BEFORE THE STATE ENGINEER, STATE OF NEVADA

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES

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IN THE MATTER OF APPLICATION NOS. 54003 THROUGH 54020, INCLUSIVE, FILED BY THE LAS VEGAS VALLEY WATER DISTRICT TO APPROPRIATE THE UNDERGROUND WATERS OF SPRING VALLEY (184) HYDROGRAPHIC BASIN, LINCOLN AND WHITE PINE COUNTIES, NEVADA.

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MOTION TO DISMISS INDIVIDUAL PROTEST CLAIMS REGARDING SPRING VALLEY APPLICATIONS AND MEMORANDUM IN SUPPORT

State 'S EXHIBIT 44
DATE: 9-11-06

COMES NOW, the Southern Nevada Water Authority (hereinafter "SNWA"), by and through its attorneys the law firms of KING & TAGGART, LTD. and McQUAID BEDFORD & VAN ZANDT, LLP, and presents its Motion to Dismiss Individual Protest Claims that were filed in response to SNWA water right applications in Spring Valley by the following entities (collectively referred to herein as "Protestants"):

U.S. Department of Interior, Bureau of Land Management (protested all Applications);
U.S. Department of the Interior, National Park Service (protested all Applications);
U.S. Fish and Wildlife Service (protested all Applications);
City of Ely / County of White Pine (protested all Applications);
Nye County (protested all Applications);
Ely Shoshone Tribe (protested Application 54019);
Toiyabe Chapter, Sierra Club (protested Applications 54003-54005);
Panaca Irrigation Co. (protested Applications 54003-54005);
Moriah Ranches (protested Applications 54013-54015, 54018);
Dr. Dan A. Love (protested Applications 54003-54005);
John Tryon (protested Application 54015);
Abigail Johnson (protested Application 54006); and
William and Katherine A. Rountree (protested Applications 54014, 54015, 54020).[1]

[1] Some confusion exists as to which basin the William and Katherine A. Rountree protests relate, as the cover page of their protests indicate that the applications are in Spring Valley, but the attachments address Snake Valley. The State Engineer's Intermediate Order And

SNWA also seeks to exclude from consideration at the Spring Valley hearing certain evidence offered in support of the protests. On this point, SNWA has filed, concurrent with the filing of this motion, a Motion to Exclude Evidence. SNWA also seeks to have certain protests dismissed because the Protestants failed to present any evidence to support their protests. Accordingly, SNWA has filed, concurrently with this motion, a Motion to Dismiss Protestants for Failure or Neglect to Prosecute Protests.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In October 1989, the Las Vegas Valley Water District (hereinafter "LVVWD") filed applications 54003 through 54021 to appropriate groundwater in the Spring Valley Hydrographic basin in Lincoln and White Pine Counties in Eastern Nevada (hereinafter the "Applications"). SNWA is now the successor-in-interest to the Applications, all of which relate to SNWA's Clark, Lincoln and White Pine Counties Groundwater Development Project (hereinafter the "Project"), which was proposed in order to develop and convey groundwater from seven hydrographic basins in northern Clark, central Lincoln and eastern White Pine Counties to SNWA purveyor members in the Las Vegas Valley and may, at the Lincoln County Water District's option, serve future customers in Lincoln County.[2]

Through the Intermediate Order and Hearing Notice dated March 8, 2006, the State

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Hearing Notice, dated March 8, 2006, noted that the Rountree protests relate to Snake Valley applications. *See* pgs. 4, 5. Given that the substance of the Rountree protests appears to relate only to potential impacts in Snake Valley, their protests should not be considered at the Spring Valley hearing.

[2] The SNWA, the LVVWD and Lincoln County also entered into a Cooperative Agreement as of February 20, 2003, pursuant to which Lincoln County agreed to withdraw its pending protests pertaining to the Project and the SNWA agreed to cooperate with Lincoln County regarding development of future water resources in Lincoln County.

Engineer ordered that a hearing be held beginning Monday, September 11, 2006, on the Applications pertaining to the Spring Valley basin. Applications dealing with appropriations from the other basins were deferred to later hearings.

II. BACKGROUND

When considering SNWA applications, NRS 533.370(1) generally provides that the State Engineer *shall approve* an application submitted in proper form which contemplates the application of water to beneficial use if: (1) the application is accompanied by the prescribed fees; and (2) the applicant establishes, in good faith, that it will construct the necessary infrastructure to put the water to beneficial use and it has the financial ability to do so.

Further, NRS 533.370(4) provides that the State Engineer must grant SNWA's applications unless he determines that: (a) there is no unappropriated water in the proposed source; (b) the proposed use or change conflicts with existing rights; (c) the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS 533.024; or (d) the proposed use or change threatens to prove detrimental to the public interest. Any such determination by the State Engineer must be supported by substantial evidence. NRS 533.450.

SNWA applications involve an interbasin transfer of water. Interbasin transfers of water are permitted by Nevada water law and have historically been a critical part of all economic development in Nevada. Factors are provided in NRS 533.370(5) for the State Engineer to consider when reviewing an application for an interbasin transfer of water. Specifically, the factors the State Engineer must consider are: (1) whether the applicant has justified the need to import the water from another basin; (2) whether any required conservation plan has been adopted and effectively implemented by the applicant; (3) whether the proposed action is environmentally sound as it relates to the basin from which the water is being exported; (4)

whether the proposed action is an appropriate long-term use that will not unduly limit growth and development in the transferring basin; and (5) other factors that the State Engineer determines are relevant.

The State Engineer's consideration of the Applications is expressly limited to considerations identified in Nevada's water policy statutes. *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 918 P.2d 697 (Nev. 1996); *see also County of Churchill, et al. v. Ricci*, 341 F.3d 1172 (9th Cir. 2003). The criteria mentioned above, in conjunction other provisions of Nevada water statutes exclusively, define the scope of the State Engineer's "public interest" review. *Pyramid Lake Paiute Tribe of Indians,* 112 Nev. at 747-48. Specifically, the Nevada Supreme Court determined that the State Engineer's public interest inquiry is limited to the consideration of the matters arising from thirteen (13) guidelines contained within Nevada's water law statutes, which include those mentioned above. *Id.* The Supreme Court rejected attempts by the Pyramid Lake Paiute Tribe to force the State Engineer to conduct an environmental review of the applications at issue in that case. *Id.* at 751.

To the extent protests issues that were lodged against the SNWA Applications are based on grounds not specifically identified by the applicable Nevada water law statutes, the protest issues should be summarily dismissed, and no evidence should be introduced regarding those protest points. State Engineer Ruling No. 5465 at pg. 27-28 (dismissing protest claim because it is not a subject for determination within the statutory duties of the State Engineer); *see also* NAC 533.210 (permitting the State Engineer to "define or limit the issues to be considered" at hearings); NAC 533.260 (permitting the State Engineer to exclude testimony that is irrelevant).

III. ARGUMENT

SNWA makes this motion on the grounds that: (1) the claims that the Applications

conflict with existing federal water rights, or existing privately held water rights, cannot be substantiated, (2) certain claims raise issues that are outside the scope and jurisdiction of the State Engineer's authority, (3) the State Engineer is not obligated to consider certain claims, (4) the State Engineer has previously rejected and dismissed identical protest claims, and (5) no evidence was submitted in support of certain claims.

A. The Protestants Have Not Provided Evidence As To Any Specific Water Rights That Would Be Jeopardized By The Granting Of These Applications, Including Federally Reserved Water Rights.

No Protestant has offered any evidence of a specific water right that would be jeopardized by the granting of the SNWA Applications. None of the Protestants have presented evidence regarding conflict with existing groundwater rights in Spring Valley. Although some Protestants claim that federally reserved water rights that are allegedly held by federal agencies, and water rights claimed by the Ely Shoshone Tribe from the 1863 Treaty of Ruby Valley, will be impacted, these asserted rights either do not invoke an actual water right, or are geographically dislocated from Spring Valley.[3]

The federal reserved water right doctrine was established by the United States Supreme Court in *Winters v. United States,* 207 U.S. 564 (1908), where the Court held that Congress has a right to reserve water for use on Indian reservations. The doctrine was subsequently expanded and applies to all federal land reservations, including National Monuments, *Cappaert v. United States*, 426 U.S. 128 (1976), and National Forests, *United States v. New Mexico*, 439 U.S. 696, 781 (1978). Under the federal reserved water rights doctrine, the United States Congress or the

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[3] *See* BLM (protested all Applications), NPS (protested all Applications), Fish and Wildlife (protested all Applications), City of Ely / County of White Pine (protested all Applications), Ely Shoshone Tribe (protested Application 54019), and Toiyabe Chapter, Sierra Club (protested Applications 54003-54005).

President may reserve water for use on federal lands when the lands are reserved, and such rights are senior to any subsequently established private water rights. Federally reserved water is limited to "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 140. And importantly, the reserved water right applies only to the "primary" purpose of the reservation, not "secondary" reservation purposes, for which the United States must acquire water under state law as any other person or entity. *New Mexico*, 439 U.S. at 701.

1. <u>The National Park Service holds no conflicting water rights that will be adversely affected by the proposed appropriation</u>.

Re protest claims:

NPS (protested all Applications), Exh. A, pg. 1, sec. II;
NPS (protested all Applications), Exh. A, pg. 2, sec. III; and
NPS (protested all Applications), Exh. A, pg. 2, sec. IV.

The National Park Service (hereinafter "NPS") claims that it holds certain federal reserved water rights or other rights with senior priority dates in the Great Basin National Park (hereinafter "GBNP"). Even if such rights exist, they should not preclude the State Engineer from granting the Applications because the claimed rights will not be affected by the requested appropriation. As of this date, the NPS has not submitted any evidence in support of its claim that granting the Applications would conflict with any federally owned water rights. Where there is no evidence of a conflict between rights, such a protest claim should be dismissed. NRS 533.450 (a decision of the State Engineer must be supported by substantial evidence). Further, as demonstrated below, the water rights claimed by the NPS are geographically separated by a distance of over ten miles and are located on the eastern side of the Snake Range, far removed from Spring Valley. The NPS has presented no evidence that withdrawal of water in Spring Valley will have an impact on its claimed reserved water rights in Snake Valley.

a. The claimed federal reserved water rights in the Great Basin National Park would not be impacted by the Applications.

