

**IN THE OFFICE OF THE STATE ENGINEER  
OF THE STATE OF NEVADA**

**IN THE MATTER OF APPLICATION ) ELY SHOSHONE TRIBE'S MOTION  
NOS. 54022 THROUGH 54030, ) REGARDING AIR QUALITY  
INCLUSIVE, FILED TO FILED TO ) IMPACTS AND EVIDENCE  
APPROPRIATE THE )  
UNDERGROUND WATERS OF )  
SNAKE VALLEY (195), )  
HYDROGRAPHIC BASIN )**

State 'S EXHIBIT 44
DATE: 8-1-08

Comes now, the Ely Shoshone Tribe, and files this Motion Regarding Air Quality Impacts and Evidence.

**INTRODUCTION**

The Ely Shoshone Tribe raised the issue of air quality in paragraph 12 of its Protest. This Motion is being filed in the abundance of caution to ensure that the Ely Shoshone Tribe has the opportunity to present evidence in this regard at the hearing on this matter. The Ely Shoshone Tribe is also filing this motion in support and joinder of the air quality motion being filed by protestant Millard County.

**BRIEF STATEMENT OF PROCEDURAL HISTORY**

In or about 1989 the Las Vegas Valley Water District (hereinafter "LVVWD") filed applications A54022 through A54030 (hereinafter the "Applications") with the Nevada State Engineer (hereinafter "the State Engineer") to appropriate water in Snake Valley. The Ely Shoshone Tribe filed a timely protest to application A54027. The LVVWD subsequently assigned its interest the Southern Nevada Water Authority (hereinafter "SNWA"). On or about May 28, 2008, the State Engineer scheduled a pre-hearing on the Applications and scheduled a hearing for July 15, 2008, at 9:30 am. At the

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Air Quality Brief  
Application Nos. 54022 - 54030  
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July 15, 2008, pre-hearing the State Engineer set a deadline of August 1, 2008, for the filing of briefs regarding whether protestants would be allowed to address air quality when they presented evidence in support of their protests.

### **ARGUMENT**

The Ely Shoshone Tribe must be allowed to present evidence regarding air quality at the hearing on these applications. Paragraph 12 of the Ely Shoshone Tribe's protest clearly refers to the Clean Air Act and the air quality effects of the applications. The Ely Shoshone Tribe should be allowed to present evidence regarding these effects on air quality as they pertain to the application A54027 and the other applications.

Millard County should also be allowed to present evidence regarding the effect on air quality that these applications will have. The Ely Shoshone Tribe hereby joins Millard County's motion in this regard.

### **I**

#### **NRS 533.370(5) AND PROPOSED USES OF WATER THAT THREATEN TO PROVE DETRIMENTAL TO THE PUBLIC INTEREST**

##### **A. Air Quality Impact Evidence At a Protest Hearing is Relevant to The State Engineer's NRS 533.370(5) Duty to Reject Applications When the Proposed Use Threatens to Prove Detrimental to the Public Interest.**

The Ely Shoshone Tribe wishes to put on evidence at the protest hearing to prove that air quality impacts from SNWA's proposed use of Snake Valley groundwater threatens to lower the water table throughout Snake Valley enough to deplete its fragile phreatophytic plant community, destabilize the valley soils and create a perpetual Owens Valley style erosive dust bowl condition detrimental to the public interest. That point is highly relevant and material, because if it proves out then the State Engineer is statutorily

required to reject SNWA's groundwater applications pursuant to NRS 533.370, which states in pertinent part:

5. Except as otherwise provided in subsection 11, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectible interests in existing domestic wells as set forth in NRS 533.024, *or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit.*

NRS 533.370(5) (emphasis added).

**B. SNWA Cannot Credibly Dispute That Any Air Quality Impacts From the Proposed Use of Snake Valley Groundwater Will Threaten To Prove Detrimental To the Public Interest.**

SNWA cannot credibly or in good faith dispute that project induced air quality impacts in Snake Valley would prove detrimental to the public interest. Such a position would conflict with SNWA's past position taken in the Spring Valley matter. There SNWA voluntarily negotiated at arms-length for the dismissal of the protests of several federal agencies, by promising those agencies in a legally enforceable and binding contract commonly called the Spring Valley Stipulated Agreement,<sup>1</sup> to prevent, monitor and mitigate *regional air quality impacts caused by the proposed action's depletion of groundwater dependent vegetation* in the so-called Area of Interest.<sup>2</sup> The Spring Valley Stipulated Agreement was presented to the State Engineer for approval and incorporation into the State Engineer's overall ruling on the Spring Valley matter.

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<sup>1</sup> 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..

<sup>2</sup> The "Area of Interest" is a large geographical region expressly defined in the Stipulated Agreement to encompass both the Nevada and Utah side of Snake Valley and stretches well beyond Snake Valley into other Utah valleys. See Figure 1 to the Stipulated Agreement.

By this action, which SNWA no doubt undertook in all sincerity and good faith, SNWA signaled to the State Engineer, to the States of Nevada and Utah, to all counties in and around Snake Valley on both sides of the state line, to the United States Government and to all other Snake Valley stakeholders, protestants and interested persons that it regards project-induced air quality impacts in and around Snake Valley to be an important matter of public interest. Consider the following excerpts from the Spring Valley Stipulated Agreement:

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* communities (hereafter referred to as Water-dependent Ecosystems) and maintain the biological diversity and ecological health of the Area of Interest over the long term, . . . .

