

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

IN THE MATTER OF APPLICATIONS 53987	)	
THROUGH 53992, INCLUSIVE, AND 54003	)	<b>CLOSING STATEMENT OF</b>
THROUGH 54021, INCLUSIVE, FILED TO	)	<b>THE CONFEDERATED</b>
APPROPRIATE THE UNDERGROUND	)	<b>TRIBES OF THE GOSHUTE</b>
WATERS OF SPRING VALLEY, CAVE	)	<b>RESERVATION, ELY</b>
VALLEY, DRY LAKE VALLEY,	)	<b>SHOSHONE TRIBE, AND</b>
(HYDROGRAPHIC BASINS 180, 181, 182	)	<b>DUCKWATER SHOSHONE</b>
AND 184), LINCOLN COUNTY AND	)	<b>TRIBE</b>
WHITE PINE COUNTY, NEVADA.	)	
_____	)	

*Bahsahwahbee* or *Paa Sawapi*. These Goshute/Shoshone words refer to the Sacred Water Valley or Swamp Cedars, Spring Valley. But there is a deeper meaning: the water is holy and the water holds special healing and medicinal powers for Tribal members and their families. That ancient water is underground, but it emerges from springs or is taken up by the roots of swamp cedar trees. According to Goshute/Shoshone tradition, a swamp cedar tree grows in the place of each Indian man, woman, and child who was murdered there during three massacres in the 1800’s. The trees and springs comprise a portion of this 14,175-acre National Historic Property. Tribal people go to Swamp Cedars to honor their ancestors, to pray and hold ceremonies, to pass down traditional knowledge, and to carry on their customs and traditions in much the same way as they have for 10,000 years in the exact same place. As if the massacres weren’t enough, the Tribes’ ancient traditions and spiritual practices are now threatened with complete elimination by the SNWA Applications to drain the groundwater from Swamp Cedars and pipe it to Las Vegas.

This is environmentally unsound—“catastrophic” and “a desecration,” as Goshute Tribal Chairman Virgil Johnson testified during the 2017 hearing on remand. For this reason and for reasons detailed below, the Confederated Tribes of the Goshute Reservation, Ely Shoshone Tribe, and Duckwater Shoshone Tribes (collectively, the “Tribes”) request that the State

Engineer deny Southern Nevada Water Authority's ("SNWA") Applications 54003-54021 and 53987-53992 ("Applications") in Spring, Cave, Dry Lake, and Delamar Valleys.<sup>1</sup>

In a week, SNWA explained or otherwise entered into evidence 151 exhibits, comprising multiple thousands of pages. And yet, that stack of documents failed to meet the requirements of Nevada water law and policy, and especially failed to comply with the Seventh Judicial District Court's remand order that contained crystal clear instructions.<sup>2</sup>

The evidence from the Protestants and the Applicant presented before the State Engineer during the 2017 hearing on remand demonstrated unequivocally:

1. The 3M Plans violate requirements of the Stipulations.
2. The unreasonable effects standard is set irrationally as catastrophic harm.
3. Mitigation triggers allow for complete elimination of environmental resources.
4. Proposed mitigation for Swamp Cedars is an adverse effect.
5. SNWA failed to include many Tribal cultural areas in the 3M Plans.

These are the facts. And there is substantial evidence to support these facts. Because SNWA has neither met the statutory standards nor complied with the Court's remand order, the State Engineer must reject the Applications.

## **I. COMPLIANCE WITH THE DISTRICT COURT'S REMAND ORDER AND STATUTORY STANDARDS**

The Seventh Judicial District Court issued an order on December 10, 2013 (filed December 13) stating "this Court will not disturb the findings of the Engineer save those findings that are the subject of this Order. This Court remands orders 6164, 6165, 6166 and 6167 for:

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<sup>1</sup> The State Engineer previously denied SNWA Applications 5016, 5017, 5018, and 5021 in Ruling 6164, because they would conflict with existing rights. *See* SE Exh 140, Ruling 6164, p. 216.

<sup>2</sup> December 10, 2013 Decision, CV-1204049 (7<sup>th</sup> Jud. Dist.).

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

SNWA must comply with instructions, and they must comply with statutory standards of Nevada water law and policy. Nevada Revised Statute 533.370(2) provides that the State Engineer shall reject an application and refuse to issue the permit where there is no unappropriated water in the proposed source of supply, or where the proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS 533.024, or where the proposed use threatens to prove detrimental to the public interest.

SNWA Applications are for an interbasin transfer of water. NRS 533.370(3) provides that in determining whether an application for an interbasin transfer of groundwater must be rejected, the State Engineer shall consider: (a) whether the applicant has justified the need to import the water from another basin; (b) if the State Engineer determines that a plan for conservation of water is advisable for the basin into which the water is to be imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out; (c) whether the proposed action is environmentally sound as it relates to the basin from which the water is exported; (d) whether the proposed action is an appropriate long-term use which will not unduly

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<sup>3</sup> December 10, 2013 Decision at 23, CV-1204049 (7<sup>th</sup> Jud. Dist.).

limit the future growth and development in the basin from which the water is exported; and (e) any other factor the State Engineer determines to be relevant.

