Case No. 65424

In the Supreme Court of Nevada

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

Petitioners,

vs.

THE SEVENTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of White Pine; and THE HONORABLE ROBERT E. ESTES, Senior District 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.

ANSWER TO PETITION

District Court Case Nos. CV-1204050, CV-1204051, CV-1204052, CV-1204053, CV-1204054, CV-1204055, CV-0418012, CV-0419012

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the Southern Nevada Water Authority is governmental agency and a political subdivision of the State of Nevada.

DATED this 27th day of August 2014.

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BACKGROUND

The Southern Nevada Water Authority ("SNWA") is a non-profit governmental entity comprised of seven local government agencies that provide potable water and/or wastewater services in southern Nevada to approximately two million Nevada residents. 1 CPB App. 083. Members of SNWA's Board of Directors are publicly elected Clark County Commissioners and City Council Members from Las Vegas, North Las Vegas, Henderson and Boulder City. *Id.* SNWA was formed to address southern Nevada's water needs on a regional basis. SNWA's mission is to manage the region's water resources and develop solutions that will ensure reliable water supplies for the Las Vegas Valley. *Id*. One such solution began with the filing in 1989 of groundwater applications in eastern Nevada, including those in Spring Valley (the "SNWA Applications").

The SNWA Applications are a part of what is now called the Clark, Lincoln, and White Pine Counties Groundwater Development Project (the "Groundwater Project") which will deliver groundwater to southern Nevada to protect against drought on the Colorado River, satisfy future demand, and replace temporary supplies. 1 CPB App. 066. Southern Nevada is almost entirely dependent on the Colorado River to meet its water needs, with 90% of southern Nevada's water being provided from the Colorado River. 1 CPB App. 069-070. At the time of the hearing below, and in response to drought on the Colorado River, Lake Mead

dropped by roughly 130-140 feet, which is a 55-60% reduction in the lake's capacity. *Id*. The drought is worse today. In a severe enough decline, water use and operational limitations could cause shortages and SNWA could lose its ability to withdraw water from the lake. *Id.* Water from the SNWA Applications will be essential for health and human safety during such a period. 1 CPB App. 072. In short, southern Nevada needs the water from the SNWA Applications, a water resource independent from the Colorado River, to protect against inevitable shortages on the Colorado River. 1 CPB App. 073, 075.

The State Engineer held two separate administrative hearings on the SNWA Applications, and each time the State Engineer decided to partially grant the SNWA Applications. On January 5, 2006, the State Engineer held a pre-hearing conference regarding the SNWA Applications and some Protestants requested the SNWA Applications be re-published and the protest period re-opened. 1 CPB App. 045. In an Order dated March 8, 2006, the State Engineer denied the request because he did not have the statutory authority to re-open the protest period. *Id.* The March 8, 2006, Order was appealed, and was upheld by the district court on May 30, 2007. 1 CPB App. 046. Protestants appealed the district court's order to this Court. *Id.*

Meanwhile, in September 2006, the State Engineer held an administrative hearing to consider the SNWA Applications, and in April 2007, partially granted

them pursuant to State Engineer Ruling 5726. 1 CPB App. 045-046. Ruling 5726 was not appealed, but this Court decided the appeal from the State Engineer's March 8, 2006, Order, and vacated Ruling 5726 on procedural grounds. The Court concluded that too much time had passed between the filing and the granting of the SNWA Applications, and ordered the State Engineer to "re-notice the applications and re-open the protest period." 1 CPB App. 046-047; *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 20, 234 P.3d 912, 920 (2010).

Pursuant to this Court's holding in *Great Basin Water Network v. Taylor*, the SNWA Applications were re-noticed and the statutory protest period re-opened on January 26, 2011. 1 CPB App. 047. Final publication of the SNWA Applications occurred on February 24, 2011 and the statutory protest period ended on March 26, 2011. The SNWA Applications were protested by multiple parties, including the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints ("CPB"). After the conclusion of the protest period, the State Engineer held a hearing on the SNWA Applications ("2011 Hearing"). The 2011 Hearing was the most extensive water rights hearing in Nevada's history. Over the 28 days and 150 hours of hearings, the State Engineer saw over 850 exhibits totaling over 23,500 pages submitted into evidence, and heard testimony from 38 expert witnesses.

CPB protested 12 of the 19 SNWA Applications on behalf of Cleveland Ranch. CPB filed its protests in March 2011 on the grounds that the SNWA Applications, if approved, would have a detrimental effect on the water available to CPB at the Cleveland Ranch. CPB did not challenge whether the water from the applications was needed in southern Nevada, whether SNWA's conservation plan was adequate, or whether SNWA has the financial and technical capability to build the Groundwater Project. CPB also conceded at the hearing below that there is over 50,000 acre feet of water available and unappropriated in Spring Valley. SNWA App. 0008, 0025.

