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STATE ENGINEER'S OFFICE

IN THE OFFICE OF THE STATE ENGINEER

OF THE STATE OF NEVADA

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In the Matter of *Great Basin Water Network v. Taylor*, 234 P.3d 912, 126 Nev. Adv. Op. No. 20 (June 17, 2010); NV S. Ct. Case No. 49718; Dist. Ct. Case No. CV-0608119 On Remand to the Nevada State Engineer	**REPLY TO SNWA RESPONSE TO MOTION FOR DECLARATORY ORDER ON SCOPE AND IMPLEMENTATION OF REMEDY ORDERED BY SUPREME COURT**

COME NOW, Great Basin Water Network and the rest of the Petitioners in the above-captioned matter, (collectively "GBWN" or "*GBWN v. Taylor* Petitioners"), by and through their counsel of record, Simeon Herskovits of Advocates for Community and Environment, and hereby file this Reply to the Southern Nevada Water Authority's ("SNWA's") Opposition to GBWN's Motion for Declaratory Order on Scope and Implementation of Remedy Ordered by Supreme Court.

INTRODUCTION:

The Petitioners filed this motion to address two narrow issues on remand from the Nevada Supreme Court. First, Petitioners seek an order from the State Engineer clarifying the proper scope of the remedy ordered by the Supreme Court with regard to SNWA's 1989 applications and correcting the State Engineer's July 7, 2010, preliminary interpretation of the Supreme Court's opinion, which Petitioners believe erred in not applying the remedy to all of SNWA's protested 1989 applications. Second, Petitioners seek an order from the State Engineer consolidating the proceedings on SNWA's protested 1989 applications and SNWA's concededly identical 2010 applications that were filed for precisely the same water rights as a back-up in case the Supreme Court declared SNWA's 1989 applications null and void.

Both issues properly are raised by Petitioners on remand with regard to applications belonging to SNWA, which has been a party to *GBWN v. Taylor* from its earliest stages. At every stage of this case, Petitioners have addressed only SNWA's 1989 applications that relate to its massive scheme to import water to the Las Vegas Valley from rural Nevada basins. This focus on SNWA's applications continues through the current motion, as reflected by the fact that Petitioners' refer continuously and exclusively to "SNWA's" applications throughout the motion.

SNWA attempts to muddy the waters and dissuade the State Engineer from addressing the merits of the two issues raised in this motion by claiming that the portion of Petitioners' motion addressing the scope of the remedy could affect other persons who have not been served with the motion. The State Engineer should not be misled by this red herring. The Petitioners have not asked the State Engineer to consider any matter extending beyond the matters at issue in *GBWN v. Taylor* on remand from the Supreme Court. Further, the Petitioners have not asked the State Engineer to address any applications or permits other than those held by SNWA, which is a party to this case. Apart from a simple error as to one application, which Petitioners mistakenly believed belonged to SNWA but which appears to belong to the Lincoln County Water District,[1] the only arguable "other" person who owns any of the applications in the list provided in Petitioners' November 9, 2010, letter is the Las Vegas Valley Water District ("LVVWD") which owns a small number (7) of the 1989 applications included on GBWN's list, only two of which are permitted and therefore implicated by GBWN's scope argument. As explained in Petitioners' November 3, 2010, letter, with regard to the applications included in Petitioners' list,

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[1] Petitioners did erroneously include an application held by the Lincoln County Water District (Application No. 53963) in the list submitted by letter dated November 9, 2010. As Petitioners have explained, their only focus in this case and the only subject matter of this motion on remand is SNWA's applications. Accordingly, the Petitioners respectfully withdraw Application No. 53963 from the list of SNWA 1989 applications which they are requesting the State Engineer to hold covered by the Supreme Court's opinion in this case.

the LVVWD shares a complete unity of interest and representation with SNWA and therefore those applications should be considered part of SNWA's 1989 applications.

