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
CV-0419012

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF LATTER-DAY SAINTS ON BEHALF OF CLEVELAND RANCH'S RESPONSE TO SOUTHERN NEVADA WATER AUTHORITY'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.[1]

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[1] SNWA concedes this at p. 3 of its Answer, *quoting Great Basin*, 234 P.3d at 920: "The Court concluded that ***too much time had passed*** between the filing and the granting of the SNWA Applications, and ordered the State Engineer to 're-notice the applications and re-open the protest period.'" [Emphasis added.]

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.[2] 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,[3] unless, of course, that requirement has been

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[2] "[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.*

[3] *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").

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.[4]

SNWA argues that even if this Court holds NRS 533.5705, enacted in 2007, inapplicable to its 1989 Applications, staged approval is still legally valid because of the State Engineer's purported inherent authority to conditionally approve water applications. SNWA's position 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 to act excess of what the Legislature has authorized.

SNWA also misrelies on a post-enactment LCB summary of 2007 legislation and comments of a prior State Engineer as to ***other*** portions of SB 274

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[4] SNWA now argues that "CPB's claim that the State Engineer is not a party to the 3M Plan is simply inaccurate." Answer, p. 11. But, the State Engineer made that ***specific representation repeatedly*** in Ruling #6164, *e.g.*:

- "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).

(2007) as constituting the legislative history of NRS 533.3705 which would endorse retroactive application. As will be demonstrated infra at §IV, there is ***no*** legislative history of NRS 533.3705 and ***no*** basis for its retroactive application to SNWA's 1989 Applications.

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. Given the unprecedented scope of SNWA's GWP, its concession that its decades-old Applications are not even what it intends or needs and the enormous 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 SNWA'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 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. SNWA ignores NRS 533.370(2), extolling the length of the 2011 hearings and number of exhibits introduced as supposedly sufficient to dispel remaining uncertainties of devastating proportion.[5] However, SNWA

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[5] SNWA Answer, p. 3, describes the 2011 hearings before the State Engineer as "the most extensive water rights hearing in Nevada's history." But, despite the hearings' length, the District Court concluded that there was insufficient evidence for the State Engineer to have approved the 1989 Applications in the amounts stated. *See* District Court Decision, CPB App. Vol. II, pp. 0279-80, observing as follows based on the State Engineer's own findings:

> The Court is charged with 'determining whether there is substantial evidence in the record to support the [Engineer's] decision.' *Revert v. Ray*, 95 Nev. 782, 786 (1979). Here, the Engineer said, however not quite consistently, that there is not enough evidence to implement, what he has characterized as 'critical,' the MMM Plan. Thus, ***if there is insubstantial evidence that it is premature to set triggers and thresholds, it is premature to grant water rights.*** [Emphasis added.]

simultaneously concedes the inescapable fact that the State Engineer misapplied "staged development" as a substitute for NRS 533.370(2)'s specific requirements, conceding for example in its Answer:

> "The remaining applications were ***approved subject to several limitations***." SNWA Answer, p. 4 (emphasis added);
>
> "[*A*]***t least two years of biologic and hydrologic baseline data must be collected and approved before any pumping can occur. Pumping is then controlled in three stages***.... SNWA is required to submit all annual data collected to the State Engineer and that information will be used by the State Engineer to decide ***whether to approve pumping*** at each new stage." *Id.*, p. 6 (emphasis added);
>
> "The State Engineer took great care in Ruling 6164 to balance the needs of the environment and local communities with his responsibility to make water resources available for appropriation.... ***To ensure this balance is made, the State Engineer required staged development and compliance with a 3M plan..... The SNWA Applications are subject to both limitations to ensure the continued protection of existing water rights and the environment.*** *Id.*, p. 10 (emphasis added);
>
> "***Staged development ensures that any declines in water levels will be slow and manageable***...." *Id.*, pp. 10-11 (emphasis added;
>
> "***Staged development*** limits the progression of the development ***so the reaction of the of the hydrologic and biologic system to the new stresses can be fully understood***...." *Id.*, p. 11 (emphasis added);
>
> "Staged development also assures that ***objective standards can be set for mitigation activities before irreversible adverse impacts can occur.***" *Id.*, p. 11 (emphasis added);[6]

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[6] While SNWA and the State Engineer are apparently conceding that additional 3M Plans will be required, they do not even allude to how the due process interests of existing rights holders, such as CPB, and the public can be satisfied. Rulings ##6164-6167 certainly do not address the problem.