The purpose of the GBNP is to "preserve for the benefit and inspiration of the people a representative segment of the Great Basin of the Western United States possessing outstanding resources and significant geological and scenic values . . ." 16 U.S.C. § 410mm. When the GBNP was reserved, it incorporated previously reserved land in Lehman Caves National Monument and Humboldt National Forest. 16 U.S.C. § 410mm(d)(1). As referenced by the NPS protests, the legislation establishing the GBNP explicitly excluded the establishment of any new federal reserved water rights.[4] *See* NPS (protested all Applications), Exh. A, pg. 1, sec. II; *see also* S. Rep. 99-458 at 5, 186 U.S.C.C.A.N. 5319 at 5321 ("establishment of the park does not establish any new reservation of water or water rights, and clarifies that whatever water rights the United States has . . . prior to the establishment of the park are retained, and any appropriation of water will be done under the established law in the State of Nevada."). Therefore, any reserved water rights in the GBNP must come from the reservation of the Humboldt National Forest or the Lehman Caves National Monument.

Regarding any possible reservation through the Humboldt National Forest, the reservation of water in National Forests is limited to the primary purpose for which the forest is established, namely, to secure the continuous supply of timber or to secure favorable water flow for private and public uses under state water law. *New Mexico*, 439 U.S. at 718. In *New Mexico,* the Court held that the United States, in setting aside the Gila National Forest from other public lands, did not reserve secondary uses of the waters of the Rio Mimbres for aesthetic, recreational, wildlife-

[4] Each of NPS protests are identical, except for the reference to the underlying Application number.

preservation, or stockwatering purposes. *See* State Engineer's Final Order of Determination, Southern Monitor Valley, at 39-45, SNWA Exhibit 671.

The NPS mistakenly claims that the primary purpose of establishing the forest includes water for an administrative site or construction of a visitor center. *See* NPS (protested all Applications), Exh. A, pg. 2, sec. IV. Under the holding of *New Mexico*, these are clearly secondary purposes for which the NPS does not have a federally reserved water right, and for which the NPS would have to seek water appropriations under Nevada law. *New Mexico,* 439 U.S. at 701. In addition, the suggestion by the NPS that the federal reservation for the Humboldt National Forest implicates water necessary for the development of cave structure and ecology at Lehman Caves is similarly mistaken, as any such use is clearly secondary to the primary purpose of the forest, which is to preserve timber resources.

Regarding the NPS claim of a federal reservation of water through the Lehman Caves National Monument, the legislation creating the national monument does not demonstrate any purpose that implicates the need for a specified groundwater flow. The Presidential Proclamation establishing the Lehman Caves National Monument states that the caves ". . . are of unusual scientific interest and importance, and it appears that the public interests will be promoted by reserving these caves with as much land as may be necessary for the proper protection thereof, as a National Monument." Statutes At Large, April 1921 to March 1923, Volume XLII, Part 2, pg. 2260 (emphasis added). There is no express reservation of water and the Proclamation appears on its face to be concerned only with the reservation of land, not water.

Assuming, *arguendo*, that a federally reserved water right exists for the Lehman Caves, the NPS has not submitted any evidence that any such water flow will be impaired by the Applications, or that the Applications will have an adverse affect on cave structure or cave

ecology. Moreover, in its June 30, 2006 submittals, the NPS has provided no evidence of the alleged impacts of SNWA's Applications on water resources at the Lehman Caves.[5] Proving an adverse impact on the caves would require showing a strong connection between groundwater appropriation at the proposed points of diversion–located to the west, northwest, and southwest of Great Basin National Park in the low lying areas of the Spring Valley basin–and an actual depletion of groundwater in the National Park. The NPS protests have provided no evidence that a withdrawal of ground water over ten (10) miles away has any impact on the hydrology of the caves.

Further, to the extent that an implied federal reserve is found to exist, it must be strictly limited to the amount of water necessary to fulfill the primary purpose of the reservation, and no more. *Cappaert*, 426 U.S. at 140. As the NPS points out, it has made no attempt to quantify this supposed reserved right, and can only assert the vague claim that granting the Applications will somehow "impair" their water rights. The federal reserved water right doctrine does not allow for the use of *all* water but is limited to a quantifiable amount for a specific purpose. It was never intended to prevent beneficial use of unappropriated water under state law.

The State Engineer should thus rejected the NPS protest claim regarding water reservations for the Lehman Caves, or the Great Basin National Park, as the claims are based on a speculative, unquantified, and non-existent right. More importantly, even if those reserved claims exist, the NPS has failed to present any evidence that its alleged reserved water rights will be impacted by the Applications.

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[5] The NPS has not provided any evidence in support of its protest claim regarding the Lehman Caves, including expert witnesses, expert reports, or hydrological studies, thus this protest claim has been abandoned.

b. **The Claimed Water Rights for Park Administrative Facilities are geographically dislocated from the proposed points of diversion of ground water.**

The NPS asserts that it holds a water right to Cave Springs with a priority date of 1890, decreed October 1, 1934, which was used to provide water for a visitor center and several other facilities inside the park. The NPS protest asserts that the diversion proposed by the Applications would impair this right if it causes groundwater levels in the vicinity to drop. However, the NPS has failed to show how groundwater withdrawals in Spring Valley will impair this surface water rights located in the eastern edge of the GBNP in Snake Valley. Further, the water right held by the NPS to Cave Springs under change application 20794 indicates the basin of origin as Snake Valley and not Spring Valley. Given that this water right is geographically dislocated from Spring Valley, any claim regarding the potential impact of the Applications on this right should be dismissed.

The NPS claims federal reserved water rights in connection with an administrative facility near the town of Baker, Nevada. The NPS was considering this new administrative facility at the time of the protest as part of new park facilities for Great Basin National Park. NPS (protested all Applications), Exh. A, pg. 2, sec. IV and V. The proposed site is located in the Snake Valley hydrographic area, not in or near Spring Valley, and thus is geographically dislocated. Therefore, any federal reserved water right associated with a use in such a location would not be impacted by the Applications.

Moreover, the protest claim regarding the visitor center is moot because the NPS has proposed to eliminate the Baker Ridge visitor center and now proposes to build the visitor center in the town of Baker, which is miles outside of the park boundary. This action is a change from the 1993 General Management Plan and is discussed in detail in the Final Supplemental EIS for

Amendment of the General Management Plan. Moreover, in the Final Supplemental EIS for the visitors' center, the NPS asserts that water is no longer an issue of concern.

The NPS asserted in its protests that it was considering a new visitor center located between Baker and Lehman Creeks within park property. *See* NPS (protested all Applications), Exh. A, pg. 3, sec. V.[6] According to the GBNP General Management Plan ("GMP"), an additional 100,000 gallon water tank will be installed to provide for increased water needs at the visitor center. GMP, at pg. 61. This would double the existing storage capacity to a total of 200,000 gallons.

When Great Basin was being considered for National Park status, one of the selling points was that there were existing facilities at the park and it could open immediately without significant increased costs to the taxpayer. It was determined that:

> [e]xisting facilities . . . at Lehman Caves National Monument are already located within the proposed park boundary, and can form the nucleus of services for the new park. Immediately available to the park visitors, therefore, would be an existing visitor center and office building complex, a small gift shop and coffee shop, a cave trail, a 30-site picnic area, restroom facilities, and a *water system.*

S.Rep 99-458 at 8-9, 1986 U.S.C.C.A.N. 5319 at 5325 (emphasis added). Clearly, it was contemplated that water rights existing for the visitor facility at Lehman Caves would suffice for the new park.

The GMP further states that to the degree feasible, the actions proposed in the plan will be accomplished using water rights currently held by the United States. If additional water is needed, rights would be obtained in accordance with state law. S. Rep. 99-458 at 5, 186 U.S.C.C.A.N. 5319 at 5321. The NPS has the same rights as other appropriators and cannot now complain that

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[6] The NPS anticipates that water for the visitor center will be provided by a well, and that if the Applications are approved there may not be water left for further appropriations, which will be counter to the public interest.

"there will be no water available for future appropriations." NPS Protest, Exh. A, pg. 3, sec. V. Therefore, this protest issues should be rejected.

2. **The U.S. Fish and Wildlife Service asserts no water rights that would be impacted by the Applications, and does not claim any federally reserved water rights in Spring Valley.**

Re protest claims:

U.S. Fish and Wildlife Service (protested all Applications), att. pgs. 1-2.

The U.S. Fish and Wildlife Service (hereinafter "FWS") argues in its protests that the granting of the Applications would reduce the water supply to four National Wildlife Refuges (hereinafter "NWR"s), thereby endangering plant and wildlife species, defeating the purpose of the NWRs, and possibly violating the Migratory Bird Treaty Act (hereinafter "MBTA"), 16 U.S.C. § 703, and the Endangered Species Act ("ESA"), 16 U.S.C. § 1531. The NWRs supposedly affected by the Applications are the Ash Meadows NWR, Desert National Wildlife Range, Moapa NWR, and Pahranagat NWR. *Id.* at pgs. 1-2.

None of these NWRs are located in the Spring Valley hydrographic basin, and there has been no evidence submitted by FWS to establish a hydrological connection between any of the NWRs and Spring Valley. "Hydrographic Basin boundaries are a critical administrative tool utilized by the Office of the State Engineer in the issuance of groundwater rights in the state of Nevada." State Engineer Ruling No. 5621 at 22. The State Engineer's long-standing policy is "to manage groundwater basins on an individual basis." *Id.* Where evidence exists of a flow system that contains separate hydrographic basins, the State Engineer has, in limited circumstances, managed separate groundwater basins jointly. State Engineer Order 1169, State Engineer Ruling 5008. However, here the FWS has presented no evidence, and in fact no evidence exists, that Spring Valley is hydrologically connected to any of the hydrographic basins

that contain the NWR mentioned in the FWS protest. Therefore, the State Engineer should reject the FWS argument that the Applications will negatively impact the NWRs.

Even if the NWRs were adjacent to any of the proposed SNWA points of diversion, there are no prior water rights claimed by FWS in connection with these NWRs. Nor does FWS claim any other water rights as federal reserved water rights. Therefore, the FWS protests as to NWRs should be dismissed.

3. Absent a conflict with existing water rights, Federal Agencies do not have an obligation to control the quantity of water available on federally managed lands.

