IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 73933

SIERRA PACIFIC INDUSTRIES, a California Corporation,

Appellant,

v.

JASON KING, P.E., in his capacity as Nevada State Engineer; THE 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

Appeal From Order Denying Petition for Judicial Review
District Court Case No.: CV16-01378
Second Judicial District Court of Nevada

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Sierra Pacific Industries

The following law firm had partners or associates who appeared on behalf of Sierra Pacific Industries and are expected to appear on its behalf in this Court:

McDonald Carano LLP

DATED this 8th day of February, 2018.

MCDONALD CARANO LLP

BY: /s/ Debbie Leonard
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JURISDICTIONAL STATEMENT

This is an appeal from the district court's denial of Appellant/Petitioner Sierra Pacific Industries' ("SPI") petition for judicial review of a decision by the Nevada State Engineer that granted an eleventh extension of time to Respondent Intermountain Water Supply ("Intermountain") to perfect certain water rights. The district court entered its order denying petition for judicial review on August 21, 2017. XI(2751-2759). Notice of entry of that order was filed on August 22, 2017. XI(2760). SPI filed its notice of appeal on September 6, 2017. XI(2765). Under NRAP 4(a)(1), SPI's appeal is timely. Because the order denying the petition for judicial review was a final judgment, appellate jurisdiction exists under NRAP 3A(b)(1) and NRS 533.450(9).

ROUTING STATEMENT

This is an administrative agency case involving water and therefore should be retained by the Supreme Court. NRAP 17(a)(8).

STATEMENT OF THE ISSUES

1. The law of beneficial use, the anti-speculation doctrine and NRS 533.380 require that a water appropriator exercise reasonable diligence to put the appropriated water to beneficial use in the location authorized by its permits or have a contractual or agency relationship with someone who can. Did the State Engineer err, as a matter of law, where Intermountain admits – and the State

Engineer acknowledged – that Intermountain does not plan to use the permitted water, or have the financial means to do so, but rather is marketing the water for sale outside the place of use authorized by the permits?

2. The State Engineer relied exclusively on unreliable, inconsistent and unsupported statements from Intermountain's principal, Robert Marshall, regarding alleged agreements that Intermountain did not provide to the State Engineer. Absent substantial and competent "proof and evidence" to meet the requirements of NRS 533.380, should the State Engineer have denied Intermountain's extension requests and canceled the permits?
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?

STATEMENT OF THE CASE

Starting in 1999, Respondent Intermountain Water Supply ("Intermountain") filed applications to appropriate groundwater in the Dry Valley Hydrographic Basin for an interbasin transfer to certain parcels in Lemmon Valley for municipal

purposes.[1] Starting in 2002, the State Engineer granted Intermountain permits 64977, 64978, 66400, 72700, 73428, 73429, 73430 and 74327 for nearly all of the available groundwater in the Dry Valley Basin ("the Permits").[2] In the 16 years since the State Engineer started issuing the Permits, Intermountain has yet to commence construction of the pipeline and necessary infrastructure to put the permitted water to use. III(654-656). Since 2005, the State Engineer has given Intermountain a series of one-year extensions to do so.[3]

Intermountain's unexercised Permits are obstructing Appellant SPI's ability to expand its agricultural operations in Dry Valley. I(47-54). For that reason, and because Intermountian has no ability to use the permitted water, SPI started to file objections to any further extensions of time for Intermountain to file proofs of completion and beneficial use. I(47-54). Over SPI's objection, on June 1, 2016, the State Engineer granted Intermountain yet another extension for each of its Permits. III(678-684).

SPI timely filed a petition for judicial review of the June 1, 2016 Decision. I(1-28). The district court denied the petition. XI(2751-2759). SPI now appeals.

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[1] I(44); IV(832-833, 951-953); V(1150-1152, 1280-81); VII(1604-1606, 1714-1717); VIII(1951-1953); IX(2119-2121, 2227-2229); X(2359-2360)
[2] IV(914-916); V(1060-1062, 1181-1184); VII(1781-1782); IX(2066-2069, 2099-2185, 2283-2286); X(2386-2388)
[3] *See*, *e.g.*, III(667); IV(946, 952, 979, 984, 989, 992, 997, 1002, 1008, 1021, 1030)

STATEMENT OF FACTS

A. Dry Valley Hydrographic Basin

Dry Valley is located in western Washoe County along the border of Lassen County, California.[4] The State Engineer has estimated the perennial yield from Dry Valley – the amount of groundwater that may be withdrawn from the basin without causing overdraft – as approximately 3,000 acre feet. IX(2089). The State Engineer has granted 3,021.60 acre feet of permits in Dry Valley, of which 2,996 acre feet are Intermountain's unexercised Permits. IX(2089).

B. The Permits Issued to Intermountain

Intermountain's permit applications proposed an interbasin transfer to export water from Dry Valley to supply what Intermountain claimed was anticipated municipal water demands in Lemmon Valley. IV(833, 1033); V(1151); IX(2170-71). The permits issued to Intermountain described the authorized place of use as certain sections of land located in the Lemmon Valley Hydrographic Basin.[5] The permits do not authorize the water to be used anywhere other than the areas of Lemmon Valley described in Intermountain's applications. *See id.*

Since the State Engineer first started issuing the Permits in 2002, Intermountain has not commenced construction of the pipeline or necessary

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[4] *See* Nevada Division of Water Resources Basin Boundary Map, http://water.nv.gov/mapping/maps/designated_basinmap.pdf

[5] IV(914); V(1060, 1185); IX(2069, 2174, 2185, 2286); X(2386).

infrastructure to put the water to beneficial use. III(647-659). Intermountain also has not submitted any evidence that it has the ability to finance or obtain financing for the necessary capital expenditures to construct the well field, pipeline and treatment system. III(647-659). Likewise, Intermountain has not secured a contractual or agency relationship with a municipal water purveyor that is authorized to serve the permitted place of use. III(647-659).

The location of Intermountain's proposed pipeline is alongside an existing pipeline, known as the North Valleys Importation Project ("NVIP"), which was constructed in 2007 to supply municipal water demands in the North Valleys, including Lemmon Valley. IV(1015-1016). The NVIP sat idle for nearly a decade without municipal demand for its use but is now part of the Truckee Meadows Water Authority's ("TMWA") distribution system. IV(1015). The NVIP is capable of serving anticipated municipal demands in Lemmon Valley for the foreseeable future, and TMWA would only use water from another water supply project such as Intermountain's if the owner has "the ability to assume the risk and invest the time and effort for permitting, design, construction, and financing," which Intermountain does not have. III(613).

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C. Intermountain's Marketing Plan for the Permits

Rather than itself develop the water under the Permits, Intermountain is actively seeking to market its "water project."[6] On a website called nevadawaterproject.com, Intermountain was offering to sell its water and other permits for $12,000,000. I(224). According to the website, "This 22 mile long, federally approved, proposed pipeline along with 3068.1 acre feet of water is for sale in northern Nevada." I(224). In other words, Intermountain has no intention to finance infrastructure construction, bear the cost of operating and maintaining the municipal water system, or put the water to beneficial use.[7]

D. Appellant/Petitioner Sierra Pacific Industries' Current Ability to Put Dry Valley Groundwater to Beneficial Use

1. Wilburn Ranch Agricultural Operations

SPI has significant ranching and farming operations, running upwards of 2,000 head of cattle across hundreds of parcels and leasing grazing rights for over 5,000 head of cattle on tens of thousands of acres. I(206-207). SPI's landholdings include lands located in Dry Valley and Long Valley in Lassen County, California and Washoe County, Nevada, collectively referred to as the Wilburn Ranch. I(207). SPI acquired the Wilburn Ranch in 2014 for agricultural production. I(208).

