IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 73933

SIERRA PACIFIC INDUSTRIES, a California Corporation,

Appellant,

v.

JASON KING, P.E., in his capacity as Nevada State Engineer; THE DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION, an agency of the State of Nevada; and INTERMOUNTAIN WATER SUPPLY, LTD., a Nevada Limited Liability Company,

Respondents

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

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

Sierra Pacific Industries

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

McDonald Carano LLP

DATED this 21st day of May, 2018.

MCDONALD CARANO LLP

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INTRODUCTION

In their answering briefs, neither the State Engineer nor Intermountain identifies steady progress to perfect the Permits. Nor could they; after more than 20 years, there is still no development in the permitted geographical area that has contracted for Intermountain's water. The State Engineer granted the extensions based on Intermountain's speculation that an end user might materialize at some point in the future, even though demand for municipal water in Lemmon Valley is already being met by other sources.

To circumvent this legal error, Intermountain and the State Engineer resort to groundless procedural arguments that contradict the record, disregard the statutory language and defy basic principles of equity and due process. Because Intermountain did not comply with the strict requirements of NRS 533.380, the State Engineer should have denied the extensions and canceled the Permits.

ARGUMENT

A. All Issues Were Properly Preserved Below and Are Not Subject to Waiver

1. SPI Raised the Same Arguments Before the District Court That it Raises on Appeal

Contrary to Intermountain's repeated and erroneous assertion (IMAB 18, 23, 27-28), SPI presented to the district court the very argument it asserts now: that an

extension cannot be premised on Intermountain's intent to sell the water for use outside the permitted geographical area. SPI's counsel argued below:

> [T]he water can't be used just anywhere. The water has to be used only in the place of use that's authorized in the permit.
>
> * * *
>
> Now, importantly, Cold Springs is not in Lemmon Valley. It's a different hydrographic basin. In order to show reasonable diligence to perfect these permits, there has to be development or a relationship with a utility provider in Lemmon Valley. Lemmon Valley is outside of Utility, Inc.'s service territory, and Cold Springs is not in Lemmon Valley. Cold Springs is not an allowable place of use under these permits. So this point is dispositive of this case.
>
> The law is clear, and this is the case of *Desert Irrigation Company* that we have cited in the briefs, the law is clear a permit holder cannot obtain an extension based on an intention to put the water to beneficial use anywhere other than the permitted place of use. That paragraph, number 6, that's exactly what it's saying. It's saying that Intermountain's having conversations to put the water to beneficial use somewhere else. The *Desert Irrigation* case, which I encourage the Court to take a look at, says you can't do that.
>
> And I would note the state engineer did not address this problem in the June 1 decision. And when we raised it in our opening brief, neither the state engineer nor Intermountain addressed it in their answering briefs. But it's dispositive of the case.
>
> So the Court's not treading any new ground here. This case, the *Desert Irrigation* case says specifically that if Intermountain is trying to perfect the water rights elsewhere, that is not reasonable diligence for these permits, and the permits must be canceled.
>
> * * *
>
> [T]his is a failed project. Nearly 20 years ago Intermountain speculated on possible need for additional water resources in Lemmon Valley. That never played out. So Intermountain gambled and lost,

> because municipal demand for Lemmon Valley is being met by other sources. So how do we know that? Because Intermountain has not provided any evidence of any development in Lemmon Valley that the proposed project will serve. It hasn't said anything about Lemmon Valley at all in its extension requests. The entire focus is on Cold Springs, which is outside of the permitted place of use.

XI(2696, 2706-07, 2714-15; *see also* X(2506) (opening brief); XI(2600-01) (reply brief). Given this argument, Intermountain's contention that this issue was not preserved before the district court is plainly wrong.

2. Equitable Principles and Basic Notions of Fair Play Prohibit a Finding of Waiver Here

Where neither Intermountain nor the State Engineer served SPI with Intermountain's extension request, they cannot fault SPI for not responding.

a. The State Engineer and Intermountain Failed to Serve SPI With Intermountain's Extension Request, Notwithstanding SPI's Specific Request for Service

SPI specifically requested service of all correspondence related to Intermountain's Permits, yet neither the State Engineer nor Intermountain served SPI with Intermountain's extension request. XI(2620-2621). On June 11, 2015, the State Engineer's office provided SPI's attorney with the form "Request for Correspondence and Change of Address" of the Division of Water Resources ("DWR"). XI(2613, 2618). The email stated: "[A]ttached is the form ***to request that you be included on correspondence for any permit that you identify by number***." XI(2613) (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." XI(2620-2621)(emphasis added). SPI's counsel included her physical and email addresses, indicating a preference to receive correspondence by email. XI(2620). Enclosed with the completed form was a list of 18 permit numbers held by Intermountain. XI(2621).

