

**BEFORE THE STATE ENGINEER, STATE OF NEVADA
DEPARTMENT OF CONSERVATION AND NATURAL
RESOURCES, DIVISION OF WATER RESOURCES**

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STATE ENGINEERS OFFICE

IN THE MATTER OF APPLICATIONS 53987
THROUGH 53992, INCLUSIVE, AND 54003
THROUGH 54021, INCLUSIVE, FILED TO
APPROPRIATE THE UNDERGROUND
WATERS OF CAVE VALLEY, DELAMAR
VALLEY, DRY LAKE VALLEY, AND
SPRING VALLEY, (HYDROGRAPHIC
BASINS 180, 181, 182 AND 184), LINCOLN
COUNTY AND WHITE PINE COUNTY,
NEVADA.

**REPLY TO SNWA'S OPPOSITION
TO MOTION TO DISMISS FOR
FAILURE TO JOIN UNITED STATES
DEPARTMENT OF INTERIOR
BUREAUS**

COME NOW, the Confederated Tribes of the Goshute Reservation ("CTGR"), the Duckwater Shoshone Tribe, and Ely Shoshone Tribe (together the "Tribes") hereby submit this Reply to SNWA's Opposition to the Tribes' Motion to Dismiss ("Opposition"). The Opposition was submitted by SNWA on October 31, 2016. The Tribes request the State Engineer to dismiss the above-referenced applications or stay the present proceeding and take no action on the above-referenced water right applications until such time as the United States Department of Interior Bureaus are joined in this proceeding.

I. FACTUAL BACKGROUND

SNWA and Federal agencies¹ executed two stipulations: the Spring Valley Stipulation and the DDC Stipulation (together "Stipulations").² The State Engineer entered both as exhibits (Exhibits 41 and 80) into the 2011 hearing. The Spring Valley Stipulation contained a

¹ National Park Service, Fish and Wildlife Service, Bureau of Land Management, and the Bureau of Indian Affairs; hereafter "DOI Bureaus or "Federal Agencies".

² The Spring Valley Stipulation is marked as State Engineer Exhibit 41. The DDC Stipulation (or Stipulation for Delamar, Dry Lake, and Cave valleys) is marked as State Engineer Exhibit 80.

Monitoring, Management and Mitigation Plan (“MMM Plan”) as Exhibits A and B of the Stipulation. The DDC Stipulation contained its MMM Plan as Exhibit A therein.

In the 2011 hearing, SNWA submitted two additional Spring Valley MMM Plans as exhibits: Hydrologic MMM Plan and Biological MMM Plan.³ Both were developed under the requirements of the Spring Valley Stipulation—to be part of the Stipulation developed as a requirement for compliance with the Stipulation. The Hydrologic MMM Plan (SNWA Exhibit 149) clearly states: “Exhibit A to the Stipulation requires development of a hydrologic monitoring plan.”⁴ The Biological MMM Plan (SNWA Exhibit 365) states: “The Spring Valley Biological Monitoring Plan (Plan) is a component of a stipulated agreement” between SNWA and Federal Agencies.⁵ The “stipulated agreement” here refers to the Spring Valley Stipulation.

Also during the 2011 hearing, SNWA submitted two additional DDC MMM Plans as exhibits: the DDC Hydrologic MMM Plan and the DDC Biological MMM Plan.⁶ Both were developed under the requirements of the DDC Stipulation—to be part of the Stipulation developed as a requirement for compliance with the Stipulation. Like the Spring Valley MMM Plans, the DDC MMM Plan also states, “Exhibit A to the Stipulation requires development of a hydrologic monitoring plan.”⁷ Also, the DDC Biological MMM Plan states, “The Biological Monitoring Plan for the Delamar, Dry Lake and Cave Valleys Stipulation (Plan) is a component of an agreement (Stipulation; Appendix A)” between the SNWA and Federal Agencies.⁸ Appendix A in Exhibit 366 is the DDC Stipulation. In fact, the Spring Valley and the DDC Biological MMM Plans’ titles specifically identify that they are MMM Plans for the Stipulation.