In Ruling 6164, the State Engineer approved some of the SNWA Applications after finding that 61,127 acre-feet of groundwater is available for appropriation in the Spring Valley basin.[1] The State Engineer denied four of the 19 SNWA Applications to protect CPB's existing water rights. 2 CPB App. 0254. The remaining applications were approved subject to several limitations. The quantity of water permitted to SNWA does not, as CPB contends, represent every drop of water remaining in the basin and does not constitute a full award of the perennial yield. 2 CPB App 0246-0247. Additionally, in a precedent-setting

[1] The State Engineer also issued Rulings 6165-67 regarding SNWA applications in Cave, Delamar and Dry Lake Valleys. CPB inaccurately states that the State Engineer also required staged development in Rulings 6165-67. CPB Writ Petition p.4. He did not. As those rulings did not require staged development, they are not implicated in CPB's Writ Petition proceeding. Also, CPB did not protest or otherwise challenge the SNWA applications in those valleys.

action, the State Engineer set aside *groundwater* in Spring Valley in order to protect *surface water* springs. 1 CPB App. 0140. These actions made 8,800 acre feet of groundwater unavailable for SNWA to use.

In Ruling 6164, the State Engineer complied with NRS 533.370 and made findings that unappropriated water exists in Spring Valley, and that the development of such water will not conflict with existing rights or threaten to prove detrimental to the public interest. 2 CPB App. 0253-0254. Further, the State Engineer found SNWA has the good faith intention and financial ability to construct the necessary works, southern Nevada needs the water, the SNWA conservation plan is adequate, the Groundwater Project is environmentally sound, and will not unduly burden future growth in the basin of origin. *Id.* The State Engineer's factual findings were supported by extensive expert reports and testimony, multiple simulations from a comprehensive groundwater model, extensive baseline data from Spring Valley, the science of managed succession, and lessons learned from development of resources in places like Owens Valley. The State Engineer also concluded that staged development pursuant to NRS 533.3705 was appropriate, and required incremental development and compliance with an extensive monitoring, management and mitigation plan ("3M plan"). Staged development is described in NRS 533.3705:

> 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.

Pursuant to the permits issued by the State Engineer for the SNWA Applications, at least two years of biologic and hydrologic baseline data must be collected and approved before any pumping can occur. 2 CPB App. 0255. Pumping is then controlled in three stages with mandated and extensive monitoring, management and mitigation throughout the life of the Groundwater Project. 2 CPB App. 0254-0256. The maximum amount of pumping authorized in Stage 1 is less than the amount of water CPB conceded at the hearing below is available in Spring Valley. SNWA is required to submit all annual data collected to the State Engineer and that information will be used by the State Engineer to decide whether to approve pumping at each new stage.

In April 2012, petitions for judicial review of Ruling 6164 were filed by multiple parties. On appeal to the Seventh Judicial District Court, CPB challenged the State Engineer's authority to invoke NRS 533.3705, claiming that the statute

was applied retroactively and in contravention of this Court's ruling in *Great Basin Water Network v. Taylor*, and that authorizing staged development allowed the State Engineer to avoid making factual findings required by NRS 533.370(2). 2 CPB App. 0265. The district court rejected CPB's arguments and ruled NRS 533.3705 was applied prospectively and properly. *Id.* The district court also confirmed the State Engineer's findings that unappropriated water is available in Spring Valley, that SNWA justified its need for the water, and that SNWA proved it can finance and build the Groundwater Project.

Portions of the decision of the district court were timely appealed by the State Engineer, SNWA, and CPB. CPB appealed the district court's decision on January 29, 2014, specifically contending NRS 533.3705 was improperly used in the approval of the SNWA applications. The State Engineer and SNWA appealed four portions of the district court's decision that disturbed the State Engineer's ruling on January 10 and 13, 2014, respectively. These appeals are not yet briefed.

In addition to the appeals, on April 15, 2014, CPB filed a Petition for Limited Writ Review of NRS 533.3705 ("Writ Petition"), asking this Court to determine whether the statute was applied retroactively to permit staged approval of the Applications. On May 30, 2014, the State Engineer and the SNWA filed separate Petitions for Writ of Mandamus related to three important issues of Nevada water law addressed in the district court's decision. This Court ordered

answers to the CPB, SNWA and State Engineer writ petitions on July 2, 2014. This is SNWA's Answer to CPB's Writ Petition.

ARGUMENT

I.

