

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 73933

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Elizabeth A. Brown
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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

JOINT APPENDIX

VOLUME XI

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IN THE SUPREME COURT OF THE STATE OF NEVADA

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that **JOINT APPENDIX VOLUME XI** does not contain the social security number of any person.

DATED this 8th Day of February, 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDonald Carano, LLP and that on February 8, 2018, **JOINT APPENDIX VOLUME XI** 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). Pursuant to NRAP 30(f)(2), all Participants in the case will be served and provided an electronic copy via U.S. mail as follows:

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

* * * * *

SIERRA PACIFIC INDUSTRIES, a California
corporation,

Case No. CV16-01378

Dept. No. 1

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,

Respondents.

and

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

Respondent-Intervenor

**RESPONDENT-INTERVENOR INTERMOUNTAIN WATER SUPPLY'S
ANSWERING BRIEF**

JA2518

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1
2 **RESPONDENT-INTERVENOR INTERMOUNTAIN WATER SUPPLY'S**
3 **ANSWERING BRIEF**

4 Respondent-Intervenor Intermountain Water Supply (“Intermountain”), by and
5 through its attorney, Richard L. Elmore, and pursuant to the September 2, 2016,
6 Stipulated Request to Amend the Scheduling Order, submits its answering brief, as
7 follows:

8 **I. INTRODUCTION**

9 This appeal by Sierra Pacific Industries (“SPI”) involves the State Engineer’s
10 June 1, 2016, decision to grant Intermountain Water Supply, Ltd. (“Intermountain”) a
11 one-year extension of time in in reference to its water rights and water supply project
12 under permits 64977, 64978, 73428, 73429, 73430, 74327, and 72700. ROA 618-624.¹
13 This appeal almost immediately follows a prior and unsuccessful appeal to this Court
14 by SPI of the State Engineer’s June 4, 2015, decision granting a similar one-year
15 extension of time to Intermountain in reference to the same water rights and water
16 supply project. *See* ROA 580-586.

17 Because SPI’s most recent objection:

- 18 - pre-dated any application by Intermountain for an extension of time and was,
19 therefore, a non-responsive objection,
20 - was submitted to the State Engineer at a time when the prior judicial review
21 proceedings before this Court were still pending,
22 - raised the same issues and claims that were under submission with this Court
23 at that time and later ruled upon by this Court in favor of Intermountain, and

24 ¹ The State Engineer’s June 1, 2016, letter granting a one-year extension to
25 Intermountain is repeated in the record for each permit to which it applies. *See* ROA 618-
26 624 (with the documents concerning permit 64977), 636-642 (with the documents
27 concerning permit 64978), 654-660 (with the documents concerning permit 66400), 671-77
28 (with the documents concerning permit 72700), 707-713 (with the documents concerning
permit 73428), 725-732 (with the documents concerning permit 73430), and 741-747 (with
the documents concerning permit 74327). Because the letter, on its face, applies globally to
all of those permits and is simply duplicated throughout the record to be included with
documents relating to each permit, and to avoid unnecessary and cumbersome references to
the record, only one reference to the State Engineer’s June 1, 2016, letter will be cited – that
at ROA 618-624. Each reference to ROA 618-624, or any portion of that reference,
includes reference to all other places in the record in which the State Engineer’s June 1,
2016, letter appears, as just described.

1 - failed to address the documents and information submitted by Intermountain
2 in support of its March 8, 2016, application for an extension of time,
3 SPI's request for judicial review raises issues in this appeal that have been waived by
4 SPI's failure to respond to the evidence and information provided by Intermountain in
5 the proceedings before the State Engineer, and are otherwise barred by issue preclusion
6 and the law-of-the-case doctrine. To the extent that this Court will nevertheless
7 entertain SPI's petition for judicial review, the State Engineer's decision to grant
8 Intermountain's March 8, 2016, application for an extension of time was supported by
9 the substantial evidence provided by Intermountain in support of that request –
10 evidence to which SPI never objected or responded in the underlying proceedings
11 before the State Engineer. Moreover, the State Engineer's refusal to extend the anti-
12 speculation doctrine adopted in *Bacher v. State Engineer*, 122 Nev. 1110, 146 P.3d 790
13 (2006) is consistent with the doctrine, as adopted in *Bacher*, with the evidence
14 Intermountain provided in support of its application for an extension of time, and with
15 the prior decision of this Court. Thus, SPI is not entitled to judicial review of the State
16 Engineer's June 1, 2016, decision granting Intermountain's March 8, 2016, application
17 for an extension of time.

18 ///

19 ///

20 ///

II. OVERVIEW

A. *Intermountain's Municipal Water Supply Project and its Dry Valley Water Rights.*²

The water rights permits at issue in this appeal concern Intermountain's water supply project ("the Project"). Since the inception of the Project in or about 1996/1997, Intermountain has sought to supply water to meet the growing municipal water demands in Lemmon Valley, where the demand for water exceeds the available groundwater supply in the basin where it is located. ROA 583 (January 12, 2016, Order denying SPI's Petition for Judicial Review). In 1997, the Washoe County Regional Water Planning Commission analyzed the Project and concluded that it was a potential source of water for the North Valleys and should be "aggressively pursued and implemented..." ROA 583, citing to the 1997 Amendment to 1995-2015 Regional Water Management Plan, "1995-2015 Plan," ROA at 818-829.³ In 2000, the Regional Water Planning Commission reaffirmed that the Project conformed to the 1995-2015 Plan by specifically including the Dry Valley sources that are the subject of this action. ROA 583.

The State Engineer granted Intermountain's water rights in 2002, 2006, and

² The prior judicial review proceedings in this Court are Second Judicial District Court case number CV15-01257. Those proceedings concern the same parties, the same water rights permits, and the same factual background that are at issue in this case. In large part, this Court has considered and set out the relevant factual background of this case and determined the legal issues raised by SPI in this case concerning Intermountain's water rights permits and water supply project. See January 12, 2016, Order denying SPI's petition for judicial review, ROA 580-586; see also December 14, 2015, oral argument the parties in this case and this Court's bench ruling, ROA at 2343-2405. Indeed, the outcome of those proceedings are part of the record in this case. *Id.* Thus, Intermountain requests that this Court take judicial notice of those proceedings and the record in that case. NRS 47.150; *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (allowing judicial notice of a prior proceeding where the cases are closely related; judicial notice may be invoked to take cognizance of the record in another case). For ease of reference, Intermountain cites to this Court's prior factual findings as provided in the record.

³ This finding and evidence, on its face, overcomes and completely undermines SPI's introductory statement that "there is no proven demand" for the Project. See Opening Brief at 1:7.

2008. ROA at 583; *see also* Table of Permits, attached as Exhibit “1.” In so doing, the State Engineer set various deadlines for building the infrastructure necessary to divert groundwater (the proof of completion, or “POC”) and for putting the water to beneficial use (the proof of beneficial use, or “PBU”). *Id.* Under these conditions, the earliest date by which Intermountain was required to submit the PBU was 2007 and the latest was 2013, as follows:

Permits 64977-78 and 66400: POC – 2005 PBU – 2007

Permits 73428-30 and 74327: POC – 2008 PBU – 2009

Permit 72700: POC – 2010 PBU – 2013

ROA at 583; *see, i.e.*, ROA at 772, 835, 969, 1102, 1696, 1984, 2295. Notably, the 2007 date by which Intermountain was required to show beneficial use was shortly before the economic downturn began. Because Intermountain had not yet acquired all necessary permits or completed the infrastructure to divert and put the water to beneficial use, it has sought and obtained one-year extensions of time to do so from the State Engineer under NRS 533.380. ROA at 583; *see also*, Table of Extension requests for Intermountain’s permits, attached as Exhibit “2.” Cumulatively, those applications show that, since its first water right permit was granted in 2002 through 2015, Intermountain has spent more than \$2,500,000.00 advancing its water supply project. *See also*, ROA at 584, 2382; Exhibit “2.” Those efforts include obtaining all necessary federal and state authorizations, approvals, and permits for its proposed pipeline across public lands, addressing endangered species concerns, and providing for reports and utilities required for its wells, as follows:

- In 2006, Intermountain completed an Environmental Impact Statement (“EIS”) as required by the National Environmental Policy Act (“NEPA”);
- In 2007, Intermountain obtained the approval of the Bureau of Land Management (“BLM”) for a right-of-way across public lands for the pipeline required from Lower Dry Valley and Bedell Flat to Lemmon Valley;
- In 2008, Intermountain obtained a right-of-way over public lands for a power line to bring electricity to its wells.

1 ROA at 584. To obtain these authorizations, Intermountain was required to engage
2 engineers and consultants to design and analyze every aspect of the Project and prepare
3 reports to the governmental agencies issuing the permits. *Id.*; ROA at 2378-2379.
4 Moreover, Intermountain was required to engage contractors to drill test wells and
5 hydrogeologists to conduct aquifer pumping tests to estimate the result of pumping
6 groundwater under the water rights. ROA at 584.

7 Since 2010, Intermountain's spending toward developing the Project has been
8 more conservative because of the uncertainties brought about by the economic
9 downturn. *See and compare* Intermountain's applications for extensions of time for its
10 water rights permits as identified in Exhibit "2." During this time, however,
11 Intermountain still maintained and complied with its prior approvals, conducted water
12 level monitoring, and resolved an issue with the PUC regarding a prior approval. *Id.*
13 Indeed, and to date, Intermountain has never stopped or stalled its ongoing
14 development of the Project.

15
16 ***B. Relevant procedural history related to SPI's objections to
Intermountain's applications in 2015 and 2016 for extensions of time.***

17 In December 2014, after Intermountain submitted its December 3, 2014,
18 application for an extension of time for Permit No. 72700 (ROA at 1754), SPI objected
19 to any additional extensions of time for any of its groundwater permits in the Dry
20 Valley basin, identifying ten different permit numbers to which its objection pertained
21 (ROA at 1756-1758). In its objection, SPI asserted that good cause to extend the time
22 for Intermountain to complete the diversion works and put the water to beneficial use
23 did not exist because:

- 24 - Intermountain had not commenced construction of the infrastructure needed
25 to transport water to its intended place of use (Lemmon Valley);
- 26 - Intermountain did not have any agreement with the Truckee Meadows Water
27 Authority ("TMWA"), which as of January 1, 2015, was to be the sole water
28 purveyor for Lemmon Valley;
- Intermountain did not intend to put the water to any beneficial use, but held

its permits in violation of the anti-speculation doctrine.

Id.

On June 4, 2015, after giving Intermountain an opportunity to respond to SPI's objection (ROA 1759-1760), the State Engineer granted Intermountain's request for an extension of time as it concerned permits 72700, 64977, 64978, 66400, 73428, 73429, 73430, and 74327.⁴ ROA 1787-1790. In so doing, the State Engineer evaluated Intermountain's project in the context of the 1995-2015 Regional Water Management Plan (the County contemplated the Project as a potential water source for the North Valleys), the costs and fees Intermountain incurred in reference to the Project in the preceding year, the application of the anti-speculation doctrine as stated in *Bacher v. State Engineer*, 122 Nev. 1110, 146 P.3d 790 (2006) and the impact of the poor economic conditions in recent years. *Id.* Based on its findings, the State Engineer concluded that, pursuant to NRS 533.380(4), good cause existed for granting Intermountain's application for an extension of time. *Id.* The State Engineer also advised that future requests for extensions of time in Intermountain's permits would be scrutinized to ensure that it adheres to the statutory criteria for granting extensions of time. *Id.*

SPI petitioned this Court for judicial review of the State Engineer's decision. ROA at 580. SPI asserted:

- the State Engineer erred by relying on the 1995-2015 Plan because a new regional plan has been adopted.
- the State Engineer did not engage in the analysis required by NRS 533.380(4).
- the State Engineer's decision to grant Intermountain's applications for extension of time is contrary to prior State Engineer decisions.
- the State Engineer was required to consider SPI's pending applications to appropriate water in Dry Valley when reviewing Intermountain's applications for extensions of time.

⁴ The State Engineer noted that because of the similarity of information in reference to those permit numbers, his decision applied equally to all of the listed permits. ROA at 1787.

1 - the State Engineer erred by not considering TMWA's Water Resource Plan
2 for 2010-2030.
3 ROA 585-586. After hearing the arguments of counsel for the parties, this Court
4 denied SPI's Petition for Judicial Review. ROA at 2303-2405 (transcript of December
5 14, 2015, judicial review hearing and bench ruling); ROA 580-586 (Order denying
6 judicial review). In so doing, it generally found that the State Engineer's June 4, 2015,
7 decision to approve the extension is supported by substantial evidence and disposed of
8 SPI's claims based upon the information and evidence in the record that was submitted
9 in the judicial review proceedings. *Id.* This Court also rejected SPI's assertion that the
10 State Engineer erred by not considering the Truckee Meadows Water Authority's Water
11 Resource Plan ("TMWA Water Resource Plan") for 2010-2030 due to SPI's failure to
12 submit that plan to the State Engineer as part of its objection. ROA 586. Though it
13 could have, SPI chose not to appeal this Court's order denying SPI's petition for
14 judicial review pursuant to NRS 533.450(9). Thus, this Court's order denying SPI's
15 petition for judicial review became final in all aspects.

16 On December 2, 2015 – prior to the December 14, 2015, judicial review hearing
17 and this Court's January 12, 2016, entry of its Order denying SPI's petition for judicial
18 review, and prior to any application by Intermountain for an extension of time – SPI
19 sent to the State Engineer an objection to any additional extensions of time to
20 Intermountain related to their permits. ROA at 5-12. As in its first objection to the
21 State Engineer (ROA 1757-1758), SPI asserted that:

- 22 - Intermountain is engaging in water speculation,
- 23 - Intermountain cannot satisfy the requirements of NRS 533.380
- 24 - There is no municipal demand for the water to which Intermountain has
25 rights.
- 26 - SPI is prepared to put to beneficial use the water to which Intermountain has
27 rights.

28 ROA at 5-12. SPI submitted with its objection a voluminous record, including the
29 TMWA Water Resource Plan. ROA 13-426. Subsequently, SPI submitted a

1 supplement to its objection to include with its record TMWA's 2016-2135 Draft Water
2 Resources Plan, which SPI claims to show that Intermountain has no contract with a
3 municipal water purveyor. ROA 430-579.

4 On March 8, 2016, Intermountain applied for an extension of time for one year
5 within which to comply with the provisions for filing the proof of completion of work
6 and proof of beneficial use. ROA 605. In its application, Intermountain stated that it
7 would need 5 years to construct the works of diversion or place the water to beneficial
8 use (*Id.*, answer to question number 4), and that its expenditures on the project in 2015
9 was \$23,300.39 (\$2,572,799.23 spent on the project to date). *Id.* Intermountain also
10 attached a statement in response to SPI's "pre-filed" objections. Though some of
11 Intermountain's response reiterated what had been argued and decided in the prior
12 proceedings and appeal (the application of *Bacher* and the impact of the economic
13 conditions of 2007-2013), Intermountain addressed the premature nature of SPI's
14 objection, discussed how the TMWA water plans reaffirm Intermountain's Project, and
15 provided a list of expenditures for the previous extension period and the supporting
16 affidavit of Robert W. Marshall (Intermountain's principal). ROA 605-617, 587-602.
17 *SPI did not respond to Intermountain's March 8, 2016, application or object to the*
18 *documents and information that Intermountain provided with its application.*

19 On June 1, 2016, the State Engineer, after considering SPI's "pre-filed"
20 objection and the evidence provided by Intermountain in its response to SPI's
21 objection, granted Intermountain's extension. The State Engineer – finding that, with
22 the exception of the TMWA planning documents, SPI's December 2, 2015, objection
23 re-raised the same legal arguments and cited to the same evidence asserted against
24 Intermountain's 2015 extension of time (ROA at 619 (fn. 2)) – undertook a
25 comprehensive overview and analysis of Intermountain's continued efforts on the
26 Project and to put the water to beneficial use. ROA at 618-624. To that end, the State
27 Engineer found that Intermountain's extensions went beyond mere statements of intent,
28

1 that they demonstrated a steady application of effort toward the project during the
2 previous extension period, that the TMWA water plans specifically identify and
3 reference Intermountain's Project, and that Intermountain showed good faith and
4 reasonable diligence in putting its water to beneficial use. *Id.* The State Engineer also,
5 again and thoroughly, addressed and dispelled SPI's contention that Intermountain is
6 speculating in water as it relates to NRS 533.370 and NRS 533.380 (the *Bacher* case,
7 *cited supra*), and outlined additional considerations in reference to most current water
8 resources plans that were included with SPI's most recent objection as they relate to the
9 Project. *Id.*

10 Despite that SPI provided no response or objection to Intermountain's March 8,
11 2016, application for an extension of time, SPI has again sought judicial review of the
12 State Engineer's decision, and primarily for the same reasons in its first unsuccessful
13 effort to seek review of the State Engineer's decision. SPI generally asserts that:

- 14 - the State Engineer's decision is not supported by substantial evidence that
15 Intermountain satisfied the requirements of NRS 533.380; and
- 16 - the State Engineer erred by failing to apply Nevada's Anti-Speculation
17 doctrine as a basis for denying Intermountain's application for an extension
18 of time.

19 SPI's assertions, however, are not only the same as the assertions it unsuccessfully
20 made in its objection to Intermountain's prior application for an extension of time and
21 its subsequent unsuccessful petition for judicial review (ROA 1756-1758; 1762-1765-
22 1786; 1787-1790; 2343-2405; 580-586), they include challenges to the documents and
23 information Intermountain provided with its application for an extension of time *and to*
24 *which SPI did not object.* Moreover, its assertions are contrary to the applicable
25 authority and the evidence and information Intermountain provided in support of its
26 ongoing efforts to develop the Project.⁵ Based upon his broad authority to make

27 ⁵ Indeed, this second effort by SPI to challenge the extensions of time granted
28 by the State Engineer to Intermountain and the unsupported bases on which it makes its
challenge clearly shows that what SPI intends is to essentially come in and take and profit
from the effort and millions of dollars that Intermountain has invested in its water supply

determinations regarding requests for extensions of time, the totality of the circumstances in reference to the Project, and his expertise, the State Engineer rendered a decision that was supported by substantial evidence. Thus, Intermountain requests that this Court deny SPI's petition for judicial review of the State Engineer's June 1, 2016, decision granting Intermountain an extension of time in reference to its water rights permits.

III. ARGUMENT

A. *Standard of Review*⁶

The water law and all proceedings under it are special in character and its provisions not only prescribe the method of procedure, but strictly limit procedure to that method. *In re Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949). When the State Engineer's decision is challenged in court, the decision is prima facie correct and the burden of proof is on the party attacking it. NRS 533.450(10); *Office of State Eng'r v. Morris*, 107 Nev. 699, 701, 703, 819 P.2d 203, 205 (1991); *Town of Eureka v. State Eng'r*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992). A decision of the State Engineer will not be disturbed on appeal unless it is arbitrary or capricious. *United States v. Alpine Land & Reservoir Co.*, 919 F.Supp. 1470, 1474 (D. Nev. 1996). A decision is not arbitrary or capricious simply because the reviewing court might have reached a different conclusion, but only if it is "baseless" or "despotic" or evidences "a sudden turn of mind without apparent motive; a freak, whim, mere fancy." *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

As to questions of fact, a court should not substitute its judgment for that of the State Engineer, pass on the credibility of witnesses, or reweigh the evidence. *Revert v.*

project. Certainly, by tying Intermountain up in the time, effort, and expense to respond to SPI's serial efforts to object to Intermountain's extensions of time is one way of sabotaging Intermountain's ability to continue to invest and develop its project.

⁶ The following standard of review reflects the standard of review applicable to this case that was stated by this Court in its January 12, 2016, Order denying SPI's petition for judicial review (ROA at 581-582). See footnote 2, *supra*.

1 *Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). It is the State Engineer's duty to
2 resolve conflicting evidence, and a court must limit itself to a "determination of
3 whether substantial evidence in the record supports the State Engineer's decision." *Id.*,
4 *citing N. Las Vegas v. Pub. Serv. Comm'n*, 83 Nev. 278, 429 P.2d 66 (1967).
5 Substantial evidence is that which "a reasonable mind might accept as adequate to
6 support a conclusion." *Bacher v. Office of State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d
7 793, 800 (2006), *citing State Emp. Sec. v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d
8 497, 498 (1986).

9 In addition, because the State Engineer has the implied power to construe the
10 state's water law, great deference should be given to those interpretations when they are
11 within the language of the statutes. *United States v. State Eng'r*, 117 Nev. 585, 589, 27
12 P.3d 51, 53 (2001) (noting that deference is especially important because the State
13 Engineer has a "special familiarity and expertise with water rights issues...."); *Pyramid*
14 *Lake Paiute Tribe of Indians v. Washoe Cnty.*, 112 Nev. 743, 747-48, 918 P.2d 697,
15 700 (1996); *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988). And even
16 though the State Engineer's interpretation of a statute is not controlling, "this court
17 recognizes the State Engineer's expertise and looks to his interpretation of a Nevada
18 water law statute as persuasive, if not mandatory, authority." *In re Nevada State Eng'r*
19 *Ruling No. 5823*, 128 Nev. ____, 277 P.3d 449, 453 (2012); *Andersen Family Assocs.*
20 *V. Ricci*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008); *United States v. Office of*
21 *State Eng'r*, 117 Nev. at 589, 27 P.3d at 53; *Pyramid Lake Paiute Tribe*, 112 Nev. at
22 748, 918 P.2d at 700; *Morros*, 104 Nev. at 713, 766 P.2d at 266. Similarly, the State
23 Engineer's conclusions of law, to the extent they are closely related to his view of the
24 facts, are entitled to deference and must not be disturbed if they are supported by
25 substantial evidence. *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986).

26 In this case, because SPI's objection predated any application by Intermountain
27 for an extension of time and, therefore, was not based on and did not address what
28

1 Intermountain provided to the State Engineer in its application, SPI waived its ability to
2 challenge on judicial review the bases on which Intermountain applied for and the State
3 Engineer granted an extension of time. To the extent that SPI's judicial review efforts
4 seek to re-argue the same objections that were the subject of its prior, unsuccessful
5 petition for judicial review, they are barred by the principal of issue preclusion and the
6 law-of-the-case doctrine. Notwithstanding the procedural and substantive bars to SPI's
7 current judicial review efforts, the State Engineer's decision is supported by substantial
8 evidence that Intermountain satisfied the requirements of NRS 533.380. Moreover, the
9 State Engineer did not err by refusing to extend the anti-speculation doctrine adopted in
10 *Bacher* to applications for extensions of time. Thus, SPI's petition for judicial review
11 should be denied.

12
13 ***B. Because SPI's December 2, 2015, objection predated any application by***
14 ***Intermountain for an extension of time and, therefore, was not based***
15 ***on and did not address what Intermountain provided to the State***
16 ***Engineer in its application, SPI has waived its ability to challenge on***
17 ***judicial review the bases on which Intermountain applied for, and the***
18 ***State Engineer granted, an extension of time.***

19 As an initial point, and as will be addressed repeatedly throughout this
20 Answering Brief, SPI's December 2, 2015, objection was not made in response to any
21 application by Intermountain for an extension of time. It pre-dated Intermountain's
22 application for an extension of time and, therefore, was not responsive to any
23 documents or information that were provided by Intermountain to the State Engineer in
24 support of its applications. See ROA at 5-12 (SPI's "pre-filed" December 2, 2015,
25 objection) and ROA 605-617, 587-602 (Intermountain's March 8, 2016, Application for
26 an Extension of Time and supporting documents). It also pre-dated the December 14,
27 2015, hearing on SPI's prior petition for judicial review (ROA at 2343-2405) and this
28 Court's January 12, 2016, Order denying SPI's petition for judicial review (ROA at
580-586), which addressed the challenges that SPI made in its anticipatory, but non-
responsive, general objection to any further extensions of time granted to

1 Intermountain. On its face, and as noted by the State Engineer (ROA at 619, fn. 2),
2 SPI's pre-filed objection primarily redundantly proffered the bases for its prior
3 objection on which the State Engineer had already ruled (ROA 1787-1790), and on
4 which this Court subsequently ruled (ROA 2343-2405; 580-586), in Intermountain's
5 favor.

6 In its March 8, 2016, application for an extension of time, Intermountain
7 submitted documents and information that established its ongoing efforts on the
8 Project, including the steps it took to negotiate and come to engineering, construction,
9 and utility agreements, and to pursue their negotiations with developers. ROA 605-
10 617, 587-602. Despite the three months that lapsed between Intermountain's March 8,
11 2016, application for an extension of time (ROA at 605-617, 587-602) and the State
12 Engineer's June 1, 2016, decision granting that application based upon the documents
13 and information Intermountain provided in support of it (ROA 618-624), SPI never
14 supplemented its objection to specifically address or challenge what Intermountain
15 provided to the State Engineer. Rather, SPI waited to raise its challenge to the bases on
16 which Intermountain sought an extension of time for the first time in its petition to this
17 Court for judicial review, which is tantamount to an appeal. *See* NRS 533.450(1)
18 (permitting judicial review of an order or decision of the State Engineer insofar as it
19 may be in the nature of an appeal). By doing so, however, SPI has waived its ability to
20 challenge the documents and information that Intermountain submitted to the State
21 Engineer for consideration with its application for an extension of time. *See Old Aztec*
22 *Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (a reviewing court will
23 not consider an argument or issue that is raised for the first time on appeal; a point not
24 urged in the lower court, unless it goes to the jurisdiction of that court, is deemed to
25 have been waived and will not be considered on appeal). Thus, and as referenced in
26 various points below, any challenge in SPI's petition for judicial review to the
27 documents and information that were provided by Intermountain in its March 8, 2016,
28

1 application for an extension of time and relied on by the State Engineer in its June 1,
2 2016, order granting that request should not be considered by this Court.

3
4 ***C. SPI's petition for judicial review is barred by issue preclusion and the
law-of-the-case doctrine.***

5 Having waived its ability to challenge on appeal that which it did not challenge
6 before the State Engineer in response to Intermountain's March 8, 2016, application for
7 an extension of time (*see, supra*), SPI's petition for judicial review otherwise raises
8 issues and claims that have already been decided by this Court in SPI's prior judicial
9 review proceedings. As a consequence, those issues and claims are barred by issue
10 preclusion and the law-of-the-case doctrine.

11 ***1. SPI's petition for judicial review is barred by issue preclusion.***

12 As more fully outlined above, SPI's petition for judicial review is based upon
13 the Intermountain's application for an extension of time and the State Engineer's
14 decision granting that request, both of which followed SPI's December 2, 2015, non-
15 responsive and "pre-filed" objection to any further extensions of time being extended to
16 Intermountain. As also outlined above and addressed in various points below, SPI's
17 judicial review efforts in this case (absent its challenges to the documents and
18 information provided by Intermountain in its application for an extension of time,
19 which SPI waived) include some of the same issues that SPI raised in its prior objection
20 to the State Engineer and its resulting petition for judicial review, which this Court
21 denied. ROA 2343-2405, 580-586. Those issues, however, are barred by the principles
22 of issue preclusion.

23 Issue preclusion prevents relitigation of an issue decided in an earlier action,
24 even if the later action is based on different causes of action and distinct circumstances.
25 *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008). In relevant
26 part, issue preclusion to applies when: (1) the issue decided in the prior litigation must
27 be identical to the issue presented in the current action; (2) the initial ruling must have
28

1 been on the merits and have become final; (3) the party against whom the judgment is
2 asserted must have been a party to the prior litigation; and (4) the issue was actually
3 and necessarily litigated. *Five Star*, 194 P.3d at 713. In this case, the prior judicial
4 review proceedings concerned the same parties, the same background, and the same
5 facts. This Court's ruling was on the merits; and, because SPI did not appeal this
6 Court's order denying its petition for judicial review, it became final. Thus, any issues
7 that SPI asserts in these proceedings that have been addressed and decided in the prior
8 proceedings (ROA at 618-624, 2343-2405, 580-586) are barred from re-consideration
9 by this Court.

10
11 2. *SPI's petition for judicial review is barred by the law-of-the-case doctrine.*

12 Similarly, SPI's petition for judicial review is barred by the law-of-the-case
13 doctrine based upon this Court's January 12, 2016, Order denying SPI's previous
14 petition for judicial review. Under the doctrine of the law of the case, when an
15 appellate court decides a principle or rule of law, that decision governs the same issues
16 in subsequent proceedings in that case. *See Ferguson v. Las Vegas Metro. Police*
17 *Dep't.*, 131 Nev. Adv. Op. 94, 364 P.3d 592, 597 (2015) *citing Dictor v. Creative*
18 *Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) and *Rebel Oil Co. v. Atl.*
19 *Richfield Co.*, 146 F.3d 1088, 1093 (9th Cir. 1998) (doctrine generally precludes a court
20 ***from reconsidering an issue that has already been decided by the same court***, or a
21 higher court in the identical case), *quoting United States v. Alexander*, 106 F.3d 874,
22 876 (9th Cir. 1997); *see also Office of State Engineer, Div. of Water Resources v. Curtis*
23 *Park Manor Water Users Ass'n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985) (the law-
24 of-the-case doctrine provides that where an appellate court states a principle of law in
25 deciding a case, that rule because the law of the case, and is controlling both in the
26 lower court and on subsequent appeals, so long as the facts are substantially the same),
27 *citing Andolino v. State*, 99 Nev. 346, 350, 662 P.2d 631 (1983). In this case, SPI's
28

December 2, 2015, non-responsive “pre-filed” objection to any further extensions of time being granted to Intermountain (ROA at 5-12) preceded this Court’s order denying its request for judicial review and raised the same issues that were addressed by the State Engineer (ROA 1787-1790) and subsequently addressed and decided by this court (ROA at 2343-2405; 580-586; 619 at n. 2). To the extent that SPI’s petition for judicial review is based upon its December 2, 2015, objection that preceded Intermountain’s application for an extension of time and the State Engineer’s decision, and as will be addressed in various points below, the issues it raises in reference to its objection are barred from being considered by this Court by the law-of-the-case doctrine.

D. The State Engineer’s decision is supported by substantial evidence that Intermountain satisfied NRS 533.380.

SPI contends that the State Engineer’s June 1, 2016, decision (ROA 618-624) is not supported by substantial evidence that Intermountain satisfied the requirements of NRS 533.380 because

- Intermountain is not proceeding in good faith and with reasonable diligence,
- there is otherwise no evidence that satisfies NRS 533.380(4), and
- the State Engineer ignored his pledge to closely scrutinize Intermountain’s extension requests.

SPI’s contentions, however, ignore the liberal and broad discretion given to a State Engineer by NRS 533.380 to grant “*any number of extensions of time*” with which construction work must be completed or water must be applied to beneficial use under a permit. NRS 533.380(3). Based upon his consideration of the evidence provided to him, his expertise in Nevada’s water laws, and consistent with the history of the Project and Intermountain’s ongoing efforts to develop the Project, the State Engineer’s decision to grant Intermountain an extension of time is consistent with NRS 533.380(4).

1 1. *Intermountain provided sufficient evidence under NRS 533.380(4)*
2 *that, even under the circumstances created by SPI, it is proceeding*
3 *in good faith and with reasonable diligence.*

4 In his decision granting Intermountain's application for an extension of time,
5 the State Engineer explained that whether an appropriator has used due diligence to
6 utilize water for beneficial use must be determined upon the facts of each particular
7 case. ROA 620, *citing Vineyard Land & Stock Co. v. Twin Falls Salmon River Land &*
8 *Water Co.*, 245 F. 9 (9th Cir. 1917). He went on to cite to the evidence of expenses that
9 Intermountain submitted, totaling \$23,300.39, and relied on *The Subdistrict v. Chevron*
10 *Shale Oil Co.*, 986 P.2d 918 (Colo. 1999) (the fact finder may consider numerous
11 factors on a case-by-case basis in a reasonable diligence analysis) as instructive in
12 reference to the types of activities that may support a finding of reasonable diligence.
13 ROA 620. To that end, the State Engineer found that, under "all the facts and
14 circumstances" (NRS 533.380(6)), and not limited to only the prior year's extension
15 period, Intermountain demonstrated a steady application of effort toward the project
16 during the last extension period.

17 SPI asserts that the evidence submitted by Intermountain did not show a steady
18 application of effort to construct the diversion works and put the permitted water to
19 beneficial use within the required time frame as required by NRS 533.380(3) because:
20 (1) Intermountain's effort to maintain the status quo does not constitute reasonable
21 diligence to perfect its application; (2) the affidavit of Robert Marshall is unreliable
22 hearsay that does not meet the substantial evidence standard; (3) the State Engineer
23 ignored his previous pledge to closely scrutinize Intermountain's extension requests;
24 and (4) the State Engineer's reliance on the *Chevron* case is inapposite. SPI's
25 assertions, however, improperly challenge for the first time in these proceedings
26 information and evidence that it did not challenge in the proceedings before the State
27 Engineer, and are otherwise without merit.
28

- 1 a. Intermountain's March 8, 2016, application for an extension
2 of time does not indicate or suggest an effort to maintain the
3 status quo.

4 SPI asserts that that evidence and information provided by Intermountain in
5 support of its application for an extension of time (ROA at 587-602, 605-617) do not
6 show progress toward putting the water to beneficial use, but only an effort to maintain
7 the status quo. SPI complains that the documents are nothing more than unexplained
8 invoices that left the State Engineer to speculate as to the work that was performed.
9 Because SPI is challenging Intermountain's evidence in support of its March 8, 2016,
10 application for an extension of time for the first time in these proceedings, however, its
11 challenge to that evidence cannot be heard or considered by this Court. By failing to
12 object to Intermountain's supporting evidence in the proceedings before the State
13 Engineer, SPI has waived its ability to do so here. *See, Old Aztec Mine, Inc.*, 97 Nev. at
14 52. Be that as it may, SPI's citation to the record in reference to Intermountain's
15 supporting evidence is incomplete and misleading, and it ignores some key issues.

16 Initially, in addition to the invoices identified by SPI, Intermountain also
17 provided with its application for an extension of time an affidavit of one of its
18 principals, Robert Marshall. In that affidavit, Mr. Marshall provided a comprehensive
19 review of all that has been done in pursuit of Intermountain's water rights permits, and
20 explained what it had done in 2015 and early 2016 to continue its efforts to comply
21 with NRS 533.380. Those efforts included agreements with engineering and
22 construction firms, negotiations with a utility company to distribute the water, and
23 meetings with developers that are expected to lead to developer agreements – efforts
24 that are consistent with and corroborated by some of the invoices that were provided.
25 ROA 612-616 (Affidavit of Robert Marshall), 587-602 (Intermountain's 2105
26 expenditures). Contrary to SPI's repeated and conclusory assertion that Intermountain
27 has no intent of putting its water to beneficial use, the information and evidence
28 provided by Intermountain *and previously unchallenged by SPI* necessarily shows

1 efforts within the last extension period to move forward with construction and to make
2 available and provide water to the developers with whom Intermountain is negotiating
3 water provision agreements. Combining the evidence of its most recent development
4 efforts with the history of the Project and the more than \$2,500,000.00 that
5 Intermountain has invested in developing the Project consistent with the needs for the
6 water as identified and approved in the various water plans (ROA at 818-829, 128-133),
7 Intermountain clearly intends for its water to be put to beneficial use. Thus, on their
8 face, Intermountain's documents and evidence in support of its March 8, 2016,
9 application for an extension of time, in addition to the facts and circumstances of the
10 Project in its entirety, go beyond an uncorroborated statement of intent to put water to
11 beneficial use.

12
13 b. Robert Marshall's affidavit in support of Intermountain's
14 March 8, 2016, application for an extension of time meets
the substantial evidence standard.

15 SPI next contends that the affidavit of Robert Marshall that was submitted by
16 Intermountain in support of its March 8, 2016, application for an extension of time was
17 speculation and hearsay and, therefore, it was unreasonable for the State Engineer to
18 rely on it in granting Intermountain's application for an extension of time.

19 As noted by SPI, the substantial evidence inquiry presupposes the fullness and
20 fairness of the administrative proceedings, and that the evidence on which the State
21 Engineer relies must be in the record before him. *Citing Revert v. Ray*, 95 Nev. 782,
22 787, 603 P.2d 262, 264 (1979) and *Eureka Cnty v. State Eng'r*, 131 Nev. ____ (Adv.
23 Op. No. 84, 359 P.3d 1114, 1121 (2015). In this case, what is not in the record before
24 the State Engineer is any objection by SPI to the content and nature of Robert
25 Marshall's affidavit. Rather, the State Engineer considered as part of the substantial
26 evidence provided by Intermountain an *unopposed* affidavit by Intermountain's
27 principal that addressed the efforts that Intermountain had made in the last extension
28 period in furtherance of putting its water to beneficial use. Notwithstanding that SPI

1 has waived its ability to challenge Robert Marshall's affidavit for the first time in these
2 proceedings, the speculation and hearsay bases on which SPI makes that challenge are
3 entirely unsupported and without merit.

4 Indeed, Robert Marshall, who is an Intermountain principal, has personal
5 knowledge of the information to which the affidavit attests, and attested to his personal
6 knowledge under penalty of perjury. ROA at 612-615. The State Engineer, who has
7 deep knowledge of and experience in working with the Project, is entitled to weigh the
8 credibility of the evidence before it in the context of the totality of the circumstances,
9 and come to a decision about that evidence that a reasonable mind might accept as
10 adequate to support a conclusion. *Revert, id.*; *Bacher, id.* Moreover, by accepting for
11 purposes of its June 1, 2016, decision the affidavit testimony of Robert Marshall,
12 together with the evidence that corroborated Mr. Marshall's statements and the totality
13 of the circumstances, the State Engineer did not ignore that additional supporting
14 documents would be required for consideration of any further extension requests.
15 Indeed, by requiring that any further extensions of time be accompanied by the
16 agreements identified in Mr. Marshall's affidavit, the State Engineer has clearly
17 considered that Intermountain's evidence of its ongoing effort is developing and has
18 imposed a safeguard to ensure the continued development of Intermountain's efforts to
19 put its water to beneficial use continues to be evidenced. Thus, combined with other
20 evidence and the totality of the circumstances, Mr. Marshall's affidavit meets the
21 substantial evidence requirements of NRS 533.380(4).

22
23 c. The State Engineer closely scrutinized Intermountain's
March 8, 2016, extension request.