SNWA has the burden of proof to demonstrate that it has both complied with the District Court's remand order and met applicable statutory requirements. The State Engineer's decision to reject or approve SNWA's Applications after the 2017 hearing on remand must be supported by "substantial evidence." "Substantial evidence" is "that which a reasonable mind might accept as adequate to support a conclusion."<sup>4</sup> The State Engineer's determination as the Applications cannot be arbitrary.<sup>5</sup> And "speculative evidence . . . is not sufficient to survive a substantial evidence inquiry."<sup>6</sup>

## **II. SNWA FAILED TO PRESENT 3M PLANS THAT COMPLIED WITH THE COURT'S INSTRUCTION TO DEFINE STANDARDS, THRESHOLDS, OR TRIGGERS SO THAT MITIGATION OF UNREASONABLE EFFECTS FROM PUMPING OF WATER ARE NEITHER ARBITRARY NOR CAPRICIOUS**

The District Court's remand order was clear: "define standards, thresholds 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."<sup>7</sup> The order pertained to all four Rulings: 6164-6167. The order also pertained to the monitoring, management, and mitigations plans (3M Plans) approved by the State Engineer in Rulings 6164-6167 and that were stipulations between the SNWA and Federal agencies.<sup>8</sup>

SNWA submitted two new 3M Plans, dated June 2017, with the request that the State Engineer make those 3M Plans a component of the permit terms of SNWA's Applications. The

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<sup>4</sup> *Bacher v. Office of the State Engineer*, 122 Nev. at 1221, 146 P.3d at 800.

<sup>5</sup> *State ex rel. Johns v. Gragson*, 85 Nev. 478, 515 P.2d 65 (1973), quoting from Judge Estes December 10, 2013 Decision at 6, CV-1204049 (7<sup>th</sup> Jud. Dist.).

<sup>6</sup> *Bacher v. Office of the State Engineer*, 122 Nev. at 1123, fn. 37, 146 P.3d at 801, fn. 37.

<sup>7</sup> December 10, 2013 Decision at 23, CV-1204049 (7<sup>th</sup> Jud. Dist.).

<sup>8</sup> December 10, 2013 Decision at 14, CV-1204049 (7<sup>th</sup> Jud. Dist.). The Stipulations are marked as SE Exh 41 and 80. "Federal agencies" or "DOI bureaus" that were signatories of the stipulations included: National Park Service, Fish and Wildlife Service, Bureau of Land Management, and the Bureau of Indian Affairs.

Spring Valley 3M Plan was marked as SNWA Exhibit 592, and the Dry Lake, Delamar and Cave Valleys (DDC) 3M Plan was marked as SNWA Exhibit 593 (collectively, the “2017 3M Plans”). These 2017 3M Plans replace the previous 2011 3M Plans.<sup>9</sup> These new 2017 3M Plans are deficient as a matter of law, and they fail to meet the District Court’s remand instructions.

**A. The 2017 3M Plans Violate the Requirements of the Stipulations**

Initially in this case, Federal agencies filed protests to the SNWA Applications. Their protests were filed pursuant to the agencies’ responsibility to protect Federal water rights and water-dependent resources—many of which are vital for the Tribes’ continued survival. SNWA and Federal agencies executed two stipulations: the 2006 Spring Valley Stipulation and the 2008 DDC Stipulation.<sup>10</sup> The Stipulations conditioned the withdrawal of the Federal agencies protests to SNWA Applications with certain specific requirements, including monitoring, management and mitigation plans (3M Plans) which were attached as exhibits to the Stipulations and made a part thereof. As the State Engineer found in Ruling 6164, “By its terms, the Stipulation[s], and its exhibits, set forth the guidelines for the elements of the monitoring plan [3M Plans].”<sup>11</sup> These requirements apply directly to the 2017 3M Plans at issue in this case and the District Court’s instructions on remand.

Before addressing these requirements, a note on the binding nature of the Stipulations. As a matter of Nevada law, the Stipulations are binding on SWNA and the Federal agencies, but the State Engineer has the authority to enforce the terms of the Stipulations. Pursuant to Nevada Administrative Code (NAC) 533.310 on stipulations:

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<sup>9</sup> SNWA Exh 592, p.1-2; the 2011 3M Plans are marked as SNWA Exh 365, 366, 148, 149;

<sup>10</sup> The Spring Valley Stipulation is marked as SE Exh 41. The DDC Stipulation (or Stipulation for Delamar, Dry Lake, and Cave valleys) is marked as SE Exhibit 80.

<sup>11</sup> SE Exh 140, Ruling 6164, p. 104. This statement was also used in Rulings 6165, 6166, and 6167.

1. With the approval of the State Engineer, the parties may stipulate to any fact in issue, either by a written stipulation introduced into evidence as an exhibit or by an oral statement entered in the record.

2. Such a stipulation is binding only upon the parties to the stipulation and is not binding on the State Engineer.

3. The State Engineer may require proof by independent evidence of the stipulated facts. (Added to NAC by St. Engineer, eff. 2-8-95.)