³ SNWA Exhibit 149 and 365.

⁴ SNWA Exhibit 149 at 5.

⁵ SNWA Exhibit 365 at 1-1.

⁶ SNWA Exhibit 148 and 366.

⁷ SNWA Exhibit 148 at 5.

⁸ SNWA Exhibit 366 at 1-1.

“Biological Monitoring Plan for the Spring Valley Stipulation” and “Biological Monitoring Plan for the Delamar, Dry Lake and Cave Valley Stipulation.”)

The MMM Plan—no matter how many times it is divided up into different documents or exhibits—clearly relates directly to the Stipulations. And “Stipulation” is mentioned about 400 times in the MMM Plan. Just within the DDC Biological MMM Plan, “Stipulation” is mentioned about 268 times, including as a header on nearly every single page.

After these MMM Plans were entered as exhibits into the 2011 hearing, and the hearing commenced, plain terms of both Stipulations were violated.⁹ In addition, the Federal government did not undergo the mandatory government-to-government consultation with the Tribes before the Stipulations were entered as exhibits.¹⁰

Following the 2011 hearing, the State Engineer (SE) issued four separate rulings: Spring Valley Ruling 6164; Cave Valley Ruling 6165; Dry Lake Valley Ruling 6166; and Delamar Valley Ruling 6167.¹¹

A. Spring Valley Ruling 6164

In the Spring Valley Ruling 6164, the SE specifically stated that “[t]he monitoring plan [MMM Plan] was initially completed as a component of the Stipulation between the Applicant [SNWA] and the U.S. Bureau of Indian Affairs, U.S. National Park Service, U.S. Bureau of Land Management, and U.S. Fish and Wildlife Service (‘Federal Agencies’) . . . The monitoring plan [MMM Plan] was finalized to comply with permit terms for the Applications . . .”¹²

The SE plainly acknowledged that the “the Stipulation is important to the consideration of the Applications for a number of reasons.” Those reasons include the following:

⁹ See Tribes October 13, 2016 Motion to Dismiss.

¹⁰ *Id.*

¹¹ See <http://water.nv.gov/hearings/past/springetal/documents.cfm?DIR=Final%20Rulings>

¹² State Engineer Spring Valley Ruling 6164 at 103.

First, the Stipulation formed the process for the initial development of the Spring Valley Management Plan. Second, the Stipulation addresses how the Federal Agencies and the Applicant will resolve issues between themselves that are related to Federal claims to water rights and resources. Third, the Stipulation provides a forum through which critical information can be collected from hydrologic and biological experts that the State Engineer can utilize to assure development of the Applications will not conflict with existing water rights or with protectable interests in existing domestic wells.¹³

The SE added, “By its terms, the Stipulation, and its exhibits, set forth the guidelines for the elements of the monitoring plan [MMM Plan].”¹⁴ The SE referenced the two exhibits that are attached to the Spring Valley Stipulation: Exhibit A (hydrologic portion of the MMM Plan) and Exhibit B (the biological portion of the MMM Plan). The purpose, as the SE stated, was that they “established a technical framework and structure” and “management elements” for the MMM Plan.¹⁵

The Spring Valley Ruling 6164 also stated, “The Stipulation established a Technical Review Panel (“TRP”) for the hydrologic plan, a Biological Work Group (“BWG”) for the biological plan, and an Executive Committee to oversee the implementation and execution of the agreement [Stipulation].”¹⁶ Moreover, these “technical review teams . . . work together to accomplish the goals of the Stipulation.”¹⁷

Under the Ruling’s “Compliance with the Federal Stipulation,” the SE plainly stated that “[t]he Stipulation created a Biological Working Group (“BWG”), which includes representatives from the SNWA, the U.S. Bureau of Indian Affairs, U.S. Bureau of Land Management, U.S. National Park Service, and U.S. Fish and Wildlife Services.”¹⁸ The BWG meetings developed

¹³ Spring Valley Ruling 6164 at 104.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Ruling 6164 at 179.

and implemented the Biological Monitoring Plan (“BMP”),”¹⁹ which is part of the Stipulation MMM Plan. Because the Stipulation directed the creation of the BWG and BMP, they remain part of the Stipulation and its requirements.