The State Engineer has not developed procedures to object to an extension. 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.[1] I(47-256); II(257-468). On December 3, 2015, DWR sent SPI's counsel a letter requesting that the objection be served on Intermountain. II(469). 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. II(470-71).

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

[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. VIII(1843-44).

> 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. XI(2628).

That same day, SPI's counsel emailed back the completed consent form. XI(2632-34).

Thereafter, the next correspondence SPI's counsel received from DWR was on June 1, 2016, which was an email enclosing the State Engineer's June 1, 2016 Decision. XI(2636-2643). The June 1, 2016 Decision referenced an extension request and affidavit of Robert Marshall that Intermountain purportedly submitted on March 8, 2016 but that was never served on SPI. XI(2641).

Having not been served with Intermountain's extension request, SPI's counsel requested a copy. XI(2646). DWR emailed SPI's counsel on June 6, 2016 with the document. XI(2646). In response, SPI's counsel wrote:

> 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? XI(2646).

Receiving no response, SPI's counsel inquired again:

> I am following up on my email below. Can you tell me why I was 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? XI(2645).

DWR's representative responded:

> 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. XI(2645).

There is nothing in either of DWR's forms that limited the notifications only to correspondence generated by the State Engineer. XI(2620, 2634). To the contrary, the Request for Correspondence form specifically states that it would result in service of "all correspondence" related to the permits identified by the requesting party. XI(2620).

Although the State Engineer required SPI to serve Intermountain with its objection, the State Engineer never required Intermountain to serve its extension request on SPI, even though Intermountain specifically filed a "Statement…In Opposition to Sierra Pacific Industries' Pre-Mature Filed Objections…." XI(2623, 2648). There is no certificate of service on Intermountain's document. XI(2637-

2681). Intermountain purposefully did not serve SPI because "there is nothing to mandate service on SPI." (IMAB 37 n.12).

b. Equitable Estoppel Prohibits a Finding of Waiver

Where they failed to serve SPI, the State Engineer and Intermountain should be estopped from asking the Court to disregard SPI's arguments. "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.*

"[E]stoppel against a government [is warranted] to avoid manifest injustice and hardship to the injured party." *S. Nevada Mem'l Hosp. v. State, Dep't of Human Res.*, 101 Nev. 387, 390, 705 P.2d 139, 141 (1985). 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, both the State Engineer and Intermountain knew they failed to serve SPI. XI(2645). The State Engineer was apprised of the true fact that DWR's form

contained the misleading language "all correspondence." XI(2620-2621). SPI had the right to believe that the State Engineer intended for those who signed up to receive correspondence related to a permit would receive "all correspondence." XI(2620-2621). SPI could not have known that "all correspondence" meant only correspondence generated by DWR. In that the State Engineer and Intermountain now ask for SPI's arguments to be disregarded, SPI relied on this language to its detriment. As a result, equitable estoppel applies. *See In re Harrison Living Trust*, 121 Nev. at 223, 112 P.3d at 1062.

c. Failure To Serve SPI Constitutes Unclean Hands

The unclean hands doctrine likewise requires that Intermountain and the State Engineer's waiver arguments be rejected.

> The doctrine of unclean hands derives from the equitable maxim that 'he who 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 relief. *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 637-38, 189 P.3d 656, 662 (2008) (internal quotation omitted).

Waiver is an equitable defense. *McKellar v. McKellar*, 110 Nev. 200, 202, 871 P.2d 296, 297 (1994). "In seeking equity, a party is required to do equity." *Overhead Door Co. of Reno v. Overhead Door Corp.*, 103 Nev. 126, 127, 734 P.2d 1233, 1235 (1987). If the State Engineer and Intermountain want to fault SPI for not responding to Intermountain's extension request, basic notions of equity, due process and fair play required them to serve it on SPI.

d. The Facts Show SPI's Intent to Preserve Its Rights, Not Waive Them

Because SPI took proactive steps to ensure that it lodged its objection before the State Engineer considered any further extension requests from Intermountain, and specifically requested service, it cannot be deemed to have waived any rights. For waiver to apply, there must be an "intentional relinquishment of a known right." *McKellar*, 110 Nev. at 202, 871 P.2d at 297. "If intent is to be inferred from conduct, the conduct must clearly indicate the party's intention." *Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). SPI's conduct shows its intention to object to the granting of any further extensions, not to relinquish any rights. I(47-256); II(257-468); XI(2620-2621).

e. The State Engineer and Intermountain Invited Any Purported Error

To the extent there were any errors in the administrative proceedings, the State Engineer and Intermountain invited them. "[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)). Here, the failure of Intermountain and the State Engineer to serve SPI, combined with the State

Engineer's failure to develop procedures for objecting to an extension, invited the purported error of which they complain.

