IN THE SUPREME COURT OF THE STATE OF NEVADA

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, on Behalf of CLEVELAND RANCH,

Petitioner,

vs.

THE SEVENTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of White Pine; and THE HONORABLE ROBERT E. ESTES, Senior District Judge,

Respondents,

and

JASON KING, P.E., in his official capacity as the Nevada State Engineer, and the NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES, and SOUTHERN NEVADA WATER AUTHORITY,

Real Parties in Interest.

Case No. 65424

District Court Case Nos.

CV-1204050
CV-1204051
CV-1204052
CV-1204053
CV-1204054
CV-1205066
CV-0418012
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CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF LATTER-DAY SAINTS ON BEHALF OF CLEVELAND RANCH'S RESPONSE TO STATE OF NEVADA'S ANSWER TO PETITION FOR LIMITED WRIT REVIEW

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I. INTRODUCTION

CPB seeks limited writ relief declaring NRS 533.3705, enacted in 2007, inapplicable to SNWA's 1989 Applications because of (1) well-settled Nevada law barring the retroactive application of statutes absent specific legislative direction to the contrary, as here; and (2) the holding of *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 20, 234 P.3d 912 (2010) ("*Great Basin II*), refusing to apply a 2003 amendment to NRS 533.370(2) which could have authorized the State Engineer to *sua sponte* continue the resolution of SNWA's 1989 Applications. Had the 2003 amendment applied to SNWA's lapsed Applications upon their equitable revival in 2010 by *Great Basin II*, there would have been no reason for the Court to have directed the State Engineer to renotice the Applications and hold new hearings. Had *Great Basin II* intended that the 1989 Applications could have remained unresolved indefinitely, as could have resulted from application of NRS 533.370(2), this Court would not have emphasized that "by setting a timeline for the approval or rejection of groundwater applications within one year in NRS 533.370(2), ... ***the Legislature intended to prevent a significant lapse of time before a ruling***." [Emphasis added.] 234 P.3d at 918-19.

At the 2011 hearings, SNWA acknowledged that its 1989 Applications are no longer its actual intent for Spring Valley. Its experts testified that SNWA's current proposal and well-field design are defective and, without drastic changes,

will result in disastrous groundwater mining, a practice prohibited by the State Engineer for over 100 years.[1] Another of SNWA's experts conceded that the Spring Valley Applications are inadequate to reach SNWA's stated goal and that it may need as many as 50 to 100 additional wells to accomplish its actual purposes. CPB App. Vol. III, p. 565 (Prieur). Under NRS 533.330, each of those new wells should require a new application,[2] unless, of course, that requirement has been silently abrogated by Ruling #6164's "staged" approval and the 3M Plan to which neither the State Engineer nor CPB or any other protestant is a party.

The State Engineer argues that even if this Court holds NRS 533.5705 inapplicable to SNWA's 1989 Applications, staged approval is still legally valid because of his purported inherent authority to conditionally approve water applications. State Engineer Answer, pp. 3 and 20. The State Engineer's position

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[1] "[T]he policy of the State Engineer for over 100 years has been to disallow groundwater mining, and that remains the policy today." State Engineer District Court Answering Brief, CPB App. Vol. III, p. 422; *see also id.*, p. 381 ("the State Engineer does not allow groundwater mining"). However, when asked why SNWA's proposed project is not groundwater mining, SNWA's senior hydrologist and expert witness, Dr. James Watrus, testified that SNWA "will not in all likelihood be awarded" what it applied for, and also, reliance on SNWA's good intentions to stop pumping in time should suffice. CPB App. Vol. III, p. 569. Dr. Watrus also conceded that were SNWA to engage in groundwater mining, it "would result in devastating effects." *Id.*

[2] *See* NRS 533.330 ("No application shall be for the water of more than one source to be used for more than one purpose; but individual domestic use may be included in any application with the other use named").

ignores both NRS 533.030(1)'s direction that water may be appropriated ***only*** in conformity with NRS Chapter 533 and the fact that the authority of Nevada administrative agencies, such as the office of the State Engineer, is limited to those powers set out by statute. The State Engineer simply has no common law or general authority in excess of what the Legislature has authorized.

Determination by CPB's writ petition of the inapplicability of NRS 533.3705 to SNWA's 1989 Applications will avoid waste of substantial time, effort and expense in the related proceedings in this Court and in additional proceedings before the State Engineer and District Court. Given the unprecedented scope of SNWA's 1989 GWP, its concessions that its decades-old Applications are not even what it intends for Spring Valley and the enormous potentially devastating uncertainties posed by the GWP as to the interests of existing water rights holders, the environment and the public, strict compliance with the State's water laws, including fundamental due process to protestants such as CPB, must be required.

II. RULING #6164 AND THE STATE ENGINEER'S ANSWER CONFIRM THAT THE STATE ENGINEER MISAPPLIED NRS 533.3705 AS A SUBSTITUTE FOR NRS 533.370(2)'S SPECIFIC REQUIREMENTS FOR APPROVAL OF WATER APPLICATIONS

NRS 533.370(2) directs that the State Engineer ***reject*** applications where there is no unappropriated water in the proposed source of supply, where the proposed use conflicts with existing rights, or where the proposed use threatens to prove detrimental to the public interest. In addition, NRS 533.335 requires that

applications be ***specific*** as to the source from which appropriation is to be made, the amount of water desired, the purpose of the application, the location at which the water is to be diverted, the estimated time to complete the works and the estimated time to put the water appropriated to beneficial use. Nevada's water laws are to be strictly construed. *Preferred Equities Corp. v. State Engineer*, 119 Nev. 384, 390, 75 P.3d 380, 383-84 (2003).

