47 (Kansas 2010).

¹⁷ *State v. Shadden*, 235 P.3d 436, 446-47 (Kansas 2010).

26 ¹⁸ *Geissel v. Galbraith*, 105 Nev. 101, 103, 769 P.2d 1294, 1296 (1989); *See also Hsu v. County of Clark*, 123 Nev. 625,
629-30, 173 P.3d 724, 728 (2007).

27 ¹⁹ *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817, 108 S.Ct. 2166 (1988); *See 5 Am. Jur. 2d Appellate*
28 *Review* §566.

1 and finality, and prevents reconsideration of decisions that are intended to “put a particular matter to
2 rest” during the course of a single lawsuit.²⁰

3 The State Engineer made many factual findings and ruled on many issues in Rulings 6164-
4 6167. On appeal, only four issues were remanded, and the remainder of the State Engineer’s findings
5 were not set aside.²¹ The District Court’s decision not to disturb the State Engineer’s findings, other
6 than the four specific remand issues, made all the other State Engineer findings the “law of the case”
7 on remand. Additionally, the facts of this case remain “substantially the same.”²² Accordingly, the
8 State Engineer’s consideration of matters outside of the four remand issues are beyond the scope of
9 remand, and any evidence or testimony related to previously decided issues that were upheld on
10 remand should be excluded from consideration at the limited remand hearing. Reopening any of these
11 matters on remand is wholly improper. The parties had the opportunity to challenge all of the State
12 Engineer’s determinations, but the Court did not agree with all of their challenges and instead only
13 remanded the case so that four limited issues could be resolved. The doctrine of the law of the case
14 demands that the already settled evidentiary matters remain settled on remand.

15 Accordingly, the evidentiary findings contained within Rulings 6164-6167, together with the
16 conclusions of law established by the Court in the Remand Order, constitute the settled law of the case
17 for any further proceedings. Also, at the prehearing conference, the parties stipulated that the scope of
18 remand was limited to the four issues. And the State Engineer has previously ordered that “[t]he scope
19 of the remand hearing will be limited to the specific issues identified in the [Court’s] ruling, and only
20 new evidence relating to those issues will be considered in addition to the existing record.”²³ As such,
21 any topic or issue outside of the four remand issues should not be entertained at the remand hearing
22 and evidence should be excluded or stricken if it relates to a topic outside the remand.

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25 ²⁰ *Hsu*, 123 Nev. at 630, 173 P.3d at 728.

26 ²¹ Remand Order, p. 23 (“After an in-depth review of the record this Court will not disturb the findings of the Engineer
save those findings that are the subject of this Order”).

27 ²² *Geissel*, 105 Nev. at 103, 769 P.2d at 1296.

²³ (Pre-hearing Order p. 3).

ARGUMENT

I. Testimony and evidence related to water budgets, sustainability, safe yield, and the State Engineer’s prior calculation of the perennial yield of Spring Valley are outside the scope of the remand hearing.

The District Court’s remand instruction related to quantifying the water available for appropriation in Spring Valley was clear and limited. The State Engineer was instructed only to recalculate the quantity of water granted to SNWA based on the goal of “assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time.”²⁴ The State Engineer was *not* instructed to: (1) alter his previous estimate of the perennial yield of Spring Valley, (2) re-formulate the well-established method for calculating the perennial yield of groundwater basins, (3) reject the concept of perennial yield in favor of some new and untested concept of “safe yield” or “sustainable yield,” or (4) re-examine his historical practice of water budgeting. Instead the State Engineer was only instructed to determine how much of the established perennial yield in Spring Valley can be appropriated by SNWA such that the basin will achieve equilibrium within a reasonable time.