Re protest claims:

BLM (protested all Applications), at pg. 2;
Fish and Wildlife (protested all Applications), at pg. 2;
City of Ely / County of White Pine (protested all Apps.), at pg. 3, ¶ 9;
Nye County (protested all Applications), at pg. 2, ¶ 6;
Ely Shoshone Tribe (protested Application 54019), at pg. 2, ¶ 6;
Toiyabe Chapter, Sierra Club (protested Apps. 54003-54005), at pg. 1;
Abigail Johnson (protested Application 54006), at pg. 3, ¶ 6.

The referenced protests incorrectly assert that the State Engineer should take into account whether granting the Applications will affect the ability of the U.S. Bureau of Land Management (BLM) and FWS to manage public lands, because granting the Applications will reduce the amount of water flowing to federal land, thereby reducing waters used by wild animals and livestock.[7] The Protestants allege that a detriment to the public interest will result from the Applications by "eliminating the capability" of federal agencies to fulfill federal land management responsibilities imposed by legislative action. The statutorily defined factors that

[7] The BLM protests state that it has an obligation to maintain undefined "waters" because of the demand placed on these waters by, among other animals, livestock. BLM protests, pg. 2 ("specific impacts" section). It is unclear how the BLM could have such an obligation, given the prohibition on issuing stockwater permits to the BLM. State Engineer Ruling No. 5327 at 11 (holding that "[t]he BLM does not qualify for a permit because it is not currently authorized by Congress to raise livestock in the name of the United States.").

cabin the State Engineer's review of water rights applications do not include the potential effects on management of public lands and should not be considered. See *Pyramid Lake Paiute Tribe,* 743 Nev. at 746-747 (such analysis not included in thirteen (13) guidelines).

Moreover, the State Engineer has previously rejected identical claims made by the BLM regarding the impact of water right applications on federal land management duties. In State Engineer Ruling No. 5385 at 6, the State Engineer rejected a claim by the BLM that management of the public lands required the subject waters for wild horses and other wildlife, and held that if the BLM determined that it needed a defined quantity of water for wildlife purposes, the BLM could submit a water right application for such a purpose. Similarly, in State Engineer Ruling No. 2609, the State Engineer rejected a claim by the BLM, which had argued that the appropriation of surface water would interfere with its multiple use management as directed by Congress, because "[w]ildlife, including deer, bird and small mammals depend on water from source." *Id.* at 2. The State Engineer held that "[t]here is no evidence that subsisting or existing rights will be impaired or that the [applications] will be detrimental to the public interest or orderly management of the public range." *Id.* at 3.

As of this date, none of the above-referenced Protestants have submitted any evidence in support of their claims that granting the Applications will interfere with federal land management duties. Under the holding of State Engineer Ruling No. 2609 at 3, where there is no evidence that the Applications will be detrimental to the management of federal lands, the protest claim should be dismissed. The agency can either manage the lands with the available resources or, to the extent permitted by federal and state law, secure additional resources through appropriation. Accordingly, the State Engineer should dismiss the above-referenced protest claims regarding interference with federal land management duties.

4. **None of the Applications in Lincoln County implicate federally reserved water rights because the Applications are outside of the Fortification Range Wilderness Study Area.**

Re protest claims:

Toiyabe Chapter, Sierra Club (protested Apps. 54003-54005), at pg. 1, ¶ 1.

The Sierra Club protests Application Nos. 54003, 54004, and 54005 on the grounds that they would be inconsistent with "federally owned water rights as to lands affected by this application." *See* Toiyabe Chapter, Sierra Club (protested Applications 54003-54005), at p. 1, ¶ 1. These protests also state that the Applications are located near a Wilderness Study Area (hereinafter "WSA") that is managed by the BLM for study for potential designation as a National Wilderness Area. *Id.*

The WSA designation creates no federal reserved groundwater right. *See* 86 Interior Decisions (I.D.) 553, 609-10 (1979) (noting that only formally designated wilderness areas can receive reserved water rights, and then only if necessary to supplement existing rights reserved for, e.g., a prior national forest); *see also* 16 U.S.C. § 1131 (permitting U.S. to seek reserved water rights if necessary for formally designated wilderness areas); *Southern Utah Wilderness Alliance v. Norton*, 326 F. Supp. 2d 102, 122 (D.D.C. 2004) (BLM only manages a WSA "in a manner so as not to impair the suitability of such areas for preservation as wilderness" thereby not impacting 43 U.S.C. § 1782(c)).

Even if there were a reserved right associated with a WSA, this protest claim is moot because, in 2004, the areas associated with Spring Valley Applications 54003, 54004, and 54005 were excluded from the wilderness study area. *See* Lincoln County Conservation, Recreation, and Development Act of 2004, Public Law 108-424 (Nov. 30, 2004), 118 Stat. 2403, § 208 (Application Nos. 54003, 54004, and 54005 are located beyond the eastern boundary of the

Fortification Range Wilderness Study Area). Further, even assuming that some of the Applications *were* within a proposed wilderness area, the claim that the Applications would interfere with the BLM's ability to manage its lands should not be considered by the State Engineer. In State Engineer Ruling No. 5008, the State Engineer declined to address this exact claim, and held that "if the proposed points of diversion are within the proposed wilderness areas that is an issue the applicant will need to address with the Bureau of Land Management." *Id.* at 40.

As of this date, the above-referenced Protestant has not submitted any evidence in support of its claim that granting the Applications would be inconsistent with federally owned water rights. Where there is no evidence of a conflict between rights, the protest claim should be dismissed. Accordingly, the Sierra Club protest claim regarding "federally owned water rights" in wilderness study areas has no merit and should be dismissed. *See* Toiyabe Chapter, Sierra Club (protested Applications 54003-54005), at 1, ¶ 1.

5. <u>Prior applications filed by White Pine County, which were substantially different from the subject Applications, have been denied and are no longer at issue</u>.

Re protest claims:

City of Ely/County of White Pine (protested all Applications), at pg. 1, ¶ 3;
City of Ely/County of White Pine (protested all Applications), at pg. 6, ¶ 28.

The White Pine County protests include a stale claim that the proposed appropriations ". . . will conflict with and interfere with groundwater sought in previously filed Applications in the Spring Valley Basin . . . which have not been acted upon by the state engineer." City of Ely/County of White Pine (protested all Applications), at 1, ¶ 3. There is no factual basis for this claim because White Pine County no longer has any pending applications for interbasin transfers in Spring Valley, thus the claim should be rejected.

On May 9, 2006, the State Engineer denied the applications filed by White Pine County in connection with a proposed power plant. State Engineer Ruling No. 5615. These same applications were cited by White Pine County to support its protest claim that the subject Applications would conflict with previously filed applications. However, because the factual basis of White Pine County's claim no longer exists, the State Engineer should dismiss the claim.

The White Pine County protests also claim, incorrectly, that the Applications should be denied under NRS 533.370(4), which allows the State Engineer discretion to deny an application when a prior application for a "similar use of water within the same basin" was previously denied.[8] *See* City of Ely/County of White Pine (protested all Applications), at 6, ¶ 28. The State Engineer has not denied applications that are similar to the SNWA Applications in Spring Valley.

In fact, the applications the State Engineer denied in State Engineer Ruling No. 5615 were not similar to the instant SNWA's Applications. The subject Applications seek water for municipal purposes, unlike the recently denied applications of White Pine County, which sought water for power purposes. In addition, White Pine County's applications were denied on grounds that are not at issue here, namely, whether the Applicant can establish that it will construct the necessary infrastructure to put the water to beneficial use (as is required under NRS 533.370(1)(c)). In Ruling No. 5615, the State Engineer found that the County repeatedly failed to present evidence that a power plant would actually be built, and that it was more likely that the applications sought water for speculative purposes. Accordingly, the State Engineer held that granting the applications for a "project that no longer exists" would threaten to prove detrimental

[8] The grounds for the previous denial are: (1) there is no unappropriated water in the proposed source of supply, (2) the proposed use or change conflicts with existing rights or with protectible interests in existing domestic wells, or (3) threatens to prove detrimental to the public interest. NRS 533.370(4).

to the public interest. Ruling No. 5615 at 19. Given the substantial differences between the applications at issue in the previous ruling and the Applications here, the previous denial of the White Pine County applications should not trigger the provisions of NRS 533.370(4).

6. **The State Engineer has previously held his Office does not have jurisdiction to determine the Ely Shoshone Tribe's supposed water right derived from the 1863 Treaty of Ruby Valley.**

Re protest claims:

Ely Shoshone Tribe (protested Application 54019), at pg. 1, ¶ 1.

The Ely Shoshone Tribe claims to hold a water right derived from the 1863 Treaty of Ruby Valley which has been the subject of many years of litigation between the tribe and the government as to who owns the land. Although the Treaty did not cede title to any lands, the Treaty granted the government rights-of-way, mining rights, rights to establish towns, ranches, and agricultural settlements; however, it did not address water rights in the Spring Valley region. The State Engineer does not have jurisdiction to hear any issues concerning the Treaty of Ruby Valley. State Engineer Ruling No. 5008 at 36, 40 (holding that ". . . issues as to the Treaty of Ruby Valley are not within [the State Engineer's] jurisdiction and all water right permits are issued subject to existing rights."). Thus the allegation of pending rights under the Treaty of Ruby Valley does not preclude the State Engineer from granting the subject Applications.

7. **The Rountree protests, relating to its DX Ranch in Snake Valley, do not implicate any water rights in Spring Valley.**

Re protest claims:

Rountree (protested Applications 54014, 54015, and 54020).

William and Katherine Rountree are owners of a ranching operation in the Snake Valley, on the Eastern flank of the Snake range and east of Great Basin National Park. They have

asserted no rights in the Spring Valley basin that would be affected by the proposed diversions and they have submitted no evidence or witnesses statements that rights in Snake Valley will be affected by the Applications in Spring Valley.

Where a protestant cannot provide evidence as to any specific water right that would be jeopardized by the granting of the applications, or otherwise cannot show any potential injury or impairment to existing groundwater rights, then that protest issue should be dismissed. State Engineer Ruling No. 5465 at 13 (summarily dismissing protestants who did not provide any evidence in support of their protest claims); *see also* State Engineer Ruling No. 3280 (overruling protest on the grounds that it has no merit and that the protestant has no standing because he holds no existing water rights). Accordingly, in the absence of any evidence of existing, conflicting water rights, the Rountree protests (protested Applications 54014, 54015, and 54020) should be dismissed.

B. <u>The State Engineer's Determination of Public Interest, and His Consideration of Whether The Proposed Transfer is "Environmentally Sound," is Limited in Scope By Statute</u>.