If an application must be ***rejected*** under any of the grounds of NRS 533.370(2), then it cannot be ***conditionally approved*** where there is ***substantial uncertainty*** as to (1) whether there is unappropriated water in the proposed source, (2) whether existing rights will be harmed, and (3) whether there is a substantial threat of public detriment. While arguing that Ruling #6164 demonstrates a proper application of NRS 533.3705 to ***approved*** applications, the State Engineer's Answer concedes that he misapplied "staged development" as a substitute for NRS 533.370(2)'s specific requirements and that the 2006 3M Plan upon which Ruling #6164 is conditioned, is not even the plan upon which SNWA intends to proceed:

> [B]ecause models involve ***predictions*** and are ***not guaranteed to match real world effects of pumping***, the State Engineer concluded that '[s]taged development, ***in conjunction with an updated and more comprehensive Management Plan is also necessary to assure the Applications will not conflict with existing rights or domestic wells, and to assure pumping is environmentally sound.***' [Emphasis added.]

State Engineer Answer, p. 6, quoting Ruling #6164, CPB Appl., Vol. II, p. 189.

But, how can the State Engineer "assure the Applications will not conflict with existing rights or domestic wells and ... [that] pumping is environmentally sound" when he is not even a party to the 2006 Stipulation between SNWA and four federal agencies by which the 3M Plan was created. Thus, Ruling #6164 repeatedly concedes:

- "The State Engineer is ***not a party to the Stipulation*** with the Federal Agencies." Ruling #6164, CPB App. Vol. I, p. 141 (emphasis added);
- "While the State Engineer is ***not a party to the Applicant's Stipulation*** with the Federal Agencies, the State Engineer finds that it provides a forum through which critical information can be collected from hydrologic experts...." *Id.*, p 158 (emphasis added); and
- "The State Engineer is ***not a party to the Stipulations*** and must independently review the Applications and comply with Nevada water law. ***The parties to the Stipulations must address any violations among themselves.***" *Id.*, p. 199-200 (emphasis added).[3]

Moreover, CPB was not even allowed to examine SNWA witnesses about the operation of the 3M Plan at the re-noticed 2011 hearings. For example, the Hearing Officer terminated CPB's questioning of SNWA's expert, Zane Marshall, as to how the monitor, manage and mitigate provisions of the 2006 Stipulation would operate. CPB App. Vol. I, p. 108-110 ("Hold on, Mr. Hejmanowski. [I]t's a stipulated settlement between particular parties. The tribe didn't settle. The ranch

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[3] The State Engineer's argument, at n. 3, p. 9, of his Answer, that CPB has mislead the Court by stating that the State Engineer is not a party to the 3M Plan is thus belied by the State Engineer's own statements in Ruling #6164.

didn't settle. So I don't really know your point. So I don't know how much farther I'm going to let you go.... Told you I wasn't going to let you go much farther.").

Ruling #6164 confirms that SNWA did not meet NRS 533.370(2)'s requirements for approval, but relies on future testing under some yet-to-be devised 3M Plan, admittedly not the Plan related to the 2006 Stipulation:

> "In order to assure that the existing rights are not impacted, ***additional information is necessary.***" *Id.*, CPB App. Vol. II, p. 000189 (emphasis added).
>
> "The State Engineer finds that staged development of the resource under the applications granted allows for ***further data collection to alleviate any uncertainty***...." *Id.*, (emphasis added).
>
> "***Staged development***, in conjunction with an updated and more comprehensive Management Plan ***is ... necessary to assure the Applications will not conflict with existing rights or domestic wells, and to assure pumping is environmentally sound. A staged and gradual lowering of the water table will assure the Project is environmentally sound and that the propagation of effects will be observed by the hydrologic monitoring network well in advance of any possible effects impacting the existing rights in Spring Valley***. *Id.* (emphasis added).
>
> "The State Engineer finds ***it does not threaten to prove detrimental to the public interest to approve development of the Applications granted in the staged manner*** described in this ruling and allowed for under NRS 533.3705. The State Engineer finds ***the staged development is to protect existing rights, springs and streams, which are sources upon which wildlife exists.***" *Id.*, at p. 000198 (emphasis added).
>
> The State Engineer finds ***because the remaining 15 applications will be developed in a staged manner, the Management Plan will detect effects before any impacts could occur, and management options will be utilized to prevent impacts. Nevertheless, if impacts do occur, the State Engineer has the authority to require mitigation***. The State Engineer finds that the 15 applications not located on the Cleve Creek alluvial fan shall be

> developed in a staged manner, and ***with the monitoring in place and the management and mitigation options available, will not conflict with existing rights of the CPB.***" *Id.*, at p. 000180 (emphasis added).
>
> "[*E*]***xisting rights are sufficiently protected by*** the Applicant's monitoring, management, and mitigation plan and the ***staged development***...." *Id.*, at p. 000253 (emphasis added).

NRS 533.370(2) required the State Engineer to reject SNWA's stale Applications. While the District Court did not base its decision to remand for further proceedings on the inapplicability of NRS 533.3705 to SNWA's 1989 GWP Applications, it did remand on the grounds the "monitor, manage and mitigate" provisions of the 3M Plan did not support the Applications' approval, requiring their rejection:

> Curiously, the Engineer has made the finding that a failure to even make 'Mitigation' a part of the current MMM plan 'demonstrates Applicant's determination to proceed in a scientifically informed, environmentally sound manner.' [Citation omitted.] It seems that if there is enough data to make informed decisions, exactly when an unreasonable impact to either the environment or existing rights occurs, the Engineer or SNWA should recognize it and make the decision to mitigate. ***If there is not enough data (as shown earlier, no one really knows what will happen with large scale pumping in Spring Valley), granting the appropriation is premature. The ruling is arbitrary and capricious.*** [Emphasis added.]

District Court Decision, CPB App. Vol. II, pp. 0273.

Neither the State Engineer nor the District Court should have applied NRS 533.3705 as a vehicle to approve applications which failed under NRS 533.370(2)'s specific criteria. The State Engineer is required to approve or deny an application

and not issue advisory opinions based on some future events.[4] SNWA did not meet its statutory burden and the State Engineer was compelled to have rejected SNWA's Spring Valley Applications.

