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

* * *

IN THE MATTER OF APPLICATION NOS. 54022 THROUGH 54030, INCLUSIVE, FILED TO APPROPRATE THE UNDERGROUND WATERS OF SNAKE VALLEY (195), HYDROGRAPHIC BASINS	OPPOSITION TO MOTIONS REGARDING AIR QUALITY EVIDENCE

COMES NOW, the SOUTHERN NEVADA WATER AUTHORITY ("SNWA"), by and through its counsel, PAUL G. TAGGART, ESQ. and LYNN V. RIVERA, ESQ., of the law firm of TAGGART & TAGGART, LTD., DANA SMITH, Deputy Counsel of SNWA, and ROBERT A. DOTSON, ESQ. of the law firm of LAXALT & NOMURA, LTD., to file this opposition to the motions filed by Millard County, the Ely Shoshone Tribe, and Ambrose et al. (collectively the "Protestants"), to present evidence on the air quality at the administrative hearing regarding SNWA groundwater right applications in Snake Valley, Nevada. The evidence should not be admitted because (1) the Protestants failed to file a protest that properly raised air quality as a protest issue; and (2) air quality evidence is not generally considered by the State Engineer because the consideration of air quality issues is outside the State Engineer's expertise and jurisdiction.

I. PROCEDURAL BACKGROUND

On October 26, 2005, the State Engineer issued a Notice of Pre-Hearing Conference for water right Applications 53987-53992 and 54003–54030, inclusive. Some of these applications, more specifically Applications 54022-54030, were filed for new appropriations in Snake Valley, Nevada. ("Snake Valley Applications") The Pre-Hearing Conference was held on January 4, 2006. On March 8, 2006, an Intermediate Order was issued by the State Engineer. The Intermediate Order set the hearing dates for the Spring Valley applications, and stated that the hearing for Snake Valley would be scheduled at some later date.

State 'S EXHIBIT 47
DATE: 8-1-08

On May 23, 2008, SNWA requested that an Administrative Hearing be scheduled for the Snake Valley Applications. On May 28, 2008, the State Engineer issued a Notice of Hearing for the Snake Valley Applications. The Notice indicated that the public administrative hearing would be initiated on July 15, 2008.

On July 15, 2008, the State Engineer initiated the administrative hearing and requested that SNWA and the Protestants file briefs regarding the issue of whether evidence concerning potential air quality impacts is admissible.

II. ANALYSIS

A. Protestants who Failed to Raise Air Quality with Reasonable Certainty as a Protest Ground Should not be Allowed to Present Evidence on Air Quality.

Most of the Protestants failed to raise a challenge based on air quality in their written protests. Given their failure to protest the air quality issue, the State Engineer should not allow them to present evidence on this issue.

1. Reasonable Certainty Required in Protests.

The right to protest a groundwater application is governed by NRS 533.365. Nevada Revised Statute 533.365(1) states:

> Any person interested may, within 30 days from the date of last publication of the notice of application, file with the State Engineer a written protest against the granting of the application, *setting forth with reasonable certainty the grounds of such protest,* which shall be verified by the affidavit of the protestant, his agent or attorney.

Emphasis added. The statute is unequivocal, in that an interested person may file a written protest "within 30 days after the date of last publication of the notice of application." NRS 533.365(1). The written protest must set "forth with reasonable certainty the grounds of such protest." *See* NRS 533.365(1). NRS 533.365(1) requires that the protest grounds be verified by a sworn affidavit. Neither the State Engineer nor an applicant should be forced to divine the meaning of a vague protest. Allowing vague protest allegations would circumvent the

requirement that the protestant swear under oath in an affidavit that the protestant is setting forth the grounds for protest with reasonable certainty. The protest affidavit requirement should be taken seriously. The State Engineer and an applicant should not be required to guess about the grounds that are alleged in a protest and, in fact, such speculation undermines the orderly administration of justice and ignores the legislative directive requiring reasonable certainty. Also, there is no procedure in NRS 533.365 allowing for amendment of a written protest, and the State Engineer has no authority to consider a protest that is untimely because the statute is jurisdictional. *See* AGO 97 (223-1922).

