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October 2, 2018

Jason King, P.E.
Nevada State Engineer
901 S. Stewart St., Suite 2002
Carson City, NV 89701

Re: Draft Order – Lower White River Flow System

Dear Mr. King:

Please accept the following comments on the *Draft Order Designating the Administration of all Water Rights within Coyote Spring Valley Hydrographic Basin (210), Black Mountains Area (Basin 215), Garnet Velley (Basin 216), Hidden Valley (Basin 217), California Wash (Basin 218), and Muddy River Springs Area (a.k.a. Upper Moapa Valley) (Basin 219) as a Single Hydrographic Basin, Limiting Groundwater Pumping, and Holding in Abeyance Review of Final Subdivision Maps* (the "Draft Order"), respectfully submitted on behalf of the Moapa Valley Water District ("District"). The Draft Order applies to the basins composing the Lower White River Flow System ("LWRFS").

1. The Draft Order Fails to Protect Certificated Water Rights, and Prioritizes Unused Water Rights.

The Draft Order, at page 11, paragraph 4, states that "water rights holders junior to the portion from March 31, 1983, within the 9,318 acre-foot limit...will not be curtailed *unless and until unused senior water right pumping exceeds 9,318 acre-feet*...." As such, a permitted LWRFS water right that has never been pumped or placed to beneficial use will retain its priority over a junior certificated right, despite the certificated right holder's diligent beneficial use of its water. The net effect of the cited phrase is subversion of the preeminent tenet of Nevada's water law ("Beneficial use is the basis, the measure and the limit of the right to the use of water.").

Nothing in the water law requires that the State Engineer curtail pumping strictly by appropriation date. Further, to allow a water permit holder to take precedence over a certificated user who has developed its water and vested that right in accordance with the law is to effect a regulatory taking in violation of both the United States Constitution and the Nevada Constitution.

The Draft Order should be amended by striking the italicized language and replacing it with language that protects certificated water rights. Suggested language to replace paragraph 4 on page 11 of the order is as follows:

> Pumping by certificated water right holders junior to the portion from March 31, 1983, whose rights were certificated prior to the issuance of this order, will not be curtailed. Pumping by permitted, but not certificated, water right holders junior to the portion from March 31, 1983, within the 9,318 acre-foot limit, which is in effect as of September 1, 2018, will not be curtailed unless and until unused senior water right pumping exceeds 9,318 acre-feet annually in the Lower White River Flow System. As existing permitted rights become certificated, curtailment of pumping when total pumping reaches 9,318 acre-feet annually will be based on the date that rights became certificated.

Alternatively, permitted right holders should be required to demonstrate the extent to which permitted rights have been beneficially used within the 12 months subsequent to issuance of the final order, and those rights certificated only to the extent of beneficial use. At that time, certificated rights can be curtailed by permit priority date. The resulting certificates will remain a freely assignable commodity, eliminating any claims for an unconstitutional regulatory taking of a valuable property right.

2. The Draft Order will Result in a "Water Grab" on Senior Permitted Rights.

The language of paragraph 4 of the Draft Order quoted above will incentivize the conveyance and pumping of pre-1983 permitted rights. The result will be a drastic increase in pumping, and confirmation of the axiom that "water flows uphill to money." The Draft Order would allow a senior permitted right holder who has never pumped the full duty of its right to convey the right to a new owner, who can begin to pump the full duty. As a result, pre-1983 rights that have not historically been pumped will be pumped in full. This dramatic increase in pumping will have immediate adverse effects on the LWRFS, which will be contrary to conservation of water and contrary to the public interest.

