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Via Hand Delivery

January 10, 2011

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

Re: Great Basin Water Network's Request to Invalidate Permits 54073 and 54074

Dear Mr. King:

Our firm represents NV Energy, who leases water that is appropriated under Permits 54073 and 54074. On December 22, 2010, the Great Basin Water Network ("GBWN") and other petitioners[1] filed a document entitled "Reply to SNWA Response to Motion for Declaratory Order on Scope and Implementation of Remedy Ordered by Supreme Court." The Southern Nevada Water Authority ("SNWA") provided a copy of that document to our office on January 3, 2011. In its Reply, GBWN argues that any permits SNWA holds that were granted on its 1989 groundwater applications, including Permits 54073 and 54074, have been "invalidated" by the Nevada Supreme Court's opinion on rehearing in *Great Basin Water Network, et al. v. Taylor, et al.*, 126 Nev. ___, 234 P.3d 912 (Adv. Opn. 20, June 17, 2010)[2] as a result of the underlying applications not being acted upon by the State Engineer within one year as required by NRS 533.370(2). Reply at 13.

Permits 54073 and 54074 were granted almost 10 years ago, and the water appropriated thereunder is used by NV Energy and LS Power at power generation facilities in southern Nevada. SNWA advised GBWN of NV Energy's lease of the water rights in its opposition to GBWN's motion on December 3, 2010. GBWN responded that "[t]he fact that SNWA has contractual arrangements with other persons to temporarily lease some if its water does not have any relevance to the threshold issue of whether the applications underlying SNWA's putative permits

[1] For sake of brevity, these parties are collectively referred to as "GBWN".

[2] Megan Salcido, an associate attorney with our office, clerked for Justice Hardesty at the time of the issuance of the *Great Basin Water Network* opinion. She has been screened from all work on this matter by our office in accordance with SCR 1.12 and this letter constitutes notice to this tribunal and all parties of her former involvement in the Nevada Supreme Court proceedings as a law clerk.

are subject to the remedy ordered by the Supreme Court in this case, since they suffer from the same fundamental procedural defect as SNWA's other protested 1989 applications." Reply at 4.

NV Energy is writing this letter to apprise you of the extent of and to protect NV Energy's interest in the water appropriated under these Permits. Not only is it NV Energy' position that the Nevada Supreme Court never intended such a result, but that GBWN's request is time-barred and implicates constitutional concerns. Thus, NV Energy urges the State Engineer not to take any action on GBWN's request to invalidate Permits 54073 and 54074.

A. NV Energy's Interest

NV Energy is a public utility company regulated by the Public Utilities Commission and supplies energy services and products to over 2.4 million Nevadans. NV Energy holds an extensive portfolio of water resources, including permitted, certificated, and vested water rights throughout the State that are used to supply water to its existing power generation facilities.

In the early 2000s, the deregulation of the California power industry resulted in widespread power shortages and escalating prices, causing a critical power demand situation which impacted other Western states, inc uding Nevada. At that time, it also became clear that Nevada Power Company[3] would not be able to continue to meet the peak demands of the growing southern Nevada population with its existing power generation facilities. Governor Guinn responded to the crisis on February 22, 2001, by announcing an energy plan for Nevada, which included expediting the construction of additional power generation facilities in southern Nevada to ensure that Nevada could meet its ever-growing power needs. Of course, the construction and operation of the envisioned facilities would require water.

The LVVWD had filed Applications 54073 and 54074[4] on October 17, 1989, to appropriate ground water in the Garnet and Hidden Valley Hydrographic Basins in Clark County for municipal and domestic purposes. These Applications were originally filed as part of a plan to supply southern Nevada with water from in-state resources to meet its growing population needs. But in the wake of the power shortages sweeping across the Western United States and Governor Guinn's directive, on March 2, 2001, the LVVWD requested that the State Engineer grant Applications 54073 and 54074 at a reduced duty to enable LVVWD to supply water for the construction and operation of additional air-cooled power generation facilities in the Garnet Valley. The State Engineer quickly

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[3] Nevada Power Company is now doing business as NV Energy.

