

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

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STATE ENGINEERS OFFICE

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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. )

**SNWA'S REPLY IN SUPPORT OF  
SNWA'S MOTION IN LIMINE TO  
EXCLUDE PORTIONS OF EXHIBIT  
CPB 19 AND RELATED TESTIMONY**

The Southern Nevada Water Authority ("SNWA") hereby replies to CPB's Opposition to Motion in Limine to Exclude Portions of CPB Exhibit 19 and Related Testimony ("Opposition") filed by the Corporation of the Presiding Bishop ("CPB"). This Reply is based on the pleadings and papers currently on file with the State Engineer in this case, including SNWA's Motion in Limine to Exclude Portions of Exhibit CPB 19 and Related Testimony ("Motion") which is incorporated herein by reference.

**INTRODUCTION**

Importantly, SNWA and CPB agree that "on remand, the [State Engineer] must follow the specific instructions of the remand order."<sup>1</sup> The disagreement between SNWA and CPB arises from each party's respective interpretation of what those remand instructions require. The best way for the State Engineer to resolve this disagreement is to fully understand the reasoning and context underlying the specific remand instructions, and to then appropriately exclude evidence that is irrelevant, duplicative, or not helpful to the State Engineer's decision making process.

**ARGUMENT**

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

The District Court's Remand Order was specific and limited in nature. The second remand instruction requires the State Engineer to recalculate the "water available for appropriation from

<sup>1</sup> Opposition at 8.

SE 'S EXHIBITS 155  
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1 Spring Valley.”<sup>2</sup> CPB contends that this instruction requires the State Engineer to recalculate the  
2 previously established perennial yield of the basin, thus allowing CPB’s expert to argue for a complete  
3 overhauling of the State Engineer’s method for determining perennial yield in Nevada.<sup>3</sup> However, it is  
4 a well-established principle of interpretation that an interpreter of a legal text must consider the entire  
5 text, its structure, and the logical relation of its many parts.<sup>4</sup> When read in context, it is clear that the  
6 District Court accepted the State Engineer’s perennial yield calculation and was merely directing the  
7 State Engineer to recalculate the amount of the perennial yield that is to be awarded to SNWA (i.e.  
8 what share of the perennial yield SNWA should be allowed to appropriate).

9 The District Court’s acceptance of the State Engineer’s method for calculating the perennial  
10 yield of the basin is evident from reading the entire section of the District Court order related to the  
11 Spring Valley appropriations. The Court recognizes the State Engineer’s estimate that groundwater  
12 evapotranspiration (“ET”) in Spring Valley equals 84,100 afa and that this number establishes the  
13 perennial yield for the basin.<sup>5</sup> Nowhere in the Remand Order did the District Court express any  
14 disagreement with the State Engineer’s water budgeting approach. The District Court also readily  
15 acknowledged that a reasonable lowering of the groundwater table is a natural consequence of placing  
16 groundwater resources to beneficial use.<sup>6</sup> What the District Court took issue with were numerical  
17 model projections that estimated that after 200 years, project pumping would only capture 84 percent  
18 of the pumped water from captured ET.<sup>7</sup>

19 \_\_\_\_\_  
20 <sup>2</sup> December 10, 2013, Decision, *White Pine County v. Jason King, P.E.*, Seventh Judicial District Court of Nevada Case No.  
CV1204049 (“Remand Order”) at 23.

21 <sup>3</sup> Opposition at 2-4.

22 <sup>4</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 167 (2012).

23 <sup>5</sup> Remand Order at 9.

24 <sup>6</sup> Remand Order at 10. SNWA disagrees with the District Court’s statement that “death of most of the phreatophytes” is a  
25 trade-off for a beneficial use of water. The 84,100 afa of ET discharge from groundwater in Spring Valley is just a portion  
26 of the total ET discharge for the basin. Evidence presented at the 2011 hearing demonstrates that total basin ET is in  
27 excess of 174,500 afa. *See* SNWA Exhibit 258 at 5-7. This finding was made by the State Engineer and upheld by the  
28 District Court. Ruling 6164 at 64 (“the State Engineer finds that the Applicant provided a scientifically sound estimate of  
total ET in Spring Valley”). Accordingly, even if pumping by water users in Spring Valley completely captured the 84,100  
afa of groundwater discharging as ET, there will still be more than 90,000 afa of direct precipitation feeding plant  
communities in Spring Valley. Several species of phreatophytic plants operate opportunistically, i.e. they use water from  
both precipitation and the groundwater aquifer depending on what is available at any given time. Therefore, groundwater  
development will clearly not lead to the death of all phreatophytic vegetation.

<sup>7</sup> Notably, the groundwater model scenario relied upon by the District Court simulated pumping of 91,224 afa from 81 well  
locations.