As "reasonable certainty" is not defined by statute, the definition of said standard is a question of statutory interpretation. In such cases, courts have held the words used in the statute are given their ordinary use or meaning. *See City of Las Vegas v. Eighth Judicial District Court of Nevada,* 188 P.3d 55 (2008). Specifically, "the plain meaning of the words in a statute should be respected unless doing so violated the spirit of the act." *Matter of William S.,* 122 Nev. 423, 437, 132 P.3d 1015, 1018 (2006). However, "[i]f more than one reasonable meaning can be understood from the statute's language, it is ambiguous, and the plain meaning rule does not apply." *Id.* at 437, 132 P.3d at 1018-19.

Here, "reasonable certainty" is not ambiguous. As such, the plain meaning of the terms "reasonable" and "certainty" must be delineated. "Reasonable" is defined as "fair, proper, or moderate under the circumstances...[a]ccording to reason." Black's Law Dictionary 1018 (7th ed. 1999). "Certainty" is defined as "fixed or settled." Merriam-Webster's Collegiate Dictionary 187 (10th ed. 1997). Therefore, the articulated standard in NRS 533.365 is whether a reasonable or fair person can read the grounds of protest and properly conclude with certainty that the protestant is making a specific claim.

Additionally, NRS Chapter 533 anticipates a situation whereby applications are made, a time period is allotted for protests, and the State Engineer may then evaluate the applications and protests and properly resolve the issues and appropriate the water. *See* NRS 533.370. If necessary, the governing statutes provide for hearing procedures. *Id.* However, hearings are not

mandatory and the majority of protests are resolved without reaching the hearing level. As NRS Chapter 533 contemplates such procedures, the manner in which protests are made must comply with the procedural context. Thus, the State Engineer must be able to read a protest and from the plain meaning of the protest, conclude with reasonable certainty a protestant is making a specific claim.

Further, as indicated in NRS 532.110, the State Engineer has a duty to enforce the rules as set forth in NRS Chapter 533. Allowing Protestants here to circumvent the explicit standard as set forth in NRS 533.365(1) would encourage blatant disregard of the statutory requirements deemed appropriate by the Legislature. In addition, circumvention of the rules would enable the Protestants to present vague claims and later argue such vague claims were actually protests to specific issues not stated with reasonable certainty. Such practice would circumvent the entire administrative proceeding and lead to a waste of State resources.

The reasonable certainty requirement in NRS 533.365(1) is neither complex nor burdensome; it merely requires that a written protest challenging the appropriation based on concerns of air quality state the concern by including the word "air" or its synonym. Millard County and the majority of the ACE Protestants failed to raise this issue and provide reasonable notice, and should be precluded from presenting evidence supporting a protest ground regarding the issue of air quality. Accordingly, SNWA respectfully requests that the State Engineer deny Millard County's and most of the ACE Protestants' request to present evidence in support of an air quality protest ground.

2. Millard County

Millard County expressly admitted at the July 15, 2008, hearing that its "protests did not specifically [include] [sic] the words air quality." Despite the fact Millard County did not use the word "air" or "air quality" in its protest, Millard County asks for the carte blanche right to present evidence on this issue. Specifically, Millard County argues that its protest claim regarding a reduction in phreatophytic plants is tantamount to a protest claim based on air quality, particularly given that "[a]ir quality impacts are an undeniable direct consequence of

phreatophytic loss." Millard County Motion at 9-10. Millard County asks the State Engineer to liberally construe its pleading and conclude that the phreatopytic loss means the same as air quality. Millard argues that "precise exactitude" is not required, and notes that the State Engineer may take judicial notice or consider any evidence on "issues that may arise under 533 and 534 of NRS." *See* Millard County Motion at 10-11 (citing NAC 533.210).

