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

IN THE MATTER OF APPLICATIONS 53987) THROUGH 53992, INCLUSIVE, AND 54003) THROUGH 54021, INCLUSIVE FILED TO) APPROPRIATE THE UNDERGROUND) WATERS OF SPRING VALLEY, CAVE) VALLEY, DELAMAR VALLEY AND DRY) LAKE VALLEY HYDROGRAPHIC BASINS) (184, 180, 182 AND 181), LINCOLN COUNTY) AND WHITE PINE COUNTY, NEVADA.)	**NOTICE OF HEARING AND INTERIM ORDER**

On September 14, 2016, the State Engineer held a status conference regarding the remand of Southern Nevada Water Authority's (SNWA) Applications 53987 through 53992, inclusive and 54003 through 54021, inclusive. At the status conference, discussion was had regarding possible motions to address various matters. On October 2, 2016, the State Engineer issued an Interim Order on Pre-hearing Scheduling pursuant to which the opportunity was provided for the parties to file various motions. In that order, the State Engineer found and ordered the following:

1. That an additional administrative hearing is necessary to provide the parties the opportunity to fully address the issues remanded.

2. That the scope of the remand hearing will be limited to the specific issues identified in the Judge Estes' Ruling, and only new evidence relating to those issues will be considered in addition to the existing record.

3. On or before October 14, 2016, the parties shall identify documents that are not currently admitted exhibits in the administrative record that the parties propose should be admitted into the record as exhibits for the upcoming hearing. For example, copies of decisions by the Nevada Supreme Court in the various appeals and writ petitions. Any objections to admission of the identified documents are due on or before October 24, 2016. If no objections are received regarding an identified document, the State Engineer will assign the document an exhibit number in numerical sequence to the existing exhibit list and admit the document into evidence. If there are objections to any document or the State Engineer determines any said document will not be admitted, the parties will be notified of the State Engineer's determination on admission of the remaining identified documents by November 30, 2016. If such notice is required, it will only be served on those parties who made an appearance at the Status Conference.

4. The State Engineer will schedule the hearing for a time period within the last week of September 2017 and the first two weeks of October 2017. The State Engineer will endeavor to provide notice of the hearing schedule and evidentiary exchange dates by November 30, 2016.

5. The parties shall submit proposed schedules for initial and rebuttal evidentiary exchange dates (including for SNWA's proposed Monitoring, Management and Mitigation Plan) on or before October 14, 2016.

6. The Confederated Tribes of the Goshute Reservation, Duckwater Shoshone Tribe, and Ely Shoshone Tribe may file a motion regarding federal agency hearing participation and party status on or before October 14, 2016.

7. The SNWA may file a motion on or before October 14, 2016, regarding whether a protestant who did not appear or participate in the proceedings before Judge Estes or in the Nevada Supreme Court proceedings can participate in the remand hearing. SNWA conceded that the Utah Counties are proper parties to participate in this proceeding.

8. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints (CPB) may file a motion regarding the availability of pre-hearing depositions on or before October 14, 2016. The State Engineer notes that NAC § 533.160 provides that prehearing discovery may be conducted in compliance with a stipulation between the parties or upon order of the State Engineer. The CPB may also file a motion regarding presentation of written direct testimony of expert witnesses in lieu of live direct testimony during the hearing on or before October 14, 2016.

NOTICE OF HEARING

Please take notice, the State Engineer hereby sets the hearing on the remand of Applications 53987 through 53992, inclusive, and 54003 through 54021, inclusive, to begin at **8:30 a.m., on Monday, September 25, 2017, continuing through Friday, September 29, 2017, ending each day by 4:30 p.m. The hearing will reconvene at 8:30 a.m. on Monday, October 2, 2017, continuing through Friday, October 6, 2017, ending each day by 4:30 p.m. at the Nevada State Legislature, 401 South Carson Street, Room 1214, Carson City, Nevada.**

PLEASE TAKE SPECIAL NOTICE - Currently the hearing room is unavailable the morning of Thursday, October 5, 2017, until 11:00 a.m.; however, this is subject to change as we get closer to the hearing date.

