IN THE SUPREME COURT OF THE STATE OF NEVADA

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, ON BEHALF OF CLEVELAND RANCH,

Petitioner,

vs.

THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WHITE PINE and THE HONORABLE ROBERT E. ESTES, SENIOR DISTRICT COURT JUDGE,

Respondents,

and

JASON KING, P.E., in his official capacity as the Nevada State Engineer, and the NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES, and SOUTHERN NEVADA WATER AUTHORITY,

Real Parties in Interest.

Case No. _____

Related Appeal Nos. 64315
District Court Case No. CV-1204050
Consolidated with CV-1204049
CV-1204051
CV-1204052
CV-1204053
CV-1204054
CV-1204055
CV-0418012
CV-0419012

PETITION FOR LIMITED WRIT REVIEW OF WHETHER NRS 533.3705 CAN BE APPLIED RETROACTIVELY TO PERMIT STAGED APPROVAL OF SOUTHERN NEVADA WATER AUTHORITY'S 1989 APPLICATIONS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints has no parent corporations and no publicly-held company owns 10% or more of its stock.

LIONEL SAWYER & COLLINS

By _____
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PETITION FOR LIMITED WRIT REVIEW OF WHETHER NRS 533.3705 CAN BE APPLIED RETROACTIVELY TO PERMIT STAGED APPROVAL OF SOUTHERN NEVADA WATER AUTHORITY'S 1989 APPLICATIONS

Pursuant to NRAP 21, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints, on behalf of Cleveland Ranch ("CPB"), requests limited writ review as to whether NRS 533.5705, enacted in 2007, can be applied retroactively to permit staged approval of Southern Nevada Water Authority's ("SNWA's") 1989 water applications. It is CPB's position that the District Court's approval of the State Engineer's retroactive application of NRS 533.3705 to SNWA's applications violates the holdings of *Great Basin Water Network v. Taylor*, 126 Nev. Op. 2, 222 P.3d 665 (2010) ("*Great Basin I*"), and *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 20, 234 P.3d 912 (2010) ("*Great Basin II*"), from which the challenged Rulings and Decision directly result.

The District Court's December 13, 2013, Decision (App. 3), remanding the State Engineer's Rulings ##6164, 6165, 6166, and 6167, respectively for Spring, Cave, Dry Lake and Delamar Valleys, for further fact findings and significant corrections, erroneously approves the State Engineer's reliance on NRS 533.3705. Interlocutory writ review will avoid waste of substantial time, effort and expense in the related consolidated appeals (Supreme Court Case No. 64815) and in additional state administrative and judicial proceedings resulting from a misapplication of the 2007 statute to the 1989 Applications.

This Petition is supported by the following Memorandum of Points and Authorities.

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Attorneys for Petitioner, Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints on behalf of Cleveland Ranch

VERIFICATION

1. I am a member of LIONEL SAWYER & COLLINS, counsel of record for Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints, on behalf of Cleveland Ranch ("CPB"), in Case No. 64815 in the Nevada Supreme Court and Case No. CV-1204050 in the Seventh Judicial District Court of the State of Nevada in and for White Pine County. I am also the attorney principally responsible for handling this matter for and on behalf of CPB.

2. This verification is made by me pursuant to NRS 15.010, NRS 34.030, NRS 34.170 and NRS 34.300, rather than CBP because the facts relevant to this Motion to Dismiss are within my knowledge as CPB's attorney.

3. I know the contents of the petition for limited writ relief and the facts stated therein are true of my own knowledge based on the proceedings and papers filed by the parties in the coordinated cases below.

4. True and correct copies of all papers served and filed by the parties in the cases below that are relevant to the issues raised in the petition are contained in the Appendix to this petition.

Paul R. Hejmanowski

SUBSCRIBED and SWORN to before me this 4th day of April, 2014.

KEN WALCOTT
Notary Public State of Nevada
No. 12-9179-1
My appt. exp. Oct. 15, 2016

Notary Public

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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF RELEVANT FACTS AND PROCEEDINGS

I. Since 1989 SNWA Has Tried to Seize Vast Amounts of Rural Water

In 1989, Las Vegas Valley Water District ("LVVWD") filed 146 applications with the State Engineer to appropriate approximately 800,000 acre feet annually ("afa") from groundwater sources in 26 rural Nevada water basins to serve greater Las Vegas. *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 20, 234 P.3d 912, 914 (2010) ("*Great Basin II*").[1] In 1991, SNWA was created and acquired LVVWD's rights to the 146 applications. Between 1991 and 2002, some applications were withdrawn and some were resolved by rulings. Some remaining applications were to appropriate groundwater from Spring, Cave, Dry Lake and Delamar Valleys and are the subject of pending consolidated appeals.[2]

In September 2006, the State Engineer held the first round of hearings on the subject applications. On April 16, 2007, the State Engineer issued Ruling #5726,

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[1] *Great Basin II* followed rehearing of *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 2, 222 P.3d 665 (2010) ("*Great Basin I*"), at the behest of SNWA and the State Engineer to clarify that SNWA's 1989 Applications did not have to be refiled.

[2] The Spring, Cave, Dry Lake and Delamar Valley applications comprise what SNWA refers to as its "Groundwater Project" ("GWP"), a project described by the previous State Engineer as "the largest interbasin appropriation and transfer of water ever requested in the history of the state of Nevada." *Great Basin II*, 234

in part approving all but four of the Spring Valley Applications for up to 60,000 afa, subject to certain staged development guidelines, including adherence to a Monitoring, Management and Mitigation Plan (the "MMM Plan") between SNWA and certain divisions of the U.S. Department of Interior (the National Park Service, Bureau of Fish and Wildlife, Bureau of Land Management and Bureau of Indian Affairs), which had withdrawn their protests in exchange for SNWA's execution of the MMM Plan. Although the MMM Plan was affirmed and later revised and approved by the State Engineer, the State Engineer is not a party to the MMM Plan, but incorporated it into Ruling #5726, as well as into Rulings ##6164, 6165, 6166, and 6167.

In 2010, *Great Basin II* vacated Ruling #5726 and remanded with orders requiring the State Engineer to renotice the 1989 Applications, reopen the protest period and hold new hearings. In conformity with the remand, the State Engineer held hearings between September 26 and November 18, 2011, on the renoticed Spring, Cave, Dry Lake and Delamar Valley Applications.

II. Despite *Great Basin I* and *II*, Staged Development Was Invoked to Grant SNWA's Applications

On March 22, 2012, the State Engineer issued Rulings ##6164, 6165, 6166 and 6167, respectively for Spring, Cave, Dry Lake and Delamar Valleys, conditionally approving most of SNWA's GWP Applications. For example, as to

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P.2d at 914.

