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Empowering Local Communities to Protect the Environment and their Traditional Ways of Life

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October 14, 2010

VIA FEDERAL EXPRESS OVERNIGHT

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

RECEIVED
2010 OCT 15 AM 11:17
STATE ENGINEER, NEVADA

Re: *GBWN V. TAYLOR* REMAND - MOTION FOR DECLARATORY ORDER ON SCOPE AND IMPLEMENTATION OF REMEDY ORDERED BY SUPREME COURT

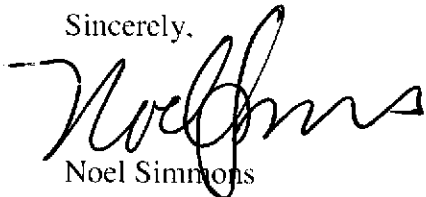
Dear Mr. King:

Enclosed for filing in Nevada Supreme Court Case No. 49718 (*GBWN v. Taylor*), on remand to the State Engineer, are an original and two copies of GBWN et al.'s **MOTION FOR DECLARATORY ORDER ON SCOPE AND IMPLEMENTATION OF REMEDY ORDERED BY SUPREME COURT.**

Please return a file stamped copy of the Motion in the enclosed self addressed stamped envelope.

If you have any questions regarding this filing, please do not hesitate to contact me at (575)758-7202.

Sincerely,



Noel Simmons

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

2010 OCT 15 AM 11:17

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:



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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:

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