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[6] I(224-232); III(665); IV(1029); V(1124, 1128, 1136, 1140); VIII(1826); IX(2116).

[7] I(224-232); III(665); IV(1029); V(1124, 1128, 1136, 1140); VIII(1826); IX(2116).

Currently, 100 to 150 head of cattle graze on the Nevada parcels and 50 to 100 head of cattle graze on the California parcels of Wilburn Ranch. I(208).

SPI has appropriated water in both Nevada and California for its Wilburn Ranch operations. I(208). In Nevada, water for livestock and some meadow irrigation is supplied by natural springs, which SPI has the right to use under its permits 70423 and 70424. I(208). So far, SPI has not pumped subsurface groundwater in Nevada other than well testing nor transferred water across the California/Nevada boundary because, as explained below, it has not been issued permits from the Nevada State Engineer to do so. I(208). In California, SPI pumps water from four different artesian springs and three different wells and uses sprinklers and flood irrigation for crops. I(208).

2. SPI's Applications 84688 and 84689

On January 9, 2015, SPI submitted Applications 84688 and 84689 to the State Engineer for its proposed expansion of irrigated lands at Wilburn Ranch. I(189-191, 197-199). SPI has an immediate need for the water it seeks and can immediately put the water to beneficial use in its existing and proposed expanded agricultural operations. I(209).

Two protests to Applications 84688 and 84689 were filed: one by Buckhorn Land and Livestock, LLC and one by Washoe County, as holders of water rights in Dry Valley. I(192-196, 200-204). Both protestants argued that SPI's Applications

should be denied because Intermountain's Permits encompass the entire perennial yield of Dry Valley, and according to the protestants, no water remains available to appropriate. I(192-196, 200-204). Applications 84688 and 84689 are currently pending with the State Engineer and were pending at the time that the State Engineer issued the June 1, 2016 Decision. I(189-191, 197-199).

E. The State Engineer's June 4, 2015 Decision to Grant Additional Extensions of Time to Intermountain, Followed By SPI's 2015 Petition for Judicial Review

In late 2014 and early 2015, as it had done throughout the previous decade, Intermountain sought extensions of time to file proofs of completion of the diversion works and proofs of beneficial use from the State Engineer.[8] Because Intermountain's unexercised Permits interfere with the SPI's ability to appropriate water on the Nevada side of Dry Valley basin, and Intermountain was not exercising reasonable diligence to perfect its applications, SPI filed an objection to Intermountain's 2015 extension requests. VIII(1840-1842).

On June 4, 2015, over SPI's objection, the State Engineer granted Intermountain yet another one-year extension of time. ("June 4, 2015 Decision," IV(1026-1029). In the June 4, 2015 Decision, the State Engineer made the express finding that "the applications for extensions of time filed since 2011 have indicated [Intermountain] is seeking a buyer for the project." IV(1029). The State Engineer

[8] IV(1023); V(1140, 1271); VI(1838); IX(2110, 2217); X(2321, 2420).

alerted 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***." IV(1029) (emphasis added).

In the June 4, 2015 Decision, the State Engineer did not analyze NRS 533.380(4)'s statutory requirements for an extension. IV(1026-1029). Instead, the State Engineer only recited the statute and stated, "In considering NRS 533.380(4), **I find good cause for granting extensions** on the Project permits. IV(1029) (emphasis in the original). However, the State Engineer warned Intermountain:

> Notwithstanding that the extensions of time are being granted, please be advised that ***further requests for extensions on permits comprising the Project will be closely scrutinized to ensure the statutory criteria for granting extensions of time are adhered to.*** IV(1029) (emphasis added).

SPI petitioned for judicial review of the June 4, 2015 Decision. III(622-628). At oral argument, the district judge, Patrick Flanagan, specifically noted: "***This is a close case. I think the writing is on the wall***. The State Engineer has informed the applicant that ***further applications will be scrutinized closely***." X(2489) (emphasis added). With this in mind, Judge Flanagan denied SPI's 2015 petition for judicial review. III(622-628).

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F. In 2016, the State Engineer Granted Yet Another Extension to Intermountain Without Evidence That a Municipal Water Purveyor Would Use the Water in the Permitted Place of Use

In late 2015 and early 2016, Intermountain yet again filed applications for extensions of time.[9] III(647-658). SPI filed an objection. I(47-55). The sum total of the "evidence" submitted by Intermountain in support of its extension requests was an affidavit of its principal, Robert Marshall; a list of expenditures that Marshall contended were associated with the Permits; and alleged invoices for those expenditures. III(647-658).

The Marshall affidavit contained the following statements:

Paragraph 5:

> During 2015, Intermountain entered into an Option Agreement with two world-wide engineering and construction firms, experienced in water systems development. One firm is located in Chicago, Illinois and the other is located in Tel Aviv Israel. III(656).

Paragraph 6:

> …Intermountain, during 2015 and early 2016 has had extensive negotiations with Utilities Inc., Nevada and Arizona, a PUCN certified utility company to distribute Intermountain's water to its present and future customers in the Cold Springs area of Washoe County. An agreement has been reached and is in the process of being signed. III(656).

[9] Neither Intermountain nor the State Engineer served SPI with Intermountain's extensions requests, notwithstanding that SPI had submitted the State Engineer's form to request all correspondence regarding the Permits and had filed an objection to Intermountain receiving any further extensions, which the State Engineer directed SPI to serve on Intermountain. XI(2605-2646, 2684-2686).

Paragraph 7:

> Intermountain has had numerous meetings with Developers [*sic*] whose plans involve construction of nearly 10,000 houses. The developments are in various stages of permitting, with all but one small one, in the City of Reno. Much work has been done by the developers to date. All of the developments are adjacent to or very near the existing developed areas. Intermountain expects to have Developer agreements in hand within three to four months. III(656).

Relying on these three paragraphs to incorrectly conclude that Intermountain purportedly "has secured agreements with engineering and construction firms, Utilities, Inc., and developers" III(664), on June 1, 2016, the State Engineer yet again granted extensions to Intermountain. III(660-666). But the State Engineer confirmed that those alleged agreements had not been submitted, stating 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." III(666) (emphasis in the original). The State Engineer did not explain how a statement of intent to use the water outside the permitted area or for unidentified developments could perfect the appropriations. III(660-666).

G. The District Court Denied SPI's 2016 Petition for Judicial Review

SPI timely filed a petition for judicial review of the June 1, 2016 Decision. I(1-28). After briefing and oral argument, Senior Judge William Maddox sitting by designation denied SPI's petition. X(2491-2561); XI(2562-2603, 2692, 2751-

2759). In reviewing SPI's petition, the district court used the wrong standard of review by incorrectly giving deference to the State Engineer's legal conclusions and interpretation of Nevada water law when *de novo* review was warranted. XI(2752). Based upon this unduly deferential standard, the district court accepted the State Engineer's arguments verbatim that a permit holder could perfect its applications by finding an "alternative use of its water where the originally intended project may not be realized." *Compare* XI(2757) *to* XI(2580-2581).

