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September 21, 2010

Mr. Jason King, State Engineer
Division of Water Resources
Dept. of Conservation and Natural Resources
901 South Stewart Street, Suite 2002
Carson City, NV 89701

Sent via email (jking@water.nv.gov) & hard copy

Re: *Great Basin Water Network v. Taylor* Remand

Dear Mr. King:

Thank you for the opportunity to provide feedback on your announcements regarding how the Division of Water Resources and the State Engineer intend to handle the SNWA Hearing on Remand following *Great Basin Water Network v. Taylor*. Defenders of Wildlife ("Defenders") submits these comments on behalf of our more than 1 million members and supporters in the U.S., over 8,000 of whom reside in Nevada.

Defenders is dedicated to protecting all wild animals and plants in their natural communities. To this end, Defenders employs science, public education and participation, media, legislative advocacy, litigation, and proactive on-the-ground solutions in order to prevent the extinction of species, associated loss of biological diversity, and habitat alteration and destruction. Defenders has sought due process rights to protest long-standing applications by the Southern Nevada Water Authority ("SNWA") and protested over 40 applications filed by SNWA in 2010.

Specifically, we offer our comments on the process and substance for re-noticing SNWA's 1989 applications and reopening the protest period as outlined in four documents: the July 7, 2010 State Engineer Interpretation of Supreme Court Decision, the August 19, 2010 Informational Statement, the SNWA Hearing on Remand Proposed Schedule, and the August 19, 2010 letter to Southern Nevada Water Authority.

At the outset, we note our agreement with others who have expressed the need for a pre-hearing conference and the difficulty of consolidation among protestants given their divergent interests and the complexities of multi-party attorney representation. Defenders understands that the State Engineer has sought to streamline and consolidate the rehearing procedures in part due to the State's budget situation. We are certainly sympathetic to the possibility of agency budgetary shortfalls and staffing needs but we are concerned by the implications of this mind-set – that financial constraints, no matter how valid, may be used as an excuse for non-compliance with the law. As explained by one court, "[b]udgetary constraints, far from being exceptional, are an everyday reality." *Ctr. for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174, 1179 (D.Ariz. 2003).

Defenders also appreciates the State Engineer's efforts to provide early notice to interested parties and set the tone for transparency in the agency proceedings by utilizing the State Engineer's website. We encourage the use of technology when it can speed and ease the distribution of information, but not at the expense of maintaining procedures that protect all parties. For example, as parties to the case on remand, we would have expected direct notification of the State Engineer's plans on remand. This is not to say that the State Engineer cannot employ newer technology and different hearing procedures. Once the State Engineer's office has provided proper notice to parties of the intended use of the website and other changes to regular practice, the office may then employ those changes to streamline its hearing procedures while maintaining due process. "Where strict compliance is found to be impracticable or unnecessary, and affected persons are given notice of any procedural changes, the State Engineer may permit deviation from the provisions of this chapter." Nev. Admin. Code § 533.010, as amended by Section 8 of LCB File No. R129-08, *available at* http://water.nv.gov/home/pdfs/r129-08_adopted.pdf. The notice must thoroughly explain any changes and continue to provide the basic protections called for in Nevada law, such as notice of hearings. We advise that the State Engineer wait until after the close of the protest period(s) before exercising this authority, to ensure that all affected persons are provided notice.

Defenders supports the State Engineer's decision to revert the permits issued to SNWA pursuant to 1989 applications in Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley to application status. The State Engineer's Interpretation and the Informational Statement were silent, however, as to how and when this reversion will occur. We urge the State Engineer to formalize this decision in the State's actual water rights records.

Furthermore, permits issued to SNWA pursuant to 1989 applications in Hidden Valley, Garnet Valley, California Wash, Tikapoo Valleys and Three Lakes Valleys suffer the same flaws as the permits mentioned above; the Nevada Supreme Court's holding in *Great Basin Water Network* encompasses these similarly situated 1989 applications from SNWA. *See Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. No. 20, at 4 (June 17, 2010) ("the State Engineer could not take action on the protested applications under the 2003 amendment to NRS 533.370"); *id.* at 18 ("in circumstances in which a protestant filed a timely protest pursuant to NRS 533.365 and/or appealed the State Engineer's untimely ruling, the proper and most equitable remedy is that the State Engineer must re-notice the applications and reopen the protest period"). A more efficient use of agency resources would deal with all of the flawed permits; the alternative leaves the agency and those permits vulnerable to the same flaws as the Court found in the Spring, Cave, Dry Lake and Delamar Valley permits.

In addition, the equitable relief afforded by this remand should extend, in limited circumstances, to the form of protests allowed during the reopened protest period. The Court recognized the inequities of the current situation and fashioned relief that the State Engineer originally deemed unavailable to him or to the parties because it was not explicitly written in Nevada law. Equity to the parties again demands relief that the State Engineer believes is not explicitly available. The State Engineer has the ability to deviate from strict compliance in order to ensure equity to the parties before and during protest hearings. *See* Nev. Admin. Code § 533.010, as amended by Section 8 of LCB File No. R129-08, *available at* http://water.nv.gov/home/pdfs/r129-08_adopted.pdf.

