IN THE SUPREME COURT OF THE STATE OF NEVADA

SIERRA PACIFIC INDUSTRIES, a California Corporation ,

Appellant,

vs.

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.
_____/

Supreme Court Case No. 73933

RESPONDENT INTERMOUNTAIN WATER SUPPLY, LTD.'s ANSWERING BRIEF

Appeal from Order Denying Petition for Judicial Review
Second Judicial District Court Case No. CV16-01378
Honorable William A. Maddox

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, Respondent Intermountain Water Supply, Ltd., by and through its attorney, Richard L. Elmore, discloses as follows:

- Respondent Intermountain Water Supply, Ltd. is a Nevada Limited Liability Company. Its managers are Intermountain Pipeline, Ltd., Robert W. Marshall, and Thomas W. Marshall.[1] It has no parent corporation or stock.

- The undersigned, Richard L. Elmore (Nevada State Bar No. 1405), represented Intermountain Water Supply, Ltd. throughout the proceedings before the district court, and is the attorney representing Respondent Intermountain Water Supply, Ltd. in the proceedings before this Court. Counsel for Intermountain Water Supply, Ltd. is, and at all relevant times during his representation of Intermountain Water Supply, Ltd. was, the principal of Richard L. Elmore, Chtd. The undersigned will be the only attorney appearing on behalf of Intermountain Water Supply, Ltd. in the proceedings before this Court.

/s/ Richard L. Elmore

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[1] Robert W. Marshall and Thomas W. Marshall are the managers of Intermountain Pipeline, Ltd.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Rules and Statutes

RESPONDENT INTERMOUNTAIN WATER SUPPLY, LTD.'S ANSWERING BRIEF

Respondent INTERMOUNTAIN WATER SUPPLY, LTD. ("Intermountain"), by and through its attorney, Richard L. Elmore, Esq., and pursuant to NRAP 28(b) and this Court's March 15, 2018, Order, submits its Answering Brief, as follows:

I. INTRODUCTION

This appeal by Sierra Pacific Industries ("SPI") concerns the district court's August 21, 2017, Order denying SPI's Petition for Judicial Review of the State Engineer's June 1, 2016, decision to grant Intermountain's application for a one-year extension of time in reference to its water rights and water supply project under permit numbers 64977, 64978, 66400, 73428, 73429, 73430, 74327, and 72700 ("the Project" or "Intermountain's water project"). *See* Joint Appendix ("JA"), Vol. I at 0015-0021.[2]

[2] The State Engineer's June 1, 2016, letter granting a one-year extension to Intermountain is repeated in the record for each permit to which it applies. *See* JA, Vol. III at 0660-0666 (with the documents concerning permit 64977); JA, Vol. III at 0678-0684 (with the documents concerning permit 64978); JA, Vol. III at 0696-0702 (with the documents concerning permit 66400); JA, Vol. III at 0713-0719 (with the documents concerning permit 72700); JA, Vol. III at 0749-0755 (with the documents concerning permit 73428); JA, Vol. III at 0767-0774 (with the documents concerning permit 73430); and JA, Vol. III at 0783-0789 (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

II. STATEMENT OF THE ISSUES

SPI's Statement of the Issues in this case (Opening Brief at 1-2) unnecessarily complicates, and otherwise mischaracterizes, what is at issue in this case.[3] The issue in this case is simple and straightforward. That is, whether the State Engineer's June 1, 2016, decision granting Intermountain a one year extension of time in reference to its water permits was, as a whole, supported by substantial evidence.

III. STATEMENT OF THE CASE

A. The Prior Proceedings.

Beginning in December 2014, after Intermountain submitted with the State Engineer its December 3, 2014, application for an extension of time for one of its groundwater permits (Permit No. 72700 (JA, Vol. VIII at 1754)) in its long-standing and ongoing water project for which it had numerous groundwater

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State Engineer's June 1, 2016, letter will be cited – that at JA, Vol. I at 0015-0021. Each reference to JA, Vol. I at 0015-0021, 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.

[3] For instance, SPI mischaracterizes the evidence on which the State Engineer relied as "unreliable, inconsistent and unsupported," and misstates the bases on which the State Engineer based its decision. Opening Brief at 2, ¶¶ 2, 3.

permits[4], SPI objected to any additional extensions of time for any of Intermountain's groundwater permits in the Dry Valley basin. JA, Vol. VIII at 1840-1842. In that initial objection, SPI asserted that good cause to extend the time for Intermountain to complete the diversion works and put the water to beneficial use did not exist because:

- Intermountain had not commenced construction of the infrastructure needed to transport water to its intended place of use (Lemmon Valley);
- Intermountain did not have any agreement with the Truckee Meadows Water Authority ("TMWA"), which, as of January 1, 2015, was to be the sole water 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 (JA, Vol. VIII at 1843-1844), 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.[5] JA, Vol. VIII at 1871-1874. In so doing, the State Engineer evaluated Intermountain's project in the

[4] As noted above, Intermountain's groundwater permits at issue in this case are Permit Numbers 72700, 64977, 64978, 66400, 73428, 73429, 73430, and 74327. *See* JA, Vol. VIII at 1787-1790.

[5] 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. JA, Vol. VIII at 1871.

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 they adhere to the statutory criteria for granting extensions of time. *Id.*

SPI petitioned the district court for judicial review of the State Engineer's decision.[6] JA, Vol. III at 0622. SPI asserted:

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[6] The prior judicial review proceedings in the district 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, the district court 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, JA, Vol. III at 0622-0628; *see also* December 14, 2015, oral argument of the parties in this case and the district court's bench ruling, JA, Vol. X at 2428-2490. 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

- 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.

- the State Engineer erred by not considering TMWA's Water Resource Plan for 2010-2030.

JA, Vol. III at 0627-0628. After hearing the arguments of counsel for the parties, the district court denied SPI's Petition for Judicial Review. JA, Vol. X at 2428-2490 (transcript of December 14, 2015, judicial review hearing and bench ruling); JA, Vol. III at 0622-0628 (Order denying judicial review). In so doing, it generally found that the State Engineer's June 4, 2015, decision to approve the extension is supported by substantial evidence and disposed of SPI's claims based upon the information and evidence in the record that was submitted in the judicial review proceedings. *Id.* The district court also rejected SPI's assertion that the State Engineer erred by not considering the Truckee Meadows Water Authority's Water Resource Plan ("TMWA Water Resource Plan") for 2010-2030 due to SPI's failure

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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 the district court's prior factual findings as provided in the record.

to submit that plan to the State Engineer as part of its objection. JA, Vol. II at 0628. And, the district court validated the State Engineer's evaluation of the anti-speculation doctrine in the context of this case. *Id.* Though it could have, SPI chose not to appeal the district court's order denying SPI's petition for judicial review pursuant to NRS 533.450(9). Thus, this Court's order denying SPI's petition for judicial review became final in all aspects.[7]

B. The Underlying Proceedings to this Appeal.

On December 2, 2015 – prior to the December 14, 2015, judicial review hearing and the district court's January 12, 2016, entry of its Order denying SPI's petition for judicial review, and *prior to any application by Intermountain for an extension of time* – SPI sent to the State Engineer an objection to any additional extensions of time granted to Intermountain related to their permits. JA, Vol. I at 0047-0054. As in its first objection to the State Engineer (JA, Vol. VIII at 1840-1842), SPI asserted that:

- Intermountain is engaging in water speculation,
- Intermountain cannot satisfy the requirements of NRS 533.380
- There is no municipal demand for the water to which Intermountain has rights.

[7] In its Opening Brief, SPI takes issue with the State Engineer's June 4, 2015, Decision. SPI's Opening Brief at 8-9. That criticism, however, is improper in this context, as the State Engineer's June 4, 2015, Decision was affirmed in a final decision on judicial review, which SPI made no further efforts to challenge.

- SPI is prepared to put to beneficial use the water to which Intermountain has rights.

JA, Vol. I at 0047-0054. SPI submitted with its objection a voluminous record, including the TMWA Water Resource Plan. JA, Vol. I at 0055 – Vol. II at 0468. Subsequently, SPI submitted a supplement to its objection to include with its record TMWA's 2016-2135 Draft Water Resources Plan, which SPI claims to show that Intermountain has no contract with a municipal water purveyor. JA, Vol. II at 0472 – Vol. III at 0621.