For virtually all legal and administrative purposes, and certainly with regard to all of these applications, the LVVWD is effectively identical to SNWA. The LVVWD and SNWA have closely overlapping boards of directors and executive management teams. They share the same general manager, the same general counsel and additional in-house legal counsel, the same administrative deputy general manager, and the same physical address. By its own account the LVVWD "functions as the operating agent for" SNWA. *See* LVVWD 2009 Comprehensive Annual Financial Report at 10. Further, the notion that the LVVWD has not received adequate notice of or had its interests adequately represented on Petitioners' motion on remand is implausible given the fact that one of the attorneys representing SNWA during the pendency of this case, Dana Walsh has served interchangeably, and been listed alternately, as in-house counsel for both SNWA and the LVVWD. Indeed Ms. Walsh, who has used the email address dana.walsh@lvvwd.com during the life of this case and who currently is listed on the Nevada State Bar Association's web site as being employed by the LVVWD,[2] is one of the attorneys responsible for preparing SNWA's opposition to this motion. *See* SNWA Opposition at 1, 23. Thus, as further explained in Petitioners' letter of November 3, 2010, for purposes of the applications at issue in this motion there is a complete identity of interest and representation between SNWA and the LVVWD.

So, Petitioners' motion relates solely to the applications of SNWA, a party to *GBWN v. Taylor*, and the motion does not seek to bind or apply the remedy ordered by the Court to any non-party. Accordingly, State Engineer should not be distracted any longer by SNWA's diversionary tactic and should rule on the scope of the remedy as to SNWA's 1989 applications.

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[2] *See* http://www.nvbar.org/findalawyerdetail.asp?Bar_Number=10228 (last visited Dec. 20, 2010).

SNWA does not even try to argue that the second issue raised in Petitioners' motion relates to anyone else's applications.

As explained in greater detail below Petitioners have only requested that the State Engineer interpret and apply the remedy ordered by the Supreme Court to applications belonging to SNWA, which is a party in the above-captioned matter. The fact that SNWA has contractual arrangements with other persons to temporarily lease some of its water does not have any relevance to the threshold issue of whether the applications underlying SNWA's putative permits 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. There is no legal support for the notion that such lessees of water from an applicant or putative permit holder like SNWA must be considered parties in an action addressing the validity of the process that led to the grant of the underlying permit. Such a line of reasoning would lead to the plainly unreasonable conclusion that every purchaser of water from SNWA must be treated as a party in this proceeding.

Similarly, the fact that someone in another proceeding may attempt to assert that the Court's opinion in *GBWN v. Taylor* affects the applications of other persons or entities who are not parties to this proceeding has no bearing on Petitioners' motion on remand in this proceeding or on the State Engineer's authority and duty to rule on the scope and application of the Court's opinion to SNWA's applications, since the Petitioners and SNWA *are* parties to this case.

Contrary to SNWA's mischaracterization, Petitioners' motion does not seek to force the State Engineer to re-notice or re-hear any of SNWA's 1989 applications on any particular schedule. Nor does the motion equate with a protest challenging any particular application. Rather the motion addresses two fundamental procedural threshold issues: the scope of the remedy as to SNWA's applications; and the appropriateness of consolidating proceedings on SNWA's concededly identical duplicative applications for the same water rights, pursuant to NAC § 533.340.

By SNWA's own admission, and consistent with the State Engineer's own interpretation, there does not appear to be any dispute as to the applicability of the remedy ordered by the Supreme Court with regard to any of SNWA's 1989 applications that still are pending, or on which the State Engineer has not yet taken action to grant or deny permits. Those applications make up the majority of the applications included in Petitioners' list. SNWA's real objection concerns the limited number of its 1989 applications in response to which permits previously were granted by the State Engineer.[3] Petitioners maintain that the plain meaning of the broad language and disjunctive construction used by the Supreme Court in describing the remedy it ordered requires that the remedy be applied to SNWA's 1989 applications that were timely protested, including applications like those in Spring Valley where the State Engineer previously granted permits on the basis of the same unlawful procedure that the Court sought to remedy in its opinion. SNWA advances a different interpretation of the Court's opinion that would exclude such applications. This is a straightforward disputed legal issue on remand that the State Engineer should resolve through a ruling, as requested by Petitioners.