B. DDC Rulings 6165-6167

The DDC Rulings 6165-6167, like Ruling 6164, specifically stated that the MMM Plan was “completed as a component of the Stipulation [DDC Stipulation].”²⁰ The MMM Plan for DDC was also completed “to comply with the permit terms for the Applications.” The DDC Rulings also state that “the Stipulation is important to the consideration of the Applications” for the three reasons listed above, under part *A. Spring Valley Ruling 6164*.

Similar to Ruling 6164, the DDC Rulings 6165-6167 stated that “Compliance with the Federal Stipulation” would be achieved in part by creating a Biological Resources Team (“BRT”).²¹ This team also includes Federal Agencies that are signatories to the Stipulation. The BRT developed a more detailed plan (DDC Biological Monitoring Plan, or “BMP”) than what was provided in Exhibit A of the Stipulation.²² Because the Stipulation directed the creation of the BRT and BMP, they remain part of the Stipulation and its requirements. The BMP is part of the Stipulation and its original Exhibit A MMM Plan.

C. District Court’s Decision (December 10, 2013)

The district court specifically identified that “[t]he MMM plan is a stipulation between the SNWA and Federal agencies (supra).”²³ “The [State] Engineer adopted the MMM Plan created by SNWA and the National Park Service, Bureau of Fish and Wildlife, and the Bureau

¹⁹ *Id.*

²⁰ Ruling 6165 at 84; Ruling 6166 at 82; Ruling 6167 at 81.

²¹ Ruling 6165 at 140; Ruling 6166 at 135; Ruling 6167 at 133-134.

²² *Id.*

²³ December 10, 2013 Decision at 14, CV1204049 (Seventh Judicial District).

of Indian Affairs.”²⁴ Because the Stipulation created working groups with representatives from the SNWA, the U.S. Bureau of Indian Affairs, U.S. Bureau of Land Management, U.S. National Park Service, and U.S. Fish and Wildlife Services, and they developed the MMM Plans,²⁵ the Federal Agencies are, as parties, certainly required to agree on any changes to the MMM Plans. Because the MMM Plans are a component to the Stipulations, any change to the Plan necessarily changes the Stipulation and how the Stipulation’s goals and objectives are implemented.

D. The MMM Plans are plainly part of the Stipulations

All MMM Plans²⁶ are part of the Stipulations, which is expressly understood and stated in the MMM Plans themselves, the State Engineer Rulings 6164-6167, and the district court’s December 10, 2013 Decision.²⁷

II. REPLY ARGUMENT

A. The United States MUST Approve Changes to the Stipulations’ MMM Plans

The MMM Plans are clearly part of the Stipulations. SNWA claims that the MMM Plans are no longer part of the Stipulations, which is counter to the many plain and specific statements in the MMM Plans, the SE Rulings 6164-6167, and the district court’s December 10, 2013 Decision. SNWA is wrong to assert otherwise. Furthermore, SNWA suggests that because the Stipulations’ MMM Plans have been divided up into multiple MMM Plans, and then labeled with a mosaic of exhibit numbers, then those MMM Plans no longer qualify as the Stipulations’ MMM Plans.²⁸ What SNWA has attempted is to shoot the Stipulations through a prism,

²⁴ *Id.*

²⁵ *Id.*

²⁶ Spring Valley Stipulation’s Exhibit A and B (see SE Exhibit 41); DDC Stipulation’s Exhibit A (see SE Exhibit 80); SNWA Exhibit 365, 366, 148, and 149.

