

Case No. CV-1204049
Dept. No. 1

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**IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WHITE PINE**

WHITE PINE COUNTY and)	
CONSOLIDATED CASES, et al.,)	
)	
Petitioner,)	ANSWERING BRIEF OF THE
v.)	CONFEDERATED TRIBES OF
)	THE GOSHUTE RESERVATION,
)	DUCKWATER SHOSHONE
TIM WILSON, P.E., Nevada State Engineer,)	TRIBE, AND ELY SHOSHONE
STATE OF NEVADA, DIVISION OF WATER)	TRIBE
RESOURCES,)	
)	
Respondent.)	
)	

COME NOW, the Confederated Tribes of the Goshute Reservation, Duckwater Shoshone Tribe, and Ely Shoshone Tribe (“Tribes”), by and through their counsel Aaron Waite of Wienstein & Riley, P.S., and Paul C. Echo Hawk of ECHO HAWK LAW OFFICE, hereby submit their answering brief.

I.
THE STATE ENGINEER CORRECTLY
DENIED SNWA'S SPRING VALLEY APPLICATIONS

A. The State Engineer Properly Denied Applications Since SNWA Failed to Demonstrate That a Reduced Amount Had Some Prospect of Reaching Equilibrium

The State Engineer (SE) correctly denied Spring Valley Applications 54003 – 54015 and 54019 and 54020 on the ground that the Southern Nevada Water Authority (SNWA) “failed to demonstrate a reduced award based on evapotranspiration (ET) capture that has some prospect of reaching equilibrium within a reasonable time.”¹ Per the Remand Decision, this Court required the State Engineer to “recalculate[e] water available for appropriation in Spring Valley assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time.”² This is otherwise known as *perennial yield*.³ SNWA falsely argued that this Remand instruction was a new rule in Nevada water law.⁴

Perennial yield is not new. Nor is the requirement for ET capture. The SE partially bases his decision as to water appropriations on perennial yield. As defined in Ruling 6164:

The perennial yield of a groundwater reservoir may be defined as the maximum amount of groundwater that can be salvaged each year over the long term without depleting the groundwater reservoir. Perennial yield is ultimately limited to the maximum amount of natural discharge that can be salvaged for beneficial use. The perennial yield cannot be more than the natural recharge to a groundwater basin and in some cases is less. If the perennial yield is exceeded, groundwater levels will decline and steady state conditions will not be achieved, a situation commonly referred to as groundwater mining.⁵

Natural discharge in Spring Valley is almost entirely ET.⁶ Therefore, in order to prevent groundwater mining—which is prohibited in Nevada—new equilibrium conditions must be

¹ ROA 039047.

² ROA 039073.

³ ROA 039060.

⁴ SNWA Opening Brief, 8-9.

⁵ ROA 000056.

⁶ ROA 000057.

achieved after a reasonable lowering of the groundwater table. If SNWA's Applications will not achieve equilibrium within a reasonable time and will pump out too much water and therefore result in groundwater mining, then they are subject to denial.

As SNWA stated in their opening brief: "Notably, SNWA's original applications were not designed to target ET, as there was no Nevada precedent for doing so and the State Engineer did not consider ET capture as a factor for granting or denying applications prior to the Remand Order."⁷ Here, SNWA exposed two major problems. First, if their Applications were not designed to target ET (natural discharge)—and thus could not bring the groundwater reservoir to a new equilibrium condition—then SNWA erred in choosing the original points of diversion. Second, the SE cannot approve Applications that result in groundwater mining.

B. The State Engineer Properly Required SNWA to Consider Only the 15 Applications and Not an Alternative Wellfield Design with 101 Wells

In an attempt to show that equilibrium had some prospect of being achieved in Spring Valley, SNWA devised a hypothetical wellfield of 101 wells.⁸ SNWA arrayed these wells throughout the Spring Valley groundwater discharge area and far beyond the Applications' points of diversion. But the SE only had 15 Applications before him. As the SE stated in Ruling 6446, "Nevada law requires the State Engineer to consider only applications that are filed, which must include their specific points of diversion. Pursuant to NRS 533.370, the State Engineer shall approve or reject *an application*."⁹ Thus, the SE cannot approve hypothetical projects for which there are no applications. The 15 pending Applications in Spring Valley were the only applications before the SE, and thus they were the only points of diversion that can be considered by the SE.¹⁰

⁷ SNWA Opening Brief, 9.