[4] Neither GBWN, nor any of the instant petitioners filed protests to these applications nor filed an appeal of Ruling 5008 pursuant to NRS 533.450(1) as "a person feeling aggrieved" by that decision.

responded by issuing Ruling 5008 on March 20, 2001, in which he granted the LVVWD's Applications for a total combined duty of 2,200 acre feet annually ("AFA"), for those purposes.[5]

Shortly thereafter, in the summer of 2001, Duke Energy, Moapa, LLC, GenWest, LLC, and Mirant Las Vegas, LLC, all entered into water supply agreements with the LVVWD enabling them to construct power generation facilities in Garnet Valley. The facilities constructed include the Chuck Lenzie and Silverhawk facilities, which are located in an area in Garnet Valley know as the Apex industrial area.[6] These facilities are now owned in whole or in part by NV Energy,[7] and the agreements with LVVWD to supply water to those facilities have been assigned to NV Energy. Also located in the Apex area is NV Energy's expanded Harry Allen facility.

In order to supply Chuck Lenzie and Silverhawk and to provide additional water for the construction and operation of NV Energy's expansion of its Harry Allen facility, in October, 2009, the LVVWD and NV Energy entered into a long-term lease agreement for the use of a portion of the water under Permits 54073 and 54074 ("Lease"). The Lease does not expire until 2054.

B. The Nevada Supreme Court Never Intended that Water Right Permits Be Invalidated.

GBWN mistakenly relies upon the Court's reference to the term "SNWA's 1989 applications" in its opinion as support for the argument that ***any*** water right permit that had been granted on ***any*** application SNWA filed in 1989 where the State Engineer had not acted within a year must be invalidated. In the beginning of its opinion, the Court specifically stated that "[t]his appeal concerns ***34 of SNWA's remaining 1989 groundwater applications in the Spring, Snake, Cave, Dry Lake, and Delamar Valleys***." *Id.* at 915 (emphasis added). Later in the opinion, the Court again refers to these specific applications in concluding the State Engineer had violated his statutory duty by failing to act on them within one year of their filing. *Id.* at 919 n.9. The Court's use of the abbreviated term "SNWA's 1989 applications" is simply one of judicial convenience and is obviously meant to only refer to the 34 applications subject to the appeal before the Court. Otherwise, the Court would have over-stepped its jurisdictional bounds by issuing an advisory opinion as to any other SNWA 1989 application that had been ***previously*** permitted where no case or controversy over those particular permits was pending before the Court. *See* Nev. Const. art. 6 § 4; *City of North Las Vegas v. Cluff*, 85 Nev. 200, 452 P.2d 617 (1969).

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[5] A petition for judicial review of Ruling 5008 was filed by Dry Lake, LLC, and Apex Industrial Park, Inc., which was ultimately resolved on remand to the State Engineer, where he affirmed Ruling 5008 and no further appeal was taken of that decision.

[6] Both the Chuck Lenzie and Silverhawk facilities are entirely dependant upon the leased water for their operation.

[7] In June of 2004, NV Energy purchased Duke Moapa's facility, which is now known as Chuck Lenzie. One year later, in June of 2005, NV Energy acquired 75% of GenWest's facility, which is now known as Silverhawk; SNWA owns the remaining 25% of Silverhawk.

GBWN also relies upon the following language of the Nevada Supreme Court in support of its position: "in circumstances in which a ***protestant*** filed a timely protest, pursuant to NRS 533.365 and/or[8] 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." *Great Basin Water Network*, 126 Nev. at ___, 234 P.3d at 920 (emphasis added). Parsing this phrase out, there are three possible alternatives when a water right ***application*** must be re-noticed and the protest period reopened: (1) when "a protestant filed a timely protest . . . [and] appealed the State Engineer's untimely ruling", (2) when "a protestant filed a timely protest," or (3) when "a protestant . . . appealed the State Engineer's untimely ruling".

A simple reading of the quoted language reveals that the first two alternatives require participation in the proceedings before the State Engineer as a ***protestant*** on the application(s) at issue. *See* NRS 533.365. That did not occur in this case, and GBWN cannot now argue that even though it was not a protestant to Applications 54073 and 54074, the mere fact that the underlying applications were "protested" triggers the voiding of the Permits.[9]

The third alternative is the only one which allows a person who did not file a protest to later argue that the untimely action of the State Engineer requires invalidation of the decision. In the third alternative, although the term "protestant" is once again used to imply that a only a ***protestant*** could appeal the State Engineer's ruling on the basis that the decision was untimely, that result would be redundant with the first alternative. As the Court was fully aware, NRS 533.450 does not limit the right to file an appeal of the State Engineer's decision to "protestants." Rather, any person "aggrieved" by the State Engineer's determination may file a timely appeal contesting the decision to permit a water right. NRS 533.450(1). Thus, the Court necessarily meant the third alternative to apply to protestants and ***persons aggrieved*** by an "untimely" determination of the State Engineer who ***filed*** an appeal of the State Engineer's decision on a particular application.