Despite this, in the Aquaveo Report the authors spend most of their time advocating that the State Engineer overturn his long-established practice of using water budgets to determine the perennial yield of groundwater basins in Nevada and instead adopt new and untried methods for managing groundwater in the State.²⁵ Reference is made to a controversial article by Bredehoeft, et al. in which Bredehoeft coined the term “Water Budget Myth.”²⁶ However, Bredehoeft’s approach was specifically litigated during the 2011 hearings and rejected by the State Engineer.²⁷

In the Aquaveo Report the authors are silent with respect to how their analysis of certain hand-picked academic articles about water budgeting, sustainability, or safe yield relates in any way to the limited remand instruction provided by the District Court. As noted above, SNWA has been given

²⁴ December 10, 2013, Decision at 23, *White Pine County v. Jason King, P.E.*, Seventh Judicial District Court of Nevada Case No. CV1204049.

²⁵ Expert Report of Aquaveo, LLC at 13-15.

²⁶ Expert Report of Aquaveo, LLC at 13.

²⁷ In 2011, a rebuttal report was prepared (Pieur, 2001 (Exhibit 428)) and submitted to the State Engineer in response to a report prepared by Bredehoeft (2011) in which the “Water Budget Myth” is espoused.

1 limited time to present evidence and testimony during the upcoming hearing. While a long academic
2 debate over the merits of various approaches to water budgeting may be interesting, it would be
3 repetitive, and it would do little to assist the State Engineer in carrying out the District Court’s
4 instructions. Accordingly, any part of the Aquaveo Report or Aquaveo Rebuttal Report related to
5 water budgets, sustainability, safe yield, or the State Engineer’s prior calculation of the perennial yield
6 of Spring Valley should be excluded from evidence and stricken from the record.

7 **II. The legal question of whether ET Capture is required under Nevada law has already**
8 **been decided and is, therefore, outside the limited scope of the remand hearing.**

9 Both the District Court and the State Engineer agree that full ET capture is not required under
10 Nevada law. In the Remand Order, the District Court favorably cited the State Engineer’s prior legal
11 conclusion that:

12 [T]here is no provision in Nevada water law that addresses time to
13 capture, and no State Engineer has required that E.T. be captured within
14 a specific period of time. It will often take a long time to reach near
15 equilibrium in large Basins . . . and this is no reason to deny water right
16 applications.²⁸

17 The District Court then held that “[t]he Engineer is *correct* that time to reach equilibrium is *not*
18 *a valid reason to deny the grant of water.*”²⁹ Contrary to assertions made by the Protestants, the
19 District Court did *not* rule that ET Capture is an absolute requirement for water development projects
20 in Nevada.³⁰ Instead, the District Court made a limited ruling that the absence of evidence indicating
21 that existing basin discharge will be fully captured by SNWA’s project pumping *may* be a “reason to
22 *limit* the appropriation below the calculated E.T.”³¹ This conclusion provides the basis for the District

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

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26 ³⁰ Such a ruling would invalidate almost all the existing groundwater permits issued in this state. The unique topography
27 of Nevada, coupled with the relatively small percentage of privately-owned land, makes full capture of ET discharge
28 almost impossible to achieve. Indeed, this is confirmed by the baseline model simulation showing that current
groundwater pumping in Spring Valley (without any pumping related to SNWA’s applications) will not fully capture an
equivalent quantity of ET discharge over the next 200 years. See Drici W., Burns, A., and Watrus J., 2017, Simulation of a
Groundwater Production Scenario Related to Southern Nevada Water Authority Groundwater Applications in Spring
Valley, Nevada.

³¹ December 10, 2013 Decision at 11, *White Pine County v. Jason King, P.E.*, Seventh Judicial District Court of Nevada
Case No. CV1204049 (emphasis added).

1 Court's remand instruction, and the instruction must be interpreted and implemented within this
2 established legal framework.

3 Since the District Court upheld the State Engineer's prior determination that Nevada law does
4 not require an applicant to demonstrate full capture of project pumping from existing sources of
5 discharge, any debate regarding this question is entirely outside the scope of the remand proceedings.
6 The only issue to be decided on remand is whether SNWA's appropriation should (or should not) be
7 *limited* (not denied) based on evidence regarding the quantity of ET discharge that can be captured by
8 project pumping.

