

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioner,

vs.

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

Real Parties in Interest.

Case No. 65424

Electronically Filed
Sep 02 2014 04:44 p.m.
District Court Case No. 1204050
Therese K. Lindeman
Clerk of Supreme Court
CV-1204050
CV-1204051
CV-1204052
CV-1204053
CV-1204054
CV-1204055
CV-0418012
CV-0419012

**STATE OF NEVADA'S ANSWER TO CPB'S PETITION FOR
LIMITED WRIT REVIEW REGARDING APPLICATION OF
NRS 533.3705 TO SNWA's 1989 APPLICATIONS**

CASSANDRA P. JOSEPH
Senior Deputy Attorney General
Nevada State Bar # 9845

JERRY M. SNYDER
Senior Deputy Attorney General
Nevada State Bar # 6830

100 N. Carson Street
Carson City, Nevada 89701
(775) 684-1216

(775) 684-1103 fax

cjoseph@ag.nv.gov

jsnyder@ag.nv.gov

Attorneys for Nevada State Engineer

TABLE OF CONTENTS

Title	Page
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. PROCEDURAL BACKGROUND.....	3
III. FACTUAL BACKGROUND.....	6
A. Summary of Facts Relating to Staged Development.....	6
B. Summary of Facts Relating to the 3M Plans	8
IV. STANDARD OF REVIEW	10
V. ARGUMENT	11
A. The State Engineer Properly Applied NRS 533.3705 to the 2012 Approval of SNWA’s Application	11
B. This Court’s Decision in <i>Great Basin II</i> Does Not Support a Conclusion That NRS 533.3705 Was Applied Retroactively	14
1. The State Engineer Has Not Delayed Ruling on SNWA’s Applications	14
2. <i>Great Basin II</i> Does Not Support CPB’s Argument.....	16
C. CPB’s Retroactive Application Argument Is Inconsistent With Its Position Regarding Application of Other Water Statues	18
D. The State Engineer Has Inherent Authority to Place Conditions On Permits.....	20
VI. CONCLUSION.....	21
CERTIFICATE OF COMPLIANCE.....	vi
CERTIFICATE OF SERVICE	viii

TABLE OF AUTHORITIES

Cases

<i>Bacher v. State Engineer</i> , 122 Nev. 1110, 1117–1118, 146 P.3d 793, 798 (2006).....	12
<i>Clark Co. Sch. Dist. v. Local Gov’t</i> , 90 Nev. 332, 446, 530 P.2d 114, 117 (1974).....	11
<i>Desert Irrigation, Ltd. v. State Engineer</i> , 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997).....	13
<i>Great Basin Water Network v. Taylor</i> , 126 Nev. Adv. Op. 20, 234 P.3d 912, 914 (2010).....	4, 16, 17
<i>Southern Nevada Water Authority v. Carter-Griffin, Inc.</i> , 2010 WL 3605907 (Nev. Sept. 13, 2010).....	4
<i>Pub. Emps.’ Benefits Program v. Las Vegas Metro, Police Dep’t (PEBP)</i> , 124 Nev. 138, 155, 179 P.3d 542, 553 (2008).....	12, 13
<i>Sandpointe Apts. v. Eighth Jud. Dist. Ct.</i> , 129 Nev. Adv. Op. 127, 313 P.3d 849, 854 (2013).....	12
<i>State v. Morros</i> , 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).....	11
<i>United States v. Alpine Land and Reservoir Company</i> , 919 F. Supp. 1470, 1479 (D. Nev. 1996).....	3, 20
<i>United States v. State Engineer</i> , 117 Nev. 585, 589–90, 27 P.3d 51, 53 (2001).....	11

Statutes

NRS 533.370(2)	3, 14, 15, 16, 17, 18
NRS 533.370(3)	2, 18, 19
NRS 533.3705.....	passim
NRS 533.3705(1)	1, 7
NRS 533.450.....	10
NRS 534.110(5)	3

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The threshold question in CPB’s Petition for Limited Writ Review (“Writ Petition”) is whether the State Engineer had authority to condition approval of SNWA’s Applications for the appropriation of groundwater in Spring Valley (“Applications”) on “staged development”—i.e., development that initially limits the amount of water that may be pumped over a period of time (here, two eight-year periods). NRS 533.3705 explicitly provides the State Engineer with this authority,¹ but CPB asserts that NRS 533.3705 does not apply because it was enacted in 2007, after the filing of the SNWA Applications in 1989. However, as the district court concluded, the fact that the Applications were filed prior to enactment of the staged development statute (NRS 533.3705) is irrelevant because

¹ NRS 533.3705(1) reads:

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.

the statute was applicable upon *approval* of the Applications, not upon *filing* of the Applications. Because NRS 533.3705 was enacted before *approval* of SNWA's Applications, which occurred in 2012 after re-publication of the Applications in 2011, the statute applies and provides indisputable authority for the State Engineer to condition SNWA's permits on staged development.