On March 8, 2016, Intermountain applied for an extension of time for one year within which to comply with the provisions for filing the proof of completion of work and proof of beneficial use. JA, Vol. III at 0647. In its application, Intermountain stated that it would need 5 years to construct the works of diversion or place the water to beneficial use (*Id.,* answer to question number 4), and that its expenditures on the project in 2015 was $23,300.39 ($2,572,799.23 spent on the project to date at that time). *Id.* Intermountain also attached a statement in response to SPI's "pre-filed" objection. JA, Vol. III at 0648-659. Though some of Intermountain's response reiterated what had been argued and decided in the prior proceedings and appeal (the application of *Bacher, supra* and the impact of the economic conditions of 2007-2013), Intermountain addressed the premature nature of SPI's objection, discussed how the TMWA water plans reaffirm Intermountain's Project, and provided a list of expenditures for the previous extension period and

the supporting affidavit of Robert W. Marshall (Intermountain's principal). *Id.; see also* JA, Vol. III at 0629-0644. SPI did not respond to Intermountain's March 8, 2016, application or object to the documents and information that Intermountain provided with its application.

On June 1, 2016, the State Engineer, after considering SPI's "pre-filed" objection and the evidence provided by Intermountain in its response to SPI's objection, granted Intermountain's extension. The State Engineer – finding that, with the exception of the TMWA planning documents, SPI's December 2, 2015, pre-filed objection re-raised the same legal arguments and cited to the same evidence asserted against Intermountain's 2015 extension of time (JA, Vol. I at 0016 (fn. 5)) – undertook a comprehensive overview and analysis of Intermountain's continued efforts on the Project and to put the water to beneficial use. JA, Vol. I at 0015-0021. To that end, the State Engineer found that Intermountain's extensions went beyond mere statements of intent, that they demonstrated a steady application of effort toward the project during the previous extension period, that the TMWA water plans specifically identify and reference Intermountain's Project, and that Intermountain showed good faith and reasonable diligence in putting its water to beneficial use. *Id.* The State Engineer also, again and thoroughly, addressed and dispelled SPI's contention that Intermountain is speculating in water as it relates to NRS 533.370 and NRS 533.380 (the *Bacher*

case, *cited supra*), and outlined additional considerations in reference to most current water resources plans that were included with SPI's most recent objection as they relate to the Project. *Id.*

Despite that it had provided no response or objection to Intermountain's March 8, 2016, application for an extension of time, SPI again sought judicial review of the State Engineer's decision, and primarily for the same reasons in its first unsuccessful effort to seek review of the State Engineer's decision. JA, Vol. I at 1-28; Vol. X at 2491-2517. SPI generally asserted that:

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

Id. In response to SPI's petition for judicial review, Intermountain highlighted that SPI's assertions were the same assertions it unsuccessfully made in its objection to Intermountain's prior application for an extension of time and its subsequent unsuccessful petition for judicial review (JA, Vol. VIII at 1840-1842, 1846-1870, 1871-1874; Vol. X at 2428-2490; Vol. III at 0622-0628), and that they included challenges to the documents and information Intermountain provided with its application for an extension of time and to which SPI had not objected. JA, Vol. XI at 2518-2561. Moreover, Intermountain asserted that SPI's position is contrary to the applicable authority and the evidence and information Intermountain

provided in support of its ongoing efforts to develop the Project.[8] *Id.* To that end, it was Intermountain's contention that, based upon his broad authority to make 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. *Id.*

The district court agreed. On August 21, 2017, after hearing the arguments of counsel for all of the parties (JA, Vol. XI at 2693-2750), the district court entered its order denying SPI's petition for judicial review (JA, Vol. XI at 2751-2759). In so doing, the district court:

- generally established the standard of its review pursuant to *Revert v. Ray,* 95 Nev. 782, 786, 603 P.2d 262 (1979) (the district court's review is limited to whether the State Engineer's decision is supported by substantial evidence, and must give deference to the State Engineer's factual determinations);

- addressed the record that was before the State Engineer in making his June 1, 2016, decision in the context of the relevant requirements of NRS 533.380 (JA, Vol. XI at 2754-2755, *citing* JA, Vol. III at 0680-0681, 0683, 0660-0666); and

[8] Indeed, with this second effort by SPI to challenge the extensions of time granted by the State Engineer to Intermountain and the unsupported bases on which it makes its challenge, it became clear that what SPI intends is to disrupt Intermountain's project with endless litigation so that it can come in and take and profit from the effort and millions of dollars that Intermountain has invested in its water supply 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.

- found that the State Engineer considered *the totality of the evidence before him,* which included evidence of Intermountain's *steady application effort to perfect its water rights.*

JA, Vol. XI at 2751-2759. SPI has appealed the district court's August 21, 2017, order denying its petition for judicial review.

IV. STATEMENT OF FACTS

The water rights permits at issue in this appeal concern Intermountain's water supply project ("the Project"). At and after its inception in 1996/1997, Intermountain initially sought to supply water to meet the growing municipal water demands in Lemmon Valley, where the demand for water exceeded the available groundwater supply in the basin where it is located. JA, Vol. III at 0625 (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…" *Id.,* citing to the 1997 Amendment to 1995-2015 Regional Water Management Plan, "1995-2015 Plan" (JA, Vol. IV at 0899-0910). 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. JA, Vol. III at 0625.

The State Engineer granted Intermountain's water rights in 2002, 2006, and 2008. JA, Vol. III at 0625; *see also* Intermountain's Table of Permits, JA, Vol. XI

at 2556. 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

JA, Vol. III at 0625; *see, i.e.,* JA, Vol. IV at 0852, 0916; Vol. V at 1050, 1184; Vol. VII at 1779; Vol. IX at 2068; Vol. X at 2380. Notably, the 2007 date by which Intermountain was required to show beneficial use was just before what would be years of a well documented, significant, and debilitating 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 sought and obtained one-year extensions of time to do so from the State Engineer under NRS 533.380. JA, Vol. III at 0625; *see also,* Table of Extension requests for Intermountain's permits, JA, Vol. XI at 2558-2561. Cumulatively, those applications show that, since its first water right permit was granted in 2002 through 2015, Intermountain spent more than $2,500,000.00 advancing its water supply project. JA, Vol. III at 0626; Vol. X at 2467; Vol. XI at 2558-2561. 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.

JA, Vol. III at 0626. To obtain those authorizations, Intermountain was required to engage engineers and consultants to design and analyze every aspect of the Project and prepare reports to the governmental agencies issuing the permits. *Id.;* JA, Vol. X at 2463-2464. Moreover, Intermountain was required to engage contractors to drill test wells and hydrogeologists to conduct aquifer pumping tests to estimate the result of pumping groundwater under the water rights. JA, Vol. III at 0626.

During the recent and pervasive recession (a matter of fact of which this Court can take judicial notice pursuant to NRS 47.130), and specifically between about 2010 and 2015, Intermountain's spending toward developing the Project was more conservative because of the uncertainties brought about by the economic downturn, including the devastating impact it had on building and development in

Northern Nevada. *See and compare* Intermountain's applications for extensions of time for its water rights permits, as identified in the table accompanying its Answering Brief in judicial review (JA, Vol. XI at 2558-2561). During this time, however, Intermountain still maintained and complied with its prior approvals, conducted water level monitoring, and resolved an issue with the PUC regarding a prior approval. *Id.*

By 2015, as the economy began to recover, Intermountain was in a position to be able to begin investing more into and regain traction on its water project. *Id.* It was at that same time, however, that SPI launched what has become a relentless, time consuming, vexatious, and expensive attack on Intermountain and its efforts to maintain its groundwater permits for its water project.[9]

Indeed, contrary to SPI's repeated assertions, and in spite of SPI's ongoing efforts to undermine Intermountain's Project by way of its relentless and abusive litigation tactics, Intermountain has never stopped or stalled its ongoing

[9] SPI is not stopping with this appeal of the State Engineer's June 1, 2016, decision granting Intermountain's request for an extension of time. SPI's unsuccessful objection to Intermountain's 2017 application for an extension of time is currently on judicial review before the district court (Second Judicial District Court Case No. CV18-00145) (*accord,* NRS 47.130, 47.150, permitting judicial notice of that case), and having received SPI's objection to its 2018 application for an extension of time, Intermountain fully expects it will have to engage in the same expensive and time consuming exercise in reference to that as well. Indeed, Intermountain has been completely wrapped up in litigation with SPI since the economy began to recover and it sought and endeavored to more fully advance its water project.

development of the Project. As a consequence, the serial decisions by the State Engineer and the district court that validate and grant Intermountain's extension requests – including the State Engineer's and the district court's decision at issue in this appeal – are supported by substantial evidence of Intermountain's ongoing efforts to put its water to beneficial use.