24 SPI takes issue with the amount of scrutiny the State Engineer gave
25 Intermountain's extension request based upon his previous admonition that subsequent
26 requests for an extension of time would be closely scrutinized. To that end, SPI asserts
27 that the State Engineer should have required a copy of the documents identified by Mr.
28

1 Marshall in his affidavit before granting Intermountain's request for more time rather
2 than deferring the obligation to provide those documents to the next extension request.
3 Nothing in the State Engineer's statement in its previous decision granting an extension
4 of time to Intermountain that it would closely scrutinize further requests for extension
5 by Intermountain required what SPI asserts that it should.

6 Initially, and as repeatedly noted above, the evidence submitted by
7 Intermountain in support of its March 8, 2016, extension request were unopposed by
8 SPI. SPI could have, but chose not to, respond and object to the documents and
9 evidence Intermountain provided in support of its extension request. With that, the
10 State Engineer had before it unopposed information and evidence on which he was
11 entitled to exercise his discretion and expertise in determining, under the totality of the
12 circumstances of the Project, that they were sufficient to constitute substantial evidence.
13 Indeed, what Mr. Marshall's affidavit outlines are the efforts it made over the last
14 extension period to put its water to beneficial use – efforts that are ongoing and in
15 progress, and were made amid a successful, but very taxing and lengthy judicial review
16 process brought by SPI in reference to the last extension request that was granted to
17 Intermountain. On its face, the information provided by Mr. Marshall indicates efforts
18 that are presently known and ongoing (*Eureka Cnty., supra*). Combined with the
19 references in the TMWA water plans regarding the Project, it is substantial evidence of
20 a project that intends to put its water to beneficial use. ROA at 623. Moreover, that
21 the State Engineer requires that further extension requests be accompanied by the
22 agreements referenced in Mr. Marshall's affidavit as evidence of continued efforts to
23 put the water to beneficial use is consistent with the scrutiny he promised in his prior
24 decision and with the discretion and authority that is granted to him to determine
25 extension requests under NRS 533.380. Thus, the State Engineer sufficiently
26 scrutinized Intermountain's March 8, 2016, extension request as he stated he would do
27 in his decision granting Intermountain's prior extension request. Furthermore, it is the
28

1 State Engineer's province to determine the level of scrutiny that is appropriate, not
2 SPI's, and the State Engineer's determination is entitled to great deference. *United*
3 *States v. State Eng'r, supra*, 117 Nev. at 589.

4 d. The *Chevron* case on which the State Engineer relied is
5 instructive as to the types of activities that constitute
6 reasonable diligence.

7 Finally, SPI contends that the *Chevron* case on which the State Engineer relied
8 in considering the evidence of Intermountain's diligence in this case is not applicable
9 because Mr. Marshall's affidavit is not analogous to the evidence considered in
10 *Chevron*. To that end, SPI noted that the evidence considered in *Chevron* was
11 presented during a three day trial and deemed competent evidence, whereas Mr.
12 Marshall's affidavit does not provide sufficient information or details regarding
13 Intermountain's efforts to further progress on the Project. SPI faults the State Engineer
14 for simply accepting Mr. Marshall's representations and not holding a hearing or
15 seeking additional information to supplement the affidavit. SPI's efforts to distinguish
16 *Chevron*, however, are to no avail.

17 In its June 1, 2016, decision granting Intermountain an extension of time, the
18 State Engineer relied on *Chevron, supra* in reference to the *types of activities* that may
19 support a finding of reasonable diligence when considered on a case-by-case basis. The
20 activities discussed in *Chevron* in reference to water rights that had been appropriated
21 nearly 45 years earlier – activities and plans that evidenced a steady application of
22 effort to complete the appropriation – were similar to what Intermountain, over its
23 Project's life, has done.⁷ Given the deference granted to a State Engineer to weigh the
24 evidence before it and consider the totality of the circumstances, the State Engineer's
25 reliance on *Chevron* as instructive as to what types of activities support a finding of

26 ⁷ It should be noted that while *Chevron* held its water rights for 45 years,
27 Intermountain's initial time to put its permitted water to beneficial use extends from 8 years
28 for some of its permits to 2013 and 2017 for others. See Intermountain's Table of
Extensions of Time, Exhibit "2."

1 reasonable diligence was within its power to determine whether an extension of time is
2 warranted by the sufficiency of the evidence. Thus, that the evidence in *Chevron* was
3 presented during a hearing is irrelevant, and there is no statutory procedure to support
4 SPI's suggestion that the State Engineer should have held an evidentiary hearing.

5 SPI also asserts that because, unlike the water rights holder in *Chevron*,
6 Intermountain has no intent to put the permitted water to beneficial use, *Chevron* is
7 inapposite. As stated above, SPI's conclusory and unsupported assertion that
8 Intermountain has no intent to put its water to beneficial use is belied by the evidence
9 of the amount of money – more than \$2.5M – that Intermountain has put into the
10 Project in furtherance of efforts to put the water to beneficial use. *See* Exhibit "2."
11 That evidence includes its most recent efforts to negotiate and contract with
12 construction and utility companies, *to which SPI made no objection in the underlying*
13 *proceedings*. Indeed, the State Engineer's most recent decisions granting
14 Intermountain's requests for extensions of time necessarily indicate his intention to
15 require continuing evidence of Intermountain's efforts to put its water to beneficial use.
16 ROA at 1787-1790; 618-624. To that end, *Chevron* provides helpful guidance to the
17 State Engineer in determining what activities constitute reasonable diligence by a water
18 rights holder, and the State Engineer was entitled to rely on *Chevron* for that purpose.

19 2. *There is sufficient evidence to satisfy NRS 533.580(4).*

20 SPI goes on to challenge the sufficiency of the evidence to satisfy NRS
21 533.580(4) based upon its conclusory claims that Intermountain does not intend to put
22 its water to beneficial use, that it failed to submit more specific evidence of what
23 parcels its water will be serving, that it failed to submit evidence of the economic
24 conditions that prevented Intermountain from putting its water to beneficial use, and
25 that it failed to submit evidence of any plan that includes the use of the permitted water.
26 Notwithstanding that SPI failed to object or respond to the evidence that was submitted
27 by Intermountain in support of its application for an extension of time (*see supra*), none
28

1 of SPI's challenges undermine the integrity of the State Engineer's June 1, 2016,
2 decision.

- 3 a. Intermountain's prior negotiations to sell the Project – a
4 sale that did not materialize – do not prohibit Intermountain
from resuming efforts to put its water to beneficial use.

5 Highlighting the admonition of the State Engineer in his June 4, 2015, decision
6 that the inability to secure a buyer for its water would not be considered good cause for
7 future requests for extensions of time, SPI asserts that the State Engineer ignored that
8 statement by granting another extension of time despite evidence in the record that
9 Intermountain intends to sell its water, not put it to beneficial use. It is undisputed that,
10 in the history of this Project, Intermountain had a potential opportunity to sell the
11 Project to Washoe County.⁸ ROA 2382-2383. That sale, however, did not materialize
12 (*Id.*), and Intermountain continued its efforts to put its water to beneficial use – efforts
13 that are developing and evidenced in its March 8, 2016, application for an extension of
14 time (ROA at 605-617, 587-602). To that end, the evidence provided by Intermountain
15 in support of its application for an extension of time necessarily shows that it heeded
16 the State Engineer's admonition. Indeed, nothing prohibits Intermountain from selling
17 its water rights and project, and nothing prohibits Intermountain from continuing its
18 efforts to put the water to beneficial use regardless of whether it makes its project and
19 water rights available for sale. Thus, the evidence is not contrary to the State
20 Engineer's consideration of Intermountain's efforts to put its water to beneficial use.

- 21 b. The State Engineer is not required to consider the level of
22 specificity as it concerns parcels and areas served as
asserted by SPI.

23 SPI asserts that because Intermountain does not present evidence of any
24 particular development that is slated to be served by the water appropriated under its

25 ⁸ As explained during the December 14, 2015, hearing on SPI's prior judicial
26 review efforts, that Washoe County was interested in purchasing the Project necessarily
27 shows that the Project was viable and worthy of consideration by Washoe County.
28 Intermountain had obtained enough permits and sufficiently developed the Project in
furtherance of the beneficial use requirements for Washoe County to be interested in
purchasing it. ROA at 2382-2383.

1 permits, evidence that it is in negotiations with developers whose plans involve the
2 construction of approximately 10,000 houses does not constitute substantial evidence
3 that warrants an extension of time. *Accord*, NRS 533.380(4)(b); *Bacher, id.* SPI,
4 however, ignores what this Court has already held in reference to the State Engineer's
5 consideration of the factors stated in NRS 533.380(4), and otherwise overstates the
6 provision of NRS 533.380(4) on which it relies.

7 In its January 12, 2016, order denying SPI's petition for judicial review, this
8 Court, in response to SPI's assertion that the State Engineer did not engage in the
9 analysis required by NRS 533.380(4), concluded that the State Engineer complied with
10 NRS 533.380(4) in considering Intermountain's applications for extensions of time
11 because the record shows: (1) (1) that State Engineer states that he considered the
12 factors stated in NRS 533.380(4); and (2) that he responded to the issues presented by
13 SPI in its objection and Intermountain's response. ROA at 585. Here, the State
14 Engineer underwent an analysis of NRS 533.380(4), and in concluding that good cause
15 existed to grant Intermountain's request for an extension of time, he: (1) stated that he
16 considered the factors stated in NRS 533.380(4); and (2) undertook an analysis of those
17 factors based upon the issues raised by SPI in its objection and Intermountain's
18 response. ROA 618-624. Thus, under issue preclusion principles and the law-of-the-
19 case doctrine (*see, supra*), that is sufficient to establish that the State Engineer satisfied
20 his obligations under NRS 533.380(4).

21 Be that as it may, NRS 533.380(4)(b) states that, in considering an extension
22 request, the State Engineer is required to consider, *among other factors*, the number of
23 units contained in or planned for the land being developed *or* the area being served by
24 the county, city, town, public water district or public water company. In this case, the
25 State Engineer considered evidence from Intermountain – *unopposed by SPI* – that it is
26 in negotiations, and expects to have an agreement, with developers as it concerns the
27 construction of nearly 10,000 houses (ROA at 614), and the TMWA water plans, which
28

1 identifies and references Intermountain's Project in the context of the various areas the
2 plans address (ROA at 618-624). Nothing in NRS 533.380(4)(b) requires the level of
3 detail that is suggested by SPI in order to satisfy the substantial evidence standard.
4 Thus, SPI's challenge on that basis is without merit.

5
6 c. Current economic considerations are not relevant to the
State Engineer's decision.

7 Based on its conclusory contention that Intermountain has no plans to put the
8 water to beneficial use, SPI asserts that none of the evidence Intermountain submitted
9 can be construed to demonstrate that economic conditions prevented it from perfecting
10 the permitted water. Because SPI's conclusory position that Intermountain has no
11 intention of putting its water to beneficial use is unsupported and, as more fully
12 explained above, entirely contrary to the evidence, that assertion is entirely without
13 merit. As explained above, and as illustrated by Exhibit "2," Intermountain's
14 expenditures on the Project reflect the economic downturn and the impact on
15 Intermountain's continuing efforts to develop the Project.

16 SPI goes on to distinguish the economic downturn of 2007-2013, which is
17 addressed in the State Engineer's June 1, 2016, decision as having impacted
18 Intermountain and in reference to the efforts it has made on the Project, and current
19 economic conditions since 2013. Continuing on its unsupported and incorrect premise
20 that Intermountain does not intend to develop the Project, SPI contends that because the
21 State Engineer's does not consider economic conditions since 2013, there is not
22 substantial evidence to show that current economic conditions are preventing
23 Intermountain from perfecting its rights. Intermountain has not claimed that the current
24 economic conditions are preventing it from continuing its development efforts, and the
25 evidence that was provided to the State Engineer shows that, consistent with the current
26 upturn in the economy, Intermountain is proceeding with its development efforts. ROA
27 at 605-617, 587-602. The only current impact on Intermountain's efforts to advance its
28

development on the Project is the resources that Intermountain has to dedicate to responding to SPI's repeated challenges to Intermountain's applications for extensions of time. *See, i.e.*, ROA at 616 (identifying the amount of money spent by Intermountain in successfully defending SPI's previous petition for judicial review). Thus, SPI's challenge based on current economic conditions is irrelevant and superfluous.

d. The provisions of NRS 278.020 or NRS Chapter 278A are not applicable to Intermountain.

Finally, SPI asserts that, contrary to NRS 533.380(4)(e), Intermountain's extension application failed to identify a plan authorized by NRS 278.010 or NRS Chapter 278A, and challenges the State Engineer's failure to cite to any evidence of such a plan as required by 533.380(4)(e) as resulting in an arbitrary and capricious extension of time under *Bacher, supra*. SPI's assertion, however, is not only barred by issue preclusion principles and the law-of-the-case doctrine, it ignores that the provisions of NRS 278.010 and NRS Chapter 278A do not apply to Intermountain.

As noted above, what is required for the State Engineer to satisfy his obligations under NRS 533.380(4) in this case has been ruled upon by this Court in its January 12, 2016, order denying SPI's petition for judicial review. According to this Court, the State Engineer complies with NRS 533.380(4) where the record shows: (1) that State Engineer states that he considered the factors stated in NRS 533.380(4); and (2) that he responded to the issues presented by SPI in its objection and Intermountain's response. ROA at 585. The State Engineer's June 1, 2016, decision granting Intermountain's request for an extension of time states that he considered the factors in NRS 533.380(4) and it undertakes an analysis of NRS 533.380(4) based upon SPI's pre-filed objection and Intermountain's response in concluding that good cause existed to grant Intermountain's request for an extension of time. ROA 618-624. Thus, under issue preclusion principles and the law-of-the-case doctrine (*see, supra*), that is sufficient to

1 establish that the State Engineer satisfied his obligations under NRS 533.380(4).

2 Moreover, the State Engineer could not review evidence of an identified plan
3 authorized by NRS 278.020 or NRS Chapter 278A in this case because the Project was
4 not issued permits to serve a planned unit development or a specific project or
5 subdivision. Indeed, NRS 533.380(4) does not require that Intermountain identify a
6 planned unit development or specific project. It requires that the State Engineer
7 consider that information. He can only consider that information, however, if it is
8 information that is part of the water rights permit. Thus, SPI's assertion that evidence
9 of an identified plan is required for consideration by the State Engineer is patently
10 incorrect.

11 ***E. The State Engineer did not err by refusing to extend the anti-***
12 ***speculation doctrine adopted in Bacher to applications for extensions of***
13 ***time.***

14 Continuing its unsupported and incorrect conclusory theory that Intermountain
15 has no intention to put its water to beneficial use, SPI challenges the State Engineer's
16 June 1, 2016, decision based upon Intermountain's failure to submit any evidence of a
17 contractual or agency relationship with an entity that plans to put the permitted water to
18 beneficial use. SPI asserts that, according to *Bacher, id.*, each time the State Engineer
19 considers an extension request, he must ensure that the permit holder is exercising
20 reasonable diligence to construct the diversion works and put the water to beneficial
21 use, and that if there is no evidence of that reasonable diligence, the permit can be
22 canceled for failing to comply with the anti-speculation doctrine. SPI's persistent but
23 redundant challenges based on the anti-speculation doctrine under *Bacher* in all of its
24 various iterations is not only barred by issue preclusion principles and the law-of-the-
25 case doctrine, it contradicts the evidence that was before the State Engineer.

26 In its prior 2015 challenge to Intermountain's request for an extension of time,
27 one of the primary issues raised by SPI was the application of the anti-speculation
28 doctrine and the beneficial use requirement. See ROA at 1756-1758 (referenced at

1 ROA 1758). The State Engineer declined to apply the anti-speculation doctrine as
2 stated in *Bacher* to deny an extension of time. ROA at 1787-1790 (reference at ROA
3 1790). SPI again argued its anti-speculation challenge during the December 14, 2015,
4 hearing. ROA at 2343-2405 (reference at ROA 2357-2359). This Court ruled on SPI's
5 anti-speculation challenge in its January 12, 2016, Order denying SPI's petition for
6 judicial review. ROA at 580-586 (reference at 585-586 (the anti-speculation doctrine
7 as adopted in *Bacher* applies to applications for water rights, not to changes in existing
8 water rights)). In its December 2, 2015, "pre-filed" objection (which pre-dated the
9 judicial review hearing and this Court's January 12, 2016, Order), SPI renewed its anti-
10 speculation argument against granting further extensions of time to Intermountain.
11 ROA at 5-12 (reference at ROA 6-8). And, again, the State Engineer explained that
12 *Bacher, id.*, which was decided after Intermountain's permits were issued, concerned
13 new applications to appropriate water under NRS 533.370, not NRS 533.380. ROA at
14 618-624 (reference at 622 and at n. 14). Nevertheless, this State Engineer determined
15 that, to the extent that the anti-speculation doctrine can be applied to extension requests,
16 Intermountain has satisfied that condition because it has provided evidence of
17 contractual/agency relationships for the beneficial use of the water. *Id.*

18 SPI's anti-speculation claim is not only an issue that has been repeatedly
19 addressed and decided in this case and, therefore, cannot be again raised to be
20 addressed by this Court under the principles of issue preclusion and the law-of-the-case
21 doctrine (*see, supra*), it is a conclusory contention and challenge by SPI that is contrary
22 to the *unopposed* evidence that Intermountain provided to the State Engineer regarding
23 the contracts it has secured in furtherance of putting its water to beneficial use (ROA at
24 605-617, 587-602).⁹ As a consequence, the State Engineer's determination in reference

25 ⁹ For the same reasons stated above, SPI's challenge to Robert Marshall's
26 affidavit is without merit. Not only has SPI waived any objection or opposition to its nature
27 and content by failing to object to a specific request for extension of time and respond to the
28 evidence presented in support of that request, the State Engineer – who has experience with
and knowledge of the Project – has the discretion to weigh the evidence before him and
make his determinations accordingly.

1 to the anti-speculation doctrine as it applies to this case and the Project was not
2 arbitrary or capricious.

3 **IV. CONCLUSION**

4 Based on the foregoing, SPI's petition for judicial review of the State Engineer's
5 June 1, 2016, decision granting Intermountain's request for an extension of time is
6 barred by principles of waiver and issue preclusion and by the law-of-the-case doctrine,
7 and otherwise fails to satisfy SPI's burden of proof that the State Engineer's June 1,
8 2016, decision was arbitrary and capricious. Thus, Intermountain requests that this
9 Court deny SPI's petition for judicial review.

10
11 **AFFIRMATION**
Pursuant to NRS 239B.030

12 The undersigned does hereby affirm that the preceding document does not
13 contain the social security number of any person.

14 DATED this 17th day of November, 2016.

15 RICHARD L. ELMORE, CHTD.
16

17
18 /s/ Richard L. Elmore
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21 *Attorney for Intervenor-Respondent*
22 *Intermountain Water Supply*
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of RICHARD L. ELMORE, CHTD. and that on this date I personally caused to be served a true copy of the foregoing **RESPONDENT-INTERVENOR INTERMOUNTAIN WATER SUPPLY'S ANSWERING BRIEF** by the method indicated and addressed to the following:

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DATED this 17th day of November, 2016.

/s/ Richard L. Elmore

INDEX OF EXHIBITS

Exhibit No.	Description	No. Pages
1	Table of Intermountain Water Supply Company's Permits	1
2	Table of Intermountain Water Supply Company's Extensions of Time	4

EXHIBIT “1”

JA2555

Table of Intermountain Water Supply Company's Permits

Application (Permit) No.	Date of filing	Date Granted	Original Date for POC	Original Date for PBU
64977	3/24/1999 (ROA 833)	1/11/2002 (ROA 834-835)	2/11/2005 (ROA 835)	2/11/2007 (ROA 835)
64978	3/24/1999 (ROA 979)	1/11/2002 (ROA 980-981)	2/11/2005 (ROA 981)	2/11/2007 (ROA 981)
66400	5/22/2000 (ROA 1100)	1/11/2002 (ROA 1101- 1102)	2/11/2005 (ROA 1102)	2/11/2007 (ROA 1102)
72700	5/3/2005 (ROA 1069)	12/18/2008 (ROA 1698- 1699)	12/18/2010 (ROA 1699)	12/18/2013 (ROA 1699)
73428	11/3/2005 (ROA 1866)	6/28/2006 (ROA 1980)	2/11/2008 (ROA 1980)	2/11/2009 (ROA 1980)
73429	11/3/2005 (ROA 2034)	6/28/2006 (ROA 2095)	2/11/2008 (ROA 2095)	2/11/2008 (ROA 2095)
73430	11/3/2005 (ROA 2140)	6/28/2006 (ROA 2197)	2/11/2008 (ROA 2197)	2/11/2009 (ROA 2197)
74327	5/23/2006 (ROA 2244)	9/13/2006 (ROA 2295)	2/11/2008 (ROA 2295)	2/11/2009 (ROA 2295)

EXHIBIT “2”

JA2557

Table of Intermountain Water Supply Company's Extensions of Time

Permit No. 64977

ROA	Extension Application Filed	Expenditures: Current Year (All Permits)	Expenditures: Total (All Permits)
863-865	2/28/2005	\$1,000,000.00 ¹	\$1,000,000.00
869-871	3/23/2006	\$500,000.00	\$1,500,000.00
896-898	2/26/2007	\$500,000.00	\$2,000,000.00
901-903	2/19/2008	\$250,000.00	\$2,250,000.00
906-908	2/19/2009	\$240,000.00	\$2,490,000.00
909-911	2/16/2010	\$16,407.38	\$2,506,400.00
914-916	2/25/2011	\$2,663.00	\$2,514,280.00
919-921	2/21/2012	\$6,005.00	\$2,526,622.00
925-927	2/19/2013	\$8,153.50	\$2,534,775.00
938-940	2/19/2014	\$17,034.00	\$2,550,649.00
942-949	2/19/2015	\$17,573.43	\$2,568,222.42
605	3/4/2016	\$23,300.39	\$2,572,799.23

Permit No. 64978

ROA	Extension Application Filed	Expenditures: Current Year (All Permits)	Expenditures: Total (All Permits)
999-1003	5/3/2005		\$950,000.00
1027-1029	2/21/2007		\$2,000,000.00
1031-1033	2/27/2008	\$250,000.00	\$2,250,000.00
1036-1038	2/18/2009	\$240,000.00	\$2,490,000.00
1039-1041	2/16/2010	\$16,407.38	\$2,506,400.00
1043-1045	2/25/2011	\$2,663.00	\$2,514,280.00
1047-2049	2/21/2012	\$6,005.00	\$2,526,622.00
1051-1053	2/14/2013	\$8,153.50	\$2,534,775.00
1055-1057	2/18/2014	\$17,034.00	\$2,550,649.00

¹ This included all funds spent since the water rights were granted in 2002.

Permit No. 66400

ROA	Extension Application Filed	Expenditures: Current Year (All permits)	Expenditures: Total (All permits)
1123-1124	2/24/2005		\$1,000,000.00
1132-1134	3/13/2006		\$1,500,000.00
1157-1159	2/21/2007		\$2,000,000.00
1161-1163	2/27/2007	\$250,000.00	\$2,250,000.00
1166-1168	2/18/2009	\$240,000.00	\$2,490,000.00
1169-1171	2/16/2010	\$16,407.38	\$2,506,400.00
1173-1175	2/25/2011	\$2,663.00	\$2,514,280.00
1181-1183	2/19/2013	\$8,153.50	\$2,534,775.00
1185-1187	2/18/2014	\$17,034.00	\$2,550,649.00
1189-1191	2/19/2015	\$17,573.43	\$2,568,222.43

Permit No. 72700

ROA	Extension Application Filed	Expenditures: Current Year (All Permits)	Expenditures: Total (All Permits)
1743-1745	12/30/2011	\$250,000.00	\$2,250,000.00
1746-1748	12/17/2012	\$5,756.00	\$2,524,968.00
1750-1753	11/25/2013	\$7,800.00	\$2,532,768.00
1754-1758	12/2/2014	\$16,733.43	\$2,549,501.00

Permit No. 73428

ROA	Extension Application Filed	Expenditures: Current Year (All Permits)	Expenditures: Total (All Permits)
1996-1998	<i>Not legible</i>	<i>Not legible</i>	<i>Not legible</i>
2001-2003	2/18/2009	\$240,000.00	\$2,490,000.00
2004-2006	2/16/2010	\$16,407.38	\$2,506,400.00
2009-2011	2/25/2011	\$2,663.00	\$2,514,280.00

2013-2015	2/21/2012	\$6,005.00	\$2,526,622.00
2017-2019	2/19/2013	\$8,153.50	\$2,534,775.00
2022-2024	2/18/2014	\$17,034.00	\$2,550,649.00
2026-2028	2/19/2015	\$17,573.43	\$2,568,222.43

Permit No. 73429

ROA	Extension Application Filed	Expenditures: Current Year (All Permits)	Expenditures: Total (All Permits)
2103-2105	<i>Not legible</i>	<i>Not legible</i>	<i>Not legible</i>
2108-2110	2/18/2009	\$240,000.00	\$2,490,000.00
2111-2113	2/16/2010	\$16,407.38	\$2,506,400.00
2115-2117	2/25/2011	\$2,663.00	\$2,514,280.00
2119-2121	2/21/2012	\$6,005.00	\$2,526,622.00
2123-2125	2/19/2013	\$8,153.50	\$2,534,775.00
2128-2130	2/18/2014	\$17,034.00	\$2,550,649.00
2132-2134	2/19/2015	\$17,573.43	\$2,568,222.43

Permit No. 73430

ROA	Extension Application Filed	Expenditures: Current Year (All Permits)	Expenditures: Total (All Permits)
2207-2209	<i>Not legible</i>	<i>Not legible</i>	<i>Not legible</i>
2212-2214	2/18/2009	\$240,000.00	\$2,490,000.00
2215-2217	2/16/2010	\$16,407.38	\$2,506,400.00
2219-2221	2/25/2011	\$2,663.00	\$2,514,280.00
2223-2225	2/21/2012	\$6,005.00	\$2,526,622.00
2227-2229	2/19/2013	\$8,153.50	\$2,534,775.00
2232-2234	2/18/2014	\$17,034.00	\$2,550,649.00
2236-2238	2/19/2015	\$17,573.43	\$2,568,222.43

Permit No. 74327

ROA	Extension Application Filed	Expenditures: Current Year (All Permits)	Expenditures: Total (All Permits)
2306-2308	<i>Not legible</i>	<i>Not legible</i>	<i>Not legible</i>
2311-2313	2/18/2009	\$240,000.00	\$2,490,000.00
2314-2316	2/16/2010	\$16,407.38	\$2,506,400.00
2318-2320	2/25/2011	\$2,663.00	\$2,514,280.00
2322-2324	2/21/2012	\$6,005.00	\$2,526,622.00
2326-2328	2/19/2013	\$8,153.50	\$2,534,775.00
2331-2333	2/18/2014	\$17,034.00	\$2,550,649.00
2335-2342	2/19/2015	\$17,573.43	\$2,568,222.43

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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

RESPONDENT STATE ENGINEER'S ANSWERING BRIEF

JA2562

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1 **I. INTRODUCTION**

2 Any number of extensions of time to place water to a beneficial use may be granted
3 by the State Engineer upon the showing that the holder of the water right has exercised
4 reasonable diligence to perfect the right. The State Engineer is afforded broad discretion
5 in exercising his duties, and based upon the explicit statutory language permitting
6 extensions of time, he reasonably and appropriately granted Intermountain Water
7 Supply, Ltd.'s (Intermountain) extensions of time.

8 Sierra Pacific Industries' (SPI) challenge to the State Engineer's decision to grant
9 Intermountain's extensions of time is fundamentally flawed. First, substantial evidence,
10 as provided for under Nevada water law, was before the State Engineer to support his
11 decision. Second, the anti-speculation doctrine does not preclude the State Engineer's
12 decision to grant Intermountain its requested extensions of time. Third, Intermountain
13 has satisfied the necessary statutory elements supporting its applications for extension
14 of time.

15 Stripped to its core, SPI is dissatisfied with the application of Nevada water law.
16 The doctrine of prior appropriation, first in time equals first in right, is the fundamental
17 basis of water law in Nevada. In its most simple terms, prior appropriation means that
18 the party with the most senior date of priority under a permit to appropriate water has
19 the right to the water, and that right is not a figurative or philosophical right, but a
20 tangible property right which is greatly protected under the law. Nevada water law
21 clearly affords a party who has a permit for the appropriation of water time necessary to
22 perfect that right by placing the water to beneficial use, and the Legislature has provided
23 that the standard for justifying such an extension, which is "for good cause shown."
24 Irrespective of another potential appropriator's interest, the State Engineer evaluates
25 each permit under the law, and as is the case here, where the elements to justify an
26 extension of time for either completion of works of diversion or placement to beneficial
27 use are present, the State Engineer may grant that application. Thus, SPI's petition for

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judicial review should be denied and the Court should affirm the decision of the State Engineer to grant Intermountain's applications for extension of time.

II. FACTUAL SUMMARY

Beginning in 1999, Intermountain applied for and received appropriations to perfect its water rights in Dry Valley Hydrographic Basin (Basin No. 95) located in Washoe County, Nevada, by means of three separate permits, Permit Nos. 64977, 64978 and 66400.¹ Intermountain's permits provide for the combined duty of water of not more than 2,996 acre-feet annually (afa) from all of its permits appropriating water from Dry Valley.² Since the issuance of its permits, Intermountain has filed numerous applications pursuant to NRS 533.380 for the purpose of extending the time place the water to a beneficial use.³

In February and March 2016, Intermountain submitted applications seeking an extension of time under its Permit Nos. 64977, 64978, 66400, 72700, 73428, 73429, 73430, and 74327.⁴ SPI pre-filed an objection to Intermountain's applications in December 2015.⁵ A supplement to the December 2015 objection was submitted by SPI in January 2016.⁶ These objections were submitted prior to Intermountain's applications seeking additional extensions of time. The basis for SPI's objections was that (a) Intermountain is engaged in water speculation, and (b) that Intermountain cannot satisfy the requirements under NRS 533.380.⁷

¹ SE ROA at 605-617, 634-635, 652-653, 669-670, 687-688, 705-706, 723-724, 739-740.

² SE ROA at 612.

³ SE ROA at 605-617, 634-635, 652-653, 669-670, 687-688, 705-706, 723-724, 739-740, 863-864, 869-870, 896-897, 901-902, 906-907, 909-910, 914-915, 919-920, 925-926, 938-939, 942-943, 999-1000, 1027-1028, 1031-1032, 1036-1037, 1039-1040, 1043-4044, 1047-1048, 1051-1052, 1055-1056, 1059-1060, 1123, 1132-1133, 1157-1158, 1161-1162, 1166-1167, 1169-1170, 1173-1174, 1181-1182, 1185-1186, 1189-1190, 1504-1505, 1509-1511, 1569-1570, 1577-1578, 1584-1585, 1589-1590, 1594-1595, 1599-1600, 1604-1605, 1609-1610, 1614-1615, 1620-1621, 1625-1626, 1736-1737, 1743-1744, 1750-1752, 1754-1755, 1849-1850, 1853-1854, 1858-1859, 1996-1997, 2001-2002, 2004-2005, 2009-2010, 2013-2014, 2017-2018, 2022-2023, 2026-2027, 2108-2109, 2111-2112, 2115-2116, 2119-2120, 2123-2124, 2128-2129, 2132-2133, 2207-2208, 2212-2213, 2215-2216, 2219-2220, 2223-2224, 2227-2228, 2232-2233, 2306-2307, 2311-2312, 2314-2315, 2318-2319, 2322-2323, 2326-2327, 2331-2332, 2335-2336.

⁴ SE ROA at 605-617, 634-635, 652-653, 669-670, 687-688, 705-706, 723-724, 739-740.

⁵ SE ROA at 5-426.

⁶ SE ROA at 430-579.

⁷ SE ROA at 5-426, 430-579.

1 In support of its applications for extension of time, Intermountain submitted its
2 expenditures for the year 2015.⁸ Additionally, Intermountain submitted a response to
3 SPI's objections to its applications for extensions of time, which included a sworn affidavit
4 submitted under penalty of perjury by Robert W. Marshall.⁹ In its response to SPI's
5 objections, Intermountain responded to SPI's contentions that noted that the Truckee
6 Meadows Water Authority's (TMWA) 2010-2030 Water Resources Plan (Plan), dated
7 December 2009, was mischaracterized by SPI with respect to Intermountain's project;
8 rather, the Plan specifically noted that water importation projects (such as
9 Intermountain's), which may bring the water resources to the Truckee Meadows, may be
10 considered by TMWA for integration into its water resource supply and "would accept will
11 serve commitments against these supplies before other supplies are fully allocated."¹⁰

12 The State Engineer, in considering SPI's objections noted that the objection
13 "generally re-raises the same legal arguments and cites the same evidence asserted
14 against Intermountain's 2015 applications for extensions of time, with the exception of
15 the planning documents."¹¹ The State Engineer fully considered all of the evidence
16 submitted by Intermountain in support of its applications for extensions of time and
17 found that substantial evidence existed supporting the granting of those applications.¹²

18 **III. STANDARD OF REVIEW**

19 NRS 533.450 provides for judicial review of orders and decisions of the State
20 Engineer made under NRS 533.270 through NRS 533.445 (setting forth the statutory
21 procedure for appropriation). Under this statute, "[t]he decision of the State Engineer is
22 prima facie correct, and the burden of proof is upon the party attacking the same."¹³
23 Decisions of the State Engineer are entitled to deference both as to their factual basis and
24 their legal conclusions.¹⁴

25 ⁸ SE ROA at 587-602.

26 ⁹ SE ROA at 607-615.

27 ¹⁰ SE ROA at 607. *See also* SE ROA at 128.

28 ¹¹ SE ROA at 742.

¹² SE ROA at 636-642.

¹³ NRS 533.450(10).

¹⁴ *Id.*

1 The Court's review under NRS 533.450 is limited to a determination of whether the
2 State Engineer's decision is supported by substantial evidence.¹⁵ Substantial evidence is
3 "that which a reasonable mind might accept as adequate to support a conclusion."¹⁶ Thus,
4 in evaluating the present matter, this Court may not "pass upon the credibility of the
5 witness nor reweigh the evidence."¹⁷

6 Decisions of the State Engineer are entitled not only to deference with respect to
7 factual determinations, but also with respect to legal conclusions. The Nevada Supreme
8 Court has explained that "an agency charged with the duty of administering an act is
9 impliedly clothed with power to construe it as a necessary precedent to administrative
10 action," and therefore "great deference should be given to the agency's interpretation
11 when it is within the language of the statute."¹⁸

12 Further, this Court is limited to consideration of the documents and records which
13 were considered by the State Engineer in rendering his decision. NRS 533.450(1) states
14 that actions to review decisions of the State Engineer are "in the nature of an appeal."
15 The Nevada Supreme Court has interpreted NRS 533.450 to mean that a petitioner does
16 not have a right to *de novo* review or to offer additional evidence at the district court.¹⁹
17 As a result, the function of the court is to review the evidence on which the State
18 Engineer based his decision to ascertain whether the evidence supports the decision, and
19 if so, the court is bound to sustain the State Engineer's decision.²⁰ "[N]either the district
20 court nor this court will substitute its judgment for that of the State Engineer: we will
21 not pass upon the credibility of the witnesses nor reweigh the evidence, but limit

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25 ¹⁵ *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262 (1979).

26 ¹⁶ *Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006).

27 ¹⁷ *Id.*

28 ¹⁸ *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (citing *Clark Co. Sc. Dist. v. Local Gov't*, 90 Nev. 332, 446, 530 P.2d 114, 117 (1974)).

¹⁹ *Revert*, 95 Nev. at 786, 603 P.2d at 264. *See also Kent v. Smith*, 62 Nev. 30, 32, 140 P.2d 357, 358 (1943) (a court may construe a prior judgment, but cannot properly consider extrinsic evidence).

²⁰ *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

ourselves to a determination of whether substantial evidence in the record supports the State Engineer's decision."²¹

IV. ARGUMENT

The State Engineer is afforded discretion in determining whether to grant an application to extend the time to complete the works of diversion or to apply appropriated waters to a beneficial use.²² In evaluating whether Intermountain's applications for extensions of time were supported by good cause, the State Engineer considered the objections of SPI as well as the materials submitted by Intermountain supporting their applications.²³ The State Engineer's decision to grant Intermountain's applications should be affirmed, as substantial evidence supports his decision and his decision to grant the applications is consistent with Nevada water law.

A. Intermountain's Applications for Extensions of Time Satisfy the Requirements Set Forth in Nevada Law

In considering an application for extension of time, in addition to considering whether the application is timely,²⁴ the State Engineer must determine whether the application is accompanied with "proof and evidence of the reasonable diligence with which the application is pursuing perfection of the application."²⁵ Reasonable diligence is defined as:

. . . the steady application of effort to perfect the application in a reasonably expedient and efficient manner under all facts and circumstances. 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.²⁶

Further, since Intermountain's permits are for municipal use of water, when deciding the applications to appropriate water, the State Engineer is required to consider

²¹ *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991).

²² NRS 533.380(3) (" . . . the State Engineer may, for good cause shown, grant any number of extensions of time . . . ").

²³ SE ROA at 618-624.

²⁴ NRS 533.380(3)(a).

²⁵ NRS 533.380(3)(b).

²⁶ NRS 533.380(6).

1 five additional factors: (1) whether good cause exists for not having placed the water to a
2 beneficial use; (2) “[t]he number of parcels, commercial or residential units” contained or
3 planned for the developed areas expected to be served; (3) whether there were any
4 economic conditions which may have affected the ability of Intermountain to place the
5 water to the beneficial use; (4) whether there were any delays in the land development
6 caused by unanticipated natural conditions; and (5) the time period contemplated for
7 project governmental approvals required by law.²⁷

8 Before the State Engineer was an affidavit sworn under penalty of perjury by
9 Robert W. Marshall, a Manager of Intermountain (Marshall Affidavit), submitted as
10 “proof and evidence” of Intermountain’s reasonable diligence.²⁸ The Marshall Affidavit
11 described the works which had historically been completed in advancing the project
12 toward development.²⁹ Additionally, the Marshall Affidavit stated that Intermountain
13 had entered in an option agreement with two engineering and construction firms and that
14 in addition to those agreements, and that after extensive negotiations with the water
15 company (Utilities, Inc.), Intermountain had reached an agreement for water service in
16 northern Washoe County, Nevada.³⁰ Additionally, the Marshall Affidavit identified the
17 number of residential units to be served by the project at “nearly 10,000 houses” and
18 specified the present status of the housing projects and time period to have agreements
19 with those developers.³¹

20 Here, the State Engineer made specific findings that Intermountain had
21 sufficiently demonstrated good faith reasonable diligence in advancing the project, thus
22 warranting the granting of the extensions of time.³² The State Engineer further
23 considered the required elements under NRS 533.380(4).³³

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25 ²⁷ NRS 533.580(4).