3. Waiver Does Not Apply to Judicial Review Under NRS 533.450

Intermountain and the State Engineer's waiver argument also has no application under NRS 533.450 because judicial review can be sought by "***any person feeling aggrieved*** by any order or decision of the State Engineer … affecting the person's interests…," regardless of whether they participated in the administrative proceedings. NRS 533.450(1)[2] (emphasis added); *see also Howell v. Ricci*, 124 Nev. 1222, 1223, 197 P.3d 1044, 1045 (2008) (holding, "so long as the decision affects a person's interests concerning the rights, and is a final written determination of the issue, it is reviewable"). The only authority cited by Intermountain does not involve a petition for judicial review under NRS 533.450 and is therefore inapplicable. *See* IMAB 28, *citing Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

No matter whether or how SPI participated in the proceedings before the State Engineer, Intermountain still had the burden to satisfy the statutory requirements for an extension. *See* NRS 533.380. Likewise, the State Engineer still had the obligation to comply with the statute, independent of any actions by SPI.

[2] *Compare* this language to NRS 233B.130(1), which requires that in a proceeding under the Administrative Procedures Act (to which the State Engineer is not subject), a party must be "a party of record … in an administrative proceeding" in order to appeal. *See* NRS 233B.039.

See id. SPI is aggrieved because its applications to appropriate water were protested on the basis that Intermountain's unexercised permits monopolize the entire perennial yield of the Dry Valley Basin. I(201, 204). SPI's arguments, therefore, must be heard on judicial review. *See* NRS 533.450.

B. Deference to the State Engineer's Incorrect Interpretation of the Law is Reversible Error

Rather than dispute that the district judge abdicated his responsibility to independently review the State Engineer's legal conclusions, the State Engineer and Intermountain contend the district court was limited to a substantial evidence standard of review. (SEAB 10-11; IMAB 17). The June 1, 2016 Decision, however, involved numerous legal conclusions to which de novo review applied. I(18-21).

For example, the State Engineer construed case law from Nevada and Colorado to interpret the "good faith and reasonable diligence" standard. I(18). He deemed the statutory language "proof and evidence" to be satisfied simply by a sworn statement. I(18). He interpreted *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 944 P.2d 835 (1997), to allow an extension when the applicant intended to use the water outside the authorized place of use. I(18). He concluded that assertions in an affidavit were not "mere statements of intent" barred by *Desert Irrigation*. I(18).

The State Engineer also deemed the anti-speculation doctrine satisfied even when an applicant intends to sell water for use outside the area authorized by the

permits and when no municipal demand has been proven. I(18-20). He likewise concluded that the language "shall consider" in NRS 533.380(4) did not require him to receive evidentiary proof to support each of the statutory criteria. I(20-21). Moreover, the State Engineer interpreted NRS 533.380(6) to allow him "to look back into historical expenditures and/or progress on the project, in addition to reviewing the progress made during the last extension period." I(18).

It was the district court's job to independently analyze whether the State Engineer correctly interpreted the law. *See In re Nevada State Eng'r Ruling No. 5823*, 128 Nev. 232, 239, 277 P.3d 449, 453 (2012); *Andersen Family Assocs. v. Ricci,* 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008). The district judge's refusal to engage in de novo review of the State Engineer's legal conclusions was improper. XI(2726:4-5, 2728:7-8, 2737:22-23; 2741:3-5).