V. STANDARD OF REVIEW

In this appeal from the district court's order denying SPI's petition for judicial review of the State Engineer's June 1, 2016, decision granting Intermountain's request for an extension of time in reference to its groundwater permits for its water project, this Court reviews the State Engineer's decision in the same manner as the district court. *See Nassiri v. Chiropractic Physicians' Board Of Nevada,* 130 Nev. ____ (Adv. Op. No. 27), 327 P.3d 487, 489 (2014), *citing Elizondo v. Hood Mach., Inc.,* 129 Nev. 780, 312 P.3d 479, 482 (2013) (citing *City of N. Las Vegas v. Warburton,* 127 Nev. 682, 262 P.3d 715, 718 (2011). Because water law and all proceedings under it are special in character and specifically prescribe and limit the method of its procedure (*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); *State Engineer 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)). Thus, 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). Moreover, 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. Ray, supra,* 95 Nev. at 786, 603 P.2d at 264. It is the State Engineer's duty to resolve conflicting evidence, and a court must limit itself to a "determination of whether substantial evidence in the record supports the State Engineer's decision." *Id., citing N. Las Vegas v. Pub. Serv. Comm'n,* 83 Nev. 278, 429 P.2d 66 (1967). Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *Bacher, supra,* 122 Nev. at 1121, 146 P.3d at 800, *citing State Emp. Sec. v. Hilton Hotels,* 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

Because the State Engineer has the implied power to construe the state's water law, great deference should be given to those interpretations when they are within the language of the statutes. *United States v. State Eng'r,* 117 Nev. 585,

589, 27 P.3d 51, 53 (2001) (noting that deference is especially important because the State Engineer has a "special familiarity and expertise with water rights issues…."); *Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty.,* 112 Nev. 743, 747-48, 918 P.2d 697, 700 (1996); *State v. Morros,* 104 Nev. 709, 713, 766 P.2d 263, 266 (1988). And even though the State Engineer's interpretation of a statute is not controlling, "this court recognizes the State Engineer's expertise and looks to his interpretation of a Nevada water law statute as persuasive, if not mandatory, authority." *In re Nevada State Eng'r Ruling No. 5823,* 128 Nev. 232, 277 P.3d 449, 453 (2012); *Andersen Family Assocs. V. Ricci,* 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008); *United States v. State Eng'r,, supra,* 117 Nev. at 589, 27 P.3d at 53; *Pyramid Lake Paiute Tribe,* 112 Nev. at 748, 918 P.2d at 700; *Morros,* 104 Nev. at 713, 766 P.2d at 266. Similarly, the State Engineer's conclusions of law, to the extent they are closely related to his view of the facts, are entitled to deference and must not be disturbed if they are supported by substantial evidence. *Jones v. Rosner,* 102 Nev. 215, 217, 719 P.2d 805, 806 (1986). In this case, the State Engineer's decision to grant Intermountain's March 1, 2016, application for extension of time was supported by substantial evidence. Thus, this Court should affirm the district court's order denying SPI's petition for judicial review.

VI. SUMMARY OF THE ARGUMENT

The State Engineer's decision to grant Intermountain's March 8, 2016, application for an extension of time was supported by the substantial evidence provided by Intermountain in support of that request – evidence to which SPI never objected or responded in the underlying proceedings before the State Engineer – and satisfied the requirements of NRS 533.380. SPI's efforts to undermine the State Engineer's decision is based upon a faulty and unsupported factual premise, it raises argument that it did not raise before the State Engineer or the district court, and otherwise advances challenges that have either been repeatedly and previously addressed, that and are contrary to the facts and authority applicable to this case, and that generally ignore the discretion and deference afforded to the State Engineer to make determinations regarding water rights permits over which it has jurisdiction. Thus, this Court should affirm the district court's order denying SPI's petition for judicial review of the State Engineer's June 1, 2016, decision to grant Intermountain an extension of time.

VII. ARGUMENT

The State Engineer's decision was supported by substantial evidence that Intermountain satisfied NRS 533.380. SPI's efforts to undermine the State Engineer's decision raises issues that it did not raise before the State Engineer or the district court, and otherwise advances challenges that have either been

repeatedly addressed and/or are contrary to the facts and authority applicable to this case.

A. The State Engineer's decision was supported by substantial evidence that Intermountain satisfied NRS 533.380.

In its June 1, 2016, decision granting Intermountain's request for an extension of time, the State Engineer issued a comprehensive analysis in reference to the requirements of NRS 533.380(3) and (4) as they relate to requests for extensions of time. JA, Vol. I at 0015-0021. To that end, the State Engineer noted that SPI's objection generally re-raised the same arguments and cited the same evidence that it asserted in response to Intermountain's 2015 request for extension of time (JA, Vol. I at 0016, fn. 5), but nevertheless again addressed the applicable statutory requirements as they related to Intermountain's water permits.

The State Engineer initially addressed whether Intermountain showed good faith and reasonable diligence. JA, Vol. I at 0016-0018; NRS 533.380(3). Relying on *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.,* 245 F. 9 (9th Cir. 1917) (whether an appropriator of water has used due diligence to utilize water for beneficial use must be determined upon the facts of each particular case), *The Subdistrict v. Chevron Shale Oil Co.,* 986 P.2d 918 (Colo. 1999) (addressing the activities that may support a finding of reasonable diligence), and *Desert Irr. Ltd. v. State,* 113 Nev. 1049, 944 P.2d 835 (1997) (mere statements of intent to put water to beneficial use is insufficient to justify an extension of time),

the State Engineer explained that the evidence submitted by Intermountain with its extension request (evidence of expenses in the amount of $23,300.39 that were incurred by Intermountain in furtherance of its efforts to put its water to beneficial use) in the context of all of the historical facts and circumstances in reference to Intermountain's development of its water rights for the entire project (NRS 533.380(6)) were sufficient to establish that Intermountain proceeded in good faith and with reasonable diligence. JA, Vol. I at 0016-0018.

The State Engineer went on to consider SPI's various arguments that Intermountain's extension requests violate the anti-speculation doctrine. JA, Vol. I at 0018-0020. He explained that the "formal contract or agency relationship requirement" stated in *Bacher, supra* is not applicable to Intermountain's permits because *Bacher* was decided after Intermountain's permits were issued, and Intermountain's application for an extension of time affirmed, via Intermountain's principal's sworn statement, that it had secured various contractual agreements that would satisfy the *Bacher* requirements. JA, Vol. I at 0019. And, in addressing any effort by Intermountain to market its water project for sale, the State Engineer noted that, pursuant to *Adaven Mgt., Inc. v. Mountain Falls Acquisition Corp.,* 124 Nev. 770, 191 P.3d 1189 (2008), the anti-speculation doctrine does not prevent a property owner from selling his or her right to draw water to a third party because the doctrine focuses on use of water for which it was granted, not ownership. JA,

Vol. I at at 0019-0020.

The State Engineer also addressed the additional considerations of NRS 533.380(4). In so doing, the State Engineer referred to the plans that had been issued by the Truckee Meadows Water Authority and the Western Regional Water Commissioners – plans that specifically reference Intermountain's water project and the fact that it would cover areas in the North Valleys (for which the permits were issued), which TMWA does not. JA, Vol. I at 0020.

Indeed, the State Engineer has liberal and broad discretion to grant "*any number of extensions of time*" within which construction work must be completed or water must be applied to beneficial use under a permit. NRS 533.380(3). In granting Intermountain's 2016 application for an extension of time, the State Engineer's based his decision upon his consideration of the undisputed and unopposed evidence that Intermountain 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. Thus, it was consistent with NRS 533.380(3) and (4) and, on its face, it is a decision that is supported by substantial evidence, as defined by Nevada law (evidence that a reasonable mind might accept as adequate to support a conclusion). *See Bacher, supra.*

In considering and affirming the State Engineer's decision on judicial review, the district court correctly noted, among other legal standards, the

deference that is to be given to the State Engineer's factual determinations and legal conclusions. JA, Vol. XI at 2752-2753 (citing NRS 533.450(1) and *Bacher, supra,* 122 Nev. at 1118, 146 P.3d at 798). To that end, the district court was limited to considering whether the State Engineer's decision is supported by evidence that a reasonable mind might accept as adequate to support a conclusion (the definition of substantial evidence). JA, Vol. XI at 2752-2753, *citing Bacher,* 122 Nev. at 1121, 146 P.3d at 800) and *State Engineer v. Morris, supra,* 107 Nev. at 701, 819 P.2d at 205 (1991). In highlighting the evidence that was before the State Engineer and SPI's objections (JA, Vol. XI at 2754-2755), the district court found that State Engineer properly considered the *totality of the evidence* before him and engaged in an extensive analysis in ultimately concluding that Intermountain demonstrated good faith and reasonable diligence in furtherance of its Project for which it was issued the permits that are the subject of this case (JA, Vol. XI at 2755-2756). As a consequence, the State Engineer's June 1, 2016, decision granting Intermountain an extension of time was supported by substantial evidence consistent with applicable Nevada law.