III. THE STATE ENGINEER AND THE DISTRICT COURT WRONGFULLY APPLIED NRS 533.3705 RETROACTIVELY TO SNWA'S 1989 APPLICATIONS

Ruling #6164 relies on NRS 533.3705, enacted in 2007, for approval of SNWA's 1989 Applications: "[T]he State Engineer will balance the needs of Southern Nevada with the protections necessary, and provided for by statute, and ***by utilizing his authority under NRS 533.3705.***"[5] [Emphasis added.] *See also*, Ruling #6164, CPB App. Vol. II, p. 212, explaining:

> Although the State Engineer carries a heavy burden of ensuring that any approval here is environmentally sound, it is also demanded that he be creative and flexible to maximize the beneficial use of the State's water. ***Nevada Revised Statute 533.3705(1)*** is an example of a statute that ***provides flexibility to the decision-making process that could otherwise stop water appropriations unnecessarily. Nevada Revised Statutes 533.3705(1)*** provides the State Engineer the

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[4] *See Thomas W. Ballow*, 1983 Nev. Op. Atty. Gen. 60 (1983), discussed further below, noting that the State Engineer's customary practice of denying or approving an application "is unassailable for numerous reasons, not the least of which are the ambiguities created relative to the appeal rights of an aggrieved party pursuant to NRS 533.450 when piecemeal rulings are entered." The 1983 State Engineer's ruling at issue did not deny or approve applications by the U.S. Government and the Attorney General cautioned that the approval of such applications might result in impairment of the state's sovereignty.

[5] Ruling #6164, CPB App. Vol. I, p. 068. *See also* additional quotations from Ruling #6164 in CPB's Petition, at pp. 14-17.

> authority and discretion to approve an application to appropriate water, but limit the initial use of water to a quantity that is less than the total amount approved for the application. ***This provision of the law provides for the submittal of additional evidence to demonstrate to the satisfaction of the State Engineer that any additional amount of water is available.*** The State Engineer interprets that statute to mean that while there is substantial evidence to approve an application, he is also able to approve it at a lower amount in order to measure and collect data that will either support increasing or decreasing the amount of the appropriation. The State Engineer finds this methodology is appropriate for this project and ***it is this staged development along with careful monitoring, management and mitigation, if needed, that he finds allows for the determination that the proposed action is environmentally sound as it relates to the basin from which the water is exported.*** [Emphasis added.]

The State Engineer's Answering Brief also repeatedly concedes Ruling #6164's dependency on NRS 533.3705, stating:

- "Ruling 6164 granted 61,127 afa, conditioned upon the implementation of 3M Plans and staged development." State Engineer Answer, p. 4;

- "[T]he district court ... ruled that the State Engineer had properly and prospectively applied NRS 533.3705 to authorize staged development." *Id.*, p. 5;

- "[T]he State Engineer concluded that '[s]taged development, ***in conjunction with an updated and more comprehensive Management Plan*** is also necessary to assure the Applications will not conflict with existing rights or domestic wells, and to assure pumping is environmentally sound." [Emphasis added.] *Id.*, p. 6;

- Quoting Ruling 6164: "***[I]t is this staged development along with careful monitoring, management and mitigation, if needed, that he finds allows for the determination that the proposed action is environmentally sound as it relates to the basin from which the water is exported.***" [Emphasis added.] *Id.*, p. 7.

- "Monitoring provides critical information that will be used to detect early warning signs of impacts as pumping begins, so that unreasonable adverse impacts can be avoided through proper management.... If necessary, the information will also be used to implement specific and effective mitigation measures to protect existing water rights and natural resources, including reduction or cessation of pumping." *Id.*, p. 10.

- "The condition of staged development... cautiously and thoughtfully provides additional protections for the environment and existing water rights holders, such as CPB and other protestants." *Id.*, p. 15.

- "In order to *ensure* protection of existing rights, the public interest and the environment, the State Engineer conditioned approval of the Applications on staged development and implementation of 3M Plans.... [I]t limits the amount of water that may be initially pumped in order to ensure that pumping does not present unexpected effects that warrant a change in the approved status of the Applications. It is a cautious and protective approach that the State Engineer has as a tool to help manage water in a new era where projects are developed based on greater scientific data that make more complex predictions available." *Id.*, pp. 15-16 (emphasis supplied).

As explained in CPB's Petition, NRS 533.3705 was enacted in 2007 without any legislative direction for its retroactive application. Absent such legislative direction, NRS 533.3705's authorization of staged development of approved applications is unavailable to SNWA's 1989 Applications, which are accorded priority as of 1989. *See, Public Employees Benefits Program v. Las Vegas Metropolitan Police Department*, 124 Nev. 138, 155, 179 P.3d 542, 553 (2008) ("[W]hen the Legislature intends retroactive application, it is capable of stating so clearly"); *County of Clark .v LB Properties, Inc.*, 129 Nev. Adv. Op. 96, 315 P.3d 294 (2013), *citing Bowen v, Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988),

and *State ex rel. State Board of Equalization v. Barta*, 124 Nev. 612, 622, 188 P.3d 1092, 1099 (2008) ("'Retroactivity is not favored in the law.' Thus, regulations generally operate prospectively 'unless an intent to apply them retroactively is clearly manifested"); *Sandpointe Apartments, LLC v. Eighth Judicial District Court*, 129 Nev. Adv. Op. 87, 313 P.3d 849, 853 (2013) ("Substantive statutes are presumed to only operate prospectively, unless it is clear that the drafters intended the statute to be applied retroactively"); *id.*, at 857-85, *citing U.S. Fidelity & Guarantee Co. v. U.S. ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) ("Not surprisingly, once it is triggered, the presumption against retroactivity is given considerable force.... 'The resumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other'"); *Pressler v. City of Reno*, 118 Nev. 506, 511, 50 P.3d 1096, 1099 (2002), *citing Nevada Power Co. v. Metropolitan Dev. Co.*, 104 Nev. 684, 686, 765 P.2d 1162, 1163 (1963) ("We have previously concluded that when the Legislature does not state otherwise, statutes have only prospective effect"); and *INS v. St. Cyr*, 533 U.S. 289, 316 (2001) ("A statute may not be applied retroactively... absent a clear indication from [the Legislature] that it intended such a result").