Further, although SNWA's permits were conditioned upon staged development, the State Engineer granted the Applications for a total of 61,127 acre feet annually ("afa"). Thus, despite CPB's assertion otherwise, there has been no postponement by the State Engineer in ruling on the Applications. The State Engineer made the necessary findings to approve the maximum amount of water permitted. CPB and other protestants had a full and fair opportunity to be heard regarding the Applications during the extensive hearings held over the course of six weeks in 2011. Accordingly, there is no delay in ruling and no due process violation exists by applying the statute.

During the hearings in which CPB participated, the State Engineer heard evidence regarding issues addressed in other statutes that were enacted after 1989 and which apply to applications for the appropriation of water, namely the interbasin transfer requirements found in NRS 533.370(3). Notably, CPB does not dispute the applicability of that statute, which increased the burden of proof for

approval of the SNWA Applications. CPB's position regarding retroactivity of statutes enacted after 1989 is inconsistent.

Moreover, aside from NRS 533.3705, the State Engineer has the inherent authority to place conditions on permits in order to ensure the protection of existing rights and natural resources, as he has done for decades. Indeed, the State Engineer is required to avoid conflicts with existing rights and may require any number of permit conditions, including staged development, in order to help protect those rights. *See United States v. Alpine Land and Reservoir Company*, 919 F. Supp. 1470, 1479 (D. Nev. 1996) ("The Nevada State Engineer has the inherent authority to condition his approval of an application to appropriate based on this statutory authority to deny applications if they impair existing water rights"); NRS 533.370(2); NRS 534.110(5). For these reasons, CPB's Writ Petition must be denied.

II. PROCEDURAL BACKGROUND

On October 17, 1989, SNWA's predecessor filed 146 applications for the appropriation of water in Nevada. In September 2006, the State Engineer held hearings on the Applications for Spring Valley, and on April 16, 2007, issued Ruling 5726 granting permits for up to 60,000 afa, conditioned upon staged development and the implementation of Monitoring, Management and Mitigation Plans ("3M Plans"). In February 2008, the State Engineer held hearings on the

Applications for Cave, Dry Lake, and Delamar Valleys, and on July 9, 2008, issued Ruling 5875 granting permits for up to 18,755 afa, conditioned upon the implementation of 3M Plans.

In 2010, this Court vacated Ruling 5726 for procedural reasons, and ordered the State Engineer to re-notice the Applications, re-open the protest period and hold new hearings. *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 20, 234 P.3d 912, 914 (2010) (*Great Basin II*). Similarly, Ruling 5875 was vacated and remanded based on the ruling in *Great Basin II*. See *Southern Nevada Water Authority v. Carter-Griffin, Inc.*, 2010 WL 3605907 (Nev. Sept. 13, 2010).

The State Engineer re-published the Applications in early 2011 and the protest period closed in March 2011. The State Engineer held a second round of hearings on the Applications in a record-long State Engineer hearing that occurred between September 26 and November 18, 2011 that involved extensive evidence and expert testimony. On March 22, 2012, the State Engineer issued Rulings 6164, 6165, 6166 and 6167 (the “Rulings”). Ruling 6164 granted 61,127 afa, conditioned upon the implementation of 3M Plans and staged development. Rulings 6165, 6166 and 6167 granted 18,755 afa, conditioned upon the implementation of 3M Plans, but not conditioned upon staged development.²

² CPB incorrectly asserts that Rulings 6165, 6166 and 6167 also conditioned approval on staged development. CPB’s Writ Petition at p. 4.

