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December 1, 2010

VIA HAND DELIVERY

Ms. Susan Joseph-Taylor, Chief Hearings Officer
Division of Water Resources
Dept. of Conservation and Natural Resources
901 South Stewart Street, 2nd Floor
Carson City, Nevada 89701

Re: SNWA's Opposition to GBWN's Motion for Declaratory Order; Service of GBWN's Motion for Declaratory Order on Affected Parties

Dear Ms. Joseph-Taylor:

Attached is SNWA's opposition to the "Motion for Declaratory Order on Scope and Implementation of Remedy Ordered by Supreme Court" filed by Simeon Herskovits of Advocates for Community and Environment with the State Engineer on October 14, 2010. This opposition is being filed pursuant to the extension of time granted by your office on November 22, 2010.

All affected parties have not been properly served in accordance with the prior directions of your office. By letter dated October 21, 2010, you informed Mr. Herskovits that he needed to serve his motion upon "all who could be affected by his interpretation of the Supreme Court's decision." By letter dated November 3, 2010, Mr. Herskovits rebuffed your instructions and has so far refused to serve his motion upon any affected party other than SNWA. By letter dated November 4, 2010, you reiterated the concern that "the motion had not been served on all who could be affected by the motion, for example, the Moapa Band of Paiute Indians." You instructed Mr. Herskovits to provide a "list of the specific applications [the GBWN] is addressing" in order to clear up the "confusion as to which 1989 applications the GBWN believes are at issue." By letter dated November 9, 2010, Mr. Herskovits provided that list of applications but it appears that he did not serve any of the affected parties other than SNWA.

In his letter dated November 3, 2010, Mr. Herskovits argued that proper service has occurred because he has "served all parties to the case at hand, *GBWN v. Taylor*." However, *GBWN v. Taylor* is not the "case at hand" as this is an entirely new and separate matter which Mr. Herskovits is attempting to initiate. The only applications at issue in *GBWN v. Taylor* were the 34 applications in Spring Valley, Snake Valley, Delamar Valley, Dry Lake Valley and Cave Valley. In the list he provided on November 9, 2010, Mr. Herskovits made it clear that his

request is now challenging permits and applications in Garnet Valley, Hidden Valley, Tikapoo Valley North, Tikapoo Valley South, Three Lakes Valley North and Three Lakes Valley South.[1] Therefore, the scope of Mr. Herskovits' request extends beyond the matters in *GBWN v. Taylor*. At the same time, some of the permits being challenged are either owned or leased by parties other than SNWA, including NV Energy, LS Power, the Las Vegas Valley Water District and Lincoln County, Nevada. Therefore, the scope of affected parties extends beyond the parties to *GBWN v. Taylor*. As a result, simply serving SNWA is not sufficient service in this new and separate matter.

There is no statute or regulation governing the procedural or service requirements in this new and separate matter because this is a not "a matter subject to a protest hearing" and there are no "parties of record" that need to be served. Section 2(1), 2(3), LCB File No. R129-08, *available at* http://water.nv.gov/home/pdfs/r129-08_adopted.pdf. Mr. Herskovits is simply making a request for the State Engineer to reopen previously acted upon applications and there is no statutory authorization for the State Engineer to hold a protest hearing on such a request.

SNWA requests that the office of the State Engineer determine what procedural and service requirements will apply in this matter. At a minimum, it seems fair that all parties that would be affected by Mr. Herskovits' request should be identified and served before the State Engineer takes any action on Mr. Herskovits' request.

Should you have any questions, please contact my office. Thank you for your consideration in this matter.

Sincerely,

Paul G. Taggart

PAUL G. TAGGART, ESQ.

PGT/AOS/rrs

cc: *Jason King*
Simeon M. Herskovits
Bryan Stockton

[1] The list itself was a politically motivated attempt to eliminate opposition from certain parties and directly target SNWA. For example, Mr. Herskovits left off permits held by The Moapa Band of Paiute Indians from his list even though the clear language of his motion would implicate those permits. Mr. Herskovits has provided no explanation for the apparently arbitrary manner in which he created his list.

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

In the Matter of the Motion for Declaratory	)
Order filed by Great Basin Water Network	)
On October 14, 2010, as amended by its	)
Letter to the State Engineer, dated	)
November 9, 2010	)

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

COMES NOW, the Southern Nevada Water Authority ("SNWA"), by and through its counsel of record, Paul G. Taggart and Adam O. Spear of the law firm Taggart and Taggart, Ltd., and Dana R. Walsh, SNWA Deputy Counsel, and hereby files its opposition to the "Motion for Declaratory Order on Scope and Implementation of Remedy Ordered by Supreme Court" (the "Motion for Declaratory Order") filed by Great Basin Water Network, a nonprofit organization; Defenders of Wildlife, a nonprofit organization; Edgar Adler; 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 (collectively, the "Petitioners").

SNWA hereby requests that the State Engineer reject the Motion for Declaratory Order in its entirety and refuse to issue any declaratory order on the matters addressed herein.

INTRODUCTION

Although the State Engineer and all of the parties involved in this matter are well aware of the extensive administrative and legal proceedings that have led us to where we are today, it is necessary to repeat that history here.

On January 5, 2006, the State Engineer held a pre-hearing conference to discuss issues related to future administrative hearings on 34 applications (the "34 Applications") held by SNWA in **Delamar Valley, Dry Lake Valley, Cave Valley, Spring Valley, and Snake Valley** (emphasis added). In 1990, the State Engineer had previously published notice of the 34 Applications and had opened a protest period. Due to the fact that roughly 16 years had passed since that protest period, various persons, including some of the Petitioners, requested that the State Engineer re-publish notice of the 34 Applications and re-open the period for filing of protests on the 34 Applications.