CPB'S WRIT PETITION SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED SHOULD BE REVIEWED IN THE APPEALS FROM THE DISTRICT COURT RULING

The Nevada Supreme Court "is confined to controversies in the true sense." *City of North Las Vegas v. Cluff*, 85 Nev. 200, 201, 452 P.2d 461, 462 (1969). Generally, the Court "do[es] not have constitutional permission to render advisory opinions." *Id.*, 452 P.2d at 462; Nev. Const. art 6, § 4. Writs are extraordinary remedies and are available when "the petitioner has no plain, speedy and adequate remedy in the ordinary course of law." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 123 Nev. 468, 474, 168 P.3d 731, 736 (2007). The right to have an issue considered on appeal "will generally constitute an adequate and speedy legal remedy precluding writ relief." *Id.*, 168 P.3d at 736. The issues raised in a writ petition and an appeal should be considered by the Court to determine whether a writ is appropriate. *Id.* at 474-475, 168 P.3d at 736.

Here, CPB asks this Court to review whether NRS 533.3705 can be applied retroactively. CPB's Writ Petition p.iii. Also, CPB has filed a motion to dismiss SNWA's and the State Engineer's appeals, and asks this Court to only review its own writ. The issue raised in CPB's Writ Petition is also raised in CPB's appeal,

and the issue is more properly considered in the context of an appeal. Just as CPB wants to avoid a new remand hearing before knowing whether the district court properly applied NRS 533.3705, SNWA and the State Engineer are entitled to know whether the district court properly coined new, unprecedented water law requirements before a remand hearing is held to force application of those new requirements.

Also, CPB's Writ Petition should not be heard in isolation. CPB supports its argument with district court findings that are subject to review in SNWA's and the State Engineer's appeals. CPB cites to certain conclusions by the district court to imply the State Engineer authorized staged development pursuant to NRS 533.3705 to avoid making factual findings required by NRS 533.370. CPB's Writ Petition p.7-8. Hence, this Court will be required to review these district court findings to decide CPB's Writ Petition. As these findings are subject to review under the appeals, rather than engage in piecemeal review, the Court should reject CPB's Writ Petition and consider these matters through those appeals. Alternatively, the Court should consider the CPB, SNWA and State Engineer writs together.

II.

THE STATE ENGINEER PROPERLY APPLIED NRS 533.3705

A. The Use of Staged Development in Ruling 6164

The State Engineer took great care in Ruling 6164 to balance the needs of the environment and local communities with his responsibility to make precious water resources available for appropriation. 1 CPB App. 065-068. To ensure this balance is made, the State Engineer required staged development and compliance with a 3M plan. 2 CPB app. 0254-0255. The SNWA Applications are subject to both limitations to ensure the continued protection of existing water rights and the environment. In contrast to CPB's portrayal, staged development is a critical, useful and prudent tool for the State Engineer to use to bridge the modern conflicts between human needs and environmental demands.

The State Engineer required the SNWA Applications to be developed in well monitored and regulated stages. 2 CPB App. 0254-0255. The stages ensure water resources will be slowly developed and closely monitored, and impacts can either be predicted and avoided altogether, or mitigated promptly. This additional safeguard will also ensure the continued protection of environmental resources. 1 CPB App. 157-158; 2 CPB App. 0180, 0185, 0198, 0201, 0232, 0250. Plants can healthily respond to slow declines in water level, but not to immediate, drastic declines. Staged development ensures that any declines in water levels will be

slow and manageable (known as “managed succession”), which promotes a healthy plant transition.

The State Engineer also ruled that the size and scope of SNWA's Groundwater Project demands a "comprehensive monitoring, management and mitigation plan that will control development of the Applications long after the Applications are permitted.” 1 CPB App. 141. Monitoring and management goes hand-in-hand with staged development. Staged development limits the progression of the development so the reaction of the hydrologic and biologic system to the new stresses can be fully understood through monitoring and management. The State Engineer determined that 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.” 2 CPB App. 0189. Staged development also assures that objective standards can be set for mitigation activities before irreversible adverse impacts can occur. CPB’s claim that the State Engineer is not a party to the 3M Plan is simply inaccurate. After hearing extensive testimony and thoroughly reviewing the 3M Plan, the State Engineer approved the 3M Plan and “conditioned [the SNWA Applications] upon the Applicant’s compliance with that Plan, and any amendments to that Plan that the State Engineer requires at a later date.” 2 CPB App 0255. Further, each of the

approved applications expressly states that it is "granted and conditioned upon the applicant's compliance with the approved Hydrologic Monitoring and Mitigation Plan and the Biological Monitoring Plan." *Id.* Thus, as the State Engineer specifically told CPB's counsel in the hearing below, the 3M Plan is a permit term that the State Engineer will enforce throughout the life of the Groundwater Project. SNWA App. 0035. ("I just want to make it clear…[that]…if permits are ever issued, there's permit terms, the regulation of these water rights are within our purview. If there's adverse impacts to existing rights…we're not going to be sitting on our hands. I mean, we're going to [be] out there being proactive. And we can assess penalties, we can require to cease and desist, curtailment of pumping, et cetera.")