As to the specific requirements of the Stipulations, SNWA has violated the terms in several ways. First, SNWA prejudiced the Tribes with the Stipulations and the 3M Plans, violating Paragraph 1 of the Stipulation which states in part that the Parties (SNWA in particular) “shall not seek to . . . prejudice any other Parties or protestants, including any Indian Tribe.”<sup>12</sup> Second, SNWA explained and defended the 2017 3M Plans—a component of the Stipulations—in the absence of Federal agencies, violating Paragraph 1 of the Stipulations which states in part that the Federal agencies and SNWA “shall jointly explain or defend this stipulation and Exhibits A and B to the State Engineer.”<sup>13</sup> Federal agencies were absent both the 2011 hearing and 2017 hearing.<sup>14</sup> Third, SNWA provided the new 2017 3M Plans with neither written agreement of Federal agencies nor input from Federal agencies, which violated Paragraph 9 of the Stipulation.<sup>15</sup> SNWA’s own witness, Mr. Zane Marshall, admitted that there had neither been any written agreement with, nor input from, the Federal agencies as to the new 2017 3M Plans.<sup>16</sup> Because the 2017 3M Plans were developed and submitted in direct violation of the clear requirements of the Stipulations, they are deficient as a matter of law and therefore must be rejected by the State Engineer.

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<sup>12</sup> SE Exh 41, p. 6.

<sup>13</sup> Transcript, p. 2033; SE Exh 41, p. 9; SE Exh 80.

<sup>14</sup> Transcript, p. 2033.

<sup>15</sup> Transcript, p. 2033; SE Exh 41, p. 12; SE Exh 80.

<sup>16</sup> Transcript, p. 779-880.

The Stipulations also required a Technical Review Panel (TRP), a Biological Working Group (BWG), and an Executive Committee (EC) to be a part of the 3M Plans.<sup>17</sup> SNWA has known that the inclusion of Federal agencies in the 3M Plans is required by the Stipulations. The 2009 Spring Valley Biological 3M Plan was titled: “Biological Monitoring Plan for the Spring Valley Stipulations”. And, its cover page references the Stipulation Parties as including the Federal agencies, including the Bureau of Indian Affairs. Section 1.1 of this Spring Valley 3M Plan (SNWA Exh 365) states:

The Stipulation *requires* that SNWA implement hydrologic and biological monitoring, management, and mitigation plans (Exhibits A and B of the Stipulation; Appendix A). For development and implementation of the monitoring, management, and mitigation plans, the Stipulation *requires* the formation of a Biological Work Group (BWG) and hydrologic Technical Review Panel (TRP). The Stipulation also *requires* creation of an Executive Committee (EC) to review recommendations of the BWG and TRP, seek negotiated resolutions of issues, and implement actions as needed. Membership in each group (BWG, TRP, and EC) consists of one representative from SNWA and *one representative from each of the DOI Bureaus*, with designated agency backups.

(SNWA Exh 365, §1.1) (emphasis added). The Final EIS for the SNWA GDP also specifically referenced these groups (BWG, TRP, EC) as requirements of the Stipulations, so these groups may make important decisions about monitoring and mitigation.<sup>18</sup>

*But these “required” groups were NOT included in the 2017 3M Plans.* When the Tribes questioned Mr. Marshall about this, he admitted that the TRP, BWG, and EC were not a part of the new 2017 3M Plans for Spring Valley and DDC Valleys.<sup>19</sup> This exclusion violates the requirements of the Stipulations—a violation and an act to exclude Federal agencies from the 3M process. And repeatedly, SNWA asked the State Engineer “To accept the two 3M Plans [the 2017 3M Plans] as a component of the permit terms so that the compliance of these plans

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<sup>17</sup> SE Exh 41, Exhibits A and B therein; SE Exh 80, Exhibit A therein.

<sup>18</sup> GBWN Exh 300, A-40 (Appendix A of SNWA GDP FEIS).

<sup>19</sup> Transcript, pp. 880-881.

are part of the permit terms for the permits.”<sup>20</sup> But, with the TRP/BWG/EC groups cut out, review and oversight—and approvals or rejections of SNWA’s 3Ms—is left to SNWA. Putting the fox in the henhouse is not a mechanism to ensure that the hens stay alive. This issue alone—yet there are many—renders the 2017 3M Plans unsound and speculative, arbitrary, and capricious.

The primary problem with the original 3M Plans was that there were no standards, thresholds, or triggers so that mitigation measures would not be arbitrary and capricious. *And still, the central problem persists!* SNWA defined the standards, thresholds, or triggers all alone—no stakeholder input and no review. They cut out the Federal agencies. They did away with the TRP/BWG/EC components of the 3M Plans. They truncated the oversight and the input from public servants charged with protecting public interests and Tribal interests.

**B. SNWA Set the Unreasonable Effects Standard as Catastrophic Harm; The Reasonable Effects Standard is Also Catastrophic Harm**

Key words from the Court’s remand order are worth repeating: “define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious.” Further, the Court found:

[the State Engineer] avoided any mention of what is unreasonable. Nor did he state how monitoring will be accomplished, or what constitutes an impact, potential or otherwise. There is no standard to know how much of an impact is unreasonable . . . before mitigation is necessary. The Engineer gives a vague statement of how mitigation can be done, but has no real plan or standard of when mitigation would be implemented. Without a stated, objective standard, the ruling is arbitrary or capricious.<sup>21</sup>

In developing the 2017 3M Plans, SNWA—and SNWA alone—defined “unreasonable effects” to be “effects to hydrologic and environmental resources that:

- a. conflict with senior water rights or protectable interests in existing domestic wells;

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<sup>20</sup> Transcript, p. 334, 736, 738, 740.

