ADVOCATES FOR COMMUNITY AND ENVIRONMENT
Empowering Local Communities to Protect the Environment and their Traditional Ways of Life
Post Office Box 1075
El Prado, New Mexico 87529
Phone (575) 758-7202 Fax (575) 758-7203

October 18, 2010

VIA EMAIL & CERTIFIED MAIL

Jason King, P.E., State Engineer
State of Nevada
Department of Conservation & Natural Resources
Division of Water Resources
901 South Stewart Street, Suite 2002
Carson City, NV 89701

Re: Comments on August 19, 2010 Statement Regarding Re-Notice and Re-Hearing of SNWA Water Right Applications in Spring, Cave, Dry Lake, and Delamar Valleys

Dear Mr. King:

This letter provides comments and suggestions in response to the informational statement published on the State Engineer's web site on August 19, 2010, and related materials, concerning the proposed renoticing of and hearing on the Southern Nevada Water Authority's (SNWA's) 1989 applications in Spring, Cave, Dry Lake, and Delamar Valleys. These comments and suggestions are being submitted on behalf of the Great Basin Water Network (GBWN) and other protestants and interested parties. In some cases, such as that of GBWN, these parties may separately have submitted comments from their own layperson's perspective. At their request, the comments contained in this letter are being submitted to supplement those parties' previous comments.

Let me begin by commending you on publishing notice of and information about your intended procedure for handling SNWA's 1989 applications in those four valleys prior to the planned publication of renewed notice of those applications. Let me also assure you that our comments are offered in a constructive spirit designed to encourage the most just, efficient and transparent process possible on these most controversial of water rights claims. While we do believe that some parts of the State Engineer's informational statement and proposed schedule need to be modified, we are presenting our critiques not to burden you and your staff, but in the hope that you and your staff will consider these issues with an open mind and in the interest of ensuring that the decisionmaking process on SNWA's applications is characterized by the greatest degree of scientific and procedural integrity practicable.[1]

[1] In addition to the issues addressed in this letter, the petitioners in the *GBWN v. Taylor* case believe that there are two significant errors in the preliminary, general "interpretation" of the Supreme Court's ruling in that case which the State Engineer published on its web site on July 7, 2010. For the most part, those issues are discrete from the

1. Preliminary General Comments:

A. The State Engineer Should Have Provided Individual Notice to the Parties in *GBWN v. Taylor*:

While we appreciate the advance notice of your intended procedure for handling these applications, we must note that the renoticing and rehearing of SNWA's 1989 applications in these valleys is the direct result of the Nevada Supreme Court's ruling in *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 20 (June 17, 2010), and is occurring in the context of the Supreme Court's and District Court's orders of remand in that case. Accordingly, the State Engineer should have provided individual notice to every prevailing petitioner in that case and should have consulted with the parties in that case before deciding how to proceed on remand. As the comments you have received from some of those parties already have suggested, by failing to do so the State Engineer has deviated from the preferred practice on remand in a legal case Even so, because the August 19 publication invited feedback from interested parties and at least implicitly promised to take such feedback into account in deciding how to proceed on these applications, the State Engineer has an opportunity to minimize controversy and conflict by modifying his proposed procedure in a number of ways.

B. Mischaracterizations of the History of SNWA's 1989 Applications and *GBWN v. Taylor*:

Before addressing particular procedural points, we note a general problem with the State Engineer's characterization, in his August 19 informational statement, of the history concerning SNWA's 1989 applications. In that statement, the State Engineer erroneously stated that the reason for the delay in consideration of SNWA's 1989 applications for more than 15 years was the protestants' requests for such a delay. The State Engineer's August 19 statement then went on to further mischaracterize the heart of the *GBWN v. Taylor* petitioners' complaint in that case as being nothing more than an implicitly hypocritical claim that the State Engineer acted improperly in acquiescing to the protestants' request for such a delay.

Both of those characterizations are seriously inaccurate. In fact, when SNWA's predecessor in interest – the Las Vegas Valley Water District (LVVWD) – filed the applications in question, it was in no way prepared to move forward on those applications at the time or in the near future. This was true of SNWA, too, when it acquired the applications from the LVVWD. The need for substantial additional preparation and study was apparent too all and was reflected in the initial prehearing conference and the August 26, 1991, Interim Order, on those applications. That was the true reason for the lengthy delay in the proceedings on SNWA's 1989 applications.