⁸ ROA 040830-040831.

⁹ ROA 038949.

¹⁰ ROA 038950.

Because SNWA provided no evidence that their 15 Applications in Spring Valley could reach equilibrium, the SE was correct in rejecting those Applications.

The hypothetical wellfield had other problems rendering a proper denial of the Applications. SNWA suggested that because the Remand Decision partly relied upon or referenced the SNWA Groundwater Project Draft Environmental Impact Statement (DEIS), they were entitled to expand to 101 wells.¹¹ But nowhere in the Remand Decision did the Court actually allude to or say that SNWA should create this hypothetical wellfield. Rather, SNWA extrapolated on their own accord, presumably on their premise that “ET capture should consider the life of the project.”¹² So, SNWA’s intention is clear: to obtain approval of a large list of future applications to drill and pump at 101 wells predicated in part on the 15 Applications. SNWA went so far as to assert that “[t]he 15 well limitation is erroneous and unrealistic because in 200 years, the time this Court used to evaluate ET capture in the Remand Order, there will be far more wells than the 15 currently identified in the Spring Valley Applications.”¹³ This is speculation. Speculation is not the standard by which the SE may approve Applications; the standard is substantial evidence.¹⁴ And while it may be SNWA’s intention to have 101 wells pumping water out of Spring Valley, 101 hypothetical well applications are not before the SE. Furthermore, the SE emphasized that the District Court’s use of “the DEIS model as a basis for the remand does not open the door for the State Engineer to consider a conceptual wellfield to answer the [equilibrium] question on remand.”¹⁵

However, SNWA argued that “[t]his Court never directed the recalculation [of water available for appropriation] to be based on only the original 15 wells.”¹⁶ Perhaps they did not

¹¹ SNWA Opening Brief, 9.

¹² *Id.*

¹³ SNWA Answering Brief, 11-12.

¹⁴ *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); see also *Town of Eureka v. Office of the State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992).

¹⁵ ROA 038952.

¹⁶ SNWA Opening Brief, 14.

because it is a given. Further, this Court clearly did not instruct any recalculation based on a hypothetical of 101 wells. In fact, the Remand Decision stated, “this Court will not disturb the findings of the Engineer save those findings that are the subject of this Order.”¹⁷ The Court did not disturb the SE’s finding that only the subject Applications, only their points of diversion, and no alternative wellfield would be considered.¹⁸ And this aligns with what the SE stated in Ruling 6164 and repeated in Ruling 6446:

At this time, the State Engineer is only considering the points of diversion for the Applications before him. If the Applicant wishes to change the points of diversion of the Applications, it must submit further applications to change the points of diversion to the State Engineer pursuant to NRS 533.345. If such applications are submitted, the State Engineer will consider pumping at the new points of diversion. **Alternative points of diversion are irrelevant . . .**¹⁹

(Emphasis added).

It stands to reason that if SNWA’s 15 Applications could be pumped in a way that would bring the groundwater reservoir system to a new equilibrium, then they would have taken that first step to demonstrate it. But they did not.²⁰ They sidestepped it and pushed into the space of a hypothetical wellfield—the only way SNWA could show that the system would even come close to equilibrium, yet still not achieve it.

SNWA also argued that the SE failed to consider their project “at full build-out.”²¹ But therein resides a penultimate problem with using a hypothetical wellfield as justification to approve the 15 Applications. And that is this: SNWA’s full build-out is perpetually changing and so neither the SE nor Protestants actually know what full build-out will be. While only 15 Applications are before the SE, the SNWA apparently intends to submit change applications for rights to pump at

¹⁷ ROA 039073.

¹⁸ ROA 038951-038952.

¹⁹ ROA 038951.

²⁰ ROA 54790-54791, 54675.

²¹ SNWA Opening Brief, 12.

101 wells. Indeed, 101 is not set in stone. It could be more, or it could be less. The wellfield used to be only the subject Applications. Then, the DEIS and SNWA began looking at 81 wells. Then in 2017 it became 101 wells. Whatever the wellfield design eventually might be would truncate the due process rights of Protestants as it would constitute an unfair surprise.²² And regardless if SNWA files change applications at some point in the future, any approval of the 15 Applications now, based on SNWA's hypothetical and ever-evolving wellfield design,²³ would violate present due process rights of Protestants.