The district court's order did not address the Nevada jurisprudence cited by SPI that barred the extensions as a matter of law because Intermountain sought to sell the permitted water for delivery outside the place of use authorized in the Permits. *Compare* XI(2751-2759) *to* X(2504-2506). Instead, the district court incorrectly stated that "[t]he project which Intermountain's water rights have been intended to benefit is the same as the time it sought its applications for new appropriations of water" XI(2757), which was contradicted by the record that Intermountain's Permits sought to serve Lemmon Valley.[10] Moreover, the district court did not address the requirements of the anti-speculation doctrine that an appropriator had to have a contractual or agency relationship with the municipal purveyor whose service territory encompassed the permitted place of use. XI(2756).

[10] IV(914); V(1060, 1185); IX(2069, 2185, 2286); X(2386).

The district court deemed the Marshall affidavit substantial evidence to support the extensions. XI(2754). In so doing, the district court expressed that the substantial evidence standard "does not impose a duty upon the State Engineer to 'test the reliability or accuracy' of Intermountain's evidence." XI(2754). Nowhere did the district court discuss what a reasonable mind would do when faced with the unsupported and conflicting statements in the Marshall affidavit, as the substantial evidence inquiry requires. XI(2751-2759). Although the district court correctly recognized that "'mere statements' without more is [*sic*] insufficient to demonstrate reasonable diligence," the district court did not identify any evidence in the record beyond the "mere statements" made in the Marshall affidavit. XI(2754-2756).

Because, Intermountain did not satisfy the legal standard for extensions of time, SPI now appeals the denial of its petition for judicial review. XI(2765-2769).

SUMMARY OF THE ARGUMENT

The June 1, 2016 Decision violated NRS 533.380, the law of beneficial use and the anti-speculation doctrine by granting extensions based upon Intermountain's mere statements of intent to sell the permitted water for use outside the area authorized in the Permits. The public policy of beneficial use that underpins Nevada law, and that is codified in Nevada's water statutes, prohibits Intermountain from exceeding the geographical limit of the Permits. The anti-

speculation doctrine requires Intermountain to have an agency relationship with a water purveyor for the place of use specified in the Permits, not some other location. And the criteria in NRS 533.380 mandate that the State Engineer review specific proof of development plans on parcels located within the authorized place of use. Intermountain did not satisfy any of the statutory requirements.

Water belongs to the public and cannot be held hostage by a water speculator such as Intermountain to the detriment of a would-be appropriator such as SPI, who is currently prepared to beneficially use the Dry Valley water resource. The June 1, 2016 Decision is not supported by any evidence, much less substantial evidence, that Intermountain has exercised reasonable diligence to perfect its applications. The issues of law presented by this case – namely, whether the anti-speculation doctrine, the law of beneficial use and NRS 533.380 prohibited the extensions – warrant *de novo* review. The district court followed an erroneous standard of review that was unduly deferential to the State Engineer's legal analysis and countenanced the State Engineer's unauthorized presumption that an as-yet unfiled application to change the place of use to some other hydrographic basin would be granted.

The State Engineer is promoting water speculation, not preventing it. By granting the extensions, he allows Intermountain to hold hostage the entire groundwater resource of Dry Valley basin to the detriment of other would-be

appropriators. To rein in the State Engineer's violations of Nevada law, SPI asks the Court to reverse the district court's order and direct the district court to grant SPI's petition for judicial review, vacate the June 1, 2016 Decision and remand to the State Engineer with instructions to cancel the Permits.

ARGUMENT

A. Standard of Review

NRS 533.450 makes orders and decisions of the State Engineer subject to judicial review. "With respect to questions of law,…the State Engineer's ruling is persuasive but not controlling," and the court must "review purely legal questions ***without deference to the State Engineer's ruling***." *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (emphasis added); *see also Andersen Family Assocs. v. Ricci,* 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008) (reviewing court "has the authority to undertake an independent review of the State Engineer's statutory construction, without deference to the State Engineer's determination"); *accord In re Nevada State Eng'r Ruling No. 5823*, 128 Nev. 232, 238, 277 P.3d 449, 453 (2012) ("Questions of statutory interpretation … receive de novo review.") (internal quotation omitted).

Any "presumption of correctness" of a State Engineer decision as provided by NRS 533.450(10), "does not extend to 'purely legal questions,' such as 'the construction of a statute,' as to which 'the reviewing court may undertake

independent review.'" *Id.* (quoting *Town of Eureka v. State Eng'r*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992)). At no time will the State Engineer's interpretation of a statute control "if an alternative reading is compelled by the plain language of the provision." *Andersen Family Assocs.*, 124 Nev. at 186, 179 P.3d at 1203 (internal quotation omitted).

The Court reviews the State Engineer's factual findings to determine if they are supported by substantial evidence. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *Bacher*, 122 Nev. at 1121, 146 P.3d at 800. The absence of specific evidence to satisfy a statutory standard is a "***fundamental defect***" that constitutes an abuse of discretion. *Id.* at 1122-23, 146 P.3d at 801 (emphasis added).

The district court's order denying petition for judicial review misstated the standard of review by proclaiming that a reviewing court must defer to the State Engineer's legal conclusions. XI(2752). This assertion is contrary to law. *See Pyramid Lake Paiute Tribe,* 126 Nev. at 525, 245 P.3d at 1148 (requiring de novo review of purely legal issues); *Andersen Family Assocs.*, 124 Nev. at 186, 179 P.3d at 1203. And the legal authorities cited by the district court, NRS 533.450(1) and *Bacher v. Office of State Eng'r*, 122 Nev. 1110, 1118, 146 P.3d 793, 798 (2006),

do not alter the *de novo* standard of review stated in *Pyramid Lake Paiute Tribe. See* 126 Nev. at 525, 245 P.3d at 1148.

Judge Maddox repeated his erroneous understanding of the standard of review four times during oral argument, underscoring that he gave undue deference to the State Engineer's interpretation of NRS Chapter 533 and this Court's precedents. XI(2726:4-5): "I'm supposed to be deferential to his interpretation of what the law is"; XI(2728:7-8): "I defer to his interpretation of the law"; XI(2737:22-23): "I defer to his interpretation of the law in the state of Nevada, so I deny the petition."; XI(2741:3-5): "[W]e are asked to, and I'll use the term both the fact and the law, to give great deference to the proceedings below, which is appropriate."). Because SPI's petition for judicial review raised numerous legal issues that warranted *de novo* review, reversal of the district court's order is required.

B. Standard for an Extension of Time to Perfect a Water Application

For a permit holder such as Intermountain to obtain an extension of time to complete the diversion works and put the appropriated water to beneficial use, the Nevada Legislature created numerous requirements. NRS 533.380. First, every applicant for an extension of time must demonstrate "good faith" and "reasonable diligence to perfect the application." NRS 533.380(3)(b). All applications for an extension must be "[a]ccompanied by proof and evidence of the reasonable

diligence with which the applicant is pursuing the perfection of the application." *Id.* "[T]he 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). The State Engineer is prohibited from granting an extension of time unless this standard is met. NRS 533.380(3)(b); *see also Desert Irr., Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997) (holding that a "prospective appropriator [must] fulfill[ ] the strict conditions imposed by our statutory scheme").