With regard to the issues presented in *GBWN v. Taylor*, it is plain from the original petition through every subsequent filing in that case that the fundamental nature of the petitioners' complaint was that the State Engineer had not taken adequate measures to provide proper notice

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issues pertaining to your August 19 publication concerning the proposed renoticing and rehearing procedures for SNWA's 1989 applications in Spring, Cave, Dry Lake, and Delamar Valleys. Accordingly, they are being addressed separately in a motion for a declaratory order that was filed last week by the *GBWN v. Taylor* Petitioners and is attached hereto.

to protestants or provide adequate opportunity for successors-in-interest and other would be protestants to participate in the hearings on SNWA's applications. In addition, as the protestants and *GBWN v. Taylor* petitioners maintained from the outset, a related problem was that after long delay and inadequate notice and opportunity for protestants to participate, the State Engineer was acquiescing to SNWA's demands that the process be restarted and rushed without sufficient scientific data having been collected or studied. Petitioners' position was not, as has been suggested, that the delay in and of itself was problematic, but rather, that the State Engineer's failure to properly provide notice, or an adequate opportunity to be meaningfully heard, to protestants and the public after such a delay resulted in denials of due process.

GBWN believes that the hastiness of the proposed renoticing and rehearing of these applications on remand has been skewed by those misrepresentations of the procedural history of those applications and the core concerns in *GBWN v. Taylor*. Accordingly, GBWN respectfully requests that the State Engineer consider both the foregoing general concerns and the following comments on specific points of the proposed procedure for renoticing and rehearing SNWA's 1989 applications on remand.

2. The Proposed Timing of the Renoticing and the Hearing on SNWA's 1989 Applications Is Unnecessarily Rushed and Inconsistent With Ensuring the Completion of Scientific Studies Concerning the Availability of Water:

Given the magnitude and significance of SNWA's applications in Spring, Cave, Dry Lake, and Delamar Valleys, it is of paramount importance that all parties be given adequate time to prepare for the eventual hearings on those applications, and that scientific studies concerning the availability of water in the groundwater systems at issue, which already have begun or have been identified as necessary, be completed. Because SNWA has publicly indicated that it cannot and does not intend to move forward with the proposed project in the near future, and because the completion of appropriate studies and the parties' preparation will take considerable time and resources on the part of both the applicant and protestants, it would be advisable to schedule a hearing for a time when all parties will be adequately prepared. Such preparation will allow for a hearing that runs smoothly and a resulting decision based on the best possible evidence.

A. Renoticing SNWA's 1989 Applications in November 2010 Would Be Premature and Is Not Required by the Nevada Supreme Court's Opinion in *GBWN v. Taylor*:

The State Engineer's August 19 Informational Statement contemplates publishing SNWA's applications this fall. The State Engineer's proposed timing of republication is not required by the Supreme Court decision nor is it required by statute. The Court's opinion said nothing at all about when the applications should be republished, and there is no valid reason for rushing to do so within the next few months. In fact, it would be advisable not to publish the applications this fall. Publication at a later date is the simplest way to ensure that the parties have an adequate opportunity to develop evidence for presentation at an eventual hearing.

None of the parties are prepared at this point to move forward with a hearing on such an abbreviated schedule. SNWA has stated repeatedly that it does not have the means or intent to move forward with the proposed project and water use anytime soon, meaning any time in the

next few years. Indeed, it is widely known that SNWA has reported that it is financially unable even to build the test pumps called for in their plan. Nor has SNWA completed the modeling necessary to move forward on its applications in these valleys. Thus, there is no urgency on the applicant's part.

The State and especially southern Nevada are experiencing an unprecedented, severe and prolonged economic contraction. As a result the State does not have the resources to conduct such extensive hearings as will be necessary to ensure that a sound decision is made. The State Engineer's cost concerns expressed in the Information Statement are legitimate and GBWN is sensitive to the fact that the hearing on SNWA's applications will stretch the State Engineer's budget thin. Postponing action on SNWA's applications until the State Engineer's Office is better able to cope with such a proceeding would be advisable given that there is no urgency to move forward immediately.

And finally, protestants must develop substantial evidence to present at the eventual hearing. This process takes significant time and resources and cannot be accomplished by the evidentiary exchange deadlines proposed by the Informational Statement.