SNWA has exposed another problem: they are not actually seeking what their Applications say, which renders the Applications false and misleading. Specifically, that false content includes: (1) the amount of water to be appropriated from a specific location;²⁴ (2) a substantially accurate description of the location of the place at which the water is to be diverted from its source (i.e., points of diversion);²⁵ and (3) a description of the proposed works (including wells, wellfields, pipelines, etc).²⁶ By SNWA's own admission, these parts of the Applications are not correct as they will be seeking different amounts of water at different points of diversion in a different wellfield design not described in the Applications.²⁷ In Ruling 5857, the SE previously concluded that if a "proposed point of diversion on the applications and as illustrated on the supporting map do not reflect the Applicant's intended point of diversion of water . . . [then] the applications are flawed and are subject to denial."²⁸ In this case, the SE was justified in denying the Applications simply on that point alone. But instead, the SE merely reemphasized that he was considering only the 15 Applications before him.

²² *Nevada State Apprenticeship Council v. Joint Apprenticeship*, 94 Nv 587 P.2d 1315, 1317 (1978).

²³ See SNWA Opening Brief, 11.

²⁴ NRS 533.335(3).

²⁵ NRS 533.335(5).

²⁶ NRS 533.335(6).

²⁷ SNWA Opening Brief, 11-14.

²⁸ SE Ruling 5857, 15.

Yet, SNWA went so far as to consider the SE's "15 well limitation" to be "erroneous and unrealistic."²⁹ These are, after all, SNWA's 15 Applications. If they considered their Applications to be erroneous and unrealistic to the full build-out of their groundwater development project, then they had every right to submit new applications for 101 wells that contain true and correct information. But they did not. And they did not because they would lose priority, which violates Nevada water law and policy. The SE has previously ruled, in Ruling 5857, "that to establish an imaginary or made-up point of diversion for the purposes of retaining priority would violate the *Alpine* Decree and Nevada water law and therefore, would threaten to prove detrimental to the public interest."³⁰ Thus, the SE was correct in limiting his consideration to 15 Applications.

C. NRS 533.370 Does Not Give the SE Authority to Approve Subject Applications Based on Hypothetical Applications and Hypothetical Wellfields

SNWA argued, in reference to the SE considering the 101 wells, that "NRS 533.370 grants the State Engineer specific authority to consider documents and models beyond what is contained in an application".³¹ This is half true. To inform proper decisions in this case, the SE needed more information from the Applicant and Protestants than what was on the Applications.

What is not true is that the SNWA's use of 101 wells for, as they stated, "ET capture calculations are much more akin to the long-term considerations" like environmental soundness.³² There is room to argue that both are long-term considerations. Yet, there is a very distinct difference between using documents and models to inform an SE decision based on the Applications versus basing a decision on hypothetical applications that are not the subject of this case. It boils down to SNWA trying to change the rules. If the rule by which the SE must operate

²⁹ SNWA Opening Brief, 11.

³⁰ SE Ruling 5857, 15. And see *United States v. Alpine Land & Reservoir Co.*, 2012 WL 4442804, 3 (D. Nev. 2012).

³¹ SNWA Opening Brief, 13.

³² *Id.*

is $A + B = C$ (where A is Application information, B is data from documents and models to inform A and C, and C is the project defined on the Applications), then the SNWA is trying to install the new rule $H + D = E$ (where H are 101 hypothetical well applications which do not exist, D is data from documents and models to inform H and E, and E is an ever-evolving hypothetical project). And no matter how SNWA argues for their hypothetical rule, only $A + B = C$ is codified. Thus, the SE was correct on this point by adhering to what was required by Nevada law.

D. The State Engineer Cannot Approve Applications Simply Because Water is Available for Appropriation or Because SNWA Might Capture a Large Share of ET Using a Hypothetical Array of 101 Wells

SNWA argued that the SE should have awarded them 61,127 acre-feet in Spring Valley based on ET capture.³³ They also suggested that what “should have controlled the State Engineer’s interpretation of this remand instruction” on ET were two parts: water is available for appropriation and development of Spring Valley’s waters would capture nearly all of the ET.³⁴ In the first part, there is little to no doubt that unappropriated groundwater exists in Spring Valley.³⁵ In the second, SNWA’s revised modeling showed that they could theoretically capture 96-98% of ET after 75-200 years by pumping their hypothetical array of 101 wells.³⁶ But this ET capture scenario was based on the assumptions that (1) the points of diversion on the Applications are not relevant and (2) the SE would later approve the 101 hypothetical wells. The SE has already made clear that the 101 hypothetical wells are not to be considered and “are irrelevant.”³⁷ What is relevant are the 15 points of diversion on the pending Applications before the SE.

