

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

SIERRA PACIFIC INDUSTRIES,
Appellant,
vs.
JASON KING, P.E., IN HIS CAPACITY AS
NEVADA STATE ENGINEER; DIVISION OF
WATER RESOURCES, DEPARTMENT OF
CONSERVATION, AN AGENCY OF THE
STATE OF NEVADA; AND INTERMOUNTAIN
WATER SUPPLY, LTD., A NEVADA LIMITED
LIABILITY COMPANY,
Respondents.

No. 73933

Electronically Filed
Sep 26 2017 01:52 p.m.

DOCKETING Elizabeth N. Brown
CIVIL APPEALS Clerk of Supreme Court

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Second Department 1
County Washoe Judge William A. Maddox, by designation
District Ct. Case No. CV16-01378

2. Attorney filing this docketing statement:

Attorney Debbie Leonard Telephone (775) 788-2000
Firm McDonald Carano LLP
Address 100 W. Liberty Street, Tenth Floor
Reno, NV 89501

Client(s) Sierra Pacific Industries

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Richard L. Elmore Telephone (775) 357-8170
Firm Richard L. Elmore, Chtd.
Address 3301 S. Virginia Street, Suite 125
Reno, NV 89502

Client(s) Intermountain Water Supply, Ltd.

Attorney Micheline N. Fairbank Telephone (775) 684-1225
Firm Office of the Nevada Attorney General
Address 100 North Carson Street
Carson City, NV 89701

Client(s) Jason King, P.E.; Division of Water Resources, Department of Conservation

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

Case No. CV15-01257, which was Sierra Pacific Industries' petition for judicial review from the State Engineer's June 4, 2015 decision to grant Intermountain its eleventh one-year extension of time to perfect the water appropriated under Intermountain's permits. The district court denied that petition on January 12, 2016 and no party appealed.

8. Nature of the action. Briefly describe the nature of the action and the result below:

This is an appeal of a district court order denying Sierra Pacific Industries' Petition for Judicial Review of the State Engineer's June 1, 2016, decision, which granted Intermountain Water Supply, Ltd. its twelfth one-year extension of time to complete the diversion works and place to beneficial use the water appropriated under specific permits.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

See attached addendum.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

N/A

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

As a petition for judicial review of a decision by the State Engineer, this is an administrative agency case involving water that is within the categories of cases the Supreme Court "shall hear and decide." NRAP 17(a)(8).

14. Trial. If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? N/A

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from August 21, 2017

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served August 22, 2017

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing N/A

☐ NRCP 52(b) Date of filing N/A

☐ NRCP 59 Date of filing N/A

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed September 6, 2017

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The district court's order denying Sierra Pacific Industries' petition for judicial review was a final appealable judgment.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Sierra Pacific Industries

Jason King, P.E.

Division of Water Resources, Department of Conservation

Intermountain Water Supply, Ltd

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

N/A

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Sierra Pacific Industries brought a petition for judicial review of the State Engineer's June 1, 2016 decision, which was disposed of on August 21, 2017.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Sierra Pacific Industries
Name of appellant

Debbie Leonard
Name of counsel of record

September 26, 2017
Date

/s/ Debbie Leonard
Signature of counsel of record

Nevada, Washoe County
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 26th day of September, 2017, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Richard L. Elmore
3301 S. Virginia Street, Suite 125
Reno, Nevada 89502

Micheline N. Fairbank
Office of the Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

Dated this 26th day of September, 2017

/s/ Pamela Miller
Signature

Addendum to Docketing Statement
Sierra Pacific Industries v. Jason King, et al.
Case No. 73933

9. Issues on appeal.

1. The “evidence” on which the State Engineer relied constituted unreliable hearsay statements regarding certain alleged documents that were not in the record. Should the State Engineer have denied Intermountain’s extension requests and canceled the permits because Intermountain failed to submit substantial and competent evidence to meet the statutory requirements for an extension?
2. The anti-speculation doctrine requires that a water appropriator intend to put the appropriated water to beneficial use in the location authorized by the permits or have a contractual or agency relationship with one who does. Did the State Engineer violate the anti-speculation doctrine and err as a matter of law where:
 - a. Intermountain admits – and the State Engineer acknowledged – that Intermountain does not plan to put the permitted water to beneficial use in the place of use authorized by the permits, or have the financial means to do so, but rather is marketing the water for sale; and
 - b. Intermountain has no contract or agency relationship with a municipal water purveyor whose service territory includes the authorized place of use of the water?
3. In 2015, the State Engineer informed Intermountain that “the inability to secure a buyer in future requests for extensions of time will not be considered good cause for extensions of time.” Did the State Engineer act arbitrarily and capriciously when, in 2016, he again granted extensions notwithstanding that Intermountain still had no buyer for the project?

1 Code: \$3550
2 Debbie Leonard (Nevada Bar No. 8260)
3 McDONALD CARANO WILSON LLP
4 100 West Liberty Street, 10th Floor
5 Reno, Nevada 89501
6 Telephone: (775) 788-2000
7 Facsimile: (775) 788-2020
8 dleonard@mcdonalddcarano.com

9 Attorney for Petitioner
10 *Sierra Pacific Industries.*

11 **SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

12 **IN AND FOR WASHOE COUNTY**

13 * * * * *

14 SIERRA PACIFIC INDUSTRIES, a CASE NO.:
15 California corporation,

16 Petitioner, DEPT. NO.:

17 v.

18 JASON KING, P.E., in his capacity as
19 Nevada State Engineer, and the DIVISION
20 OF WATER RESOURCES, DEPARTMENT
21 OF CONSERVATION, an agency of the State
22 of Nevada,

23 Respondents.
24 _____/

25 **PETITION FOR JUDICIAL REVIEW**
26 **(NRS 533.450)**

27 Petitioner Sierra Pacific Industries, a California corporation ("SPI"), by and through its
28 attorney Debbie Leonard of the law firm McDonald Carano Wilson LLP, petitions the Court for
judicial review of a decision of Jason King, P.E., Nevada State Engineer, which granted an
extension of time to prove completion of the diversion works and prove beneficial use of water
under the following permit numbers: 72700, 64977, 64978, 66400, 73428, 73429, 73430 and
74327. The holder of those permits is Intermountain Water Supply ("IWS"), and the proposed
purpose of those appropriations is to construct and operate an interbasin pipeline to bring
municipal water to the North Valleys of the Reno/Sparks area. IWS has no contractual or agency

1 relationship with a municipal water purveyor for the North Valleys and therefore failed to satisfy
2 the requirements of the Anti-Speculation Doctrine, which the State Engineer expressly adopted in
3 the context of a request for extension of time. The State Engineer's decision, therefore, is not
4 supported by substantial evidence, is marked by clear error of law and is arbitrary and capricious.
5 The State Engineer's decision was issued on June 1, 2016 and is attached hereto as Ex. 1 ("the
6 June 1, 2016 Decision").

7 This Petition for Judicial Review is filed pursuant to NRS 533.450. The State Engineer's
8 June 1, 2016 Decision to issue extensions of time to complete the diversion works and prove
9 beneficial use of Permits 72700, 64977, 64978, 66400, 73428, 73429, 73430 and 7432 injuriously
10 affects Petitioner because it allows IWS to speculate in water and thereby prevent others from
11 putting unused water in Dry Valley Hydrographic Basin (095) to beneficial use.

12 **I. JURISDICTIONAL STATEMENT**

13 This Petition for Judicial Review is timely filed pursuant to NRS 533.450(1). Under NRS
14 533.450(1), decisions of the State Engineer are subject to judicial review "in the proper court of
15 the county in which the matters affected or a portion thereof are situated." The real property to
16 which the water at issue in this appeal is appurtenant, and for which Petitioner seeks a new
17 appropriation, lies within Washoe County. Therefore, the Second Judicial District Court of the
18 State of Nevada in and for Washoe County is the proper venue for judicial review of the State
19 Engineer's June 1, 2016 Decision.