MOTION FOR PRE-HEARING DISCOVERY AND WRITTEN DIRECT TESTIMONY

Cleveland Ranch, which has been identified and will continue to be identified in this proceeding as the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints (CPB), filed a Motion Regarding Discovery and Mandatory Presentations of Proposed Written Testimony. CPB requests that the State Engineer authorize pre-hearing discovery and order that direct testimony be presented by written submittals. The CPB presents its motion as a way to promote just, speedy and economical determination of the issues. The water right applicant Southern Nevada Water Authority (SNWA) opposed the motion noting that historically the State Engineer has required live testimony, which allows for the State Engineer to clarify issues immediately by questioning the witness, streamlines the State Engineer's ability to understand and probe the evidence, allows the parties to immediately understand the evidence and reports, provides an extended opportunity for the State Engineer to gauge witness credibility, and cultivates public understanding of the proceedings. The SNWA also notes that expert

witnesses are required to provide written reports in advance of the hearing and asserts that the addition of written testimony will add little to what is already available from the reports. The SNWA also opposes pre-hearing discovery noting that it will add substantial costs and the State Engineer is not equipped to manage discovery disputes in the manner of a district court. White Pine County, *et al.*, agrees with the request for written direct testimony, but opposes the request for discovery asserting that it will waste time and resources and indicates its belief that cross-examination will be a sufficient tool by which to challenge expert testimony. In SNWA's Reply to White Pine County, *et al.*'s Response to SNWA Motion Regarding Schedule, Proper Parties and Offer of Exhibits, it again opposes the request for direct written testimony and asserts that in a case of statewide importance, such as this, the State Engineer should not amend the usual hearing practices and procedures.

The State Engineer denies the request for pre-hearing discovery and the request for written direct testimony. The State Engineer finds that the expert witnesses in the remand hearing will be required to submit written reports with citations to the information upon which their opinions are based and believes this is sufficient to inform the parties of the opinions of those witnesses without the additional discovery proceedings. This has been an adequate process throughout these proceedings and the State Engineer does not believe that substantial value is added to the process by pre-hearing discovery. The State Engineer finds there is value for him as the decision maker and his staff to have the direct testimony presented during the course of the hearing and that the proceedings can be confusing and awkward when starting with cross-examination. The State Engineer finds that the public is highly interested in this specific hearing and would most likely find it informative and valuable in hearing the direct testimony live.

MOTION TO DISMISS FOR FAILURE TO JOIN UNITED STATES DEPARTMENT OF INTERIOR BUREAUS

On October 14, 2016, the Confederated Tribes of the Goshute Reservation, the Duckwater Shoshone Tribe and the Ely Shoshone Tribe (Tribes) submitted a Motion to Dismiss the matter of the above-referenced water right applications for the failure to join the United States Department of Interior Bureaus (DOI Bureaus) (which includes the Bureau of Indian Affairs, Bureau of Land Management, National Park Service and Fish and Wildlife Service) in the present proceeding or, in the alternative, requested that the State Engineer stay the proceeding and take no action on the applications until such time as the United States Department of Interior Bureaus are joined in the proceeding. The motion was joined in by White Pine County, *et al.* The Tribes support their request arguing that the Monitoring, Management and Mitigation Plans (3M Plans) are exhibits to two Stipulations for Withdrawal of Federal Protests executed in 2006 and 2008 between the SNWA and the DOI Bureaus and that said DOI Bureaus are key members of teams established to execute the responsibilities and activities in the 3M Plans and that without the presence of the DOI Bureaus in the proceeding, Judge Estes' Order remanding the matter to determine objective standards as to when mitigation must occur cannot be accomplished without amending, altering or varying the 3M Plans. Further, they

assert that written consent of the DOI Bureaus is required to amend the Stipulations and 3M Plans. The Tribes assert that without the participation of the DOI Bureaus, any amendment to the 3M Plans would be legally invalid, and any objective standards established would be arbitrary and capricious. Moreover, they assert that setting standards affecting Federal water rights in the absence of the DOI Bureaus would violate the due process of the Tribes. They also assert that now that the 3M Plans have been found to be legally flawed, the Stipulations entered to protect Federal water rights and Federal water resources are also flawed and should be terminated. The State Engineer finds that while the SNWA and the DOI Bureaus may have to amend their Stipulations, and perhaps the exhibits, that fact does not require the State Engineer to dismiss the applications or delay the proceedings or that the DOI Bureaus be made a party to the proceedings.

The Tribes argue that proceeding without the DOI Bureaus violates the plain meaning of the Stipulations for Withdrawal of Federal Protests. The State Engineer finds that he is not a party to those Stipulations and is not the appropriate person to decide this disagreement between the Tribes regarding consultation with or representation by the Federal Government. The Tribes argue that their due process rights will be violated without the presence of the DOI Bureaus and proceeding without them is inconsistent with the role of the Federal Government in fulfilling its trust responsibility to the Tribes. The State Engineer finds that the Federal Government's trust responsibility to the Tribes is a matter of federal law over which the State Engineer has no jurisdiction and in which he is in no position to decide. The Tribes assert that if the DOI Bureaus cannot be joined because of sovereign immunity, then the SNWA application review process should be dismissed or stayed until such time as the DOI Bureaus participate. The State Engineer does not agree.

