

BEFORE THE OFFICE OF THE STATE ENGINEER

STATE OF NEVADA

State	's EXHIBIT 32
DATE:	7-15-08

IN THE MATTER OF APPLICATIONS
54022 THROUGH 54030, INCLUSIVE,
FILED TO APPROPRIATE THE
UNDERGROUND WATER OF THE
SNAKE VALLEY HYDROGRAPHIC
BASIN (195), WHITE PINE COUNTY,
NEVADA.

RESPONSE TO OPPOSITION TO
APPLICATIONS FOR INTERESTED
PARTY STATUS

Salt Lake County, Utah and Utah County, Utah (the "Utah Counties") respond to the Opposition of Southern Nevada Water Authority ("SNWA") to their Applications for Interested Person status in the above matter, as follows:

The Utah Counties have three major responses to SNWA's Opposition: (1) SNWA distorts the State Engineer's statutory obligation to consider "environmental soundness"; (2) SNWA misapplies the Spring Valley and Cave, Dry Lake and Delemar Valleys precedent it cites; and, (3) the example of SNWA's voluntary arms-length promise to protect air quality in the Spring Valley Stipulated Agreement (a) belies its present posture that air quality matters are irrelevant and (b) bolsters the Utah Counties' claims that air quality protection questions raise "broad public issues or matters" that qualifies them for interested person status under NAC 533.100(3).¹

¹ SNWA does not challenge the Utah Counties' claim that extreme circumstances prevented them from filing their own protests in a timely manner, for purposes of NAC 533.100(1).

I.

This is an action to determine whether to reject SNWA's applications to pump and export 50,000 afa of groundwater from the Snake Valley hydrographic basin ("the proposed action"). In making this determination for an inter-basin transfer of groundwater, the State Engineer is legally obligated to consider: "Whether the proposed action is *environmentally sound* as it relates to the basin from which the water is exported[;]" NRS 533.370(6)(c) (emphasis added). The obligation to consider environmental soundness is a binding, non-discretionary statutory duty.²

The Utah Counties raise straightforward concerns over environmental soundness when they sound the alarm that a 50,000 afa diversion and export of groundwater from fragile Snake Valley, the basin from which the water would be exported, would lower the Snake Valley Basin water table enough to kill off groundwater dependent vegetation there, de-stabilize the soils there, and create dust conditions there of such a magnitude that air quality in the million-and-a-half person population centers of Salt Lake and Utah Counties would be significantly impacted. In short, the Utah Counties desire to present evidence as to why the proposed action, a project of unprecedented scale, threatens to turn 50-mile long Snake Valley into another Owens Valley, California pollution-spewing dust bowl, a dust bowl that knows no state boundaries.

SNWA would dismiss the Utah Counties' concerns as irrelevant under the statute. That interpretation turns the plain meaning of the statute on its head. Nevada law plainly obligates the State Engineer to consider whether a 50,000 afa diversion of groundwater is "environmentally

² "... the State Engineer *shall* consider ..." *Id.* (emphasis added).

sound” in Snake Valley. What could be more relevant to this obligation than to receive two metropolitan counties’ requests to consider scientific evidence bearing on whether the proposed action will turn Snake Valley into another Owens Valley, California? How can SNWA or anybody else argue with a straight face that such a concerns do not qualify as “broad public issues or matters” for purposes of NAC 533.100(3)?

II.

SNWA’s reliance on State Engineer Ruling 5726 (April 16, 2007) on SNWA’s Spring Valley groundwater applications is misplaced. A protestant in the Spring Valley hearing alleged that granting SNWA’s Spring Valley applications means more water for Las Vegas Valley, which means more growth in Las Vegas Valley, which means more air pollution in Las Vegas Valley. The protestant said nothing about air quality in Spring Valley, the basin from which the water would be exported. In matters of proposed inter-basin water transfers, NRS 533.370 does not specifically authorize the State Engineer to consider environmental soundness in the destination basin. Instead, the environmental soundness issue is statutorily limited to the “basin from which the water is exported.” Hence, the State Engineer correctly replied to the protestant’s Las Vegas air quality concerns by observing that “the State Engineer’s authority in the review of the water right applications is limited to considerations in Nevada’s water policy statutes.” *Id.*, at 21.