The fatal flaw in Millard County's argument is that NRS 533.365 is jurisdictional. Just as a protest cannot be filed outside the thirty day jurisdictional period, a protest cannot be amended after the expiration of the thirty day jurisdictional period. NRS 533.365. Under Nevada law, Millard County's claims of protest and evidence in support thereof are limited to the grounds alleged with "reasonable certainty" in its written protest. In its protest, Millard County alleged that Snake Valley Applications would threaten phreaotophytes "which provide water and habitat critical to the use and survival of wildlife, grazing livestock and other surface existing uses." If Millard County believed the groundwater appropriation would have adverse affects on air quality, it should have articulated that concern in its written protest.

While Millard County is correct that precise exactitude of the ground of protest is not required, NRS 533.365 requires reasonable certainty. Certainly it is reasonable to require a protestant alleging the appropriation of groundwater will affect the quality of air to incorporate the word "air," or a comparable synonym, in the written statement of protest. Perhaps the Hearing Officer explained the law best at the July 15, 2008, hearing, in response to Millard County's admission that its protests did not reference "air quality," when she explained: "You're limited to exactly what's in your protest." July 15, 2008, Hearing Transcript, 50. A reasonable review of this language in Millard County's protest does not yield an air quality concern.

Finally, Millard County urges the State Engineer to evaluate a protest under the notice pleading standard. The notice pleading standard, set forth in NRCP 8(a), states "[a] pleading which sets forth a claim for relief...shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the

pleader seeks." Articulating a protest with reasonable certainty is clearly a higher standard than notice pleading. In this administrative hearing, the State Engineer and the Applicant are almost entirely reliant upon the detail and specificity of the protest to provide notice of the basis of the protest. This is in contrast to a case of original jurisdiction in district court where discovery is incredibly broad and allowed as a matter of course. The Nevada Courts, in adopting the notice pleading standard, also implemented the discovery process by which factual issues are developed, and to prevent the ambush of an opposing party during trial. In the administrative provisions of NRS Chapter 533, however, no such discovery procedure is provided. Thus, there is no procedural safeguard to prevent ambush of the opposing party at a hearing except for the requirement of stating a protest with reasonable certainty.

The standard of "reasonable certainty" set forth in NRS 533.365 is far more akin to the specificity requirements of a fraud claim listed in NRCP 9(b) and even in such a case the same exhaustive discovery would be allowed in district court. The standard the Protestants ask this tribunal to adopt would lead to abuse and would force the State Engineer and the Applicant to grope in the dark for the basis of each protest. Such a result would be terribly inefficient and violative of basic due process.

In addition, Millard County failed to even meet the bare Notice Pleading standard as they did not mention air quality or dust issues in their protest. Instead, Millard County's protest related the environmental concern to farming. As such, SNWA respectfully requests that the State Engineer not consider any air quality evidence submitted based on Millard County's protest.

3. ACE Protestants

Most of the 36 Protestants represented by the Advocates for Community Environment ("ACE Protestants") are similarly situated to Millard County in that their protests do not allege concerns about air quality. The ACE Protestants fail to discuss each written protest individually but, like Millard County, argue that general reference to the affect of phreatophtyic loss on the

environment is sufficient to present a claim regarding air quality. *See* ACE Protestants Motion at 7.

Of the ACE Protestants, the following protestants failed to state *any* protest ground regarding an environmentally-related issue: Protestant Marilyn J. Ambrose, the Baker Advisory Board, Charles Berger, Reita Berger, Border Inn, James R. Jordan, Marie L. Jordan, New Age Gardeners, Tracy Lee Pelk, Snake Valley Senior Citizen Center, and Perry P. and Betty L. Steadman. In fact, the latter Protestants only address economic concerns of the water transfer. As such, the argument that these Protestants raised an air quality protest ground is completely unfounded. These Protestants should be prohibited from presenting evidence regarding an air quality protest ground.