20 **II. FACTUAL BACKGROUND**

21 **A. Dry Valley Hydrographic Basin**

22 Dry Valley Hydrographic Basin is located in western Washoe County along the border
23 with Lassen County, California. The Nevada State Engineer has estimated the perennial yield
24 from Dry Valley to be 3,000 afa (Ruling 5568), which is the amount of groundwater that the State
25 Engineer has determined may be withdrawn from the Dry Valley Hydrographic Basin without
26 causing overdraft. Although the State Engineer has already granted 3,021.60 afa of water rights
27 permits in Dry Valley basin, up to 2,996 afa of those permits issued are currently not being used
28 and have no means of being used.

1 **B. Permits 72700, 64977, 64978, 66400, 73428, 73429, 73430 and 74327**

2 Intermountain Water Supply (“IWS”) holds 2,996 afa of underground water rights under
3 Permits 72700, 64977, 64978, 66400, 73428, 73429, 73430 and 74327 in Dry Valley Basin. IWS
4 proposes to export the water under its permits from Dry Valley into Lemmon Valley to supply
5 what IWS has claimed to be anticipated municipal water demands. IWS also has water rights
6 applications pending for the same use. In order to put its permitted water and the water for which
7 is has applied to beneficial use, IWS proposes to construct a new pipeline across private, county,
8 state and federal land. IWS cannot exercise its permitted rights without construction of this
9 pipeline.

10 IWS first filed water rights applications for its pipeline in 1999. In the 17 intervening
11 years, IWS has yet to complete construction of the necessary infrastructure required to place to
12 beneficial use the quantity of water applied and permitted. Rather than itself develop the water
13 under its applications and permits, IWS is actively seeking to market its “water project.”

14 The State Engineer has granted multiple extensions of time to IWS to file proofs of
15 completion and proofs of beneficial use of the water appropriated under Permits 72700, 64977,
16 64978, 66400, 73428, 73429, 73430 and 74327. On June 1, 2016, the State Engineer granted yet
17 another extension of time such that IWS now has until February 7, 2017 to file proofs for Permits
18 64977, 64978, 66400, 73428, 73429, 73430 and 74327 and December 18, 2016 to file proofs for
19 Permit 72700 (“the June 1, 2016 Decision”). In the June 1, 2016 Decision, the State Engineer
20 expressly noted that the anti-speculation doctrine applies to extension requests, yet then granted
21 the extensions to IWS without IWS providing any evidence that it has a contractual relationship
22 with the end user of water, as required by *Bacher v. State Engineer*, 122 Nev. 1110, 1119, 146
23 P.3d 793, 799 (2006).

24 **C. Background on Petitioner Sierra Pacific Industries**

25 SPI is a third-generation family-owned forest products company based in Anderson,
26 California. SPI has significant ranching and farming operations, running upwards of 2,000 head
27 of cattle across hundreds of parcels and leasing grazing rights for over 5,000 head of cattle on
28 tens of thousands of acres.

1 **D. Wilburn Ranch**

2 SPI's landholdings include lands located in Dry Valley and Long Valley in Lassen
3 County, California and Washoe County, Nevada, collectively referred to as the Wilburn Ranch.
4 SPI acquired the Wilburn Ranch in 2014 for agricultural production. Currently, 100 to 150 head
5 of cattle graze on the Nevada parcels and 50 to 100 head of cattle graze on the California parcels
6 of Wilburn Ranch.

7 SPI has appropriated water in both Nevada and California for its Wilburn Ranch
8 operations. Approximately 180 acres in Nevada have been converted from sagebrush flats to
9 meadow grass grazing areas. On the California parcels, approximately 800 acres have been
10 converted from sagebrush flats to meadow grass grazing areas and irrigated crop production.

11 In Nevada, water for livestock and some meadow irrigation is supplied by natural springs,
12 which SPI has the right to appropriate under Permits 70423 and 70424. So far, no subsurface
13 groundwater has been pumped in Nevada other than well testing, and no water has been
14 transferred across the California/Nevada boundary. In California, the water is pumped from four
15 different artesian springs and three different wells. Sprinklers and flood irrigation are used for the
16 crops. The crops planted have included potatoes, corn, wheat, oats, wheatgrass, rye grass, alfalfa,
17 and most recently, triticale.

18 In 1977, the Nevada State Engineer permitted 4,460 acre-feet of water rights for use on
19 Wilburn Ranch. These water rights were cancelled in 1983, however, when SPI's predecessor did
20 not comply with the provisions of the permits. SPI desires to bring the Nevada side of the
21 Wilburn Ranch back into agricultural production and to expand currently irrigated acreage on the
22 California side of Wilburn Ranch. Therefore, SPI submitted Applications 84688 and 84689 to
23 facilitate the proposed expansion of the irrigated lands at Wilburn Ranch.

24 **E. Applications 84688 and 84689**

25 In Applications 84688 and 84689, SPI seeks sufficient water to bring the Wilburn Ranch
26 back into agricultural production. To put the water sought in Applications 84688 and 84689 to
27 beneficial use, SPI anticipates it will use drilled and cased irrigation wells that are equipped with
28 power, a pump, motor, discharge piping and flow meter. SPI's water transmission system is

1 anticipated to include a ditch and pipe network that facilitates flood irrigation and sprinkler
2 irrigation from wheel lines and hand lines. With approval of Applications 84688 and 84689, SPI
3 plans to utilize existing wells in Nevada and California to expand existing irrigation capabilities
4 to facilitate increased crop production. SPI has an immediate need for the water it seeks and can
5 immediately put the water to beneficial use in its existing and proposed expanded agricultural
6 operations. Applications 84688 and 84689 are currently pending with the State Engineer.

7 Two protests to Applications 84688 and 84689 were filed: one by Buckhorn Land and
8 Livestock, LLC (Ex. 2 hereto) and one by Washoe County (Ex. 3 hereto), as a holder of water
9 rights in Dry Valley. Both protestants argued that SPI's Applications should be denied because
10 IWS's Permits encompass the entire perennial yield (as determined by the State Engineer) of the
11 Dry Valley Basin, and no water remains available to appropriate.

12 **III. GROUNDS FOR PETITION**

13 In granting extensions to IWS, the State Engineer arbitrarily and capriciously failed to
14 correctly apply the Anti-Speculation Doctrine. Speculation is the act of acquiring a resource for
15 the purpose of subsequent use or resale, in hopes of profiting from future price fluctuations. The
16 act of speculation allows an individual or entity to lock up scarce and essential water resources
17 from use by individuals and communities who have an immediate need to provide water for crops
18 or other uses (Ruling 6063). Nevada has adopted the Anti-Speculation Doctrine, which
19 "addresses the situation in which the purported appropriator does not intend to put water to use
20 for its own benefit and has no contractual or agency relationship with one who does." *Bacher*,
21 122 Nev. at 1119, 146 P.3d at 799 (quoting *Three Bells Ranch v. Cache La Poudre*, 758 P.2d 164,
22 173 n. 11 (Colo. 1988)). The State Engineer has applied the Anti-Speculation Doctrine to
23 extensions.

24 The State Engineer's June 1, 2016 Decision recognizes that IWS's proposed project to
25 export water from Dry Valley Hydrographic Basin into the North Valleys is subject to the Anti-
26 Speculation Doctrine. IWS failed to provide any evidence that it has a contract with any
27 municipal water supplier for the proposed place of use. For this and other reasons, the June 1,
28 2016 Decision is not supported by substantial evidence, is affected by errors of law, is clearly

1 erroneous and is arbitrary and capricious. SPI reserves the right to present all grounds for this
2 Petition in the briefs and argument in this matter.

3 **IV. CONCLUSION**

4 For the reasons explained above, and others that may be presented in briefing and
5 argument, Petitioner respectfully requests that this Court to grant this Petition for Judicial Review
6 and reverse the issuance of the extensions granted to IWS for Permits 72700, 64977, 64978,
7 66400, 73428, 73429, 73430 and 74327 or to remand the matter to the State Engineer with
8 instructions to deny the extensions and cancel the permits.