GBWN does not mean to suggest that consideration of the applications should be postponed indefinitely, or even for an extended period of time, but only for that limited time necessary for SNWA and protestants to prepare adequate modeling and develop impacts evidence. Indeed, the schedule could and should be tied to the completion of required modeling evidence by the applicant before the State Engineer dedicates resources to a hearing on the applications. As long as all parties are properly informed and kept abreast of the schedule, such a limited postponement would benefit the process and would allow for a more informed decision based on the best available scientific evidence. Such a postponement would be very different from the postponement that GBWN challenged in court in *GBWN v. Taylor*. There, the postponement was not properly noticed, the statute was not followed, and successors in interest were not allowed to step into the shoes of original protestants, resulting in a situation that excluded many protestants and would-be protestants. The postponement suggested here by GBWN would be very different, because it would be limited and would not result in exclusion of protestants and successors in interest to protestants.

GBWN respectfully suggests that republication of SNWA's 1989 applications should not occur until 2012 and that moving forward on SNWA's application should be predicated upon a demonstration by the applicant that it has completed a calibrated transient flow groundwater model the scope of which includes its applications in Spring, Cave, Dry Lake, and Delamar Valleys.

B. Neither the Hearing nor the Decision on SNWA's 1989 Applications Needs To Be, or Appropriately Could Be, Completed Within One Year of the Renoticing of Those Applications:

Even if the State Engineer decides to publish SNWA's applications this fall, the hearing need not be held within one year provided that the State Engineer complies with NRS § 533.370(2) and the provides adequate notice. The State Engineer has the authority to postpone action on

SNWA's applications beyond the one year time frame set out in NRS § 533.370(2). The State Engineer has two options should he wish to postpone action.

First, NRS § 533.370(2)(b) as it existed in 1989 provided that action may be postponed beyond the one year statutory timeframe set out in NRS § 533.370(2) if there is a study of the water supply "being made." That exception clearly is available and applies here. Indeed, studies already have been determined to be necessary and some have begun, including the baseline data gathering and study called for in the SNWA-Federal monitoring and mitigation plan, the NPS-USGS studies, and the Utah GS study. So, the State Engineer has a very solid basis for postponing further action on this matter until one or all of those, and maybe other studies, are completed pursuant to NRS § 533.370(2)(b) as it existed in 1989.[2] Such a postponement clearly would be authorized by statute.

Second, all parties could agree to a postponement pursuant to NRS § 533370(2)(a). Although there likely will be a large number of protestants, it is quite possible that they would agree to such a postponement both because it would permit (and could be predicated upon) the completion of necessary scientific studies and because it would save the State and the concerned public the expense of going through the hearing process unless and until circumstances change so as to put SNWA in a position where it plausibly could move forward with the project in a reasonable timeframe. SNWA has no valid ground for objecting to a limited postponement considering it has stated that it doesn't intend to move forward with the project in the near future and because of its repeated public statements that it is committed to obtaining and working with genuinely complete, reliable scientific data.

Thus, not only is it advisable to schedule the hearing at a later date, the State Engineer clearly has the authority and ability to do so.

3. SNWA Should Be Required To Complete an Acceptable Groundwater Model by the Time of the First Evidentiary Exchange:

The State Engineer should require SNWA to complete and submit with the first evidentiary exchange materials a calibrated transient flow groundwater model. SNWA's track record of making conflicting statements regarding the utility of such work makes it imperative to place SNWA under a strict, clear requirement to complete and share a groundwater model, as already has been mandated prior to the Snake Valley hearing. Such a model is critical to the State Engineer's ability to make a well reasoned scientifically sound decision on SNWA's applications in these valleys.

[2] The language of NRS § 533.370(2)(b) has since been modified to allow postponement when the State Engineer determines that such a study is necessary. The provision is now codified as NRS § 533.370(2)(c).

4. **Given the Extraordinary Complexity of the Issues Raised by These Highly Controversial Applications and the Diverse Nature of Likely Protestants, the State Engineer Should Hold a Pre-Hearing Conference Before Proceeding to Hearing on These Applications:**

Given the number of substantive and logistical issues confronting the State Engineer and the parties on this particular set of applications, a pre-hearing conference would aid the State Engineer immeasurably in focusing the issues for review and designing the most fair and efficient procedure for handling the applications and protests, because a pre-hearing conference will allow the State Engineer to hear from and discuss with the opposing parties how best to tackle each of those issues. Moving forward without a prehearing conference likely would result in unnecessary and inefficient expenditures of time at the evidentiary hearing belatedly addressing what properly ought to be considered preliminary management issues best addressed at a prehearing conference.

