

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

IN THE MATTER OF APPLICATIONS)
53987 THROUGH 53922 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)
_____)

PROPOSED RULING
[Offered by Confederated
Tribes of the Goshute
Reservation¹]

GENERAL

I.

Applications 54003 through 54021 were filed on October 17, 1989, by the Las Vegas Valley Water District, and are now held in the name of the Southern Nevada Water Authority (“SNWA” or “Applicant”). “Southern Nevada Water Authority” is a political subdivision of the State of Nevada created on July 25, 1991, by a cooperative agreement pursuant to the provisions of NRS 277.080 through 277.180. The applications seek to appropriate 83,370.49 acre per year (“afy”) of water out of a total of allegedly available groundwater evapotranspiration of 94,800 afy, from nineteen specific locations within the Spring Valley Hydrographic Basin.² The Applicant states that the water sought under the applications will be placed to beneficial use within the Southern Nevada Water Authority service area, i.e., the Las Vegas metropolitan area, that the water may also be served and beneficially used by users within Lincoln, Nye and White Pine Counties, and that water from these target basins would be commingled with other water rights owned or served by the Applicant.

¹ The Confederated Tribes of the Goshute Reservation (“Goshutes” or “Tribes”) confine their proposed ruling to the substantive topics raised by the Tribes during the hearings. The Tribes address only the applications in Spring Valley. The Tribes address the legal standards pertaining to existing water rights and the public interest. With respect to other applications and other standards that the State Engineer must address under Nevada law, the Tribes join Protestants Great Basin Water Network and Corporation of the Presiding Bishop on Behalf of the Cleveland Ranch.

² There was a lack of consistency in the evidence at the hearing on the amount sought by the applicant. The State Engineer uses the numbers found in the applicant’s closing statement at 6.

Subsequent to the filing of the Applications, by letter dated March 22, 1990, the Applicant stated that the approximate number of users to be served is 800,000 in addition to the current service of 618,000. The Applicant seeks all unappropriated water within the target basins.

II.

Pending before the State Engineer are SNWA's applications for 19 wells from which it proposes to extract groundwater for export to its service area. SNWA presented testimony as to its intention to seek authorization to add as many as 50 to 100 additional wells (*see, e.g.*, RT Vol. 11 at 2534), and a "distributed pumping option" which was the subject of the environmental review process for the proposed pipeline from the Basin to SNWA's service area. CTGR Exh. 14 (Myers). Nevertheless, the State Engineer has before it only the applications for the 19 wells. State Engineer Exhibits 3 through 12. The applications are for specific diversion rates at specific locations. *Id.*, and *see* RT Vol. 11 at 2507-08; NRS 533.335 (an application shall state the amount of water desired for appropriation and the point of diversion). The State Engineer rules only on the 19 applications. NRS 533.370(2) ("the State Engineer shall approve or reject each application"); and *see, Nevada Power Company v. Public Service Commission*, 91 Nev. 816 (1975) (applicant is limited to the factors stated in the application). The State Engineer finds that testimony regarding potential future applications for other and different points of diversion is not material to these proceedings.

III.

Protests were filed regarding applications 54003-54021 by numerous parties.

PROTESTANTS [listed].

PROTEST GROUNDS [listed].

IV.

The United States Department of the Interior ("DOI") on behalf of its agencies, the Bureau of Land Management, National Park Service, Bureau of Indian Affairs, and Fish and Wildlife Service, protested the applications. DOI's protests stated that the extraction and export of water in the Great Basin "may injure Federal Water Rights and/or affect Federal Resources . . ." State Engineer Exh. 41 at 2. SNWA and DOI subsequently entered into a "Stipulation for Withdrawal of Protests." *Id.* The withdrawal of DOI's protests was specifically limited: "It is expressly understood that this Stipulation is binding only upon the Parties hereto [SNWA and DOI and its agencies] . . . and shall not bind or seek to bind or prejudice any other Parties or protestants, including any Indian Tribe." *Id.* at 6.