9 Instead of operating within the limited legal framework provided by the District Court, the
10 authors of the Aquaveo Report improperly attempted to broaden the scope of the remand hearing and
11 argue for a radical reinterpretation of well-established Nevada law. The State Engineer should not
12 countenance such a blatant disregard of his previous orders and instructions which clearly state that the
13 scope of the remand hearing will be limited to the four issues contained within the District Court's
14 Remand Order. Any discussion in the Aqueveo Report related to Nevada's methodology for
15 determining unappropriated water, whether Nevada law places an absolute requirement on an
16 applicant to demonstrate full ET capture, or claims that an application should be denied for failure to
17 demonstrate full ET capture, should be excluded from evidence and stricken from the record.

18 **III. Issues related to alleged impacts that SNWA's pumping might have on Cleveland Ranch**
19 **have already been decided and are outside the limited scope of the remand hearing.**

20 The authors of the Aquaveo Report repeatedly claim that SNWA's pumping will negatively
21 impact operations at the Cleveland Ranch. However, nothing in the Remand Order directs the State
22 Engineer to re-open and re-litigate the already settled issue of whether SNWA's pumping will conflict
23 with Cleveland Ranch's water rights. The only issue for the State Engineer to decide is whether he
24 should limit SNWA's appropriation of water based on the amount of time it will take for the basin to
25 reach a new equilibrium condition in response to project pumping.

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1 The Protestants had ample opportunity during the 2011 hearing to present evidence and cross-
2 examine SNWA’s experts regarding any potential impacts that project pumping might have on
3 existing water rights. In Ruling 6164, the State Engineer outlined a site-specific, qualitative analysis
4 of such impacts.³² This included a specific section with respect to the water rights appurtenant to the
5 Cleveland Ranch.³³ The State Engineer found that “the potentially impacted CPB water rights are or
6 will be monitored and that this monitoring will allow for early warning of potential impacts” and that
7 with the implementation of a staged development plan SNWA’s pumping “will not conflict with
8 existing rights of CPB.”³⁴ The District Court required SNWA’s 3M plan to have more “standards,
9 threshold or triggers so that mitigation of unreasonable effects from pumping of water are neither
10 arbitrary nor capricious in Spring Valley.” But the District Court did not overturn the State Engineer’s
11 findings regarding alleged impacts in Spring Valley. Accordingly, any discussion related to potential
12 impacts to water rights appurtenant to Cleveland Ranch is outside the scope of the remand
13 proceedings.

14 The purpose of the remand hearing is to gather evidence related to the District Court’s four
15 remand issues – not to re-litigate the entire 2011 hearing. SNWA has been granted limited time during
16 the remand proceedings to address the four remand issues. Re-litigating the issue of alleged impacts to
17 Cleveland Ranch would require a great deal of additional time and only serve to distract from the real
18 issues that need to be decided. Accordingly, the State Engineer should exclude any evidence or
19 testimony related to impacts that project pumping might have on Cleveland Ranch’s water rights.

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26 ³² Ruling 6164 at 133-144.

27 ³³ Ruling 6164 at 137-142.

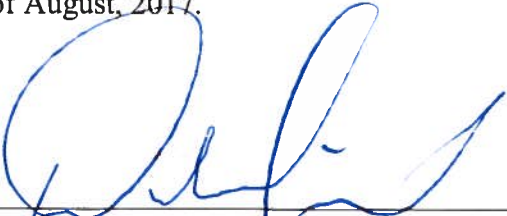
27 ³⁴ Ruling 6164 at 139-40, 142.

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CONCLUSION

For the foregoing reasons, SNWA respectfully requests that the State Engineer issue a pre-hearing order excluding any 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. In the alternative, SNWA requests that the hearing be extended for an additional week to give SNWA the opportunity to present additional rebuttal evidence related to these issues.

Respectfully submitted this 18th day of August, 2017.

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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:

[X] By electronic means using a web-based file sharing service pursuant to stipulation of counsel made on April 25, April 27, May 15, and June 22, 2017, as follows:

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DATED this 18th day of August, 2017



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