26 ²⁸ SE ROA at 612-15.

27 ²⁹ SE ROA at 612-13,

³⁰ SE ROA at 614.

³¹ *Id.*

28 ³² SE ROA at 638-39.

³³ SE ROA at 641.

1 **1. The State Engineer found that, based upon substantial**
2 **evidence, Intermountain had reasonably demonstrated good**
3 **faith and reasonable diligence in perfecting its applications**

4 Nevada law defines reasonable diligence as the steady application of effort to
5 perfect an application in a reasonably expedient and efficient manner.³⁴ The concept of
6 reasonable diligence is not a recent concept in Nevada water law. Rather, the Nevada
7 Supreme Court in *Ophir Mining Co. v. Carpenter*, stated:

8 Where the right to the use of running water is based upon
9 appropriation, and not upon an ownership in the soil, it is the
10 generally recognized rule here that priority of appropriation
11 gives the superior right. When any work is necessary to be done
12 to complete the appropriation, the law gives the claimant a
13 reasonable time within which to do it, and although the
14 appropriation is not deemed complete until the actual diversion
or use of the water, still if such work be prosecuted with
reasonable diligence, the right relates to the time when the first
step was taken to secure it. If, however, the work not be
prosecuted with diligence, the right does not so relate, but
generally dates from the time when the work is completed or the
appropriation is fully perfected.³⁵

15 Thus, the State Engineer is required to review the evidence before him to determine
16 whether the evidence reflects a “steady application to business of any kind, constant effort
17 to accomplish an undertaking.”³⁶

18 Contrary to the position which SPI seeks to convince this Court, the Marshall
19 Affidavit is not insufficient evidence for the State Engineer to consider. In fact, SPI offers
20 no persuasive authority to support its contention that “it was not ‘reasonable’ for the
21 State Engineer to rely on speculation and hearsay to grant the extension.”³⁷ First, the
22 State Engineer is not subject to the same legal evidentiary standards which may apply
23 before a court of law, such as this Court.³⁸ What this Court may subject to the
24 evidentiary rule against hearsay evidence is not imposed upon the State Engineer.

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26 ³⁴ NRS 533.380(6).

27 ³⁵ 4 Nev. 534, 543-33 (1869).

28 ³⁶ *Id.* at 546.

³⁷ See Petitioner Sierra Pacific Industries’ Opening Brief at p. 10.

³⁸ See, e.g., NAC 533.110, *et seq.*

1 Second, the State Engineer takes an applicant's assertions for face value where such
2 assertions are made as sworn statements.³⁹

3 While the State Engineer acknowledges his obligation to render his decisions based
4 upon substantial evidence, the State Engineer cannot adopt SPI's characterization of the
5 law regarding reasonable diligence. The argument of SPI inferring that the State
6 Engineer's reliance on the Marshall Affidavit circumvented "the fullness and fairness of
7 the administrative proceedings" is incongruous. Rather, unconventionally, SPI pre-filed
8 its objections to Intermountain's applications for extensions of time.⁴⁰ Even when SPI
9 supplemented its objections, that supplement was submitted prior to any filing by
10 Intermountain.⁴¹ Following the submission of Intermountain's application, SPI could
11 have submitted any arguments against the Marshall Affidavit and evidence provided to
12 the State Engineer supporting its applications; yet, SPI did not. And while there was no
13 legal obligation of the State Engineer to even consider SPI's pre-filed objections, as such
14 process is not provided for in the water law, the State Engineer, in affording both
15 Intermountain and SPI a fully and fair proceeding, considered SPI's objections.⁴² But
16 when SPI did not avail itself of an opportunity to respond to Intermountain's evidence,
17 including the Marshall Affidavit, it cannot now assert that somehow the proceedings were
18 deficient.

19 Further, it is tenuous for SPI to now raise arguments regarding the evidence
20 Intermountain introduced, including the Marshall Affidavit, when such arguments were
21 not presented to the State Engineer for consideration when the opportunity was available
22 to SPI. The function of the court is to review the evidence on which the State Engineer
23 based his decision to ascertain whether the evidence supports the decision, and if so, the
24 court is bound to sustain the State Engineer's decision.⁴³ "[N]either the district court nor
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26 ³⁹ Applications submitted to the Office of the State Engineer are sworn, notarized statements.
27 *See, e.g.*, SE ROA at 605.

28 ⁴⁰ SE ROA at 5-426.

⁴¹ SE ROA at 430-579.

⁴² SE ROA at 637, n.5.

⁴³ *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

1 this court will substitute its judgment for that of the State Engineer: we will not pass
2 upon the credibility of the witnesses nor reweigh the evidence, but limit ourselves to a
3 determination of whether substantial evidence in the record supports the State
4 Engineer's decision."⁴⁴ Accordingly, SPI's arguments should be rejected as not being
5 timely presented refuting the Marshall Affidavit.

6 The State Engineer considered the evidence before him, which reflected a steady
7 application effort by Intermountain to perfect its water rights. Irrespective of SPI's
8 criticisms of the Marshall Affidavit, the affidavit is a statement with representations
9 presented to an administrative agency, made under the penalty of perjury.⁴⁵ The State
10 Engineer has reasonably relied upon the representations made based upon the fact that if
11 the statements made by Mr. Marshall, particularly those statements set forth in
12 paragraphs 5 through 8 that the State Engineer relied upon in making his findings, are
13 untrue would subject Mr. Marshall and Intermountain to significant personal and
14 professional consequences. The basis for SPI's criticism of Intermountain's applications is
15 that subjectively, SPI does not believe it to be good enough.

16 The State Engineer engaged in an extensive analysis finding that Intermountain
17 demonstrated good faith and reasonable diligence.⁴⁶ In evaluating whether
18 Intermountain has demonstrated reasonable diligence, the State Engineer looked to
19 Colorado case law for guidance, as NRS 533.380(6) was based upon the Colorado
20 definition of "reasonable diligence."⁴⁷ In making his decision, the State Engineer relied
21 upon the Colorado decision in *The Subdistrict v. Chevron Shale Oil Co.*, 986 P.2d 918
22 (Colo. 1999).⁴⁸ Based upon findings of the Colorado Supreme Court, the State Engineer
23 considered the numerous factors presented by Intermountain in determining that
24 reasonable diligence and good faith existed.⁴⁹ Specifically, the State Engineer found that
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26 ⁴⁴ *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991).

27 ⁴⁵ SE ROA at 612-15.

28 ⁴⁶ SE ROA at 637-639.

⁴⁷ SE ROA at 638.

⁴⁸ *Id.*

⁴⁹ SE ROA at 638-639.

Intermountain's efforts to perfect its water rights paralleled those factors considered by the *Chevron* court.⁵⁰ Here, Intermountain provided substantial evidence in the form of invoices and the Marshall Affidavit demonstrating its numerous activities and financial expenditures made in an effort to perfect its water rights.⁵¹

Unlike SPI's arguments, *Chevron* is relevant and applicable here and the State Engineer's consideration is not inconsistent with the law. Unlike Nevada, the Colorado Legislature established a separate judicial branch exclusively for the purpose of administering Colorado water law.⁵² In Colorado, which is unlike Nevada, all applications are filed with the water court and administered under the supervision of the water court.⁵³ Thus, SPI's criticism of the State Engineer's consideration of the various factors regarding Intermountain's reasonable diligence under NRS 533.380(6) compared to the Colorado system in *Chevron* is disingenuous. Nevada law does not impose a duty upon the State Engineer to "test the reliability or accuracy" of Intermountain's evidence. While the Nevada Supreme Court has found that "mere statements" without more is insufficient to demonstrate reasonable diligence,⁵⁴ here, Intermountain has, since the granting of its applications to appropriate water, provided the State Engineer with evidence of its incremental efforts to perfect its water rights. The State Engineer has taken into consideration the history of Intermountain's efforts to develop its water, and the consideration of the totality of the evidence is sufficient to support the State Engineer's decision.

2. The State Engineer considered the relevant elements of NRS 533.380(4) and the evidence put forth by Intermountain supporting the grant of applications of extension of time

The State Engineer fulfilled his duty to consider the relevant elements under NRS 533.380(4). However, SPI places emphasis upon the wrong word contained within

⁵⁰ SE ROA at 639.

⁵¹ SE ROA at 606-617.

⁵² The Colorado Water Rights Determination and Administration Act of 1969.

⁵³ See Colorado Revised Statutes (CRS) 37-92-101, *et seq.*

⁵⁴ *Desert Irr. Ltd. v. State*, 113 Nev. 1049, 1057 (1997).

1 NRS 533.380(4). The State Engineer does not dispute that he is required to consider the
2 factors set forth within subsection 4; however, the State Engineer is only required to
3 *consider* those factors.⁵⁵ Here, SPI attempts to impose an obligation upon the State
4 Engineer that is not present within the statute, a submission of affirmative proof of each
5 factor. However, the statute requires the State Engineer to consider the factors, which
6 he did.

7 The State Engineer considered the Marshall Affidavit, which described the work
8 that had historically been completed in advancing the project toward development, as
9 well as other details regarding the number of residential units, the status of the housing
10 projects and the anticipated time periods for agreements and the status of governmental
11 review.⁵⁶ Further, the State Engineer considered SPI's arguments and evidence that
12 there was no municipal demand by TMWA or in Lemon Valley to support Intermountain's
13 project.⁵⁷ The State Engineer noted that while it was clear TMWA had not committed to
14 pursuing Intermountain's project, the 2010-20130 Water Resources Plan and draft
15 TMWA Draft Plan for 2016-20135 specifically reference Intermountain's project.⁵⁸

16 Additionally, the Marshall Affidavit stated that Intermountain had entered in an
17 option agreement with two engineering and construction firms.⁵⁹ Additionally, to those
18 agreements, the Marshall Affidavit states that after extensive negotiations with Utilities,
19 Inc., Intermountain had reached an agreement with the company for the purpose of water
20 service in northern Washoe County, Nevada.⁶⁰ Additionally, the Marshall Affidavit
21 identified the number of residential units to be served by the project at "nearly 10,000
22 houses" and specified the present status of the housing projects and time period to have

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26 ⁵⁵ NRS 533.380(4).

27 ⁵⁶ SE ROA at 612-13.

28 ⁵⁷ SE ROA at 641-642.

⁵⁸ SE ROA at 128, 607, 641.

⁵⁹ SE ROA at 614.

⁶⁰ *Id.*

1 agreements with those developers.⁶¹ Further, the State Engineer considered additional
2 factors relating to Intermountain's project.⁶²

3 Finally, SPI's argument that the economic downturn is inappropriately considered
4 by the State Engineer in granting Intermountain's applications is misguided. While
5 certainly the evidence reflects a recent modest economic resurgence, if one were to take
6 SPI's argument at face value, one would be required to dismiss the sequencing of the
7 recovery and where that recovery has occurred. However, the State Engineer did consider
8 the economic conditions over the history of the Intermountain project as required under
9 NRS 533.380(4), and found that Intermountain's efforts, as a whole, have been
10 reasonable.⁶³

11 Thus, based upon the State Engineer's consideration of the totality of the factors
12 within NRS 533.380(4) and the evidence before him, the State Engineer concluded that
13 substantial evidence supported his finding to grant Intermountain's applications.

14 **3. The State Engineer's granting of Intermountain's applications**
15 **for extensions of time is not in violation of the Anti-**
16 **Speculation Doctrine**

17 The anti-speculation doctrine historically extends to only new appropriations of
18 water.⁶⁴ Where an appropriator had "nothing more than an intent to sell the right at an
19 unknown time in the future for profit" when seeking new water right, such applications
20 were subject to a doctrine precluding speculation.⁶⁵ At least in Colorado, the application
21 of the anti-speculation doctrine has been expanded.^{66,67} A holder of a water right may
22 become subject to the anti-speculation doctrine if that right, or a portion of the right,
23 becomes speculative over time.⁶⁸

24

⁶¹ *Id.*

25 ⁶² *Id.*

26 ⁶³ SE ROA at 639 at n.9.

27 ⁶⁴ *See Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566, 568 (1979).

28 ⁶⁵ *Municipal Subdistrict, Northern Colorado Water Conservation Dist. v. Oxy USA, Inc.*, 990 P.2d 701, 709 (1999). *See also Batcher v. State Engineer*, 146 Nev. 1110, 1119-20 (2006).

⁶⁶ *Municipal Subdistrict, Northern Colorado Water Conservation Dist.*, 990 P.2d at 709.

⁶⁷ Nevada courts have not affirmatively extended the anti-speculation doctrine beyond the appropriation of water.

⁶⁸ *Id.*

1 While, SPI's focus is on the state of Intermountain's efforts to perfect its water
2 rights during the previous year, the State Engineer considers the totality of the
3 circumstances and history relating to Intermountain's project in determining whether the
4 anti-speculation doctrine is applicable to Intermountain's applications for extensions of
5 time.⁶⁹ SPI's argument is focused on a single comment in the legislative history by
6 Assemblywoman Vivian L. Freeman who stated: ". . . the bill will give the [S]tate
7 [E]ngineer additional tools to prevent any speculation on water."⁷⁰ However, the State
8 Engineer found, when considering SPI's arguments in opposition to Intermountain's
9 applications, which is the same asserted before this Court, "the inclusion of the provision
10 codified as NRS 533.370(c)(1), makes it less clear which provisions legislators were
11 referring to in the discussion concerning speculation."⁷¹ Moreover, SPI's argument
12 completely ignores a critical component of the discussion and analysis with respect to
13 "speculation" where Senator Mark A. James stated in relevant part:

14 I really get concerned when we try to say that we should
15 discourage all speculation in water rights. I think it's kind of,
16 you know, if it's real property that you're dealing with you call it
17 investment. If somebody then tries to do the same thing,
18 investing in water rights, you call it speculation and now it's
19 suddenly nefarious. In my experience I have run into very few
20 people where that's the situation, but the people who need to use
these things, they're trying to hold water rights so that they can
develop a project that takes many years, over several phases to
develop . . . I think it's very dangerous for us to consider all
types of holding on to a permit before it ripens into a certificate,
consider that speculation and try to prevent that from
occurring.⁷²

21 In response to Senator James' concern, then State Engineer Mike Turnipseed agreed,
22 noting that the bill provided that ". . . work on one feature of the project or system may be
23 considered in finding that reasonable diligence has been shown in the development of
24 water rights for all features of the entire project or system."⁷³

25 ///

26 ⁶⁹ SE ROA at 639-640.

27 ⁷⁰ SE ROA at 406.

28 ⁷¹ SE ROA at 640, n.12.

⁷² SE ROA at 407.

⁷³ SE ROA at 407-08; NRS 533.380(6).

1 Here, the State Engineer rejected SPI's reliance on prior decisions of the State
2 Engineer involving the anti-speculation doctrine, finding that those decisions were not
3 persuasive as they related to new appropriations as examined under NRS 533.370, and
4 that the State Engineer is not bound by *stare decisis*.⁷⁴ And while the State Engineer
5 rejected Intermountain's argument that the anti-speculation doctrine only applies to new
6 appropriations, the State Engineer did not find that the anti-speculation doctrine was
7 applicable to Intermountain's 2016 applications for extensions of time. Rather, the State
8 Engineer considered SPI's arguments, that Intermountain's applications for extensions of
9 time were contrary to the findings in *Bacher v. State Engineer*, 122, Nev. 1110 (2006), and
10 ultimately rejected those arguments.⁷⁵

11 In evaluating Intermountain's applications for extensions of time within the
12 context of the *Bacher* decision, the State Engineer found that Intermountain's
13 applications to appropriate water were granted prior to the *Bacher* decision.⁷⁶ The State
14 Engineer declined to retroactively apply *Bacher*'s "formal contract or agency relationship
15 requirement" in a historic review of Intermountain's permits.⁷⁷ Instead the State
16 Engineer considered the present, and historic, circumstances relating to Intermountain's
17 applications for extensions of time, specifically finding that based upon the Marshall
18 Affidavit, Intermountain had "secured agreements with engineering and construction
19 firms, Utilities, Inc., and developers."⁷⁸ Thus, based upon substantial evidence before
20 him, the State Engineer determined that SPI's argument that Intermountain's
21 applications for extensions of time were "speculative" were not meritorious; rather, the
22 sworn Marshal Affidavit "affirms that contractual agreements have been secured."⁷⁹

23 ///

24 ///

25 ⁷⁴ SE ROA at 639-640. *See also Motor Cargo v. Pub. Serv. Comm'n*, 108 Nev. 335, 337 (1992) (State
26 agencies are not bound by *stare decisis*).

27 ⁷⁵ SE ROA at 640.

28 ⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

1 Finally, the State Engineer's finding that an attempt to sell the water project by
2 Intermountain does not violate the anti-speculation doctrine.⁸⁰ The State Engineer
3 considered SPI's arguments in the context of the law as discussed by the Nevada Supreme
4 Court in *Adaven Management, Inc. v. Mountain Falls Acquisition Corp.*, 124 Nev. 770,
5 191 P.3d 1189 (2008).⁸¹ In *Adaven*, in considering the anti-speculation doctrine adopted
6 in the *Bacher* case, the Nevada Supreme Court clarified that speculation as to a new
7 water right applicant's ability to place water to a beneficial use compared to an existing
8 water rights holder's ability to transfer the ownership of a water right.⁸² The State
9 Engineer found this distinction to be significant and to not preclude Intermountain's
10 ability to sell its water rights subsequent to obtaining the water rights permits under the
11 law as it existed at the permits were granted.⁸³

12 The error in SPI's argument against Intermountain's potential sale of their water
13 rights project is two-fold. First, it presupposes that at the time Intermountain's
14 applications to appropriate water were granted, the State Engineer's action was in
15 violation of established law at that time.⁸⁴ However, the grant of Intermountain's
16 applications for new appropriations of water was done in conformity with Nevada law as
17 it existed at the time the applications were granted, and the time to challenge the
18 issuance of Intermountain's permits has long since expired. Thus, it is not subject to
19 dispute or challenge that Intermountain's permits conform to the requirements of Nevada
20 water law, and the only challenge SPI may assert is regarding the applications for
21 extension of time.

22 Here, Intermountain's applications for extensions of time do demonstrate that the
23 company is making measureable steps toward perfecting its water rights.⁸⁵ And, Nevada
24 law allows a permittee to find an alternative use of its water where the originally
25

26 ⁸⁰ *Id.*

27 ⁸¹ *Id.*

28 ⁸² *Adavan*, 124 Nev. at 777.

⁸³ SE ROA at 640-641.

⁸⁴ See Opening Brief at pp. 19-20.

⁸⁵ SE ROA at 605-624.

intended project may not be realized. The Nevada Supreme Court in *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. Adv. Op. 48, 245 P.3d 1145 (2010), found that the State Engineer did not err when granting applications to change the point of use for existing groundwater permits. In that decision, the water right holder, Nevada Land and Resource Company (NLRC), had secured groundwater permits for the temporary use of water in a mining and milling project.⁸⁶ However, the mining and milling project was unfruitful, and during an approximate 20-year period of time, the water rights were maintained in good standing using the application for extension of time process.⁸⁷ Ultimately, NLRC sought to change the permitted use from mining and milling to industrial power generation purposes and from a temporary to permanent use.⁸⁸ Though the NLRC's anticipated power plant project was cancelled, and the water rights were later negotiated for use by the City of Fernley, the court did not find there to be a violation of the anti-speculation doctrine.⁸⁹ Thus, *Pyramid Lake Paiute Tribe of Indians v. Ricci*, which was decided four years after *Bacher*, did not assert any contention that the maintenance of the water rights by NLRC in good standing for nearly 20 years while seeking a buyer for its groundwater source was a violation of the anti-speculation doctrine.⁹⁰

The 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. However, Intermountain has commenced looking for other entities which may be better suited to fully develop the project and ultimately place the water to its intended beneficial use. Whether Intermountain ultimately sells the totality of its project, or sells an interest in the project, is not of the State Engineer's concern; rather, the concern the Nevada Legislature has charged the State Engineer with is first determining whether Intermountain has, in good faith, demonstrated a steady application of effort to perfect its

⁸⁶ *Pyramid Lake Paiute Tribe of Indians*, 245 P.3d at 1146.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at n.1.

⁹⁰ *Id.*

1 water rights, and second, since this is a municipal project, considering the factors set
2 forth in 533.380(4). Here, the State Engineer has performed his legal duties in evaluating
3 Intermountain's applications for extensions of time. The State Engineer considered all
4 relevant factors contained within NRS 533.380, and based upon the substantial evidence
5 before him, determined that there was not violation of the anti-speculation doctrine.⁹¹

6 **B. Consideration of Sierra Pacific Industries' Pending Water Rights**
7 **Applications Must Not be Considered as They are Irrelevant and**
8 **Improperly Presented to the Court**

9 The relevance of SPI's pending applications is simply that they are not relevant.
10 As the Court found in SPI's prior challenge to the State Engineer's granting of
11 Intermountain's applications for extensions of time:

12 SPI's need for water in Dry Valley is not relevant to the State
13 Engineer's determination under NRS 533.380 and the statute
14 does not indicate that the State Engineer should consider them
15 as part of Intermountain's applications for extensions of time.
Accordingly, the State Engineer did not err by not considering
SPI's need for water.⁹²

16 The State Engineer reasonably and appropriately declined to consider SPI's pending
17 applications when deciding whether to grant Intermountain's applications for extensions
18 of time.⁹³ Just as the State Engineer and the District Court have found, there is no basis
19 within NRS 533.380 to consider any pending applications when determining whether an
20 application for extension of time to perfect an existing water right.^{94, 95}

21 **V. CONCLUSION**

22 Substantial evidence supports the decision of the State Engineer to grant
23 Intermountain's applications for extensions of time. SPI has failed to demonstrate
24 the State Engineer's decision is legally erroneous. Accordingly, the State Engineer
25

26 ⁹¹ SE ROA at 639-641.

27 ⁹² SE ROA at 568.

28 ⁹³ SE ROA at 642.

⁹⁴ SE ROA at 586, 642.

⁹⁵ See also *United States v. State Eng'r.*, 117 Nev. 585, 591-592, 27 P.3d 51, 55 (2001) (Nevada water law is strictly based upon the doctrine of prior appropriation, first in time is the first in right).

respectfully requests the Court affirm the State Engineer's decision granting Intermountain's applications for extensions of time.

AFFIRMATION

The undersigned does hereby affirm that the preceding Respondent State Engineer's Answering Brief does not contain the social security number of any person.

DATED this 28th day of November, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Micheline N. Fairbank
MICHELINE N. FAIRBANK
Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 28th day of November, 2016, I served a true and correct copy of the foregoing RESPONDENT STATE ENGINEER'S ANSWERING BRIEF, by electronic filing to:

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

* * * * *

SIERRA PACIFIC INDUSTRIES, a CASE NO.: CV16-01378
California corporation,

Petitioner, DEPT. NO.: 1

v.

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,

Respondents,

and

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

Intervenor-Respondent.

PETITIONER SIERRA PACIFIC INDUSTRIES' REPLY BRIEF

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INTRODUCTION

Neither the State Engineer nor Intermountain points to substantial evidence that Intermountain intends to put its water permits to beneficial use in their proposed place of use or has otherwise satisfied the legal requirements for an extension. In the absence of substantial evidence, Intermountain and the State Engineer resort to groundless procedural arguments that, based upon basic principles of equity and due process, must be rejected. Because Intermountain has failed to meet the statutory standard and engages in water speculation, SPI respectfully asks that its petition for judicial review be granted.

ARGUMENT

A. Respondents' Inequitable Conduct Bars Application Of The Waiver Doctrine

1. The State Engineer Must Be Estopped From Arguing "Waiver" Where He Failed To Serve Or Require Intermountain To Serve SPI With Intermountain's Extension Request

To the extent the State Engineer contends that SPI's arguments should be disregarded because SPI purportedly "did not avail itself of the opportunity to respond to Intermountain's evidence" (SEAB 8:15-9:5), the Court should apply equitable estoppel to prevent the State Engineer from benefitting from his inequitable conduct. "Equitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct." *In re Harrison Living Trust*, 121 Nev. 217, 223, 112 P.3d 1058, 1061-62 (2005) (quotation omitted). For equitable estoppel to apply,

(1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped. *Id.*

"[A] party will not be heard to complain on appeal of errors which he himself induced or provoked...the opposite party to commit....[I]t is sufficient that the party who on appeal complains of the error has contributed to it." *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (*quoting* 5 Am.Jur.2d Appeal and Error § 713 (1962)). Also, a public agency cannot benefit in court from having given misleading information to a party during the administrative proceeding. *S. Cal. Edison v. First Jud. Dist. Ct.*, 127 Nev. 276, 286, 255 P.3d

231, 237 (2011). Here, the facts show that the State Engineer provided misleading information to SPI and failed to require Intermountain to serve SPI with its extension request, such that equitable estoppel should apply.

On June 11, 2015, Kristen Geddes, Chief of the Hearings Section of the Nevada Division of Water Resources (“DWR”) provided a copy of DWR’s “Request for Correspondence and Change of Address” form to SPI’s attorney. Ex. 1.¹ Ms. Geddes stated: “[A]ttached is the form *to request that you be included on correspondence for any permit that you identify by number.*” Ex. 1 (emphasis added). On June 17, 2015, SPI’s counsel mailed the completed form to DWR, checking the box that said: “Please add my name to the mailing list and send copies *of all correspondence* to the address below.” Ex. 2 (emphasis added). SPI’s counsel included her physical and email addresses, indicating a preference to receive correspondence by email. *Id.* Enclosed with the form was a list of 18 permit numbers held by Intermountain. *Id.*

Because Intermountain’s 2015 extensions were set to expire starting in December 2015, on December 2, 2015, SPI filed an objection to the State Engineer granting any further extensions.² (ROA 5-426). On December 3, 2015, Ms. Geddes sent SPI’s counsel a letter requesting that the objection be served on Intermountain. Ex. 3. SPI’s counsel sent a responding letter on December 9, 2015 confirming that the objection had been personally served on Intermountain’s counsel and enclosing the certificate of service. Ex. 4.

On February 19, 2016, SPI’s counsel received an email from Sean Christensen of DWR enclosing a copy of the final notice letter for some of Intermountain’s permits, which stated:

¹ All exhibit numbers refer to the exhibits to SPI’s Motion to Supplement the Record, or in the Alternative, to Take Judicial Notice that is filed concurrently herewith. Supplementation of the record is warranted as this correspondence to and from the State Engineer’s office is a matter of public record, part of the State Engineer’s files relating to Intermountain’s permits and shows the failure to serve SPI. *See Oregon Nat. Desert Ass’n v. Cain*, 17 F. Supp. 3d 1037, 1048 (D. Or. 2014) (quoting *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir.1989) for the proposition that the “whole record is not just what the agency submitted as the administrative record but also includes ‘all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency’s position.’”). Alternatively, SPI requests that the Court take judicial notice of these documents. *See* NRS 47.130.

² The previous year, because Intermountain had filed only form extension requests without any supporting documentation, the State Engineer had requested that Intermountain file supplemental information to address the points made in SPI’s objection but did not give SPI an opportunity to respond. (E.g. ROA 942, 1759-60).

1 Also I noticed that we received a request for correspondence form from you on
2 June 17, 2015. You did check the box on this form to receive correspondence by
3 email but we do need the Consent to Electronic Delivery of Documents form to be
4 completed by you in order for you to receive correspondence by email. Ex. 5.

5 That same day, SPI's counsel emailed back the completed consent form. See Ex. 6.

6 Thereafter, the next correspondence SPI's counsel received from DWR was on June 1,
7 2016, which was an email from Juanita Mordhost of DWR enclosing the State Engineer's June 1,
8 2016 Decision. Ex. 7. The June 1, 2016 Decision referenced an extension request and affidavit
9 of Robert Marshall that Intermountain purportedly submitted on March 8, 2016 but that SPI never
10 received from either the State Engineer or from Intermountain. Ex. 7.

11 Having not been served with Intermountain's extension request, SPI's counsel contacted
12 DWR to request a copy. Ms. Geddes emailed SPI's counsel on June 6, 2016 with the extension
13 request filed by Intermountain. Ex. 8. In response, SPI's counsel wrote:

14 I was under the impression that, having signed up for electronic notifications for
15 the Intermountain permits, that I was going to be served with any filings and
16 submissions that pertained to those permits. Was I incorrect in my
17 understanding? Ex. 8.

18 Receiving no response, SPI's counsel inquired again:

19 I am following up on my email below. Can you tell me why I was not served
20 with the filings and submissions related to Intermountain's permits, as I had
21 requested? Was there something else I needed to do to ensure I would be served?
22 Ex. 8.

23 Ms. Geddes responded:

24 I think there was a miscommunication about the purpose of our electronic service
25 notice. The request for electronic service our office uses applies to
26 correspondence and rulings that our office generates allowing us to serve parties
27 by e-mail rather than physical mailing. We do not notice any party, applicant or
28 protestant, of the filing of third party documents (i.e., like an extension). One
limited exception is that we are required by statute to notice an applicant of the
filing of a protest against a new or change application (NRS 533.365(3)).

There is no authority for, or against, the filing an objection against an extension
request, so this office has permitted them to be filed, although it is rare. For SPI's
objection last year, this office followed a process similar to 533.365 and notified
Intermountain of SPI's objection and requested a response. This year, we
requested SPI serve Intermountain with the objection directly, it having been filed
prior to the extension requests. Thereafter the extensions were filed according to
the deadline set by last year's approval letter.

Hopefully this clarifies our electronic service process, let me know if you have
any additional questions. Ex. 8.

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1 There is nothing in either of DWR's forms submitted by SPI's counsel that limited the
2 notifications only to correspondence generated by the State Engineer. *See* Exs. 2 and 6. To the
3 contrary, the Request for Correspondence form specifically states that it would result in service of
4 "all correspondence" related to the permits identified by the requesting party. Ex. 2.

5 This is the precise circumstance in which estoppel should apply: the State Engineer was
6 apprised of the true fact that its form stated "all correspondence" would be served on the party
7 submitting the form; SPI had the right to believe that the State Engineer intended for those who
8 signed up to receive correspondence related to a permit would receive "all correspondence"; SPI
9 could not have known that the form that said "all correspondence" only meant correspondence
10 generated by DWR; and to the extent the State Engineer and Intermountain now base their
11 arguments on the fact that SPI did not respond to the evidence and arguments presented in
12 Intermountain's extension requests, SPI relied to its detriment. *See In re Harrison Living Trust*,
13 121 Nev. at 223, 112 P.3d at 1062.

14 Moreover, although the State Engineer required SPI to serve Intermountain with its
15 objection (Ex. 3), the State Engineer never required that Intermountain serve its extension request
16 on SPI, even though both the State Engineer and Intermountain acknowledged that SPI's
17 objection was already on file at that time. (ROA 606, 619). There is no certificate of service on
18 Intermountain's document. (ROA 605-617). Chapter 533 does not provide a formal protest
19 procedure for extension requests. In the absence of a formal procedure, and knowing that SPI had
20 filed an objection, basic notions of due process and fair play warranted that the State Engineer
21 and/or Intermountain serve SPI. Having failed to do so, they should be estopped from raising a
22 waiver argument now.

23 **2. Intermountain's Failure To Serve SPI Constitutes Unclean Hands That** 24 **Precludes It From Arguing Waiver**

25 The doctrine of unclean hands bars Intermountain from seeking denial of SPI's petition
26 for judicial review based on waiver.

27 The doctrine of unclean hands derives from the equitable maxim that 'he who
28 comes into equity must come with clean hands.' The doctrine bars relief to a party
who has engaged in improper conduct in the matter in which that party is seeking

1 relief. *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 637-38, 189
2 P.3d 656, 662 (2008) (internal quotation omitted).

3 Waiver is an equitable defense. *McKellar v. McKellar*, 110 Nev. 200, 202, 871 P.2d 296, 297
4 (1994). “In seeking equity, a party is required to do equity.” *Overhead Door Co. of Reno v.*
5 *Overhead Door Corp.*, 103 Nev. 126, 127, 734 P.2d 1233, 1235 (1987). Here, because
6 Intermountain did not serve SPI with Intermountain’s extension request, it is barred from raising
7 the equitable defense of waiver. *See id.*

8 **3. The Facts Show SPI’s Intent To Preserve Its Rights, Not Waive Them**

9 Because SPI took proactive steps to ensure that it lodged its objection before the State
10 Engineer considered any further extension requests from SPI, it cannot be deemed to have waived
11 any rights. For waiver to apply, there must be an “intentional relinquishment of a known right.”
12 *McKellar*, 110 Nev. at 202, 871 P.2d at 297. “If intent is to be inferred from conduct, the conduct
13 must clearly indicate the party’s intention.” *Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*,
14 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). SPI’s conduct shows its intention to object to the
15 granting of any further extensions, not to relinquish any rights.

16 **4. Waiver Does Not Apply Where NRS 533.450 Allows “Any Person Feeling** 17 **Aggrieved” To Seek Judicial Review, Regardless Of Whether They Participated** **In The Administrative Proceedings**

18 Intermountain’s waiver argument also has no application under NRS 533.450 because
19 judicial review can be sought by “*any person feeling aggrieved* by any order or decision of the
20 State Engineer ... affecting the person’s interests” NRS 533.450(1) (emphasis added). This
21 language is broadly inclusive and does not require participation in the State Engineer’s
22 proceeding in order to seek judicial review. *See id.*; *see also Howell v. Ricci*, 124 Nev. 1222,
23 1223, 197 P.3d 1044, 1045 (2008) (holding, “so long as the decision affects a person’s interests
24 concerning the rights, and is a final written determination of the issue, it is reviewable”). This is
25 in stark contrast to NRS 233B.130 (1), which requires that in a proceeding subject to the
26 Administrative Procedures Act (to which the State Engineer is not subject), a party must be “a
27 party of record ... in an administrative proceeding” in order to appeal. *See* NRS 233B.039.

28 ///

1 SPI is an aggrieved person because its applications to appropriate water have been
2 protested on the basis that Intermountain's unexercised permits monopolize the entire perennial
3 yield of the Dry Valley Basin. (ROA159, 162). According to NRS 533.450(1), the timing of
4 SPI's objection and the manner in which SPI participated in the proceedings before the State
5 Engineer does not affect its right to judicial review. The only authority cited by Intermountain
6 does not involve a petition for judicial review under NRS 533.450 and is therefore inapplicable.
7 See IMAB 13, citing *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

8 **B. Application Of Issue Preclusion Is Contrary To Chapter 533 And Would Violate Nevada**
9 **Public Policy**

10 **1. Issue Preclusion Does Not Apply To A New State Engineer Decision Based On**
11 **New And Different Evidence**

12 Intermountain cannot hang its hat on issue preclusion because the 2016 extensions are
13 based on new evidence, new findings, new analysis and new legal conclusions different from the
14 June 4, 2015 Decision. As Intermountain readily acknowledges, for issue preclusion to apply, the
15 *issue decided* in a previous proceeding must be *identical* to the one presented in the current
16 action. IMAB 14, citing *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008);
17 *see also Britton v. City of N. Las Vegas*, 106 Nev. 690, 693, 799 P.2d 568, 570 (1990) (stating
18 elements of administrative res judicata). The record here shows that the issues decided in 2016
19 are not the same as in 2015: Intermountain offered new evidence and argument to support the
20 2016 extensions, and the State Engineer reviewed that new information and argument, engaged in
21 new analysis and reached new conclusions. (*Compare* ROA 618-624 to 1515-1518). Indeed, the
22 district judge who reviewed the June 1, 2015 Decision specifically anticipated that challenges to
23 future extensions would be forthcoming. (ROA 2404). Where the 2015 and 2016 extensions
24 involved different time periods, different facts and different arguments, issue preclusion does not
25 apply. See *Gross v. Schweiker*, 577 F. Supp. 887, 889-90 (M.D. Ga. 1984).

26 This is also clear from Chapter 533's statutory scheme. For every new extension
27 requested, the Legislature requires the permit holder to prove anew its intent to perfect the
28 permits. NRS 533.380(3). To that end, each year, the permit holder must ensure that the new
extension application is "[a]ccompanied by proof and evidence of the reasonable diligence with

1 which the applicant is pursuing the perfection of the application.” NRS 533.380(3)(b). The State
2 Engineer then must undergo a new analysis as to whether the evidence submitted with that
3 specific application satisfies the statutory requirements for an extension and otherwise complies
4 with the law. NRS 533.380(3)-(4). Where the Court’s task is to decide whether the State
5 Engineer’s June 1, 2016 Decision was supported by substantial evidence, the Court’s 2015 review
6 of the State Engineer’s June 4, 2015 Decision cannot have preclusive effect.

7 Additionally, applying the doctrine of issue preclusion would render meaningless NRS
8 533.450(1), which allows for judicial review of “*any order or decision of the State Engineer.*”
9 (emphasis added). “[C]ourts must construe statutes to give meaning to all of their parts and
10 language, and this court will read each sentence, phrase, and word to render it meaningful within
11 the context of the purpose of the legislation.” *Coast Hotels & Casinos, Inc. v. Nev. State Labor*
12 *Comm’n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001). Depriving SPI of the ability to seek full
13 judicial review every time the State Engineer grants a new extension runs afoul the language of
14 NRS 533.450.