Obviously, the third alternative was set forth by the Court to directly address the role of the GBWN and the other petitioners as such "aggrieved" persons who timely challenged the decision of the State Engineer under NRS 533.450 when the State Engineer denied their request to re-notice the 34 applications in the Spring, Snake, Cave, Dry Lake, and Delamar Valleys. 126 Nev. at ___, 234 P.3d at 915-16. But as to their instant request, neither

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[8] Unfortunately, the Court was not more precise in its conclusory language. The use of "and/or" is particularly damaging in legal writing because a bad-faith reader can pick whichever suits him, the "and" or the "or." *See* Garner, Bryan A., "Looking for words to kill? Start with these", Student Lawyer 35.1 (American Bar Association 2006).

[9] Also implicit under the second alternative, the one which GBWN is trying to exploit, is that action has not yet been taken by the State Engineer on the ***protested application,*** *i.e.,* the application is still pending. It is only under the first and third alternatives where the Court identifies the very limited circumstance of when the State Engineer's action permitting a protested application can be "unwound". That limited circumstance is when the party ***requesting*** the re-noticing had filed an ***appeal***, as either a protestant or other aggrieved person, challenging the "untimely" action of the State Engineer. That did not occur here, and GBWN has no right to make such a request now.

GBWN nor any of the other petitioners filed any such appeal of the State Engineer's decision to issue Permits 54073 and 54074. Nor, as SNWA has correctly pointed out, did GBWN appeal the granting of subsequent change permits on those base rights on the grounds that the base rights were invalid due to the inaction of the State Engineer. GBWN cannot now attempt to "resurrect" a right to challenge that decision as "an aggrieved person" long after the time to file any such appeal has lapsed. *See* NRS 533.450(1),(3) (appeal of State Engineer's decision must be filed within 30 days from issuance thereof and notice thereof must be given to State Engineer within that same time or the court may not "entertain" the appeal); *see also Mikohn Gaming v. Espinosa,* 122 Nev. 593, 593, 137 P.3d 1150 (2006) (the statutory time limitation in which to file an appeal of an administrative agency's decision is jurisdictional; a district court is divested of jurisdiction if the appeal is not timely filed).

C. GBWN's Request is Barred by Laches.

It cannot be overlooked that the reason for the issuance of the Court's opinion on rehearing was twofold: (1) to clarify the applications to which the opinion applied; and (2) to determine the "proper remedy" for the State Engineer's violation of his statutory duty by not acting on SNWA's applications within one year of filing. *Great Basin Water Network*, 126 Nev. ___, 234 P.3d at 913. In determining the latter issue, the Court held that

> [v]oiding the State Engineer's ruling and preventing him from taking future action would be ***inequitable*** to SNWA and future similarly situated applicants. Similarly, it would be inequitable to the original and subsequent protestants to conclude that the State Engineer's failure to take action results in approval of the applications over 14 years after their protests were filed. Thus, we cannot concluded that the State Engineer's inaction deems the applications either approved or rejected.

Id. at 920 (emphasis added). The Court based its formulation of the remedy on principles of equity. *Id.* ("most equitable remedy is that the State Engineer must re-notice the applications and reopen the protest period"). If the Court shied away from voiding an ***application*** due to the inaction of the State Engineer because of the inequity to the ***applicant***, it would be loathe to void a ***permit*** because of the inequity to the permit holder, particularly those who have expended significant time and capital to construct works and put the water to beneficial use according to the permit terms.

The ***equitable*** doctrine of laches prevents such a result. This doctrine "'may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable.'" *Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997) (quoting *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610-11, 836 P.2d 633, 636-37 (1992)). However, it must be noted that "'laches is more than a mere delay in seeking to enforce one's rights; it is a delay that works to the disadvantage of another.'" *Id.* (quoting *Home Savings v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989)). In fact, "'[t]he condition of the party asserting laches must become so changed that the party cannot be restored to its former state.'" *Id.* Accordingly, to successfully assert laches, a party must show (1) the delay of

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the party seeking to enforce its rights, and (2) during the period of inaction, the position of the party asserting laches "so changed" that granting the relief would be inequitable, *i.e.*, the party cannot be restored to its previous condition.

Here, a cleaner case of laches could not be articulated. In reliance upon the issuance of Permits 54073 and 54074 ***ten years ago***, NV Energy has spent in excess of ***1.4 billion dollars*** in the acquisition, construction and operation of its Apex Area power generation facilities. It is only through these facilities that NV Energy has been able to meet the growing energy needs of southern Nevada. Peremptorily declaring the Permits invalid will lay waste to NV Energy's efforts and throw the ability of NV Energy to meet the power needs of its customers into extreme uncertainty. Thus, not only will NV Energy suffer from such action, but so will the citizens of southern Nevada. They will be faced with potential rolling black-outs and steeply escalating rates, the exact circumstances which prompted Governor Guinn to declare the power emergency in 2000 and the State Engineer to issue Ruling 5008.