On March 8, 2006, the State Engineer issued an intermediate order in which the State Engineer determined it was "not authorized by Nevada Revised Statutes" to re-publish notice or re-open the protest period for the 34 Applications. Therefore, the State Engineer denied the requests. *State Engineer's Intermediate Order and Hearing Notice* (March 8, 2006), at 7.

On July 6, 2006, Petitioners filed their "Petition for Declaratory Order to Re-notice 16 Year Old Groundwater Applications in the **Delamar Valley, Dry Lake Valley, Cave Valley, Spring Valley, and Snake Valley**" (emphasis added) in which Petitioners formally asked the State Engineer to issue a declaratory order to re-notice only the 34 Applications. *Petition for Declaratory Order* (July 6, 2006), at 1.

On July 27, 2006, the State Engineer issued an intermediate order in which it restated the determination in its previous intermediate order that it was "not authorized by the Nevada Revised Statutes" to re-publish notice or re-open the protest period for the 34 Applications. *State Engineer's Intermediate Order No. 3* (July 27, 2006), at 2.

On August 22, 2006, Petitioners filed their "Petition for Judicial Review" with the Seventh Judicial District Court of the State of Nevada in which they petitioned "for judicial

review of the State Engineer's July 27, 2006 order and decision denying Petitioner's request for a declaratory order to re-notice SNWA's sixteen year old groundwater applications in the **Spring, Snake, Cave, Dry Lake, and Delamar Valley**" (emphasis added). *Petition for Judicial Review* (August 22, 2006), at 2. This petition for judicial review was made within 30 days of the State Engineer's July 27, 2006, intermediate order and thus complied with the appeal timing requirements of NRS 533.450. This appeal was pending when the State Engineer issued Ruling 5726, which granted SNWA applications in Spring Valley, and Ruling 5875, which granted SNWA applications in Delamar Valley, Dry Lake Valley and Cave Valley. The appeal of the July 27, 2006, order only addressed the 34 Applications.

On May 30, 2007, the District Court issued its "Order Denying Petition for Judicial Review of State Engineer's Intermediate Order" in which it denied the petition for judicial review of the State Engineer's July 27, 2006, decision relating to the 34 Applications. The District Court held, inter alia, that the State Engineer "acted pursuant to Nevada's water law statutes" when it denied the request to re-notice the 34 applications. *Order Denying Petition for Judicial Review* (May 30, 2007), at 9.

Petitioners then appealed the District Court's decision to the Nevada Supreme Court. *Notice of Appeal* (June 22, 2007). At around the same time, Ruling 5875 which granted SNWA's applications in Delamar Valley, Dry Lake and Cave Valleys, was also timely appealed by the protestants in that matter. *Petition for Judicial Review* (October 4, 2007).

On January 28, 2010, the Supreme Court issued its opinion in *Great Basin Water Network v. Taylor* ("*GBWN v. Taylor I*"). 126 Nev. Adv. Op. No. 2 (January 28, 2010). The Supreme Court recognized that "[t]his appeal concerns 34 of SNWA's remaining 1989 groundwater applications in the **Spring, Snake, Cave, Dry Lake and Delamar Valleys**" (emphasis added). *Id.* at 5. Because the opinion in *GBWN v. Taylor I* questioned the validity of the 34 Applications, SNWA spent over $40,000 to immediately file applications that would hold SNWA's place in line in the event that SNWA's 1989 applications were somehow voided.

During the 30-day protest period on SNWA's 2010 applications, many protests were filed, including protests filed by the Petitioners.

GBWN v. Taylor I did not provide a remedy and instead simply remanded and instructed the District Court to adjudicate a proper remedy. *Id.* at 16. The opinion created uncertainty in Nevada water law and the State Engineer and SNWA filed petitions for rehearing asking the Supreme Court to resolve this uncertainty. Of concern were approximately 7,004 permits and certificates that were granted later than one year after the end of the protest period, and 7,655 applications that were denied later than one year after the protest period. *See Affidavit of Jason King* (March 15, 2010), filed in support of *State Engineer's Petition for Rehearing* (March 15, 2010). The State Engineer and SNWA asked the Supreme Court to clarify its opinion so that the status of these permits and certificates would be clear. *State Engineer's Petition for Rehearing* (March 15, 2010), at 3-6; *SNWA's Reply to Answer to Petition for Rehearing* (May 6, 2010), at 1-2.

On June 17, 2010, after briefing on petitions for rehearing, the Supreme Court issued a modified opinion in *Great Basin Water Network v. Taylor ("GBWN v. Taylor II,"* and together with *GBWN v. Taylor I, "GBWN v. Taylor"*) and remanded the case to the District Court with instructions to remand to the State Engineer for "further proceedings consistent with its opinion." 234 P.3d 912, 126 Nev. Adv. Op. No. 20 (June 17, 2010). As a remedy, the Supreme Court provided:

> in circumstances in which a protestant has 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. Again, the Supreme Court recognized that "[t]his appeal concerns 34 of SNWA's remaining 1989 groundwater applications in the **Spring, Snake, Cave, Dry Lake, and Delamar Valleys**" (emphasis added). *Id.* at 5-6.

As the history of administrative and legal proceedings makes clear, the 34 Applications in Spring Valley, Snake Valley, Cave Valley, Dry Lake Valley and Delamar Valley were the only

applications before the State Engineer, the District Court and the Supreme Court. At no point during the administrative or legal proceedings in *GBWN v. Taylor* did the Petitioners challenge the State Engineer's orders or decisions in connection with permits granted in any other groundwater basin.