On the other hand, Ruling 5726 does hold that it is certainly within the State Engineer’s scope of statutory authority to consider, *in the basin from which the groundwater will be diverted and exported*, whether the project is environmentally sound, that is, whether pumping 50,000 afa out of the Snake Valley Basin will turn Snake Valley into another Owens Valley type dust bowl.

In Ruling 5726 the State Engineer squarely opined:

While there are no definitions [in the statutes] of what environmentally sound is, there are examples of what environmentally sound is not, such as the Owens Valley project in California. The State Engineer believes that the legislative intent of NRS § 533.370(6)(c) was to protect the natural resources of the basin of origin and prevent a repeat of the Owens Valley while at the same time allowing for responsible use of the available water resources by the citizens of Nevada.

Id. at 47.

SNWA's reliance on Intermediate Order No. 1, dated October 4, 2007 (the "10-4-07 Order") regarding SNWA's Delamar, Dry Lake and Cave Valleys applications is likewise misplaced. The 10-4-07 Order at 7-8 notes the following protest ground:

17. The applications will encourage and enable the uncontrolled population growth *in the Las Vegas Valley*, which will exacerbate existing problems of air quality, traffic and crime. (Emphasis added.)

The 10-4-07 Order at 14 rejected this protest ground, noting that "decisions of growth control are the responsibility of other branches of government" and "whether growth exacerbates air pollution, traffic and crime is not within the State Engineer's jurisdiction."

The 10-4-07 Order at 9 noted the following additional protest ground:

31. The applications will negatively impact Nevada's environment in that it will lead to regional air pollution in violation of law.

The 10-4-07 Order did not reject protest ground No. 31. The only air-quality related protest ground, which the State Engineer rejected, is the *growth-induced Las Vegas Valley* (destination basin) air pollution claim. Protest ground No. 31, which urged that granting the groundwater applications will negatively impact Nevada's environment by leading to regional air pollution, was not stricken by the 10-4-07 Order.

The unambiguous precedent that comes out of the Spring Valley Ruling and the 10-4-07 Order in the Dry Lake, Cave and Delamar Valleys matter is this: Air pollution due to water-aided growth in the destination basin is not relevant to the State Engineer's determination of whether the inter-basin transfer is environmentally sound in the basin from which the groundwater is exported. However, Owens Valley style air quality impacts resulting directly from the export of groundwater are certainly relevant, as bearing on whether the proposed action is "environmentally sound as it relates to the basin from which the water is exported."³

III.

Actions speak louder than words. SNWA's past actions speak exponentially louder than its current words and undercut its current position. In the Spring Valley matter, SNWA voluntarily negotiated at arms-length for the dismissal of the protests of several federal agencies, by doing what? By promising those federal agencies, and by entering into a legally enforceable and binding contract with those federal agencies, to prevent, monitor and mitigate against regional air quality impacts caused by the proposed action's depletion of groundwater dependent vegetation. That binding contract, commonly known as the Spring Valley Stipulated

³ In the matters relating to State Engineer Rulings 5465 and 5506, it does not appear from a reading of those rulings that any of the protestants raised the specific claim that the applications as proposed would not be "environmentally sound as it relates to the basin from which the water is exported," for purposes of NRS 533.370(6)(c). In any event, the State Engineer's later rulings, namely Ruling 5726 and the decision in the 10-4-07 Order not to reject protest No. 31 regarding the environmental impact to regional air quality (see discussion above), would appear to be the most recent and therefore the most reliable precedent on the issue.

Agreement,⁴ was presented to the State Engineer for approval and incorporation into the State Engineer's overall ruling on the Spring Valley matter. The Spring Valley Stipulated Agreement states in relevant part:

The common goals of the Parties are 1) to manage the development of groundwater by SNWA in the Spring Valley HB in order to avoid unreasonable adverse effects to wetlands, wet meadow complexes, springs, streams, and riparian and *phreatophytic* [groundwater dependent] communities (hereafter referred to as Water-dependent Ecosystems) and maintain the biological diversity and ecological health of the Area of Interest⁵ over the long term, . . .