Moreover, prior SE rulings required the SE to deny the Applications where there would be

³³ SNWA Opening Brief, 17.

³⁴ SNWA Opening Brief, 16.

³⁵ ROA 038957; SNWA Opening Brief, 16.

³⁶ SNWA Opening Brief, 17; and ROA 040812.

³⁷ ROA 038951.

perpetual lowering of the groundwater reservoir.³⁸ SNWA argued that this Court's "equilibrium rule was unworkable and 'upsets the established state policy for appropriating groundwater.'"³⁹ Contrary to that belief, there is the prohibition on groundwater mining which is part of established Nevada water law and policy. The guiding light for it is equilibrium between recharge and discharge. Pumping cannot exceed recharge such that a new equilibrium is actually reached.

E. The State Engineer Properly Denied the Applications Based on SNWA's Flawed Approach and Protestant Evidence

SNWA argued that the SE was required to award 61,127 acre-feet for the Spring Valley Applications" because the Remand said to "recalculate the award" and because the Remand found that "the time to reach equilibrium is not a valid reason to deny the grant of water."⁴⁰ And yet, SNWA ignored the SE's requirement that only the 15 Applications were being considered. Instead, SNWA focused its ET and equilibrium modeling on 101 wells, which were neither in the Remand Decision nor before the SE. Moreover, as stated in Ruling 6446, "CPB's evidence demonstrated that the maximum ET that could be captured at the proposed 15 points of diversion is 69% after 200 years; which according to the remand instruction, does not demonstrate a prospect of reaching equilibrium within a reasonable time."⁴¹ The only choice was to then deny SNWA's Applications on the ground that SNWA failed to show that their actual 15 Applications would reach equilibrium.

II
THE STATE ENGINEER CORRECTLY DENIED APPLICATIONS
IN CAVE, DRY LAKE, AND DELAMAR VALLEYS

The Remand Decision required a recalculation of appropriations from the DDC valleys "to avoid over appropriation or conflicts with down-gradient, existing water rights."⁴² It was a simple

³⁸ See White Pine County, et al. Opening Brief, 65 (e.g. SE Ruling 3486).

³⁹ SNWA Opening Brief, 17.

⁴⁰ SNWA Opening Brief, 17.

⁴¹ ROA 038955.

⁴² ROA 039073.

and straightforward task. But SNWA, as the SE found in Ruling 6446, presented no information or analysis as to whether their appropriations would cause over appropriations or conflicts with existing rights, down-gradient.⁴³ SNWA argued they had already done so during the 2011 hearing and thus they were not required to conduct new hydrologic analysis.⁴⁴ The problem with that argument is that this Court rejected the SE’s findings on this matter because the award in CDD basins was “unseemly to this court, that one transitory individual may simply defer serious water problems and conflict to later generations.”⁴⁵ The Remand Decision also stated quite clearly that “[t]he current orders [SE Rulings 6165-6167] do not contain such a calculation” where “water from the CDD basins . . . could properly be appropriated without conflicting with down-gradient rights.” This Court’s specific instructions were then for “a recalculation of possibly unappropriated water” that would not conflict with down-gradient rights.⁴⁶ Because SNWA did not carry through on that remand requirement, the SE denied the CDD Applications.

III
THE STATE ENGINEER PROPERLY DENIED
APPLICATIONS 54014 AND 54015

The SE denied Applications 54014 and 54015 on the ground that granting them would threaten to prove detrimental to the public interest, specifically as it relates to Swamp Cedars.⁴⁷ SNWA argued that this finding was improper for four reasons.⁴⁸ The Tribes hold that the SE’s denial of these two Applications was proper and justified.

A. The Threat Detrimental to the Public Interest is Strong and Apparent With or Without the Spring Valley 3M Plan

SNWA alleged that the SE denial of 54014 and 54015 was improper because it “inconsistent

⁴³ ROA 038973

⁴⁴ SNWA Opening Brief, 18-20.