In April 2012, CPB and several other parties filed petitions for judicial review of the Rulings. CPB's Petition asserted, among other arguments, that the State Engineer retroactively applied NRS 533.3705 in Ruling 6164 and improperly delayed a ruling on the Applications. CPB Appendix to Writ Petition ("CPB App."), Vol. I. at 2–36. In a December 10, 2013 Decision ("Decision"), among other rulings, the district court disagreed with CPB and ruled that the State Engineer had properly and prospectively applied NRS 533.3705 to authorize staged development. CPB App., Vol. II. at 265. On January 29, 2014, CPB filed an appeal of the district court's Decision following separate filings of appeals of the district court Decision by the State Engineer and SNWA on January 9, 2014, which appeals are currently pending (Case No. 64815). CPB filed a motion to dismiss the appeals filed by the State Engineer and SNWA on the basis that the district court's Decision is not an appealable decision. The State Engineer and SNWA separately opposed CPB's Motion to Dismiss.

In addition, CPB filed its Petition for Limited Writ Review of NRS 533.3705 in the event this Court determined that the district court's Decision was not appealable. *See* CPB's Docketing Statement at ¶ 20(b). CPB's Writ Petition is limited to review of the State Engineer's application of NRS 533.3705 in Ruling 6164. CPB's Writ Petition at p. iii. On July 2, 2014, this Court ordered answers to CPB's Writ Petition, as well as answers to separate writ petitions filed by the State

Engineer and SNWA related to different issues addressed in the district court's Decision. In order to avoid piecemeal review and promote judicial economy, this Court should consider all of the issues raised by the parties through either the appeals or through the writ petitions filed by the State Engineer, SNWA and CPB, but not through both procedural avenues.

III. FACTUAL BACKGROUND

A. Summary of Facts Relating to Staged Development

The State Engineer concluded based on substantial evidence that 61,127 afa of water was available for appropriation from Spring Valley and that granting those rights would not conflict with existing rights or prove detrimental to the public interest. CPB App., Vol. II. at 253. In addition, the State Engineer found that SNWA proved a good faith intention and financial ability to construct the project, the need to import the water, that an effective conservation plan is in place and that the project would not unduly limit development in Spring Valley and is environmentally sound. *Id.* at 253–254. However, because models involve predictions and are not guaranteed to match real world effects of pumping, the State Engineer concluded that “[s]taged 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.” CPB App., Vol. II. at 189.

The State Engineer found as follows:

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.

CPB App., Vol. II. at 212.

Based on this analysis, the State Engineer approved a total of 61,127 afa in permits for Spring Valley, with a staged development plan 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 associate 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 Application 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 (42,000 afa–50,000 afa) for a minimum of eight years. Data from those eight years of pumping and updated modeling results will be submitted to the State Engineer as part of the annual hydrologic monitoring report. The State Engineer will then make a determination as to whether the Applicant can proceed to Stage 3.

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

CPB App., Vol. II. at 254–255. The Permits are also conditioned upon SNWA’s implementation and compliance with the Hydrologic Monitoring and Mitigation Plan and upon the Biologic Monitoring Plan. *Id.* at 255.

B. Summary of Facts Relating to the 3M Plans

The State Engineer conditioned SNWA’s Permits in all of the groundwater basins, including Spring Valley, on the implementation of comprehensive hydrological and biological 3M Plans. CPB App., Vol. II at 255. The 3M Plans were developed in cooperation with the State Engineer, BLM, National Park Service, Bureau of Indian Affairs, U.S. Fish and Wildlife Service and Southern

Nevada Water Authority, and were designed to ensure the protection of existing water rights and the natural resources.³ CPB App., Vol. I. at 141.

Under the hydrological 3M Plan, dozens of groundwater monitoring wells and piezometers and surface water devices have been installed throughout Spring Valley and surrounding areas to measure groundwater levels and surface water flows. *Id.* at 141–154. After consultation with the State Engineer and CPB, SNWA installed monitoring wells designed specifically to protect CPB’s existing water rights near Cleveland Ranch. *Id.* at 149. Substantial hydrological data has already been collected, reviewed, analyzed, and reported to the State Engineer. *Id.* at 141–149.