Re protest claims:

BLM (protested all Applications), at pg. 3, ¶ 3;
NPS (protested all Applications), at pg. 1, sec. I;
Fish and Wildlife (protested all Applications), at pg. 2;
City of Ely / County of White Pine (protested all Applications), at pg. 3, ¶ 9;
Nye County (protested all Applications), at pg. 1, ¶ 6;
Ely Shoshone Tribe (protested Application 54019), at pg. 2, ¶ 6;
Toiyabe Chapter, Sierra Club (protested Apps. 54003-54005), at pg. 2, ¶ 6;
Panaca Irrigation Co. (protested Applications 54003-54005), at pg. 1; and
Abigail Johnson (protested Application 54006), at pg. 3, ¶ 6.

The State Engineer is required by statute to determine whether an application will threaten to prove detrimental to the public interest, and to consider whether an interbasin transfer is "environmentally sound" as to the exporting basin. NRS 533.370(4)-(5). However, the State Engineer is not required to duplicate the environmental review that other state and federal

agencies are obliged by state and federal law to complete. Accordingly, the State Engineer should reject any protest claim that alleges that the State Engineer must undergo a review of issues that are clearly placed by statute under the authority of other state or federal officials, and which are already underway. *See Pyramid Lake Paiute Tribe,* 112 Nev. at 751 (the State Engineer's public interest review is limited to concerns that arise exclusively within the water law statutes of Nevada.)

1. Legislative history of interbasin transfer statute.

With respect to the interbasin transfer consideration, the State Engineer is directed as follows:

> [i]n determining whether an application for an interbasin transfer of groundwater must be rejected pursuant to this section, the State Engineer shall consider . . . [w]hether the proposed action is *environmentally sound* as it relates to the basin from which the water is exported.

NRS 533.370 (6)(c) (emphasis added). The environmentally sound language was introduced by Senate Bill 108 in May of 1999 and was derived from, in part, the "Study of the Use, Allocation and Management of Water" prepared by the Legislative Commission of the Legislative Counsel Bureau, State of Nevada, and from the State Water Plan.

In commenting on the original language of the bill, former State Engineer R. Michael Turnipseed indicated that he had a problem with the "environmentally sound" language:

> I generally don't consider myself to be the guardian of the environment. I am comfortable being the guardian of the state ground water and surface water . . . I am not a range manager or scientist.

Minutes of the Subcommittee of the Senate Committee on Natural Resources, Seventieth Session, February 22, 1999, at 2. Senator James, who introduced the language through amendment to the bill, states that "it is not his intention to create an environmental impact statement (EIS) out of every interbasin water transfer application," nor to "require an EIS for the

importer of water but to consider the environmental impacts on the basin of origin." *Id.* The final introductory statement for Senate Bill 108 clarifies the role of the State Engineer, and states that "the State Engineer must determine that additional studies are actually necessary before postponing action on an application." *Id.* Thus, the fact that additional environmental studies have been identified and are underway fulfills the meaning of the statute.

Additionally, consideration of the environmental soundness of an application does not compel the State Engineer to deny the Applications on that basis. As made clear by the plain language of the statute, consideration as to the environmental "soundness" of the Applications is but one of several criteria the State Engineer contemplates in evaluating the public interest. The consideration requires a balancing of competing priorities among potential uses and consideration of, for example, the public interest in making water available for beneficial uses, and in ensuring that environmental issues are being addressed through other statutory processes.

2. The State Engineer is *not* required to engage in a detailed environmental analysis, which would be duplicative of efforts by more qualified federal agencies.

An appropriation hearing before the State Engineer is not the proper forum to either consider or resolve environmental issues because it would duplicate the efforts of other agencies of the federal or state government. As discussed above, the State Engineer is limited by statute to only consider whether the proposed action is "environmentally sound." The statute's intent is to have the State Engineer determine if environmental studies are necessary for interbasin transfers, but defers implementation to other more qualified entities. Meanwhile, the State Engineer directly administers the surface and groundwater resources. Currently, a number of environmental studies are underway that will evaluate the potential impact of the pending Applications. The State Engineer should not postpone action on the Applications because the

environmental studies are already underway and any issues associated with specific environmental media will be resolved through those independent studies and the agencies with specific statutory authority to address them.

Further, as the Supreme Court held in *Pyramid Lake Paiute Tribe, supra*, the State Engineer does not have to consider alternatives, or conduct an environmental review when considering a water right application. *Pyramid Lake Paiute Tribe*, 112 Nev. at 751; *see also* State Engineer Ruling No. 5465 at 15. The State Engineer's authority in the review of water rights applications is limited to considerations identified in Nevada's water policy statutes. *United States v. Alpine Land & Reservoir Co.*, 341 F.3d 1172, 1183 - 1184 (9th Cir. 2002). The State Engineer should not conduct analysis required by other agencies as provided by legislative mandate. *Alpine*, 341 F.3d at 1183; *Pyramid Lake Paiute Tribe*, 112 Nev. at 751. Once an environmental study is required by either the applicant or a governmental agency, there is no environmental determination that is required of the State Engineer.

Here, an environmental impact analysis is required for the Project under the National Environmental Policy Act (hereinafter "NEPA"), 42 U.S.C. § 4300. The preparation of an Environmental Impact Statement (hereinafter "EIS") is currently underway and is being administered by the BLM.[9] Further, efforts are underway to comply with the Endangered Species Act (hereinafter "ESA"), 16 U.S.C. § 1531, and it is anticipated that the BLM and FWS will conduct a formal consultation under the ESA regarding potential impacts to species.

SNWA has filed an application with the BLM for rights-of-way for their proposed water supply facilities. Pursuant to NEPA, the BLM is preparing an EIS to identify and disclose direct and indirect effects associated with the project. This EIS will consider the potential

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[9] The draft EIS is expected to be made available for public comment by the BLM in 2007.

environmental impacts of construction and operation of the proposed facilities. Thus, since other agencies are already deciding whether the Project is environmentally sound, no duplicative environmental analysis is required by the State Engineer.

Accordingly, the State Engineer should properly reject Protestants' request to provide a detailed review and analysis of the Project's potential impact on plant and animal species in the Spring Valley region and defer consideration of these issues to the federal agencies who are bound to enforce NEPA and the ESA.

3. The State Engineer has determined in prior rulings that analysis of the potential impact on air quality is not within the jurisdiction of the State Engineer.

Re protest claims:

BLM (protested all Applications), at pg. 3, ¶ 2;
City of Ely / County of White Pine (protested all Applications), at pg. 4, ¶ 17;
Nye County (protested all Applications), at pg. 3, ¶¶ 12, 23;[10]
Ely Shoshone Tribe (protested Application 54019), at pg. 3, ¶ 12;
Toiyabe Chapter, Sierra Club (protested Applications 54003-54005), at pg. 2, ¶ 7; and
Abigail Johnson (protested Application 54006), at pg. 3, ¶ 12.

The State Engineer must dismiss all protests based on the assertion that appropriations sought by the Applications will create dust, negatively impact the air quality in the Spring Valley region, and potentially violate the Clean Air Act or NRS Chapter 445. Any review of potential impact on air quality is outside the scope of the State Engineer's review: ". . . issues as to air quality resulting from water rights being removed are not within the jurisdiction of the State Engineer under Nevada water law." State Engineer Ruling No. 5078 at 33 (stating in dicta that there is no information to support the protest claim, and ". . . the dirt roads in the area have more

[10] The State Engineer has previously rejected an identical claim made by Nye County regarding the State Engineer's supposed duty to prevent air pollution. State Engineer Ruling No. 4151 at 18-19 ("The State Engineer finds that he, as administrative head of the Division of Water Resources, is far removed from air quality management for the Las Vegas Basin.").

likelihood of causing dust and air pollution issues than the stripping off water rights of the lands at issue here."); State Engineer Ruling No. 5465 at 21-21 (holding that the enforcement of federal and state air quality laws is ". . . entrusted to other divisions of government.").

In addition, as of this date none of the above-referenced Protestants have submitted any evidence in support of their claims that granting the Applications will degrade air quality. Where there is no evidence that granting the Applications will be detrimental to public interest, the protest claim should be dismissed.

3. **The State Engineer has determined in prior rulings that analysis of water quality issues is not within the jurisdiction of the State Engineer.**

Re protest claims:

City of Ely / County of White Pine (protested all Applications), at pg. 2, ¶ 5;
Nye County (protested all Applications), at pg. 1, ¶ 2, pg. 5, ¶ 24;
Ely Shoshone Tribe (protested Application 54019), at pg. 1, ¶¶ 2, 3;
Toiyabe Chapter, Sierra Club (protested Apps. 54003-54005), at pg. 2, ¶ 5;
Panaca Irrigation Co. (protested Applications 54003-54005), at pg. 1;
Moriah Ranches (protested Apps. 54013-54015, 54018), at pg. 2, ¶¶ 1, 2; and
Abigail Johnson (protested Application 54006), at pg. 1, ¶¶ 1, 2.

The State Engineer must dismiss protests made on the grounds that the Applications may impair the water quality and potentially violate the federal Clean Water Act or Nevada water quality laws. Such detailed consideration of water quality issues should be deferred to the EIS process or another agency of government. The State Engineer has previously held that ". . . the issue as to whether there is a violation of the federal Clean Water Act or Nevada water quality regulations is not within the areas the State Engineer has been given jurisdiction over under Nevada law." State Engineer Ruling No. 5078 at 31. In addition, ". . . the issue as to water quality [under the Safe Drinking Water Act] is relegated to another agency of government." State Engineer Ruling No. 5506 at 15-16, 23 (concluding that ". . . such review is not a matter for

consideration under the State Engineer's statutory duties."). The State Engineer should defer the determination of this issue to other government agencies and thus dismiss each of the above-referenced protest claims.

C. The Applicant Has Obtained Portions of the Rights-of-Way Needed For The Project, And Even If Rights-of-Way Were Not Demonstrated, That Would Not Bar The State Engineer From Granting The Applications.

Re protest claims:

City of Ely / County of White Pine (protested all Apps.), at pg. 4, ¶ 13;
Nye County (protested all Applications), at pg. 2, ¶ 8;
Ely Shoshone Tribe (protested Application 54019), at pg. 3, ¶ 8;
Toiyabe Chapter, Sierra Club (protested Applications 54003-54005), at pg. 1, ¶ 2; and
Abigail Johnson (protested Application 54006), at pg. 3, ¶ 8.