Nevertheless, Petitioners are now challenging permits previously granted by the State Engineer in Garnet Valley, Hidden Valley, Tikapoo Valley North, Tikapoo Valley South, Three Lakes Valley North and Three Lakes Valley South. *Motion for Declaratory Order,* at 5-6. The basis for these challenges is Petitioners' belief that *GBWN v. Taylor* requires the State Engineer to re-publish notice and re-open the protest period for these permits. *Id.*

The State Engineer held hearings and granted those applications many months (in most cases years) before Petitioners filed the petition for judicial review that led to the opinion in *GBWN v. Taylor*. Applications in Tikapoo Valley North, Tikapoo Valley South, Three Lakes Valley North, and Three Lakes Valley South were granted by the State Engineer pursuant to Ruling 5465 issued on January 4, 2005 and Ruling. Other applications in Three Lakes Valley were granted by the State Engineer in Ruling 5533 issued on September 26, 2005. The applications in Garnet Valley and Hidden Valley were granted by the State Engineer pursuant to Ruling 5008 issued on March 20, 2001. Ruling 5008 was appealed pursuant to NRS 533.450, but the appeal was resolved and the permits were undisturbed by the ruling on remand issued on July 22, 2002. The Garnet and Hidden Valley permits are currently owned by the Las Vegas Valley Water District, but are being used by NV Energy and LS Power and are critically important to electrical power generation in southern Nevada. None of these rulings were appealed pursuant to NRS 533.450. Additionally, change applications on the Garnet and Hidden Valley permits were filed in 2002 and 2009, while change applications on the Three Lakes Valley permits were filed in 2005. None of the Petitioners filed protests to the change applications or otherwise indicated any interest in the change applications while they were being considered.

Originally, Petitioners' Motion for Declaratory Order also challenged permits in California Wash. In their motion, Petitioners requested that the State Engineer "require renoticing of all of SNWA's 1989 applications which were protested." *Motion for Declaratory Order*, at 2, 6, and 12. In response, the State Engineer sent a letter to Petitioners expressing concern that the motion impacted permits that were held by parties other than SNWA or the Las Vegas Valley Water District and therefore notice of the motion was improper. *Letter from the State Engineer*, dated October 21, 2010. The State Engineer followed up by requiring Petitioners to file a "list of the specific applications it is addressing related to its Motion." *Letter from the State Engineer*, dated November 4, 2010. Despite the fact that the California Wash applications were filed on the same day and by the same party as the rest of the applications in this matter and are procedurally indistinguishable, Petitioners filed a list which excluded permits held by the Moapa Band of Paiute Indians in California Wash. *Letter from Advocates for Community and Environment to the State Engineer*, dated November 9, 2010.

Petitioners are also challenging (1) applications in Coyote Spring Valley owned by the Las Vegas Valley Water District which were held in abeyance pursuant to Order 1169, and (2) an application owned by Lincoln County in Garden Valley and applications owned by SNWA in Railroad Valley and Snake Valley which have not yet been acted upon. *Id.* Petitioners are therefore urging the State Engineer to re-notice applications for which the State Engineer is not yet ready to hold hearings and act.

Specifically, Petitioners' Motion for Declaratory Order requests the State Engineer to issue a declaratory order:

> (1) defining the scope of the Supreme Court's ruling in [*GBWN v. Taylor*] 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.

Motion for Declaratory Order, at 2.

In response to Petitioners' Motion for Declaratory Order, SNWA requests that the State Engineer reject the Petitioner's request for a declaratory order because it is untimely with regard to the Garnet, Hidden, Tikapoo, and Three Lakes Valley permits, and premature with regard to the Coyote Spring, Garden, Railroad and Snake Valley applications. Moreover, granting Petitioners' motion would violate Nevada water law and conflict with the Supreme Court's ruling in *GBWN v. Taylor*. Finally, the State Engineer should reject Petitioners' request to consolidate hearings and protests to SNWA's 1989 and 2010 applications.

ARGUMENT

I. THE STATE ENGINEER SHOULD REJECT PETITIONERS' REQUEST TO RE-NOTICE PERMITS ORIGINATING FROM SNWA'S 1989 APPLICATIONS BECAUSE THE REQUEST IS UNTIMELY AND WOULD OVERTURN FINAL DECISIONS OF THE STATE ENGINEER.

Petitioners are asking the State Engineer to re-notice and reconsider 1989 applications that have already been granted and which were not before the Supreme Court on appeal in *GBWN v. Taylor*. The Petitioners' request is contrary to the letter and spirit of Nevada's water statutes, contravenes important rules regarding finality of judgments, asks for relief that the State Engineer is without power to grant, and is otherwise barred by the doctrine of laches. The State Engineer should not reopen previously granted applications because the actions taken on those applications were not timely appealed under Nevada law and are thus final and conclusive. The State Engineer has no equitable powers and does not have the authority to reconsider his prior decisions. Petitioners' request should be denied as the State Engineer has correctly interpreted the ruling in *GBWN v. Taylor* as only requiring re-notice of the 34 Applications that were before the Supreme Court on appeal, as well as other protested and/or timely appealed applications. *Letter from the State Engineer*, dated July 7, 2010; *Letter from the State Engineer*, dated October 15, 2010.