In addition, under the biological 3M Plan, monitoring of dozens of plant and animal species is required for the collection of important biological baseline data. CPB App., Vol. II. at 217–220. The biological monitoring focuses on special status species (such as endangered and threatened species) and other ecological

³ CPB’s statement that the State Engineer is not a “party” to the 3M Plans is misleading. CPB’s Writ Petition at p. 2. The State Engineer is not a party to the *stipulations* from which the 3M Plans were initially borne, but the State Engineer is intimately involved with the 3M Plans. The 3M Plans were a cooperative effort between a host of governmental and private entities which culminated in approval by the State Engineer. CPB App. Vol. I. at 141–143. Further, a representative of the State Engineer’s Office serves as a member of the Technical Review Panel (TRP), a panel of experts established by the 3M Plans, who will make initial determinations regarding monitoring, management and mitigation, if necessary, over all of which the State Engineer maintains ultimate authority. *Id.* at 143.

components that are believed to be good indicators of ecosystem health, including those that may provide early warning of adverse impacts. *Id.*

The data collected as part of the 3M Plans is analyzed and interpreted by technical teams established by the 3M Plans, of which a representative from the State Engineer's Office is a member, and reported to the State Engineer on at least an annual basis. *Id.* at 142–143, 217–220. Monitoring provides critical information that will be used to detect early warning signs of impacts as pumping begins, so that unreasonable adverse impacts can be avoided through proper management. *Id.* at 141–154, 217–220. If necessary, the information will also be used to implement specific and effective mitigation measures to protect existing water rights and natural resources, including reduction or cessation of pumping. *Id.* at 155–158.

IV. STANDARD OF REVIEW

Petitions for Judicial Review of State Engineer orders and decisions are governed by NRS 533.450. Pursuant to this statute, “[t]he decision of the State Engineer is *prima facie correct* and the burden of proof is on the party attacking the same.”

Decisions of the State Engineer are entitled not only to deference with respect to factual determinations, but also with respect to legal conclusions. The Nevada Supreme Court has explained that “an agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary

precedent to administrative action,” and therefore “great deference should be given to the agency’s interpretation when it is within the language of the statute.” *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (citing *Clark Co. Sch. Dist. v. Local Gov’t*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974)). Thus, the State Engineer’s interpretation of the Nevada statutory scheme for adjudication of vested water rights and appropriation of public waters is, while not controlling, persuasive. *Id.* Because the State Engineer has “a special familiarity and expertise with water rights issues,” his interpretation of a statute may only be disregarded if “an alternate reading is compelled by the plain language of the provision.” *United States v. State Engineer*, 117 Nev. 585, 589–90, 27 P.3d 51, 53 (2001).

V. ARGUMENT

A. The State Engineer Properly Applied NRS 533.3705 to the 2012 Approval of SNWA’s Application

The State Engineer did not retroactively apply NRS 533.3705 as asserted by CPB. As the district court found, application of NRS 533.3705 was not retroactive because the statute was enacted in 2007 and only applied to the SNWA Applications upon *approval* by the State Engineer in March 2012 by Ruling 6164. CPB App., Vol. II. at 265. NRS 533.3705 explicitly states that: “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.” *Id.* Therefore, the statute does not apply until “approval of an application,” which

did not occur for SNWA's Applications until 2012—more than four years after enactment of NRS 533.3705. The plain language of the statute instructs that staged development can be applied upon approval of an application; therefore, this Court should reject CPB's unreasonable interpretation regarding the applicability of the statute.⁴ *Bacher v. State Engineer*, 122 Nev. 1110, 1117–1118, 146 P.3d 793, 798 (2006) (“If a statute is clear on its face, the court cannot go beyond its plain language in determining legislative intent.”).

“A statute does not operate ‘retrospectively’ merely because it ‘draws upon past facts,’ or upsets expectations based in prior law.” *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 127, 313 P.3d 849, 854 (2013), quoting *Pub. Emps.’ Benefits Program v. Las Vegas Metro, Police Dep’t (PEBP)*, 124 Nev. 138, 155, 179 P.3d 542, 553 (2008) (citations omitted). “Rather, ‘[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.’” *Id.* (citations omitted).

⁴ It is worth highlighting that the State Engineer has required staged development in other rulings where applications were filed prior to enactment of NRS 533.3705, but ruled on after enactment. Those rulings would also be affected by this Court's decision on this issue. See Permit No. 64692 and Ruling Nos. 5918 and 5816 (available on the State Engineer's website at www.water.nv.gov).