<sup>21</sup> December 10, 2013 Decision at 17, CV-1204049 (7<sup>th</sup> Jud. Dist.).

- b. jeopardize the continued existence of federally threatened and endangered species;
- c. cause extirpation of native aquatic-dependent special status animal species from a hydrographic basin's groundwater discharge area;
- d. cause elimination of habitat types from a hydrographic basin's groundwater discharge area; or
- e. cause excessive loss of shrub cover that results in extensive bare ground.”<sup>22</sup>

More explanation of and justification for these effects is provided in the 3M Plans' companion document, “Technical Analysis Report Supporting the Spring Valley and Delamar, Dry Lake, and Cave Valleys, Nevada, 3M Plans,” dated June 2017.<sup>23</sup> These definitions of unreasonable effects are, SNWA asserted, “in accordance with the Remand Order and Nevada water law.”<sup>24</sup>

To a rational mind, they most certainly are not. But, before expounding on that critical point we address the origin of use of the term “unreasonable effects,” as it relates to SNWA's Applications.

### **1. On the Origin of “Unreasonable Effects”**

In the beginning, there were Stipulations. The Spring Valley Stipulation at Recital H provides an important of what was intended by “unreasonable effects”:

- (1) avoid unreasonable adverse effects to wetlands, wet meadow complexes, springs, streams, and riparian and phreatophytic communities (hereafter referred to as Water-dependent Ecosystems) and maintain the biological integrity and ecological health of the Area of Interest [shown in Figure 1 of the Stipulation] the over the long term . . .
- (2) avoid any effects to Water-dependent Ecosystems within the boundaries of Great Basin National Park.<sup>25</sup>

The Spring Valley Stipulation at Exhibit B, under the sections on Common Goals and Mitigation Requirements, provides other obvious clues:

- (1) avoid unreasonable adverse effects caused by such [SNWA] groundwater development to Water-dependent Ecosystems and maintain and/or enhance the baseline biological integrity and ecological health of the Area of Interest

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<sup>22</sup> SNWA Exh 592, p. 1-2.

<sup>23</sup> SNWA Exh 507, pp. 2-2 – 2-4.

<sup>24</sup> SNWA Exh 592, pp. 1-3.

<sup>25</sup> SE Exh 41, p. 4.

- over the long term;
- (2) avoid any effects to Water-dependent Ecosystems within the boundaries of Great Basin National Park;
  - (3) The Parties have determined it is in their best interests to cooperate in data collection and analysis related to groundwater levels and the maintenance of Water-dependent Ecosystems within the Area of Interest;
  - (4) The goal of the Parties is to avoid the aforementioned Water-dependent Ecosystem effects . . . [and they] shall make all reasonable efforts to achieve this goal. If this goal is not achieved, SNWA shall mitigate any Water-dependent Ecosystem effects so as to ensure the baseline biological integrity and ecological health of Water-dependent Ecosystem are maintained and/or enhanced over the long term.<sup>26</sup>

As is quite clear, the Stipulations provide essential information about what constitutes an unreasonable effect. In part, the Stipulations foresaw an unreasonable effect to be any adverse effect, reasonably attributable to SNWA's GDP pumping, below baseline conditions of Federal Water Rights, Federal Resources, Water-dependent Ecosystems, and the maintenance of biological integrity and ecological health of Spring Valley.

Thus, SNWA's first error in defining unreasonable effects was that they ignored the Stipulations, just as they did with regard to their aforementioned violations of the Stipulations. SNWA also ignored the Court's remand order whereby the Court specifically highlighted the three principal components of the 3M Plans attached as Exhibits to the Stipulations, which referenced the goals set forth in Recital H of the Stipulations.<sup>27</sup> In doing so, the remand order was clear in directing SNWA as to the first steps in defining unreasonable effects. Ignoring the remand instructions and conjuring arbitrary standards fails the test of substantial evidence, and it fails the test of compliance with the Court.

## **2. Unreasonable Effects Standard Set as Catastrophic Harm**

SNWA set unreasonable effects to be, in no uncertain terms, catastrophic harm. The greatest possible impact—in other words, the most extreme effect possible. Before SNWA

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<sup>26</sup> SE Exh 41, Exhibit B therein at pp. 2 and 10.