Spring Valley, Ruling #6164 conditionally approved 61,127 afa subject to ***staged approval*** and subsequent modification under NRS 533.3705,[3] stating:

> The protests to Applications 54003-54021 are hereby overruled in part and upheld in part. Applications 54016, 54017, 54018 and 54021 are hereby denied on the grounds that the use of the water would conflict with existing rights. Applications 54003 to 54015, 54019 and 54020 are hereby granted in the following amounts and subject to the following conditions:
>
> 1. The amount of groundwater available for appropriation under the Applications is 61,127 afa, in staged development. The Stage development plan is as follows:
>
> a. **Stage 1 Development**: Pumping pursuant to the Applications shall be limited to 38,000 afa, to provide for a pumping stress that ***will allow for collection of reliable transient-state data and effective calibration of a groundwater flow model.*** Before the increase in pumping associated with Stage 2 development can occur, the Applicant will be required to pump at least 85% but not more than 100% of the Stage 1 development amount (32,300 afa - 38,000 afa) for a minimum of eight years. Data from those eight years of pumping and updated modeling results will be submitted to the State Engineer as part of the annual hydrologic monitoring report. ***The State Engineer will then make a determination as to whether the Applicant can proceed to Stage 2.***
>
> b. **Stage 2 Development**: Pumping pursuant to the Applications will be limited to a total of 50,000 afa. This pumping will provide additional pumping stresses that ***will allow for collection of reliable transient-state data and continued calibration of a groundwater flow model.*** The Applicant will be required to pump at least 85% but not more than 100% of the Stage 2 development amount (42,000 afa - 50,000 afa) for a minimum of eight years. Data from those eight years of pumping and ***updated modeling results*** will be submitted to the State Engineer as part of the annual hydrologic monitoring report. ***The State Engineer will then make a determination as to whether the Applicant can proceed to Stage 3.***
>
> c. **Stage 3 Development**: The Applicant may pump

[3] As explained in Section II, the retroactive application of NRS 433.3705 violates the *Great Basin* holdings.

the full amount granted, 61, 127 afa. The annual hydrologic monitoring report will continue to be submitted and reviewed by the State Engineer;

2. The State Engineer has reviewed and approves the Hydrologic ***Monitoring and Mitigation Plan*** for Spring Valley that was prepared by the Applicant. ***The Applications are granted conditioned upon the Applicant's compliance with that Plan, and any amendments to the Plan that the State Engineer requires at a later date pursuant to his authority under Nevada law***;

4. The Applicant shall file an annual report with the State Engineer by March 31st of each year detailing the findings of the approved Hydrologic and Biological Monitoring Plans;

5. ***Prior to the Applicant exporting any groundwater resources from Spring Valley, biological and hydrologic baseline studies shall be completed and approved by the State Engineer***. A minimum of two years of biological and hydrologic baseline data shall be collected by the Applicant in accordance with the approved monitoring plans. Data collected prior to the approval of the monitoring plans by the State Engineer qualifies as baseline data, provided the data was collected in accordance with the subsequently approved plans;

6. ***The Applicant shall update a computer groundwater flow model approved by the State Engineer once before groundwater development begins and at a minimum of every eight years thereafter, and provide predictive results for 10-year, 25-year and 100-year periods***;

7. The applications are granted subject to existing rights; and

8. The Applicant shall pay the statutory permit fees. [Emphasis added.]

Ruling #6164, App. 2, pp. 216-217. Rulings ##6165 (pp. 169-170), 6166 (pp. 163-64) and 6167 (pp. 161-162) were similarly conditioned.

The possibility of staged development was never addressed at the hearings before the Engineer. It was raised for first time in SNWA's proposed rulings lodged with the State Engineer after conclusion of the hearings.

III. The District Court Remanded the Matter to the State Engineer for Significant Corrections

Nine petitions for judicial review were filed -- six as to the Spring Valley Ruling and one each as to the Cave, Dry Lake and Delamar Valley Rulings, by such parties as CPB; White Pine, Eureka, Elko and Nye Counties, Nevada; The Confederated Tribes of the Goshute Reservation; Ely and Duckwater Shoshone Tribes, and Millard and Juab Counties, Utah, all objecting to the State Engineer's Rulings based on the MMM Plan. In addition to broader issues, CPB also protested the State Engineer's retroactive application of NRS 533.3705, enacted in 2007, to authorize staged approval and development of SNWA's 1989 applications. CPB Petition for Judicial Review, App. 1. The District Court consolidated all of the petitions for hearing.

Following arguments on June 13 and 14, 2013, the District Court issued its Decision on December 13, 2013, concluding that the State Engineer had (1) exceeded his statutory authority; (2) relinquished his statutory authority and responsibility; (3) made findings not based on substantial or reliable evidence, but on subjective, insubstantial and unscientific data; (4) acted arbitrarily and capriciously; (5) approved the applications prematurely; and (6) authorized impermissible groundwater mining contrary to the public interest and unfair to following generations of Nevadans. As to Spring Valley, the District Court explained:

[T]he Engineer has instituted the MMM Plan as a condition of the SNWA appropriations (ROA 000181), and has been involved in developing the Plan. ROA 013243-44. However, ***the MMM Plan is flawed in several respects, most notably: 'Mitigation planning is not part of this plan but will be handled separately when impact location and magnitude are better understood.***' ROA 020648. Nonetheless, the MMM Plan emphasizes that mitigation will cure any adverse effects and the Engineer has found that the existing, non-Federal rights are sufficiently protected by the Plan. ROA 000215. ***There are no objective standards to determine when mitigation will be required and implemented. The Engineer has listed what mitigation efforts can possibly be made***, i.e., stop pumping, modifying pumping, change location of pumps, drill new wells, or increase or improve leopard frog populations in a different location from one that suffers an unreasonable impact. ROA 000190. Also, the Engineer has noted that if pumping has an adverse effect on swamp cedars, SNWA could mitigate, ROA 000189, ***but does not cite objective standards of when mitigation is necessary***. The Engineer states: 'where unreasonable impacts may occur and how bad the impacts may be is not understood and thus mitigation cannot be part of the plan at the present.' ***Not knowing where or how bad an impact is, is not the same thing as defining what [is] an adverse impact.***

The Engineer has found that it is 'premature to attempt to set quantitative standards or triggers for mitigation actions,' because '[f]actors such as natural variation in the environmental resources must be understood before any standards are triggers are set.' ROA 00311. 'Selecting specific standards before a full baseline is developed would be premature. It would not lead to sound scientific decisions.' ROA 000182-183.