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B. SPI's efforts to undermine the State Engineer's decision raises argument that it did not raise before the State Engineer or the district court, and otherwise advances challenges that have either been repeatedly addressed and/or are contrary to the facts and authority applicable to this case.

In its challenge to the State Engineer's June 1, 2016, decision to grant Intermountain's application for an extension of time, SPI asserts that the area in which Intermountain seeks to put its water to beneficial use is not permitted, that the extensions of time allow Intermountain to speculate in water, and that Intermountain did not provide sufficient "proof and evidence" to meet the statutory requirements. Notwithstanding that SPI's ongoing effort to disrupt and interfere with Intermountain's water rights and project is based on a faulty and unsupported factual premise, it introduces a challenge to the permits that it did not raise before the district court, and otherwise asserts challenges that have been repeatedly addressed by the State Engineer and district court and/or are otherwise contrary to the facts and law applicable to this case. Thus, the district court properly affirmed the State Engineer's June 1, 2016, decision to grant Intermountain an extension of time for its groundwater permits.

1. SPI's Efforts to Disrupt and Interfere with Intermountain's Water Rights and Project is Based upon a Faulty and Unsupported Factual Premise.

As an initial matter, SPI premises its appeal in this case on factual misrepresentations that are unsupported by the record. In addition to the

unnecessarily complicated and mischaracterized statement of the issues, as noted above, SPI further misrepresents the history of how the State Engineer addressed the permits at issue in this case. In its case and factual overview, SPI suggests that the permits identified in this case were issued sixteen years ago, and would have this Court believe that Intermountain simply sat on those permits for those sixteen years without doing anything with them and that it has no ability to develop its water project or use the permitted water. *See* Opening Brief at 3-5, 8. All of that, however, is not true. Initially, not all of the permits at issue in this case were issued sixteen years ago. *See* Table of Intermountain's permits, JA, Vol. XI at 2556. Only three of the permits (permit numbers 64977, 64978, and 66400) were issued sixteen years ago (*Id.; see also,* JA, Vol. IV at 0914-0916; JA Vol. V at 1060-1062, 1182-1184). Four of them (permit numbers 73428, 73429, 73430, and 74327) were issued twelve years ago (JA, Vol. XI at 2556*.; see also,* JA, Vol. IX at 2066-2068, 2180-2184, 2281-2285; Vol. X at 2380, 2383, 2386-2388), and one (permit number 72700) was issued ten years ago (JA, Vol. XI at 2556; *see also* JA, Vol. VII at 1780-1782). Notably, the earliest date by which Intermountain was required to show beneficial use was 2007, just before the economic downturn began. JA, Vol. III at 0625; Vol. XI at 2526. Moreover, SPI's unsupported characterization of Intermountain's efforts since obtaining its groundwater permits ignores the evidence of the work that Intermountain has done in furtherance of its

project since first obtaining its first permits. JA, Vol. XI at 2558-2561 (Intermountain's table of extensions and synopsis of amounts spent on permits). Indeed, and as supported by the decisions in its favor, throughout SPI's challenges to Intermountain's groundwater permits, Intermountain has repeatedly established its intention and ability to put its permitted water to beneficial use. JA, Vol. VIII at 1871-1874 (State Engineer's June 4, 2015, decision) Vol. X at 2428-2490 (transcript of December 14, 2015, judicial review hearing and bench ruling denying judicial review of the State Engineer's June 4, 2015 decision); JA, Vol. III at 0622-0628 (Order denying judicial review of State Engineer's June 4, 2015, decision); JA, Vol. I at 0015-0021 (State Engineer's June 1, 2016, decision); Vol. XI at 2695-2749 (transcript of May 14, 2017, judicial review hearing and bench ruling denying judicial review of State Engineer's June 1, 2016, decision); Vol. XI at 2751-2758 (Order denying judicial review of State Engineer's June 1, 2016, decision).

SPI goes on to state that Intermountain is not permitted to use the groundwater secured by its permits in any other area than Lemmon Valley. Opening Brief at 4, 11-12. As more fully explained below, this is a new position taken by SPI since the underlying judicial review proceedings. As also explained below, to the extent this Court is inclined to consider this newly-asserted position in the context of this appeal, Intermountain's project was approved for the "North

Valleys," not just Lemmon Valley. JA, Vol. IV at 0899-0909, 1000 (Regional Water Planning Commissioner, 1997, referenced Intermountain's project as part of the North Valleys Strategy – Intermountain's project could be configured to take water to Cold Springs Valley); JA, Vol. I at 0056-0188; Vol. III at 0647-0657 (TMWA 2010-2030 Water Resource Plan); JA, Vol. I at 0241-Vol. II at 0308 (Western Regional Water Commission 2011-2030, Comprehensive Regional Water Management Plan); JA, Vol. II at 0474-Vol.III at 0621 (TMWA 2016-2035 Draft, Water Resource Plan). Thus, SPI's assertion is contrary to the record and evidence in this case.

2. *SPI's challenge to the area in which Intermountain will be putting its water to beneficial use is not an issue that is before this Court; even if this Court were to consider SPI's assertion regarding where Intermountain intends to use its water, it is without merit.*

Based upon its misrepresented, incomplete, and false factual premise, SPI goes on to challenge the State Engineer's June 1, 2016, decision granting Intermountain's applications for extensions of time on permit numbers 64977, 64978, 66400, 72700, 73428, 73429, 73430, and 74327 because Intermountain no longer sought to use the water within the "permitted" geographical area. In so doing, SPI cites to Intermountain's intent to put its water to beneficial use in Cold Springs rather than Lemmon Valley, which SPI asserts was the area in which Intermountain initially sought and obtained its groundwater permits. SPI generally contends that that State Engineer could not grant Intermountain extensions of time

where Intermountain no longer sought to use the water within the "permitted geographical area," and that Intermountain's extension requests are, essentially, improper change of place applications. As noted above, however, SPI did not raise this challenge in its petition for judicial review in reference to the State Engineer's decision granting Intermountain's 2016 application for an extension of time and, therefore, it is not appropriate for SPI to raise it on appeal here. Should this Court be inclined to consider SPI's newly-asserted challenge as it concerns Intermountain's requests for an extension of time since its 2016 application, it is entirely without merit.

a. SPI's challenge to the area in which Intermountain seeks to put its water to beneficial use in reference to its 2016 application was not at issue and not raised in the proceedings before the district court; this is a new issue SPI has raised with the State Engineer and the district court since the proceedings that are before this Court.

SPI devotes much of its opening brief to its challenge to the State Engineer's decision granting Intermountain's 2016 application for an extension of time based upon the area in which Intermountain intends to put its water to beneficial use. *See* Opening Brief at 12, 14, 19-26. It is a position it squarely addresses (*Id.*), and also sprinkles in among the other arguments it had previously raised before the district court, but without this new assertion. According to SPI, Intermountain's permits do not authorize the water they secure to be used in Cold Springs because the water was supposed to have been used in Lemmon Valley. *Id.* Because SPI did not

make this challenge in the judicial review proceedings that are at issue in this appeal (JA, Vol. X at 2491-2517 (SPI's Opening Brief); Vol. XI at 2584-2603 (SPI's Reply Brief)), and because it is a new position that SPI has taken in reference to Intermountain's project since the proceedings at issue in this appeal[10], SPI's efforts to challenge the State Engineer's June 1, 2016, decision granting Intermountain's request for an extension of time as it concerns the "permitted area" for the water is not appropriate for consideration by this Court. *See Old Aztec Mine, Inc. v. Brown,* 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (appellant who fails to raise arguments before the district court waives them on appeal).

b. To the extent this Court is inclined to consider SPI's newly-asserted challenge, it is entirely without merit.