The State Engineer should not deny SNWA its applications for failure to obtain all rights-of-way necessary for the proposed appropriations. For the reasons discussed below, these grounds of protest should be dismissed because: (i) they are moot following enactment of federal legislation granting certain of the necessary rights-of-way; and (ii) proceedings are underway by which the SNWA seeks to obtain the other necessary rights of way and completion of that process is not a prerequisite to the State Engineer's approval of the subject applications.

1. The Lincoln County Conservation, Recreation, and Development Act of 2004 provides rights-of-way for the project.

The Lincoln County Conservation, Recreation, and Development Act of 2004 was passed to establish wilderness areas, promote conservation, improve public land, and provide for the high quality development of Lincoln County, Nevada, and for other purposes. This legislation specifically directs the Secretary of Interior to grant rights-of-way to SNWA for the Project in Lincoln and Clark Counties. Public Law 108-424 (Nov. 30, 2004), 118 Stat. 3403. Applications

54003, 54004 and 54005 pertain to proposed sites of diversion located within Lincoln County; therefore, this protest point is moot at least with respect to those Applications.

2. SNWA has applied to the BLM for rights-of-way needed for the Spring Valley Applications, and the completion of the rights-of-way process is not a prerequisite to the approval of the Applications.

SNWA is pursuing rights-of-way for the Project. The pending status of those efforts should not prevent the State Engineer from granting the Applications. Even SNWA's failure to demonstrate that it had acquired the necessary rights-of-way for the Project would not prevent the State Engineer from granting the subject applications, as such failure ". . . does not prevent the State Engineer from granting a water right permit allowing the Applicant to go forward in an attempt to obtain its right of access in order to prove beneficial use of the water." State Engineer Ruling No. 5465 at 17-18; State Engineer Ruling No. 5008 at 27 (holding that ". . . every water right permit is conditioned on the applicant obtaining the necessary rights-of-way, if needed, and these applicants will not be treated differently). Moreover, obtaining the necessary rights-of-way ". . . is an issue for the Applicant to address with the appropriate federal agency," not with the State Engineer. State Engineer Ruling No. 5465 at 60.

D. The SNWA Applications, As Amended And Supplemented, Are Complete And Include All Of The Statutorily Required Information.

Re protest claims:

NPS (protested all Applications), at pg. 6, sec. XI, pg. 8, sec. K;
City of Ely / County of White Pine (protested all Applications), at pg. 4, ¶ 16;
Nye County (protested all Applications), at pg. 2, ¶ 11, pg. 3, ¶ 14, pg. 5, ¶ 27;
Ely Shoshone Tribe (protested Application 54019), at pg. 3, ¶ 11, pg. 4, ¶ 13;
Toiyabe Chapter, Sierra Club (protested Apps. 54003-54005), at ¶ 9, 11;
Moriah Ranches (protested Applications 54013-54015, 54018), at ¶ 6; and
Abigail Johnson (protested Application 54006), at pg. 4, ¶¶ 11, 13.

Several of the Protestants make the stale claim that the Applications are incomplete and

should be denied because they fail to provide all the statutorily-required information, e.g., the place of use, description of proposed works, estimated cost of works, number and type of units to be served, etc. Specifically, the protests claim that the information required by NRS 533.335, 533.340(3), and 533.363(3) has not been provided.

In State Engineer Ruling No. 5465, the State Engineer dismissed an identical protest claim because the applicant, whose original application did not include the information required by NRS 533.340(3), later supplemented its application with the necessary information. *Id.* at 27 (finding that there was no evidence to support the protestant's claim); *see also* State Engineer Ruling No. 4943 at 6 (rejecting argument that the application "failed to provide relevant information" under NRS 533.335 and 533.340 because the required information was provided in an amended application).

None of the Protestants here have demonstrated that the Applications lack the information required by NRS 533.335, 533.340(3), or 533.363(3). The State Engineer should therefore dismiss each of the above-referenced protest claims regarding statutorily-required information.

1. **The Applicant has provided comprehensive water resource development planning information, even though Nevada Water Law does not require this information prior to granting applications.**

Re protest claims:

Fish and Wildlife (protested all Applications), at pg. 2;
City of Ely / County of White Pine (protested all Applications), at pg. 3, ¶ 7;
Nye County (protested all Applications), at pg. 1, ¶ 5;
Ely Shoshone Tribe (protested Application 54019), pg. 2, ¶ 5;
Toiyabe Chapter, Sierra Club (protested Apps. 54003-54005), at pg. 2, ¶ 7;
Moriah Ranches (protested Applications 54013-54015, 54018), at pg. 2, ¶¶ 4, 5; and
Abigail Johnson (protested Application 54006), at pg. 2, ¶ 4.

Protestants incorrectly claim that the applications should be denied because of a lack of

"comprehensive planning," i.e., considerations of environmental impact, socio-economic impact, cost/benefit analysis, and water resource development planning.

The publicly available record of SNWA's comprehensive water resource development planning for this Project demonstrates that this claim is meritless. Moreover, the State Engineer does not require an applicant to provide such planning information in order to grant an application:

> The State Engineer finds there is no provision in the Nevada Water Law which requires comprehensive water resource development planning prior to the granting of a water right application, and further as discussed below, that the Las Vegas Valley Water District and the Southern Nevada Water Authority have engaged in long-range planning.

State Engineer Ruling No. 5008 at 26, 37 (emphasis added) (rejecting protest claim that the applicant did not provide information regarding environmental impact, socio-economic impact, cost/benefit, etc.); *see also* State Engineer Ruling No. 4943 at 7 (holding that the State Engineer has discretion to determine whether a comprehensive water resource development plan is necessary before granting applications). The State Engineer should therefore dismiss each of the above-referenced protest claims regarding comprehensive planning.

2. The State Engineer is not required by Nevada water law to examine alternative appropriative uses of water.

Re protest claims:

> **City of Ely / County of White Pine (protested all Applications), at pg. 5, ¶ 18, pg. 6, ¶ 25;**
> **Nye County (protested all Applications), at pg. 3, ¶ 13, pg. 4, ¶ 20;**
> **Ely Shoshone Tribe (protested Application 54019), at pg. 4, ¶ 13, pg. 5, ¶ 19;**
> **Toiyabe Chapter, Sierra Club (protested Applications 54003-54005), at pg. 2, ¶ 10; and**
> **Abigail Johnson (protested Application 54006), at pg. 4, ¶ 13, pg. 5, ¶ 19.**

Protests should be dismissed that are based on the claim that the Applications failed to include an independent, formal and publicly reviewable assessment of, *inter alia*, alternatives to

the proposed extraction, such as would be required under the National Environmental Policy Act[11] ("NEPA"), 42 U.S.C. § 4300. The State Engineer has previously held that ". . . there is nothing in Nevada water law that supports the protest claim that the use of water under the applications is not in the public interest because the Applicant failed to have an independent, formal and publicly reviewable assessment of . . . alternatives to the proposed extraction." State Engineer Ruling No. 5465 at 21; *see also* State Engineer Ruling No. 5008 at 28 (holding that ". . . there is nothing in the water law which requires a public review assessment process."). This position is consistent with the holding in *Pyramid Lake Paiute Tribe,* 112 Nev. at 749-50, in which the Supreme Court rejected the request that the State Engineer consider alternative water supply projects. The State Engineer should therefore dismiss each of the above-referenced protest claims regarding alternative appropriative uses.

3. **Where potential impacts from the appropriations cannot be known without actually pumping the groundwater, the State Engineer may grant the applications to make such information available.**

Re protest claims:

BLM (protested all Applications), at pg. 4;
City of Ely / County of White Pine (protested all Applications), at pg. 6, ¶ 29;
Nye County (protested all Applications), at pg. 8, ¶ 29;
Ely Shoshone Tribe (protested Application 54019), at pg. 5, ¶ 20;
Toiyabe Chapter, Sierra Club (protested Apps. 54003-54005), at pg. 2, ¶ 11;
Moriah Ranches (protested Applications 54013-54015, 54018), at pg. 2, ¶ 7;
Dr. Dan A. Love (protested Applications 54003-54005), at pg. 1;
John Tryon (protested Application 54015), at pg. 1, ¶ 3; and
Abigail Johnson (protested Application 54006), at pg. 5, ¶ 20.

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[11] The National Environmental Policy Act ("NEPA") does not require the Nevada State Engineer to conduct assessments of alternative uses: the NEPA requires *federal* agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. U.S. Environmental Protection Agency, Compliance and Enforcement, at *http://www.epa.gov/compliance/nepa/index.html* (last visited June 15, 2006).

Protestants make the incorrect claim that there is insufficient information to determine potential impacts from the appropriations. This is not a ground justifying dismissal of an application. The State Engineer has previously found that, where there is insufficient information to determine the potential impacts from the appropriations, and such impacts cannot be known without actually pumping the groundwater, the State Engineer may grant the applications to make such information available, provided that safeguards are imposed to quantify and mitigate any impacts. State Engineer Ruling No. 5465 at 14, 52, 57, and 61.

In State Engineer Ruling No. 5465, the State Engineer evaluated applications filed in 1989 by the LVVWD for appropriations in Tikapoo Valley for municipal and domestic purposes that closely resemble the subject Applications. The State Engineer found that, given the great uncertainty and the parties inability to quantify the impacts, and the fact that information as to the impacts would likely never become available without actually pumping some water, ". . . it does not threaten to prove detrimental to the public interest to allow the quantities of water to be developed under these applications when said development is done in conjunction with sufficient monitoring, and plans for mitigation of impacts, including cessation of pumping, if necessary." *Id.* at 14, 52, and 61; *see also* State Engineer Ruling No. 5008 at 31 (finding that ". . . gradual, staged appropriations of smaller quantities of water with sufficient monitoring and mitigation will deal with these protest issues, and there are too many unknowns to be able to address this issue without developing additional science."). For these reasons, the State Engineer dismissed the protest claims that the applications should be denied because insufficient information exists about the impact of groundwater pumping. *Id.*

Given the substantial similarities to the applications at issue here, the State Engineer should dismiss all of the above-referenced claims that there is insufficient information to

determine potential impacts from the appropriations.

4. <u>There is no merit to the claims of due process violation because the applications, as amended, contain all of the relevant information</u>.

Re protest claims:

Nye County (protested all Applications), at pg. 3, ¶ 14, pg. 5, ¶ 27; and City of Ely / County of White Pine (protested all Applications), at pg. 5, ¶ 19.