The same is true of the second issue raised in Petitioners' motion, which seeks to avoid the costs and administrative burdens associated with duplicative, redundant proceedings on SNWA's duplicative applications. By its own admission, SNWA filed the 2010 applications at issue merely to duplicate its 1989 applications in case they were held to be voided by the Supreme Court's opinion. SNWA Opposition at 19. As such, those applications are identical in every regard to SNWA's 1989 applications, and the original justification for filing repetitive applications is gone. If ever there was a case in which it was appropriate for the State Engineer to exercise his statutorily authorized power to consolidate proceedings, it is this case: the

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[3] These are: Permit No. 53948 in Tikapoo Valley North, Permit Nos. 53950 and 53951 in Tikapoo Valley South, Permit Nos. 54060, 54068, and 54069 in Three Lakes Valley North, Permit No. 54062 (abrogated by Change Permit Nos. 72792, 72793, and 72794) and Permit No. 54066 (abrogated by Change Permit Nos. 72795, 72796, and 72797) in Three Lakes Valley South, Permit No. 54073 in Garnet Valley, and Permit No. 54074 in Hidden Valley.

applicant is identical, the water rights sought are identical, and every factual, scientific and public policy issue to be addressed is identical.

Nonetheless, despite being a public agency with annual budgets measured in the billions of dollars, SNWA opposes consolidation primarily on the basis of a complaint that it paid the application fees for its voluntary and admittedly duplicative applications. Despite SNWA's somewhat disingenuous attempt to minimize the relative cost of protest fees paid by Petitioners and other protestants in comparison to its own cost, SNWA's application fees actually were miniscule and far less in the context of its massive budget than the protest fees were to the protestants who are of vastly smaller means.[4] Absent this petty and invalid complaint, SNWA has no coherent response to the obvious benefits of consolidation in this case. Indeed, SNWA's unreasoned opposition to Petitioners' motion even descends to the level of asserting that people opposed to SNWA's duplicative applications should be forced to file duplicative protests and the State Engineer should be forced to conduct duplicative proceedings on those duplicative applications, all for the supposed purpose of advancing the policy of discouraging duplicative protests. One could hardly be faulted for being bewildered by this mysterious anti-logic by which SNWA urges the State Engineer to gratuitously waste Nevada taxpayers' money. But regardless of one's views on the merits of consolidation in this case, the issue plainly is one that appropriately should be resolved by an order of the State Engineer.

Because the scope of the remedy ordered by the Supreme Court as to SNWA's protested 1989 applications and the question of whether the Supreme Court's goals in ordering re-notice

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[4] Conservatively assuming a budget of $1 billion for SNWA (which actually has annual budgets of multiple billions of dollars), the application fees bemoaned by SNWA in its opposition amount to four hundred-thousandths of a percent of its budget (i.e., 0.00004%). That is equivalent to $2.00 for a person making an annual salary of $50,000.00, or $8.00 for a person with an annual income of $200,000.00. In contrast, many of the Petitioners and other protestants who have annual incomes toward the lower end of that modest range were forced to spend hundreds or thousands of dollars to protest and preserve their right to oppose SNWA's duplicative 2010 applications, which represents a far greater portion of their far more meager annual budgets. Thus, there is no comparison between SNWA's voluntarily incurred expense of filing its unnecessary, patently duplicative, 2010 applications and the involuntary expense forced on protestants by SNWA's unnecessary duplicative filings.

and rehearing of SNWA's 1989 applications would be furthered by consolidating the proceedings on SNWA's duplicative 2010 and 1989 applications both are proper issues to be addressed on remand, the State Engineer should issue an order resolving both of these issues. For the reasons described above and further explained below, the State Engineer should grant Petitioners' motion and hold: (1) that the remedy ordered by the Supreme Court, requiring re-notice and re-hearing of SNWA's applications from 1989 that were protested, covers SNWA's protested 1989 applications in response to which the State Engineer previously granted SNWA permits on the basis of the same legally defective and invalid procedure that the Court struck down in its opinion; and (2) that consolidation of the proceedings on SNWA's concededly duplicative 2010 and 1989 applications is warranted under NAC §533.340.