After much evidence and testimony, the State Engineer concluded that "the monitoring efforts and data collection in Spring Valley will provide scientifically sound baseline information from which changes to the system and potential impacts can be diagnosed, assessed, and, if necessary, mitigated." 1 CPB App. 149. As noted by the State Engineer in his rulings, monitoring and management is a tool he has used in the past, especially for large-scale water development such as that seen in the mining industry. 1 CPB App. 141. The 3M plan, coupled with staged development, allowed the State Engineer to properly balance the needs of

Nevada's largest communities for water with the critical requirements of environmental and water right protection.

B. The State Engineer Applied NRS 533.3705 Prospectively, not Retroactively

The plain language of NRS 533.3705 indicates the State Engineer applied the law prospectively. Judicial review of any statute begins with what the statute actually says. *Cromer v. Wilson*, 126 Nev. ___, ___, 235 P.3d 788, 790 (2010). When there is no ambiguity in a statute, the plain and ordinary meaning of the statutory language is controlling, and there is no need to implement rules of statutory construction. *Id.* NRS 533.3705 provides expressly that "upon approval" of an application, staged development can be required. As used in the statute, the word "upon" means contemporaneously or immediately thereafter. *See* The Random House Dictionary, Revised Edition (1984) (defining the word "upon" as "on the occasion of, at the time of, or immediately after"). When read in context, the statute means "at the time of approval of an application…." Pursuant to NRS 533.3705's plain language, staged development can be required at the time an application is approved – not when an application is initially filed or published. The plain language of the statute indicates that staged development can be applied to any application that has not yet been approved (permitted). Since the plain language of NRS 533.3705 is clear and unambiguous, this Court should not look beyond its plain language.

In Ruling 6164, the State Engineer approved the SNWA Applications pursuant to NRS 533.370. *Upon that approval*, the State Engineer used NRS 533.3705 to control and enforce his findings under NRS 533.370 by conditioning SNWA's water development. Thus, the State Engineer applied the statute prospectively. NRS 533.3705 was enacted in 2007, and the Applications were permitted in 2012 – five years after the enactment of NRS 533.3705. The statute was thus applied properly – upon approval of the Applications in 2012. The State Engineer has similarly conditioned other pre-2007 applications on staged development, and CPB's argument would undermine the validity of these actions by the State Engineer. SNWA App. 0037-39 (State Engineer Permit 64692 (Tule Valley)); SNWA App. 0071, 0083 (Ruling 5918 (Lake Valley)); SNWA App. 121-22 (Ruling 5816 (Red Rock Valley)).

The district court agreed that the State Engineer applied NRS 533.3705 prospectively. 2 CPB App. 0265. CPB made the same argument to the district court that is raises in its Writ Petition. The district court found that NRS 533.3705 was properly applied to this case because the approval of the SNWA Applications occurred after the enactment of NRS 533.3705. *Id.* On this point, the district court was correct. Accordingly, this Writ Petition should be rejected.

C. NRS 533.3705 does not upset Legal Rights that Existed Prior to the Adoption of NRS 533.3705

This Court's precedent clearly indicates NRS 533.3705 was not applied retroactively in this case. In *Public Employees' Benefits Program v. Las Vegas Metropolitan Police Department*, 124 Nev. 138, 179 P.3d 542 (2008) (*"PEBP"*), this court concluded NRS 287.023(4) was not applied retroactively. That statute went into effect on October 1, 2003, and required public employers to pay a retirement health care subsidy for employees "for persons who join the [PEBP] upon retirement . . .." *Id.* The Metropolitan Police Department argued that requiring it to pay the subsidy for employees who had retired prior to October 1, 2003 was a retroactive application of the statute.

Relying on *INS v. St. Cyr*, 533 U.S. 289 (2001), this Court stated that "[a] statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *PEBP*, 124 Nev. at 155, 179 P.3d at 553-4. The court continued to say "even though a statute operates only from the time of its enactment, it is retroactive if it impairs vested rights and past transactions." *Id.*, 179 P.3d at 554 (internal citations omitted). NRS 287.023(4) required employers to pay the subsidy on premiums for coverage only after the law went into effect in October 2003, and not for premiums paid before that date. Thus, even though some of the employees had enrolled in

the coverage prior to the time of the law's enactment, the requirement that the Metropolitan Police Department pay the subsidy on their programs from the date of enactment was not a retroactive application of the statute, "even though it may have unsettled expectations that Metro . . . relied on in negotiating collective bargaining agreements…." *Id.*, 179 P.3d at 554.