"***With the understanding that staged development would be utilized,*** the State Engineer found that the full 61,127 acre-feet can be developed without conflicts with existing rights and in compliance with the interbasin transfer criteria. The gradual nature of development is ***an additional layer of protection for existing rights***...." *Id.*, p. 29 (emphasis added);

"***[B]y*** authorizing pumping of 61,127 acre-feet per year under NRS 533.370, but ***initially limiting such pumping under NRS 533.3705 to verify his determination as development progresses" the State Engineer has given meaning to NRS 533.3705*** and NRS 533.370. *Id.*, p. 30 (emphasis added).

Ruling #6164 itself confirms that SNWA did not in fact meet NRS 533.370(2)'s requirements for approval, but requires additional information and a new 3M Plan or new Plans, stating for example:

"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) compelled the State Engineer to reject SNWA's outdated Applications. Although 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 remanded on the grounds the "monitor, manage and mitigate" provisions of the 3M Plan did not support the Applications' approval, explaining:

> 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. Despite the length of the State Engineer's hearings and the number of exhibits presented, SNWA failed to meet its statutory burden under NRS 533.370(2). NRS 533.3705 is unavailable to cure defects in SNWA's presentation under NRS 533.370(2). Denial of SNWA's Applications was compelled .

III. THE STATE ENGINEER AND THE DISTRICT COURT MISAPPLIED 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.***"[7] [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 authority and discretion to approve an application to appropriate

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

> 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.]

SNWA's Answer also repeatedly concedes Ruling #6164's dependency on NRS 533.3705, stating:

- "To ensure this balance is made, the State ***Engineer required staged development*** and compliance with a 3M Plan." Answer, p. 10.

- "***The State Engineer required the SNWA Applications to be developed in well monitored and regulated stages***.... The stages ensure water resources will be slowly developed and closely monitored, and impacts can either be predicted and avoided altogether, or mitigated promptly. This additional safeguard will also ensure the continued protection of environmental resources." *Id.*, p. 10.

- "Staged development ensures that any declines in water levels will be slow and manageable.... *Id.*, pp. 10-11.

- "Staged development also assures that objective standards can be set for mitigation activities before irreversible adverse impacts can occur." *Id.*, p. 11.

But, 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. *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.

SNWA's argument that no retroactive application occurs unless "pre-existing legal rights" are affected fails on the record before the State Engineer and Ruling #6164. For example, Ruling #6164 contains the State Engineer's express concession that CPB has vested water rights in Spring Valley and that those rights may be impacted, or even destroyed, by SNWA's wells. 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, a real and clear threat to CPB's vested rights has arisen.[8] NRS 533.3705 should not be misapplied retroactively or

[8] 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***

misconstrued to relieve SNWA of its failure to satisfy the requirements for approval of NRS 533.370. The result is devastation to CPB's water rights, an obvious impairment to its existing legal rights.

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" revival of 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.

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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").

Finally, SNWA's argument (at p. 19 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. SNWA cannot seriously believe that the criteria for interbasin transfers set forth in NRS 533.370(3) 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.[9] 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 SNWA'S ARGUMENT THAT NRS 533.3705 MERELY "CODIFIES" EXISTING LAW

SNWA argues that regardless of the applicability of NRS 533.3705 to its 1989 Applications, Ruling #6164 is still valid because the State Engineer always had the "inherent" authority approve applications in stages. SNWA's 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) misrepresents the existence of a "legislative history" of NRS 533.3705 when there actually is none; (4) misrelies on a federal district court case interpreting the

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[9] *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."