The Tribes also based their argument on joinder under the Nevada Rules of Civil Procedure (NRCP). The State Engineer's hearing process is not that of a district court, but rather a quasi-judicial administrative process. The NRCP do not apply. It is interesting to note that the Tribes did not even serve this motion on the parties they are asserting should be joined, but rather they assert that the State Engineer should provide notice of the purpose of this proceeding to the DOI Bureaus and invite their participation and make it the DOI Bureaus' responsibility to determine whether to join or assert sovereign immunity as a defense to participation. The Tribes assert, citing to *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 811-12 (1976), that the McCarran Amendment, 43 U.S.C. § 666 has been interpreted to allow the United States to be joined as a party in a State water adjudication proceeding involving unadjudicated Indian water rights.

The SNWA opposes the motion arguing that the 3M Plans submitted during the 2011 hearing are separate documents from the Federal Stipulations. It argues that the District Court ordered amendments to the 3M Plans and did not address the Federal Stipulations and that nothing in the Stipulations purports to regulate the 3M Plans submitted to the State Engineer. The State Engineer finds he has not and does not rely on the Federal Stipulations regarding the 3M Plans for this proposed project. Those Stipulations are a matter between the SNWA and

DOI Bureaus, which resulted in the withdrawal of the DOI Bureaus' protests. The State Engineer finds he is not restricted or governed by the Stipulations in what he will require under the 3M Plans. The 3M Plans are a requirement of the State Engineer in permitting the applications. The State Engineer agrees with the argument of the SNWA that the 3M Plans are broader and more inclusive than the Federal Stipulations because they address non-federal water rights and resources.

The State Engineer finds the 3M Plans he had approved, and will be reconsidering on remand, are plans approved by him and are different from the Stipulated agreements. If there is a violation of the DOI Bureaus agreements with the SNWA, that is a matter between them and not for the State Engineer. The State Engineer is not a party to those agreements. Once an agreement is reached between parties for withdrawal of a protest, that protest and related party is no longer before the State Engineer. If amendments to those Stipulations are necessary that is a matter between the signatories of which the State Engineer is not one.

The Tribes assert that if the DOI Bureaus cannot be joined because of sovereign immunity, then the SNWA application review process should be dismissed or stayed until such time as the DOI Bureaus participate. The State Engineer does not agree. This is a matter of the appropriation of water under state law. While the DOI Bureaus can willingly participate as a witness if they so desire, their participation is not essential for the State Engineer's determinations in this matter. The Tribes are sovereign nations who filed their own protests and who are represented by competent legal counsel who can present their issues before the State Engineer. If the Tribes believe the Federal Government has failed to adequately consult with or represent them, then that is a matter between them and does not prevent the State Engineer from carrying out his duties in acting on applications. The Tribes' due process rights will not be violated as they are full party participants in this proceeding and have been represented by competent legal counsel of their own choosing throughout the hearing process.

The State Engineer finds that it is the Tribes and not the State Engineer bringing this motion. It was their responsibility to serve the appropriate parties. The State Engineer finds that once the DOI Bureaus stipulated to withdraw their protests that is the end of their participation before the State Engineer and they are no longer a party to the proceeding.

The State Engineer finds the Tribes slightly exaggerate the holding in the decision in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). In that case, the Court ruled that the McCarran Amendment only provides a limited waiver of sovereign immunity for purposes of joinder to **comprehensive, general stream adjudications** in which the rights of all competing claimants are adjudicated. The waiver does not subject the United States to private suits to decide priorities between the United States and a particular claimant. This proceeding is not a comprehensive general stream adjudication.

The State Engineer finds that forced joinder in the absence of a formal protest to a water right application would violate the provision for protest found in Nevada water law and perhaps the rights of the water right applicant. The rules for practice and procedure in an administrative hearing on a protested water right application are found in Nevada Administrative Code chapter

533 and they do not provide for mandatory joinder. The State Engineer denies the Motion to Dimiss.