⁴⁵ ROA 039070.

⁴⁶ ROA 039070, 039073.

⁴⁷ ROA 039047.

⁴⁸ SNWA Opening Brief, 26.

with the State Engineer’s finding that the Spring Valley 3M Plan is sound.”⁴⁹ SNWA is of the opinion that the 3M Plan absolves threats to Swamp Cedars.⁵⁰ For SNWA devised “a specific approach” to 3M,⁵¹ which included a menu of mitigation options—none of which are known to actually work and most of which are just another adverse effect.⁵² In fact, the 3M Plan could foreseeably not require SNWA to mitigate even if 100% of the swamp cedar trees died out within a one- to four-year period; they could wait until after the fifth year to mitigate.⁵³

But even if SNWA were to curtail pumping (the extent to which is undefined in the 3M Plan), then there is the very serious problem of recovery. In the 2011 hearing, Dr. Bredehoeft stated, regarding spring flow recovery after pumping groundwater: “It’s not like we can go out there and pump for a hundred years . . . and then we stop and let the system recover. The system is not going to recover in that kind of time.”⁵⁴ The point being: the 3M Plan has holes which do not assure that Swamp Cedars will be protected. Swamp Cedars—with the many springs feeding the area—may not respond to pumping curtailment for a very long period of time and none of SNWA’s proposed mitigation options are known to work. As the SE stated:

[I]n light of Dr. Roundy’s testimony highlighting the uncertainty of the dependency of the trees on groundwater and concerning the effects that may be seen from groundwater pumping, it is possible that an unreasonable effect [elimination of Swamp Cedars] may occur prior to the investigation trigger being activated, posing a threat of loss to the Swamp Cedars ACEC. To that end, the State Engineer finds that the 3M Plan is inadequate in this regard to protect against such risk. To guard against the potential loss of the swamp cedar ACEC prior to the investigation trigger being activated, the State Engineer finds the public interest compels the denial of Applications 54014 and 54015, as these applications pose the greatest potential for immediate groundwater drawdown and risk of loss of the swamp cedars in the ACEC.⁵⁵

⁴⁹ SNWA Opening Brief, 26.

⁵⁰ SNWA Opening Brief, 27.

⁵¹ SNWA Opening Brief, 26.

⁵² Tribes’ Opening Brief at 20-21 and 27-32.

⁵³ Tribes’ Opening Brief, 27-32.

⁵⁴ ROA 037826, 2011 Transcript vol 24, 5402.

⁵⁵ ROA 039022-039023.

To their credit, SNWA did lay out a detailed process for 3M. Unfortunately, it isn't one that ensures protection as they claim. On the one hand, the SE stated that the SNWA is "committed to take mitigation action to ensure that the tree stand stays within the historical range of variation."⁵⁶ But on the other hand, SNWA leaves the door wide open for the possibility of never mitigating at all and not mitigating until all the trees are dead.⁵⁷ Plus, the 3M Plan didn't even consider the very long timeframe for which Spring Valley and Swamp Cedars would likely need to recover after groundwater drawdown and after impacts on the system. According to Dr. Bredehoeft in the 2011 hearing, "pumping these systems is a one-off."⁵⁸ And so the reality is that Applications 54014 and 54015 threaten to prove detrimental to the public interest, even with 3M.⁵⁹

B. SE's Denial of Applications 54014 and 54015 Was Within the Scope of the Remand

SNWA claimed that the SE's denial of Applications 54014 and 54015 was not within the scope of the Remand Decision and the SE should not have rehashed the issues around these two Applications.⁶⁰ While SNWA had an opportunity to submit thousands of pages of new evidence, they essentially claim that the SE should not have considered any approval or rejection of the Applications based on their evidence but rather only to approve the Spring 3M Plan.

However, this Court specifically added language to the Remand Decision so that the SE would be required to examine whether "mitigation of unreasonable effects of pumping of water are neither arbitrary nor capricious."⁶¹ This statement clearly required the SE to examine the effects of pumping water at the Applications' points of diversion, given SNWA's totally new and different 3M Plans. The SE found that the Spring Valley 3M Plan is "inadequate" and that "it is possible"

⁵⁶ ROA 039023.