C. A Permit Cannot be Perfected Through Intent to Use the Water Outside the Permitted Place of Use

1. Neither the State Engineer Nor Intermountain Disputes That the Alleged "Agreements" Discussed in Marshall's Affidavit Are Not for the Authorized Place of Use

In his answering brief, the State Engineer erroneously asserts that Marshall's intent to use the water in the "Cold Springs area" as opposed to Lemmon Valley, and in a hydrographic basin adjacent to the basin where the permitted place of use is located, is close enough to justify the extension. (SEAB 12-13, 16-17). Intermountain parrots this contention. (IMAB 30-33). Once a permit is granted,

however, the permit holder must proceed with reasonable diligence to use the water exactly as specified in the application. NRS 533.380(3)-(5). To perfect the water rights, the water rights must be exercised in the authorized place of use and nowhere else. *See* NRS 533.425; *Desert Irr.*, 113 Nev. at 1057-58, 944 P.2d at 840-41. Otherwise, the place of use in the permit application, which defines the limit of the permits and must be described by legal subdivisions, would be meaningless. *See*, *e.g.*, IV(833-34).[3]

The Respondents do not dispute that Intermountain's Permits are for specific parcels in Lemmon Valley, not Cold Springs. Instead, the State Engineer speculates that the "Cold Springs" reference in Marshall's affidavit did not foreclose the possibility that Intermountain's alleged agreements *might* be for developments in the permitted place of use. (SEAB 12-13). Such conjecture is not evidence. *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. Adv. Op. 27, 327 P.3d 487, 490 (2014). And Intermountain confirms that the State Engineer's conjecture

[3] The State Engineer and Intermountain's continued reliance on *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 523, 245 P.3d 1145, 1146 (2010), does not alter this conclusion. Unlike the applicant in *Pyramid Lake*, Intermountain has not filed applications to change the proposed place of use to somewhere other than Lemmon Valley. 126 Nev. at 523, 245 P.3d at 1146. And the protestant in *Pyramid Lake* did not object on the basis of speculation. *See id.* at 524, 245 P.3d at 1147. Nothing in *Pyramid Lake* changes the holding of *Desert Irr.* that an extension cannot be premised on an intent to use the water outside the permitted area. 113 Nev. at 1057-58, 944 P.2d at 840-41.

was wrong. (IMAB 30) (noting the pipeline alignment would have to be reconfigured to take water to Cold Springs).

The State Engineer's guesswork underscores that, when granting the extensions, he had absolutely no idea whether the "efforts" Marshall described were directed towards the permitted area, as required by *Desert Irr.*, 113 Nev. at 1057-58, 944 P.2d at 840-41. Moreover, neither the State Engineer nor Intermountain disputes that the place of use of Intermountain's permits is outside Utilities, Inc.'s service territory, a fact of which the Court can take judicial notice. *See* OB n.19. An unexecuted "agreement" with a water purveyor who, by law, cannot serve the permitted place of use does not constitute substantial evidence to support the extensions. *See* NRS 704.355; *Desert Irr.*, 113 Nev. at 1057-58, 944 P.2d at 840-41.

2. Intermountain's Post-Hoc Revision of its "Project" Contradicts Marshall's Previous Representations and is Prohibited by The Permit Language

To circumvent the holding of *Desert Irrigation*, Intermountain contradicts previous statements made by Marshall and offers a revisionist history of third-party documents that cannot substitute for the Permit language. (IMAB 25-26, 30-32). The legal description in the Permits, and nothing else, defines the limit of Intermountain's authorized place of use. *See* NRS 533.035; NRS 533.380; *Desert*

Irr., 113 Nev. at 1057-58, 944 P.2d at 840-41. Intermountain candidly admits that the plans to which he cites do not meet the statutory requirements. (IMAB 46).

The fact that, back in 1997, the now-defunct Regional Water Planning Commission considered Intermountain's proposed project as part of a "North Valleys Strategy" does not alter the Permit language. (IMAB 25-26). In fact, Marshall told the Regional Water Planning Commission that the water was to be transported to the Stead Airport, which is in Lemmon Valley, not Cold Springs. IV(893); *see also* IV(854) (letter from Airport Authority re delivery to Stead Airport).

Similarly, in 1999, Marshall wrote to the State Engineer that the Dry Valley water "will be part of a small project to take approximately 3000 AFY of water ***to Lemmon Valley*** … We believe that enhancing the water supply ***to Lemmon Valley*** is good for Washoe County and its people." IV(851-52); *see also* IV(888-89) (2001 letter from Intermountain's representative to State Engineer describing "project to take water to Lemmon Valley" because "[t]he need for an alternative source of water to Lemmon Valley is critical"). In support of its 2015 extension request, Marshall acknowledged the Dry Valley water is "permitted for municipal use in Lemmon Valley." VIII(1846).