GBWN is sensitive to the fact that the State Engineer has limited resources with which to conduct such a prehearing conference. Thus, GBWN respectfully suggests that the State Engineer require SNWA to cover the costs associated with such a proceeding. The State Engineer clearly has the discretion to require this pursuant to NAC § 533.010(2) and the equities in this case weigh in favor of such a decision. SNWA has the financial resources available to cover the costs associated with a prehearing conference, while the State Engineer and protestants do not. Additionally, scheduling the proceedings at a later date could allow the State Engineer to secure the funding necessary to adequately conduct those proceedings.

CONCLUSION

Accordingly, GBWN respectfully requests that the State Engineer schedule the hearing on SNWA's Applications in Spring, Cave, Dry Lake, and Delamar Valleys for a date that allows sufficient time for preparation of evidence by all parties. GBWN urges the State Engineer to require that both the inventory and a calibrated transient flow groundwater model be completed by the first evidentiary exchange. GBWN also believes that it is crucial that there be a pre-hearing conference scheduled to ensure an organized efficient proceeding and that a provision for rural participation be made both at the prehearing conference and at the hearing on SNWA's applications in Spring, Cave, Dry Lake, and Delamar Valleys.

GBWN appreciates the opportunity to weigh in on the State Engineer's August 19, 2010 Informational Statement and the State Engineer's willingness to review and seriously consider our concerns and comments. We hope these comments are helpful, informative, and useful in your effort to move forward on SNWA's applications in Spring, Cave, Dry Lake, and Delamar Valleys. If you have any questions or comments, or wish to discuss the issues raised in these comments in greater detail, please do not hesitate to contact me.

Sincerely,

Simeon Herskovits
simeon@communityandenvironment.net

cc:
Susan Joseph-Taylor
Bryan Stockton

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

In the Matter of *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 20 (June 17, 2010); NV S. Ct. Case No. 49718; Dist. Ct. Case No. CV-0608119 On Remand to the Nevada State Engineer	**MOTION FOR DECLARATORY ORDER ON SCOPE AND IMPLEMENTATION OF REMEDY ORDERED BY SUPREME COURT**

MOTION FOR DECLARATORY ORDER ON SCOPE AND IMPLEMENTATION OF REMEDY ORDERED BY SUPREME COURT

COME NOW, Great Basin Water Network, a nonprofit organization; Defenders of Wildlife, a nonprofit corporation; Edgar Alder; Clark W. Miles; Raymond E. Timm; Theodore Stazeski; Sheldon M. Edwards; Kathryn Hill; Kenneth F. Hill; Scotty Heer; Beth B. Anderson; Susan L. Geary; Donald W. Geary; Robert Ewing; Pamela Jensen; Bruce Jensen; Renee A. Alder; Robert J. Nickerson; Joyce B. Nickerson; Edward J. Weisbrot; Alexander Rose, Executive Director of the Long Now Foundation; Robert N. Kranovich; Pamela M. Pedrini; Rick Havenstrite; Terrence P. Marasco; Bryan Hamilton; John B. Woodyard, II; Laurie E. Cruikshank; Donald Foss; Selena L. Weaver; Mary E. Collins; Candi A. Ashby; Sally L. Gust; Bruce Ashby; Daniel Maes; Robert N. Marcum; Tara Foster; Donald A. Duff; Elisabeth A. Douglass; Jamie Deneris; Nomi Martin-Sheppard; Veronica F. Douglass; Abigail C. Johnson; Marie Jordan; James Jordon; Rutherford Day; The Great Basin Chapter of Trout Unlimited; Wilda Garber; The Utah Council of Trout Unlimited; Pandora Wilson; Parker Damon; Carol Damon; Anna Heckethorn; and Deborah Torvinen ("GBWN" or "*GBWN v. Taylor* Petitioners"), by and through their counsel of record, Simeon Herskovits of Advocates for Community and Environment, and pursuant to NAC §§ 533.390(2,5) (2009), as amended by Section 2 of LCB File No. R129-08, *available at* http://water.nv.gov/home/pdfs/r129-08_adopted.pdf, hereby file

this motion for a declaratory order: (1) defining the scope of the Supreme Court's ruling in *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. No. 20 (June 17, 2010) to include and require renoticing of all of SNWA's 1989 applications which were protested; and (2) consolidating the hearings on the original 1989 applications and SNWA's 2010 applications that duplicate those original 1989 applications or, in the alternative, declaring that the protests to SNWA's duplicative 2010 applications will be treated as valid and effective as to both the original underlying 1989 applications and the 2010 applications that merely duplicate those original 1989 applications.