Beyond the requisite showing of good faith and reasonable diligence, water intended for municipal uses must meet an additional five criteria. NRS 533.380(4). The State Engineer "shall" consider:

> (a) Whether the holder has shown good cause for not having made a complete application of the water to a beneficial use;
>
> (b) The number of parcels and commercial or residential units which are contained in or planned for the land being developed or the area being served by the county, city, town, public water district or public water company;
>
> (c) Any economic conditions which affect the ability of the holder to make a complete application of the water to a beneficial use;
>
> (d) Any delays in the development of the land or the area being served by the county, city, town, public water district or public water company which were caused by unanticipated natural conditions; and
>
> (e) The period contemplated in the:

(1) Plan for the development of a project approved by the local government pursuant to NRS 278.010 to 278.460, inclusive; or

(2) Plan for the development of a planned unit development recorded pursuant to chapter 278A of NRS,

if any, for completing the development of the land.

NRS 533.380(4). The Legislature's use of the word "shall" required the State Engineer to receive and consider substantial evidence to support each of these factors. *See State v. Am. Bankers Ins. Co.*, 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990). As set forth below, Intermountain's extension requests failed to meet the statutory standard.

C. As a Matter of Law, The State Engineer Could Not Grant Extensions When Intermountain No Longer Sought to Use the Water Within the Permitted Geographical Area

1. Intermountain's Efforts to Sell the Water for Use in a Location Not Authorized by the Permits Did Not Constitute Reasonable Diligence to Perfect its Appropriation

Intermountain's applications to appropriate water in Dry Valley identified the proposed place of use as certain sections of land in the Lemmon Valley Hydrographic Basin and specifically stated that the purpose of the interbasin transfer was to supply the water to Lemmon Valley.[11] The State Engineer issued the Permits for that limited purpose and restricted the place of use to those areas of

[11] IV(833-834, 843-44, 851, 1033-34); V(1151-52); VIII(1951-1953, 2054-2055); IX(2119-2121, 2182-2185, 2227-2229).

Lemmon Valley that Intermountain identified in its applications.[12] The Permits do not authorize the water to be used in Cold Springs or anywhere else outside of the described place of use. *See id.*

Yet in its 2016 applications for extension of time, Intermountain informed the State Engineer it had reached an unsigned agreement to sell the water to serve Cold Springs, rather than Lemmon Valley. III(656). Cold Springs is not a place of use authorized by the Permits and is in a separate hydrographic basin.[13] By trying now to distribute the water in Cold Springs, Intermountain impliedly admits that it no longer has a necessity for the water in the Lemmon Valley locations authorized in the Permits. III(656). "Once the party's 'necessity for the use of water' ceases to exist, 'the right to divert [the water] ceases' as well." *Bacher* 122 Nev. at 1116, 146 P.3d at 797, *quoting* NRS 533.045.

Trying to sell the water for use in Cold Springs would not "perfect" the appropriations, as NRS 533.380(3)(b) requires, because the Permits are for specific parcels in Lemmon Valley.[14] Absent reasonable diligence by Intermountain to perfect the water at the place of use described in the Permits, as a matter of law, the

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[12] IV(914-916); V(1060-1062, 1182-85); VIII(2054-2055); IX(2066-2069, 2198-2286)

[13] IV(914-916); V(1060-1062, 1182-85); VIII(2054-2055); IX(2066-2069, 2198-2286); *see also* Nevada Division of Water Resources Basin Boundary Map, http://water.nv.gov/mapping/maps/designated_basinmap.pdf (identifying Lemmon Valley basin as 92A and 92B and Cold Springs basin as 100)

[14] IV(914-916); V(1060-1062, 1182-85); VIII(2054-2055); IX(2066-2069, 2198-2286)

State Engineer should have denied the extensions. *See* NRS 533.380; *Bacher* 122 Nev. at 1116, 146 P.3d at 797.

2. The Extensions Violated Nevada's Law of Beneficial Use Because They Allowed Intermountain to Exceed the Limit of its Water Rights

By granting the extensions, the State Engineer also violated the fundamental principle of beneficial use that underlies all of Nevada's water law. *See Desert Irr.*, 113 Nev. at 1060, 944 P.2d at 842. Beneficial use is "the basis, the measure and the limit of the right to the use of water." NRS 533.035. According to this Court:

> The preeminent public policy concern in Nevada regarding water rights is beneficial use…The legislature has recognized that water is a limited resource in Nevada and it belongs to the public; therefore, one who does not put it to a beneficial use should not be allowed to hold it hostage.

Preferred Equities Corp. v. State Eng'r, 119 Nev. 384, 389, 75 P.3d 380, 383 (2003); *see also Desert Irr.*, 113 Nev. at 1059, 944 P.2d at 842 ("The concept of beneficial use is singularly the most important public policy underlying the water laws of Nevada and many of the western states."). The requirement that a permit holder perfect its water rights in the geographical area specified in the Permits prevents an "appropriator [from] holding water rights in perpetuity when it was not being put to beneficial use…." *Desert Irr.*, 113 Nev. at 1060, 944 P.2d at 842.

The "limit" of Intermountain's Permits, within the meaning of NRS 533.035, is specific parcels in Lemmon Valley.[15] Because the extensions were premised on Intermountain's stated intent to use the permitted water elsewhere, the State Engineer allowed Intermountain to exceed the "limit" of its Permits. *See id.* The policy of beneficial use embedded in the statutory scheme prohibited the extensions under these circumstances. *See* NRS 533.035; *see also* NRS 533.030(1) (allowing "appropriat[ion] for beneficial use as provided in this chapter ***and not otherwise***) (emphasis added); *Desert Irr.*, 113 Nev. at 1060, 944 P.2d at 842.

3. This Court Has Already Established That An Extension Cannot Be Premised on an Intention to Put Water to Use on a Parcel Other Than the Permitted Location

Not only did the State Engineer run afoul his statutory mandates, but he likewise ignored clear precedent that prohibits the State Engineer from granting an extension of time based on a proposed development outside the permitted place of use. *See Desert Irr.*, 113 Nev. at 1055, 944 P.2d at 839. The *Desert Irr.* case is directly on point. In *Desert Irr.*, the permit holder sought a sixteenth extension of time to prove beneficial use. *Id.* at 1057, 944 P.2d at 841. In support of the extension, the permit holder made statements of intent to put the water to use at a proposed development that was not within the place of use described in the permit.

[15] IV(914-916); V(1060-1062, 1182-85); VIII(2054-2055); IX(2066-2069, 2198-2286).

Id. at 1057, 944 P.2d at 840-41. The Supreme Court held that NRS 533.380 did not authorize an extension under these circumstances. *Id.* at 1057, 944 P.2d at 840.