A. Petitioners' Request is Untimely and Would Be Barred by the Statute of Limitations.

The Nevada water statutes allow a person aggrieved by a decision of the State Engineer to have that decision reviewed by a district court in a proceeding in the nature of an appeal. NRS 533.450(1). However, the district court may not review a decision of the State Engineer unless the petitioner files a petition for judicial review and serves notice of appeal to the State Engineer and affected persons within 30 days of the decision being rendered. NRS 533.450(1) and (3). Therefore, State Engineer decisions become final 30 days after they are rendered when no timely appeal is filed. *Preferred Equities Corp. v. State Eng'r*, 119 Nev. 384, 387, 75 P.3d 380, 382 (2003) (per curiam). The Supreme Court "strictly construes statutes dealing with mandatory filing dates in water rights actions." *Id.* at 388, 75 P.3d at 383. The Supreme Court has consistently held that courts lack jurisdiction to review an administrative agency decision if the petitioner fails to timely file the petition for judicial review. *See Mikohn Gaming v. Espinosa*, 122 Nev. 593, 598, 137 P.3d 1150, 1154 (2006); *Bing Constr. Co. v. Nev. Dep't of Taxation*, 107 Nev. 630, 631, 817 P.2d 710, 710-11 (1991) (per curiam); *see also PUC of Or. v. VCI Co.*, 220 P.3d 745, 747 (Or. Ct. App. 2009) (holding that the court lacked jurisdiction to review an agency's order because the petition for review was untimely). Failure to timely appeal a decision of the State Engineer warrants dismissal of a petition for judicial review absent proof of substantial compliance with water law. *Preferred Equities Corp.*, 119 Nev. at 389, 75 P.3d at 383; *see also Howell v. Ricci*, 124 Nev. ___, ___, 197 P.3d 1044, 1046–47, 1050 (2008) (noting prior affirmance of district court's dismissal of petition for review of State Engineer's decision filed more than 30 days after it was rendered as "procedurally barred").

Petitioners' challenge to the Tikapoo, Three Lakes, Garnet, and Hidden Valley permits should be rejected as Petitioners did not timely appeal the State Engineer decisions granting these permits. Once the State Engineer acted upon these applications, the 30 day appeal period began to run and expired on April 19, 2001 for the Garnet and Hidden Valley permits, February 3, 2005 for the Tikapoo Valley permits, and February 3, 2005 and October 26, 2005 for the

Three Lakes Valley permits. *See* State Engineer Ruling No. 5008 (March 20, 2001) (Garnet and Hidden Valleys); Ruling No. 5465 (January 4, 2005) (Tikapoo and Three Lakes Valleys); and Ruling No. 5533 (September 26, 2005) (Three Lakes Valley). Under Nevada's water statutes, courts now lack jurisdiction to disturb the State Engineer's decisions on those applications, and the procedure contained in Nevada's water statutes is strictly enforced. *See Preferred Equities Corp.*, 119 Nev. at 388, 75 P.3d at 383. The State Engineer should not allow Petitioners to do an end-run around those jurisdictional requirements by boot-strapping untimely attacks on SNWA's permitted 1989 applications to Petitioners' timely appeal of the 34 Applications.

Any effective regime for the appropriation of water must contain a degree of certainty and finality. Appropriators often expend a great amount of time, money and resources to divert water before they can put it to a beneficial use. It can take years before the beneficial use of the water outweighs the initial investment. For example, power companies have invested significant money and time for the prosecution of water rights applications and the construction of power generation facilities in Garnet Valley to cope with the 2001 threatened power crisis. *See* State Engineer Ruling 5008, at 21–25 (March 20, 2001); Application Nos. 54073–74, 68822, 72798, 73149–51, 78954T, 79001–10. Indeed, NV Energy alone spent in excess of $1.4 billion to construct its three power plants in Garnet Valley. The permitting process gives appropriators some guarantee that they will have rights to use the water before they make a substantial investment. If an approved application for water rights could be procedurally and collaterally attacked beyond the 30-day time period for appeal, an appropriator would never be secure in its rights. This would greatly discourage investment in beneficial uses of Nevada's waters and result in appropriators being forced into the "long, vexatious, and expensive litigation to protect their rights against subsequent appropriators" that Nevada's water statutes seek to avoid. *See Ormsby County v. Kearney*, 37 Nev. 314, 338, 142 P. 803, 806 (1914).

This public policy against prolonged legal uncertainty is also evidenced by Nevada's statutes of limitation. *See* NRS 11.010–11.500. Statutes of limitation bar the commencement of legal actions after a certain period of time and thereby "promote repose by giving security and

stability to human affairs." *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990) (quoting 51 Am. Jur. 2d § 18: Limitation of Actions (1970)). The need to conclusively settle legal rights is especially important with respect to property rights, including water rights. *See United States v. Beggerly*, 524 U.S. 38, 48–49 (1998) (discussing landowners' need to "know with certainty what their rights are, and the period during which those rights may be subject to challenge"); *see also Nevada v. United States*, 463 U.S. 110, 129 & n.10 (1983) (noting that policies regarding the conclusiveness of court judgments are "at their zenith in cases concerning real property, land, and water"). The statute of limitations in Nevada regarding real property is generally five years. *See* NRS 11.030–11.180. However, to the extent that Petitioners are alleging a violation of a statutory procedural right, the applicable statute of limitations could be three years for "an action upon liability created by statute." NRS 11.190(3)(a). A general catch-all four year statute of limitations may also apply to an action for relief not otherwise provided for. NRS 11.220. In this case, Petitioners are seeking to challenge the issuance of permits in Garnet and Hidden Valleys more than nine years after the State Engineer granted them and permits in Tikapoo and Three Lakes Valleys more than five years after they were granted. *See* State Engineer Ruling Nos. 5008, 5465, 5533, and 5621. Even under the most generous statute of limitation that could apply in this case, Petitioners' request would be barred. As granting Petitioners' motion would run counter to the public policy favoring finality of judgments and certainty of property rights, Petitioners' request should not be indulged.

B. The State Engineer Lacks the Authority to Grant Petitioners' Request Because the State Engineer May Not Reconsider Previous Decisions and Does Not Have Equitable Powers.

Petitioners' motion may also be characterized as a request for the State Engineer to reconsider his 2001 and 2005 decisions granting water rights in Garnet, Hidden, Tikapoo, and Three Lakes Valleys. However, Petitioners may not ask the State Engineer to reconsider his prior actions in granting permits. The State Engineer's regulations expressly state that "[p]etitions for reconsideration or rehearing will not be accepted." Adopted Regulation of the

State Engineer R129-08 § 7, at 3 (Feb. 11, 2009). Therefore, Petitioners' Motion for Declaratory Order is improper because it is asking the State Engineer for both reconsideration of, and rehearing on, the applications previously granted in Garnet Valley, Hidden Valley, Tikapoo Valley North, Tikapoo Valley South, Three Lakes Valley North and Three Lakes Valley South.