ARGUMENT

I. Background:

To begin with, SNWA misrepresents the true scope of the issues addressed throughout the life of *GBWN v. Taylor*, and which consequently were covered by the Supreme Court's opinion in this case. Fixating on a passing reference in the background section of the opinion, in which the Court noted that it was the 34 applications in the five valleys of Spring, Snake, Cave, Dry Lake and Delamar that gave rise to the case, SNWA repeatedly asserts that "only" those 34 applications were addressed by the Court. *See, e.g.*, SNWA Opposition at 4-5 (emphasis in original). Yet despite its repetitive statements about the scope of the case being limited to SNWA's 34 protested 1989 applications in those five valleys, SNWA concedes that it is impossible to read the Supreme Court's opinion as not extending to other protested 1989 applications of SNWA's, which make up the bulk of the list of SNWA's 1989 applications that Petitioners submitted on November 9, 2010. SNWA Opposition at 7, 11. Thus, SNWA's attempt to prevent application of the Court's opinion to some of its other protested 1989 applications is undermined by its own acknowledgment that the opinion must be applied to its protested 1989 applications beyond those five valleys.

In addition, SNWA misrepresents the nature of Petitioners' argument regarding the scope of the remedy ordered by the Supreme Court as some kind of attempt to dictate a schedule to the State Engineer. Notwithstanding SNWA's attempt to distort the nature of Petitioners' motion, at no time have Petitioners attempted to "dictate the timing of when these applications will be heard." SNWA Opposition at 11-12. Rather, all Petitioners have asserted, and requested confirmation of, is that the Court's opinion applies to SNWA's protested 1989 applications beyond those five valleys. The timing of how the State Engineer implements the remedy ordered by the Court with regard to particular applications is not even raised or addressed in Petitioners' motion. As noted above, Petitioners motion on remand seeks clarification as to the applicability of the Supreme Court's opinion to SNWA's permitted applications from 1989 that were protested and that are outside the five valleys which the State Engineer already has recognized are covered by the opinion. In particular, the Petitioners maintain that the applications and permits held by SNWA in Hidden, Garnet, Tikapoo Valley North and South, and Three Lakes Valley North and South, are subject to the remedy ordered by the Court.[5]

Petitioners' motion presented the State Engineer with two straightforward threshold issues of law affecting the scope and procedure for implementing the remedy ordered by the Court on remand. The first issue before the State Engineer on this motion is whether, despite the plain broad language employed by the Supreme Court, the Court's opinion should be held not to cover those protested 1989 applications of SNWA that were later permitted by the State Engineer on the basis of the same unlawful procedure that the Court revoked in relation to the permits previously granted to SNWA in Spring Valley. And the second issue is whether the State

[5] The applications and permits in Hidden and Garnet Valleys are held in the name of the LVVWD. However, as explained above and in Petitioners' letter of November 3, 2010, with regard to these applications and this case there is a complete unity of interest, operation and representation between the LVVWD and SNWA. Thus, these applications and permits of the LVVWD should be considered applications and permits of SNWA for purposes of determining the applicability of the remedy ordered by the Court in this case.

Engineer should consolidate the proceedings on SNWA's admittedly duplicative 2010 applications with those on SNWA's original protested 1989 applications.

Petitioners did not ask the State Engineer to exercise equity jurisdiction with regard to either of those issues. Accordingly, SNWAs' lengthy discussion and argument about the State Engineer lacking equity jurisdiction to "reconsider" previous rulings and about the equitable doctrine of laches are inapposite to this motion. By the same token, while SNWA's lengthy argument that equitable considerations favor the preservation of its permits in certain valleys may be relevant to the reconsideration of those permits and the underlying 1989 applications on rehearing, such equitable arguments about the need for certain permitted water rights are not pertinent to the threshold legal inquiry as to whether those applications fall within the scope of the remedy ordered by the Supreme Court.