According to the Court, an extension of time can only be based on application of the water in "the area *within* which a permittee has a right to put water to beneficial use." *Id.* at 1056, 944 P.2d 840 (emphasis in the original). The Court noted that the statutory framework prevented a permit holder from obtaining an extension based on plans to develop land outside the "permitted area." *Id.* at 1055-56, 944 P.2d at 839-40. Where Intermountain's extension requests were premised on a desire to use the water in Cold Springs rather than the Lemmon Valley parcels authorized in the permits, *Desert Irr.* prohibited the State Engineer from granting the extensions. *See id.*

The district court did not even address the holding of *Desert Irr.* and its prohibition against an extension for Intermountain. XI(2751-2758). Instead, the district court asserted that "Nevada law allows a permittee to find an alternative use of its water where the originally intended project may not be realized." XI(2757), *citing Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 245 P.3d 1145 (2010)). The district court's reliance on *Pyramid Lake* is misplaced because that case does not involve an extension request. Rather, in *Pyramid Lake*, the Court had to determine whether the State Engineer correctly concluded there

was unappropriated water in the source to support an application to change the place and manner of use. *See id.* at 526-27, 245 P.3d at 1149.

As the *Pyramid Lake* case says, leading up to the change application filing, the permit holder had "kept its water rights valid and in good standing." *Id.* at 523, 245 P.3d at 1146. The Court's opinion does not describe the evidence presented by the permit holder to do so, since that issue was not before the Court. *See id.* Likewise, that case did not involve water speculation. *See id.* As a result, the district court erroneously cited to *Pyramid Lake* to prop up the State Engineer's failure to follow the mandate of *Desert Irr.* that an extension cannot be based on an intent to use water outside the authorized place of use. *See Desert Irr.*, 113 Nev. at 1055, 944 P.2d at 839.

4. The State Engineer's Extensions Improperly Presumed That a Future Application to Change the Place of Use Would Be Granted

The State Engineer also could not grant the extensions because Intermountain must first obtain approval of an application to change the place of use before it could use the permitted water elsewhere. *See* NRS 533.370. Every permit issued by the State Engineer describes the authorized place of use, and the water is only appurtenant to that land. *See Adaven Mgmt., Inc. v. Mountain Falls Acquisition Corp.*, 124 Nev. 770, 773, 191 P.3d 1189, 1191 (2008). To use the water in a different place, the permit holder must file an application to change the

place of use. *See* NRS 533.370; *State v. Morros*, 104 Nev. 709, 717, 766 P.2d 263, 268 (1988).

> If at any time it is impracticable to use water beneficially or economically at the place to which it is appurtenant, the right may be severed from the place of use and be simultaneously transferred and become appurtenant to another place of use, ***in the manner provided in this chapter***.... NRS 533.040 (emphasis added).

An application to change the place of use must meet numerous statutory criteria, with an interbasin transfer being subject to more rigorous requirements. *See* NRS 533.370. Intermountain's extension applications did not even attempt to satisfy these statutory mandates, presumably because Intermountain has not filed any applications to change the place of use. III(647-658). For example, Intermountain did not demonstrate a "justified need to import the water" into the Cold Springs valley; propose a conservation plan for Cold Springs; or discuss whether the importation of water into Cold Springs is "environmentally sound" or "an appropriate long-term use" in light of the resulting limitations on agricultural development in Dry Valley. *See* NRS 533.370 (3); *Bacher*, 122 Nev. at 1116–17, 146 P.3d at 797.

Even if it had, notice of an application to change the place of use would have to be published according to the statutory requirements, and the State Engineer would have to give the public an opportunity to file protests. *See* NRS 533.360. In other words, a change application cannot be approved (implicitly or explicitly) in

the context of a request for extension of time. *See* NRS 533.360, 533.370, 533.380. As a result, when reviewing Intermountain's extension requests, the State Engineer could not presume that as-yet unfiled applications to change the place of use of the permitted water would be granted. *See* NRS 533.360, 533.370, 533.380.

D. The Extensions Improperly Allowed Intermountain to Speculate in Water

1. Intermountain Failed to Submit Any Evidence of a Contractual or Agency Relationship With An Entity That Plans To Put The Water To Use in the Permitted Area

As the State Engineer recognized, a would-be appropriator must prove both with its initial applications and with any extension request that it is not speculating in water. III(664). In addition to the statutory scheme that prohibits water speculation, Nevada has expressly adopted the anti-speculation doctrine, which "addresses the situation in which the purported appropriator does not intend to put water to use for its own benefit and has no contractual or agency relationship with one who does." *Bacher*, 122 Nev. at 1119, 146 P.3d at 799 (quoting *Three Bells Ranch v. Cache La Poudre*, 758 P.2d 164, 173 n. 11 (Colo. 1988)). To protect against speculation, the statutory scheme requires a would-be appropriator to "apply the water to the intended beneficial use with reasonable diligence." *Bacher*, 122 Nev. at 1119-20, 146 P.3d at 799, quoting Hrg. on S.B. 98 Before the Assembly Gov't Affairs Comm., 68th Leg. (Nev., April 11, 1995).

Here, the factual record is undisputed that Intermountain has no intention to itself develop the pipeline project, lacks the financial capacity to do so and has no agency or contractual relationship with the municipal water purveyor that serves the proposed place of use.[16] Instead, as Intermountain has admitted since 2011, it simply seeks to sell the water rights.[17]

Because the June 1, 2016 Decision acknowledged that permits can be canceled for failure to comply with the anti-speculation doctrine, the State Engineer's statement that *Bacher* had not been decided when Intermountain's permits were first granted is irrelevant. III(664). NRS 533.395(1) protects against speculation by requiring proof that "the holder" of the permit act in good faith and with reasonable diligence to put the water to beneficial use.[18] If the permit holder does not intend to itself perfect the application, it is axiomatic that the water could

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[16] I(224); IV(1029); V(1124, 1128, 1136, 1140); VIII(1826).

[17] *Id.* Contrary to the State Engineer's assertion, SPI does not invoke the anti-speculation doctrine to contend that there is any restriction on the alienability of water rights. III(664), *citing Adaven*, 124 Nev. at 770, 191 P.3d at 1189. Rather, SPI's position is that Intermountain violates the anti-speculation doctrine by having no intent or ability to use the water in its permitted location and no agency relationship with one that does. Unlike Intermountain's permits, the water rights in *Adaven* had been put to beneficial use, and there was no question as to whether they had been perfected. *See id.* at 772, 191 P.3d at 1191.

[18] In addition to the statutory language, the legislative history of NRS 533.380 and 533.395 shows that the evidentiary requirements to obtain an extension were designed to protect against speculation. II(448-450) (Assemblywoman Freeman, the bill's sponsor: "[A]ddressing the topic of reasonable diligence as it relates to water permits," the proposed statutory changes "will give the state engineer additional tools to prevent any speculation on water.").

only be put to use through a contract or agency relationship with someone who does. As a result, *Bacher* did not articulate some new rule that did not exist at the time Intermountain's permits were granted; it simply clarified the statutory requirements. 122 Nev. at 1119-20, 146 P.3d at 799.

In any event, each time the State Engineer considers an extension request, he must ensure the permit holder is exercising reasonable diligence to construct the diversion works and put the water to use solely in the manner allowed by the permit. NRS 533.380. If the permit holder has no such intention, it is the permit holder, i.e. Intermountain, who must demonstrate through substantial evidence how the permits will be perfected. NRS 533.380(3)-(4); NRS 533.395(1). Because Intermountain candidly admits it has no intention to itself use the permitted water, in the absence of a contractual or agency relationship with the municipal water supplier for the geographical area authorized by the Permits, the State Engineer had no discretion to grant the extensions to Intermountain. *See Bacher*, 122 Nev. at 1119, 146 P.3d at 799. The district court's order did not even address this infirmity. XI(2751-2759).

