

**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.

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. 65424

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District Court Case No.  
CV-1204050

Consolidated with: CV-1204049

CV-1204051

CV-1204052

CV-1204053

CV-1204054

CV-1204055

CV-0418012

CV-0419012

**APPENDIX TO  
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**

**VOLUME II**

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potential impacts to these water rights; the State Engineer has the authority to require additional monitoring and will exercise his authority as needed to protect these existing rights, and will require mitigation if warranted.

The next group of water rights is located north and east of the Cleve Creek alluvial fan.<sup>805</sup> The existing rights are located in an area where CPB experts predicted a drawdown of 10 to 20 feet after 75 years of continuous pumping from full build-out.<sup>806</sup> The CPB analyses of pumping scenarios show that spring claims V10086 and V10087 will be minimally affected by pumping of the full Applications after 75 to 200 years, but for the Minus4 scenario, impacts are negligible after 200 years.<sup>807</sup> Drawdown at the Fera well after 75 years of full pumping is approximately 30 feet using the Minus4 pumping scenario.<sup>808</sup> This amount of drawdown over 75 years is reasonable.

Recently filed claims of vested rights V010078 through V010085 are for springs at the toe of the alluvial fan and each claim enough water sufficient to water 2,120 cattle. Vested claims V02818 – V02828 claim a total combined duty of 9,600 afa for irrigation. These claims also are located at the edge of the Cleve Creek alluvial fan. They are within an area where the Applicant's model predicted greater than 50 feet of drawdown.<sup>809</sup> The CPB's Minus4 simulation indicates approximately 20 feet of drawdown after 75 years.<sup>810</sup> The Applicant submitted geologic data for monitoring wells SPR7030M and M2.<sup>811</sup> These wells are located at the base of the alluvial fan in the area of these vested claims.<sup>812</sup> The water levels in both wells are shown as artesian, indicating that the wells penetrate confining units.<sup>813</sup> Both wells show significant clay layers in the range of 10 to 30 feet and 40 to 60 feet below ground surface.<sup>814</sup> In addition, the deeper of the two wells, SPR 7030M2 has clay layers at 110 to 120 feet, 160 to 190 feet and 220

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<sup>805</sup> Recent vested claims in this area include V10086, V10087. Recent filed claims include the Fera Well. The remaining rights were analyzed as part of the Applicant's conflicts analysis. Exhibit No. CPB\_011, p. 4; Exhibit No. SNWA\_337, Appendix B.

<sup>806</sup> Exhibit No. CPB\_011, p. 27.

<sup>807</sup> Exhibit No. CPB\_011, p. 39.

<sup>808</sup> Exhibit No. CPB\_011, p. 33.

<sup>809</sup> Recently claims V010082, V010083, V010084, V010085, V010078, V010079, V010080, V010081, and three rights identified by the Applicant V02821, V02824, V02825; Exhibit No. CPB\_011, p. 4; Exhibit No. SNWA\_337, p. 6-8.

<sup>810</sup> Exhibit No. CPB\_011, p. 33.

<sup>811</sup> Exhibit No. SNWA\_179.

<sup>812</sup> Exhibit No. SNWA\_149, p. 32.

<sup>813</sup> Exhibit No. SNWA\_179, pp. 9, 18.

<sup>814</sup> Exhibit No. SNWA\_179, pp. 9, 18.

to 230 feet.<sup>815</sup> Similar stratification is also shown in well log 111291 corresponding to CPB Permit 54024 on the Cleveland Ranch. The well log shows clay layers from 115 feet to 140 feet, 215 to 217 feet, 230 to 237 feet, 345 to 360 feet, 365 to 375 feet, and 550 to 575 feet below ground surface.<sup>816</sup> The clay layers in wells SPR7030M and M2 do not exactly line up with the clay layers shown in well log 111291 indicating an absence of lateral continuity between these clay layers on the valley floor-alluvial fan interface. There is also some question about the reach of these clay layers up the alluvial fan toward the mountain block. The Applicant's stratigraphic column for test well SPR7029M2, located about half way up the Cleve Creek alluvial fan, did not encounter any clay layers within the depth of the borehole which was 440 feet of the ground surface.<sup>817</sup> However, the Cleveland Well is also located in the vicinity of SPR7029M2.<sup>818</sup> It is screened from 100 feet to about 600 feet below the ground surface and is a flowing artesian well indicating that the well penetrates a confining unit.<sup>819</sup>

Depending on the lateral continuity of the clay layers and their reach into the alluvial fan, the Applicant's witness, Mr. Prieur, opined that the Applicant could design a pumping regime to avoid impacts to existing rights that derive their source above the clay layers.<sup>820</sup> Dr. Mayo believed that pumping below the clay layers would cause the cone of depression to extend up the alluvial fan beyond the clay layers to the head of the system and intercept younger water destined to reach the springs at the base of the fan.<sup>821</sup>

The CPB has argued that the monitoring and management program will not be effective at protecting existing rights.<sup>822</sup> The Applicant, through numerous arguments and testimony disputes this, insisting that all Applications can be developed without impacting existing rights. Their arguments detailing how confining layers at the toe of the Cleve Creek fan will prevent impacts are not believable. Accordingly, the State Engineer agrees in part with the CPB's position that the monitoring and mitigation plan will be ineffective in protecting their water rights from pumping all 19 applications. The CPB and their expert witnesses and testimony have

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<sup>815</sup> Exhibit No. SNWA\_179, p. 18.

<sup>816</sup> Exhibit No. SNWA\_468.

<sup>817</sup> Exhibit No. SNWA\_180, p. 18.

<sup>818</sup> Exhibit No. CPB\_011, p. 5.

<sup>819</sup> Exhibit No. CPB\_011, p. 15.

<sup>820</sup> Transcript, Vol.8 pp. 1854:10-1856:6 (Prieur).

<sup>821</sup> Transcript, Vol.27 p. 6032:1-23 (Mayo).

<sup>822</sup> Transcript, Vol.29 p. 6438:11-17 (Hejmanowski).

provided substantial evidence that Applications 54016, 54017, 54018 and 54021, on the Cleve Creek alluvial fan and up-gradient of numerous CPB water rights will impact those rights to the extent that mitigation is not possible or practical; therefore, these applications are denied.

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.

**f. EskDale Center**

Protestant EskDale Center represents the interests of the EskDale Community and its associated agricultural activities which are located in western Millard County, Utah, within Snake Valley. EskDale Center participated in the hearing on the Applications and contended that approval of the Applications as part of the Applicant's groundwater Project would conflict with EskDale's water rights in Snake Valley. After 200 years, Dr. Myers' model simulates essentially no impacts to Deep Creek Valley, Tippet Valley, or the EskDale Center.<sup>823</sup> The State Engineer finds that approval of the Applications will not conflict with EskDale's existing water rights in Snake Valley.

**g. Tribal Protestants**

Protestant Confederated Tribes of the Goshute Reservation protested that the Applications would conflict with water rights and/or claims on the Goshute reservation, which lies in Tippet and Deep Creek Valleys, Nevada and Snake Valley, Utah. The State Engineer notes that it appears that the Tribal Protestants are concerned with pumping in Spring Valley and not in any of the other Project basins.<sup>824</sup> The land of the Confederated Tribes of the Goshute Reservation is located in Deep Creek, Tippet, Pleasant, and Snake Valleys.<sup>825</sup> The Duckwater Shoshone Tribe's reservation is located in Duckwater Valley/Railroad Valley in Nye County,

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<sup>823</sup> Transcript, Vol.20 pp. 4415:19-4419:11, Vol.21 p. 4666:7-16 (Myers).

<sup>824</sup> See, Transcript, Vol.25 pp. 5793:19-5794:4 (Marques); Transcript, Vol.25 p. 5778:5-17 (Sanchez).

<sup>825</sup> Exhibit No. SE\_060 (Confederated Tribes of the Goshute Reservation Protest to Application 54003, at 3).

Nevada.<sup>826</sup> The Ely Shoshone Tribe's lands are located near the City of Ely in Steptoe Valley and in White River Valley in White Pine County, Nevada.<sup>827</sup>

The Tribal Protestants also argue that approving the Applications will negatively impact their existing reserved water rights. The State Engineer notes that the Tribes' reserved water rights have not been formally adjudicated. However, the State Engineer finds that in the absence of an adjudication of tribal reserved water rights, he will take a conservative approach and assume that each tribe has reserved water rights on their reservations, and will then determine whether pumping pursuant to the Applications will impact these water rights.

No evidence was presented at the hearing that suggests any unreasonable impacts to the Tribal Protestants' reservation lands or reserved water rights due to pumping pursuant to the Applications. On cross-examination, the Tribal Protestants' own witness, Dr. Myers, indicated that there are essentially no predicted impacts to the Tribal Protestants' reservation lands.<sup>828</sup> Dr. Myers' model results show essentially no drawdown in central Tippet Valley and Deep Creek Valley for over 100 years of simulated pumping. The results show only minimal drawdown in Deep Creek Valley, even after 10,000 years of pumping.<sup>829</sup> No evidence was presented showing drawdown near the City of Ely or Railroad Valley.<sup>830</sup> Therefore, no evidence was presented to support the Tribal Protestants' allegation of impacts to their claimed reserved water rights.

The Tribal Protestants also suggest that where potential impacts are uncertain to their interests, they should not bear the risk that any future impacts occur.<sup>831</sup> However, the State Engineer is unable to deny a water right application in the absence of credible evidence of impacts due to the remote possibility of impacts. The State Engineer finds that no credible evidence was presented of conflicts with reserved water rights of the Tribal Protestants and thus the Applications will not be denied on this ground.

The Tribal Protestants assert many arguments against the Applications under the broad category of threats to the public interest citing to other "existing rights." They argue that the

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<sup>826</sup> Exhibit No. SE\_060 (Duckwater Shoshone Tribe Protest to Application 54003, pp. 1-2).

<sup>827</sup> Exhibit No. SE\_060 (Ely Shoshone Tribe Protest to Application 54003, p. 3).

<sup>828</sup> Transcript, Vol.26 pp. 5957:8-5958:7 (Myers).

<sup>829</sup> Exhibit No. CTGR\_014, p. 3.

<sup>830</sup> See, Transcript, Vol.25 pp. 5813:23-5814:3 (Chairman Alvin Marques, testifying that the fear that the proposed pumping will affect the water supply for the City of Ely and therefore his tribe is not based on hydrologic data); Transcript, Vol.25 p. 5784:1-5 (Chairwoman Virginia Sanchez, testifying that she is aware of no model showing impacts to Railroad Valley due to the proposed pumping).

<sup>831</sup> Closing Argument of the Confederated Tribes of the Goshute Reservation, p. 3.

proposed pumping will negatively affect their hunting, gathering, and cultural traditions in Spring Valley, will cause harmful impacts to Native American ritual worship and sacred sites, prehistoric Native American village or dwelling sites, graves or burial sites, and scenes of historic massacres of Tribal ancestry. They assert that the use of water under the Applications would violate federal and state laws that protect cultural, religious and historic resources, including but not limited to: The National Historic Preservation Act, American Indian Religious Freedom Act of 1978, Religious Freedom Restoration Act, Native American Graves Protection and Repatriation Act of 1990, Executive Order 13007, and the Treaty of 1863 in Ruby Valley. They also argue that the Applications should be denied because the use of the water would violate the federal government's trust responsibility to affected Indian tribes, that the federal government did not properly consult with them or consider their interests during the federal environmental review of the proposed Project and the execution of the Stipulations with the Applicant. Finally, their protests assert that the use of the water would unduly injure the Indian Tribes' sovereignty and ability to regulate their territory.

The Tribal Protestants argue the State Engineer should protect claimed treaty rights, i.e., aboriginal hunting and gathering rights and ceremonial use and historic value of natural resources as part of the public interest analysis.<sup>832</sup> Though the Tribal Protestants' current reservation lands are not located in Spring Valley,<sup>833</sup> the Tribal Protestants presented evidence regarding past and present use of natural resources in Spring Valley and suggest that tribal treaty rights protect these uses.<sup>834</sup>

While the Tribes presented testimony that springs and water sources are important sacred sites, they did not present evidence showing that these springs are connected to the regional groundwater system. In the absence of evidence showing that these springs are connected to the regional system and that they would be affected by pumping under the Applications, the State Engineer is unable to conclude that approving the Applications would harm these cultural resources. The State Engineer finds that the simple "risk" of a lower water table affecting springs or wells hundreds of years in the future is not substantial evidence of a conflict.

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<sup>832</sup> See, e.g., Transcript, Vol.1 48:13-20 (Echohawk) (discussing the importance of elk hunting to the Tribes).

<sup>833</sup> See, Duckwater/Ely Joint Closing Statement, p. 4 (Dec. 23, 2011).

<sup>834</sup> See, Exhibit No. CTGR\_001; Exhibit No. CTGR\_005.

#### **4. Myers' Spring and Snake Valley Model**

Dr. Myers developed a groundwater model of the Spring and Snake Valleys to predict future conditions in the valleys due to pumping.<sup>835</sup> Dr. Myers developed his model using the MODFLOW-2000 modeling code with additional packages.<sup>836</sup>

There was considerable discussion and evidence presented by all parties regarding the construction, errors, capabilities and accuracy of both the Applicant's and Dr. Myers' models. After considering the models, the evidence and the testimony, the State Engineer finds that the Applicant's model generally provides a more reliable basis to predict regional-scale impacts resulting from the Applicant's proposed pumping. The Applicant's model relies on better data and techniques, was developed through a more rigorous collaborative process with the BLM and recognized modeling experts, and is accompanied by more thorough documentation. Dr. Myers' Spring and Snake Valley model did not have the same benefit of a time-intensive collaborative process and a diversity of expert input. The State Engineer, however, finds that it is beneficial to examine the results of both models, as long as they are viewed in the context of their limitations and uncertainties. In addition, the State Engineer is encouraged that the two models, constructed by opposing parties and with opposing perspectives, are similar in many areas, at least when viewed at the regional level.<sup>837</sup> Thus, the State Engineer will use both models' Spring Valley pumping simulations for the purpose of this ruling, but the Applicant's model will be given more weight.

In addition to determining the relative predictive reliability of the numerical groundwater models presented, the State Engineer must determine the appropriate use of the models. The Applicant's model and Dr. Myers' Spring and Snake Valley model, like all models, contain uncertainty in their representations of the groundwater system and their predictions of effects of pumping into the future.<sup>838</sup> The uncertainty largely arises from the coarseness of the models and the lack of pumping stress data at a similar magnitude as the proposed pumping to calibrate the model.<sup>839</sup> Though Dr. Myers characterizes his Spring and Snake Valley model and the Applicant's model as "intermediate" rather than "regional," he admits that they were not

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<sup>835</sup> Exhibit No. GBWN\_002, p. 1.

<sup>836</sup> Exhibit No. GBWN\_002, p. 2.

<sup>837</sup> Transcript, Vol.18 pp. 4111:23-4112:12, Vol.19 p. 4260:147-12, Vol.21 pp. 4668:13-4669:5 (Myers).

<sup>838</sup> See, Transcript, Vol.17 p. 3882:19-21; Vol.21 p. 4639:7-15 (Myers).

<sup>839</sup> Exhibit No. GBWN\_002, p. 1, p. 42; Transcript, Vol.20 p. 4479:8-12 (Myers).

designed for detailed, local-scale predictions.<sup>840</sup> Dr. D'Agnese notes that the reliability of predictions depends on the specific prediction because certain areas have more data and are better represented than others.<sup>841</sup> Furthermore, he testified that the models fail to account for management decisions to reduce or move pumping over the life of the project. Instead, they simulate full pumping of all the Applications 24 hours a day, 365 days a year.<sup>842</sup>

The State Engineer agrees the reliability of model predictions decreases the further out into the future they are made, especially when the period of future simulations exceeds the period of available pumping data.<sup>843</sup> A general rule of thumb is that one can use a model to make predictions with confidence for a period into the future equal to the period of data available to calibrate the model. For example, if one has ten years of data to build the model, it can generally be used to predict ten years into the future.<sup>844</sup> This is known as history matching. Dr. Bredehoeft testified that predictions that go out a thousand years are beyond the possibility of history matching.<sup>845</sup> Long-term model projections are subject to the greatest error.<sup>846</sup>

The Applicant suggests that the model should be used to simulate up to 75 years of pumping. The Applicant argues that 75 years is the expected lifetime of the equipment and infrastructure for the proposed Project and that predictions beyond 75 years are made at a reduced confidence level.<sup>847</sup> The State Engineer agrees that 75 years is a reasonable simulation period, but not due to expected lifetime of the equipment and infrastructure, which can be replaced, rather it is an appropriate length of time given the existing data.

Dr. Myers admits that predictions become more uncertain for periods beyond 75 years and that the predictions are less certain for a 200-year period than for a 75-year period.<sup>848</sup> Dr. Myers, however, does not believe that the Project will only last 75 years and, in any regard, suggests that even though the model predictions are uncertain, they provide the only tool

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<sup>840</sup> Transcript, Vol.20 p. 4418:12-21, p. 4459:12-18 (Myers).

<sup>841</sup> Transcript, Vol.9 p. 1975:1-19 (D'Agnese).

<sup>842</sup> See, Transcript, Vol.18 pp. 4105:15-4106:3, Vol.20 p. 4391:3-12, p. 4476:12-24 (Myers).

<sup>843</sup> Transcript, Vol.20 pp. 4471:13-4472:19, Vol.21 p. 4645:6-11 (Myers); Transcript, Vol.24 p. 5421:8-14 (Bredehoeft); see also, Exhibit No. GBWN\_012, p. 1.

<sup>844</sup> See, Transcript, Vol.24 p. 5422:21-25 (Bredehoeft).

<sup>845</sup> Transcript, Vol.24 p. 5423:20-23 (Bredehoeft).

<sup>846</sup> Transcript, Vol.24 pp. 5423:24-5424:1 (Bredehoeft).

<sup>847</sup> Exhibit No. SNWA\_337, p. 4-4.

<sup>848</sup> Transcript, Vol.17 p. 3780:3-5, Vol.20 pp. 4488:25-4489:3 (Myers).



available to examine trends far into the future.<sup>849</sup> As stated above, because of the uncertainty and regional nature of the models, the Applicant also suggests that predicted drawdowns of less than 50 feet and predicted reductions in spring flow of less than 15% should not be considered.<sup>850</sup> Dr. Myers suggests that the State Engineer examine drawdowns of one foot. However, he admits that such predictions are imprecise.<sup>851</sup> Dr. Myers notes that even a 12-foot drawdown may result in springs going dry.<sup>852</sup> He states that even though drawdowns of less than ten feet, or even 20 feet, are within the scope of seasonable variability, they should be considered as superimposed on the existing seasonal variability.<sup>853</sup> However, he also admitted that it may be proper not to consider drawdowns of less than ten feet.<sup>854</sup>

The State Engineer finds Dr. Myers' model is useful for approximating the effects of pumping at a basin scale for periods up to 100 years, but that longer time periods are less certain.

Dr. Myers presents his results relative to the simulated steady state of his model. Dr. Myers presented drawdown contours, spring flow hydrographs, and aggregate change in discharge and storage data. He did not, however, analyze the simulated effects of pumping on specific existing water rights.

In general, if groundwater is developed such that the amount pumped does not exceed perennial yield, a new equilibrium will be reached.<sup>855</sup> Dr. Myers simulated recharge and discharge in Spring Valley such that the Applicant's proposed pumping exceeds recharge by 27% and discharge by 20%.<sup>856</sup>

When examining the model simulations for a 75-year pumping period and looking at 50-foot drawdown contours, Dr. Myers' model simulation generally shows similar impacts as the Applicant's simulations.<sup>857</sup> After 75 years of simulated pumping at the full application amounts, Dr. Myers' model simulates a 50-foot drawdown area in central Spring Valley of about 10 by 15 miles in Layer 2.<sup>858</sup>

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<sup>849</sup> Transcript, Vol.18 p. 4107:12-16; Vol.20 pp. 4418:22-4419:2 (Myers).

<sup>850</sup> Exhibit No. SNWA\_337, p. 6-1.

<sup>851</sup> Transcript, Vol.18 p. 4107:12-16, Vol.20 pp. 4418:22-4419:2 (Myers).

<sup>852</sup> Transcript, Vol.19 p. 4237:11-21 (Myers).

<sup>853</sup> Transcript, Vol.21 p. 4634:5-8 (Myers).

<sup>854</sup> Transcript, Vol.20 pp. 4477:2-4478:8 (Myers).

<sup>855</sup> Transcript, Vol.21 pp. 4596:4-4597:15 (Myers).

<sup>856</sup> Exhibit No. GBWN\_003, p. 4.

<sup>857</sup> Transcript, Vol.18 pp. 4111:23-4112:12, Vol.19 p. 4260:9-14 (Myers).

<sup>858</sup> Exhibit No. GBWN\_003, p. 8.

Dr. Myers also presents drawdown contours for 1-foot, 5-foot, 10-foot, and 20-foot drawdowns. Mr. Watrus and Ms. Drici argue that 1-foot contours are of no value due to their uncertainty.<sup>859</sup> Dr. Myers admits that there is imprecision in 1-foot drawdowns, as well as all drawdown contours.<sup>860</sup> He admits that anything within ten feet is within seasonable variability and measurement accuracy.<sup>861</sup> However, he argues that the predicted drawdowns are superimposed on the seasonable variability and measurement accuracy and should still be considered. He argues that even a lowering of one foot could dry up a spring, but does not provide evidence as to what springs would be impacted in such a way.<sup>862</sup> The State Engineer agrees that a drawdown of just a few feet could dry up a spring; however, he also understands that the available models do not have that level of accuracy.

Dr. Myers also provides simulated impacts for pumping periods beyond 75 years. The Applicant limited simulations to 75 years of pumping because that is the expected life of the equipment and infrastructure and because predictions become increasingly uncertain the further into the future they are made. The Applicant argues little is gained by examining pumping simulations of greater than 75 years and simulations beyond 75 years become more uncertain. After 200 years of simulated pumping at the full application amounts, Dr. Myers' model simulates a 50-foot drawdown area in central Spring Valley of about 15 by 15 miles and a smaller 50-foot drawdown area in southern Spring Valley in Layer 2.<sup>863</sup> Even looking at Dr. Myers' 10-foot drawdown, simulated impacts are contained within Spring Valley and the western edge of Hamlin Valley.<sup>864</sup>

Dr. Myers testified that a small amount, approximately 3,000 afa, of water is induced to flow into Spring Valley from Steptoe Valley after 200 years of simulated pumping.<sup>865</sup> After 200 years, Dr. Myers' model simulates essentially no impacts to Deep Creek Valley, Tippet Valley, or the EskDale Center.<sup>866</sup> Though such predictions are highly uncertain, it is worth noting that even after 200 years of simulated pumping, South Spring Valley Springs and Big Springs

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<sup>859</sup> Exhibit No. SNWA\_407, p. 3.

<sup>860</sup> Transcript, Vol.18 p. 4107:11-16 (Myers).

<sup>861</sup> Transcript, Vol.20 pp. 4477:2-4478:8 (Myers).

<sup>862</sup> Exhibit No. GBWN\_003, p. 7; Transcript, Vol.19 p. 4237:11-21 (Myers).

<sup>863</sup> Exhibit No. GBWN\_003, p. 8.

<sup>864</sup> Exhibit No. GBWN\_003, p. 10.

<sup>865</sup> Transcript, Vol.18 p. 4119:5-10 (Myers).

<sup>866</sup> Transcript, Vol.20 pp. 4415:19-4419:11, Vol.21 p. 4666:7-16 (Myers).

continue to flow in Dr. Myers' simulation.<sup>867</sup> Simulated flow at South Spring Valley Springs has reduced to about 2,000 afa from about 15,000 afa after 200 years.<sup>868</sup> This impact is likely exaggerated due to Dr. Myers' use of a low-conductivity groundwater divide in Spring Valley.<sup>869</sup>

Dr. Myers' model simulates flow at Big Springs decreasing from about 1,500 afa to about 1,100 afa after 200 years.<sup>870</sup> However, Dr. Myers' simulated flow at Big Springs is not accurate. Recent observed flow at Big Springs has ranged from about 9.5 to 10.5 cubic feet per second,<sup>871</sup> or to about 6,900 to 7,600 afa. Dr. Myers used a target discharge rate for Big Springs of 443,000 cubic feet per day or about 3,700 afa.<sup>872</sup> Dr. Myers' pre-development target is thus about half of the actual observed flow at Big Springs post-development. Moreover, Dr. Myers' model simulated initial discharge at Big Springs as less than half his target discharge rate - about 1,500 afa.<sup>873</sup> Dr. Myers' simulated reduction in flow is about 25% after 200 years.<sup>874</sup> The impact to Big Springs may be exaggerated due to Dr. Myers use of a high-conductivity corridor from Steptoe and Lake Valleys, through southern Spring Valley, and into Hamlin and southern Snake Valley, as discussed above.<sup>875</sup> Dr. Myers' model predictions for flow reductions as a percentage of initial flow for Big Springs are consistent with those of the Applicant's model, and add confidence that the models have similar results in this area.

Even after 1,625 years of simulated pumping, the 50-foot drawdown contour of Dr. Myers' model is essentially contained in Spring and Hamlin Valleys.<sup>876</sup> After 10,200 years of pumping, Dr. Myers' model is close to a new equilibrium. It simulates 1,310 afa being pumped from storage, or about 1.4% of the pumping amount. Even after long-term pumping simulations, Dr. Myers testified that there are essentially no predicted impacts to the reservation of the Confederated Tribes of the Goshute Reservation.<sup>877</sup>

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<sup>867</sup> Exhibit No. GBWN\_003, p. 15.

<sup>868</sup> Exhibit No. GBWN\_003, p. 23.

<sup>869</sup> See, Transcript, Vol.20 pp. 4343:24-4344:11 (Myers).

<sup>870</sup> Exhibit No. GBWN\_003, p. 24; Transcript, Vol.20 pp. 4384:24-4385:8 (Myers).

<sup>871</sup> Transcript, Vol.20 pp. 4376:16-4379:21 (Myers).

<sup>872</sup> Exhibit No. GBWN\_002, p. 38.

<sup>873</sup> Exhibit No. GBWN\_002, p. 38; Transcript, Vol.20 pp. 4380:18-4382:19 (Myers).

<sup>874</sup> Transcript, Vol.20 pp. 4387:9-4389:17 (Myers).

<sup>875</sup> Exhibit No. SNWA\_407, p. 6.

<sup>876</sup> Exhibit No. GBWN\_003, pp. 25-26.

<sup>877</sup> Transcript, Vol.26 pp. 5957:7-5958:6 (Myers).

Dr. Myers also simulated pumping at 60,000 and 30,000 afa in his Spring and Snake Valley model by reducing the rate of each well proportionately.<sup>878</sup> Reducing the pumping rates decreases the drawdown extent of the 5-foot contour in north Spring Valley by about 2 to 5 miles and significantly reduces the extent of drawdown in the southern part of Spring Valley. The 50-foot drawdown contour is decreased more substantially.<sup>879</sup> The lower pumping rates approach equilibrium faster and remove less water from storage.<sup>880</sup> The lower rates reduce simulated discharge at springs more slowly.<sup>881</sup>

In addition, Dr. Myers provided many simulations of pumping at alternative points of diversion.<sup>882</sup> 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 to the analysis of whether the proposed pumping unreasonably conflicts with existing rights for this hearing.

Dr. Myers also presents simulations of recovery after pumping ceases. Dr. Myers' model simulates that full recovery does not occur within 600 years. However, drawdowns of 50 feet and greater are greatly reduced after 230 years of recovery and essentially eliminated after 600 years of recovery.<sup>883</sup> After about 230 years of recovery, Millick and Cleve Creek Springs begin to flow again in Dr. Myers' model. After 600 years of recovery, spring discharge in Spring Valley has mostly recovered.<sup>884</sup> However, Dr. Myers' simulation essentially shows that recovery is possible, though it may take longer than the period of pumping.

Dr. Myers's model simulates that Big Springs discharge reaches its minimum about 150 years after pumping ceases and the basin is allowed to recover.<sup>885</sup> Recovery then occurs slowly

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<sup>878</sup> Exhibit No. GBWN\_003, p. 7.

<sup>879</sup> Exhibit No. GBWN\_003, pp. 16-19.

<sup>880</sup> Exhibit No. GBWN\_003, p. 20.

<sup>881</sup> Exhibit No. GBWN\_003, pp. 21-22.

<sup>882</sup> See, Exhibit No. GBWN\_105; Exhibit No. CTGR\_014.

<sup>883</sup> Exhibit No. GBWN\_003, pp. 11-14.

<sup>884</sup> Exhibit No. GBWN\_003, p. 15.

<sup>885</sup> Exhibit No. GBWN\_003, p. 14.

in his model, with the rate still being less than 85% of the steady state rate 600 years after pumping ceases.<sup>886</sup>

In sum, Dr. Myers' simulations do not alter the State Engineer's analysis of impacts. The impacts simulated by Dr. Myers are uncertain given the amount of simulated drawdown or reduction in flow spread over hundreds or thousands of years. The State Engineer finds Dr. Myers' model is useful for analyzing effects of pumping, but that predictions of effects after hundreds of years will carry little weight. After considering both the Applicant's and Dr. Myers' models, the State Engineer finds that the Applicant's model is more comprehensive, better documented and peer reviewed, and will carry more weight in impacts analyses.

#### 5. Addressing Uncertainty

In order to ensure that existing rights are not impacted, additional information is necessary.<sup>887</sup> Staged development, in conjunction with an updated and more comprehensive Management Plan is also 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. However, a significant amount of initial pumping is required to discern pumping effects and provide reliable transient state data and information to calibrate a groundwater model for local-scale applications. To achieve this purpose, the State Engineer will require a staged development plan for the Applications granted in this ruling.

Water rights shall be developed in a staged progression, with a minimum of eight years for each stage. Pumping at any time may be adjusted by the State Engineer based on observed or predicted effects from prior stage pumping. 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.

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<sup>886</sup> Exhibit No. GBWN\_003, p. 24.

<sup>887</sup> NRS 533.3705.

## **VI. PUBLIC INTEREST**

Nevada Revised Statute 533.370 provides that the State Engineer must reject an application if the proposed use "threatens to prove detrimental to the public interest." There is no specific statutory definition of the public interest considerations and not all the same considerations are applicable to all the various types of applications that come before the State Engineer. The criterion must be addressed on a case-by-case basis.

In State Engineer's Ruling No. 5726, which is the first ruling issued on these applications in Spring Valley, the State Engineer reviewed the case law and the history of how State Engineers have interpreted this statutory provision. In this ruling, the State Engineer further refines that analysis for the applications under consideration here and provides specific criteria that will be considered in this case under this statutory provision. The State Engineer notes that other statutory criteria, such as the provisions of NRS 533.370(3), which addresses interbasin transfers of groundwater, also address what the State Engineer considers to be public interest issues. For example, whether the proposed action is environmentally sound as it relates to the basin from which the water is exported. However, in the State Engineer's analysis in this section of the ruling, the focus will be the public interest criteria that are not found within specific provisions of the law that must be, and are, considered elsewhere in this ruling.

### **A. Analysis of Judicial Interpretations**

Only one Nevada Supreme Court case addresses this statutory criterion. In what is commonly known as the Honey Lake case, the State Engineer issued a ruling on pending water right applications, and on appeal the district court concluded that the State Engineer had not specifically determined whether the applications were detrimental to the public interest and remanded the matter to the State Engineer to further consider that statutory criterion. Upon remand, the State Engineer identified 13 policy considerations contained in Nevada water statutes to help define the public interest in that case. The State Engineer further found that the Nevada Legislature has provided substantial guidance as to what it determines to be in the public interest and indicated that, in his review of Nevada water law, an additional 13 other principles (for a total of 26) should also serve as guidelines in the determination of what constitutes "the public interest" within the meaning of NRS 533.370. On further appeal, the Nevada Supreme Court specifically addressed whether the State Engineer had properly defined the meaning of the "public interest" and found that he had done so in

that case.<sup>888</sup> The State Engineer found in the Honey Lake case while it was in the public interest to facilitate the augmentation of the water supplies of the Reno-Sparks and North Valleys areas because of their declining water tables, it could only be done **so long as the other public interest values were not compromised or could be mitigated**. The State Engineer notes that Nevada's water law has not remained static since the 1996 Nevada Supreme Court decision; therefore, he must analyze this criterion in light of the water law as of 2012.

On appeal in the Honey Lake case, the Appellants contended that the State Engineer's failure to include economic considerations, such as whether the proposal was economically feasible or an analysis of alternatives, in the public interest guidelines was a dereliction of duty. The Appellants referenced the statutes of other states to indicate the types of issues they believed should be encompassed in the analysis of whether the use of the water as proposed would threaten to prove detrimental to the public interest. However, the Nevada Supreme Court held that it could find no indication that Nevada's Legislature intended the State Engineer determine public policy in Nevada by incorporating another state's statutes and vesting the State Engineer with the authority to re-evaluate the political and economic decisions made by local government. The Court held that the Nevada Legislature, presumably aware of the broad definition of the public interest enacted by other states (particularly Alaska and Nebraska), demonstrated through its silence that Nevada's water law statutes should remain as they have been and found that the State Engineer had properly defined the public interest in that case.

Only two other courts have specifically considered the meaning of Nevada's public interest criterion. The first case addressed State Engineer's Ruling No. 4848, pursuant to which the State Engineer was considering water right applications for the use of water at a nuclear waste storage facility. In the ruling, the State Engineer found that the Nevada Legislature had determined the public interest through its determination of policy in the enactment of NRS 459.910, which provides that it is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada. The State Engineer held pursuant to that statutory provision that the Nevada Legislature had already determined that the use of water applied for threatened to prove detrimental to the public interest and denied the applications. The Federal District Court for the District of Nevada overturned the State Engineer's decision focusing its reasoning

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<sup>888</sup> *Pyramid Lake Patute Tribe of Indians v. Washoe County*, 112 Nev. 743, 918 P.2d 697 (1996).

on the grounds that NRS 459.910 is not a Nevada water law statute, either substantive or procedural.<sup>889</sup>

The second opinion addressing the criterion was from the Ninth Circuit Court of Appeals in *United States v. Alpine Land & Reservoir Co. (County of Churchill v. Ricci)*, 341 F.3d 1172 (9th Cir. 2003). In that case, the United States Fish and Wildlife Service (Service) had filed eight applications to transfer 2,855 acre-feet of water from irrigation use to the Stillwater National Wildlife Refuge to maintain wetland habitat. The transfers were in furtherance of a water-right acquisition program that instructed the Service to acquire 75,000 acre-feet of water to fulfill the congressional directive set forth in Section 206(a) of Public Law 101-618, 104 Stat. 3289. Churchill County and the City of Fallon had protested the applications on the grounds that the State Engineer should study the cumulative effect on the public interest of the entire acquisition program and not just the eight applications that were currently before him for decision. The Ninth Circuit Court of Appeals held that the State Engineer has broad discretion under Nevada law to determine whether the use of water as proposed under an application will threaten to prove detrimental to the public interest. The Court noted that the Nevada Legislature has not provided an explicit definition of what constitutes a threat to the public interest under NRS 533.370, but held that the State Engineer's authority is limited to considerations identified in Nevada's water policy statutes.

In the Honey Lake decision, the State Engineer identified the following thirteen policy considerations contained in Nevada water statutes (NRS Chapters 532, 533, 534 and 540) to help define the criterion, those being:

1. The water of all sources above or beneath the ground belongs to the public. NRS 533.025.
2. Subject to existing rights, all such water may be appropriated for beneficial use as provided in this chapter and not otherwise. NRS 533.030(1).
3. The beneficial use of water is declared a public use. NRS 533.050.
4. The Legislature has determined that it is the policy of the State of Nevada to continue to recognize the critical nature of the State's limited water resources. It is acknowledged that many of the State's surface water resources are committed to existing uses, under existing water rights, and that in many areas of the State the available groundwater supplies have been appropriated for current uses. It is the policy

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<sup>889</sup> See, *United States v. Nevada*, CV-S-00-268-RLH (LRL) (D. Nev. 2003).



of the State of Nevada to recognize and provide for the protection of existing water rights. It is also the policy of the State to encourage efficient and non-wasteful use of the State's limited supplies of water resources. NRS 540.011(1).

5. The Legislature further recognizes the relationship between the critical nature of the State's limited water resources and the increasing demands placed on these resources as the population of the State continues to grow. NRS 540.011(2).
6. The Legislature recognizes the use of water for wildlife including the establishment and maintenance of wetlands and fisheries. NRS 533.023.
7. Springs on which wildlife customarily subsist must be protected. NRS 533.367.
8. The Legislature encourages the use of effluent where such use is not contrary to public health, safety or welfare. NRS 533.024.
9. Water for recreational purposes from either underground or surface sources is declared to be a beneficial use. NRS 533.030(2).
10. Livestock watering is declared to be a beneficial use. NRS 533.490(1).
11. Springs and streams on which livestock subsist must be protected. NRS 533.495.
12. The law addresses not allowing the waste of water and allowing rotation among users. NRS 533.075 and NRS 533.463.
13. The law prohibits the pollution and contamination of underground water and directs the State Engineer to promulgate rules to prevent such. NRS 534.020(2).

Additionally, the State Engineer found that the Nevada Legislature had also provided substantial guidance as to what it determines to be in the public interest and, that in his review of Nevada water law, the additional following principles should also serve as guidelines in the determination of what constitutes "the public interest" within the meaning of NRS 533.370.

1. An appropriation must be for a beneficial use. NRS 533.030(1).
2. The applicant must demonstrate the amount, source and purpose of the appropriation. NRS 533.335.
3. If the appropriation is for a municipal supply, the applicant must demonstrate the approximate number of persons to be served and the approximate future requirements. NRS 533.340(3).
4. The right to divert ceases when the necessity for the use of water does not exist. NRS 533.045.

5. The applicant must demonstrate the magnitude of the use of water, such as the number of acres irrigated, the use to which generated hydroelectric power will be applied, or the number of animals to be watered. NRS 533.340.
6. In considering extensions of time to apply water to beneficial use, the State Engineer must determine the number of parcels and commercial or residential units which are contained or planned in the area to be developed, economic conditions which affect the availability of the developer to complete application of the water to beneficial use, and the period contemplated for completion in a development project approved by local governments or in a planned unit development. NRS 533.380(4).
7. For large appropriations, the State Engineer must consider whether the applicant has the financial capability to develop the water and place it to beneficial use. NRS 533.375.
8. The State Engineer may cooperate with federal authorities in monitoring the development and use of the water resources of the State. NRS 532.170(1).
9. The State Engineer may cooperate with California authorities in monitoring the future needs and uses of water in the Lake Tahoe area and to study ways of developing water supplies so that the development of the area will not be impeded. NRS 532.180.
10. Rotation in use is authorized to bring about a more economical use of supplies. NRS 533.075.
11. The State Engineer may determine whether there is over pumping of groundwater and refuse to issue permits if there is no unappropriated water available. NRS 534.110(3).
12. The State Engineer may determine what is a reasonable lowering of the static water level in an area after taking into account the economics of pumping water for the general type of crops growing and the effect of water use on the general economy of the area in general. NRS 534.110(4).
13. Within an area that has been designated, the State Engineer may monitor and regulate water supply. NRS 534.110(6).

**B. Standards Used in this Case for Analysis of Whether the Use of the Water Threatens to Prove Detrimental to the Public Interest**

The State Engineer recognizes that many of the public interest criteria that are identified above are considerations addressed in other sections of this ruling and those will not be reconsidered here. After review of the current water law, along with those criteria identified above, additional public interest criteria were identified that will be analyzed in this case to determine whether the use of the water threatens to prove detrimental to the public interest. They are as follows:

1. The water of all sources above or beneath the ground belongs to the public. NRS 533.025.

2. Subject to existing rights, all such water may be appropriated for beneficial use as provided in Chapters 533 and 534 and not otherwise. NRS 533.030(1), 534.020(1).
3. The beneficial use of water is declared a public use. NRS 533.050.
4. The Legislature has determined that it is the policy of the State of Nevada to continue to recognize the critical nature of the State's limited water resources. It is acknowledged that many of the State's surface water resources are committed to existing uses, under existing water rights, and that in many areas of the State the available groundwater supplies have been appropriated for current uses. It is the policy of the State to recognize and provide for the protection of existing water rights. It is also the policy of the State to encourage efficient and non-wasteful use of the State's limited supplies of water resources. NRS 540.011(1).
5. The Legislature further recognizes the relationship between the critical nature of the State's limited water resources and the increasing demands placed on these resources as the population of the State continues to grow. NRS 540.011(2).
6. The Legislature further recognizes the important role of water resource planning and that such planning must be based upon identifying current and future needs for water. The Legislature determines that the purpose of the State's water resource planning is to assist the State, its local governments and its citizens in developing effective plans for the use of water. NRS 540.011(4).
7. The Legislature recognizes the use of water for wildlife including the establishment and maintenance of wetlands and fisheries. NRS 533.023.
8. Springs on which wildlife customarily subsist must be protected. NRS 533.367.
9. Springs and streams on which livestock subsist must be protected. NRS 533.495.
10. It is the policy of this State to recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply of water from unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which cannot reasonably be mitigated. NRS 533.024(1)(b).
11. It is the policy of this State to encourage the State Engineer to consider the best available science in rendering decisions concerning the available surface and underground sources of water in Nevada. NRS 533.024(1)(c).
12. It is the policy of the State to recognize and provide for the protection of existing water rights. NRS 540.011(1).
13. It is the policy of the State to encourage suppliers of water to establish prices for the use of water that maximize water conservation with due consideration to the essential service needs of customers and the economic burdens on businesses, public services and low-income households. NRS 540.011(1).

14. The State Engineer may cooperate with federal authorities in monitoring the development and use of the water resources of the State. NRS 533.165.
15. 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 Chapters 533 and 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. NRS 533.3705.

**C. Analysis of Public Interest Criteria in this Case**

**1. Water of All Sources Belongs to the Public and May Be Appropriated for Beneficial Use**

Some Protestants assert that they feel it is their duty to protest any extraction and exportation of water from their county, while others feel that Clark County should grow within the limits of its natural resources or that Clark County should solve its problems there and not steal the good things Nevada offers. Others assert that the State of Nevada should consider public-policy issues concerning dispersal of population or that the proposed action is not an appropriate long-term use of Nevada's water. Some Protestants want the State Engineer to determine that Las Vegas' population is "big enough" and that further growth is not in the best interest of the Las Vegas community. Other Protestants indicate that the State Engineer has a responsibility to all the people of Nevada and must consider all the adverse effects the granting of these applications will have on all areas of the State. Some assert that the Applicant should pursue alternatives such as desalination and Colorado River management alternatives before the State Engineer should consider granting these applications. Others indicate that the Applicant has more feasible and cost-effective options.

The State Engineer finds that the water sought for appropriation belongs to the public, which includes all Nevada's citizens and the water does not belong to any one basin or county. The State Engineer finds that a policy behind Nevada water law is that, subject to existing rights, the water may be appropriated for beneficial use as provided in Nevada water law. The State Engineer finds use of water applied for under these Applications is for the beneficial public use of water. The State Engineer finds the Nevada Supreme Court has held that it is not the State Engineer's job to re-evaluate the political and economic decisions made by local government and there is nothing in

Nevada water law instructing the State Engineer to control or distribute population or perform an alternatives analysis. The State Engineer finds the water belongs to the people and the entities that provide water for Southern Nevada have as much right to apply for it as those who live in Northern Nevada. The State Engineer finds his job is to evaluate water right applications before him within the confines of the water law and water policy found in the Nevada Revised Statutes. The State Engineer finds the section of this ruling that addresses beneficial use and need further and more fully addresses this provision that the use of the water does not threaten to prove detrimental to the public interest.

**2. Protection of Existing Rights, Limited Supply, Increasing Demands, Encourage Efficient Use**

It is the policy of the State of Nevada to recognize and provide for the protection of existing water rights. It is also the policy of the State to encourage efficient and non-wasteful use of the State's limited supplies of water resources. The Legislature has recognized the relationship between the critical nature of the State's limited water resources and the increasing demands placed on these resources as the population of the State continues to grow. The State Engineer finds the Legislature has recognized that the population of the State has grown or will grow and directs the State Engineer to consider encouraging efficient and non-wasteful use of the water resources. These policies instruct the State Engineer in developing the State's water resources for all. The State Engineer finds this is what is being done in this ruling.

The Applicant presented evidence of the economic value of the Project to the State of Nevada and Protestants presented evidence of potential economic harms to Lincoln and White Pine Counties if the Applications are granted. The State Engineer finds there is nothing in Nevada water law that instructs the State Engineer to value one part of Nevada as greater than another part of Nevada and does not believe it should be the State Engineer's job to choose one part of the state over another. The State Engineer's consideration of public interest is limited by the considerations found in Nevada's water law and water policy statutes.

**3. Important Role of Water Planning**

The Legislature has recognized the important role of water resource planning and that such planning must be based upon identifying current and future needs for water. The Applicant presented testimony and evidence through Ms. Brothers, Mr. Enstminger and Mr. Holmes

regarding its water planning that identifies its current and future needs for water.<sup>890</sup> The section of this ruling that addresses Beneficial Use and the Need for the Water provides substantial evidence of SNWA's water resource planning and demonstrates that this portion of the public interest analysis has been met.

4. **Protection of Springs for Wildlife and Livestock; Protection of Domestic Wells**

The Legislature recognizes the use of water for wildlife, including the establishment and maintenance of wetlands and fisheries and the springs on which wildlife customarily subsist, must be protected. Springs and streams on which livestock subsist must be protected and it is the policy of this State to recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply of water from unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which cannot reasonably be mitigated.

The State Engineer finds the Nevada Legislature has established a public interest policy that emphasizes the protection of existing resources and water rights, but it also established a public interest policy that directs the State Engineer to recognize the relationship between the limited nature of the State's water resources, the increasing demands being placed on those resources as Nevada has grown and to encourage the efficient and non-wasteful use of those limited resources. 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.

5. **Government to Government Relations - Tribal Protestants**

In addition, the Tribal Protestants argue that the State Engineer should deny the Applications because the BLM and other Federal agencies have not complied with federal law and because the U.S. Bureau of Indian Affairs has violated its trust responsibility to the Tribal Protestants. The Tribes argue that the BLM has not complied with the government-to-government consultation process during the federal permitting process for the Project. The Tribal Protestants argue that they have cultural interests in the Project area, and that the BLM has

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<sup>890</sup> Exhibit No. SNWA\_189; Exhibit No. SNWA\_209.

not complied with the consultation process that protects those interests during the federal permitting process for the Project.

Federal permitting processes protect tribal cultural interests that relate to Spring Valley and adjacent basins. Through a programmatic agreement being promulgated in accordance with the National Historic Preservation Act,<sup>891</sup> the Tribes have been invited to participate, to both help identify and assess impacts to historic properties in Spring Valley and adjacent basins, and to participate in the preservation of those properties.<sup>892</sup> This process, known as the Section 106 process, affords tribes an opportunity to participate in the federal environmental review processes associated with the Project.<sup>893</sup> In any event, the State Engineer finds he does not have jurisdiction to review the actions of the BLM or BIA in complying with the National Historic Preservation Act and other federal statutes, and he declines to rule on this issue.