In considering the issues raised on Petitioners' motion, the State Engineer should bear in mind the Supreme Court's own clear description of what it was changing when it issued its modified opinion on rehearing. First, in the Court's own words it was responding to the State Engineer's petition by "clarify[ing] that *this opinion applies to protested applications*." *Great Basin Water Network v. Taylor*, 234 P.3d 912, 913, 126 Nev. Adv. Op. No. 20, at 3 (June 17, 2010) (emphasis added). Second, the Court said it was responding to SNWA's petition by "undetak[ing] the *determination of the proper remedy in this case*." *Id.* (emphasis added). So, the Court clearly stated that its opinion covers all protested applications and its opinion determines the proper remedy in this case.

II. The Scope of *GBWN v. Taylor* Properly Includes All of SNWA's Protested 1989 Pending and Permitted Applications

a. The Plain Language of the Supreme Court's Opinion in *GBWN v. Taylor* Indicates that the Remedy Applies to All of SNWA's 1989 Applications that Were Protested, Regardless of Whether Permits Were Erroneously Granted in Response to Those Applications

In its opinion, the Supreme Court used broad, generic language indicating that the remedy it ordered was applicable to all of SNWA's 1989 applications that had been protested,

without qualification as to whether those applications had been improperly granted like those in Spring Valley. SNWA's argument that it is "absurd" to read the Supreme Court's opinion as applying to SNWA's protested 1989 applications that already have been granted assumes its conclusion and fails to meaningfully address the actual plain meaning of the language used by the Court. The Court clearly held that the State Engineer had violated his duty with regard to all of SNWA's 1989 applications that he failed to rule on within one year of the close of the protest period without obtaining the protestants' consent for such a delay. *GBWN v. Taylor,* 234 P.3d at 919, 126 Nev. Adv. Op. No. 20, at 17. In determining the remedy to be applied with regard to SNWA's 1989 applications the Court used a disjunctive construction, ordering that such applications be subjected to the remedy of re-noticing and re-opening the protest period where a timely protest had been filed to the application *and/or* where a protestant appealed the State Engineer's untimely decision on the application. *GBWN v. Taylor,* 234 P.3d at 920, 126 Nev. Adv. Op. No. 20, at 18. By definition, a disjunctive construction like that employed by the Court is an either/or construction, meaning that if either alternative is fulfilled then the remedy applies. Accordingly, as Petitioners have explained, where a 1989 application of SNWA's was timely protested it is subject to the remedy ordered by the Court even if the State Engineer's improper decision on that application was not appealed, just as a 1989 application would be subject to the remedy ordered by the Court even if it was not protested but was appealed. This reading of the straightforward language in the Court's opinion is consistent with the conceded applicability of the Court ordered remedy to SNWA's applications in Spring Valley. Those 1989 applications of SNWA's were protested, but the State Engineer's untimely ruling on those applications was not appealed. Notwithstanding the failure to appeal the Spring Valley ruling, as both the State Engineer and SNWA have recognized, the Supreme Court's opinion and remedy clearly apply to SNWA's protested 1989 applications in Spring Valley.

Further, as noted above, SNWA's efforts to bootstrap a passing mention in the opinion's background section of the 34 applications directly before the Court on appeal into a narrow

limitation of the remedy to only those 34 applications does not accord with the broader language used by the Court in both the legal analysis and remedy portions of its opinion. The body of the opinion makes it clear that the opinion is to apply much more broadly than SNWA suggests. The Supreme Court ordered that "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." *GBWN v. Taylor*, 234 P.3d at 920, 126 Nev. Adv. Op. No. 20, at 18. The Court's use of a disjunctive construction and such broad language in this critical sentence is not consistent with SNWA's narrow reading of the opinion. Such broad language would not have been necessary had the Supreme Court wished to limit the ruling to SNWA's 34 applications directly before the Court and pending applications.

b. The Supreme Court's Jurisdiction in This Case Properly Extended To All of SNWA's 1989 Applications that Were Infected with the Same Fundamental Procedural Deficiency, Including Those Applications in Response To Which the State Engineer Had Improperly Granted Permits, Like SNWA's 1989 Applications In Spring Valley