While this Court cannot completely disagree with the State Engineer's statement above, he has also stated: 'The State Engineer finds that the applicant [SNWA] gathered and presented substantial environmental resource baseline material and that the environmental resource baseline information provides a platform for sound, informed decision making.' ROA 00176. Thus, if SNWA, and thereby the Engineer, has enough data to make informed decisions, setting standards and 'triggers' is not premature. Curiously, the Engineer has made the finding that a failure to even make 'Mitigation' a part of the current MMM plan 'demonstrates Applicant's determination to proceed in a scientifically informed, environmentally sound manner.'

> ROA 00183. ***It seems that if there is enough data to make informed decisions, exactly when an unreasonable impact to either the environment or existing rights occurs, the Engineer or SNWA should recognize it and make the decision to mitigate. If there is not enough data (as shown earlier, no one really knows what will happen with large scale pumping in Spring Valley), granting the appropriation is premature. The ruling is arbitrary and capricious.*** [Emphasis added.]

Decision, App. 3, pp. 15-16; *see also id.*, p. 12 ("The Engineer's finding that equilibrium in Spring Valley... will 'take a long time' was not based on substantial or reliable evidence, and is incorrect. Indeed, by his own statements -- and evidence -- equilibrium will never be reached"); pp. 12-13 ("[L]osing 9,780 afa from the basin, over and above E.T. after 200 years is unfair to following generations of Nevadans, and is not in the public interest. In violating the Engineer's own standards, the award... is arbitrary and capricious"); p. 17 ("The Engineer gives a vague statement of how mitigation can be done, but has no real plan or standard of when mitigation would be implemented. Without a stated, objective standard, the ruling is arbitrary and capricious"); p. 17 ("Without a plan to monitor that large of an area, a statement that the Engineer will monitor the area is also arbitrary and capricious"); p. 18 ("Impliedly, the Engineer has ceded the monitoring responsibilities to SNWA.... Yet, the plan has failed to set any standard of how impacts may be recognized. Essentially, the Engineer is simply saying, 'we can't define adverse impacts, but we will know it when we see it'"); p. 18 ("The Engineer rightly recognized his 'heavy burden of ensuring' that this water

project is environmentally sound.... A heavy burden indeed and one which is not complete"); p. 20 ("[I]t is also unseemly... that one transitory individual may simply defer serious water problems and conflict to later generations, whether in seventy-five (75) years or 'hundreds,' especially when the 'hundreds' of years is only a ***hoped*** for resolution" (emphasis supplied); p. 21 ("The Engineer has, in effect, relinquished his responsibilities to others"); p. 22 ("Without standards, any decision to mitigate is subjective and thus, arbitrary and capricious"); pp. 22-23 ("[T]he Engineer said, however not quite consistently, that there is enough evidence to implement, what he has characterized as 'critical,' the MMM Plan. Thus, if there is substantial evidence and it is premature to set triggers and thresholds, it is premature to grant water rights"); p. 23 ("Absent a thorough plan and comprehensive standards for mitigation, any mitigation, (or lack thereof) is subjective, unscientific, arbitrary and capricious. This matter must be remanded to the Engineer so that objective standards may be established").

The District Court also held that NRS 533.3705, enacted in 2007 to authorize staged development of approved applications, was not being applied retroactively because the applications were approved in March 2012, despite the multitude of uncertainties discussed above that were identified by the District Court itself. Decision, App. 3, p. 8.

The District Court remanded Rulings ##6164, 6165, 6166 and 6167 to the

State Engineer. Notice of entry of the District Court's Decision was served on January 2, 2014. Notices of Appeal were filed by the State Engineer (January 10, 2014), SNWA (January 13, 2014) and CPB (January 29, 2014). The Court consolidated those appeals (Case 64815).

ARGUMENT

I. The Court Should Grant Limited Writ Review Regarding Whether NRS 533.3705 Applies Retroactively so as to Permit the State Engineer to Grant Relief on the 1989 Applications in Stages

A. The Propriety of Limited Writ Review

The purpose of the final judgment requirement for appealable decisions is to promote judicial efficiency and economy by avoiding piecemeal appellate review.[4] Occasionally, however, interlocutory review of a district court ruling on a dispositive question of law promotes judicial economy and efficiency by precluding further administrative and/or judicial proceedings (including subsequent appeals), or significantly limiting and/or clarifying the available claims, remedies and defenses.

Specifically, the Court has frequently recognized that writ review is justified "where an important issue of law needs clarification and public policy is served by the [C]ourt's invocation of its original jurisdiction," *Mountainview Hospital Inc. v. Eighth Judicial District Court*, 128 Nev.Adv.Op. 17, 273 P.3d 861, 865 (2012),

[4] CPB has also filed a motion in this Court to dismiss the consolidated

quoting Mineral County v. State, Dep't of Conserv., 117 Nev. 235, 243, 20 P.3d 800, 805 (2001), particularly where "this [C]ourt's review would promote sound judicial economy." *Mountainview Hospital, supra, quoting, International Game Tech. v. Dist. Ct.*, 122 Nev. 132, 142-43, 127 P.3d 1088, 1096 (2006). Here, as in *Mineral County, supra*, the Court's interlocutory writ review of the applicability of NRS 533.3705 to SNWA's 1989 applications may avoid the waste of substantial time, effort and expense in additional state administrative and judicial proceedings.

B. NRS 533.3705 Cannot Be Applied Retroactively so as to Permit the State Engineer to "Approve" the 1989 Applications in Stages without Violating Nevada Statutes and *Great Basin*

The 1989 Applications purportedly "approved" by the State Engineer's Rulings were filed a quarter of a century ago. In *Great Basin II,* the Court held that the State Engineer had violated his statutory duty under NRS 533.370(2) by failing to rule on SNWA's 1989 applications within one year after the final protest date, as the law at the time required. The Court expressly ***rejected*** the State Engineer's attempt to retroactively apply a 2003 amendment to NRS 533.370 to the 1989 applications that permitted the State Engineer to indefinitely postpone action on the 1989 applications. In doing so, the Court emphasized that "by setting a timeline for the approval or rejection of groundwater appropriations within one year in NRS 533.370(2), ... the Legislature intended to prevent a significant lapse

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appeals for lack of an appealable final order or judgment.

of time before a ruling." 234 P.3d at 918-19.