Id. at 4 (emphasis added).

The common goals of the Parties is to manage the development of groundwater by SNWA in the Spring Valley HB to avoid an unreasonable degradation of the scenic values of, and visibility from Great Basin National Park *due to a potential increase in airborne particulates and loss of surface vegetation which may result from groundwater withdrawals by SNWA in the Spring Valley HB.*

Id. at 5 (emphasis added).

⁴ The formal title of which is "Stipulation for Withdrawal of Protests", dated September 8, 2006, entered into by SNWA, United States Department of Interior, Bureau of Indian Affairs, Bureau of Land Management, Fish and Wildlife Service and National Park Service.

⁵ The "Area of Interest" agreed to by SNWA and the Federal Agencies is a vast area that stretches well into Utah. See Figure 1 to Stipulated Agreement.

Further, it is in the Parties' best interests to cooperate in the collection and analysis of additional information regarding the relationship between the development of groundwater resources, loss of surface vegetation, drying of surface soils, increased susceptibility of land surfaces to wind erosion, and the long-term avoidance of unreasonable degradation of the scenic values of, and visibility from, Great Basin National Park.

Id. at 5-6.

The DOI Bureaus hereby expressly agree to withdraw their protests to the SNWA Applications and agree that the Nevada State Engineer may rule on the SNWA Applications based upon the terms and conditions set forth herein.

Id. at 6.

If the consensus of the TRP and BWG is that the proposed change(s) will not . . . (4) cause unreasonable degradation of scenic values of, and the existing visibility from, Great Basin National Park, then the TRP and the BWG will recommend to the Executive Committee that protests not be filed to the proposed change(s).

Id. at 7.

The Parties agree that a copy of this Stipulation shall be submitted to the Nevada State Engineer at the commencement of the administrative proceedings scheduled to begin on September 11, 2006. At that time, the Parties shall request on the record at the beginning of the scheduled proceeding that the State Engineer include this Stipulation and Exhibits A and B as part of the permit terms and conditions in the event that he grants any of the SNWA Applications in total or in part.

Id. at 9.

In the face of the foregoing language quoted from the Spring Valley Stipulated Agreement, SNWA cannot credibly maintain that the protection of air quality from the effects of groundwater depletion is (a) not relevant to these proceedings, and (b) not a legitimate, bona fide broad public matter or issue of concern for purposes of conferring interested person status on the Utah Counties under NAC 533.100(3). Air quality as it relates to the vegetative and soil impacts from

the feared depletion of the groundwater table, was a big enough matter of interest to SNWA and the Federal agencies, to induce them to negotiate for the protection against such impacts, to reduce those negotiations to an enforceable contract, and to submit that contract to the State Engineer for review and approval in the Spring Valley proceedings. For SNWA to now turn about in the Snake Valley proceedings and dismiss *the very same interests and concerns* advanced by the Utah Counties is disingenuous and simply not technically or legally well taken.

CONCLUSION

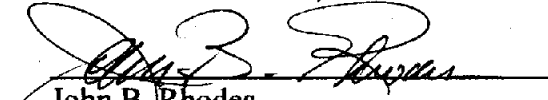
The authority provided under NRS 533.370(6)(c) not only authorizes but also obligates the State Engineer to consider the environmental soundness of the proposed action "as it relates to the basin from which the water is exported". The Utah Counties' claims and evidence concerning the proposed action's threat of turning Snake Valley into another pollution spewing Owens Valley style dust bowl are clearly relevant. The State Engineer at page 47 of Ruling 5726 has already accepted the concept that "environmental soundness" for purposes of NRS 533.370(6)(c) includes the duty to protect against a repeat of the Owens Valley debacle. That is the basis of the Utah Counties' application for interested person status, to present evidence to the State Engineer on the threat of such a repeat debacle.

SNWA of course may challenge the Utah Counties' presentation at the hearing and counter it with its own evidence if any it has; but SNWA has no good reason to keep the Utah Counties from telling their side of the story. The Utah Counties with over a million and a half

citizens, who stand to take the brunt of these air quality impacts, have a compelling reason to be granted interested person status under NAC 533.100(3).

Respectfully submitted this 1st day of July, 2008.

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