INTRODUCTION

On January 28, 2010, the Nevada Supreme Court issued an opinion in *Great Basin Water Network v. Taylor* (*GBWN v. Taylor*) concluding that the State Engineer "violated his statutory duty by ruling on applications well beyond the one-year statutory limitation without first properly postponing action" and requiring the applications to be either renoticed or re-filed. *GBWN v. Taylor*, 126 Nev. Adv. Op. No. 2, at 15 (January 28, 2010). After briefing on petitions for rehearing filed by SNWA and the State Engineer, on June 17, 2010, the Nevada Supreme Court issued a modified opinion in *GBWN v. Taylor* and remanded the case to the District Court with instructions to remand to the State Engineer for renoticing of SNWA's 1989 applications. *GBWN v. Taylor*, 126 Nev. Adv. Op. No. 20 (June 17, 2010). On August 19, 2010, the District Court remanded to the State Engineer for renoticing of SNWA's 1989 applications pursuant to the Supreme Court's ruling. In the meantime, on July 7, 2010, the State Engineer issued a preliminary interpretation of the Supreme Court's ruling. That interpretation generally addressed issues of the ruling's scope as well as the status of protests against SNWA's recent 2010 applications filed in the wake of the Supreme Court's original decision in *GBWN v. Taylor* for

the express purpose of re-filing and re-claiming the same water rights as were sought by SNWA's original 1989 applications.

GBWN v. Taylor involved past procedural defects in the State Engineer's handling of SNWA's 1989 applications to appropriate groundwater from several rural Nevada valleys for the purpose of supplying SNWA's massive proposed groundwater development and pipeline project. The Supreme Court's opinion in *GBWN v. Taylor* comprehensively reversed the State Engineer's proceedings on all of SNWA's protested 1989 applications and required them to be re-noticed and subjected to new protest periods and hearings. The plain language of the Supreme Court's opinion in *GBWN v. Taylor* defines the scope of the remedy as applying to all of SNWA's protested 1989 applications, which suffer from the same historic procedural deficiencies. The State Engineer's July 7 interpretation of the Supreme Court's opinion erroneously asserts that the scope of the opinion applies only to a small subset of SNWA's protested 1989 applications.

In addition, the State Engineer's interpretation unnecessarily requires GBWN and other protestants to file duplicative protests and pay duplicative protest fees in order to maintain a protest against any of SNWA's protested 1989 applications, even though they have filed protests against SNWA's 2010 applications which SNWA admits are duplicative of the same 1989 applications. The interpretation refuses to take into account the fact that in spring of 2010 these protestants were forced to file protests based on their protest grounds against the original underlying 1989 applications as a result of SNWA filing those duplicative applications in early 2010. GBWN does not believe imposing such an unreasonable and unnecessary burden on protestants would be consistent with the spirit of the remedy ordered in the Supreme Court's opinion.

ARGUMENT

I. THE STATE ENGINEER SHOULD ISSUE A DECLARATORY ORDER PROPERLY DEFINING THE SCOPE OF THE RULING IN *GBWN V. TAYLOR* AS COVERING ***ALL*** OF SNWA'S PROTESTED 1989 APPLICATIONS

With regard to the scope of applicability of the Supreme Court's opinion and remedy in *GBWN v. Taylor*, GBWN respectfully urges the State Engineer to conform his interpretation to the plain language of the Supreme Court's opinion, which makes it clear that the opinion and the remedy provided therein applies to all of SNWA's protested 1989 applications. As the Supreme Court unambiguously stated: "We determine that the State Engineer must renotice SNWA's 1989 applications and reopen the period during which appellants may file protests." *GBWN v. Taylor*, 126 Nev. Adv. Op. No. 20, at 4 (June 17, 2010). The Court went on to hold broadly that: "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." *Id.* at 18. If the Court had wanted to limit the scope of the ruling to only SNWA's 34 applications in Spring, Snake, Cave, Dry Lake and Delamar Valleys, it would have specified that only those particular applications needed to be renoticed, rather than using broad language covering all of SNWA's protested 1989 applications. Given the Court's choice to reject such narrow language, which the State Engineer had urged it to adopt, and instead to use such plain, broad language, it is clear that the Court's opinion applies to all of SNWA's protested 1989 applications, because all such applications involve the same circumstances, the same statutory violation, and the same due process concerns. To define the scope more narrowly would put the State Engineer in direct conflict with the Court's clear language.