9 Petitioner further requests that the Court set a schedule for submission of the record and
10 briefing in this matter.

11 **AFFIRMATION**

12 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding
13 document does not contain the social security number of any persons.

14 Dated: June 29, 2016.

15 **McDONALD CARANO WILSON LLP**

16
17 By: /s/ Debbie Leonard
18 Debbie Leonard
19 100 West Liberty Street, 10th Floor
20 Reno, Nevada 89501
21 (775) 788-2000

22 *Attorney for Petitioner*
23 *Sierra Pacific Industries*
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD
3 CARANO WILSON LLP and that on June 29, 2016, I served SIERRA PACIFIC
4 INDUSTRIES's Petition for Judicial Review by hand delivery to the following:

5 **Jason King, P.E.**
6 **Nevada State Engineer**
7 **Division of Water Resources**
8 **901 South Stewart Street, Suite 2002**
9 **Carson City, NV 89701-5250**

10 and by placing a true copy thereof enclosed in sealed envelopes with postage prepaid, certified,
11 return receipt requested, in the United States Post Office mail at 100 West Liberty Street, 10th
12 Floor, Reno, Nevada 89501 addressed as follows:

13 **Robert W. Marshall**
14 **Intermountain Water Supply, Ltd.**
15 **625 Onyo Way**
16 **Sparks, NV 89441**

17 **Washoe County, Nevada**
18 **Attn: Vahid Behmaram**
19 **P.O. Box 11130**
20 **Reno, NV 89520-0027**

21 **Buckhorn Land and Livestock, LLC**
22 **500 Damonte Ranch Parkway, Suite 980**
23 **Reno, NV 89521**

24 I am familiar with the firm's practice for collection and processing of correspondence for
25 mailing with the United States Postal Service.

26 The envelopes addressed to the above parties were sealed and placed for collection by the
27 firm's messengers and will be deposited today with the United States Postal Service in the
28 ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 29, 2016, at Reno, Nevada.

/s/ Pamela Miller
An employee of McDonald Carano Wilson LLP

LIST OF EXHIBITS

EXHIBIT	DESCRIPTION	PAGES
1.	State Engineer's June 1, 2016 decision	7
2.	Buckhorn Land and Livestock, LLC protest	3
3.	Washoe County protest	2

FILED
Electronically
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2016-06-29 10:39:50 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 5585466 : rk Watkins

EXHIBIT 1

EXHIBIT 1

STATE OF NEVADA

BRIAN SANDOVAL
Governor



LEO DROZDOFF
Director

JASON KING, P.E.
State Engineer

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES

901 South Stewart Street, Suite 2002
Carson City, Nevada 89701-5250
(775) 684-2800 • Fax (775) 684-2811
<http://water.nv.gov>

June 1, 2016

Robert W. Marshall
Intermountain Water Supply, Ltd.
625 Onyo Way
Sparks, Nevada 89441

Re: Applications for Extension of Time concerning Permits 64977, 64978, 66400,
72700, 73428, 73429, 73430 and 74327

Dear Mr. Marshall:

Please allow this correspondence to inform you as to the decisions to grant the extensions of time concerning the above-referenced permits.

Background

In or around 2014, Intermountain Water Supply (Intermountain) filed extensions of time for the proof of completion of work and/or proof of beneficial use concerning Project Permits¹ pursuant to Nevada Revised Statute (NRS) § 533.380. Shortly after the filing of the extension requests, an objection was filed by Sierra Pacific Industries (SPI).² The State Engineer requested Intermountain respond to the objection and provide evidence supporting its request for extensions of time. After considering that evidence, and the objection of SPI, the State Engineer granted Intermountain's extensions of time. SPI appealed that decision, and the decision of the State Engineer was subsequently affirmed in *Sierra Pacific Industries v. Jason King, P.E.*, Second Judicial District Court Case No. CV15-1257 (January 12, 2016).³

¹ The "Project Permits" include those that are the subject of the Objection, including 64977, 64978, 66400, 72700, 73428, 73429, 73430 and 74327, and Permits that not included in the Objection, but which are identified in the Affidavit of Robert Marshall at ¶ 2.

² Intermountain had been granted extensions of time in years prior to the 2015 extensions, but the 2015 extensions were the first year that SPI filed an objection.

³ See *Order Denying Petition for Judicial Review* attached to Affidavit of Robert Marshall in support of the extensions of time.

**Sierra Pacific Industries' Pre-Filed Objection to
Intermountain's 2016 Extensions of Time**

Shortly before the December 14, 2015, court hearing on the *Petition for Judicial Review*, *supra*, SPI pre-filed an objection on December 2, 2015, to the granting of any further extensions of time to Intermountain Water Supply (Objection). The Objection was supplemented on January 6, 2016. Intermountain's extensions of time were timely filed after the pre-filed Objection.^{4,5} SPI argues in its Objection that Intermountain is engaging in water speculation and that it cannot satisfy the statutory requirements of NRS § 533.380, and requests the extensions be denied. SPI's Objection and Intermountain's extension requests are addressed below.

A. Extensions of time pursuant to NRS 533.380(3)

Upon the issuance of a permit, extensions of time to complete the works of diversion or to place water to beneficial use may be requested pursuant to NRS § 533.380(3).⁶ The State Engineer may grant any number of extensions, but an application for extension must in all cases be accompanied by proof and evidence of the reasonable diligence with which the applicant is pursuing completion of work or placing water to beneficial use. The measure of reasonable diligence is the steady application of effort to perfect the application in a reasonably expedient and efficient manner under all the facts and circumstances. NRS § 533.380(6). When a project or integrated system is composed of several features, work on one feature of the project or system may be considered in finding that reasonable diligence has been shown in the development of water rights for all features of the entire project or system. *Id.*

1. Whether Intermountain has shown good faith and reasonable diligence

The concept of diligence in the application of water to beneficial use has its origins in the

⁴ All extensions of time were filed by Intermountain on March 8, 2016, except for Permit 72700, which was filed on February 9, 2016.

⁵ Intermountain argues the State Engineer should refuse to consider the Objection as a fugitive document where no extensions were pending at the time the Objection was filed. I decline to refuse to consider the Objection out-of-hand; however, I find the Objection generally re-raises the same legal arguments and cites the same evidence asserted against Intermountain's 2015 extensions of time, with the exception of the planning documents.

⁶ NRS § 533.380(3) states: Except as otherwise provided in subsection 4 and NRS 533.395 and 533.4377, the State Engineer may, for good cause shown, grant any number of extensions of time within which construction work must be completed, or water must be applied to a beneficial use under any permit therefor issued by the State Engineer, but a single extension of time for a municipal or quasi-municipal use for a public water system, as defined in NRS 445A.235, must not exceed 5 years, and any other single extension of time must not exceed 1 year. An application for the extension must in all cases be:

- (a) Made within 30 days following notice by registered or certified mail that proof of the work is due as provided for in NRS 533.390 and 533.410; and
- (b) Accompanied by proof and evidence of the reasonable diligence with which the applicant is pursuing the perfection of the application.

→The State Engineer shall not grant an extension of time unless the State Engineer determines from the proof and evidence so submitted that the applicant is proceeding in good faith and with reasonable diligence to perfect the application. The failure to provide the proof and evidence required pursuant to this subsection is *prima facie* evidence that the holder is not proceeding in good faith and with reasonable diligence to perfect the application.

Re: Applications for Extension of Time concerning Permits 64977, 64978, 66400, 72700, 73428, 73429, 73430 and 74327

June 1, 2016

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early development of the principles of prior appropriation in the water law of the Western states. *Bailey v. State*, 95 Nev. 378, 594 P.2d 734 (1979) (citing 1 S. Wiel, *Water Rights in the Western States*, s 382 (3d ed. 1911)). Whether an appropriator has used due diligence to utilize water for beneficial use must be determined upon the facts of each particular case. *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 F. 9 (9th Cir. 1917).