New Mexico State Engineer's authority under New Mexico law as a valid statement of Nevada law; and (5) misrelies on various Permits and Rulings involving far smaller appropriations that were never judicially challenged, and many of which were cancelled, abandoned or abrogated.

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).[10]

Specifically addressing the office of the State Engineer, the Nevada Attorney General confirms that the authority of a state administrative agency 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***

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

> ***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)[11] are satisfied and to reject 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), 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

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[11] 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 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.

violation of its statutory limitations usurped the Legislature's function in violation of the Nevada's Constitution as well as general principles of administrative law:

> On its face, this statute [NRS 439.150(1)] appears to grant almost unlimited authority to the State Board of Health over nonadministrative matters relating to the preservation of health. 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); California State Restaurant Ass'n v. Whitlow, 58 Cal. App. 3d 347, 129 Cal.Rptr. 826 (1976). 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 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 533.370(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 533.370 as the specific source of the State Engineer's authority for approving 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 approved SNWA's Applications absent NRS 533.3705 as part of his "inherent" or pre-existing authority.

C. THE LCB'S POST-SESSION "SUMMARY OF LEGISLATION" DOES NOT DEMONSTRATE WHAT WAS BEFORE THE LEGISLATURE WHEN IT ENACTED NRS 533.3705 AND IS NOT A LEGISLATIVE HISTORY

SNWA argues that the "legislative history" of NRS 533.3705 (SB 274 (2007)) demonstrates that the Legislature was simply codifying the State Engineer's inherent or existing authority to apply "incremental development" in approving water applications. SNWA Answer, pp. 21-22. As authority for this position, SNWA relies on a "Summary of Legislation" prepared by the LCB, Research Division, which SNWA describes as representing information provided to the Legislature "***prior to the enactment of SB 274***...." SNWA Answer, p. 21 (emphasis added).

Although SNWA filed a 134-page Appendix and a 204-page Pamphlet in support of its Answer, it did not include an actual copy of the LCB's "Summary of Legislation" or of any excerpts of that document. Had it done so, the Court would have seen that LCB's "Summary of Legislation," excerpts of which are provided at CPB App. Vol. III, pp. 559-562, is ***not part of any pre-enactment*** "legislative history" of SB 274 (2007), but begins at p. 2 with an Introduction which invalidates each of SNWA's representations about it and confirms that the

"Summary" is actually a "review" of "passed" bills and is not intended to be relied upon by the "legal community" as interpreting the meaning any of the passed bills:

> The 74th Legislative Session adjourned Sine Die at 2:40 a.m. on June 5th. The Governor called the 23rd Special Session in the late afternoon of June 5th, and the Special Session adjourned Sine Die at 8:49 p.m. that same day.
>
> The *Summary of Legislation* reviews each of the bills and joint and concurrent resolutions ***passed*** by the 2007 Regular and the 23rd Special Session. ***These summaries do not constitute legal analyses and are not intended for use by the legal community in place of the actual statutes.***
>
> * * *
>
> Research Division
> Legislative Counsel Bureau
> September 2007 [Emphasis added.]

CPB App. Vol. III, p. 561.

The LCB's entire description of SB 274 (2007), at CPB App. Vol. III, p. 562, also shows that SB 274 addressed ***many*** topics, of which staged development of approved applications was but small part:

> **S.B. 274 (Chapter 429)**
>
> Senate Bill 274 authorizes the State Engineer to adopt regulations for the imposition of administrative fines for violations of certain statutes relating to water resources. This measure also specifies topics that the State Engineer must consider when adopting regulations and the Engineer must submit a written report detailing the regulations to the Legislative Counsel Bureau by January 1, 2009. Although regulations may be adopted, the State Engineer may not impose any administrative penalties related to this measure before July 1, 2009.
>
> Senate Bill 274 requires the State Engineer to notice a new period of protest of 45 days for successors in interest or affected rights holders if the Engineer, within seven years, fails to act on or hear certain applications filed after July 1, 2007. In addition, successors of