MOTIONS REGARDING SCHEDULING, PROPER PARTIES, OFFER OF EXHIBITS

At the status conference, the State Engineer requested the parties try to agree to the dates for evidentiary exchanges. By letter dated October 12, 2016, CPB indicated that the parties were unable to agree to a schedule for the exchange of reports and rebuttal reports and proposed the schedule that initial reports be exchanged about May 15, 2017, and rebuttal reports to follow 45 days later, or June 30, 2017. Part of the reasoning for these early dates is likely attributable to the motion for pre-hearing discovery.

The SNWA filed a Motion Regarding Schedule, Proper Parties and Offer of Exhibits pursuant to which it proposes that the initial evidentiary exchange occur approximately 60 days before the first day of hearing or July 20, 2017, and the rebuttal exchange occur approximately 30 days before the first day of hearing or August 24, 2017. It also indicated that if the pre-hearing discovery proposal was not approved by the State Engineer, it would be amenable to a first exchange approximately 90 days before the first day of hearing or Thursday, June 29, 2017, and the rebuttal exchange taking place on Friday, August 11, 2017. However, in the SNWA's Reply to White Pine County, *et al.*'s Response to SNWA Motion Regarding Schedule, Proper Parties and Offer of Exhibits it again requests that the dates for evidentiary exchange be its proposed 60/30 day schedule or 60 days before the first day of hearing or July 20, 2017, and the rebuttal exchange occur approximately 30 days before the first day of hearing or August 24, 2017. The dates for the exchange of evidence are set forth in this Order below.

The SNWA appears to have dropped its objection raised at the status conference as to proper parties to this hearing and does not object to the participation by any party that appeared at the status conference.

Both the SNWA and White Pine County, *et al.* proposed additional exhibits to be admitted into the record. The State Engineer finds little value in most of the proposed exhibits and does not believe they will add to the record required for the State Engineer's analysis on remand and some are already part of the record before the District Court and need not be replicated as exhibits, such as transcripts of previous hearings and rulings. The State Engineer sees no value in including in this record all the briefing in the various lawsuits. The record in this matter is already unprecedented in its size and the State Engineer will not add to it documents that will not be relevant to his analysis on remand. *See* NAC § 533.260(1) (all evidence offered must be relevant). Therefore the State Engineer denies the request for inclusion of all the identified exhibits except for those listed below.

The State Engineer has already added the following exhibits to the exhibit list and will ask if there is any objection to their admission at the hearing:

SE_119	Notice of Status Conference dated June 17, 2016
SE_120	Interim Order re Pre-hearing scheduling Oct. 3, 2016
SE_121	CPB letter re: proposed scheduling dated October 12, 2016

SE_122	CPB Motion Regarding Discovery and Mandatory Presentations of Proposed Written Testimony, Oct. 14, 2016
SE_123	SNWA's Motion Regarding Schedule, Proper Parties and Offer of Exhibits, Oct. 14, 2016
SE_124	Tribes' Motion to Dismiss for Failure to Join United States Department of Interior Bureaus, Oct. 14, 2016
SE_125	White Pine County, *et al.*, Joinder to Motion to Dismiss for Failure to Join United States Department of Interior Bureaus, Oct. 14, 2016
SE_126	SNWA's Opposition to Motion Regarding Discovery and Mandatory Presentation of Proposed Witness Testimony, Oct. 24, 2016
SE_127	White Pine County, *et al.'s* Response to SNWA Motion Regarding Schedule, Proper Parties and Offer of Exhibits and to CPB Motion Regarding Discovery and Mandatory Presentations of Proposed Witness Testimony, Oct. 24, 2016
SE_128	SNWA's Opposition to Motion to Dismiss for Failure to Join United States Department of Interior Bureaus, Oct. 31, 2016
SE_129	CPB's Reply in Support of Motion Regarding Discovery and Mandatory Presentations of Proposed Witness Testimony, Oct. 25, 2016
SE_130	SNWA's Reply to White Pine County, *et al.'s* Response to SNWA Motion Regarding Schedule, Proper Parties and Offer of Exhibits

The State Engineer will admit the following documents identified in the motions and expects the SNWA to provide the required copies at the hearing.

Revised NDWR Solver – SNWA Exhibit Nos. 258 and 452, as revised by the State Engineer for Ruling 6255. This exhibit was submitted by SNWA in the prior hearing regarding Applications 53987 through 53992, but was revised by the State Engineer for Ruling 6255 at page 25.

Order Denying Petition for Writ of Mandamus or Prohibition, *King v. Seventh Jud. Dist. Ct.,* Case No.: 65775, filed with the clerk of the Nevada Supreme Court on May 21, 2015.