Here, no vested rights of any party are abridged by applying NRS 533.3705 to the Applications. An applicant has no rights in water by merely filing an application. The right to *use* water only attaches once an application is granted. *See Desert Irrigation, Ltd. v. State Engineer*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997) (“Even those holding certificated, vested, or perfected water rights do not own or acquire title to water. They merely enjoy the right to beneficial use.”). Because the Applications were approved conditioned upon staged development, NRS 533.3705 did not apply to existing rights and therefore did not impair any vested rights. In other words, the “obligation” of staged development was not “imposed on past transactions,” since the relevant transaction was the approval of the Applications. *See PEBP*, 124 Nev. at 156, 179 P.3d at 554.

Likewise, no vested rights of CPB or other protestants holding existing water rights are abridged. The condition of staged development on approval of the Applications helps *protect* existing water rights—not *impair* them. Initially limiting pumping allows time for the State Engineer and other interested parties to review the effects of pumping based on substantial monitoring data pursuant to the 3M Plans, and to take appropriate action to manage and, if necessary, institute mitigation measures before conflicts or unreasonable adverse effects occur. In addition, staged development is environmentally sound in that it allows time for plants and other biological criteria to slowly adjust to the lowering of the water

table—known as plant succession—a management tool that has proven to be effective for other projects. CPB App. Vol. II. at 225–229 (“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 functioning and healthy.”).

B. This Court’s Decision in *Great Basin II* Does Not Support a Conclusion That NRS 533.3705 Was Applied Retroactively

CPB repeatedly—and erroneously—relies on this Court’s decision in *Great Basin II* to assert that NRS 533.3705 was retroactively and inappropriately applied to “delay a final resolution of the parties’ waters rights for years, even decades, through ‘staged approvals.’” CPB’s Writ Petition at pp. 11–13. CPB’s retroactive application argument hangs entirely on the false premise that the State Engineer failed to make the necessary findings under NRS 533.370(2) to grant the full 61,127 afa. This is a critical flaw in CPB’s argument.

1. The State Engineer Has Not Delayed Ruling on SNWA’s Applications

Ruling 6164 includes complete findings by the State Engineer for each and every criteria required under the water statutes to grant an application. CPB App. Vol. I–II. at 39–256. The State Engineer found that there was sufficient

///

///

unappropriated water in the basin to grant 61,127 afa,⁵ and that granting 61,127 afa would not create conflicts with existing rights or prove detrimental to the public interest. *Id.* at 252–253; NRS 533.370(2). The State Engineer also made the necessary findings for an interbasin transfer, including a finding of environmental soundness. *Id.* at 254. Thus, the State Engineer has not delayed any decision on the Applications as asserted by CPB. Rather, the State Engineer has made the necessary findings to grant the full amount of water under the permits. The condition of staged development does not alter these findings—instead it cautiously and thoughtfully provides additional protections for the environment and existing water rights holders, such as CPB and other protestants.

In order to *ensure* protection of existing rights, the public interest and the environment, the State Engineer conditioned approval of the Applications on staged development and implementation of 3M Plans. This does not affect the status of the approval of the Applications and certainly does not *delay* the approval. Rather, it limits the amount of water that may be initially pumped in order to ensure that pumping does not present unexpected effects that warrant a change in the approved status of the Applications. It is a cautious and protective approach that the State Engineer has as a tool to help manage water in a new era

⁵ The State Engineer denied four of SNWA’s applications after finding that those water rights would conflict with CPB’s existing water rights. CPB App. Vol. II. at 254. The State Engineer also reserved an additional 4,000 afa of water for future growth and development. *Id.* at 252–253.

where projects are developed based on greater scientific data that make more complex predictions available.

2. *Great Basin II* Does Not Support CPB's Argument

CPB's reliance on *Great Basin II* is misplaced because the amendments to the statute at issue in that case, NRS 533.370(2), concern a different timeframe and therefore require a different analysis for a determination of retroactivity than NRS 533.3705. *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 20, 234 P.3d 912, 914 (2010). The amendment to NRS 533.370(2) addressed in *Great Basin II* concerns the period of time between when an application is filed and when the State Engineer approves or denies an application. In contrast, NRS 533.3705 concerns the period of time *upon approval* of an application. This temporal difference is significant in analyzing the applicability of the statutes.