<sup>27</sup> See for example, SE Exh 41, Exhibit B therein at pp. 1-2. Also see DDC Stipulation.

would classify an impact to be an unreasonable effect, they or the State Engineer would have to demonstrate that SNWA pumping caused an endangered species to be in jeopardy of extinction, or caused the extirpation of a water-dependent species, or caused the complete elimination of habitat areas like Swamp Cedars from Spring Valley, or some other extreme effects. Regarding habitat areas, SNWA witness Zane Marshall testified that the 3M Plans’ “standard is a basin-wide standard that’s intended to ensure that we don’t lose habitats . . .”<sup>28</sup> However, for habitat areas like Swamp Cedars, which SNWA termed “terrestrial woodland habitat” in their Spring Valley 3M Plan, SNWA defined an unreasonable effect to be “elimination of terrestrial woodland habitat from Spring Valley groundwater discharge area.”<sup>29</sup>

Why SNWA defined unreasonable effects for Swamp Cedars, for example, to be total elimination of Swamp Cedars defies reason. Tribal witness Dr. Monte Sanford provided substantial evidence that Swamp Cedars is an Native America ceremonial gathering area and Tribal cultural use area, a site of three massacres of Indian people including one of the largest in U.S. history, a site where the swamp cedar trees are the spiritual embodiment of their slain ancestors, a place where the spring waters are for special medicine and healing, and also a site formally listed on the National Register of Historic Places as a Traditional Cultural Property.<sup>30</sup>

Goshute Tribal Elder and Councilman Rupert Steele testified that the die-off of swamp cedars from SNWA pumping would have:

[an] adverse effect on our way of life. The effects are the trees ability to heal, the affects of plants ability to heal. It . . . does not have that vigor and life to provide that healing. Healing proper[ties] that we call upon when we use those in our medicinal use and ceremonies. It would have an adverse effect on, on our way of living.<sup>31</sup>

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<sup>28</sup> Transcript vol. 1, p. 369.

<sup>29</sup> SNWA Exh 592, pp. 3-41 and 3-43 and 3-45; SNWA Exh 507, Section 2.2.

<sup>30</sup> CTGR Exh 21; CTGR Exh 22, Appendix A; Transcript pp. 1486-1493.

<sup>31</sup> Transcript, p. 1608.

Similarly, Goshute Tribal Chairman Virgil Johnson testified that die-off of swamp cedars trees from SNWA groundwater pumping “would be catastrophic. . . . And we would rather not face that catastrophic event because it will affect us as Native Americans in that area.”<sup>32</sup>

When the Tribes questioned SNWA witness Mr. Marshall about whether there was “any tribal input in developing this definition,” Mr. Marshall conceded: “Not directly, no.”<sup>33</sup> Mr. Marshall then seemed to suggest that he considered indirect input—“from the perspective of input from the Tribes from previous hearings and the concern raised regarding the Swamp Cedar area of critical environmental concern, this list of [un]reasonable effects includes that consideration.”<sup>34</sup> Mr. Marshall conceded that SNWA was the sole decision maker in crafting the definition of unreasonable effects and that SNWA did not meet with or seek input from any Tribal representatives in the development of the 2017 3M Plans.<sup>35</sup> And Mr. Steele’s testimony validated the fact that the Tribes were not consulted regarding SNWA’s new 2017 3M Plans.<sup>36</sup>

Q Were the tribes consulted about the proposed 3M Plans that the subject of this hearing?

A (Mr. Steele) No, they weren’t.

Q And was the tribe involved, in any way, in establishing any standards, triggers or thresholds under the proposed 3M plans?

A (Mr. Steele) No.

It is particularly troubling that SNWA set the definition or standard for unreasonable effects on Swamp Cedars and other habitat areas and species of concern to be a total die off—elimination, extirpation, jeopardy of extinction. All of these are catastrophic harm. This is not environmentally sound. SNWA’s standard is irrational, subjective, unsupported by the evidence, and plainly arbitrary and capricious.

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<sup>32</sup> Transcript, p. 1609.

<sup>33</sup> Transcript, p. 882.

<sup>34</sup> Transcript, p. 882.

<sup>35</sup> Transcript, p. 883-884.

<sup>36</sup> Transcript, p. 1605.

That SNWA gathered no input from the Tribes in determining what constituted an unreasonable effect for Swamp Cedars, and other Tribal cultural use areas and habitat types, reveals SNWA's true intentions. They want to be the ones who will determine whether there will ever be mitigation. And they want to be the ones who decide what is appropriate mitigation, absent the Tribes and absent the Federal agencies. Again, this runs counter to the requirements of the Stipulations and the directive of the District Court on remand.

### **C. Thresholds and Triggers for Mitigation of Unreasonable Effects**

Because SNWA's definition of unreasonable effects was arbitrary and capricious, any subsequent thresholds or triggers set for management and mitigation are also thereby arbitrary and capricious. But, there are many other issues with the 2017 3M Plans' thresholds and triggers that render them unreasonable. A few examples make it very clear.

#### **1. Mitigation Triggers for Hamlin and Snake Valleys Are Subjective**

In northern Hamlin and Southern Snake Valleys, SNWA's Spring Valley 3M Plan calls for monitoring Big Springs, Dearden Springs, and Clayton Springs North for the rare and endemic spring snail *Pyrgulopsis anguina*. These springs are the only places where the snail lives. There are several very peculiar aspects about this. First, the monitoring data that will be collected on this species will be presence/absence data. Second, the 3M Plan is vacant any mention of how presence/absence data of the snail will be used to trigger investigations, management actions, or mitigation actions. What happens if the snail populations drop by 50%? What if their populations drop by 99.9%? What if only one snail remains? We do not know because it is not in the 3M Plan. SNWA's has left unknown what they will do with the presence and absence data on the spring snail, and they have left us guessing as to how that data will feed into investigation, management, and mitigation efforts.