In *Great Basin*, the Court held that SNWA's 1989 applications did not remain "pending" in 2003, but had lapsed. The Court did not, however, require SNWA to file new applications. Instead, the Court granted "equitable relief," requiring that the State Engineer re-notice the 1989 applications and reopen the protest period, thereby initiating a new "timeline" within which the State Engineer had to approve or reject the 1989 applications under NRS 533.370(2) and *Great Basin*. Hence, elementary due process principles of notice and an opportunity to be heard dictate that the hearings resulting in the State Engineer's Rulings (including Ruling #6164) at issue below should have been limited to the appropriations sought in the 1989 applications. *See, e.g. Nevada Power v. Public Service Commission*, 91 Nev. 816, 544 P.2d 428 (1975).

Instead, on remand from the District Court in conformity with *Great Basin II*, the State Engineer took evidence on SNWA's much larger GWP and then attempted to retroactively apply NRS 533.3705 to "approval" of the 1989 applications to accomplish precisely what the Court condemned in *Great Basin* -- postpone a resolution of the parties' water rights for years, even decades, through "staged approvals," when the requirements of NRS 533.370 for approval of the appropriations sought by SWNA have not been met. Application of NRS 533.3705 to the 1989 Applications was never mentioned during the hearings, but

was raised for the first time in SNWA's proposed rulings lodged with the State Engineer.

The District Court asserts in its December 13, 2013, Decision that the State Engineer did not apply NRS 533.3705 retroactively because the applications were approved in March 2012, after enactment of NRS 533.3705; but that assertion conflicts with not only the express text of both NRS 533.370 and NRS 533.3705, but also the reasoning and holding of the Court in *Great Basin*.

By its express terms, NRS 533.3705 only applies to applications that already have been "approved" by the State Engineer, and the State Engineer's authority to approve applications is defined and constrained by NRS 533.370. As in 1989, NRS 533.370 still directs that the State Engineer "shall reject" any application "[w]here there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights, ... or threatens to prove detrimental to the public interest." If the applicant fails to demonstrate that there is unappropriated water, or there is evidence the requested use conflicts with existing rights or threatens detriment to the public interest, then the application ***must*** be rejected under NRS 533.370, and NRS 533.3705 never becomes applicable.

Hence, the State Engineer's attempt to transform NRS 533.3705 from a "staged development" statute into a "staged approval" statute and apply it

retroactively to the 1989 applications in order to once again avoid his statutory duty to ***reject*** the 1989 applications for failing to satisfy the requirements of NRS 533.370 fares no better than his earlier attempt to do the very same thing with the 2003 amendment to NRS 533.370(2) that the Court rejected in *Great Basin.*

Nor can the additional evidentiary proceedings ordered by the District Court cure this fatal defect since these proceedings are premised on the District Court's holding that the 1989 Applications were "approved" in 2011, with the State Engineer allowed to use "staged development" under NRS 533.3705 to delay a final resolution of the parties' water rights for years, even decades. As a result, the additional evidentiary proceedings ordered by the District Court are based on the fundamentally erroneous premise that the State Engineer can retroactively use NRS 533.3705, enacted in 2007, to avoid fully and finally resolving SNWA's 1989 Applications for additional water appropriations indefinitely by allowing SNWA's GWP to proceed in "stages" ***without*** the requirements of NRS 533.370 having been satisfied for the 1989 applications.

The State Engineer's attempt to retroactively apply NRS 533.3705 to the 1989 applications and thereby postpone resolution of the parties' water rights indefinitely through "staged development" fails for the very same reason the same effort failed in *Great Basin* -- "without the Legislature's explicit intent to the contrary, it would be inequitable to allow applications to linger for years without

obtaining the parties' written authorization to postpone action..." *Id.*, 234 P.3d at 918-19. Since no such intent accompanied enactment of NRS 533.3705, the Court should grant writ relief to prevent NRS 533.3705's "staged development" provisions from being used as a subterfuge for "staged approval" of the 1989 Applications -- and thereby prevent those Applications from ***ever*** being rejected -- despite the failure to satisfy the requirements of NRS 533.370 for such approval.

C. Ruling #6164 Depends on NRS 533.3705, Enacted in 2007, to Approve the Challenged 1989 Applications

Ruling #6164 repeatedly invokes NRS 533.3705, including the following statements:

- "[T]he State Engineer ***will balance*** the needs of Southern Nevada with the protections necessary, and provided for by statute, and ***by utilizing his authority under NRS 533.3705.***" (Ruling #6164, App. 2, at p. 30 (emphasis added)).

- As authority for the statement "***In order to ensure that existing rights are not impacted, additional information is necessary.***" (*Id.*, at p. 151, fn. 887 (NRS 533.3705) (emphasis added)).

- "[T]he State Engineer may establish a period during which ***additional studies may be conducted or additional evidence provided to support the application. NRS 533.3705.***" (*Id.*, p. 158 (emphasis added)).

- "The State Engineer finds it does not threaten to prove detrimental to the public interest to ***approve development of the Applications granted in the staged manner decided in this ruling and allowed for under NRS 533.3705.*** The State Engineer finds the ***staged development is to protect existing rights, springs and streams,*** which are sources upon which wildlife exists." (*Id.*, p. 160 (emphasis added))/

- "Upon approval of an application to appropriate water, the State Engineer may limit the initial use of water to a quantity that is less than the

total amount approved for the application. ***NRS 533.3705***.... The State Engineer finds that the Legislature indicated that it does not threaten to prove detrimental to the public interest to allow the staged development being utilized in Spring Valley; therefore, the use of the water does not threaten to prove detrimental to the public interest." (*Id.*, p. 163 (emphasis added)).

- "The State Engineer finds the public interest policy set forth in ***NRS 533.3705*** provides for staged development being allowed here; thus the use of the water does not threaten to prove detrimental to the public interest." (*Id.*, p. 164 (emphasis added)).

- "Although the State Engineer carries a heavy burden of ensuring that any approval here is environmentally sound, it is also demanded that he be creative and flexible to maximize the beneficial use of the State's water. ***Nevada Revised Statute 533.3705(1)*** is ***an example of a statute that provides flexibility to the decision-making process that could otherwise stop water appropriations unnecessarily***. ***Nevada Revised Statutes 533.3705(1)*** provides the State Engineer the authority and discretion to approve an application to appropriate water, but limit the initial use of water to a quantity that is less than the total amount approved for the application. ***This provision of the law provides for the submittal of additional evidence to demonstrate to the satisfaction of the State Engineer that any additional amount of water is available***. The State Engineer interprets that statute to mean that while there is substantial evidence to approve an application, he is also able to approve it at a lower amount in order to measure and collect data that will either support increasing or decreasing the amount of the appropriation. The State Engineer finds this methodology is appropriate for this project and ***it is this staged development along with careful monitoring, management and mitigation, if needed, that he finds allows for the determination that the proposed action is environmentally sound as it relates to the basin from which the water is exported***." (*Id.*, pp. 173-74) (emphasis added)).