Protestants' argument that they have been denied due process of law because the SNWA has not provided "the relevant information" on the Applications as required by law, e.g., NRS 533.363, is without merit, as the State Engineer has previously found and properly rejected this protest issue.

In State Engineer Ruling No. 4943, the State Engineer rejected an identical claim by a protestant who argued that the application "failed to provide relevant information" under NRS 533.335 and 533.340, finding no due process violation where: (1) the applicant provided the statutorily required information by amending the original applications, (2) the protestant had ample time to determine the grounds for protest based on the amended application, and (3) the protestant did not specify what information was missing from the application. *Id.* at 6. The relevant information at issue in State Engineer Ruling No. 4943 was precisely the kind of relevant information that the Protestants here claim is missing, namely, the basic information required for an application to appropriate water.

None of the Protestants here have demonstrated that the SNWA's amended Applications are missing any of the relevant information required by statute, nor have they shown any prejudice resulting from insufficient notice, thus they have not established any due process

violation. As such, the State Engineer should dismiss the above-referenced protest claims.[12]

E. <u>The Protest Claims Asserting A Supposed Vested Right To Maintain Groundwater At A Particular Level Should Be Dismissed Because No Such Right Exists</u>.

Re protest claims:

BLM (protested all Applications), at pg. 1, ¶ 1, pg. 2, ¶ 2;
NPS (protested all Applications), at pg. 7, ¶ B;
City of Ely / County of White Pine (protested all Apps.), at pg. 2, ¶¶ 2, 4;
Nye County (protested all Applications), at pg. 1, ¶¶ 2, 3;
Ely Shoshone Tribe (protested Application 54019), at pg. 1, ¶¶ 2, 3;
Toiyabe Chapter, Sierra Club (protested Apps. 54003-54005), at pg. 2, ¶ 5;
Panaca Irrigation Co. (protested Applications 54003-54005), at pg. 1;
Moriah Ranches (protested Apps. 54013-54015, 54018), at pg. 2, ¶¶ 1, 2; and
Abigail Johnson (protested Application 54006), at pg. 2, ¶¶ 1, 2.

Several of the Protestants assert as a protest ground that the proposed appropriations will reduce groundwater levels. However, there is no vested right to maintain groundwater at a specific level or flow. Under NRS § 534.110(5), Nevada allows the State Engineer to grant permits for applications that "may cause a reasonable lowering of the static water level in a prior appropriator's well in a particular area." State Engineer Ruling No. 4943 at 6-7. Nevada law also allows applications that will lower the static water level, "so long as any protectible interests in existing domestic wells and the rights of existing appropriators can be reasonably satisfied." State Engineer Ruling No. 5440 at 2-3. Even under Nevada law, with respect to existing, permitted rights, the State Engineer has the power to "order restrictions on water withdrawal or to make rules, regulations, and orders regulating the usage of water permits issued." Opinion of the Nevada Atty. Gen, 78-223, 1978 Nev. Op. Atty. Gen. 8, 1978 WL 27749 (Nev. A.G.) (1978);

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[12] The BLM protests also claim that an analysis of the anticipated impacts of the applications has not been made available to the public. BLM (protested all Applications), at pg. 3. If the State Engineer construes this claim as asserting a due process violation, this claim should be dismissed because there has been no demonstration by the BLM that the Applications, as amended, do not contain all the relevant information.

NRS § 534.110(2)(b); NRS § 534.110(6). Thus the argument that a permit holder is entitled to a certain level of groundwater, as opposed to a certain quantity of groundwater, is without merit.

None of the Protestants have a cognizable interest in maintaining the groundwater at a particular level or flow, provided that any existing water rights they hold are not demonstrably impaired. Absent specific evidence that the subject applications will cause an unreasonable lowering of the static water table, any protest claims on that basis should be dismissed. *See* State Engineer Ruling No. 5465 at 23. In the absence of any such evidence, the State Engineer should therefore dismiss each of the above-referenced protest claims.

F. <u>The Protest Claims That The SNWA Lacks The Financial Capability To Develop The Project Are Without Merit, Irrelevant, And Should Be Dismissed.</u>

Re protest claims:

City of Ely / County of White Pine (protested all Applications), at pg. 4, ¶ 15;
Nye County (protested all Applications), at pg. 2, ¶ 10, pg. 5, ¶ 26;
Ely Shoshone Tribe (protested Application 54019), at pg. 3, ¶ 10;
Toiyabe Chapter, Sierra Club (protested Applications 54003-54005), at pg. 2, ¶ 4; and
Abigail Johnson (protested Application 54006), at pg. 2, ¶ 10.

Many of the protests incorrectly argue that the applications should be denied because SNWA "lacks the financial capability for developing and transporting water under the subject permit," which is a prerequisite for putting the water to beneficial use. None of the above-listed Protestants have submitted any evidence on financial feasibility or lack thereof.

The State Engineer has previously ruled such claim irrelevant where the Applicant has demonstrated the requisite financial capability. In State Engineer Ruling No. 5008, which involved applications for appropriations in Clark, Lincoln, Nye and White Pine Counties filed by the LVVWD in 1989, the State Engineer held that ". . . since there is evidence that the project of water and power development will be done jointly with private industry, the State Engineer finds

the issue of financial ability to develop the massive project of all the Las Vegas Valley Water District filings concurrently is not relevant." *Id.* at p. 27. In ruling on similar applications, also filed by the LVVWD in 1989 to appropriate ground water from the Tikapoo Valley and Three Lakes Valley, the State Engineer found that there was sufficient evidence to demonstrate that the applicant had the financial capability to develop the subject waters for beneficial use. State Engineer Ruling No. 5465 at 15.

Given that the Applicant here is the same party, seeking to appropriate waters from the Spring Valley basin for the same purposes, any protest claim as to the financial capability of the SNWA is irrelevant. The State Engineer should therefore dismiss the above-referenced protest claims.

G. <u>The Applications Should Not Be Denied Because Prior Applications For Groundwater In Spring Valley By *Other Parties* For *Other Uses* Have Been Denied.</u>

Re protest claims:

City of Ely / County of White Pine (protested all Apps.), at pg. 6, ¶ 28; and Nye County (protested all Applications), at pg. 4, ¶ 21.

The previous denial of an unrelated, factually dissimilar group of applications in Spring Valley should not preclude the State Engineer from granting the subject applications. Several Protestants incorrectly raise this assertion and point to prior applications submitted by White Pine County to appropriate water in the Spring Valley basin which were denied by the State Engineer in 2006 after pending for more than 20 years. Those applications were denied because, *inter alia*, the State Engineer found that there was no evidence that any companies were actively pursuing the power project as originally contemplated by the applications. State Engineer Ruling No. 5615 at 19. That situation is not present here, as SNWA is actively pursuing its groundwater development plans in Clark, Lincoln and White Pine Counties. Accordingly, the above-

referenced protest claims regarding previously denied applications in Spring Valley by *other parties* for *other uses* have no merit and should be denied.

H. <u>The Protests' Claim That Approving The Applications Would Sanction Water Mining Is Without Merit And Should Be Dismissed.</u>

Re protest claims:

City of Ely / County of White Pine (protested all Applications), at pg. 2, ¶ 4;
Nye County (protested all Applications), at pg. 1, ¶ 3;
Toiyabe Chapter, Sierra Club (protested Applications 54003-54005), at pg. 2, ¶ 8; and
Abigail Johnson (protested Application 54006), at pg. 2, ¶2.

Several of the protests raise the meritless claim that the proposed appropriation would exceed the available yield of the Spring Valley basin and thereby sanction water mining. Where the applicant demonstrates that the requested appropriation is limited to the perennial yield of the relevant groundwater basin, any claim that the use of the water will sanction water mining is meritless and should be dismissed by the State Engineer. "With the appropriations limited as described below, the protest claim that the use of water under the applications will sanction water mining is without merit and is dismissed." State Engineer Ruling No. 5465 at 15-16. For the same reason, the State Engineer should dismiss the above-referenced protests as meritless.

I. <u>The Protest Claim That The Applications Would Encourage Willful Waste And Inefficient Use Has No Merit And Should Be Dismissed.</u>

Re protest claims:

NPS (protested all Applications), at pg.6, sec. X;
City of Ely / County of White Pine (protested all Apps.), at pg. 4, ¶¶ 12, 14;
Nye County (protested all Applications), at pg. 2, ¶¶ 7, 9;
Ely Shoshone Tribe (protested Application 54019), at pg. 3, ¶¶ 7, 9;
Toiyabe Chapter, Sierra Club (protested Applications 54003-54005), at pg. 1, ¶ 3; and
Abigail Johnson (protested Application 54006), at pg. 3, ¶¶ 7, 9.

Protests asserting that approval of the Applications "will sanction and encourage the

willful waste of water" are incorrect. First, no Protestant submitted any evidence on this issue. Second, the State Engineer has previously ruled that the practices of SNWA and the LVVWD in fact encourage the *efficient* use of water: "The State Engineer finds the Southern Nevada Water Authority is taking conservation seriously as part of its overall water management plan." State Engineer Ruling No. 5008 at 27; State Engineer Ruling No. 5465 at 18 (finding that LVVWD ". . . is encouraging more efficient use of water in Las Vegas through various water conservation programs such as restricted watering schedules, cash for grass programs where citizens are paid to remove turf grasses, conservation plans for government facilities, tiered water rates, and landscape development restrictions.") (cited favorably in State Engineer Ruling No. 5621.

Where there is no genuine dispute as to the Applicant's effort toward improving the efficient use of water, the State Engineer should conclude ". . . that the protest issue that the applications would encourage willful waste and inefficient use of water in the Las Vegas Valley is not a protest issue warranting consideration." State Engineer Ruling No. 5008 at 38. Accordingly, the above-referenced protest claims regarding the alleged willful waste of water are meritless and should be dismissed.

J. <u>The Protestants May Not Incorporate By Reference Any Other Protestants' Claims.</u>

Re protest claims:

> **City of Ely / County of White Pine (protested all Applications), at pg. 6, ¶ 30;**
> **Nye County (protested all Applications), at pg. 9, ¶ 30;**
> **Ely Shoshone Tribe (protested Application 54019), at pg. 5, ¶ 21;**
> **Toiyabe Chapter, Sierra Club (protested Apps. 54003-54005), at pg. 2; and**
> **Abigail Johnson (protested Application 54006), at ¶ 21.**

Protests attempting to incorporate by reference each and every other protest to the subject applications is a practice not permitted by the State Engineer. Where a protestant attempts to "incorporate by reference . . . each and every other protest to the subject application," the State

Engineer has declined to consider any such external protest claims: "The State Engineer finds that the issues to be considered are determined from the contents of the subject application and that enumerated in the protest filed against granting of said application." State Engineer Ruling No. 4943 at 3-4 (holding also ". . . that [the party named in the protest] is the only protestant against the subject application."). Thus, other claims sought to be incorporated into the above-referenced protest should be disregarded by the State Engineer.