The general premise to SPI's newly-asserted challenge is that Intermountain's permits do not authorize use of the water they secure to be used anywhere outside of Lemmon Valley. SPI relies primarily on *Desert Irrigation,*

[10] This challenge by SPI regarding the alleged changed place of use is a challenge that has been considered and rejected by the State Engineer, and is currently an issue that is being addressed on SPI's latest petition for judicial review, noted above. Should this Court wish to take judicial notice of what has taken (and is continuing to take) place before the State Engineer and the district court in reference to Intermountain's 2017 extension application pursuant to NRS 47.150 and *Occhiuto, supra* (permitting judicial notice to take cognizance of the record in another case), Intermountain directs this Court's attention to Ruling #6421 from the Office of the State Engineer, issued on January 9, 2018 (a ruling after a full evidentiary hearing on SPI's objection to Intermountain's 2017 extension application, and which fully addresses and dispels this new position taken by SPI) and Second Judicial District court Case No. CV18-00145 (SPI's third petition for judicial review) regarding Intermountain's groundwater permits.

supra, 113 Nev. 1049, 944 P.2d 835, which, according to SPI, states that a permit holder cannot obtain an extension of time based upon an intention to put the water to use on a parcel other than the described place of use in the permit. To the extent that this Court is inclined to consider this argument that relates to Intermountain's applications with the State Engineer that proceed the application at issue in this case, SPI's assertion is entirely without merit.

Indeed, SPI's reliance on *Desert Irrigation, supra* is misplaced. In *Desert Irrigation,* the permitted use was for quasi-municipal use on a specific development in Pahrump. In July 1972, the State Engineer granted an application to change the manner and place of use, with the PBU due in February 1977 (approximately 6 ½ years after the permit issued). Desert Irrigation filed extensions of time every year from 1977 to 1990. A portion of the water was put to beneficial use, but not all of it. The fifteenth extension of time for filing the PBU was filed in May 1991 and was granted by the State Engineer. Before the sixteenth extension request, Desert Irrigation sought to change its place of use to a different parcel six miles away. The State Engineer granted the extension of time, but denied the change application because Desert Irrigation had not proceeded with reasonable diligence to put the excess water to beneficial use. To that end, there was no evidence of good faith and due diligence to put the excess water to beneficial use on that different parcel. It was the absence of "any" evidence to

develop the parcel on which the State Engineer based his decision.

According to NRS 533.580(4)(b), in considering an extension of time, the State Engineer shall consider the number of parcels and commercial or residential units that are contained in or planned for *the land being developed or the area being served*. According to the *Desert Irrigation* Court, that is interpreted to mean "the *area* within which a permittee has a right to put water to beneficial use." *Desert Irrigation, supra,* 113 Nev. at 1057. Prior to Desert Irrigation's change application, there was no evidence that it was exercising good faith and due diligence to put its excess water to beneficial use on that different parcel. In distinguishing the cases that had been cited by Desert Irrigation, the Court noted that they were different "in one important respect." Those cases involved developments in which *all* permitted water was committed to a specific use "from the outset." *Id.* at 1058.

In this case, Intermountain's use is for an entire area – townships, ranges, and many sections. There was a reference to Lemmon Valley in Intermountain's permits, but the water management plans referenced the North Valleys. *See, i.e.,* JA, Vol. IV at 0899-0909, 1000 (Regional Water Planning Commissioner, 1997, referenced Intermountain's project as part of the North Valleys Strategy – Intermountain's project could be configured to take water to Cold Springs Valley); JA, Vol. 1 at 0056-0188; Vol. III at 0647-0657 (TMWA 2010-2030 Water

Resource Plan); JA, Vol. I at 0241-Vol. II at 0308 (Western Regional Water Commission 2011-2030, Comprehensive Regional Water Management Plan); JA, Vol. II at 0474-Vol. III at 0621 (TMWA 2016-2035 Draft, Water Resource Plan). Thus, contrary to *Desert Irrigation, supra,* in which the parcel of property at issue had never been mentioned, the area contemplated by Intermountain's developer agreement has been at issue in reference to Intermountain's permits by several governmental agencies.

Moreover, where Desert Irrigation had received fifteen extensions of time by the State Engineer, Intermountain has received far less. For four of its permits in the Lower Dry Valley (Permit Nos. 74327, 73428, 73429, 73430), for which their PBUs were due on 2/11/09, the 2016 applications for extensions of time were the ninth requests. *See, i.e.,* JA, Vol. XI at 2559-2561. The 2016 extension application for the other Lower Dry Valley Permit (Permit No. 66400), the PBU for which was due 2/11/09, was the tenth extension request. JA, Vol. XI at 2559. For two of the permits for the Upper Dry Valley (Permit Nos. 64977 and 64978), PBUs for which were due 2/11/07, the 2016 application for extension of time was the eleventh one (JA, Vol. XI at 2558), and the other Upper Dry Valley Permit (Permit No. 72700), the PBU for which was due 12/18/13, the 2016 application for an extension of time was only the fourth one (JA, Vol. XI at 2559). Thus, *Desert Irrigation, supra* is not applicable to this case.

SPI also challenges the district court's citation to *Pyramid Lake Paiute Tribe, supra,* which states that Nevada law allows a permittee to find an alternative use of its water where the originally intended project may not be realized. According to SPI, *Pyramid Lake Paiute Tribe, supra* is not applicable because the case did not involve an extension request and it does not involve water speculation. SPI, however, not only makes a distinction without a difference, it ignores that any alternate use by Intermountain of its water is within the area in which it was approved to be used – the North Valleys. *See, supra.* And, SPI ignores that, as more fully set forth below, the issue of water speculation has been fully and finally (and repeatedly) determined in this case. SPI also ignores that, as stated in *Pyramid Lake,* Intermountain has kept its water rights alive and in good standing. Not only has Intermountain spent millions of dollars on advancing its project (JA, Vol. XI at 2558-2561), it has timely submitted all required filings to keep its water rights in good standing (*Id.*).

Finally, SPI's assertion that Intermountain was required to apply to change the place to use its permitted groundwater and the authority on which it relies is not relevant to Intermountain's permits. As fully explained above, Intermountain's extension requests for the permits at issue in this case concern water and a project that, from the outset and as identified in the regional plans, contemplated the water's use in the North Valleys, of which Lemmon Valley, where it was initially

tagged for use, and Cold Springs, which is the current focus of its use, are located. Thus, the place of use for Intermountain's permits is, and has always been, for the North Valleys. At no time and under no circumstances were Intermountain's extension requests intended to change the place of use, or intended to be an application for that purpose. Thus, a change of place of use application is entirely irrelevant to Intermountain's permits.

3. The extension of time granted to Intermountain does not improperly allow Intermountain to speculate in water.

SPI challenges the State Engineer's decision to grant Intermountain's application for an extension of time because, according to SPI: (1) Intermountain failed to submit any evidence of a contractual or agency relationship with an entity that plans to put the water to use in the permitted area; and (2) the Marshall Affidavit does not satisfy the anti-speculation doctrine. Notwithstanding that SPI's "water speculation" challenge has been repeatedly addressed in SPI's various proceedings to challenge Intermountain's groundwater permits[11], as it is advanced

[11] This contention, and many of those that follow, raise issues that have been fully and finally determined in the State Engineer and judicial review proceedings that concerned Intermountain's 2015 extension request. JA, Vol. I at 0015-0021 (the State Engineer noting at JA 0016, n. 5, that SPI re-raises in these proceedings the same legal arguments and cites the same evidence as it did in its challenge to Intermountain's 2015 extension application); JA, Vol. III at 1871-1874 (the State Engineer's 2015 decision to grant Intermountain's extension request); JA, Vol. . JA, Vol. III at 0622-0628 (the district court's January 12, 2016, order denying SPI's petition for judicial review, which SPI did not appeal). Because those previous proceedings addressed the same issues between the same

in this case, it is entirely unsupported and contrary to the evidence.

a. The State Engineer's determination about the applicability of the *Bacher* requirements to Intermountain's extension request and his consideration of Robert Marshall's affidavit as to the contractual and agency relationships it had established in furtherance of its project were sufficient to support its finding that Intermountain is not speculating in water.