15 **2. Public Policy Requires That SPI Be Allowed To Seek Judicial Review From** 16 **Every Decision Of The State Engineer**

17 The application of issue preclusion here would violate Nevada public policy. “Both
18 administrative res judicata and administrative collateral estoppel are qualified or rejected when
19 their application would contravene an overriding public policy or result in manifest injustice.”
20 *Martin v. Donovan*, 731 F.2d 1415, 1416 (9th Cir. 1984); *see also Britton*, 106 Nev. at 692, 799
21 P.2d at 569 (noting that there are public policy exceptions to administrative res judicata);
22 *Campbell v. State, Dep’t of Tax.*, 108 Nev. 215, 217, 827 P.2d 833, 835 (1992) (declining to
23 apply administrative res judicata for fairness reasons).³ “[A]dministrative res judicata is applied
24 more circumspectly than its judicial counterpart, taking into account (1) the subject matter
25 decided by the administrative agency, (2) the purpose of the administrative proceeding, and (3)
26 the reasons for the later proceeding.” *Ziesch v. Workforce Safety & Ins.*, 713 N.W.2d 525, 530

27
28 ³ A public agency also cannot benefit from its misleading statements to argue that preclusion
doctrines should apply. *See S. Cal. Edison*, 127 Nev. at 286 n.5, 255 P.3d at 237 n.5.

1 (N.D. 2006). “The purpose of administrative res judicata is to preserve scarce administrative
2 resources and avoid wasteful expense and delay.” *Id.*

3 Here, if the Court were to accept Intermountain’s issue preclusion argument, it would
4 foreclose judicial oversight of the State Engineer’s annual extensions. By allowing for judicial
5 review of every State Engineer decision and order, and setting the maximum extension length that
6 the State Engineer could grant, the Legislature intended for each extension to be reviewable. *See*
7 NRS 533.380(3)-(5); NRS 533.450(1). As a matter of law, therefore, judicial review of every
8 subsequent extension granted by the State Engineer is not “wasteful” to warrant the application of
9 issue preclusion. *See Ziesch*, 713 N.W.2d at 530. If Intermountain’s position were accepted,
10 once the State Engineer grants one extension, no subsequent extensions could be reviewed by a
11 court. That is contrary to the law. *See* NRS 533.450.

12 Second, the Supreme Court adopted the administrative res judicata doctrine in Nevada due
13 to “the similarities in issues facing both judicial and quasi-judicial officers” who preside over
14 administrative hearings. *Britton*, 106 Nev. at 690, 799 P.2d at 569. This presumes that a full and
15 fair administrative hearing occurred with all requisite due process rights. *See id.* “An action
16 taken by an administrative agency to grant or deny a benefit is not an adjudicated action unless
17 the agency has made its decision using procedures substantially similar to those employed by the
18 courts.” *Delamater v. Schweiker*, 721 F.2d 50, 53 (2d Cir. 1983), *citing* Restatement, § 83
19 comment b. No such hearing or procedures occurred here. The State Engineer did not hold an
20 administrative hearing, subject Marshall to cross examination for the 2015 or 2016 extensions or
21 even serve SPI with Intermountain’s extension requests. As a result, there are no grounds to
22 apply issue preclusion. *See id.*

23 **C. The Law Of The Case Doctrine Does Not Extend To This New And Different Case**

24 Because this petition for judicial review from the June 1, 2016 Decision is a distinct case
25 from its petition for judicial review from the June 4, 2015 Decision, and no rule of law was stated
26 by an appellate court, the law of the case doctrine does not apply. “[W]hen an appellate court
27 states a principle or rule of law necessary to a decision, the principle or rule becomes the law of
28 the case and must be followed throughout its subsequent progress, both in the lower court and

1 upon subsequent appeal.” *Hsu v. Cnty. of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007).
2 The law of the case doctrine is not a jurisdictional rule that limits the power of a court. *Id.* at 632,
3 173 P.3d at 729-30. Rather, it merely expresses a general practice of courts to decline to reopen
4 what has been decided. *Id.*

5 Although a petition for judicial review is in the nature of an appeal, this court is not an
6 appellate court. And in denying the 2015 petition, the Court did not state a rule of law that could
7 apply to subsequent cases. (ROA 585-586). There is nothing in the Court’s disposition of SPI’s
8 2015 petition for judicial review that prevents the Court from now reviewing the June 4, 2016
9 Decision. *See Hsu*, 123 Nev. at 632, 173 P.3d at 729-30. SPI’s objection to the 2016 extensions
10 was not part of the record on appeal in the 2015 petition for judicial review.⁴ *See* CV15-01257.
11 This Court’s decision on SPI’s 2015 petition for judicial review has no bearing on whether the
12 factual record now before the Court meets the substantial evidence standard to support the June 1,
13 2016 Decision.

14 Moreover, the Court has a duty to consider and decide SPI’s petition: in petitions for
15 judicial review from the State Engineer’s decisions, “[t]he proceedings in every case ***must be***
16 ***heard by the court***, and ***must be informal*** and summary ...” NRS 533.450(2) (emphasis added).
17 This statement affords the Court no discretion to decline review, and prohibits the Court from
18 using a rigid formalistic approach to decide SPI’s petition. *See id.* The law of the case doctrine
19 therefore does not apply here.

20 **D. Neither Intermountain Nor The State Engineer Points To Evidence That Meets The**
21 **Substantial Evidence Standard**

22 The June 1, 2016 Decision must meet the substantial evidence standard whether or not the
23 “evidence” before the State Engineer is challenged. *See Bacher v. Office of State Eng’r*, 122 Nev.
24 1110, 1121, 146 P.3d 793, 800 (2006). The State Engineer’s and Intermountain’s briefs do not
25

26
27 ⁴ Contrary to Intermountain’s argument (IMAB 16:1-5), SPI cannot be prejudiced by the length of
28 time it took the Court to hear and decide its 2015 petition for judicial review. The fact that
Intermountain’s 2015 extensions expired before the Court decided SPI’s 2015 petition for judicial
review should not be held against SPI.

1 point to evidence that a reasonable mind would accept as adequate to show that Intermountain is
2 exercising reasonable diligence to put the water to beneficial use in the permitted place of use.

3 **1. The Record Shows, And Intermountain’s Brief Confirms, That Intermountain**
4 **Has No Intent To Put The Water To Beneficial Use But Simply Hopes To Sell**
5 **The Permits For a Profit**

6 Multiple times in its brief, Intermountain contends that SPI has made the “conclusory”
7 statement that Intermountain has no intention to put the water to beneficial use. Yet multiple
8 places in the record, Intermountain represented that it has no plans to itself perfect the water
9 rights but, instead, is marketing the permits to an as-yet nonexistent buyer who would develop the
10 water. On its website www.nevadawaterproject.com, Intermountain offers the water rights and
11 associated permits for \$12,000,000 and states, “It’s ready for implementation.” (ROA 182).
12 According to Intermountain’s marketing materials, “All water rights are secured and permitted by
13 the State Engineer of Nevada ... Please email us for more information *about purchasing.*” (ROA
14 183) (emphasis added).

15 Based upon this and other evidence in the record, as of the June 1, 2016 Decision and to
16 this day Intermountain has made repeated statements that it has no intention to perfect the
17 permitted water. (ROA 182-183, 1764-65, 1790). To the extent that there are elusive references
18 in the Marshall Affidavit to alleged “agreements” (ROA 614), they are unsupported by the record,
19 which shows that no buyer exists. (ROA 182-183, 1764-65, 1790). As a result, the State
20 Engineer’s reliance on unsupported and internally contradictory statements in the Marshall
21 Affidavit was unreasonable and does not meet the substantial evidence standard. *See Bacher*, 122
22 Nev. at 1121, 146 P.3d at 800.

23 Notably, although it repeatedly accuses SPI of making “conclusory” statements, not once
24 does Intermountain actually assert that it plans to put the water to beneficial use. (IMAB 23:7,
25 23:21). Rather, Intermountain carefully uses the passive voice to state that it intends for someone
26 else to put the water to beneficial use. *See, e.g.*, IMAB 19:7 (“Intermountain clearly intends for
27 its water *to be put* to beneficial use”). Moreover, the \$2.5 million that Intermountain has
28 allegedly spent is not proof that Intermountain itself plans to put the water to beneficial use but
instead is nothing more than its gamble on a speculative water scheme. If Intermountain obtains

1 its asking price (\$12,000,000) should some buyer ultimately materialize, Intermountain would
2 walk away with a \$9,500,000 profit. (ROA 182).

3 It is true that nothing prevents Intermountain from selling its water rights because water
4 rights are alienable. What makes Intermountain's conduct unlawful is that it is holding
5 unperfected water rights while speculating on possible future need and lacks any contractual or
6 agency relationship with someone who can put the water rights to beneficial use at their proposed
7 place of use. This is classic water speculation. *See Bacher*, 122 Nev. at 1119, 146 P.3d at 799.
8 The State Engineer erred as a matter of law in concluding otherwise because, by requiring that the
9 permit holder exercise reasonable diligence to itself put the water to beneficial use, NRS 533.380
10 protects against such speculation.

11 For this reason (and others discussed in SPI's opening brief), the *Chevron* case does not
12 support the June 1, 2016 Decision. *Mun. Subdistrict, N. Colo. Water Conserv. Dist. v. Chevron*
13 *Shale Oil Co.*, 986 P.2d 918 (Colo. 1999). The types of activities of which the *Chevron* court
14 approved presumed, based on the evidence presented, that the water rights holder (i.e. Chevron)
15 planned to put the water to beneficial use. *Id.* at 920. Intermountain does not. It wants to sell the
16 water rights at a profit to someone else who may or may not put the water to beneficial use. Until
17 the water is put to beneficial use, the permits are conditional. *See Desert Irr., Ltd. v. State*, 113
18 Nev. 1049, 1059, 944 P.2d 835, 842 (1997). While they are a "tangible property right" as stated
19 by the State Engineer (SEAB 1:20), the water rights are only protected under the law to the extent
20 that the permit holder satisfies all statutory requirements. *See* NRS 533.380. Intermountain has
21 not done so here.

22 **2. Without The Actual Agreements Referenced By Marshall, The Marshall**
23 **Affidavit Is Not Substantial Evidence**

24 The arguments of Intermountain and the State Engineer beg the question: how can the
25 information submitted by Marshall in 2016 meet the substantial evidence standard if, as stated in
26 the June 1, 2016 Decision, it will be insufficient in the future? The State Engineer emphasized in
27 the June 1, 2016 Decision that "**future extension requests** must be accompanied by copies of the
28 agreements you indicated in Paragraphs 5, 6, and 7 of your Affidavit that Intermountain has

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1 reached with engineering and construction firms, Utilities, Inc., and developers.” (ROA 624)
2 (emphasis in the original). Oddly, Intermountain points to this language to argue that the June 1,
3 2016 Decision meets the substantial evidence standard. (IMAB 20:13-21, 21:21-22). If future
4 requests will not meet the substantial evidence standard without the alleged agreements, their
5 absence from the current record necessarily means the June 1, 2016 Decision is not supported by
6 substantial evidence and is thereby deficient.

7 Intermountain contends that the State Engineer’s requirement that future requests include
8 the alleged agreements constitutes “a safeguard to ensure” the exercise of reasonable diligence.
9 (IMAB 20:17-20). Yet that is exactly what the State Engineer purported to do in the June 4, 2015
10 Decision by warning that “*further requests for extensions on permits comprising the Project*
11 *will be closely scrutinized to ensure the statutory criteria for granting extensions of time are*
12 *adhered to.* (ROA 948) (emphasis added). It was this pledge to implement a future “safeguard”
13 that prompted the Court to deny SPI’s 2015 petition for judicial review. (ROA 2404).

14 However, neither the State Engineer nor Intermountain points to any close scrutiny in the
15 June 1, 2016 Decision because there is none. Rather, the State Engineer simply accepted
16 Marshall’s unsupported hearsay statements at face value, even though they were contrary to other
17 representations made by Intermountain. (ROA 182-183, 1764-65, 1790). The June 1, 2016
18 Decision embodies run-of-the-mill review not the “close scrutiny” promised in the June 4, 2015
19 Decision. (ROA 948).

20 The fact that the Marshall Affidavit is made under penalty of perjury is immaterial if the
21 facts to which the affiant attests do not meet the substantial evidence standard. *See Desert Irr.*,
22 113 Nev. at 1053, 944 P.2d at 838. While the State Engineer may not be subject to “the same
23 legal evidentiary standards which [sic] may apply before a court of law” (SEAB 7:22-23), he
24 must support his decisions with substantial evidence. *See Bacher*, 122 Nev. at 1121, 146 P.3d at
25 800 (2006). By definition, the substantial evidence standard requires the State Engineer to test
26 the reliability and accuracy of the information presented because a reasonable mind would not
27 accept speculation, hearsay and internally contradictory statements – whether or not they are
28 made under oath – as adequate. *See id.*; *Desert Irr.*, 113 Nev. at 1056, 944 P.2d at 840. There is

1 nothing in the law that authorizes the State Engineer to simply accept an applicant's assertions at
2 "face value" solely because they are sworn, and the State Engineer identifies no statute or case
3 law that would deem such blanket acceptance reasonable. (SEAB 8:1-2).

4 **3. There Is No Evidence To Satisfy The Required Factors In NRS 533.380(4)**

5 In his answering brief, the State Engineer contends that because NRS 533.380(4) only
6 requires the State Engineer to "consider" the statute's factors, an applicant for an extension of
7 time need not submit "affirmative proof of each factor." (SEAB 11:4-6). The State Engineer's
8 argument is contrary to law: "An abuse of discretion occurs when the record does not contain
9 substantial evidence supporting the administrative decision." *City Plan Dev., Inc. v. Office of*
10 *Labor Comm'r*, 121 Nev. 419, 426, 117 P.3d 182, 187 (2005). The "substantial evidence" on
11 which the State Engineer relies must be "in the record before him." *Eureka Cnty v. State Eng'r*,
12 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1121 (2015) (reversing a State Engineer's decision that
13 was based on unsupported findings). To the extent that the State Engineer argues that an
14 applicant for an extension of time need not submit evidence to support each of the mandatory
15 NRS 533.380(4) factors, that is an issue of law that the Court must review de novo without
16 deference to the State Engineer. *See In re Nevada State Eng'r Ruling No. 5823*, 128 Nev. Adv.
17 Op. 22, 277 P.3d 449, 453 (2012).

18 In the absence of evidence to support each factor, one cannot know what the State
19 Engineer has "considered." Such a lack of transparency is the hallmark of arbitrary and
20 capricious decision making. *See City Plan Dev.*, 121 Nev. at 426, 117 P.3d at 187. Because the
21 Court's review must determine whether substantial evidence supports the State Engineer's
22 consideration of NRS 533.380(4), it is axiomatic that Intermountain had to submit actual evidence
23 relating to each of the required factors. *See Desert Irr.*, 113 Nev. at 1056, 944 P.2d at 840.
24 Intermountain did not.

25 Indeed, Intermountain concedes that it cannot do so because there is no specific project,
26 no development and no parcel for which its water is slated, thereby confirming the speculative
27 nature of the permits. (IMAB 28:2-8). And contrary to the State Engineer's contention (SEAB
28 14:21-22), the Marshall Affidavit does not identify any agreements that satisfy the anti-

1 speculation doctrine because the purported agreements do not relate to a specific project,
2 development or parcel to be served *within the proposed place of use of Intermountain's*
3 *permits*.⁵ (OB 11:7-12:14). On this basis alone, the June 1, 2016 Decision is contrary to law, and
4 the State Engineer's reliance on *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521,
5 523, 245 P.3d 1145, 1146 (2010) does not alter this conclusion. *See Desert Irr.*, 113 Nev. at
6 1057-58, 944 P.2d at 841. Unlike the applicant in the *Pyramid Lake* case, Intermountain has not
7 filed applications to change the proposed place of use to somewhere other than Lemmon Valley.
8 126 Nev. at 523, 245 P.3d at 1146. And the protestant in the *Pyramid Lake* case did not object on
9 the basis of the anti-speculation doctrine. *See id.* at 524, 245 P.3d at 1147. Here, the State
10 Engineer approved Intermountain's extensions based upon an alleged agreement to serve a
11 location outside of the proposed place of use in Intermountain's permits (ROA 614, 622), which
12 Nevada law clearly prohibits. *See Desert Irr.*, 113 Nev. at 1057-58, 944 P.2d at 841.

13 Nothing in the *Pyramid Lake* case or in the Court's denial of SPI's 2015 petition for
14 judicial review relieves the State Engineer from his obligation to consider actual evidence to
15 satisfy NRS 533.380(4). *See Eureka Cnty*, 131 Nev. at ___, 359 P.3d at 1121. The State
16 Engineer cannot substitute a "totality of the circumstances" approach for evidence that satisfies
17 every statutory requirement. *See* NRS 533.380(4). Absent substantial evidence to support the
18 NRS 533.380(4) factors, the June 1, 2016 decision cannot withstand judicial review.

19 CONCLUSION

20 The State Engineer and Intermountain have not identified substantial evidence to satisfy
21 NRS 533.380(3)-(4). Moreover, because both come to the Court with unclean hands, the Court
22 cannot disregard any of SPI's arguments. As a result, SPI respectfully requests that the Court
23 grant this Petition for Judicial Review, vacate the extensions granted to Intermountain for Permits
24 72700, 64977, 64978, 66400, 73428, 73429, 73430 and 74327, and remand the matter to the State
25 Engineer with instructions to cancel the permits.

26
27 ⁵ The TMWA Water Resource Plan is clear that a water project developer would have to build
28 and dedicate the project at its own expense before TMWA would issue any will-serve
commitments against the project water. (ROA 128).

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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 persons.

Dated: December 30, 2016.

McDONALD CARANO WILSON LLP

By: /s/ Debbie Leonard

Debbie Leonard
100 West Liberty Street, 10th Floor
Reno, Nevada 89501
(775) 788-2000

*Attorney for Petitioner
Sierra Pacific Industries*

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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that I am an employee of McDONALD CARANO WILSON LLP and that on December 30, 2016 I certify that I electronically filed the foregoing PETITIONER SIERRA PACIFIC INDUSTRIES' REPLY BRIEF with the Clerk of the Court by using the ECF system, which served the following parties electronically:

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DATED: December 30, 2016.

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Sierra Pacific Industries

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

* * * * *

SIERRA PACIFIC INDUSTRIES, a CASE NO.: CV16-01378
California corporation,

Petitioner, DEPT. NO.: 1

v.

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,

Respondents,

and

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

Intervenor-Respondent.

PETITIONER SIERRA PACIFIC INDUSTRIES'
MOTION TO SUPPLEMENT THE RECORD,
OR IN THE ALTERNATIVE,
FOR JUDICIAL NOTICE

JA2604

1 Petitioner Sierra Pacific Industries (“SPI”), through its attorney Debbie Leonard of
2 McDonald Carano Wilson LLP, moves the Court to supplement the record, or in the alternative,
3 to take judicial notice of correspondence that is in the files of the Nevada State Engineer, Division
4 of Water Resources, which is attached hereto as Exhibits 1-8 and marked SROA 2406-2475. This
5 motion is based on the following points and authorities, the exhibits and declaration of Debbie
6 Leonard attached hereto, the briefing on file in this case and such other matters that the Court
7 may wish to consider.

8 **POINTS AND AUTHORITIES**

9 **A. Introduction**

10 In their answering briefs, Respondent-Intervenor Intermountain Water Supply
11 (“Intermountain”) and Respondent Nevada State Engineer have raised waiver and similar
12 arguments based on the fact that SPI did not file a response to Intermountain’s extension request.
13 However, the attached correspondence, which is in the files of the Division of Water Resources
14 (“DWR”) and is therefore a matter of public record, demonstrates that both Intermountain and the
15 State Engineer should be estopped from raising such arguments because they failed to serve SPI’s
16 counsel with Intermountain’s extension request, notwithstanding that SPI’s counsel had signed up
17 to receive all correspondence related to Intermountain’s permits. To ensure the record is
18 complete, SPI requests that the Court supplement the record with, or in the alternative, take
19 judicial notice of these documents.

20 **B. Factual Background**

21 On June 11, 2015, Kristen Geddes, Chief of the Hearings Section of the Nevada Division
22 of Water Resources (“DWR”) provided a copy of DWR’s “Request for Correspondence and
23 Change of Address” form to SPI’s attorney. Ex. 1. Ms. Geddes stated: “[A]ttached is the form *to*
24 *request that you be included on correspondence for any permit that you identify by number.*”
25 Ex. 1 (emphasis added). On June 17, 2015, SPI’s counsel mailed the completed form to DWR,
26 checking the box that said: “Please add my name to the mailing list and send copies *of all*
27 *correspondence* to the address below.” Ex. 2 (emphasis added). SPI’s counsel included her

28 ///

1 physical and email addresses, indicating a preference to receive correspondence by email. *Id.*
2 Enclosed with the form was a list of 18 permit numbers held by Intermountain. *Id.*

3 Because Intermountain's 2015 extensions started to expire in December 2015, on
4 December 2, 2015, SPI filed an objection to the State Engineer granting any further extensions.¹
5 (ROA 5-426). On December 3, 2015, Ms. Geddes sent SPI's counsel a letter requesting that the
6 objection be served on Intermountain. Ex. 3. SPI's counsel sent a responding letter on December
7 9, 2015 confirming that the objection had been personally served on Intermountain's counsel and
8 enclosing the certificate of service. Ex. 4.

9 On February 19, 2016, SPI's counsel received an email from Sean Christensen of DWR
10 enclosing a copy of the final notice letter for some of Intermountain's permits, which stated:

11 Also I noticed that we received a request for correspondence form from you on
12 June 17, 2015. You did check the box on this form to receive correspondence by
13 email but we do need the Consent to Electronic Delivery of Documents form to be
14 completed by you in order for you to receive correspondence by email. Ex. 5.

15 That same day, SPI's counsel emailed back the completed consent form. *See* Ex. 6.

16 Thereafter, the next correspondence SPI's counsel received from DWR was on June 1,
17 2016, which was an email from Juanita Mordhost of DWR enclosing the State Engineer's June 1,
18 2016 Decision. Ex. 7. The June 1, 2016 Decision referenced an extension request and affidavit
19 of Robert Marshall that Intermountain purportedly submitted on March 8, 2016 but that SPI never
20 received from either the State Engineer or from Intermountain. Ex. 7.

21 Having not been served with Intermountain's extension request, SPI's counsel contacted
22 DWR to request a copy. Ms. Geddes emailed SPI's counsel on June 6, 2016 with the extension
23 requests filed by Intermountain. Ex. 8. In response, SPI's counsel wrote:

24 I was under the impression that, having signed up for electronic notifications for
25 the Intermountain permits, that I was going to be served with any filings and
26 submissions that pertained to those permits. Was I incorrect in my
27 understanding? Ex. 8.

28 Receiving no response, SPI's counsel inquired again:

¹ The previous year, because Intermountain had filed only form extension requests without any supporting documentation, the State Engineer had requested that Intermountain file supplemental information to address the points made in SPI's objection but did not give SPI an opportunity to respond. (*E.g.* ROA 942, 1759-60).

1 I am following up on my email below. Can you tell me why I was not served
2 with the filings and submissions related to Intermountain's permits, as I had
3 requested? Was there something else I needed to do to ensure I would be served?
4 Ex. 8.

5 Ms. Geddes responded:

6 I think there was a miscommunication about the purpose of our electronic service
7 notice. The request for electronic service our office uses applies to
8 correspondence and rulings that our office generates allowing us to serve parties
9 by e-mail rather than physical mailing. We do not notice any party, applicant or
10 protestant, of the filing of third party documents (i.e., like an extension). One
11 limited exception is that we are required by statute to notice an applicant of the
12 filing of a protest against a new or change application (NRS 533.365(3)).

13 There is no authority for, or against, the filing an objection against an extension
14 request, so this office has permitted them to be filed, although it is rare. For SPI's
15 objection last year, this office followed a process similar to 533.365 and notified
16 Intermountain of SPI's objection and requested a response. This year, we
17 requested SPI serve Intermountain with the objection directly, it having been filed
18 prior to the extension requests. Thereafter the extensions were filed according to
19 the deadline set by last year's approval letter.

20 Hopefully this clarifies our electronic service process, let me know if you have
21 any additional questions. Ex. 8.

22 There is nothing in either of DWR's forms submitted by SPI's counsel that limited the
23 notifications only to correspondence generated by the State Engineer. *See* Exs. 2 and 6. To the
24 contrary, the Request for Correspondence form specifically states that it would result in service of
25 "all correspondence" related to the permits identified by the requesting party. Ex. 2. Moreover,
26 although the State Engineer required SPI to serve Intermountain with its objection (Ex. 3), the
27 State Engineer never required that Intermountain serve its extension request on SPI, even though
28 both the State Engineer and Intermountain acknowledged that SPI's objection was already on file
at that time. (ROA 606, 619). There is no certificate of service on Intermountain's document.
(ROA 605-617). Based on these facts, SPI argues in its reply brief that Intermountain and the
State Engineer should be estopped from advancing a waiver or similar argument.

29 **C. Argument**

30 **1. The Circumstances Warrant That The Record Be Supplemented With The 31 Correspondence To And From DWR**

32 Because this correspondence to and from the State Engineer's office is a matter of public
33 record and a part of the State Engineer's files relating to the pertinent Intermountain permits, SPI

1 requests that the Court supplement the record to include these documents. “The proceedings in
2 every case [of judicial review of a State Engineer decision] must be heard by the court, and must
3 be informal and summary, but full opportunity to be heard must be had before judgment is
4 pronounced.” NRS 533.450(2). Consistent with the informal nature of review and to ensure a
5 full opportunity to be heard, the “whole record is not just what the agency submitted as the
6 administrative record but also includes ‘all documents and materials directly or indirectly
7 considered by agency decision-makers and includes evidence contrary to the agency’s position.’”
8 *Oregon Nat. Desert Ass’n v. Cain*, 17 F. Supp. 3d 1037, 1048 (D. Or. 2014) (quoting *Thompson*
9 *v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). When the agency omits from the
10 record material that was before the agency, the record should be supplemented. *Portland*
11 *Audubon Soc’y v. Endangered Species Comm’n*, 984 F.2d 1534, 1548 (9th Cir. 1993).

12 Here, the correspondence attached as Exhibits 1-8 hereto are matters of public record as it
13 consists of emails and other documents either sent or received by employees of DWR. The
14 correspondence relates to Intermountain’s permits that are the subject of the extensions granted
15 by the State Engineer in the June 1, 2016 Decision and are part of DWR’s records for those
16 permits. As a result, at a minimum, they were part of the record that was indirectly considered by
17 DWR and contradict DWR’s position that SPI had a full opportunity to respond to
18 Intermountain’s extension requests.

19 Moreover, NRS 233B.135(1) (which does not apply to a petition for judicial review from
20 a State Engineer decision, but in the absence of any other authority can be referenced by analogy)
21 allows the court reviewing an agency decision to receive evidence concerning alleged
22 irregularities in procedure that are not shown in the record. *See Minton v. Bd. of Med. Exam’rs*,
23 110 Nev. 1060, 1081, 881 P.2d 1339, 1354 (1994), *disapproved of on other grounds by Nassiri v.*
24 *Chiropractic Physicians’ Bd.*, 130 Nev. Adv. Op. 27, 327 P.3d 487 (2014); *see also Portland*
25 *Audubon Soc’y*, 984 F.2d at 1548 (record should be supplemented with documents that show
26 “impropriety in the process”). The failure to serve SPI with Intermountain’s extension request,
27 notwithstanding that SPI’s objection was already on file and that SPI had submitted DWR’s form

28 ///

request to be served with “all correspondence,” constitutes a procedural irregularity that warrants the Court’s review of Exhibits 1-8.

2. Alternatively, The Circumstances Warrant That The Court Take Judicial Notice

In the alternative, SPI requests that the Court take judicial notice of the documents attached as Exhibits 1-8 because they meet the statutory requirements for judicial notice. “A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.” NRS 47.150(2). A judicially noticed fact must be “[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned ... so that the fact is not subject to reasonable dispute.” NRS 47.130(2). Here, the correspondence to and from DWR has all indicia of authenticity, is part of DWR’s public records and is not subject to reasonable dispute. As a result, SPI asks the Court to take judicial notice of these documents.

D. Conclusion

Based on the foregoing, SPI asks the Court to supplement the record, or in the alternative, take judicial notice, of the documents attached hereto as Exhibits 1-8, marked SROA 2406-2475.

AFFIRMATION

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

Dated: December 30, 2016.

McDONALD CARANO WILSON LLP

By: /s/ Debbie Leonard

Debbie Leonard
100 West Liberty Street, 10th Floor
Reno, Nevada 89501
(775) 788-2000

*Attorney for Petitioner
Sierra Pacific Industries*

1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(b), I hereby certify that I am an employee of McDONALD
3 CARANO WILSON LLP and that on December 30, 2016 I certify that I electronically filed the
4 foregoing PETITIONER SIERRA PACIFIC INDUSTRIES' MOTION TO SUPPLEMENT THE
5 RECORD, OR IN THE ALTERNATIVE, TAKE JUDICIAL NOTICE with the Clerk of the
6 Court by using the ECF system, which served the following parties electronically:

7 Micheline Fairbank
8 Office of the Attorney General
9 100 North Carson Street
10 Carson City, Nevada 89701
11 mfairbank@ag.nv.gov

12 Rick Elmore
13 3301 S. Virginia St., Suite 125
14 Reno, NV 89502
15 relmore@rlepc.com

16 DATED: December 30, 2016.

17 /s/ Pamela Miller
18 Pamela Miller
19
20
21
22
23
24
25
26
27
28

JA2610

LIST OF EXHIBITS

EXHIBIT	DESCRIPTION	PAGES
1	June 11, 2015 email from Kristen Geddes, with attachments	6
2	Debbie Leonard Request for Correspondence and Change of Address	2
3	December 3, 2015 letter to Debbie Leonard	1
4	December 9, 2015 letter to Kristen Geddes, with enclosure	2
5	February 19, 2016 email from Sean Christensen, with attachments	3
6	February 19, 2016 email from Debbie Leonard, with attachment	3
7	June 1, 2016 email from Juanita Mordhorst, with attachment	8
8	June 6 - 9, 2016 email correspondence between Kristen Geddes and Debbie Leonard, with attachment to June 6, 2016 email	37
9	Declaration of Debbie Leonard	4

EXHIBIT 1

EXHIBIT 1

SRQA-2408
JA2612

Debbie A. Leonard

From: Kristen Geddes <kgeddes@water.nv.gov>
Sent: Thursday, June 11, 2015 1:19 PM
To: Debbie A. Leonard
Subject: Jason King correspondence to Bob Marshall
Attachments: 6-4-15 Bob Marshall Extensions.pdf; address_chg09.pdf

Ms. Leonard:

Per your request, attached please find the correspondence from Jason King to Bob Marshall dated 6/4/15. Also attached is the form to request that you be included on correspondence for any permit that you identify by number. The invoice for the correspondence will follow separately once issued by the front office.

Kristen

Kristen Geddes

Chief, Hearings Section
Nevada Division of Water Resources
901 S. Stewart St., Suite 2002
Tel: (775) 684-2882
Fax: (775) 684-2811
kgeddes@water.nv.gov

BRIAN SANDOVAL
Governor

STATE OF NEVADA



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 4, 2015

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

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

Dear Mr. Marshall:

On March 12, 2015, you responded to the request for evidence concerning the extension of time filed concerning Permit 72700. Given the similarity of information stated on the request for extension of time concerning Permit 72700, and Permits 64977, 64978, 66400, 73428, 73429, 73430 and 74327, this response applies equally to all of the listed Permits (*i.e.*, "the Project").

Pursuant to NRS § 533.380(3) an application for the extension must in all cases be accompanied by proof and evidence of the reasonable diligence with which the applicant is pursuing the perfection of the application. 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). Further, 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.*

In addition, in requests for extensions on permits for municipal use on any land referred to in NRS § 533.380(1)(b), or for any use which may be served by a county, city, town, public water district or public water company, requests an extension of time to apply the water to a beneficial use, the State Engineer shall also consider:

(a) Whether the holder has shown good cause for not having made a complete application of the water to a beneficial use;

SRQA2498
JA2614

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

Page 2

(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.

Your response included a written response, copies of the amendment to the Washoe County Regional Water Management Plan to Include the North Valley Strategy, Regional Water Planning Commission Minutes, a written Current Status of the Project, and various invoices for legal fees, consultant and professional fees, accountant fees and secretary of state fees. I have considered the evidence you submitted concerning the extension request and a discussion of my opinion concerning the evidence submitted as it relates to the extension request follows below.

1. Discussion of Amendment to the Regional Water Management Plan and Current Status of the Project

The Amendment to the Regional Water Management Plan to Include the North Valley Strategy (1995-2015), which was adopted March 31, 1997, identified four water supply alternatives, one of which included the Warm Springs Importation Project ("Project"). Although the Project was briefly described, the Plan Amendment makes clear that the County sought to pursue multiple projects simultaneously in order to maximize flexibility, to provide greater competitive position among negotiations with project proponents, and to secure a reliable water supply system beyond 2015. Therefore, it was recommended that, among other potential projects, your Project was to be aggressively pursued and implemented as needed and merited. Specific activities of the Regional Plan to implement the strategy included entering into agreements with project proponents to resolve remaining implementation issues and set performance criteria for proving viability of the projects. If the projects met the performance criteria, completed supporting technical analysis, submitted permit applications, prepared environmental documentation, completed preliminary engineering design, then the county would initiate formal discussions with project proponents to establish potential terms of an agreement to implement each project. Based on the results of these activities the County was to implement either the Project or the Green Gulch Project, or both.

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

Page 3

Subsequent to the revision of the Regional Plan, the "Current Status of the Project" does identify a number of performance criteria that were carried out, including: conformance reviews completed by the Regional Water Planning Commission, a Record of Decision issued on the EIS, Special Permit issued by the County, a Utility Environmental Protection Act (UEPA) permit issued by the Public Utility Commission, easements and rights of way were obtained and the drilling of seven wells. You also state that a final report, the archeological survey, is due later this year.

From the foregoing history it is evident that in 1997, the County contemplated the Project as a potential water source for the North Valleys, and considered future implementation of the Project subject to later-met performance criteria. As you demonstrate in your response, many activities were carried out laying the groundwork for the Project until the economic slowdown beginning in or around 2008.

2. Discussion of invoices

You submitted a number of invoices for attorney's fees, which your response states were incurred from meetings with Washoe County commissioners and meetings with representatives of the Washoe County District Attorney's Office to develop an appropriate agreement for Washoe County to obtain the Project.¹ While you state that ultimately an agreement was not reached with the County, the attorney's fees which were incurred appear to support the portions of the Regional Water Management Plan that formal discussions between the County and you would occur concerning the potential terms of an agreement to implement the Project.

As well, the consultant fees paid to Robert Williams to draft a letter of support regarding the FEIS demonstrates new efforts toward project milestones.

However, I find that the invoices for professional accounting and tax preparation services, and annual Secretary of State filing fees, do not help demonstrate the steady application of effort to perfect the application. Rather, invoices for professional accounting and tax preparation services, annual Secretary of State filing fees are indicative of revolving administrative fees incurred by Intermountain Water Supply.

¹ You later clarified that the attorney's fees were incurred by Rew Goodenew, of Parsons, Behle & Lattimer.

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

Page 4

3. Application of Bacher.

I decline at this time to apply the anti-speculation doctrine of the *Bacher* decision to deny the extensions on the basis of speculation. I would note, however, that the applications for extensions of time filed since 2011 have indicated you are seeking a buyer for the project. Inasmuch as negotiations with the County were unfruitful at the end of 2014, the inability to secure a buyer in future requests for extensions of time will not be considered good cause for extensions of time. See *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979) (articulating anti-speculation doctrine adopted by *Bacher*, stating the right to appropriate is for use, not merely for profit).

In considering NRS 533.380(4), I find good cause for granting extensions on the Project permits. The area to be served is Lemmon Valley, which has existing developments with currently little to no recharge. It is true that economic conditions have been poor in recent years for which I have taken into consideration.

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. In that vein, for any future extensions of time filed regarding the Project, please submit evidence at the time the request for extensions are filed, which demonstrates good cause supporting future extension requests made pursuant to NRS 533.380.²

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: Chris Skinner, Sierra Pacific Industries

² This also applies to Permits 66873 and 73048 referenced in your response.

SRG 24
JA2617

State of Nevada
Division of Water Resources
Request for Correspondence and Change of Address

In regard to permit number(s) _____: (Check applicable item)

- ☐ Please add my name to the mailing list and send copies of all correspondence to the address below:
(Fill in NEW ADDRESS information only.)
- ☐ Please change the address for copies to be sent as indicated below:
(Fill in NEW ADDRESS and OLD ADDRESS information.)
- ☐ I am the permit holder. Please change my address as indicated below:
(Fill in NEW ADDRESS and OLD ADDRESS information.)

NEW ADDRESS

Name: _____

Address: _____

City, State, Zip: _____

Telephone: _____

Email: _____

- ☐ I prefer to receive correspondence by email.

OLD ADDRESS

Name: _____

Address: _____

City, State, Zip: _____

Telephone: _____

I am the:

- ☐ Individual named above. (Complete signature below only.)
- ☐ Agent or representative. (Complete signature, name and address below.)

This form accurately reflects the mailing address for the permit holder or other individual identified above.

Signature: _____

Name: _____

Address: _____

City, State, Zip: _____

Telephone: _____ Email: _____

- ☐ I prefer to receive correspondence by email.

Mail form to: Division of Water Resources, 901 S. Stewart Street, Suite 2002, Carson City, NV 89701

Rev. 03/2012

SR0121
JA2618

EXHIBIT 2

EXHIBIT 2

State of Nevada
Division of Water Resources
Request for Correspondence and Change of Address

In regard to permit number(s) See Attached: (Check applicable item)

- ☒ Please add my name to the mailing list and send copies of all correspondence to the address below:
(Fill in NEW ADDRESS information only.)
- ☐ Please change the address for copies to be sent as indicated below:
(Fill in NEW ADDRESS and OLD ADDRESS information.)
- ☐ I am the permit holder. Please change my address as indicated below:
(Fill in NEW ADDRESS and OLD ADDRESS information.)

NEW ADDRESS

Name: Debbie Leonard

Address: 100 W. Liberty Street, 10th Floor

City, State, Zip: Reno, NV 89501

Telephone: (775) 788-2000

Email: dleonard@mcdonaldcarano.com

- ☒ I prefer to receive correspondence by email.