Indeed, in briefing on petitions for rehearing before the Court in *GBWN v. Taylor* earlier in 2010, the State Engineer argued that the Court ought to modify its opinion with language

expressly limiting its ruling to only the 34 applications alluded to above. State Engineer Petition for Rehearing, at 3-5 (March 15, 2010). The Supreme Court, in its June 17 modified opinion, declined to limit the ruling to those applications, as requested by the State Engineer, choosing instead only to modify the opinion "with respect to the State Engineer's request that we clarify that this opinion applies to protested applications." *GBWN v. Taylor*, 126 Nev. Adv. Op. No. 20, at 3.

The State Engineer himself argued in his Petition for Rehearing that the Supreme Court's ruling would apply broadly to other applications unless the Court's opinion was modified to expressly limit the scope of its ruling to the aforementioned 34 applications, or modified to expressly exclude any other applications for which permitted water rights had been issued. As noted above, the Supreme Court refused to make those modifications and, in accord with the State Engineer's fallback argument, only modified its opinion slightly, making it clear that the ruling covers all of SNWA's protested 1989 applications that were not acted on within the one-year time frame, without proper extension of that time period.

Not only did the Court reject the State Engineer's argument relating to permitted rights and refuse to limit the opinion to those 34 applications, as requested by the State Engineer, the Court used language throughout the opinion to describe the scope of the ruling that consistently was so broad as to make it implausible for the State Engineer now to assert that the ruling could apply only to SNWA's 1989 applications in Spring, Cave, Dry Lake and Delamar Valleys. Given the Court's obvious choice not to limit the scope of its ruling to SNWA's applications in those four valleys, the State Engineer's apparent reliance on that rejected argument as a basis for excluding SNWA's protested 1989 applications in Hidden Valley, Garnet Valley, California Wash,

Tikapoo Valley North and South and Three Lakes Valley North and South is directly at odds with the Supreme Court's opinion.

There can be no dispute that most, if not all, of SNWA's 1989 applications in basins such as Hidden, Garnett, Three Lakes, and Tikapoo valleys were protested and meet the Supreme Court's other criteria. Accordingly, for the State Engineer to rely on the premise that the Supreme Court's opinion does not apply to those applications, despite the broad language of that opinion, is blatantly contradictory to his own argument before the Supreme Court, as well as to the clear language of the Court's opinion. Because this component of the State Engineer's July 7 interpretation is plainly erroneous, the *GBWN v. Taylor* Petitioners respectfully urge the State Engineer to issue an order correcting that interpretation and acknowledging that the Supreme Court's ruling applies to all of SNWA's protested 1989 applications.

II. THE STATE ENGINEER SHOULD CONSOLIDATE PROCEEDINGS ON SNWA'S 1989 APPLICATIONS AND ITS 2010 APPLICATIONS THAT DUPLICATE THOSE 1989 APPLICATIONS, OR IN THE ALTERNATIVE SHOULD ORDER THAT PROTESTS TO SNWA'S DUPLICATIVE 2010 APPLICATIONS ARE EFFECTIVE AS TO BOTH SNWA'S ORIGINAL 1989 APPLICATIONS AND ITS DUPLICATIVE 2010 APPLICATIONS

In early 2010 SNWA filed numerous water rights applications in response to the Supreme Court's January 28, 2010, opinion. By its own admission, SNWA filed many of these 2010 applications in order to protect and pursue exactly the same water rights as were sought by SNWA's 1989 applications, which had been called into question by the Supreme Court's opinion.[1] *See, e.g.*, SNWA Answer to Protests at 3, In the Matter of Application Number 79321 (NV State Eng'r July 1, 2010). SNWA asserts that those 2010 applications essentially duplicated the substance of its 1989 applications and were intended to substitute for them should the 1989

[1] A number of the applications filed by SNWA in early 2010 deal with water rights that are discrete from the water rights sought by SNWA's 1989 applications. Those 2010 applications may raise other issues and suffer from defects that eventually need to be addressed by the State Engineer, but they are not addressed in this Motion.

applications, and/or any permits issued pursuant to those applications, ultimately prove to have been voided by the Supreme Court's opinion. As a result of these duplicative applications being filed in early 2010, many protestants who are concerned with SNWA's 1989 water rights applications and the pipeline project those applications support had no choice but to file protests to SNWA's 2010 applications.