Moreover, the Western Regional Water Commission's planning document, to which Intermountain points, notes that the former regional water plan that

included the "North Valleys strategy" only remained in effect until 2011, at which time it was superseded. II(282). Although the planning documents of the Western Regional Water Commission and the Truckee Meadows Water Authority ("TMWA") loosely note that Vidler's North Valley Importation Project, Intermountain and other proposed importation projects *may* deliver water to Lemmon Valley, Cold Springs and other locations in the "North Valleys," these vague and factually unsupported statements cannot supplant what is specified in the Permits. I(174-175); II(307-308); *see Desert Irr.*, 113 Nev. at 1057-58, 944 P.2d at 840-41. And the map in TMWA's planning document clearly shows the terminus of Intermountain's proposed pipeline as the Stead Airport in Lemmon Valley; no route to Cold Springs is depicted. I(173).

Notably, in 1999, 2000 and 2005, Intermountain filed amended applications to appropriate the Dry Valley water, yet it ***did not*** expand the proposed place of use to include any legal subdivisions in Cold Springs. IV(842-45, 1040-42); V(1182); VII(1580, 1728-33). In light of this evidence, Intermountain's contention that use of the water in Cold Springs was "always" envisioned is unsupported by the record. (IMAB 33). If Intermountain's intent was to have the permitted water serve that area, it took no actions with the State Engineer in the past 20 years to allow for that possibility.

3. Intermountain Has No Intent To Put The Water To Beneficial Use But Rather is Speculating That it Will Sell The Permits For a Profit if Demand Materializes

Multiple times in its brief, Intermountain accuses SPI of making the "conclusory" and purportedly unsupported statement that Intermountain has no intention to put the water to beneficial use. (IMAB 34, 40, 43-44, 48, 54). Yet multiple places in the record, Intermountain represented that it is marketing the permits for sale, rather than seeking to perfect the water itself. I(224-25); VIII(1848). On its website www.nevadawaterproject.com, Intermountain offers the water rights and associated permits for $12,000,000 and states, "It's ready for implementation." I(224). According to Intermountain's marketing materials, "All water rights are secured and permitted by the State Engineer of Nevada … Please email us for more information ***about purchasing***." I(225) (emphasis added). Intermountain informed the State Engineer of its failed efforts to find a buyer. VIII(1848). In 2015, the State Engineer noted Intermountain's "unfruitful" negotiations to sell the Permits and informed Intermountain "the inability to secure a buyer in future requests for extensions of time will not be considered good cause for extensions of time." IV(1029).

Not once does Intermountain cite to actual evidence that it "has an intention and ability to put its permitted water to beneficial use." (IMAB 25). Instead, Intermountain subtly employs the passive voice to indicate it intends for a potential

(but nonexistent) buyer to do so. *See*, *e.g.*, IMAB 48 ("Intermountain clearly intends for its water ***to be put*** to beneficial use").

Intermountain's proposed project has never had an end user; it is a speculative gamble that an end user might materialize. IV(854); VIII(1848); X(2467-2468). As a result, the $2.5 million that Intermountain claims to have spent is not proof of reasonable diligence to perfect the applications but rather the price Intermountain was willing to wager that demand might emerge in the future. If Intermountain obtains its asking price ($12,000,000) should some buyer ultimately step forward, Intermountain would walk away with a $9,500,000 profit on a public resource that it has held hostage for the last 20 years. I(224); *see Preferred Equities Corp. v. State Eng'r, State of Nev*., 119 Nev. 384, 389, 75 P.3d 380, 383 (2003).

It is true that water rights are alienable. What makes Intermountain's conduct unlawful is that it holds unperfected water rights while speculating on possible future need and lacks any contractual or agency relationship with someone who can put the water rights to beneficial use at their proposed place of use. This is classic water speculation. *See Bacher*, 122 Nev. at 1119, 146 P.3d at 799.

D. This Court's Precedents Confirm That Marshall's Affidavit is Not Substantial Evidence to Support the Extensions

1. A Sworn Statement Alone Does Not Convert "Mere Statements of Intent" Into Substantial Evidence

The fact that Marshall submitted his statements in the form of an affidavit did not transform them into substantial evidence. An extension request must be "[a]ccompanied by proof ***and*** evidence of the reasonable diligence with which the applicant is pursuing the perfection of the application." NRS 533.380(3)(b) (emphasis added). "A mere statement of intent to put water to beneficial use, uncorroborated with any actual evidence, after nearly twenty years of nonuse is insufficient to justify a sixteenth PBU extension." *Desert Irr.*, 113 Nev. at 1057, 944 P.2d at 841; *see also Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 536 (1868) ("Intention must be inferred from acts and from acts alone.").