Investigation and management apparently would not be triggered even if there were no spring snails left in any of the three springs. Investigation of the snail will be triggered only if monitoring well 383533114102901 is triggered—presumably by its water level and no other parameter, not even a glance at the springs and the snails in question...just the well. And the trigger is not apparent in the section that describes triggers for the snail, Section 3.4.2.1 and Table 3.10 of the Spring Valley 3M Plan.<sup>37</sup> “If investigation indicates cause of water level change at monitor well 383533114102901 is the result of SNWA GDP pumping, SNWA will conduct annual presence/absence monitoring of the longitudinal gland pyrg [*Pyrgulopsis anguina*] at Big Springs, Dearden Springs, and Clayton Springs North.”<sup>38</sup> Curiously, the mitigation trigger then turns back to hydrologic data at some other site known as HAM1008M.<sup>39</sup>

If SNWA finds that their changes in the water levels at their predetermined monitoring wells are caused by their groundwater pumping, then they will take “mitigation actions” of “collaboration” and “funding.” Collaboration and funding for water availability. Collaboration and funding for habitat improvements. Collaboration and funding for habitat expansion and habitat creation. Collaboration and funding for establishing habitat or populations elsewhere.<sup>40</sup> According to the Oxford Dictionary, mitigation is defined as “the action of reducing the severity, seriousness, or painfulness of something.” Collaboration and funding are not really mitigation actions. Collaboration and funding in and of themselves will not bring groundwater levels back up. Funding doesn’t make dried-up springs flow again. Funding does not ensure the survival of the endemic spring snail. SNWA’s investigation, management, and mitigation

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<sup>37</sup> SNWA Exh 592, p. 3-49 and 3-51.

<sup>38</sup> SNWA Exh 592, p. 3-52.

<sup>39</sup> SNWA Exh 592, p. 3-53.

<sup>40</sup> SNWA Exh 592, p. 3-55.

thresholds and triggers lack specifics as required by the District Court’s remand order. These issues must be specified in order to comply with the Court’s order.

## **2. Mitigation Trigger for Swamp Cedars: 100% Elimination + 1 year**

Swamp Cedars is what SNWA terms “terrestrial woodland habitat.”<sup>41</sup> SNWA will focus its monitoring and mitigation on the Swamp Cedars Area of Critical Environmental Concern (ACEC) and the SNWA-owned “Osceola Property.” About 40% (1,500 acres) of the terrestrial woodland habitat is the Swamp Cedars ACEC.<sup>42</sup> The Osceola Property is less than half the size of the Swamp Cedars ACEC.<sup>43</sup> A total area—by rough approximation—of about 2,250 acres. However, the Swamp Cedars National Historic Property, or Traditional Cultural Property, listed on the National Register of Historic Places is 14,175 acres,<sup>44</sup> which wholly encompasses the Swamp Cedars ACEC. And even though these 14,175 acres are not all swamp cedar woodlands, there are significant areas outside of the ACEC to the north that are swamp cedar woodlands or other sacred and ceremonial areas needed for the continuance of Tribal traditional and ceremonial activities.<sup>45</sup> These were not included in SNWA’s 3M Plans, though the cedar trees and springs and spring-fed meadows are the most vital to the Tribes.

As to the thresholds and triggers for the Swamp Cedars ACEC, two points must be highlighted. First, the Spring Valley 3M Plan states that “the investigation trigger is activated if any tree-covered area for the Swamp Cedar ACEC, compared to the baseline maximum tree cover area, falls within 5% of the lower limit of the baseline percent range in cover.”<sup>46</sup> The maximum baseline tree cover area is 44 acres, and SNWA set the investigation trigger at 35

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<sup>41</sup> SNWA Exh 592, p. 2-48.

<sup>42</sup> SNWA Exh 592, p. 3-41.

<sup>43</sup> SNWA Exh 592, p. 2-43, Figure 2-16.

<sup>44</sup> CTGR Exh 21, p. 33.

<sup>45</sup> CTGR Exh 21.

<sup>46</sup> SNWA Exh 592, p. 3-42.

acres. This is a 20% difference.<sup>47</sup> This investigation trigger for Swamp Cedars is not based on substantial evidence and disregards Tribal and public interest of Swamp Cedars as a National Historic Property.

The second point is: reasonable effect vs. unreasonable effect. An unreasonable effect for Swamp Cedars is 100% elimination of the swamp cedar trees. A reasonable effect, therefore, could be 99% loss of swamp cedar trees. A 99% loss of the Swamp Cedars is plainly unreasonable, arbitrary, and capricious.