Although Ruling #6164, App. 2, concludes by "approving" the challenged applications, it only does so conditioned on applicability of NRS 533.3705, stating at pp. 216-217:

1. The amount of groundwater available for appropriation

under the Applications is 61,127 afa, in ***staged development.*** The Stage development plan is as follows:

a. **Stage 1 Development**: Pumping pursuant to the Applications shall be limited to 38,000 afa, to provide for a pumping stress that ***will allow for collection of reliable transient-state data and effective calibration of a groundwater flow model.*** Before the increase in pumping associated with Stage 2 development can occur, the Applicant will be required to pump at least 85% but not more than 100% of the Stage 1 development amount (32,300 afa - 38,000 afa) for a minimum of eight years. Data from those eight years of pumping and ***updated modeling results*** will be submitted to the State Engineer as part of the annual hydrologic monitoring report. ***The State Engineer will then make a determination as to whether the Applicant can proceed to Stage 2.***

b. **Stage 2 Development**: Pumping pursuant to the Applications will be limited to a total of 50,000 afa. This pumping will provide additional pumping stresses that ***will allow for collection of reliable transient-state data and continued calibration of a groundwater flow model.*** The Applicant will be required to pump at least 85% but not more than 100%^ of the Stage 2 development amount (42,000 afa - 50,000 afa) for a minimum of eight years. Data from those eight years of pumping and ***updated modeling results*** will be submitted to the State Engineer as part of the annual hydrologic monitoring report. ***The State Engineer will then make a determination as to whether the Applicant can proceed to Stage 3.***

c. **Stage 3 Development**: The Applicant may pump the full amount granted, 61, 127 afa. The annual hydrologic monitoring report will continue to be submitted and reviewed by the State Engineer;

2. The State Engineer has reviewed and approves the Hydrologic Monitoring and Mitigation Plan for Spring Valley that was prepared by the Applicant. The Applications are ***granted conditioned*** upon the Applicant's compliance with that Plan, and ***any amendments to that Plan that the State Engineer requires at a later date pursuant to his authority under Nevada water law***;

3. The State Engineer has reviewed and approves the Biological Monitoring Plan for Spring Valley that was prepared by the Applicant. The Applications are ***granted conditioned*** upon the Applicant's compliance with that Plan, and any amendments to that Plan that the State Engineer requires at a later date pursuant to his

authority under Nevada water law;

* * *

5. ***Prior to the Applicant exporting any groundwater resources from Spring Valley, biological and hydrologic baseline studies shall be completed and approved by the State Engineer.*** A minimum of two years of biological and hydrologic baseline data shall be collected by the Applicant in accordance with the approved monitoring plans. Data collected prior to the approval of the monitoring plans by the State Engineer qualifies as baseline data, provided the data was collected in accordance with the subsequently approved plans.... [Emphasis added.]

Ruling #6164 violates the *Great Basin* cases by approving many of the 1989 applications by using an inapplicable 2007 statutory amendment.

D. Neither NRS 533.3705 Nor Its Legislative History Supports the Statute's Retroactive Application to the 1989 Applications

As of 1989, NRS 533.370 authorized the State Engineer to approve or reject water applications, with no room for a conditional, wait-and-see approval. This aspect of NRS 533.370 is still true today: applications must be rejected if there is no unappropriated water in the proposed source of supply, where the proposed use conflicts with existing rights or with protectable interests in existing domestic wells, or threatens to prove detrimental to the public interest.

In 2007, the Legislature amended NRS Chapter 533 by adding NRS 533.3705. While that section did not change NRS 533.370's criteria for approval or rejection of an application, it did authorize the State Engineer to subject "***approved applications***" to a staged development process, stating:

1. ***Upon approval of an application to appropriate water***,

> the State Engineer may limit the initial use of water to a quantity that is less than ***the total amount approved*** for the application. The use of an additional amount of water that is not more than ***the total amount approved*** for the application may be authorized by the State Engineer at a later date if additional evidence demonstrates to the satisfaction of the State Engineer that the additional amount of water is available and may be appropriated in accordance with this chapter and chapter 534 of NRS. In making that determination the State Engineer may establish a period during which additional studies may be conducted or additional evidence provided to support the application.
>
> 2. In any basin in which ***an application to appropriate water is approved*** pursuant to subsection 1, the State Engineer may act upon any other pending application to appropriate water in that basin that the State Engineer concludes constitutes the use of a minimal amount of water. [Emphasis added.]

According to Nevada law, statutes are to be applied only prospectively unless there is a clear legislative directive that they be applied retroactively. *State ex rel. State Board of Equalization v. Barta*, 124 Nev. 612, 622, 188 P.3d 1092, 1099 (2008) (statutes "operate prospectively, unless an intent to apply them retroactively is clearly manifested"); *In re Estate of Thomas*, 116 Nev. 492, 495, 998 P.2d 560, 562 (2000) ("The general rule is that statutes are prospective only, unless it clearly, strongly, and imperatively appears from the act itself that the legislature intended the statute to be retrospective in its operation"); *McKellar v. McKellar*, 110 Nev. 200, 204, 871 P.2d 296, 298 (1994) ("There is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent or unless the intent of the legislature cannot be otherwise satisfied").

Nothing in the language of NRS 533.3705 supports its retroactive application. And, nothing in its non-existent legislative history does either. NRS 533.3705 was a late addition to SB 274, appearing at the last minute as §3.5. SB 274's legislative history addressed the merits of ***only one topic*** -- the authority of the State Engineer to impose ***punishments for the misuse of water***. There is no discussion of staged development.[5]

SB 274 was enacted on June 4, 2007, without discussion of staged development or §3.5, or any indication that it should be applied retroactively. SB 274 simply concludes that the act will be effective July 1, 2007. As a result, NRS 533.3705 is not subject to retroactive application.

E. *Great Basin* Compels Rejection of NRS 533.3705's Application to SNWA's 1989 Applications

The challenged applications were filed on October 17, 1989. As of 1989, NRS 533.370(2) required the State Engineer to either ***approve or reject*** those applications within in ***one year*** from the final date for filing a protest.[6] It is the

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[5] *See* App. 4, collected minutes and reports regarding the Legislative History of 2007 SB 274.

[6] In 1989, NRS 533.570(1), (2), and (3) provided:

> 1. Except as otherwise provided in NRS 533.345 and 533.372 and this section, the state engineer ***shall approve*** an application submitted in proper form which contemplates the application of water to beneficial use if:
>
> (a) The application is accompanied by the prescribed fees; and

applicability of that provision of Chapter 533 to SNWA's 1989 applications that is at the core of the holdings in the *Great Basin* cases.