Whether or not the Federal government has met its trust responsibilities to the Tribal Protestants, the State Engineer's obligation to the Tribal Protestants is to accord them due process of law and consider their evidence and protests as required by Nevada water law. The Tribes participated in the process of consideration of the Applications by filing written protests.<sup>894</sup> The Tribes presented testimony during both the public comment session and through direct examination by their attorney.<sup>895</sup> The Tribes presented expert testimony by two expert witnesses,<sup>896</sup> and they cross-examined the Applicant's witnesses.<sup>897</sup>

The Tribal Protestants also argue that the State Engineer should not have admitted the Stipulations between the Applicant and the Federal agencies into evidence. The Tribal Protestants claim they were not involved with the Stipulations and the monitoring and management programs that came out of the Stipulations. The Tribal Protestants also allege certain terms of the Stipulations were violated.<sup>898</sup> Whether or not the parties to the Stipulations have violated provisions of the Stipulations is not relevant to the State Engineer's determination. The State Engineer is not a party to the Stipulations and must independently review the

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<sup>891</sup> Exhibit No. SNWA\_408, pp. 29-75.

<sup>892</sup> Transcript, Vol.12 p. 2773:8-12 (Luptowitz).

<sup>893</sup> Transcript, Vol.12 p. 2774:2-6 (Luptowitz).

<sup>894</sup> Transcript, Vol.25 p. 5749:1-4 (Naranjo).

<sup>895</sup> Transcript, Vol.25 pp. 5749:7-5752:11 (Naranjo).

<sup>896</sup> Transcript, Vol.25 pp. 5749:19-5750:1 (Naranjo).

<sup>897</sup> E.g., Transcript, Vol.1 pp. 144:10-151:11 (Mukroy); Transcript, Vol. 25 p. 5751:19-23 (Naranjo).

<sup>898</sup> Duckwater/Ely Joint Closing Statement pp. 7-9.

Applications and comply with Nevada water law. The parties to the Stipulations must address any violations among themselves. While both the Applicant and the Tribal Protestants offered evidence and testimony regarding the Federal Stipulations, the State Engineer declines to rely on this evidence in order to make his public interest determination.

The State Engineer finds that it is not his responsibility to ensure that the Federal government fulfills its responsibilities to the Tribal Protestants; determinations regarding violations of the trust responsibility and consultation requirements the Federal government has towards the Tribal Protestants is beyond the State Engineer's jurisdiction and such alleged violations do not affect his determination to grant or deny an application pursuant to Nevada water law.

**6. Best Available Science**

The Legislature has established that it is the policy of this State to encourage the State Engineer to consider the best available science in rendering decisions concerning the available surface and underground sources of water in Nevada. The Applicant asserts that it has provided the most current, comprehensive, best science that any water right Applicant has ever provided. The State Engineer finds the Applicant provided a substantial amount of scientific work in this hearing and the State Engineer has fully analyzed that work in this ruling. However, the State Engineer finds that he does not agree that the most recent work can always be readily characterized as "the best available science" or that other work has "no value." The State Engineer finds as addressed in other sections of this ruling that the errors found in the Applicant's calculations regarding ET and precipitation indicate that at least a portion of the Applicant's work is not the "best science available." All who work in the sciences of geology, hydrology, and hydrogeology know that there is a great deal of uncertainty in the calculations being made and that no perfect numbers are ever going to be attained. The State Engineer finds that due to the uncertainties associated with many of the studies and evidence submitted during the hearing by all parties, it is prudent to consider and weigh the science provided by all parties, and then use the "best science available" submitted, regardless of who submitted it.

**7. Water Pricing**

The Legislature has established that it is the policy of the State to encourage suppliers of water to establish prices for the use of water that maximize water conservation with due consideration to the essential service needs of customers and the economic burdens on businesses,



public services and low-income households. The State Engineer finds this policy provision of Nevada's water law is adequately addressed in the section of this ruling on conservation.

**8. Cooperating with Federal Agencies and Limiting Initial Quantity**

The State Engineer may cooperate with federal authorities in monitoring the development and use of the water resources of the State. The State Engineer finds this policy provision of Nevada's water law supports the State Engineer's consideration of the existence of the Stipulations between the Applicant and the Federal agencies in his analysis of whether the use of the water threatens to prove detrimental to the public interest.

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 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 Chapters 533 and 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. The State Engineer finds 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.

**9. Public Interest Summary**

The State Engineer finds the analysis of whether the use of water for a proposed project threatens to prove detrimental to the public interest must be addressed on a case-by-case basis. The State Engineer finds the statutory criterion, like beneficial use, is a dynamic concept changing over time, particularly as the Nevada Legislature provides more guidance as to the issues of importance.

The State Engineer finds in this case that the Applicant has applied for water that belongs to the public and the citizens of Southern Nevada are part of that public. The State Engineer has already found that the Applicant has demonstrated a need for the water and it does not threaten to prove detrimental to the public interest to allow the use of the water for reasonable and economic municipal uses in the service area of the members of the SNWA. The State Engineer finds it does not threaten to prove detrimental to the public interest to encourage Southern Nevada's

efficient and non-wasteful use of the State's limited supply of water. The State Engineer finds it does not threaten to prove detrimental to the public interest to cautiously use the water of Spring Valley for the population of Southern Nevada. The State Engineer finds it does not threaten to prove detrimental to the public interest for the SNWA to look to the water resources of Spring Valley in its water planning process.

The State Engineer finds the water law and policy of the State does not and should not require the State Engineer to include economic considerations of pitting one part of the State against another or to analyze alternatives to the Project. The State Engineer finds he has not been nor should he be vested with the authority to re-evaluate the political and economic decisions made by local government. The State Engineer finds the use of the water would threaten to prove detrimental to the public interest if it jeopardizes the sources of water for wildlife, livestock or domestic wells. The State Engineer finds that he has considered the "best available science," but does not accept that the newest science is always the best available science. The science used for the type of decision making being made here is built upon and includes the science that came before it, and what the evidence in this hearing shows is that uncertainty exists in the newest science, and any additional data and analysis cannot be obtained without pumping some amount of water in order to add to the knowledge base. The State Engineer finds that the science will never be perfect, will never be all-knowing and complete before decisions can be made, but that it does not threaten to prove detrimental to the public interest to move forward without perfect science.

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. The State Engineer recognizes the critical nature between the limitations of the Applicant's current water resources and the increasing demands based on projected population growth. The State Engineer recognizes that existing rights must be protected, as well as a concern for the wildlife and maintenance of wetlands and fisheries; therefore, the State Engineer finds, as addressed in other sections of this ruling, it would not threaten to prove detrimental to the public interest to allow the resource to be developed in the manner set forth in this ruling. The State Engineer finds the springs and streams upon which water rights exist and wildlife depend on must be protected. The Applicant has demonstrated the approximate number of persons to be served and the approximate future requirements of water

supply. The Applicant has demonstrated the ability to finance the project and has demonstrated a capability to develop large water projects. The State Engineer finds the proposed use of the water, as outlined in the ruling section, does not threaten to prove detrimental to the public interest.

## VII. INTERBASIN TRANSFER CRITERIA

Nevada Revised Statute 533.370(3) provides that in determining whether an application for an interbasin transfer of groundwater must be rejected, the State Engineer shall consider: (1) whether the applicant has justified the need to import the water from another basin; (2) if the State Engineer determines a plan for conservation of water is advisable for the basin into which the water is imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out; (3) whether the proposed action is environmentally sound as it relates to the basin from which the water is exported; (4) whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and (5) any other factor the State Engineer determines to be relevant.

### A. Justification of Need to Import Water

For the reasons stated in the "Beneficial Use and Need for Water" section above, the State Engineer has already determined that the Applicant's projected water demands will exceed available water supplies and that the Applicant will need additional water resources during the Applicant's planning period. The Applicant presented evidence of how this water will be used as part of the water resource portfolio in Southern Nevada.<sup>899</sup> The Applicant presented evidence that if the water from the Applications is not available, there will be shortfalls between projected demands and available supplies during normal conditions on the Colorado River and that shortfalls would be even greater during shortage conditions on the Colorado River.<sup>900</sup>

There are no other water supplies available in the Las Vegas Valley Hydrographic Basin. The Applicant has maximized local groundwater and surface water resources in the Las Vegas Valley. The Las Vegas Valley groundwater basin is fully appropriated.<sup>901</sup> There are simply no

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<sup>899</sup> Exhibit No. SNWA\_189, p. 6-2, Figure 6-2; Exhibit No. SNWA\_209, p. 43, Figure 28.

<sup>900</sup> Exhibit No. SNWA\_189, p. 6-4, Figure 6-3, p. 6-5, Figure 6-4.

<sup>901</sup> Exhibit No. SNWA\_189, p. 3-2.

additional groundwater resources available in the Las Vegas Valley to meet Southern Nevada's water needs.

The Applicant cannot expect to receive additional Colorado River water. First, it is not realistic for Southern Nevada to expect to receive an increased allocation from the other Colorado River basin states. The Colorado River basin states are highly protective of their Colorado River allocations. The Colorado River basin states view their Colorado River allocation as their "birth right" and if Southern Nevada were to gain water, it means that another basin state would lose water.<sup>902</sup> The basin states are prepared to litigate in front of the U.S. Supreme Court to protect their water rights if necessary.<sup>903</sup> Even if certain states were somehow able to reach agreement, any amendment to the Colorado River Compact would require ratification by seven state legislatures, seven governors, the United States Congress, and the President of the United States.<sup>904</sup> Second, it is not realistic for Southern Nevada to expect that transfers and exchanges will allow it to receive additional Colorado River water from users in other states. Even if a user is willing to sell Colorado River rights, the user would lack the power to transfer those rights outside of the state because the states are the ultimate owners of the rights and users are simply licensees.<sup>905</sup> Third, system-augmentation projects are long-term projects between the basin states that are not expected to make additional water available on the Colorado River for decades.<sup>906</sup> These augmentation projects have been described as "conceptual in nature" and cannot be reasonably relied upon by water managers for immediate or intermediate water planning purposes.<sup>907</sup> At the same time, even if the Applicant were able to develop additional Colorado River water, such as through desalination or another method, it would not resolve supply issues relating to drought and shortage conditions on the Colorado River because Lake Mead water levels need to be sufficient to allow withdrawal of the new water.<sup>908</sup>

Southern Nevada cannot expect that the federal government or other states will solve its water supply issues. The other basin states are facing their own water supply issues and have expressed a reluctance to help Nevada unless Nevada helps itself by developing permanent in-

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<sup>902</sup> Transcript, Vol.2 pp. 264:24-266:1 (Entsminger).

<sup>903</sup> Transcript, Vol.2 pp. 265:23-266:1 (Entsminger).

<sup>904</sup> Transcript, Vol.2 p. 265:10-13 (Entsminger).

<sup>905</sup> Transcript, Vol.2 p. 266:5-12 (Entsminger).

<sup>906</sup> Transcript, Vol.2 pp. 297:9-298:23 (Entsminger).

<sup>907</sup> Transcript, Vol.2 p. 299:2-7 (Entsminger).

<sup>908</sup> Exhibit No. SNWA\_189, p. 3-3.

state supplies.<sup>909</sup> Southern Nevada has demonstrated a need for additional water resources for future growth and drought protection. The only way for Southern Nevada to become self-sufficient is to develop other, non-Colorado River water supplies. The State Engineer finds that the Applicant has justified its need to import water from another basin.

**B. Conservation**

In determining whether an application for an interbasin transfer of groundwater must be rejected, the State Engineer shall determine whether a plan for conservation of water is advisable for the basin into which the water is to be imported, and if so "whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out."<sup>910</sup> The State Engineer determines that a plan for conservation of water is advisable for the Las Vegas Valley Hydrographic Basin, which is the main basin into which the evidence indicates most of the water is to be imported.

The Applicant presented expert testimony on this subject by Mr. Douglas Bennett, who is the Applicant's Conservation Manager and was qualified by the State Engineer as an expert in water conservation planning, municipal water conservation, and xeriscaping.<sup>911</sup> Mr. Bennett testified about the Applicant's Conservation Plan and the many programs promulgated under the plan, its rate-setting practices, and reductions in Southern Nevada's water use. Great Basin Water Network presented expert testimony on this subject from Dr. Peter Gleick. Dr. Gleick was qualified by the State Engineer as an expert on water conservation and efficiency.<sup>912</sup> Dr. Gleick testified about the Applicant's conservation program and his organization's 2007 Hidden Oasis report on the Applicant's conservation program; however, he indicated that he has never read the Applicant's 2009-2013 Conservation Plan.<sup>913</sup>

The Applicant has had a Conservation Plan in effect since 1999,<sup>914</sup> has submitted a conservation plan to the State Engineer for approval at five-year intervals since 1999<sup>915</sup> with the

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<sup>909</sup> Transcript, Vol.1 p. 137:15-23 (Mulroy); Vol.2 pp. 234:23-235:11, p. 361:7-23 (Brothers).

<sup>910</sup> NRS 533.370(3)(b).

<sup>911</sup> Transcript, Vol.4 p. 823:16-19.

<sup>912</sup> Transcript, Vol.23 p. 5091:10-12.

<sup>913</sup> Transcript, Vol.23 p. 5145:21-25 (Gleick).

<sup>914</sup> Exhibit No. SNWA\_004, p. 1-1; Transcript, Vol.4 p. 825:3-5 (Bennett).

<sup>915</sup> Exhibit No. SNWA\_005 (State Engineer approval of SNWA's Conservation Plan for the years 2009-2013); Transcript, Vol.4 pp. 824:17-825:1 (Bennett).

last Conservation Plan approved by the State Engineer on April 22, 2009.<sup>916</sup> The Bureau of Reclamation also requires the Applicant to develop "appropriate water conservation measures," resulting from the "full consideration and incorporation of prudent and responsible water conservation measures"<sup>917</sup> and approved the Applicant's Conservation Plan on May 14, 2009.<sup>918</sup>

The Applicant's Conservation Plan employs a four-part strategy to ensure active, community-wide participation in conservation.<sup>919</sup> The four interwoven strategies are regulation, pricing, incentives and education.<sup>920</sup> Protestants asserted the Applicant's efforts with respect to these strategies could be more robust; however, Dr. Gleick testified that the Applicant had already adopted many of the recommendations in the Hidden Oasis report that had formed the basis for his criticisms of the Applicant's Conservation Plan.<sup>921</sup> In addition, Protestant's witness failed to update his analysis of SNWA member agencies' rate structures in his initial expert report<sup>922</sup> and his rebuttal report<sup>923</sup> to reflect two subsequent rate adjustments that enhanced the conservation effect of SNWA member agencies' rate structures.<sup>924</sup> The State Engineer finds Dr. Gleick's reports did not adequately consider the current status of the Applicant's conservation efforts, including its 2009-2013 Conservation Plan.

Contrary to Protestants' assertion that approval of the Applications will encourage the willful waste of water, regulatory programs throughout the SNWA service area curb consumptive use through development codes and water use restrictions.<sup>925</sup> These development codes restrict turfgrass in new developments to no more than 50% of the landscape area of residential backyards, and prohibit turfgrass altogether on residential front yards and commercial properties.<sup>926</sup> They restrict the use of water for ornamental water features and man-made lakes,<sup>927</sup> limit the size and scale of swimming pools,<sup>928</sup> and require resort hotels to submit water efficiency plans describing their current or projected uses of water and their water efficiency

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<sup>916</sup> Exhibit No. SNWA\_006.

<sup>917</sup> Reclamation Reform Act, § 210(a) & (b) and 43 C.F.R. § 427.1.

<sup>918</sup> Exhibit No. SNWA\_007.

<sup>919</sup> Exhibit No. SNWA\_004, p. 2-1; Transcript, Vol.4 pp. 831:22-832:9 (Bennett).

<sup>920</sup> Exhibit No. SNWA\_004, p. 2-1; Transcript, Vol.4 p. 832:1-2 (Bennett).

<sup>921</sup> Transcript, Vol.23 p. 5199:17-22 (Gleick).

<sup>922</sup> Exhibit No. GBWN\_069.

<sup>923</sup> Exhibit No. GBWN\_118.

<sup>924</sup> Transcript, Vol.23 pp. 5176:14 - 5177:2 (Gleick).

<sup>925</sup> Exhibit No. SNWA\_004, p. 3-1; Exhibit No. SNWA\_012; Exhibit No. SNWA\_013.

<sup>926</sup> Transcript, Vol.4 pp. 841:6-842:5 (Bennett).

<sup>927</sup> Transcript, Vol.4 p. 845:14-15 (Bennett).

<sup>928</sup> Transcript, Vol.4 p. 845:16-17 (Bennett).

plans.<sup>929</sup> Customer water use is also limited through mandatory landscape watering groups,<sup>930</sup> and prohibited water waste. Violators who allow water to run down the street or flow off the customer's property can be sanctioned.<sup>931</sup> Enforcement of water waste restrictions is aggressive; the Las Vegas Valley Water District assesses fees in excess of \$5,000 per violation to chronic violators,<sup>932</sup> and golf courses that violate water waste restrictions by exceeding their water budgets can be fined up to 900% of their top tier water rate.<sup>933</sup>

Pricing of water throughout the SNWA service area encourages conservation and discourages water waste. The Applicant is not a retail rate-setting agency, but through a Memorandum of Understanding, all SNWA member agencies have committed to using tiered block-rate structures.<sup>934</sup> In accordance with the water resource policy of the State of Nevada, member agencies' water pricing maximizes water conservation with due consideration to the essential service needs of customers and the economic burdens on businesses, public services, and low-income households.<sup>935</sup> The rate structures have remained affordable in the first pricing tier, which is intended to meet basic health and sanitation needs, and in the upper tiers the rate structure has been steepened and compressed over time to incentivize conservation.<sup>936</sup> Member agencies have committed to reviewing and adjusting rates frequently to ensure the conservation effect is sustained.<sup>937</sup>

The Applicant has created substantial, long-term water savings by providing financial incentives and products to customers.<sup>938</sup> Its Water Smart Landscapes program has incentivized customers to replace high water-use lawns with water-efficient xeric landscaping, resulting in the removal of more than 150 million square feet of turfgrass and a demand reduction of more than 127,000 acre-feet of water over the past ten years.<sup>939</sup> It is the largest incentive program in the nation, paying customers an average of \$16 million per year for turfgrass conversion.<sup>940</sup>

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<sup>929</sup> Transcript, Vol.4 p. 845:18-24 (Bennett).

<sup>930</sup> Transcript, Vol.4 p. 842:14-24 (Bennett).

<sup>931</sup> Transcript, Vol.4 p. 843:4-8 (Bennett).

<sup>932</sup> Exhibit No. SNWA\_004, pp. 3-4; Transcript, Vol.4 p. 857:1-22 (Bennett).

<sup>933</sup> Transcript, Vol.4 p. 863:2-5 (Transcript).

<sup>934</sup> Exhibit No. SNWA\_004, p. 4-1; Transcript, Vol.4 p. 864:10-12 (Bennett).

<sup>935</sup> See, NRS 540.011.

<sup>936</sup> Transcript, Vol.4 pp. 865:10-867:1 (Bennett).

<sup>937</sup> Exhibit No. SNWA\_395, p. 7.

<sup>938</sup> Exhibit No. SNWA\_004, p. 5-1.

<sup>939</sup> Exhibit No. SNWA\_004, p. 5-1; Transcript, Vol.4 pp. 872:19-873:18 (Bennett).

<sup>940</sup> Transcript, Vol.4 p. 869:20-21, p.870:16-22 (Bennett).

Consumptive water use, the type targeted by the Water Smart Landscapes program, justifiably is the primary focus of the Applicant's conservation efforts because reducing consumptive use extends water resources.<sup>941</sup>

Reducing non-consumptive uses, such as indoor household uses, does not extend the Applicant's water resources because the Applicant receives return-flow credits for its treated wastewater, nearly 100% of which is directly or indirectly reused.<sup>942</sup> In response to a question from the State Engineer's staff concerning whether indoor conservation would actually allow the Applicant to serve more customers, Protestants' witness acknowledged that conservation of non-consumptive uses would allow the Applicant to serve new customers only if those new customers added no consumptive uses,<sup>943</sup> which is not plausible. Even though indoor conservation does not reduce overall consumptive use of water, as part of its commitment to fostering a conservation ethic, the Applicant promotes indoor conservation as well.<sup>944</sup> The Applicant produced evidence of indoor conservation programs and incentives including its Water Efficient Technologies program, which has facilitated large-scale conservation efforts primarily for commercial and industrial clients, and indoor retrofit kits providing free components for indoor water efficiency retrofits that exceed current plumbing standards.<sup>945</sup>

The Applicant's education programs ensure community-wide participation in conservation efforts throughout the Las Vegas Valley and the Applicant has worked to create a culture of conservation by developing a consistent message about the importance of indoor and outdoor conservation and offers public awards for innovative conservation programs. Its website logs more than 450,000 visits annually; it produces a Water Smart Living quarterly newsletter; it circulates an annual calendar with water-saving tips; and it has located community demonstration gardens throughout the Las Vegas Valley to maximize exposure to xeriscaping techniques.<sup>946</sup> Public/private partnerships, including the Water Upon Request and Water Smart Homes programs, help promote the conservation message.<sup>947</sup> Awards that encourage community conservation include the Water Hero Award and the annual SNWA Landscape Awards, now in

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<sup>941</sup> Transcript, Vol.4 p. 833:10-13 (Bennett).

<sup>942</sup> Exhibit No. SNWA\_004, p. ES-1; Exhibit No. SNWA\_402; Transcript, Vol.2 pp. 283:21-284:22 (Entsminger).

<sup>943</sup> Transcript, Vol.23 pp. 5207:18-5208:7 (Gleick).

<sup>944</sup> Transcript, Vol.4 p. 834:6-20 (Bennett).

<sup>945</sup> Exhibit No. SNWA\_004, pp. 5-3 to 5-4; Exhibit No. SNWA\_399.

<sup>946</sup> Exhibit No. SNWA\_004, p. 6-1; Transcript, Vol.4 pp. 887:18-888:22 (Bennett).

<sup>947</sup> Exhibit No. SNWA\_004, pp. 7-1 to 7-2; Transcript, Vol.4 pp. 889:21-891:11 (Bennett).



its fourteenth year.<sup>948</sup> The Applicant has already implemented many of the programs suggested by the Protestants.

The Applicant's conservation planning has made a significant difference in the way southern Nevadans use water.<sup>949</sup> The Applicant has set and achieved conservation goals resulting in a dramatic reduction in per capita water use.<sup>950</sup> In 1990, the Applicant service area's gallons-per-capita-per-day ("GPCD") use was 347,<sup>951</sup> which was reduced to 274 GPCD by 2004.<sup>952</sup> The Applicant established a goal of 199 GPCD by 2035.<sup>953</sup> When compared to the 274 GPCD of 2004, the 199 GPCD goal will reduce annual demand by 276,000 acre-feet of water by the year 2035.<sup>954</sup> The Applicant has achieved a 31% reduction in per capita deliveries in Southern Nevada from 1990 to 2008 over a period when total population increased by almost 160%.<sup>955</sup> Those savings outpace the seven Colorado River basin states as a whole, where from 1975 to 2005 per capita water use declined by 21%.<sup>956</sup>

One of the major conclusions of Dr. Gleick's rebuttal report was that per capita water use is declining, but more can be done.<sup>957</sup> This conclusion was founded on a comparison of the Applicant's system-wide GPCD with the system-wide GPCDs of other water agencies, such as Denver, Albuquerque, Tucson, and Los Angeles.<sup>958</sup> Dr. Gleick opined "there's nothing inherently special or different about the Las Vegas Valley that justifies this higher per capita use."<sup>959</sup> However, Dr. Gleick did recognize that, "a city in a hot, dry climate like Las Vegas, would likely have higher outdoor demand requirements than a city in a cool, wet climate."<sup>960</sup>

The Applicant challenges the Protestants' use of cross-utility GPCD comparison and introduced evidence from authoritative sources, including publications by the American Water Works Association ("AWWA") and the Pacific Institute, which stated that cross-utility GPCD comparisons are inappropriate due to such differences as climate and functional population, the

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<sup>948</sup> Exhibit No. SNWA\_395, p. 9; Transcript, Vol.4 p. 891:15-23 (Bennett).

<sup>949</sup> Transcript, Vol.1 p. 69:24-25 (Mulroy).

<sup>950</sup> Exhibit No. GBWN\_118, p. 3.

<sup>951</sup> Transcript, Vol.4 p. 894:4-7 (Bennett).

<sup>952</sup> Transcript, Vol.4 p. 894:8-14 (Bennett).

<sup>953</sup> Transcript, Vol.4 p. 894:15-22, p. 895:20 (Bennett).

<sup>954</sup> Exhibit No. SNWA\_209, p. 39; Transcript, Vol.4 p. 895:21-25 (Bennett).

<sup>955</sup> Exhibit No. SNWA\_397, p. 25.

<sup>956</sup> Exhibit No. SNWA\_397, p. 3.

<sup>957</sup> Transcript, Vol.23 p. 5099:1-3 (Gleick).

<sup>958</sup> Exhibit No. GBWN\_118, pp. 5-6; Transcript, Vol.23 p. 5099: 3-12, p. 5102:7-15 (Gleick).

<sup>959</sup> Transcript, Vol.23 p. 5099:13-15 (Gleick).

<sup>960</sup> Exhibit No. GBWN\_072, p. 18; Transcript, Vol.23 p. 5141:7-13 (Gleick).

measure of population that takes into account a high influx of daily visitors that normally are not included in population for GPCD calculations.<sup>961</sup> Mr. Bennett testified that if the Applicant accounted for functional population, the Applicant's GPCD would be reduced by as much as 40 GPCD.<sup>962</sup> Dr. Gleick indicated that he had failed to account for either functional population or climatic differences in his analysis.<sup>963</sup> He also compared the cross-utility uses in the single family sector in order to correct for many of the biases in cross-utility GPCD comparisons. Dr. Gleick testified that this made the single-family account GPCD metric a relatively valuable one for comparing the effectiveness of different conservation programs;<sup>964</sup> however, a recent AWWA article found that even comparisons of single-family use accounts did not eliminate differences across different utilities due to local climate conditions and the influence of several other factors, such as housing density, average lot size, average number of people per household, marginal price of water availability, cost of reclaimed irrigation water, median household income, and other characteristics of the single-family residential sector.<sup>965</sup>

The State Engineer finds that due to the inconsistencies inherent in comparing GPCD between utilities, the fact that the Applicant has a higher GPCD than other western cities does not mean that the Applicant's Conservation Plan is ineffective.

Mr. Bennett opined that the Applicant has effectively carried out its Conservation Plan judged by the progress at reducing water demand by 30%. This has resulted in a savings of more than 9.5 billion gallons a year.<sup>966</sup> Even Protestants' expert, after acknowledging that the Applicant has adopted most of the suggestions made in the Hidden Oasis report, admitted that pieces of the Applicant's Conservation Plan were effectively carried out,<sup>967</sup> but still argues that the Applicant could do even more.<sup>968</sup>

The State Engineer finds the statutory standard does not require the Applicant to develop and effectively implement the most severe Conservation Plan possible or to outpace every

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<sup>961</sup> Exhibit No. SNWA\_014, pp. 8-14; Exhibit No. SNWA\_397, p. 8.

<sup>962</sup> Transcript, Vol.4 p. 904:6-8 (Bennett).

<sup>963</sup> Transcript, Vol.23 pp. 5142:24-5143:2, p. 4134:4-6 (Gleick).

<sup>964</sup> Transcript, Vol.23 p. 5203: 7-11 (Gleick).

<sup>965</sup> Transcript, Vol.23 p. 5145:12-22 (Gleick).

<sup>966</sup> Transcript, Vol.4 p. 912:14-23 (Bennett).

<sup>967</sup> Transcript, Vol.23 p. 5200:3 (Gleick).

<sup>968</sup> Transcript, Vol.23 p. 5203:21 (Gleick).

conservation effort in the nation.<sup>969</sup> The State Engineer finds the Applicant provided substantial evidence that it has a Conservation Plan in place that is effectively implemented and has addressed, at least in part, every recommendation offered by Protestants to improve its conservation efforts. The State Engineer finds the Applicant has demonstrated that a conservation plan has been adopted and is being effectively carried out.

**C. Environmental Soundness**

The State Engineer must consider whether the approval of the Applications is environmentally sound as it relates to Spring Valley – the basin from which the water is exported.<sup>970</sup> Nevada is the driest state in the nation, averaging approximately nine inches of precipitation each year. It has also been the fastest growing state in the nation for decades. The need for available water is undeniable and the water will only become more precious. It is imperative that the State Engineer maximize the beneficial use of all waters within the state, otherwise, it could unnecessarily stymie economic growth, eliminate recreational opportunities, hinder the use of water for environmental concerns, and be generally detrimental to the state as a whole. However, maximizing the beneficial use of the State's water resources shall not be done to the detriment of the other criteria found in Nevada water law.

In terms of the decision before the State Engineer here in Spring Valley, there is uncontroverted evidence that there is water available at the groundwater source. In other words, the amount of water appropriated by the State Engineer's office to date is less than estimates of perennial yield for the basin. However, in terms of interbasin transfers of groundwater, there is a dichotomy in how Nevada has appropriated its groundwater for more than 60 years and the fact that Nevada's water law requires interbasin transfers of ground water be found to be environmentally sound for the basin from which the water is exported. Nevada has formally and informally maintained that the amount of groundwater available to appropriate is equal to the amount of discharge available for capture – either through phreatophytic discharge, subsurface flows leaving the basin or a combination of the two. These opposing criteria raise the question "*[h]ow do we appropriate groundwater that targets the capture of wetland, meadow and other evapotranspiration but still be environmentally sound?*" Although the State Engineer carries a heavy burden of ensuring that any approval here is environmentally sound, it is also demanded

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<sup>969</sup> NRS 533.370(3)(c).

<sup>970</sup> NRS 533.370(3)(c).

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.

The Applicant presented expert testimony on this subject by three witnesses, Mr. Zane Marshall, Ms. Lisa Luptowitz and Dr. Terry McLendon. Mr. Marshall is the director of the Applicant's Environmental Resources Department. Mr. Marshall was qualified by the State Engineer as an expert in the area of biological resources, including conservation biology, environmental compliance and environmental monitoring.<sup>971</sup> Mr. Marshall testified about the Applicant's baseline investigations, the nature of the environmental areas of interest, the projected impacts on the environmental resources in Spring Valley and adjacent basins, the tools available to the Applicant to minimize or mitigate environmental impacts, the oversight by other agencies on the environmental monitoring and adaptive management plans and the Applicant's commitment to operating an environmentally sound Project. Ms. Luptowitz testified about the federal, state and local environmental permitting for the Project and how the U.S. Bureau of Indian Affairs and tribal governments were involved in the federal permitting processes. Dr. McLendon was qualified by the State Engineer as an expert in the areas of ecology and range science.<sup>972</sup> Dr. McLendon testified about the effect of change in depth to water ("DTW") on

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<sup>971</sup> Transcript, Vol.8 p. 1776:15-24 (Marshall).

<sup>972</sup> Transcript, Vol.7 p. 1611:23-25 (McLendon).

individual plants and plant communities, plant succession and blowing dust from playas and dry lake beds.

GBWN presented expert testimony on this subject from three witnesses, Dr. James Deacon, Dr. Duncan Patten and Dr. Robert Harrington. The Long Now Foundation presented expert testimony on this subject from two witnesses, Mr. Clifford Landers and Dr. Clay Robinson. Other Protestants provided lay testimony about the feared impact on the environmental resources of Spring Valley and adjacent basins. Dr. Deacon was qualified by the State Engineer as an expert in the area of desert aquatic ecology.<sup>973</sup> Dr. Deacon testified about the fragility of springsnails and fish species in general, potential impacts of decreasing spring flow on springsnail and fish species, the effectiveness of the Federal oversight process and the history in Nevada of species extinction caused by water diversions. Dr. Patten was qualified by the State Engineer as an expert in the area of plant ecology and hydroecology.<sup>974</sup> Dr. Patten testified about the effect of change in DTW on individual plants and plant communities, plant succession and the effectiveness of monitoring and mitigation plans for preventing impacts to desert vegetation communities. Mr. Landers was qualified by the State Engineer as an expert in the area of soil science.<sup>975</sup> Mr. Landers testified about the effect of change in DTW on blowing dust on playas and dry lake beds. Dr. Robinson was qualified by the State Engineer as an expert in the area of soils and plant ecology.<sup>976</sup> Dr. Robinson testified about the effect of change in DTW on individual plants and plant communities, plant succession and how plant succession could cause blowing dust.

1. **Environmental Baseline**

The Applicant has performed significant work toward establishing the environmental baseline in the basins from which water is to be exported, and in adjacent basins, as well.<sup>977</sup> The Applicant has studied a broad array of biotic communities within Spring Valley and adjacent basins. Areas of focus included: aquatic ecosystems;<sup>978</sup> amphibians;<sup>979</sup> birds;<sup>980</sup> mammals,

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<sup>973</sup> Transcript, Vol.19 p. 4140:17-12 (Deacon).

<sup>974</sup> Transcript, Vol.18 p. 3938:20-21 (Patten).

<sup>975</sup> Transcript, Vol.28 pp. 6266:22-6267:1 (Landers).

<sup>976</sup> Transcript, Vol.28 6309:16-20 (Robinson).

<sup>977</sup> Exhibit No. SNWA\_363, pp. 4-1 to 4-43; Transcript, Vol.12 pp. 2681:17-2691:2, pp. 2723:3-2724:20 (Marshall).

<sup>978</sup> Exhibit Nos. SNWA\_363, pp. 4-2 to 4-5; SNWA\_422; SNWA\_374; Transcript, Vol.12 pp. 2691:5-2697:13 (Marshall).

including bats and small mammals;<sup>981</sup> reptiles;<sup>982</sup> fish, including the Pahrump poolfish and Moapa dace;<sup>983</sup> invertebrates, including terrestrial and aquatic invertebrates;<sup>984</sup> and vegetation, including endangered, threatened and sensitive plant species, cactus and yucca, weeds and phreatophytic vegetation.<sup>985</sup> The Applicant also assessed environmental areas of interest throughout Spring Valley and adjacent basins,<sup>986</sup> focusing on groundwater-influenced habitats and associated special-status species, including federally threatened, endangered, proposed or candidate species under the Endangered Species Act ("ESA"), Nevada BLM sensitive species, Nevada and Utah state-protected species, and species ranked critically imperiled or imperiled across their entire range by NatureServe.<sup>987</sup> These environmental areas of interest provide a good representation of the key groundwater-influenced habitats and areas of focus in and around the Project basins.<sup>988</sup>

GBWN argued in their written closing that the baseline data was inadequate in kind and quality,<sup>989</sup> but they did not provide an expert witness opinion, report or exhibit that explained or substantiated that argument. In fact, Dr. Deacon testified he had no criticism of Dr. McLendon or Mr. Marshall's baseline work.<sup>990</sup> Dr. Patten similarly testified he had no criticism of Dr. McLendon's work.<sup>991</sup>

The State Engineer finds that the Applicant gathered and presented substantial environmental resource baseline material and that the environmental resource baseline information provides a platform for sound, informed decision-making. Notwithstanding this finding, the State Engineer reserves the right to require additional types and/or years of baseline information as set forth below.

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<sup>979</sup> Exhibit No. SNWA\_363 pp. 4-5 to 4-8; Transcript, Vol.12 pp. 2697:14-2698:5 (Marshall).

<sup>980</sup> Exhibit No. SNWA\_363 pp. 4-8 to 4-17; Transcript, Vol.12 pp. 2698:6-2706:10 (Marshall).

<sup>981</sup> Exhibit No. SNWA\_363, pp. 4-17 to- 4-21; Transcript, Vol.12 pp. 2706:11-2713:12 (Marshall).

<sup>982</sup> Exhibit No. SNWA\_363, pp. 4-22 to 4-24; Transcript, Vol.12 pp. 2713:13-2714:11 (Marshall).

<sup>983</sup> Exhibit No. SNWA\_363, pp. 4-25 to 4-26; Transcript, Vol.12 pp. 2714:12-2717:2 (Marshall).

<sup>984</sup> Exhibit No. SNWA\_363, p. 4-25, pp. 4-27 to 4-28; Transcript, Vol.12 p. 2717:3-25 (Marshall).

<sup>985</sup> Exhibit No. SNWA\_363, p. 4-27, pp. 4-29 to 4-36; Transcript, Vol.12 pp. 2718:1-2722:2 (Marshall).

<sup>986</sup> Exhibit No. SNWA\_363, pp. 2-3 to 2-11 (Spring Valley), pp. 2-20 to 2-22 (Snake Valley), pp. 2-23 to 2-25 (Hamlin Valley), pp. 2-26 to 2-27 (Lake Valley); Transcript, Vol.12 pp. 2728:15-2738:7 (Spring Valley), pp. 2745:17-2747:15 (Snake Valley)(Marshall).

<sup>987</sup> Exhibit No. SNWA\_363, p. 2-1.

<sup>988</sup> Transcript, Vol.12 p. 2752:2-4 (Marshall).

<sup>989</sup> GBWN Closing Statement, p. 24.

<sup>990</sup> Transcript, Vol.19 pp. 4174:18-4177:23 (Deacon).

<sup>991</sup> Transcript, Vol.18 pp. 4028:4-4029:11 (Patten).

## 2. Permitting

The baseline information collected by the Applicant was presented to federal, state and local resource managers<sup>992</sup> who have permitting authority over the Project.<sup>993</sup> Federal and state laws, including the National Environmental Policy Act ("NEPA"), the ESA, the Clean Water Act ("CWA"), and Nevada water law, require environmental protection through comprehensive permitting and regulatory processes.<sup>994</sup> These permitting processes impose strict environmental controls on the Project that ensure it will be environmentally sound.<sup>995</sup> Protestants' witness Rebecca Mills, former superintendent at Great Basin National Park, testified it is the mission of Federal agencies to zealously enforce the environmental protections with which they are charged.<sup>996</sup>

NEPA requires a full consideration of environmental impacts resulting from the Project.<sup>997</sup> NEPA compliance will result in substantive protections that can ensure environmental soundness. For instance, an Environmental Impact Statement can identify and consider mitigation measures and those mitigation measures become part of a Record of Decision for the Project and are then required under the terms of any right-of-way grant.<sup>998</sup> With respect to the Project, the Applicant has prepared more than 300 Applicant Committed Measures aimed at minimizing and mitigating Project impacts.<sup>999</sup>

The ESA imposes strict substantive protections, in the form of reasonable and prudent alternatives, that include minimization and mitigation measures that prevent jeopardy to listed species or their critical habitat.<sup>1000</sup> The Applicant agreed to inclusion of even non-listed species for the Project ESA consultation, resulting in an even greater breadth of coverage.<sup>1001</sup>

Protestants' expert Dr. James Deacon raised concerns regarding the extinction of species due to water development, but those concerns arise in the context of historical water

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<sup>992</sup> Transcript, Vol.12 p. 2723:20-24 (Marshall).

<sup>993</sup> Transcript, Vol.12 pp. 2752:21-2753:1 (Luptowitz).

<sup>994</sup> Exhibit No. SNWA\_363, p. 5-3, Table 5-2: Potentially Required Federal and State Permits and Reviews.

<sup>995</sup> Transcript, Vol.12 pp. 2783:25-2784:8 (Luptowitz) (Federal agency oversight of the project has been rigorous, resulting in a lengthy, thorough, comprehensive permitting process).

<sup>996</sup> Transcript, Vol.22 p. 4952:15-20 (Mills); *see also*, Transcript, Vol.25 p. 5743:7-10 (Naranjo) (Federal employees do their best to follow the law).

<sup>997</sup> Transcript, Vol.12 p. 2763:10-21 (Luptowitz) (the EIS for the project will assess direct, indirect and cumulative effects of the project, and will consider the human, biological, and physical environment).

<sup>998</sup> Transcript, Vol.12 pp. 2764:23-2765:11 (Luptowitz).

<sup>999</sup> Transcript, Vol.12 p. 2765:16-24 (Luptowitz).

<sup>1000</sup> Transcript, Vol.12 pp. 2755:21-2756:1, pp. 2756:22-2757:2 (Luptowitz).

<sup>1001</sup> Transcript, Vol.12 p. 2758:8-16 (Marshall).

development practices that preceded the ESA.<sup>1002</sup> The Applicant's expert Mr. Marshall noted that the Applicant has learned from others' mistakes of the past to act in a more environmentally sound manner.<sup>1003</sup>

Protestants have argued that NEPA, the ESA and other federal and state permitting requirements do not relieve the State Engineer of his responsibility to determine the Project is environmentally sound.<sup>1004</sup> Protestants also expressed doubts about a future State Engineer's resolve to halt groundwater withdrawals if adverse environmental impacts occurred.<sup>1005</sup>

The State Engineer finds that he has the jurisdiction and responsibility to determine the Project's environmental soundness independently of other federal and state permitting requirements and will do so. The State Engineer considers the regulatory background of the Project as evidence that other agencies with diverse regulatory responsibility and environmental expertise will also exercise continuous authority to regulate the Project in a manner that protects the environment. While the State Engineer rejects the argument that he should consider the possibility that some future State Engineer may not have the resolve to perform statutory duties, the ongoing jurisdiction of the diverse state and federal agencies with regulatory authority over the Project demonstrates redundancies in environmental regulation of the Project that will ensure continuous oversight regardless of the resolve of a future State Engineer.

The State Engineer finds that the oversight provided by federal and state agencies will supplement the State Engineer's ability to ensure the environmental soundness of the Project. The State Engineer's water right permitting requirements will ensure the Project's environmental soundness.

### **3. Compliance with the Federal Stipulation**

On September 8, 2006, SNWA and four Department of the Interior agencies, the U.S. Fish and Wildlife Service, U.S. Bureau of Indian Affairs, U.S. Bureau of Land Management, and U.S. National Park Service entered into a Stipulation for Withdrawal of Protests regarding Application Nos. 54003-54021 in Spring Valley.<sup>1006</sup>

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<sup>1002</sup> Transcript, Vol.12 pp. 2823:22-2824:3 (Marshall).

<sup>1003</sup> Transcript, Vol.12 pp. 2823:22-2824:7 (Marshall).

<sup>1004</sup> GBWN Closing Statement, p. 21.

<sup>1005</sup> GBWN Closing Statement, p. 26.

<sup>1006</sup> The Tribes argue the Stipulation is not properly in evidence. SNWA explained that the Stipulation provides it "may be used in any future proceeding to interpret and/or enforce its terms." Exhibit No. SE\_041, p. 12. In any event, because the State Engineer's ruling relies on the incorporation of the BMP, rather than the Stipulation,



Goals of the Spring Valley Stipulation included:

- To manage the development of groundwater by the Applicant in Spring Valley without causing injury to Federal Water Rights and/or unreasonable adverse effects to Federal Resources in the Area of Interest;
- To accurately characterize the groundwater gradient from Spring Valley to Snake Valley via Hamlin Valley;
- To avoid any effect on Federal Resources located within the boundaries of Great Basin National Park from groundwater withdrawal by the Applicant in Spring Valley;
- To manage the development of groundwater by the Applicant in Spring Valley in order to avoid unreasonable adverse effects to wetlands, wet meadow complexes, springs, streams, and riparian and phreatophytic communities (referred to as Water-dependent Ecosystems) and maintain the biological integrity and ecological health of the Area of Interest over the long term;
- To avoid any effects to Water-dependent Ecosystems within the boundaries of Great Basin National Park; and,
- To manage the development of groundwater by the Applicant in Spring Valley to avoid an unreasonable degradation of the scenic values of the visibility from Great Basin National Park due to a potential increase in airborne particulates and loss of surface vegetation which may result from groundwater withdrawals by the Applicant in Spring Valley.

The Stipulation created a Biological Work Group ("BWG"), which includes representatives from the SNWA, the U.S. Bureau of Indian Affairs, U.S. Bureau of Land Management, U.S. National Park Service, and U.S. Fish and Wildlife Service.<sup>1007</sup> These representatives are biologists who provide scientific and technical expertise.<sup>1008</sup> The Nevada Department of Wildlife, the Utah Division of Wildlife Resources and the Nevada State Engineer have also participated in BWG meetings developing and implementing the Biological Monitoring Plan ("BMP").<sup>1009</sup>

The role of the BWG is to develop and implement a BMP.<sup>1010</sup> The BMP requires the development of conceptual models and the identification of indicators and ecological attributes

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arguments about the admissibility of the Stipulation are not relevant to the State Engineer's environmental soundness determination.

<sup>1007</sup> Exhibit No. SNWA\_365, p. 1-2; Transcript, Vol.8 p. 1809:11-15 (Marshall).

<sup>1008</sup> Transcript, Vol.8 p. 1809:10-19 (Marshall).

<sup>1009</sup> Exhibit No. 365, p. 1-2; Transcript, Vol.8 p. 1809:15-19 (Marshall).

<sup>1010</sup> See, Spring Valley Stipulation, Exhibits A & B; DDC Stipulation, Exhibit A.

to be monitored throughout Spring Valley and adjacent basins that will allow for the thorough assessment of the health and integrity of the full range of groundwater-influenced resources in Spring Valley and adjacent basins.<sup>1011</sup> In addition, the BMP contains a detailed monitoring plan which has been in use for two and one-half years. Development of the monitoring plan involves significant interaction between the BWG and the hydrologic Technical Review Panel ("TRP"). This interaction is integral to enhancing the technical understanding of monitoring processes and results under the BMP.<sup>1012</sup> The coordination between hydrologic and biologic experts improves the ability of the State Engineer to assure that environmental resources will be properly protected as the hydrologic decisions are made to regulate the Project. Detailed management and mitigation approaches will be included in the BMP when enough data and information has been gathered to support their development. The BMP envisions and establishes a framework for such management and mitigation approaches.<sup>1013</sup>

The BMP provides for monitoring potential impacts to both Spring Valley and adjacent basins.<sup>1014</sup> The Spring Valley BMP establishes an Initial Biologic Monitoring Area ("IBMA") that encompasses the Spring Valley Hydrographic Basin, the northern portion of the Hamlin Valley Hydrographic Basin, and the Big Spring Creek sub-watershed in southern Snake Valley.<sup>1015</sup> The IBMA contains portions of Hamlin and Snake Valleys because of potential interbasin groundwater flow from Spring Valley.<sup>1016</sup> Notably, 95% of the land in the IBMA is federally held; only 4% is private land.<sup>1017</sup> Protestants' expert, Dr. James Deacon, agreed the monitoring sites identified by the BMP will produce a good body of information.<sup>1018</sup>

The State Engineer approved the Spring Valley BMP on January 23, 2009.<sup>1019</sup> The Applicant has demonstrated its commitment to implementing the BMP in the Spring Valley Biological Monitoring Plan Annual Reports it filed even after the reversal of the prior Spring Valley ruling (Ruling 5726). These reports reflect the extensive work on data collection,

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<sup>1011</sup> Exhibit No. SNWA\_365, pp. 2-1 to 2-4.