²⁷ See citations in subsections A-C above.

²⁸ See SNWA’s Opposition at 3-5.

bifurcate its vital components, and assert that the refracted media no longer bear connection to the Stipulations.

We must not bend the bifurcated facts. By SNWA's own admission, they themselves wrote that the MMM Plans are part of the Stipulations: (1) "The Spring Valley Biological Monitoring Plan (Plan) is a component of a stipulated agreement" between SNWA and Federal Agencies.²⁹ (2) "The Biological Monitoring Plan for the Delamar, Dry Lake and Cave Valleys Stipulation (Plan) is a component of an agreement (Stipulation; Appendix A)" between the SNWA and Federal Agencies.³⁰ The SE even affirmed that the MMM Plan was "completed as a component of the Stipulation."³¹ Especially important is the district court's Decision that made the fact crystal clear: "[t]he *MMM plan is a stipulation* between the SNWA and Federal agencies (supra) (emphasis added)."³²

As the district court rightly stated, "The [State] Engineer adopted the MMM Plan created by SNWA and the National Park Service, Bureau of Fish and Wildlife, and the Bureau of Indian Affairs."³³ As outlined in the MMM Plan, the Federal Agencies are key members of the Executive Committee, Technical Review Panel, and Biological Working Group established to develop and execute the Plan and to ensure compliance with the Stipulations. Accordingly, these "technical review teams" MUST "work together to accomplish the goals of the Stipulation."³⁴ The "Stipulation requires the BWG" (and other MMM Plan teams) to perform several essential functions applicable to the amendment of the MMM Plans, including (1) "develop and oversee implementation" of the MMM Plan "that will assess baseline conditions as well as predict and

²⁹ SNWA Exhibit 365 at 1-1.

³⁰ SNWA Exhibit 366 at 1-1.

³¹ State Engineer Spring Valley Ruling 6164 at 103.

³² December 10, 2013 Decision at 14, CV1204049 (Seventh Judicial District).

³³ *Id.*

³⁴ *Id.*

assess impacts,” and (2) “review and recommend modifications to the Plan.”³⁵ Clearly, the Federal Agencies must be involved in modifying and amending the MMM Plan, especially after the district court has found the MMM Plan—a part of the Stipulations—to be legally flawed.

SNWA asserted that what the Tribes’ claim—the United States must approve changes ordered by the district court regarding the MMM Plan—was “without merit.” Are we to turn a blind eye to the words in the Stipulations’ MMM Plan and assume SNWA has the sole authority to amend the MMM Plans so long as the SE approves? Already, the MMM Plans were held by the district court to be legally insufficient—no triggers, no thresholds, no standards, exclusion of vital areas that would be impacted, and no mitigation expressly required until such time as would be negotiated later. Now remanded back to the SE to require proper MMM Plans, the Tribes indeed assert that Federal Agency participation is required both in amending the MMM Plan—a part of the Stipulation—and the proceeding.

Just as we saw the terms of the Stipulations violated during the 2011 hearing,³⁶ we now see SNWA purporting to violate the Stipulations again. SNWA says that they do need Federal Agencies’ participation or approval with the court-ordered amendments or modifications to the legally flawed MMM Plans. The only way that could be true is if SNWA failed to see the terms of the Stipulations, specifically paragraphs 17 and 18.³⁷ Those terms expressly require:

17. This Stipulation may be amended by mutual written agreement of the Parties.
18. This Stipulation sets forth the entire agreement of the Parties and supersedes all prior discussions, negotiations, understandings or agreements. No alteration or variation of this Stipulation shall be valid or binding unless contained in an amendment in accordance with paragraph 17.

³⁵ SNWA Exhibit 365 at 1-2.

³⁶ See SE Exhibit 104 at 7-9.

³⁷ See Tribes Motion to Dismiss, Exhibit 1, p. 12. Also see the DDC Stipulation.