⁵⁷ See Tribes Opening Brief, 29-32.

⁵⁸ ROA 037826.

⁵⁹ ROA 039018-039020, 039022-039023.

⁶⁰ SNWA Opening Brief, 29.

⁶¹ ROA 039073.

that groundwater pumping at 54015 and 54015 could result in the unreasonable effect of the elimination of Swamp Cedars even before the activation of the investigation trigger.⁶² Thus, the 3M Plan was arbitrary and capricious on that point alone. Instead of rejecting the 3M Plan on that account, the SE made a determination per his duty under NRS 533.370 to approve or reject the subject Applications given the evidence on record. Considering the SE's finding and the evidence that the 3M Plan would not be protective of Swamp Cedars, the SE acted in accordance with his duties and denied 54014 and 54015.

C. Substantial Evidence Supports the SE's Denial of Applications 54014 and 54015

SNWA claimed that no evidence from the remand hearing supported the SE's denial of Applications 54014 and 54015.⁶³ In SNWA's Opening Brief, they cited to their expert witness Dr. McLendon who testified in 2011 that swamp cedar trees (the local common name for the unique ecotype of Rocky Mountain Junipers) could tolerate drier conditions.⁶⁴ McLendon then emphasized that the percent cover or density of these trees is greater in moist areas and less in drier areas.⁶⁵ McLendon said the Swamp Cedars woodland "needs more water than is supplied by precipitation in Spring Valley. We don't know precisely [how much] . . . But the trees need more water than six inches a year."⁶⁶ He continued on that point, saying that the trees "are responding to the increased water supply in the lowland sites" and that they are "responding well to a high water table but not to the surface."⁶⁷ And in the 2017 remand hearing, CPB's expert witness Dr. Roundy testified that for similar species, like One Seeded or Utah juniper:

But when they run out of water, it's going to die quickly. Because it will lose its conduction between the root water, if there is no water . . .

But you could end up potentially losing your woodland if all the water

⁶² ROA 039022-039023. And see Tribes' Opening Brief, 25-32 and citations therein.

⁶³ SNWA Opening Brief, 30.

⁶⁴ SNWA Opening Brief, 30; ROA 034093-034094.

⁶⁵ ROA 034093.

⁶⁶ ROA 034093.

⁶⁷ ROA 034093 and 034094.

quickly went down.

I'm not sure [when] that would happen. Might take a few years.
McLendon estimated a few decades . . .⁶⁸

Dr. Roundy's point was clear: drain the groundwater and the swamp cedars would quickly die off.⁶⁹ The DEIS showed large drops in groundwater after pumping, especially around points of diversion. McLendon also testified that groundwater-dependent plants would disappear around those points of diversion.⁷⁰ Indeed, pumping out 8,687 acre-feet annually from Swamp Cedars area would drop the water table within and very close to Swamp Cedars, as also shown in the DEIS. (So, it is odd that SNWA now claims that "no evidence exists that pumping could cause such rapid groundwater declines in the [Swamp Cedars] ACEC area."⁷¹) As to groundwater drawdown impacts around points of diversion, either for swamp cedar woodlands or groundwater-dependent plants, SNWA's expert witness Dr. McLendon said it bluntly: "Pumping, same principle. Too much water taken too quickly in the wrong places can cause impacts that wouldn't have occurred had that pumping been done in a different location, different amount, different timing."⁷² There is no doubt that pumping 4,343.82 acre-feet at a single point of diversion will cause a cone of depression around the well, that pumping the two wells close together will cause an eventual coalescence of cones of depression into one larger cone, and that over time it will spread and expand as described in SNWA's DEIS. And thus, in Ruling 6446,

The State Engineer finds that given the local hydrological characteristics of the area, it is likely that groundwater pumping will affect the supplemental groundwater utilized by the swamp cedars, and it is uncertain that the habitat can be maintained from surface runoff and precipitation alone.⁷³

Because the 3M Plan did not guard against this, the SE correctly found that SNWA's

⁶⁸ ROA 055208.

⁶⁹ ROA 039022.

⁷⁰ ROA 034182-034184

⁷¹ SNWA Opening Brief, 31.

⁷² ROA 034175.

⁷³ ROA 039022.

pumping of at Applications 54014 and 54015 would very likely cause the unreasonable effect of elimination of Swamp Cedars.⁷⁴ Denial of these two Applications was thus proper.