*Id.* at 4 (emphasis added).

The common goal 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).

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.

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. It would not be technically nor legally well taken for SNWA to now turn about in the Snake Valley proceedings and dismiss as not potentially detrimental to the public interest, *the very*

*same air quality interests and concerns* which The Ely Shoshone Tribe wishes to advance as part of its case.

**II**

**NRS 533.370(6)(c) AND THE ENVIRONMENTAL SOUNDNESS OF PROPOSED INTERBASIN TRANSFERS AS IT RELATES TO THE VALLEY OF EXPORT**

**A. Air Quality Impact Evidence At a Protest Hearing is Relevant to The State Engineer's NRS 533.370(6)(c) Duty to Consider Whether SNWA's Proposed Interbasin Groundwater Transfer Is Environmentally Sound As it Relates to The Basin From Which the Water is Exported.**

The Ely Shoshone Tribe wishes to put on evidence at the protest hearing to prove that air quality impacts from SNWA's proposed interbasin transfer of Snake Valley groundwater threatens to lower the water table throughout Snake Valley enough to deplete its fragile phreatophytic plant community, destabilize the valley soils and create a perpetual Owens Valley style erosive dust bowl condition detrimental to the public interest. That point statutorily deserves consideration by the State Engineer in determining whether SNWA's Snake Valley applications must be rejected, because the potential repeat of the Owens Valley debacle goes to whether SNWA's proposed action is environmentally sound as it relates to the basin from which the water is exported. NRS 533.370 states in pertinent part that:

6. In determining whether an application for an interbasin transfer of groundwater must be rejected pursuant to this section, the State Engineer shall consider:

.....

(c) Whether the proposed action is environmentally sound as it relates to the basin from which the water is exported;

NRS 533.370(6)(c).<sup>3</sup>

**B. The Precedent On Which SNWA Is Apt to Rely Does Not Support Its Argument That Air Quality Impacts Are Irrelevant the State Engineer's NRS 533.370(6)(c) Duty To Consider Environmental Soundness In Interbasin Groundwater Transfer Protest Hearings**

SNWA cannot legitimately rely on State Engineer Ruling 5726 for the notion that air quality evidence is irrelevant. 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, nowhere does NRS 533.070(6)(c) authorize the State Engineer to consider environmental soundness in the valley of destination. Instead, the environmental soundness question is statutorily limited to the "basin from which the water is exported." Hence, the State Engineer in Ruling 5726 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.

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<sup>3</sup> In State Engineer Ruling 5726 (April 16, 2007) on SNWA's Spring Valley groundwater applications, 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.

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 valley from which the groundwater will be diverted*, whether the project is environmentally sound, that is, whether pumping 50,000 afa out of Snake Valley will turn Snake Valley into another Owens Valley type dust bowl. See footnote 3 above.

Nor can SNWA legitimately rely on Intermediate Order No 1 (October 4, 2007), ("the 10-4-07 Order") regarding SNWA's Delamar, Dry Lake and Cave Valleys applications. 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 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 valley is not relevant to the State Engineer's determination of whether the inter-basin transfer is environmentally sound in the valley from which the groundwater is exported. However, Owens Valley style air quality impacts flowing 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."<sup>4</sup>

**C. In Any Event SNWA Cannot Credibly Dispute That Any Air Quality Impacts From the Proposed Interbasin Groundwater Transfer Will Render The Proposal Environmentally Unsound As it Relates to the Basin From Which the Water is Exported.**

Based on the Stipulated Agreement language quoted in I B above, SNWA cannot credibly dispute that air quality impacts caused by the proposed interbasin transfer out of Snake Valley would render the proposal environmentally unsound. SNWA and the Federal agencies negotiated for the protection against such impacts, reduced those negotiations to an enforceable contract, and submitted that contract to the State Engineer for review and approval in the Spring Valley proceedings. The Stipulated Agreement's reference at pages 5-6 to "the relationship between the development of groundwater resources, loss of surface vegetation, drying of surface soils, increased susceptibility of

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<sup>4</sup> In the matters relating to State Engineer Rulings 5465 and 5506, it does not appear that any of the protestants raised the claim that the proposed action would not be "environmentally sound as it relates to the basin from which the water is exported," for purposes of NRS 533.070(6)(c). In any event, the State Engineer's later rulings, namely Ruling 5726 and the decision in its 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.

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” reads like a would-be The Ely Shoshone Tribe trial brief on air quality related environmental soundness, were The Ely Shoshone Tribe permitted to put on an air quality case.


### **III. CONCLUSION**

It is crucial that the Ely Shoshone Tribe be allowed to present an air quality impact case to the State Engineer before the State Engineer considers whether to reject SNWA’s proposed interbasin transfer and groundwater use, and before the State Engineer determines if the proposed transfer threatens the public interest and the environment. .

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DATED this 1st day of August, 2008.



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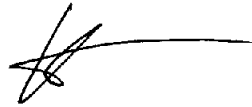
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 1<sup>st</sup> day of August, 2008, I deposited for delivery via certified mail, postage prepaid, a true and correct copy of the foregoing, addressed to:

Paul G. Taggart, Esq.  
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Southern Nevada Water Authority  
1001 South Valley View Blvd.  
Las Vegas, Nevada 89153

A handwritten signature in black ink, consisting of a stylized 'P' followed by a horizontal line extending to the right.

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