2. The Marshall Affidavit Does Not Satisfy The Anti-Speculation Doctrine

In the June 1, 2016 Decision, the State Engineer found that Intermountain purportedly complied with the anti-speculation doctrine by "affirm[ing] that it has secured agreements with engineering and construction firms, Utilities, Inc., and

developers." III(664), citing paragraphs 5, 6 and 7 of Marshall's affidavit. The district court deemed this sufficient. XI(2756). Yet Marshall's affidavit says nothing about a contractual or agency relationship with a municipal water purveyor who plans to distribute the water in the permitted place of use. III(656). Specifically, the alleged "Option Agreement" with "engineering and construction firms" referenced in Paragraph 5; the alleged Utilities, Inc. agreement to distribute water in Cold Springs referenced in Paragraph 6; and the non-existent "Developer agreements" in Paragraph 7 do not purport to be with a municipal water purveyor or anyone else who intends – and has the financial means – to serve the Lemmon Valley parcels identified in the Permits.[19] III(656). Rather than comply with the anti-speculation doctrine, the State Engineer encourages speculation.

[19] Indeed, the service territory of Utilities, Inc. (now known as Great Basin Water Company) does not even include the place of use authorized by the Permits. https://www.uiwater.com/nevada/regulations/tariff-rates The State Engineer cannot presume that the Public Utilities Commission of Nevada would approve annexation of this area. *See* NRS 704.355 ("determining whether to issue a certificate of public convenience and necessity to a new public utility that authorizes the construction, ownership, control or operation of any line, plant or system for the purpose of furnishing water for municipal, industrial or domestic purposes…, the Commission shall consider whether another public utility or person is ready, willing and able to provide the services in the geographic area proposed by the applicant for the certificate"). The Court may take judicial notice of Great Basin Water Company's tariffs. *See* NRS 47.130.

E. Intermountain Did Not Provide "Proof and Evidence" to Meet the Statutory Requirements for an Extension

Even if the State Engineer could base an extension on an effort to develop water at an unauthorized location (which SPI steadfastly disputes), the documents submitted by Intermountain did not meet the substantial evidence standard to satisfy each of the statutory criteria.

1. There is No Evidence to Satisfy NRS 533.380(4) For a Municipal Project

As to the requirements for an extension of time to perfect a municipal appropriation, the district court made only the conclusory statement that the State Engineer "addressed the elements set forth under NRS 533.380(4)." XI(2755). The district court did not point to any language in the June 1, 2016 Decision to support this assertion nor cite specific evidence that satisfied each element. XI(2755). The record shows no such evidence existed:

a. Intermountain Did Not Submit Evidence To Show Good Cause For Failing to Use the Permitted Water But Rather Admits It Does Not Intend To Do So

The evidence before the State Engineer showed that Intermountain is marketing its water for sale, not planning to put it to beneficial use within the permitted area.[20] In the June 4, 2015 Decision, the State Engineer expressly stated that "the inability to secure a buyer in future requests for extensions of time **will**

[20] I(224); IV(1029); V(1124, 1128, 1136, 1140); VIII(1826).

not be considered good cause for extensions of time." IV(1029) (emphasis in the original). Yet in the June 1, 2016 Decision, the State Engineer completely ignored his earlier mandate when he found good cause for the extensions even in the absence of any evidence that Intermountain had secured a buyer, much less a buyer who could use the water in the permitted place of use. III(665). The State Engineer's grant of extensions of time in direct violation of his own previous order is the hallmark of arbitrary and capricious decision making. *See Marmolejo–Campos v. Holder*, 558 F.3d 903, 914 (9th Cir. 2009) (en banc) (an "unexplained inconsistency" between agency decisions is impermissibly arbitrary).

b. Intermountain Failed To Submit Evidence Of Parcels That Allegedly Will Be Served By Its Permits

Intermountain presented no evidence to the State Engineer of any particular residential or commercial development, parcel or unit that is slated to be served by the water appropriated under the Permits. III(654-658). To skirt this "fundamental defect," *Bacher*, 122 Nev. at 1122-23, 146 P.3d at 801, Marshall made the unsubstantiated assertion that "Intermountain has had numerous meetings with Developers [*sic*] whose plans involve construction of nearly 10,000 houses." III(656). Marshall's inclusion of this statement in his affidavit did not satisfy the statutory standard for a number of reasons. *See* NRS 533.380(4)(b).

First, mere meetings with certain unidentified developers do not constitute substantial evidence of specific parcels that will be served by the appropriated

water, as the statute requires. *See id.*; *Bacher*, 122 Nev. at 1122-23, 146 P.3d at 801. Second, to the extent those unidentified developers actually plan to construct 10,000 houses, there is no evidence that those houses will be constructed in the place of use identified in Intermountain's applications. III(656). To the contrary, where Marshall's affidavit states that Intermountain is contracting with a purveyor for Cold Springs, he concedes the alleged housing developments ***are not*** in the authorized place of use. III(656).

Third, "[a] 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." *Desert Irr.*, 113 Nev. at 1057, 944 P.2d at 841. This Court has rejected statements that had much more specificity than Marshall's as failing to meet the substantial evidence standard. *See id.*; *Bacher*, 122 Nev. at 1122–23, 146 P.3d at 801. Marshall's affidavit is precisely the type of "speculative evidence of development projects [that] is not sufficient to survive a substantial evidence inquiry on review." *Bacher*, 122 Nev. at 1122-23, 146 P.3d at 801 n.37.

c. Intermountain Failed to Submit Evidence of Economic Conditions That Prevented Intermountain From Putting the Water to Beneficial Use

NRS 533.380(4)(c) requires the State Engineer to consider "economic conditions which affect the ability ***of the holder*** to make a complete application of

the water to a beneficial use." (emphasis added). Here, it is undisputed that the permit "holder," i.e. Intermountain, does not itself intend to put the water to beneficial use.[21] As a result, under no circumstance could Intermountain ever provide substantial evidence to satisfy this statutory standard. *See id.*

Attempting to overcome this infirmity, Intermountain cited to portions of TMWA's Draft 2016-2035 Water Resource Plan to argue that it could satisfy NRS 533.380(4)(c). III(652). Even if Intermountain could depend on these statements as the "proof and evidence" required by NRS 533.380, they do not describe the economic conditions facing the Intermountain project in the previous extension period or even the previous three extension periods. III(652). Rather, they only describe economic conditions in TMWA's service territory through 2013. III(652).

In his June 1, 2016 Decision, the State Engineer cited the "severe economic downturn from 2007-2013" as support for his conclusion "that Intermountain's efforts were reasonable." III(663 n.9). The State Engineer failed to look at the economic conditions from 2013 to the present, and there is not substantial evidence to show that economic conditions at the time of the 2016 extension requests prevented Intermountain from perfecting the water rights. III(648-657, 663 n.9).

[21] I(224); IV(1029); V(1124, 1128, 1136, 1140); VIII(1826).