OLD ADDRESS

Name: _____

Address: _____

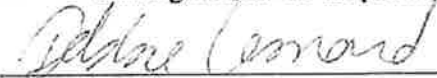
City, State, Zip: _____

Telephone: _____

I am the:

- ☒ Individual named above. (Complete signature below only.)
- ☐ Agent or representative. (Complete signature, name and address below.)

This form accurately reflects the mailing address for the permit holder or other individual identified above.

Signature: 

Name: Debbie Leonard

Address: 100 W. Liberty St., 10th Floor

City, State, Zip: Reno, NV 89501

Telephone: (775) 788-2000 Email: dleonard@mcdonaldcarano.com

- ☐ I prefer to receive correspondence by email.

Mail form to: Division of Water Resources, 901 S. Stewart Street, Suite 2002, Carson City, NV 89701

Rev. 03/2012

SROA2416
JA2620

72700
64977
64978
66400
73428
73429
73430
74327
66873
66961
67037
70423
70424
73048
73049
79548
84688
84689

EXHIBIT 3

EXHIBIT 3

**SROA 2417
JA2623**

EXHIBIT 4

EXHIBIT 4

SROA-2418
JA2624



McDONALD-CARANO-WILSON^{LLP}

Debbie Leonard
dleonard@mcwlaw.com

Reno Office

December 9, 2015

Kristen Geddes
Chief, Hearing Section
Dept. of Conservation and Natural Resources
Division of Water Resources
901 S. Stewart St., Suite 2002
Carson City, NV 89701

Re: Intermountain Water Supply's Permits:

64977
64978
66400
66961
72700
73428
73429
73430
74327
79548

Dear Ms. Geddes:

In response to your letter of December 3, 2015, enclosed please find a Certificate of Service. Sierra Pacific Industries' Objection to Extensions for Intermountain Water Supply's Permits, dated December 2, 2015 was hand delivered to John R. Zimmerman, attorney of record for Intermountain Water Supply, on December 8, 2015.

Sincerely,

Pamela Miller, Secretary to
Debbie Leonard

/pm
Enclosure

100 WEST LIBERTY ST., 10TH FLOOR
RENO, NEVADA 89501

P.O. BOX 2670, RENO, NEVADA 89505
775-788-2000 • FAX 775-788-2020

ATTORNEYS AT LAW



WWW.MCWLAW.COM

2300 WEST SAHARA AVENUE
SUITE 1200
LAS VEGAS, NEVADA 89102
702-873-4100
FAX 702-873-9966

SRO
JA2625

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO WILSON LLP and that on December 8, 2015, I hand delivered a copy Sierra Pacific Industries' Objection to Extensions for Intermountain Water Supply's Permits, dated December 2, 2015, as follows:

John R. Zimmerman
Parsons Behle & Latimer
50 West Liberty Street, Suite 750
Reno, NV 89501

A handwritten signature in black ink, appearing to read "B. Behle", is written over a horizontal line. A small number "7" is written to the right of the signature.

EXHIBIT 5

EXHIBIT 5

Debbie A. Leonard

From: Sean Christensen <schristensen@water.nv.gov>
Sent: Friday, February 19, 2016 7:32 AM
To: Debbie A. Leonard
Subject: Final Notice
Attachments: Intermountain Water Supply 67037 fn.ltr.pdf; Electronic_Consent.pdf

Hello,

You are receiving a copy of a final notice letter for Intermountain Water Supply.

Also I noticed that we received a request for correspondence form from you on June 17, 2015. You did check the box on this form to receive correspondence by email but we do need the Consent to Electronic Delivery of Documents form to be completed by you in order for you to receive correspondence by email.

I have attached this form for you, if you could please fill it out and email or fax it back to me that would be great.

If you have any questions please let me know.



Sean Christensen
Nevada Dept. of Conservation & Natural Resources
Division of Water Resources
901 S. Stewart St., Ste. 2002
Carson City, NV 89701
schristensen@water.nv.gov
p: 775.684.2827
f: 775.684.2811

BRIAN SANDOVAL
Governor

STATE OF NEVADA

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
(800) 992-0900
(In Nevada Only)
<http://water.nv.gov>

FINAL NOTICE

February 19, 2016

FINAL NOTICE

Intermountain Water Supply
Robert W. Marshall
625 Onyo Way
Sparks, NV 89441
Certified Mail No: 7106 7808 0630 0062 0826

Re: Final Notice for Permit 67037

The provisions of your above referenced permit to appropriate waters of the State of Nevada require you to file a **Proof of Completion and Proof of Beneficial Use** on or before **February 7, 2016**.

Our records indicate that you have not filed the required proof(s) and your permit is in danger of cancellation unless the proof(s) or an application for an extension of time along with the appropriate filing fee(s) with which to file the required proof(s) is/are received and filed with the State Engineer within thirty (30) days of the date of this final certified notice.

Per NRS 533.390 and/or 533.410, if the required proof or extension of time is not received within thirty (30) days after the mailing of this notice, your permit will be cancelled.

Please be advised that the permittee is responsible for notifying the State Engineer's Office of any address change. Furthermore, when multiple addresses are used by the applicant or agent, the required legal notices will be sent to the latest address of record and not to earlier addresses unless proper written notification from the applicant or agent directs otherwise.

If there are any questions regarding this notice please contact our office at (775) 684-2800.

sgc
cc: Debbie Leonard (email)

Schedule of Fees:
Fee for filing Proof of Completion - \$60
Fee for filing Proof of Beneficial Use - \$60
Fee for filing Request for Extension of Time - \$120

SRO 1147
JA2629

State of Nevada
Division of Water Resources
CONSENT TO ELECTRONIC DELIVERY OF DOCUMENTS

I, the undersigned, consent to receive electronic delivery of documents from the Division of Water Resources (Division). This consent does not apply to any notice, disclosure or other communication that the Division is required by Nevada Revised Statute to send in hard copy through the postal mail. The consent granted herein will continue indefinitely, unless it is revoked in accordance with the terms set forth below.

If you would like to withdraw your consent for electronic delivery of all eligible documents and receive paper copies, please send a *Request to Withdraw Consent for Correspondence* form to: State of Nevada, Division of Water Resources, 901 S. Stewart St., Ste. 2002, Carson City, NV 89701 or fax to (775) 684-2811.

"Electronic Delivery" means making information available by:

- Transmitting such information in an email or, at our option, in an attachment to an email, to your email address of record; or
- Sending notice to your email address of record that such information is available on our website or with instructions on how to access such information.

It is the responsibility of the recipient to notify the Division of any changes to their email address.

Please mail the completed form to: State of Nevada, Division of Water Resources, 901 S. Stewart St., Ste. 2002, Carson City, NV 89701 or fax to (775) 684-2811.

In regard to water right file number(s): _____

- ◆ For delivery of documents related to an active adjudication, please write the name of the adjudication: _____

Your name: _____

Company name: _____

Address: _____

City/State/ZIP: _____

Telephone: _____

Email address: _____

Additional email address (opt.): _____

- ☐ I am the water right holder
- ☐ I am the agent/correspondent

Signature: _____ Date: _____

Office Use Only:
Withdrawn on: _____ By: mail _____ fax _____ email _____ Rev. 11/2014

- ◆ If an adjudication is named, a copy of this form needs to be routed to the Adjudication Section's clerical staff.

SRO
JA2630

EXHIBIT 6

EXHIBIT 6

Debbie A. Leonard

From: Debbie A. Leonard
Sent: Friday, February 19, 2016 3:51 PM
To: Sean Christensen
Subject: RE: Final Notice
Attachments: 20160219092504.pdf

Sean,
Attached is my email consent. Please let me know if you need anything else.

Thanks,
Debbie

Debbie A. Leonard | Partner

MCDONALD CARANO WILSON LLP
100 West Liberty Street, 10th Floor | Reno, NV 89501
phone (775) 788-2000 | *facsimile* (775) 788-2020

BIO | WEBSITE | V-CARD



PERSONAL AND CONFIDENTIAL: This message originates from the law firm of McDonald Carano Wilson LLP. This message and any file(s) or attachment(s) transmitted with it are confidential, intended only for the named recipient, and may contain information that is a trade secret, proprietary, protected by the attorney work product doctrine, subject to the attorney-client privilege, or is otherwise protected against unauthorized use or disclosure. This message and any file(s) or attachment(s) transmitted with it are transmitted based on a reasonable expectation of privacy consistent with ABA Formal Opinion No. 99-413. Any disclosure, distribution, copying, or use of this information by anyone other than the intended recipient, regardless of address or routing, is strictly prohibited. If you receive this message in error, please advise the sender by immediate reply and delete the original message. Personal messages express only the view of the sender and are not attributable to McDonald Carano Wilson LLP.

From: Sean Christensen [<mailto:schristensen@water.nv.gov>]
Sent: Friday, February 19, 2016 7:32 AM
To: Debbie A. Leonard
Subject: Final Notice

Hello,

You are receiving a copy of a final notice letter for Intermountain Water Supply.

Also I noticed that we received a request for correspondence form from you on June 17, 2015. You did check the box on this form to receive correspondence by email but we do need the Consent to Electronic Delivery of Documents form to be completed by you in order for you to receive correspondence by email.

I have attached this form for you, if you could please fill it out and email or fax it back to me that would be great.

If you have any questions please let me know.



Sean Christensen
Nevada Dept. of Conservation & Natural Resources
Division of Water Resources
901 S. Stewart St., Ste. 2002
Carson City, NV 89701
schristensen@water.nv.gov
p: 775.684.2827
f: 775.684.2811

State of Nevada
Division of Water Resources
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In regard to water right file number(s): 64977, 64978, 66400, 66961, 72700, 73428, 73429, 73430, 74327, 79548

- ♦ For delivery of documents related to an active adjudication, please write the name of the adjudication: _____

Your name: Debbie Leonard
Company name: McDonald Carano Wilson LLP
Address: 100 West Liberty Street, 10th Floor
City/State/ZIP: Reno, Nevada 89501
Telephone: 775-788-2000
Email address: dleonard@mcdonaldcarano.com
Additional email address (opt.): _____

- ☐ I am the water right holder
☒ I am the agent/correspondent

Signature:  Date: February 19, 2016

Office Use Only:
Withdrawn on: _____ By: mail _____ fax _____ email _____ Rev. 11/2014

♦ If an adjudication is named, a copy of this form needs to be routed to the Adjudication Section's clerical staff.

SRO **JA2634**

EXHIBIT 7

EXHIBIT 7

Debbie A. Leonard

From: Juanita Mordhorst <jmordhorst@water.nv.gov>
Sent: Wednesday, June 01, 2016 10:24 AM
To: April Holt; Debbie A. Leonard
Cc: Jason King
Subject: Applications for Extension of Time re: 64977 etc.
Attachments: Marshall, Robert 72700 Extension grant (2016) JKjm 6-1-16.pdf

On behalf of Jason King, P.E., State Engineer, please find attached letter regarding Applications for Extension of Time concerning Permits 64977, 64978, 66400, 72700, 73428, 73429, 73430 and 74327.

Juanita Mordhorst
Admin. Asst. III, Hearings Section & Adjudications
Division of Water Resources



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.

SROA-2431
JA2637

**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

Page 3

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)).

Re: Applications for Extension of Time concerning Permits 64977, 64978, 66400, 72700,
73428, 73429, 73430 and 74327
June 1, 2016
Page 4

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).

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

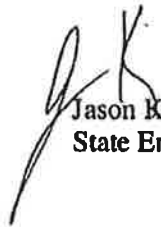
SPI states that Intermountain's permits should be cancelled because SPI has pending applications in the Dry Valley Hydrographic Basin and it stands ready to put the water to beneficial use. I find that an examination of the factors identified in NRS § 533.380, as discussed above, is an appropriate examination 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,

 P.E.
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).

EXHIBIT 8

EXHIBIT 8

Debbie A. Leonard

From: Kristen Geddes <kgeddes@water.nv.gov>
Sent: Thursday, June 09, 2016 10:04 AM
To: Debbie A. Leonard
Subject: RE: Intermountain Extensions of Time

Good Morning Debbie,

I think there was a miscommunication about the purpose of our electronic service notice. The request for electronic service our office uses applies to correspondence and rulings that our office generates allowing us to serve parties by e-mail rather than physical mailing. We do not notice any party, applicant or protestant, of the filing of third party documents (*i.e.*, like an extension). One limited exception is that we are required by statute to notice an applicant of the filing of a protest against a new or change application (NRS 533.365(3)).

There is no authority for, or against, the filing an objection against an extension request, so this office has permitted them to be filed, although it is rare. For SPI's objection last year, this office followed a process similar to 533.365 and notified Intermountain of SPI's objection and requested a response. This year, we requested SPI serve Intermountain with the objection directly, it having been filed prior to the extension requests. Thereafter the extensions were filed according to the deadline set by last year's approval letter.

Hopefully this clarifies our electronic service process, let me know if you have any additional questions.

Kristen

From: Debbie A. Leonard [<mailto:dleonard@mcdonaldcarano.com>]
Sent: Wednesday, June 08, 2016 3:22 PM
To: Kristen Geddes
Subject: RE: Intermountain Extensions of Time

Hi Kristin,

I am just following up on my email below. Can you tell me why was I not served with the filings and submissions related to Intermountain's permits, as I had requested? Was there something else I needed to do to ensure I would be served?

Thank you,
Debbie

Debbie A. Leonard | Partner
MCDONALD CARANO WILSON LLP
100 West Liberty Street, 10th Floor | Reno, NV 89501
phone (775) 788-2000 | facsimile (775) 788-2020

From: Debbie A. Leonard
Sent: Monday, June 06, 2016 9:28 AM
To: 'Kristen Geddes'
Subject: RE: Intermountain Extensions of Time

Thank you. I was under the impression that, having signed up for electronic notifications for the Intermountain permits, that I was going to be served with any filings and submissions that pertained to those permits. Was I incorrect in my understanding?

Debbie A. Leonard | Partner

MCDONALD CARANO WILSON LLP

100 West Liberty Street, 10th Floor | Reno, NV 89501
phone (775) 788-2000 | facsimile (775) 788-2020

From: Kristen Geddes [<mailto:kgeddes@water.nv.gov>]

Sent: Monday, June 06, 2016 9:08 AM

To: Debbie A. Leonard

Subject: Intermountain Extensions of Time

Ms. Leonard:

Attached please find a copy of the Extension of Time filed for Permit 64079, which is representative of the Intermountain extensions of time discussed in Mr. King's recent letter.

Regards,

Kristen Geddes

Chief, Hearings Section
Nevada Division of Water Resources
901 S. Stewart St., Suite 2002
Tel: (775) 684-2882
Fax: (775) 684-2811
kgeddes@water.nv.gov

BEFORE THE STATE ENGINEER OF THE STATE OF NEVADA

APPLICATION FOR EXTENSION OF TIME

Owner of Record Robert W. and Nanette Marshall

IN THE MATTER OF PERMIT NO. 64079 FILED TO APPROPRIATE/CHANGE THE WATERS OF
Warm Springs Creek

(Name of stream, lake, spring, underground or other source)

THIS APPLICATION IS RESPECTFULLY SUBMITTED.

Comes now Robert W. Marshall

the Permittee

Permittee or Agent

who after being duly sworn and answering to the best of their knowledge the following questions in compliance with the requirements as set forth in the permit terms:

1. Does this permit have multiple owners? ☐ Yes ☒ No (Check the appropriate box) (husband and wife)

2. If "Yes" on question 1 is checked, is this request for an extension of time submitted on behalf of all the owners?

☐ Yes ☐ No (Check the appropriate box)

3. If "No" on question 2 is checked, on whose behalf is this extension being filed?

4. How much time is needed to construct the works of diversion or place the water to beneficial use? 5 years

5. What is the expenditure on the project under this permit? last year? (2015) \$23,300.39 Total to date? \$2,573,799.23

6. The permittee requests an extension of time for 1 year within which to comply with the provisions for filing the
(Not to exceed 1 year)

Proof of Completion of Work and Proof of Beneficial Use

(Proof of completion of work and/or Proof of beneficial use)

7. Describe progress made during the last year and explain in detail why this request for an extension of time is being submitted (See instructions on back. Use additional pages if necessary):

(a) See attached statement in opposition to pre-filed objections of Sierra Pacific Industries which pertained to Intermountain Water Supply Ltd.'s Dry Valley permits. Since the above permit and the Dry Valley permits are part of the same project, the attached statement is included in this Application for Extension of time.

(b) Affidavit of Robert W. Marshall.

(c) List of expenditures and supporting invoices for calendar 2015.

State of Nevada

County of Washoe

Subscribed and sworn to before me on March 4, 2016

by Robert W. Marshall

Signed

Robert W. Marshall
Permittee or Agent

Address

625 Onyo Way

Street Address or PO Box

Sparks, NV 89441

City, State, ZIP Code

Phone

(775) 425-1161

E-mail

Kathy Souviron
Signature of Notary Public Required



Notary Stamp or Seal Required

**\$120 FILING FEE MUST ACCOMPANY THIS APPLICATION FOR EXTENSION OF TIME
A SEPARATE APPLICATION MUST BE FILED FOR EACH PERMIT**

Revised 07/13 - ext_app

SR9A2416
JA2647
TX APPROVED
2-20-16
11201

**STATEMENT OF INTERMOUNTAIN WATER SUPPLY IN OPPOSITION TO SIERRA
PACIFIC INDUSTRIES' PRE-MATURE FILED OBJECTIONS TO APPLICATIONS FOR
EXTENSIONS OF TIME FOR INTERMOUNTAIN'S DRY VALLEY PERMITS**

Sierra Pacific Industries, a California corporation ("Protestant") filed objections to anticipated extensions of time to be filed in the future by Intermountain Water Supply, Ltd., a Nevada limited liability company ("Intermountain") for its permits in Dry Valley (Basin 95). The objections were filed on December 2, 2015, and supplemented on January 6, 2016. The objections raise the same issues which Protestant raised with respect to Intermountain's filings in 2015 for its Dry Valley permits. All of Protestants' objections were rejected by the Washoe County District Court in its Order Denying Petition for Judicial Review dated January 12, 2014, in case CV15-01257. The objections are repetitive to those filed last year. The Court's Order became final on February 11, 2016, the last day for Protestant to file its appeal to the Nevada Supreme Court. No appeal was taken.

1. **Objections constitute a fugitive document.** Protestant's entire filing should be ignored by the State Engineer as a fugitive document. The filing did not address any matter pending before the State Engineer. There is nothing in the water law which authorizes filing objections to anticipated but non-existent pending matters. Indeed, there is no procedure in the water law which authorizes objections to extension of time applications already on file, let alone "speculative" objections to anticipated extension of time applications which might be filed in the future.

2. **The State Engineer Rulings cited in the objections are not applicable to the issues raised by Protestant's objections.** The objections filed by Protestant consist primarily of the TMWA 2010-2030 Water Resource Plan dated 2009, the 2011-2030 Comprehensive Regional Water Management Plan dated January 14, 2011, numerous State Engineer rulings denying Applications (#4192 – EcoVision, #4548 – Amargosa Resources, #5612 – Lifestyle Houses, #6063 – Aqua Trac), and legislative histories.

The Western Regional Water Commissions' 2011-2030 Comprehensive Regional Water Management Plan, dated January 14, 2011, submitted by Protestant, although more general than the TMWA Plan, and not confined to only the TMWA service territory, states on p. 3 of the Executive Summary that "New water resources, including imported water, may be developed provided they further the goals of the Regional Plan and Regional Water Plan." Specifically p. 16 of the Executive Summary of the 2011-2030 Comprehensive Regional Water Management Plan dated January 14, 2011, states:

"The demand for potable water supplies in Cold Springs will be met in the future using a combination of local groundwater resources, augmented with imported water supplies, such as the Fish Springs and Intermountain water importation projects." (emphasis added).

The TMWA Plan and the Comprehensive Regional Water Management Plan both support and recognize the development of Intermountain's Project as a supplier of municipal water to the North Valleys, contrary to the inaccurate assertions of the Protestant.

The Supplement filed by Protestant constitutes a "draft plan," not yet in effect, and should be considered in that light. However, the TMWA Draft plan for 2016-2035 re-states its policy on page 131 as follows:

There are a number of water importation projects being pursued by private developers who may be willing to bring these water supplies into the region. -----to the extent these private developers find their projects to be environmentally permissible, cost effective and worth the financial risk they may take, TMWA would integrate these projects into its water resource supply mix and would accept will-serve commitments against these supplies before other supplies are fully allocated." (emphasis added).

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The TMWA draft plan continues on page 132 to describe the Intermountain Project as follows:

"Intermountain Water Project:

Sponsored by Intermountain Water Supply, Ltd., the Intermountain Water Project ("IWP") is permitted for 3,564.1 AF/yr for municipal water from three close-in basins to supply water to the North Valleys. Interbasin transfers have been approved as follows: Bedell Flat 368.1 AF/yr, Lower Dry Valley ("LDV"), 2,000 AF/yr, Upper Dry Valley ("UDV"), 996 AF/yr, and Newcomb Lake, 200 AF/yr. The project received a record of decision ("ROD") from BLM for a pipeline and related infrastructure from the LDV and Bedell Flat well sites to Lemmon Valley as well as an Environmental Assessment for a power line from NV Energy's transmission line on Red Rock Road to the Bedell Flat well site and

pump station. Right-of-way grants and easements over private land have been secured for the LDV and Bedell Flat well sites. Private easements have also been secured for the Newcomb Lake well site and a portion of the UDV well sites.

Test wells have been drilled and pumped in LDV which indicates a sustainable yield of 25 percent more water than is currently permitted. The project can be developed in increments as demand requires, starting with Bedell Flat and moving through the five LDV wells sites and thereafter to Newcomb Lake and UDV. Washoe County has issued the IWP a Special Use Permit."

4. The TMWA plan is limited in area and does not cover areas outside of TMWA's service territory. The TMWA Plan covers only TMWA's service territory as of 2009 and does not include any of the Washoe County service territory nor Cold Springs, both of which areas can easily be served by the Intermountain Project. Neither does the TMWA Plan include area of Lemmon Valley that are not within TMWA's or Washoe County's service areas.

5. Bacher case requirements not applicable to Extensions of Time. Protestant once again tries to apply the Bacher requirements to applications for extensions of Time in Protestants' "speculative" objection (*Bacher v. State Engineer*, 122 Nev. 1110, 146 P3rd 793 (2006)). Protestants' objection was filed prior to the court's decision in the appeal, which was entered on January 12, 2016. The Court found that the requirements for Bacher, which was decided in 2006, apply to

"new or changes to existing, interbasin water rights. As such, the applications at issue in those prior decisions triggered NRS 533.370(3) and the anti-speculation requirements adopted in Bacher. This case involves applications for extensions of time to put water appropriated under existing water rights to beneficial use. Accordingly, the State Engineer's decision in this case is not contrary to those prior decisions."

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The court decision in the Appeal is controlling with respect to the issues raised in Protestant's Objection and is binding on Protestant. To assert the same objections that have already been decided between the parties constitutes vexatious litigation involving a multiplicity of suits.

6. Available Truckee River Water is not applicable to future needs of the North Valleys. Protestant quotes from the Comprehensive Regional Water Management Plan of 2011-2030 to the effect that 50,000 acre feet of Truckee River mainstream water is potentially available to meet TMWA's future water right requirements through the planning horizon. This statement is for areas served by the Truckee River (which is 85% of TMWA's service obligation), and does not include the North Valleys. Protestants' obvious purpose in including this statement is to show no potential demand

8. **Summary.**

- a. The objection of Protestant to Intermountain's anticipated filings for extension of time in 2016 should be ignored as a fugitive document not responsive to any pending matter before the State Engineer at the time of filing.
- b. The cited State Engineer rulings denying applications for interbasin transfers are not applicable to Intermountain's application for extension of time, based on the Judge's decision in the Appeal.
- c. The various water resource plans filed by Protestant recognize the Intermountain project as one of only two projects which are permitted and approved to supply water to the North Valleys, including Cold Springs. There is nothing obsolete in the original approval of the Intermountain project in the 1995-2015 Regional Water Management Plan.
- d. The TMWA 2010-2030 plan does not cover all of the area which can be served by the Intermountain project. Specifically, it does not cover much of Lemmon Valley, it does not cover Cold Springs and it does not cover areas of Lemmon Valley outside of TMWA's service territory. Not only do the submitted plans not show there is no need for Intermountain's municipal water, they specifically include the Intermountain project in their plans.
- e. The Bacher requirements for new applications for interbasin transfers under NRS 533.370 are not applicable to applications for extensions of time under NRS 533.380, according to the Judge's decision in the Appeal.
- f. Protestant's quote regarding 50,000 acre feet of water from the mainstream of the Truckee River as being sufficient for all of TMWA's water requirements through 2030 refers to the areas served by Truckee River water and not the North Valleys or Cold Springs.
- g. The severity of the "Great Recession" is highlighted in the 2010-2030 TMWA Water Resource Plan dated December 2009 and in the Draft TMWA Water Resource Plan 2016-2035. The information presented shows the wisdom of requiring the State Engineer to consider economic conditions when determining whether or not to grant an extension of time. (see NRS 533.380 4(c)).

9. **Conclusion.** The objections of Protestant should be rejected by the State Engineer when considering further applications for extension of time by Intermountain with respect to its Dry Valley permits.

Respectfully submitted
Intermountain Water Supply, LTD

Robert Marshall

AFFIDAVIT OF ROBERT W. MARSHALL

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, Robert W. Marshall, hereby swear under the penalties of perjury of the laws of the State of Nevada that the following assertions are true:

1. I am one of the owners of the Intermountain Ranch, along with my wife, Nanette. The Permit to which this affidavit pertains is for surface water in Warm Springs Valley which is permitted for municipal use in Lemmon Valley which is part of the Intermountain Water Supply Project.

2. In addition to the permits held by Intermountain Water Supply, Ltd., the following permits are also currently part of the Intermountain Water Supply Project: No. 64076, 64077 (Pradere Springs) 64078 and 64079 (Warm Springs Creek) ("Ranch Water").

3. Intermountain has spent nearly \$3,000,000.00 on this municipal water project having (a) obtained right-of-way grants from the BLM after having gone through an EIS process, (b) obtained a right-of-way grant from the BLM for a power line after an Environmental Assessment, (c) spent in excess of \$300,000.00 on an archeological study and field work, (d) prepared and filed an application under UEPA with the Public Utility Commission of Nevada, (e) obtained a Washoe County Special Use Permit, (f) obtained, at great expense all of the above permits from the State Engineer, (g) drilled five test wells, (h) test pumped seven wells, including a ten (10) day continuous pump test on five (5) of the wells, (i) commissioned and received technical studies from DRI, Stantec, Interflow Hydrology, Cordrilleran Hydrology and an analysis from R. Michael Turnipseed, P.E., former Nevada State Engineer, (j) paid for and obtained easements over private land, (k) received an independent study of available water from Dry Valley prepared jointly by USGS, DRI and Boise State University, (l) obtained on December 14, 2015,

an oral opinion from the Second Judicial District Court of Nevada for Washoe County affirming the State Engineer's determination in June of 2015 that Intermountain had proceeded with good faith and reasonable diligence to perfect its applications pursuant to the provisions of NRS 533.380 which requires the "steady application of effort to perfect the applications(s) in a reasonably expedient and efficient manner under all the facts and circumstances," (m) received a written opinion from the Court on January 12, 2016, consistent with the oral opinion, a copy of which is attached to this affidavit, and (n) the court decision is now final, the Protestant-Petitioner Sierra Pacific Industries, Inc. having failed to appeal from the court's decision within the time allowed by law.

4. Understandably, Intermountain had to devote substantial time and resources to the vexations litigation.

5. During 2015, Intermountain and Robert and Nanette Marshall entered into Option Agreements 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.

6. In addition to the agreement with the engineering and construction firms, Intermountain, during 2015 and early 2016 has had extensive negotiations with Utilities Inc., Nevada and Arizona, a PUCN certificated utility company to distribute Intermountain's water and the Ranch 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.

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.

8. Negotiating and entering into the agreements referenced in paragraphs 5, 6, and 7 above would normally entail significant and substantial attorney fees. Because one of the principals in Intermountain is an attorney, experienced in water law and in contract preparation, Intermountain has been spared such expense. However, that fortunate occurrence does not minimize the countless hours and extensive effort that has been put forth on behalf of Intermountain to perfect the permits involved in the water project in a "reasonably expedient and efficient manner."

9. A list of allowable expenses incurred by Intermountain during 2015 to move the project along is attached with supporting documentation verifying the expenditures. These expenditures total \$23,300.39 for 2015. In addition to the listed expenses, all of which Intermountain believes are allowable by the State Engineer in moving the project forward, Intermountain spent the additional sum of \$1,054.10 for Secretary of State (\$325.00); bank fees (\$35.00), accountant fees (\$501.90), and entertainment of construction firm representative and developers (\$192.20).


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10. Intermountain's Statement in opposition to the pre-filed "speculative" objection to Intermountain's anticipated applications for extension of time for some of its permits filed by the lawyer for Sierra Pacific Industries on or about December 2, 2015 is submitted with this affidavit.

FURTHER AFFIANT SAYETH NAUGHT.


Robert W. Marshall

SUBSCRIBED and SWORN to before me
this 4 day of March, 2016 by Robert W. Marshall.


NOTARY PUBLIC



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INTERMOUNTAIN WATER SUPPLY, LTD.

2015 EXPENDITURES

1.	Extensions of Time Check 1502, 2/2//15, \$960.00 (73428, 73429, 73430, 74327, 67037, 64977, 64978, 66400) Check 5006, 12/21/15, \$240.00 (66873, 73048)	\$1,200.00
2.	BLM – rent on four (4) well sites Check 5003, 11/20/15	\$500.00
3.	Interflow Hydrology – monitoring continuous recording meters Check 11444, 04/07/15 Check 11673, 11/13/15	\$755.72 \$594.75
4.	Western Nevada Supply Co. – well repair part Check 1507, 4/13/15	\$8.74
5.	Enviroscientists – PUC, UEPA Application Check 3, 9/10/15	\$114.75
6.	Parsons Behle & Latimer – legal work Sierra Pacific Industries Petition for Judicial Review Check 2, 8/25/15 Check 4, 9/25/15 Check 5002, 11/13/15 Check 5008, 12/29/15	\$16,567.90
7.	Parsons Behle & Latimer – legal work, archeological contract Check 5004, 12/12/15	\$1,731.10
8.	Reimbursed Expenses – maps and postage Check 1504, 2/28/15 Check 5005, 12/16/15	\$32.21
9.	Reimbursed Expenses – trip to Pahrump – Utilities Inc. Check 1, 08/01/15	\$114.29
10.	Copies of documents to project construction Firms (Sierra Legal Duplicating) Check 5007, 12/28/15	<u>\$1,680.93</u>
Total		\$23,300.39

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Clerk of the Court
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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. CV15-01257

Dept. No. 7

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ORDER DENYING PETITION FOR JUDICIAL REVIEW

This matter comes before the Court on Sierra Pacific Industries' ("SPI") Petition for Judicial Review of the State Engineer's June 4, 2015, 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 permits 64977, 64978, 73428, 73429, 73430, 74327, and 72700. The case has been fully briefed and oral arguments were

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1 heard on December 14, 2015. At oral argument, SPI was represented by Debbie Leonard,
2 Esq., the State Engineer was represented by Senior Deputy Attorney Micheline N. Fairbank,
3 and Intermountain was represented by John R. Zimmerman, Esq.

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

8 I. STANDARD OF REVIEW

9 The water law and all proceedings under it are special in character and its provisions
10 not only prescribe the method of procedure, but strictly limit procedure to that method. *In re*
11 *Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949). When the State Engineer's decision is
12 challenged in court, the decision is prima facie correct and the burden of proof is on the party
13 attacking it. NRS 533.450(10); *Office of State Eng'r v. Morris*, 107 Nev. 699, 701, 703,
14 819 P.2d 203, 205 (1991); *Town of Eureka v. State Eng'r*, 108 Nev. 163, 165, 826 P.2d 948,
15 949 (1992). A decision of the State Engineer will not be disturbed on appeal unless it is
16 arbitrary or capricious. *United States v. Alpine Land & Reservoir Co.*, 919 F. Supp. 1470,
17 1474 (D. Nev. 1996).

18 As to questions of fact, a court should not substitute its judgment for that of the State
19 Engineer, pass on the credibility of witnesses, or reweigh the evidence. *Revert v. Ray*,
20 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). It is the State Engineer's duty to resolve
21 conflicting evidence, and a court must limit itself to a "determination of whether substantial
22 evidence in the record supports the State Engineer's decision." *Id.* (citing *N. Las Vegas v.*
23 *Pub. Serv. Comm'n*, 83 Nev. 278, 429 P.2d 66 (1967)). Substantial evidence is that which
24 "a reasonable mind might accept as adequate to support a conclusion." *Bacher v. Office of*
25 *State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (citing *State Emp. Sec. v. Hilton*
26 *Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

27 In addition, because the State Engineer has the implied power to construe the state's
28 water law, great deference should be given to those interpretations when they are within the

1 language of the statutes. *United States v. State Eng'r*, 117 Nev. 585, 589, 27 P.3d 51, 53
2 (2001); *Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty.*, 112 Nev. 743, 747-48,
3 918 P.2d 697, 700 (1996); *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).
4 And even though the State Engineer's interpretation of a statute is not controlling, "this court
5 recognizes the State Engineer's expertise and looks to his interpretation of a Nevada water
6 law statute as persuasive, if not mandatory, authority." *In re Nevada State Eng'r Ruling*
7 *No. 5823*, 128 Nev. ___, ___, 277 P.3d 449, 453 (2012); *Andersen Family Assocs. v. Ricci*,
8 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008); *United States v. Office of State Eng'r*,
9 117 Nev. at 589, 27 P.3d at 53; *Pyramid Lake Paiute Tribe*, 112 Nev. at 748, 918 P.2d at 700;
10 *Morros*, 104 Nev. at 713, 766 P.2d at 266. Similarly, the State Engineer's conclusions of law,
11 to the extent they are closely related to his view of the facts, are entitled to deference and
12 must not be disturbed if they are supported by substantial evidence. *Jones Rosner*,
13 102 Nev. 215, 217, 719 P.2d 805, 806 (1986).

14 **II. FINDINGS AND CONCLUSIONS OF LAW**

15 "Water in Nevada belongs to the public and is a precious and
16 increasingly scarce resource. Consequently, state regulation like
17 that in NRS Chapters 533 and 534 is necessary to strike a sensible
18 balance between the current and future needs of Nevada citizens
19 and the stability of Nevada's environment. NRS Chapter 533
20 prescribes the general requirements that every applicant must meet
21 to appropriate water. Its fundamental requirement, as articulated in
22 NRS 533.030(1), is that water only be appropriated for 'beneficial
23 use.' In Nevada, beneficial use is 'the basis, the measure and the
24 limit of the right to the use of water.' The right to use water for a
25 beneficial use depends on a party actually using the water."

21 *Bacher*, 122 Nev. at 1116.

22 The State Engineer shall not grant an extension of time to put water to beneficial use
23 unless he determines from the proof and evidence submitted that the permit holder is
24 proceeding in good faith and with reasonable diligence to perfect the application.
25 NRS 533.380(3). Reasonable diligence is "the steady application of effort to perfect the
26 application in a reasonably expedient and efficient manner under all the facts and
27 circumstances." NRS 533.380(6). Further, "[w]hen a project or integrated system is
28 composed of several features, work on one feature of the project or system may be

1 considered in finding that reasonable diligence has been shown in the development of water
2 rights for all features of the entire project or system." *Id.* And where water rights are for
3 municipal use, the State Engineer must weigh any economic conditions that affect the water
4 right holder's ability to put water to beneficial use. NRS 533.380(4)(c). Lastly, the statute
5 provides that the State Engineer may grant any number of extensions of time so long as the
6 water right holder shows reasonable diligence. NRS 533.380(3).

7 The Court has reviewed the record in its entirety, and considered the arguments of
8 counsel. The water right permits at issue in this appeal are part of Intermountain's project to
9 supply water for municipal uses in Lemmon Valley, where the demand for water exceeds the
10 available groundwater supply present within the groundwater basin in which it is located.
11 Record on Appeal ("R.") 135. Intermountain initiated its water importation project in 1996.
12 R. 126. In 1997, the Washoe County Regional Water Planning Commission analyzed the
13 Project and concluded that it was a potential source of water for the North Valleys and should
14 be "aggressively pursued and implemented...." R. 138, 142 (1995-2015 Washoe County
15 Comprehensive Regional Water Management Plan, as amended March 31, 1997 (1995-2015
16 Plan"). In 2000, the Regional Water Planning Commission reaffirmed the Project confirmed
17 to the 1995-2015 Plan. R. 127.

18 Intermountain obtained water right permits for the Project in 2002, 2006, and 2008.
19 R. 114-16, 290-92, 415-18, 983-84, 1170-73, 1336-39, 1442-45, 1545-47. The permit
20 terms, the State Engineer imposed two deadlines on Intermountain. First, the State Engineer
21 set a deadline to build the infrastructure necessary to divert groundwater (the proof of
22 completion "POC"). R. 114-16, 290-92, 415-18, 983-84, 1170-73, 1336-39, 1442-45, 1545-47.
23 Second, the State Engineer set a deadline by which Intermountain was required to put the
24 water to beneficial use (the proof of beneficial use or "PBU"). R. 114-16, 290-92, 415-18,
25 983-84, 1170-73, 1336-39, 1442-45, 1545-47. Under these conditions, the earliest date by
26 which Intermountain was required to submit the PBU was 2007 and the latest was 2013.
27 R. 116 and 889. Because Intermountain has not yet placed any water to beneficial use, in

28 ///

1 order to maintain its permit, it is required to obtain one-year extensions of time to go to the State Engineer as authorized under NRS 533.380.