A second group of ACE Protestants - Baker Ranches, Inc., Garrett Family Trust, Carolyn Garrett, Jo Anne Garrett, Owen L. Gonder, Clay Iverson, Nevada Farm Bureau Federation, Margaret Ann Pense, William R. and Katherine Rountree, Gerald Sand, Patsy Schlabsz, School of Natural Order, Thomas E. Sims, Snake Valley Volunteer Fire Department, Terrance P. and Debra J. Steadman, Darwin and Kay Wheeler, Darlene S. Whitlock, and John G. Tryon (mentioned only "damage to plant and animal life") - articulated their protest, in part, as follows:

> Diversion and export of such a quantity of water will...further threaten springs, seeps and phreatophytes which provide water and habitat critical to the survival of grazing our livestock, wildlife, and other surface area uses.
>
> The water diversion "will unnecessarily destroy environmental, ecological scenic and recreational values that the State holds in trust for all its citizens.

This language is similar to that used by Millard County in its protest. Such protests fail to mention or address the issue of air quality, pollution, dust problems, or any environmental issue relating to the air. As such, the State Engineer or any reasonable person reading the protest could not conclude with reasonable certainty that the above stated protests were articulating

claims relating to air quality. Therefore, this group of ACE Protestants must be barred from presenting evidence relating to an air quality protest issue.

The remaining ACE Protestants presented the following protest ground, "the subject application should be denied because it individually and cumulatively with other Applications will exceed the safe yield of this basin thereby adversely affecting phreatophytes and create air contamination and air pollution in violation of State and Federal Statutes, including but not limited to the Clean Air Act and Chapter 445 of the Nevada Revised Statutes." The Protestants that included this protest ground are as follows: Thomas A. Bath, William R. Coffman, County of White Pine, Nevada Cattlemen's Association Eastern Unit, Robert B. and Gayle J. Robison and Dean C. Stubbs. SNWA concedes that this group of Protestants has properly stated a protest ground regarding air quality in the exporting basin. These protests did not state an air quality concern for air quality on other locations, such as Salt Lake or Utah Counties. Accordingly, to the extent the State Engineer may properly consider dust issues in the environmentally sound inquiry, as discussed in section C below, SNWA concedes that these Protestants may submit such evidence about potential impacts in Snake Valley only.

The ACE Protestants argue a broad spectrum of protest grounds asserted by them are sufficient to give rise to a protest based on air quality, including allegations that the groundwater appropriation would: (1) threaten springs and seeps, (2) place the health of the people in Spring Valley in jeopardy; and (3) lower ground water levels. ACE Protestant Motion at 7. In alleging that a protest based on a general allegation of concern for the community should be construed to include air quality issues, the ACE Protestants ask the State Engineer to ignore the rule of law and pretend that the reasonable certainty requirement set forth in NRS 533.365(1) does not exist. Under the ACE Protestants' construction of the protest statute, any claim of protest referencing any general concern, no matter how broad or ambiguous, would vest a protestant with the

unlimited ability to present evidence on any issue, without affording the applicant and the State Engineer adequate notice of the protest ground. The ACE Protestants' construction of NRS 533.365 is contrary to basic notions of notice and due process, and should be rejected.

Finally, the ACE Protestants even go so far as to argue that they should be allowed to present evidence on claims that they did not plead and that were unknown and unidentified at the time of the written protest merely by incorporating by reference the written protests of all protestants. *See* ACE Protestant Motion at 7. The mere fact that some of the written protests included language incorporating other unknown and unidentified protest grounds by reference should not afford the protestants an unqualified right to assert any claim imaginable. Such a freewheeling atmosphere would offend the reasonable certainty requirement, frustrate the purposes of orderly administration of justice, and result in the needless and endless cumulative presentations of evidence. This notion that protestants have an unqualified right to amend a protest or incorporate other protest grounds by reference has been rejected by the State Engineer consistently in other Rulings and Orders. Spring Valley Intermediate Order No. 4 at 11; Delamar, Dry Lake and Cave Valley Intermediate Order No. 1 at 10-11 (rejecting attempt by ACE to amend protest).