SPI argues that Intermountain cannot demonstrate that it is proceeding in good faith and with reasonable diligence where Intermountain points to sums expended over the last 16 years of the project. SPI argues that the amount of money spent does not alter the fact that Intermountain has no plans to put the water to beneficial use.

Intermountain submitted evidence of expenses incurred during the last extension period for permit expenses, well monitoring, BLM fees, legal work related to litigation and an archeological contract, and expenses related to document production for construction firms, all totaling \$23,300.39. As well, Intermountain asserts that during the last year it negotiated and secured agreements with engineering and construction firms experienced in water systems development, Utilities, Inc., and with developers.

The Subdistrict v. Chevron Shale Oil Co., 986 P.2d 918 (Colo. 1999) discusses types of activities which may support a finding of reasonable diligence. The definition of "reasonable diligence" in NRS § 533.080(6) was based upon the Colorado definition of "reasonable diligence;"⁷ therefore, I find *Chevron* instructive as to considerations of reasonable diligence. In *Chevron*, the Colorado Supreme Court reaffirmed that a fact-finder may consider numerous factors⁸ on a case-by-case basis in a reasonable diligence analysis. *Id.* at 921. There, the opponent challenged Chevron's applications for a finding of reasonable diligence, arguing that Chevron had failed to construct any facilities even though the water rights were appropriated nearly forty-five years earlier; that it spent relatively little (\$1.5M) on perfecting the rights during the prior extension period compared to the capital expenditure of its parent company (\$3B), and that of the money spent during that period, nearly one-third (\$500K) was spent on litigation unrelated to perfecting the water rights; and, that Chevron's participation with other companies on a joint venture slowed Chevron's progress in perfecting its own rights. The water court found in favor of Chevron, and on appeal, the Colorado Supreme Court upheld the water court's finding that "Chevron's efforts, although minimal [in the face of downturn in the shale oil industry], were sufficient to demonstrate a steady application of effort to complete its appropriation in a reasonably expedient and efficient manner. Chevron had planned for a diversion facility, planned a dam on Roan Creek, planned for pipeline facilities, prepared environmental baseline studies, prepared a detailed master planning document for Chevron's

⁷ See SPI App 401.

⁸ The non-exhaustive list includes (1) economic feasibility; (2) the status of requisite permit applications and other required governmental approvals; (3) expenditures made to develop the appropriation; (4) the ongoing conduct of engineering and environmental studies; (5) the design and construction of facilities; and (6) the nature and extent of land holdings and contracts demonstrating the water demand and beneficial uses which the conditional right is to serve when perfected. *Id.* at 921 (citing *Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 36 (Colo. 1997)).

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Parachute Creek Unit, and had participated in miscellaneous activities related to the conditional water rights such as litigation, research projects, and studies.” *Id.* at. 922.

In *Desert Irr., Ltd., v. State*, 113 Nev. 1049, 944 P.2d 835 (1997) (citing *People v. City of Thornton*, 775 P.2d 11, 18-19 (Colo.1989)), the Nevada Supreme Court has stated that mere statements of intent to put water to beneficial use, uncorroborated with any actual evidence, after nearly twenty years of nonuse was insufficient to justify a sixteenth PBU extension. Here, I find that Intermountain’s extensions go beyond mere statements of intent and demonstrate a steady application of effort toward the project during the last extension period. The evidence submitted by Intermountain closely parallels the type of evidence relied upon in *Chevron* where the court made a finding of reasonable diligence.⁹ To that end, I agree with SPI’s statement that there must be a “good cause” finding anew with each extension requested; however, I disagree with SPI that any evaluation is limited to *only* the prior year’s extension period. The language of NRS § 533.380(6) allowing a consideration of “all the facts and circumstances” and that work on one feature of the project may be considered in the development of water rights for the entire project, is broad enough to allow the State Engineer to look back into historical expenditures and/or progress on the project, in addition to reviewing the progress made during the last extension period.

2. Whether Intermountain is speculating in water

SPI makes numerous arguments that Intermountain’s extension requests violate the anti-speculation doctrine.

First, SPI cites several past State Engineer rulings to argue that the anti-speculation doctrine applies to new applications and to permits. Intermountain argues that the cited rulings are inapplicable because the rulings pertain to decisions on initial applications pursuant to NRS § 533.370, rather than extensions of time pursuant to NRS § 533.380, and are therefore not controlling.¹⁰ I agree that the rulings cited by SPI concern new appropriations examined pursuant to NRS § 533.370, requiring different considerations than for extensions of time pursuant to NRS § 533.380. SPI points to the legislative history of NRS § 533.380 as supporting its argument that anti-speculation applies to applications for extensions of time.¹¹ I find that the legislative history of A.B. 624 (1993) is not entirely clear on this point. While the committee minutes do mention speculation, A.B. 624 also enacted the provision now codified as NRS § 533.370(1)(c) – the provision traditionally viewed as limiting speculative appropriations. Therefore, it is unclear whether the references in the legislative history refer to that provision, or

⁹ *Chevron* is likewise instructive in the respect of economic considerations. *Chevron*’s diligence was examined within the scope of the oil shale industry (specifically its continuous efforts to develop the water rights despite the decline in oil prices), suggesting it is appropriate to consider economic conditions of the industry for which the permits were granted. Economic conditions affecting the ability of the holder to make a complete application of the water to a beneficial use is a factor found under NRS § 533.380(4). Intermountain cites TMWA’s Plan and Draft Plan which recognize the severe economic downturn from 2007-2013, and the effect on the housing demand. See *Extensions of Time* at p. 5. I find that Intermountain’s efforts were reasonable in consideration of the economic downturn, as affecting demand for municipal water.

¹⁰ In any event, even if applicable, state agencies are not bound by *stare decisis*. *Motor Cargo v. Pub. Serv. Comm’n*, 108 Nev. 335, 337, 830 P.2d 1328, 1330 (1992).

¹¹ See *Objection* at pp. 2-3 (citing legislative history).

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to the provisions adopted concerning extensions of time. Nevertheless, in Ruling No. 6343, recently issued, the anti-speculation doctrine was interpreted as applying to extensions of time to prevent a forfeiture; therefore, I find that it would be inconsistent to apply the doctrine, in appropriate cases, to forfeiture, but not to extensions concerning cancellation.¹² Accordingly, as discussed below, the doctrine may be a consideration in extensions of time to prevent cancellation in appropriate cases.¹³

SPI next cites *Bacher v. State Engineer*, 122 Nev. 1110, 146 P.3d 790 (2006) which formally adopted the anti-speculation doctrine in Nevada.¹⁴ *Bacher* adopted the requirement that there be a formal contractual or agency relationship where the applicant intends to rely on a third party to demonstrate beneficial use. Notably, *Bacher* was issued after Intermountain's permits were issued;¹⁵ therefore, there was no "formal contract or agency relationship requirement" at the time Intermountain's permits were issued. Consequently, the lack of contractual or agency relationship by Intermountain with third parties at the time the permits were issued (between 1999-2006), was not fatal to the issuance of the permits pursuant to NRS § 533.370. In the extension requests now pending, Intermountain affirms that it has secured agreements with engineering and construction firms, Utilities, Inc., and developers;¹⁶ therefore, I am unpersuaded by SPI's argument that the extension requests are speculative on the basis that Intermountain lacks any contractual agreements: this requirement was not in place when the permits were granted and the sworn affidavit affirms that contractual agreements have been secured, in any event.