In *LB Properties*, 315 P.3d at 296, this Court also explained that while a first-time interpretive regulation might be applied to pre-existing issues, no

retroactive treatment is appropriate where a new statute "establishes a substantive rule" as opposed to "merely construe[ing] the meaning of the [pre-existing] statute." This interpretation is particularly appropriate where the new law does not provide for retroactive application, as with NRS 533.3705. *See, id.*, at 296-97.

The State Engineer's argument that no retroactive application occurs unless vested rights are affected fails on the record before the State Engineer. State Engineer's Answer, pp. 12-14. Ruling #6164 contains the State Engineer's concession that CPB has vested water rights in Spring Valley. CPB App. Vol. I-II, pp. 176-180. It is clear that by using NRS 533.3705 to approve SNWA's uncertain and unsettled GWP Applications in Spring Valley, the State Engineer has created a real and clear threat to CPB's vested rights.[6] The State Engineer should not have retroactively applied NRS 533.3705 or misconstrued it in order to relieve SNWA of its failure to satisfy the requirements for approval of NRS 533.370. The result is

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[6] The undisputed evidence presented to the State Engineer at the 2011 hearings, based on simulations run from SNWA's own groundwater model, showed an "aggregate cone of depression" and concentrated drawdowns of ***120 to 160 feet*** after 200 years of pumping – far more than the "less than 50 feet" that the State Engineer found "generally reasonable," and still with no end in sight – even without the four denied wells in Spring Valley. CPB App. Vol. III, p. 573-74 and 576 (Dr. Jones, CPB's expert, testified that SNWA's own Spring Valley model showed that the drawdown "doesn't reach a state of equilibrium" and that "[t]he longer the wells are pumped, the larger and deeper the aggregate cone of depression").

devastation to CPB's water rights, an obvious impairment to its existing legal rights contrary to the State Engineer's argument.

Great Basin II's specific remand also results in the inapplicability of NRS 533.3705 to SNWA's 1989 Applications. *Great Basin II* resulted in "equitable" relief reviving SNWA's lapsed 1989 Applications by republication, renotice and rehearing. Had *Great Basin II*'s 2010 "equitable relief" resulted in transforming SNWA's 1989 Applications into 2010 Applications, the Supreme Court could have simply allowed the State Engineer to apply the 2003 amendment at issue in *Great Basin II* -- authorizing the State Engineer to *sua sponte* continue resolution of applications -- to the equitably revived Applications and ordered the renotice and rehearing of those old Applications. Instead, *Great Basin II* treated the 1989 Applications as 1989 filings, as SNWA requested to retain its 1989 priority, and applied the existing timeline for their resolution, recognizing that the due process rights of protestants, including CPB, are important and entitled to protection.

Finally, the State Engineer's argument (at pp. 19-20 of its Answer) that the criteria for interbasin transfers contained in NRS 533.370(3) disappear if NRS 533.3705 is not allowed to apply retroactively fails for want of logic. The State Engineer cannot seriously take the position that the criteria for interbasin transfers set forth in NRS 533.370(3), including that the proposed action is environmentally sound, are not also inherent in NRS 533.370(2) and part of the State Engineer's

duties as guardian of Nevada's water for the public.[7] Concerns for interbasin transfers, including whether the proposed project is environmentally sound, are also protected by NRS 533.370(2)'s requirement that applications be rejected if the proposed use threatens to prove detrimental to the public interest.

IV. THERE IS NO AUTHORITY FOR THE STATE ENGINEER'S ARGUMENT THAT NRS 533.3705 MERELY "CODIFIES" EXISTING LAW

The State Engineer argues that regardless of the applicability of NRS 533.3705 to SNWA's 1989 Applications, the Ruling is still legally valid because the State Engineer always had the "inherent" authority approve applications in stages. State Engineer Answer, pp. 20-21. This argument fails because it (1) violates express statutory limitations on the State Engineer's authority; (2) ignores Ruling #6164's repeated invocations of NRS 533.3705 as the specific source of the State Engineer's authority to approve SNWA's Applications; (3) misrelies on a federal case interpreting the New Mexico State Engineer's authority under New Mexico law; and (4) misrelies on various Permits involving far smaller appropriations that were never judicially challenged, many of which were eventually cancelled, abandoned or abrogated.

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[7] *See* NRS 533.025: "The water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public."

A. THE STATE ENGINEER'S AUTHORITY IS LIMITED BY STATUTE AND HE HAS NO GENERAL OR COMMON LAW POWERS

NRS 532.110 directs that the "State Engineer ***shall perform such duties as are or may be prescribed by law.***" [Emphasis added.] And, as this Court has made it clear, "[***w***]***ater appropriation in Nevada is governed by statute,***" specifically, by NRS 533.030(1), which states that "[s]ubject to existing rights, ***all water may be appropriated for beneficial use as provided in this chapter and not otherwise.***" *State v. Morros*, 104 Nev. 709, 712, 655 P.2d 263, 265 (1988) (emphasis added).[8]

Previously addressing the scope of authority of the office of the State Engineer, the Nevada Attorney General confirmed that such authority is limited by statute and does not include general or common law powers:

> We note that ***the powers of the State Engineer***, like other state administrative agencies, ***are limited to those set forth in the statutes.*** *See e.g., Andrews v. Nev. St. Bd. of Cosmetology*, 86 Nev. 207, 208, 457 P.2d 96 (1970). ***The State Engineer has no general or common law powers, but only such powers as have been conferred by law expressly or by implication.*** *Id.* ***The State Engineer has the authority to approve applications to appropriate the public waters if the conditions of NRS 533.370(3)[9] are satisfied and to reject***

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[8] *Moore v. Orr*, 30 Nev. 458, 98 P. 398 (1908), strictly construes a constitutional directive "not otherwise provided for" as to allow no exception.