SNWA's principal argument against application of the Supreme Court's opinion to SNWA's 1989 applications that previously resulted in permits is that it would disturb the finality of the State Engineer's previous decisions. This argument would be somewhat reasonable, but for the fact that it fails to recognize the well-established exception to the principle of finality where the administrative agency's previous decision was made in violation of the required legal procedures and therefore is invalid, or void ab initio. As courts consistently have held in such circumstances, because the administrative agency's initial decision was made in violation of the applicable legal requirements that decision is not valid and therefore not entitled to any deference or presumption of finality. 50 C.J.S. *Judgments* § 710 (2010) (but a void judgment may be attacked at any time by any person in any proceeding); *see also State ex rel. Smith v. Sixth Judicial Dist. Court, Humboldt County*, 63 Nev. 249, 256, 167 P.2d 648, 651 (1946); *see also*

Prather v. Loyd, 382 P.2d 910, 912-13 (Idaho 1963) ("A void judgment is a nullity, and no rights can be based thereon . . . ."); 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2862 (2d ed. West 2010) ("[T]here is no time limit on an attack on a judgment as void.").

A judgment is void where a court or agency violated procedural requirements and acted inconsistently with principles of due process in proceedings underlying the judgment. *Browning v. Dixon*, 114 Nev. 213, 218, 954 P.2d 741, 744 (1998) ("A default judgment not supported by proper service of process is void and must be set aside."); *Tandy Computer Leasing, a Div. of Tandy Electronics, Inc. v. Terina's Pizza, Inc.*, 105 Nev. 841, 843, 784 P.2d 7, 8 (1989) ("a judgment rendered in violation of due process is void in the rendering state and is not entitled to full faith and credit elsewhere"); 16D C.J.S. *Constitutional Law* § 1792 (2010). Thus, when statutory notice requirements are not complied with, a judgment after hearing based on the defective notice is not entitled to deference as a final judgment. 73A C.J.S. *Public Administrative Law and Procedure* § 289 (2010); *see also Sarman v. First Judicial Dist. Court of State in and for Douglas County*, 99 Nev. 201, 203, 660 P.2d 990, 991 (1983). Thus, the principle of finality is inapplicable "where an administrative agency makes an erroneous interpretation of law, or where there is a manifest error in the record of the prior administrative proceeding." 73 C.J.S. *Public Administrative Law and Procedure* § 291 (2010).[6]

Here, that is precisely the nature of the situation concerning SNWA's 1989 applications in Hidden, Garnet, Three Lakes North and South and Tikapoo North and South Valleys. By SNWA's own admission, those applications were not ruled on until long after the original one-year time limit had expired without the State Engineer obtaining the necessary consent from the

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[6] Indeed, it appears that SNWA is aware of this line of cases, because like the State Engineer, SNWA itself argued in briefing on its petition for rehearing that the Supreme Court's ruling in *GBWN v. Taylor* would have a broad reaching effect if not limited. It is inconsistent and borders on disingenuous for SNWA now to argue that the court did not use limiting language in the ruling because it was cognizant of some jurisdictional limit on its authority over applications in valleys such as Garnet, Hidden, Three Lakes, Tikapoo, Railroad, and Coyote Spring. In fact, just the opposite is true as evidenced by the Supreme Court's questioning during oral argument about these other valleys.