The Draft Order states that it will be "considered" in examining change applications, Requests for Extensions of Time to file Proofs of Completion and Beneficial Use, and Extensions of Time to Prevent Forfeiture. That language is ambiguous, and should be strengthened to set solid limits and standards by which applications and requests for extensions can be judged. The Draft Order should be amended to include a restriction on applications to change permitted rights. To reduce the potential for widespread water speculation described above, the District suggests that the Order include a requirement that a water right be certificated prior to granting any application to change the right. Additionally, requests for extension of time

to file proof of beneficial use should be approved only when a permittee can show diligent and active development of the right. Essentially, the State Engineer should stringently exercise the discretion he was given pursuant to NRS 533.380(3) by elevating the "good cause" standard. Senior permit holders not actively developing rights should be required to submit proofs of beneficial use, regardless of the extent of development, and certificates issued on those permits that have been developed. Extensions of time to submit proof of beneficial use for non-municipal or quasi-municipal uses should be limited to one year. For municipal water providers, a 50-year water development plan can meet the standard for active development.

3. The Draft Order Ignores the Fact that Certificated Groundwater Rights already have an Implied Right to Deplete Surface Water Flows.

The State Engineer has long recognized that the LWRFS carbonate aquifer and the Muddy River surface water system are interconnected. *See* Order 1169 (March 8, 2002) (citing a 1984 memorandum from Terry Katzer of the USGS to the State Engineer). As such, any permits and certificates that the State Engineer approved for the past several decades have come with the implicit approval of a certain amount of surface water flow reduction. The Draft Order appears to be an admission by the State Engineer that impacts to surface flows were inadequately considered when groundwater rights were permitted or certificated. The Draft Order also appears to be an attempt to remedy that historic oversight by forcing certificated water right holders to reduce or cease pumping altogether.

In fact, forcing certificated water right holders to cease pumping while simultaneously allowing previously unused senior permitted rights to be pumped may result in increased depletion effects on the Muddy River. Because the certificated water rights have been pumped for, in some cases, several decades, the majority of the impacts of that pumping have already reached the surface water system and are reflected in the River and Spring Hydrographs. If pumping of the certificated rights were to cease there would continue to be delayed pumping effects on surface water, while additional effects of pumping the senior permitted rights would be additive to the delayed effects, potentially resulting in further reductions in surface water flows above the currently existing depletions until the delayed effects have ceased to be a factor. The timing and magnitude of these overlapping effects (delayed pumping effects plus new pumping effects) can only be determined by using a reliable groundwater model of the area, which currently does not exist. Absent a reliable groundwater model, the most hydrologically defensible way to maintain current surface water flows is to allow continuation of certificated pumping and limit pumping of rights that have not been historically put to beneficial use.

4. The Draft Order Ignores the 2006 Memoranda of Agreement.

In a series of 2006 Memoranda of Agreement ("2006 MOAs"), the District, along with the Southern Nevada Water Authority ("SNWA"), United States Fish and Wildlife Service, Coyote Springs Investments, and the Moapa Band of Paiute Indians, agreed to certain measures

intended to protect LWRFS water levels and Moapa dace habitat. Importantly, the 2006 MOAs exchanged priority dates of several water rights among the signatories and provided for substitute water from junior, yet more sustainable, wells.

The 2006 MOAs also established a Recovery Implementation Program, where by measures necessary to accomplish protection and recovery of dace were integrated with operations and development of regional water facilities. The District dedicated pre-1983 water rights on Jones Spring to augmentation of dace habitat in exchange for certain water deliveries from SNWA. Other parties to the 2006 MOAs also dedicated water, while others provided significant funding for studies and models designed to help with Moapa dace preservation. The Draft Order fails to mention the 2006 MOAs or the parties thereto, and the measures those parties took to preserve Moapa dace habitat.

The Draft Order should be amended to include reference to the 2006 MOAs, and should expressly recognize how those agreements effectively exchange priorities and limit pumping of certain water rights by the signatories thereto. Junior water rights used to replace senior water rights dedicated under the 2006 MOAs must be protected as if they hold senior status. In short, the efforts made by parties to the 2006 MOAs must not result in the parties' loss of ability to serve their customers.