D. The SE Understood the 3M Plan Requirements, but the SNWA Did Not

Regarding the SE's denial of Applications 54014 and 54015, SNWA argued that the SE based his decision on "the incorrect assumption that all of the trees in the Swamp Cedars ACEC could perish before a trigger is activated and mitigation actions are taken."⁷⁵ SNWA also asserted that "[t]he question assumed an unprecedented and sudden decrease in tree cover could cause a 25 percent loss of cover every year for four years, and could result in complete loss of trees before a mitigation trigger is activated."⁷⁶

Two problems arise from SNWA's claims: they misunderstand their own 3M Plan and they assume that the trees would not die off quickly. How fast the swamp cedar trees would likely die off given SNWA pumping is partially addressed under section III.C above. SNWA makes the dangerous assumption that the tree die-off would be a slow process. We have expert testimony, both from SNWA and Protestants, that the swamp cedars would die if groundwater drawdown went below root depth. The rate of die-off is not exactly known. But the best available evidence on record is that the die-off of trees would more likely be fast than slow. Therefore, it is beseeching for the 3M Plan to fully and carefully lay out a 3M process to address the litany of impacts that the SNWA Project would have, including leaving the swamp cedar trees with no more groundwater as 61,127 afa of groundwater is drained from Spring Valley every single year. It is speculation for SNWA to disregard the possibility of the swamp cedars dying off rapidly. It is speculation for SNWA to say they can mitigate the tree die-off when in fact they have no idea if their mitigation

⁷⁴ ROA 039022-039023.

⁷⁵ SNWA's Opening Brief, 32.

⁷⁶ SNWA's Opening Brief, 32.

options would actually work.⁷⁷ Perhaps the most flawed part of the 3M Plan is that there are several holes (e.g., die-off before mitigation is required, no stakeholder involvement, and SNWA’s determination that impacts may or may not be due to their pumping) by which SNWA could escape any requirement to mitigate.⁷⁸

And where there are such holes in the 3M Plan that would not protect Swamp Cedars and thus be detrimental to the public interest, the SE had a duty under NRS 533.370 to deny the Applications. In opposition, SNWA claimed that the SE’s determination was “baseless” and “does not rise to a detailed level to permit judicial review.” But as described in the paragraphs above and detailed in six pages of the SE Ruling 6446,⁷⁹ the determination to deny Applications 54014 and 54015 had a foundation based in substantial evidence.

Finally, SNWA claimed that the SE “ignored the mandates of other relevant aspects of the 3M Plan.”⁸⁰ No matter SNWA’s “layers of various triggers and actions,”⁸¹ the facts remain that the 3M Plans still have serious holes which render them unprotective of species and habitat, and which render them arbitrary and capricious, speculative, and not based on substantial evidence.

IV **PETITIONER TRIBES INCORPORATE BY REFERENCE** **ARGUMENTS OF OTHER PROTESTANTS**

The Tribes join with and incorporate by reference the arguments provided by other Protestants, including Great Basin Water Network and White Pine County, Millard and Juab Counties, Utah, and the Corporation of the Presiding Bishop of the Church of the Jesus Christ of Latter-Day Saints on behalf of Cleveland Ranch.

⁷⁷ See Tribes Opening Brief, 20.

⁷⁸ See Tribes Opening Brief, 29-32.

⁷⁹ ROA 039018-039023.

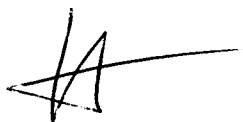
⁸⁰ SNWA Opening Brief, 32.

⁸¹ SNWA Opening Brief, 32.

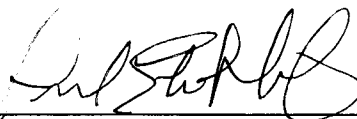
CONCLUSION

For the reasons above, the State Engineer's denial of SNWA's Applications 54003 – 54015 and 54019 and 54020 in Ruling 6446 was proper. This Court should uphold the SE denial of the Applications.

Dated: July ^{6th} 8, 2019.



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CERTIFICATE OF SERVICE

I hereby certify that on the ^{6th} day of July 2019, I served counsel of record with a copy of the foregoing by electronic mail pursuant to the parties' stipulation, and addressed as follows:

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