K. <u>The Protestants Do Not Have An Unqualified Right To Amend Their Protests At Any Time</u>.

Re protest claims:

BLM (protested all Applications), at pg. 4;
NPS (protested all Applications), at pg.8, sec. XIII;
City of Ely / County of White Pine (protested all Applications), at pg. 6, ¶ 29;
Nye County (protested all Applications), at pg. 8, ¶ 29;
Ely Shoshone Tribe (protested Application 54019), at pg. 5, ¶ 20;
Moriah Ranches (protested Applications 54013-54015, 54018), at pg. 2, ¶ 7;
Dr. Dan A. Love (protested Applications 54003-54005), at pg. 1;
John Tryon (protested Application 54015), at pg. 1, ¶ 3; and
Abigail Johnson (protested Application 54006), at pg. 5, ¶ 20.

Several of the protests assert that Protestants reserve the unqualified right to amend their protest "as issues develop." This is not permitted by the State Engineer, who has previously rejected last-second attempts to amend protests.

In State Engineer Ruling No. 4943, in response to a protestant indicating that they would "amend their protest as issues develop," the State Engineer held that ". . . the issues to be considered are determined from the contents of the subject application and that enumerated in the protest filed against granting of said application." *Id.* at 4. The State Engineer has also disallowed the amending of protests to add claims "at the last minute" because it would be unfair to the applicants. State Engineer Ruling No. 5005 at 18-19 (noting that the protestants had an opportunity to present evidence to support its claims or garner additional evidence for 10 years);

see also State Engineer Ruling No. 5047 at 52 (disallowing the protestant from amending its contentions "years into this matter" and holding that the state engineer will only rule on the list of contentions as originally asserted).

The above-referenced Protestants should thus be precluded from amending their protests at the last minute.

L. <u>The Protest Claim Regarding The State Engineer's Approval Of Subdivision Maps Has No Merit And Should Be Dismissed.</u>

Re protest claims:

Nye County (protested all Applications), at pg. 5, ¶ 25.

The Nye County protests assert that the Applications should not be approved if the approval is influenced by the State Engineer's desire to ensure that there is sufficient water for Las Vegas Valley developments. This claim is apparently based upon subdivision maps the State Engineer has approved and certified. There is no merit to this claim: "The State Engineer finds it is his responsibility and obligation to follow the law, not his desire; therefore, the protest claim is dismissed." State Engineer Ruling No. 5465 at 29. Accordingly, the Nye County protest claims regarding approval of subdivision maps, found in each protest at pg. 5, ¶ 25, should be dismissed.

M. <u>The Protest Claim Regarding Population And Water Demand Projections Has No Merit And Should Be Dismissed</u>.

Re protest claims:

City of Ely / County of White Pine (protested all Applications), at pg. 5, ¶ 20, pg. 6, ¶ 24;
Nye County (protested all Applications), at pg. 3, ¶ 15, pg. 4, ¶ 19;
Ely Shoshone Tribe (protested App. 54019), at pg. 4, ¶ 14, pg. 5, ¶ 18; and
Abigail Johnson (protested Application 54006), at pg. 4, ¶¶ 14, 18.

The above Protestants oppose the Applications on the grounds that the population projection numbers supporting the water demand projections are unrealistically high and because

other data suggests that the water demand forecasts are substantially overstated. First, none of the above-referenced Protestants have submitted any evidence in support of such a claim. Second, these arguments were made in opposition to prior applications filed by the LVVWD, and as recently as 2001, were rejected by the State Engineer. In State Engineer Ruling No. 5008, which involved appropriations from the Garnet Valley Hydrographic Area for use in Clark, Lincoln, Nye and White Pine Counties, the State Engineer held that the LVVWD's population projections made in 1989 as to Clark County were not unrealistic. *Id.* at 28. The State Engineer should therefore dismiss each of the above-referenced protest claims as being impermissibly based upon water demand forecasts and population projections.

N. <u>The Protest Claims Seeking Consideration of Scenic and Recreational Values Have No Merit And Should Be Dismissed</u>.

Re protest claims:

White Pine County/City of Ely, at pg. 3, ¶ 6, pg. 4, ¶ 11;
Ely Shoshone, at pg. 2, ¶ 4;
Nye County, at pg. 1, ¶ 4;
Moriah Ranches, pg. 2, ¶ 3.

The referenced protests each assert the generalized and unsupported grounds that granting the Applications will destroy the "scenic and recreational values" of the State. First, none of the above-referenced Protestants have submitted any evidence to support this claim. Second, similar unsupported arguments were previously considered and rejected by the State Engineer. *See, e.g.,* State Engineer Ruling No. 5011 at 9 (Protests alleging scenic and recreational values were dismissed because the protestant does not cite to any authority that the County of origin holds such values in trust); State Engineer Ruling No. 5465 at 17 (Protests based upon scenic and recreational value dismissed for lack of supporting evidence).[13] The same result should occur

[13] Although not raised here by any Protestant, analogous claims have also been previously rejected by the State Engineer. State Engineer Ruling No. 5465, at 23 (State Engineer has no

here.

O. The Three Protests Raised By Dan Love Should Be Dismissed Outright Because They Raise No Substantive Challenge to the Applications.

Re protest claims:

Dr. Dan A. Love (protested Applications 54003-54005)

Dr. Love has filed three protests to SNWA's applications. Each protest, in sum, simply objects to the scope of the project as being too big, with no basis for this claim or why mere size is of itself objectionable, and also objects to the purportedly unprecedented nature of the Applications, similarly without support. The State Engineer cannot consider protests that fail to raise any substantive objection to the proposed project. Dr. Love apparently believes that protest, in this context, has its broader, common English interpretation. But a protest before the State Engineer is not so broad – Dr. Love has failed to provide any support for his claims and, in fact, has failed to articulate any legitimate protest. Since Dr. Love's protests fail to meet the legal standard for an acceptable protest to SNWA's applications, the State Engineer should dismiss them in their entirety.

P. All Of The Protests Raised By Nye County, Moriah Ranches, Inc., And Panaca Irrigation Co. Should Be Dismissed Outright Because They Raise No Substantive Challenge to the Applications.

Re protest claims:

Nye County (protested all Applications);
Moriah Ranches (protested Applications 54013-54015, 54018); and
Panaca Irrigation Co. (protested Applications 54003-54005).

The protests filed by Nye County, Moriah Ranches, Inc., and Panaca Irrigation Co., which raise various objections to the Applications, fail to provide any evidentiary basis in support of

---

control or statutory mandate over aesthetics, i.e. de-greening, construction improvements, etc.).

their claims. These Protestants did not submit a witness list, an exhibit list, or any documentary evidence. The State Engineer cannot consider protests that fail to raise any substantive objection to the proposed project. Since the above-referenced protests fail to meet the legal standard for an acceptable protest to SNWA's applications, the State Engineer should dismiss them in their entirety.

IV. CONCLUSION

For the foregoing reasons, the SNWA requests that the individual protest claims listed above should be dismissed and not addressed at the hearings on the subject Applications.

DATED this 7 day of July, 2006.

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BEFORE THE STATE ENGINEER, STATE OF NEVADA

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES

* * *

IN THE MATTER OF APPLICATION NOS. 54003 THROUGH 54020, INCLUSIVE, FILED BY THE LAS VEGAS VALLEY WATER DISTRICT TO APPROPRIATE THE UNDERGROUND WATERS OF SPRING VALLEY (184) HYDROGRAPHIC BASIN, LINCOLN AND WHITE PINE COUNTIES, NEVADA.

_____/

[PROPOSED] ORDER GRANTING MOTION TO DISMISS INDIVIDUAL PROTEST CLAIMS REGARDING SPRING VALLEY APPLICATIONS

For good cause appearing, the individual protest claims of the following Protestants, as listed in Attachment A appended hereto, should be dismissed:

U.S. Department of Interior, Bureau of Land Management (protested all Applications);
U.S. Department of the Interior, National Park Service (protested all Applications);
U.S. Fish and Wildlife Service (protested all Applications);
City of Ely / County of White Pine (protested all Applications);
Nye County (protested all Applications);
Ely Shoshone Tribe (protested Application 54019);
Toiyabe Chapter, Sierra Club (protested Applications 54003-54005);
Panaca Irrigation Co. (protested Applications 54003-54005);
Moriah Ranches (protested Applications 54013-54015, 54018);
Dr. Dan A. Love (protested Applications 54003-54005);
John Tryon (protested Application 54015);
Abigail Johnson (protested Application 54006); and
William and Katherine A. Rountree (protested Applications 54014, 54015, 54020).

DATED: July ____, 2006.

_____

State Engineer, State of Nevada
Department of Conservation and Natural Resources, Division of Water Resources

Attachment A

Protestant	*Claim To Be Dismissed*
NPS (at pg. 1, sec. II, sec. III, and sec. IV) Fish and Wildlife (at pgs. 1-2)	The Applications would conflict with existing water rights.
BLM (at pg. 2) Fish and Wildlife (at pg. 2) City of Ely/County of White Pine (pg. 3, ¶ 9) Nye County (at pg. 2, ¶ 6) Ely Shoshone Tribe (at pg. 2, ¶ 6) Toiyabe Chapter, Sierra Club (at pg. 1) Abigail Johnson (at pg. 3, ¶ 6)	The Applications will affect the ability of the BLM and FWS to manage public lands.
Toiyabe Chapter, Sierra Club (at pg. 1, ¶ 1)	The Applications would be inconsistent with federally owned water rights in wilderness study areas.
City of Ely/County of White Pine (at pg. 1, ¶ 3, and pg. 6, ¶ 28)	The proposed appropriations will conflict with and interfere with groundwater sought in previously filed Applications in the Spring Valley Basin.
Ely Shoshone Tribe (at pg. 1, ¶ 1)	The State Engineer has jurisdiction to determine the Ely Shoshone Tribe's supposed water right derived from the 1863 Treaty of Ruby Valley.
Rountree (Protested Apps. 54014, 54015, and 54020)	William and Katherine Rountree have rights in the Spring Valley basin that would be affected by the proposed diversions.
BLM (at pg. 3, ¶ 3) NPS (at pg. 1, sec. I) Fish and Wildlife (at pg. 2); City of Ely/County of White Pine (at pg. 3, ¶ 9) Nye County (at pg. 1, ¶ 6) Ely Shoshone Tribe (at pg. 2, ¶ 6) Toiyabe Chapter, Sierra Club (at pg. 2, ¶ 6) Panaca Irrigation Co. (at pg. 1) Abigail Johnson (at pg. 3, ¶ 6)	The Applications threaten adverse environmental impact and possibly jeopardize the existence of species protected by the ESA.