protestants as well as the applicant to an open-ended extension. *See* SNWA Opposition at 8-9 (noting that these applications were approved by the State Engineer in 2001 and 2005, more than a decade after the close of the original protest period). As the Supreme Court explained, where the State Engineer failed to properly extend the time for making a decision on SNWA's protested 1989 applications any ruling he made on such applications violated his statutory duty. *See GBWN v. Taylor,* 234 P.3d at 919, 126 Nev. Adv. Op. No. 20, at 17. Therefore, any decision of the State Engineer granting any of SNWA's protested 1989 applications and issuing permits to SNWA, like Spring Valley, was invalid to begin with, and those applications must be re-noticed and re-heard. *See id.* at 919-20, 126 Nev. Adv. Op. No. 20, at 17-18 (explaining that the most equitable remedy in such circumstances is re-noticing and re-hearing on the original application because that procedure will not deprive either the applicant or "original or subsequent" protestants of their right to be heard before approval of the applications). Because the Supreme Court's opinion held that decisions such as those on which SNWA seeks to rely were not valid final decisions to begin with, SNWA's legal argument based on the deference generally due to final decisions of the administrative agencies is unavailing in this case. As a further consequence of the Court's holding as to the invalidity of the State Engineer's untimely grant of permits on the basis of SNWA's protested 1989 applications, neither SNWA's statute of limitations or laches arguments are availing, because neither legal consequence could have been triggered by a decision that was unlawful and void from the outset.

In sum, the Court in *GBWN v. Taylor* was not precluded from invalidating the State Engineer's rulings in valleys such as Hidden, Garnet, Three Lakes, and Tikapoo, all of which suffer from identical procedural deficiencies to the 34 applications that were directly before the Court. These rulings are void due to their fundamental procedural deficiency, and thus are not entitled to be treated as final, the effect being that the permits are invalidated by the Court's opinion and SNWA's protested 1989 applications on which those permits were unlawfully issued must be re-noticed and subjected to a new protest period. The Supreme Court's plain and broad

language indicating that the remedy it ordered was applicable to all of SNWA's 1989 applications that had been protested, without qualification as to whether those applications had been improperly granted, was therefore proper and should be given effect by the State Engineer.

Perhaps recognizing its vulnerability on the legal merits, SNWA attempts to argue that the equities favor the rejection of any potential protest and the preservation of SNWA's improperly granted permits in these valleys. SNWA Opposition at 10-13. SNWA's resort to equitable arguments is odd, given its simultaneous insistence that the State Engineer lacks any equitable powers. *Id.* More to the point, however, is the fact that SNWA's arguments about the reliance that has been placed on the water rights that were permitted by the State Engineer in violation of his statutory duty are irrelevant to the threshold legal question of whether the unlawful decisions to grant SNWA's underlying applications in those valleys are subject to the remedy ordered by the Court for all of SNWA's 1989 applications that were protested or subjected to an appeal. The equitable considerations raised by SNWA are proper considerations for the State Engineer to take into account on re-hearing once he has re-noticed SNWA's underlying protested 1989 applications in those valleys, but those equitable considerations cannot come into play in determining the purely legal question of those applications' status under the Supreme Court's opinion.

III. Because Consolidation Would Advance the Legislature's Public Policy Objectives in NAC § 533.340, Would Save Taxpayer Dollars from Unnecessary Waste, and Would Not Prejudice Any Party, the State Engineer Should Exercise His Statutory Authority to Consolidate Proceedings on SNWA's Identical 2010 and 1989 Applications

As explained in Petitioners' motion, SNWA's duplicative, essentially identical, 2010 and 1989 applications in this case are ideally suited to consolidation under NAC § 533.340. Consolidation would recognize that the two sets of applications involve the same water, science,

potential impacts, applicant, and protestants. Further, consolidating these two iterations of the same applications would accomplish the Legislature's policy goals embodied in NAC § 533.340 of minimizing administrative burdens and costs and avoiding the waste of taxpayer dollars on duplicative proceedings involving the same issues and parties. These goals are especially important at a time when the State as a whole and the office of the State Engineer in particular are facing severe financial shortfalls.

Since these two sets of applications are concededly duplicative in every regard, SNWA has no legitimate interest in opposing their consolidation. Both iterations of SNWA's admittedly identical applications still would be considered by the State Engineer, and SNWA's applications would retain their priority. Thus, SNWA cannot plausibly claim that it would be prejudiced in any meaningful sense by consolidation of the proceedings on these applications. SNWA's claim that its filing of the duplicative 2010 applications gives it a vested property right that is entitled to be protected from consolidation with another form of the same applications is at odds with well settled law holding that the pendency of an application for a water right (or an analogous land use right) does not give the applicant any vested property right. Op. Nev. Att'y Gen. 97-05, at n.19 (Feb. 11, 1997) ("An applicant for a water right has a right to have his application considered and acted upon by the authorities, but unless and until those requirements are met the applicant obtains no property right or any other right against the state.") (citations omitted); *Boulder City v. Cinnamon Hills Assoc.*, 110 Nev. 238, 871 P.2d 320 (1994)..