> a person who filed a written protest during the first notice period have the right to continue the protest if they notify the State Engineer. The measure confirms the authority of the State Engineer to limit the initial use of approved water rights to a lesser quantity, and to approve junior applications requesting a minimal amount of water. Senate Bill 274 also provides that each applicant and protestant shall file information as required by the State Engineer and shall provide such information to the other parties. The bill declares that the State Engineer may consider consumptive uses of water in reviewing certain applications, except as to water rights originating in the Muddy and Virgin Rivers, and provided such consideration is consistent with applicable federal or State decrees.
>
> Senate Bill 274 requires the State Engineer to render a decision a water rights application within 240 days after the hearing transcript is available or the date for filing additional information, unless the State Engineer grants an extension for good cause.
>
> The bill is effective on July 1, 2007.

CPB App. Vol. III, p. 562.

The LCB's ***post-passage*** Summary of Legislation does not support SNWA's arguments as to the existence, let alone meaning, of a ***pre-passage*** "legislative history" of NRS 533.3705.[12] *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. Adv. Op. 75, __ P.3d. __, 2014 WL 4656471, *5 (2014) ("'An official comment written by the drafters of a statute and available to a legislature before the statute is enacted has considerable weight as an aid to statutory construction.'"). Contrary to what SNWA claims, there is no pre-passage legislative history of SB 274!

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[12] *See, Great Basin II*, 234 P.3d at 918, n. 8, in which the Court rejected SNWA's reliance on "episodic comments by legislators during various legislative sessions between 1991 and 2003" as valid support for the contention that the 2003 Legislature intended the 2003 amendment to apply retroactively.

D. THE LCB'S JANUARY 2007 LEGISLATIVE COMMITTEE NOTES CONTAINING THE STATE ENGINEER'S WRITTEN COMMENTS IN AN APPENDIX DO NOT CONSTITUTE A "LEGISLATIVE HISTORY" OF SB 274 (2007)

SNWA's second LCB document, also missing from its filed Appendix and Pamphlet, is part of Appendix "B" ("State Engineer's Comments on the S.C.R. 26, June 21, 2006, 'Work Session Document'") attached to the January 2007 "Use, Management, and Allocation of Water Resources (LCB Bulletin No. 07-11)." CPB App. Vol. III, pp. 478-558.

Appendix "B" begins with a memorandum dated June 21, 2006, from former State Engineer Tracy Taylor to the "Members of the Legislative Commission's Committee to Study the Use, Management and Allocation of Water Resources." The memorandum is identified as "Comments to Work Session Document Recommendations." CPB App. Vol. III, at p. 520. The memorandum, *id.*, states:

> The attached document is our comments to the fifty-one (51) recommendations posed in the Work Session Document.
>
> We look forward to working through any and all language you will be considering for bill drafts. As always, thank you for all your help during this interim-study period.

The next 21-pages of Appendix B to the LCB's Bulletin consist of Mr. Taylor's comments to 51 legislative proposals. While SNWA cites the LCB Bulletin (CPB App. Vol. III, p. 535) as authority for the State Engineer's statement that a bill adopting incremental development of a project "is unnecessary because [the State Engineer] already has the statutory authority to perform these functions

and can take these into account when reviewing interbasin transfer applications," the State Engineer Taylor's actual comments do not even mention the issue of "incremental development," but address only the impracticability of undertaking inventories of the State's water and water uses. Appendix B, Item 31, CPB App. Vol. III, pp. 535-536, states in full as follows:

> 31. RESOLUTION ON FACTORS STATE ENGINEER TO CONSIDER IN PERMITTING INTERBASIN TRANSFER. Adopt a resolution directing the State Engineer to consider the following during the permitting process for interbasin or intercounty transfer projects that result in the exportation of a significant portion of the groundwater resources: (1) a comprehensive baseline inventory of historical and current water uses and related environmental factors; (2) an in-place, continuing monitoring system to ascertain impacts; (3) incorporation of the baseline inventory and monitoring into the project, along the hydrogeology studies; (4) incremental development of the project. (Dean Baker for Snake Valley Citizens Alliance, Las Vegas, May 2006).
>
> COMMENTS: The State Engineer believes this recommendation is unnecessary because he already has the statutory authority to perform these functions and can take these into account when reviewing interbasin transfer applications.
>
> The State Engineer is not sure what a resolution hopes to accomplish, but this resolution is similar to legislation proposed last session that called for the adjudication of water rights in a basin before the allowance of an interbasin transfer. A comprehensive baseline inventory of historical and current water uses is the work that is performed in an adjudication. Requiring a comprehensive baseline inventory (an adjudication) and related environmental factors would have an enormous economic impact on Nevada in that it would essentially halt development all over the state in areas such as Reno, Sparks, Churchill County, Las Vegas and Mesquite, which are all

> looking outside the basins in which they are physically located for water to support their communities and would essentially stop all interbasin transfers for many years.
>
> To complete a comprehensive baseline inventory of historical and current water uses and related environmental factors would first mean funding and finding dozens and dozens of qualified employees that would require significant training, would require millions of dollars on an annual basis for their salaries and equipment and would require support staff for data entry, and would require years of fieldwork. The State Engineer is already requiring monitoring plans for interbasin transfers of water and is not clear what the recommendation means by implementation testing.

It is clear that State Engineer Taylor never addressed "incremental development." His comments do not establish any prior practice of the State Engineer as to conditional approvals (which is impossible in any event under NRS 533.030(1)). In *Robert E. v. Justice Court of Reno Township, County of Washoe*, 99 Nev. 443, 665 P.2d 957 (1983), this Court refused to accept similar comments to a legislative committee as amounting to a persuasive "legislative history," explaining:

> The legislative history with which respondent buttresses its argument consists of several statements made by Mr. Carmen, the Director of Clark County Juvenile Court Services, during Assembly and Senate Judiciary Committee hearings on A.B. 476.... Mr. Carmen testified that 'once a juvenile had been certified up as an adult, they [sic] would remain certified for all subsequent actions unless a showing of exceptional circumstances was made.' Although respondent claims that this legislative history is 'entitled to substantial weight and deference' by this court, the authorities state that 'testimony before a committee is of little value in ascertaining legislative intent, at least where the committee fails to prepare and

> distribute a report incorporating the substance of the testimony.' *Seward Marine Services, Inc. v. Anderson*, 643 P.2d 493, 497 n. 8 (Alaska 1982). *Accord Thompson v. IDS Life Insurance Co.*, 549 P.2d 510 (Or.1976); 2A *Sands, Sutherland on Statutory Construction* § 48.10 (3d ed. 1974). In the present case, the respondent has made no showing that Mr. Carmen's testimony was endorsed or relied on by the committees. Although Mr. Carmen's study of A.B. 476 was attached to the Assembly Judiciary Committee's minutes as an exhibit, ***it would be extremely speculative to impute Mr. Carmen's beliefs and opinions to the legislature as a whole.*** Thus, we are left with "reason and public policy" to aid in interpreting NRS 62.080. [Emphasis added.]

Even had Mr. Taylor addressed staged approval of applications, which he did not, SNWA offers nothing to show that Mr. Taylor's comments were ever considered by any legislator. State Engineer Taylor's written comments on "work session documents" delivered to unidentified members of a committee are not evidence of the Legislature's confirmation of a prior practice of the State Engineer in conditionally approving water applications.

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

SNWA also 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 the Nevada State Engineer had inherent authority under

Nevada law to conditionally approve SNWA's Applications.[13] Not only does *Alpine Land* actually concede 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 it 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 approval 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 decisions by panels of the federal appeal 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*

[13] SNWA also miscites *Alpine Land* as appearing at 119 F.Supp. The correct citation is 919 F.Supp 1470.

Winston Products Co. v. DeBoer, 122 Nev. 517, 134 P.3d 726 (2006). *Alpine Land* is not good support for SNWA's position.