[9] NRS 533.370(3), now NRS 533.370(2), stated in 1983:

> Where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interest, the state

> ***applications if they are not. No power is conferred to create new conditions or extinguish existing conditions by way of an advisory ruling.*** The condition of primary concern in NRS 533.370(3), for purposes of our review, requires the State Engineer to reject an application if it 'threatens to prove detrimental to the public interest.' This condition contemplates an objective approach based upon pertinent cases, the laws and legislatively stated policy and not upon, *inter alia*, perceived fears of federal power. [Emphasis added.]

Thomas W. Ballow, 1983 Nev. Op. Atty. Gen. 60 (1983); *see also, Andrews*, 86 Nev. at 208, 457 P.2d at 96-97 (1970), *cited* in the *Ballow* Opinion, explaining:

> The Board is a state administrative agency, created by the Legislature.... ***Its powers are limited to those powers specifically set forth in chapter 644.*** As an administrative agency ***the Board has no general or common law powers, but only such powers as have been conferred by law expressly or by implication.*** [Citations omitted.] Official powers of an administrative agency cannot be assumed by the agency, nor can they be created by the courts in the exercise of their judicial function. [Citation omitted.] ***The grant of authority to the agency must be clear.*** [Emphasis added.]

In *John Daniel Wilkes, M.D.*, 1982 Nev. Op. Atty. Gen 20, the Attorney General reached the same result, reasoning that the State Board of Health's violation of its statutory limitations violated general principles of administrative law as well as unconstitutionally usurping the Legislature's function:

> On its face, this statute [NRS 439.140(1)] appears to grant almost unlimited authority to the State Board of Health over nonadministrative matters relating to the preservation of health.

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engineer shall reject the application and refuse to issue the permit asked for. When a previous application for a similar use of water within the same basin has been rejected on these grounds, the new application may be denied without publication.

> However, ***such a broad interpretation must be rejected as contrary to some generally recognized principles of administrative law.***
>
> It is clear that ***administrative bodies and officers have only such powers as have expressly or impliedly been conferred upon them by the constitution or by statute.*** Andrews v. Nev. St. Bd. Cosmetology, 86 Nev. 207 (1970).... Any regulation promulgated by the Board which would require licensure to engage in midwifery must derive its force and effect from an enabling statute, and as such, cannot conflict with the statute ***nor supply omissions to a statute.*** [Citation omitted.]
>
> A cardinal principle of administrative law is that ***an administrative agency has no discretion to promulgate regulations which exceed the authority conferred upon it by statute.*** If a regulation is challenged on these grounds, ***the question before a reviewing court will not be the wisdom of the agency's regulation, but rather whether the regulation alters, amends or enlarges the scope of the statute.*** [Citations omitted.]....
>
> * * *
>
> .... ***The power of an administrative agency to administer a statute and to prescribe regulations to that end is not the power to make law, for no such power can be delegated by the legislative branch to the executive branch. The power to adopt regulations is limited to carrying into effect the will of the legislative branch as expressed by the statute.*** [Emphasis added.]

This Court has repeatedly confirmed the limitation on administrative agency powers. For example, *Cramer v. State ex rel. Department of Motor Vehicles*, 126 Nev. Adv. Op. 38, 240 P.3d 8, 11-12 (2010), holds that where a statute imposed a duty on a hearing officer to admit an affidavit from an affiant who previously was allowed to testify as an expert in the district courts regarding concentration of alcohol in a person's blood, breath or urine, the hearing officer had no authority to admit an affidavit from such a proposed expert who had not been so qualified by a district court. *See, id., citing Department of Taxation v. DaimlerChrysler Services*

No. Am., LLC, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) ('[O]missions of subject matters from statutory provisions are presumed to have been intentional.'), and *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1987) ('The maxim 'EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS', the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State').

To the same effect, *Taylor v. Department of Health and Human Services*, 129 Nev. Adv. Op. 99, 314 P.3d 949, 951 (2013), concludes that a hearing officer had no authority to dismiss, demote, or suspend an employee, but only to determine the reasonableness of the action of an "appointing authority" in dismissing, demoting or suspending an employee:

> These provisions [of NRS Chapter 284] grant the hearing officer the power to review for reasonableness, and potentially set aside, an appointing authority's dismissal, demotion, or suspension decision; however, ***they do not make hearing officers appointing authorities or provide them with explicit power to prescribe the amount of discipline to be imposed.*** [Emphasis added.]

In 2007, the Nevada Legislature authorized ***staged development of approved applications***, meaning applications which have been approved under the criteria of NRS 533.130(2). Staged development of approved applications did not exist before 2007 and it has never existed as a substitute for the criteria of NRS 533.130 for approval of water applications. Since Ruling #6164 depends on NRS 533.3705 to possibly determine that after pumping and testing, SNWA's Applications might meet the criteria of NRS 533.370(2), the Ruling exceeds the State Engineer's

authority and is not entitled to either deference or enforcement. *Public Agency Compensation Trust v. Blake*, 127 Nev. Adv. Op. 77, 265 P.3d 694 (2011) explains: "[*W*]*e* ***will not defer to the agency's interpretation if, for instance, a regulation 'conflicts with existing statutory provisions or exceeds the statutory authority of the agency.'"*** [Citation omitted; emphasis added].