4. Ely Shoshone Tribe Protest

The protest filed by the Ely Shoshone Tribe contains the same language as the last group of ACE Protestants described above. Accordingly, SNWA concedes that the Ely Shoshone Tribe properly stated a protest ground regarding air quality in the exporting basin. This protest did not state an air quality concern for air quality on other locations, such as Salt Lake or Utah Counties. Accordingly, to the extent the State Engineer may properly consider dust issues in the environmentally sound inquiry, as discussed in section C below, SNWA concedes that the Ely Shoshone Tribe may submit such evidence about potential impacts in Snake Valley only.

B. Broad Air Quality Concerns are not Included in the Type of Public Interest Evidence the State Engineer Should Consider, nor Does the Environmentally Sound Consideration Open the Door to Extensive Analysis by the State Engineer of Air Quality Issues.

Protestants argue the State Engineer should consider their evidence on air quality concerns because it involves the public interest and such consideration is required to determine whether the project is environmentally sound. Shoshone Motion at 2-6; ACE Protestant Motion at 3. Notably, in support of their arguments, Shoshone and Millard County rely primarily on rhetorical narratives about Owens Valley and, amazingly, SNWA's settlement agreement with several federal agencies in the Spring Valley case. Shoshone Motion at 3-5; Millard Motion at 3-5. For the following reasons, such a broad interpretation of the State Engineer's statutorily required inquiry is without merit.

1. The Scope of the Public Interest Review in NRS 533.370 is Limited by the Specialized and Limited Nature of the State Engineer's Jurisdiction.

NRS 533.370(5) provides that the State Engineer shall reject an application to appropriate groundwater where the appropriation "threatens to prove detrimental to the public interest." The Nevada Supreme Court has rejected the argument that the public interest concern in NRS 533.370 should be defined broadly to include considerations that were not set forth in Nevada's water policy statutes. *See Pyramid Lake Paiute Tribe of Indians v. Washoe County,* 112 Nev. 743, 748, 918 P.2d 697, 700 (1996) (holding that the State Engineer need not conduct a comparative economic analysis of project alternatives). In doing so, the Court recognized the limited nature of the State Engineer's resources and personnel and concluded that "the Legislature's failure to increase funding for the State Engineer's staff impliedly reinforces the conclusion that the legislature placed the burden of evaluating" concerns that are not included in the water statutes on other government agencies. *Id.* at 750, 918 P.2d at 701.

Moreover, with respect to the State Engineer's analysis of public interest concerns, the Ninth Circuit Court has held that a cumulative impact study on a transfer application is not required. *United States v. Alpine Land & Reservoir Co.*, 341 F.3d 1172, 1183-84 (9th Cir. 2003). The Ninth Circuit explained that the State Engineer may fulfill his duty to guard the public

interest under NRS 533.370 by merely considering the 'environmental soundness' of the project and balancing that consideration with several other public interest factors related to water, including the public interest in making water available for beneficial uses. *See Id.*

Accordingly, the State Engineer's public interest inquiry that is called for in NRS 533.370 is limited to water-related concerns, and not environmental concerns like air quality.

2. The Legislative History of NRS 533.370(6) Indicates That the Legislature did not Intend to Expand the State Engineer's Inquiry into the Regulation of Air Quality.