<sup>1012</sup> Transcript, Vol. 8, p. 1813:8-12 (Marshall).

<sup>1013</sup> Exhibit No. SNWA\_365 (Spring Valley BMP), § 8.4; Transcript Vol.8 p. 1810:12-15 (Marshall).

<sup>1014</sup> Exhibit No. SNWA\_365, p. 1-6; Transcript, Vol.8 p. 1810:5-11 (Marshall).

<sup>1015</sup> Exhibit No. SNWA\_365, p. 1-6.

<sup>1016</sup> Exhibit No. SNWA\_365, p. 1-6.

<sup>1017</sup> Exhibit No. SNWA\_365, p. 1-6.

<sup>1018</sup> Transcript, Vol.19 p. 4181:22-24 (Deacon).

<sup>1019</sup> Exhibit No. SNWA\_367.

conceptual model formulation and determination of representative monitoring locations.<sup>1020</sup> These reports provide valuable information to the State Engineer, which will inform his continued regulatory control over the Project. Through this ruling, the State Engineer expressly incorporates the Spring Valley BMP into the terms of the approved permits.

The State Engineer finds the monitoring and reporting aspects of the BMP comprehensively address the groundwater-influenced environmental resources of Spring Valley and adjacent basins. The sites and species identified for monitoring are representative of sites and species found throughout the federal, state and private resources within Spring Valley and adjacent basins. The State Engineer finds that incorporation of the BMP in the permit terms for the Applications, and the State Engineer's continued regulatory control over pumping under the Applications, will ensure proper monitoring and oversight of the Project and its environmental soundness as it relates to groundwater-influenced resources.

#### **4. Adaptive Management**

The BMP provides flexibility for future modifications to the monitoring plan based on new information and technologies and future management considerations.<sup>1021</sup> In addition, the monitoring methodology instituted by the BMP provides an adaptive management framework, in other words, instituting the steps of setting goals and priorities, developing monitoring and conservation strategies, taking needed action, measuring results, and refining the plan.<sup>1022</sup> Protestants' expert Dr. Patten emphasized that monitoring is a critical element of adaptive management, which can result in the successful management of systems if resource managers adhere to the steps of researching, learning, testing ideas, adapting, reconsidering conceptual ideas, and trying again.<sup>1023</sup> A central component of the BMP, adaptive management calls for continual evaluation of the BMP and its success, and it provides for alteration of the BMP as necessary to achieve environmental soundness-related goals.<sup>1024</sup>

Protestants assert adaptive management plans are not learn-as-you-go plans, and criticize the Applicant's BMP on this ground. However, Dr. Patten testified that learning, and adapting to what scientists learn through monitoring, is an important part of understanding the ecological

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<sup>1020</sup> Exhibit Nos. SNWA\_368; SNWA\_369; SNWA\_418.

<sup>1021</sup> Exhibit No. SNWA\_365, p. 1-6.

<sup>1022</sup> See Exhibit No. SNWA\_365, p. 3-3.

<sup>1023</sup> Exhibit No. SNWA\_461, p. 17; Transcript, Vol.18 pp. 4024:20-4025:24 (Patten).

<sup>1024</sup> Transcript, Vol.8 p. 1815:10-16 (Marshall).

function of systems and managing those systems.<sup>1025</sup> Dr. Patten further testified that monitoring programs can achieve ecological sustainability of spring areas through appropriate water management.<sup>1026</sup> Protestants' witness, Dr. Robert Harrington, Director of the Inyo County Water Department, acknowledged that the adaptive management process is one he employs in the Owens Valley,<sup>1027</sup> and that adaptive management has had success there.<sup>1028</sup>

The State Engineer finds the adaptive management approach incorporated in the BMP is an accepted scientific approach that is appropriate and advisable for managing a long-term Project such as this one. The State Engineer finds that adaptive management is a critical component in ensuring water development occurs in a manner that is environmentally sound.

#### 5. Triggers and Thresholds

The BMP lays out a process for developing triggers for action in the event an unreasonable adverse impact to a resource is anticipated.<sup>1029</sup> The process includes the identification of conservation targets and their key ecological attributes and indicators and the development of adequate baseline data.<sup>1030</sup> The BWG agreed to collect at a minimum seven years of baseline data prior to groundwater development in Spring Valley.<sup>1031</sup> The BWG has already collected two years of data.<sup>1032</sup> The BWG is fully engaged in the process of data development.<sup>1033</sup>

Protestants argue the BMP provides inadequate assurances of the Project's environmental soundness because it has not yet identified the specific quantifiable standards that will be used to provide early warning to impacts in the ecosystem.<sup>1034</sup> However, under the BMP, the BWG is working to develop suitable conservation targets and parameters that in concert with hydrologic monitoring will provide early warning of impacts to the ecosystem.<sup>1035</sup> Factors such as natural variation in the environmental resources must be understood before any standards or triggers are set.

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<sup>1025</sup> Transcript, Vol.18 pp. 4023:10-4025:20 (Patten).

<sup>1026</sup> Exhibit No. GBWN\_059, p. 12; Transcript, Vol.18 pp. 4027:10-4028:1 (Patten).

<sup>1027</sup> Transcript, Vol.23 p. 5271:2-14 (Harrington).

<sup>1028</sup> Transcript, Vol.23 pp. 5208:23-5209:13 (Harrington).

<sup>1029</sup> Exhibit No. SNWA\_365, pp. 8-4, 8-5.

<sup>1030</sup> Transcript, Vol.8 p. 1815:4-16 (Marshall).

<sup>1031</sup> Transcript, Vol.8 p. 1829:18-22 (Marshall).

<sup>1032</sup> Transcript, Vol.8 p. 1835:11 (Marshall).

<sup>1033</sup> Transcript, Vol.8 p. 1829:4-14 (Marshall).

<sup>1034</sup> Transcript, Vol.23 p. 5276: 6-17 (Harrington).

<sup>1035</sup> Transcript, Vol.8 p. 1836:3-15 (Marshall).

Selecting specific standards before a full baseline is developed would be premature.<sup>1036</sup> It would not lead to sound scientific decisions.<sup>1037</sup> Indeed, Protestants' expert Cliff Landers stated, "[Y]ou really have to have baseline data in order to be able to make intelligent decisions."<sup>1038</sup> Dr. Robert Harrington agreed the collection of baseline data prior to groundwater withdrawal makes the Project far better positioned to ensure water development occurs in a sustainable manner than was the case in the Owens Valley.<sup>1039</sup>

The State Engineer finds that the BMP establishes a sound process for developing triggers and decisional thresholds to be employed in the adaptive management plan for the Project. Furthermore, it is premature to set management triggers and decision thresholds until additional years of data have been collected and natural variation and other factors are thoroughly understood. The State Engineer finds that failure to set triggers or thresholds at this time does not invalidate the BMP or undercut the development of an effective adaptive management plan; to the contrary, it demonstrates the Applicant's determination to proceed in a scientifically informed, environmentally sound manner.

#### 6. Enforcement and Dispute Resolution

Protestants argued the protections provided by the BMP are inadequate because the Stipulation between SNWA and the Federal agencies lacks adequate enforcement mechanisms.<sup>1040</sup> However, as Mr. Marshall identified, the Applicant is bound by any decision made by the State Engineer.<sup>1041</sup> As the State Engineer admonished, the regulation of water rights is in the State Engineer's purview, and the State Engineer proactively monitors impacts to existing rights and the environment.<sup>1042</sup> The State Engineer always retains the authority to monitor water rights and any impact to them and the dispute resolution process in the Stipulation has no impact on that authority.<sup>1043</sup>

Although Dr. Deacon has criticized the Stipulation based on his belief that final or controversial decisions would be made by management personnel rather than scientists, Mr.

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<sup>1036</sup> Transcript, Vol.12 p. 2683:16-21, Vol.14 p. 3211:7-15 (Marshall).

<sup>1037</sup> Transcript, Vol.12 p. 2686: 2-9 (Marshall).

<sup>1038</sup> Transcript, Vol.28 p. 6289:10-11 (Landers).

<sup>1039</sup> Transcript, Vol.23 pp. 5286:22-5287:5 (Harrington).

<sup>1040</sup> See, Transcript, Vol.11 p. 2495:1-10 (Hejmanowski).

<sup>1041</sup> Transcript, Vol.11 p. 2496:13-14 (Marshall).

<sup>1042</sup> Transcript, Vol.11 p. 2499:7-22 (State Engineer King).

<sup>1043</sup> Transcript, Vol.11 p. 2499:16-22 (State Engineer King).

Marshall testified that decision-makers act on the basis of the recommendations made by the scientifically trained staff that comprise the technical committees, such as the biologists who develop and implement the BMP.<sup>1044</sup> Protestants' witness, former Great Basin National Park superintendent Rebecca Mills, acknowledged that Federal agency management takes seriously and follows the recommendations of scientific personnel.<sup>1045</sup>

The State Engineer finds that he had been requested to take the Stipulation into consideration regarding the analysis of whether the proposed project is environmentally sound for the basin of export. The enforcement of the Stipulation is a matter between the parties to it, and while he is not relying on the Stipulation to make his environmental soundness determination, the Stipulated Agreement provides an additional level of assurance.

#### 7. Environmental Effects Analysis

The Applicant identified those environmental areas of interest in Spring Valley and adjacent basins that could be sensitive to groundwater withdrawal.<sup>1046</sup> The Applicant applied both a qualitative and a quantitative analysis to predict whether environmental areas of interest were susceptible to impacts from pumping pursuant to the Applications.<sup>1047</sup> Under the qualitative approach, hydrologists assessed local hydrology, specifically connectivity to the regional aquifer, to determine whether a site could be impacted by groundwater withdrawal.<sup>1048</sup> If a site lacked connectivity to the regional aquifer, no quantitative analysis was warranted because no impacts can occur when the site is not linked to the regional aquifer.<sup>1049</sup> If quantitative analysis was warranted, results from the Applicant's groundwater model were consulted, using criteria reflective of the limitations in using a regional model.<sup>1050</sup> This criteria was a 50-foot or greater drawdown in depth to groundwater or a 15% reduction in spring flow.<sup>1051</sup> This 50-foot, 15% criteria did not provide the definition of a reasonable or unreasonable impact, it does not set monitoring priorities or establish monitoring sites, and it

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<sup>1044</sup> Transcript, Vol.12 pp. 2822:25-2823:17 (Marshall).

<sup>1045</sup> Transcript, Vol.22 p. 4953:13-23 (Mills).

<sup>1046</sup> Exhibit No. SNWA\_363, pp. 2-3 to 2-11 (Spring Valley), pp. 2-19 to 2-22 (Snake Valley), pp. 2-23 to 2-25 (Hamlin Valley), pp. 2-26 to 2-28 (Lake Valley); Transcript, Vol.12 pp. 2728:15-2738:7 (Spring Valley), 2745:18-2747:15 (Snake Valley)(Marshall).

<sup>1047</sup> Transcript, Vol.12 p. 2796:11-17 (Marshall).

<sup>1048</sup> Transcript, Vol.12 pp. 2796:21-2797:1 (Marshall).

<sup>1049</sup> Transcript, Vol.12 p. 2797:2-4 (Marshall).

<sup>1050</sup> Transcript, Vol.12 p. 2797:7-8 (Marshall).

<sup>1051</sup> Transcript, Vol.12 p. 2797:12-14 (Marshall).

does not form the basis for biological evaluations.<sup>1052</sup> The Applicant used the 50-foot, 15% criteria for an initial evaluation of the appropriateness of the monitoring network established by the BWG.<sup>1053</sup> Due to the inability of the groundwater model to make site-specific predictions, the Applicant, the Federal regulators and the State Engineer's office will rely on the broad monitoring network put in place by the BWG to determine the actual environmental effects and the mitigation required.<sup>1054</sup>

This measured approach to assessing impacts contrasts with the impacts analysis provided by Protestants' expert, Dr. James Deacon.<sup>1055</sup> Dr. Deacon did not use a qualitative or quantitative approach. Instead he assumed all springs, even mountain block springs that are disconnected from the regional aquifer, would dry up and thus all species dependent on those springs would die.<sup>1056</sup> He did not do any other analysis on the effect of merely reducing flows or of drying up some springs as opposed to all springs. Dr. Deacon's analysis is generalized, and it relies on the results from Dr. Myers' modeling. However, even Dr. Myers did not assume that the Applicant's pumping would dry up mountain block springs.<sup>1057</sup> Dr. Deacon stated that even if Dr. Myers was wrong he would not change his opinion, because Dr. Myers' modeling conclusions were consistent with the BLM DEIS model results.<sup>1058</sup> Dr. Deacon testified that the BLM cautioned their model results "did not have the level of accuracy required to predict absolute values at specific points in time (especially decades or centuries into the future)."<sup>1059</sup> He also agreed that because of the regional nature of the groundwater model it is not possible to accurately predict site-specific changes in flow for springs and streams.<sup>1060</sup> As a result, Dr. Deacon testified that groundwater models only permit a generalized understanding and therefore require testing through a monitoring plan.<sup>1061</sup> Dr. Deacon also relied on Dr. Bredehoeft's application of the time to capture theory.<sup>1062</sup> He acknowledged the models upon which he relied

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<sup>1052</sup> Transcript, Vol.12 pp. 2797:25-2799:15 (Marshall).

<sup>1053</sup> Transcript, Vol.12 p. 2798:18-23 (Marshall).

<sup>1054</sup> Transcript, Vol.12 p. 2799:9-19 (Marshall).

<sup>1055</sup> See, Exhibit No. GBWN\_014.

<sup>1056</sup> See, Exhibit No. GBWN\_014, pp. 2-3; Exhibit No. GBWN\_138, pp. 5-8; Exhibit No. GBWN\_248, p. 4, pp. 6-7; Transcript, Vol.12 p. 2820-21:14-21 (Marshall).

<sup>1057</sup> Transcript, Vol.20 p. 4468:22-25 (Myers).

<sup>1058</sup> Transcript, Vol.19 p. 4162:10-13, p. 4190:2-12 (Deacon).

<sup>1059</sup> Transcript, Vol.19 p. 4184:12-22 (Deacon).

<sup>1060</sup> Transcript, Vol.19 p. 4185:11-18 (Deacon).

<sup>1061</sup> Transcript, Vol.19 p. 4186:1-8 (Deacon).

<sup>1062</sup> Transcript, Vol.19 p. 4189:6-15 (Deacon).

so extensively for site-specific analysis provide predictions that, applied even more generally, are uncertain at best.<sup>1063</sup> His report does not take into consideration the realities of federal and state environmental compliance and the authority that the State Engineer holds.<sup>1064</sup> Based on the discussion above, the State Engineer finds Dr. Deacon's testimony does not compel the State Engineer to find the Project is not environmentally sound.

The Applicant's effects analysis predicted possible impacts to four valley floor areas: Swamp Cedar North, Unnamed #5 Spring, Four Wheel Drive Spring, and South Millick Spring.<sup>1065</sup> Special status species at some of these sites include northern leopard frog, birds, and bats.<sup>1066</sup> Big game uses some of these habitats from time to time.<sup>1067</sup> Groundwater drawdown and reduced spring flow at these sites has the potential to further degrade existing habitat and cause the redistribution of mobile species.<sup>1068</sup> However, the aquatic habitats in this area are relatively small, and through the use of the available monitoring and management tools, unreasonable adverse effects can be avoided and/or mitigated to ensure the sustainable management of the associated biological resources.<sup>1069</sup> For instance, mitigation techniques for reducing impacts to swamp cedars could include irrigation with surface water and fencing out herbivores such as cattle and deer that might graze on juvenile swamp cedars.<sup>1070</sup>

Sites where the 50-foot, 15% criteria indicated no impacts would occur also will be monitored.<sup>1071</sup> For instance, several types of monitoring data collection efforts occur at the Shoshone Ponds site, home to the Pahrump pool fish.<sup>1072</sup> These efforts include monitoring of Pahrump pool fish, relict dace, and leopard frog.<sup>1073</sup> A number of vegetative transects have been placed across the aquatic, wetland, and meadow habitats, as well.<sup>1074</sup>

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<sup>1063</sup> Transcript, Vol.19 pp. 4185:17-4186:4 (Deacon).

<sup>1064</sup> Exhibit No. GBWN\_014, p. 4.

<sup>1065</sup> Transcript, Vol.12 p. 2800:4-14 (Marshall).

<sup>1066</sup> Transcript, Vol.12 pp. 2800:22-2801:7 (Marshall).

<sup>1067</sup> Transcript, Vol.12 p. 2801:8-14 (Marshall).

<sup>1068</sup> Exhibit No. SNWA\_363, p. 8-2; Transcript, Vol.12 pp. 2801:20-2803:1 (Marshall).

<sup>1069</sup> Exhibit No. SNWA\_363, p. 8-2.

<sup>1070</sup> Transcript, Vol.12 p. 2803: 2-21 (Marshall).

<sup>1071</sup> Transcript, Vol.12 p. 2798:10-15 (Marshall).

<sup>1072</sup> Transcript, Vol.12 p. 2804:1-5 (Marshall).

<sup>1073</sup> Transcript, Vol.12 p. 2804:4-6 (Marshall).

<sup>1074</sup> Transcript, Vol.12 p. 2804:6-8 (Marshall).



The Applicant's adjacent basins analysis predicted no impacts to Snake, Hamlin, and Lake Valleys environmental areas of interest.<sup>1075</sup> However, even though no sites met or exceeded the 50-foot, 15% criteria, monitoring is in place to provide early warning of any unanticipated effects,<sup>1076</sup> and the BMP applies to ensure there would be adequate monitoring, management, and mitigation.

The State Engineer finds that the Applicant has adequately described the potential environmental effects of the Project in a manner that allows the State Engineer to make an informed environmental soundness determination.

**8. A Viable Ecosystem Will Remain**

The Applicant presented substantial evidence that plant communities will receive adequate water to avoid unreasonable adverse effects. In Spring Valley, development of the baseline and understanding of change in depth to water ("DTW") concepts creates the ability to plan for effective adaptive management.<sup>1077</sup> The Applicant's stated goal for the management of plant succession that may occur is the maintenance of healthy and functioning ecosystems. If there is a transition, it would be a gradual transition in the species composition of shrub communities, which still support terrestrial wildlife, bird and bat populations, and big game so that the ecosystem continues to be functioning and healthy.<sup>1078</sup>

The Applicant's experts testified that there is no one-to-one relationship between DTW and plant function.<sup>1079</sup> This means that impacts to plant function cannot be predicted based solely on projected water table declines. Precipitation impacts the relationship of plants to DTW because many plants in arid environments prefer to use precipitation-derived water over groundwater.<sup>1080</sup> Anthropogenic factors, especially irrigation, impact the location and type of vegetation.<sup>1081</sup>

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<sup>1075</sup> Transcript, Vol.12 pp. 2806:18-2807:2 (Snake Valley), pp. 2807:19-2808:2 (Hamlin Valley), pp. 2808:8-19 (Lake Valley) (Marshall).

<sup>1076</sup> Transcript Vol. 12, p. 2807:3-8 (Snake Valley); p. 2808:3-7 (Hamlin Valley) (Marshall).

<sup>1077</sup> Transcript, Vol.7 p. 1628:15-18 (McLendon).

<sup>1078</sup> Transcript, Vol.12 p. 2812:5-11 (Marshall).

<sup>1079</sup> Exhibit No. SNWA\_039, p. 7; Exhibit No. SNWA\_044, p. G24; Transcript, Vol.7 pp. 1633:25-1634:2 (McLendon).

<sup>1080</sup> Exhibit No. SNWA\_039, p. 7; Exhibit No. SNWA\_044, p. G24; Transcript, Vol.7 pp. 1628:21-1629:3 (McLendon).

<sup>1081</sup> Transcript, Vol.8 pp. 1648:24-1649:4 (McLendon).

Where change may occur, it would follow orderly succession patterns.<sup>1082</sup> Succession does not result in a denuded landscape; as one plant type is reduced, there is a shift to other plant types better adapted to the altered conditions.<sup>1083</sup> Changes in cover values do not equate to a lack of plant life; roots underground hold soil in place and collect moisture.<sup>1084</sup> Dr. McLendon testified that an increase in depth to water can result in healthy stable communities and does not inevitably result in not barren land.<sup>1085</sup>

The Applicant's experts indicate the aquatic and wetland communities would be most sensitive to change,<sup>1086</sup> but these are subject to monitoring, management and mitigation.<sup>1087</sup> Most of the wet meadows and grasslands in Spring Valley are sustained by irrigation and surface water runoff, so if irrigation continues, these would persist despite any change in groundwater levels.<sup>1088</sup>

Protestants argued that swamp cedars were also susceptible to adverse impacts from an increased DTW. The Applicant's plant expert Dr. McLendon testified that swamp cedars are the local name for Rocky Mountain juniper, the most widespread type of juniper in the Western United States.<sup>1089</sup> The species has a wide range all over the western United States and is adapted to many different environmental conditions.<sup>1090</sup> While the rooting depth of swamp cedars in Spring Valley is unknown, Rocky Mountain junipers have a maximum rooting depth of 20 meters.<sup>1091</sup> While it is possible that the "swamp cedars" are a distinct ecotype adapted to high groundwater in Spring Valley, there have been no genetic or field ecotype studies that have drawn that conclusion.<sup>1092</sup> In Spring Valley, Rocky Mountain juniper appears in both the valley floor where they are known as swamp cedars and in some higher elevation non-valley floor locations.<sup>1093</sup> The valley floor populations occur in two clusters, one about in the center of

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<sup>1082</sup> Transcript, Vol.8 p. 1691:2-11 (McLendon).

<sup>1083</sup> Transcript, Vol.7 p. 1624:10-18 (McLendon).

<sup>1084</sup> Transcript, Vol.8 pp. 1672:19-1673:1 (McLendon).

<sup>1085</sup> Transcript, Vol.8 p. 1706:5-9 (McLendon).

<sup>1086</sup> Transcript, Vol.8 pp. 1710:23-1711:2 (McLendon).

<sup>1087</sup> Transcript, Vol.8 pp. 1713:19-1715:5 (McLendon).

<sup>1088</sup> Transcript, Vol.8 p. 1655:5-16, p. 1657: 8-25 (McLendon).

<sup>1089</sup> Transcript, Vol.8 p. 1677:3-4 (McLendon).

<sup>1090</sup> Transcript, Vol.8 p. 1677:17-19 (McLendon).

<sup>1091</sup> Transcript, Vol.8 p. 1681:5-9 (McLendon).

<sup>1092</sup> Transcript, Vol.8 p. 1677: 9-11 (McLendon).

<sup>1093</sup> Transcript, Vol.8 p. 1676: 7-12 (McLendon).

Spring Valley and the other around Shoshone Ponds.<sup>1094</sup> The Shoshone Ponds cluster is sustained in part by flow from artesian wells.<sup>1095</sup> The highest cover values for junipers are in the wetter lowland sites.<sup>1096</sup> In drier sites, the density and the cover values decrease.<sup>1097</sup> This indicates that junipers respond to increased water supply in the lowland sites but can tolerate drier conditions. However, where standing water occurred the trees were dying.<sup>1098</sup> In the event that pumping has an effect on swamp cedars, Mr. Marshall testified that the Applicant could mitigate the impacts by regulating grazing and using the wells or surface water sources in the area to irrigate the trees.<sup>1099</sup>

Protestants did not present a witness that testified about swamp cedars or contradicted Dr. McLendon's description of swamp cedars and how they use water. The State Engineer finds that any increase in DTW that effects the swamp cedar will result in a decrease of density and cover, and the Applicant will be required to mitigate impacts to swamp cedars through regulating grazing and using the wells or surface water sources in the area to irrigate the trees or other methods approved by the State Engineer.

Protestant CPB argued that approving the Applications would decrease the amount of forage available for their cattle to eat and would result in cheatgrass infestation. However, Dr. McLendon testified that cheatgrass would not result from a change in DTW.<sup>1100</sup> External factors (soil disturbance, heavy grazing) result in domination of a site by cheatgrass, but those factors can be controlled.<sup>1101</sup> Understanding how cheatgrass functions allows management of it.<sup>1102</sup> With regard to cattle forage, some forage types are not phreatophytes. Since they do not rely on groundwater, any change in DTW would not affect these types of forage. Most of the wet meadows in Spring Valley are created via surface water irrigation techniques or surface water runoff,<sup>1103</sup> which would not change due to an increase in DTW. The State Engineer finds that in the absence of any specific site-by-site analysis of different forage types and their dependence on

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<sup>1094</sup> Transcript, Vol.8 p. 1676:1-6 (McLendon).

<sup>1095</sup> Transcript, Vol.8 p. 1740:15-17 (McLendon).

<sup>1096</sup> Transcript, Vol.8 p. 1678:17-18 (McLendon).

<sup>1097</sup> Transcript, Vol.8 p. 1678:19-23 (McLendon).

<sup>1098</sup> Transcript, Vol.8 pp. 1678:15-1679:4 (McLendon).

<sup>1099</sup> Transcript, Vol.12 p. 2803:2-17 (Marshall).

<sup>1100</sup> Transcript, Vol.8 p. 1694:6-10 (McLendon).

<sup>1101</sup> Transcript, Vol.8 pp. 1694:14-1696:10 (McLendon).

<sup>1102</sup> Transcript, Vol.8 pp. 1696:19-1697:7 (McLendon).

<sup>1103</sup> Transcript, Vol.8 p. 1655:5-16, p. 1657:19-25 (McLendon).

the regional groundwater system, the general plant succession evidence presented by Dr. McLendon is persuasive.

Dr. McLendon's 75-year vision for Spring Valley is of a landscape that looks much the same, with perhaps some bigger and smaller meadows, perhaps some different composition of shrublands, and aquatic and wetland habitats still in place.<sup>1104</sup> Many wetlands in Spring Valley are supported by surface water diversions, and these wetlands would not be changed by declines in DTW.<sup>1105</sup> A slow, gradual change in DTW will lead to a healthy transition in the plant community, indicating that hydrologic management of the Project should focus on slow, gradual declines in DTW to ensure environmental soundness.<sup>1106</sup> Overall, this would lead to a greater presence of shrublands.<sup>1107</sup> In some instances, such as where greasewood shrublands are ultimately replaced by big sagebrush shrublands, ecological benefits in the form of increased vertebrate density may be realized.<sup>1108</sup>

In those areas where surface flows to aquatic habitats may be substantially diminished, a decline in species diversity can result.<sup>1109</sup> However, as described in the Effects discussion above, impacts will not result in habitat or population reductions throughout Spring Valley and adjacent basins, but will be more limited in scope. For instance, although there may be a reduction in leopard frog habitat quality or quantity in discrete areas, mitigation techniques could be used in other areas to improve or increase overall leopard frog populations.<sup>1110</sup> Although there might be localized impacts to individuals at a specific site, there would be little impact to bird and bat populations in Spring Valley because birds and bats are mobile species and could reach other springs and water sources throughout Spring Valley and the adjacent basins.<sup>1111</sup> For species that lack mobility, such as fish, in addition to its approach of avoidance and minimization, the Applicant plans proactive steps, such as working with the Nevada Department of Wildlife to enhance habitat to improve species resiliency.<sup>1112</sup>

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<sup>1104</sup> Transcript, Vol.8 pp. 1767:11-1768:5 (McLendon).

<sup>1105</sup> Transcripts, Vol.8 pp. 1767:20-1768:19 (McLendon).

<sup>1106</sup> Transcript, Vol.12 p. 2812:5-11 (Marshall).

<sup>1107</sup> Transcript, Vol.8 p. 1769:4-15 (McLendon).

<sup>1108</sup> Exhibit No. SNWA\_363, p. 8-1.

<sup>1109</sup> Exhibit No. SNWA\_363, p. 8-1.

<sup>1110</sup> Transcript, Vol.12 pp. 2801:20-2802:13 (Marshall).

<sup>1111</sup> Transcript, Vol.12 pp. 2802:20-2803:1 (Marshall).

<sup>1112</sup> Transcript, Vol.12 p. 2810:8-20 (Marshall).

Based on the evidence in the record, including the adoption of the BMP and adaptive management techniques discussed herein, the State Engineer finds that despite any increase in depth to water, viable plant and wildlife communities will remain, and the Project, as developed and described in this ruling, will be environmentally sound.

**9. Ability to Mitigate Potential Effects**

In both Spring Valley and adjacent basins, the Applicant will implement effective monitoring, management and mitigation programs that will protect environmental areas of interest. Dr. Patten, Dr. Harrington and Mr. Landers all acknowledged the effectiveness of monitoring, management and mitigation programs.<sup>1113</sup> The Applicant's approach is first avoidance, then minimization, then mitigation of impacts, avoiding as many conflicts as possible as the Project is developed.<sup>1114</sup>

Voluntary commitments by the Applicant pursuant to its participation with Fish Recovery Implementation Teams and as a signatory to Candidate Conservation Agreements with Assurances provide an additional layer of environmental protections to such species as the Greater Sage-Grouse, the least chub, the Columbia spotted frog, and the Big Springs spinedace.<sup>1115</sup>

The Applicant has acquired extensive properties in Spring Valley and other basins that include land, surface water and groundwater rights, and grazing allotments ("Northern Resources"), which give numerous options for implementing management and mitigation actions that will protect the environment.<sup>1116</sup> The Northern Resources provide a platform for using integrated resource management techniques. Integrated resource management techniques coordinate the management of water, land, vital ecosystems, special status species, and other related natural resources to ensure their long-term sustainability.<sup>1117</sup>

The Applicant purchased private landholdings totaling approximately 23,500 acres in Spring, Dry Lake, and Steptoe Valleys.<sup>1118</sup> These deeded properties encompass, in part, the

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<sup>1113</sup> Exhibit No. GBWN\_59, p. 12; Transcript, Vol.18 pp. 4027:10-4028:1 (Patten); Transcript, Vol.23 pp. 5308:23-5309:13 (Harrington); Transcript, Vol.28 p. 6297:19-22 (Landers).

<sup>1114</sup> Transcript, Vol.12 pp. 2799:20-2800:1 (Marshall).

<sup>1115</sup> Exhibit No. SNWA\_363, p. 6-1, Table 6-1: Conservation Initiatives in which SNWA Voluntarily Participates; Transcript Vol.12 pp. 2784:12-2785:14 (Marshall).

<sup>1116</sup> Exhibit No. SNWA\_363, p. 6-5; Transcript, Vol.12 pp. 2790:23-2791:3 (Marshall).

<sup>1117</sup> Exhibit No. SNWA\_363, p. 6-5; Transcript, Vol.12 pp. 2789:22-2790:11 (Marshall).

<sup>1118</sup> Exhibit No. SNWA\_363, p. 6-6.

majority of Stonehouse Spring Complex; the majority of Minerva Spring Complex; a portion of Keegan Spring Complex; portions of Swamp Cedar North and Swamp Cedar South; Swallow Spring; and Unnamed #5 Spring.<sup>1119</sup> Four of the ranch properties are base properties to federal grazing allotments that are managed by BLM or U.S. Forest Service.<sup>1120</sup> The grazing allotments span eight hydrographic areas (Tippett, Spring, Steptoe, Hamlin, Lake, Dry Lake, Patterson, and Pahroc Valleys) and total approximately 900,000 acres, or 1,400 square miles.<sup>1121</sup> The majority of these grazing allotments are in Spring Valley (>60%) and northern Dry Lake Valley (>30%).<sup>1122</sup> Approximately 40% (over 4,500 acres) of the wetland/meadow habitats in Spring Valley occur on the Applicant's deeded property and 40% (approx. 60,000 acres) of the phreatophytic shrublands on the valley floor and valley floor/alluvial fan interface in Spring Valley occur within the Applicant's grazing allotments.<sup>1123</sup> These grazing allotments encompass, in part: Shoshone Ponds; Blind Spring; Four Wheel Drive Spring; a portion of Keegan Spring Complex; a small portion of Minerva Spring Complex; South Millick Spring; portions of Swamp Cedar North and Swamp Cedar South; a down-stream channel of Unnamed #5 Spring; and Willow Spring.<sup>1124</sup>

The Applicant's Northern Resources are used by the aquatic special status species: northern leopard frog and relict dace; the Toquerville pyrg; the terrestrial special status species Greater Sage-Grouse; valley-floor Rocky Mountain juniper trees; and big game.<sup>1125</sup> The Applicant can use the Northern Resources to irrigate with surface water or groundwater differently, and restrict grazing and enhance existing habitat as a way to avoid, minimize or mitigate potential Project impacts on the environmental areas of interest.<sup>1126</sup> The Applicant can also use the Northern Resources to manage succession of plant species through such techniques as modifying grazing and irrigation practices to reduce stress to meadow habitats, to improve meadows and wetlands, and to improve wildlife habitat.<sup>1127</sup>

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<sup>1119</sup> Exhibit No. SNWA\_363, p. 6-6.

<sup>1120</sup> Exhibit No. SNWA\_363, p. 6-6.

<sup>1121</sup> Exhibit No. SNWA\_363, p. 6-6.

<sup>1122</sup> Exhibit No. SNWA\_363, p. 6-6.

<sup>1123</sup> Exhibit No. SNWA\_363, p. 6-6.

<sup>1124</sup> Exhibit No. SNWA\_363, p. 6-6.

<sup>1125</sup> Exhibit No. SNWA\_363, p. 6-6.

<sup>1126</sup> Exhibit No. SNWA\_363, p. 6-5; Transcript, Vol.12 pp. 2789:22-2790:11 (Marshall).

<sup>1127</sup> Transcript, Vol.12 pp. 2791:8 -- 2792:11 (Marshall).

The State Engineer finds that the Applicant has the ability to identify impacts of the Project through its environmental monitoring plan. If the Applicant is unable to avoid or adequately minimize the impacts, it has the resources in place to mitigate any unreasonable impact.

10. Air Quality

Protestants argued that the Project is not environmentally sound because it may cause air pollution through additional blowing dust. The State Engineer's authority in the review of water right applications is generally limited to considerations identified in Nevada's water law. Air quality is not a consideration identified in Nevada's water law; rather, it is under the jurisdiction of the Nevada Department of Environmental Protection. Accordingly, these considerations are not properly before the State Engineer, and are not a basis for denying water rights applications.

Even if they were, however, substantial evidence showed that the project will not create a dust emissions problem. Although Protestants charged that dust problems at Owens Lake show that the Project also will create dust emissions problems, Protestants' experts agreed with Dr. McLendon that there are many differences between Owens Valley and Spring Valley.<sup>1128</sup>

Based on hydrologists' potentiometric maps, Dr. McLendon concluded Spring Valley playas are predominantly dry playas.<sup>1129</sup> Protestant expert Mr. Clifford Landers acknowledged the data he reviewed on the Spring Valley playas was insufficient for site-specific evaluation.<sup>1130</sup> The data he reviewed was insufficient for making a definitive determination as to whether playas should be categorized as wet or dry playas.<sup>1131</sup>

Dr. McLendon testified that playas do not produce dust unless the surface is disturbed.<sup>1132</sup> And although there was some disagreement as to whether to divide playas into just wet and dry playas or three different categories,<sup>1133</sup> there was no disagreement that a change in depth to water may decrease, rather than increase, the propensity to blowing dust.<sup>1134</sup> The Applicant has demonstrated its commitment to environmental sustainability and informed, scientifically sound

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<sup>1128</sup> Transcript, Vol.8 p. 1697:13-17 (McLendon); Transcript, Vol.28 p. 6271:13-22 (Landers).

<sup>1129</sup> Transcript, Vol.8 p. 1700:18-21 (McLendon).

<sup>1130</sup> Transcript, Vol.28 pp. 6363:20-6364:12 (Landers).

<sup>1131</sup> Transcript, Vol.28 p. 6368:2-14 (Landers).

<sup>1132</sup> Exhibit No. SNWA\_411; Transcript, Vol.8 p. 1701:3-5 (McLendon).

<sup>1133</sup> Transcript, Vol.28 p. 6377:5-9 (Landers).

<sup>1134</sup> Exhibit No. SNWA\_411; Transcript, Vol.8 p. 1701:9-12 (McLendon); Transcript, Vol.28 pp. 6389:23-6390:1 (Landers).

decision-making.<sup>1135</sup> 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.

**D. Future Growth and Development in the Basin of Origin**

Pursuant to NRS 533.370(3)(d), in determining whether to approve or reject an application for an interbasin transfer of groundwater, the State Engineer must consider whether the proposed action is an appropriate long-term use of the water, which will not unduly limit the future growth and development in the basin from which the water is exported. In considering the criterion of NRS 533.370(3)(d), the State Engineer has reviewed the evidence presented by the Applicant and the Protestants to determine whether the evidence supports the conclusion that there will be any future growth or development in Spring Valley which would be unduly limited by approving the Applications.

The Protestants position, generally, is that some or all of the Applications should be denied, arguing that the granting of the Applications will limit growth, adversely affect growth and development which has already occurred and that the threat of these Applications have affected growth during their pendency. The Applicant argues that future development in Spring Valley that requires significant new water resources is highly unlikely to occur in the foreseeable future and, therefore, the use of water as described in the Applications is an appropriate long-term use that will not unduly limit future growth and development in Spring Valley.

In reviewing what constitutes future growth and development, the State Engineer has elected to adopt a broad, conservative interpretation; however, the State Engineer has determined that a definition encompassing every type of potential growth and development that might possibly occur at some point in the future is too broad and speculative. The State Engineer need not accept anything anyone can think up as a possibility and leave water in a basin for that purpose in hopes that the proposed or hoped for use someday occurs. The State Engineer considers evidence of growth that is reasonably foreseeable to occur given current and historic

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<sup>1135</sup> Transcript, Vol.12 p. 2724:9-20 (Marshall).



conditions and trends. This includes projects that are planned or being developed and are currently or likely in the future to be economically, financially and technically feasible.

The Applicant argues that the Nevada Legislature has not mandated that any water be reserved for the basin of origin.<sup>1136</sup> But rather, asserts that the statute only provides that the State Engineer is required to consider “[w]hether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported.”<sup>1137</sup> In determining the likelihood of future growth and development in Spring Valley, the State Engineer has considered the evidence submitted relevant to residential, commercial, industrial, agricultural and other categories of growth and development. The State Engineer has then, based upon that evidence, determined what, if any, future water needs may be reasonably foreseeable to occur given current and historic conditions and trends.

The Applicant undertook a complete and comprehensive evaluation of the future rural economic development that would require significant water resources in Spring Valley, also referred to as the basin of origin.<sup>1138</sup> Among other things, the Applicant submitted evidence related to future agricultural use. This evidence primarily took the form of an investigation by experts retained by the Applicant, their summary report, and their supporting testimony.<sup>1139</sup> The Applicant submitted evidence regarding commercial, industrial, and alternative energy development within Spring Valley.<sup>1140</sup> The Applicant offered evidence related to possible residential development within Spring Valley.<sup>1141</sup> The Applicant also submitted evidence related to possible economic development and growth issues related to mining, manufacturing, tourism, hunting and general population growth.<sup>1142</sup> The Applicant also presented evidence and foundational testimony from Mr. Dylan Frehner regarding Lincoln County and the Lincoln County Water District’s intentions in Spring Valley.<sup>1143</sup> The evidence submitted by the Applicant provided the State Engineer with a comprehensive evaluation of economic

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<sup>1136</sup> NRS 570.370(6)(d).

<sup>1137</sup> NRS 570.370(6)(d).

<sup>1138</sup> Exhibit No. SNWA\_241.

<sup>1139</sup> Exhibit Nos. SNWA\_103, 104, 105, 241; Transcript, Vol.13 pp. 2947-3053 (Peseau and Carter). *See also*, Transcript, Vol.15 pp. 3357-3361 (Holmes).

<sup>1140</sup> Exhibit No. SNWA\_113 through Exhibit No. SNWA\_142, Exhibit No. SNWA\_241; *See also*, Transcript, Vol.14 pp. 3273-3331, Vol.15 pp. 3321-3390 (Holmes); Transcript, Vol.13 pp. 3053-3083, Vol.14 pp. 3084-3144 (Linvill and Candelaria).

<sup>1141</sup> Exhibit No. SNWA\_241; Transcript, Vol.14 pp. 3273-3331, Vol.15 pp. 3321-3390 (Holmes).

<sup>1142</sup> Exhibit No. SNWA\_241; Transcript, Vol.14 pp. 3273-3331, Vol.15 pp. 3321-3390 (Holmes).

<sup>1143</sup> Exhibit No. SNWA\_346; Exhibit No. SNWA\_347; Transcript, Vol.14 pp. 3146, 3153-3157 (Frehner).

County Water District's intentions in Spring Valley.<sup>1143</sup> The evidence submitted by the Applicant provided the State Engineer with a comprehensive evaluation of economic development and growth issues for Spring Valley and included an analysis of all current and proposed categories of development known to be relevant to the basin.

**1. Future Economic Activity in Spring Valley**

The Applicant undertook a comprehensive review of the historic and existing economic activity in Spring Valley. The Applicant submitted its findings and Mr. Richard Holmes testified regarding the examination he and his staff had undertaken. Mr. Holmes testified that it is very unlikely that residential, commercial and industrial development will occur within Spring Valley in the foreseeable future that would require additional water resources to be reserved for the basin.<sup>1144</sup>

In determining the likelihood of future economic growth and development in Spring Valley, Mr. Holmes reviewed federal, state and local publications and data resources and applied that information to general growth factors that he determined were particularly relevant in assessing the economic growth and development trends in Spring Valley.<sup>1145</sup> Mr. Holmes testified that the most fundamental factors which would lead to economic growth within Spring Valley include close proximity to large, established metropolitan centers and markets, sufficient population size, an educated labor force, a diversity of employment opportunities, location along the major transportation corridor, and substantial infrastructure, including electricity, roads, access to modern communications and the availability of basic public utilities and services.<sup>1146</sup>

In applying those factors to Spring Valley, Mr. Holmes testified that the presently declining population in Spring Valley is unlikely to show an upward trend.<sup>1147</sup> To support this conclusion, Mr. Holmes testified that the State of Nevada was the fastest growing state in the country for each of the last five decades, yet the population in Spring Valley remained virtually unchanged - in fact it decreased in population - during this period of extreme growth within the state.<sup>1148</sup> Because the population in Spring Valley did not increase even in this time of fast

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<sup>1143</sup> Exhibit No. SNWA\_346; Exhibit No. SNWA\_347; Transcript, Vol.14 pp. 3146, 3153-3157 (Frehner).

<sup>1144</sup> Mr. Holmes was qualified as an expert in land use planning. See, Transcript Vol.14, pp. 3279:1-5 (Holmes).

<sup>1145</sup> Exhibit No. SNWA\_241, pp. 1-1 -to1-2; Transcript, Vol.14 pp. 3285-3299 (Holmes).

<sup>1146</sup> Exhibit No. SNWA\_241, p. 2-1; Transcript, Vol.14 pp. 3285-3299 (Holmes).

<sup>1147</sup> Exhibit No. SNWA\_241, pp. 2-6 to 2-11; Transcript, Vol.14 pp. 3305-3308, Vol.15 pp. 3321-3332 (Holmes).

<sup>1148</sup> Exhibit No. SNWA\_241, pp. 2-6 to 2-11; Transcript, Vol.14 pp. 3305-3308, Vol. 15 pp. 3321-3332 (Holmes).

growth for the state as a whole, Mr. Holmes concluded that it is unlikely Spring Valley would experience an increase in population in the future.<sup>1149</sup> The Protestants witness Dr. Maureen Kilkenny not only conceded that the population statistics utilized by Mr. Holmes were correct, but she deferred to his numbers when presenting rebuttal testimony.<sup>1150</sup> Thus, based on the extremely low population of Spring Valley, Mr. Holmes concluded that there is little to no labor force for future business expansion within Spring Valley.<sup>1151</sup>

Furthermore, Mr. Holmes testified that Spring Valley is extremely isolated and is located well over 250 miles from the nearest metropolitan city.<sup>1152</sup> The extreme isolation of Spring Valley is further exacerbated by the lack of infrastructure within the valley, the lack of access to utilities such as sewer, electricity and natural gas, as well the absence of basic services such as medical services and police and fire protection.<sup>1153</sup> Mr. Holmes further testified that given the high expenses associated with developing the infrastructure and services needed to support economic growth within Spring Valley, it is unlikely that there will be any public or private investment to develop such infrastructure as Spring Valley will not generate significant return on the investment.<sup>1154</sup> Furthermore, Mr. Holmes concluded that there is limited potential for the establishment of new types of land uses or expansion of existing land uses in Spring Valley in the foreseeable future. For example, Mr. Holmes testified that water consumption for tourism and recreation within Spring Valley will be minimal as the basin has stagnant hunting and fishing numbers and there are low visitor numbers at Great Basin National Park in adjacent Snake Valley. Additionally there are few mining operations in the basin despite the current high demand for metals.<sup>1155</sup> As such, based on all these factors, Mr. Holmes concluded that it is highly unlikely that Spring Valley will sustain any economic growth requiring significant water resources in the foreseeable future.<sup>1156</sup>

The Protestants provided evidence and testimony from Dr. Kilkenny to rebut Mr. Holmes' evaluation of the likelihood of future growth and development within Spring Valley.

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<sup>1149</sup> Transcript, Vol.14 pp. 3305-3308; Vol.15 pp. 3321-3332 (Holmes); Exhibit No. SNWA\_241, pp. 2-6 to 2-11.

<sup>1150</sup> Transcript, Vol.22 p. 5028 (Kilkenny).

<sup>1151</sup> Transcript, Vol.15 p 3332:8-12 (Holmes).

<sup>1152</sup> Exhibit No. SNWA\_241, p. 2-4; Transcript, Vol.14 pp. 3301-3302 (Holmes).

<sup>1153</sup> Transcript, Vol.14 pp. 3294-3305 (Holmes).

<sup>1154</sup> Transcript, Vol.15 pp. 3347-3349 (Holmes).

<sup>1155</sup> Exhibit No. SNWA\_241, p. 3-8 to 3-11; Transcript, Vol.14 pp. 3375-3381 (Holmes).

<sup>1156</sup> Exhibit No. SNWA\_241, pp. 5-1 to 5-2; Transcript, Vol.15 pp. 3380-3381 (Holmes).

Dr. Kilkenny argued that the Applicant failed to consider the Central Place Theory Model and Rank-Size rule to predict future urban areas in Nevada.<sup>1157</sup> Dr. Kilkenny further argued in her rebuttal report that Mr. Holmes conceded in his expert report that the approval of the Applications will impact water resources in surrounding areas such as Ely, Baker and Caliente.<sup>1158</sup> Dr. Kilkenny additionally contends that the appropriate geographic scope for the analysis of the economic and social impact of the proposed water withdrawals and transfers is, at a minimum, the rural counties of White Pine and Lincoln.<sup>1159</sup> Finally, Dr. Kilkenny testified that the threat of these Applications has affected growth during their pendency.<sup>1160</sup>

The Applicant provided testimony and evidence to rebut Dr. Kilkenny's arguments and demonstrated that Dr. Kilkenny's testimony and expert report was based on fundamental errors.<sup>1161</sup> It is evident from Mr. Holmes' report and testimony that the Applicant does not concede that the approval of the Applications will impact water resources in areas such as Ely, Baker and Caliente; rather, Mr. Holmes was referring to the impacts of increased tourism and recreation, not to the impacts of groundwater pumping.<sup>1162</sup> While NRS 533.370(3)(d) does not require the State Engineer to look beyond the basins in examining future growth and development, the Applicant utilized county-wide data in assessing future growth and development when appropriate, and considered economic development within the counties containing Spring Valley.<sup>1163</sup> In contrast, Dr. Kilkenny admitted to speculation, utilized unduly strong and unsupported statements in her report, failed to correctly extrapolate figures from the source material she was updating, and admitted to numerous errors in her report.<sup>1164</sup> Critically, Dr. Kilkenny rests her conclusions upon a fundamental misunderstanding or disregard of Nevada water law and the prior appropriation doctrine. This is clear from her report and testimony, as she assumed the loss of all water in both White Pine and Lincoln Counties as a result of pumping under the Applications.<sup>1165</sup> Additionally, Dr. Kilkenny's testimony regarding the lack of growth

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<sup>1157</sup> Exhibit No. GBWN\_114, pp. 12-13.