Application of NRS 533.3705 simply did not *impair the vested rights* of any protestant that were developed prior to enactment of the statute. *See id*, 179 P.3d at 554. Most importantly, NRS 533.3705 did not alter the requirement under Nevada water law that the SNWA Applications not conflict with existing rights. Also, if a potential protestant to the re-published SNWA Applications had reviewed Nevada water laws, he or she would have been aware of NRS 533.3705 prior to filing a protest in 2011. Also, such a protestant should have been aware that the State Engineer previously approved the SNWA Applications in Ruling 5726 with staged development limitations. Despite CPB's implication that it was prejudiced because staged development was not discussed at the State Engineer hearing, CPB's Writ Petition p.4, CPB entered the protest period and hearing after the enactment of NRS 533.3705 and the vacation of Ruling 5726, and was aware that the State Engineer could initially limit development to a reduced amount.

NRS 533.3705 is unlike the statute that was reviewed in *Pressler v. City of Reno*, 118 Nev. 506, 50 P.3d 1096 (2002). In *Pressler*, the newly-adopted "at

will" legislation altered the terms of employment for city employees. The plaintiff in that case had been an employee for 25 years, and retroactive application of the new statute would have altered his employment terms, upon which the court held he had a reasonable right to rely. Here, the only vested property rights that the protestants arguably could claim are impacted would be water rights. Those rights remain protected today just as they were prior to the enactment of NRS 533.3705. In fact, the staged development permitted by NRS 533.3705 manifestly increases the level of protection for protestants' water rights.

CPB argues that this Court's holding in *Great Basin Water Network v. Taylor* ("*GBWN v. Taylor*") compels the conclusion that NRS 533.3705 was applied retroactively. However, the facts of *GBWN v. Taylor* are distinguishable from this case, and the rights the court sought to protect in that case are not implicated here. As illustrated by *PEBP* and *Pressler*, the key to retroactivity analysis is whether vested rights were improperly changed by application of a newly-enacted law. *See INS v. St. Cyr*, 533 U.S. 289 (2001). If no vested rights are altered by application of the new law, it is permissible for that law to change rules of general applicability.

In *GBWN v. Taylor*, the Court concluded that NRS 533.370, as it existed in 1989, required applications to be granted or denied by the State Engineer within one year of the protest period. A 2003 amendment to the statute allowed the State

Engineer more time to grant or deny applications for municipal water rights like SNWA's Applications. The *GBWN* court rejected the State Engineer's attempt to apply the 2003 amendment to the SNWA Applications because expiration of the one-year period in the original statute had already affected the status of the 1989 applications when the 2003 amendment was passed. The court reasoned that protestants had a right to rely on the lapse in the applications after one year. In order to change the legal status of the applications that had lapsed, the 2003 amendment had to be applied retroactively.

Here, NRS 533.3705 does not change the legal status of the SNWA Applications, which were republished in 2011. Therefore, NRS 533.3705 is not being applied retroactively in the manner in which the Court disapproved in *GBWN v. Taylor*.

D. Republication of the SNWA Applications Cured any Due Process Concerns that Arose from the Enactment of NRS 533.3705

In *GBWN v. Taylor*, the Court was concerned that the 17-year period that had passed between the filing of protests and the State Engineer's hearing on the applications was unfair to both original protestants and potential new protestants. To correct due process concerns, the *GBWN* court required the State Engineer to re-publish the SNWA Applications and allow additional protests. Just as republication cured the *GBWN* court's due process concerns, republication cured any concern arising from the adoption of NRS 533.3705. After NRS 533.3705 was

enacted in 2007, protestants were afforded an opportunity in 2011 to include protest grounds relating to staged development. Therefore, to the extent a prejudice or due process concern could result from the application of NRS 533.3705 to the SNWA Applications, that concern was cured by the 2011 republication.

E. The Unintended Consequences of CPB's Argument that NRS 533.3705 was Applied Retroactively

The criteria contained in NRS 533.370(3) relating to interbasin groundwater transfers were adopted in 1999. Interbasin transfer criteria require consideration of whether 1) the importation is needed, 2) the importing basin has an adequate conservation plan, 3) the proposed project will be environmentally sound, and 4) the proposed project will not unduly limit development in the basin of origin. The SNWA Applications undeniably propose an interbasin transfer. However, if the court chooses to adopt the CPB argument that no law enacted after applications were filed can properly apply to those applications, the interbasin transfer criteria would not apply to SNWA's 1989 Applications. Further, CPB's view that new statutes do not apply to the approval of an existing application would force the construction of an impossible matrix to track, based on the date a water right application is filed and what statutory amendments apply to each water application.

III.

NRS 533.3705 CODIFIED THE EXISTING POWERS OF THE STATE ENGINEER TO APPROVE APPLICATIONS BASED ON STAGED DEVELOPMENT

The State Engineer did not retroactively apply NRS 533.3705 because that statute actually confirmed the existing powers of the State Engineer. Legislative history illustrates this. The State Engineer's power to require incremental development arises inherently from his power to deny a water right application and from express powers granted pursuant to NRS 534.110(5). The State Engineer used these powers to impose incremental development requirements on water right permits in Nevada for decades prior to the adoption of NRS 533.3705.