Likewise, the scope of the State Engineer's consideration of environmental soundness under NRS 533.370(6) is far more limited than is suggested by Protestants. The plain language of the statute and its legislative history show that the environmental soundness of the Snake Valley Applications is but one of several criteria the State Engineer should consider in evaluating the public interest. This evaluation requires a balancing of competing priorities among potential uses and consideration of the following factors:

> (a) Whether the applicant has justified the need to import water to another basin;
>
> (b) If the State Engineer determines that a plan for conservation of water is advisable for the basin into which the water is to be imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out;
>
> (c) Whether the proposed action is environmentally sound as it relates to the basin from which the water is exported;
>
> (d) Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and
>
> (e) Any other factor the State Engineer determines to be relevant.
>
> NRS 533.370(6).

In the proper context, the "environmental soundness" of the project is merely one consideration among many public interest factors, and these two words should not be construed to control the entire hearing process before the State Engineer. This limited construction of the "environmental soundness" consideration is completely consistent with legislative history of Senate Bill 108 which was codified as NRS 533.370(6). During the debate over this bill, then State Engineer Michael Turnipseed directly addressed the "environmental soundness" language in SB 108, explaining that water was his area of expertise:

> I generally don't consider myself to be the guardian of the environment. I am comfortable being the guardian of the state ground water and surface water . . . I am not a range manager or scientist.

Hearing before the Senate Subcommittee on Natural Resources, at page 2 (February 22, 1999). In response, Senator James, one of the bills drafters, clarified that the legislature did not "inten[d] to create an environmental impact statement (EIS) for every interbasin transfer application" and the law "requires a determination to see if a project is detrimental to the public interest." *Id.* at pg. 3. Additionally, the testimony in the hearings that emphasized the concerns over environmental soundness, and was directly related to the availability of water:

> [T]here was a need for a concise definition of what was required in order to ensure public interest would be protected regarding water rights laws, particularly as it applied to interbasin transfers. It was important to protect the future environment of basins in rural communities to ensure water would be available for future growth.

See Hearing on SB 108 Before the Assembly Committee on Natural Resources, at pg. 5 (April 21, 1999). The recommendation to the Legislature that led to the proposal of SB 108 expressly stated that the environmentally soundness of a water appropriation is one of several factors to consider "[i]n applying the public interest test (under NRS 533.370(3)) to an interbasin or intercounty water right appropriation or change request." *See* Recommendation to Draft Nevada State Water Plan, pg. 54.

Further, the legislative history for SB 108 states that the interbasin factors are to be considered by the State Engineer in order to determine ". . . if additional studies were needed prior to postponing action on an application." Minutes of the Assembly Committee on Natural Resources, Agriculture, and Mining, Seventieth Session, April 21, 1999, at pg. 3. These are not elements which must be proven by the Applicant, but are a list of various public interest factors to consider when determining if additional studies are needed.

SNWA has satisfied any Nevada water law requirement regarding comprehensive studies of the project by prepared many reports, including the environmental impact study on the Clark, Lincoln and White Pine County Groundwater Project. The environmental impact study is required by federal law and is currently underway to evaluate the potential environmental impact of the Snake Valley Applications. Issues associated with specific environmental media will be addressed through that independent study and reviewed by the agencies with specific statutory authority over those issues. Accordingly, the State Engineer should decline to duplicate that analysis by engaging in an extensive review of air quality issues.

3. The State Engineer has Properly Determined That Air Quality Issues are not Relevant to the Public Interest or Environmentally Sound Inquiries.

The State Engineer's previous construction of the scope of the public interest and environmental soundness analysis is consistent with the above mentioned case law and legislative history. On at least four occasions, the State Engineer has construed the water laws of Nevada to confirm that his Office has no jurisdiction over issues involving air quality because the Legislature has delegated authority of the regulation of air quality to another administrative agencies. The four prior State Engineer rulings on this issue are directly on-point and unequivocal.