<sup>1158</sup> Exhibit No. GBWN\_114, p. 54.

<sup>1159</sup> Exhibit No. GBWN\_114, pp. 4-6.

<sup>1160</sup> Transcript, Vol.22 pp. 4988-4989, pp. 5022-5023 (Kilkenny).

<sup>1161</sup> Transcript, Vol.15 pp. 3349-3355 (Holmes), Vol.13 pp. 3009-3013 (Peseau and Carter).

<sup>1162</sup> Transcript, Vol.15 pp. 3352-3354 (Holmes).

<sup>1163</sup> Exhibit No. SNWA\_241, p. 1-1; Transcript, Vol.14 pp. 3285-3291, Vol.15 pp. 3435-3438 (Holmes).

<sup>1164</sup> Transcript, Vol.22 pp. 4999-5002, pp. 5039-5040, pp. 5043-5058 (Kilkenny).

<sup>1165</sup> Exhibit No. GBWN\_066, p. 1; Transcript, Vol.22 pp. 5008-5009, pp. 5023-5024 (Kilkenny).

within the basins due to the mere threat of the Applications is highly speculative.<sup>1166</sup> The State Engineer must make his decisions based upon the evidence submitted and not on the speculative assertions as to public beliefs offered by Dr Kilkenny.<sup>1167</sup> The State Engineer finds that Dr. Kilkenny did not provide substantial or credible evidence of specific future growth and development which was planned, being considered, or which might even occur.

In addition, the Applicant presented testimony and evidence as to White Pine County's land use plans to show that White Pine County does not have any plans for development which would require significant new water resources in Spring Valley.<sup>1168</sup> Instead, development in White Pine County is more targeted towards Steptoe Valley.<sup>1169</sup> The Applicant additionally presented testimony from Lincoln County Water District General Counsel Dylan Frehner, who testified that Lincoln County has no current plans to utilize water from the Applications in the Lincoln County portion of Spring Valley.<sup>1170</sup> Resolutions passed by Lincoln County and the Lincoln County Water District state that the Lincoln County Water Plan does not anticipate any proposed development or use of water within the Lincoln County portion of Spring Valley.<sup>1171</sup> The Protestants have not presented any contradicting evidence or testimony to refute the lack of any current development plans in Spring Valley. Testimony provided through White Pine County Commissioner Gary Perea discussed the development of the Pattern Energy wind project within Spring Valley,<sup>1172</sup> but this type of wind project would not utilize significant water in its operation.<sup>1173</sup> Furthermore, in response to a question from the State Engineer regarding the amount of water identified in the White Pine County Water Plan for future growth and development in Spring Valley, Mr. Perea could not identify any specific quantity of water, but mentioned again the wind generation project and noted that there are numerous mining claims in the basin.<sup>1174</sup> White Pine County Economic Diversification Director Mr. Jim Garza additionally failed to testify to any economic plans that White Pine County has for Spring Valley.<sup>1175</sup>

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<sup>1166</sup> Transcript, Vol.22 pp. 4988-4989 (Kilkenny).

<sup>1167</sup> Transcript, Vol.22 pp. 4988-4989 (Kilkenny).

<sup>1168</sup> Exhibit No. SNWA\_252; Transcript, Vol. 15 pp. 3372-3373 (Holmes).

<sup>1169</sup> Transcript, Vol.15 pp. 3372-3373 (Holmes).

<sup>1170</sup> Exhibit No. SNWA\_353; Transcript, Vol.14 pp. 3151-3153 (Frehner).

<sup>1171</sup> Exhibit No. SNWA\_346; Exhibit No. SNWA\_347.

<sup>1172</sup> Transcript, Vol.21 p. 4682:1-23 (Perea).

<sup>1173</sup> Transcript, Vol.14 p. 3090:9-16 (Candelaria and Linvill).

<sup>1174</sup> Transcript, Vol.21 pp. 4692:10-4693:6 (Perea).

<sup>1175</sup> Transcript, Vol.21 pp. 4693-4757 (Garza).

## **2. Renewable Energy Development in Spring Valley**

The Applicant offered the expert testimony of Dr. Carl Linvill and Mr. John Candelaria to address the possible future water needs of Spring Valley related to future alternative energy development.<sup>1176</sup> In reaching their conclusions, Dr. Linvill and Mr. Candelaria reviewed and relied upon numerous sources, which have been submitted as exhibits.<sup>1177</sup> These included, for example, the information published by the Western Electric Coordinating Council, also known as WECC. This source shows demand for renewable energy in each of the western states and how much remaining unmet demand there is in those states.<sup>1178</sup> They also relied upon information from the National Renewable Energy Lab, which evaluates the effectiveness of renewable energy technologies and evaluates policies relative to renewable energy resources and the effect of those policies on renewable energy development in the western United States.<sup>1179</sup> They referenced the Renewable Energy Transmission Initiative in California which brings together persons from varying interests to evaluate renewable energy and transmission in California.<sup>1180</sup> They also considered the Western Renewable Energy Zone, Resource Plans filed by NV Energy, Sierra Pacific Power Company, Nevada State Office of Energy, and Regional plans by Lincoln County and White Pine County utility companies, and Western States' legislative policies with emphasis on Nevada and California for regional portfolio standards for renewable energy.<sup>1181</sup>

The evidence submitted by the Applicant demonstrates that the quality of renewable energy resources available in Spring Valley are not as competitive as those available in other areas within Nevada and the western region and, therefore, development of these resources in a fashion that would require significant water resources is very improbable. Furthermore, Mr. Candelaria testified and submitted cost figures to demonstrate that utility companies prefer to use geothermal energy as it produces a constant output much like conventional resources, whereas solar and wind power are more intermittent.<sup>1182</sup> Mr. Candelaria testified that solar energy is currently the most costly renewable energy to develop.<sup>1183</sup> Based on the high cost to develop

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<sup>1176</sup> Exhibit No. SNWA\_113; Transcript, Vols. 13-14 pp. 3053-3144 (Candelaria and Linvill).

<sup>1177</sup> Exhibit Nos. SNWA\_114 through 142.

<sup>1178</sup> Transcript, Vol.13 pp. 3075:10-3076:20 (Candelaria and Linvill).

<sup>1179</sup> Transcript, Vol.13 pp. 3076:21-3077:10 (Candelaria and Linvill).

<sup>1180</sup> Transcript, Vol.13 pp. 3077:11-3079:22 (Candelaria and Linvill).

<sup>1181</sup> Transcript, Vol.13 pp. 3079-3082 (Candelaria and Linvill).

<sup>1182</sup> Transcript, Vol.14 pp. 3098:17-3101:13 (Candelaria and Linvill).

<sup>1183</sup> Transcript, Vol.14 p. 3099:7-9 (Candelaria and Linvill).

solar energy and the general preference in developing geothermal over solar and wind energy, the experts' report at Figure 1-3 demonstrates that Nevada produces over 10,000 GWh of highly competitive geothermal energy, and these resources make up the bulk of Nevada's renewable energy portfolio standard.<sup>1184</sup>

Dr. Linvill's testimony and Figures 1-6 and 1-7 in his report demonstrate that the highest quality solar resources within any of the four basins that were the subject of the hearing are located in Delamar Valley.<sup>1185</sup> Dr. Linvill and Mr. Candelaria explained that even this higher quality Delamar Valley resource is not competitive and will not likely be developed.<sup>1186</sup> Dr. Linvill's testimony and Figure 1-1 of his report explain that solar energy primarily utilizes two different technologies, concentrated solar technologies (trough system) and photovoltaic ("PV").<sup>1187</sup> PV bypasses the turbine process and requires little to no water.<sup>1188</sup> The Applicant presented evidence and testimony that the only water required for PV-based solar energy is approximately 1.9 gal/MWh of water use for mirror/panel washing.<sup>1189</sup> Furthermore, the evidence demonstrates that PV costs are rapidly declining, making the technology more competitive than concentrated solar.<sup>1190</sup> The State Engineer finds the Applicant provided substantial evidence that the quality of the solar resource in Spring Valley is such that it is not competitive and will not likely be developed. Furthermore, the Applicant has presented sufficient evidence that even if eastern Nevada solar energy were to become competitive in the energy market, such development would be PV-based, occur in the very distant future, and require very little to no water given emerging cleaning technologies.<sup>1191</sup> The State Engineer finds that no reservation of water will be necessary, even in the distant future, to support the development of solar power resources in Spring Valley.

Dr. Linvill also provided testimony regarding the high quality wind resources that exist in Spring Valley.<sup>1192</sup> This resource and its development and water usage was also the subject of

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<sup>1184</sup> Exhibit No. SNWA\_113, Figures 1-3 and 4-2.

<sup>1185</sup> Exhibit No. SNWA\_113, p. 1-5; Transcript, Vol.14 p. 3103:12-19 (Candelaria and Linvill).

<sup>1186</sup> Exhibit No. SNWA\_113 pp.1-5 to 1-8; Transcript Vol.14, pp. 3103-3105 (Candelaria and Linvill).

<sup>1187</sup> Exhibit No. SNWA\_113, p.1-10; Transcript, Vol.14 pp. 3090:20-3092:9 (Candelaria and Linvill).

<sup>1188</sup> Transcript, Vol.14 pp. 3090-3094 (Candelaria and Linvill).

<sup>1189</sup> Exhibit No. SNWA\_113, p.1-10; Transcript Vol.14 pp. 3090:17-3094:22 (Candelaria and Linvill).

<sup>1190</sup> Exhibit No. SNWA\_113, p. 1-9; Transcript, Vol.14 pp. 3094-3099 (Candelaria and Linvill).

<sup>1191</sup> Exhibit No. SNWA\_113, p. 7-1 to 7-5.

<sup>1192</sup> Transcript, Vol.14 p. 3090:9-16 (Candelaria and Linvill).

testimony from Protestant witnesses.<sup>1193</sup> Dr. Linvill explained that after construction, the operation of wind energy facilities requires little to no water.<sup>1194</sup> Testimony of several witnesses established that water for development of the current wind project in Spring Valley was supplied through a temporary change of use of an existing agricultural water right.<sup>1195</sup> It is likely that any future wind power projects in Spring Valley would be able to do the same.

The State Engineer notes that there was no evidence presented by any Protestant demonstrating current or even future alternative energy development plans in Spring Valley which would require additional water resources. Based upon the evidence received, the State Engineer finds that it is improbable that future renewable energy development will occur that would require additional water resources.

### **3. Agricultural Development in Spring Valley**

The Applicant submitted the testimony of two economic experts who examined the likelihood from an economic perspective of future agricultural development which would require additional water resources.<sup>1196</sup> Dr. Dennis Peseau and George Carter explained that they researched and reviewed data and literature which they believed would be particularly relevant to analyze agricultural operations in Spring Valley and White Pine County and memorialized their research in their report.<sup>1197</sup> The information reviewed and relied upon included U.S. Department of Agriculture ("USDA") historical data and trends, and University of Nevada, Reno and University of California, Davis extension studies prepared to assist farmers in determining typical expenses for starting and maintaining an operation.<sup>1198</sup> Additionally, Dr. Peseau and Mr. Carter visited Spring Valley and reviewed satellite maps to determine terrain and existing infrastructure and current operations within Spring Valley.<sup>1199</sup>

The Applicant presented evidence to show that Nevada is among the lowest ranking alfalfa producers in the Western United States and that White Pine County, which holds most of Spring Valley, is among the lowest producing counties within the state.<sup>1200</sup> Mr. Carter testified

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<sup>1193</sup> Transcript, Vol.27 pp. 6189:18-6191:6 (Scott and Drew).

<sup>1194</sup> Transcript, Vol.14 p. 3090:9-16 (Candelaria and Linvill).

<sup>1195</sup> Transcript, Vol.27 pp. 6189:18-6191:6 (Scott and Drew).

<sup>1196</sup> Transcript, Vol.13 pp. 2947-3053 (Carter and Peseau).

<sup>1197</sup> Exhibit No. SNWA\_103, pp. 26-28; Transcript, Vol.13 pp. 2959-2961, pp. 2965-2967 (Carter and Peseau).

<sup>1198</sup> Exhibit No. SNWA\_103, pp. 26-28; Transcript, Vol.13 pp. 2959:14-2960:15 (Carter and Peseau).

<sup>1199</sup> Transcript, Vol.13 pp. 2966:4- 2968:1 (Carter and Peseau).

<sup>1200</sup> Exhibit No. SNWA\_103, pp.1-8; Transcript, Vol.13 pp. 2971-2974 (Carter and Peseau).



that a comparison of regional markets is important because the regional market affects market prices for a potential grower in Spring Valley.<sup>1201</sup>

The Applicant submitted evidence that the primary crop grown within Spring Valley is hay and, in particular, alfalfa.<sup>1202</sup> Mr. Carter additionally provided evidence and testimony regarding the historic trends which reveal a decline in alfalfa production in White Pine County over the last decade.<sup>1203</sup> The evidence indicates that White Pine County and Spring Valley likely have lower production due to soil conditions and high altitude, which equates to a shorter growing period.

On direct examination, the relatively high current prices for alfalfa were discussed.<sup>1204</sup> Mr. Carter offered his opinion that although alfalfa is currently enjoying very high market prices, such prices are due to unusual factors that likely will not create a trend.<sup>1205</sup> However, Mr. Carter testified that despite these high prices in alfalfa, White Pine County is not showing any increase in production.<sup>1206</sup>

The Applicant has utilized the most relevant factors to determine that it is unlikely that there will be future agricultural growth and development in Spring Valley. In addition to the factors discussed above, the Applicant's conclusion is based upon the fact that new investment in agricultural projects within Spring Valley will not result in positive economic returns and therefore it is unlikely that new money will be invested in such a venture.<sup>1207</sup> Dr. Peseau and Mr. Carter base this opinion in large measure upon studies published by the University of Nevada, Reno.<sup>1208</sup> These documents were each based upon practices and materials considered typical of a well-managed farm and ranch in the region, as determined by a producer panel.<sup>1209</sup> Dr. Peseau and Mr. Carter explained that utilizing the establishment and maintenance costs of these studies compared to the USDA alfalfa market prices demonstrates unfavorable economic circumstances for establishing new alfalfa stands in White Pine County and Spring Valley.<sup>1210</sup>

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<sup>1201</sup> Transcript, Vol.13 pp. 2968:22-2970:5 (Carter and Peseau).

<sup>1202</sup> Exhibit No. SNWA\_103, p. ES-1 to ES-2; Transcript, Vol.13 pp. 2967:15- 2968:5 (Carter and Peseau).

<sup>1203</sup> Exhibit No. SNWA\_103, p. 6; Transcript, Vol.13 pp. 2978:7-16 (Carter and Peseau).

<sup>1204</sup> Transcript, Vol.13 pp. 2978:24-2982:5 (Carter and Peseau).

<sup>1205</sup> Transcript, Vol.13 pp. 2978:24-2982:5 (Carter and Peseau).

<sup>1206</sup> Transcript, Vol.13 pp. 2978:24-2982:5 (Carter and Peseau).

<sup>1207</sup> Exhibit No. SNWA\_103; Transcript, Vol.13 pp. 2958:16- 2958:13 (Carter and Peseau).

<sup>1208</sup> Exhibit Nos. SNWA\_104; SNWA\_105; Transcript, Vol.13 pp. 2964:12-2966:3 (Carter and Peseau).

<sup>1209</sup> Exhibit Nos. SNWA\_104; SNWA\_105; Transcript, Vol.13 pp. 2964:12-2966:3 (Carter and Peseau).

<sup>1210</sup> Exhibit No. SNWA\_103; Transcript, Vol.13 pp. 2987-2999 (Carter and Peseau).

Dr. Peseau also provided testimony regarding his review of external factors that might be relevant to agricultural growth in Spring Valley.<sup>1211</sup> He testified that the USDA prediction of contraction of the dairy market will likely negatively impact alfalfa demand and is not likely to drive growth in this basin.<sup>1212</sup> The State Engineer also received testimony that limitations on grazing allotments will negatively impact the demand for alfalfa as a supplemental winter feed in Spring Valley.<sup>1213</sup> This opinion was consistent with the Protestant testimony that grazing allotments have been reduced in recent years.<sup>1214</sup>

No Protestant submitted any credible evidence indicating the likelihood of expansion of agriculture within Spring Valley that would require additional water resources. Mr. Jim Garza did testify on behalf of White Pine County regarding his calculations of the amount of water available in Spring Valley and the amount of alfalfa that in his view could be grown using that water.<sup>1215</sup> The State Engineer notes that Mr. Garza, although a county official, was not designated as an expert. The information upon which Mr. Garza based his calculations was not marked or submitted into the record, as it was not exchanged pursuant to the State Engineer's Pre-hearing Order.<sup>1216</sup> The testimony of Mr. Garza has been given little weight by the State Engineer because Mr. Garza's calculations showed what he speculated could be done in Spring Valley with a certain amount of water. Mr. Garza's calculations were a mathematical exercise and were unsupported by any evidence that the development he suggested was likely, even if these Applications were denied.<sup>1217</sup>

On cross-examination there was a suggestion by counsel for the CPB that the motivation to expand ranching operations for the CPB may be different from a for-profit operation; however, there was no evidence submitted by CPB or any protestant of any current plan or intent to expand operations.<sup>1218</sup> Indeed, the Cleveland Ranch exhibits and testimony confirmed that its operations do not include any alfalfa production and there was no evidence of a desire by the CPB to expand its operation.

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<sup>1211</sup> Transcript, Vol.13 pp. 2983:10-2985:19 (Carter and Peseau).

<sup>1212</sup> Exhibit No. SNWA\_103, pp.12-13; Transcript, Vol.13 pp. 2999:8-3002:1 (Carter and Peseau).

<sup>1213</sup> Transcript, Vol.13 pp. 2984:11-2985:11 (Carter and Peseau).

<sup>1214</sup> Transcript, Vol.24 p. 5507:12-15 (Gloeckner).

<sup>1215</sup> Transcript, Vol.21 pp. 4705:24-4711:20 (Garza).

<sup>1216</sup> Exhibit No. SE\_001.

<sup>1217</sup> Transcript, Vol.21 pp. 4705:24-4711:20 (Garza).

<sup>1218</sup> Transcript, Vol.13 pp. 3029:9-3031:12 (Carter and Peseau).

Finally, several Protestant witnesses testified that they believed that approving the Applications will harm and/or "dry up" the existing vegetation on their ranching operations.<sup>1219</sup> However, none of these Protestant witnesses provided testimony or evidence regarding future expansion of their existing operations or future economic or agricultural development plans which would require significant additional water resources.<sup>1220</sup> The State Engineer finds that the Protestants witnesses have not presented evidence that approving the Applications will unduly limit growth and development of existing ranching operations within Spring Valley.

As with crop-based agriculture, the evidence demonstrates that the cow/calf market in Spring Valley is unlikely to grow in the foreseeable future. Mr. Carter provided testimony and USDA trends for cow/calf grazing.<sup>1221</sup> These trends are downward and do not support likely growth. The Applicant again relies in part on information published by University of Nevada, Reno for establishment and maintenance costs of a cattle operation in White Pine County.<sup>1222</sup> Dr. Peseau and Mr. Carter then contrasted this information with USDA cow/calf market prices and the resulting conclusion, like the alfalfa operation, demonstrates the generally unfavorable economic circumstances for establishing new cattle operations in Spring Valley. Although on cross-examination counsel for GBWN asked Dr. Peseau about grazing allotments and Dr. Peseau's knowledge of proposals to expand grazing operations, Dr. Peseau indicated he had no information and at no point did GBWN or any Protestant, including the representative of the Nevada Cattlemen's Association, submit evidence of intent to expand cattle operations which would result in a need for additional water resources within the basin.<sup>1223</sup>

Lastly, Dr. Peseau and Mr. Carter submitted their analysis of the economics of a new joint alfalfa and cow/calf operation.<sup>1224</sup> Similar to each type of operation singularly, this analysis demonstrates to a reasonable certainty that a joint alfalfa and cow/calf operation is still not economic, even though certain expenses and overhead can be shared, and therefore it is unlikely that there will be future development of such operations.<sup>1225</sup>

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<sup>1219</sup> Transcript, Vol.24 pp. 5503:11-5516:7 (Gloeckner); Vol.24 pp. 5541-5551 (Rountree).

<sup>1220</sup> Transcript, Vol.24 pp. 5503:11-5516:7 (Gloeckner); Vol.24 pp. 5541-5551 (Rountree).

<sup>1221</sup> Transcript, Vol.13 pp. 3002:15-3009:5 (Carter and Peseau).

<sup>1222</sup> Exhibit No. SNWA\_104.

<sup>1223</sup> Transcript Vol. 13 pp. 3037-3038 (Carter and Peseau).

<sup>1224</sup> Exhibit No. SNWA\_103; Transcript, Vol.13 pp. 3013:13-3016:24 (Carter and Peseau).

<sup>1225</sup> Exhibit No. SNWA\_103; Transcript, Vol.13 pp. 3013:13-3016:24 (Carter and Peseau).

The evidence and conclusions of Dr. Peseau and Mr. Carter were uncontroverted by any opposing expert. Dr. Kilkenny testified on behalf of GBWN. Although she testified to her opinion that the pendency of these Applications has affected growth and development in the basins as an abstract concept, she did not quantify that growth nor could she indicate what had been the effect.<sup>1226</sup> On cross examination, Dr. Peseau and Mr. Carter testified to the contrary that the pendency of these Applications has not been a factor in depressing investment in agriculture in the basins of origin.<sup>1227</sup> Dr. Kilkenny criticized the method employed by Dr. Peseau and Mr. Carter, suggesting that they had only considered 10 to 12 years of a typical cattle cycle, but she did not offer a contrary opinion regarding the conclusions they reached.<sup>1228</sup> In fact, Dr. Kilkenny provided testimony consistent with the conclusion advanced by the Applicant, suggesting that such operations are marginally profitable at best and often in the red.<sup>1229</sup> Similarly, she offered no contrary opinion or rebuttal report regarding the economics of new crop-based agriculture in the basins. Rather, the evidence submitted both through the testimony of Dr. Kilkenny and all of the Protestants focused on the currently existing economic activity and not on future activity which might be negatively impacted by the granting of these Applications.<sup>1230</sup>

The Applicant presented substantial evidence supported by expert testimony that it is highly improbable that there will be any significant additional investment in new agricultural endeavors in Spring Valley and that numerous factors including the unfavorable economics of such operations, and not the availability of water, is and will continue to be the factor limiting additional agricultural development in Spring Valley.<sup>1231</sup> The State Engineer finds that it is unlikely that there will be any significant new agricultural development in Spring Valley and therefore the granting of these Applications will not unduly limit such development.

#### **4. Change of Use for Existing Water Rights**

In reaching the conclusion that granting the Applications will not unduly limit future growth and development, the State Engineer has considered not just the prospects and trends for future growth, but also the water rights already established within Spring Valley that may remain

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<sup>1226</sup> Transcript, Vol.22 pp. 4988-4989 (Kilkenny).

<sup>1227</sup> Transcript, Vol.13 pp. 3047-3048 (Carter and Peseau).

<sup>1228</sup> Transcript, Vol.22 pp. 4991-4992 (Kilkenny).

<sup>1229</sup> Transcript, Vol.22 p. 4991:21-22 (Kilkenny).

<sup>1230</sup> Exhibit Nos. GBWN\_066; GBWN\_068; GBWN\_114; Transcript, Vol.22 p. 4991:21-22 (Kilkenny); Transcript, Vol.28 pp. 6226-6260 (Cooper and Sanders).

<sup>1231</sup> Transcript, Vol.13 pp. 3021-3022 (Carter and Peseau).

within the basin for current and future uses. The Protestants focused upon the existing water rights and the effects should those rights be lost; however, existing water rights are protected under the law and approving the Applications does not undermine any of those rights or their priority. The existing water rights in Spring Valley will remain available not only for their current use, but may also be available for different permanent and temporary uses through a change of use application. Many basins in Nevada have grown and developed in this fashion, with agricultural water rights being changed to a different purpose when a demand arises. However, the State Engineer also finds that although there are existing rights in the basin that may be transferred to other uses to accommodate future activities, a significant amount of those rights are owned by the Applicant. The Applicant testified that under certain circumstances, use of their existing water rights in the basin may be used for mitigation of any impacts.<sup>1232</sup> The Applicant cannot use its existing water rights on the ranches it purchased in Spring Valley for both mitigation and future development; these two uses are contradictory. Although significant existing water rights are available within Spring Valley and will remain in the basin even after these Applications are granted, not all of the existing water rights may be available to support any unforeseen future use that is not known or contemplated at the time these Applications are considered.

#### **4. Reserving Water for Future Uses**

GBWN offered the testimony of Dr. Kilkenny regarding basin of origin issues. By her own admission, Dr. Kilkenny completed no original work.<sup>1233</sup> Rather, she indicates her effort was an attempt to update information which had been previously compiled by others.<sup>1234</sup> Notably, Dr. Kilkenny did not provide any opinion regarding the likelihood of future growth and development within Spring Valley, nor did she provide any evidence of specific future growth and development which was planned, being considered, or which might even occur. Rather, she speculated that the pendency of these Applications has had an effect upon the growth and development of the basin.<sup>1235</sup> Dr. Kilkenny explained that she did not attempt to quantify the economic activity within Spring Valley; instead, she presented county-wide information for

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<sup>1232</sup> Transcript, Vol.1 pp. 100:16-101:1 (Mulroy); Transcript, Vol.9 p. 2079:14-17 (Prieur); Transcript, Vol.11 pp. 2585:23-2586:6 (Watrus).

<sup>1233</sup> Transcript, Vol.22 pp. 5020:18-5021:7 (Kilkenny).

<sup>1234</sup> Transcript, Vol.22 pp. 5020:18-5021:7 (Kilkenny).

<sup>1235</sup> Transcript, Vol.22 pp. 4988-4989, 5023 (Kilkenny).

White Pine and Lincoln Counties.<sup>1236</sup> Dr. Kilkenny testified that when she authored her report she did not understand the geographic extent of Spring Valley.<sup>1237</sup> Dr. Kilkenny's testimony revealed errors and misstatements in her report and her report and testimony has been given little weight by the State Engineer.

The State Engineer has determined it is appropriate to reserve a quantity of water within Spring Valley. This quantity of water is established to ensure that future growth and development, which is not currently foreseeable or anticipated, is not unduly limited as a consequence of the approval of the Applications. No Protestant submitted evidence in support of a specific quantity of water that should be reserved in Spring Valley; however, many Protestant witnesses discussed growth in more general terms. The Applicant has suggested that a reservation of 300 afa is consistent with the testimony of its expert witness, Mr. Holmes. Based on the historic use of water in the basin, he asserts that 300 afa would be more than enough water for any unforeseen future uses in Spring Valley. However, the State Engineer must utilize his knowledge and judgment to evaluate the evidence and determine whether the Applicant's suggestion of 300 afa should be accepted and whether that amount is sufficient to satisfy the statutory requirement.

The State Engineer finds that he will reserve an amount of water based on the evidence and his professional knowledge and judgment. This evidence includes that cited above and official records on file in the Office of the State Engineer.<sup>1238</sup> The Applicant indicates it holds significant water rights in Spring Valley and implies that these water rights could be used for future growth and development; however, the Applicant states that its existing water rights may be used for mitigation purposes.<sup>1239</sup> Because the Applicant may use its existing water rights for mitigation purposes, those water rights would not be available for re-purposing to support future growth and development; therefore, the State Engineer finds that he must reserve more than the 300 afa suggested by the Applicant. Based upon the evidence in the record, including but not limited to that cited above, the State Engineer finds that approving the Applications, as limited in

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<sup>1236</sup> Transcript, Vol.22 pp. 5033-5038 (Kilkenny).

<sup>1237</sup> Transcript, Vol.22 pp. 5024-5026 (Kilkenny).

<sup>1238</sup> NAC 533.300.

<sup>1239</sup> Transcript, Vol.1 pp. 100:16-101:1 (Mulroy), Transcript, Vol.9 p. 2079:14-17 (Prieur), Transcript, Vol.11 2585:23-2586:6 (Watrus).

this ruling and with the reservation of 4,000 afa of water, will not unduly limit future growth and development in Spring Valley.

### VIII. PLACE OF USE (LINCOLN COUNTY)

The Applications were filed for municipal and domestic uses in Clark, Lincoln, Nye, and White Pine Counties. During the administrative hearing on these Applications, evidence was provided to support a claim that there is a place of use in both Clark and Lincoln Counties.

Mr. Dylan Frehner, General Counsel for the Lincoln County Water District, provided testimony on behalf of Lincoln County and the Lincoln County Water District (collectively, "Lincoln County"). That testimony described Lincoln County's agreement with the Applicant that would assign a portion of the Applications to Lincoln County.<sup>1240</sup> Mr. Frehner also described Lincoln County's intentions to put any water it received from the Applications to beneficial use within Lincoln County. Mr. Frehner testified regarding two resolutions: one from the Lincoln County Board of County Commissioners, and one from the Lincoln County Water District.<sup>1241</sup> Both resolutions identified and confirmed Lincoln County's lack of current plans for growth and development in that portion of Spring Valley which resides in Lincoln County.<sup>1242</sup> In that regard, evidence indicated that Lincoln County does not anticipate development for municipal use of water within the Lincoln County portion of Spring Valley.<sup>1243</sup> Rather, this evidence indicated Lincoln County's intention to put the water to beneficial use elsewhere within Lincoln County, specifically within Coyote Spring Valley.<sup>1244</sup>

The agreement between SNWA and Lincoln County was admitted into evidence as Exhibit No. SNWA\_352. In accordance with this agreement, the use of the water by Lincoln County is limited to Lincoln County in general or the applicable basin of origin.<sup>1245</sup> Through the testimony of Mr. Frehner and the evidence submitted, Lincoln County has indicated that it does not anticipate projects or development in Spring Valley, and further has indicated its intent to use any water obtained pursuant to these Applications within the Lincoln County/Coyote Springs Consolidated General Improvement District.<sup>1246</sup>

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<sup>1240</sup> Exhibit No. SNWA\_352.; Transcript, Vol.14 pp. 3149:18-3152:9 (Frehner).

<sup>1241</sup> Exhibit No. SNWA\_346; Exhibit No. SNWA\_347; Transcript, Vol.14 pp. 3153:4-3157:7 (Frehner).

<sup>1242</sup> Exhibit No. SNWA\_346, Exhibit No. SNWA\_347; Transcript, Vol.14 pp. 3153:4-3157:7 (Frehner).

<sup>1243</sup> Transcript, Vol. 14, pp. 3153:4-3157:7 (Frehner).

<sup>1244</sup> Transcript, Vol. 14, pp. 3153:4-3157:7 (Frehner).

<sup>1245</sup> Exhibit No. SNWA\_352; Transcript, Vol.14 pp. 3152:14-3153:2 (Frehner).

<sup>1246</sup> Exhibit No. SNWA\_346; Exhibit No. SNWA\_347; Transcript, Vol.14 pp. 3152-3157 (Frehner).

The Applicant submitted a Lincoln County resolution dated June 20, 2011, in which Lincoln County expressed a preference for the use of any water acquired pursuant to the agreement.<sup>1247</sup> While the resolution clearly indicates intent by Lincoln County to use any water assigned to Lincoln County within the Coyote Springs-Lincoln County General Improvement District, the resolution provides that the water would be used for the Coyote Springs Development in Coyote Spring Valley. On cross examination, the Applicant's Lincoln County witness conceded that all development has come to a halt on that project and that the original project proponent no longer owns the development.<sup>1248</sup> Further, Coyote Springs Development was the only anticipated use for the water.<sup>1249</sup>

The Nevada Supreme Court in the case of *Bacher v. Office of the State Engineer*,<sup>1250</sup> reversed the district court's affirmance of the State Engineer's approval of an interbasin groundwater transfer because the evidence of the applicant's need was not based on specific facts, but speculation:

When reaching his decision to grant Vidler Water's application, the State Engineer considered the proposed power plant second phase expansion, the mall expansion, the MGM Grand employee housing, an industrial park, and a theme park. Both the State Engineer's decision and the record suffer from a fundamental defect: neither specifies how much afa of water each project would require and how that quantity would be reduced by Primm South's unused water permits. Without this specificity, a reasonable mind could not accept as adequate the conclusion that Vidler Water had justified a need to import 415 afa of water from the Sandy Valley Basin. Because he failed to make the necessary calculations to determine Primm South's future water usage by project and the support of that usage by the imported water, the State Engineer's decision is not supported by substantial evidence. We therefore conclude the State Engineer abused his discretion in finding that Vidler Water had presented sufficient evidence to justify a need to import water under NRS 533.370(6)(a) (Currently, NRS 533.370(3)(a)).

The State Engineer finds these Applications were originally filed by the Las Vegas Valley Water District and are now held by the Southern Nevada Water Authority. The State Engineer finds there is no evidence in the record of a need for or a beneficial use of the water for anywhere other than Clark County, and there is no evidence in the record showing the Applicant has justified a need to import water into Coyote Spring Valley as part of the Coyote Springs-

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<sup>1247</sup> Exhibit No. SNWA\_347.

<sup>1248</sup> Transcript Vol.14 pp. 3168-70 (Frehner).

<sup>1249</sup> Transcript Vol.14 pp. 3171-72 (Frehner).

<sup>1250</sup> *Bacher v. Office of the State Engineer*, 122 Nev. 1110, 1122-23, 146 P.3d 793, 801 (2006).



Lincoln County General Improvement District. The State Engineer finds based on the *Bacher* decision that insufficient evidence was provided to support a claimed use of any specific amount of water in Lincoln County. Accordingly, the State Engineer finds that the Applicant has not presented sufficient evidence that the place of use of the Applications will include Lincoln County.

## **IX. OTHER PROTEST GROUNDS**

### **A. The Applications are in Proper Form**

The Protestants allege that the Applications should be denied because they fail to adequately describe the place of use, proposed works, the cost of such works, estimated time required to construct the works and place the water to beneficial use, and the approximate number of persons to be served. The application form used by the Office of the State Engineer only requires a brief explanation of the description of the proposed works of diversion and delivery of water. On its Applications, the Applicant described that the water was to be diverted via a cased well, pump, pipelines, pumping stations, reservoirs and distribution system. The Applicant estimated the cost of each well and indicated it believed it would be a minimum of 20 years to construct the works of diversion and place the water to beneficial use.<sup>1251</sup>

Applicants who request an appropriation for municipal water use are required by NRS 533.340(3) to provide information approximating the number of persons to be served and the future requirement. While the Applicant did not have this information physically on its application, by letter dated March 22, 1990, the Applicant supplemented its Applications and indicated the approximate number of persons to be served was 800,000 in addition to the 618,000 persons it was currently serving. The population of Southern Nevada already exceeds this projection as it now is nearing 2 million citizens. The State Engineer finds for the purposes of the application form, the Applications adequately describe the proposed works, the cost of such works, estimated time required to construct the works and place the water to beneficial use and the approximate number of persons to be served and dismisses this protest claim.

### **B. Access to Federal Land**

Some of the Protestants alleged that the Applicant has not demonstrated the ability to access land containing the points of diversion or a right-of-way from the BLM for the Project.

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<sup>1251</sup> See, e.g., Exhibit No. SE\_003 (Spring).

Testimony was provided that the Lincoln County Lands Act identified a utility corridor for this and other utilities and that the Act required issuance of a right-of-way for the Project within the area designated by the Act.<sup>1252</sup> The Applicant submitted evidence that it is complying with NEPA and a DEIS has been prepared as part of the process to obtain from the BLM the rights-of-way to gain access to federal land for the Project.<sup>1253</sup> The State Engineer finds the evidence indicates the Applicant is pursuing the right-of-way in good faith and with reasonable diligence and dismisses this protest claim.

**C. Need for Further Study/More Information**

Protestants allege that the Applicant has not completed sufficient analysis of its need for this water, and sufficient information about the aquifers at issue does not presently exist to allow the State Engineer to make an intelligent judgment as to the effects of granting the Applications. Protestants argue that granting the Applications in absence of further comprehensive study and planning and an independent, formal and publicly-reviewable assessment would prove detrimental to the public interest. The State Engineer finds there is no evidence that the State Engineer or the public has been denied relevant information. The State Engineer finds there is no provision in Nevada water law that requires comprehensive water-resource development planning prior to the granting of a water right application; however, the evidence shows that the Applicant has engaged in comprehensive long-range planning.<sup>1254</sup> The State Engineer finds there is nothing in Nevada water law that requires water resource evaluation by an independent entity, but rather that is the responsibility of the State Engineer; therefore, these protest claims are dismissed. The State Engineer finds that additional study is not needed to grant the Applications; however, additional studies associated with staged development pursuant to NRS 533.3705 will provide needed information for future development. The Applicant has already conducted valuable study of the hydrology and environment of the area. The State Engineer finds that additional study will be required going forward in the form of the Management Plan.

**D. Las Vegas is Big Enough**

Protestants argue that Las Vegas is large enough and further growth is not in the best interest of the Las Vegas Valley, that Clark County should only grow within the limits of its

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<sup>1252</sup> Exhibit No. SNWA\_351.

<sup>1253</sup> Transcript, Vol.1 p. 217:16-25 (Holmes).

<sup>1254</sup> Exhibit No. SNWA\_209; Transcript, Vol.2 pp. 248:20-250:2 (Entsminger).

local resources, and that the State should encourage growth control, use of local resources, and sustainability rather than give Las Vegas more water. The State Engineer finds no evidence was provided in support of the protest claim. In addition, the State Engineer finds he has not been delegated the responsibility to control growth and has not been delegated the responsibility for land use planning in Nevada. The State Engineer finds the decisions as to growth control are the responsibility of other branches of government and dismisses this protest claim.

**E. Corruption and Reputational Harm as Seen in California**

Protestants argue that the proposed water project will injure the state's reputation, promote factious politics and allegations of corruption, waste tremendous quantities of water through leakage and evaporation, and foster the dangerous illusion that water supplies are limitless or that supplies are allocated solely for the advantage of the rich and powerful. The Protestants state that these consequences are evident by California's large scale water project experience. The State Engineer finds that though some evidence was presented regarding water projects in California, those projects are not analogous to the proposed Project before the State Engineer. For example, unlike the Owens Valley water projects in California, this Project does not involve large-scale export of both ground and surface water. Unlike the Owens Valley project, the Applicant will engage in thorough monitoring and management before pumping even commences. The State Engineer finds that no evidence was presented that the proposed Project is similar to any water project in California and no evidence was presented suggesting that the proposed Project will lead to the same negative results as any water project in California and dismisses this protest claim.

**F. Denial of Prior Applications**

Protestants argue that the Applications should be denied because the State Engineer has already denied water appropriations in this basin. No evidence was presented, however, that prior applications were denied in the basin for reasons that are applicable to the Applications at issue. The State Engineer finds that several applications in the basin that were based on the Desert Land Entry Act and the Carey Act were denied for failure to establish a reasonable expectation to put the water to beneficial use based on lack of control of the point of diversion. The State Engineer finds that the Applicant is actively pursuing right-of-ways to the points of diversion and dismisses this protest claim.

**G. Duplicate Applications**

Protestants argue that the Applications should be denied because the Applicant filed duplicate applications in 2010. The Applicant likely did this because of uncertainty as to the status of the Applications at issue during the appeals process after the last hearing. The State Engineer finds the 2010 applications are irrelevant to the matter under consideration in this ruling and dismisses this protest claim.

**H. Subdivision Maps**

The State Engineer finds no evidence was provided in support of the protest claim that the Applications should not be approved if said approval is influenced by the State Engineer's desire or need to ensure there is sufficient water for new lots and condominium units created in the Las Vegas Valley by subdivision maps. The State Engineer finds it is his responsibility and obligation to follow the law, not his desire or need and dismisses this protest claim.

**I. Impacts to Indian Springs, Nellis Air Force Base, Lake Mead and Wildlife Areas**

Protestants argue that the Applications should be denied because of potential impacts to the Indian Springs Valley Basin, which may harm rights owned by the U.S. Air Force in the basin. The State Engineer finds that no evidence was presented of impacts to Indian Springs Valley Basin, Pahrnagat and Moapa National Wildlife Refuges, Pahrnagat and White River Valleys, Lake Mead National Recreation Area, Overton and Key Pittman and Wayne E. Kirsch Wildlife Management Areas, Railroad Valley wetlands areas, and Ash Meadows National Wildlife Refuge and Moapa Wildlife Refuge from the appropriation of water in Spring Valley and dismisses this protest claim.

**J. Climate Change**

Protestants allege that cyclical drought and long-term climatic change are causing a diminishment of water resources in this basin and all connecting basins. The State Engineer finds that no evidence was submitted that the groundwater resources in Spring Valley are diminishing due to climate change or drought and dismisses this protest claim.

**X. UNAPPROPRIATED WATER**

The estimated average annual groundwater ET in Spring Valley is 84,100 acre-feet. Using estimated groundwater ET as a basis, the State Engineer finds the perennial yield of Spring Valley is 84,000 acre feet. Existing water rights, as calculated in this ruling, equal 18,873

afa and an additional 4,000 afa is reserved for future growth and development, for a total of 22,873 afa of water committed to the basin. Subtracting 22,873 afa from the perennial yield of 84,000 afa, leaves 61,127 afa available for appropriation. The State Engineer finds that there is unappropriated water in the amount of 61,127 afa within the Spring Valley Hydrographic Basin available for appropriation pursuant to these applications.

### **CONCLUSIONS OF LAW**

#### **I. JURISDICTION**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>1255</sup>

#### **II. STATUTORY DUTY TO DENY**

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:<sup>1256</sup>

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectable interests in existing domestic wells as set forth in NRS 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

The State Engineer concludes there is unappropriated water for export from Spring Valley, there is no substantial evidence the proposed use will conflict with existing rights, that existing rights are sufficiently protected by the Applicant's monitoring, management, and mitigation plan and the staged development, there is no substantial evidence that the proposed use will conflict with protectable interests in existing domestic wells, or that the use will threaten to prove detrimental to the public interest. Therefore, there is no reason to reject the Applications under NRS 533.370(2).

#### **III. GOOD FAITH, REASONABLE DILIGENCE, FINANCIAL ABILITY**

The State Engineer concludes that the Applicant provided proof satisfactory of its intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence, and its financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable

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<sup>1255</sup> NRS Chapters 533 and 534.

<sup>1256</sup> NRS 533.370(2).

diligence. Therefore, if all other statutory requirements are fulfilled, NRS 533.370(1) requires the Applications to be approved.

**IV. NEED, CONSERVATION PLAN, ENVIRONMENTALLY SOUND, FUTURE GROWTH AND DEVELOPMENT BASIN OF ORIGIN**

The State Engineer concludes that the Applicant has justified the need to import water from Spring Valley, that an acceptable conservation plan is being effectively carried out, that the use of the water is environmentally sound as it relates to the basin of origin, and that by reserving 4,000 afa in the basin of origin, that the export of water will not unduly limit the future growth and development of Spring Valley. Therefore, there is no reason to reject the Applications under NRS 533.370(3).

**RULING**

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 shall 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 (42,500 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;

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

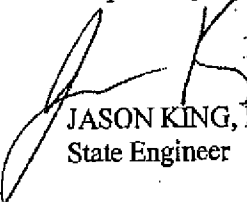
5. Prior to the Applicant exporting any groundwater resources from Spring Valley, biological and hydrologic baseline studies shall be completed and approved by the State Engineer. A minimum of two years of biological and hydrologic baseline data shall be collected by the Applicant in accordance with 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;

Ruling  
Page 218

7. The Applications are granted subject to existing rights; and
8. The Applicant shall pay the statutory permit fees.

Respectfully submitted,

 P.E.  
JASON KING, P.E.  
State Engineer

Dated this 22<sup>nd</sup> day of  
March, 2012.



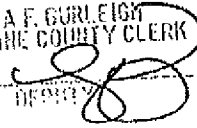
# **APPENDIX 3**

12/13/13  
WP CLERK

Case No. CV1204049  
Dept. 1

FILED

2013 DEC 13 AM 11:53

LINDA F. GURLEIGH  
WHITE PINE COUNTY CLERK  
BY 

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, E.T.. al.,

Plaintiffs,

vs.

DECISION

JASON KING, P.E., NEVADA STATE  
ENGINEER, STATE OF NEVADA,  
DIVISION OF WATER RESOURCES,

Defendant.

This matter is an appeal from the Nevada State Engineer, Jason Kings' rulings 6164, 6165, 6166 and 6167 concerning the grant of water rights to Southern Nevada Water Authority in Spring Valley (Lincoln and White Pine Counties), Cave Valley, Dry Lake Valley and Delamar Valley.

Petitioners include the Great Basin Water Network, (GBWN),<sup>1</sup> White Pine County, Nevada, Millard and Juab County, Utah, Ely Shoshone and Duckwater Shoshone Tribes, Confederate Tribe of the Goshute Reservation and the Presiding Bishop of the Churchill of Latter-Day Saints on behalf of the Cleveland Ranch.

As explained below, the State Engineer's rulings is remanded: for recalculation of water available from the respective basins; for additional hydrological study of Delamar, Dry

<sup>1</sup> GBWN is a non-profit corporation formed by over fifty individuals and related conservation groups.

1 Lake and Cave Valley; and to establish standards for mitigation in the event of a conflict with  
2 existing water rights or unreasonable effects to the environment or the public interest.

3  
4 HISTORY

5 In 1989, Las Vegas Valley Water District applied for unappropriated water in  
6 hydrographic basins 180, 181, 182 and 184; Cave Valley, Dry Lake, Delamar Valley and  
7 Spring Valley respectively. In 1991, the current real party in interest, South Nevada Water  
8 Authority (SNWA) became the successor in interest to the Las Vegas Valley Water District.