Third, SPI argues that Intermountain is actively seeking to market its water project in violation of Nevada's prohibition on anti-speculation.¹⁷ Recently, the State Engineer examined the relationship between the anti-speculation doctrine and the alienability of water rights concerning extensions of time to prevent a forfeiture. In Ruling No. 6343, the State Engineer recognized that two years after *Bacher*, the Nevada Supreme Court decided *Adaven Mgt., Inc. v. Mtn. Falls Mountain Falls Acquisition Corp.*, 124 Nev. Adv. Op. 67, 191 P.3d 1189 (2008). The *Adaven* court opined that the anti-speculation doctrine does not prevent a property owner from selling to a third party his right to draw water, but that the doctrine focuses on use of water for which it was granted, not ownership. Accordingly, the Nevada Supreme Court clarified in *Adaven* that it did not adopt the anti-speculation doctrine in *Bacher* to limit the free alienability

¹² The analysis in Ruling No. 6343 relied, in part, on the legislative history of A.B. 624, stating it suggested the doctrine applied to extensions filed to avoid cancellation; however, upon further reading of the legislative history for this response, I find that inclusion of the provision codified as NRS § 533.370(c)(1), makes it less clear which provisions legislators were referring to in the discussion concerning speculation.

¹³ As indicated by *Vineyard Land & Stock*, extensions of time are a fact dependent inquiry; therefore, I find that the State Engineer need not analyze every extension of time under the anti-speculation doctrine, nor make written findings regarding same, but that if circumstances warrant analyzing whether the extension request runs afoul of the doctrine it may be appropriate to engage in such an analysis. Because SPI has raised numerous arguments concerning speculation, the issue will be examined herein.

¹⁴ *Bacher* concerned new applications to appropriate water, and specifically involved an inter-basin transfer of water, and was therefore analyzed under NRS § 533.370, not NRS § 533.380.

¹⁵ See Objection at p. 2 (chart of permit approvals), *cf.* *Bacher* decision issued November 22, 2006.

¹⁶ Extensions of Time, Affidavit of Robert Marshall ¶¶ 5, 6 and 7.

¹⁷ Objection at pp. 3-4.

of water rights. Indeed, relying on Colorado authorities, the court stated that the doctrine by itself does not limit transfers of water rights ownership. In considering these authorities, I find there is no bright-line distinction when a project or transaction may be considered "speculative;" however, taking *Bacher* and *Adaven* together, Intermountain's attempt to sell the project at the same time it has demonstrated measurable progress during the last extension period, does not violate the anti-speculation doctrine.

B. Additional considerations pursuant to NRS § 533.380(4)

In addition to the considerations of NRS § 533.30(3), additional considerations are required for municipal rights pursuant to NRS § 533.380(4). All of Project Permits are permitted for municipal use. SPI argues that (1) there is no development to be served by Intermountain's water; (2) economic conditions do not prevent Intermountain from putting water to beneficial use; and (3) makes arguments concerning speculation (addressed in Section A(2)).

SPI includes the Truckee Meadows Water Authority 2010-2030 Water Resources Plan (TMWA Plan), the Truckee Meadows Water Authority Draft Plan for 2016-2035 (TMWA Draft Plan), and the Western Regional Water Commissioners' 2011-2030 Comprehensive Regional Water Management Plan (Regional Plan). SPI argues that these documents demonstrate there is no municipal demand by TMWA, or in Lemmon Valley.¹⁸

Intermountain argues that the documents make clear that TMWA has not committed itself to pursuing Intermountain's project, but that the risks and pursuit of the project remains with the private developers, *i.e.*, Intermountain. Indeed, Intermountain identifies specifically where in each plan TMWA references Intermountain's project in its Plan and Draft Plan.¹⁹ I agree with Intermountain that the allocation of responsibility in the planning documents to pursue and develop the project does not render the project obsolete. The planning documents demonstrate that although TMWA has not committed itself to pursuing the project, it has not foreclosed using water from the project as may be developed privately by Intermountain.

Additionally, Intermountain notes that the TMWA Plan does not cover areas outside of TMWA's service area, *e.g.*, Cold Springs or Lemmon Valley, which are areas that could be served by the project.²⁰ As well, the 50,000 acre-feet of Truckee River water referenced by SPI does not include the North Valleys, which is the reason the TMWA Plan continues to reference Intermountain and Vidler's water projects in its plans. I find Intermountain's statements to this effect to be accurate; and further, the project at issue is the same project for which the permits were issued. Therefore, this analysis must be mindful of confining the examination to whether Intermountain has employed reasonable diligence in perfecting the permits for the project, and will avoid revisiting the decision to grant the permits, which became final decisions long ago.

¹⁸ Objection at p. 7.

¹⁹ See Extensions of Time at pp. 2-3.

²⁰ Extensions of Time at p. 4.

Re: Applications for Extension of Time concerning Permits 64977, 64978, 66400, 72700, 73428, 73429, 73430 and 74327

June 1, 2016
Page 7

effect to be accurate; and further, the project at issue is the same project for which the permits were issued. Therefore, this analysis must be mindful of confining the examination to whether Intermountain has employed reasonable diligence in perfecting the permits for the project, and will avoid revisiting the decision to grant the permits, which became final decisions long ago.

- C. The State Engineer will limit the review to the extensions of time, and not to other unrelated applications filed to appropriate water

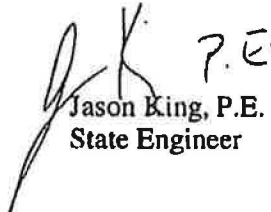
SPI states that Intermountain's permits should be cancelled because SPI has pending applications in the Dry Valley Hydrographic Basin and it stands ready to put the water to beneficial use. I find that an examination of the factors identified in NRS § 533.380, as discussed above, is an appropriate examination of whether the extension requests should be granted. Accordingly, this analysis is confined to the evidence supporting the permits and not whether other applications stand in line to use water, which may be freed up by cancelling Intermountain's permits.²¹

Conclusion

In conclusion, in considering NRS § 533.380(3),(4), I find good cause for granting the extensions of time on the Project Permits, provided however, that future extension requests must be accompanied by copies of the agreements you indicated in Paragraphs 5, 6 and 7 of your Affidavit that Intermountain has reached with engineering and construction firms, Utilities, Inc., and developers.

You will receive confirmation of the extension dates and new proof filing dates under separate cover. If you have any questions regarding the foregoing please do not hesitate to contact me.

Sincerely,


Jason King, P.E.
State Engineer

cc: Debbie Leonard, E-mail
April Holt, E-mail

²¹ See Order Denying Petition for Judicial Review at 7 (affirming that the SPI's need for water in Dry Valley is not relevant to the State Engineer's determination under NRS § 533.380, and the statute does not indicate the State Engineer should consider them as part of Intermountain's extensions of time).

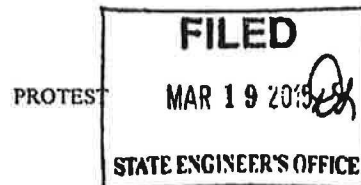
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EXHIBIT 2

EXHIBIT 2

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

IN THE MATTER OF APPLICATION NUMBER 84688
FILED BY Sierra Pacific Industries
ON January 9, 20 15



Comes now Buckhorn Land and Livestock, LLC, a Nevada limited liability company
Printed or typed name of protestant
whose post office address is 500 Damonte Ranch Parkway, Suite, 980, Reno, NV 89521
Street No. or PO Box, City, State and ZIP Code
whose occupation is Ranching and protests the granting
of Application Number 84688, filed on January 9, 20 15
by Sierra Pacific Industries for the
waters of Underground situated in Washoe
an underground source or name of stream, lake, spring or other source
County, State of Nevada, for the following reasons and on the following grounds, to wit:
Please refer to Attachment "A"

THEREFORE the Protester requests that the application be Denied
Denied, issued subject to prior rights, etc., as the case may be
and that an order be entered for such relief as the State Engineer deems just and proper.