In Ruling No. 5726 at 21-22, the State Engineer concluded that his "authority in the review of water rights applications is limited to considerations identified in Nevada's water policy statutes and "does not include consideration of factors identified in directives in Nevada statutes requiring other governmental agencies to act in the consideration of water rights

applications."" In Ruling No. 5465 at 21, the State Engineer concluded that "the issue as to water quality is relegated to another agency of government." In Ruling 5078 at 31 and 33, the State Engineer recognized that any review of air quality is "not within the jurisdiction of the State Engineer under Nevada water law." In cases involving water right applications, in Hazen, the State Engineer also refused to consider air quality evidence. Transcript, dated July 15, 2008, at 109.

More specifically, in the Spring Valley case the State Engineer construed the environmentally sound language set forth in NRS 533.370(6)(c). *See* State Engineer Ruling No. 5726 at 47. The State Engineer determined that, with respect to environmental soundness, "the perspective the State Engineer is to focus on is that of hydrologic issues" and "is not to be duplicative of the environmental review conducted pursuant to federal law." *See id* ; *see also* Spring Valley, Intermediate Order No. 4 at 6. Notably, the State Engineer defined environmentally sound in the same manner as the public interest exception based on the Nevada water statutes. *See* State Engineer Ruling No. 5726 at 47. The State Engineer expressly stated that the appropriate inquiry is "whether the use of water is sustainable over the long-term without unreasonable impacts to the water resources and the hydrologic-related natural resources that are dependent on those resources." *Id.* The hydrologic-related natural resources were expressly identified in the ruling to include wildlife (NRS 533.367), contamination of drinking water (NRS 534.020), and plant community changes resulting from lowering of the static water level (NRS 534.110(4)). *See id.* at 48.

As can be seen from case law, legislative history, and prior State Engineer Rulings, the Legislature has limited the State Engineer's jurisdiction to the regulation and appropriation of water -- not air quality. *See* NRS 532.165 (defining the State Engineer duties in context of adjudication of water rights); *Bailey v. State of Nevada,* 95 Nev. 378, 594 P.2d 734, 737 (1979). Neither Millard County, the ACE Protestants, nor Shoshones, have identified any Nevada water law vesting the State Engineer with regulatory authority over air quality or pollution and, in fact, no such statutory authority exists.

The Shoshones and Millard County argue that the State Engineer's prior rulings are distinguishable because they involve air quality concerns in the importing basin. They note their air quality challenge in this case involves the exporting basin and therefore, pursuant to NRS 533.370(6)(c), the State Engineer should consider air quality claims as part of the consideration of whether the proposed action is "environmentally sound." While Protestants are correct that NRS 533.370(6) expressly states that the State Engineer must determine "[w]hether the proposed action is environmentally sound as it relates to the basin from which the water is exported," they wrongly assert that the Legislature added the environmentally sound consideration to vest the State Engineer with authority over air quality claims.

Nowhere in the legislative history of the interbasin transfer statute is there any reference to expanding the jurisdiction of the State Engineer to include air quality and, likewise, nowhere in the legislative history is there a reference to Owens Valley. No matter how many times the Protestants rhetorically cite to the Owens Valley example, they cannot change the fact the Nevada legislature was not reacting to Owens Valley when it adopted the interbasin transfer considerations. The environmentally sound consideration in NRS 533.370 can not be defined by anecdote. It is undisputable that Nevada water law is created by the Legislature, and construed by the State Engineer and the Nevada Supreme Court. Nevada law, including NRS 533.370, is not defined by what occurred almost one hundred years ago, in 1913, when the City of Los Angeles built an aqueduct in Owens Valley. While what happened at Owens Valley paints a dramatic picture for the Protestants, SNWA and the State of Nevada neither participated in nor contributed to the creation of a dust bowl in Owens Valley. In fact, Owens Valley is a non-issue in this case as it could not occur in Nevada given the comprehensive state and federal regulatory scheme for protecting air, water and the environment. Further, SNWA has consistently committed to developing the subject water resources in an environmentally responsible fashion. Spring Valley Transcript, dated September 11, 2006, at 83-91. (Testimony of Patricia Mulroy). Accordingly, while the Protestants' arguments are replete with references to Owens Valley, the historical reference to a dust particulate problem in another state, from another time and due to

the lack of statutory oversight truly has nothing to do with the case before this tribunal. Certainly, such references cannot change the State Engineer's statutory authority.