9 Several protests were filed against the application in July of 1989. The Nevada State  
10 Engineer (Engineer) was required to rule on the application within one-year of the protest's  
11 filing date. NRS 533.370(2). The applications were not ruled on within one-year, however,  
12 hearings on the application were held in 2006. By 2006, the water rights had changed hands  
13 many times and few right holders received notice of the 2006 hearings. Great Basin Water  
14 Network v Nevada State Eng'r, 126 Nev. Adv. Op. 20, 234 P.3d 912 (2010).<sup>2</sup>

15  
16 Prior to the 2006 hearings, The National Park Service, Bureau of Fish and Wildlife,  
17 Bureau of Land Management (BLM) and the Bureau of Indian Affairs (BIA) were actively  
18 protesting the orders granting water rights to SNWA. All of these entities are divisions of the  
19 Department of the Interior. ROA 000007. Each entity entered into an agreement with SNWA,  
20 withdrawing their protests in exchange for implementation of a hydrologic and biologic  
21 Monitoring, Management and Mitigation plan. ROA 000012; 020791; 020806; Ex. SE 041.  
22 This plan's stipulation was affirmed prior to the 2011 hearings, Id. and later revised to the  
23 current plan approved by the Engineer. Certain specifics of this agreement will be addressed  
24 later in this order. The Engineer is not a party to the stipulation, but has approved of the  
25 agreement and incorporated its terms into his rulings. ROA 000103-000106.

26  
27  
28 <sup>2</sup> Subsequently, the Engineer's orders were vacated, new notices were sent, and the hearings  
rescheduled for September and November, 2011.

1 After the Fall 2011 hearings, the Engineer approved 61,127 acre-feet annually (afa)  
2 to SNWA from Spring Valley and reserving 4,000 afa for future growth in Order 6164 (March,  
3 2012). ROA 000216. Other terms of the Order include:

- 4 A. First stage pumping is limited to 38,000 afa for eight  
5 years, data to be collected, modeled reported to the Engineer  
6 annually.
- 7 B. Stage two pumping shall be limited to 50,000 afa  
8 for a minimum of eight years with the data collection  
9 and modeling to be reported annually.
- 10 C. Stage three, SNWA will be allowed to pump the full  
11 61,127 afa.

12 Id.

13 Further, the Engineer must approve each stage of pumping and SNWA must comply with the  
14 MMM plan prepared by SNWA and approved by the Engineer. ROA 000216-000217.

15 Orders 6165, 6166 and 6167 concern the water rights granted to SNWA in Cave  
16 Valley, Dry Lake Valley and Delamar Valley respectively. All three orders condition the water  
17 grants as Compliance with the Hydrologic MMM plan prepared by SNWA and the Biological  
18 Monitoring plan. ROA 00387-8; 000551; 00713-4. The MMM plan shall be subject to  
19 modification by the Engineer. SNWA must report annually and provide 10-25-100 year  
20 predictive models to the Engineer.

21 The Cave Valley appropriation is 5,235 afa with 50 afa reserved for future growth.  
22 Dry Lake Valley's appropriation is 11,584 afa, 50 afa for future growth. Delamar Valley's  
23 appropriation is 6,042 afa and 50 afa for future growth. Id.

24 The four rulings by the Engineer represent the largest water appropriations in Nevada  
25 history. The water basins concerned including Spring, Cave, Dry Lake and Delamar Valleys  
26 encompass 20,688 square miles of Nevada. ROA 000125.

27 The basins size has been compared to New England, encompassing great portions of  
28 Vermont, New Hampshire, Massachusetts, Connecticut and some of New York.

1 SNWA Ex. 339, ROA 020181. It is likely the largest interbasin transfer of water in U.S.  
2 history.

3  
4 **II**  
**AUTHORITY AND OBLIGATIONS OF THE STATE ENGINEER**

5 The Engineer "[s]hall approve an application submitted in proper form which  
6 contemplates the application to beneficial use if:"

- 7 (a) The application is accompanied by the prescribed fee;
- 8 (b) The proposed use or change, if within an irrigation district,  
9 does not adversely affect the cost of water for other holders  
10 of water rights in the district or lessen the efficiency of the  
11 district in its delivery or use of water; and
- 12 (c) The applicant provides proof satisfactory to the State  
13 Engineer of the applicant's:
- 14 (1) Intention is good faith to construct any work necessary to  
15 apply the water to the intended beneficial use with  
16 reasonable diligence; and
- 17 (2) Financial ability and reasonable expectation actually to  
18 construct the work and apply the water to the intended  
19 beneficial use with reasonable diligence.

20 NRS 533.370 (1).

21 Additionally, the Engineer must determine;

- 22 1. Whether there is unappropriated water;
- 23 2. Whether the proposed use will conflict with existing rights  
24 and/or domestic wells; or
- 25 (a) If the appropriation threatens to prove detrimental to  
26 the public interest,

27 "The State Engineer shall reject the application" NRS 533.370 (2).

28 The Engineer must also consider:

- (a) Whether the applicant has justified the need to import the  
water from another basin.
- (b) If the State Engineer determines that a plan for conservation  
of water is advisable for the basin into which the water is to be  
imported, whether the applicant has demonstrated that such a  
plan has been adopted and is being effectively carried out;

- 1 (c) Whether the proposed action is environmentally sound as it  
2 relates to the basin from which the water is exported;
- 3 (d) Whether the proposed action is an appropriate long-term use  
4 which will not unduly limit the future growth and development  
to the basin from which the water is exported; and
- 5 (e) Any other factor the State Engineer determines to be relevant.

6 NRS 533.370(3).

7 III  
8 STANDARD OF REVIEW

9 After the Engineer issues the rulings, an aggrieved party is entitled to have the order  
10 or decision reviewed by the District Court, in the nature of an appeal. NRS 533.450. On a  
11 petition for judicial review, the Court is confined to considering the administrative record.  
12 NRS 533.450 (1). The proceedings in every case must be heard by the Court, and must be  
13 informal and a summary, but a full opportunity to be heard must be had before judgment is  
14 pronounced. NRS 533.450 (2).

15 In reviewing the record, the Court must treat the State Engineer's decision as "prima  
16 facie correct, and the burden of proof shall be upon the party" challenging the decision. NRS  
17 533.450 (9). The Court may not substitute its judgment for that of the State Engineer, but is  
18 limited to determining whether there is substantial evidence in the record to support the  
19 decision. Revert v. Ray, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). Substantial evidence  
20 is "that which a reasonable mind might accept as adequate to support a conclusion." Bacher  
21 v. Office of the State Eng'r of Nev., 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006).

22 [A] conclusion that substantial evidence supports the findings of  
23 the State Engineer does not, however, dispose of the . . . appeal.  
24 The applicable standard of review of the decisions of the State  
25 Engineer, limited to an inquiry as to substantial evidence,  
26 presupposes the fullness and fairness of the administrative  
27 proceedings: all interested parties must have had a "full  
28 opportunity to be heard." See NRS 533.450 (2); the State  
Engineer must clearly resolve all the crucial issues presented, see  
*Nolan v. State Dep't of Commerce*, 86 Nev. 428, 470 P.2d 124  
(1970) (on rehearing); the decision maker must prepare findings in  
sufficient detail to permit judicial review, *Id.*; *Wright v State*



1 That Southern Nevada provided substantial evidence of  
2 need for additional water "independent of the Colorado  
3 River," ROA 000037, and that "current available supplies  
4 [are] insufficient to meet projected future water demands  
5 under normal conditions." ROA 000038.

6 That Southern Nevada provided substantial evidence that it  
7 "intends to construct the works necessary and put water  
8 from the applications to beneficial use . . . with reasonable  
9 diligence." ROA 000046.

10 That Southern Nevada provided substantial evidence of  
11 financial ability and a "feasible conceptual plan of  
12 development. ROA 000047.

13 These findings were opposed by many of the Protestants and countered with expert  
14 opinions. However, there is no real question that the Engineer's findings above were not  
15 based on substantial evidence acceptable to a reasonable mind. Further, the Protestants  
16 had a full and fair opportunity to present their evidence. Thus, the Engineer's findings were  
17 not arbitrary or capricious.

18 **V**  
19 **OBJECTIONS MADE BY PROTESTANTS**

20 Virtually all of the Protestants which include Cleveland Ranch (Corp. of the Church of  
21 Latter-Day Saints), White Pine, Eureka, Elko, and Nye counties, Nevada, The Confederate  
22 Tribes of the Goshute Reservation, Ely and Duckwater Shoshone Tribes and Millard and  
23 Juab counties, Utah, object to the Engineer's orders on the basis of the Monitor, Manage and  
24 Mitigate Plan (MMM). The Protestants allege that as the plan is currently written it cannot  
25 adequately protect existing rights or the environment.

26 Most of the Protestants object to the Orders alleging that any amount of water  
27 awarded to SNWA is excessive or should not be granted at all, citing to evidence and  
28 arguments presented to the Engineer at the 2011 hearings. Essentially, the objections are  
that the award is neither environmentally sound nor in the public interest, pursuant to NRS  
533.370. The objections are either relating to the entire Spring Valley Basin and/or Delamar,



1 Cave or Dry Lake Valleys, or localized areas inhabited or used by the Ely, Duckwater and  
2 Goshute Native Americans.

3 Other, more specific objections are that NRS 533.3705 (which allows staged  
4 development of a water award) is inapplicable to the instant case because the statute is not  
5 retroactive to SNWA's 1989 application; and that hydrological knowledge of the respective  
6 basins is so incomplete that any water award is premature and; that the perennial yield of  
7 Delamar, Dry Lake, and Cave Valley, as part of the White Pine River Flow System is already  
8 appropriated in the lower parts of the flow system.

9  
10 Some of the Protestants argue that SNWA failed to meet its burden of proving need,  
11 good faith intentions to construct the infrastructure, and financial ability to perform the  
12 construction. As stated above, this court finds the Engineer's ruling valid regarding need,  
13 good faith and financial ability.

14 Regarding the argument that NRS 533.3705, allowing staged development, does not  
15 apply retroactively, as interpretation is a matter of law, this court finds that NRS 533.3705  
16 does apply in this case. Enacted in 2007 the law states "[u]pon approval of an application to  
17 appropriate water, the State Engineer may limit the initial use of water to a quantity that is  
18 less than the total amount approved for the application." The applications in question were  
19 approved in March, 2012, after the enactment of the statute. See generally PEBP v. LVMPD,  
20 124 Nev. 138 (2008).

21  
22 Millard and Juab counties, Utah, object that Ruling 6164 does not specifically include  
23 Snake Valley, Utah in the mitigation process. Snake Valley is specifically to be monitored by  
24 six (6) wells and sixteen (16) monitoring sites. ROA 000114-115. Snake Valley, Utah is not  
25 specifically mentioned as a mitigation site. Whether the omission was inadvertent or not,  
26 Ruling 6164 is remanded to include Snake Valley, Utah in the mitigation plan.

27  
28 The Confederated Tribes of the Goshute Reservation argue that pursuant to the  
Public Trust Doctrine, the Spring Valley awards must be vacated.

1 If the current law governing the water Engineer does not clearly  
2 direct the Engineer to continuously consider in the course of his  
3 work the public's interest in Nevada's natural water resources, the  
4 law is deficient. It is then appropriate, if not our constitutional  
5 duty, to expressly reaffirm the Engineer's continuing responsibility  
6 as a public trustee to allocate and supervise water rights so that  
7 the appropriations do not substantially impair the public interest in  
8 the lands and waters remaining. [The public trust] is an affirmation  
of the duty of the state to protect the people's common heritage of  
streams, lakes, marshlands, and tidelands, surrendering that right  
of protection only in rare cases when the abandonment of that  
right is consistent with the purposes of the trust. Our dwindling  
natural resources deserve no less.

9 Lawrence v Clark County, 127 Nev. Adv. Op. 32, 254 P.2d. 606, 611 (2011).

10 The Goshute's argument is well taken, but whether Spring Valley groundwater is part  
11 of the Public Trust Doctrine or not, Nevada law requires the Engineer to oversee an  
12 environmentally sound stewardship of the water, the same goal as the doctrine.

13 VI  
14 SPRING VALLEY APPROPRIATIONS

15 A. THE AWARD OF 61,127 AFA VIOLATES THE STATE ENGINEER'S RULES

16 The Engineer relied on substantial evidence, produced from numerous sources, when  
17 determining the amount of water available for the Spring Valley appropriation granted to  
18 SNWA. ROA 000057-000090. Considering the evidence of evapotranspiration, inter-basin  
19 flow and recharge, the Engineer found 84,000 afa available. ROA 000090. Further, he  
20 found, "there is no substantial evidence that the proposed use will conflict with protectable  
21 interests in existing domestic wells, or that the use will threaten to prove detrimental to the  
22 public interest." ROA 000215.

23 The Engineer began his calculation of the Spring Valley appropriation with the  
24 "estimated average groundwater evapotranspiration (E.T.)," at 84,100 afa. Thus, the  
25 perennial yield of Spring Valley is 84,000 afa. ROA 000214. Existing water rights are 18,873  
26 afa and "an additional 4,000 afa is reserved for future growth and development for a total of  
27  
28

22,873 afa of water committed to the basin. Subtracting 22,873 afa from the perennial yield of 84,000 afa leaves 61,127 afa available for appropriation." ROA 000215.

Perennial yield has been for many years defined by the Engineer as:

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.

ROA 000056.

In theory, with enough time the water removed from the system equals the recharge of the system thereby reaching equilibrium. However, reaching equilibrium may take hundreds of years, and "always involves the depletion of water from transitional storage." Engineer Ans. Brief, p.54. If more water comes out of a reservoir than goes into the reservoir, equilibrium can never be reached. This is known as water mining and "[w]hile there is no statute that specifically prevents groundwater mining, the policy of the Engineer for over one hundred (100) years has been to disallow groundwater mining. This policy remains today. Id.

The Engineer defines groundwater mining as pumping exceeding the perennial yield over time such that the system never reaches equilibrium. ROA 56. Natural discharge in Spring Valley is almost exclusively E.T. ROA 000057. E.T. occurs by plants and phreatophytes discharging the groundwater from the basin through use. In Spring Valley, this is the water sought for beneficial use. Of course, to do so, the phreatophytes must be completely eliminated. Engineer Ans. Brief, p.53-54.

Obviously, any water-well cannot capture all of the E.T., and while pumping and E.T. are both occurring, the water table drops. A reasonable lowering of the water table and death of most of the phreatophytes is a trade-off for a beneficial use of the water. "It is a condition of each appropriation of groundwater acquired under this Chapter that the right of

1 the appropriator relates to a specific quantity of water and that the right must allow for a  
2 reasonable lowering of the static water level at the appropriator's point of diversion." NRS  
3 534.110(4). The Engineer specifically found "there is no provision in Nevada water law that  
4 addresses time to capture, and no State Engineer has required that E.T. be captured within a  
5 specific period of time. It will often take a long time to reach near equilibrium in large basins .  
6 . . . and this is no reason to deny water right applications." ROA 000090. The Engineer is  
7 correct that the time to reach equilibrium is not a valid reason to deny the grant of water, but  
8 it may very well be a reason to limit the appropriation below the calculated E.T.  
9

10 Here, there is no valid evidence of when SNWA will capture E.T., if ever. Evidence  
11 was submitted at the hearing over many days, the Engineer stated that seventy-five (75) year  
12 models of groundwater pumping are appropriate due to "existing data." ROA 000146.  
13 However, over seventy-five (75) years becomes less certain. Id. Moreover, the Engineer did  
14 not require SNWA to prove that they could capture all of the E.T. SNWA did claim that after  
15 two hundred (200) years; their evidence showed that eighty-four (84%) percent of the E.T.  
16 would be captured and eighty four percent [is] close to a hundred percent." SNWA Ans. Brief  
17 p.288. Simple arithmetic shows that after two hundred (200) years, SNWA pumping and  
18 evapotranspiration removes 70,977 afa from the basin with no equilibrium in sight. That is  
19 9,780 afa more than SNWA's grant.  
20

21 Mr. Stockton, arguing on behalf of the Engineer stated that, "requiring these E.T.  
22 salvage projects . . . it's just not appropriate. It can't be done in most basins because the  
23 federal government owns the land. They're not going to allow it to be dotted with wells all  
24 over the place and the State Engineer found that it wasn't appropriate to require an E.T.  
25 salvage project." SE Ans. Brief, Vol. I, p.54. SNWA stated that "[t]he whole question of  
26 groundwater mining and E.T. capture and timed equilibrium are not part of the water law and  
27 they are not necessary." SNWA Ans. Brief, Vol. I, p.69.  
28

1 The Engineer acknowledged that it is unlikely all of the E.T. in a basin will be  
2 captured. Additionally, "[i]t is unclear where [Cleveland Ranch] got the impression that  
3 groundwater development in Nevada is required to be an E.T. salvage project, which is  
4 certainly not contained in statutory law." Engineer Ans. Brief, p.54. Perhaps Cleveland  
5 Ranch and the other Protestants "got the impression" from the Engineer's definition:  
6 "Perennial yield is ultimately limited to the maximum amount of natural discharge that can be  
7 salvaged for beneficial use." ROA 000056. Moreover, in the Engineer's Ruling 5726 he  
8 defined perennial yield as an "assumption that water lost to natural E.T. can be captured by  
9 wells and placed to beneficial use." Cleveland Ranch Opening Brief, App. 1 at 27, citing  
10 Ruling 5726. The Nevada Supreme Court stated, "[t]he perennial yield of a hydrological  
11 basin is the equilibrium amount or maximum amount of water that can safely be used without  
12 depleting the source." *Pyramid Lake Paiute Tribe of Indians v RICC*, 126 Nev. Adv. Op. 48;  
13 245 P.3d 1146, 1147 (2010).

14  
15 The Engineer's finding that equilibrium in Spring Valley water basin will "take a long  
16 time" was not based on substantial or reliable evidence, and is incorrect. Indeed, by his own  
17 statements -- and evidence -- equilibrium will never be reached.

18  
19 The Engineer has also said that "[d]rawdown of less than 50 feet over a seventy-five  
20 year period is generally a reasonable lowering of the static water table." ROA 000132.  
21 However, after two hundred (200) years of pumping the water table is losing 9,780 afa over  
22 and above the amount SNWA has been authorized to pump. SNWA's expert certified that  
23 uncaptured E.T. would have to be deducted from the perennial yield. ROA 34928. This, the  
24 Engineer did not do.

25  
26 This Court finds that the Engineer's own calculations and findings, show that  
27 equilibrium, with SNWA's present award, will never be reached and that after two hundred  
28 (200) years, SNWA will likely capture but eighty-four (84%) of the E.T. Further, this court  
finds that losing 9,780 afa from the basin, over and above E.T. after 200 years is unfair to

1 following generations of Nevadans, and is not in the public interest. In violating the  
2 Engineer's own standards, the award of 61,127 afa is arbitrary and capricious.

3 This finding by the court requires that this matter be remanded to the State Engineer  
4 for an award less than the calculated E.T. for Spring Valley, Nevada, and that the amended  
5 award has some prospect of reaching equilibrium in the reservoir.

6  
7 B. THERE ARE NO OBJECTIVE STANDARDS AS TO WHEN THE MITIGATION  
8 PART OF THE MONITOR, MANAGE AND MITIGATE PLAN GO INTO EFFECT

9 SNWA's expert reports make it clear that the hydrology of Spring Valley, as well as  
10 Delamar, Dry Lake and Cave Valley, is not completely understood. Much of the data  
11 collected over the years is analyzed by computer models and is "significantly" limited in  
12 accuracy concerning the hydrological framework, actual precipitation, recharge and other  
13 factors. ROA 010704; 010708-9. The experts recognize that inaccuracies exist because of  
14 a lack of data collection over vast areas of Spring Valley, Delamar, Dry Lake and Cave  
15 Valleys. ROA 010706. For example, 10 years of data collection generally means an  
16 accurate predictive model for the next 10 years. ROA 000146. Thus, the Engineer has  
17 stated that a 75 year model is a reasonable simulation because there are 75 years of existing  
18 data. "Over 75 years becomes less certain." Id. "[U]ncertainty is reduced overtime as more  
19 baseline and operational data become available." ROA 013244. "Much is not known about  
20 the groundwater-influenced ecosystems in the [initial biological monitoring area] (e.g.,  
21 relationship, between groundwater levels and spring-flow; relative dependence of certain  
22 vegetation on groundwater versus other sources of water), and the response of these  
23 systems to groundwater withdrawal by SNWA." Biological Monitoring Plan Spring Valley  
24 Stipu. ROA 020648.

25  
26 Recognizing that no one really knows what the impact of pumping water from Spring  
27 Valley on such a large scale will be (ROA 000135-6 and 020066), the Engineer found that  
28 staged pumping is environmentally sound and will insure no conflicts with existing rights.

1 ROA 000151. Additionally, the Engineer adopted the MMM Plan created by SNWA and the  
2 National Park Service, Bureau of Fish and Wildlife, and the Bureau of Indian Affairs. A  
3 description of the plan is contained in State Engineer's Order No. 6164. ROA 000103-120.

4 The MMM plan is a stipulation between SNWA and Federal agencies (supra). In  
5 summary, SNWA's pumping will be managed to avoid "unreasonable harm to scenic values"  
6 in the Great Basin National Park and the "loss of surface vegetation." ROA 020496. The  
7 three principal components are:  
8

9 *Monitoring Requirements* – including, but not limited to monitoring  
10 wells, spring flow measurements, water chemistry analyses,  
11 quality control procedures, and reporting requirements; and

12 *Management Requirements* – Including, but not limited to the  
13 creation of a Technical Review Panel ("TRP") to review  
14 information collected under this Plan and advise the Executive  
15 Committee (a group consisting of one management-level person  
16 from each Party, as described below in Management  
17 Requirements), the use of an agreed-upon regional groundwater  
18 flow system numerical model(s) to predict effects of groundwater  
19 withdrawals by SNWA in the Spring Valley HB, and the  
20 establishment of a consensus-based decision-making process;  
21 and

22 *Mitigation Requirements* – including, but not limited to the  
23 modification, relocation or reduction in points of diversion and/or  
24 rates and quantities of groundwater withdrawals or the  
25 augmentation of Federal Water Rights and/or Federal Resources  
26 as well as measures designed and calculated to rehabilitate,  
27 repair or replace any and all Federal Water Rights and Resources  
28 if necessary to achieve the goals set forth in Recital G of the  
Stipulation.

ROA 20791.

Similarly, the Biologic Monitoring, Management and Mitigation Plan has been  
instituted to "determine the appropriate course of action to avoid and/or mitigate any effects  
to Water-dependent Ecosystems . . . within the Great Basin National Park (and other  
Federal) 'Areas of Interest.'" ROA 020806. The Biologic monitoring is to "determine potential  
Indicator species and appropriate parameters to monitor for early warning of unreasonable  
adverse effects and of any effect within the boundaries of Great Basin National Park . . .

1 resulting from SNWA's withdrawal of ground water from the Spring Valley HB." Id. The  
2 Mitigation portion of the Plan briefly describes what could possibly be done to mitigate  
3 unreasonable effects. Id.

4 Appendix B of NSE Ruling 5726 contains objectives 6, 7, and 8 of the "Plan":

5 6. During the Pre-Withdrawal Phase, establish the range of  
6 variation for each indicator (or suite of indicators) that will be  
7 considered acceptable.

8 7. Define what constitutes an "unreasonable adverse effect"  
9 during the Pre-Withdrawal Phase.

10 8. In coordination with TRP, during the Pre-Withdrawal Phase,  
11 establish criteria that will initiate the BWG consultation process as  
12 outlined in the Stipulation.

13 The Stipulation directs there be no "unreasonable adverse effect"  
14 to groundwater-influenced ecosystems in the IBMA and no  
15 adverse effect to GBNP as a result of SNWA's groundwater  
16 withdrawal in Spring Valley. In order to meet these requirements,  
17 it is imperative that impacts are detected and assessed, and  
18 appropriate management actions are initiated, prior to such effect  
19 occurring.

20 ROA 020647.

21 As noted above, the Engineer has instituted the MMM Plan as a condition of the  
22 SNWA appropriations (ROA 000181), and has been involved in developing the Plan. ROA  
23 013243-44. However, the MMM Plan is flawed in several respects, most notably: "Mitigation  
24 planning is not part of this plan but will be handled separately when impact location and  
25 magnitude are better understood." ROA 020648. Nonetheless, the MMM Plan emphasizes  
26 that mitigation will cure any adverse effects and the Engineer has found that the existing,  
27 non-Federal rights are sufficiently protected by the Plan. ROA 000215.

28 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



1 unreasonable impact. ROA 000190. Also, the Engineer has noted that if pumping has an  
2 adverse effect on swamp cedars, SNWA could mitigate, ROA 000189, but does not cite  
3 objective standards of when mitigation is necessary. The Engineer states: "where  
4 unreasonable impacts may occur and how bad the impacts may be is not understood and  
5 thus mitigation cannot be part of the plan at the present." Not knowing where or how bad an  
6 impact is, is not the same thing as defining what an adverse impact..

7  
8 The Engineer has found that it is "premature to attempt to set quantitative standards  
9 or triggers for mitigation actions," because "[f]actors such as natural variation in the  
10 environmental resources must be understood before any standards or triggers are set." ROA  
11 000311. "Selecting specific standards before a full baseline is developed would be  
12 premature. It would not lead to sound scientific decisions." ROA 000182-183.

13 While this Court cannot completely disagree with the Engineer's statement above, he  
14 has also stated: "The State Engineer finds that the applicant [SNWA,] gathered and  
15 presented substantial environmental resource baseline material and that the environmental  
16 resource baseline information provides a platform for sound, informed decision making."  
17 ROA 00176. Thus, if SNWA, and thereby the Engineer, has enough data to make informed  
18 decisions, setting standards and "triggers" is not premature. Curiously, the Engineer has  
19 made the finding that a failure to even make "Mitigation" a part of the current MMM plan  
20 "demonstrates Applicant's determination to proceed in a scientifically informed,  
21 environmentally sound manner." ROA 000183. It seems that if there is enough data to make  
22 informed decisions, exactly when an unreasonable impact to either the environment or  
23 existing rights occurs, the Engineer or SNWA should recognize it and make the decision to  
24 mitigate. If there is not enough data (as shown earlier, no one really knows what will happen  
25 with large scale pumping in Spring Valley), granting the appropriation is premature. The  
26 ruling is arbitrary and capricious.  
27  
28

1 Still other flaws with the MMM Plan are evident. The Engineer stated: "the regulation  
2 of water rights is in the State Engineer's purview, and the State Engineer proactively  
3 monitors impacts to existing rights and the environment." ROA 000183.

4 Also, "[t]he State Engineer finds that the potentially impacted water rights . . . are or will be  
5 monitored and that this monitoring will allow for early warning of potential impacts to these  
6 water rights . . . and will exercise his authority as needed to protect these existing rights and  
7 will require mitigation if needed." ROA 000139-140.

8  
9 The Engineer found that lowering the Spring Valley water table by 50 feet is  
10 "reasonable," but has avoided any mention of what is unreasonable. Nor did he state how  
11 monitoring will be accomplished, or what constitutes an impact, potential or otherwise. There  
12 is no standard to know how much of an impact is unreasonable to leopard frogs, or to swamp  
13 cedars, before mitigation is necessary. The Engineer gives a vague statement of how  
14 mitigation can be done, but has no real plan or standard of when mitigation would be  
15 implemented. Without a stated, objective standard, the ruling is arbitrary and capricious.

16  
17 Regarding monitoring and proactive monitoring by the Engineer, there is no plan.  
18 The Federal/SNWA stipulation requires yearly reports to the Engineer, but even a cursory  
19 examination of the stipulation reveals that between SNWA, the Federal agencies and  
20 existing water right holders, the goals and motivations of each party will certainly conflict.  
21 The Engineer finds that he has jurisdiction to oversee the "environmental soundness" of the  
22 project "and will do so." ROA 000178. Again, he has not stated how this will be  
23 accomplished. If the Engineer believes that his department will monitor the non-Federal  
24 rights and environment, he has not said how it will be done. The Engineer pointed out in  
25 *Great Basin Water Network v. State Engineer*, 126 Nev. Adv. Op. 20; 234 P.3d 912 (2010),  
26 that he is short staffed. There are 172,605 acres in Spring Valley alone. ROA 18788.  
27 Without a plan to monitor that large of an area, a statement that the Engineer will monitor the  
28 area is also arbitrary and capricious.

Impliedly, the Engineer has ceded the monitoring responsibilities to SNWA. "The State Engineer finds that [SNWA] has the ability to identify impacts of the project through its environmental monitoring plan." ROA 000193. 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."

Both SNWA and the Engineer have properly referenced the successful MMM plan used at Devil's Hole in the Armagosa Valley. In Devil's Hole, aside from being a small fraction of area compared to Spring Valley, Delamar, Dry Lake and Cave Valley, the MMM plan specifically has a "trigger." When the water level falls 2.7 feet below a copper washer, mitigation must occur. Transcript, Vol. I, p.65. This is an objective and recognizable standard.

The Engineer has stated several times that "under specific conditions" SNWA will be required to modify or curtail pumping. ROA 013248 and 013264. Yet again, there are no specifics stated.

The Engineer rightly recognized his "heavy burden of ensuring" that this water project is environmentally sound. ROA 000173. A heavy burden indeed and one which is not complete. Several of the Protestants noted that the MMM plan is filled with good intentions but lacks objective standards. This Court agrees. Granting water to SNWA is premature without knowing the impacts to existing water right holders and not having a clear standard to identify impacts, conflicts or unreasonable environmental effects so that mitigation may proceed in a timely manner. Based on the above, this matter must be remanded to the State Engineer until objective standards can be established and stated – as to when mitigation must occur.

## VII GAVE, DRY LAKE AND DELAMAR VALLEY

A. THE WATER AWARDED TO SNWA IN RULINGS 6165, 6166 AND 6167 IS ALREADY APPROPRIATED IN THE LOWER BASINS

1  
2 Cave, Dry Lake, and Delamar Valley (CDD) are contiguous and linear, stretching from  
3 White Pine County, Nevada, southerly, into Lincoln County. It is approximately sixty (60)  
4 miles from the Northern tip of Cave Valley to the Southern end of Delamar Valley.

5 ROA 020507. Unlike Spring Valley, which is a "closed valley", the CDD basins are "not  
6 closed". ROA 000599. In closed valleys, natural water discharge is by evapotranspiration  
7 (E.T.). In CDD, water is discharged by water flow from one basin into another. "Just like  
8 water in streams, groundwater moves from areas of higher hydraulic heads to areas of lower  
9 hydraulic heads." ROA 017407.

11 The Engineer described the CDD basins as part of the White River Flow system,  
12 consisting of ten (10) additional hydrographic basins, which discharge primarily into the  
13 White River Valley, Pahrangat Valley, and the Muddy Springs Area. ROA 000599.  
14 Approximately 2,000 afa flow into Dry Lake Valley from Pahroc. ROA 010588. "There is no  
15 groundwater E.T. in Dry Lake Valley, (ROA 017415) so all groundwater in Dry Lake Valley  
16 flows down gradient to the south to Delamar Valley." Id. and continues from Delamar to  
17 northern Coyote Springs Valley. Id.

19 The Protestants allege that the CDD water allocation to SNWA, has been previously  
20 appropriated. The awarding SNWA water from the higher gradient of the White River Flow  
21 allows SNWA to take the water before it recharges the lower basins, which conflicts with  
22 earlier established water rights. In other words, the same water has been awarded twice,  
23 once in the upper basins, and again in the lower basins.

25 The Engineer tacitly acknowledges the double appropriation of the same water but  
26 rationalizes it in two different ways. First, he refers to the rights in Coyote Springs as "paper  
27 water rights." Oral Arg. Trans., Vol. II, p.255. Exactly what the Engineer means by "paper  
28 water rights" is unclear, but this Court takes it to mean: valid, existing rights. If the rights  
were invalid, there would be no over appropriation. Second, the Engineer states that "up-

1 gradient use will not, if at all, measurably affect down-gradient supply for hundreds of years."  
2 ROA 000599-600. Further, he found that "if no measurable impacts to existing rights occur  
3 within hundreds of years, then the statutory requirement of not conflicting with existing water  
4 rights is satisfied." ROA 000600.

5       Considering that models which project water disbursement longer than seventy-five  
6 (75) years are uncertain (ROA 020061) -- and giving some deference to the Engineer's  
7 ruling, (see *Town of Eureka*, 108 Nev. 163 (1992)), this Court cannot agree with the  
8 Engineer's interpretation of NRS 533.370 (2). The statute is unequivocal, if there is a conflict  
9 with existing rights, the applications "shall" be rejected.  
10

11       Moreover, it is also unseemly to this court, that one transitory individual may simply  
12 defer serious water problems and conflict to later generations, whether in seventy-five (75)  
13 years or "hundreds," especially when the "hundreds" of years is only a *hoped* for resolution.  
14

15       There may be water from the CDD basins which could properly be appropriated  
16 without conflicting with down-gradient rights. The current orders do not contain such a  
17 calculation. For this reason, rather than an outright reversal of the appropriations from Cave,  
18 Dry Lake and Delamar Valleys, the matter is remanded to the Engineer for recalculation of  
19 possibly unappropriated water.

20       **B.     LIKE SPRING VALLEY, THE MONITOR, MANAGE AND MITIGATION**  
21       **PLAN REQUIRES SPECIFIC STANDARDS TO BE AN EFFECTIVE**  
22       **PLAN**

23       The analysis of the MMM Plan and the requirement for standards to be applied to  
24 determine when mitigation is necessary in the Cave, Dry Lake and Delamar Valleys is much  
25 the same as in Spring Valley. There is still a great deal of uncertainty regarding the  
26 hydrology of CDD. ROA 000671. Because of the unknowns, the Engineer has adopted the  
27 MMM Plan in the CDD valleys;

28       The State Engineer finds an effective management program that  
includes monitoring activities, management tools and mitigation  
options is critical to the determination that the Applications will not

1 conflict with existing water rights or with protectable interests in  
2 existing domestic wells.

3 ROA 000632.

4 The Engineer has also found that a drawdown of less than fifty (50) feet over a  
5 seventy-five (75) year period is a reasonable lowering of the static water table "made on a  
6 case-by-case basis". ROA 000653. He has presumably accepted testimony of SNWA's  
7 expert predicting one (1%) percent to seventeen (17%) percent spring flow reductions in the  
8 White River and Pahrangat Valleys and has determined a seventeen (17%) percent flow  
9 reduction is reasonable.

10 Additionally, he found that "Federal and state laws, including the National  
11 Environmental Policy Act ("NEPA"), the [Environmental Species Act (ESA)], the Clean Water  
12 Act ("CWA") and Nevada water law, require environmental protection through comprehensive  
13 permitting and regulatory process." ROA 000683. "The ESA imposes strict substantive  
14 protections, in the form of reasonable and prudent alternatives, that include minimization and  
15 mitigation measures that prevent jeopardy to listed species or their critical habitat." ROA  
16 000684. Further, "non-listed" species will also be protected – "resulting in an even greater  
17 breadth of coverage." Id. Notwithstanding the Federal Involvement, the Engineer states that  
18 he still has the jurisdiction and responsibility to determine environmental soundness  
19 independently of other agencies – "and will do so." ROA 000684.

20 The Engineer has, in effect, relinquished his responsibilities to others. Again, the  
21 Engineer has failed to state under what specific conditions he will require mitigation. The  
22 Engineer also recognizes that SNWA will extensively monitor springs and sensitive sites in  
23 the CDD valleys and finds that the Applicants' monitoring plan will be effective. ROA  
24 000636-000640.

25 Like the Spring Valley Plan, the Engineer finds that it is premature to set standards  
26 and/or triggers because there is not enough "baseline" data. ROA 000641. Yet, the  
27  
28

1 Engineer has also made the specific finding "that the Applicant gathered and presented  
2 substantial environmental resource baseline material and that the environmental resource  
3 baseline information provides a platform for sound, informed decision-making." ROA  
4 000683. Whether this is contradictory or not (sufficient baseline data v. insufficient baseline  
5 data), standards, triggers or thresholds, however phrased, must be objective to provide  
6 notice of when and where mitigation is necessary. Without standards, any decision to  
7 mitigate is subjective and thus, arbitrary and capricious.  
8

9 Stated differently, the Engineer decided that because the final configuration of the  
10 wells and locations of wells within the valleys is unknown at the present, setting quantitative  
11 standards, "or triggers" for mitigation is pre-mature because it must be known how the  
12 aquifer responds to pumping. ROA 000641. It seems that when and where unreasonable  
13 effects occur, is not the same as recognizing an unreasonable effect, wherever or whenever  
14 it appears. Paraphrasing Samuel Clemens, show me a man who knows what's reasonable  
15 and I'll show you a man who knows what isn't.  
16

17 Further, the Engineer found that "natural variability in the system must be  
18 documented to determine if observed changes are due to pumping, rather than natural  
19 fluctuations due to seasonal recharge or other factors." ROA 000641. The Engineer has  
20 already found that SNWA has gathered and presented enough baseline data to make sound  
21 and informed decisions, not to mention that SNWA has been studying the basins and valleys  
22 for at least twenty-five (25) years and likely longer. In short, without standards, triggers or  
23 thresholds the MMM Plan is not a "comprehensive" plan, "critical to the determination that the  
24 Applications will not conflict with existing water rights or with protectable interests in existing  
25 domestic wells". ROA 000632.  
26

27 This Court is charged with "determining whether there is substantial evidence in the  
28 record to support the [Engineer's] decision." *Revert v. Ray*, 95 Nev. 782, 786 (1979). Here,  
the Engineer said, however not quite consistently, that there is not enough evidence to

1 implement, what he has characterized as "critical," the MMM Plan. Thus, if there is  
2 insubstantial evidence and it is premature to set triggers and thresholds, it is premature to  
3 grant water rights.

4 As stated in the Plan, a definition of an unreasonable adverse effect, i.e. a trigger, a  
5 standard, a threshold must be defined. ROA 020647. Absent a thorough plan and  
6 comprehensive standards for mitigation, any mitigation, (or lack thereof) is subjective,  
7 unscientific, arbitrary and capricious. This matter must be remanded to the Engineer so that  
8 objective standards may be established.  
9

#### 10 VIII 11 CONCLUSION

12 After an in-depth review of the record this Court will not disturb the findings of the  
13 Engineer save those findings that are the subject of this Order. This Court remands orders  
14 6164, 6165, 6166 and 6167 for:

- 15 1. The addition of Millard and Juab counties, Utah in the mitigation plan so far as  
16 water basins in Utah are affected by pumping of water from Spring Valley Basin,  
17 Nevada;
- 18 2. A recalculation of water available for appropriation from Spring Valley assuring  
19 that the basin will reach equilibrium between discharge and recharge in a  
20 reasonable time;
- 21 3. Define standards, thresholds or triggers so that mitigation of unreasonable  
22 effects from pumping of water are neither arbitrary nor capricious in Spring  
23 Valley, Cave Valley, Dry Lake Valley and Delamar Valley, and;
- 24 4. Recalculate the appropriations from Cave Valley, Dry Lake and Delamar Valley  
25 to avoid over appropriations or conflicts with down-gradient, existing water rights.

26 DATED this 10<sup>th</sup> day of December, 2013.

27   
28 ROBERT E. ESTES  
SENIOR DISTRICT JUDGE



# **APPENDIX 4**

SENATE BILL NO. 274—COMMITTEE ON NATURAL RESOURCES

(ON BEHALF OF THE LEGISLATIVE COMMISSION'S  
COMMITTEE TO STUDY THE USE, MANAGEMENT,  
AND ALLOCATION OF WATER RESOURCES)

MARCH 13, 2007

Referred to Committee on Natural Resources

SUMMARY—Makes various changes to provisions governing the  
State Engineer. (BDR 48-206)

FISCAL NOTE: Effect on Local Government: No.  
Effect on the State: No.

EXPLANATION — Matter in *bolded italics* is new; matter between brackets [omitted material] is material to be omitted.

AN ACT relating to water; expanding the purposes for which the  
State Engineer may adopt regulations; authorizing the  
State Engineer to impose administrative fines and to order  
payment of the costs of certain proceedings; authorizing  
the State Engineer to seek injunctive relief for certain  
violations; and providing other matters properly relating  
thereto.

**Legislative Counsel's Digest:**

- 1 Pursuant to existing law, the State Engineer may make such reasonable rules  
2 and regulations as may be necessary for the proper and orderly execution of the  
3 powers conferred on him by law. (NRS 532.120) The penalty prescribed for the  
4 violation of a majority of the provisions set forth in chapters 533, 534, 535 and 536  
5 of NRS is a misdemeanor. (NRS 533.480, 534.190, 535.110, 536.120)  
6 **Section 1** of this bill expands the provisions for which the State Engineer may  
7 adopt regulations to include chapters 534, 535 and 536 of NRS in addition to  
8 chapter 533 of NRS. **Sections 3, 7, 10 and 14** of this bill provide the State Engineer  
9 with the additional authority to impose, after notice and opportunity for a hearing,  
10 administrative fines, to require a person to replace certain unlawfully taken or  
11 wasted water, and to recover expenses incurred in investigating and stopping  
12 various water law violations.  
13 **Sections 4, 8, 11 and 15** of this bill authorize the State Engineer to seek  
14 injunctive relief to prevent a violation or continued violation of chapters 533, 534,  
15 535 and 536 of NRS.



\* S B 2 7 4 \*

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN  
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     **Section 1.** NRS 532.120 is hereby amended to read as follows:  
2     532.120 1. The State Engineer ~~is empowered to~~ *may* make  
3     such reasonable rules and regulations as may be necessary for the  
4     proper and orderly execution of the powers conferred by law.

5     2. The State Engineer ~~shall have power to make rules,~~ *may*  
6     *adopt regulations,* not in conflict with law, governing the practice  
7     and procedure in all contests before his office, to ~~insure~~ *ensure* the  
8     proper and orderly exercise of the powers granted by law, and the  
9     speedy accomplishment of the purposes of ~~chapter~~ *chapters* 533 ,  
10    534, 535 and 536 of NRS. Such rules of practice and procedure  
11    ~~shall~~ *must* be furnished to any person upon application therefor.

12    **Sec. 2.** Chapter 533 of NRS is hereby amended by adding  
13    thereto the provisions set forth as sections 3 and 4 of this act.

14    **Sec. 3. 1.** *In addition to any other penalty provided by law,*  
15    *the State Engineer may, after notice and opportunity for a*  
16    *hearing, require a person who violates any provision of this*  
17    *chapter or any permit, certificate, order or decision issued or*  
18    *regulation adopted by the State Engineer pursuant to this chapter*  
19    *or NRS 532.120 to:*

20    (a) *Pay an administrative fine not to exceed \$10,000 per day*  
21    *for each violation as determined by the State Engineer.*

22    (b) *In the case of an unauthorized use or willful waste of water*  
23    *in violation of NRS 533.460 or an unlawful diversion of water in*  
24    *violation of NRS 533.530, or any other violation of this chapter*  
25    *that, as determined by the State Engineer, results in an unlawful*  
26    *use, waste or diversion of water, replace not more than 200*  
27    *percent of the water used, wasted or diverted.*

28    2. *If an administrative fine is imposed against a person*  
29    *pursuant to subsection 1 or the person is ordered to replace any*  
30    *water pursuant to that subsection, the State Engineer may require*  
31    *the person to pay the costs of the proceeding, including*  
32    *investigative costs and attorney's fees.*

33    3. *An order imposing an administrative fine or requiring the*  
34    *replacement of water or the payment of costs or fees pursuant to*  
35    *this section may be reviewed by a district court pursuant to*  
36    *NRS 533.450.*

37    **Sec. 4. 1.** *The State Engineer may seek injunctive relief in*  
38    *the appropriate court to prevent the continuance or occurrence of*  
39    *any act or practice which violates any provision of this chapter, or*  
40    *any permit, certificate, decision or order issued or regulation*  
41    *adopted by the State Engineer pursuant to this chapter or*  
42    *NRS 532.120.*



1       2. On a showing by the State Engineer that a person is  
2 engaged, or is about to engage, in any act or practice which  
3 violates or will violate any provision of this chapter, or any permit,  
4 certificate, decision or order issued or regulation adopted by the  
5 State Engineer pursuant to this chapter or NRS 532.120, the court  
6 may issue, without a bond, any prohibitory or mandatory  
7 injunction that the facts may warrant, including a temporary  
8 restraining order issued ex parte or, after notice and hearing, a  
9 preliminary or permanent injunction.

10       3. Failure to establish lack of an adequate remedy at law or  
11 irreparable harm is not a ground for denying a request for a  
12 temporary restraining order or injunction.

13       4. The court may require the posting of a sufficient  
14 performance bond or other security to ensure compliance with the  
15 court order within the period prescribed.

16       5. Any proceeding conducted or injunction or order issued  
17 pursuant to this section is in addition to, and not in lieu of, any  
18 other penalty or remedy available for a violation specified in this  
19 section.

20       Sec. 5. NRS 533.450 is hereby amended to read as follows:

21       533.450 1. Any person feeling himself aggrieved by any  
22 order or decision of the State Engineer, acting in person or through  
23 his assistants or the water commissioner, affecting his interests,  
24 when ~~{such}~~ the order or decision relates to the administration of  
25 determined rights or is made pursuant to NRS 533.270 to 533.445,  
26 inclusive, or section 3, 7, 10 or 14 of this act, may have the same  
27 reviewed by a proceeding for that purpose, insofar as may be in the  
28 nature of an appeal, which ~~{shall}~~ must be initiated in the proper  
29 court of the county in which the matters affected or a portion thereof  
30 are situated, ~~{;}~~ but on stream systems where a decree of court has  
31 been entered, the action ~~{shall}~~ must be initiated in the court that  
32 entered the decree. ~~{Such}~~ The order or decision of the State  
33 Engineer ~~{shall be and remain}~~ remains in full force and effect  
34 unless proceedings to review the same are commenced in the proper  
35 court within 30 days ~~{following}~~ after the rendition of the order or  
36 decision in question and notice thereof is given to the State Engineer  
37 as provided in subsection 3.

38       2. The proceedings in every case ~~{shall}~~ must be heard by the  
39 court, and ~~{shall}~~ must be informal and summary, but full  
40 opportunity to be heard ~~{shall}~~ must be had before judgment is  
41 pronounced.

42       3. No such proceedings may be entertained unless notice  
43 thereof, containing a statement of the substance of the order or  
44 decision complained of, and of the manner in which the same  
45 injuriously affects the petitioner's interests, has been served upon



1 the State Engineer, personally or by registered or certified mail, at  
2 his office at the State Capital within 30 days following the rendition  
3 of the order or decision in question. A similar notice ~~{shall}~~ *must*  
4 also be served personally or by registered or certified mail upon the  
5 person ~~{or persons}~~ who may have been affected by ~~{such}~~ *the* order  
6 or decision.

7 4. Where evidence has been filed with, or testimony taken  
8 before, the State Engineer, a transcribed copy thereof, or of any  
9 specific part of the same, duly certified as a true and correct  
10 transcript in the manner provided by law, ~~{shall}~~ *must* be received in  
11 evidence with the same effect as if the reporter were present and  
12 testified to the facts so certified. A copy of the transcript ~~{shall}~~  
13 *must* be furnished on demand, at actual cost, to any person affected  
14 by ~~{such}~~ *the* order or decision, and to all other persons on payment  
15 of a reasonable amount therefor, to be fixed by the State Engineer.

16 5. A bond ~~{shall}~~ *must* not be required except when a stay is  
17 desired, and the proceedings provided for in this section are not a  
18 stay unless, within 5 days ~~{following}~~ *after* the service of notice  
19 thereof, a bond is filed in an amount to be fixed by the court, with  
20 sureties satisfactory to ~~{such}~~ *the* court, conditioned to perform the  
21 judgment rendered in ~~{such}~~ *the* proceedings.