Signed

Gregory M. Bilyeu
Agent or protestant

Address

9480 Double Diamond Parkway, Suite 200
Printed or typed name, if agent
Reno, NV 89521
Street No. or PO Box
City, State and ZIP Code

State of Nevada

County of Washoe

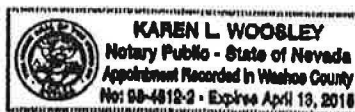
Subscribed and sworn to before me on 3-18-15

(775) 352-7800 x 227
Phone Number

by Gregory M. Bilyeu

gregb@tecreno.com
E-mail

Karen L. Woosley
Signature of Notary Public Required



Notary Stamp or Seal Required

**+ \$30 FILING FEE MUST ACCOMPANY PROTEST. PROTEST MUST BE FILED IN DUPLICATE.
ALL COPIES MUST CONTAIN ORIGINAL SIGNATURE.**

Attachment "A"
Protests to Applications 84688 & 84689

Applications 84668 & 84689 seek to appropriate groundwater from the Dry Valley Hydrographic Basin (Basin 95). Each application is filed for 1,500 acre-feet annually with a total combined duty of 3,000 acre-feet annually.

The Dry Valley Hydrographic Basin is currently fully appropriated by existing underground permits as determined by the Nevada State Engineer in Ruling 5568 issued in 2006 (and reinforced in Rulings 5622 and 5897). Current groundwater appropriations total 3,021.60 acre-feet, of which 2,996 acre-feet are issued for municipal use outside of the basin itself.

NRS 533.370(3) sets forth the criteria for rejection of an application to appropriate water. Said statute reads as follows:

"Except as otherwise provided in subsection 6, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectible interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the requested permit. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication."

Applications 84688 and 84689 seek to appropriate 3,000 additional acre-feet over and above the established perennial yield of Basin 95 and therefore no unappropriated water is available at the source.

Issuance of additional groundwater rights over and above the established perennial yield of Basin 95 would result in water being removed from storage within the basin, which in turn could cause excessive drawdown to the water table, resulting in adverse impacts to streamflow in Dry Valley Creek and to spring discharge within said basin and thus adversely affect and conflict with the Protestant's senior surface water rights from Dry Valley Creek and numerous springs within the basin.

The Protestant has recently granted conservation easements across much of its land to the United State of America. These easements provide for the preservation of open space for the benefit of wildlife and for recreational purposes. The diminished streamflow in Dry Valley Creek and spring discharges within the Dry Valley Hydrographic Basin would result in reductions in the amount of water available to both livestock and wildlife within the basin and thus the appropriations being sought threaten to prove detrimental to the public interest.

Attachment "A"
Protests to Applications 84688 & 84689

Finally, portions of the place of use of these applications (as well as the Point of Diversion for Application 84689) are located in California. These applications are also subject to the provisions of NRS 533.520, in particular those portions whereby the State Engineer, in determining whether or not the use of the water outside the State of Nevada complies with the provisions of NRS 533.324 to 533.450 must consider the following factors:

- (a) The supply of water available in this State
- (b) The current and reasonably anticipated demands for water in this State;
- (c) The current or reasonably anticipated shortages of water in this State;
- (d) Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated shortages of water in this State;
- (e) The supply and sources of water available to the applicant in the state in which the applicant intends to use the water;
- (f) The demands placed on the applicant's supply of water in the state in which he or she intends to use the water; and
- (g) Whether the request in the application is reasonable, taking into consideration the factors set forth in paragraphs (a) to (f), inclusive.

Applications 84688 and 84689 fail to provide any information to the State Engineer that would allow him to make a determination as to whether or not the these applications comply with NRS 533.324 to 533.450 and thus they are deficient and should be rejected as failing to comply with NRS 533.520.

Therefore, based on the foregoing, Buckhorn Land and Livestock, LLC respectfully requests that Applications 84688 and 84689 be denied.

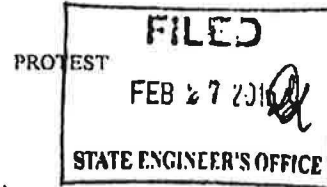
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EXHIBIT 3

EXHIBIT 3

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

IN THE MATTER OF APPLICATION NUMBER 84688
FILED BY Sierra Pacific Industries
ON January 9, 20 15



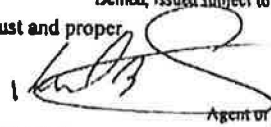
Comes now Washoe County
whose post office address is P.O. Box 11130, Reno Nevada 89520-0027
whose occupation is a political subdivision of State of Nevada
of Application Number 84688, filed on January 9, 20 15
by Sierra Pacific Industries
waters of Underground situated in Washoe
on underground source or name of stream, lake, spring or other source
County, State of Nevada, for the following reasons and on the following grounds, to wit:
Please refer to attached Exhibit "A".

THEREFORE the Protestant requests that the application be
and that an order be entered for such relief as the State Engineer deems just and proper

Denied

Denied, issued subject to prior rights, etc., as the case may be

Signed


Agent of protestant

Vahid Behmaram

Printed or typed name, if agent

Address P.O. Box 11130,

Street No or PO Box

Reno Nevada 89520-0027

City, State and ZIP Code

(775) 954-4647

Phone Number

vbehmaram@washoecounty.us

E-mail

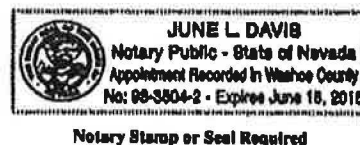
State of Nevada

County of Washoe

Subscribed and sworn to before me on 2/26/15

by Vahid Behmaram


Signature of Notary Public Required



+ \$30 FILING FEE MUST ACCOMPANY PROTEST. PROTEST MUST BE FILED IN DUPLICATE.
ALL COPIES MUST CONTAIN ORIGINAL SIGNATURE.

Exhibit "A"

Applications 84688 & 84689

The above referenced applications propose to appropriate 3000 acre-feet of ground water from the Dry Valley Hydro-graphic Basin.

State Engineer's ruling # 5568 determined a perennial yield of 3000 acre-feet for this basin.

Existing appropriations against the ground water resources of this basin are at or slightly over the yield estimate. Furthermore, the State Engineer's records indicate an additional 3400 acre-feet of pending applications within this basin.

NRS 533.370 (5) states that:

The State Engineer is prohibited by law from granting an application to appropriate the public waters of State of Nevada where:

- A. There is no unappropriated water at the proposed source;*
- B. The proposed use or change conflicts with existing rights;*
- C. The proposed use or change conflicts with protectible interests in the existing domestic wells as set forth in NRS 533.024; or*
- D. The proposed use or change threatens to prove detrimental to the public interest.*

Therefore, based on the foregoing Washoe County request that these applications be denied as granting them would be contrary to items A, B & D of the provisions of NRS 533.370 (5) listed above.

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9 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
10 **IN AND FOR THE COUNTY OF WASHOE**
11

12 **SIERRA PACIFIC INDUSTRIES, a**
13 **California Corporation,**

14 **Petitioner,**

15 **vs.**

16 **JASON KING, P.E., in his capacity as**
17 **Nevada State Engineer, and the**
18 **DIVISION OF WATER RESOURCES,**
19 **DEPARTMENT OF CONSERVATION,**
20 **an agency of the State of Nevada,**

21 **Respondent,**

22 **and,**

23 **INTERMOUNTAIN WATER SUPPLY,**
24 **LTD., a Nevada limited liability company,**

25 **Intervenor-Respondent.**

Case No. CV16-01378

Dept. No. 1

26 **ORDER DENYING PETITION FOR JUDICIAL REVIEW**

27 This matter comes before the Court on Sierra Pacific Industries' (SPI) Petition for
28 Judicial Review of the State Engineer's June 1, 2016, decision granting Intermountain
Water Supply, Ltd. (Intermountain) a one-year extension of time to complete the
diversion works and place to beneficial use the water appropriated under Permit
Nos. 64977, 64978, 73428, 73429, 73430, 74327 and 72700. The petition for judicial

1 review has been fully briefed and oral arguments heard on May 24, 2017. At oral
2 argument, SPI was represented by Debbie Leonard, Esq., the State Engineer was
3 represented by Senior Deputy Attorney General Micheline N. Fairbank, and
4 Intermountain was represented by Rick Elmore, Esq.