2
3 Since its first water right permit was granted in 2002, Intermountain has spent over
4 \$2,500,000 toward advancing the Project. R. 91, 85, 58, 53, 48, 45, 40, 35, 29, 7. This
5 work includes obtaining all necessary Federal authorizations to build a pipeline across public
6 lands, addressing endangered species concerns, and obtaining numerous studies and
7 reports. R. 91. In 2006, Intermountain completed an Environmental Impact Statement ("EIS")
8 as required by the National Environmental Policy Act ("NEPA") and in 2007 obtained Bureau
9 of Land Management ("BLM") approval of a right-of-way across public lands for the pipeline
10 required from Lower Dry Valley and Bedell Flat to Lemmon Valley. R. 908. In 2008,
11 Intermountain obtained a right-of-way over public lands for a power line to bring electricity to
12 its wells. R. 908. To obtain these authorizations, Intermountain was required to engage
13 engineers and consultants to design and analyze every aspect of the Project and prepare
14 reports to the governmental agencies issuing the permits. Additionally, Intermountain was
15 required to engage contractors to drill test wells and hydrogeologists to conduct aquifer
16 pumping tests to estimate the result of pumping groundwater under the water rights. R. 435,
17 457-628, 898-901, 296-300, 405, 908, 91, 85, 58, 53, 48, 45, 40, 35, 29, 7.

18 In his decision in this case, the State Engineer discussed the statutory requirements for
19 applications for extensions of time under NRS 533.380 and the evidence submitted by
20 Intermountain in support thereof. R. 9-11. This evidence included a written response to the
21 State Engineer's request for certain evidence concerning the applications for extensions of
22 time, copies of the 1995-2015 Plan (as amended), Regional Water Planning Commission
23 meeting minutes at which Intermountain's project was discussed and determined to be in
24 compliance with the Plan, a written status report of Intermountain's project, and various
25 invoices for legal fees, consultants and professional fees, accountant fees, and Secretary of
26 State fees. R. 9. The State Engineer considered and analyzed the evidence submitted by
27 Intermountain and, applying NRS 533.380, found good cause for granting the applications for
28 extensions of time. R. 11.

1 The Court concludes that a reasonable mind could find the above-described evidence
2 adequate to support the State Engineer's conclusion that Intermountain was proceeding in
3 good faith with reasonable diligence to perfect its appropriation of water under NRS 533.380.
4 Accordingly, the Court finds that the State Engineer's decision to approve the 2014 extension
5 is supported by substantial evidence.

6 SPI contends that the State Engineer erred by relying on the 1995-2015 Plan because
7 a new regional plan has been adopted. The record shows that the former Regional Water
8 Planning Commission thoroughly reviewed and analyzed the Project and in 2000 reaffirmed
9 that it conformed to the 1995-2015 Plan. In granting the one-year extension applications, the
10 State Engineer considered the entire record pertaining to Intermountain's project. The record
11 does not show that those findings and conclusions are no longer valid, carry no weight, or
12 were repudiated, and therefore, the State Engineer's partial reliance on them was not clearly
13 erroneous under the circumstances.

14 SPI also asserts that the State Engineer did not engage in the analysis required by
15 NRS 533.380(4). The State Engineer's decision, however, states that he considered
16 NRS 533.380(4). The State Engineer responded to the issues presented by SPI in its
17 objection and Intermountain's written response. R. 8-11. NRS 533.380(4) requires the State
18 Engineer to consider the factors described in the statute and the record, shows that he did so
19 in this case. Accordingly, the Court concludes that the State Engineer complied with
20 NRS 533.380(4) in considering Intermountain's applications for extensions of time.

21 Next, SPI asserts that the State Engineer's decision to grant Intermountain's
22 applications for extensions of time are contrary to prior State Engineer decisions.
23 Opening Br. 13:7. The prior decisions relied on by SPI involve applications for new, or
24 changes to existing, interbasin water rights. As such, the applications at issue in those prior
25 decisions triggered NRS 533.370(3) and the anti-speculation requirements adopted in *Bacher*.
26 This case involves applications for extensions of time to put water appropriated under existing
27 water rights to beneficial use. Accordingly, the State Engineer's decision in this case is not
28 contrary to those prior decisions. Further, because the State Engineer is not bound by stare

1 decisis he is not required to strictly follow his past decisions. *Motor Cargo v. Pub. Serv.*
2 *Comm'n*, 108 Nev. 335, 337, 830 P.2d 1328, 1330 (1992). Therefore, the State Engineer's
3 decision is not arbitrary and capricious or an abuse of discretion.

4 Additionally, SPI asserts the State Engineer was required to consider its pending
5 applications to appropriate water in Dry Valley when reviewing Intermountain's applications for
6 extensions of time. SPI's need for water in Dry Valley is not relevant to the State Engineer's
7 determination under NRS 533.380 and the statute does not indicate that the State Engineer
8 should consider them as part of Intermountain's applications for extensions of time.
9 Accordingly, the State Engineer did not err by not considering SPI's need for water.

10 Similarly, SPI asserts the State Engineer erred by not considering the Truckee
11 Meadows Water Authority's ("TMWA") Water Resource Plan for 2010-2030. SPI, however,
12 failed to submit TMWA's plan to the State Engineer as part of its objection to Intermountain's
13 applications for extensions of time, and therefore, it was not part of the record and the State
14 Engineer was not required to review it. Accordingly, the State Engineer did not err by not
15 considering evidence outside the record.

16 Lastly, SPI's request that this Court take Judicial Notice of facts outside the record
17 before the State Engineer is denied. SPI is not entitled to a trial de novo and the facts SPI
18 requests the Court take judicial notice of are outside the scope of appellate review of a State
19 Engineer decision.

20 The Court has considered SPI's remaining arguments and concludes they are without
21 merit. Therefore, good cause appearing:

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

23 ORDERED this 12 day of JANUARY, 2016.

24 *Daniel Flanagan*
25 DISTRICT JUDGE
26
27
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INTERMOUNTAIN WATER SUPPLY, LTD.

2015 EXPENDITURES

1.	Extensions of Time Check 1502, 2/2//15, \$960.00 (73428, 73429, 73430, 74327, 67037, 64977, 64978, 66400) Check 5006, 12/21/15, \$240.00 (66873, 73048)	\$1,200.00
2.	BLM – rent on four (4) well sites Check 5003, 11/20/15	\$500.00
3.	Interflow Hydrology – monitoring continuous recording meters Check 11444, 04/07/15 Check 11673, 11/13/15	\$755.72 \$594.75
4.	Western Nevada Supply Co. – well repair part Check 1507, 4/13/15	\$8.74
5.	Enviroscientists – PUC, UEPA Application Check 3, 9/10/15	\$114.75
6.	Parsons Behle & Latimer – legal work Sierra Pacific Industries Petition for Judicial Review Check 2, 8/25/15 Check 4, 9/25/15 Check 5002, 11/13/15 Check 5008, 12/29/15	\$16,567.90
7.	Parsons Behle & Latimer – legal work, archeological contract Check 5004, 12/12/15	\$1,731.10
8.	Reimbursed Expenses – maps and postage Check 1504, 2/28/15 Check 5005, 12/16/15	\$32.20
9.	Reimbursed Expenses – trip to Pahrump – Utilities Inc. Check 1, 08/01/15	\$114.29
10.	Copies of documents to project construction Firms (Sierra Legal Duplicating) Check 5007, 12/28/15	\$1,680.93
	Total	\$23,300.39

RECEIVED
2016 MAR -8 PM 1:35
TACE ENGINEERS CFI

RECEIVED
2016 FEB -9 PM 2:13
TACE ENGINEERS OFFICE

United States Department of the Interior
 Bureau of Land Management
 CARSON CITY DISTRICT OFFICE
 5665 MORGAN MILL RD
 CARSON CITY, NV 89701
 Phone: (775) 885-6000

Receipt

No: 3442103

Transaction #: 3541440	
Date of Transaction: 11/30/2015	
CUSTOMER:	
INTERMOUNTAIN WATER SUPPLY LTD 625 ONYO WAY SPARKS, NV 89441 US	

LINE #	QTY	DESCRIPTION	REMARKS	UNIT PRICE	TOTAL
1	1.00	LANDS & REALTY MANAGEMENT / RIGHTS OF WAY-RENTAL / R/W RENTAL-FLPMA-PD CASES: NVN 084712/\$500.00 PROJECT: LUGD32000180 RECEIPT REFERENCE: 2016006037 / L900584	RIGHT OF WAY RENTAL - WASHOE COUNTY	- n/a -	500.00
TOTAL:					\$500.00

PAYMENT INFORMATION			
1	AMOUNT:	500.00	POSTMARKED: N/A
	TYPE:	CHECK	RECEIVED: 11/30/2015
	CHECK NO:	5003	
	NAME:	INTERMOUNTAIN WATER SUPPLY LTD 625 ONYO WAY SPARKS NV 89441 US	

REMARKS

This receipt was generated by the automated BLM Collections and Billing System and is a paper representation of a portion of the official electronic record contained therein.

InterFlow Hydrology, Inc.
P.O. Box 1482
Truckee, CA 96160

Invoice

Bill To:
Intermountain Land & Cattle Co.
625 Onyo Way
Spanish Springs, NV 89441
Attn: Bob Marshall

Invoice #: IFH - 1053
Invoice Date: 4/2/2015
Due Date: 5/2/2015
Project:
P.O. Number:

(12)
4/7/15
11444

RECEIVED
2016 MAR -8 PM 1:30
STATE ENGINEERS OFFICE

Description	Hours/Qty	Rate	Amount
Warm Springs Creek Gages			0.00
Professional Services of Jack Childress, PG, Senior Hydrogeologist:			0.00
3-19-15 Gage maintenance and data downloads	6	80.00	480.00
Reimbursable Expenses:			0.00
3-19-15 Napa - Two replacement batteries	163.38	1.10	179.72
3-19-15 Travel - Field Vehicle	128	0.75	96.00

RECEIVED
2016 FEB -9 PM 2:13
STATE ENGINEERS OFFICE



Total	\$755.72
Payments/Credits	\$0.00
Balance Due	\$755.72

SRQA-2462
JA2668

InterFlow Hydrology, Inc.
P.O. Box 1482
Truckee, CA 96160

Invoice

Invoice #: IFH - 1122
Invoice Date: 11/5/2015
Due Date: 12/5/2015
Project:
P.O. Number:

Bill To:
Intermountain Land & Cattle Co.
625 Onyo Way
Spanish Springs, NV 89441
Attn: Bob Marshall

11/13/15
#1122

(02)

Description	Hours/Qty	Rate	Amount
Warm Springs Gages			
Professional Services of Jack Childress, PG, Senior Hydrogeologist: 10-16-15 Stream Gage Data Downloads and Maintenance	5.5	90.00	495.00
Reimbursable Expenses: 10-16-15 Travel - Field Vehicle	133	0.75	99.75

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2016 MAR - 8 PM 1:35
JAE ENGINEERS OFFICE
JAE ENGINEERS OFFICE

Professional Hydrogeologic Services in October 2015

Wright T. Smith

Total	\$594.75
Payments/Credits	\$0.00
Balance Due	\$594.75

SROA 2462
JA2669



950 S. Rock Blvd.
Sparks, NV 89431
tel 775.359.5800 fax 775.359.4649
www.gobluesteam.com

INVOICE

INVOICE NUMBER	INVOICE DATE
16206074	04/08/15
ACCOUNT NUMBER	SHIP TO ACCT NUM
94250	94250

PLEASE REMIT PAYMENT TO:
WESTERN NEVADA SUPPLY
PO BOX 31001-1161
PASADENA, CA 91110-1161

728 1 AT 0.406 E0065X 10126 D1300951897 P2528365 0001:0001



INTERMOUNTAIN CATTLE CO.
625 ONYO WAY
SPARKS NV 89441-7583

SHIPPING ADDRESS

INTERMOUNTAIN CATTLE CO.
625 ONYO WAY
SPARKS, NV. 89441
SPARKS, NV. 89441

SOLD FROM		SHIPPED FROM		JOB NUMBER/NAME		PO NUMBER		WRITTEN BY	
TERN NEVADA SUPPLY - SPARKS, NV		WESTERN NEVADA SUPPLY - SPARKS, NV							
ALES PERSON	JOB CONTACT	SHIP VIA		F.O.B.		ORDER DATE	DATE REQUIRED	SHIP DATE	
HOUSE		WW COUNTER SALE		FULL FREIGHT ALLOWED		04/08/15	04/08/15	04/08/15	
ITEM NUMBER	DESCRIPTION	ORD QTY	SHIP QTY	B.O. QTY	UNIT PRICE	UNIT	EXT PRICE	DISC %	NET AMOUNT
270690	2 GLV MI CAP IMPORT **WESTERN NEVADA SUPPLY IS NOT RESPONSIBLE FOR ANY PURCHASE OF NON 111-280 LEAD FREE COMPLIANT MATERIAL OR ITS INSTALLATION WHERE APPLICABLE**	1	1	0	31.80	EA	31.80	74.5	8.11
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							2016 MAR -8 PM 1:35		



Enviroscientists, Inc.

1630 Meadow Wood Lane
Reno, Nevada 89502
Phone: (775) 826-8322 Fax: (775) 826-8337
www.enviroincus.com

Invoice

Date	Invoice #
8/31/2015	18212

9/10/15
3

Bill To

Intermountain Water Supply, LTD.
Robert W. Marshall
625 Onya Way
Sparks, Nevada 89441

Project Name

Intermountain - Permitting

P.O. No.

Terms

Cust Rep

Project Rep

Project No.

Net 30

RFD

RFD

3509

Item

Description

Activity Date

Hrs/Qty/\$

Rate

Amount

PRW

R. DeLong: Intermountain Water - PUC
Letter

8/4/2015

0.5

200.00

100.00

AAF

N. Chavez: Intermountain Water - Project
Set-up

8/31/2015

0.25

50.00

12.50

495 Computer Service Charge

Computer Service Charge

8/31/2015

112.5

0.02

2.25

RECEIVED
2016 FEB -9 PM 2:13
TATE ENGINEERS OFFICE

RECEIVED
2016 MAR -8 PM 1:35
TATE ENGINEERS OFFICE

Please remit to above address.

Total

\$114.75

SROA 2465
JA2671

PARSONS
BEHLE &
LATIMER

201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Main 801.532.1234
Fax 801.536.6111
parsonsbehle.com

8/25/15
#2

A Professional
Law Corporation

INTERMOUNTAIN WATER SUPPLY, LTD.
ROBERT W. MARSHALL
C/O PARSONS, BEHLE & LATIMER
50 W. LIBERTY STREET, SUITE 750
RENO, NV 89501

AUGUST 12, 2015
FILE NUMBER: 18226.001
INVOICE NO.: 463494
TAX ID NO.: 87-0279766

REGARDING: CORPORATE GENERAL

FOR PROFESSIONAL SERVICES RENDERED THROUGH JULY 31, 2015

CURRENT LEGAL FEES	\$	3,049.50
CURRENT COSTS AND DISBURSEMENTS	\$	0.00
TOTAL	\$	3,049.50

BALANCE DUE FROM PREVIOUS STATEMENT
LESS PAYMENT(S) -- THANK YOU

BALANCE FORWARD

TOTAL AMOUNT DUE

\$

RECEIVED
2016 FEB -9 PM 2:18
CIVIL ENGINEERS OFFICE

RECEIVED
2016 MAR -8 PM 1:35
CIVIL ENGINEERS OFFICE

DUE UPON RECEIPT
TO ENSURE ACCURATE CREDITING, PLEASE RETURN THE COPY OF THIS STATEMENT WITH YOUR PAYMENT

SRQA 2466
JA2672

**PARSONS
BEHLE &
LATIMER**

A Professional
Law Corporation

201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Main 801.532.1234
Fax 801.536.6111
parsonsbehle.com

4
9/25/15

INTERMOUNTAIN WATER SUPPLY, LTD.
ROBERT W. MARSHALL
C/O PARSONS, BEHLE & LATIMER
50 W. LIBERTY STREET, SUITE 750
RENO, NV 89501

SEPTEMBER 8, 2015
FILE NUMBER: 18226.001
INVOICE NO.: 470396
TAX ID NO.: 87-0279766

REGARDING: CORPORATE GENERAL

FOR PROFESSIONAL SERVICES RENDERED THROUGH AUGUST 31, 2015

RECEIVED
2016 MAR -8 PM 1:30
STATE ENGINEERS OFFICE

CURRENT LEGAL FEES	\$	1,016.50
CURRENT COSTS AND DISBURSEMENTS	\$	214.96
TOTAL	\$	1,231.46

ANCE DUE FROM PREVIOUS STATEMENT
SS PAYMENT(S) -- THANK YOU

3049.50
(3049.50)

.00

ANCE, FORWARD

AL AMOUNT DUE

\$ 1,231.46
=====

RECEIVED
2016 FEB -9 PM 2:13
STATE ENGINEERS OFFICE

DUE UPON RECEIPT
TO ENSURE ACCURATE CREDITING, PLEASE RETURN THE COPY OF THIS STATEMENT WITH YOUR PAYMENT

SROA 2467
JA2673

**PARSONS
BEHLE &
LATIMER**

201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Main 801 532 1234
Fax 801 535.6111
parsonsbehle.com

A Professional
Law Corporation

INTERMOUNTAIN WATER SUPPLY, LTD.
ROBERT W. MARSHALL
C/O PARSONS, BEHLE & LATIMER
50 W. LIBERTY STREET, SUITE 750
RENO, NV 89501

NOVEMBER 5, 2015
FILE NUMBER: 18226.001
INVOICE NO.: 484177
TAX ID NO.: 87-0279766

11/13/15
#5002

RECEIVED
2016 MAR -8 PM 1:35
STATE ENGINEERS OFFICE

REGARDING: CORPORATE GENERAL

FOR PROFESSIONAL SERVICES RENDERED THROUGH OCTOBER 31, 2015

CURRENT LEGAL FEES	\$	8,307.45
CURRENT COSTS AND DISBURSEMENTS	\$	128.09
TOTAL	\$	8,435.54

BALANCE DUE FROM PREVIOUS STATEMENT	1231.46
LESS PAYMENT(S) -- THANK YOU	(1231.46)
BALANCE FORWARD	.00
TOTAL AMOUNT DUE	\$ 8,435.54

RECEIVED
2016 FEB -9 PM 2:13
STATE ENGINEERS OFFICE

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SRQA-2468
JA2674

PARSONS
BEHLE &
LATIMER

A Professional
Law Corporation

201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Main 801.532.1234
Fax 801.538.6111
parsonsbehle.com

INTERMOUNTAIN WATER SUPPLY, LTD.
ROBERT W. MARSHALL
C/O PARSONS, BEHLE & LATIMER
50 W. LIBERTY STREET, SUITE 750
RENO, NV 89501

DECEMBER 28, 2015
FILE NUMBER: 18226.001
INVOICE NO.: 495983
TAX ID NO.: 87-0279766

REGARDING: CORPORATE GENERAL

FOR PROFESSIONAL SERVICES RENDERED THROUGH NOVEMBER 30, 2015

CURRENT LEGAL FEES	\$	3,833.25
CURRENT COSTS AND DISBURSEMENTS	\$	18.15

TOTAL	\$	3,851.40
		=====

pd. 12/29/15
5008

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2016 FEB -9 PM 2:13
STATE ENGINEERS OFFICE

STATE ENGINEERS OFFICE

2016 MAR -8 PM 1:35

RECEIVED

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TO ENSURE ACCURATE CREDITING, PLEASE RETURN THE COPY OF THIS STATEMENT WITH YOUR PAYMENT

SROA 2462
JA2675

PARSONS
BEHLE &
LATIMER

201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Main 801.532.1234
Fax 801.536.6111
parsonsbehle.com

A Professional
Law Corporation

INTERMOUNTAIN WATER SUPPLY, LTD.
ROBERT W. MARSHALL
C/O PARSONS, BEHLE & LATIMER
50 W. LIBERTY STREET, SUITE 750
RENO, NV 89501

5004
12/12/15
DECEMBER 7, 2015
FILE NUMBER: 18226.001
INVOICE NO.: 490703
TAX ID NO.: 87-0279766

REGARDING: CORPORATE GENERAL

FOR PROFESSIONAL SERVICES RENDERED THROUGH NOVEMBER 30, 2015

CURRENT LEGAL FEES	\$	1,696.00
CURRENT COSTS AND DISBURSEMENTS	\$	35.10
TOTAL	\$	1,731.10

STATE ENGINEERS OFFICE

2016 MAR -8 PM 1:36

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RECEIVED
2016 FEB -9 PM 2:13
STATE ENGINEERS OFFICE

DUE UPON RECEIPT
TO ENSURE ACCURATE CREDITING, PLEASE RETURN THE COPY OF THIS STATEMENT WITH YOUR PAYMENT

SRO 2470
JA2676



ReproMax
The Technology Leader in Digital Imaging and Printing
FOOTHILL COMMERCE CENTER CROSSROADS PLAZA
9738 S. Virginia St. Suite D 380 E Winnie Lane
P.O. Box 19459 Reno NV 89511 Carson City NV 89706
Ph: 775-827-4441 Ph: 775-883-6011
Fax: 775-827-4576 Fax: 775-883-6015
www.avblue.com

Page 1 INVOICE
Invoice Number 0000233734
Invoice Date 11/23/2015 12:52:55PM
PO Number
Order Number
Customer CA100
Apply To

AS1

Bill To: CASH SALE--RENO STORE
9738 S VIRGINIA ST SUITE D
RENO, NV 89511

Ship To: CASH SALE--RENO STORE
9738 S VIRGINIA ST SUITE D
RENO, NV 89511

*RM
12/16/15
\$5005*

Project: COPIES				Ordered By: Walter		
Sales Rep: Management				Terms: Net 30 Days		
Num	Num	Qty		Sq Feet		
Orig	Sets	Prints	Item Code	Description	Total	Price Amount
10			12-108	11x17 Color Copies Laser	1.6900	16.90

Payment: American Express 3797* 288405 18.21

R.W. Marshall
Water Supply
AMEX - 11/23/15
cc memo

STATE ENGINEERS OFFICE
2016 MAR -8 PM 1:36

RECEIVED
2016 FEB -9 PM 2:13
STATE ENGINEERS OFFICE

Sub-Total	Discount	Sales Tax	Deposit Rec'd	Balance Due
16.90	0.00	1.31	18.21	

SRO JA2677



NEVADA BLUE LTD

ReproMAX

The Technology Leader in Digital Imaging and Printing

FOOTHILL COMMERCE CENTER

9738 S. Virginia St. Suite D

P.O. Box 19459 Reno NV 89511

Ph: 775-827-4441

Fax: 775-827-4576

www.evblue.com

CROSSROADS PLAZA

280 E Winnie Lane

Carson City NV 89706

Ph: 775-883-8011

Fax: 775-883-8015

Page 1

INVOICE

Invoice Number 0000219960

Invoice Date 2/27/2015

2:58:07PM

PO Number

Order Number

Customer CA100

Apply To

NH1

Bill To: CASH SALE-RENO STORE
9738 S VIRGINIA ST SUITE D
RENO, NV 89511

Ship To: COD CUSTOMERS NAME
P/U @ STORE
C.O.D.

Project Name		Ordered By		Sales Rep		MANAGEMENT		Items (Net 30 Days)	
Num	Unit	Qty	Unit Price	Ext	Unit Price	Ext	Unit Price	Ext	Unit Price
6	12-108	11x17 Color Copies Laser	1.6900	10.14					

Payment: American Express 3728* 507641

10.92

3.01
14.00

Raimb Rwm
#1504
2/28/15

AM EX
2/27/15

2M Water Supply

R. Marshall

STATE ENGINEERS OFFICE

2016 MAR -8 PM 1:36

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2016 FEB -9 PM 2:14
STATE ENGINEERS OFFICE

Sub-Total

Fuel Surcharge

Discount

Sales Tax

Deposit Rec'd

Balance Due

10.14

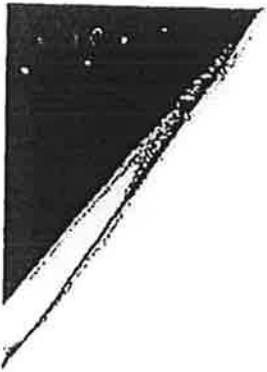
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SRO 2472
JA2678



**PARSONS
BEHLE &
LATIMER**

A Professional
Law Corporation

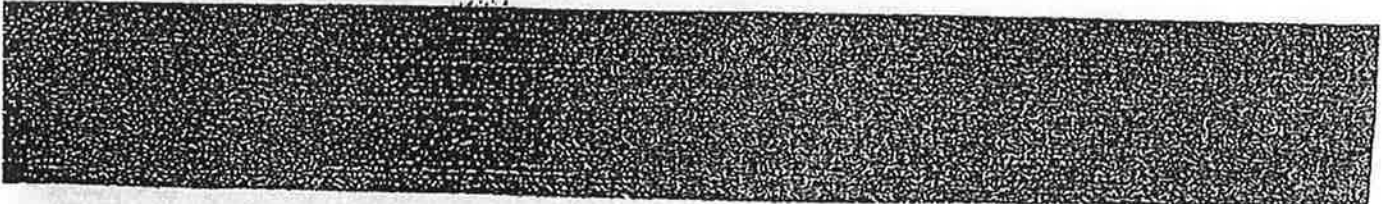
Robert W. Marshall
50 West Liberty Street, Suite 750
Reno, Nevada 89501

s Manager

Water Project

RECEIVED
2016 MAR -8 PM 1:36
STATE ENGINEERS OFFICE

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STATE ENGINEERS OFFICE



SRO
JA2679

Intermountain Water Supply, Ltd

Trip To Pahrump - meet with Wendy Barnett, Pres.
of Utilities Inc. Nevada; 7/31/15

Air fare	- - -	11.20
Gas	- - -	19.30
Car rental	- -	64.79
- Parking	- -	219.00
		<u>\$ 114.29</u>

Reimb. R.W.M.

8/1/15
#

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2016 MAR -8 PM 1:36
STATE ENGINEERS OFFICE

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2016 FEB -9 PM 2:14
STATE ENGINEERS OFFICE

SRO 2471
JA2680

Sierra Legal Duplicating, Inc.

P.O. Box 2452
Reno, NV 89505
775-786-8224 or 888-753-5345
F.IN 88-0369419

Invoice

DATE	INVOICE #
11/30/2015	Nov 15 90

BILL TO
Intermountain Water Supply, LTD 625 Onyo Way Sparks, NV 89441

SHIP TO
Intermountain Water Supply, LTD 625 Onyo Way Sparks, NV 89441

RECEIVED
2016 MAR -8 PM 1:08
STATE ENGINEERS OFFICE

TERMS	REP	SHIP	VIA	CLIENT/MATTER
Net 30	EF	11/30/2015	Hand Deliver	Monhai/Bob Marshall

QUANTITY	ITEM CODE	DESCRIPTION	PRICE EACH	AMOUNT
4,021	Scan	Scan Documents	0.155	623.26T
374	Scan Color	Scan Color	0.69	258.06T
17	Scan Oversize	Scan Oversized Documents		0.00
67	Scan Color Oversize	Scan Color Oversized Documents (Sq. Ft.)	5.00	85.00T
4,441	OCR	OCR Documents	6.50	435.50T
1	CD Master	CD Master (PDF/Tiff/Jpeg)	0.00	0.00T
7	CD	CD	0.00	0.00T
1	Misc.	16gb Flash Drive	15.00	105.00T
20	0013	Rebind	35.00	35.00T
		Sales Tax	1.00	20.00
			7.725%	119.11
Total				51,680.93

*OK # 5007
12/28/15*

RECEIVED
2016 FEB -9 PM 2:14
STATE ENGINEERS OFFICE

Please pay by this invoice. No monthly statement will be sent. Terms: Net 30 days, interest rate of 1.5% (18.0% per annum) will be added after 30 days. Now for your convenience, we accept Visa, Master Card, Discover and American Express.



SR0A-2475
JA2681

EXHIBIT 9

EXHIBIT 9

JA2682

1 Debbie Leonard (Nevada Bar No. 8260)
2 McDONALD CARANO WILSON LLP
100 West Liberty Street, 10th Floor
3 Reno, Nevada 89501
Telephone: (775) 788-2000
4 Facsimile: (775) 788-2020
dleonard@mcdonaldcarano.com

5 Attorney for Petitioner
6 *Sierra Pacific Industries*

7
8 **SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
9 **IN AND FOR WASHOE COUNTY**

10 * * * * *

11 SIERRA PACIFIC INDUSTRIES, a
California corporation,

CASE NO.: CV16-01378

12 Petitioner,

DEPT. NO.: 1

13 v.

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

17 Respondents,

18 and

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

21 Intervenor-Respondent.

22 _____/

23
24 **DECLARATION OF DEBBIE LEONARD IN SUPPORT OF**
PETITIONER SIERRA PACIFIC INDUSTRIES'
25 **MOTION TO SUPPLEMENT THE RECORD OR, IN THE ALTERNATIVE,**
26 **TO TAKE JUDICIAL NOTICE**
27
28

JA2683

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1 7. On December 3, 2015, Ms. Geddes sent me a letter requesting that SPI's objection
2 be served on Intermountain. A true and correct copy of this letter is attached to the Motion as
3 Exhibit 3.

4 8. Through my secretary Pamela Miller, I sent a responding letter to Ms. Geddes on
5 December 9, 2015 confirming that the objection had been personally served on Intermountain's
6 counsel and enclosing the certificate of service. A true and correct copy of the letter and
7 enclosure is attached to the Motion as Exhibit 4.

8 9. On February 19, 2016, I received an email from Sean Christensen of DWR
9 enclosing a copy of the final notice letter for some of Intermountain's permits, a true and correct
10 copy of which is attached to the Motion as Exhibit 5. The email also stated:

11 Also I noticed that we received a request for correspondence form from you on
12 June 17, 2015. You did check the box on this form to receive correspondence by
13 email but we do need the Consent to Electronic Delivery of Documents form to be
completed by you in order for you to receive correspondence by email.

14 10. That same day, I emailed back the completed consent form. A true and correct
15 copy of the form and the email with which it was transmitted are attached to the Motion as
16 Exhibit 6.

17 11. Thereafter, the next correspondence I received from DWR was on June 1, 2016,
18 which was an email from Juanita Mordhost enclosing the State Engineer's June 1, 2016 Decision.
19 A true and correct copy of the email is attached to the Motion as Exhibit 7.

20 12. I reviewed the June 1, 2016 Decision and saw that it referenced an extension
21 request and affidavit of Robert Marshall that Intermountain purportedly submitted on March 8,
22 2016. I was never served with these documents.

23 13. I contacted DWR to request a copy of what Intermountain had submitted. Ms.
24 Geddes emailed me on June 6, 2016 with an example of an extension request filed by
25 Intermountain. A true and correct copy of that email correspondence is attached to the Motion as
26 Exhibit 8.

27 ///

28 ///

14. Believing that I had signed up to receive electronic service, I followed up with Ms. Geddes to inquire as to why I had not been served. A true and correct copy of that email correspondence is attached to the Motion as Exhibit 8.

15. I believed that when I checked the box on DWR's forms to receive "all correspondence" that I would also be served with everything that Intermountain submitted to DWR. I relied on that language to ensure I would be apprised of all correspondence, whether to or from DWR, related to Intermountain's permits.

16. Neither DWR nor Intermountain served me with Intermountain's extension requests and associated document and affidavit. The first time I saw those documents was June 6, 2016 when Ms. Geddes provided them to me.

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

Dated: December 30, 2016.

Debbie Leonard

DEBBIE LEONARD

3370

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

* * * * *

SIERRA PACIFIC INDUSTRIES, a
California corporation,

CASE NO.: CV16-01378

Petitioner,

DEPT. NO.: 1

v.

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,

Respondents,

and

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

Intervenor-Respondent.

**ORDER GRANTING
SIERRA PACIFIC INDUSTRIES'
MOTION TO SUPPLEMENT THE RECORD**

On December 30, 2016, Petitioner SIERRA PACIFIC INDUSTRIES filed a Motion to
Supplement the Record. Respondents and Intervenor-Respondent did not file oppositions.

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1 Good cause appearing, it is hereby ordered that Petitioner SIERRA PACIFIC
2 INDUSTRIES' Motion to Supplement the Record, filed on December 30, 2016, is GRANTED.

3 IT IS SO ORDERED

4 Dated this 3rd day of February, 2017.

5
6 Janet Berry
District Court Judge

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 6 day of February, 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

DEBBIE LEONARD, ESQ. for SIERRA PACIFIC INDUSTRIES

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

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


JUDICIAL ASSISTANT

JA2689

CODE 1250

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SIERRA PACIFIC INDUSTRIES, A
CALIFORNIA CORPORATION,

Plaintiff,

vs.

Case No. CV16-01378

Dept. No. 1

JASON KING, P.E., IN HIS CAPACITY AS
NEVADA STATE ENGINEER, AND THE DIVISION
OF WATER RESOURCES, DEPARTMENT OF
CONSERVATION, AN AGENCY OF STATE OF
NEVADA,

Defendants.

AND RELATED MATTERS.

APPLICATION FOR SETTING VIA TELECONFERENCE

TYPE OF ACTION: CIVIL

MATTER TO BE HEARD: PETITION FOR JUDICIAL REVIEW

DATE OF APPLICATION: April 26, 2017

COUNSEL FOR PLAINTIFF: DEBBIE LEONARD, ESQ.

COUNSEL FOR DEFENDANTS: MICHELINE FAIRBANK, ESQ.-JASON KING, DIV OF
WATER RESOURCES
RICHARD ELMORE, ESQ.-INTERMOUNTAIN WATER SUPPLY

JURY DEMAND BY: N/A

DURATION OF HEARING/TRIAL: 3 HOURS

Petition **9:00 p.m.** **24TH** **MAY, 2017.**
HEARING SETTING AT ON THE DAY OF

*** Hearing set for May 4, 2017 is VACATED.***

CERTIFICATE OF SERVICE

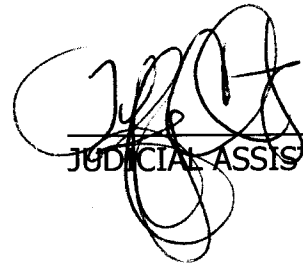
Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 28 day of APRIL, 2017, I hand delivered or deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, 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

DATE, JUDGE
OFFICERS OF
COURT PRESENT

APPEARANCES-HEARING

05/24/17

PETITION FOR JUDICIAL REVIEW

HONORABLE

WILLIAM MADDOX
DEPT. NO. 1

M. Schuck
(Clerk)

L. Clarkson
(Reporter)

Deputy Plunkett
(Bailiff)

Plaintiff, Sierra Pacific Industries, without a representative present and represented by Debbie Leonard, Esq.

Defendant, Jason King, not present and represented by Micheline Fairbank, Esq.

Defendant, Division of Water Resources, with representative Malcolm Wilson present and represented by Micheline Fairbank, Esq.

Defendant, Intermountain Water Supply, Ltd., with representative Bob Marshall present and represented by Richard Elmore, Esq.
Matter convened at 9:04 a.m.

Counsel Leonard commenced her argument in favor of her Petition for Judicial Review. She requested the Court grant said petition.
Counsel Fairbank presented her argument against Petition for Judicial Review.

Counsel Elmore presented his argument against Petition for Judicial Review.

Court interjected his questions and concerns during each argument.

Counsel Leonard presented her rebuttal to both Counsel Fairbank's and Counsel Elmore's arguments. She requested her Petition for Judicial Review be granted.

Court indicated there was substantial evidence and deferred to the previous view of the law.

COURT denied Petition for Judicial Review.

Court directed Counsel Fairbank to prepare the proposed Order and to email him a said proposed Order to his stated email.

Matter concluded at 10:43 a.m.

Code No. 4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
BEFORE THE HONORABLE WILLIAM A. MADDOX, SENIOR JUDGE

SIERRA PACIFIC INDUSTRIES,

Plaintiff,

-vs-

Case No. CV16-01378

Dept. No. 1

JASON KING, P.E., DIVISION
OF WATER RESOURCES, and
INTERMOUNTAIN WATER SUPPLY, LTD.,

Defendants.

PETITION FOR JUDICIAL REVIEW

May 24, 2017

Reno, Nevada

Reported by: Lesley A. Clarkson, CCR #182

JA2693

A_P_P_E_A_R_A_N_C_E_S

FOR THE PLAINTIFF:

DEBBIE LEONARD, ESQ.
McDONALD CARANO
100 West Liberty Street
Reno, Nevada 89501

FOR THE DEFENDANT
JASON KING and
DIVISION OF WATER
RESOURCES:

MICHELINE N. FAIRBANK, ESQ.
Senior Deputy Attorney General
Bureau of Government Affairs
Government and Natural
Resources Division
100 North Carson Street
Carson City, Nevada 89701

FOR THE DEFENDANT
INTERMOUNTAIN WATER
SUPPLY, LTD.:

RICHARD L. ELMORE, ESQ.
RICHARD L. ELMORE CHARTERED
3301 South Virginia Street
Reno, Nevada 89502

1 RENO, NEVADA, THURSDAY, MAY 24, 2017, 9:00 A.M.

2 -o0o-

3
4 THE COURT: This is Case No. CV16-01378, Sierra Pacific
5 Industries versus Jason King, et al.

6 Could the parties identify themselves and who they
7 represent.

8 MS. LEONARD: Debbie Leonard, Your Honor, representing
9 the petitioner, Sierra Pacific Industries.

10 MS. FAIRBANK: Micheline Fairbank, Your Honor,
11 representing Jason King, the division of water resources, and the
12 state engineer.

13 MR. ELMORE: Good morning, Judge. Rick Elmore. I'm
14 here on behalf of Intermountain Water Supply, and my client
15 representative Bob Marshall is here with me this morning.

16 THE COURT: Miss Leonard, this is your petition. Do
17 you want to go ahead.

18 MS. LEONARD: Sure. Thank you, Your Honor. Again,
19 Debbie Leonard on behalf of Sierra Pacific Industries.

20 A permit to appropriate water is conditional. In order
21 to perfect the permit, the permit holder must build the diversion
22 works and put the water to beneficial use. This can be as simple
23 as digging a ditch to divert water into a pasture, or as in this
24 case, it can involve drilling multiple municipal wells,
25 constructing an interbasin pipeline, building a water treatment

1 plant, and delivering it to new homes and businesses, all with a
2 price tag of tens of millions of dollars. Either way an
3 applicant has the same fundamental obligation. You must
4 construct the diversion facilities and put the water to
5 beneficial use within the time period authorized by the permit.
6 But the water can't be used just anywhere. The water has to be
7 used only in the place of use that's authorized in the permit.