F. NO PURPORTED PAST PRACTICE OF THE STATE ENGINEER ESTABLISHES AN INHERENT AUTHORITY TO APPROVE APPLICATIONS CONTRARY TO NRS 533'S SPECIFIC REQUIREMENTS

SNWA argues various Permits and Rulings issued before enactment of NRS 533.3705 in 2007 prove the State Engineer's inherent authority to grant staged approvals of water applications regardless of the lack of any statutory authority. *See* SNWA Answer, pp. 24-27, Appendix and Pamphlet. However, not only does the State Engineer have no common law or general authority beyond what is authorized by the Legislature, but not a single one of SNWAs cited Permits and Rulings appears to have been challenged in any of the Nevada's courts and many were issued without protest. Also, the State Engineer's own records show many of the permits cited in SNWA's and the State Engineer's Answers to have been abandoned, withdrawn, cancelled or abrogated. SNWA's chart of "Staged Development Permits" and discussion of other permits at pp. 25-26 of its Answer should have shown the following additional information evidenced by documents located on the State Engineer's website. *See* collected information on permits, CPB App. Vol. IV, pp. 713-792:

Permit	Protest	Result	Ruling Conditions
35040-35043	Protest found	Cancelled	
41674-41679	No protest found	Withdrawn	
45548	Protest overruled	Permit	
47043	Protest overruled	Withdrawn	#2850, requires semi-annual pumpage reports to State Engineer
47252	No protest found	Withdrawn	
47127-47132	No protest found	Abrogated	#2989, requires well logs to be submitted to State Engineer
49943-49946	Protest found	Abrogated	#3467, requires implementation of monitoring program, written status report, and implementation of injection program and timetable, reserving authority to regulate consumption in State Engineer
51841, 51843-48	No protest found	Expired	
51842	No protest found	Withdrawn	
50701, et al	No protest found	Abrogated	
47615, et al	Protest found	Abrogated	#3573, requires monitoring plan to be submitted to the State Engineer within 90 days of ruling.
43669	No protest found	Abrogated	
46029, et al	No protest found	Permit	#3724, requires all wells to be constructed so as to draw only from Horse Springs Formation
54866	No protest found	Abrogated	
57327	No protest found	Abrogated	
55450, 58269	No protest found	Permit	#4243, requires applicant to submit a comprehensive monitoring plan to State Engineer and Protestants, with Protestants allowed to comment and Plan to be approved by State Engineer; required annual reports to State Engineer.
43401	No protest found	Permit	

In addition, SNWA's reliance on Ruling #5726, issued in 2007, but before passage of NRS 533.3705, as amounting to a "notable" example of the State Engineer's pre-2007 use of staged development also fails. 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 addressed the applicability of staged approval to SNWA's 1989 Applications. SNWA Answer, p. 3.

Unlike the various small non-interbasin-transfer permits now identified by SNWA and conceded as representing awards "for no more than 1,000 acre feet," SWNA's GWP permit is 61 times larger, with an indefinite project lifespan, with construction costs of $15+ billion and represents unprecedented interbasin transfers which SNWA's own experts have confirmed pose the potential of disaster. *See, e.g.*, SNWA Answer, p. 26 ("While each permit was for no more than 1,000 acre feet..."). 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 SNWA 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 §IV of its Answer, SNWA argues that Ruling #6164 does not allow its 1989 Applications to remain unresolved for decades, but merely set an "***upper limit***" of what water may be taken by SNWA. Answer, p. 28. 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. *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, 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***."[14]

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

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[14] 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").

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.'***
>
> ***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. SNWA's protests to the contrary are simply are unavailing.

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

SNWA 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. SNWA 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

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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 8,811 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 SOUTHERN NEVADA WATER AUTHORITY'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
Dana Walsh
Bryan Stockton
Cassandra Joseph
Gregory Walch
Paul Taggart
Severin Carlson
Joel Henriod
Daniel Polsenberg

/s/ Lynda S. Mabry