The State Engineer continues to control and regulate water rights during the development stage and long after they permitted. His continued involvement is part of the State Engineer's enduring statutory duties, not a signal that the State Engineer failed to make necessary findings before a water right was granted. Depending on the nature of a project, the State Engineer has varying degrees of involvement. For the most common water right, proofs must be filed to document when the works of diversion were completed and when the water had been put to beneficial use. NRS 533.390, 533.400. In many cases, the State Engineer additionally requires the periodic submittal of routine pumping records and monitoring data to better control the development and progress of a water right. NRS 534.110. In more complex cases, the State Engineer sets milestones of

development that require his specific review and approval before further development is allowed.

At any time after a permit is issued, the State Engineer has the authority to further regulate the use of the water granted. *See* NRS chapter 534. All water rights issued by the State Engineer specify that "the amount of water herein granted is only a temporary allowance and that the final water right obtained under this permit will be dependent upon the amount of water actually placed to beneficial use." And all water rights are also issued "subject to existing rights." The permit amount merely reflects the *maximum* amount of water authorized to a user, with the ultimate limit of the water right dependent on the ability to beneficially use the water without conflicting with existing rights or harming the environment.

A. The Legal Basis for the State Engineer's Pre-existing Authority to Require Staged Development

The legislative history of NRS 533.3705, enacted through SB 274, confirms that the incremental development section of SB 274 was a restatement of powers already held and exercised by the State Engineer. In the *Summary of Legislation* prepared by the Legislative Counsel Bureau ("LCB"), the LCB informed the legislature prior to the enactment of SB 274 that the bill "*confirms* the authority of the State Engineer to limit the initial use of approved water rights to a lesser quantity…." Legislative Counsel Bureau, Research Division, *Summary of*

Legislation: 74th Sess. 2007, 23d Spec. Sess. June 5, 2007 at 190. The LCB clearly understood that the enactment of SB 274 would not create a new power for the State Engineer, but would confirm the power he already had. This is also what the legislature understood when it voted to enact SB 274, thereby evidencing its clear intent that SB 274 confirm the existing power of the State Engineer to impose incremental development requirements on any permit.

Prior to adoption of SB 274 in 2007, incremental development was addressed in the January 2007 Interim Report to the 74th Session of the Legislature from the Committee to Study the Use, Allocation and Management of Water Resources. The committee recommended that a bill be adopted to direct the State Engineer to consider incremental development of a project during the permitting process. Legislative Counsel Bureau, *Bulletin No. 07-11, Use, Management and Allocation of Water Resources* at 46 (Jan. 2007). The State Engineer, in response, commented that "this recommendation is unnecessary because he already has the statutory authority to perform these functions and can take these into account when reviewing interbasin transfer applications." *Id.*

The State Engineer's pre-existing power to require incremental permit development arises out of his general power to completely deny a water right application. In *United States v. Alpine Land and Reservoir Company,* 119 F.Supp 1470, 1479 (D. Nev. 1996), the court agreed that the power to deny an application,

which is a clear power of the State Engineer granted pursuant to NRS 533.370, includes the inherent power to conditionally approve an application. In that case, a water permit holder challenged the State Engineer's authority to place conditions on its permits that would require it to bear transmission losses. Finding in favor of the State Engineer, the federal district court stated that although the Nevada Supreme Court had not addressed the issue, the reasoning of the New Mexico Supreme Court was sound. The New Mexico Court has long held that the New Mexico "state engineer may properly impose suitable conditions on granting applications as inherent in the broader statutory authority vested in the state engineer to deny applications if they impair existing water rights." *City of Albuquerque v. Reynolds,* 71 N.M. 428, 379 P.2d 73, 81 (1962). The soundness of that ruling led the federal district court to agree that the power to deny an application includes the inherent power to conditionally approve an application. Thus, the State Engineer has been conditionally approving applications since well before the enactment of NRS 533.3705. The enactment of the statute codified the inherent power that the State Engineer was already exercising with court approval.

In addition to the State Engineer's inherent powers to condition the approval of an application, the State Engineer has the power to approve an application subject to "express conditions." NRS 534.110(5). Nevada water law "does not prevent the granting of permits to applicants later in time on the ground that the

diversions under the proposed later appropriations may cause the water level to be lowered at the point of diversion of a prior appropriator, so long as [. . .] the rights of holders of existing appropriations can be satisfied under such *express conditions*." *Id.* (emphasis added). Here, the State Engineer required incremental development as an express condition in the permit terms for the SNWA water rights because he determined a reasonable lowering of the water table may result from the development of those rights, and that staged development would assure "rights of the holders of existing appropriations can be satisfied." Clearly this power existed prior to the adoption of NRS 533.3705, and SB 274 simply confirmed the power to require staged development. *See also* NRS 533.020(2) (State Engineer is empowered make rules and regulations *as may be necessary* for the proper execution of his duties) (emphasis added).