B. RULING #6164 CONCEDES ITS DEPENDENCE ON NRS 533.3705, NOT ON APPARENT OR INHERENT AUTHORITY OF THE STATE ENGINEER

Ruling #6164 repeatedly invokes NRS 533.3705, conceding it to be the specific source of the State Engineer's authority for staged approval of SNWA's Spring Valley Applications, *e.g.*:

- "[T]he State Engineer will balance the needs of Southern Nevada with the protections necessary, and provided for by statute, ***and by utilizing his authority under NRS 533.3705.***" CPB App. Vol. I, p. 68 (emphasis added).

- "Upon approval of an application to appropriate water, the State Engineer may limit the initial use of water to a quantity that is less than the total amount approved for the application. The use of an additional amount of water that is not more than the total amount approved for the application may be authorized by the State Engineer at a later date if additional evidence demonstrates to the satisfaction of the State Engineer that the additional amount of water is available and may be appropriated in accordance with Chapters 533 and 534 of NRS. In making that determination, the State Engineer may establish a period during which additional studies may be conducted or additional evidence provided to support the application. NRS 533.3705." *Id.*, p. 196.

- "The State Engineer finds it does not threaten to prove detrimental to the public interest to approve development of the Applications ***granted in the staged manner*** decided in this ruling and ***allowed for under NRS 533.3705.***" *Id.*, p 198 (emphasis added).

- "Upon approval of an application, the State Engineer may limit the initial use of water to a quantity that is less than the total amount approved for the application. NRS 533.3705." *Id.*, p. 201.

- "The State Engineer finds ***the public interest policy set forth in NRS 533.3705 provides for staged development being allowed here***; thus, the use of the water does not threaten to prove detrimental to the public interest." *Id.*, p. 202 (emphasis added).

- "Nevada Revised Statute 533.3705(1) is an example of a statute that provides flexibility to the decision-making process that could otherwise stop water appropriations unnecessarily. ***Nevada Revised Statutes 533.5705(1) provides the State Engineer the authority and discretion to approve an application to appropriate water, but limit the initial use of water to a quantity that is less than the total amount approved for the application.*** This provision of the law provides for the submittal of additional evidence to demonstrate to the satisfaction of the State Engineer that any additional amount of water is available. The State Engineer interprets that statute to mean that while there is substantial evidence to approve an application, he is also able to approve it at a lower amount in order to measure and collect data that will either support increasing or decreasing the amount of the appropriation. The State Engineer finds this methodology is appropriate for this project and it is this staged development along with careful monitoring, management and mitigation, if needed, that he finds allows for the determination that the proposed action is environmentally sound as it relates to the basin from which the water is exported." *Id.*, p. 212 (emphasis added).

Ruling #6164 does not even suggest that the State Engineer believed he could have reached the same result absent NRS 533.3705 as part of his inherent or pre-existing authority.

C. THE STATE ENGINEER'S FEDERAL DISTRICT COURT CASE INTERPRETING THE AUTHORITY OF THE NEW MEXICO STATE ENGINEER UNDER NEW MEXICO LAW HAS NO PRECEDENTIAL VALUE IN THIS CASE

The State Engineer misrelies on a federal District Court case, *United States v. Alpine Land & Reservoir Co.*, 919 F.Supp. 1470 (D. Nev. 1996), as authority for the proposition that he had inherent authority under Nevada law to conditionally approve SNWA's Applications. First, *Alpine Land* actually concedes that the Nevada Supreme Court has not addressed the "issue of the authority of the State Engineer to condition approval of an application to appropriate," but then analyzes a New Mexico Supreme Court decision reasoning that the New Mexico state engineer under New Mexico law could properly impose conditions on granting applications as "inherent in the broader statutory authority vested in the state engineer to deny applications if they impair existing water rights." *Id.*, at 1479.

Clearly, the "inherent authority" being discussed in *Alpine* does not represent Nevada law or discuss staged development of a groundwater project. *See, id.* ("Groundwater development is not directly impacted by this decision"). Moreover, *Alpine* rejects any notion that the State Engineer can approve applications that conflict with existing rights based on some inadequate mitigation plan with no provision for notice or other due process to protestants, other interested parties, or even the State Engineer. Finally, according to this Court, federal court decisions, even by panels of the federal appeals courts, are not binding on it. *Blanton v.*

North Las Vegas Municipal Court, 103 Nev. 623, 633, 748 P.2d 494, 500 (1987); *Custom Cabinet Factory of New York v. Eighth Judicial District Court*, 119 Nev. 51, 54, 62 P.3d 741, 742 (2003), *overruled on other grounds by Winston Products Co. v. DeBoer*, 122 Nev. 517, 134 P.3d 726 (2006). *Alpine Land* provides no support for the State Engineer's position.

D. NO PURPORTED PAST PRACTICE OF THE STATE ENGINEER ESTABLISHES AN INHERENT AUTHORITY TO APPROVE APPLICATIONS CONTRARY TO NRS CHAPTER 533.130(2)'S SPECIFIC PROVISIONS

The State Engineer argues that various Permits issued before enactment of NRS 533.3705 in 2007 prove the his inherent authority to issue staged approvals of water applications regardless of the lack of any statutory authority. *See* State Engineer Answer, pp. 20-21, and n. 7 ("[E]ven if this Court determines that NRS 5333.3705 was improperly applied, the State Engineer had authority to order staged development based on his authority to condition permits on any number of actions").