This Court has repeatedly deemed a sworn statement insufficient to meet the substantial evidence standard. For example, in *Desert Irr.*, the applicant submitted a declaration of its alleged intent to develop property, which the Court found lacking. *See id.* at 1057, 944 P.2d at 840-41. The applicant then reiterated this intent when testifying at the cancellation hearing. *See id.* at 1053, 944 P.2d at 838. The Court gave no elevated status to the applicant's statements of intent simply because they were made under oath. *See id.* at 1057, 944 P.2d at 840-41. The same was true in *Bacher v. Office of State Eng'r*, in which the Court rejected live

testimony as failing to satisfy the substantial evidence standard. 122 Nev. 1110, 1122-23 146 P.3d 793, 801 (2006).

Considering this law, the State Engineer could not accept Marshall's assertions "at face value" simply because they were stated under penalty of perjury by a licensed attorney. (SEAB 28). Where Marshall's affidavit consists of nothing more than statements unaccompanied by proof of reasonable diligence, the extensions are not supported by substantial evidence. *See Desert Irr.*, 113 Nev. at 1057, 944 P.2d at 841.

2. A Reasonable Mind Would Not Accept Vague Statements That Lack Specificity

The State Engineer also could not rest the extensions on the amorphous statements in Marshall's affidavit regarding alleged "agreements" and "developments." The absence of specificity regarding a project and its water demands is a "fundamental defect" that fails to meet the substantial evidence standard. *See Bacher*, 122 Nev. at 1122-23, 146 P.3d at 801. "Without this specificity, a reasonable mind could not accept as adequate the conclusion [asserted by the applicant]." *Id.*

In his answering brief, the State Engineer repeatedly asserts that Paragraphs 5, 6 and 7 of Marshall's affidavit met the substantial evidence standard. (SEAB 17, 22, 34-35, 38-39). Yet the affidavit did not specifically describe any particular contract or development. III(656). Because a reasonable mind would not accept

such vague statements as adequate, the State Engineer should have tested the reliability and accuracy of the information presented. *See Bacher*, 122 Nev. at 1122-23, 146 P.3d at 801.

3. "Totality of the Evidence" is Not the Same as, and Cannot be Substituted for, Substantial Evidence

In the absence of the required specificity, the State Engineer and Intermountain resort to a sweeping "totality of the evidence" argument. (SEAB 17, 19, 22, 33, 36; IMAB 10, 22, 50-51, 54). The law is clear, however, that no matter the amount, the evidence must have adequate specificity for a reasonable mind to conclude it meets each statutory requirement. *See Bacher*, 122 Nev. at 1122-23 146 P.3d at 801. Although NRS 533.380(5) directs the State Engineer to look at "all the facts and circumstances," it does not create a "totality of the evidence" standard or allow the State Engineer to disregard any specific element in NRS 533.380(3)-(4).

4. The State Engineer's Findings Are Not Supported by Marshall's Affidavit and are Clearly Erroneous

The State Engineer's brief highlights numerous errors in his findings that are either not supported by Marshall's affidavit or wholly contradict it. An agency's clearly erroneous factual findings cannot withstand judicial review. *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011). Here, the State Engineer contends that "the affidavit identified the number of residential units to be served by the project at 'nearly 10,000 houses.'" (SEAB 39, *quoting* III(656)).

That is simply untrue. Marshall's affidavit said only that "Intermountain has had numerous meetings with Developers [*sic*] whose plans involve construction of nearly 10,000 houses." III(656). Nowhere does Marshall indicate that those houses will be served by the proposed pipeline or demonstrate they will be built within the permitted place of use. III(656).

Moreover, in his answering brief, the State Engineer doubles down on his erroneous finding from the June 1, 2016 Decision that "Intermountain had '***secured*** agreements with engineering and construction firms, Utilities, Inc., and developers'" and that "the sworn affidavit 'affirms that contractual agreements have been ***secured***.'" (SEAB 22) (emphasis added). Yet the affidavit states that Intermountain ***had not*** signed an agreement with Utilities, Inc. and ***had not*** reached any agreements with any developers. III(656). SPI does not ask the Court to reweigh Marshall's credibility; it simply points out that the evidence did not meet the threshold statutory requirements.