Chapter 533 of the Nevada Administrative Code governs applications and permits for the appropriation of public waters in addition to the conduct of hearings. As the chapter title states, it

applies to the adjudication of vested water rights and appropriation of public waters, in concert with chapter 533 of Nevada Revised Statutes, and is to be "liberally construed to secure the just, speedy and economical determination of all issues presented to the State Engineer." Nev. Admin. Code § 533.010, as amended by Section 8 of LCB File No. R129-08 (emphasis added). To interpret the Code otherwise would render superfluous any Code provisions governing activities that occur outside the confines of a hearing. *See, e.g., id.* § 533.140, as amended by Section 13 of LCB File No. R129-08 (allowing for filing of an answer to a protest); *id.* § 533.150, as amended by Section 14 of LCB File No. R129-08 (allowing protestant to withdraw his protest and allowing protestant and applicant to enter into stipulations).

Should SNWA withdraw the applications it now claims are duplicative of the 1989 applications and subsequent permits,[1] the State Engineer could allow protests filed against the duplicative 2010 applications to apply to the 1989 applications when he reopens the protest period on the 1989 applications. And, as with protests original to the 1989 applications, protestants could decide to reprotest or to let stand original protests. There are numerous statements in the Informational Statement regarding the State's need to reduce costs. The same principle holds true for protestants, and given the unusual circumstances, relief in the form of transferring protests to republished applications – if the 2010 applications are withdrawn – should be available.

We are also encouraged that the proposed schedule allows some time for meaningful rehearing and reconsideration by the State Engineer and other parties, yet strict adherence to a one-year timeframe undermines the rehearing to be provided on remand. The State Engineer need not republish all 25 applications immediately and simultaneously.

Defenders supports the State Engineer's first proposal to stagger republication "as the workload of the agency can accommodate the work" and believes that this approach befits all applications that require republication and rehearing. There is no need to move quickly on these applications because SNWA has publicly admitted its inability to move forward with the project to put the water to beneficial use with the next several years. Staggering republication and rehearing of the 1989 applications would provide the additional time needed for completion of all four requisite basin inventories; it is likely that the legislative drafters contemplated that each inventory would take one year. *See* Nev. Rev. Stat. § 533.364.

Defenders urges the State Engineer not to foreclose postponing action on the applications before even reopening the protest period; the statutory criteria for postponement may be available here. We also disagree with the notion that the all four basin inventories must be completed with the next eight months. Each basin inventory is necessary for a final determination on each application and thus falls within the ambit of studies required before acting on a permit. *See* Nev. Rev. Stat. §

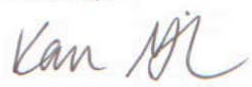
[1] SNWA filed numerous water rights applications in early 2010 and has since stated that the applications were filed "in order to maintain its existing rights to this water" and "to replace the Existing Permit in the event it is deemed invalid." *See, e.g.,* In The Matter Of Application Number 79321 Filed By The Southern Nevada Water Authority On January 28, 2010 To Maintain Existing Rights In Ground-water Appropriated Under Permit Number 53948, Answer to Protests (July 1, 2010). Potentially affected parties dutifully protested the 2010 applications because, continuing with Application 79321 as an example, nowhere within Application 79321 does SNWA indicate that the application will "maintain" existing rights. In fact, no reference is made to Application 53948 or the 2005 permit issued pursuant to said application. On the contrary, the entirety of the application indicates that the water rights sought are different from those issued under Permit 59348, with differing application dates, applicants, estimated cost of works, time to complete works, and time to put water to beneficial use. Also, were a permit to be issued pursuant to an application filed in 2010, it would not replace or maintain a permit or permitted rights issued pursuant to an application filed in 1989.

533.364 (requiring inventory if similar study or inventory not already performed pursuant to NRS 533.368). Allowing the State Engineer to postpone action until this inventory or other studies yield the results necessary to make a decision, *see id.* §§ 533.370(2)(c), 533.368(1), also harmonizes this requirement with the statutory provision that allows each inventory to take up to one year to complete. *See id.* § 533.364. Additional time is also available under Nevada law because if the State Engineer plans to hold a hearing, he has until at least May 2012 to issue a ruling. *See* Nev. Rev. Stat. § 533.365(5) ("If the State Engineer holds a hearing pursuant to subsection 3, the State Engineer shall render a decision on each application not later than 240 days after the later of: (a) The date all transcripts of the hearing become available to the State Engineer; or (b) The date specified by the State Engineer for the filing of any additional information, evidence, studies or compilations requested by the State Engineer.").

The requirement to rule on applications within one year is neither inflexible nor in conflict with the other requirements placed on applications, permits and hearings. We are not asking for indefinite postponement, but for a reasonable amount of time for protestants and the State Engineer to thoroughly examine all 25 water rights applications in four basins.

In conclusion, Defenders repeats our appreciation for the State Engineer's efforts thus far in addressing some of the complexities of a situation of first impression to the State Engineer, the applicant, protestants and other interested parties. We offer these suggestions in the hope of avoiding due process concerns in the republication and rehearing of the protested applications cited in the State Engineer's website documents well as in future proceedings that will be required given the vast number of SNWA applications implicated by *Great Basin Water Network v. Taylor*.

Sincerely,



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