SPI's challenge to the State Engineer's June 1, 2016, decision based upon Intermountain's failure to submit any evidence of a contractual or agency relationship with an entity that plans to put the permitted water to beneficial use is a continuing, unsupported and incorrect conclusory theory that Intermountain has no intention to put its water to beneficial use. SPI asserts that, according to *Bacher, supra,* each time the State Engineer considers an extension request, he

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parties over the same subject matter, principles of issue preclusion and the law of the case doctrine prohibit SPI from re-asserting them in these proceedings. *See Five Star Capital Corp. v. Ruby,* 124 Nev. 1048, 194 P.3d 709 (2008) (issue preclusion prevents relitigation between the same parties of an issue that was decided on its merits in an earlier action that became final, even if the later action is based on different causes of action and distinct circumstances) and *Fergason v. Las Vegas Metro. Police Dep't.,* 131 Nev. ___ (Adv. Op. 94), 364 P.3d 592, 597 (2015) (when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case), *citing Rebel Oil Co. v. Atl. Richfield Co.,* 146 F.3d 1088, 1093 (9th Cir. 1998) (doctrine generally precludes a court ***from reconsidering an issue that has already been decided by the same court***, or a higher court in the identical case); *see also Office of State Engineer, Div. of Water Resources v. Curtis Park Manor Water Users Ass'n,* 101 Nev. 30, 32, 692 P.2d 495, 497 (1985) (the law-of-the-case doctrine provides that where an appellate court states a principle of law in deciding a case, that rule because the law of the case, and is controlling both in the lower court and on subsequent appeals, so long as the facts are substantially the same), *citing Andolino v. State,* 99 Nev. 346, 350, 662 P.2d 631 (1983).

must ensure that the permit holder is exercising reasonable diligence to construct the diversion works and put the water to beneficial use, and that if there is no evidence of that reasonable diligence, the permit can be canceled for failing to comply with the anti-speculation doctrine. SPI's persistent but redundant challenges based on the anti-speculation doctrine under *Bacher, supra* in all of its various iterations, however, contradict the evidence that was before the State Engineer.

In its prior 2015 challenge to Intermountain's request for an extension of time, one of the primary issues raised by SPI was the application of the anti-speculation doctrine and the beneficial use requirement. *See* JA, Vol. VIII at 1840-1842 (referenced at JA 1842). The State Engineer declined to apply the anti-speculation doctrine as stated in *Bacher, supra* to deny an extension of time. JA, Vol. VIII at 1871-1874 (reference at JA 1874). SPI again argued its anti-speculation challenge during the December 14, 2015, hearing. JA Vol. X at 2428-2490 (reference at JA 2442-2444). The district court ruled on SPI's anti-speculation challenge in its January 12, 2016, Order denying SPI's petition for judicial review. JA, Vol. III at 0622-0628 (reference at JA 0627-0628 (the anti-speculation doctrine as adopted in *Bacher* applies to applications for water rights, not to changes in existing water rights)). In its December 2, 2015, "pre-filed" objection (which pre-dated the judicial review hearing and the district court's

January 12, 2016, Order), SPI renewed its anti-speculation argument against granting further extensions of time to Intermountain. JA, Vol. I at 0047-0054 (reference at JA 0048-0050). And, again, the State Engineer explained that *Bacher, supra,* which was decided after Intermountain's permits were issued, concerned new applications to appropriate water under NRS 533.370, not NRS 533.380. JA, Vol. I at 0015-0021 (reference at JA 0019 and at fn. 14 on JA 0019). Nevertheless, this State Engineer determined that, to the extent that the anti-speculation doctrine can be applied to extension requests, Intermountain has satisfied that condition because it has provided evidence of contractual/agency relationships for the beneficial use of the water. *Id.*

In this case, SPI's December 2, 2015, non-responsive "pre-filed" objection to any further extensions of time being granted to Intermountain (JA, Vol. I at 0047-0054) preceded the district court's January 12, 2016, order denying its previous request for judicial review and raised the same issues that were addressed by the State Engineer (JA, Vol. III at 1871-1874) and subsequently addressed and decided by the district court (JA, Vol. X at 2428-2490; JA Vol. III at 0622-0628 (January 12, 2016, final decision by the district court denying SPI's petition for judicial review); Vol. I at 0016 at n. 5 (the State Engineer noting in its June 1, 2016, decision at issue in this case that SPI re-raises the same legal arguments based on the same evidence as raised in its 2015 objection)). Because this is an

issue that has already been decided by the district court in a final decision in a case between the same parties involving the same issues (SPI having not appealed the district court's January 12, 2016, order denying SPI's petition for judicial review, *supra*), it is precluded by issue preclusion and the law of the case doctrine, as noted above.

Be that as it may, SPI's anti-speculation claim is entirely contrary to the *unopposed* evidence that Intermountain provided to the State Engineer regarding the contracts it has secured in furtherance of putting its water to beneficial use (JA, Vol. III at 0647-0659, 0629-0644).[12] For the reasons it fully explained and stated in its June 1, 2016, decision (JA, Vol. 1 at 0015-0021), the State Engineer was entitled to rely on Robert Marshall's unopposed affidavit, which testified to contract and agency relationships it had established at that time in furtherance of Intermountain's project, in support of his finding that Intermountain's extension

[12] In its "pre-filed" objection to Intermountain's 2016 application for an extension of time SPI requested that the State Engineer forward to it any documents received by the State Engineer related to Intermountain's water permits. As addressed by the district court, however, there is no mechanism by which SPI is entitled to notice of documents filed with the State Engineer, or by which the State Engineer is required to serve SPI with documents filed with it simply because it intends to object. JA, Vol. XI at 2751-2758 (reference at JA 2755). Certainly, Intermountain had no obligation to serve SPI with anything it filed with the State Engineer's office. That there is nothing to mandate service on SPI, however, did not preclude SPI from filing an objection or opposition to Intermountain's 2016 application, and having objected to Intermountain's 2015 application, SPI was certainly aware of its ability to do so in that process was known to it. *See, i.e.* JA, Vol. XI at 2742 (argument of counsel for Intermountain before the district court). It simply chose not to.

request satisfied the statutory requirement that it was proceeding in furtherance of its groundwater permits in good faith and with reasonable diligence. As a consequence, the State Engineer's determination in reference to the anti-speculation doctrine as it applies to this case and the Project was not arbitrary or capricious.

b. Because Robert Marshall's unopposed affidavit, on its face, attested to the contracts and relationships it had established at that time in furtherance of its water project, it necessarily satisfies the requirements of *Bacher,* to the extent that *Bacher* is applicable to Intermountain's extension requests.

SPI also asserts that Robert Marshall's affidavit in support of Intermountain's 2016 application for an extension of time does not satisfy the anti-speculation doctrine because it does not say anything about a contractual or agency relationship. Notwithstanding that SPI never objected to the content or substance of Robert Marshall's affidavit at the time Intermountain submitted its 2016 extension request (*see, supra*), the affidavit, on its face, attests to the contracts and relationships it had established, and was otherwise in the process of establishing, in furtherance of its water project. The State Engineer – who has experience with and historic knowledge of the Project – had the discretion to weigh the evidence before him and make his determination regarding Intermountain's reasonable diligence *under all the facts and circumstances* accordingly. *See* NRS 533.380(6) (defining the measure of reasonable diligence for purposes of NRS 533.380 as the steady

application of effort to perfect the application in a reasonably expedient and efficient manner under all the facts and circumstances). Thus, SPI's challenge to Robert Marshall's affidavit as it concerns the anti-speculation doctrine has no bearing on the State Engineer's decision granting Intermountain's 2016 application for an extension of time.

4. Intermountain provided sufficient "proof and evidence" to meet the statutory requirements for an extension of time.

Contrary to SPI's assertion that Intermountain failed to provide sufficient "proof and evidence" to meet the statutory requirements for an extension of time, Intermountain's evidence in support of its request for an extension of time was sufficient to satisfy NRS 533.380(4), to the extent that those provisions are applicable. Moreover, Intermountain's March 8, 2016, application for an extension of time does not indicate or suggest an effort to maintain the status quo. Robert Marshall's affidavit in support of Intermountain's March 8, 2016, application for an extension of time meets the substantial evidence standard. The State Engineer closely scrutinized Intermountain's March 8, 2016, extension request. Finally, the *Chevron* case on which the State Engineer relied is instructive as to the types of activities that constitute reasonable diligence. Thus, Intermountain provided sufficient proof and evidence to meet the statutory requirements for its extension request.

a. To the extent that is provisions are applicable, Intermountain has provided sufficient evidence to satisfy NRS 533.380(4).