8 Now, the statute gives the state engineer authority to
9 grant extensions, but only if strict statutory criteria are met.
10 If not, the state engineer must cancel the permits and allow
11 others who are in line to use the water. Why does Nevada have
12 these strict statutory requirements? Because water is a scarce
13 resource that belongs to the public. The public policy is that
14 no one can hold a scarce resource hostage or speculate on future
15 needs. Rather, if you hold a permit for the state's limited
16 water resource, you must make beneficial use of it or you lose
17 it.

18 So this petition for judicial review relates to
19 conditional permits that the state engineer initially granted to
20 Intermountain Water Supply in 1999 for a proposed water
21 importation project that sought to pump from the Dry Valley
22 hydrographic basin, transport it to Lemmon Valley, treat it, and
23 distribute it for possible --

24 THE COURT: Does anybody find that ironic at all, that
25 we are talking about transporting water to Lemmon Valley right

1 now?

2 Go ahead. I didn't mean --

3 MS. LEONARD: Because of the flooding right now, Your
4 Honor?

5 THE COURT: Yes.

6 MS. LEONARD: There's an abundance of water in Lemmon
7 Valley right now.

8 Intermountain's permits were for nearly 3,000 acre feet
9 of ground water, which, as established by the state engineer, is
10 the entire ground water resource in Dry Valley. The state
11 engineer uses the term perennial yield. Because of that
12 Intermountain's permits, although not exercised, prohibit others
13 from using water in Dry Valley.

14 So Intermountain concedes it does not itself intend to
15 put the water to beneficial use. It has no capital to build the
16 pipeline and related infrastructure, and it owns no land in
17 Lemmon Valley. Instead, Intermountain wants to sell the permits
18 for a profit. As a matter of law, that means that Intermountain
19 is engaging in water speculation. In essence Intermountain is
20 wagering that municipal demand in Lemmon Valley might materialize
21 at some point in the future. But in the 15 years that
22 Intermountain has held the permits that has not occurred. And in
23 the 15 years that Intermountain has held the permits, it's never
24 found a buyer for the water. So for the past 15 years the state
25 engineer has allowed Intermountain to hold the resource hostage.

1 So how does this happen? Well, year after year
2 Intermountain asks for an extension, and the state engineer
3 grants it. And so for the last 12 years Intermountain, well,
4 since 2005, the last 12 years, the state engineer has granted
5 Intermountain these one-year extensions of time. The most recent
6 extension was granted on June 1, 2016, and that's the order
7 that's now before the Court.

8 So I'll explain, that the June 1, 2016, decision is not
9 supported by competent evidence, doesn't meet the statutory
10 criteria, is marked by clear error of law, and constitutes an
11 arbitrary and capricious decision making, and for that reason the
12 state engineer shouldn't have granted the extension. They should
13 have canceled the permit.

14 So I think it would be helpful to start briefly with a
15 timeline of the events that have occurred in relation to these
16 permits. In the mid-1990s Washoe County was in the business of
17 being a municipal water purveyor, and Lemmon Valley was within
18 Washoe County's service territory. Washoe County has a planning
19 document that referred to a strategy of pursuing importation
20 projects, quote, as merited to serve the north valleys.

21 So then in 1999 Intermountain started to file water
22 rights permits for water in Dry Valley. And starting in 2002 the
23 state engineer started granting permits to Intermountain, as I
24 said, for 3,000 acre feet, which constituted the entire source of
25 Dry Valley. But those permits required Intermountain to complete

1 the diversion works by 2005 and prove up beneficial use by 2007.
2 Otherwise, by statute the permits could be canceled.

3 So then 2005 came along, and Intermountain had failed
4 to build the pipeline, and so requested an extension, which the
5 engineer granted. And from 2005 to the present the state
6 engineer has routinely granted these one-year extensions, not
7 one, not two, not a handful, but 12 extensions. In the meantime
8 another water company, Vidler Water Company, constructed its own
9 water importation project to serve Lemmon Valley in the, nearly
10 the same location as Intermountain proposes to build its
11 pipeline. Vidler Water Company financed its own project to the
12 tune of a hundred million dollars, built the infrastructure,
13 built the pipeline, and dedicated it to the municipal water
14 purveyor. And currently it's serving Lemmon Valley's needs
15 serving 8,000-acre feet of water.

16 So starting in 2011, when Intermountain would submit
17 its extensions requests, it admitted it had no intention itself
18 to build the diversion works, it was looking for someone to buy
19 the permits. And then at the end of 2014 three important things
20 happened. First, Washoe County got out of the business of being
21 a municipal water purveyor. TMWA and Washoe County merged, TMWA
22 is the Truckee Meadows Water Authority, and TMWA became the
23 surviving entity. So Washoe County was no longer going to be
24 buying any water facilities or certainly wasn't going to be
25 helping Intermountain to build any water facilities. And then

1 also there was some discussion at the Washoe County Commission
2 about just separately buying water permits as a, quote,
3 investment, and that fell apart at the end of 2014, too, where
4 the county commission said no, we are not going to do that. And
5 Intermountain in its request at that time said that the talks had
6 terminated, that was off the table. There's no longer going to
7 be Washoe County purchasing these water rights.

8 So the third thing that happened is Sierra Pacific
9 Industries, my client, who has land in Dry Valley and wants to
10 put the water to beneficial use there for irrigation, started
11 objecting to Intermountain being granted further extension
12 requests on the basis that these permits are speculative because
13 Intermountain doesn't plan to build the infrastructure and
14 doesn't have a buyer, and that Intermountain's extension request
15 failed to meet the statutory requirements for an extension.

16 So then in June 4, 2015, the state engineer granted
17 Intermountain extensions over Sierra Pacific's objection, but
18 acknowledged that the negotiations with Washoe County had been
19 unfruitful, those were the words used by the state engineer, and
20 that Intermountain since 2011 had been just looking for a buyer,
21 somebody to buy these permits.

22 But the state engineer issued two warnings that should
23 frame the Court's analyst of this order that it's reviewing.
24 First, the state engineer said the inability to secure a buyer in
25 future requests will not be considered good cause for an

1 extension. Second, and importantly, the state engineer said
2 further requests for extensions will be closely scrutinized to
3 insure that the statutory criteria for granting extensions are
4 adhered to.

5 So Sierra Pacific filed a petition for judicial review
6 of that 2015 order. And Judge Flannagan heard that petition for
7 judicial review, and this is what he said: This is a close case.
8 I think the writing is on the wall. The state engineer has
9 informed the applicant that further applications will be closely
10 scrutinized, and the state engineer characterized the language as
11 the -- excuse me. Judge Flannagan characterized this language
12 closely scrutinized as the state engineer wagging its finger at
13 Intermountain and warning it that future requests would be looked
14 at closely. And even the state engineer's counsel during oral
15 argument agreed, saying: As you already pointed out, Your Honor,
16 the state engineer kind of rattled the saber, saying hey, look,
17 you are getting to the point where something has got to move one
18 way or the another. Nevertheless, Judge Flannagan found that the
19 2015 decision was supported by substantial evidence and denied
20 Sierra Pacific's petition for judicial review. The Court didn't
21 reach the question as to whether Intermountain was violating the
22 anti-speculation doctrine.

23 So at the end of 2015 and early 2016 not surprisingly
24 Intermountain filed yet another round of applications for
25 extensions of time, and Sierra Pacific objected to those.

1 Intermountain's extension request was primarily supported by an
2 affidavit of its principal, Robert Marshall. And on June 1,
3 2016, the state engineer granted yet another extension, and
4 that's the orders that we are here to talk about.

5 So with that procedural history in mind, let me discuss
6 why what Intermountain submitted in support of its extension
7 request could not just justify an additional extension.

8 First I think we need to remember how the Court should
9 conduct its review. For legal errors the Court's review is
10 de novo, and we have raised legal errors in the state engineer's
11 failure to correctly apply the statutory requirements and the
12 state engineer's failure to apply the antispeculation doctrine,
13 which is a legal issue. But otherwise the review is to determine
14 whether the state engineer's decision is supported by substantial
15 evidence, that there's substantial evidence to support all of the
16 statutory requirements, and if not, the decision is arbitrary and
17 capricious and an abuse of discretion.

18 So what is substantial evidence? The definition is
19 that which a reasonable mind might accept to support a
20 conclusion. And how does the state engineer meet that standard?
21 Well, there's a number of legal principles. The first is that
22 the state engineer's factual determinations must be reasonably
23 supported by evidence of sufficient quality and quantity. The
24 evidence, the second is the evidence must be reliable and
25 probative. And the third is the absence of specific evidence of

1 a statutory requirement constitutes a fundamental defect and is
2 an abuse of discretion.

3 So in addition to the legal standard, the Court should
4 also hold the state engineer to his own stated standards from the
5 2015 decision, that said attempts to sell the permits would not
6 constitute good cause, and further extensions would be closely
7 scrutinized.

8 So the statutory criteria that are at issue here for an
9 extension are found in the NRS 533.380. There's two subsections
10 at issue. The first is subsection 3, and that sets forth the
11 minimum requirements that every extension request needs to
12 satisfy. The applicant must submit proof and evidence of
13 reasonable diligence to perfect the application. And the statute
14 defines reasonable diligence as the steady application of effort
15 to protect the application in a reasonably expedient and
16 efficient manner under all the facts and circumstances. So if
17 the applicant is not proceeding in good faith and with reasonable
18 diligence, the state engineer must cancel the permits.

19 So for municipal water projects, which this water is
20 proposed for, subsection 4 has additional criteria that the state
21 engineer must consider. And those include the specific parcels
22 or units that will be served, the economic conditions, and the
23 time period for construction of this specific project that's
24 anticipated in a development plan. So in other words, here the
25 state engineer could only grant an extension to Intermountain if

1 Intermountain showed through reliable, probative, and substantial
2 evidence in both quality and quantity that it's steadily making
3 efforts to build the pipeline to Lemmon Valley, construct a
4 treatment facility and other infrastructure, and serve specific
5 residential or commercial developments in the Lemmon Valley
6 basin. The evidence submitted by Intermountain has, there's no
7 evidence that it has taken any steps to do that.

8 Now, the state engineer relied on Mr. Marshall's
9 affidavit. And based on this affidavit, the state engineer
10 concluded that Intermountain had, quote, secured agreements with
11 engineering and construction firm Utilities, Inc., and
12 developers. Now, Intermountain provided no agreement. It was
13 just an affidavit. And it's pretty standard fare when you
14 provide an affidavit that refers to agreement that something,
15 that the affiant would say, "and attached hereto as Exhibit 1 is
16 a true and correct copy of that agreement." This affidavit had
17 no such exhibits. The alleged agreements were not provided.

18 So what did the affidavit itself actually say? I think
19 we need to look at it closely, because the state engineer did not
20 look at it closely, despite having pledged the year before to use
21 close scrutiny.

22 So the three primary paragraphs that the state engineer
23 relied on were paragraphs 5, 6, and 7 of the Marshall affidavit,
24 and I'll talk about each of them specifically. So paragraph 5
25 says during 2015 Intermountain and Robert and Annette Marshall

1 entered into an option agreement with two worldwide engineering
2 and construction firms experienced in water systems development.
3 One firm is located in Chicago, Illinois, and the other is
4 located in Tel Aviv, Israel. That's what paragraph 5 says. So
5 this begs the question, what are these options for? What's being
6 optioned? Do these even relate to the project? Because the
7 statement doesn't say anything about that. It's completely
8 silent as to whether it relates to building anything that's going
9 to bring water to Lemmon Valley. It doesn't say whether these
10 engineering and construction firms were planning to build the
11 facilities, and that's what they would presumably need to do.

12 But the other thing that's interesting about this
13 statement is that it was completely inconsistent with everything
14 that Intermountain had been saying up until that point in its
15 applications for extensions. Intermountain had been saying we
16 want to sell these permits, and now it seems to be saying that
17 it's trying to get somebody to construct the facilities. That
18 was inconsistent, and is actually inconsistent within the
19 affidavit itself. Because if you look to the next paragraphs,
20 it's talking about selling the water to a utility and it's
21 talking about selling the water to developers. And so why would
22 it be doing all three? If it's selling the water to the
23 developers or the utility, the construction would occur through
24 them.

25 So the affidavit didn't explain any of this

1 discrepancy, and the state engineer didn't ask for any
2 explanation, just accepted these statements without delving any
3 further. And our position is that that's not what a reasonable
4 mind would do. When there's internal inconsistencies within an
5 affidavit and there's inconsistencies between that affidavit and
6 a previous statement by the same affiant, that a reasonable mind,
7 which is the hallmark of the substantial evidence standard, would
8 look more deeply.

9 So turning to paragraph 6. This says in addition to
10 the agreement with the engineering and construction firms,
11 Intermountain has had extensive negotiations with Utilities,
12 Inc., and I'm paraphrasing here, to distribute water to its
13 present and future customers in Cold Springs. An agreement has
14 been reached and is in the process of being signed.

15 Now, importantly, Cold Springs is not in Lemmon Valley.
16 It's a different hydrographic basin. In order to show reasonable
17 diligence to perfect these permits, there has to be development
18 or a relationship with a utility provider in Lemmon Valley.
19 Lemmon Valley is outside of Utility, Inc.'s service territory,
20 and Cold Springs is not in Lemmon Valley. Cold Springs is not an
21 allowable place of use under these permits. So this point is
22 dispositive of this case.

23 The law is clear, and this is the case of Desert
24 Irrigation Company that we have cited in the briefs, the law is
25 clear a permit holder cannot obtain an extension based on an

1 intention to put the water to beneficial use anywhere other than
2 the permitted place of use. That paragraph, number 6, that's
3 exactly what it's saying. It's saying that Intermountain's
4 having conversations to put the water to beneficial use somewhere
5 else. The Desert Irrigation case, which I encourage the Court to
6 take a look at, says you can't do that.

7 And I would note the state engineer did not address
8 this problem in the June 1 decision. And when we raised it in
9 our opening brief, neither the state engineer nor Intermountain
10 addressed it in their answering briefs. But it's dispositive of
11 the case.

12 So the Court's not treading any new ground here. This
13 case, the Desert Irrigation case says specifically that if
14 Intermountain is trying to perfect the water rights elsewhere,
15 that is not reasonable diligence for these permits, and the
16 permits must be canceled.

17 Now, turning to paragraph 7 of Mr. Marshall's
18 affidavit, it says Intermountain has had numerous meetings with
19 developers whose plans involve construction of nearly 10,000
20 houses. The developments are in various stages of permitting,
21 with all but one small one in the city of Reno. Much work has
22 been done by the developers to date. All of the developments are
23 adjacent to or very near existing developed areas. Intermountain
24 expects to have developer agreements in hand within three to four
25 months.

1 So the most important thing about this paragraph is
2 that it admits that no developer agreements are in place. Yet in
3 the June 1, 2016, decision the state engineer states the exact
4 opposite, that developer agreements had been secured by
5 Intermountain, and that's just flat out wrong. The affidavit
6 doesn't say that.

7 Additionally, this paragraph says nothing about whether
8 these supposed developments, none of which were identified, are
9 in the permitted place of use; in other words, Lemmon Valley.
10 Doesn't say anything about that. And it says nothing about
11 whether the developers plan to finance and construct the
12 pipeline, treatment plan, and related infrastructure. It doesn't
13 identify any development, which going back to the statutory
14 criteria of subsection 4, the state engineer needs to consider a
15 specific development plan and specific parcels or units that are
16 going to be developed. This says nothing about any specific
17 parcels or units. It's very elusive as to that point. So it's
18 speculation. All this paragraph is is speculation that some
19 development might materialize, but that's not enough to survive a
20 substantial evidence inquiry.

21 So in other words, on their face, the statements made
22 in Mr. Marshall's affidavit don't satisfy the substantial
23 evidence standard. So the state engineer, with all of these
24 inconsistencies, with all of those open questions, with all of
25 this silence as to where these developments are, or alleged

1 developments, the state engineer needs to drill down further,
2 because a reasonable mind would not have accepted these
3 statements given these discrepancies and the unanswered
4 questions.

5 Why should the state engineer have drilled down?
6 There's a number of legal principles that say why. First, an
7 uncorroborated statement of intent to put water to beneficial use
8 is not sufficient to justify an extension of time and warrants
9 cancellation of the rights. That's that Desert Irrigation case
10 that I was referring to earlier.

11 Second, this is from a case from the Nevada Supreme
12 Court in the last few years relating to Eureka County, and it
13 said that the documents on which the state engineer relies must
14 be in the record before him. Otherwise there's not substantial
15 evidence. So if these agreements or alleged agreements were not
16 in the record, then the Eureka County case says that that's not
17 substantial evidence.

18 The third principle is that speculative statements do
19 not constitute substantial evidence. So a reasonable mind would
20 not have accepted these statements, and it calls into question
21 how could this possibly be the, quote, close scrutiny that the
22 state engineer had promised.

23 What's more, and I have submitted a motion to
24 supplement the record, when Intermountain submitted its 2017
25 extension request, it confirmed that the 2016 statements were

1 false. We moved to supplement the record to demonstrate that
2 these were misrepresentations, because in the limited opposition
3 that Intermountain and the state engineer provided they don't
4 dispute that there were no agreements.

5 MS. FAIRBANK: Your Honor, I'm going to object on the
6 basis of going into the contents of the applications for 2017.
7 It's pending motions which hasn't been ruled upon by the Court.

8 MR. ELMORE: We join in the motion.

9 THE COURT: Go ahead.

10 MS. LEONARD: Thank you, Your Honor. I think it's
11 important what the Intermountain and the state engineer did or
12 did not say in their are opposition to our motion to supplement
13 the record. They did not dispute that there were no agreements
14 at the time that Marshall signed the 2016 affidavit. And I would
15 encourage the Court to take a look at their opposition as to what
16 it does not say.

17 So even though they don't dispute that, they are
18 expecting this Court to affirm the state engineer's 2016
19 decision, knowing that the evidence that the state engineer
20 relied on was false. And I would submit that is arbitrary and
21 capricious. In the event, whether the Court supplements the
22 record or not, these documents underscore how unreasonable it was
23 for the state engineer to not dig deeper into the statements made
24 in the Marshall affidavit.

25 So leaving the substantial evidence standard and

1 turning to the legal errors. I want to talk specifically about
2 the violation of the antispeculation doctrine. That's stated in
3 the Bacher (phonetic) case, and it requires that an applicant for
4 water intend to put the water to beneficial use in the permitted
5 place of use or have a contract or agency relationship with
6 someone who does.

7 So the state engineer has acknowledged that this
8 antispeculation doctrine applies and must be adhered to with
9 extension requests. Yet the only thing cited in the 2016
10 decision for the state engineer to conclude that Intermountain
11 was not speculating in water was again this incorrect finding
12 that Intermountain, quote, affirms that it has, quote, secured
13 agreements with engineering and construction firms, Utilities,
14 Inc., and developers.

15 I have already discussed why that's not what the
16 affidavit says. And in any event, we now know it's not true.
17 But this issue of whether Intermountain is speculating on water,
18 this is reviewed de novo. If no agreements existed, as a matter
19 of law Intermountain is engaging in water speculation, and the
20 extensions needed to be denied and the permits canceled.

21 Now, the state engineer and Intermountain have raised
22 in their answering briefs some arguments with regard to waiver,
23 that somehow Sierra Pacific has waived its rights to raise these
24 points because it did not file any objection after Intermountain
25 submitted its extension requests. And we have provided in the

1 reply brief, and there was a first motion to supplement the
2 record, which notably neither the state engineer or Intermountain
3 opposed, and the Court has already granted it, that show that we
4 were not served with the objection. And I think that unless the
5 Court has questions on that, I think that that issue is addressed
6 adequately in the reply.

7 So in conclusion --

8 THE COURT: You are saying that you should have gotten
9 notice and you didn't; is that correct? So you didn't
10 participate in this 2016 application for an extension?

11 MS. LEONARD: That's quite what I'm saying. Two
12 things. We did participate in the 2016. We filed --

13 THE COURT: You filed it all ahead of time before the
14 extension was ever requested; is that correct?

15 MS. LEONARD: Before the extension was submitted. I'm
16 not sure exactly on the timing. The extension is due, it doesn't
17 have to be requested. I mean the state engineer doesn't request,
18 but it was before they submitted their extension application.

19 So we submitted that. And we also submitted, I was,
20 submitted the form to get notice of all the correspondence for
21 these permits, and I was not notified of their filing of the
22 extension request. That's all in the first motion to supplement
23 the record.

24 THE COURT: Are you satisfied with the explanation of
25 why you weren't served with those?

1 MS. LEONARD: No, I'm not satisfied at all. But be
2 that as it may, I now have a copy of it and was adequately able
3 to petition for judicial review.

4 THE COURT: In other words, what you are raising here
5 today was never presented to the commissioner.

6 MS. LEONARD: To the state engineer, Your Honor?

7 THE COURT: To the state engineer, yes.

8 MS. LEONARD: I would disagree. I mean the arguments
9 we are making with regard to why we think these extension
10 requests are speculative has not changed. The difference is that
11 we had not seen Mr. Marshall's affidavit until after I made the
12 request to see it after we had gotten a copy of the 2016
13 decision.

14 THE COURT: But have you ever raised your concerns with
15 the Marshall affidavit with the engineer, the water engineer?

16 MS. LEONARD: No, Your Honor, because we weren't served
17 with it. Intermountain didn't serve us with it, the state
18 engineer didn't serve us with it.

19 And in any event, I think this is important, the
20 statute NRS 533.450 allows, quote, any person feeling aggrieved
21 by a state engineer decision to seek judicial review. Regardless
22 of whether they participated in the administrative proceedings,
23 if you are aggrieved, you can seek judicial review.

24 So the legislature has allowed for a broad judicial
25 review, and this presumes, if you don't have to participate

1 below, it presumes that there are going to be arguments raised on
2 judicial review that were not raised before the state engineer.
3 But we think that the state engineer and Intermountain need to be
4 estopped from arguing that hey, even though we didn't serve you,
5 you still had an obligation to file a response.

6 And I want, actually I think it's important to see this
7 in the context of what happened in 2015, because, first of all,
8 the state engineer doesn't have any procedures in place for
9 filing objections to extension requests, so we are sort of
10 winging it here. But also in 2015 Intermountain just filed sort
11 of pro forma extension requests. They didn't have any evidence
12 attached to them at all. Sierra Pacific objected to those
13 extensions. And in response to that, the state engineer gave
14 Intermountain an opportunity to respond to the points made by
15 Sierra Pacific. So in a similar vein, our objection gave the
16 opportunity to Intermountain to respond to the objections that we
17 raised.

18 But the important point is that we were not served.
19 It's not equitable to allow the state engineer to say that they
20 are going to serve you with all correspondence and then not serve
21 you. Or to require you to serve Intermountain, but then not
22 require Intermountain to serve you. Either way, we believe that
23 that's inequitable and inappropriate.

24 So in conclusion, I want to say that this is a failed
25 project. Nearly 20 years ago Intermountain speculated on

1 possible need for additional water resources in Lemmon Valley.
2 That never played out. So Intermountain gambled and lost,
3 because municipal demand for Lemmon Valley is being met by other
4 sources. So how do we know that? Because Intermountain has not
5 provided any evidence of any development in Lemmon Valley that
6 the proposed project will serve. It hasn't said anything about
7 Lemmon Valley at all in its extension requests. The entire focus
8 is on Cold Springs, which is outside of the permitted place of
9 use.

10 So the extension request, we submit, should have been
11 denied and these permits canceled, and we would request that the
12 Court grant our petition for judicial review.

13 If the Court doesn't have any other questions, I would
14 like to reserve some time for rebuttal.

15 THE COURT: That's fine.

16 MS. LEONARD: Thank you, Your Honor.

17 THE COURT: Miss Fairbank, you or Mr. Elmore going to
18 go first?

19 MS. FAIRBANK: I'll go ahead and take the first stab,
20 Your Honor.

21 Your Honor, Micheline Fairbank on behalf of state
22 engineer. With me today is Malcolm Wilson, who is also with the
23 state engineer's office.

24 So there's really two issues in this particular case.
25 First, whether or not the state engineer's decision to grant

1 Intermountain's 2016 applications for extension of time under NRS
2 533.380 are supported, is supported by substantial evidence, and
3 whether or not the antispeculation doctrine applies to that grant
4 of applications for extension of time.

5 I think it's very important to go back to the source
6 and the beginning, really what governs the state engineer's
7 actions in this particular case, and that is NRS 533.380, which
8 very explicitly sets forth those requirements for the state
9 engineer to consider. And again it's important to remember that
10 these are considerations of the state engineer, not necessarily
11 black and white mandates and the end-all be-all, but, for each
12 and every element to be demonstrated, but they are all the
13 components for the state engineer to consider.

14 Specifically when you look at NRS 533.380, subsection
15 3, the state legislature provides that the state engineer may for
16 good cause shown grant any number of extensions of time within
17 which construction work must be completed or water must be
18 applied to a beneficial use. Any number of extensions of time.
19 So regardless of whether it's been one or two or 12 or 22
20 extensions of time, the legislature has given the state engineer
21 the discretion to grant any number of extensions of time so long
22 as the remaining provisions are considered by the state engineer
23 and considered in evaluation of that application.

24 When you go on under subsection 3, the state engineer
25 is required to make a determination for proof and evidence

1 submitted that the applicant is proceeding in good faith and with
2 reasonable diligence to perfect the application. So the state
3 engineer's required to make that determination, that affirmative
4 determination that the applicant is proceeding in good faith and
5 reasonable diligence. And reasonable diligence is defined within
6 section 6 that says reasonable diligence is the steady
7 application of effort to perfect the application in a reasonably
8 expedient and efficient manner under all the facts and
9 circumstances. So the state engineer has to consider all of the
10 facts and circumstances.

11 So what really this case hinges upon is subsection 4,
12 which talks about the grant of an extension of time for a
13 municipal or quasi-municipal use of water. And the legislature
14 set out five different criteria for the state engineer to
15 consider, among other factors. So this list is not exhaustive,
16 it's not exclusive. The state engineer has discretion to look at
17 these five factors as well as consider other factors.

18 The procedural history as set forth by Sierra Pacific
19 Industries certainly demonstrates that, and Marshall and
20 Intermountain Water has for a very long period of time been
21 attempting to perfect their water rights. And perfection is the
22 construction of works and the placement of water to a beneficial
23 use. It's kind of a term of art in the water industry. But what
24 happened in 2002, what happened in 2010, or '12 or '14 or '15 or
25 beforehand is not the matters before the Court here, because that

1 is all res judicata. Last year Sierra Pacific Industries
2 challenged the state engineer's grant of an extension of time to
3 Intermountain.

4 THE COURT: Are you talking 2015 or --

5 MS. FAIRBANK: 2015. So the 2015 applications for
6 extension of time were found to have been supported by
7 substantial evidence. So whether Sierra Pacific Industries
8 agrees or disagrees, what is before the Court today is the 2016
9 applications. And what is not before the Court today is the 2017
10 applications. Because in 2016 the state engineer had before him
11 Sierra Pacific Industries' objections and their positions and
12 their arguments, which are substantially the same as what they
13 have presented to the Court in this particular petition for --

14 THE COURT: Did they get to respond to the Marshall
15 affidavit? Did Sierra Pacific get to respond to that?

16 MS. FAIRBANK: Your Honor, I don't believe they did.
17 The basis for that, I don't have a good answer, I don't know what
18 the answer is for that.

19 THE COURT: Should they have gotten notice?

20 MS. FAIRBANK: There's no requirement. They asked for
21 notice, but there's no statutory requirement, and --

22 THE COURT: Doesn't the constitution require notice and
23 the right to be heard?

24 MS. FAIRBANK: Do they have a due process right, in
25 this particular the due process is given to Mr. Marshall and

1 Intermountain. They have the due process interest, because they
2 are the ones with the property interest and the right to
3 appropriate water. Sierra Pacific Industries is merely another
4 water user that is waiting in line, just like there are tens of
5 thousands of water users in the state of Nevada with applications
6 that are waiting in line so that perhaps they get their day to go
7 ahead and use the water that they have applied for, with the hope
8 that somebody ahead of them falls out of line.

9 So it's not, there's not a due process interest,
10 because the reality is NRS 533.450 is their due process. Any
11 person feeling aggrieved by a decision of the state engineer has
12 the opportunity to seek judicial review of that decision.

13 THE COURT: So you are not taking the position that
14 she's, Sierra Pacific's precluded from getting judicial review of
15 the engineer's decision because they didn't object in the lower
16 proceedings.

17 MS. FAIRBANK: No, we are not taking that position.
18 But what we have here, Your Honor, is we have --

19 THE COURT: Doesn't the water commissioner want as much
20 comment on anything he's considering as he can get so he can make
21 the best reasoned decision? I mean isn't that part --

22 MS. FAIRBANK: These are administrative proceedings.
23 These are applications for extension of time.

24 THE COURT: I know. There's still a right.

25 MS. FAIRBANK: These are applications for extensions of

1 time. And let me tell you, Your Honor, an objection and judicial
2 review of grant of an application of extension of time is an
3 exception, not the rule. Applications for extensions of time,
4 there's not a notice and hearing provision, there's not these
5 different types of things. Thousands of these come in every
6 year, and the state engineer considers all the information made
7 available to them, and within the statutory framework applies
8 that statute based upon the individual facts and circumstances of
9 that individual application.

10 And so holding a hearing or having those different
11 types of things upon every application for extension of time,
12 quite candidly, Your Honor, there's not the resources to do that.
13 So the state engineer does the best they can, and they take the
14 information, and they have to rely upon the applicant and
15 protestants. That's the process.

16 THE COURT: Well, in this case the protestant didn't
17 receive notice of at least part of the proceedings. That's what
18 I'm saying. If that were the case --

19 MS. FAIRBANK: If that were the case --

20 THE COURT: That's what troubles me the most, is that
21 they asked for notice and they didn't get it. So they didn't get
22 a chance to contest this Marshall affidavit, which they are
23 flatly asserting is false.

24 MS. FAIRBANK: Your Honor, I can't say that, because
25 it's a sworn affidavit made under penalty of perjury that was

1 provided to the state engineer. And the state engineer, knowing
2 that these are the requirements, knowing that the applicant has a
3 clear understanding of what the statutory requirements are, the
4 state engineer has to take the information provided to him and
5 his office at face value. And in this particular case the
6 affidavit that was submitted by Intermountain in support of their
7 application for extension of time was based upon --

8 THE COURT: Why wouldn't you require that they attach
9 any agreements?

10 MS. FAIRBANK: These are administrative proceedings.
11 These are not held --

12 THE COURT: Just for your information, I was an
13 administrative hearing officer for the state of California
14 Department of Benefit Payments for two years when I was in law
15 school, so I know what it's like to be an administrative hearing
16 officer.

17 MS. FAIRBANK: These aren't, these are applications.
18 This is not the same as an application to appropriate water where
19 you have publication and notice and opportunity for protest and
20 all those different things. That's all set forth within
21 different and separate statutory provision. These are
22 applications just to go ahead and continue that property
23 interest, to enable that individual that ongoing opportunity to
24 go ahead and perfect their water right.

25 THE COURT: He's still required to test assertions by,

1 assertions made in support of an application for extension.

2 MS. FAIRBANK: But we have an affidavit. And Your
3 Honor, the state engineer is not held to the same evidentiary
4 standard as a court of law.

5 THE COURT: I understand that.

6 MS. FAIRBANK: You have to understand, the state
7 engineer is, again it's an office of limited resources, limited
8 staff, and they have to take assertions made by people for face
9 value. And their job is not to go ahead and try to poke holes in
10 every presentation and every assertion made before them. Sierra
11 Pacific Industries certainly wants to, because they have a
12 financial interest in trying to go ahead and undermine
13 Intermountain's application because they want that water.

14 THE COURT: Which is why it would have been helpful had
15 they got notice and had a chance to poke holes in that affidavit.
16 That's what concerns me.

17 MS. FAIRBANK: Your Honor, in 2016 there's no
18 requirement. Had the legislature thought that those individuals
19 who may want to protest, that may want to go ahead and challenge
20 an application for extension of time be afforded greater notice
21 and opportunity to respond, they would have put forth the same
22 type of requirements that they have in the appropriations
23 process. But the legislature hasn't extended that same notice of
24 right and responsibility and response opportunities in this
25 particular statutory provision. And certainly there's no

1 obligation on the part of the state engineer to go through some
2 sort of formal hearing process. The state engineer has the
3 discretion to do that.

4 THE COURT: I'm not saying that he does. But it seems
5 like if someone, I mean it's pretty obvious that Sierra Pacific
6 objected to these extensions. They asked for notice, and they
7 didn't get it, and they didn't get an --

8 MS. FAIRBANK: But it's not dispositive, because that's
9 not the measure, that's not the standard. That is not the basis
10 and measure of the state engineer's decision. The standard of
11 review is whether or not the decision is supported by substantial
12 evidence.

13 THE COURT: Why shouldn't I remand this back to him,
14 give him a chance to look at their objections?

15 MS. FAIRBANK: You certainly can, Your Honor. That's
16 within the Court's discretion. It's the Court sitting in the
17 role of an appellate jurisdiction.

18 THE COURT: I mean this, this obviously, having been an
19 active judge in Carson City, I have heard a lot of these
20 administrative, 233B mostly, but a lot of these, depending on
21 whether people appeal or not.

22 What I'm troubled by in this case is that their failure
23 to get notice and be able to test this affidavit, and just in
24 writing if nothing else, to best inform the water engineer before
25 he makes a decision. And at least in theory that's the idea

1 behind notice and right to be heard. And when I say right to be
2 heard, being heard through documents is, and you are right, he
3 doesn't have to have a hearing, he's got limited staff. I know
4 how important water is in Nevada. So I'm sure there's lots of
5 people fighting over it. So he doesn't have a whole lot of time
6 to do all of this.

7 But that's what concerns me, is that, and I can't help
8 wondering if in the back of his mind when he granted this he was
9 thinking well, there could be a problem with this affidavit,
10 Sierra Pacific would have brought it to my attention, and because
11 they didn't, he just accepted it on face value when he might not
12 have otherwise.

13 MS. FAIRBANK: I understand. But, Your Honor --

14 THE COURT: That's what bothers be.

15 MS. FAIRBANK: -- at the same time the state engineer
16 does take a sworn affidavit made under penalty of perjury that
17 the affirmations, that the statements are valid. And certainly
18 in this particular instance the state engineer had no reason not
19 to accept those statements at face value.

20 THE COURT: No, because the one person that was
21 opposing wasn't given notice and didn't have a chance to --

22 MS. FAIRBANK: But the assumption, then, then the state
23 engineer is supposed to somehow, is supposed to then try to poke
24 holes in every affidavit or every sworn statement or every piece
25 of proof that's put before him, as opposed to the alternative,

1 which is to accept it at face value. And so the opportunity is
2 here. And they disagree with the, Sierra Pacific Industries
3 disagrees with the state engineer's interpretation and reliance
4 on the affidavit. That's the dispute. Was the state engineer
5 justified in relying on those statements? That's that the issue
6 before the Court, not whether or not Sierra Pacific Industries
7 had the opportunity to respond to that.

8 THE COURT: They are trying to present evidence now of
9 a false view of what was contained in the affidavit.

10 MS. FAIRBANK: Your Honor, that's not before the Court.
11 The state engineer, the reality is -- let's just go ahead and
12 remember the context. That information which Sierra Pacific
13 Industries is trying to go ahead and interject into this case to
14 try to discredit the applicant was not provided to the office of
15 state engineer until 2017.

16 THE COURT: I agree.

17 MS. FAIRBANK: Well after the affidavit was submitted
18 by Intermountain, well after the state engineer made his
19 decision, and well after even had the state engineer offered
20 Sierra Pacific Industries the opportunity to respond, that
21 information and those documents wouldn't have been available.

22 It's great to be an armchair quarterback and have the
23 opportunity to say well, hindsight is 20/20. Well, we can't do
24 that here. That's not what the law with regard to the judicial
25 review process of the decision of the state engineer permits, and

1 that's now not how the supreme court has decided it. We don't
2 get to be armchair quarterbacks.

3 THE COURT: I agree. I know what the substantial
4 evidence standard is, and I also know that I'm supposed to be
5 deferential to his interpretation of what the law is. And I
6 always have been. But what I am concerned about is after asking
7 for notice they didn't get it, they didn't have a chance to
8 refute that affidavit, to the benefit of the commissioner,
9 because he would have had more information.

10 MS. FAIRBANK: But we are speculating. We are
11 speculating as to that, Your Honor, as to whether or not it would
12 have changed the decision.

13 THE COURT: Well, if I remand it back --

14 MS. FAIRBANK: If you remand it back, then that's a
15 whole different, and it's no longer speculation.

16 THE COURT: -- he gets a chance.

17 MS. FAIRBANK: We are no longer speculating as to
18 whether that would change the decision. So the decision of the
19 state engineer really has to be measured upon the evidence that
20 was before him at the time he made the decision. And it's not a
21 justiciable right.

22 THE COURT: What I am being asked to do is reverse the
23 decision and remand it back and order him to deny it, the
24 extension.

25 MS. FAIRBANK: That is what you are being asked to do.

1 And the state engineer asserts that that's not an appropriate
2 outcome, because he does believe that his decision was supported
3 by substantial evidence. He wouldn't have granted the extension.
4 He didn't hold Intermountain --

5 THE COURT: My concern is it wasn't supported by all
6 the evidence that he might have gotten had they got notice after
7 they requested it.

8 MS. FAIRBANK: The assumption is they are entitled to
9 notice statutorily, and they are not.

10 THE COURT: We superimpose that requirement in lots of
11 instances where there's no statutory, a statute that sets it out.

12 MS. FAIRBANK: But that's a new standard that the state
13 engineer is not obligated under the law. The state engineer is
14 not obligated to provide notice to any possible person with
15 regards to an application for extension of time. Again, the
16 state legislature saw it very clear for appropriations to set out
17 the notice and comment requirements. That hasn't been granted.

18 THE COURT: Nobody can object to his giving an
19 extension is what you are saying.

20 MS. FAIRBANK: I am not saying that. I'm just saying
21 that a claim of due process violation on the basis of somebody
22 for not getting notice, that's not a justiciable basis to
23 challenge a decision of the state engineer. It has to be more.
24 And that's what Sierra Pacific Industries has done here. They
25 didn't bring their claim on the inability to receive notice.

1 THE COURT: Well, that's in front of me.

2 MS. FAIRBANK: But that's not what the basis for
3 petition for judicial review is. The basis for the petition for
4 judicial review is that it doesn't conform to the requirements
5 under NRS 533.380.