But, not a single one of the State Engineer's Permits appears to have been challenged in any of the State's courts and many were issued without protest. Also, the State Engineer's own records show many of the Permits cited in his Answer to have been abandoned, withdrawn, cancelled or abrogated. The State Engineer's list of permits ordering "staged development" at p. 20, fn. 7, should show the

following additional information evidenced on the State Engineer's website. *See* collected information on permits, CPB App. Vol. IV, pp. 713-792:

Permit	Protest	Result
43401	No protest found	Permit
45548	Protest overruled	Permit
47043	Protest overruled	Withdrawn
47252	No protest found	Withdrawn
47127	No protest found	Abrogated
47128	No protest found	Abrogated
47129	No protest found	Abrogated
47130	No protest found	Abrogated
47131	No protest found	Abrogated
47132	No protest found	Abrogated
49943	Protest overruled	Abrogated
49945	Protest overruled	Abrogated
49946	Protest overruled	Abrogated
50701	No protest found	Abrogated
50808	No protest found	Permit
51870	No protest found	Permit
51871	No protest found	Permit
51872	No protest found	Permit
51873	No protest found	Permit
52087	No protest found	Permit
52088	No protest found	Permit
44687	Protest overruled	Cancelled
44688	Protest overruled	Cancelled
47614	Protest overruled	Abrogated
47615	Protest overruled	Abrogated
47616	Protest overruled	Abrogated
47617	Protest overruled	Abrogated
43699	No protest found	Abrogated
46029	No protest found	Permit
46030	No protest found	Permit
53704	No protest found	Withdrawn
53829	No protest found	Permit
53830	No protest found	Abrogated
53831	No protest found	Permit
54866	No protest found	Abrogated
54450	Protest overruled	Permit
58269	Protest overruled	Permit
35040	Protest found	Cancelled
41674	No protest found	Withdrawn

57327	No protest found	Abrogated
51841	No protest found	Expired

In addition, the State Engineer's reliance on Ruling #5726, issued in 2007, but before passage of NRS 533.3705, as a valid example of the State Engineer's pre-2007 use of staged development also fails. State Engineer Answer, pp. 18, 20. Vacation of that Ruling was the result of this Court's 2010 remand which resulted in the State Engineer's 2011 hearings. The Court never even addressed the applicability of staged approval to SNWA's 1989 Applications.

As set forth in the Attorney General's 1983 Ballow Opinion, *cited* above, the State Engineer has no authority under Nevada law to act absent Legislative authority and he has no authority to approve applications where the proposed use conflicts with existing rights or threatens to prove detrimental to the public interest. The Permits and Rulings upon which the State Engineer now relies do not establish any legal authority to the contrary.

V. RULING #6164 ALLOWS SNWA'S 1989 APPLICATIONS TO REMAIN UNRESOLVED FOR DECADES IN VIOLATION OF NEVADA'S PROHIBITION AGAINST SPECULATION IN WATER RESOURCES

In §V(B) of its Answer, the State Engineer argues that Ruling #6164 does not allow SNWA's 1989 Applications to remain unresolved for decades, but merely sets a limit of what water may be taken by SNWA. Answer, p. 15. To the contrary, with no limit as to how long SNWA may take pumping at Stage 1 or

Stage 2, and dependent on future 3M Plans adopted without due process, Ruling #6164 authorizes speculation in water, Nevada's most precious resource, contrary to *Great Basin II* and long-standing Nevada public policy.[10] *See, Great Basin II*, 234 P.3d at 918-919, commenting on the inequities arising from applications that "linger for years..."; and *Preferred Equities Corp. v. State Engineer*, 119 Nev. 384,

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[10] At p. 1 of his Answer, the State Engineer misstates that Ruling #6164 "initially limits the amount of water that may be pumped over a period of time (here, two eight-year periods). Ruling #6164 actually has no time limit for SNWA's Stage 1 and Stage 2 pumping, stating instead minimums, not limits:

> a. **Stage 1 Development**: Pumping pursuant to the Applications shall be limited to 38,000 afa, to provide for a pumping stress that will allow for collection of reliable transient-state data and effective calibration of a groundwater flow model. Before the increase in pumping associated with Stage 2 development can occur, the Applicant will be required to pump at least 85% but not more than 100% of the Stage 1 development amount (32,300 afa - 38,000 afa) ***for a minimum of eight years***. Data from those eight years of pumping and updated modeling results will be submitted to the State Engineer as part of the annual hydrologic monitoring report. The State Engineer will then make a determination as to whether the Applicant can proceed to Stage 2.
>
> b. **Stage 2 Development**: Pumping pursuant to the Applications will be limited to a total of 50,000 afa. This pumping will provide additional pumping stresses that will allow for collection of reliable transient-state data and continued calibration of a groundwater flow model. The Applicant will be required to pump at least 85% but not more than 100% of the Stage 2 development amount (42,000 afa - 50,000 afa) ***for a minimum of eight years***. Data from those eight years of pumping and updated modeling results will be submitted to the State Engineer as part of the annual hydrologic monitoring report. The State Engineer will then make a determination as to whether the Applicant can proceed to Stage 3.

CPB App. Vol. II, pp. 254-55.

389, 75 P.3d 380, 383 (2003), stating that it is Nevada's "preeminent public policy" that water be put to beneficial use, and that "one who does not put it to beneficial use ***should not be allowed to hold it hostage.***"[11]

Since 1913, NRS 533.035 has stated: "Beneficial use shall be ***the basis, the measure and the limit of the right to the use of water.***" [Emphasis added.] This statute is the foundation of Nevada's "anti-speculation doctrine" and is discussed at length in *Bacher v. State Engineer*, 122 Nev. 1110, 1116-17, 1122-23 146 P.3d 793, 797, 801 (2007), which reversed the District Court's affirmance of a State Engineer's ruling approving an interbasin transfer based on the failures of both the applicant and State Engineer to specify how much water would be required and how it would be obtained:

> ***Water in Nevada belongs to the public and is a precious and increasingly scarce resource.*** Consequently, state regulation like that in NRS Chapters 533 and 534 is necessary to strike a sensible balance between the current and future needs of Nevada citizens and the stability of Nevada's environment.
>
> NRS Chapter 533 prescribes the general requirements that every applicant must meet to appropriate water. ***Its fundamental requirement, as articulated in NRS 533.030(1), is that water only be appropriated for 'beneficial use.' In Nevada, beneficial use is 'the basis, the measure and the limit of the right to the use if water.'***

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[11] In *Preferred Equities, id.*, this Court affirmed the District Court's affirmance of the State Engineer's ruling forfeiting water rights for five years of non-use -- the filing of an application to change the point of diversion did not cure the forfeiture, and "[b]ecause [the applicant] did not use its rights, we will not grant it equitable relief").