Given the fact that both these 2010 applications and the protests filed in response to them actually are concerned with SNWA's 1989 applications (the applications being intended to shore up those old applications and the protests being intended to ensure that the protestants' objections to those applications are considered by the State Engineer), it would make no sense to require protestants to refile substantively identical protests to the old 1989 applications. As explained below, the State Engineer has two forms of legal authority that permit him to order that protests filed against SNWA's duplicative 2010 applications, which were intended to address the issues raised by SNWA's original, underlying 1989 applications, will be treated as valid and effective both as to the original, underlying 1989 applications and SNWA's reiterative 2010 applications. *GBWN v. Taylor* Petitioners respectfully suggest that to do otherwise would be inconsistent with the guiding principles of efficiency, economy and equity.

To begin with, the State Engineer clearly has the authority to consolidate the proceedings on SNWA's 2010 and 1989 applications pursuant to NAC § 533.340, which provides that "[t]he state engineer may consolidate two or more proceedings if it appears that the issues are substantially the same and the interests of the parties will not be prejudiced by the consolidation." NAC § 533.340(1). As noted, many of SNWA's 2010 applications are essentially nothing more than reiterations of SNWA's protested 1989 applications, and SNWA has admitted as much. With regard to those applications, then, there cannot be any doubt that

"the issues are substantially the same" as to both the underlying original 1989 applications and the duplicative 2010 applications. Similarly, since the 2010 applications in question were filed for the specific purpose of safeguarding SNWA's opportunity to pursue the very same water rights as it is seeking under its 1989 applications – a point SNWA has acknowledged – there is no way that consolidating the proceedings on the original and the reiterative applications could prejudice any legitimate interest of SNWA's.

Such an approach would promote efficiency and economy for both the State Engineer and the parties. In particular, it would save the State Engineer's Office the expenditures and logistical burdens associated with managing a new set of effectively identical protests filed by the 2010 protestants when SNWA's effectively identical 1989 applications are renoticed. In addition, it would avoid burdening protestants to SNWA's 2010 applications, whose focus was plainly on SNWA's original 1989 applications, with filing duplicative protests and paying repetitive protest fees when SNWA's 1989 applications are renoticed. As GBWN and other protestants have explained to the State Engineer, the protestants have vastly inferior financial and other resources to SNWA, and they can ill afford to repetitively file and pay to file what are in effect the same protests for the duplicated 1989 applications.

For the reasons set forth above, consolidation plainly represents the most efficient, economical, equitable and rational solution to what has become a confusing and frustrating process for all involved. Given the clear benefits and absence of any detriment from adopting this statutorily authorized procedure, *GBWN v. Taylor* Petitioners respectfully urge the State Engineer to consolidate proceedings on SNWA's original protested 1989 applications and the 2010 applications that effectively duplicated those original applications, and in so doing order

that protests to either an original 1989 application or a 2010 application seeking the very same water rights be treated as valid and effective in the consolidated proceedings.

In addition, the State Engineer has authority to deviate from the strict provisions of his regulations governing his proceedings on applications to appropriate public waters and protests to such applications. Specifically, the State Engineer's regulations provide that: "[w]here 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." NAC § 533.010(2), as amended by Section 8 of LCB File No. R129-08, *available at* http://water.nv.gov/home/pdfs/r129-08_adopted.pdf (emphasis added). In considering how to employ the discretion provided in section 533.010(2), the State Engineer should bear in mind the immediately preceding provision, which directs that these regulations "are intended to be liberally construed to secure the just, speedy and economical determination of all issues presented to the State Engineer." *Id.* at § 533.010(1)(b). Read together, these provisions clearly direct the State Engineer to strive for efficient and just proceedings, and to avoid burdens or obstructions to that goal which might result from a rigid adherence to every unnecessary formal technicality under his regulations.

This case, and especially the aspect of this case that involves the technical formality of requiring protestants to file duplicative protests to what SNWA has acknowledged to be effectively identical, reiterative, applications, constitute the type of circumstances and just the sort of *unnecessary* procedural burden that is contemplated, in section 533.010(2), as grounds for deviation from rigid adherence to the regulations governing these proceedings.