To the extent Petitioners are resorting to equitable principles to compel the State Engineer to re-open consideration on previously granted applications, the State Engineer lacks any equitable powers that would allow him to grant Petitioners' requested relief. The State Engineer is a statutory officer and an administrative agency whose powers are limited to those set forth in statute and those necessarily implied in the performance of enumerated duties. *See City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006) (quoting *Clark Co. School Dist. v. Teachers Ass'n*, 115 Nev. 98, 102, 977 P.2d 1008, 1010 (1999)); *see also Andrews v. Nev. St. Bd. of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96, 96-97 (1970). While the courts may take equitable considerations into account when reviewing the actions of water rights holders, the State Engineer must strictly comply with statutory mandates. *State Eng'r v. American Nat'l Ins. Co.*, 88 Nev. 424, 426, 498 P.2d 1329, 1330 (1972) (recognizing the "awkward and unenviable position" the State Engineer is in when he must comply with the letter of the statutes while the district court may reverse him on equitable grounds); *Engelmann v. Westergard*, 98 Nev. 348, 351–52, 647 P.2d 385, 387 (1982) (noting that the district court may grant equitable relief when the State Engineer is bound by statute to cancel a permit). Therefore, the State Engineer lacks the authority to consider Petitioners' argument that equity requires the State Engineer to re-notice and open previously granted permits to new protest hearings.

Finally, not only is it improper for Petitioners to request that the State Engineer re-notice existing permits, it is also improper for Petitioners to request that the State Engineer re-notice pending applications that have <u>not</u> yet been acted upon (i.e., those in Coyote Spring Valley, Garden Valley, Railroad Valley, and Snake Valley). SNWA agrees that currently pending applications in Coyote Spring, Garden, Railroad, and Snake Valleys need to be re-noticed, but SNWA does not agree with Petitioners' request to dictate the timing of when these applications

will be heard. The State Engineer has indicated that it will re-notice these applications prior to acting on them but the State Engineer has discretion to determine when to re-notice them and when (or if) to hold a hearing on them. *See Letter from the State Engineer*, dated July 7, 2010; *Letter from the State Engineer*, dated October 15, 2010; NRS 533.365(3); *see also* 2 Am. Jur. 2d *Administrative Law* § 334 (2010) (noting an administrative decision maker has the power to set the time and place of a hearing). This discretion is important because the State Engineer must approve or reject each application within one year of the end of the protest period. NRS 533.370; *Great Basin Water Network v. State Eng'r*, 234 P.3d 912, 919, 126 Nev. Adv. Op. No. 20 (June 17, 2010). If the State Engineer were required to re-notice all pending applications at the same time, the State Engineer would not have the staff or resources to approve or reject all re-noticed applications within one year. However, this does not mean that the Petitioners are without a remedy. If the State Engineer fails to re-notice SNWA's and LVVWD's Coyote Spring, Railroad, and Snake Valley applications or Lincoln County's Garden Valley application prior to acting on them, then Petitioners may challenge those decisions in a district court at that future time. *See* NRS 533.450. Until then, however, any State Engineer or district court challenge to the timeline for action on the Coyote Spring, Garden, Railroad, and Snake Valley applications is premature.

C. Petitioners' Request to Re-notice Existing Permits Would Be Barred by Laches.

Although the State Engineer does not have equitable authority to grant Petitioners' requested relief, even if the State Engineer had such equitable powers, relief would be barred by the laches doctrine. Laches is an equitable doctrine which may be invoked where "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) (internal citations omitted). Here, Petitioners challenge permits in Garnet and Hidden Valleys that are over nine years old and permits in Tikapoo and Three Lakes Valleys that are over five years old. In Garnet Valley four electrical power plants were

constructed in direct response to the State Engineer granting water rights to LVVWD in Garnet and Hidden Valleys. NV Energy spent in excess of $1.4 billion on construction of its three plants. The Garnet Valley power plants are currently being operated by NV Energy and LS Power and are an important component of southern Nevada's electrical power portfolio. Since 2005, SNWA has spent over $2.52 million on securing rights of way and environmental compliance for infrastructure necessary to put the Tikapoo Valley water rights to use and over $8.5 million on the Three Lakes Valley water rights. Petitioners have sat on their hands for at least five years and watched as substantial monetary investments have been made to put these water rights to beneficial use and never petitioned the State Engineer or any court for relief.

Petitioners not only failed to raise any objection to the Garnet, Hidden, Tikapoo and Three Lakes Valley permits in 2001 and 2005, Petitioners also sat on the sidelines while change applications on these water rights were considered. Change applications on the Garnet and Hidden Valley permits were filed on May 16, 2002, and again on November 2, 2009. Change applications on the Three Lakes Valley water rights were filed on May 17, 2005. Public notice was published in a newspaper of general circulation once a week for four consecutive weeks regarding these applications, yet Petitioners never protested them. *See* NRS 533.360. Petitioners also did not file an appeal of these change applications within 30 days after they were granted. Instead, Petitioners waited and watched as these water rights were put to productive use and only now raise their claim. If Petitioners were allowed to bring their challenges now, after many years of delay, SNWA, NV Energy, LVVWD, and LS Power would be prejudiced by the delay. Equity aids those who have been vigilant and diligent, and should not reward Petitioners' inaction in this case. *See Cooney v. Pedroli*, 49 Nev. 55, 235 P. 637, 639-40 (1925).

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II. THE STATE ENGINEER SHOULD REJECT PETITIONERS' REQUEST TO RE-NOTICE EXISTING PERMITS BECAUSE IT WOULD REQUIRE AN ABSURD INTERPRETATION OF *GBWN V. TAYLOR* AND AN ARBITRARY APPLICATION OF THAT INTERPRETATION.