SPI challenges the sufficiency of Intermountain's evidence as not satisfying NRS 533.580(4) based upon its conclusory claims that Intermountain does not intend to put its water to beneficial use, that it failed to submit more specific evidence of what parcels its water will be serving, that it failed to submit evidence of the economic conditions that prevented Intermountain from putting its water to beneficial use, and that it failed to submit evidence of any plan that includes the use of the permitted water. Notwithstanding that SPI failed to object or respond to the evidence that was submitted by Intermountain in support of its application for an extension of time (*see supra*), none of SPI's challenges undermine the integrity of the State Engineer's June 1, 2016, decision.

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

Highlighting the admonition of the State Engineer in his June 4, 2015, decision that the inability to secure a buyer for its water would not be considered good cause for future requests for extensions of time, SPI asserts that the State Engineer ignored that statement by granting another extension of time despite evidence in the record that Intermountain intends to sell its water, not put it to beneficial use. It is undisputed that, in the history of this Project, Intermountain

had a potential opportunity to sell the Project to Washoe County.[13] JA, Vol. X at 2467-2468. That sale, however, did not materialize (*Id.*), and Intermountain continued its efforts to put its water to beneficial use – efforts that are developing and evidenced in its March 8, 2016, application for an extension of time (JA, Vol. III at 0647-0659, 0629-0644). To that end, the evidence provided by Intermountain in support of its application for an extension of time necessarily shows that it heeded the State Engineer's admonition. Indeed, nothing prohibits Intermountain from selling its water rights and project, and nothing prohibits Intermountain from continuing its efforts to put the water to beneficial use regardless of whether it makes its project and water rights available for sale. Thus, the evidence is not contrary to the State Engineer's consideration of Intermountain's efforts to put its water to beneficial use.

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

SPI asserts that because Intermountain does not present evidence of any particular development that is slated to be served by the water appropriated under its permits, evidence that it is in negotiations with developers whose plans involve

[13] As explained during the December 14, 2015, hearing on SPI's prior judicial review efforts, that Washoe County was interested in purchasing the Project necessarily shows that the Project was viable and worthy of consideration by Washoe County. 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. JA, Vol. X at 2467-2468.

the construction of approximately 10,000 houses does not constitute substantial evidence that warrants an extension of time. *Accord,* NRS 533.380(4)(b); *Bacher, supra.* SPI, however, ignores what the district Court already held in reference to the State Engineer's consideration of the factors stated in NRS 533.380(4), and otherwise overstates the provision of NRS 533.380(4) on which it relies.

In its January 12, 2016, order denying SPI's petition for judicial review, the district court, in response to SPI's assertion that the State Engineer did not engage in the analysis required by NRS 533.380(4), concluded that the State Engineer complied with NRS 533.380(4) in considering Intermountain's applications for extensions of time because the record shows: (1) that the 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. JA, Vol. III at 0627. Here, the State Engineer again underwent an analysis of NRS 533.380(4), and in concluding that good cause existed to grant Intermountain's request for an extension of time, he: (1) stated that he considered the factors stated in NRS 533.380(4); and (2) undertook an analysis of those factors based upon the issues raised by SPI in its objection and Intermountain's response. JA, Vol. I at 0015-0021. Based upon the State Engineer's consideration of the unopposed evidence provided by Intermountain with its extension request in reference to NRS 533.380(6) (as addressed, *supra*) and the law of case on this issue by way of the

district court's resolution of this issue in its January 12, 2016, final order denying SPI's petition for judicial review (as also addressed, *supra*), the State Engineer's consideration of the factors stated in NRS 533.380(4) satisfied his obligations in considering and granting Intermountain's 2016 extension request.

Be that as it may, NRS 533.380(4)(b) states that, in considering an extension request, the State Engineer is required to consider, *among other factors,* the number of units 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. In this case, the State Engineer considered evidence from Intermountain – *unopposed by SPI* – that it was in negotiations, and expected to have an agreement, with developers as it concerned the construction of nearly 10,000 houses (JA, Vol. III at 656), and the TMWA water plans, which identifies and references Intermountain's Project in the context of the various areas the plans address (JA, Vol. I at 0015-0021). Nothing in NRS 533.380(4)(b) requires the level of detail that is suggested by SPI in order to satisfy the substantial evidence standard. Thus, SPI's challenge on that basis is without merit.

iii. Intermountain has not asserted that current economic conditions are preventing it from continuing its development efforts; Intermountain is proceeding with its development efforts consistent with its intention to put its water to beneficial use.

Based on its conclusory contention that Intermountain has no plans to put

the water to beneficial use, SPI asserts that none of the evidence Intermountain submitted can be construed to demonstrate that economic conditions prevented it from perfecting the permitted water. Because SPI's conclusory position that Intermountain has no intention of putting its water to beneficial use is unsupported and, as more fully explained above, entirely contrary to the evidence, that assertion is entirely without merit. As explained above, and as illustrated by JA, Vol. XI at 2558-2561, Intermountain's expenditures on the Project reflect the economic downturn – a downturn that devastated development in Northern Nevada – and the impact on Intermountain's continuing efforts to develop the Project.

SPI goes on to distinguish the economic downturn of 2008-2015, which is addressed in the State Engineer's June 1, 2016, decision as having impacted Intermountain and in reference to the efforts it has made on the Project, and current economic conditions since 2013. Continuing on its unsupported and incorrect premise that Intermountain does not intend to develop the Project, SPI contends that because the State Engineer does not consider economic conditions since 2013, there is not substantial evidence to show that current economic conditions are preventing Intermountain from perfecting its rights. Intermountain, however, has not claimed that the current economic conditions are preventing it from continuing its development efforts, and the evidence that was provided to the State Engineer shows that, consistent with the current upturn in the economy, Intermountain is

proceeding with its development efforts. JA, Vol. III at 0647-0659, 0629-0644; Vol. XI at 2558-2561. The only impact on Intermountain's efforts to advance its development on the Project since the economy began to recover is the resources that Intermountain has to dedicate to responding to SPI's repeated *and continuing* challenges to Intermountain's applications for extensions of time. *See, i.e.,* JA, Vol. III at 0658 (identifying the amount of money Intermountain spent in successfully defending SPI's previous petition for judicial review); *see also,* footnote 9, *supra*. Thus, SPI's challenge based on current economic conditions is irrelevant and superfluous.

iv. 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 278.020 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, has not only already been addressed in this case by the district court's January 12, 2016, final decision, 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 the district

court in its January 12, 2016, order denying SPI's petition for judicial review. JA, Vol. III at 0627. According to the district 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. *Id.* 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. JA, Vol. I at 0015-0021. Thus, on its face and based upon issue preclusion and the law-of-the-case doctrine (*see, supra*), that is sufficient to establish that the State Engineer satisfied his obligations under NRS 533.380(4).

Moreover, the State Engineer could not review evidence of an identified plan authorized by NRS 278.020 or NRS Chapter 278A in this case because the Project was not issued permits to serve a planned unit development or a specific project or subdivision. Indeed, NRS 533.380(4) does not require that Intermountain identify a planned unit development or specific project. It requires that the State Engineer consider that information. He can only consider that information, however, if it is information that is part of the water rights permit.

Thus, SPI's assertion that evidence of an identified plan is required for consideration by the State Engineer is patently incorrect.

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

SPI asserts that that evidence and information provided by Intermountain in support of it application for an extension of time (JA, Vol. III at 0629-0644, 0647-0659) do not show progress toward putting the water to beneficial use, but only an effort to maintain the status quo. SPI complains that the documents are nothing more than unexplained invoices that left the State Engineer to speculate as to the work that was performed. Notwithstanding that Intermountain's evidence in support of its 2016 extension application was unopposed by SPI when the State Engineer considered and ruled on it, SPI's citation to the record in reference to Intermountain's supporting evidence is incomplete and misleading, and it ignores some key issues.