NRS 533.370(2) allows the State Engineer to delay acting on an application for the appropriation of water when certain elements exist. The legislature amended NRS 533.370(2) in 2003 to expand the occasions when a delay is allowed. The 2003 amendment to 533.370(2) expressly applied to "applications" filed on or after July 1, 2003 or "pending" on July 1, 2003. Because the applications were filed in 1989 and were not "pending" on July 1, 2003, this Court found that the amendments to NRS 533.370(2) did not apply to the SNWA

Applications and ultimately determined that those applications did not qualify for delay on action by the State Engineer on the Applications.

This Court in *Great Basin II* concluded that the 2003 amendment to NRS 533.370(2) that allowed delay could not be applied to the Applications for four reasons: (1) by setting a timeline for approval or rejection of a groundwater appropriation application within one year in NRS 533.370(2), the legislature intended to prevent a significant lapse of time before a ruling; (2) the 2003 amendment did not contain a clear indication of retroactive effect; (3) an interpretation allowing retroactive effect would deny appellants their due process rights to grant or withhold authorization to postpone action; and (4) there was no indication that the legislature intended that NRS 533.370(2) should apply to every application filed with the State Engineer. *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 20, 234 P.3d at 918–919.

The Courts’ concerns in *Great Basin II* do not apply in this case. First, as discussed above, nothing in the application of NRS 533.3705 contravenes the legislative intent to prevent a significant lapse of time before a ruling. The Applications were approved by Ruling 6164 in March 2012—within a year of the re-publication date. Second, unlike NRS 533.370(2) in *Great Basin II*, NRS 533.3705 applies to any “approval of an application.” Thus, because approval of the Applications occurred well after enactment of NRS 533.3705 the statute was not

applied retroactively. Third, no due process rights are violated by applying NRS 533.3705 to the Applications because the Applications were re-published in 2011, providing a full and fair opportunity for protest by any affected party. The State Engineer held a hearing on the Applications, during which the protestants, including CPB, participated by providing evidence and witness testimony. CPB had an opportunity to address staged development during that hearing, knowing that NRS 533.3705 had been enacted several years earlier and therefore was potentially applicable *upon approval* of the SNWA Applications.⁶ Finally, the plain language of NRS 533.3705 indicates that it may be applied upon approval of any application unlike the amendment to NRS 533.370(2), which expressly applied only to certain applications. Accordingly, CPB's reliance on *Great Basin II* is flawed.

C. CPB's Retroactive Application Argument Is Inconsistent With Its Position Regarding Application of Other Water Statues

If NRS 533.3705 does not apply to the State Engineer's approval of the SNWA's Applications, then other statutory amendments post-1989 should also not apply. Most notably this would include the statutory amendment in 1999 that added the "interbasin transfer" criteria for all appropriations where the point of

⁶ In addition, because the State Engineer had conditioned approval of the SNWA Applications on staged development in his first ruling on the Applications in 2007 (Ruling 5726), CPB was well aware that staged development was a condition the State Engineer contemplated for the project.

diversion of water is in a different basin from the proposed beneficial use of the water. *See* NRS 533.370(3) (SB108, May 5, 1999). If the interbasin transfer criteria had not applied to SNWA's Applications, then the State Engineer would not have been required to make findings that: (1) justified the need to import water; (2) showed that southern Nevada's conservation plan has been effective; (3) the proposed action is environmentally sound; and (4) the proposed action will not unduly limit the future growth and development in Spring Valley. NRS 533.370(3). It is one of these very criteria—the environmentally sound criteria—that CPB asserts the State Engineer's ruling inappropriately delays by permitting staged development. CPB Brief at pp. 26–27. To apply CPB's retroactive application argument consistently, CPB must agree that the interbasin transfer criteria also do not apply to the SNWA Applications.

This is nonsensical. It does not appear that that the legislature intended to “grandfather in” older applications such that they are reviewed under a lesser standard from an application later filed but reviewed at the same time. This is especially true because the determination for approval of the application considers the state of the resource (i.e., amount of water available for appropriation, existing rights, and public interest) at the time of approval, not at the time of filing an application. It would be unjust and impracticable for the State Engineer to apply

different standards for determining whether an appropriation should be granted depending on when an application was filed.