In fact, the TMWA Plan on which both Intermountain and the State Engineer relied demonstrates that economic downturn had been over for three years at the time Intermountain sought its extensions:

> [A] number of key events … have occurred over the past five years which include: … A reversal of negative or stagnant economic trends dominating the region since 2007 which altered the economic activity and growth expectations for the Truckee Meadows. ***The region began experiencing a modest economic resurgence in late 2013 which continues today***. II(494) (emphasis added); *see also* II(507-509) (noting signs of economic recovery starting in 2012 and the corresponding increase in home buying and will-serve commitments)).

After 17 years without any evidence that construction of Intermountain's interbasin pipeline would commence at all, the State Engineer needed to do more than simply note a past economic downturn that ended three years earlier in order to justify further extensions. *See* NRS 533.380(4)(c). Because the question of whether Intermountain's proposed project to deliver water to Lemmon Valley would ever be economical is purely speculative, particularly where the North Valleys Importation Project already has the capacity to serve the place of use of Intermountain's Permits, the State Engineer's extension is not supported by substantial evidence. *See Bacher*, 122 Nev. at 1122-23, 146 P.3d at 801 n.37.

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d. Intermountain Failed to Submit Evidence of Any Plan Developed Pursuant to NRS 278 or NRS 278A That Includes Use Of The Permitted Water

The June 1, 2016 Decision did not cite to any evidence of a plan authorized by NRS Chapters 278 or 278A that includes a development that Intermountain's proposed water importation project will serve. III(660-666); *see* NRS 533.380(4)(e). Because the State Engineer's analysis of this and the other criteria in NRS 533.380(4) was mandatory, absent such evidence, the State Engineer's grant of the extensions to Intermountain was arbitrary, capricious and an abuse of discretion. *See Bacher*, 122 Nev. at 1122-23, 146 P.3d at 80.

2. Intermountain's "Evidence" Showed an Effort to Maintain the Status Quo, Not Perfect Its Applications

The list of alleged expenses submitted by Intermountain lacked any evidence to show diligence in building the diversion works or developing property in the authorized place of use. III(629). Rather, those claimed expenses relate only to maintaining the status quo: maintenance of existing test wells; fees charged by the State Engineer for applications of extension of time; costs associated with marketing pitches to sell the water on speculation; and legal and other expenses related to holding and defending the unperfected permits. III(629). Moreover, the invoices were not sufficiently descriptive to allow the State Engineer to do anything other than speculate as to the work performed. III(630-644). Where Intermountain frankly admits it plans to sell the water for use outside the permitted

area, the invoices at most support Intermountain's marketing efforts, not perfection of the Permits.[22]

3. The Marshall Affidavit Is Unreliable Because Marshall Failed to Provide the Alleged "Agreements" He References

After 14 years of Intermountain's failure to construct the diversion works or prove beneficial use, it was not reasonable for the State Engineer to rely on unsupported statements to grant the extensions. The substantial evidence inquiry "presupposes the fullness and fairness of the administrative proceedings.…" *Revert*, 95 Nev. at 787, 603 P.2d at 264. In that regard, the "substantial evidence" on which the State Engineer relies must be "in the record before him." *Eureka Cnty v. State Eng'r*, 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1121 (2015) (reversing a State Engineer's decision that was based on unsupported findings). Speculative statements do not satisfy the substantial evidence standard. *Bacher*, 122 Nev. at 1122-23, 146 P.3d at 801 n.37.

Notwithstanding these requirements, the State Engineer relied on grossly unreliable, self-serving and inconsistent representations in Marshall's affidavit, without any documentary support. III(662-666). In particular, Paragraphs 5, 6 and 7 of the affidavit, to which the June 1, 2016 Decision specifically cited, do not satisfy the statutory criteria. III(656, 662-666).

[22] I(224); III(630-644); IV(1029); V(1124, 1128, 1136, 1140); VIII(1826).

Paragraph 5:

> During 2015, Intermountain entered into an Option Agreement with two world-wide engineering and construction firms, experienced in water systems development. One firm is located in Chicago, Illinois and the other is located in Tel Aviv Israel. III(656).

This statement is not "proof and evidence" that either of these firms plans to put the water to beneficial use in locations authorized by the Permits. NRS 533.380(3). Indeed, it does not even assert that the alleged "Option Agreement" relates to the project at issue in this case and does not describe what is being "optioned." III(656). And while these firms purportedly engage in "engineering and construction," there is no evidence that the purpose of the alleged agreement is to provide those services for construction of the pipeline contemplated in Intermountain's permits. III(656). Because the record is replete with representations that Intermountain has no ability to finance construction of pipeline, water treatment facility and related infrastructure,[23] the State Engineer could not assume otherwise. *See Eureka Cnty*, 131 Nev. at __, 359 P.3d at 1121.

Paragraph 6:

> Intermountain, during 2015 and early 2016 has had extensive negotiations with Utilities Inc., Nevada and Arizona, a PUCN certified utility company to distribute Intermountain's water to its present and future customers in the Cold Springs area of Washoe County. An agreement has been reached and is in the process of being signed. III(656).

[23] I(224); III(630-644); IV(1029); V(1124, 1128, 1136, 1140); VIII(1826).

Setting aside the fundamental defect discussed above that Cold Springs is not part of the permitted place of use,[24] Marshall's unsubstantiated statement regarding the alleged agreement "uncorroborated with any actual evidence … [is] insufficient to justify [an] … extension." *Desert Irr.*, 113 Nev. at 1057, 944 P.2d at 841; *see also Bacher*, 122 Nev. at 1122-23, 146 P.3d at 801 (rejecting testimony that lacked specificity).

Paragraph 7:

> Intermountain has had numerous meetings with Developers whose plans involve construction of nearly 10,000 houses. The developments are in various stages of permitting, with all but one small one, in the City of Reno. Much work has been done by the developers to date. All of the developments are adjacent to or very near the existing developed areas. Intermountain expects to have Developer agreements in hand within three to four months. III(656).

This uncorroborated statement likewise does not show reasonable diligence because (1) it says nothing about whether the "developments" are located within the place of use of the permitted rights; (2) Marshall candidly admits that no agreements have been reached; and (3) there is no evidence that the "Developers" seek to use the permitted water to service their developments. *See Desert Irr.*, 113 Nev. at 1057, 944 P.2d at 841.

The State Engineer's finding that Intermountain had "secured" development agreements is clearly not supported by this statement. *Compare* III(656) *to*

[24] IV(914-916); V(1060-1062, 1182-85); VIII(2054-2055); IX(2066-2069, 2198-2286).

III(664). Even if it were, a "reasonable mind," the keystone of a substantial evidence inquiry, would not simply accept Marshall's word that such agreements exist. *See Eureka Cnty*, 131 Nev. at __, 359 P.3d at 1121; *Revert*, 95 Nev. at 787, 603 P.2d at 264. Moreover, even if the documents exist, the fact that they exist should not have ended the State Engineer's analysis; the State Engineer needed to request those alleged documents to review their content. *See Revert*, 95 Nev. at 787, 603 P.2d at 264; *Eureka Cnty*, 131 Nev. at __, 359 P.3d at 1121; *Desert Irr.*, 113 Nev. at 1057, 944 P.2d at 841.