5 The Court having reviewed the record on appeal, considered the arguments of the
6 parties, the applicable law and findings of fact by the State Engineer, and all pleadings
7 and papers on file in this matter, hereby makes the following Findings, Conclusions of
8 Law and Order Denying the Petition.

9 I. STANDARD OF REVIEW

10 NRS 533.450 provides for judicial review of orders and decisions of the State
11 Engineer made under NRS 533.270 through NRS 533.445 (setting forth the statutory
12 procedure for appropriation). Nevada water laws, and all proceedings under it, are
13 special in character and its provisions not only prescribe the method of procedure, but
14 strictly limit procedure to the method set forth under the law. *In re Filippini*, 66 Nev. 17,
15 27, 202 P.2d 535, 540 (1949). Where there is a challenge to a decision of the State
16 Engineer in court, "[t]he decision of the State Engineer is prima facie correct, and the
17 burden of proof is upon the party attacking the same." NRS 533.450(10); *Office of State*
18 *Eng'r v. Morris*, 107 Nev. 699, 701, 703, 819 P.2d 205 (1992); *Town of Eureka v. State*
19 *Eng'r*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992). Decisions of the State Engineer are
20 entitled to deference both as to their factual basis and their legal conclusions.
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27 II. FINDINGS AND CONCLUSIONS OF LAW

28 In determining whether to grant an application for extension of time to perfect a

1 water right, the State Engineer must determine from the proof and evidence submitted to
2 him that the permit holder is proceeding in good faith and reasonable diligence to perfect
3 the application. NRS 533.380(3). Reasonable diligence is defined as "the steady
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14 extensions of time within which the construction work must be completed, or water must
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19 Appeal (SE ROA) at 5-426, 430-579, 587-602, 605-616. Within the evidence before the
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1 be served by the project at "nearly 10,000 houses" and specified the present status of the
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3 In deciding whether to grant Intermountain's applications for extension of time
4 pursuant to NRS 533.380, the State Engineer considered whether Intermountain had
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15 The concept of reasonable diligence is not a recent concept in Nevada water law. Rather,
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18 appropriation, and not upon an ownership in the soil, it is the
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9 that Intermountain demonstrated good faith and reasonable diligence.
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12 Nevada Supreme Court has found that "mere statements" without more is insufficient to
13 demonstrate reasonable diligence. *Desert Irr. Ltd. v. State*, 113 Nev. 1049, 1057 (1997).
14 And, in this case, Intermountain has, since the initial granting of its applications to
15 appropriate water, provided the State Engineer with evidence of its incremental efforts to
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17 Intermountain's efforts to develop its water, and the consideration of the totality of the
18 evidence is sufficient to support the State Engineer's decision. SE ROA at 618-24. The
19 State Engineer considered the totality of factors required by NRS 533.380, and concluded
20 that substantial evidence supported granting Intermountain's applications for extensions
21 of time. *Id.* The State Engineer's findings in his June 1, 2016, decision granting
22 Intermountain's extension of time applications is supported by substantial evidence.

23 Further, the State Engineer considered SPI's contention that Intermountain's
24 applications violate the anti-speculation doctrine as established by the Nevada Supreme
25 Court in *Bacher v. State Engineer*, 122, Nev. 1110 (2006). In granting Intermountain's
26 applications for extension of time, the State Engineer found that there was not a violation
27 of the anti-speculation doctrine because Intermountain's applications for extensions of
28 time demonstrate that the company is making measureable steps toward perfecting its

1 water rights. SE ROA at 605-624. Nevada law allows a permittee to find an alternative
2 use of its water where the originally intended project may not be realized. The Nevada
3 Supreme Court in *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. Adv. Op. 48,
4 245 P.3d 1145 (2010), found that the State Engineer did not err when granting
5 applications to change the point of use for existing groundwater permits. In that decision,
6 the water right holder, Nevada Land and Resource Company (NLRC), had secured
7 groundwater permits for the temporary use of water in a mining and milling project.
8 *Pyramid Lake Paiute Tribe of Indians*, 245 P.3d at 1146. In that case, however, the
9 mining and milling project was unfruitful, and during an approximate 20-year period of
10 time, the water rights were maintained in good standing using the application for
11 extension of time process. *Id.* Ultimately, NLRC sought to change the permitted use
12 from mining and milling to industrial power generation purposes and from a temporary to
13 permanent use. *Id.* Though the NLRC's anticipated power plant project was cancelled,
14 and the water rights were later negotiated for use by the City of Fernley, the court did not
15 find there to be a violation of the anti-speculation doctrine. *Id.* at n.1. Thus, the Court in
16 *Pyramid Lake Paiute Tribe of Indians v. Ricci*, which was decided four years after *Bacher*,
17 did not assert any contention that the maintenance of the water rights by NLRC in good
18 standing for nearly 20 years while seeking a buyer for its groundwater source was a
19 violation of the anti-speculation doctrine. *Id.*

20 The project which Intermountain's water rights have been intended to benefit is
21 the same as the time it sought its applications for new appropriations of water. However,
22 Intermountain has commenced looking for other entities which may be better suited to
23 fully develop the project and ultimately place the water to its intended beneficial use.
24 Whether Intermountain ultimately sells the totality of its project, or sells an interest in
25 the project, is not of the State Engineer's concern under current Nevada law. The law
26 requires the State Engineer to determine whether Intermountain has, in good faith,
27 demonstrated a steady application of effort to perfect its water rights, and second, since
28 this is a municipal project, considering the factors set forth in 533.380(4). Here, the State

1 Engineer has performed his legal duties in evaluating Intermountain's applications
2 for extensions of time and considered all relevant factors contained within NRS 533.380;
3 thus, based upon substantial evidence before him, the State Engineer reasonably
4 determined that there was not violation of the anti-speculation doctrine.
5 SE ROA at 639-41.

6 Finally, SPI requests this Court to consider facts and evidence outside of the record
7 before the State Engineer when issuing his June 1, 2016, decision. SPI is not entitled to a
8 de novo review and the evidence SPI requests the Court to consider is beyond the scope of
9 appellate review of the State Engineer's decision under NRS 533.450.

10 The Court, having reviewed the record in its entirety, and considered the argument
11 of the parties and counsel finds that the State Engineer's June 1, 2016, decision to grant
12 Intermountain's applications to extend time to complete works and place water to a
13 beneficial use for Permit Nos. 64977, 64978, 73428, 73429, 73430, 74327 and 72700 is
14 supported by substantial evidence.

15 IT IS HEREBY ORDERED that SPI's Petition for Judicial Review is hereby
16 DENIED.

17 ORDERED this 21st day of August, 2017.

18 William C. Madrox
19 DISTRICT JUDGE
20
21
22

23 SUBMITTED BY:

24 ADAM PAUL LAXALT
25 Attorney General
26 MICHELINE N. FAIRBANK
27 Senior Deputy Attorney General
28 100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1225
F: (775) 684-1108
E: ~~ADAM@NVSUPREMECOURT.NV.GOV~~

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VIA ECF
RICHARD ELMORE, ESQ. for INTERMOUNTAIN WATER SUPPLY, LTD.
MICHELINE FAIRBANK, ESQ. for JASON KING, P.E., DIVISION OF WATER RESOURCES
DEBBIE LEONARD, ESQ. for SIERRA PACIFIC INDUSTRIES

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JUDICIAL ASSISTANT

2545
RICHARD L. ELMORE, CHTD.
Richard L. Elmore, Esq.
Nevada Bar No. 1405
3301 So. Virginia Street, Suite 125
Reno, NV 89502
(775) 357-8170

*Attorney for Intervenor-Respondent
Intermountain Water Supply*

**IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE**

SIERRA PACIFIC INDUSTRIES, a California
Corporation,

Petitioner,

vs.