5. None of the Trigger Levels in the 2006 Memoranda of Agreement have been Exceeded.

The 2006 MOAs, recognizing that maintenance of in-stream flows in the Warm Springs area is essential for the protection and recovery of the Moapa dace, established a set of trigger levels, determined by the average flow levels measured at the Warm Springs West flume, which would require the parties to the MOAs to take specific actions. Actions that can be triggered include planning for mitigation measures and limitation or cessation of pumping at specific wells.

By including specific triggers in the 2006 MOAs, the LWRFS parties – including the Fish and Wildlife Service – agreed to the acceptable flow levels for dace preservation and recovery. To date, none of the trigger levels have been exceeded. The greatest average flow level that will trigger any action under the 2006 MOAs is 3.2 c.f.s., and flows have remained above that level consistently, even during test pumping. That indicates that the State Engineer might be setting the annual allowable pumping lower than it should be set.

The Draft Order should be amended to directly reference the triggers set in the 2006 MOAs, and should acknowledge that none of the trigger levels has been met to date.

6. The Draft Order is Premature, as there is Insufficient Data upon which to Base the Order.

There are multiple studies ongoing to measure the effects of pumping on the LWRFS, and groups such as the Hydrologic Review Team ("HRT") established under the 2006 MOA continue to compile information. It is curious, then, that the 9,318 acre-foot annually pumping limit in the Draft Order is based solely on the fact that 9,318 acre-feet is the average pumping level for the past three years in the LWRFS, and "groundwater levels and spring flows have remained relatively flat." Draft Order at p. 8. In light of the fact that groundwater levels and spring flows are currently stable, the State Engineer should delay issuing a final order on LWRFS pumping until sufficient data can be included in the order to justify pumping limits.

The State Engineer should refrain from issuing any order at this time. The District believes that the data will show that 9,318 acre-feet annually is too restrictive, but does not have sufficient data at this time to propose an alternative limit. The HRT and other interested parties should be allowed to compile the data necessary to set a pumping limit that is more properly supported and defensible. Unless and until declines in groundwater levels or spring flow are observed, there is no immediate need to issue an order limiting or curtailing pumping.

7. The Draft Order Uses a Small Sample Size to Set Limits on Pumping.

The Draft Order states that pumping in the subject basins "in calendar years 2007 through 2010" and "2013 through 2017" (pre- and post-Order 1169 pump testing) averaged 11,400 acre-feet annually. Draft Order at p. 7. On page 8, the Draft Order states that the average pumping "over the last 3 years" averaged 9,318 acre-feet annually. Despite being contradictory, with 2,082 acre-feet of discrepancy between the amounts of water pumped, all average pumping levels are taken from small sample sizes. A larger time frame should be used to provide a more thorough understanding of aquifer properties, and to set a sustainable pumping limit with greater certainty.

The Draft Order should be amended to include additional data that supports the initial pumpage limits, and to clarify average historic pumping levels where they appear to be contradictory within the Draft Order. A greater sample size of pumpage history should be included where possible to better justify the initial limit.

8. Data Resulting in the 9,318 acre-foot Pumpage Limit should be Revisited Periodically.

The Draft Order cites NDWR Groundwater Pumpage Inventories for the subject basins for the years 2012 through 2017, paired with "relatively flat" groundwater levels through that time period, to support the conclusion that pumping will be limited to 9,318 acre-feet annually. *See* Draft Order at p. 8. The Draft Order also states that continued pumping will allow the State Engineer to gain "a more precise understanding of the amount of sustainable groundwater

pumpage," and additional data "coupled with the public workshop process" will allow him to make a determination as to long-term LWRFS basin management. The District does not object to the Draft Order as a *starting point* for responsible LWRFS management. However, the volume of water that can be pumped from the LWRFS should be subject to revision as additional information becomes available.

The Draft Order should be amended to include a sunset provision on the 9,318 acre-foot pumping limit. The sunset provision will allow data that is the basis of the 9,318 acre-foot limit – water levels, spring flow rates, Muddy River flow rates – to be re-evaluated and to allow LWRFS water users to comment on the future pumping limits. Five-year intervals would allow sufficient data to be collected and impacts from pumping to be observed. If the pumping limits imposed in the Draft Order result in aquifer recovery and/or increased spring and river flows, then pumping limits should be adjusted accordingly.