In the decades since the 1989 SNWA filings, the Legislature amended NRS Chapter 533 on various occasions, sometimes at the behest of SNWA, as was the case with the 2003 amendment to NRS 533.370(2) which authorized the State Engineer to *sua sponte* postpone resolution of applications for municipal use.[7]

(b) The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the district's efficiency in its delivery or use of water.

2. ***The state engineer shall either approve or reject each application within 1 year after the final date for filing protest.*** However:

(a) Action can be postponed by the state engineer upon written application to do so by the applicant or, in the case of a protested application, by both the protestant and the applicant.

(b) In areas where studies of water supplies are being made or where court actions are pending, the state engineer may withhold action until it is determined there is unappropriated water or the court action becomes final.

3. ***Where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the permit asked for.*** Where a previously application for a similar use of water within the same basin has been rejected on these grounds the new application may be denied without publication. [Emphasis added.]

[7] As amended in 2003, NRS 533.370(2) provided:

2. Except as otherwise provided in this subsection and subsection 7, the State Engineer shall approve or reject each application within 1 year after the final date for filing a protest. The

Although it was SNWA's position that the 2003 statutory amendment applied retroactively to its 1989 applications to support their indefinite postponement by *sua sponte* direction of the State Engineer, the Supreme Court disagreed in the *Great Basin* cases and directed the State Engineer to renotice the 1989 applications, leading directly to the proceedings below.

Ruling #6164 again raises the issue of the retroactive applicability of statutes, repeatedly relying on NRS 533.3705, enacted in 2007, to justify postponing a full and final resolution of the parties' water rights regarding the 1989 Applications indefinitely by allowing SNWA's GWP to proceed in stages without the requirements of NRS 533.370(2) having been satisfied. But, just as with the 2003 amendment to NRS 533.370(2) at issue in the *Great Basin* cases, the 2007

State Engineer may:

(a) Postpone action upon written authorization to do so by the applicant or, if an application is protested, by the protestant and the applicant.

(b) Postpone action if the purpose for which the application was made is municipal use.

(c) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to NRS 533.368 or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

Great Basin II, 234 P.3d at 918, notes that "[a]fter examining the legislative history, it is clear that SNWA requested the 2003 municipal-use amendment...." An examination of the legislative history of NRS 533.3705 leads to the same conclusion -- it was sought by SNWA and passed without any recorded discussion.

statutory enactment also should be held inapplicable to SNWA's 1989 applications. Hence, *Great Basin II* compels the Court's vacation of the District Court's Decision requiring further proceedings on Ruling #6164, which collapses absent its misreliance on NRS 533.3705.

Specifically, *Great Basin II* identified four compelling reasons why the Court accepted the protestants' position that the 2003 amendment did not apply retroactively to the 1989 Applications. Those four arguments are equally applicable to the 2007 amendment to NRS Chapter 533 now at issue and compel the Court's rejection of the retroactive applicability of NRS 533.3705 to the State Engineer's resolution of the 1989 applications:

1. Legislative Intent and Public Policy Requiring Prompt Resolution of Applications for Water Rights

The *Great Basin* cases recognize that the statutory process governing the State Engineer's review of applications to appropriate water is to be construed to result in their prompt resolution for the protection of applicants, the protestants, and the public. Thus *Great Basin II* states:

> First, by setting a timeline for the approval or rejection of groundwater appropriation applications within one year in NRS 533.370(2), we determine that the Legislature intended to prevent a significant lapse of time before a ruling. ... Therefore, without the Legislature's explicit intent to the contrary, it would be inequitable to allow applications to linger for years without obtaining the parties' written authorization to postpone action or providing adequate notice of the initiation of hearings on stale applications.

Id., 234 P.3d at 918-919; *see also*, *Great Basin I*, 222 P.3d at 671.

Nevada's "preeminent public policy" is that water be put to beneficial use, and that "one who does not put it to beneficial use should not be allowed to hold it hostage." *Preferred Equities Corp. v. State Engineer*, 119 Nev. 389, 75 P.3d 380, 383 (2003); *see also Desert Irrigation, Ltd. v. State Engineer*, 113 Nev. 1049, 1057, 944 P.2d 835, 840-41 (1997). Other State Engineer rulings and Nevada cases reflect the State's public policy against delay in the resolution of water rights by the use of applications that do not reflect what is actually being sought by the applicant. *See, e.g. United States v. Alpine Land & Reservoir Co.*, 2012 WL 4442804 *3 (D. Nev. 2012), *citing* and *quoting* the State Engineer's 2008 Ruling #5857 at p. 15, denying applications to change the point of diversion and place of use of waters on the grounds that the applications did not state what the applicant actually intended:

> The State Engineer concludes that to establish an imaginary or made-up point of diversion for the purpose of retaining priority would violate the *Alpine* Decree and Nevada water law and therefore, would threaten to prove detrimental to the public interest.

Id.

Yet, the District Court's approval of the State Engineer's use of "staged development" under NRS 533.3705 in Ruling #6164 endorses precisely what the State Engineer and U.S. District Court rejected with regard to the *Alpine* applications and what NRS Chapter 533 in general rejects -- indefinite delay in (1)

resolving the 1989 Applications that no longer reflect what SNWA wants, to preserve its priorities; (2) constructing works after the so-called "approval" of the 1989 Applications without the evidence required by NRS 533.370(2) for such approval; and (3) putting the water in question to beneficial uses never disclosed to the protestants or the public in the 1989 Applications that *Great Basin II* directed be renoticed for hearing. By supposedly "approving" the 1989 Applications when they no longer reflect what SNWA intends, or what future studies may (or may not) support, the District Court and Ruling #6164 have indefinitely delayed the review process contrary to the Legislative intent described in *Great Basin II*, and removed it from the protections of fundamental due process guaranteed by NRS Chapter 533.

2. The Absence of Legislative Intent Favoring a Retroactive Application that Would Render NRS 533.370(2) Superfluous

Second, *Great Basin II* also concluded that the 2003 statutory amendment could not be applied retroactively to the 1989 Applications because there was no clear indication of legislative intent to do so, and doing so would render the statutory timeline created by the 1989 version of NRS 533.370(2) superfluous. 234 P.3d at 919. Again, the very same thing is true for NRS 533.3705: there is no legislative history whatsoever regarding NRS 533.3705, much less legislative history supporting retroactively applying it to the 1989 Applications, and

permitting "staged development" to be used to delay resolution of the parties' water rights indefinitely while additional information is collected destroys the one-year timeline created by the 1989 version of NRS 533.370.