In reality, SNWA's opposition to consolidation seems based not so much on any genuine concern with prejudice or sound public policy ground as it is on SNWA's consistent hostility to transparency and adequate process for public participation in the decisionmaking process concerning these highly controversial applications concerning the State's most vital resource. SNWA goes so far as to argue that people opposed to SNWA's 1989 applications should be

required to file duplicative protests to both the original 1989 applications and the 2010 reiterations of those same applications that SNWA gratuitously filed in early 2010. Bizarrely, SNWA claims that this enforced waste and duplication, which will unnecessarily burden the Office of the State Engineer as well as individual protestants, must be carried forward to discourage people from filing duplicative protests. Contrary to SNWA's claims in connection with this argument, the people who protested SNWA's 2010 applications incontrovertibly already have paid the fee to protest what SNWA has conceded are nothing more than identical reiterations of its 1989 applications. By consolidating the proceedings on these identical applications the State Engineer would minimize the administrative burdens and costs incurred by his office. In contrast, SNWA's position that the State Engineer must consider these identical applications separately actually would impose far greater costs and administrative burdens on the office of the State Engineer, as well as on the parties.

Perhaps in recognition of the unreasonableness of its opposition to consolidation of its concededly duplicative applications, SNWA seeks to trivialize the procedural concerns at the heart of this case as nothing more than a game of tripping the State Engineer and SNWA up on meaningless technicalities. *See* SNWA Opposition at 22. That blatant mischaracterization attempts to obscure the fact that the Petitioners' claims and arguments throughout this case always have been that SNWA's and the State Engineer's failure to comply with basic procedural requirements under Nevada statutory law and with the fundamental requirements of notice and due process had worked to violate the due process rights of Petitioners and similarly positioned people, and that if not corrected those procedural defects would result in a constitutionally impermissible denial of due process. The Supreme Court made it clear in its opinion that it agreed with Petitioners. While choosing, prudentially, to decide the case by remedying the statutory violation, the Supreme Court acknowledged that the failure to do so would give rise to a constitutional due process problem. *See GBWN v. Taylor,* 234 P.3d at 919, 126 Nev. Adv. Op. No. 20, at 16.

The Supreme Court's acknowledgment of the gravity of the due process concern latent in this case belies SNWA's view of this case as one in which the State Engineer and SNWA were tripped up on the basis of an inconsequential oversight. Rather, the seriousness with which the Court regarded the need to ensure that protestants have access and a meaningful opportunity to participate in the proceedings on SNWA's applications should guide the State Engineer to take the procedural rights of Petitioners and similarly situated persons seriously and to ensure that their right to present their claims and objections is not inappropriately constrained or burdened by duplicative fees and proceedings. Because consolidation would advance the public policy goals that NAC § 533.340 was designed to achieve, would save taxpayer dollars from unnecessary waste, and would not cause any genuine prejudice to SNWA, Petitioners respectfully urge the State Engineer to consolidate the proceedings on SNWA's duplicative 2010 applications with those on SNWA's identical, original 1989 applications.

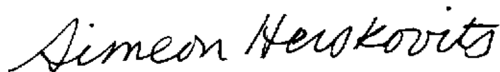
CONCLUSION

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, including those that previously resulted in permits being granted in violation of the State Engineer's statutory duty like those in Spring Valley; and

B. consolidates the proceedings on SNWA's 1989 applications with those on SNWA's duplicative 2010 applications and establishes that protests to either version of these effectively identical applications will be treated as valid and effective in the consolidated proceedings.

Respectfully submitted this 22nd day of December,



Simeon Herskovits
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this **REPLY TO SNWA RESPONSE 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, first class mail on this 22nd day of December, 2010:

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