A. Petitioners' Interpretation is Absurd.

Petitioners' interpretation of the ruling in *GBWN v. Taylor* evidences a fundamental misunderstanding of the scope and effectiveness of judicial decisions. Specifically, Petitioners make the argument that:

> If the [Supreme] 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 need to be renoticed, rather than using broad language covering all of SNWA's protested 1989 Applications.

Motion for Declaratory Order, at 4. In contrast to that assertion, there are a number of reasons why the Supreme Court did not include the limiting language Petitioners suggest would be necessary.

First, the Supreme Court did intend for the reasoning of the ruling in *GBWN v. Taylor* to apply to other applications beyond just the 34 Applications. As provided in the opinion, the remedy in *GBWN v. Taylor* will apply "in circumstances in which a protestant filed a timely protest pursuant to NRS 533.365 and/or appealed the State Engineer's untimely ruling." 234 P.3d at 920, 126 Nev. Adv. Op. No. 20 at 18. As a result, the remedy in *GBWN v. Taylor* may apply to other parties besides just SNWA and to other applications besides just the 34 Applications. However, there is simply no indication in the opinion that the Supreme Court intended the remedy to apply to applications that have already been granted and where no appeal is pending, such as the Garnet, Hidden, Tikapoo, and Three Lakes Valley permits.

Second, the Supreme Court would not have had jurisdiction to craft a remedy that would apply to literally all of SNWA's 1989 applications. *See Motion for Declaratory Order*, at 4. As explained in Section I above, due to the finality of judgments rule and applicable statutes of limitation, the Supreme Court would not have had jurisdiction to require the State Engineer to re-notice applications that had been granted and not timely appealed such as the Tikapoo and Three

Lakes Valley permits. At the same time, the Supreme Court would not have had jurisdiction to require the State Engineer to re-notice applications that had been granted and appealed but where the appeal was no longer pending, such as the Garnet and Hidden Valley permits. *See Preferred Equities Corp.*, 119 Nev. at 386, 75 P.3d at 382; *see also Mikohn Gaming v. Espinosa*, 122 Nev. 593, 598 137 P.3d 1150, 1154 (2006); *see also Bing Constr. Co. v. Nev. Dep't of Taxation*, 107 Nev. 630, 631, 817 P.2d 710, 710-11 (1991) (per curiam). Therefore, the applicability of the remedy was already limited by the lack of jurisdiction and the Court may have felt it was not necessary to include additional limiting language.

Third, there is no indication in *GBWN v. Taylor* that the Supreme Court intended to extend or toll the statute of limitations that would otherwise bar Petitioners' challenge of long-standing permits. *See* Section I. The Supreme Court would have included a detailed discussion if it meant to provide a remedy that would conflict with or overrule those statutes and judicial precedent. The fact that no such discussion was included indicates that the Supreme Court did not intend its remedy to apply to permits in contravention of those statutes and judicial precedent. As such, there is no reason to expect the Supreme Court to have included specific language in *GBWN v. Taylor* excluding such permits from the scope of its ruling.

Furthermore, the absence of additional limiting language in the *GBWN v. Taylor* opinion should not be taken to indicate a broad applicability which is not indicated by the plain language of the opinion. The State Engineer proposed language in its petition for rehearing in an attempt to clarify that the opinion was not meant to disturb permitted and certificated water rights. *State Engineer's Petition for Rehearing* (March 15, 2010). However, the fact that the Supreme Court did not include all of that language in its ruling does not, as Petitioners argue, make "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." *See Motion for Declaratory Order*, at 5. The more likely explanation is that the Supreme Court is aware of the basic judicial principle that the relief granted must follow "legitimately and logically from the pleadings . . . and it must not . . . take the defendant by surprise." *Buaas v. Buaas*, 62 Nev. 232, 235, 147 P.2d

495, 496 (1944) (internal citations omitted); 61B Am. Jur. 2d *Pleading* § 887 (court's authority to grant relief limited by issues raised in the pleadings or tried by consent of parties). As the petition for judicial review in *GBWN v. Taylor* is plainly limited to SNWA's Spring, Snake, Delamar, Dry Lake, and Cave Valley applications (the 34 Applications), the relief granted by the Supreme Court is similarly limited and simply does not apply to the Garnet, Hidden, Tikapoo, and Three Lakes Valley permits. *See Petition for Judicial Review* (August 22, 2006), at 2. Regardless of why the Supreme Court chose to word its opinion as it did, the exclusion of proposed language cannot be used to provide meaning to the otherwise plain language of the opinion.

Some of the confusion in this matter arises out of the Supreme Court's imprecise use of the term "1989 applications" in various parts of the *GBWN v. Taylor* opinion. However, that imprecision is explained by the fact that only the 34 Applications were before the Supreme Court on appeal and that none of the 34 Applications had been granted into permits when Petitioners filed their petition for judicial review with the District Court in 2006. Therefore, there was no reason for the Supreme Court to believe it would be misunderstood, as Petitioners do here, when referring interchangeably to "1989 applications," "SNWA's 1989 applications," the "34 groundwater applications," and the "remaining groundwater applications." *See generally GBWN v. Taylor*, 234 P.3d 912, 126 Nev. Adv. Op. No. 20.

Petitioners have jumped on the Supreme Court's imprecise language as support for their absurd interpretation of the *GBWN v. Taylor* opinion. If the interpretation proposed by Petitioners were followed, the State Engineer would essentially have to re-notice every protested water right application that was filed before July 1, 2002, and acted upon more than one year after the protest period ended. That means the State Engineer would have to re-notice and reopen the protest period for approximately 661 protested permits and certificates that have already been granted. The result would be near total paralysis of the State Engineer's ability to administer water rights in Nevada. Such a situation would delay, and possibly prevent, the State Engineer from acting upon SNWA's 34 Applications, which would effectively accomplish

Petitioners' goal in these matters. However, despite Petitioners' best efforts to craft laws that apply only to SNWA, there is no mechanism to confine the requested remedy to apply to applications filed by one particular party.