Order Denying Petition for Writ of Mandamus, *King v. Seventh Jud. Dist. Ct.,* Case No.: 65776, filed with the clerk of the Nevada Supreme Court on May 21, 2015.

Corp. Bishop, LDS v. Seventh Jud. Dist. Ct., 132 Nev. Adv. Op. 6, 366 P.3d 1117 (2016) Case No. 65424

Order Dismissing Appeal, Case No.: 64815, filed with the clerk of the Nevada Supreme Court on February 6, 2015.

EXCHANGE OF EVIDENCE AND WITNESS LISTS

The exchange of documents, witness lists and descriptions of witness testimony will take place in two simultaneous exchanges. The State Engineer requires that two copies of any of the documents reference below be filed in the Office of the State Engineer along with the electronic copies discussed below.

Initial Evidentiary Exchange. The parties are hereby ordered to serve on each other and the State Engineer in Carson City, Nevada, **no later than Friday, June 30, 2017**, an exhibit list, a witness list, a reasonably detailed summary of the testimony of each witness, and copies of any documentary evidence intended to be introduced into the hearing record. If a witness is not identified as testifying on direct as to a certain topic, the witness may not be allowed to testify to the unidentified topic in his or her direct testimony. If a witness is to be presented to provide expert testimony, the evidentiary exchange shall include a written report prepared and signed by the witness, which shall contain a complete statement of all opinions to be expressed and the basis and reasons for those opinions, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or in support of the opinions and a statement of qualifications of the witness.

Second Evidentiary Exchange: The parties are hereby ordered to serve on each other and the State Engineer in Carson City, Nevada, **no later than Friday, August 11, 2011**, an additional exhibit list, witness list, witness testimony summaries or documentary evidence intended to be introduced at the administrative hearing that may be necessary in response to the other parties' first evidentiary exchange. This exchange is meant only to provide evidence that becomes necessary in rebuttal to the original exchange. A party may not present for the first time evidence as to its case in chief.

In addition to the hard copies of the lists, summaries and evidence to be served on the State Engineer in Carson City, Nevada, **the parties are hereby ordered to also file in the Office of the State Engineer in Carson City, Nevada, a computer disk or thumb drive that includes: an exhibit list identifying any additional exhibits with exhibit numbers that are consecutive to those on the current exhibit list, their witness summaries, and scanned copies of all their exhibits in pdf 200 dpi format**. The State Engineer will make these documents available on the Division of Water Resources website at *http://water.nv.gov*.

EXHIBITS

Nevada Administrative Code Chapter 533 requires that exhibits introduced into evidence must be in a readily reproducible form, on paper that is 8½" x 11" or foldable to that size. Larger charts, maps, drawings and other material will not be admitted into evidence, but may be used for demonstrative purposes. The State Engineer recognizes that if hydrologic models are used some evidence may need to be submitted on computer disks. An original and one copy of each exhibit must be submitted to the State Engineer. Exhibits based on technical studies or models shall be accompanied by sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the studies or models. To expedite the exchange of

information, reduce paper use, and lower the cost of participating in the hearing, participants are encouraged to agree to electronic service. Each electronically submitted exhibit must be saved as a separate pdf file, with the name of the party presenting the document, the exhibit number and a short description of the document in the title. For example, Exhibit No. 902 is submitted by the Southern Nevada Water Authority and is a report by Dr. Jones, it would be identified as *SNWA Ex. No. 902 Jones Report.*

RULES OF EVIDENCE NOT APPLICABLE

Pursuant to NRS § 533.365(4), the technical rules of evidence do not apply to administrative hearings before the State Engineer.

COST OF REPORTING

As set forth in Nevada Administrative Code Chapter 533, the hearing will be reported by a certified court reporter. The court reporter will file an original and one copy of the transcript with the State Engineer. Anyone wanting a copy of the transcript should make arrangements with the court reporter. The costs of the transcript will be borne equally by all parties actively participating during the hearing.

REASONABLE ACCOMMODATIONS

We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the hearing. If special arrangements are necessary, please notify Susan Joseph-Taylor at the Nevada Division of Water Resources, 901 South Stewart, Suite 2002, Carson City, Nevada, 89701, or by calling (775) 684-2872.

Respectfully submitted,

S Joseph Taylor

Susan Joseph-Taylor
Deputy Administrator

SJT/jm

Dated this 28th day of

November, 2016.

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NOTICE OF HEARING AND INTERIM ORDER

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Chairperson, County Commission
County of Millard, Utah
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Fillmore, Utah 84631

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County of Nye
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Chairperson, County Commission
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