The regulations governing practice and procedure in hearings before the State Engineer apply not only to the physical hearing on SNWA's applications, as has been suggested, but also

to the proceedings leading up to those hearings, which includes the procedures relating to the filing of protests. *See, e.g.*, NAC §§ 533.130 (Pleadings: forms for filing protests), 533.140 (Pleadings: Answers), and 533.150 (Withdrawal of protest; Procedure; consequences; stipulation regarding protest). Thus, the State Engineer has the authority and the discretion to deviate from procedure not only as to the hearing itself, but also as to the procedure for handling applications and protests generally.

Unlike the situation before the Court in *GBWN v. Taylor*, where the State Engineer violated a statutory requirement that narrowly circumscribed his discretion to deviate from its requirements, here there is no statutory provision that prohibits the State Engineer from applying the 2010 protests to the 1989 applications that were merely reiterated by SNWA's 2010 applications. So, pursuant to NAC § 533.010(2), the State Engineer has the authority to deviate from his regular procedure and order that protests to SNWA's duplicative 2010 applications will be treated as valid and effective with regard to SNWA's original, underlying 1989 applications, as well as SNWA's duplicative 2010 applications.

GBWN v. Taylor Petitioners respectfully suggest that the circumstances and equities that have characterized the handling of SNWA's 1989 applications further support such a deviation from ordinary procedure in order to lessen, rather than add to, the burdens on and obstacles to protestants' ability to participate in the State Engineer's decisionmaking process on these most controversial of water rights applications. In both oral argument and in its opinion leading to this remand, the Supreme Court did not merely focus on a minor technical statutory violation, as has been suggested, but rather expressed distinct concern with the peremptory manner in which protestants' procedural due process rights had been dismissively treated and remarked upon the due process problems that would arise if this improper exclusionary treatment were not

adequately remedied going forward. *See, e.g., GBWN v. Taylor*, 126 Nev. Adv. Op. No. 20 at 15-18 (June 17, 2010).

Accordingly, GBWN respectfully requests that the State Engineer issue a declaratory order, pursuant to NAC § 533.340(1), consolidating the proceedings on SNWA's original protested 1989 applications with those on SNWA's 2010 applications that effectively reiterate the underlying 1989 applications. In the alternative, GBWN respectfully requests that the State Engineer exercise his authority under NAC § 533.010, in the interests of equity, economy and efficiency, to order that protests to those of SNWA's 2010 applications that effectively reiterated SNWA's original 1989 applications will be treated as valid and effective as against both the 2010 applications and the duplicated, underlying 1989 applications.

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CONCLUSION

For the reasons set forth above, *GBWN v. Taylor* Petitioners respectfully request that the State Engineer issue a declaratory order that:

A. defines the scope of the ruling in *GBWN v. Taylor* to include all of SNWA's protested 1989 applications; and

B. consolidates the proceedings on SNWA's 1989 applications and those of SNWA's 2010 applications that duplicate those original applications, declares that protests to either version of those effectively identical applications will be treated as valid and effective in the consolidated proceedings, or in the alternative declares that protests to those of SNWA's 2010 applications that duplicate SNWA's original, underlying 1989 applications will be treated as valid and effective against those 1989 applications as well as the reiterative 2010 applications.

Respectfully submitted this 14th day of October, 2010.

By: 

Simeon M. Herskovits
Nevada State Bar No. 11155
Advocates for Community and Environment
P.O. Box 1075
El Prado, NM 87529
Telephone: (575)758-7202
Facsimile: (575)758-7203
Email: simeon@communityandenvironment.net

Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellants' **MOTION FOR DECLARATORY ORDER DEFINING THE SCOPE OF GBWN V. TAYLOR AND DECLARING THE STATUS OF PROTESTS TO SNWA'S 2010 APPLICATIONS** was served on the following counsel of record by U.S. Postal Service, first class mail, postage prepaid on this 14th day of October, 2010:

Bryan Stockton
Office of the Attorney General
Nevada Department of Justice
100 North Carson Street
Carson City, Nevada 89701- 4717

Paul G. Taggart
Taggart & Taggart
108 North Minnesota Street
Carson City, NV 89703

Dana R. Walsh
Southern Nevada Water Authority
1001 South Valley Blvd.
Las Vegas, NV 89153

Daniel F. Polsenberg
Lewis and Rocca, LLP
3993 Howard Hughes Parkway, 6th Floor
Las Vegas, Nevada 89169

J. Stephen Peek
Holland & Hart LLP
3800 Howard Hughes Parkway, 10th Floor
Las Vegas, NV 89169

Michael J. Van Zandt
Hanson Bridgett LLP
425 Market Street, 26th Floor
San Francisco, California 94105

Noel Simmons