5. The State Engineer's Subjective Belief That NRS 533.380 Creates a "Low Threshold" for an Extension is Not Supported by Law

In a misguided effort to shore up the June 1, 2016 Decision, the State Engineer mischaracterizes NRS 533.380 as creating a "low threshold," when the statute says no such thing. (SEAB 13). Neither the Legislature nor this Court has ever characterized the requirements of "good faith and reasonable diligence to perfect the appropriation" and "steady application of effort to perfect the

application" as a "low threshold." NRS 533.380(3)-(6). To the contrary, they are "***strict conditions*** imposed by our statutory scheme." *Desert Irr.*, 113 Nev. at 1059, 944 P.2d at 842 (emphasis added).

To support his "low threshold" interpretation, the State Engineer claimed he could look back at the project history to justify an extension. I(18). However, the statute uses the present tense: to grant an extension, the State Engineer must confirm that the applicant "***is pursuing*** the perfection" and "***is proceeding*** to perfect" the applications. NRS 533.380(3)(b) (emphases added). Intermountain's decades-old activities do not make up for the lack of ongoing efforts. *See id.*

Moreover, when granting the previous extension to Intermountain, the State Engineer himself articulated that future requests would be "closely scrutinized," which is irreconcilable with the "low bar" the State Engineer now articulates. IV(1029). Close scrutiny required the State Engineer to test the competency of Marshall's unsubstantiated statements by, at a minimum, requesting a copy of the actual documents that Marshall's affidavit purported to describe. *See Eureka Cnty v. State Eng'r*, 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1121 (2015).

Oddly, Intermountain points to the June 1, 2016 Decision's requirement that future extension requests be accompanied by copies of the agreements described in Paragraphs 5, 6, and 7 of Marshall's affidavit as "a safeguard to ensure" the exercise of reasonable diligence. (IMAB 50) (emphasis in the original). Yet that is

exactly what the State Engineer purported to do in the June 4, 2015 Decision by warning that "***further requests for extensions on permits comprising the Project will be closely scrutinized to ensure the statutory criteria for granting extensions of time are adhered to.*** IV(1029) (emphasis added). The State Engineer has aptly demonstrated he has no intent to enforce his own "safeguards."

6. There Is No Evidence to Satisfy the Required Factors In NRS 533.380(4)

In response to SPI's opening brief, both the State Engineer and Intermountain now claim they are exempt from the requirements of NRS 533.380(4). Because NRS 533.380(4) only requires him to "consider" the statute's factors, the State Engineer contends that an applicant for an extension need not submit "affirmative proof of each factor." (SEAB 33-34). This argument defies logic and is contrary to law because the "substantial evidence" on which the State Engineer relies must be "in the record before him." *Eureka Cnty*, 131 Nev. at __, 359 P.3d at 1121 (reversing a State Engineer's decision that was based on unsupported findings). "[A]n abuse of discretion occurs when the record does not contain substantial evidence supporting the administrative decision." *City Plan Dev., Inc. v. Office of Labor Comm'r*, 121 Nev. 419, 426, 117 P.3d 182, 187 (2005). Without actual evidence relating to each factor in NRS 533.380(4), the Court can know what the State Engineer "considered." *See Desert Irr.*, 113 Nev. at 1056, 944 P.2d at 840.

Intermountain did not – and concedes it cannot – submit such evidence because there is no specific project, no development and no parcel for which its water is slated. (IMAB 41-43). Instead, Intermountain now argues for the first time that the statute "is not applicable to Intermountain." (IMAB 45). The statute contains no special exception for Intermountain, and the fact that there is no "planned unit development or a specific project or subdivision" that will be served underscores that Intermountain is speculating on need and did not satisfy the requirements of NRS 533.380(4). (IMAB 46).

E. Application Of Issue Preclusion Is Contrary To Chapter 533 And Would Violate Nevada Public Policy

1. Issue Preclusion Does Not Apply To A New Decision Based On New And Different Evidence

Because the statute provides for judicial review of each independent annual extension that gets granted, Intermountain's issue preclusion argument should be rejected. (IMAB 33-34, 37, 46). For issue preclusion to apply, the ***issue decided*** in a previous proceeding must be ***identical*** to the one presented in the current action and have been actually and necessarily litigated. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008); *see also Britton v. City of N. Las Vegas*, 106 Nev. 690, 693, 799 P.2d 568, 570 (1990) (stating elements of administrative res judicata).

When reviewing the June 4, 2015 Decision, the district court did so based only on the evidence considered by the State Engineer prior to June 4, 2015. III(622-628). The district judge specifically anticipated that challenges to future extensions would be forthcoming because the "writing is on the wall" regarding the project's lack of viability. X(2489). In 2016, Intermountain offered new evidence and argument to support its extension requests. III(647-659). The State Engineer reviewed that new information and argument, engaged in new analysis, made new findings and reached new conclusions. *Compare* III(660-666) *to* IV(1026-1029). Where the 2015 and 2016 extensions involved different time periods, different facts and different arguments, the issues are not identical and preclusion does not apply.