B. <u>Prior Practice of State Engineer</u>

Prior practice of the State Engineer also reflects that his power to require staged development existed before the enactment of NRS 533.3705. Specific limitations and planned, staged development are tools that are often used by the State Engineer to regulate large extractions of water, and to further control the development of the water resource. This tool is commonly used in large mining, industrial, commercial, or municipal operations. Close monitoring and controls are required by the State Engineer to better understand the dynamics of a water system and to ensure continued protection of water rights and environmental resources.

For decades before the enactment of NRS 533.3705, the State Engineer issued permits that require staged development. *See* SNWA Pamphlet of State Engineer Permits With Staged Development.[2] Examples of staged development permits that were issued before NRS 533.3705 was enacted are listed in the following table.

Staged Development Permits Issued by State Engineer

Permit	Issuance Date	Basin	Ruling/Permit
Permits 35040-35043	7/17/1981	Truckee Meadows	Permit
Permits 41674-41679	7/22/1981	Truckee Meadows	Permit
Permit 43401	10/27/1981	Dayton Valley	Permit
Permit 45548	2/21/1984	Elko Segment	Permit
Permit 47043	2/22/1984	Elko Segment	Ruling 2850
Permit 47252	5/3/1984	Elko Segment	Permit
Permits 47127-47132	7/18/1984	Pleasant Valley	Ruling 2989
Permits 49943-49946	10/22/1987	Brady's Hot Springs Area	Ruling 3467
Permits 51841-51848	11/4/1988	Amargosa Desert	Permit
Permits 50701, et al	12/8/1988	Ivanpah Valley-North	Permit
Permits 47615, et al	1/26/1989	Goshute Valley	Ruling 3573
Permit 43699	3/29/1990	Carson Valley	Permit
Permits 46029, et al	8/30/1990	Black Mountains Area	Ruling 3724
Permit 54866	11/6/1990	Carson Valley	Permit
Permit 57327	12/1/1992	Carson Valley	Permit
Permits 55450, 58269	12/19/1995	Muddy River Springs Area	Ruling 4243

[2] Here, the issues presented by CPB require a review of the past practice of the State Engineer in the issuance of permits and the entering of rulings. Nevada Rule of Appellate Procedure 28(f) directs that if the Court's determination of the issues presented requires a review of "statutes, rules, regulations, etc.," the relevant parts of those items can be supplied in pamphlet form. Also, the State Engineer's permits and rulings are public records of which the Court may take judicial notice. SNWA's pamphlet does not include all staged development permits the State Engineer has issued, but it constitutes a representative sample.

Specifically, in 1981, the State Engineer required staged development in municipal water rights granted to Carson City under Permits 43401 and 43699. These rights were not protested, and resulted in no hearing or ruling. However, they were limited and required to be developed in stages to ensure protection of existing rights. While each permit was for no more than 1,000 acre feet, the State Engineer required that the "annual duty of water under [each] permit is initially limited to 500 acre-feet." *Id.* at 13, 111, 120. Prior to any diversion of groundwater under the permits a series of monitoring wells is required to be installed within the general area of the production wells. The amount of water allowed under each permit could be raised to a maximum of 1,000 acre-feet "in stages and as approved and authorized by the State Engineer only after the State Engineer has determined that the additional withdrawal will not adversely affect existing rights or the ground water resource." *Id.* at 116, 120, 126.

In 1985, Permits 47127-47132 were granted to the Mt. Rose Service Company, but conditioned on staged development. *Id.* at 27-66. These applications were protested by several water users in the Pleasant Valley Basin. A hearing was held, and the rights were ultimately granted for 1,000 acre feet, but the "initial combined diversion of water [could] not exceed 500 acre-feet annually until such time as the applicant demonstrate[d] that the source of water can sustain the yield necessary to support additional phased development and without

interference or adverse effects on existing rights." *Id.* at 58-59. Portions of these water rights are now owned by Washoe County to supply municipal service to the Pleasant Valley area and portions are owned by Mt. Rose Development for quasi-municipal uses in and around the Mt. Rose Ski Resort.

There are many other examples of the State Engineer using staged development as a tool across the state, including permits issued to Elko County School District, Elko Heat Company, Brady Power Partners, Primm South Real Estate Company, Moapa Valley Water District and the City of West Wendover. *Id.* Another notable ruling that granted water rights based on staged development was vacated Ruling 5726, which initially granted water rights in Spring Valley to SNWA in 2006. SNWA App. 0135.