In total, there are approximately 7,004 permits and certificates that the State Engineer granted later than one year after the end of the protest period. *See Affidavit of Jason King* (March 15, 2010). Estimates indicate that at least 661 of these permits and certificates were protested. It is unclear how many of these permits and certificates were not protested, but were pending on appeal at the time *GBWN v. Taylor* was issued. If the State Engineer were to adopt the absurd interpretation of *GBWN v. Taylor* proposed by Petitioners, the opinion would necessarily apply to State Engineer action on at least 661 permits and certificates. Therefore, the owners of the water rights that were not before the Supreme Court would lose their property rights without notice and an opportunity to be heard. It should also be noted that the Supreme Court made explicit efforts to balance the equities of the parties while fashioning the remedy in *GBWN v. Taylor* and stated "applicants cannot be punished for the State Engineer's failure to follow his statutory duty." 234 P.3d at 920, 126 Nev. Adv. Op. No. 20 at 17-18. Conspicuously, the Supreme Court made no efforts to balance the gross inequities and wasted monetary investments that would result from requiring the State Engineer to re-notice and reopen the protest period for permits and certificates that have already been granted. The likely reason is that the Supreme Court knew that only the 34 Applications were the subject of Petitioners' 2006 petition for judicial review and therefore did not foresee that Petitioners would argue for an absurd interpretation of the Court's ruling in *GBWN v. Taylor II.*

Not only would it have been counter to Nevada's water statutes for the Supreme Court to overturn action on all protested or appealed permits, it also would have been counter to the policy behind Nevada's permitting and adjudication process. "The purpose of the water law is perfectly obvious. It seeks not only to have the water rights adjudicated but to have them adjudicated in such a proceeding as to terminate for all time litigation between all such water users." *Ruddell v. Sixth Judicial Dist. Ct.*, 54 Nev. 363, 367, 17 P.2d 693, 695 (1933). The

Supreme Court of the United States has also emphasized the importance of the conclusiveness of judgments regarding water rights. *See Nevada v. United States*, 463 U.S. 110, 129 & n.10 (1983) (noting that policies regarding the conclusiveness of court judgments are "at their zenith in cases concerning real property, land, and water"). If the Supreme Court could reopen the State Engineer's decisions on permits outside the statutory procedure, it would create an absurd perpetual threat of litigation that would loom over every water right. As Petitioners' request would do just that, it should not be indulged.

B. Petitioners' Request is Arbitrary.

Furthermore, Petitioners are also advocating an arbitrary application of the absurd interpretation they propose. Petitioners' exclusion of the California Wash permits from their request for relief demonstrates the blatantly arbitrary and overtly political application of their interpretation. The California Wash permits currently held by the Moapa Band of Paiute Indians were part of the large group of 1989 applications filed by the Las Vegas Valley Water District. However, Petitioners have excluded these permits from their request and have provided no rationale as to how or why such exclusion is proper. *Letter from Advocates for Community and Environment to the State Engineer*, dated November 9, 2010. The rule Petitioners urge through their interpretation of *GBWN v. Taylor* either applies to all previously issued permits and certificates originating from LVVWD's 1989 applications, or it does not. Additionally, the rule Petitioners urge through their interpretation applies to all 661 protested applications that were pending for longer than one year statewide, or it does not. A special rule should not be uniquely applied to SNWA permits and certificates solely on the basis of who now holds or uses those permits or certificates. Petitioners' request is an inconsistent and politically motivated attempt to eliminate other interested parties from opposing Petitioners' interpretation, and such a request should be denied.

In summary, the Petitioners are proposing an absurd interpretation of *GBWN v. Taylor* and an arbitrary application of that absurd interpretation. The only reasonable interpretation of *GBWN v. Taylor* is that the State Engineer must uniformly re-notice applications and reopen the

protest period in the following circumstances: (1) before acting upon a protested application filed prior to July 1, 2002, for which action was not properly postponed under statute, and (2) if an application filed prior to July 1, 2002, was acted upon later than one year after the close of the protest period and that action was the subject of a timely and pending appeal at the time *GBWN v. Taylor* was decided. This is the interpretation articulated by the State Engineer in its letter dated October 15, 2010, and it is the same interpretation that the State Engineer should continue to use as it complies with the Order for Remand issued by the District Court.

III. THE STATE ENGINEER SHOULD REFUSE TO CONSOLIDATE SNWA'S 1989 APPLICATIONS AND SNWA'S 2010 APPLICATIONS BECAUSE IT WOULD DEPRIVE SNWA OF A PROTECTABLE PROPERTY INTEREST.

As a result of the uncertainly created by the ruling in *GBWN v. Taylor I*, SNWA was forced to file substantively identical applications (the "2010 Applications") to duplicate almost all of its 1989 applications. SNWA believed that the 1989 applications were still pending before the State Engineer but could not risk having those applications be declared invalid by the Supreme Court without having a contingency plan. Therefore, as a contingency, SNWA filed the 2010 Applications at great cost and expense, resulting in over $40,000 of filing fees plus additional filing-related costs. In response, various protestants paid $25 per protest and filed protests to the 2010 Applications.

In *GBWN v. Taylor II*, the Supreme Court eliminated the uncertainty as to whether SNWA's 1989 applications were still valid. This eliminated SNWA's original need for the 2010 Applications to cover the 1989 applications. Nevertheless, SNWA will not be reimbursed and cannot recover the tens of thousands of dollars it was forced to spend to file the 2010 Applications. As such, SNWA continues to have a protectable property interest in the 2010 Applications and reserves the right to use that property interest as it sees fit in the future. Once the 34 Applications are re-noticed and acted upon, there will remain considerable uncertainty as to the fate of the 34 Applications upon judicial review. To hedge against this uncertainty created by the judicial review process, SNWA's 2010 Applications serve to keep a place in line to

appropriate water. As the applicant and property owner, SNWA requests that its 2010 Applications remain pending until such time as action on the 34 Applications is final and all judicial review has been completed. Only at that time will SNWA consider whether to withdraw or request action on its 2010 Applications.