Great Basin II is in accord with long-settled Nevada statutory interpretation. Absent clear legislative direction, it is the general rule that Nevada statutes do not apply retroactively. *McKellar*, *supra*, 110 Nev. at 203, 871 P.2d at 298 ("There is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent...."); *Pressler v. City of Reno*, 118 Nev. 506, 511, 50 P.3d 1096, 1099 (2002), *citing Nevada Power v. Metropolitan Dev. Co.*, 104 Nev. 684, 686, 765 P.2d 1162, 1163 (1963) ("We have previously concluded that when the Legislature does not state otherwise, statutes have only prospective effect"); and *INS v. Ct. Cyr*, 533 U.S. 289, 316 (2001) ("A statute may not be applied retroactively... absent a clear indication from [the Legislature] that it intended such a result").

For example, in *Pressler*, *supra*, the Court held that a legislative change to a city charter provision making appointed employees terminable at will instead of only for cause could not be retroactively applied to an employee hired some 25 years earlier so as to deprive the employee of his property interest in continued employment terminable only for cause, saying:

> Based on the presumption that statutes apply prospectively unless otherwise stated and on the legislative history, we conclude

> that the city charter amendments apply only prospectively. Accordingly, we conclude that the district court erred in granting summary judgment on the basis that Pressler was an at-will employee. We conclude that as a matter of law, *Pressler could be removed only for cause as provided by the city charter at the time he accepted his appointment*. [Emphasis added.]

111 Nev. at 512, 50 P.3d at 1099-1100.

Likewise here, there is no 2007 legislative history pertaining to NRS 533.3705 at all -- let alone whether or not it was intended to have retroactive application. Consequently, here as in *Pressler* and the *Great Basin* cases, the law governing the approval of the 1989 Applications is the law in effect when those Applications were filed, ***not*** the law in effect in 2003 when the amendment relied on by SNWA and the State Engineer in the *Great Basin* cases was adopted, nor the law in effect in 2007 when NRS 533.3705, relied on by SNWA, the State Engineer, *and* the District Court below, was adopted.

Moreover, it is also contrary to Nevada law that a portion of a complex statutory scheme, such as NRS Chapter 533, be rendered superfluous. That would be precisely the result of imposing the State Engineer's and the District Court's interpretation of NRS 533.3705 on the 1989 Applications. If an application must be rejected under NRS 533.370(2) where there is no unappropriated water in the proposed source of supply, where the proposed use conflicts with existing rights, or where the proposed use threatens to prove detrimental to the public interest, then it cannot be conditionally approved where there is substantial uncertainty as to (1)

whether there is unappropriated water in the proposed source, (2) where there is substantial uncertainty as to whether existing rights will be harmed, and (3) whether there is a substantial threat of public detriment.

Ruling #6164 itself leaves no doubt that those serious questions as to the grounds for approval of a water application under NRS 533.370 are still unsettled and unresolved, saying:

> • In order ***to ensure that existing rights are not impacted, additional information is necessary***. (Ruling #6164, App. 2, at p. 151 (emphasis added)).
>
> • "The State Engineer finds that ***staged development*** of the resource under the applications granted ***allows for further data collection to alleviate any uncertainty associated with the current analyses related to conflicts to existing rights, domestic wells, environmental soundness, as well as the perennial yield of the resource.***" (*Id.*, at p. 151 (emphasis added)).
>
> • "***[I]t is this staged development along with careful monitoring, management and mitigation, if needed, that [the State Engineer] finds allows for the determination that the proposed action is environmentally sound as it relates to the basin from which the water is exported.***" (*Id.*, at p. 174 (emphasis added)).
>
> • "The State Engineer finds that ***by requiring*** (1) the ***collection of biological baseline data*** in concert with hydrologic data, (2) a ***significant monitoring***, management and mitigation plan ***through the incorporation of the BMP as conditions*** to development of the Applications, and (3) ***staged development and associated studies, there are sufficient safeguards in place to ensure that the interbasin transfer of water*** from Spring Valley ***will be environmentally sound.***" (*Id*, at p. 194 (emphasis added)).
>
> • "The State Engineer finds ***it does not threaten to prove detrimental to the public interest to approve development of the Applications granted in the staged manner*** decided in this ruling and

allowed for under NRS 533.3705. The State Engineer finds ***the staged development is to protect existing rights, springs and streams, which are sources upon which wildlife exists***." (*Id.*, at p. 160 (emphasis added)).

- "***Staged development***, in conjunction with an updated and more comprehensive Management Plan ***is ... necessary to assure the Applications will not conflict with existing rights or domestic wells, and to assure pumping is environmentally sound. A staged*** and gradual ***lowering of the water table will assure the Project is environmentally sound and that the propagation of effects will be observed by the hydrologic monitoring network well in advance of any possible effects impacting the existing rights in Spring Valley***." (*Id.*, p. 151 (emphasis added)).

- "The State Engineer finds that ... ***staged development, will ensure the development of the Applications in a sustainable manner that will avoid conflicts with existing rights***. While the State Engineer is not a party to the Applicant's Stipulation with the Federal Agencies, the State Engineer finds that it provides a forum through which critical information can be collected from hydrologic experts, and used ***to assure development of the Applications will not conflict with existing water rights or with protectable interests in existing domestic wells***." (*Id.*, at pp. 119-120 (emphasis added)).

- "The State Engineer finds ***because the remaining 15 applications will be developed in a staged manner, the Management Plan will detect effects before any impacts could occur, and management options will be utilized to prevent impacts. Nevertheless, if impacts do occur, the State Engineer has the authority to require mitigation***. The State Engineer finds that the 15 applications not located on the Cleve Creek alluvial fan shall be developed in a staged manner, and ***with the monitoring in place and the management and mitigation options available, will not conflict with existing rights of the CPB***." (*Id.*, p. 142 (emphasis added)).

- "***[E]xisting rights are sufficiently protected by*** the Applicant's monitoring, management, and mitigation plan and the ***staged development***...." (*Id.*, p. 215 (emphasis added)).

Finally, NRS 533.3705 as used in Ruling #6164 also wreaks havoc on NRS 533.380, which sets specific time limits for completion of work (5 years from

approval), and for application of the appropriated water to its designated beneficial use (10 years from approval). These time limitations were the same in the 1989 version of NRS 533.380.

Therefore, for the same reasons stated in *Great Basin II* and *Pressler*, NRS 533.3705 should not be applied to permit what is in effect an indefinite extension of the State Engineer's resolution of the 1989 Applications.

3. Application of the New Statutory Provisions to the 1989 Applications Would Have Violated the Protestants' Fundamental Due Process Rights

Third, in *Great Basin II*, the Court concluded that retroactive application of the 2003 statutory amendment to the 1989 applications would have denied protestants their fundamental due process right to be heard on whether to resolve the water rights in question or postpone action on the 1989 Applications. *Id.*, 234 P.3d at 919.