D. The State Engineer Has Inherent Authority to Place Conditions On Permits

The State Engineer has inherent authority to place conditions on permits, including conditions of staged development, and has exercised that authority prior to the enactment of NRS 533.3705. Importantly, the State Engineer included staged development in his first ruling on the SNWA applications issued in April 2007 (Ruling 5726). Thus, before the enactment of 533.3705 (SB 274, effective July 1, 2007), the State Engineer conditioned SNWA's permits for Spring Valley on staged development, relying on his inherent authority to apply conditions to permits. *See United States v. Alpine Land & Reservoir Company*, 919 F. Supp. 1470, 1479 (D. Nev. 1996). None of the parties appealed the State Engineer's Ruling on the basis that the State Engineer exceeded his authority by ordering staged development. For decades the State Engineer has exercised his inherent authority to condition permits and has ordered staged development in more than a dozen permits since at least the 1980s.⁷

⁷ For example, the State Engineer has ordered staged development in at least Permit Nos. 43401, 45548, 47043, 47252, 47127–47132, 49943–46, 50701, 50808, 51870–73, 52087, 52088, 44687–88, 47615–17, 43699, 46029–30, 53704, 53829, 53830–31, 54866, 55450, 58269, 35040, 41674, 57327, 51841. *See* www.water.nv.gov.

Therefore, even if this Court determines that NRS 533.3705 was improperly applied, the State Engineer had authority to order staged development based on his authority to condition permits on any number of actions.

VI. CONCLUSION

For the foregoing reasons, the State Engineer respectfully requests that this Court deny CPB's Writ Petition, or in the alternative, affirm the district court's decision that the State Engineer properly applied staged development in Ruling 6164 as permitted under NRS 533.3705.

DATED this 2nd day of September, 2014.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Cassandra P. Joseph
CASSANDRA P. JOSEPH
Senior Deputy Attorney General
Nevada State Bar # 9845
JERRY M. SNYDER
Senior Deputy Attorney General
Nevada State Bar # 6830
100 N. Carson Street
Carson City, Nevada 89701
(775) 684-1216
(775) 684-1103 fax
cjoseph@ag.nv.gov
jsnyder@ag.nv.gov
Attorneys for Nevada State Engineer

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 proportionally spaced typeface using Microsoft Word 2010 with 14-point, double Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more and contains 4,967 words.

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 portions of the 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 it to be found.

I understand I may be subject to sanctions in the event the accompanying brief is not conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of September, 2014.

/s/ Cassandra P. Joseph
Cassandra P. Joseph

CERTIFICATE OF SERVICE

I, Ginny Brownell, hereby certify that I am an employee of the Office of the Attorney General, State of Nevada, and hereby certify that the foregoing **STATE OF NEVADA'S ANSWER TO CPB'S PETITION FOR LIMITED WRIT REVIEW REGARDING APPLICATION OF NRS 533.3705 TO SNWA's 1989 APPLICATIONS** was filed electronically with the Nevada Supreme Court on the 2nd day of September, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Daniel Polsenberg
Joel Henriod
Paul G. Taggart
Gregory Walch
Dana Walsh
Severin Carlson
David Frederick
Lynda Mabry

I further certify that on the 2nd day of September, 2014, I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Carson City, Nevada, addressed as follows:

Paul R. Hejmanowski, Esq.
Lionel Sawyer & Collins
1700 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

J. Mark Ward
Utah Association of Counties
5397 South Vine Street
Murray, Utah 84107

Kelly C. Brown
District Attorney for White Pine
County, Nevada
810 Clark St., Suite 3
Ely, Nevada 89301

Aaron Waite
The Cooper Castle Law Firm, LLP
5275 South Durango Drive
Las Vegas, Nevada 89113

Paul EchoHawk
Kiolpatrick, Townsend & Stockton
LLP
1420 Fifth Avenue, Suite 440
Seattle, Washington 98101

The Honorable Robert E. Estes
Senior District Judge
911 Harvey Way
Yerington, Nevada 89449

Gregory H. Morrison
Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, NV 89703

Simeon Herskovits
Iris Thornton
Advocates for Community and
Environment
P.O. Box 1075
El Prado, New Mexico 97529-1075

John B. Rhodes
Rhodes Law Offices
P.O. Box 18191

Scott Williams
Curtis Berkey
Berkey Williams, LLP
2030 Addison Street, Suite 40
Berkeley, California 94704

/s/ Ginny Brownell
Ginny Brownell, an employee of the
Office of the Nevada Attorney General