Petitioners have urged the State Engineer to consolidate the 2010 Applications and the 1989 applications pursuant to NAC 533.340. Petitioners are seeking consolidation so that protestants to the 2010 Applications will not have to file and pay the $25 fee for protests to the re-noticed 1989 applications as required by NRS 533.435. However, consolidation is only available, in part, if "the interests of the parties will not be prejudiced by the consolidation." NAC 533.340(1). In this case, consolidation of the 2010 Applications and the 1989 applications would effectively dismiss the 2010 Applications and eliminate SNWA's property interest therein. This would prejudice SNWA as it would prevent SNWA from using the 2010 Applications as it sees fit in the future. Therefore, the State Engineer should refuse to consolidate the 2010 Applications and the 1989 applications because consolidation is not authorized under NAC 533.340.

IV. THE STATE ENGINEER SHOULD REFUSE TO DEVIATE FROM THE STATUTORY PROTEST FEE REQUIREMENT BECAUSE HE HAS NO AUTHORITY TO DO SO.

As an alternative argument to the one addressed in Section III above, Petitioners have asked the State Engineer to order that protests to the 2010 Applications be treated as valid and effective as against both the 2010 Applications and the 1989 applications. Again, Petitioners are seeking to avoid having to pay the $25 fee for filing protests in connection with the re-noticing of the 34 Applications.

Protestants are required to pay a $25 fee when filing protests to water right applications. NRS 533.435. Petitioners argue that requiring protestants to pay a fee to protest the 34 Applications would be a "technical formality" and an "unnecessary procedural burden" that the State Engineer can deviate from pursuant to NAC 533.010(2). *Motion for Declaratory Order*, at

9. However, the State Engineer cannot use his administrative regulations to justify non-compliance with a statute. *See Roberts v. State*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988) (administrative regulations can't contradict implementing statute). Moreover, as discussed above in Section I, the State Engineer has no equitable authority and may not deviate from the clear statutory requirement to collect a fee for filing a protest. *See State Eng'r v. American Nat'l Ins. Co.*, 88 Nev. 424, 426, 498 P.2d 1329, 1330 (1972) (recognizing the "awkward and unenviable position" the State Engineer is in when he must comply with the letter of the statutes while the district court may reverse him on equitable grounds); *see also Provenzano v. Long*, 64 Nev. 412, 427-28, 183 P.2d 639, 646 (1947) (comparing statutory and equitable powers of quasi-judicial administrative agency versus the district courts and noting that it was not the legislature's intent to grant equitable powers to quasi-judicial Industrial Commission.) While the courts may take equitable considerations into account when reviewing the actions of water rights holders, the State Engineer must strictly comply with statutory mandates, and therefore must collect the protest fee here.

Far from being a "technical formality," requiring a fee serves the important purposes of helping the State Engineer to pay administrative costs associated with protests while at the same time discouraging parties from filing duplicative and unsubstantiated protests. Protests impose an administrative burden upon the office of the State Engineer because the State Engineer has to identify and manage each and every protest, incur the expense of noticing protestants of hearing dates by certified mail, and eventually respond to each and every protest in its ruling. The protest fee is meant to cover, in part, the administrative and certified mailing costs that the State Engineer incurs in connection with protests. If the fee is waived in this case, the State Engineer will be forced to bear these costs entirely on its own.

At the same time, protests impose a burden upon the applicant, in this case SNWA, because the applicant has to identify, analyze and possibly file responses to each and every protest submitted. The protest fee is meant to discourage protestants from filing duplicative and unsubstantiated protests for the sole purpose of increasing costs that the applicant incurs in

connection with protests. If the fee is waived in this case, the State Engineer and SNWA will still have to incur the costs associated with the protests. If the State Engineer and SNWA are forced to bear these protest-related costs, then there is no reason why the protestants should not also be required to bear the cost of filing their protests. Waiving the protest fee in this case would only benefit protestants and would be inequitable to the other parties involved.

It should also be noted that Petitioners spent years arguing before the State Engineer, the District Court and the Supreme Court that the State Engineer should not be allowed to deviate from the procedures required by the Nevada water statutes. The fact that Petitioners are now arguing that the water statutes should be liberally construed and deviated from under the guise of "equity" is totally inconsistent with those arguments. *GBWN v. Taylor* gave Petitioners the right to protest the 34 Applications but it did not excuse Petitioners from having to pay the fees associated with those protests.

Therefore, the State Engineer should refuse to waive the protest fee for any protests to the re-noticed 34 Applications and should require all protestants to pay the statutorily mandated fees in their entirety.

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CONCLUSION

For the reasons set forth above, SNWA respectfully requests that the State Engineer take no action on the Motion for Declaratory Order submitted by Petitioners. Previous letters and actions from the State Engineer have adequately and correctly interpreted the ruling in *GBWN v. Taylor* and there is no need for any further decision by the State Engineer.

Respectfully submitted this 1st day of December, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December 2010, a true and correct copy of SNWA's OPPOSITION TO MOTION FOR DECLARATORY ORDER ON SCOPE AND IMPLEMENTATION OF REMEDY ORDERED BY SUPREME COURT was served on the following counsel of record by U.S. Postal Service, first class mail, postage prepaid:

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I further certify that a true and correct copy of the same was hand delivered via interoffice-type messenger on the following:

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DATED this 1st day of December, 2010.

Employee of TAGGART & TAGGART, LTD.