Which brings us to the third point: the mitigation trigger for Swamp Cedars. As stated in the Spring Valley 3M Plan, “the mitigation trigger is activated if annual tree-cover area for the Swamp Cedars ACEC, compared to the baseline maximum tree cover area, falls below the lower limit of the baseline percent range in cover for a period of five consecutive years as a result of SNWA GDP pumping.”<sup>48</sup> On cross-examination of Mr. Marshall, the Tribes demonstrated, with Marshall conceding, that 100% of the swamp cedars woodland could be eliminated before the mitigation trigger was activated. That is, before SNWA would be required to mitigate.<sup>49</sup>

A quick calculation reveals a serious problem with the 3M Plans. Based on Figure 3-8 of the Spring Valley 3M Plan, the baseline maximum tree cover area is 44 acres. The lower limit of the baseline percent range in cover is 25%. If the area of swamp cedars woodland drops by 25% for four consecutive years, then that is a 100% loss—SNWA’s standard in the 2017 3M Plans. So, reasonable effects could reach 100% elimination of Swamp Cedars and unreasonable effects to Swamp Cedars may also be 100% elimination. SNWA would not be required to mitigate, per the 2017 3M Plan and thus the permit terms of the Applications, unless after the

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<sup>47</sup> SNWA Exh 592, p. 3-43.

<sup>48</sup> SNWA Exh 592, p. 3-42.

<sup>49</sup> Transcript, pp. 886-891.

5th year there were still no swamp cedar trees AND unless SNWA found that the loss of the swamp cedars was caused by SNWA GDP pumping.

By this curious threshold or trigger, it is possible that SNWA would not mitigate until all of the swamp cedars were dead. It is also possible that SNWA would NEVER mitigate even after all the swamp cedars died out and SNWA was draining Spring Valley of its water. This mitigation trigger is unsound, is not based on substantial evidence, and is not reasonable. The mitigation trigger is arbitrary and capricious.

**D. Applications 54009-54018 and 54020-54021 Would Drain Swamp Cedars and Destroy the Swamp Cedars (*Bahsahwahbee*) National Historic Property**

SNWA Applications 54014 and 54015 have points of diversion (PODs) that are located within the boundaries of the Swamp Cedars (*Bahsahwahbee*) National Historic Property.<sup>50</sup> And Applications 54009-54018 and 54020-54021 are located in close proximity to Swamp Cedars. All of these Applications would lower the aquifer beneath Swamp Cedars, where Applications 54013-54016 would certainly be the first to cause adverse effects to the springs and trees at Swamp Cedars. The SNWA GDP FEIS demonstrates that pumping groundwater in the amounts approved under Alternative F would cause such adverse effects.<sup>51</sup> In fact, in the approved Alternative F, there would be an 80% reduction in spring discharge and evapotranspiration (ET) in Spring Valley by 75-200 years.<sup>52</sup> Alternative E (a simulated pumping regime of 60,000 afa in Spring Valley) also demonstrated substantial lowering of groundwater beneath Swamp Cedars by 75-200 years.<sup>53</sup> And this Alternative E pumping would result in over 50% reduction of spring discharge and ET by 75 years of pumping, including from Swamp Cedars.<sup>54</sup>

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<sup>50</sup> Compare SNWA Exh 592 Figure 2-6 and 2-8 with CTGR Exh 21 at 43.

<sup>51</sup> SNWA Exh 478, pp. 3.3-182, 183.

<sup>52</sup> SNWA Exh 478, pp. 3.3-185.

<sup>53</sup> SNWA Exh 478, pp. 3.3-174, 175.

<sup>54</sup> SNWA Exh 478, pp. 3.3-176.

### **E. SNWA's Proposed Mitigation for Swamp Cedars Is an Adverse Effect**

Swamp Cedars is sacred for many reasons. As Dr. Sanford testified, "Swamp Cedars has always been a place for intertribal gathering. It's a place where tribes came from all over the place, and they would meet at Swamp Cedars and they would hold ceremonies and hold ceremonies for weeks. They would do rain dances, circle dances, they would give offerings, and it was a very significant place for that reason."<sup>55</sup>

But the water was especially important. Swamp Cedars was a place where tribes either lived or visited because of the spring water. As Dr. Sanford stated: "Swamp Cedars has always been [sacred because of the] water that has special healing powers and special medicinal properties."<sup>56</sup>

Swamp Cedars is also sacred to the Tribes because of massacres that occurred there. The Tribes submitted into evidence the National Register of Historic Places Registration Form (CTGR Exh 21) that details what is currently known about three separate massacres at or very near the present boundaries of the Swamp Cedars National Historic Property. In 1859, the United States Army killed an estimated 500-700 Goshute and Shoshone people. In 1863, the California Infantry Volunteers killed about 23 Goshute and Shoshone people at Swamp Cedars. In 1897, an estimated 300-350 Goshute and Shoshone were murdered at Swamp Cedars.<sup>57</sup>

Because of the historical, cultural, and religious significance of Swamp Cedars, including the special cultural and spiritual significance of the spring water and swamp cedar trees, the State of Nevada (the State Historic Preservation Office) found Swamp Cedars to be nationally significant. The National Park Service placed Swamp Cedars on the National Register.<sup>58</sup>

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<sup>55</sup> Transcript, p. 1486.

<sup>56</sup> Transcript, p. 1486.

<sup>57</sup> CTGR Exh 21, pp. 17-22; Transcript, pp. 1487-1488.

<sup>58</sup> CTGR Exh 21, see final pages.