Here, the due process rights of the protestants, including CPB, are just as important, if not more so, than those identified in *Great Basin*, since they amount to the protestants' right and ability to address the GWP as it is developed and the actual appropriations SNWA intends to pursue. These due process rights are fundamental, going to the protestants' ability to contest the intended points of diversion, the contemplated works, and intended use, and to have the State Engineer approve or reject applications straight up or straight down based on those

applications. Nothing about NRS Chapter 533 nor Nevada law countenances place-keeping, "imaginary," or "made-up" applications to obtain a permit or fix a priority. *See* Ruling #5857 and the *Alpine* decision discussed above.

Moreover, NRS 533.330, enacted in 1913 and unchanged since 1951, directs that "No application shall be for the water of more than one source to be used for more than one purpose...." Then, NRS 533.335, also enacted in 1913 and unchanged since 1951, directs that each application give notice of the following:

1. the name of the source from which the appropriation is to be made;
2. the amount of water requested, expressed precisely;
3. the purpose for which the application is made,
4. a "substantially accurate description of the location of the place at which the water is to be diverted from its source and, if any of such water is to be returned to the source, a description of the place of return;"
5. a description of the "proposed works;"
6. the estimated cost of such works; and
7. the estimated time required to construct the works, and the estimated time required to complete the application of the water to beneficial use.

These specific requirements for obtaining a water permit for nearly a century demonstrate that Ruling #6164's conditional approval of water applications based on unknown sources of water, unknown amounts to be appropriated, changing purposes, inaccurate descriptions of the intended source of diversion, unknown works, and unknown time for determining the works needed, let alone the time to construct them and put the water to beneficial use, are not contemplated or countenanced by NRS Chapter 533.

What Ruling #6164 has done by retroactively applying NRS 533.3705 is kick the challenged 1989 Applications down the road for still more decades while preserving SNWA's 1989 priority[8] -- all without due process protections of notice to the protestants and the public as to what the purported necessary future tests and studies will provide. The opportunity to be heard as to the actual contents of an application is the minimum requirement of due process in a Nevada administrative process. *See Public Service Comm'n v. Southwest Gas*, 99 Nev. 268, 271, 662 P.2d 624, 626 (1983), *citing Johanson v. Dist. Ct.*, 124 Nev. 245, 253, 182 P.3d 94, 99 (2008) (valid notice includes notice of the rate application and must "accurately reflect the subject matter to be addressed and that the hearing will allow full consideration of it"). Hence, depriving potential protestants and the public of their fundamental due process right to notice of such information and their right to be heard on the project being approved cannot be justified by transforming NRS

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[8] NRS 533.355(2), unamended since its 1981 enactment, states in pertinent part:

> An application does not lose its priority of filing on account of defects if the application, properly corrected and accompanied by such maps and drawings as may be required, is filed in the Office of the State Engineer within 60 days after the date of the return to applicant. Any application returned for correction or completion, not refiled in proper form within 60 days, must be cancelled. For good cause shown, upon application made prior to the expiration of the 60-day period, the State Engineer may, in his or her discretion, grant an extension of time not to exceed 60 days in which to file the instruments.

533.3705 from a "staged development" statute into a "staged approval" statute and applying it retroactively to the 1989 Applications.

4. Retroactive Application to Every Groundwater Appropriation Application Would Produce Absurd Results

Finally *Great Basin II* rejected retroactive application of the 2003 amendment allowing the State Engineer to *sua sponte* indefinitely continue resolution of the 1989 Applications, saying:

> Fourth, there is no indication that the Legislature intended that the 2003 amendment to NRS 533.370(2) apply to every groundwater appropriation application ever filed in the office of the State Engineer. Such an interpretation would produce absurd results. ... We determine that the 2003 amendment to NRS 533.370(2) does not apply retroactively and that the district court erred when it found that the 2003 amendment applied to SNWA's 1989 applications.

Id., 234 P.3d at 919. Again, the same is true for NRS 533.3705.

If the State Engineer can simply invoke NRS 533.3705 and use it as applied in Ruling #6164 whenever the State Engineer lacks sufficient information to approve an application and therefore must reject it under NRS 533.370(2), then the State Engineer need never reject an application for failing to satisfy the requirements of NRS 533.370(2). The State Engineer can simply invoke "staged development," permit the applicant to begin appropriating water, continue collecting data, and adjust the amount of water the applicant can appropriate to match the data the State Engineer finds persuasive indefinitely into the future. As discussed above, NRS 533.3705 applies to applications that ***already*** have been

approved under NRS 533.370; it does ***not*** place protestants and other interested parties forever at the mercy of SNWA's ever-changing self-interested intentions and the State Engineer's ever-changing findings and conclusions indefinitely into the future.

The Court should grant writ review and refuse to permit NRS 533.3705 to be applied retroactively so as to permit "staged approval" of SNWA's GWP project extending indefinitely into the future without having satisfied NRS 533.370's requirements for approval of its 1989 Applications.

CONCLUSION

The Court should grant limited writ review and prevent the State Engineer from retroactively applying NRS 533.3705 to permit "staged approval" of SNWA's 1989 applications extending indefinitely into the future and thereby avoid rejecting those applications due to the failure to satisfy the requirements of NRS 533.370 for

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approval of those applications.

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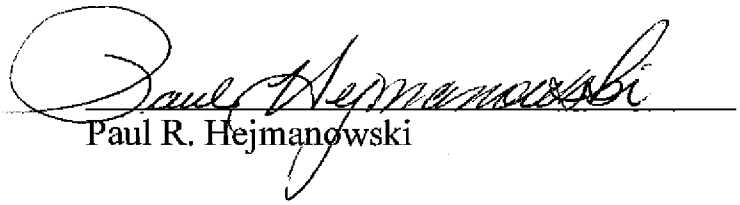
CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief has been prepared in proportionally spaced typeface using Microsoft Word 2007 with 14-point, double spaced 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).

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more and contains 9,181 words.

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 portions of the Nevada Rules of Appellate Procedure.

I understand I may be subject to sanctions in the event the brief does not conform with the requirement of the Nevada Rules of Civil Procedure.



Paul R. Hejmanowski

Certificate of Service

I hereby certify that on this day, the 14th day of April, 2014, I caused to be delivered a copy of the foregoing ***Petition for Limited Writ Review of Whether NRS 533.3705 Can Be Applied Retroactively to Permit Staged Approval of Southern Nevada Water Authority's 1989 Applications*** by U.S. Mail to the following:

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