The Nevada Supreme Court has held that claims are barred by laches in circumstances not nearly as inequitable as those presented here. For example, in *Price*, the court held that action for injunctive relief was barred when landowners who opposed an affordable housing construction project delayed instituting legal proceedings until eight months after public announcement of the approval of the project, and during that time the developer had expended "thousands of dollars" in lot preparation, governmental approvals and preliminary construction. 113 Nev. at 412; 934 P.2d at 1044. Thus, the Court held that the delay caused a "material disadvantage" to the developer which so altered its position, that the developer could not be restored to "pre-project" position. *Id.* There is no doubt that the same can be said here ***and then some***. NV Energy has spent over ***1.4 billion dollars*** on power generation facilities in the last decade after the permitting of 54073 and 54074. Obviously, the circumstance of NV Energy (and the citizens of Southern Nevada) has so changed in reliance upon the issuance of Permits 54073 and 54074 that it cannot be equitably restored to its former state. Any attempt to do so would materially disadvantage NV Energy and all of its customers in southern Nevada. Thus, GBWN's request to invalidate those Permits is barred by laches.

E. Due Process

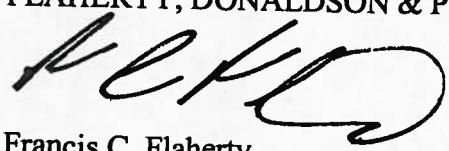
Once a water right application is permitted by the State Engineer, a right "to use water beneficially [is created,] which will be regarded and protected as *real property*." *In re Filippini*, 66 Nev. at 21-22 (emphasis added); *see also Dermody v. City of Reno*, 113 Nev. 207, 931 P.2d 1354 (1997) (appurtenant water rights are a separate "stick" in the bundle of rights attendant to real property"); *Carson City v. Estate of Lompa*, 88 Nev. 541, 541, 501 P.2d 662 (1972) ("right [to use water] . . . is regarded and protected as real property"). While LVVWD is the holder of the Permits 54073 and 54074, NV Energy's right to use the water under the Permits pursuant to the Lease vests it with a protectible property interest in the water. *NL Indus. v. Eisenman Chem. Co.*, 98 Nev. 253, 255, 645 P.2d 976, 978 (1982) (treating a lease of mineral rights as a property interest in the minerals in the property); *Sticka v. Casserino (In re Casserino)*, 379 F.3d 1069, 1071 (9th Cir. 2004) (a "lessee owned a possessory interest in the leased property"). The State Engineer cannot arbitrarily deprive NV Energy of its property interest in Permits 54073 and 54074, nor can the State Engineer take any action which would equate to depriving NV Energy of its

property without due process of law. U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8; *Nellis Motors v. State*, 124 Nev. ___, 197 P.3d 1061 (Adv. Opn. 102, December 24, 2008) ("Due process of law is required whenever the state deprives a person of 'life, liberty, or property'"); *Jason S. et al., v. Valley Hospital Medical Center, et al.*, 120 Nev. 157, 87 P.3d 521 (2004) ("substantive due process guarantees that no person shall be deprived of life, liberty, or property for arbitrary reasons"); *State of Nevada v. Dist. Ct.*, 118 Nev. 140, 42 P.3d 233 (2002) (procedural due process guarantees notice and an opportunity to be heard prior to being deprived of a protectible property interest). Yet, such firmly established constitutional doctrine does not give any GBWN pause as it requests the State Engineer divest NV Energy and others of their protected property rights. That request plainly cannot stand.

In closing, NV Energy respectfully requests that the State Engineer not act upon GBWN's request as it pertains to Permits 54073 and 54074. That request is not properly before the State Engineer, is time-barred, and would result in consequences not contemplated by the Nevada Supreme Court or Nevada law. In the event that the State Engineer is inclined to entertain GBWN's request, NV Energy would like to be provided the opportunity to formally request leave to intervene in the proceeding to defend its interests as the user of a portion of the water appropriated under Permits 54073 and 54074.

Please do not hesitate to contact us if you have any questions or concerns regarding this letter.

Sincerely,
DYER, LAWRENCE, PENROSE,
FLAHERTY, DONALDSON & PRUNTY



Francis C. Flaherty

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