1 The Court reasoned that if project pumping only captured 84 percent of its water from ET, then  
2 a pumping rate of 61,127 afa would result in 9,780 afa of ET remaining uncaptured.<sup>8</sup> Since this  
3 uncaptured ET represents groundwater that is still discharging from the basin, the Court concluded that  
4 more water will be discharging from the basin than is allowed under SNWA's permits.<sup>9</sup> The Court  
5 believed that this problem could be solved merely by reducing the amount awarded to SNWA by the  
6 quantity of uncaptured ET.<sup>10</sup>

7 When read in context with the District Court's analysis, the dictate of the second remand  
8 instruction is clear. The District Court did not direct the State Engineer to overturn his established  
9 practice and policy with respect to calculating the perennial yield for basins in Nevada. Instead, the  
10 Court merely instructed the State Engineer to recalculate the appropriation granted to SNWA based on  
11 the basin reaching a new equilibrium within a reasonable period of time. The District Court's  
12 suggested solution to the problem illustrates the confines of the analysis the State Engineer must  
13 perform on remand. As the District Court suggests, the State Engineer should not re-calculate the  
14 perennial yield, but instead should review the updated modeling projections for some prospect that ET  
15 can be captured and equilibrium reached in a reasonable amount of time.<sup>11</sup>

16 The third remand instruction concerns the 3M Plan that was approved by the State Engineer.  
17 CPB contends that the mention in the instruction of "unreasonable effects" mandates that the State  
18 Engineer re-open his previous conflicts analysis to look at specific impacts to Cleveland Ranch.<sup>12</sup>  
19 However, just as with the second remand instruction, this instruction must be read in context with the  
20 District Court's full analysis.

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23 <sup>8</sup> Remand Order at 11.

<sup>9</sup> Remand Order at 11.

24 <sup>10</sup> The District Court apparently did not realize that the percentage of ET captured by project pumping is not fixed, but  
varies based on many factors, including where the wells are located in relation to the groundwater discharge area. *See e.g.*  
CPB Exhibit 25 at 15; SNWA Exhibit 475.

25 <sup>11</sup> SNWA reserves its right on any future appeal to argue that ET capture is not a reason to limit a water appropriation. For  
26 purposes of this Reply, SNWA respects the decision of the District Court at the trial court level and understands that the  
District Court's interpretation of Nevada water law with respect to ET capture and basin equilibrium has not been  
27 confirmed on appeal.

<sup>12</sup> Opposition at 6-8.

1           Nowhere in the Remand Order does the District Court find that SNWA’s pumping will conflict  
2 with particular existing rights. Instead, the concern expressed by the Court was that the 3M Plan  
3 lacked objective standards and triggers for identifying, managing, and mitigating any impacts that  
4 might arise.

5           The District Court did not overturn the State Engineer’s determinations that: (1) “a drawdown  
6 of less than 50 feet over a 75-year period is generally a reasonable lowering of the static water table”,  
7 and (2) SNWA’s “approach to the conflicts analysis is acceptable given the limitations in the model  
8 and the purpose of this analysis.”<sup>13</sup> The District Court only held that some aspects of the 3M Plan had  
9 to be remedied. As noted by the Court “[n]ot knowing where or how bad an impact is, is not the same  
10 thing as defining what [constitutes] an adverse impact.”<sup>14</sup> Accordingly, the District Court instructed  
11 the State Engineer on remand to consider changes to the 3M Plan to “define standards, thresholds or  
12 triggers” that can be used to determine whether unreasonable adverse impacts are occurring and  
13 identify what will be done to mitigate them.<sup>15</sup> Put simply, the size of the cone of depression in Spring  
14 Valley, and whether or not it will cause an “unreasonable effect” on CPB’s water rights, was fully  
15 litigated before the State Engineer and his findings regarding those issues was not disturbed by the  
16 District Court. Those issues are wholly unrelated to whether the 3M Plan contains definite standards,  
17 thresholds, or triggers.

18           Read in context with the rest of the Remand Order, the third remand instruction is clear.  
19 Before approving any 3M Plan, the State Engineer must ensure that the plan includes sufficient  
20 standards for identifying impacts and setting standards for the management and mitigation of those  
21 impacts. This does not require a re-opening of the State Engineer’s findings regarding the conflicts  
22 analysis.

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26 <sup>13</sup> Ruling 6164 at 132.  
27 <sup>14</sup> Remand Order at 16.  
28 <sup>15</sup> Remand Order at 23.

1 **II. Water budgets, sustainability, safe yield, and the perennial yield of Spring Valley are**  
2 **outside the scope of the remand hearing.**

3 CPB asserts that “[t]he Aquaveo Reports do *not* denounce the use of a water budget analysis”  
4 and that “CPB recognizes that a water budget analysis is a vital first step.”<sup>16</sup> This is completely at  
5 odds with the actual language in the Aquaveo Report which states that “[q]uantifying the safe yield of  
6 an aquifer system using a water budget analysis *is fundamentally flawed.*”<sup>17</sup> In fact, despite CPB’s  
7 arguments to the contrary, the entirety of Section 3 of the Aquaveo Report that SNWA seeks to  
8 exclude is a direct attack on the use of water budgets as a tool in water resource planning and  
9 development. In particular, Section 3.3 refers to the State Engineer’s practice of using water budgets  
10 as a “myth” and cites to controversial opinions by Bredehoeft and others who specifically advocate for  
11 an end to the use of water budgets to determine basin yields.<sup>18</sup> Aquaveo then claims that groundwater  
12 models should be used to develop safe yields. This discussion should be excluded.