> ***The right to use water for a beneficial use depends on a party actually using the water.*** Under NRS 533.370(1), once beneficial use is established, '[t]he quantity of water ... appropriated ... shall be limited to such water as shall reasonably be required for the beneficial use to be served.' Once the party's 'necessity for the use of water' ceases to exist, 'the right to divert [the water'] cases as well. [Emphasis added.]

See also, id., 122 Nev. at 1119, 146 P.3d at 799 ("This doctrine precludes speculative water right acquisitions without a showing of beneficial use. ***Precluding applications by persons who would only speculate on need ensures satisfaction of the beneficial use requirement that is so fundamental to our State's water law jurisprudence***" (emphasis added)); *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1057, 944 P.2d 835, 840-41 (1997) ("mere statement of intent to put water to beneficial use, uncorroborated with any actual evidence, after nearly twenty years of nonuse is insufficient to justify a sixteenth PBU extension"); *United States v. Alpine Land & Reservoir Co.*, 2012 WL 4442804, *3 (D. Nev. 2012) ("***The State Engineer concludes that to establish an imaginary or made-up point of diversion for purposes of retaining priority would violate*** the Alpine Decree and ***Nevada water law and*** therefore, ***would threaten to prove detrimental to the public interest***" (emphasis added)).

The State Engineer, at least with regard to other applications, has also recognized the Legislature's directive that Nevada's water be put to beneficial use and not tied up for some future use. *See, e.g.,* State Engineer's 2011 Ruling #6095,

at p. 2 ("The State Engineer finds that the beneficial use requirement provides that the Applicant must demonstrate an actual beneficial use for the water applied for and ***does not allow for an applicant to tie up water for some project it might find in the future***" (emphasis added)); 2010 Ruling #6063, at p. 4 (to the same effect); *id.*, pp. 4-5 ("The State Engineer finds while it is useful to have new studies of water availability for Nevada's future growth, it threatens to prove detrimental to the public interest to allow an applicant to hold on to a water right application when it is ***unable to demonstrate an actual project for which the water will be used or to fail to provide information required by Nevada law***" (emphasis added)); 2009 Ruling #5997, pp. 5-6 (discussing the State's anti-speculation doctrine and an applicant's need to demonstrate actual need for water, its actual beneficial purpose, the quantity of water to be appropriated, and actions undertaken in furtherance of beneficial use of the water sought); 2007 Ruling #5782, p. 20 ("The Applicant also did not provide any evidence on the specifics of where water would be used and in what quantities; thus, there was no evidence of beneficial use"); 2006 Ruling #5612, p. 10 ("The State Engineer finds the Applicant did not provide anything specific as to what would be built and where. The State Engineer finds ***this is not the kind of specificity required under a water right application***" (emphasis added)).

Nothing in Nevada law countenances place-keeping, "imaginary" or "made-up" applications to obtain a permit or fix a priority to water rights. Yet, that is exactly what Ruling #6164 accomplished, authorizing SNWA to tie up the water of Spring Valley for decades, perhaps even centuries. Moreover, if something goes wrong, which is almost certain to happen, there may be no means to remedy it, and Nevada may have another Owens Valley on its hands. The State Engineer's protests to the contrary are simply are insufficient given the potential for devastation.

VI. RESOLUTION OF CPB'S PETITION IS NECESSARY AND PROPER TO CONSERVE JUDICIAL AND ADMINISTRATIVE RESOURCES

The State Engineer argues that CPB's limited issue writ petition must await appeal or be determined together with SNWA's and the State Engineer's writ petitions. The State Engineer misconstrues the purpose of writ review and CPB's petition.

CPB's limited writ petition properly seeks clarification of a legal question in the interests of judicial and administrative efficiency. If, as CPB contends, NRS 533.3705 is inapplicable to SNWA's 1989 Applications, such a determination by the Court will control further administrative and/or judicial proceedings arising out of the misapplication of Nevada law. Such a determination is properly presented by interlocutory writ to promote judicial and administrative efficiency. *Sandpointe Apartments v. Eighth Judicial District Court*, 129 Nev. Adv. Op. 87, 313 P.3d 849

(2013) (writ of mandamus was proper vehicle to test trial court's ruling that statute limiting deficiency judgments applied prospectively only, because there were important issues of law with statewide impact requiring clarification); *Mountainview Hospital Inc. v. Eighth Judicial District Court*, 128 Nev.Adv.Op. 17, 273 P.3d 861, 865 (2012); *Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001).

VII. CONCLUSION

The Court should grant limited writ relief as requested by CPB to prevent the State Engineer from retroactively applying NRS 533.3705 to permit "staged approval" of SNWA's 1989 GWP Applications to indefinitely extend them into the future and thereby avoid rejecting those Applications for failure to satisfy the requirements of NRS 533.370(2).

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief has been prepared in proportionally spaced typeface using Microsoft Word 2007 with 14-point, double spaced complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6).

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more and contains 7,166 words.

I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable portions of the Nevada Rules of Appellate Procedure.

I understand I may be subject to sanctions in the event the brief does not conform with the requirement of the Nevada Rules of Civil Procedure.

Paul R. Hejmanowski, Esq., NSB #94

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2014, I submitted the foregoing **CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF LATTER-DAY SAINTS ON BEHALF OF CLEVELAND RANCH'S RESPONSE TO STATE OF NEVADA'S ANSWER TO PETITION FOR LIMITED WRIT REVIEW** for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

Jerry Snyder
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/s/ Lynda S. Mabry