Each year, the State Engineer must undergo a new analysis as to whether the evidence submitted with that specific application satisfies the statutory requirements for an extension and otherwise complies with the law. NRS 533.380(3)-(4). NRS 533.380 requires the State Engineer to review an annual extension request based on the evidence presented, and NRS 533.450 allows for judicial review of each extension that the State Engineer grants. Where the Court's task is to decide whether the State Engineer's June 1, 2016 Decision was compliant with the law and supported by substantial evidence, the district court's review of

the June 4, 2015 Decision cannot have preclusive effect. *See Britton*, 106 Nev. at 690, 799 P.2d at 569.

2. Public Policy Requires That SPI Be Allowed to Seek Judicial Review From Every Decision of The State Engineer Without Preclusive Effect

The application of issue preclusion here would violate Nevada public policy. "Both administrative res judicata and administrative collateral estoppel are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice." *Martin v. Donovan*, 731 F.2d 1415, 1416 (9th Cir. 1984); *see also Britton*, 106 Nev. at 692, 799 P.2d at 569 (noting that there are public policy exceptions to administrative res judicata); *Campbell v. State, Dep't of Tax.*, 108 Nev. 215, 217, 827 P.2d 833, 835 (1992) (declining to apply administrative res judicata for fairness reasons). Application of administrative res judicata presumes that a full and fair administrative hearing occurred with all requisite due process rights. *Britton*, 106 Nev. at 690, 799 P.2d at 569. "An action taken by an administrative agency to grant or deny a benefit is not an adjudicated action unless the agency has made its decision using procedures substantially similar to those employed by the courts." *Delamater v. Schweiker*, 721 F.2d 50, 53 (2d Cir. 1983), *citing* Restatement, § 83 comment b.

No such protective measures occurred here. The State Engineer did not hold an administrative hearing, subject Marshall to cross examination or even serve SPI

with Intermountain's extension requests. Moreover, applying the doctrine of issue preclusion would render meaningless NRS 533.450(1), which allows for judicial review of "***any order or decision of the State Engineer***." (emphasis added). If Intermountain's argument were accepted, once the State Engineer grants one extension that gets upheld on judicial review, no subsequent extensions could be reviewed. That is contrary to law. *See* NRS 533.380(3)-(5); NRS 533.450(1).

F. The Law Of The Case Doctrine Does Not Extend To This New And Different Case

"[W]hen an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal." *Hsu v. Cnty. of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007). The law of the case doctrine is not a jurisdictional rule that limits the power of a court. *Id.* at 632, 173 P.3d at 729-30. It merely expresses a general practice of courts to decline to reopen what has been decided. *Id.*

Although a petition for judicial review is in the nature of an appeal, the district court is not an appellate court. And in denying the 2015 petition, the district

court did not state a rule of law that could apply to subsequent cases.[4] III(625-628). SPI's objection to the 2016 extensions was not part of the record on appeal in the 2015 petition for judicial review. Because "[t]he proceedings in every case ***must be heard by the court***, and ***must be informal*** and summary …," the law of the case doctrine does not apply here. NRS 533.450(2) (emphasis added).

CONCLUSION

The State Engineer and Intermountain have not overcome the legal shortcomings of the June 1, 2016 Decision nor identified substantial evidence to satisfy NRS 533.380(3)-(4). Moreover, because both come to the Court with unclean hands, they must be estopped from arguing that SPI has waived any rights. SPI respectfully requests that the Court reverse the order denying petition for judicial review and remand to the district court to grant the petition, vacate the extensions, and order the State Engineer to cancel the permits.

[4] To the extent the law of the case doctrine applies, it favors SPI because the district court clearly stated that the water is for use in Lemmon Valley only: "Intermountain's project [is] to supply water for municipal uses in Lemmon Valley, where the demand for water exceeds the available groundwater supply present within the groundwater basin in which it is located." III(625). The approved pipeline right of way alignment is from Lower Dry Valley to Lemmon Valley. III(626).

AFFIRMATION

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

Dated this 21st day of May, 2018.

By: */s/ Debbie Leonard*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,912 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 21st day of May, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano, LLP, and that on this 21st day of May, 2018, a copy of the foregoing **APPELLANT'S REPLY BRIEF** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system and others not registered will be served via U.S. mail as follows:

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