Attachment A

Protestant	*Claim To Be Dismissed*
BLM (at pg. 3, ¶ 2) City of Ely / County of White Pine (at pg. 4, ¶ 17) Nye County (at pg. 3, ¶¶ 12, 23) Ely Shoshone Tribe (at pg. 3, ¶ 12) Toiyabe Chapter, Sierra Club (at pg. 2, ¶ 7) Abigail Johnson (at pg. 3, ¶ 12)	The Applications will create dust, negatively impact the quality in the Spring Valley region.
City of Ely / County of White Pine (at pg. 2, ¶ 5) Nye County (at pg. 1, ¶ 2, pg. 5, ¶ 24) Ely Shoshone Tribe (at pg. 1, ¶¶ 2, 3) Toiyabe Chapter, Sierra Club (pg. 2, ¶ 5) Panaca Irrigation Co. (at pg. 1) Moriah Ranches (at pg. 2, ¶¶ 1, 2) Abigail Johnson (at pg. 1, ¶¶ 1, 2)	The Applications may impair the water quality in the Spring Valley region.
City of Ely / County of White Pine (at pg. 4, ¶ 13) Nye County (at pg. 2, ¶ 8) Ely Shoshone Tribe (at pg. 3, ¶ 8) Toiyabe Chapter, Sierra Club (at pg. 1, ¶ 2) Abigail Johnson (at pg. 3, ¶ 8)	The Applicant has not obtain all rights-of-way necessary for the proposed appropriations.
NPS (at pg. 6, sec. XI, pg. 8, sec. K) City of Ely / County of White Pine (at pg. 4, ¶ 16) Nye County (at pg. 2, ¶ 11, pg. 3, ¶ 14, pg. 5, ¶ 27) Ely Shoshone Tribe (at pg. 3, ¶ 11, pg. 4, ¶ 13) Toiyabe Chapter, Sierra Club (at ¶ 9, 11) Moriah Ranches (at ¶ 6) Abigail Johnson (at pg. 4, ¶¶ 11, 13)	The Applications do not provide all the statutorily-required information.
Fish and Wildlife (at pg. 2) City of Ely / County of White Pine (at pg. 3, ¶ 7) Nye County (at pg. 1, ¶ 5) Ely Shoshone Tribe (pg. 2, ¶ 5) Toiyabe Chapter, Sierra Club (at pg. 2, ¶ 7) Moriah Ranches (at pg. 2, ¶¶ 4, 5) Abigail Johnson (at pg. 2, ¶ 4)	The Applications do not have comprehensive water resource development planning information.

Attachment A

Protestant	*Claim To Be Dismissed*
City of Ely /County of White Pine (at pg. 5, ¶ 18, pg. 6, ¶ 25) Nye County (at pg. 3, ¶ 13, pg. 4, ¶ 20) Ely Shoshone Tribe (at pg. 4, ¶ 13, pg. 5, ¶ 19) Toiyabe Chapter, Sierra Club (at pg. 2, ¶ 10) Abigail Johnson (at pg. 4, ¶ 13, pg. 5, ¶ 19)	Applications failed to include an independent, formal and publicly reviewable assessment
City of Ely/County of White Pine (at pg. 5, ¶ 18, pg. 6, ¶ 25) Nye County (at pg. 3, ¶ 13, pg. 4, ¶ 20) Ely Shoshone Tribe (at pg. 4, ¶ 13, pg. 5, ¶ 19) Toiyabe Chapter, Sierra Club (at pg. 2, ¶ 10) Abigail Johnson (at pg. 4, ¶ 13, pg. 5, ¶ 19)	The State Engineer is required by Nevada water law to examine alternative appropriative uses of water.
BLM (at pg. 4) City of Ely / County of White Pine (at pg. 6, ¶ 29) Nye County (at pg. 8, ¶ 29) Ely Shoshone Tribe (at pg. 5, ¶ 20) Toiyabe Chapter, Sierra Club (at pg. 2, ¶ 11) Moriah Ranches (at pg. 2, ¶ 7) Dr. Dan A. Love (at pg. 1) John Tryon (at pg. 1, ¶ 3) Abigail Johnson (at pg. 5, ¶ 20)	The Applications cannot be granted if there is insufficient information to determine potential impacts from the appropriations,
Nye County (at pg. 3, ¶ 14, pg. 5, ¶ 27) City of Ely / County of White Pine (at pg. 5, ¶ 19)	The Protestants have been denied due process of law because the SNWA has not provided "the relevant information" on the Applications as required by law.
BLM (at pg. 1, ¶ 1, pg. 2, ¶ 2) NPS (at pg. 7, ¶ B) City of Ely / County of White Pine (at pg. 2, ¶¶ 2, 4) Nye County (at pg. 1, ¶¶ 2, 3) Ely Shoshone Tribe (at pg. 1, ¶¶ 2, 3) Toiyabe Chapter, Sierra Club (at pg. 2, ¶ 5) Panaca Irrigation Co. (at pg. 1) Moriah Ranches (at pg. 2, ¶¶ 1, 2) Abigail Johnson (at pg. 2, ¶¶ 1, 2)	There is a vested right to maintain groundwater at a specific level or flow.

Attachment A

Protestant	*Claim To Be Dismissed*
Nye County (at pg. 5, ¶ 25)	Approval of the applications may be influenced by the State Engineer's desire to ensure that there is sufficient water for Las Vegas Valley developments.
City of Ely/County of White Pine (pg. 5, ¶ 20, pg. 6, ¶ 24) Nye County (at pg. 3, ¶ 15, pg. 4, ¶ 19) Ely Shoshone Tribe (at pg. 4, ¶ 14, pg. 5, ¶ 18) Abigail Johnson (at pg. 4, ¶¶ 14, 18)	The population projection numbers supporting the water demand projections are unrealistically high.
White Pine County/City of Ely (pg. 3, ¶ 6, pg. 4, ¶ 11) Ely Shoshone (pg. 2, ¶ 4) Nye County (pg. 1, ¶ 4) Moriah Ranches (pg. 2, ¶ 3)	The Applications will destroy the scenic and recreational values of the State.
Dr. Dan A. Love	No Substantive Challenge to the Applications.
Nye County Moriah Ranches Panaca Irrigation Co.	No Substantive Challenge to the Applications.

Attachment A

Protestant	*Claim To Be Dismissed*
City of Ely / County of White Pine (at pg. 4, ¶ 15) Nye County (at pg. 2, ¶ 10, pg. 5, ¶ 26) Ely Shoshone Tribe (at pg. 3, ¶ 10) Toiyabe Chapter, Sierra Club (at pg. 2, ¶ 4) Abigail Johnson (at pg. 2, ¶ 10)	SNWA lacks the financial capability for developing and transporting water under the subject permit.
City of Ely / County of White Pine (at pg. 6, ¶ 28) Nye County (at pg. 4, ¶ 21)	The previous denial of an unrelated, factually dissimilar group of applications in Spring Valley should preclude the State Engineer from granting the subject applications.
City of Ely / County of White Pine (at pg. 2, ¶ 4) Nye County (at pg. 1, ¶ 3) Toiyabe Chapter, Sierra Club (at pg. 2, ¶ 8) Abigail Johnson (at pg. 2, ¶ 2)	The proposed appropriation would exceed the available yield of the Spring Valley basin and thereby sanction water mining.
NPS (at pg.6, sec. X) City of Ely / County of White Pine (at pg. 4, ¶¶ 12, 14) Nye County (at pg. 2, ¶¶ 7, 9) Ely Shoshone Tribe (at pg. 3, ¶¶ 7, 9) Toiyabe Chapter, Sierra Club (at pg. 1, ¶ 3) Abigail Johnson (at pg. 3, ¶¶ 7, 9)	The Applications will sanction and encourage the willful waste of water.
City of Ely / County of White Pine (at pg. 6, ¶ 30) Nye County (at pg. 9, ¶ 30) Ely Shoshone Tribe (at pg. 5, ¶ 21) Toiyabe Chapter, Sierra Club (at pg. 2) Abigail Johnson (at ¶ 21)	The Protestants may incorporate by reference each and every other protest to the Applications.
BLM (at pg. 4) NPS (at pg.8, sec. XIII) City of Ely / County of White Pine (at pg. 6, ¶ 29) Nye County (at pg. 8, ¶ 29) Ely Shoshone Tribe (at pg. 5, ¶ 20) Moriah Ranches (at pg. 2, ¶ 7) Dr. Dan A. Love (at pg. 1) John Tryon (at pg. 1, ¶ 3) Abigail Johnson (at pg. 5, ¶ 20)	The Protestants have the unqualified right to amend their protest as issues develop.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of KING & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of the MOTION TO DISMISS INDIVIDUAL PROTEST CLAIMS REGARDING SPRING VALLEY APPLICATIONS AND MEMORANDUM IN SUPPORT, addressed to:

[__X__] By **U.S. POSTAL SERVICE**: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed to:

SEE ATTACHED SERVICE LIST

[__X__] By **FACSIMILE**: I transmitted via facsimile from the law offices of KING & TAGGART, a true and correct copy of the above-identified document, in the ordinary course of business, to the individual and facsimile number listed below:

SEE ATTACHED SERVICE LIST

[__X__] By **E-MAIL**:

SEE ATTACHED SERVICE LIST

[__X__] By **HAND DELIVERY**, via:

[___ _] Reno-Carson Messenger Service
[__X__] interoffice-type messenger
[_____] other type of delivery service: _____

by placing a true and correct copy of the above-identified document in an envelope containing the above-identified document, in the ordinary course of business, addressed to:

SEE ATTACHED SERVICE LIST

DATED this 17th day of July, 2006.

Employee of KING & TAGGART, LTD.

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