22 6. Costs ~~{shall}~~ *must* be paid as in civil cases brought in the  
23 district court, except by the State Engineer or the State.

24 7. The practice in civil cases applies to the informal and  
25 summary character of such proceedings, as provided in this section.

26 8. Appeals may be taken to the Supreme Court from the  
27 judgment of the district court in the same manner as in other civil  
28 cases.

29 9. The decision of the State Engineer ~~{shall be}~~ *is* prima facie  
30 correct, and the burden of proof ~~{shall be}~~ *is* upon the party  
31 attacking the same.

32 10. Whenever it appears to the State Engineer that any  
33 litigation, whether now pending or hereafter brought, may adversely  
34 affect the rights of the public in water, he shall request the Attorney  
35 General to appear and protect the interests of the State.

36 Sec. 6. Chapter 534 of NRS is hereby amended by adding  
37 thereto the provisions set forth as sections 7 and 8 of this act.

38 Sec. 7. 1. *Except as otherwise provided in NRS 534.280,*  
39 *534.310 and 534.330 and in addition to any other penalty provided*  
40 *by law, the State Engineer may, after notice and opportunity for a*  
41 *hearing, require a person who violates any provision of this*  
42 *chapter or any permit, order or decision issued or regulation*  
43 *adopted by the State Engineer pursuant to this chapter or NRS*  
44 *532.120 to:*



1 (a) Pay an administrative fine not to exceed \$10,000 per day  
2 for each violation as determined by the State Engineer.

3 (b) In the case of an unlawful waste of water in violation of  
4 NRS 534.070 or any other violation of this chapter that, as  
5 determined by the State Engineer, results in an unlawful use,  
6 waste or diversion of water, replace not more than 200 percent of  
7 the water used, wasted or diverted.

8 2. If an administrative fine is imposed against a person  
9 pursuant to subsection 1 or the person is ordered to replace any  
10 water pursuant to that subsection, the State Engineer may require  
11 the person to pay the costs of the proceeding, including  
12 investigative costs and attorney's fees.

13 3. An order imposing an administrative fine or requiring the  
14 replacement of water or payment of costs or fees pursuant to this  
15 section may be reviewed by a district court pursuant to  
16 NRS 533.450.

17 Sec. 8. 1. The State Engineer may seek injunctive relief in  
18 the appropriate court to prevent the continuance or occurrence of  
19 any act or practice which violates any provision of this chapter, or  
20 any permit, order or decision issued or regulation adopted by the  
21 State Engineer pursuant to this chapter or NRS 532.120.

22 2. On a showing by the State Engineer that a person is  
23 engaged, or is about to engage, in any act or practice which  
24 violates or will violate any provision of this chapter, or any permit,  
25 order or decision issued or regulation adopted by the State  
26 Engineer pursuant to this chapter or NRS 532.120, the court may  
27 issue, without a bond, any prohibitory or mandatory injunction  
28 that the facts may warrant, including a temporary restraining  
29 order issued ex parte or, after notice and hearing, a preliminary or  
30 permanent injunction.

31 3. Failure to establish lack of an adequate remedy at law or  
32 irreparable harm is not a ground for denying a request for a  
33 temporary restraining order or injunction.

34 4. The court may require the posting of a sufficient  
35 performance bond or other security to ensure compliance with the  
36 court order within the period prescribed.

37 5. Any proceeding conducted or injunction or order issued  
38 pursuant to this section is in addition to, and not in lieu of, any  
39 other penalty or remedy available for a violation of this chapter.

40 Sec. 9. Chapter 535 of NRS is hereby amended by adding  
41 thereto the provisions set forth as sections 10 and 11 of this act: -

42 Sec. 10. 1. In addition to any other penalty provided by law,  
43 the State Engineer may, after notice and opportunity for a  
44 hearing, require a person who violates any provision of this  
45 chapter, any permit, order or decision issued by the State Engineer



1 pursuant to this chapter or any regulation adopted by the State  
2 Engineer pursuant to NRS 532.120 to pay an administrative fine  
3 not to exceed \$10,000 per day for each violation as determined by  
4 the State Engineer.

5 2. If an administrative fine is imposed against a person  
6 pursuant to subsection 1, the State Engineer may require the  
7 person to pay the costs of the proceeding, including investigative  
8 costs and attorney's fees.

9 3. An order imposing an administrative fine or requiring the  
10 payment of costs or fees pursuant to this section may be reviewed  
11 by a district court pursuant to NRS 533.450.

12 Sec. 11. 1. The State Engineer may seek injunctive relief in  
13 the appropriate court to prevent the continuance or occurrence of  
14 any act or practice which violates any provision of this chapter,  
15 any permit, order or decision issued by the State Engineer  
16 pursuant to this chapter or any regulation adopted by the State  
17 Engineer pursuant to NRS 532.120.

18 2. On a showing by the State Engineer that a person is  
19 engaged, or is about to engage, in any act or practice which  
20 violates or will violate any provision of this chapter, any permit,  
21 order or decision issued by the State Engineer pursuant to this  
22 chapter or any regulation adopted by the State Engineer pursuant  
23 to NRS 532.120, the court may issue, without a bond, any  
24 prohibitory or mandatory injunction that the facts may warrant,  
25 including a temporary restraining order issued ex parte or, after  
26 notice and hearing, a preliminary or permanent injunction.

27 3. Failure to establish lack of an adequate remedy at law or  
28 irreparable harm is not a ground for denying a request for a  
29 temporary restraining order or injunction.

30 4. The court may require the posting of a sufficient  
31 performance bond or other security to ensure compliance with the  
32 court order within the period prescribed.

33 5. Any proceeding conducted or injunction or order issued  
34 pursuant to this section is in addition to, and not in lieu of, any  
35 other penalty or remedy available for a violation of this chapter.

36 Sec. 12. NRS 535.100 is hereby amended to read as follows:

37 535.100 1. ~~{It is unlawful for any person being}~~ Any person  
38 who is the owner of or in possession of any sawmill used for the  
39 making of lumber, or any slaughterhouse, brewery or tannery ~~{te}~~  
40 shall not injure or obstruct the natural flow of water in any river,  
41 creek or other stream.

42 2. Any city or county government, or any person, ~~{being}~~ who  
43 is the owner of or in possession of any agricultural lands ~~{, who may}~~  
44 be ~~and~~ who is injured by reason of the violation on the part of any  
45 person of the provisions contained in subsection 1 ~~{, shall have the}~~



1 right to] may commence and maintain an action against [such] the  
2 person for any damage sustained, in such manner as may be  
3 provided by law.

4 ~~[3. Any person who shall willfully and knowingly violate the~~  
5 ~~provisions of this section shall be punished by a fine of not more~~  
6 ~~than \$500.]~~

7 Sec. 13. Chapter 536 of NRS is hereby amended by adding  
8 thereto the provisions set forth as sections 14 and 15 of this act.

9 Sec. 14. 1. In addition to any other penalty provided by law,  
10 the State Engineer may, after notice and opportunity for a  
11 hearing, require a person who violates any provision of this  
12 chapter, any order or decision issued by the State Engineer  
13 pursuant to this chapter or any regulation adopted by the State  
14 Engineer pursuant to NRS 532.120 to pay an administrative fine  
15 not to exceed \$10,000 per day for each violation as determined by  
16 the State Engineer.

17 2. If an administrative fine is imposed against a person  
18 pursuant to subsection 1, the State Engineer may require the  
19 person to pay the costs of the proceeding, including investigative  
20 costs and attorney's fees.

21 3. An order imposing an administrative fine or requiring the  
22 payment of costs or fees pursuant to this section may be reviewed  
23 by a district court pursuant to NRS 533.450.

24 Sec. 15. 1. The State Engineer may seek injunctive relief in  
25 the appropriate court to prevent the continuance or occurrence of  
26 any act or practice which violates any provision of this chapter,  
27 any order or decision issued by the State Engineer pursuant to this  
28 chapter or any regulation adopted by the State Engineer pursuant  
29 to NRS 532.120.

30 2. On a showing by the State Engineer that a person is  
31 engaged, or is about to engage, in any act or practice which  
32 violates or will violate any provision of this chapter, any order or  
33 decision issued by the State Engineer pursuant to this chapter or  
34 any regulation adopted by the State Engineer pursuant to NRS  
35 532.120, the court may issue, without a bond, any prohibitory or  
36 mandatory injunction that the facts may warrant, including a  
37 temporary restraining order issued ex parte or, after notice and  
38 hearing, a preliminary or permanent injunction.

39 3. Failure to establish lack of an adequate remedy at law or  
40 irreparable harm is not a ground for denying a request for a  
41 temporary restraining order or injunction.

42 4. The court may require the posting of a sufficient  
43 performance bond or other security to ensure compliance with the  
44 court order within the period prescribed.





- 1     5. *Any proceeding conducted or injunction or order issued*
- 2 *pursuant to this section is in addition to, and not in lieu of, any*
- 3 *other penalty or remedy available for a violation of this chapter.*
- 4     Sec. 16. This act becomes effective on July 1, 2007.

60



\* S B 2 7 4 \*

DE PAOLI

PROPOSED AMENDMENT TO SB 274

Prepared by Gordon H. DePaoli  
April 3, 2007

On page 3, at line 20, add a new section 5 as follows, and renumber the remaining sections accordingly:

Sec. 5.

In implementing and enforcing the provisions of Sections 3 and 4 of this act by regulation or otherwise, the State Engineer may not act in any manner which conflicts with any federal or state court decree, any interstate compact, or any interstate allocation of water pursuant to an act of Congress and ~~regulations promulgated thereunder.~~

→ an agreement thereunder to which the State of Nevada is a party,

~~shall avoid jurisdictional conflicts with persons acting~~

## DISCLAIMER

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Contact the Library at (775) 684-6827 or [library@lcb.state.nv.us](mailto:library@lcb.state.nv.us).

SB 274

Testimony for Tracy Taylor, State Engineer

~~Senate Natural Resources~~

Government Affairs

April 4, 2007

*Morning* ~~Good afternoon~~ *Madam Chair* Chairman Rhoads and Members of the Committee. For the record, my name is Tracy Taylor, Nevada State Engineer. Thank you for the opportunity to provide testimony on this bill.

*2 topics* *Introduction as passed on Senate Side*  
Senate Bill 274 is language *introduce Bill Amendments* requested by my Agency during the 2006 interim study on water resources. The bill's primary focus is to authorize this Agency to order any person in violation of NRS Chapters 533, 534, 535, and 536 and NAC chapters 534 and 535 to: (a) pay an administrative fine not to exceed \$10,000 per day for each violation; (b) be liable for any expense incurred by the Division of Water Resources in investigating and stopping the violation; and (c) potentially re-pay up to 200% of the water illegally used (d) have the ability to seek injunctive relief. Administrative details for addressing violations, assessing fines or penalties, and procedures would be done through the development of rules and regulations. This fining authority is needed because the existing process for addressing violations of the water law is slow and cumbersome without any meaningful consequence or accountability for violations (misdemeanor only). The substantial increase in the value and importance of water rights over the past 10 years makes a misdemeanor offense almost meaningless.

Assembly committee: Government Affairs

Exhibit C P. 1 of 3 Date 5/9/07

Submitted by: Tracy Taylor

The intent of these fines is to achieve compliance only and not as an additional funding source for the Division of Water Resources.

Examples of issues that this proposed fining ability are to address are the illegal use of water without a permit and also the over use of water under an existing permit. This fining ability does not fall on individual taxpayers but on the affected industry.

The Interim Committee asked this office to develop some draft regulations concerning the requirements on fining. Deputy State Engineer Jason King has spent numerous days reviewing other western states and other State of Nevada agencies fining regulations. Jason has done a very thorough and complete job in developing these draft regulations. He is prepared to summarize these regulations at this time unless the committee has any questions for me.

THESE Amendments ADDRESS CONCERNS  
FROM COMMUNITY WATER OWNERS IN  
THE LAS VEGAS AREA  
BUT FIRST I WOULD <sup>LIKE TO</sup> STATE THAT FINING IS  
NON COMPLIANCE AND ILLEGAL USE  
TO ADDRESS STATEWIDE ISSUES.  
A COUPLE EXAMPLES  
WAS 400 U.  
HUMBOLDT R

- To address the community well issue
- Example of 4 House Community well
- Regulations will address due problems

One last thing

Address Allocation of  $1.0 \text{ ac/ft}$  per Residence  
This is a generous allocation with you  
consider <sup>the majority of the</sup> actual uses in the Basin.

For Example Residences served by water  
purveyor you less than  $1.7 \text{ ac/ft}$  annually,  
in North its dependent on lot size  
but ranges from  $.28 \text{ ac/ft}$  ~~for~~ for small  
lots up around  $.5$  for average <sup>size</sup> lots.

So there is every opportunity to be  
in compliance.

They may be some discussion of Individual  
Domestic Being allow  $2.0 \text{ ac/ft}$ , this  
a maximum amount defined by statute  
and not permitted by this office,  
but typically from water use conducted  
this uses are approximately  $1.0 \text{ ac/ft}$   
or less.

**MINUTES OF THE  
SENATE COMMITTEE ON NATURAL RESOURCES**

**Seventy-fourth Session  
April 11, 2007**

The Senate Committee on Natural Resources was called to order by Chair Dean A. Rhoads at 3:30 p.m. on Wednesday, April 11, 2007, in Room 2144 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

**COMMITTEE MEMBERS PRESENT:**

Senator Dean A. Rhoads, Chair  
Senator Mike McGinness, Vice Chair  
Senator Mark E. Amodei  
Senator Joseph J. Heck  
Senator Bob Coffin  
Senator Michael A. Schneider  
Senator Maggie Carlton

**GUEST LEGISLATORS PRESENT:**

Senator Dina Titus, Clark County Senatorial District No. 7.

**STAFF MEMBERS PRESENT:**

Ardyss Johns, Committee Secretary  
Matthew Pritchard, Intern to Senator Carlton  
Susan Scholley, Committee Policy Analyst  
Randy Stephenson, Committee Counsel  
Christopher Trent, Intern to Senator Rhoads  
Shirley Parks, Committee Secretary

**OTHERS PRESENT:**

David K. Schumann, Nevada Committee for Full Statehood  
Janine Hansen, Nevada Eagle Forum  
John P. Sande III, Western States Petroleum

Senate Committee on Natural Resources  
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SENATOR CARLTON MOVED TO AMEND AND DO PASS AS AMENDED  
S.B. 105.

SENATOR AMODEI SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

\*\*\*\*\*

CHAIR RHOADS:

We will now open the hearing on S.B. 272.

**SENATE BILL 272:** Revises provisions governing awarding of costs and attorney's fees in certain actions involving rights to graze or water livestock. (BDR 50-370)

CHAIR RHOADS:

Senate Bill 272 revises government rewarding of costs and attorney fees in certain actions involving rights to graze or water livestock.

Ms. SCHOLLEY:

This bill mandates an award of attorney fees and costs to the winning party in litigation by a person contesting the rights of another to graze or water livestock on public lands. Based on testimony at the hearing, the sponsor, Senator Rhoads, proposes an amendment which would limit the mandatory award of attorney fees to the defendant of the case.

SENATOR AMODEI MOVED TO AMEND AND DO PASS AS AMENDED  
S.B. 272.

SENATOR MCGINNESS SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR CARLTON VOTED NO.)

\*\*\*\*\*

CHAIR RHOADS:

We will now open the hearing on S.B. 274.

**SENATE BILL 274:** Makes various changes to provisions governing the State Engineer. (BDR 48-206)



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April 11, 2007  
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Ms. SCHOLLEY:

This bill authorizes the state water engineer to impose administrative fines and seek injunctive relief for violations of water law. The amendment proposed to the bill is by Gordon DePaoli representing Truckee Meadows Water Authority and the Walker River Irrigation District (Exhibit J). It would add language to S.B. 274. There are some concerns as the need of this addition. Others feel they are neutral on the amendment being included. One variation on the theme would be to adopt this language but strike the end, "regulations promulgated thereunder,"

TRACY TAYLOR, P.E., (State Engineer, Division of Water Resources, State Department of Conservation and Natural Resources):  
We agree with the language and have no problem with it.

SENATOR MCGINNESS:

Mr. Taylor, why would you approve something that would restrict you from enacting the state water law?

MR. TAYLOR:

I do not believe this restricts me enforcing state water law. I do not think I can trump a federal decree that is administered by the court.

SENATOR MCGINNESS:

I still have some concerns but I feel better with the language revision by Ms. Scholley, omitting, "regulations promulgated thereunder."

GORDON DEPAOLI (Truckee Meadows River Water Authority; Walker River Irrigation District):

I have a suggestion to help with this. In lieu of the omitted three words, "regulations promulgated thereunder," consider substituting these words, "an agreement thereunder to which the State of Nevada is a party", Exhibit J. I suggest this because my concern relates specifically to certain provisions of the Truckee River Operating Agreement which will not happen unless Nevada is in fact a party. Under the act that authorizes, it is a federal regulation.

STEVE KING (City of Fallon):

I appreciate Mr. DePaoli's proposed substitute language. It is a step in the right direction. There still should be some caution, as the language would appear to enforce Nevada water rights and water law that would say, "Oh, by the way,

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certain water rights would be subject to court decree." It seems like a matter of policy when something is written in the statute, it might be a seed planted with future implications that might take on other meaning. With this in mind, I think the substitute language is a great improvement.

SENATOR MCGINNESS:

As a matter of legislative record, this is not intended to be a seed.

SENATOR AMODEI MOVED TO AMEND AND DO PASS AS AMENDED  
S.B. 274 WITH THE SUBSTITUTE LANGUAGE OF MESSRS. DEPOALI,  
KING, AND TAYLOR.

SENATOR CARLTON SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

\*\*\*\*\*

CHAIR RHOADS:

We will open the work session on S.B. 275.

**SENATE BILL 275:** Makes various changes relating to underground water.  
(BDR 48-208)

Ms. SCHOLLEY:

This is the domestic well bill from the interim study. It will do five basic things as laid out in the bill. The bill mock-up incorporates all the comments that were received during the hearing and some additional two cleanup words proposed by the state engineer's office. This proposal is consistent with the interim study committee's original recommendations.

SENATOR AMODEI MOVED TO AMEND AND DO PASS AS AMENDED  
S.B. 275.

SENATOR MCGINNESS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

\*\*\*\*\*

## THE SEVENTY-NINTH DAY

CARSON CITY (Tuesday), April 24, 2007

Senate called to order at 11:31 a.m.  
 President Krolicki presiding.

Roll called.

All present.

Prayer by the Chaplain, Marie Hanson.

Please join with me now as we invite the presence and power within each of us into our awareness, into our oneness, with all that is. From this point of light and unity, may we know and accept divine and perfect order in our affairs, schedules and deadlines.

May we know and accept Your ease and effortlessness in accomplishing all that is before us today. May we invite the great and Holy Spirit to give us His strength to do that which will be done. For this, we celebrate in thanksgiving today. And, so it is.

AMEN.

Pledge of Allegiance to the Flag.

Senator Raggio moved that further reading of the Journal be dispensed with, and the President and Secretary be authorized to make the necessary corrections and additions.

Motion carried.

## REPORTS OF COMMITTEES

*Mr. President:*

Your Committee on Transportation and Homeland Security, to which was referred Senate Bill No. 394, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

DENNIS NOLAN, *Chair*

## MESSAGES FROM THE ASSEMBLY

ASSEMBLY CHAMBER, Carson City, April 23, 2007

*To the Honorable the Senate:*

I have the honor to inform your honorable body that the Assembly on this day passed, as amended Assembly Bills Nos. 12, 25, 39, 53, 70, 80, 97, 101, 139, 145, 147, 207, 209, 234, 263, 278, 279, 283, 285, 297, 311, 321, 335, 352, 365, 375, 383, 396, 415, 424, 431, 433, 439, 446, 461, 462, 478, 490, 491, 494, 496, 506, 507, 513, 527, 535, 569, 570, 576, 577, 592, 600, 602, 605.

LUCINDA BENJAMIN

*Assistant Chief Clerk of the Assembly*

## WAIVERS AND EXEMPTIONS

## NOTICE OF EXEMPTION

April 24, 2007

The Fiscal Analysis Division, pursuant to Joint Standing Rule 14.6, has determined the eligibility for exemption of Senate Bills Nos. 45, 52, 499.

GARY CHIGGERI

*Fiscal Analysis Division*

Senate Bill No. 234 having received a constitutional majority, Mr. President declared it passed, as amended.  
Bill ordered transmitted to the Assembly.

Senate Bill No. 242.

Bill read third time.

Roll call on Senate Bill No. 242:

YEAS—21.

NAYS—None.

Senate Bill No. 242 having received a two-thirds majority, Mr. President declared it passed, as amended.  
Bill ordered transmitted to the Assembly.

Senate Bill No. 265.

Bill read third time.

Roll call on Senate Bill No. 265:

YEAS—21.

NAYS—None.

Senate Bill No. 265 having received a constitutional majority, Mr. President declared it passed, as amended.  
Bill ordered transmitted to the Assembly.

Senate Bill No. 269.

Bill read third time.

Roll call on Senate Bill No. 269:

YEAS—21.

NAYS—None.

Senate Bill No. 269 having received a constitutional majority, Mr. President declared it passed, as amended.  
Bill ordered transmitted to the Assembly.

Senate Bill No. 274.

Bill read third time.

Remarks by Senators Amodei, Care, Lee and Titus.

Senator Lee requested that the following remarks and letter be entered in the Journal.

SENATOR AMODEI:

Thank you, Mr. President. This bill has been the subject of questions and e-mail correspondence to my colleagues in Clark Districts 1, 6, 7 and 10.

There was a meeting in my office this morning with the State Engineer to discuss those issues. I would like to thank those colleagues who attended.

There was some concern expressed about a \$10,000 limit in terms of how the discretion would be used for the administrative fines. I believe my colleague from Clark District 1 has a letter from the State Engineer that he would like made part of the legislative record. I have no objection to this. The discussion encompassed the ability to amend the bill on the Assembly side providing some general statutory language. The discussion took place in the context that this came to some peoples' attention within 48-72 hours of the deadline that looms at midnight tonight. I have no objection to continuing to work on that issue.

I think it is appropriate that we look at the several water bills coming over from the Assembly and we should amend those to provide some statutory general guidance for when a fine is made. There be certain findings made in an administrative order concerning severity of the offense. Prior warnings should be considered as well as if the person had ever had the offense before. These are general things that would be part of any order defined but not limited to those.

There was some information provided by the Southern Nevada Water Authority which I think is important just to validate the process whereby this bill came through the State Water Committee. The Minority Leader served on this committee as well as other members here. It talks about a study that was initiated as far back as 2003 regarding the ability to fine and to ask the Advisory Committee for ground water management in Las Vegas to assist with the development of a reasonable fine proposal. The committee voted in favor of a proposal.

Over the past four years, the Advisory Committee has held 20 meetings all of which were open to the public and focused to some extent on over-pumping. Representatives from the Nevada Well Owners Association were present at the meetings and participated in those discussions. The State Engineer's office mailed four letters to more than 13,000 well owners in Clark County on the issue of over pumping. Over the past four years, one letter was general in nature and was mailed to all well owners. The three remaining were sent to well owners who were over pumping and explained the consequences of over pumping in a resource context. The committee also held four public workshops at which 300 people attended. Over-pumping was discussed at length. The committee also mailed five newsletters to all well owners in the Las Vegas Valley. All newsletters referred to the over-pumping issue in some way. In addition, the S.C.R. 26 Statewide Water Committee met seven times and was given express authority to address the State Engineer's ability to assess fines. The committee voted last June for the bill draft request that is before you now. This was not something where someone woke up one day and got an idea. It represents an on-going process. Hopefully, we have some confidence in the work of that committee and also the committee that is in Las Vegas.

With the respect to the issue of community-well owners versus domestic-well owners, there was correspondence regarding the equity of treating them equally in the proposed amendment and also in the regulations that will come. There was discussion of including a provision that said, "In any community-well-owner context, if there is a problem, it is the State Engineers burden to prove which one of those community-well owners was the source of the over pumping, not the community-well owners, as individuals, to prove they were not the source of activity which may lead to an administrative fine."

The process continues. Senate Bill No. 274, with the provisions from the State Engineer that I requested we put into the record and the on-going regulatory process and the amendment process still open, is appropriate for your favorable vote at this time.

#### SENATOR CARE:

Thank you, Mr. President. This issue is extremely important, and we need a clear record of legislative history. We have all read in the paper about the pipeline and the purchase of ranches with water rights and, in some cases, just water rights in the northern part of the State by the Southern Nevada Water Authority.

This body might appreciate having some idea who these potential violators might be. I have a copy of the letter by the State Engineer. He discusses constructing a dam without a permit, the plugging and abandonment of water wells, the construction of an illegal diversion structure on a stream or creek, just to name a few. Maybe this goes on or maybe it is the threat of it going on, but to seek \$10,000 a day is extreme. I appreciate the comments about the regulations and the tiers we will see later. I also appreciate replacing, in the case of diversion, not more than 200 percent of the water used, wasted or diverted language under section 1 of section 3 of the bill. These people must have lots of money and many assets. This is using heavy artillery in the war over the equivalent of oil in the State of Nevada.

#### SENATOR AMODEI:

I appreciate the comments from my colleague in Clark District 7. I would like to put the \$10,000 into context. According to personnel from the Southern Nevada Water Authority, if you are in the Las Vegas Valley, are on a community-well, have a five-acre parcel, are sub-metered—which means not the meter on the well in general but the submeter on the line that

goes to your parcel—have water rights for an acre foot, the sub-meter indicates that you are over pumping by an acre foot, it would cost you about a \$25,000 - \$27,000 to buy nonrevocable water rights in the Las Vegas Valley.

In urban, western Nevada and southern Nevada, if you were to be hit with the maximum potential fine, replacing the water is a more expensive proposition for you than the \$10,000 fine. These administrative procedures are subject to being taken to the District Court, which involves expenditures, if you feel you have been wrongly fined. The average price of an acre-foot of water in the Las Vegas Valley is \$25,000 - \$27,000 for non revocable rights. The difference between revocable and non revocable rights are that one after 1955 granted by the State Engineer's Office. If you were given the ability to hook up to a municipal water system you had to hook up to that system. After 1955, those rights were provided to a person with that proviso. To get the water you may not have the ability to pump which you are pumping is a five-figure proposition. That is why replacing the water may be a more appropriate measure for someone who is a violator of the agreed-upon amounts for pumping acre footages in that particular basin.

There are tremendous resources and efforts going into providing the primary quality of life determiner for a community. To ignore what the State Engineer has designated, based on scientific considerations, as an appropriate amount to be pumping is a serious community issue in a designated basin, which most of the ones in urban Nevada surrounding the two major urban areas are. The \$10,000 may be a bargain depending on how much was being over pumped.

#### SENATOR LEE:

I thank you, Mr. President. Senate Bill No. 274 gives the State Engineer the authority to impose administrative penalties up to \$10,000 per day for violations of Nevada Water Law. The State Engineer needs an administrative mechanism to protect Nevada's limited water supply, existing water rights and public safety. The State Engineer does not have adequate tools to address over pumping of a water right, the illegal use of the State's water, the plugging of abandoned wells that pose a risk to water quality and the construction of dams or stream diversion structures without a permit.

Initially, I was concerned that the amount of the fines was too high. However, given the vast differences in the value of water throughout the State, I can see the wisdom in giving the State Engineer some discretion in the dollar amount of the fines. When I met with the State Engineer on Friday, he gave me a copy of a draft regulation that would establish the framework for the State Engineer's fining authority. It allows the State Engineer to impose fines based on the nature and gravity of the offense and provides opportunities for the alleged violator to appeal any administrative action to an independent review committee or to the State courts. The State Engineer also committed to me, in writing, that he would impose significantly smaller fines for first time offenses with the fines going up if the violations are not corrected.

Mr. President, water in the State of Nevada belongs to the public. It is necessary for the State Engineer to be able to impose administrative penalties so that the State's water is protected from illegal uses.

HONORABLE SENATOR JOHN LEE

c/o Nevada Senate

401 S. Carson Street

Carson City, NV 89701

RE: Senate Bill 274

DEAR SENATOR LEE:

Thank you for the opportunity to meet with you this morning regarding your concerns on Senate Bill No. 274 which gives the Division of Water Resources (DWR) the ability to administer penalties and fines.

The need for enhanced enforcement authority for DWR was discussed at length in Senator Rhoads' S.C.R. 26 Interim Study Committee on Water Resources. Senate Bill No. 274 was the outcome of those extensive hearings along with a provision that DWR submit draft regulations indicating how the statutes would be implemented. The draft regulations were provided to the Senate Natural Resources Committee during hearing and to you in our meeting. I would like to emphasize that the intent of Senate Bill No. 274 and the associated draft

regulations is to protect Nevada's limited water supplies, existing water rights and public safety. The State Engineer currently does not have adequate tools to address issues such as over pumping of a water right, the illegal use of a water right, the construction of a dam without a permit, plugging and abandonment of water wells and the construction of an illegal diversion structure on a stream or creek to name a few. Passage of Senate Bill No. 274 will give DWR the tool necessary to ensure an equitable playing field for all water users and protect this precious resource.

Even though this law would establish a maximum fine of \$10,000 per day per violation, the goal is to ensure compliance with Nevada Water Law. The State Engineer has no intentions of imposing the maximum penalties except under egregious circumstances and after appropriate due process. We commit to developing regulations that provide appropriate penalties that take into consideration the nature and gravity of the violation, number of offenses and the economic benefit to the violator. Included in the regulations will be a staged approach that provides for a smaller fine for first offenses and coinciding increases for repeat or continued offenses.

However, because the cost of water varies a great deal across the State, the State Engineer must have the flexibility to adjust those penalties to ensure they are a meaningful deterrent to noncompliance.

The regulations will provide the alleged violator numerous opportunities to achieve compliance and avoid a penalty. Any penalty imposed under this authority would be subject to review by an Independent Committee and judicial review. If fines are collected, the regulations propose to deposit such fines into the school district in the county where the infraction occurred.

In developing the regulations, we are required to hold workshops across the State to receive public comment and work with interested individuals before compiling a final version for codification. The final draft must be submitted to the Legislative Commission for final approval; consequently, there will be at least one other opportunity for legislative review.

Should you like to discuss this further, please contact me at your earliest convenience.

Sincerely,  
TRACY TAYLOR, P.E.  
State Engineer

#### SENATOR TITUS:

One of my reservations with this bill is that it is just one in a whole series of pieces we are considering this Session that is giving more, more and more power to the State Engineer. The State Engineer is becoming the water czar. Most people do not know who the State Engineer is, much less how to get in touch with that person. We do not have many ways to hold that person accountable. We may have a good engineer now who is making moderate, split-the-baby decisions, but there is no guarantee of that in the future. If we give the engineer too much authority, how will you ever rein him or her in?

#### SENATOR AMODEI:

This office is a creation of the Legislature. The person serves at the pleasure of the Governor, but there is nothing in the Nevada Constitution about the Division of Water Resources or a State Engineer. We created that person.

If there are concerns about exercise of discretion or amount of power, then that is a legitimate area for future and current legislation.

Referring to Senate Bill No. 274, under existing law, if you violate the terms of your permit or do not have a permit, the State Engineer's only tool is to send you a letter asking you to stop or to take you to District Court and to ask the Court to enjoin you from continuing what you were doing, basically ordering you to stop.

The way water has evolved for purposes of municipal use in Nevada, it has become no-enforcement authority at all. Of the surrounding states, we are the last one to provide them with this.

Many of the provisions you see before you in Senate Bill No. 274 were culled from Utah's laws. Arizona has a similar law. If this person is going to be responsible when someone is granted a permit to use the public waters of the State of Nevada that the water is going to be there first, foremost and always, they can rely on that. You then need to give them the authority to prevent those people who have not gone through that process from usurping or taking the

rights of the other people who have gone through the process. Make no mistake, in the fastest growing state in the Nation, water is the most important resource, and the person who makes the decision as to if it is there, if it can be transferred from agricultural to municipal, wields a considerable amount of authority. If someone has a better structure for how those decisions ought to be made, then we should take a look at that. The historical processes as they have evolved will continue to evolve as the State's use of water changes. This is the best one I have heard of so far.

Roll call on Senate Bill No. 274:

YEAS—21.

NAYS—None.

Senate Bill No. 274 having received a constitutional majority,  
Mr. President declared it passed, as amended.  
Bill ordered transmitted to the Assembly.

Senate Bill No. 280.

Bill read third time.

Remarks by Senator Titus.

Roll call on Senate Bill No. 280:

YEAS—21.

NAYS—None.

Senate Bill No. 280 having received a constitutional majority,  
Mr. President declared it passed, as amended.  
Bill ordered transmitted to the Assembly.

Senate Bill No. 292.

Bill read third time.

Roll call on Senate Bill No. 292:

YEAS—21.

NAYS—None.

Senate Bill No. 292 having received a constitutional majority,  
Mr. President declared it passed, as amended.  
Bill ordered transmitted to the Assembly.

Senate Bill No. 293.

Bill read third time.

Roll call on Senate Bill No. 293:

YEAS—21.

NAYS—None.

Senate Bill No. 293 having received a constitutional majority,  
Mr. President declared it passed, as amended.  
Bill ordered transmitted to the Assembly.

#### MOTIONS, RESOLUTIONS AND NOTICES

Senator Arnodei moved that Senate Bill No. 302 be placed on the bottom of the General File.  
Remarks by Senator Arnodei.  
Motion carried.



**MINUTES OF THE MEETING  
OF THE  
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS**

**Seventy-Fourth Session  
May 9, 2007**

The Committee on Government Affairs was called to order by Chair Marilyn K. Kirkpatrick at 8:02 a.m., on Wednesday, May 9, 2007, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at [www.leg.state.nv.us/74th/committees/](http://www.leg.state.nv.us/74th/committees/). In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: [publications@lcb.state.nv.us](mailto:publications@lcb.state.nv.us); telephone: 775-684-6835).

**COMMITTEE MEMBERS PRESENT:**

Assemblywoman Marilyn K. Kirkpatrick, Chair  
Assemblywoman Peggy Pierce, Vice Chair  
Assemblyman Kelvin Atkinson  
Assemblyman Bob Beers  
Assemblyman David Bobzien  
Assemblyman Jerry D. Claborn  
Assemblyman Pete Goicoechea  
Assemblyman Ruben Kihuen  
Assemblyman Harvey J. Munford  
Assemblywoman Bonnie Parnell  
Assemblyman James Settelmeyer  
Assemblyman Lynn D. Stewart  
Assemblywoman RoseMary Womack

**COMMITTEE MEMBERS ABSENT:**

Assemblyman Chad Christensen, (Excused)

Minutes ID: 1151



Michael Pennington, Public Policy Director, Reno-Sparks  
Chamber of Commerce  
Jack Robb, Builders Association of Northern Nevada  
Rosanna Coombes, Interim Director, Truckee Meadows Regional  
Planning Agency  
Steve Bradhurst, Private Citizen, Washoe County  
Jan Gilbert, Northern Nevada Coordinator, Progressive Leadership Alliance  
of Nevada  
Dennis Ghiglieri, Representative, Great Basin Water Network  
Tina Nappe, Private Citizen, Washoe County  
Charles Ragusa, Chairman, Voices for Truckee Meadows  
Ira Hansen, Private Citizen, Washoe County  
Leo Horishny, Private Citizen, Washoe County  
Pat Phillips, Private Citizen, Washoe County  
Richard Daly, Business Manager, Laborers' Union Local 169  
Toni Harsh, Private Citizen, Washoe County

[Call to Order, Roll Call]

**Chair Kirkpatrick:**

I have some strict ground rules when there are more than five signed in to speak. I will go over them before we get started so there are no questions. Speakers, you are either for, against, or neutral. When we call you up, if you are in favor, I want you to testify that you are in favor. If you are going to be proposing amendments to either bill I would like you to testify that you are neutral on an amendment. Please be mindful of the time, there are close to 70 people who would like to speak today. Please do not be repetitive. We do not do "he said, she said" in Government Affairs.

We will start with Senate Bill 274 (1st Reprint).

**Senate Bill 274 (1st Reprint): Makes various changes to provisions governing the State Engineer. (BDR 48-206)**

**Senator Dean A. Rhoads, Rural Nevada Senatorial District:**

Last session we created the 2005-2006 Interim Committee to Study the Use, Management, and Allocation of Water Resources (Senate Concurrent Resolution No. 26, File No. 100, Statutes of Nevada 2005), which I Chaired. We learned two things: one, there is no incentive in Nevada to save water, and two, we do not have many fines or laws to impose upon people for using too much or wasting water.

Senate Bill 274 (R1) was requested by this committee to allow the State Engineer to enforce state water law through the adoption of regulations for the imposition of administrative penalties in request for injunctive relief in the courts. The committee was advised the State Engineer's current enforcement authority is limited to criminal prosecution for misdemeanors. The State Engineer explained and convinced the committee that criminal proceedings are a slow, cumbersome, and ineffective way to achieve compliance. The State Engineer assured the committee that the regulations will provide for graduated fines so that the amount of the fine will be appropriate to the nature and severity of the violation. The courts would be the final authority. Any fines that are received will be deposited into the State General Fund.

**Chair Kirkpatrick:**

I would like to invite those who support S.B. 274 (R1) to speak.

**Tracy Taylor, State Engineer, Division of Water Resources, State Department of Conservation and Natural Resources:**  
[Read from prepared statement (Exhibit C).]

The amendments address concerns from the community well owners in the Las Vegas area. First, fining is to address statewide issues of non-compliance and illegal use; it is not just for overuse of community wells. Some examples of when we have not been able to get compliance is Washoe Valley, where every year a person digs a trench out of the bank and takes all of the water out of the ditch. This person does not have any water rights. This has been going on for five years. We refill the trench every year and are still in court. Another person was taking all the water out of his diversion structure on the Humboldt River. It took three years for a judge to put the person in jail to get compliance. The fining ability would allow us to get compliance quicker and easier.

An example of a community well is four houses on one well. A problem with community wells is how to determine which user is overpumping? The amendments (Exhibit D) address that issue. [Read first amendment.] The amount of water that is allocated is one acre-foot per residence per year. This is a generous allocation compared with the majority of users in the basin. Residents served by water purveyors in the Las Vegas area use less than seven-tenths of an acre-foot annually. In the north, it is dependent on lot size, but ranges from twenty-eight hundredths of an acre-foot for small lots to five-tenths of an acre-foot for average lots. There is every opportunity to be in compliance.

**Jason King, Deputy State Engineer, Division of Water Resources,  
State Department of Conservation and Natural Resources:**

[Read from prepared statement, (Exhibit E), handed out flowchart (Exhibit F) and draft regulations (Exhibit G).]

**Assemblyman Goicoechea:**

Do you have an estimate or approximation of how much it would cost to purchase and install a water meter?

**Tracy Taylor:**

I think meters run \$300 to \$500, and with installation it would be \$1000.

**Assemblyman Goicoechea:**

Would it be a finable offense if a meter failed, depending on the structure of the meter and the magnet?

**Tracy Taylor:**

I do not believe so. If we never collect money, we do not care. We want to achieve compliance.

**Assemblyman Goicoechea:**

Did I hear you say that the duty on a domestic well would be changed?

**Tracy Taylor:**

No, the duty of the community wells is one acre-foot per residence. Domestic wells are still two acre-feet.

**Assemblyman Goicoechea:**

It sounded like you were going to submit these draft regulations to the Legislative Commission, but clearly, you would not do that until you had the work session and so forth.

**Tracy Taylor:**

That is correct.

**Assemblyman Goicoechea:**

I appreciate your bringing the amendments forward. It should resolve many of the concerns I have heard about the community wells.

**Assemblyman Beers:**

What would be the cost of reading the meters? Would additional personnel be needed?

**Tracy Taylor:**

No, we have meter readers in the Las Vegas area who could read the additional meters.

**Assemblyman Beers:**

Why the difference between domestic and residential wells? Are domestic wells for farm use?

**Tracy Taylor:**

Domestic wells are the only type of use that the State Engineer does not permit. Community wells are permitted rights by the State Engineer's Office. Domestic wells by statute are given a maximum use of two acre-feet per year, which is 1,800 gallons a day. When one is allocating water, one wants to allocate the amount believed to be used. That is why community wells are allocated one acre-foot.

**Assemblyman Beers:**

That comes out to how many gallons for those community wells per residence?

**Tracy Taylor:**

It comes to 1,000 gallons per day.

**Chair Kirkpatrick:**

I have heard both sides of this. If you are a community well person and are getting shortchanged, you have a problem with this but if you are the well owner who is using the excess water, you have a problem. I want to thank you for your amendment. Yesterday we passed out a bill that is on General File for Thursday, which states that regulations have to come before the Legislative Commission first, and then go out for workshop and back to the Legislative Commission. One of the biggest concerns was the rules would continue to get the workshops, so I want it on the record that the workshops would be important and be where the workshops need to be, whether in Elko or Carlin.

**Jason King:**

We also have regulations within our Division for well drillers and dam safety. We see this paralleling that process in that we do go to Elko, I think we went to Ely, Carson City, and Las Vegas. We can go to more cities if need be. It is our intent to go throughout the State, maybe twice.

**Assemblyman Goicoechea:**

The legislation would preclude you from having a work session and a hearing on the same day. My concern with that bill was it would require you to go to Elko

and have a workshop, and then return if you were going to have a public hearing. Now they will have the work session in the morning and hold the formal public hearing in the afternoon. The legislation that is being proposed would say that you could not do that. We want to ensure that it will not duplicate trips for you, but would not stop you from coming.

**Nancy Covey, Private Citizen, Clark County:**

I appreciate the opportunity to offer my comments in opposition to S. B. 274 (R1) as it is currently written. Given the ongoing drought in the southwest and the need to conserve our water resources, I support the purpose and intent of this bill, but I have two concerns about the fair application of the provisions of S.B. 274 (R1) and one concern about the basis upon which fines will be assessed.

Those of us who depend solely upon groundwater to meet our basic living needs have a vested interest in using water wisely and staying within our mandated water allocations. That is why I believe the provisions of S.B. 274 (R1) should also apply to domestic well users who are extracting groundwater in areas, such as the Las Vegas Valley, where the groundwater table is being depleted.

As presently written, domestic wells are exempt from S.B. 274 (R1) because domestic wells, unlike community wells, are not required to be permitted or metered. Nevertheless, domestic wells are currently restricted to 1,800 gallons per day. I should note that Senate Bill 275 seeks to change the allocation for domestic wells from 1,800 gallons per day to two acre-feet per year. Despite the fact that domestic wells are restricted in the amount of water they can use without the requirement for a totalizing meter at the well head, there is no way to measure whether they are in compliance. Under current *Nevada Revised Statutes* (NRS) the State Engineer may require a domestic well to be metered if he suspects a well owner is abusing his allocation. It is unclear under what circumstances it would trigger the State Engineer to require the metering of a domestic well. I am not sure whether there has ever been a case in the Las Vegas Valley when a domestic well owner has been required to install a meter. For purposes of fairness and consistency, all domestic wells in areas of groundwater depletion should be metered and monitored for compliance in the same manner as permitted wells.

I am concerned about how the fines for overpumping will be assessed against community wells. Community well owners have been told repeatedly that the State Engineer lacks the authority to assess fines against individual well users. The fines would be imposed at the permit level against all well owners. This approach would obviously be unfair to those water conscience community

well users who stayed within their individual water allocation. The proposed amendment seems to address this issue, so I support the amendment because it will eliminate this type of inequity.

It is unclear how a fine for overpumping will be applied on a daily basis. Currently community well owners are notified of overpumping on an annual basis. The water used fluctuates depending on the season. Water use typically exceeds the daily allocation in the summer and is lower than the allocation in the winter, so how will a daily fine of up to \$10,000 be assessed? The Advisory Committee on Ground Water Management had discussed using a graduated or sliding scale based on the amount of water overpumped with repeat offenders being subject to additional fines. Such an approach makes more sense than the imposition of a daily fine.

**Chair Kirkpatrick:**

So we do not get the echo on the microphones, will you please nod yes or no. You are okay with the amendment?

[Ms. Covey nodded her head yes.]

You would like to see domestic wells included?

[Ms. Covey nodded her head yes.]

If this bill were to pass, you would like to be part of the regulation process?

**Nancy Covey:**

I definitely intend to be part of the regulation process, but one of the problems is the daily fine might be appropriate for damming up a river or diverting water from a stream, but I am unclear how it would work with a community well that is overpumping since owners are notified on an annual basis and water use fluctuates through the year. So, for community wells you might want to reconsider if the daily fine is the most appropriate.

**Chair Kirkpatrick:**

What section of the bill are you referring to?

**Nancy Covey:**

Section 3, (a) "fine not to exceed \$10,000 per day for each violation as determined by the State Engineer." I would like to see something for community wells that would be based on a graduated scale based on the number of gallons that were overpumped.

**Assemblyman Goicoechea:**

The fine is not to exceed \$10,000 per day. As we go through the regulatory process it will establish how those fines would be imposed and at what level. All S.B. 274 (R1) does is allow for fines up to \$10,000 a day. It does not say that if you are over 10,000 gallons you would get the maximum fine.

**Sally Larimore, Private Citizen, Clark County:**

I am against S.B. 274 (R1) as written, but am in favor of the amendment. Senate Bill 274 (R1) as written is extremely broad and tends to address water misappropriation issues across a large spectrum—from river and stream diversion to agriculture, logging, mining, and families on community wells. Since it is a one-size-fits-all legislation, its approach to implementing penalties is particularly heavy-handed as it pertains to proposed fines for residential users who depend on groundwater on a daily basis. It punishes the innocent law-abiding community well user or users on a permit along with those who are overpumping.

The State Engineer's proposed amendment takes a step toward rectifying the basic unfairness of S.B. 274 (R1) by requiring that the State Engineer prove which user or users, on a permitted well, are overpumping. It provides the State Engineer with the authority to require any or all users on a permitted well to install submeters that will reflect their individual usage so the good actors can be differentiated from the bad. The provisions in the amendment are crucial to providing a fair basis for enforcing overpumping restriction. However, the amendment provides that the cost of the submeters be born by the property owner regardless of who is at fault for overpumping. For families with modest means and seniors with fixed incomes, the cost of installing a meter, parts, and labor would impose an unfair hardship on their finances. I therefore urge the Committee to include in the State Engineer's amendment a provision that mandates that property owners who are required to install submeters be reimbursed for this expense through the Groundwater Management Fees that each well user pays on an annual basis. The proposed fine structure in S.B. 274 (R1) treats permitted well users more harshly than municipal rate payers who pay a graduated scale for water use in excess of a base allocation. I believe the current allocation is about 13,000 gallons a month, thus municipal rate payers can use more water without ever facing severe penalties such as the \$10,000 a day fine and/or up to two times the cost of replacing the excess water they used. Furthermore, domestic wells are neither permitted nor monitored so they are able to avoid any penalties for overpumping. This is clearly an inequitable situation. I strongly urge the Committee to include in the State Engineer's amendment a provision that imposes a graduated penalty structure for overpumping. This approach was recommended by the Las Vegas Valley Groundwater Advisory Board last year and is much fairer than what is



proposed in S.B. 274 (R1). If these recommended modifications are incorporated and adopted into the amendment, they would provide a reasonable and balanced approach to enforcing water restriction on permitted wells.