Conditional approvals have been utilized by the State Engineer and since before NRS 533.3705 was enacted. Thus, NRS 533.3705 is simply an express restatement of an inherent power that the State Engineer has held and had been using for many years prior to Ruling 6164. This power -- and hence NRS 533.3705 -- was not exercised retroactively here.

IV.

STAGED DEVELOPMENT DOES NOT ALLOW APPLICATIONS TO LINGER FOR YEARS OR DELAY FINDINGS REQUIRED UNDER NRS 533.370

CPB claims NRS 533.3705 allows the SNWA Applications to linger for years. In light of the republication requirements from *GBWN v. Taylor*, this

argument is without merit. The SNWA Applications were re-noticed, and a new protest period opened, in January 2011. The protest period ended in March 2011. After the extended hearings, the rulings were issued by the State Engineer in March 2012, within one year of the expiration of the protest period.

Further, CPB incorrectly asserts that staged development delays the NRS 533.370 findings that the State Engineer is required to make before approval of an application. NRS 533.3705 allows the State Engineer to approve an upper limit to the amount of water in a permit, while providing for a lesser quantity to be pumped during the initial development of that water. The initial approval of the upper limit, however, must satisfy all the requirements of NRS 533.370 *at the time of approval*. NRS 533.3705 then authorizes a *downward* adjustment from the total amount of water approved; it does not allow for pumping in excess of the amount of water initially permitted. If a lesser amount of diversion is initially allowed by the State Engineer pursuant to NRS 533.3705, any subsequent approval of increased pumping must continue to satisfy all NRS 533.370 requirements. *See* NRS 533.3705 ("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*") (emphasis added). Clearly, application of the requirements of 533.370 at the time of initial approval, as well as when subsequent

increases in pumping are allowed under NRS 533.3705, affords more, not less, protection for existing rights and the environment.

In this case, the State Engineer understood "if an application must be denied under NRS 533.370 where there is no unappropriated water at the source, where there are conflicts, or where the application threatens to prove detrimental to the public interest, then it cannot be approved conditionally [pursuant to NRS 533.3705]." CPB's Writ Petition at p.26. With that in mind, the State Engineer considered the SNWA Applications, *straight up and straight down,* and did not delay the resolution of any party's rights. He denied four SNWA Applications and, after expressly making all of the necessary NRS 533.370 findings, permitted 61,127 acre-feet under the remaining 15 SNWA Applications. With the understanding that staged development would be utilized, the State Engineer found that the full 61,127 acre-feet can be developed without conflicts with existing rights and in compliance with the interbasin transfer criteria. The gradual nature of development is an additional layer of protection for existing rights; it is not, as CPB characterizes it, an attempt to dodge statutory responsibility under NRS 533.370.

CPB's position would also improperly render NRS 533.3705 surplusage. CPB claims that the State Engineer must make all the NRS 533.370 findings without considering staged development at all. The court should reject CPB's

invitation to ignore inconvenient portions of the water law. Instead, the two statutes should be read to be consistent with one another and both statutes should be given meaning. The State Engineer has done just that here by authorizing pumping of 61,127 acre-feet per year under NRS 533.370, but initially limiting such pumping under NRS 533.3705 to verify his determination as development progresses. Adopting CPB's interpretation of the statutes, however, would render NRS 533.3705 meaningless and inconsistent with NRS 533.370, a result that should be avoided. *See Paramount Ins. v. Rayson & Smitley,* 86 Nev. 644, 649, 472 P.2d 530, 533 (1970).

Finally, NRS 533.3705 does not "wreak havoc," as CPB alleges, with the timelines for proof of beneficial use under NRS 533.380. NRS 533.380 requires the holder of an approved application to prove that it has completed the works of diversion and placed the permitted water to beneficial use within a certain period of time. The period for municipal water rights is five years. However, NRS 533.380 also allows the State Engineer to extend that period of time "for good cause shown." Rules of statutory construction direct that every effort must be made to read statutes in context and to interpret them to work together in a common statutory scheme. *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999) (whenever possible, a court will interpret a rule or statute in harmony with other rules or statutes); *Charlie Brown Constr. Co. v. Boulder*

City, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990), *overruled on other grounds by Calloway v. City of Reno,* 116 Nev. 250, 993 P.2d 1259 (2000).

Here, the staged development ordered by the State Engineer may require the proofs of completion to be filed beyond five years from the date the Applications were approved, but the decision to allow an extension of time is well within the discretion afforded the State Engineer in the statute. Because the State Engineer understood that the scope of the Groundwater Project might require an extension of time, the SNWA Applications were approved in contemplation of such extensions. Because such extensions are discretionary to the State Engineer, they cannot "wreak havoc" with the statutory deadlines.

CONCLUSION

For the reasons stated herein, CPB's Writ Petition should be rejected.

Dated this 27th day of August, 2014.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14 point, double-spaced Times New Roman font.

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

Rules of Appellate Procedure.

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