13 CPB also wrongfully asserts that “Judge Estes has clearly decreed that perennial yield  
14 estimated through a simple water budget analysis is insufficient without establishing how much of the  
15 perennial yield will be recovered through E.T. salvage.”<sup>19</sup> Nowhere in the District Court’s Remand  
16 Order does the Court state that the State Engineer’s use of a water budget analysis is insufficient. In  
17 fact, it does not discuss the relative pros and cons of water budgeting at all. Rather, in the Remand  
18 Order, the District Court accepted and utilized the State Engineer’s estimates of perennial yield and  
19 groundwater discharge and recharge (i.e. the State Engineer’s water budget analysis), and certainly did  
20 not disturb those findings.

21 After accepting the State Engineer’s water budget analysis, the Court determined that before  
22 the State Engineer can allocate any portion of the calculated perennial yield to an appropriator like  
23 SNWA, evidence must show “some prospect” of the aquifer reaching equilibrium within a reasonable  
24 period of time after groundwater pumping has commenced.<sup>20</sup> Accordingly, the issue before the State

25 <sup>16</sup> Opposition at 2.

26 <sup>17</sup> CPB Exhibit 19 at 16 (emphasis added).

27 <sup>18</sup> CPB Exhibit 19 at 13-15.

<sup>19</sup> Opposition at 4.

<sup>20</sup> Remand Order at 13.

1 Engineer is not a recalculation of the perennial yield of Spring Valley, or whether water budgeting is  
2 the appropriate method to use in making such a determination. Rather the issue is what quantity of the  
3 already-established perennial yield should be awarded to SNWA, and whether SNWA can provide the  
4 State Engineer with evidence showing that there is at least some prospect that the basin will reach  
5 equilibrium within a reasonable period of time in response to project pumping. Section 3 of  
6 Aquaveo’s Report provides absolutely nothing to assist the State Engineer with making this  
7 determination. Accordingly, SNWA’s Motion should be granted.

8 **III. Issues related to alleged impacts on Cleveland Ranch are outside the scope of the remand**  
9 **hearing.**

10 CPB asserts that the District Court’s third remand instruction mandates that the State Engineer  
11 revisit and reconsider his prior existing rights conflicts analysis.<sup>21</sup> However, this is not what the third  
12 remand instruction mandates. The third remand instruction directs the State Engineer to ensure that  
13 the 3M Plan submitted by SNWA has defined triggers and thresholds “so that *mitigation* of  
14 unreasonable effects from pumping of water are neither arbitrary nor capricious.”<sup>22</sup> The State  
15 Engineer made undisturbed findings that the drawdown evidence did not constitute a conflict, in part  
16 because of the 3M Plan. The Court is not asking the State Engineer to reconsider whether project  
17 pumping will create conflicts with existing rights. Rather, the Court is directing the State Engineer to  
18 ensure that the 3M Plan: (1) contains standards, triggers, or thresholds for identifying any  
19 unreasonable impacts to existing rights, and (2) provides specific mitigation measures that will be  
20 implemented.

21 There simply is nothing in the District Court’s third remand instruction that authorizes the  
22 State Engineer re-open a discussion on issues related to alleged impacts from SNWA pumping. CPB  
23 is correct that “[f]ew legal precepts are as firmly established as the doctrine that ‘the mandate of a  
24 higher court is controlling as to matters within its compass.’”<sup>23</sup> This is precisely why SNWA’s Motion  
25 should be granted. In this case, the District Court upheld most of the State Engineer’s findings and

26 <sup>21</sup> Opposition at 6-7.

27 <sup>22</sup> Remand Order at 23 (emphasis added).

28 <sup>23</sup> Opposition at 7 (quoting *Samples v. Calvin*, 103 F.Supp.3d 1227, 1231-32 (D. Ore. 2015)).

1 conclusions in Rulings 6164-6167. However, the case was remanded to the State Engineer with  
2 instructions to address four narrow issues. The State Engineer should strictly adhere to the mandate of  
3 the District Court and refuse to entertain evidence and testimony on issues outside the scope of the  
4 Remand Order. Accordingly, SNWA's Motion should be granted in its entirety.

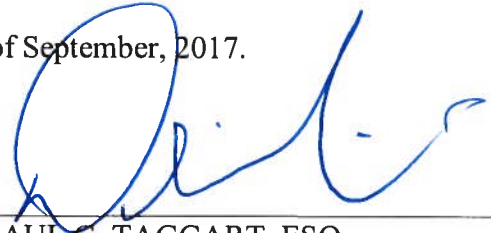
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CONCLUSION

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 5<sup>th</sup> day of September, 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:

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

  
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