Initially, in addition to the invoices identified by SPI, Intermountain also provided with its application for an extension of time an affidavit of one of its principals, Robert Marshall. In that affidavit, Mr. Marshall provided a comprehensive review of all that has been done in pursuit of Intermountain's water rights permits, and explained what it had done in 2015 and early 2016 to continue its efforts to comply with NRS 533.380. Those efforts included agreements with

engineering and construction firms, negotiations with a utility company to distribute the water, and meetings with developers that are expected to lead to developer agreements – efforts that are consistent with and corroborated by some of the invoices that were provided. JA, Vol. III at 0654-0658 (Affidavit of Robert Marshall), 0629-0644 (Intermountain's 2105 expenditures). Contrary to SPI's repeated and conclusory assertion that Intermountain has no intent of putting its water to beneficial use, the information and evidence provided by Intermountain *and previously unchallenged by SPI* necessarily shows efforts within the last extension period to move forward with construction and to make available and provide water to the developers with whom Intermountain was negotiating water provision agreements. Combining the evidence of its most recent development efforts with the history of the Project and the more than $2,500,000.00 that Intermountain has invested in developing the Project consistent with the needs for the water as identified and approved in the various water plans (JA, Vol. IV at 0899-0909; Vol. I at 0170-0175), Intermountain clearly intends for its water to be put to beneficial use. Thus, on their face, Intermountain's unopposed documents and evidence in support of its March 8, 2016, application for an extension of time, in addition to the facts and circumstances of the Project historically and in its entirety, go beyond an uncorroborated statement of intent to put water to beneficial use.

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

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

As noted by SPI, the substantial evidence inquiry presupposes the fullness and fairness of the administrative proceedings, and that the evidence on which the State Engineer relies must be in the record before him. *Citing Revert v. Ray, supra,* 95 Nev. at 787, 603 P.2d at 264 and *Eureka Cnty v. State Eng'r,* 131 Nev. ____ (Adv. Op. No. 84, 359 P.3d 1114, 1121 (2015). In this case, what is *not* in the record before the State Engineer is any objection by SPI to the content and nature of Robert Marshall's affidavit. Rather, the State Engineer considered as part of the substantial evidence provided by Intermountain an *unopposed* affidavit by Intermountain's principal that addressed the efforts that Intermountain had made in the last extension period in furtherance of putting its water to beneficial use. Notwithstanding that SPI never objected to Robert Marshall's affidavit in reference to the State Engineer's consideration of Intermountain's extension request, the speculation and hearsay bases on which SPI makes that challenge are

entirely unsupported and without merit.

Indeed, Robert Marshall, who is an Intermountain principal, has personal knowledge of the information to which the affidavit attests, and attested to his personal knowledge under penalty of perjury. JA, Vol. III at 0654-0657. The State Engineer, who has deep knowledge of and experience in working with the Project, is entitled to weigh the credibility of the evidence before it in the context of the totality of the circumstances, and come to a decision about that evidence that a reasonable mind might accept as adequate to support a conclusion. *Revert, supra.; Bacher, supra.* Moreover, by accepting for purposes of its June 1, 2016, decision the affidavit testimony of Robert Marshall, together with the evidence that corroborated Mr. Marshall's statements and the totality of the circumstances, the State Engineer did not ignore that additional supporting documents would be required for consideration of any further extension requests. Indeed, by requiring that any further extensions of time be accompanied by the agreements identified in Mr. Marshall's affidavit, the State Engineer has clearly considered that Intermountain's evidence of its ongoing effort is developing and has imposed a safeguard to ensure the continued development of Intermountain's efforts to put its water to beneficial use continues to be evidenced. Thus, combined with other evidence and the totality of the circumstances, Mr. Marshall's affidavit meets the substantial evidence requirements of NRS 533.380(4).

d. The State Engineer closely scrutinized Intermountain's March 8, 2016, extension request.

SPI takes issue with the amount of scrutiny the State Engineer gave Intermountain's extension request based upon his previous admonition that subsequent requests for an extension of time would be closely scrutinized. To that end, SPI asserts that the State Engineer should have required a copy of the documents identified by Mr. Marshall in his affidavit before granting Intermountain's request for more time rather than deferring the obligation to provide those documents to the next extension request. Nothing in the State Engineer's statement in its previous decision granting an extension of time to Intermountain that it would closely scrutinize further requests for extension by Intermountain required what SPI asserts that it should. JA, Vol. VIII at 1871-1874.

Initially, and as repeatedly noted above, the evidence submitted by Intermountain in support of its March 8, 2016, extension request were unopposed by SPI. SPI could have, but chose not to, respond and object to the documents and evidence Intermountain provided in support of its extension request. With that, the State Engineer had before it unopposed information and evidence on which he was entitled to exercise his discretion and expertise in determining, under the totality of the circumstances of the Project, that they were sufficient to constitute substantial evidence. Indeed, what Mr. Marshall's affidavit outlined were the efforts Intermountain made over the previous extension period to put its water to

beneficial use – efforts that were, and are, ongoing and in progress, and were made amid a successful, but very taxing and lengthy judicial review process brought by SPI in reference to the last extension request that was granted to Intermountain. On its face, the information provided by Mr. Marshall indicates efforts that were known and ongoing (*Eureka Cnty., supra*). Combined with the references in the TMWA water plans regarding the Project, it is substantial evidence of a project that is intended to put water to beneficial use. JA, Vol. I at 0020. Moreover, that the State Engineer required that further extension requests be accompanied by the agreements referenced in Mr. Marshall's affidavit as evidence of continued efforts to put the water to beneficial use is consistent with the scrutiny he promised in his prior decision and with the discretion and authority that is granted to him to determine extension requests under NRS 533.380. Thus, the State Engineer sufficiently scrutinized Intermountain's March 8, 2016, extension request as he stated he would do in his decision granting Intermountain's prior extension request. Furthermore, it is the State Engineer's province to determine the level of scrutiny that is appropriate, not SPI's, and the State Engineer's determination is entitled to great deference by this Court. *United States v. State Eng'r, supra,* 117 Nev. at 589.

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

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

In its June 1, 2016, decision granting Intermountain an extension of time, the State Engineer relied on *Chevron, supra* in reference to the *types of activities* that may support a finding of reasonable diligence when considered on a case-by-case basis. The activities discussed in *Chevron* in reference to water rights that had been appropriated nearly 45 years earlier – activities and plans that evidenced a steady application of effort to complete the appropriation – were similar to what

Intermountain, over its Project's life, has done.[14] Given the deference granted to a State Engineer to weigh the evidence before it and consider the totality of the circumstances, the State Engineer's reliance on *Chevron* as instructive as to what types of activities support a finding of reasonable diligence was within its power to determine whether an extension of time is warranted by the sufficiency of the evidence. Thus, that the evidence in *Chevron* was presented during a hearing is irrelevant, and there is no statutory procedure to support SPI's suggestion that the State Engineer should have held an evidentiary hearing.

SPI also asserts that because, unlike the water rights holder in *Chevron,* Intermountain has no intent to put the permitted water to beneficial use, *Chevron* is inapposite. As stated above, SPI's conclusory and unsupported assertion that Intermountain has no intent to put its water to beneficial use is belied by the evidence of the amount of money – more than $2.5M – that Intermountain has put into the Project in furtherance of efforts to put the water to beneficial use. JA, Vol. XI at 2558-2561. That evidence includes its most recent efforts to negotiate and contract with construction and utility companies, *to which SPI made no objection in the underlying proceedings.* Indeed, the State Engineer's most recent decisions granting Intermountain's requests for extensions of time necessarily indicate his

[14] It should be noted that while *Chevron* held its water rights for 45 years, Intermountain's initial time to put its permitted water to beneficial use extended from 8 years for some of its permits to 2013 and 2017 for others. *See* Intermountain's Table of Extensions of Time, JA, Vol. XI at 2558-2561.

intention to require continuing evidence of Intermountain's efforts to put its water to beneficial use. JA, Vol. VIII at 1871-1874; Vol. I at 0015-0021. To that end, *Chevron* provides helpful guidance to the State Engineer in determining what activities constitute reasonable diligence by a water rights holder, and the State Engineer was entitled to rely on *Chevron* for that purpose.

VIII. CONCLUSION

Based on the foregoing, Intermountain requests that this Court affirm the district court's order affirming the State Engineer's June 1, 2016, decision granting Intermountain an extension of time on its water permits.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and, including footnotes, does not exceed 30 pages and contains 13,772 words (NRAP 32(a)(7)(A)(i) & (ii) (requiring that an opening brief not exceed 30 pages and contain no more than 14,000 words).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I personally caused to be served a true copy of the foregoing **RESPONDENT INTERMOUNTAIN WATER SUPPLY, LTD.'s ANSWERING BRIEF** by the method indicated and addressed to the following:

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DATED this 20th day of April, 2018.

/s/ Richard L. Elmore