6 THE COURT: Well, let me put it, based upon what was
7 before him, I'm fine with the decision that he made, and I defer
8 to his interpretation of the law. My concern is that after
9 asking for notice they weren't given it, and he didn't get the
10 benefit of what they would have submitted had they had notice.

11 MS. FAIRBANK: Your Honor, and that's not the issue.
12 And this is not the issue or the circumstances before the Court
13 today. The 2017 applications are pending before the state
14 engineer, and they are proceeding with a hearing on that
15 application for extension of time. This is an evolving process.

16 THE COURT: You're right, it's not before me.

17 MS. FAIRBANK: So we have the 2016 decision.

18 THE COURT: That's probably going to be the case in
19 most instances when people object to the extension of time, that
20 by the time it gets to the court you are already in the next
21 season of extensions, I guess is what you described it as.

22 MS. FAIRBANK: Theoretically if the legislature changed
23 it we might get a longer time period for these proceedings to go
24 ahead and flesh themselves out. But that's an aside.

25 THE COURT: I try as little as I can to pay attention

1 to what the legislature is doing until they get done, because I
2 don't find anything, they talk a lot over there, and half the
3 time it doesn't have anything to do with what eventually comes
4 out of legislative session.

5 Anyway, go ahead.

6 MS. FAIRBANK: So, Your Honor, I think you very clearly
7 understand the position of the state engineer. And within the
8 affidavit submitted by Mr. Marshall, the state engineer found
9 that the elements of the requirements under NRS 533.380,
10 subsection 4, were satisfied. That affidavit that was before the
11 state engineer identified the number of parcels to be served, the
12 period contemplated for development of the project, and
13 articulated that steady application of effort to develop the
14 water.

15 Sierra Pacific Industries raises an issue with respect
16 to the service location. However, the affidavit didn't preclude
17 its service area of Lemmon Valley. It just encompassed all the
18 efforts that Intermountain was making towards the development of
19 their water.

20 And so when you look at that, and you take those
21 statements at face value, when you don't try to undermine the
22 plain reading of those statements, and you don't try to go ahead
23 and pick them apart because you want to find fault with them,
24 because that's not, the state engineer's position and role is not
25 to try to find fault with the statement, but to take those

1 statements at face value. Those requirements that were set forth
2 within 533.450, excuse me, 380, subsection 4, were met not only
3 by the application and the affidavit of Mr. Marshall, but the
4 accompanying documents demonstrating there was continued
5 financial investment into the perfection of the project.

6 And when we talk about the antispeculation doctrine,
7 it's very important to remember that we step back, and the
8 easiest and the most succinct way to define the antispeculation
9 doctrine is I can't secure a water right, sit on it, do nothing
10 waiting for there to suddenly become a demand so I can go ahead
11 and then sell that water and benefit from that, while I have zero
12 intent to ever be a participant in the development, the
13 construction of the work for the placement of that water to
14 beneficial use. The antispeculation doctrine does not preclude
15 someone from working and then collaborating to develop, to
16 construct and develop.

17 And what we have here, based upon the facial reading of
18 Mr. Marshall's affidavit, is collaboration. Collaboration, not
19 everybody has the financial means to do something themselves.
20 They may have the foresight, they may have the ability to go
21 ahead and get that particular idea, in this particular case to
22 secure water in these particular basins, with the idea that they
23 could serve the greater Washoe County area as development
24 improved and grew. And Intermountain invested in that, and they
25 have engaged in a steady application of effort as an intent to do

1 that. But every once in a while somebody needs that investor or
2 that infusion or that other partner to help get it past that
3 finish line.

4 Based upon the facial reading of the affidavit and the
5 applications and the history of this project, that's what is
6 occurring in this particular case. It's not that Intermountain
7 is sitting there just doing nothing, waiting for that water to
8 suddenly become valuable to go ahead and then sell it. That
9 would be speculation. But in this particular case the facial
10 reading of the affidavit doesn't demonstrate that there's
11 speculation, and the state engineer did not find in the 2016
12 application for extensions of time that the antispeculation
13 doctrine was being violated, because Intermountain did
14 demonstrate its involvement efforts and application of effort,
15 and they are demonstrating their good faith intent to place that
16 water to its intended beneficial use.

17 So the state engineer relied upon, and it's absolutely
18 true the state engineer relied heavily on the affidavit submitted
19 by Intermountain in support of their applications. But that was
20 the evidence that was before them, and in the eyes of the state
21 engineer, based upon the statutory requirements, the state
22 engineer found that to be sufficient. The state engineer, at the
23 time he made his decision, didn't have a reason, doesn't have a
24 reason to question the veracity and the intent and the meaning
25 behind the affidavit and that there was good faith, so the state

1 engineer made his findings.

2 And as the state engineer went through in his June 1,
3 2016, letter, the state engineer went through and articulated all
4 of these issues and articulated in detail, great detail, why the
5 state engineer found that the applications for extension of time
6 were supported by substantial evidence.

7 So the state engineer believes that his decision is
8 supported by substantial evidence that was based upon that
9 information in 2016. His decision conforms with NRS 533.380. He
10 saw that there was a steady application. And that's incremental,
11 it doesn't have to be leaps and bounds, but it's just pushing
12 that stone steadily and just moving it along. And that's why the
13 legislature didn't establish time limits on the number of
14 applications that can be granted. So the state engineer, in his
15 discretion, made that decision to grant these applications for
16 extension of time.

17 So the state engineer not only addressed those
18 statutory requirement under 533.380, finding that the affidavit
19 provided sufficient information regarding the efforts to reach
20 agreements, the efforts to secure the ability to construct the
21 works, the efforts to place that water to a beneficial use. All
22 of that being done by Intermountain also didn't meet that, the
23 antispeculation doctrine. It wasn't in the antispeculation. And
24 so the state engineer addressed that in his decision and
25 articulated why the Batchner decision wasn't applicable to this

1 particular case.

2 So this particular case the state engineer, based upon
3 these relatively incremental and small steps that are required by
4 law and were demonstrated through that affidavit, the state
5 engineer took that affidavit at face value and in good faith and
6 granted the applications.

7 THE COURT: I have no questions.

8 MS. FAIRBANK: Thank you.

9 THE COURT: Mr. Elmore.

10 MR. ELMORE: Thank you, Judge.

11 Rick Elmore on behalf of Intermountain Water Supply,
12 the intervening party in this matter.

13 I don't want to duplicate the argument of the state,
14 because clearly our position is in support of the state
15 engineer's finding with regard to the 2016 application. But
16 there are a couple of things that I want to focus the Court on
17 here.

18 Obviously troubled by this issue about the request for
19 notice and why Sierra Pacific didn't participate in the
20 proceedings that led to the approval that is the subject of your
21 review today.

22 THE COURT: Well, you argued pretty extensively that I
23 shouldn't because they didn't participate in the proceedings
24 below. If they didn't receive notice, then why should they have?

25 MR. ELMORE: Let's look at what was going on in 2015

1 when the fight began. Okay? Ultimately there was a court
2 process. There was a --

3 THE COURT: I saw that.

4 MR. ELMORE: There was a grant of the 2015 extension.
5 Sierra Pacific seeks judicial review of that. Okay? Ultimately
6 there's protracted litigation in front of Judge Flannagan.

7 One of the things that I find so curious is that the
8 hearing on that 2015 application is held I believe around the
9 14th or 15th of December of 2015. Some point in time just days
10 prior to that hearing taking place, but importantly before that
11 hearing took place, the petitioner in this litigation filed an
12 objection with the state engineer to the anticipated request for
13 an extension was going to come in 2016. Okay? So there's been
14 no application made yet, because we are not in 2016, so
15 Intermountain hasn't applied for an extension, but curiously
16 filed with the state engineer its objection to the grant of
17 anymore extensions of these permits.

18 The state is represented by counsel, Sierra Pacific is
19 represented by counsel, Intermountain is represented by counsel,
20 and they are all participants in the proceeding, the court
21 proceeding that is being held a few days after this pre-objection
22 is filed. I mean there's not even a proceeding yet in the state
23 engineer's office. Okay?

24 Now, Miss Leonard says in her petition that she
25 requested notice from the state engineer. Okay? But Miss

1 Leonard also knew how the process worked in conjunction with the
2 2015 request for an extension, because she participated in that
3 proceeding. As a matter of fact, she participated all the way to
4 the point in time where there's a court hearing that led to Judge
5 Flannagan's order in January of 2016.

6 All of this information is available on the state
7 engineer's website. You can see when the applications come due,
8 when somebody's going to have to apply for an extension of time.
9 She clearly knew that Intermountain was likely to apply again for
10 an extension in 2016. That's why she filed the pre-objection in
11 2015.

12 But do we have any information in the documents
13 submitted to you that suggests that she went to the lawyers for
14 the state, the lawyer for Intermountain Water Supply and served
15 the pre-objection to the coming 2016 application? Do we have any
16 information that suggests that she ever served Intermountain
17 Water Supply with request for notice that she contends that she
18 sent to the state? No. Is there anything in the record to
19 suggest that Mr. Marshall or anyone else at Intermountain Water
20 Supply had any idea that a request for service had been made? So
21 the one thing that is absolutely clear here is that no fault can
22 be attributed to Intermountain for not serving documents.

23 Now, clearly Intermountain anticipated that there would
24 be some participation in the 2016 application. But the reality
25 is that that participation is limited to what was filed before

1 the application was even made with the state engineer for the
2 extension of time.

3 And there's one small point I just wanted to make to
4 the Court. The initial objection to any further extensions was
5 filed while the litigation was pending and before the decision
6 was made. Then a supplemental, or a supplement to the objection
7 was filed in January, and I believe that is some time that is
8 very close to when the Court's order came out denying judicial
9 review of the 2015 petition, but at a time when all of these
10 issues are still pending.

11 The question is why didn't Sierra Pacific address this
12 issue with the Court? Well, I think very clearly the answer to
13 that is that it did address those issues with the Court. And if
14 you look at Judge Flannagan's order, all these same issues were
15 raised in the legal proceedings that pertained to the 2015
16 application.

17 Now, it is true, of course, because the affidavit of
18 Mr. Marshall was not filed until March of 2016 when the
19 application for an extension was made then by Intermountain, but
20 all Sierra Pacific Industries had to do was look at the status of
21 the proceedings in the state engineer's office pertaining to an
22 application that it obviously knew was going to be made, and it
23 could have done anything that it wanted to do just like it did in
24 2015.

25 So it's unfair, I think, to say well, the state

1 engineer is responsible solely for the fact that Sierra Pacific's
2 not a participant in that proceeding after the affidavit. And it
3 certainly isn't Intermountain Water Supply's fault they didn't
4 make an objection that they now come to court and tell you about.

5 So I understand the Court's concern that everybody
6 should have an opportunity to participate, but here is the
7 problem. We are guessing as to what, if anything, Sierra Pacific
8 would have offered that --

9 THE COURT: Doesn't that mean shouldn't I remand it
10 back and let the water commissioner instead of me try to make
11 some decision, let the water commissioner decide what effect all
12 of that would have?

13 MR. ELMORE: That's one of the alternatives that's
14 available to the Court. I mean we have a new proceeding that has
15 a hearing coming next month for the 2017 extension.

16 THE COURT: You know, I'm sitting here thinking, think
17 for a moment, I know you won't want like this assumption, there's
18 a whole bunch of false things in Marshall's affidavit. If I say
19 no, whether there was or not, the commissioner had substantial
20 evidence to support the decision that he made based on the
21 affidavit that was before him, and therefore I hold his decision
22 and I defer to his interpretation of the law in the state of
23 Nevada, so I deny the petition.

24 And then now on this next application you guys,
25 different reasons for why you want an extension, if you are

1 asking for one, and they are all substantial, is the fact that it
2 might have been a false affidavit, and it doesn't, if there was,
3 and Sierra Pacific had had a chance to test that, and the
4 commissioner had found in Intermountain's favor again, as long as
5 he has substantial evidence, I'm not a super court, I don't get
6 to redecide facts that have already been decided unless they are
7 clearly erroneous, that's what's troubling me right now.

8 I mean I am more than happy to play my role in this
9 process, not, the only facts I consider are the ones that were
10 before the water engineer, and I decide whether or not his
11 decision was supported by substantial evidence. But in this case
12 we have got this issue hanging out here that wasn't considered by
13 him. So why shouldn't I remand it back to him and let him
14 consider it?

15 MR. ELMORE: Well, one reason that you should refrain
16 from doing that is the plaintiff, Sierra, had a place to go at
17 the time on these very issues. She goes to the affidavit, and
18 she takes these three paragraphs, okay, and then she, I hope my
19 characterization is not offensive to anyone, but she literally
20 nitpicks the language in three paragraphs of the affidavit.

21 THE COURT: That's what lawyers do, isn't it?

22 MR. ELMORE: Unfortunately there's a complete document
23 there. And that document --

24 THE COURT: Now you are starting to argue facts, and
25 I'm not a finder of fact. I review decisions made by the water

1 engineer, but I'm not a finder of fact, and I'm getting put in
2 the position where I'm finding facts. And that's not what I'm
3 supposed to do in this procedure.

4 MR. ELMORE: Unfortunately the first person to speak
5 this morning in this proceeding elected to go to those three
6 paragraphs to point out to you that they are deficient in
7 satisfying certain requirements of the statute. And that's not
8 appropriate, because the state engineer's obligation was to look
9 at the totality of the document, and at the end of day, if he was
10 going to grant the extension, having to come to the conclusion
11 that those elements, statutory elements, were satisfied in
12 something that Intermountain gave him in conjunction with the
13 application.

14 But here's my point to you, Judge. If you look at the
15 things that she is taking issue with in the affidavit, things
16 that she says are false, one has to guess on what basis she has
17 information to make any of those conclusions. And of course that
18 gets back to this issue about, you know, her needing to be there
19 in the first place. But counsel for the state has correctly
20 pointed out that the state engineer could look at the totality of
21 the affidavit and say okay, these requirements are satisfied by
22 substantial evidence here.

23 Now, the bigger question that you have to keep in mind,
24 though, is Sierra had an absolute right to address those same
25 elements in the context of the court proceedings that started

1 with the hearing in December of 2015. The issues that she raises
2 now are all issues that could have been appropriately raised, and
3 I submit were raised, in the context of the 2015 hearing.

4 Does the antispeculation statute apply in this case?
5 That issue is addressed by Judge Flannagan in his order. What
6 were they going to use the water for? That issue was addressed
7 in the 2015 court proceedings. Were they going to sell, were
8 they going to have somebody else buy it, were they going to have
9 somebody else effect the construction? She's cited no authority
10 that says that an applicant is forced to elect one of the three
11 alternatives and can't, in the process of pursuing this project,
12 actually be pursuing all three elements. There's no law anywhere
13 that I'm aware of that says they were precluded from doing that.

14 So there's not an inconsistency. Intermountain was
15 free to do any of those things, because any of them constitute
16 the diligent effort required by law. But it isn't that she was
17 precluded from addressing those issues. She did address them in
18 the context of the 2015. She just lost. And I should say,
19 Judge, properly, Sierra lost. And that's the crux, I think, of
20 the issue before you.

21 So I think there's more than enough support for what
22 the state engineer decided in 2016, I think that's what you said
23 a minute ago, and the issue is only whether there's some process
24 requirement that was violated. But I ask the Court to remember
25 that Intermountain Water Supply didn't have anything to do with

1 that.

2 THE COURT: I'm not suggesting you did. I'm just
3 troubled, I mean we are asked to, and I'll use the term both the
4 fact and the law, to give great deference to proceedings below,
5 which is appropriate. And probably as much as anybody I
6 understand the reason for that, because as a judge in Carson City
7 I heard appeals from the PUC, appeals from the environmental
8 protection agency, appeals from workmen's comp hearings, the tax
9 commission, I don't know how many different ones. And there's
10 just no way that a district court judge can have the expertise at
11 the lower tribunals, and I shouldn't call them lower, the other
12 tribunals have. And so you do, they are the finder of facts,
13 same as the justice court, whenever there's appeals from the
14 justice court. So I'm entirely comfortable with that, and I
15 understand the reason for it.

16 My concern is that, part of the reason I'm comfortable
17 in doing that is because everybody's got a chance to be heard in
18 the proceedings below. You know, our sacred notices and rights
19 to be heard have been complied with. And in this case, maybe I'm
20 overly picking on this, but I just, it seems like there would be
21 procedures in place for if someone says I want notice of the
22 pendency of any request for extensions, that they get it. And if
23 they do, then they can argue in front of the water commissioner.
24 And 90 percent of the time his decision is going to be upheld,
25 because if there's substantial evidence before him, and we defer

1 on the law, that's about the percentage I have upheld of
2 administrative tribunals.

3 So go ahead, Mr. Elmore.

4 MR. ELMORE: I was just going to close, Your Honor, by
5 saying that the first numbered paragraph entitled standard of
6 review in Judge Flannagan's order that was entered in January
7 last year correctly states the law on what kind of a review is
8 applicable. And the state has said, and we have said extensively
9 in our brief, that he had everything that he needed to justify
10 the extension that he granted. And the failure today is of
11 Sierra to say well, okay, we might have provided some
12 information, maybe not, it's equal opportunity, but we might have
13 provided some information if we had known about the affidavit.
14 Well, that process was known to them, they anticipated it in
15 December of 2015, they did send a request, accepting the
16 representation that's been made, that request is made. But that
17 doesn't explain why after March of 2016, when the application is
18 there and Mr. Marshall's affidavit is there, why there isn't some
19 response from Sierra to whatever was contained in the
20 application.

21 Thank you.

22 THE COURT: Miss Leonard, did you want to make a reply?

23 MS. LEONARD: Yes, Your Honor. Thank you.

24 Your Honor, I think what's really notable about the
25 comments by Intermountain and state engineer's counsel is what

1 they did not say. Neither of them have addressed this case, the
2 Desert Irrigation case. It's cited in our briefs, I discussed it
3 here earlier. It says that you can only get an extension of time
4 if you are showing reasonable diligence to prove up the water in
5 the place of use that's authorized in the permit.

6 THE COURT: You know, you bring that up. Do either of
7 you, because I asked them a lot of questions, do either one of
8 you want to respond to that? And then you can reply.

9 MS. FAIRBANK: Your Honor, I think I did address it in
10 my statement where I said the affidavit doesn't preclude the
11 place of use of being Lemmon Valley. So that was the basis in
12 which there's, you know, the Desert Irrigation also, that case
13 particularly articulates that the state engineer engages in a
14 case-by-case fact specific analysis. And so --

15 THE COURT: So you agree with her assertion of what
16 that case says, then, that it has to be the place where they
17 apply for it, Lemmon Valley?

18 MS. FAIRBANK: A permit to appropriate water is
19 specific in terms of its place of diversion and place of use.
20 However, the affidavit doesn't preclude the place of use being in
21 Lemmon Valley.

22 THE COURT: Do you have anything you want to say?

23 MR. ELMORE: Just say the same thing.

24 THE COURT: I interrupted him with a lot of questions,
25 so that's why I'm letting him do that.

1 MS. LEONARD: So that language doesn't preclude is
2 curious to me, because that's not standard. The affidavit has to
3 show reasonable diligence to perfect the water in Lemmon Valley.
4 It doesn't say anything about Lemmon Valley. So I understand
5 Your Honor's concern with regard to the lack of notice, and we
6 share them. However, this affidavit could be a hundred percent
7 true or a hundred percent false, but if you take it on its face,
8 if you take it as the state engineer has said, then look at it,
9 it says nothing about trying to perfect water in Lemmon Valley.
10 And that is dispositive of this case. So as a matter of law the
11 Court can say this is not adequate to support these extensions.

12 It doesn't matter who was heard and what happened in
13 front of the state engineer. The state engineer's obligation is
14 to review the affidavit to determine if it's showing reasonable
15 diligence to perfect the applications in Lemmon Valley. It says
16 nothing about that. So as a matter of law this affidavit is
17 deficient, whether or not we accept whether it's true or not.

18 So in that respect I really need to disagree with my
19 colleague as to the description of what the substantial evidence
20 standard is. The state engineer's counsel said that the state
21 engineer had to accept the statements in the affidavit at face
22 value. That is not a correct statement of the substantial
23 evidence standard. The substantial evidence standard says what
24 would a reasonable mind do. If something is just said, would a
25 reasonable mind just accept it? No. The state engineer has to

1 determine through proof and evidence that a, that there's
2 reasonable diligence being shown. A reasonable mind would
3 question, would address the inconsistencies, would seek more,
4 would ask for the alleged agreements.

5 So the state engineer can't just look at an affidavit
6 and say it's a sworn statement, that's it. An affidavit may in
7 and of itself be evidence, but it's not substantial evidence.
8 That's a whole different standard. So I disagree on that point.

9 My colleague also said that the court, or the state
10 engineer looked at the totality of the document or the totality
11 of the circumstances. And we agree that the state engineer looks
12 at all the facts and circumstances. But the state engineer
13 looked specifically at these three paragraphs. I'm not picking
14 on these three paragraphs because I think, only because I think
15 they are important. The state engineer relied on these three
16 paragraphs, cited these three paragraphs in fact, and they, and
17 said based on these three paragraphs, that Intermountain had,
18 quote, secured agreements.

19 Again, we don't think that that's what these paragraphs
20 say, but we are citing to those paragraphs because this is
21 exactly what the state engineer has said that he relied on.

22 So the substantial evidence standard that this Court
23 has to review doesn't put it in the role of fact finder. It's
24 not a role of looking at whether the state engineer did his job,
25 is the affidavit in front of him enough to show that

1 Intermountain was trying to put the water to beneficial use in
2 Lemmon Valley. And the state engineer did not do his job,
3 because it says nothing about that.

4 So I want to talk a little bit about Your Honor's
5 suggestion about remand for the state engineer to look at Sierra
6 Pacific's objections. Now, if it's remanded, the state
7 engineer's only going to be looking at what did Intermountain
8 submit as of the date it submitted its extension request. It
9 can't take any new evidence now. That's fundamentally unfair.
10 It's looking at that specific time, so no new evidence can be
11 accepted.

12 THE COURT: Why couldn't new evidence be accepted if I
13 remand it back? It's like he starts, not necessarily starts all
14 over again, but he can take whatever he wants.

15 MS. LEONARD: I would disagree respectfully, Your
16 Honor, because an extension request is for a period of time.
17 It's a one-year extension request, and the applicant for the next
18 extension request has to show what did you do in the previous
19 year. So he can't come up with anything new. Everything is
20 framed from that time period alone.

21 THE COURT: Well, if you question the affidavit, and
22 you want to respond to your questioning --

23 MS. LEONARD: I'm sorry, Your Honor?

24 THE COURT: If you question the affidavit, they would
25 have the opportunity to respond.

1 MS. LEONARD: Well, as I'm saying, and I really
2 encourage the Court to look at this Desert Irrigation case.

3 THE COURT: I have.

4 MS. LEONARD: So I want to address two other points.
5 One is this idea that Mr. Elmore, well, I think both counsel
6 raised with regard to res judicata. Their argument is --

7 THE COURT: I'm not considering that.

8 MS. LEONARD: Okay.

9 THE COURT: That or the issue of preclusion, either
10 one.

11 MS. LEONARD: Thank you, Your Honor. So in that
12 regard, my, I would just like to close with the concept of look
13 at what has been submitted and whether it shows anything about
14 Lemmon Valley. The fact it doesn't requires that as a matter of
15 law that the Court can reverse. And for that reason, we request
16 that you grant the petition for judicial review.

17 Thank you, Your Honor.

18 THE COURT: Well, I don't get to look at these cases
19 and say well, this is the way I would decide it, and if the
20 commissioner didn't decide the same way I would, reverse it. I
21 have to look at what was before him, decide whether or not there
22 was substantial evidence, defer to him on his interpretations of
23 the law.

24 I find there was substantial evidence. I defer on his
25 interpretations of the law. I'm extraordinarily concerned about

1 the fact that there isn't a procedure in place on extensions that
2 when a participant gives notice that they want to participate,
3 that they are not given everything that's filed after that. It
4 wouldn't even have to be by the commissioner. It could just, my
5 concern here is had you let Intermountain, had you sent your
6 request to Intermountain, although I don't know why you would
7 have, then I might have a tendency to remand this back. But --

8 MS. LEONARD: Your Honor, if I may.

9 THE COURT: What?

10 MS. LEONARD: The state engineer did ask us to serve
11 our objection on Intermountain, which we did. So we served them.
12 They didn't serve us.

13 THE COURT: I understand that. And that might very
14 well be a good issue on appeal. You made the point there's no
15 statutory provision for notice and the right to be heard, even
16 though I think there is one, and the fact that there's no
17 procedures intrigues me. I think there ought to be. But again,
18 I don't get to decide those issues. I'm concerned about that,
19 but not enough to not uphold the water commissioner.

20 So the petition is denied.

21 Anything more? Who wants to prepare the order?

22 MS. FAIRBANK: Your Honor, the respondent state
23 engineer will go ahead and prepare that order and circulate it.

24 THE COURT: Circulate it. Deposit your order with the
25 court. And if you could email me a copy of it at BMaddox --

1 actually, I phoned up some cards, maybe I still have some -- at
2 BMaddox1004@ATT.net.

3 MS. FAIRBANK: That was BMaddox1004@ATT.net?

4 THE COURT: If you could send that to me when you
5 deposit it with the court and circulate it. And if there's any
6 objections, then I'll give you five days after you receive it to
7 file any objections. And if I don't receive any objections, then
8 I'll just sign the order. Otherwise I'll look at it and decide
9 what the order should be.

10 Anything more, then?

11 MR. ELMORE: No, Your Honor.

12 MS. FAIRBANK: Nothing further, Your Honor. Thank you.

13 THE COURT: Court's in recess. You can all be at ease.

14 MS. LEONARD: Thank you, Your Honor.

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1 STATE OF NEVADA)
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I, LESLEY A. CLARKSON, Official Reporter of the
Second Judicial District Court of the State of Nevada, in
and for the County of Washoe, DO HEREBY CERTIFY:

That I was present in Department No. 1 of the
within-entitled Court on Thursday, May 24, 2017, and took
stenotype notes of the proceedings entitled herein and
thereafter transcribed them into typewriting as herein appears;

That the foregoing transcript is a full, true and
correct transcription of my stenotype notes of said hearing.

Dated this 21st day of September, 2017.

/s/ Lesley A. Clarkson
Lesley A. Clarkson, CCR #182

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

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SIERRA PACIFIC INDUSTRIES, a
California Corporation,

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Petitioner,

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vs.

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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,

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Respondent,

20

and,

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

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Intervenor-Respondent.

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ORDER DENYING PETITION FOR JUDICIAL REVIEW

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This matter comes before the Court on Sierra Pacific Industries' (SPI) Petition for 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.
21 NRS 533.450(1). *See also Bacher v. State Engineer*, 122 Nev. 1110, 1118, 146 P.3d 793,
22 798 (2006) ("While the State Engineer's interpretation of a statute is not controlling, it is
23 persuasive.").

24 The Court's review under NRS 533.450 is limited to a determination of whether the
25 State Engineer's decision is supported by substantial evidence. *Revert v. Ray*, 95 Nev.
26 782, 786, 603 P.2d 262 (1979). Substantial evidence is "that which a reasonable mind
27 might accept as adequate to support a conclusion." *Bacher*, 122 Nev. at 1121, 146 P.3d

28 ///

1 at 800. Thus, in evaluating the present matter, this Court may not "pass upon the
2 credibility of the witness nor reweigh the evidence." *Id.*

3 Decisions of the State Engineer are entitled not only to deference with respect to
4 factual determinations, but also with respect to legal conclusions. The Nevada Supreme
5 Court has explained that "an agency charged with the duty of administering an act is
6 impliedly clothed with power to construe it as a necessary precedent to administrative
7 action," and therefore, "great deference should be given to the agency's interpretation
8 when it is within the language of the statute." *State v. State Engineer*, 104 Nev. 709, 713,
9 766 P.2d 263, 266 (1988) (citing *Clark Co. Sc. Dist. v. Local Gov't*, 90 Nev. 332, 446,
10 530 P.2d 114, 117 (1974)).

11 Further, this Court is limited to consideration of the documents and records which
12 were considered by the State Engineer in rendering his decision. NRS 533.450(1) states
13 that actions to review decisions of the State Engineer are "in the nature of an appeal."
14 The Nevada Supreme Court has interpreted NRS 533.450 to mean that a petitioner does
15 not have a right to *de novo* review or to offer additional evidence at the district court.
16 *Revert*, 95 Nev. at 786, 603 P.2d at 264. *See also Kent v. Smith*, 62 Nev. 30, 32, 140 P.2d
17 357, 358 (1943) (a court may construe a prior judgment, but cannot properly consider
18 extrinsic evidence). As a result, the function of the court is to review the evidence on
19 which the State Engineer based his decision to ascertain whether the evidence supports
20 the decision, and if so, the court is bound to sustain the State Engineer's decision. *State*
21 *Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985). "[N]either the district
22 court nor this court will substitute its judgment for that of the State Engineer: we will
23 not pass upon the credibility of the witnesses nor reweigh the evidence, but limit
24 ourselves to a determination of whether substantial evidence in the record supports the
25 State Engineer's decision." *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205
26 (1991).

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
4 application of effort to perfect the application in a reasonably expedient and efficient
5 manner under all the facts and circumstances." NRS 533.380(6). "When a project or
6 integrated system is composed of several features, work on one feature of the project or
7 system may be considered in finding that reasonable diligence has been shown in the
8 development of water rights for all features of the entire project or system. *Id.* Moreover,
9 where the water rights are for municipal use, Nevada law defines several factors which
10 the State Engineer must consider, including a demonstration of good cause, the number of
11 parcels or units planned to be served, economic conditions, delays in development of land
12 or area to be served, and the time period for development plan. NRS 533.380(4). The
13 statute expressly affords the State Engineer discretion to "grant any number of
14 extensions of time within which the construction work must be completed, or water must
15 be applied to a beneficial use." NRS 533.380(3).

16 The State Engineer had before him SPI's objections to extensions of time sought by
17 Intermountain, SPI's supplement to its objections to extensions of time for Intermountain,
18 and Intermountain's applications for extensions of time. State Engineer's Record on
19 Appeal (SE ROA) at 5-426, 430-579, 587-602, 605-616. Within the evidence before the
20 State Engineer was a sworn affidavit by Robert W. Marshall, a Manager of Intermountain
21 (Affidavit), submitted as "proof and evidence" of Intermountain's reasonable diligence.
22 SE ROA at 612-15. The Affidavit described the works which had historically been
23 completed in advancing the project toward development. SE ROA at 612-13.
24 Additionally, the Affidavit stated that Intermountain had entered in an option agreement
25 with two engineering and construction firms and that in addition to those agreements,
26 and that after extensive negotiations with the water company, Intermountain
27 had reached an agreement for water service in northern Washoe County, Nevada.
28 SE ROA at 614. Additionally, the Affidavit identified the number of residential units to

1 be served by the project at "nearly 10,000 houses" and specified the present status of the
2 housing projects and time period to have agreements with those developers. *Id.*

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
5 sufficiently demonstrated good faith and reasonable diligence in advancing the project,
6 thus warranting the granting of the extensions of time and had addressed the elements
7 set forth under NRS 533.380(4). SE ROA at 638-39, 641. The State Engineer further
8 considered SPI's objections. SE ROA at 618-24. However, the Court notes that SPI was
9 not afforded an opportunity to respond to the Affidavit submitted by Intermountain in
10 support of its applications. While SPI was not afforded an opportunity to respond, the
11 Court finds that there was no violation of due process or NRS 533.380, which does not set
12 forth a procedure for objections to an application for extension of time.

13 Nevada law defines reasonable diligence as the steady application of effort to
14 perfect an application in a reasonably expedient and efficient manner. NRS 533.380(6).
15 The concept of reasonable diligence is not a recent concept in Nevada water law. Rather,
16 the Nevada Supreme Court in *Ophir Mining Co. v. Carpenter*, stated:

17 Where the right to the use of running water is based upon
18 appropriation, and not upon an ownership in the soil, it is the
19 generally recognized rule here that priority of appropriation
20 gives the superior right. When any work is necessary to be done
21 to complete the appropriation, the law gives the claimant a
22 reasonable time within which to do it, and although the
23 appropriation is not deemed complete until the actual diversion
or use of the water, still if such work be prosecuted with
reasonable diligence, the right relates to the time when the first
step was taken to secure it. If, however, the work not be
prosecuted with diligence, the right does not so relate, but
generally dates from the time when the work is completed or the
appropriation is fully perfected. 4 Nev. 534, 543-33 (1869).

24 Thus, the State Engineer is required to review the evidence before him to determine
25 whether the evidence reflects a "steady application to business of any kind, constant effort
26 to accomplish an undertaking." *Id.*

27 In this case, the record reflects that the State Engineer considered the totality of
28 the evidence before him, which included evidence of Intermountain's steady application

1 effort to perfect its water rights. While SPI is highly critical of the Affidavit submitted in
2 support of Intermountain's applications, it is a statement with representations presented
3 under the penalty of perjury to an administrative agency. SE ROA at 612-15. The State
4 Engineer was reasonable in his reliance upon the representations contained within the
5 Affidavit. The basis for SPI's criticism of Intermountain's applications is that
6 subjectively, SPI does not believe it to be good enough; however, that is not the standard
7 in this case.

8 Here, the State Engineer engaged in an extensive analysis, ultimately concluding
9 that Intermountain demonstrated good faith and reasonable diligence.
10 SE ROA at 637-639. Contrary to SPI's position, Nevada law does not impose a duty upon
11 the State Engineer to "test the reliability or accuracy" of Intermountain's evidence. The
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
16 perfect its water rights. The State Engineer has taken into consideration the history of
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. Maddox
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: afairbank@nyspi.com

CERTIFICATE OF SERVICE

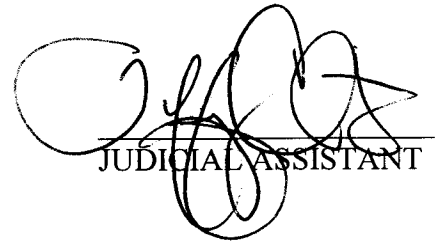
Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 21 day of August, 2017, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy 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

JA2759

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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1 **AFFIRMATION**

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

4 DATED: August 22, 2017.

5
6 RICHARD L. ELMORE, CHTD.

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

10 *Attorney for Intervenor-Respondent*
11 *Intermountain Water Supply*
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2 **CERTIFICATE OF SERVICE**

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

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

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

15
16 DATED this 22nd Day of August, 2017.

17
18 /s/ Richard L. Elmore
Richard L. Elmore

INDEX OF EXHIBITS

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

FILED
Electronically
CV16-01378
2017-08-22 01:21:07 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6261790

EXHIBIT 1

JA2764

\$2515
Debbie Leonard
Nevada State Bar No. 8260
MCDONALD CARANO LLP.
P.O. Box 2670
100 W. Liberty St., 10th Floor
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dleonard@mcdonaldcarano.com
Attorneys for the Petitioner Sierra Pacific Industries

Electronically Filed
Sep 08 2017 02:19 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

SIERRA PACIFIC INDUSTRIES, a California
Corporation,

Case No. CV16-01378

Petitioner,

Dept. No. 1

vs.

NOTICE OF APPEAL

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.

TO: JASON KING, P.E., Nevada State Engineer of the DIVISION OF WATER
RESOURCES, DEPARTMENT OF CONSERVATION, and INTERMOUNTAIN
WATER SUPPLY, LTD., and their attorneys of record, Senior Deputy Attorney General
Micheline N. Fairbank, Esq., and Rick Elmore, Esq. respectively:

Notice is hereby given that, SIERRA PACIFIC INDUSTRIES, by and through its
attorney of record Debbie Leonard of McDonald Carano, hereby appeals to the Supreme Court
of Nevada from the Order Denying Petition for Judicial Review entered by the above-entitled

JA2765

1 Court on August 21, 2017 and all interlocutory orders related thereto. A copy of the Notice of
2 Entry of Order is attached hereto as Exhibit 1.

3 AFFIRMATION

4 The undersigned hereby affirms that this document does not contain the social security
5 number of any person.

6 DATED this 6th day of September, 2017.

7 McDONALD CARANO

8
9 By: /s/ Debbie Leonard
10 Debbie Leonard
11 Nevada State Bar No. 8260
12 P.O. Box 2670
13 Reno, NV 89505-2670
14 T: (775) 788-2000
15 dleonard@mcdonaldcarano.com
16 Attorneys for *Sierra Pacific Industries*
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28

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that I am an employee of McDONALD CARANO ^{LLP} and that on September 6, 2017, I caused to be electronically filed the foregoing NOTICE OF APPEAL with the Clerk of the Court using the ECF system, which will automatically e-serve the same on the attorneys of record as set forth below:

Richard L. Elmore, Chtd.
Richard L. Elmore, Esq.
3301 So. Virginia Street, Suite 125
Reno, NV 89502

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

Executed on September 6, 2017 at Reno, Nevada.

/s/ Pamela Miller
An Employee of McDonald Carano

JA2767

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Index of Exhibits

<u>Ex. #</u>	<u>Document Description</u>	<u>Number of Pages</u>
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1 **Code 1350**

2
3
4 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
5 **IN AND FOR THE COUNTY OF WASHOE**

6 **SIERRA PACIFIC INDUSTRIES, a**
7 **California Corporation,**

Case No. CV16-01378

8 **Petitioner,**

Dept. No. 1

9 **vs.**

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

14 **Respondent**

15 **and,**

16 **INTERMOUNTAIN WATER SUPPLY, LTD., a**
17 **Nevada limited liability company**

18 **Intervenor-Respondent**
19 _____/

20 **CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL**

21 I certify that I am an employee of the Second Judicial District Court of the State of Nevada,
22 County of Washoe; that on the 6th day of September, 2017, I electronically filed the Notice of
23 Appeal in the above entitled matter to the Nevada Supreme Court.

24 I further certify that the transmitted record is a true and correct copy of the original
25 pleadings on file with the Second Judicial District Court.

26 Dated this 6th day of September, 2017

27 Jacqueline Bryant
28 Clerk of the Court
By /s/ Yvonne Vilorio
Yvonne Vilorio
Deputy Clerk

JA2769