9. The Draft Order Improperly Includes Language Specific to the Moapa Dace.

Pursuant to NRS Chapter 501, administration and conservation of the wildlife of the State of Nevada is the duty of the Department of Wildlife ("NDOW"). Nothing in NRS Chapters 532-534 places wildlife under the purview of the State Engineer. Nonetheless, the Draft Order repeatedly mentions that the LWRFS is the home of the Moapa dace, and that the dace is a federally-listed endangered species. In fact, the Draft Order expressly states that it is intended to address threats to the Moapa dace. In doing so, the Draft Order improperly exceeds the authority delegated to the Office of the State Engineer and assumes the statutory authority of NDOW.

To the extent that the State Engineer must consider environmental soundness in the water rights application process, *see* NRS 533.370(3)(c), the Moapa dace is within the environmental analysis. However, nothing in the statute mandates, or even allows, the State Engineer to make rules or issue orders specific to one species.[1] The Draft Order should therefore be amended to eliminate all discussion of the Moapa dace. Alternatively, the Draft Order should include an explanation of how maintenance of Moapa dace habitat falls within the purview of the office of the State Engineer.

10. The Draft Order Fails to Recognize Preferred Uses.

Each of the recitals in Section I of the Draft Order acknowledges that the applicable Order of the State Engineer designating that basin pursuant to NRS 534.030 declares several preferred uses in that basin. Draft Order, pp. 1-2. Yet, the Draft Order does not appear to prioritize any of those preferred uses in Section VII. Instead, the Draft Order proposes curtailment strictly by priority, without reference to a preferred use. For consistency among

[1] To the extent that NDOW has procured or can procure water rights for dace preservation, those water rights are an interest within the purview of the State Engineer.

orders, preferred uses designated in previous orders should remain preferred uses in the Draft Order.

The omission should be corrected by amending the Draft Order to recognize the importance of preferred uses such as municipal, industrial, and commercial, and prioritizing those uses ahead of non-preferred uses such as irrigation.

11. The Draft Order Fails to Adequately Protect Existing Municipal Uses.

Municipal water providers and, in turn, their customers in the LWRFS rely upon the existing water supply to plan and grow their communities. The District has carefully and diligently developed its water portfolio and had its water rights certificated as expediently as possible. The Draft Order threatens to undermine that development and limit or eliminate the water supply upon which the District's customers rely. The District believes that its customers are entitled to rely on their water supply, without which those customers will have to relocate or utilize domestic wells, which are not addressed in the Draft Order.

The Draft Order should be amended to expressly recognize municipal uses and to prioritize those uses to the extent that municipal customers have come to rely on them.

12. The Draft Order Contains Ambiguous and Overbroad Language.

In addition to the issues cited above, the Draft Order includes several examples of ambiguous, contradictory, and overbroad language that will result in disputes and litigation. For example, in Section V at page 9, the Draft Order states that only "a very small portion" of existing LWRFS groundwater rights can be pumped. In Section VI on the same page, it says that "a small percentage" can be pumped. Not only are the two phrases ambiguous, they are contradictory.

The Draft Order should be scrutinized carefully to ensure that is consistent throughout, and unambiguous to the parties who will impacted by it. A provision that the Draft Order will be "considered" in future applications does not lend itself to clarity; the standards by which applications will be granted or denied should be expressly stated. A provision should be included stating that any application for extension of time in which the permittee/applicant cannot provide evidence that they are proceeding in good faith and with reasonable diligence to perfect the right will be denied. A provision that any change application that would reduce the amount of water available to a certificated water right holder will be denied should be included. What constitutes "adverse effects" to senior rights should be specified, particularly if adverse effects are not those specified by the triggers in the 2006 MOAs.

Please contact me should you wish to discuss this matter further.

Sincerely,

PARSONS BEHLE & LATIMER

Gregory H. Morrison

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