The Tribes reemphasize that under the plain language of the Stipulation, any amendment, alteration, or variation of the MMM Plans will require the signed agreement of the Federal Agencies. Establishing “objective standards” for the MMM Plans is an amendment, alteration, and variation of the terms of the MMM Plans, which are part to the Stipulations. Accordingly, proceeding in this current hearing process without the Federal Agencies is a violation of the plain terms of the Stipulations.

SNWA claims that “Nothing in the Stipulations purports to regulate the 3M Plans [MMM Plans] SNWA submits to the State Engineer . . .”³⁸ Of course, this is false. There are many terms in the Stipulation—not “nothing”—that aim to regulate the MMM Plans. Paragraph 2 of the Spring Valley Stipulation says, “The Parties agree to implement the Monitoring, Management and Mitigation Plans [MMM Plans], attached hereto ‘Exhibits A and B,’ which are expressly incorporated into this Stipulation.”³⁹ Paragraph 2 continues to say that “To facilitate the implementation” of the MMM Plans, “the Parties shall establish” the TRP, BWG and Executive Committee (EC). “The establishment, membership, conduct, obligations and responsibilities of the TRP, BWB, and Executive Committee shall be as set forth in Exhibits A and B of this Stipulation.”⁴⁰ Because these teams and committees are directed to implement the MMM Plans under the terms of the Stipulation, and to assure “Compliance with the Federal Stipulation,”⁴¹ they in effect “regulate” the MMM Plans. These teams and committees are essential parts of all MMM Plans, including SNWA Exhibits 148, 149, 365 and 366. Along with the Parties of the Stipulations, who are specifically identified on the MMM Plans, the teams and

³⁸ SNWA’s Opposition at 3.

³⁹ Spring Valley Stipulation at 6.

⁴⁰ *Id.* at 6-7.

⁴¹ See SE Ruling 6164.

committees are essentially a regulatory body for the development and implementation of MMM Plans.

The Tribes have not asserted that NRCP 19 is necessarily applicable and binding in this proceeding, but the due process principle of the Rule is applicable to this proceeding. Because the federal agencies are a necessary party to any changes to the stipulations and their incorporated MMM Plans, the federal agencies must be included in any proceeding to address the directive of the district court in this remanded matter.

The United States agencies withdrew their protests in reliance on the implementation of MMM Plans that have now been declared legally insufficient by the district court. The deficiencies identified by the Court cannot be cured in the absence of the federal agencies. And the due process rights and interests of the Tribes cannot be protected in the absence of the federal agencies.

The Tribes have never consented to SNWA's interpretation of the stipulations, and including the stipulations as part of the record in this case should not be interpreted as the Tribes agreement with SNWA's asserted arguments. While the SE has addressed the Tribes' argument that the federal agencies should have been part of the prior proceeding, the district court's subsequent ruling invalidated the legal sufficiency of the MMM Plans. The Tribes' are now correctly asserting that the district court's order on remand cannot be fairly and adequately addressed without the active inclusion and participation of the federal agencies that are parties to the stipulations and necessary parties to any changes to the MMM Plans.

III. CONCLUSION

For the foregoing reasons, the Tribal Protestants maintain that this proceeding should be dismissed for failure to join the United States DOI Bureaus. In the alternative, the State Engineer should stay the proceeding and invite the DOI Bureaus to participate.

DATED this 15th day of November 2016.

ECHO HAWK LAW OFFICE



Paul C. Echo Hawk

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing TRIBES' REPLY TO SNWA'S OPPOSITION TO MOTION TO DISMISS FOR FAILURE TO JOIN UNITED STATES DEPARTMENT OF INTERIOR BUREAUS was served on the following counsel of record as follows:

[X] By electronic means pursuant to stipulation of counsel on October 13, 2016.

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DATED this 15th day of November 2016.



For ECHO HAWK LAW OFFICE