**Jim Donohue, President, Nevada Well Owners Association:**

We are in support of the legislation because we believe the mechanism that is currently in place is not workable. We suggest that no residents be fined for any violation that does not involve more than two acre-feet of water. The intent is to remove the minor problems with the allocated thousand gallons per day places. We do not think lower-level users should have their permit levels ignored, but there are other mechanisms to fix minor infractions. We do not need to shotgun butterflies.

The regulation as proposed will have a propensity to hit an unusual group. It will hit large families, ten-bed nursing homes, and people with one acre lots. It is also shown in the State Engineer's studies that the average usage for a half-acre is 1.3-1.4 acre-feet per year. The State Engineer did a study in the northwest, so we know that the average user on a half-acre lot would be in violation of the permitted limit. Rather than enforcing unachievable compliance, we suggest that the limit start at two acre-feet and go up from there. This will catch the real violators.

The well owners have gone after these people on occasion without success. The State Engineer does not have a sufficient set of tools. We have pointed out people who are obviously using three and four acre feet, but the State Engineer has no way of proving such violations.

**Assemblyman Settlemeyer:**

You said two acre-feet. If the current allocation is two acre-feet, are you saying the users should be allowed to go 100 percent over their allocation?

**Jim Donohue:**

No, I am saying if the amount of water utilized is more than two acre-feet; the threshold for a violation is two acre-feet. Any amount, no matter how small, greater than two acre-feet would be a violation.

**Assemblyman Goicoechea:**

I know where you are coming from, but there are probably a number of water users that would like to be able to exceed their appropriated amounts.

**Chair Kirkpatrick:**

Let us say one has lived in an area for years where there has been a community well, and then a new person moves in. Is there some documentation that shows what the new resident's acre-feet allocation is supposed to be? How does that work?

**Jim Donohue:**

As a real estate agent, I can say that virtually no one in the northwest who is buying a home on a domestic or community well has the faintest idea what the limits are. We still see ads that say all the water you can use for \$50 a month. The State Engineer has made a cogent attempt to get this information out, but this is buried in the arcane literature in the county records. Even if you get the information, you cannot read it. It is couched in terminology that is not discernable by normal human beings.

**Kyle Davis, Policy Director, Nevada Conservation League:**

The Nevada Conservation League is in support of the bill. We believe in the importance of water and water conservation. We support the idea of giving the State Engineer a tool that will allow him to take care of violations of the State water law. The language in the bill and the amendment provide enough latitude and guidance so the regulations will work while still ensuring there is still some kind of an enforcement mechanism.

**Chair Kirkpatrick:**

You are in support of the amendment?

**Kyle Davis:**

Yes, we are in support of the bill and amendment.

**Steve Walker, representing Truckee Meadows Water Authority:**

The Truckee Meadows Water Authority (TMWA) supports S.B. 274 (R1). We think it will provide a better tool for water management in the State. The Board has not reviewed the amendment, but it seems reasonable and a good public process to get the rules out and to be fair.

**Andy Belanger, Senior Management Analyst, Southern Nevada Water Authority and the Las Vegas Valley Water District:**

We too, are in support of S.B. 274 (R1) and the amendment proposed by the State Engineer. We believe there must be some mechanism in state law to require enforcement with the terms "permits" and "with the provisions of State law." We believe this approach is fair and provides the State Engineer with the latitude and flexibility he needs to address each situation accordingly.

It provides sufficient protections to ensure that the fines are based on the nature and gravity of the offense, whether it is a first time or a repeat violation.

During the interim and throughout the year, I help manage the Advisory Committee for Groundwater Management in the Las Vegas Valley. That committee has studied this issue for the last four years. It has been a long process: there have been over 20 meetings where the topic of fining has been discussed. The well owning community has come a long way in understanding the necessity of following the permit terms and State law.

I would like to respond to some of Ms. Covey's comments. Domestic wells are subject to Nevada water law, but there is an exemption in the law that they are not subject to the permit if they do not exceed two acre-feet a year. If a well owner uses more than two-acre feet per year, then he would be subject to the same fines and mechanisms of law that any other well owner would be, including us. The Las Vegas Valley Water District has 40,000 acre-feet of groundwater rights in the Las Vegas Valley. If we overpumped that allocation, we would receive a fine just like anyone else. This law would be applied evenly to all people who use water.

**Assemblywoman Parnell:**

The issue of litigation of our State water law has been talked about. I think it is the most litigated in the country. Would passage of this law decrease this? Would it clarify water law so we would not always be in the middle of litigation?

**Tracy Taylor:**

It would drastically reduce the amount of litigation.

**Assemblywoman Francis O. Allen, Clark County Assembly District No. 4:**

Ms. Covey and Ms. Larimore are my constituents in the northwest part of the Las Vegas Valley. That is where most of the community well owners reside. They did a good job articulating their concerns, particularly about the potential of the daily fine assessed only to community well owners. The amendment submitted by the State Engineer sounds like it addresses those concerns. Should the Committee decide to move on the bill, I would like to be part of any working group you might have because it directly impacts my constituency.

**Assemblyman Harry Mortenson, Clark County Assembly District No. 42:**

I support the bill. We must have some kind of monitoring of wells. I am in support of an amendment suggested by the Well Owner's Association, which is that there should be a threshold at two acre-feet of water, and no one is to be fined until he exceeds that level. The State law states that a household should

be entitled to two acre-feet but households on community wells are not getting that amount. They are limited to one acre-foot, and I happen to be one of those people. I live on an acre of land, and the State Engineer required that I put in a meter, but I put three extra in to monitor each house on the community well. On my acre I have a horse, a burro, peacocks, and a house, I use two acre-feet of water. I am going to be fined under the law if the State Engineer gets the ability to fine. I have stopped watering five trees so that I try to achieve the smaller amount allocated to me. This is compared to the man down the street who has one well, the same size lot, and no meter.

**Chair Kirkpatrick:**

Is there anyone else who would like to testify on S.B. 274 (R1)? [There were none.]

**Assemblyman Claborn:**

Maybe I did not hear Mr. Mortenson correctly, but if I use two acre-feet of water, I go into a different tiered system, and it costs me a whole lot of money. We do get penalized. The fact is that I am on North Las Vegas water.

**Assemblyman Settlemeyer:**

A question for Mr. Taylor. Will it apply to residential areas served by water systems like Mr. Claborn's?

**Tracy Taylor:**

Are you talking about systems that provide water by water purveyors?

**Assemblyman Settlemeyer:**

Correct.

**Tracy Taylor:**

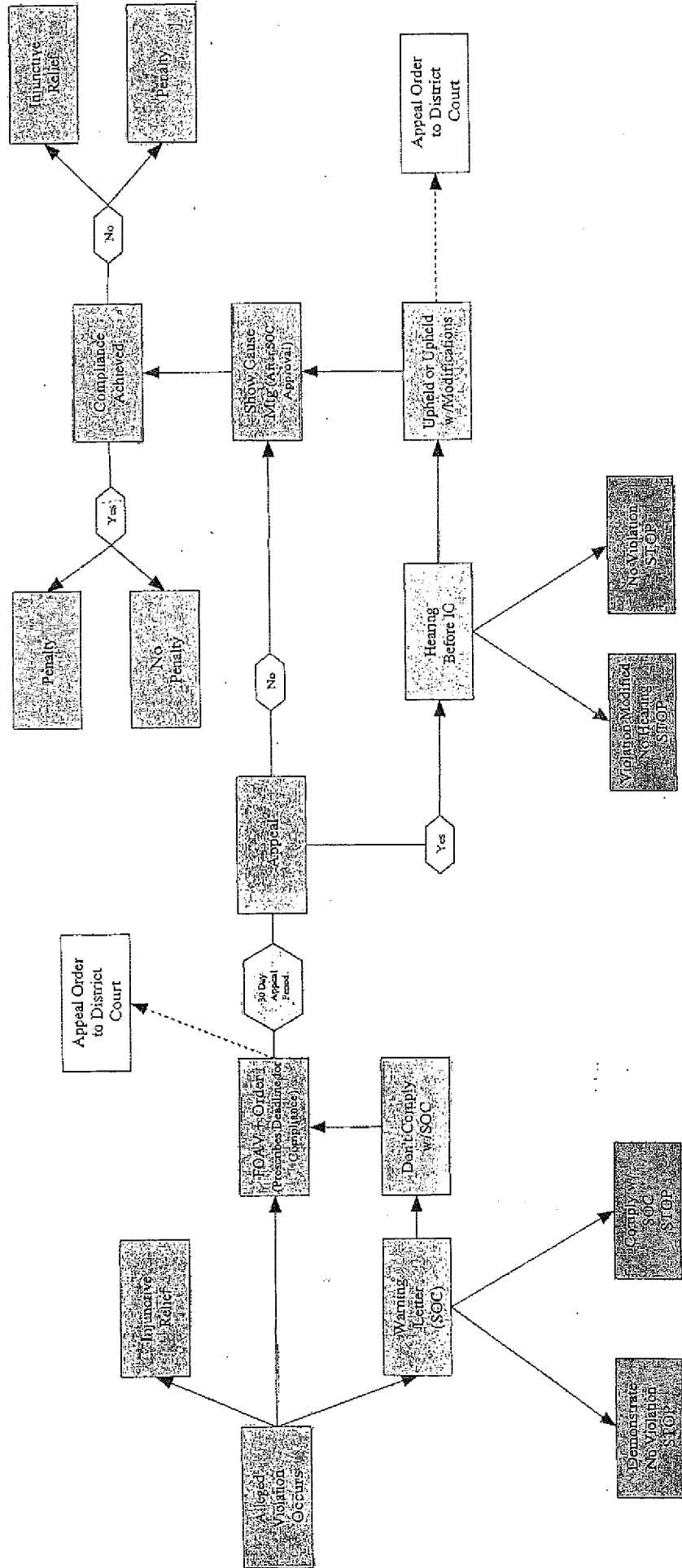
Yes, their wells are metered. The purveyor would be the one responsible.

**Chair Kirkpatrick:**

We will close the public hearing on S.B. 274 (R1). Ms. Covey and Ms. Larimore, we will take your thoughts into consideration. Ms. Allen will be working with the Committee to address your concerns. We will move on to Senate Bill 487 (2nd Reprint).

**Senate Bill 487 (2nd Reprint):** Revises provisions relating to water resources in certain counties. (BDR 48-183)

# Framework For How Enforcement Actions Will Be Handled Through Regulations



FOAV - Finding of Alleged Violation  
 SOC - Schedule of Compliance  
 IC - Independent Committee

Assembly committee: Government Affairs  
 Exhibit F P. 1 of 1 Date 5/19/07  
 Submitted by: Jason King

## **SB 274 Amendment**

**May 9, 2007**

Amend Section 3 on page 2, by adding two new sections, after line 36, which reads:

4. In investigating violations related to the overuse of water from a water right that has 16 or fewer connections, it is the State Engineers burden to prove which user(s) are in violation of their individual duty allotment.
5. The State Engineer may require any or all water users, to install and maintain at their own expense, totalizing meters that measure their individual water usage.

Amend Section 7 on page 5, by adding two new sections, after line 21, which reads:

4. In investigating violations related to the overuse of water from a water right that has 16 or fewer connections, it is the State Engineers burden to prove which user(s) are in violation of their individual duty allotment.
5. The State Engineer may require any or all water users, to install and maintain at their own expense, totalizing meters that measure their individual water usage.

Assembly committee: Government Affairs

Exhibit D P. 1 of 1 Date 5/9/07

Submitted by: Tracy Taylor

SB 274  
Testimony for Jason King, Deputy State Engineer  
Assembly Government Affairs

May 9, 2007

Good Morning Madam Chair and Members of the Committee, for the record, my name is Jason King, Deputy State Engineer.

You should all have a copy of the draft regulations and a flowchart that lays-out the framework for assessing violations and implementing penalties.

I'm not going to go through the draft regulations item by item, but instead want to highlight the intent:

- The purpose of the statute amendment and the adoption of regulations is to achieve compliance of Nevada's Water Law – NOT generate revenue. In fact, the regulations as currently drafted, propose any monies collected under the penalty provisions, to be deposited into the school district of the county where the violation occurred.
- The regulations are written to provide ample opportunity for due process. The flowchart at the beginning of the regulations show that it is our intent to give the alleged violator every opportunity to achieve compliance and avoid a penalty if possible.
- During this process of investigating the alleged violation, along with the opportunities to meet with staff of our office, built into the process is an appeal period for which the alleged violation can be appealed to an Independent Committee. Additionally, there are two opportunities to appeal the decision to a court of competent jurisdiction.
- The three elements of the statutorily provided penalties are intended to achieve different aims of equity and public policy:

Assembly committee: Government Affairs

Exhibit E P. 1 of 3 Date 5/9/07

Submitted by: Jason King

- a. The administrative fines are intended to remove the financial incentive of the violation by removing the economic benefit as well as imposing a punitive measure.
  - b. Replacement of water is intended to make whole the resource and impacted water users, as far as this is possible, by requiring respondents to leave an amount of water undiverted or undiminished in the resource for use by others. The allowance of up to 200% replacement indicates the penalty can incorporate a punitive element, as appropriate.
  - c. Reimbursement of enforcement costs is required to replace the public funds expended to achieve compliance with the law.
- In terms of the fines, I know there was some concern during the Interim Study and also from a few on the Senate side, that the Division would all of a sudden be sending out \$10,000 a day fines for violations. Again, it is not our intent to generate revenue, only achieve compliance. If we feel that fines and/or replacement water is warranted, those penalties will be determined by:
    - a. The value or quantity of water unlawfully taken, including the cost or difficulty of replacing the water;
    - b. The gravity of the violation, including the economic injury or impact to others;
    - c. Whether the respondent subject to fine or replacement attempted to comply with the State Engineer's orders; and
    - d. The respondent's economic benefit from the violation.

Lastly, keep in mind that the draft regulations are simply that, a draft. If this bill is approved and becomes law, we feel comfortable submitting these draft regulations to the LCB to begin the codification process as well as disseminating it to the regulated community to begin the public workshop process. We would anticipate a minimum of 2 rounds of public workshops in cities and towns across the state before compiling a final version for codification. I again remind you that the final draft has to be submitted to the Legislative Commission for final approval, so



there will be at least one other opportunity for you or your colleagues to review the regulations.

With that, I'd be happy to answer any questions.

# DRAFT

## NEVADA ADMINISTRATIVE CODE

### CHAPTER 533A

#### Administrative Procedures for Enforcement Proceedings

533A-1	Authority
533A-2	Application and Preamble
533A-3	Purpose

#### General Provisions

533A-4	Definition
533A-5	Civil Penalty
533A-6	Division
533A-7	Economic Benefit
533A-8	Enforcement Action
533A-9	Enforcement Cost
533A-10	Files
533A-11	Finding of Alleged Violation
533A-12	Independent Committee
533A-13	Mitigation
533A-14	Noncompliance/Nonconformance/Failure to Comply/Violation
533A-15	Person
533A-16	Record
533A-17	Respondent
533A-18	Requirement
533A-19	Schedule of Compliance
533A-20	State Engineer
533A-21	Violation Order
533A-22	Water Commissioner

533A-23	Options for Adjudicative Enforcement
533A-24	Computation of Time
533A-25	Appeal Process to the Independent Committee
533A-26	Assessment of Administrative Penalties and Administrative Costs
533A-27	Replacement and Mitigation
533A-28	Failure to Pay Penalty
533A-29	Appeals to District Court

# DRAFT

## **NAC 533A-1. Authority.**

- (1) Under NRS 532.120, the State Engineer is empowered to promulgate rules and regulations to ensure proper and orderly execution of Nevada Water Law.
- (2) The State Engineer's powers and duties include acting on behalf of the State of Nevada to administer the distribution and use of all surface and ground waters within the state in accordance with statutory authority, including but not limited to Nevada Revised Statutes, Chapters 533 through 536.

## **NAC 533A-2. Application and Preamble.**

- (1) These regulations are applicable statewide to the use of the waters of the state. Additional regulations may be promulgated to address water enforcement for specific hydrologic areas.
- (2) The Division may initiate an Enforcement Action for any violation of Nevada Revised Statutes, Chapters 533 through 536, regulations, waivers, permits, certificates or orders.
- (3) The respondent may appeal the Enforcement Action in a proceeding before an Independent Committee appointed by the State Engineer. The respondent, on two occasions, has the ability to appeal the decision to a court of proper jurisdiction.
- (4) These regulations shall be liberally construed to permit the State Engineer to effectuate the administration of Nevada Water Law.
- (5) These regulations in no way are meant to supersede any powers associated with federal or civil decree courts.

## **NAC 533A-3. Purpose.**

- (1) These regulations are intended to:
  - a. Assure the protection of Nevada's water resources and the public welfare by promoting compliance and deterring noncompliance with the statutes, regulations, permits, certificates, waivers and orders administered and issued under the Division's authority; and
  - b. Assure that the State Engineer assess administrative penalties lawfully, fairly, and consistently, which reflect:
    - i. The nature and gravity of the violation and the potential for harm to Nevada's water resource and the public welfare by the violation;
    - ii. The length of time which the violation was repeated or continued;
    - iii. Any economic benefit realized as a result of the violation; and
    - iv. The costs which are actually expended by the Division during the course of the investigation and subsequent enforcement.
  - c. Clarify the Division's authority to enforce the statutes, regulations, permits, certificates, waivers and orders administered by the State Engineer.
- (2) The three elements of the statutorily provided penalties are intended to achieve different aims of equity and public policy. To achieve these aims, the following classes of penalties have been established by statute:

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- a. Administrative fines are intended to remove the financial incentive of the violation by removing the economic benefit as well as imposing a punitive measure.
- b. Replacement of water is intended to make whole the resource and impacted water users, as far as this is possible, by requiring respondents to leave an amount of water undiverted or undiminished in the resource for use by others. The allowance of up to 200% replacement indicates the penalty can incorporate a punitive element, as appropriate.
- c. Reimbursement of enforcement costs is intended to make whole the state by requiring a violator to replace the public funds expended to achieve compliance with the law.

## Definitions.

**533A-4** As used in this chapter, unless the context otherwise requires, the words and terms defined in NAC 533A-5 to 533A-22, inclusive, have the meanings ascribed to them in those sections.

**533A-5** "Civil Penalty" means a monetary sum assessed by the State Engineer in response to a violation of, or a failure to comply with, a law administered by the Division, or any regulation, waiver, permit or order adopted pursuant to the Division's authority

**533A-6** "Division" means the Division of Water Resources. The term State Engineer or Division may be used interchangeably unless clearly indicated otherwise by the context of the sentence in which it appears.

**533A-7** "Economic Benefit" means the benefit actually or potentially realized and/or a cost avoided by a violator as a result of the unlawful activity defined as a violation in the Enforcement Action.

**533A-8** "Enforcement Action" consists of a Finding of Alleged Violation (FOAV) and a Violation Order.

**533A-9** "Enforcement Cost" means a monetary sum assessed by the State Engineer for any expense incurred by the Division in investigating and stopping a violation of, or a failure to comply with, a statute, regulation, permit, waiver and order adopted pursuant to the Division's authority.

**533A-10** "Files" means information maintained in the Division files, which may include both paper and electronic information.

**533A-11** "Finding of Alleged Violation (FOAV)" is a notice of violation alleged by the Division that cites the statute, regulation, permit, waiver or order that has been violated.

**533A-12** "Independent Committee (IC)" means a committee whose members are appointed by the State Engineer. The members cannot be employed by the Division of Water Resources but must be known to have water resource experience and who will be fair and impartial. When an Enforcement Action is appealed, the IC will review the alleged violation and make a decision to uphold, modify or overturn the order.

**533A-13** "Mitigation" means to provide compensation or reparation acceptable to the Division for injury caused by the violation.

**533A-14** "Noncompliance" or "Nonconformance" or "Failure to Comply" or "Violation" each mean any act or failure to act which constitutes or results in:

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- (1) Engaging in any activity prohibited by, or not in compliance with, any statutes, regulations, permits, waivers and orders administered under Division's authority;
- (2) Engaging in any activity without a necessary permit or approval that is required by law or regulation;
- (3) The failure to perform, or the failure to perform in a timely fashion, anything required by a law administered by the Division or by a statute, regulation, waiver, permit or order adopted pursuant to the Division's authority.

**533A-15** "Person" has the definition ascribed to it pursuant to NRS 533.010 and 534.014.

**533A-16** "Record" means the official collection of all written and electronic materials in water enforcement proceedings, including but not limited to the administrative action, pleadings, motions, exhibits, orders and testimony that took place during the proceeding.

**533A-17** "Respondent" means any person to whom the Division issues an Enforcement Action.

**533A-18** "Requirement" means any statute, regulation, permit, waiver or order adopted or granted pursuant to the Division's authority.

**533A-19** "Schedule of Compliance (SOC)" means a schedule outlining a date, or series of dates, for which compliance is to be achieved. The SOC can either be initiated by the State Engineer as part of an alleged violation; submitted by the Respondent in response to an allegation of violation; or a stipulated schedule between the State Engineer and the Respondent in regard to the alleged violation.

**533A-20** "State Engineer" is the Administrator of the Division of Water Resources appointed pursuant to NRS 532.020. The terms State Engineer or Division may be used interchangeably unless clearly indicated otherwise by the context of the sentence in which it appears. In the case of an enforcement action proceeding, the State Engineer can mean the State Engineer himself, persons appointed by the State Engineer, or persons designated by the Division's rules, or statute.

**533A-21** "Violation Order" is a decision issued by the State Engineer in conjunction with a FOAV. The order identifies actions and timeframes necessary to achieve compliance.

**533A-22** "Water Commissioner" means a person appointed to distribute water on a stream system.

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## **NAC 533A-23. Options for Adjudicative Enforcement.**

- (1) The State Engineer may, at his discretion, pursue any combination of the following administrative and judicial enforcement actions depending upon the circumstances and gravity of each case:
  - a. Warning Letter
  - b. Enforcement Action consisting of a:
    - i. Notice of Alleged Violation which is a formal notice of a suspected violation which:
      - a) Cites the law, regulation, permit and/or order allegedly violated;

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- b) States the facts which form the basis for the Division's belief that a violation has occurred;
- ii. Violation Order which shall:
  - a) Specify a reasonable deadline or deadlines by which the respondent:
    - i) Shall come into compliance with the requirements described in the Notice of Alleged Violation, and/or
    - ii) Shall submit a written mitigation plan or proposal setting forth how and when that respondent proposes to achieve compliance that must be approved by the Division.
    - iii) Shall meet with the Division to show cause why the Division should not seek a civil penalty.
- c. Injunctive Relief

## NAC 533A-24. Computation of Time.

- (1) Computation of any time period referred to in these regulations shall begin with the issuance date of the act that initiates the running of the time period. The last day of the time period computed is included unless it is a Saturday, Sunday, or legal holiday or any other day on which the Division is closed, in which event the period shall run until the end of the business hours of the following business day. When the time period is less than seven (7) days, intervening days when the Division is closed shall be excluded in the computation.
- (2) The State Engineer, for good cause shown, may extend any time limit contained in these regulations, unless precluded by statute. All requests for extensions of time shall be submitted as a written request.
- (3) Information or data required or permitted to be filed under these regulations shall be filed with the Division within the time limits for such filing as are set by the Division or other provision of law. Information or data filed in the following manner shall be deemed filed as set forth:
  - a. Information or data hand delivered during regular business hours shall be deemed filed on the date of hand-delivery.
  - b. Information or data deposited in the U.S. mail shall be deemed filed on the date stamped received by the Division.
  - c. Information or data transmitted by facsimile, telecopier or other electronic transmission shall not be accepted for filing unless approved in writing by the State Engineer.

## NAC 533A-25. Appeal Process to the Independent Committee.

- (1) Upon issuance of an Enforcement Action, a request for a hearing before the Independent Committee can be made. The request shall be in writing and shall be filed with the Division within thirty (30) calendar days of the date of the Enforcement Action.
- (2) The Independent Committee must schedule a hearing within thirty (30) days after receiving the appeal request. This timeframe may be extended for good cause.
- (3) The location of the hearing will be decided by the State Engineer in conjunction with the Independent Committee.

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- (4) At the conclusion of the hearing before the Independent Committee, a decision will be made which may result in the dismissal of the case or upholds the Enforcement Action.

## **NAC 533A-26. Assessment of Administrative Penalties and Administrative Costs.**

- (1) Pursuant to NRS 533 through 536 and these regulations, the State Engineer, may assess civil penalties for any violation of the Nevada Water Law and no penalty shall exceed the maximum penalty allowed by State law.
- (2) Each day which the violation is repeated, continued or remains in place, constitutes a separate violation. The State Engineer may assess an administrative penalty, not to exceed ten thousand dollars (\$10,000) per day for each violation, not including assessed enforcement costs and water reparation penalties.
- (3) The penalty imposed shall begin on the first day the violation occurred, and continues to accrue through and including the day the Enforcement Action is issued until the date compliance is achieved.
- (4) The amount of the penalty shall be calculated based on:
  - a. The value or quantity of water unlawfully taken, including the cost or difficulty of replacing the water;
  - b. The gravity of the violation, including the economic injury or impact to others;
  - c. Whether the respondent subject to fine or replacement attempted to comply with the State Engineer's orders; and
  - d. The respondent's economic benefit from the violation.
- (6) Enforcement costs, interest, late payment charges, costs of compliance inspections, and collection costs may be assessed in addition to the administrative penalty. These include:
  - a. Enforcement costs: Time spent by water enforcement staff, supervisors and the Attorney General's Office, at the full cost of the each employee's hourly rate, including salary, benefits, overhead and other directly related costs.
  - b. Late payment charges: due at the monthly percentage rate assessed by the Nevada Division of Business and Finance.
  - c. Compliance inspections: based on staff time at the full cost of the hourly rate, including salary, benefits, overhead and other directly related costs.
  - d. Collection costs: actual collection costs.
- (7) The Division may report the total amount of civil fines and/or enforcement costs assessed to consumer reporting agencies and pursue collection as provided by Nevada law.
- (8) Any monies collected under the penalty provisions of NRS 533 through 536 and these regulations, shall be deposited into the school district of the county where the violation occurred.

## **NAC 533A-27. Replacement and Mitigation.**

- (1) In addition to civil penalties and enforcement costs, the State Engineer may order the respondent to mitigate damages caused by the violation and/or replace up to 200 percent of the water unlawfully taken.

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- (2) The State Engineer shall consider, before ordering replacement of water, the following factors:
- a. The value or quantity of water unlawfully taken, including the cost or difficulty of replacing the water;
  - b. The gravity of the violation, including the economic injury or impact to others;
  - c. Whether the respondent attempted to comply with the State Engineer's orders; and
  - d. The respondent's economic benefit from the violation.

## **NAC 533A-28. Failure to Pay Penalty.**

If the respondent fails to pay the fine portion of a penalty, the State Engineer is empowered to place a lien on the property associated with the violation or sue the respondent in a court of proper jurisdiction, for the amount in question. Additionally, any cost accrued by the state in pursuing this legal action, will be added to the penalty amount.

## **NAC 533A-29. Appeals to District Court.**

The respondent may appeal the Enforcement Action and/or the decision of the Independent Committee to the court of proper jurisdiction pursuant to NRS 533.450.



**MINUTES OF THE MEETING  
OF THE  
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS**

**Seventy-Fourth Session  
May 18, 2007**

The Committee on Government Affairs was called to order by Chair Marilyn K. Kirkpatrick at 9:33 a.m., on Friday, May 18, 2007, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at [www.leg.state.nv.us/74th/committees/](http://www.leg.state.nv.us/74th/committees/). In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: [publications@lcb.state.nv.us](mailto:publications@lcb.state.nv.us); telephone: 775-684-6835).

**COMMITTEE MEMBERS PRESENT:**

Assemblywoman Marilyn K. Kirkpatrick, Chair  
Assemblywoman Peggy Pierce, Vice Chair  
Assemblyman Kelvin Atkinson  
Assemblyman Bob Beers  
Assemblyman David Bobzien  
Assemblyman Chad Christensen  
Assemblyman Jerry Claborn  
Assemblyman Pete Goicoechea  
Assemblyman Ruben Kihuen  
Assemblyman Harvey Munford  
Assemblywoman Bonnie Parnell  
Assemblyman James Settelmeyer  
Assemblyman Lynn Stewart

**COMMITTEE MEMBERS ABSENT:**

Assemblywoman RoseMary Womack

Minutes ID: 1329



ASSEMBLYMAN BEERS MOVED TO AMEND AND DO PASS AS  
AMENDED SENATE BILL 234 (1st REPRINT).

ASSEMBLYMAN STEWART SECONDED THE MOTION.

THE MOTION PASSED (ASSEMBLYMAN MUNFORD VOTED NO.  
ASSEMBLYWOMAN WOMACK WAS ABSENT FOR THE VOTE).

I will do the Floor statement.

Our next bill is Senate Bill 274 (1st Reprint), which is a community and domestic well bill.

**Senate Bill 274 (1st Reprint): Makes various changes to provisions governing the State Engineer. (BDR 48-206)**

It will take the State Engineer's Office some time to put regulations in place. I suggest we allow the Engineer's Office to proceed with the amendment proposed by Mr. Belanger, Mr. King, and Mr. Crowell (Exhibit E), but not allow implementation without a progress report to the next legislative session. Other regulations and Senator Wiener's bill will take about the same time to proceed as to come back to the next legislative session. I believe this bill will go into a conference committee.

**Assemblyman Bobzien:**

I have a question about the new section added to the bill. I do not see how number 1, point (a) and point (d) come together. Point (a) says the State Engineer would establish a threshold that would have to be exceeded before an administrative penalty would be imposed, but in point (d) we are specifying two acre-feet. May I have clarification on that?

**Chair Kirkpatrick:**

I was not part of that. May we have Mr. Belanger, Mr. King, and Mr. Crowell come to the table?

**Assemblyman Bobzien:**

I continue to be concerned we are potentially treating some people unfairly with this.

**Chair Kirkpatrick:**

I am not sure who wants to take charge of this.

**Bob Crowell, representing the Nevada Well Owners Association:**

There is a fair amount of support for the enforcement in S.B. 274 (R1), but there was a suggestion to place a threshold on the enforcement mechanism. It would say if you were using up to two acre-feet, the potential fining mechanisms would not be applicable in those situations. That particular dialogue started with the State Engineer, Tracy Taylor, Mr. Belanger, the Southern Nevada Water Authority (SNWA), and the Well Owners Association. They discussed how that could be implemented, if at all.

Before you is a joint suggestion as to how that would be done. The State Engineer would consider establishing a threshold that, if one went over, a fine would be imposed. If the well owner complies with the Administrative Procedure Act we would consider waiving the penalty. The intent is to try to solve the issues regarding the threshold matters during the interim.

**Jason King, Deputy State Engineer, Division of Water Resources,  
State Department of Conservation and Natural Resources:**

We support this bill with the amendment.

**Assemblyman Settlemeyer:**

I understand the necessity of the amendment and am in favor of doing what we can to keep this bill alive.

I am bothered by point (d) which establishes two acre-feet as the threshold. It should go to a concept of percentage. With the concept of two acre-feet, if an individual had one acre-foot, this proposed amendment would allow him to go 100 percent over his allocation.

**Bob Crowell:**

The reason for two acre-feet is that it is the amount currently allowed for non-permitted domestic wells, which is theoretically a standard in the law that applies to homeowners served by their own domestic wells. It is not designed to increase allocations although what is happening in southern Nevada is a varied description of allotments from 300 gallons a day to 1,800 gallons a day. It is not fair to fine a homeowner who is allocated 300 or 500 gallons a day when a neighbor with a 1,800 gallon a day allotment is not fined. We want to flush out that type of concept in these rule-making proceedings.

**Assemblyman Settlemeyer:**

I understand your desire for equality; however, those individuals who are on the community well knew that allotment when they bought the property. If they did their research on their water rights, they knew they had a percentage of the

total allocation because it is divided amongst the lots. I support the bill and will do what I can to keep it alive, but I do have a problem with that particular section, and I may vote no because of it.

**Chair Kirkpatrick:**

I also have concerns. I think we should continue discussions during the interim so we can move forward. I know northern Nevada is trying to address its water concerns, and people who have lived for years in southern Nevada are trying to address their concerns. This will allow for discussions to continue. We can always go to conference committee and put it on the desk if people are still not clear with it.

**Assemblyman Goicoechea:**

This would not be implemented until the 2009 Legislative Session, with a report that would become part of this amendment, is that correct?

We want to keep the bill alive. We can try to separate point (d) out so that those regulations will be dealing with community wells, as S.B. 274 (R1) is about a lot more than community wells. I will vote for the bill as amended hoping that we can provide some protection for those community well owners, especially in southern Nevada.

**Chair Kirkpatrick:**

Is there any further discussion?

ASSEMBLYWOMAN PARNELL MOVED TO AMEND AND DO PASS  
AS AMENDED SENATE BILL 274 (1st REPRINT).

ASSEMBLYMAN GOICOECHEA SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYWOMAN WOMACK WAS  
ABSENT FOR THE VOTE.)

**Chair Kirkpatrick:**

Mr. Settlemeyer will do the floor statement.

Our next bill is Senate Bill 487 (2nd Reprint), which holds the record for the longest committee hearing this Legislative Session.

Senate Bill 487 (2nd Reprint): Revises provisions relating to water resources in certain counties. (BDR 48-183)

Jointly Submitted by Jason King, Bob Crowell, and Andy Belanger  
(after meeting with Assemblywoman Allen and Assemblyman Mortenson on May 16, 2007)

SB 274 Amendment

Amend Section 3, by adding two new sections, after line 36, which reads:

4. In investigating violations related to the overuse of water from a water right that has 16 or fewer connections, it is the State Engineers burden to prove which user(s) are in violation of their individual duty allotment.
5. The State Engineer may require any or all water users, to install and maintain at their own expense, totalizing meters that measure their individual water usage.

Amend Section 7, by adding two new sections, after line 26, which reads:

4. In investigating violations related to the overuse of water from a water right that has 16 or fewer connections, it is the State Engineers burden to prove which user(s) are in violation of their individual duty allotment.
5. The State Engineer may require any or all water users, to install and maintain at their own expense, totalizing meters that measure their individual water usage.

Add a new section to the bill, which reads:

1. In promulgating regulations pursuant to this act, the State Engineer shall:
  - (a) Consider establishing a minimum threshold amount of water that an alleged violator would have to exceed before an administrative penalty would be imposed;
  - (b) Comply with the provisions of NRS 233B;
  - (c) Consider waiving an administrative penalty for an alleged violation if the violator has made significant progress in correcting the violation; and
  - (d) Consider waiving an administrative penalty in the case of an unauthorized use or willful waste of water in violation of NRS 533.460 or an unlawful diversion of water in violation of NRS 533.530, if the use does not exceed two acre-feet of water annually.

*Can not  
be implemented  
before the  
legislative session  
with a report  
2009.*

## THE ONE HUNDRED AND TENTH DAY

CARSON CITY (Friday), May 25, 2007

Assembly called to order at 10:32 a.m.

Madam Speaker presiding.

Roll called.

All present.

Prayer by the Chaplain, Pastor Albert Tilsta.

Lord, give us the faith to believe that the words now spoken and the yearnings of the hearts now open before You are heard and understood in Your presence. Hold us steady lest we lose our poise. Blunt out speech lest by cutting words and careless deeds we hurt out colleagues and the cause for which we speak. Where we differ in approaches to a problem, may we ever be open to consider another and a better way, guided not by whether it be popular, or expedient, or practical, but always whether it be right. Where we are wrong, make us willing to change and where we are right make us easy to live with. Hear our prayer, O Lord.

AMEN.

Pledge of allegiance to the Flag.

Assemblyman Ocegueda moved that further reading of the Journal be dispensed with, and the Speaker and Chief Clerk be authorized to make the necessary corrections and additions.  
Motion carried.

## REPORTS OF COMMITTEES

Madam Speaker:

Your Committee on Judiciary, to which was referred Senate Joint Resolution No. 2, has had the same under consideration, and begs leave to report the same back with the recommendation: Amended, and do pass as amended.

BERNIE ANDERSON, *Chair*

Madam Speaker:

Your Committee on Transportation, to which were referred Assembly Bill No. 624; Senate Bill No. 161, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

KELVIN ATKINSON, *Chair*

## MESSAGES FROM THE SENATE

SENATE CHAMBER, Carson City, May 24, 2007

To the Honorable the Assembly:

I have the honor to inform your honorable body that the Senate on this day passed Assembly Bills Nos. 253, 321, 322, 391, 421, 493, 507, 516, 531, 533, 540, 549, 554.

Also, I have the honor to inform your honorable body that the Senate amended, and on this day passed, as amended, Assembly Bill No. 13, Senate Amendment No. 843; Assembly Bill No. 41, Senate Amendment No. 735; Assembly Bill No. 50, Senate Amendment No. 759; Assembly Bill No. 51, Senate Amendment No. 936; Assembly Bill No. 53, Senate Amendment No. 733; Assembly Bill No. 54, Senate Amendment No. 835; Assembly Bill No. 67, Senate Amendment No. 742; Assembly Bill No. 80, Senate Amendment No. 801; Assembly Bill No. 90, Amendments Nos. 662, 762; Assembly Bill No. 91, Senate Amendment No. 828; Assembly Bill No. 101, Senate Amendment No. 682; Assembly Bill No. 110, Senate Amendment No. 711;

Senate Bill No. 222.

Bill read third time.

Remarks by Assemblyman Goedhart.

Roll call on Senate Bill No. 222:

Yeas—41.

Nays—None.

Excused—Settemeyer.

Senate Bill No. 222 having received a two-thirds majority, Madam Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 274.

Bill read third time.

The following amendment was proposed by Assemblywoman Kirkpatrick:  
Amendment No. 993.

~~SUNMARRY—Makes various changes to provisions governing the State Engineer relating to water. (BDR 48-206)~~

AN ACT relating to water; expanding the purposes for which the State Engineer may adopt regulations; expressing the sense of the Legislature as to the temporary conversion of certain water rights for certain ecological purposes; authorizing the State Engineer to impose administrative fines and to order payment of the costs of certain proceedings; authorizing the State Engineer to seek injunctive relief for certain violations; revising provisions relating to the protest of certain applications involving interbasin transfers of groundwater; and providing other matters properly relating thereto.

#### Legislative Counsel's Digest:

Pursuant to existing law, the State Engineer may make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred on him by law. (NRS 532.120) The penalty prescribed for the violation of a majority of the provisions set forth in chapters 533, 534, 535 and 536 of NRS is a misdemeanor. (NRS 533.480, 534.190, 535.110, 536.120)

Section 1 of this bill expands the provisions for which the State Engineer may adopt regulations to include chapters 534, 535 and 536 of NRS in addition to chapter 533 of NRS. Section 2.5 of this bill provides that it is the policy of the State of Nevada to allow the temporary conversion of certain agricultural water rights for wildlife purposes or to improve the quality or flow of water. Sections 3, 7, 10 and 14 of this bill provide the State Engineer with the additional authority to impose, after notice and opportunity for a hearing, administrative fines, to require a person to replace certain unlawfully taken or wasted water, and to recover expenses incurred in investigating and stopping various water law violations. Section 7 provides additionally that: (1) in determining violations relating to the unauthorized use of water from certain wells, it is the burden of the State Engineer to prove which user or users of water are withdrawing water in excess of their

individual allotments; and (2) the State Engineer may require users of water from certain wells to install and maintain, at their own expense, meters to measure their individual withdrawal of water.

Sections 4, 8, 11 and 15 of this bill authorize the State Engineer to seek injunctive relief to prevent a violation or continued violation of chapters 533, 534, 535 and 536 of NRS.

Existing law sets forth requirements for the State Engineer to provide certain notice of an application for a permit to appropriate water. These requirements include publishing the notice in a newspaper and, if the application is for a well, mailing a copy of the notice to owners of real property containing a domestic well that is within 2,500 feet of the proposed well. (NRS 533.360) Existing law also allows an interested person to file with the State Engineer a written protest to the application. (NRS 533.365) Sections 4, 7 and 4.9 of this bill require that if the State Engineer fails to grant, deny or hear an application for a permit to appropriate, change the point of diversion of, change the manner of use of, or change the place of use of more than 250 acre-feet of water per annum within 7 years after the date on which the application was submitted, the State Engineer must, if the application involves an interbasin transfer of groundwater, notice a new period of protest of 45 days. This bill also provides that certain successors in interest of persons who had already filed a written protest against the granting of such an application must be allowed to continue pursuing the protest as though they were the person who had filed the original protest.

Section 16 of this bill requires the State Engineer to consider certain matters in adopting regulations to carry out the amendatory provisions of this bill.

Section 17 of this bill requires the State Engineer, on or before January 1, 2009, to submit to the Director of the Legislative Counsel Bureau a written report detailing his efforts in, and progress toward, the development and adoption of regulations to carry out the amendatory provisions of this bill.

Section 18 of this bill prohibits the State Engineer, before July 1, 2009, from imposing an administrative penalty pursuant to the amendatory provisions of this bill or any regulations adopted to carry out those amendatory provisions.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN  
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 532.120 is hereby amended to read as follows:

532.120 1. The State Engineer ~~is empowered to~~ *may* make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law.

2. The State Engineer ~~shall have power to make rules~~ *may adopt regulations*, not in conflict with law, governing the practice and procedure in



all contests before his office, to ~~insure~~ *ensure* the proper and orderly exercise of the powers granted by law, and the speedy accomplishment of the purposes of ~~the~~ *chapters* 533, 534, 535 and 536 of NRS. Such rules of practice and procedure ~~shall~~ *must* be furnished to any person upon application therefor.

Sec. 2. Chapter 533 of NRS is hereby amended by adding thereto the provisions set forth as sections ~~3, 4 and~~ 2, 5 to 4, 5, inclusive, of this act.

Sec. 2.5. The Legislature hereby finds and declares that it is the policy of this State to allow the temporary conversion of agricultural water rights for wildlife purposes or to improve the quality or flow of water.

Sec. 3. 1. In addition to any other penalty provided by law, the State Engineer may, after notice and opportunity for a hearing, require a person who violates any provision of this chapter or any permit, certificate, order or decision issued or regulation adopted by the State Engineer pursuant to this chapter or NRS 532.120 to:

(a) Pay an administrative fine not to exceed \$10,000 per day for each violation as determined by the State Engineer.

(b) In the case of an unauthorized use or willful waste of water in violation of NRS 533.460 or an unlawful diversion of water in violation of NRS 533.530, or any other violation of this chapter that, as determined by the State Engineer, results in an unlawful use, waste or diversion of water, replace not more than 200 percent of the water used, wasted or diverted.

2. If an administrative fine is imposed against a person pursuant to subsection 1 or the person is ordered to replace any water pursuant to that subsection, the State Engineer may require the person to pay the costs of the proceeding, including investigative costs and attorney's fees.

3. An order imposing an administrative fine or requiring the replacement of water or the payment of costs or fees pursuant to this section may be reviewed by a district court pursuant to NRS 533.450.

Sec. 4. 1. The State Engineer may seek injunctive relief in the appropriate court to prevent the continuance or occurrence of any act or practice which violates any provision of this chapter, or any permit, certificate, decision or order issued or regulation adopted by the State Engineer pursuant to this chapter or NRS 532.120.

2. On a showing by the State Engineer that a person is engaged, or is about to engage, in any act or practice which violates or will violate any provision of this chapter, or any permit, certificate, decision or order issued or regulation adopted by the State Engineer pursuant to this chapter or NRS 532.120, the court may issue, without a bond, any prohibitory or mandatory injunction that the facts may warrant, including a temporary restraining order issued *ex parte* or, after notice and hearing, a preliminary or permanent injunction.

3. Failure to establish lack of an adequate remedy at law or irreparable harm is not a ground for denying a request for a temporary restraining order or injunction.

4. The court may require the posting of a sufficient performance bond or other security to ensure compliance with the court order within the period prescribed.

5. Any proceeding conducted or injunction or order issued pursuant to this section is in addition to, and not in lieu of, any other penalty or remedy available for a violation specified in this section.

Sec. 4.5. The State Engineer shall not carry out his duties pursuant to this chapter in a manner that conflicts with any applicable provision of a decree or order issued by a state or federal court, an interstate compact or an agreement to which this State is a party for the interstate allocation of water pursuant to an act of Congress.

Sec. 4.7. NRS 533.365 is hereby amended to read as follows:

533.365 1. Any person interested may, within 30 days from the date of last publication of the notice of application, file with the State Engineer a written protest against the granting of the application, setting forth with reasonable certainty the grounds of such protest, which shall be verified by the affidavit of the protestant, his agent or attorney.

2. On receipt of a protest, the State Engineer shall advise the applicant whose application has been protested of the fact that the protest has been filed with him, which advice shall be sent by certified mail.

3. The State Engineer shall consider the protest, and may, in his discretion, hold hearings and require the filing of such evidence as he may deem necessary to a full understanding of the rights involved. The State Engineer shall give notice of the hearing by certified mail to both the applicant and the protestant. The notice must state the time and place at which the hearing is to be held and must be mailed at least 15 days before the date set for the hearing.

4. The State Engineer shall adopt rules of practice regarding the conduct of such hearings. The rules of practice must be adopted in accordance with the provisions of NRS 233B.040 to 233B.120, inclusive, and codified in the Nevada Administrative Code. The technical rules of evidence do not apply at such a hearing.

5. The provisions of this section do not prohibit the noticing of a new period of 45 days in which a person may file with the State Engineer a written protest against the granting of the application, if such notification is required to be given pursuant to subsection 8 of NRS 533.370.

Sec. 4.9. NRS 533.370 is hereby amended to read as follows:

533.370 1. Except as otherwise provided in this section and NRS 533.345, 533.371, 533.372 and 533.503, 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;

(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 efficiency of the district in its delivery or use of water; and

(c) The applicant provides proof satisfactory to the State Engineer of:

(1) His intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and

(2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

2. Except as otherwise provided in this subsection and subsections 3 and ~~4~~ 11, the State Engineer shall approve or reject each application within 1 year after the final date for filing a protest. The 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.

3. Except as otherwise provided in subsection ~~4~~ 11, the State Engineer shall approve or reject, within 6 months after the final date for filing a protest, an application filed to change the point of diversion of water already appropriated when the existing and proposed points of diversion are on the same property for which the water has already been appropriated under the existing water right or the proposed point of diversion is on real property that is proven to be owned by the applicant and is contiguous to the place of use of the existing water right. The State Engineer may:

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

(b) 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.

4. If the State Engineer does not act upon an application within 1 year after the final date for filing a protest, the application remains active until acted upon by the State Engineer.