JASON KING, P.E., in his capacity as Nevada
State Engineer, and the DIVISION OF WATER
RESOURCES, DEPARTMENT OF
CONSERVATION, an agency of the State of
Nevada,

Respondent,

and,

INTERMOUNTAIN WATER SUPPLY, LTD.,
a Nevada limited liability company,

Intervenor-Respondent.

Case No. CV16-01378

Dept. No. 1

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order Denying Petition for Judicial Review was entered in the
above-entitled matter on August 21, 2017. A copy of said order is attached hereto as Exhibit 1.

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AFFIRMATION

The undersigned does hereby affirm that the preceding document filed in Second Judicial District Court does not contain the Social Security number of any person.

DATED: August 22, 2017.

RICHARD L. ELMORE, CHTD.

By: /s/ Richard L. Elmore
Richard L. Elmore, Esq.
Nevada Bar No. 1405
3301 So. Virginia Street, Suite 125
Reno, NV 89502
(775) 357-8170

*Attorney for Intervenor-Respondent
Intermountain Water Supply*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am the principal of RICHARD L. ELMORE, CHTD. and that on
3 this date I personally caused to be served a true copy of the foregoing **NOTICE OF ENTRY**
4 **OF ORDER** by the method indicated and addressed to the following:
5

6 Debbie Leonard, Esq.
7 MCDONALD CARANO WILSON LLP
8 P.O. Box 2670
9 100 W. Liberty St., 10th Floor
10 Reno, NV 89501-2670

____ Via U.S. Mail
____ Via Overnight Mail
____ Via Hand Delivery
____ Via Facsimile
X Via ECF

11
12 Micheline N. Fairbank, Esq.
13 OFFICE OF THE ATTORNEY GENERAL
14 100 N. Carson Street,
15 Carson City, NV 89701

____ Via U.S. Mail
____ Via Overnight Mail
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X Via ECF

16 DATED this 22nd Day of August, 2017.

17 /s/ Richard L. Elmore
18 Richard L. Elmore
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INDEX OF EXHIBITS

Exhibit No.	Description	No. Pages
1	Order Denying Petition for Judicial Review	9

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Clerk of the Court
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EXHIBIT 1

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Dept. No. 1

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20 and,

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23 **ORDER DENYING PETITION FOR JUDICIAL REVIEW**

24 This matter comes before the Court on Sierra Pacific Industries' (SPI) Petition for
25 Judicial Review of the State Engineer's June 1, 2016, decision granting Intermountain
26 Water Supply, Ltd. (Intermountain) a one-year extension of time to complete the
27 diversion works and place to beneficial use the water appropriated under Permit
28 Nos. 64977, 64978, 73428, 73429, 73430, 74327 and 72700. The petition for judicial

1 review has been fully briefed and oral arguments heard on May 24, 2017. At oral
2 argument, SPI was represented by Debbie Leonard, Esq., the State Engineer was
3 represented by Senior Deputy Attorney General Micheline N. Fairbank, and
4 Intermountain was represented by Rick Elmore, Esq.

5 The Court having reviewed the record on appeal, considered the arguments of the
6 parties, the applicable law and findings of fact by the State Engineer, and all pleadings
7 and papers on file in this matter, hereby makes the following Findings, Conclusions of
8 Law and Order Denying the Petition.

9 I. STANDARD OF REVIEW

10 NRS 533.450 provides for judicial review of orders and decisions of the State
11 Engineer made under NRS 533.270 through NRS 533.445 (setting forth the statutory
12 procedure for appropriation). Nevada water laws, and all proceedings under it, are
13 special in character and its provisions not only prescribe the method of procedure, but
14 strictly limit procedure to the method set forth under the law. *In re Filippini*, 66 Nev. 17,
15 27, 202 P.2d 535, 540 (1949). Where there is a challenge to a decision of the State
16 Engineer in court, "[t]he decision of the State Engineer is prima facie correct, and the
17 burden of proof is upon the party attacking the same." NRS 533.450(10); *Office of State*
18 *Eng'r v. Morris*, 107 Nev. 699, 701, 703, 819 P.2d 205 (1992); *Town of Eureka v. State*
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27 of the anti-speculation doctrine because Intermountain's applications for extensions of
28 time demonstrate that the company is making measureable steps toward perfecting its

1 water rights. SE ROA at 605-624. Nevada law allows a permittee to find an alternative
2 use of its water where the originally intended project may not be realized. The Nevada
3 Supreme Court in *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. Adv. Op. 48,
4 245 P.3d 1145 (2010), found that the State Engineer did not err when granting
5 applications to change the point of use for existing groundwater permits. In that decision,
6 the water right holder, Nevada Land and Resource Company (NLRC), had secured
7 groundwater permits for the temporary use of water in a mining and milling project.
8 *Pyramid Lake Paiute Tribe of Indians*, 245 P.3d at 1146. In that case, however, the
9 mining and milling project was unfruitful, and during an approximate 20-year period of
10 time, the water rights were maintained in good standing using the application for
11 extension of time process. *Id.* Ultimately, NLRC sought to change the permitted use
12 from mining and milling to industrial power generation purposes and from a temporary to
13 permanent use. *Id.* Though the NLRC's anticipated power plant project was cancelled,
14 and the water rights were later negotiated for use by the City of Fernley, the court did not
15 find there to be a violation of the anti-speculation doctrine. *Id.* at n.1. Thus, the Court in
16 *Pyramid Lake Paiute Tribe of Indians v. Ricci*, which was decided four years after *Bacher*,
17 did not assert any contention that the maintenance of the water rights by NLRC in good
18 standing for nearly 20 years while seeking a buyer for its groundwater source was a
19 violation of the anti-speculation doctrine. *Id.*

20 The project which Intermountain's water rights have been intended to benefit is
21 the same as the time it sought its applications for new appropriations of water. However,
22 Intermountain has commenced looking for other entities which may be better suited to
23 fully develop the project and ultimately place the water to its intended beneficial use.
24 Whether Intermountain ultimately sells the totality of its project, or sells an interest in
25 the project, is not of the State Engineer's concern under current Nevada law. The law
26 requires the State Engineer to determine whether Intermountain has, in good faith,
27 demonstrated a steady application of effort to perfect its water rights, and second, since
28 this is a municipal project, considering the factors set forth in 533.380(4). Here, the State

1 Engineer has performed his legal duties in evaluating Intermountain's applications
2 for extensions of time and considered all relevant factors contained within NRS 533.380;
3 thus, based upon substantial evidence before him, the State Engineer reasonably
4 determined that there was not violation of the anti-speculation doctrine.
5 SE ROA at 639-41.

6 Finally, SPI requests this Court to consider facts and evidence outside of the record
7 before the State Engineer when issuing his June 1, 2016, decision. SPI is not entitled to a
8 de novo review and the evidence SPI requests the Court to consider is beyond the scope of
9 appellate review of the State Engineer's decision under NRS 533.450.

10 The Court, having reviewed the record in its entirety, and considered the argument
11 of the parties and counsel finds that the State Engineer's June 1, 2016, decision to grant
12 Intermountain's applications to extend time to complete works and place water to a
13 beneficial use for Permit Nos. 64977, 64978, 73428, 73429, 73430, 74327 and 72700 is
14 supported by substantial evidence.

15 IT IS HEREBY ORDERED that SPI's Petition for Judicial Review is hereby
16 DENIED.

17 ORDERED this 21st day of August, 2017.

18 William C. Madrox
19 DISTRICT JUDGE
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21
22

23 SUBMITTED BY:

24 ADAM PAUL LAXALT
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 21 day of August, 2017, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed the individuals listed herein and/or electronically filed the foregoing document with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

VIA ECF

RICHARD ELMORE, ESQ. for INTERMOUNTAIN WATER SUPPLY, LTD.

MICHELINE FAIRBANK, ESQ. for JASON KING, P.E., DIVISION OF WATER RESOURCES

DEBBIE LEONARD, ESQ. for SIERRA PACIFIC INDUSTRIES



JUDICIAL ASSISTANT