Likewise, the scope of the environmentally sound inquiry cannot be defined by the Spring Valley Settlement Agreement ("Settlement Agreement"). The Shoshones and Millard County argue that the State Engineer should define the NRS 533.370 inquiry by examining SNWA's Settlement Agreement with certain federal agencies. Specifically, the Shoshones and Millard County note that, in the Spring Valley Settlement, SNWA stated that it had common goals with the federal agencies of managing groundwater in the Spring Valley hydrographic basin to avoid (1) "unreasonable adverse effects" to water-dependent ecosystems, including phreatophytes, and (2) to avoid unreasonable degradation of the scenic values of, and visibility from Great Basin National Park. *See* Settlement Agreement at 4-6. The Shoshones and Millard County argue that because the Spring Valley Settlement agreement uses the word "phreatophytic" and "airborne particulates" it proves that air quality evidence is admissible under NRS 533.370.

The Settlement Agreement, however, does not and cannot define NRS 533.370. The Nevada legislature was not a party to the Settlement Agreement, indeed no State agency is a party to the Agreement. Although the Agreement was accepted and even referenced by the State Engineer in Ruling 5726, that document does not bind the State Engineer or the parties to the agreement beyond its terms. Moreover, it is erroneous to suggest that through a Settlement Agreement a party to an application has authority to construe or change existing law.

Accordingly, the Shoshones' and Millard County's argument that the Owens Valley example or the Spring Valley Settlement Agreement change the scope of the environmentally sound inquiry is without merit.

C. Proper Scope of Evidence Regarding Air Quality

As argued above, the State Engineer's statutory inquiry into environmental soundness may involve analysis of whether the use of water is sustainable over the long-term without unreasonable impacts to the water resources and the hydrologic-related natural resources that are

dependent on those resources. State Engineer Ruling 5726 at 48. To some extent this inquiry extends to the impact, if any, of groundwater level declines on plant communities. However, to date, all arguments that have been made by the Protestants regarding air quality are speculation. The ACE Protestants argue that groundwater decline from the Snake Valley appropriation *could* affect vegetation cover in Snake Valley resulting in wind erosion, which then *could* increase dust particular, and potentially *could* cause serious health effects in humans and even global warming. *See* ACE Protestant Motion at 8.

The administration of the Snake Valley hearing will already be complicated by the number of Protestants representing various points of view. The evidence presented by the Protestants and by SNWA will provide all the relevant information necessary to make a sound determination on the applications. Allowing the Protestants to present broad air quality evidence will only increase the complexity of the hearing and needlessly waste time through the presentation of cumulative and irrelevant evidence. Further, it is clear that under Nevada law there is no mandate that dust impact be considered as part of the public interest or environmental soundness criterion, and the connection between the groundwater appropriation in this case and air quality is tenuous and speculative.

Accordingly, to maintain order in the administrative hearing, and to avoid distractions based on pure rhetoric and speculation, to the extent the State Engineer allows the qualifying Protestants to present air quality evidence, that evidence should be limited to the issue of the potential effect, if any, of groundwater level declines on plant communities in Snake Valley. If the State Engineer elects to consider such evidence, SNWA requests that the State Engineer define and limit such evidence in an interim order so as to allow fair notice to SNWA of the type, nature and means of evidence that will be allowed at the Snake Valley administrative hearing.

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III. CONCLUSION

For the reasons stated herein, SNWA respectfully requests that the State Engineer decline the Protestants' broad request to present air quality evidence.

DATED this 15th day of August, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on the 15th day of August, 2008, I caused to be served a true and correct copy of the OPPOSITION TO MOTIONS REGARDING AIR QUALITY EVIDENCE, to following:

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