5. Except as otherwise provided in subsection ~~4~~ 11, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectible interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

6. In determining whether an application for an interbasin transfer of groundwater must be rejected pursuant to this section, the State Engineer shall consider:

(a) Whether the applicant has justified the need to import the water from another basin;

(b) If the State Engineer determines that a plan for conservation of water is advisable for the basin into which the water is to be imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out;

(c) Whether the proposed action is environmentally sound as it relates to the basin from which the water is exported;

(d) Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and

(e) Any other factor the State Engineer determines to be relevant.

7. If a hearing is held regarding an application, the decision of the State Engineer must be in writing and include findings of fact, conclusions of law and a statement of the underlying facts supporting the findings of fact. The written decision may take the form of a transcription of an oral ruling. The rejection or approval of an application must be endorsed on a copy of the original application, and a record must be made of the endorsement in the records of the State Engineer. The copy of the application so endorsed must be returned to the applicant. Except as otherwise provided in subsection ~~10~~ 12, if the application is approved, the applicant may, on receipt thereof, proceed with the construction of the necessary works and take all steps required to apply the water to beneficial use and to perfect the proposed appropriation. If the application is rejected, the applicant may take no steps toward the prosecution of the proposed work or the diversion and use of the public water while the rejection continues in force.

8. *If:*

(a) The State Engineer receives an application to appropriate any of the public waters, or to change the point of diversion, manner of use or place of use of water already appropriated;

(b) The application involves an amount of water exceeding 250 acre-feet per annum;

(c) The application involves an interbasin transfer of groundwater; and  
(d) Within 7 years after the date of last publication of the notice of application, the State Engineer has not granted the application, denied the application, held an administrative hearing on the application or issued a permit in response to the application.

↳ the State Engineer shall notice a new period of 45 days in which a person may file with the State Engineer a written protest against the granting of the application. Such notification must be entered on the Internet website of the State Engineer and must, concurrently with that

notification, be mailed to the board of county commissioners of the county of origin.

9. Except as otherwise provided in subsection 10, a person who wishes to protest an application in accordance with a new period of protest noticed pursuant to subsection 8 shall, within 45 days after the date on which the notification was entered and mailed, file with the State Engineer a written protest that complies with the provisions of this chapter and with the regulations adopted by the State Engineer, including, without limitation, any regulations prescribing the use of particular forms or requiring the payment of certain fees.

10. If a person is the successor in interest of an owner of a water right, an owner of real property containing a domestic well or an owner of an interest in a domestic well, and if that previous owner had already filed a written protest against the granting of an application to allow an interbasin transfer of groundwater, the successor in interest must be allowed to pursue that protest in the same manner as though he were the previous owner to whose interest he succeeded. If such a successor in interest wishes to protest an application in accordance with a new period of protest noticed pursuant to subsection 8, the successor need not file with the State Engineer a new written protest but must, within 45 days after the date on which the notification was entered and mailed, inform the Office of the State Engineer that he wishes to continue pursuing the protest.

11. The provisions of subsections 1 to 6, inclusive, do not apply to an application for an environmental permit.

~~10. 12.~~ The provisions of subsection 7 do not authorize the recipient of an approved application to use any state land administered by the Division of State Lands of the State Department of Conservation and Natural Resources without the appropriate authorization for that use from the State Land Registrar.

~~10. 13.~~ As used in this section, "~~interbasin~~":

(a) "County of origin" means the county from which groundwater is transferred or proposed to be transferred.

(b) "Domestic well" has the meaning ascribed to it in NRS 534.350.

(c) "Interbasin transfer of groundwater" means a transfer of groundwater for which the proposed point of diversion is in a different basin than the proposed place of beneficial use.

Sec. 5. NRS 533.450 is hereby amended to read as follows:

533.450 1. Any person feeling himself aggrieved by any order or decision of the State Engineer, acting in person or through his assistants or the water commissioner, affecting his interests, when ~~first~~ the order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, or ~~section 3, 7, 10 or 14 of this act~~, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which ~~first~~ must be initiated in the proper court of the county in which the matters affected or a portion

thereof are situated, ~~it~~ but on stream systems where a decree of court has been entered, the action ~~shall~~ *must* be initiated in the court that entered the decree. ~~Such~~ *The* order or decision of the State Engineer ~~shall be and remain~~ *remains* in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days ~~following~~ *after* the rendition of the order or decision in question and notice thereof is given to the State Engineer as provided in subsection 3.

2. The proceedings in every case ~~shall~~ *must* be heard by the court, and ~~shall~~ *must* be informal and summary, but full opportunity to be heard ~~shall~~ *must* be had before judgment is pronounced.

3. No such proceedings may be entertained unless notice thereof, containing a statement of the substance of the order or decision complained of, and of the manner in which the same injuriously affects the petitioner's interests, has been served upon the State Engineer, personally or by registered or certified mail, at his office at the State Capital within 30 days following the rendition of the order or decision in question. A similar notice ~~shall~~ *must* also be served personally or by registered or certified mail upon the person ~~for persons~~ who may have been affected by ~~shall~~ *the* order or decision.

4. Where evidence has been filed with, or testimony taken before, the State Engineer, a transcribed copy thereof, or of any specific part of the same, duly certified as a true and correct transcript in the manner provided by law, ~~shall~~ *must* be received in evidence with the same effect as if the reporter were present and testified to the facts so certified. A copy of the transcript ~~shall~~ *must* be furnished on demand, at actual cost, to any person affected by ~~shall~~ *the* order or decision, and to all other persons on payment of a reasonable amount therefor, to be fixed by the State Engineer.

5. A bond ~~shall~~ *must* not be required except when a stay is desired, and the proceedings provided for in this section are not a stay unless, within 5 days ~~following~~ *after* the service of notice thereof, a bond is filed in an amount to be fixed by the court, with sureties satisfactory to ~~shall~~ *the* court, conditioned to perform the judgment rendered in ~~shall~~ *the* proceedings.

6. Costs ~~shall~~ *must* be paid as in civil cases brought in the district court, except by the State Engineer or the State.

7. The practice in civil cases applies to the informal and summary character of such proceedings, as provided in this section.

8. Appeals may be taken to the Supreme Court from the judgment of the district court in the same manner as in other civil cases.

9. The decision of the State Engineer ~~shall be~~ *is* prima facie correct, and the burden of proof ~~shall be~~ *is* upon the party attacking the same.

10. Whenever it appears to the State Engineer that any litigation, whether now pending or hereafter brought, may adversely affect the rights of the public in water, he shall request the Attorney General to appear and protect the interests of the State.

Sec. 6. Chapter 534 of NRS is hereby amended by adding thereto the provisions set forth as sections 7 and 8 of this act.

Sec. 7. 1. Except as otherwise provided in NRS 534.280, 534.310 and 534.330 and in addition to any other penalty provided by law, the State Engineer may, after notice and opportunity for a hearing, require a person who violates any provision of this chapter or any permit, order or decision issued or regulation adopted by the State Engineer pursuant to this chapter or NRS 532.120 to:

(a) Pay an administrative fine not to exceed \$10,000 per day for each violation as determined by the State Engineer.

(b) In the case of an unlawful waste of water in violation of NRS 534.070 or any other violation of this chapter that, as determined by the State Engineer, results in an unlawful use, waste or diversion of water, replace not more than 200 percent of the water used, wasted or diverted.

2. In determining violations of this chapter relating to the unauthorized use of water yielded from a well that is used pursuant to a permit issued by the State Engineer and that has 16 or fewer connections, the State Engineer has the burden of proving which user is withdrawing water in excess of the portion of water allotted to the connection of that user. The State Engineer may require any or all users of the well to install and maintain, at their own expense, a meter that measures the amount of water withdrawn from the well by each connection.

3. If an administrative fine is imposed against a person pursuant to subsection 1 or the person is ordered to replace any water pursuant to that subsection, the State Engineer may require the person to pay the costs of the proceeding, including investigative costs and attorney's fees.

4. An order imposing an administrative fine or requiring the replacement of water or payment of costs or fees pursuant to this section may be reviewed by a district court pursuant to NRS 533.450.

Sec. 8. 1. The State Engineer may seek injunctive relief in the appropriate court to prevent the continuance or occurrence of any act or practice which violates any provision of this chapter, or any permit, order or decision issued or regulation adopted by the State Engineer pursuant to this chapter or NRS 532.120.

2. On a showing by the State Engineer that a person is engaged, or is about to engage, in any act or practice which violates or will violate any provision of this chapter, or any permit, order or decision issued or regulation adopted by the State Engineer pursuant to this chapter or NRS 532.120, the court may issue, without a bond, any prohibitory or mandatory injunction that the facts may warrant, including a temporary restraining order issued ex parte or, after notice and hearing, a preliminary or permanent injunction.

3. Failure to establish lack of an adequate remedy at law or irreparable harm is not a ground for denying a request for a temporary restraining order or injunction.

4. The court may require the posting of a sufficient performance bond or other security to ensure compliance with the court order within the period prescribed.

5. Any proceeding conducted or injunction or order issued pursuant to this section is in addition to, and not in lieu of, any other penalty or remedy available for a violation of this chapter.

Sec. 9. Chapter 535 of NRS is hereby amended by adding thereto the provisions set forth as sections 10 and 11 of this act.

Sec. 10. 1. In addition to any other penalty provided by law, the State Engineer may, after notice and opportunity for a hearing, require a person who violates any provision of this chapter, any permit, order or decision issued by the State Engineer pursuant to this chapter or any regulation adopted by the State Engineer pursuant to NRS 532.120 to pay an administrative fine not to exceed \$10,000 per day for each violation as determined by the State Engineer.

2. If an administrative fine is imposed against a person pursuant to subsection 1, the State Engineer may require the person to pay the costs of the proceeding, including investigative costs and attorney's fees.

3. An order imposing an administrative fine or requiring the payment of costs or fees pursuant to this section may be reviewed by a district court pursuant to NRS 533.450.

Sec. 11. 1. The State Engineer may seek injunctive relief in the appropriate court to prevent the continuance or occurrence of any act or practice which violates any provision of this chapter, any permit, order or decision issued by the State Engineer pursuant to this chapter or any regulation adopted by the State Engineer pursuant to NRS 532.120.

2. On a showing by the State Engineer that a person is engaged, or is about to engage, in any act or practice which violates or will violate any provision of this chapter, any permit, order or decision issued by the State Engineer pursuant to this chapter or any regulation adopted by the State Engineer pursuant to NRS 532.120, the court may issue, without a bond, any prohibitory or mandatory injunction that the facts may warrant, including a temporary restraining order issued ex parte or, after notice and hearing, a preliminary or permanent injunction.

3. Failure to establish lack of an adequate remedy at law or irreparable harm is not a ground for denying a request for a temporary restraining order or injunction.

4. The court may require the posting of a sufficient performance bond or other security to ensure compliance with the court order within the period prescribed.

5. Any proceeding conducted or injunction or order issued pursuant to this section is in addition to, and not in lieu of, any other penalty or remedy available for a violation of this chapter.

Sec. 12. NRS 535.100 is hereby amended to read as follows:



535.100 1. ~~It is unlawful for any person being~~ *Any person who is the owner of or in possession of any sawmill used for the making of lumber, or any slaughterhouse, brewery or tannery shall not injure or obstruct the natural flow of water in any river, creek or other stream.*

2. Any city or county government, or any person, ~~being~~ *who is the owner of or in possession of any agricultural lands* ~~who may be~~ *and who is injured by reason of the violation on the part of any person of the provisions contained in subsection 1* ~~shall have the right to~~ *may commence and maintain an action against* ~~the~~ *the person for any damage sustained, in such manner as may be provided by law.*

~~3. Any person who shall willfully and knowingly violate the provisions of this section shall be punished by a fine of not more than \$500.~~

Sec. 13. Chapter 536 of NRS is hereby amended by adding thereto the provisions set forth as sections 14 and 15 of this act.

Sec. 14. 1. *In addition to any other penalty provided by law, the State Engineer may, after notice and opportunity for a hearing, require a person who violates any provision of this chapter, any order or decision issued by the State Engineer pursuant to this chapter or any regulation adopted by the State Engineer pursuant to NRS 532.120 to pay an administrative fine not to exceed \$10,000 per day for each violation as determined by the State Engineer.*

2. *If an administrative fine is imposed against a person pursuant to subsection 1, the State Engineer may require the person to pay the costs of the proceeding, including investigative costs and attorney's fees.*

3. *An order imposing an administrative fine or requiring the payment of costs or fees pursuant to this section may be reviewed by a district court pursuant to NRS 533.450.*

Sec. 15. 1. *The State Engineer may seek injunctive relief in the appropriate court to prevent the continuance or occurrence of any act or practice which violates any provision of this chapter, any order or decision issued by the State Engineer pursuant to this chapter or any regulation adopted by the State Engineer pursuant to NRS 532.120.*

2. *On a showing by the State Engineer that a person is engaged, or is about to engage, in any act or practice which violates or will violate any provision of this chapter, any order or decision issued by the State Engineer pursuant to this chapter or any regulation adopted by the State Engineer pursuant to NRS 532.120, the court may issue, without a bond, any prohibitory or mandatory injunction that the facts may warrant, including a temporary restraining order issued ex parte or, after notice and hearing, a preliminary or permanent injunction.*

3. *Failure to establish lack of an adequate remedy at law or irreparable harm is not a ground for denying a request for a temporary restraining order or injunction.*

4. *The court may require the posting of a sufficient performance bond or other security to ensure compliance with the court order within the period prescribed.*

5. *Any proceeding conducted or injunction or order issued pursuant to this section is in addition to, and not in lieu of, any other penalty or remedy available for a violation of this chapter.*

Sec. 16. The State Engineer shall, in adopting regulations to carry out the amendatory provisions of this act:

1. Consider establishing a minimum threshold amount of water that a user of water would be required to exceed in using, wasting or diverting water in an unlawful manner before an administrative penalty would be imposed;

2. Comply with the provisions of chapter 233B of NRS;

3. Consider waiving an administrative penalty for a violation if the violator has, in the determination of the State Engineer, made significant progress toward correcting the violation; and

4. In addition to the requirements of subsection 1, consider waiving an administrative penalty in the case of an unauthorized use or willful waste of water in violation of NRS 533.460 or an unlawful diversion of water in violation of NRS 533.530, if the amount of water so used or wasted does not exceed 2 acre-feet per annum.

Sec. 17. The State Engineer shall, on or before January 1, 2009, submit to the Director of the Legislative Counsel Bureau a written report detailing the effort and progress of the State Engineer in developing and adopting regulations to carry out the amendatory provisions of this act.

Sec. 18. The State Engineer shall not, before July 1, 2009, impose an administrative penalty pursuant to the amendatory provisions of this act or any regulations adopted to carry out the amendatory provisions of this act.

Sec. 19. This act becomes effective on July 1, 2007.

Assemblywoman Kirkpatrick moved the adoption of the amendment.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 289.

Bill read third time.

Remarks by Assemblyman Bobzien.

Roll call on Senate Bill No. 289:

YEAS—41.

NAYS—None.

EXCUSED—Settelmeyer.

Senate Bill No. 289 having received a constitutional majority, Madam Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 307.

Bill read third time.

**MINUTES OF THE  
SENATE COMMITTEE ON NATURAL RESOURCES**

**Seventy-fourth Session  
May 30, 2007**

The Senate Committee on Natural Resources was called to order by Chair Dean A. Rhoads at 2:10 p.m. on Wednesday, May 30, 2007, on the Senate Floor of the Legislative Building, Carson City, Nevada. There was no Agenda. There was no Attendance Roster.

**COMMITTEE MEMBERS PRESENT:**

Senator Dean A. Rhoads, Chair  
Senator Mike McGinness, Vice Chair  
Senator Mark E. Amodei  
Senator Joseph J. Heck  
Senator Bob Coffin  
Senator Michael A. Schneider  
Senator Maggie Carlton

**STAFF MEMBERS PRESENT:**

Susan E. Scholley, Committee Policy Analyst  
Randy Stephenson, Committee Counsel  
Shirley Parks, Committee Secretary

Chair Rhoads opened the floor meeting with a discussion on Senate Bill (S.B.) 274.

**SENATE BILL 274 (3rd Reprint):** Makes various changes to provisions relating to water. (BDR 48-206)

SENATOR AMODEI MOVED TO NOT CONCUR WITH AMENDMENT NO. 945 AND AMENDMENT NO. 993 TO S.B. 274.

SENATOR SCHNEIDER SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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Senate Committee on Natural Resources  
May 30, 2007  
Page 2

Chair Rhoads adjourned the meeting of the Senate Committee on Natural Resources at 2:12 p.m.

RESPECTFULLY SUBMITTED:

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Shirley Parks,  
Committee Secretary

APPROVED BY:

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Senator Dean A. Rhoads, Chair

DATE: \_\_\_\_\_

Assembly Bill No. 617 having received a constitutional majority,  
Mr. President declared it passed.  
Bill ordered transmitted to the Assembly.

UNFINISHED BUSINESS  
REPORTS OF CONFERENCE COMMITTEES

Mr. President:

The first Conference Committee concerning Senate Bill No. 274, consisting of the undersigned members, has met and reports that:

It has agreed to recommend that the Amendments Nos. 945 and 993 of the Assembly be concurred in.

It has agreed to recommend that the bill be further amended as set forth in Conference Amendment No. 35, which is attached to and hereby made a part of this report.

Conference Amendment.

"SUMMARY.—Makes various changes to provisions relating to water. (BDR 48-206)"

"AN ACT relating to water, expanding the purposes for which the State Engineer may adopt regulations, ~~expressing the sense of the Legislature as to the temporary conversion of certain water rights for certain ecological purposes~~ authorizing the State Engineer to impose administrative fines and to order payment of the costs of certain proceedings, ~~authorizing the State Engineer to consider the consumptive use of a water right under certain circumstances~~, authorizing the State Engineer to seek injunctive relief for certain violations, revising provisions relating to the protest of certain applications involving interbasin transfers of groundwater, and providing other matters properly relating thereto."

Legislative Counsel's Digest.

Pursuant to existing law, the State Engineer may make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred on him by law. (NRS 532.120) The penalty prescribed for the violation of a majority of the provisions set forth in chapters 533, 534, 535 and 536 of NRS is a misdemeanor. (NRS 533.480, 534.190, 535.110, 536.120)

Section 1 of this bill expands the provisions for which the State Engineer may adopt regulations to include chapters 534, 535 and 536 of NRS in addition to chapter 533 of NRS. ~~Section 2.5 of this bill provides that it is the policy of the State of Nevada to allow the temporary conversion of certain agricultural water rights for wildlife purposes or to improve the quality of flow of water.~~ Sections 3, 7, 10 and 14 of this bill provide the State Engineer with the additional authority to impose, after notice and opportunity for a hearing, administrative fines, to require a person to replace certain unlawfully taken or wasted water, and to recover expenses incurred in investigating and stopping various water law violations. Section 7 provides additionally that: (1) in determining violations relating to the unauthorized use of water from certain wells, it is the burden of the State Engineer to prove which user or users of water are withdrawing water in excess of their individual allotments; and (2) the State Engineer may require users of water from certain wells to install and maintain, at their own expense, meters to measure their individual withdrawal of water.

Sections 4, 8, 11 and 15 of this bill authorize the State Engineer to seek injunctive relief to prevent a violation or continued violation of chapters 533, 534, 535 and 536 of NRS.

~~Section 3.3 of this bill authorizes the State Engineer to consider the consumptive use of a water right in determining the appropriateness of approving a proposed change in the place of diversion, manner of use, or place of use of water pursuant to that right. Section 3.5 of this bill authorizes the State Engineer, upon approval of an application to appropriate water, to limit the initial use of that water to an amount that is less than the total amount approved. If the State Engineer at a later date determines that water is available for the total amount approved for the application, he may authorize the use of that additional amount.~~

Existing law sets forth requirements for the State Engineer to provide certain notice of an application for a permit to appropriate water. These requirements include publishing the notice in a newspaper and, if the application is for a well, mailing a copy of the notice to owners of real property containing a domestic well that is within 2,500 feet of the proposed well.

(NRS 533.360) Existing law also allows an interested person to file with the State Engineer a written protest to the application. (NRS 533.365) Sections 4, 7 and 4.9 of this bill require that if the State Engineer fails to grant, deny or hear an application for a permit to appropriate, change the point of diversion of, change the manner of use of, or change the place of use of more than 250 acre-feet of water per annum within 7 years after the date on which the application was submitted, the State Engineer must, if the application involves an interbasin transfer of groundwater, notice a new period of protest of 45 days. This bill also provides that certain successors in interest of persons who had already filed a written protest against the granting of such an application must be allowed to continue pursuing the protest as though they were the person who had filed the original protest.

Section 16 of this bill requires the State Engineer to consider certain matters in adopting regulations to carry out the amendatory provisions of this bill.

Section 17 of this bill requires the State Engineer, on or before January 1, 2009, to submit to the Director of the Legislative Counsel Bureau a written report detailing his efforts in, and progress toward, the development and adoption of regulations to carry out the amendatory provisions of this bill.

Section 18 of this bill prohibits the State Engineer, before July 1, 2009, from imposing an administrative penalty pursuant to the amendatory provisions of this bill or any regulations adopted to carry out those amendatory provisions.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN  
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 532.120 is hereby amended to read as follows:

532.120 1. The State Engineer ~~is empowered to~~ may make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law.

2. The State Engineer ~~shall have power to make these~~ may adopt regulations, not in conflict with law, governing the practice and procedure in all contests before his office, to ~~insure~~ ensure the proper and orderly exercise of the powers granted by law, and the speedy accomplishment of the purposes of ~~chapter~~ chapters 533, 534, 535 and 536 of NRS. Such rules of practice and procedure ~~shall~~ must be furnished to any person upon application therefor.

Sec. 2. Chapter 533 of NRS is hereby amended by adding thereto the provisions set forth as sections 2.5 to 4.5, inclusive, of this act.

Sec. 2.5. ~~The legislative hereby finds and declares that it is the policy of this State to allow the temporary conversion of agricultural water rights for wildlife purposes to improve the quality of flow of waters. (Deleted by amendment.)~~

Sec. 3. 1. In addition to any other penalty provided by law, the State Engineer may, after notice and opportunity for a hearing, require a person who violates any provision of this chapter or any permit, certificate, order or decision issued or regulation adopted by the State Engineer pursuant to this chapter or NRS 532.120 to:

(a) Pay an administrative fine not to exceed \$10,000 per day for each violation as determined by the State Engineer.

(b) In the case of an unauthorized use or willful waste of water in violation of NRS 533.460 or an unlawful diversion of water in violation of NRS 533.530, or any other violation of this chapter that, as determined by the State Engineer, results in an unlawful use, waste or diversion of water, replace not more than 200 percent of the water used, wasted or diverted.

2. If an administrative fine is imposed against a person pursuant to subsection 1 or the person is ordered to replace any water pursuant to that subsection, the State Engineer may require the person to pay the costs of the proceeding, including investigative costs and attorney's fees.

3. An order imposing an administrative fine or requiring the replacement of water or the payment of costs or fees pursuant to this section may be reviewed by a district court pursuant to NRS 533.450.

Sec. 3.3. 1. ~~The State Engineer may consider the consumptive use of a water right and the consumptive use of a proposed beneficial use of water in determining whether a proposed change in the place of diversion, manner of use or place of use complies with the provisions of subsection 5 of NRS 533.370.~~

2. The provisions of this section:

(a) Must not be applied by the State Engineer in a manner that is inconsistent with any applicable federal or state decree concerning consumptive use.

(b) Do not apply to any decreed, certified or permitted right to appropriate water which originates in the Virgin River or the Muddy River.

Sec. 3.5. 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.

Sec. 4. 1. The State Engineer may seek injunctive relief in the appropriate court to prevent the continuance or occurrence of any act or practice which violates any provision of this chapter, or any permit, certificate, decision or order issued or regulation adopted by the State Engineer pursuant to this chapter or NRS 532.120.

2. On a showing by the State Engineer that a person is engaged, or is about to engage, in any act or practice which violates or will violate any provision of this chapter, or any permit, certificate, decision or order issued or regulation adopted by the State Engineer pursuant to this chapter or NRS 532.120, the court may issue, without a bond, any prohibitory or mandatory injunction that the facts may warrant, including a temporary restraining order issued ex parte or, after notice and hearing, a preliminary or permanent injunction.

3. Failure to establish lack of an adequate remedy at law or irreparable harm is not a ground for denying a request for a temporary restraining order or injunction.

4. The court may require the posting of a sufficient performance bond or other security to ensure compliance with the court order within the period prescribed.

5. Any proceeding conducted or injunction or order issued pursuant to this section is in addition to, and not in lieu of, any other penalty or remedy available for a violation specified in this section.

Sec. 4.5. The State Engineer shall not carry out his duties pursuant to this chapter in a manner that conflicts with any applicable provision of a decree or order issued by a state or federal court, an interstate compact or an agreement to which this State is a party for the interstate allocation of water pursuant to an act of Congress.

Sec. 4.7. NRS 533.365 is hereby amended to read as follows:

533.365. 1. Any person interested may, within 30 days ~~(ten)~~ after the date of last publication of the notice of application, file with the State Engineer a written protest against the granting of the application, setting forth with reasonable certainty the grounds of such protest, which ~~(ten)~~ must be verified by the affidavit of the protestant, his agent or attorney.

2. On receipt of a protest, the State Engineer shall advise the applicant whose application has been protested of the fact that the protest has been filed with him, which advice ~~(ten)~~ must be sent by certified mail.

3. The State Engineer shall consider the protest, and may, in his discretion, hold hearings and require the filing of such evidence as he may deem necessary to a full understanding of the rights involved. The State Engineer shall give notice of the hearing by certified mail to both the applicant and the protestant. The notice must state the time and place at which the hearing is to be held and must be mailed at least 15 days before the date set for the hearing.

4. Each applicant and each protestant shall, in accordance with a schedule established by the State Engineer, provide to the State Engineer and to each protestant and each applicant information required by the State Engineer relating to the application or protest.

5. If the State Engineer holds a hearing pursuant to subsection 3, the State Engineer shall render a decision on each application not later than 240 days after the later of:

- (a) The date all transcripts of the hearing become available to the State Engineer; or
- (b) The date specified by the State Engineer for the filing of any additional information, evidence, studies or compilations requested by the State Engineer. The State Engineer may, for good cause shown, extend any applicable period.

6. The State Engineer shall adopt rules of practice regarding the conduct of ~~hearing~~ <sup>a hearing held pursuant to subsection 3.</sup> The rules of practice must be adopted in accordance with the provisions of NRS 233B.040 to 233B.120, inclusive, and codified in the Nevada Administrative Code. The technical rules of evidence do not apply at such a hearing.

~~7. The provisions of this section do not prohibit the noticing of a new period of 45 days in which a person may file with the State Engineer a written protest against the granting of the application, if such notification is required to be given pursuant to subsection 8 of NRS 533.370.~~

Sec. 4.9. NRS 533.370 is hereby amended to read as follows:

533.370 1. Except as otherwise provided in this section and NRS 533.345, 533.371, 533.372 and 533.503, 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;
- (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 efficiency of the district in its delivery or use of water; and

(c) The applicant provides proof satisfactory to the State Engineer of:

- (1) His intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and
- (2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

2. Except as otherwise provided in this subsection and subsections 3 and ~~4~~ <sup>5</sup> ~~and~~ <sup>NRS 533.365</sup>, the State Engineer shall approve or reject each application within 1 year after the final date for filing a protest. The 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.

3. Except as otherwise provided in subsection ~~4~~ <sup>5</sup> ~~11~~, the State Engineer shall approve or reject, within 6 months after the final date for filing a protest, an application filed to change the point of diversion of water already appropriated when the existing and proposed points of diversion are on the same property for which the water has already been appropriated under the existing water right or the proposed point of diversion is on real property that is proven to be owned by the applicant and is contiguous to the place of use of the existing water right. The State Engineer may:

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

(b) 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.

4. If the State Engineer does not act upon an application within 1 year after the final date for filing a protest, the application remains active until acted upon by the State Engineer.

5. Except as otherwise provided in subsection ~~4~~ <sup>5</sup> ~~11~~, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectible interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.



6. In determining whether an application for an interbasin transfer of groundwater must be rejected pursuant to this section, the State Engineer shall consider:

- (a) Whether the applicant has justified the need to import the water from another basin;
  - (b) If the State Engineer determines that a plan for conservation of water is advisable for the basin into which the water is to be imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out;
  - (c) Whether the proposed action is environmentally sound as it relates to the basin from which the water is exported;
  - (d) Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and
  - (e) Any other factor the State Engineer determines to be relevant.
7. If a hearing is held regarding an application, the decision of the State Engineer must be in writing and include findings of fact, conclusions of law and a statement of the underlying facts supporting the findings of fact. The written decision may take the form of a transcription of an oral ruling. The rejection or approval of an application must be endorsed on a copy of the original application, and a record must be made of the endorsement in the records of the State Engineer. The copy of the application so endorsed must be returned to the applicant. Except as otherwise provided in subsection f(3) 12, if the application is approved, the applicant may, on receipt thereof, proceed with the construction of the necessary works and take all steps required to apply the water to beneficial use and to perfect the proposed appropriation. If the application is rejected, the applicant may take no steps toward the prosecution of the proposed work or the diversion and use of the public water while the rejection continues in force.

8. *If*

- (a) *The State Engineer receives an application to appropriate any of the public waters, or to change the point of diversion, manner of use or place of use of water already appropriated;*
  - (b) *The application involves an amount of water exceeding 250 acre-feet per annum;*
  - (c) *The application involves an interbasin transfer of groundwater; and*
  - (d) *Within 7 years after the date of last publication of the notice of application, the State Engineer has not granted the application, denied the application, held an administrative hearing on the application or issued a permit in response to the application,*
- the State Engineer shall notice a new period of 45 days in which a person who is a successor in interest to a protestant, or an affected water right owner may file with the State Engineer a written protest against the granting of the application. Such notification must be entered on the Internet website of the State Engineer and must, concurrently with that notification, be mailed to the board of county commissioners of the county of origin.*

9. *Except as otherwise provided in subsection 10, a person who is a successor in interest to a protestant, or an affected water right owner who wishes to protest an application in accordance with a new period of protest noticed pursuant to subsection 8 shall, within 45 days after the date on which the notification was entered and mailed, file with the State Engineer a written protest that complies with the provisions of this chapter and with the regulations adopted by the State Engineer, including, without limitation, any regulations prescribing the use of particular forms or requiring the payment of certain fees.*

10. *If a person is the successor in interest of an owner of a water right in an owner of real property containing a domestic well on an owner of an interest in a domestic well and if that person owner had already filed a written protest against the granting of an application to either an interbasin transfer of groundwater or the diversion in interest water be allowed to pursue that protest in the same manner as though the water the person owner to whom interest the succeeded. If such a successor in interest wishes to protest an application in accordance with a new period of protest noticed pursuant to subsection 8, the successor need not file with the State Engineer a new written protest but must, within 45 days after the date on which the notification was entered and mailed, inform the Office of the State Engineer that the wish to continue pursuing the protest, or an owner of real property upon which a domestic well is located and if the former owner of the water right or real property on which a domestic well is located had previously filed a written protest against the granting of an application, the successor in interest must be allowed to pursue that protest in the same manner as if he were the former owner whose*

*interest he succeeded. If the successor in interest wishes to pursue the protest, the successor in interest must notify the State Engineer on a form provided by the State Engineer.*

11. The provisions of subsections 1 to 6, inclusive, do not apply to an application for an environmental permit.

12. The provisions of subsection 7 do not authorize the recipient of an approved application to use any state land administered by the Division of State Lands of the State Department of Conservation and Natural Resources without the appropriate authorization for that use from the State Land Registrar.

13. As used in this section [“~~interest~~”]:

(a) “*County of origin*” means the county from which groundwater is transferred or proposed to be transferred.

(b) “*Domestic well*” has the meaning ascribed to it in NRS 534.350.

(c) “*Interbasin transfer of groundwater*” means a transfer of groundwater for which the proposed point of diversion is in a different basin than the proposed place of beneficial use.

Sec. 5. NRS 533.450 is hereby amended to read as follows:

1. Any person feeling himself aggrieved by any order or decision of the State Engineer, acting in person or through his assistants or the water commissioner, affecting his interests, when ~~that~~ the order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, or section 3, 7, 10 or 14 of this act, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which ~~that~~ must be initiated in the proper court of the county in which the matters affected or a portion thereof are situated, ~~but~~ on stream systems where a decree of court has been entered, the action ~~that~~ must be initiated in the court that entered the decree. ~~That~~ The order or decision of the State Engineer ~~shall be and remains~~ remains in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days ~~following~~ after the rendition of the order or decision in question and notice thereof is given to the State Engineer as provided in subsection 3.

2. The proceedings in every case ~~shall~~ must be heard by the court, and ~~shall~~ must be informal and summary, but full opportunity to be heard ~~shall~~ must be had before judgment is pronounced.

3. No such proceedings may be entertained unless notice thereof, containing a statement of the substance of the order or decision complained of, and of the manner in which the same injuriously affects the petitioner's interests, has been served upon the State Engineer, personally or by registered or certified mail, at his office at the State Capital within 30 days following the rendition of the order or decision in question. A similar notice ~~shall~~ must also be served personally or by registered or certified mail upon the person ~~for persons~~ who may have been affected by ~~that~~ the order or decision.

4. Where evidence has been filed with, or testimony taken before, the State Engineer, a transcribed copy thereof, or of any specific part of the same, duly certified as a true and correct transcript in the manner provided by law, ~~shall~~ must be received in evidence with the same effect as if the reporter were present and testified to the facts so certified. A copy of the transcript ~~shall~~ must be furnished on demand, at actual cost, to any person affected by ~~that~~ the order or decision, and to all other persons on payment of a reasonable amount therefor, to be fixed by the State Engineer.

5. A bond ~~shall~~ must not be required except when a stay is desired, and the proceedings provided for in this section are not a stay unless, within 5 days ~~following~~ after the service of notice thereof, a bond is filed in an amount to be fixed by the court, with sureties satisfactory to ~~that~~ the court, conditioned to perform the judgment rendered in ~~that~~ the proceedings.

6. Costs ~~shall~~ must be paid as in civil cases brought in the district court, except by the State Engineer or the State.

7. The practice in civil cases applies to the informal and summary character of such proceedings, as provided in this section.

8. Appeals may be taken to the Supreme Court from the judgment of the district court in the same manner as in other civil cases.

9. The decision of the State Engineer ~~shall be~~ is prima facie correct, and the burden of proof ~~shall be~~ is upon the party attacking the same.

10. Whenever it appears to the State Engineer that any litigation, whether now pending or hereafter brought, may adversely affect the rights of the public in water, he shall request the Attorney General to appear and protect the interests of the State.

Sec. 6. Chapter 534 of NRS is hereby amended by adding thereto the provisions set forth as sections 7 and 8 of this act.

Sec. 7. 1. Except as otherwise provided in NRS 534.280, 534.310 and 534.330 and in addition to any other penalty provided by law, the State Engineer may, after notice and opportunity for a hearing, require a person who violates any provision of this chapter or any permit, order or decision issued or regulation adopted by the State Engineer pursuant to this chapter or NRS 532.120 to:

(c) Pay an administrative fine not to exceed \$10,000 per day for each violation as determined by the State Engineer.

(b) In the case of an unlawful waste of water in violation of NRS 534.070 or any other violation of this chapter that, as determined by the State Engineer, results in an unlawful use, waste or diversion of water, replace not more than 200 percent of the water used, wasted or diverted.

2. In determining violations of this chapter relating to the unauthorized use of water yielded from a well that is used pursuant to a permit issued by the State Engineer and that has 16 or fewer connections, the State Engineer has the burden of proving which user is withdrawing water in excess of the portion of water allotted to the connection of that user. The State Engineer may require any or all users of the well to install and maintain, at their own expense, a meter that measures the amount of water withdrawn from the well by each connection.

3. If an administrative fine is imposed against a person pursuant to subsection 1 or the person is ordered to replace any water pursuant to that subsection, the State Engineer may require the person to pay the costs of the proceeding, including investigative costs and attorney's fees.

4. An order imposing an administrative fine or requiring the replacement of water or payment of costs or fees pursuant to this section may be reviewed by a district court pursuant to NRS 533.450.

Sec. 8. 1. The State Engineer may seek injunctive relief in the appropriate court to prevent the continuance or occurrence of any act or practice which violates any provision of this chapter, or any permit, order or decision issued or regulation adopted by the State Engineer pursuant to this chapter or NRS 532.120.

2. On a showing by the State Engineer that a person is engaged, or is about to engage, in any act or practice which violates or will violate any provision of this chapter, or any permit, order or decision issued or regulation adopted by the State Engineer pursuant to this chapter or NRS 532.120, the court may issue, without a bond, any prohibitory or mandatory injunction that the facts may warrant, including a temporary restraining order issued *ex parte* or, after notice and hearing, a preliminary or permanent injunction.

3. Failure to establish lack of an adequate remedy at law or irreparable harm is not a ground for denying a request for a temporary restraining order or injunction.

4. The court may require the posting of a sufficient performance bond or other security to ensure compliance with the court order within the period prescribed.

5. Any proceeding conducted or injunction or order issued pursuant to this section is in addition to, and not in lieu of, any other penalty or remedy available for a violation of this chapter.

Sec. 9. Chapter 535 of NRS is hereby amended by adding thereto the provisions set forth as sections 10 and 11 of this act.

Sec. 10. 1. In addition to any other penalty provided by law, the State Engineer may, after notice and opportunity for a hearing, require a person who violates any provision of this chapter, any permit, order or decision issued by the State Engineer pursuant to this chapter or any regulation adopted by the State Engineer pursuant to NRS 532.120 to pay an administrative fine not to exceed \$10,000 per day for each violation as determined by the State Engineer.

2. If an administrative fine is imposed against a person pursuant to subsection 1, the State Engineer may require the person to pay the costs of the proceeding, including investigative costs and attorney's fees.

3. An order imposing an administrative fine or requiring the payment of costs or fees pursuant to this section may be reviewed by a district court pursuant to NRS 533.450.

Sec. 11. 1. The State Engineer may seek injunctive relief in the appropriate court to prevent the continuance or occurrence of any act or practice which violates any provision of this chapter, any permit, order or decision issued by the State Engineer pursuant to this chapter or any regulation adopted by the State Engineer pursuant to NRS 532.120.

2. On a showing by the State Engineer that a person is engaged, or is about to engage, in any act or practice which violates or will violate any provision of this chapter, any permit, order or decision issued by the State Engineer pursuant to this chapter or any regulation adopted by the State Engineer pursuant to NRS 532.120, the court may issue, without a bond, any prohibitory or mandatory injunction that the facts may warrant, including a temporary restraining order issued ex parte or, after notice and hearing, a preliminary or permanent injunction.

3. Failure to establish lack of an adequate remedy at law or irreparable harm is not a ground for denying a request for a temporary restraining order or injunction.

4. The court may require the posting of a sufficient performance bond or other security to ensure compliance with the court order within the period prescribed.

5. Any proceeding conducted or injunction or order issued pursuant to this section is in addition to, and not in lieu of, any other penalty or remedy available for a violation of this chapter.

Sec. 12. NRS 535.100 is hereby amended to read as follows:

535.100 1. ~~It is unlawful for any person being~~ Any person who is the owner of or in possession of any sawmill used for the making of lumber, or any slaughterhouse, brewery or tannery ~~they~~ shall not injure or obstruct the natural flow of water in any river, creek or other stream.

2. Any city or county government, or any person, ~~being~~ who is the owner of or in possession of any agricultural lands ~~to whom they are~~ and who is injured by reason of the violation on the part of any person of the provisions contained in subsection 1 ~~to~~ shall have the right to may commence and maintain an action against ~~the~~ the person for any damage sustained, in such manner as may be provided by law.

~~13. Any person who shall willfully and knowingly violate the provisions of this section shall be punished by a fine of not more than \$500.~~

Sec. 13. Chapter 536 of NRS is hereby amended by adding thereto the provisions set forth as sections 14 and 15 of this act.

Sec. 14. 1. In addition to any other penalty provided by law, the State Engineer may, after notice and opportunity for a hearing, require a person who violates any provision of this chapter, any order or decision issued by the State Engineer pursuant to this chapter or any regulation adopted by the State Engineer pursuant to NRS 532.120 to pay an administrative fine not to exceed \$10,000 per day for each violation as determined by the State Engineer.

2. If an administrative fine is imposed against a person pursuant to subsection 1, the State Engineer may require the person to pay the costs of the proceeding, including investigative costs and attorney's fees.

3. An order imposing an administrative fine or requiring the payment of costs or fees pursuant to this section may be reviewed by a district court pursuant to NRS 533.450.

Sec. 15. 1. The State Engineer may seek injunctive relief in the appropriate court to prevent the continuance or occurrence of any act or practice which violates any provision of this chapter, any order or decision issued by the State Engineer pursuant to this chapter or any regulation adopted by the State Engineer pursuant to NRS 532.120.

2. On a showing by the State Engineer that a person is engaged, or is about to engage, in any act or practice which violates or will violate any provision of this chapter, any order or decision issued by the State Engineer pursuant to this chapter or any regulation adopted by the State Engineer pursuant to NRS 532.120, the court may issue, without a bond, any prohibitory or mandatory injunction that the facts may warrant, including a temporary restraining order issued ex parte or, after notice and hearing, a preliminary or permanent injunction.

3. Failure to establish lack of an adequate remedy at law or irreparable harm is not a ground for denying a request for a temporary restraining order or injunction.

4. *The court may require the posting of a sufficient performance bond or other security to ensure compliance with the court order within the period prescribed.*

5. *Any proceeding conducted or injunction or order issued pursuant to this section is in addition to, and not in lieu of, any other penalty or remedy available for a violation of this chapter.*

Sec. 16. The State Engineer shall, in adopting regulations to carry out the amendatory provisions of sections 1, 3, 4, 5, 7, 8, 10, 11, 12, 14 and 15 of this act:

1. Consider establishing a minimum threshold amount of water that a user of water would be required to exceed in using, wasting or diverting water in an unlawful manner before an administrative penalty would be imposed.

2. Comply with the provisions of chapter 233B of NRS.

3. Consider waiving an administrative penalty for a violation if the violator has, in the determination of the State Engineer, made significant progress toward correcting the violation, and

4. In addition to the requirements of subsection 1, consider waiving an administrative penalty in the case of an unauthorized use or willful waste of water in violation of NRS 533.460 or an unlawful diversion of water in violation of NRS 533.530, if the amount of water so used or wasted does not exceed 2 acre-feet per annum.

Sec. 17. The State Engineer shall, on or before January 1, 2009, submit to the Director of the Legislative Counsel Bureau a written report detailing the efforts and progress of the State Engineer in developing and adopting regulations to carry out the amendatory provisions of this act.

Sec. 18. The State Engineer shall not, before July 1, 2009, impose an administrative penalty pursuant to the amendatory provisions of this act or any regulations adopted to carry out the amendatory provisions of this act.

Sec. 19. *The amendatory provisions of subsection 8 of section 4.9 of this act do not apply to:*

1. *An application to appropriate water filed before July 1, 2007.*

2. *An application to change the place of diversion, manner of use or place of use of appropriated water filed before that date; or*

3. *A written report relating to an application specified in subsection 1 or 2.*

~~Sec. 10.~~ Sec. 20. This act becomes effective on July 1, 2007.

MIKE MCGINNIS

MARILYN KIRKPATRICK

DEAN A. RHODES

DAVID BOEZIEN

MICHAEL A. SCHNEIDER

PETE GOICOECHEA

Senate Conference Committee

Assembly Conference Committee

Senator McGinnis moved that the Senate adopt the report of the first Conference Committee concerning Senate Bill No. 274.

Remarks by Senator McGinnis.

Motion carried by a constitutional majority.

*Mr. President:*

The first Conference Committee concerning Senate Bill No. 354, consisting of the undersigned members, has met and reports that:

It has agreed to recommend that the Amendment Nos. 930 and 1017 of the Assembly be concurred in.

It has agreed to recommend that the bill be further amended as set forth in Conference Amendment No. 32, which is attached to and hereby made a part of this report.

Conference Amendment

"SUMMARY--Makes various changes to provisions relating to the safety of children. (BDR 15-1062)"

"AN ACT relating to the safety of children; prohibiting the possession of certain firearms on the property of or in a vehicle of child care facilities; revising the definition of "firearm", requiring children who are taken into custody for possession of a firearm while on school property to submit to an evaluation by a qualified professional and a drug test; revising

requests a conference, and appointed Senators Horsford, Mathews and Hardy as a first Conference Committee to meet with a like committee of the Assembly.

Also, I have the honor to inform your honorable body that the Senate on this day respectfully refused to recede from its action on Assembly Bill No. 428, Senate Amendments Nos. 695, 948, and requests a conference, and appointed Senators Anodel, Washington and Care as a first Conference Committee to meet with a like committee of the Assembly.

Also, I have the honor to inform your honorable body that the Senate on this day respectfully refused to concur in the Assembly Amendment No. 1082 to Senate Bill No. 404.

Also, I have the honor to inform your honorable body that the Senate on this day appointed Senators Nolan, Lee and Carlton as a first Conference Committee concerning Senate Bill No. 43.

Also, I have the honor to inform your honorable body that the Senate on this day appointed Senators McGinness, Rhoads and Schneider as a first Conference Committee concerning Senate Bill No. 274.

Also, I have the honor to inform your honorable body that the Senate on this day appointed Senators Horsford, Lee and Nolan as a first Conference Committee concerning Senate Bill No. 303.

Also, I have the honor to inform your honorable body that the Senate on this day appointed Senators Lee, McGinness and Washington as a first Conference Committee concerning Senate Bill No. 328.

Also, I have the honor to inform your honorable body that the Senate on this day appointed Senators Townsend, Heck and Schneider as a first Conference Committee concerning Senate Bill No. 436.

Also, I have the honor to inform your honorable body that the Senate on this day appointed Senators Anodel, Care and Washington as a first Conference Committee concerning Senate Bill No. 483.

Also, I have the honor to inform your honorable body that the Senate on this day appointed Senators Hardy, Lee and Beers as a first Conference Committee concerning Senate Bill No. 509.

Also, I have the honor to inform your honorable body that the Senate on this day adopted the report of the first Conference Committee concerning Senate Bill No. 19.

Also, I have the honor to inform your honorable body that the Senate on this day adopted the report of the first Conference Committee concerning Senate Bill No. 244.

SHERY L. RODRIGUEZ

*Assistant Secretary of the Senate*

#### MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Ocegueda moved that Senate Bill No. 490 be taken from the Chief Clerk's desk and placed on the General File.  
Motion carried.

#### GENERAL FILE AND THIRD READING

Senate Bill No. 490.

Bill read third time.

The following amendment was proposed by Assemblyman Conklin:  
Amendment No. 1123.

AN ACT relating to the Legislature; revising provisions governing bill draft requests authorized for various requesters; revising provisions governing the prefilng, reprinting and transmittal of bills and resolutions; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law specifies the number of bill drafts various entities may request the Legislative Counsel to prepare. (NRS 218.240-218.255) Sections

## Certificate of Service

I hereby certify that on this day, the 15<sup>th</sup> day of April, 2014, I caused to be delivered a copy of the foregoing ***Appendix-Volume I and Volume II to 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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*Respondent*

*s/ Lynda S. Mabry*

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Lynda S. Mabry