But, SNWA ignored this too. The SNWA has proposed that they can mitigate the die-off of swamp cedar trees. SNWA has included in the 3M Plans that they could replant swamp cedar trees and replace spring water with some other source of water from some other place.<sup>59</sup> And the Tribes had this to say about it:

Q (Mr. Echo Hawk) The chairman touched on this, already, in terms of whether replanting trees would be an adequate substitute if groundwater pumping were to kill older trees. Do you see a difference there between replanted trees and existing Swamp Cedar[s]?

A (Mr. Steele) It would be a direct insult on the Indian people and it would diminish our way of living. It would seriously adversely effect what we have there with our connection with our ancestors that are currently there now.

Q (Mr. Echo Hawk) What about there's been some discussion or suggestion of the 3M Plans replacing original spring water in the Swamp Cedars with mitigation water. Would that be acceptable to the tribes?

A (Mr. Steele) I feel that is another form of insult because if you're taking away the water that's there, pure in its nature as it is now, . . . No, no it's not acceptable.<sup>60</sup>

To the same questions, Goshute Tribal Chairman Virgil Johnson added this:

when it comes to sacredness, it would not – it would not be good. You're basically trying to replace something that people hold dearly, historically, with maybe a new way of doing things and what isn't considered is how, by doing that, it throws a balance off nature for our tribe. And we're not willing to take that route. We want to be protective of our rights, of our religious tradition ceremonial rights and to do that [SNWA proposed mitigation] would take us out of balance. And to replace it [swamp cedars and spring water] with something else, no matter what you do, it would not work.<sup>61</sup>

Chairman Johnson also emphasized that the swamp cedar trees have grown in places where his Tribal ancestors were killed during the massacres. Again: a swamp cedar tree grew in the place where every Indian man, woman and child was murdered. This makes Swamp Cedars an especially holy land for the Tribes. And so, as Chairman Johnson stated further that:

To cut down cedar trees and try to replace them by some kind of regrowth would be very disrespectful to the native tribe, our tribe. It would be a desecration to

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<sup>59</sup> SNWA Exh 592, p. 3-46.

<sup>60</sup> Transcript, pp. 1605-1606.

<sup>61</sup> Transcript, p. 1607.

uproot those trees. I don't think any water being brought in would replant the trees. Trees that are replanted would not represent the same thing that those trees are now representing.

The Tribes want to protect Swamp Cedars and as that the State Engineer not allow SNWA to drain the water and kill off the swamp cedar trees and other aspects of that holy land. The Tribes want to continue to use the cedar trees and spring water at Swamp Cedars for their healing ceremonies and prayer ceremonies. They want to continue to use that water and trees at Swamp Cedars for their traditional medicine. They want to continue to practice their Tribal customs and traditions and ceremonies at Swamp Cedars in the way their people have always done at Swamp Cedars—a place where some of the cedar trees are an estimated 300 years old.<sup>62</sup>

### **III. MANY TRIBAL CULTURAL AREAS WERE NOT INCLUDED IN SNWA'S 3M PLANS**

The Tribes have many other Tribal cultural areas that were not included in SNWA 3M Plans. A comparison between SNWA's 3M Plans and Appendix A of CTGR Exhibit 22 will make this clear. SNWA did not seek input from the Tribes on other Tribal cultural areas (TCAs), so unreasonable effects to these cultural areas and to Tribal spiritual and cultural traditions at these TCAs have no standards, no thresholds and no triggers as to when monitoring, management and mitigation would be required. Locations, description, and spiritual/cultural significance of a few of these TCAs were submitted into evidence.<sup>63</sup>

SNWA pumping would impact all of these TCAs described in Appendix A of CTGR Exhibit 22 (Dr. Sanford's report). The Swallow Creek TCA highlights a spiritual journey that

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<sup>62</sup> Transcript, pp. 2037-2038.

<sup>63</sup> CTGR Exh 22, Appendix A.

Tribal members take. As Dr. Sanford stated in his report, based on visits to the area with Tribal elders and spiritual leaders:

The Swallow Creek TCA is a sacred area where individual Tribal members go to ascend physically up the mountain while also ascending spiritually. Tribal people may fast for many days as part of this journey. They take the water from the springs up to the high mountain cliffs that overlook Spring Valley. They carry eagle feathers and sacred plants and other items used for spiritual practices. On the high mountain cliffs, they pray for health and healing, for relatives and ancestors, for friends and enemies, and for the continued gifts provided by the earth. They use the spring water and eagle feathers to send their prayers into the sky. And they repeat that ceremony to allow their own spirits to ascend. After that journey, they may leave their sacred items hidden on the cliffs as an offering or use them again the next time they return.<sup>64</sup>

SNWA's pumping project will eliminate the Tribal peoples' ability to continue this way of life in the Swamp Cedars.

#### **IV. CONCLUSION**

For all the reasons discussed above, and those highlighted in the Tribes' Proposed Ruling, the Tribes respectfully request the State Engineer to deny SNWA's Applications

Submitted by:

By: \_\_\_\_\_

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<sup>64</sup> CTGR Exh 22, Appendix A at pp. 6-8.

## CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January 2018, a true and correct copy of the foregoing CLOSING ARGUMENT OF THE CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION, ELY SHOSHONE TRIBE, AND DUCKWATER SHOSHONE TRIBE was served on the following counsel of record by electronic mail according to the parties' agreement:

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