What did the purported agreements say? Are they enforceable? Do the contracting parties seek to buy the water rights? Do they have the financial means to develop the diversion works and put the water to beneficial use in the foreseeable future? Are the alleged developments within the permitted place of use? Why would Intermountain contract with engineering and construction firms if it plans to sell the water to a utility and/or developers?

The district court discounted SPI's challenge to the reliability of Marshall's statements as a "subjective" belief that they were not "good enough." XI(2756). Yet by pointing out the deficiencies in Intermountain's application, SPI simply underscored that a "reasonable mind" would not deem the Marshall affidavit adequate to justify Intermountain's continued lock on the entire Dry Valley aquifer when SPI and others are presently prepared to put the water to beneficial use. *See*

NRS 533.025. A reasonable mind would have demanded the documents themselves to ensure they satisfy the statutory requirements. *See Bacher*, 122 Nev. at 1121, 146 P.3d at 800.

4. The State Engineer Ignored His Previous Pledge To Closely Scrutinize Intermountain's Extension Requests

The defects in the June 1, 2016 Decision are particularly egregious because, according to the June 4, 2015 Decision, the State Engineer planned to "closely scrutinize" future extension requests. IV(1029). Judge Flanagan only affirmed the June 4, 2015 Decision based upon the State Engineer's stated commitment to engage in such close scrutiny, noting that "the writing is on the wall" as to whether Intermountain can continue to monopolize the entire Dry Valley resource in "this…close case." X(2489). "Close scrutiny" means the State Engineer had an obligation to test the competency of Marshall's unsubstantiated statements by, at a minimum, requesting a copy of the actual documents that Marshall's affidavit purported to describe. *See Eureka Cnty*, 131 Nev. at __, 359 P.3d at 1121.

Rather than fulfill that obligation, the State Engineer deferred it to Intermountain's next extension requests. III(666). However, the State Engineer could only rest on substantial evidence "presently known" at the time of the June 1, 2016 Decision, not on "information to be determined in the future." *Eureka Cnty.*, 131 Nev. at __, 359 P.3d at 1120. Because the State Engineer failed to "closely scrutinize" Intermountain's extension requests and instead relied on speculation,

the Court can and should second guess the State Engineer's findings. *See Revert*, 95 Nev. at 786, 603 P.2d at 264. The district court did not even address whether the June 1, 2016 constituted the "close scrutiny" promised by the State Engineer. XI(2751-2759).

5. The *Chevron* Case on Which The State Engineer Relied Is Not Analogous

Although the district court did not discuss it, the State Engineer erroneously deemed Intermountain's "evidence" adequate based on alleged parallels to a case decided by the Colorado Supreme Court. III(662-663), *citing Mun. Subdistrict, N. Colo. Water Conserv. Dist. v. Chevron Shale Oil Co.*, 986 P.2d 918 (Colo. 1999). In numerous ways, Marshall's unsubstantiated affidavit is incomparable in quality and quantity to the evidence presented in *Chevron*. *Compare* III(654-657) to *Chevron*, 986 P.2d at 920-23.

a. Unlike In *Chevron*, The State Engineer Did Not Test The Accuracy Or Reliability Of Intermountain's "Evidence"

In contrast to Marshall's unsubstantiated representations accepted by the State Engineer, the evidence that the Colorado Supreme Court deemed sufficient to show reasonable diligence had been presented to Colorado's Water Court in a three-day trial, subject to cross examination. *Id.* at 920. At trial, the party opposing the extension did not dispute the evidence or challenge the accuracy of the water court's factual findings. *See id.* at 921-23. And on appeal, the Colorado Supreme

Court independently reviewed the record and concluded that the water court's findings were supported by "competent evidence." *Id.* at 923.

Here, Marshall's affidavit provided no details as to the content of referenced documents, much less the documents themselves. III(654-657). The State Engineer did not request copies of the documents or seek any information as to their content. III(666). Likewise, the State Engineer did not hold a hearing on Intermountain's extension requests to subject Marshall to cross examination on his statements or the invoices he submitted. Instead, the State Engineer simply accepted Marshall's unsupported representations at face value. III(666). Where Intermountain's submission does not come close to the caliber of evidence heard and considered at trial by the Colorado Water Court, *Chevron* is not analogous.

b. Unlike In *Chevron*, Marshall Has No Intent Or Ability to Put The Permitted Water To Beneficial Use

Chevron is also distinguishable because, there, the holder of the conditional water rights (i.e. Chevron) itself "intend[ed] to perfect [its] rights at some point in the future by using the water for the production of shale oil and its by-products." *Chevron*, 986 P.2d at 920. The water rights were appropriated "for use in connection with Chevron's shale oil project," and Chevron owned the oil shale lands where the water was to be put to beneficial use. *Id.* Chevron had pursued numerous activities to put the water to beneficial use in its project and submitted a

planning document to the water court that contained various scenarios for the project start-up date. *Id.* at 921-922.

In contrast, here, it is undisputed that Intermountain has no intent to itself put the water to beneficial use but, rather, simply hopes to sell the water rights for profit.[25] Likewise, Intermountain does not own any land in Dry Valley or the proposed place of use, unlike Chevron, which made plans for and sought to use the water for its own development project on land it owned. *Compare Chevron*, 986 P.2d at 920-22. Because Intermountain failed to submit any evidence of comparable plans (because no such plans exist), the State Engineer's reliance on *Chevron* was misplaced. *See id.*

CONCLUSION

More than a decade has passed since the original deadline for Intermountain to perfect its water appropriations. Yet in that time period, Intermountain has not constructed the production wells, pipeline, treatment facility or related infrastructure to put the water to use. Nor has Intermountain contracted with a municipal purveyor who can serve the Lemmon Valley parcels authorized in the Permits. Nevertheless, in derogation of his statutory duty, the State Engineer has allowed Intermountain to wager that, at some point in the future, the water might become marketable for municipal uses.

[25] I(224); III(630-644); IV(1029); V(1124, 1128, 1136, 1140); VIII(1826).

Rather than discourage speculation, the June 1, 2016 Decision promotes it. Based solely on unsubstantiated and unreliable statements, the State Engineer allows Intermountain to commandeer Nevada's public resources to the detriment of other would-be appropriators, such as SPI, who are currently prepared to put the Dry Valley water to beneficial use. By deeming the information provided by Intermountain the "proof and evidence" demanded by NRS 533.380, the State Engineer has rendered the statutory requirements meaningless. The State Engineer exceeded his authority by granting extensions based on mere assertions, particularly where those assertions express an intent to use the water outside its permitted place of use.

In light of these infirmities, SPI respectfully requests that the Court reverse the district court's order and direct the district court to grant SPI's petition for judicial review, vacate the extensions granted to Intermountain for Permits 72700, 64977, 64978, 66400, 73428, 73429, 73430 and 74327, and remand the matter to the State Engineer with instructions to cancel the permits.

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AFFIRMATION

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

Dated this 8th day of February, 2018.

By: */s/ Debbie Leonard*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief 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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 10,074 words.

Pursuant to NRAP 28.2, 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 Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th day of February, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano, LLP, and that on this 8th day of February, 2018, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system and others not registered will be served via U.S. mail as follows:

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