The withdrawal of protests was based upon an agreement by SNWA to implement "Monitoring, Management, and Mitigation Plans" attached to the stipulation. *Id.*, Exhibits A and

B. In return for the United States' agreement to withdraw its opposition to the groundwater extraction and export proposals, SNWA agreed to implement the monitoring, management and mitigation plans if this State Engineer approves any one or portions of the applications. *Id.* at 6. The plans are intended, if they become effective, to “avoid unreasonable adverse effects to wetlands, wet meadow complexes, springs, streams, and riparian and phreatophytic communities, and maintain the biological integrity and ecological health” in the “Area of Interest.” *Id.* at Figure 1 (Area of Interest includes the target basins, contiguous valleys and basins, Great Basin National Park, and the Goshute Reservation). The monitoring, management and mitigation plans are further intended to protect “Federal Resources” within the Great Basin National Park specifically, and Area of Interest generally, by avoiding “degradation of scenic values of, and visibility from Great Basin National Park due to a potential increase in airborne particulates and loss of surface vegetation which may result from groundwater withdrawals by SNWA in the Spring Valley HB.” *Id.* at 4-5.

FINDINGS OF FACT

I.

[Notice of hearing given]

II.

STANDARDS TO GRANT or DENY APPLICATIONS

The State Engineer finds that NRS 533.025 provides: “[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public.” *See also, Bacher v. Office of State Engineer*, 122 Nev. 1110, 1116 (2006)(“Water in Nevada belongs to the public and is a precious and increasingly scarce resource.”) “Notably, NRS 533.025 does not provide that Nevada’s water belongs to the state; rather, it belongs to the public.” *Lawrence v. Clark County*, 127 Nev. Adv. Op. No. 32, 254 P.3d 606 (2011). The Nevada Supreme Court in *Lawrence*, cited with approval the comments of Justice Rose regarding the public interest doctrine in Nevada, and the obligations of the Office of State Engineer:

This court has itself recognized that this public ownership of water is the “most fundamental tenet of Nevada water law.” Additionally, we have noted that those holding vested water rights do not own or acquire title to water, but merely enjoy a right to the beneficial use of the water. This right, however, is forever subject to the public trust, which at all times “forms the outer boundaries of permissible government action with respect to public trust resources.” In this manner, then, the public trust doctrine operates simultaneously with the system of prior appropriation.

. . .

If the current law governing the water engineer does not clearly direct the engineer to continuously consider in the course of his work the public's interest in Nevada's natural water resources, then the law is deficient. It is then appropriate, if not our constitutional duty, to expressly reaffirm the engineer's continuing responsibility as a public trustee to allocate and supervise water rights so that the appropriations do not "substantially impair the public interest in the lands and waters remaining." "[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." Our dwindling natural resources deserve no less.

Lawrence, id. at 611(citing with approval, *County of Mineral v. State Department of Conservation*, 117 Nev. 235, 20 P.3d 800 (2001)(Rose, J., concurring)(internal citations omitted)). The State Engineer finds that he retains an affirmative duty "to protect the people's common heritage of streams, lakes, [and] marshlands" in evaluating these applications. As the Supreme Court has stated, "state regulation like that in NRS Chapters 533 and 534 is necessary to strike a sensible balance between the current and future needs of Nevada citizens and the stability of Nevada's environment." *Bacher, supra* at 1116.

The State Engineer finds that he "shall approve" an application if, among other things, the applicant "provides proof satisfactory" to this Agency of its intention to construct the facilities necessary to put the water to beneficial use and do so with "reasonable diligence," and establishes its financial ability to complete the project. NRS 533.370(1)(c). On the other hand, the State Engineer must deny an application where there is "no unappropriated water," where the proposal "conflicts with existing rights or with protectable interests in existing domestic wells," or "threatens to prove detrimental to the public interest." NRS 533.370(5); NRS 533.371.

The State Engineer finds that he is further guided by statute with respect to applications such as this, for interbasin transfers of groundwater. The applicant must "justif[y] the need to import water from another basin," and "demonstrate[...]" that it has a conservation plan in place in the basin of import. The State Engineer must "consider" whether the proposal is "environmentally sound" with regard to the basin of export, whether the export of water will "unduly limit" the economic development of the basin of export, and "any other factor" deemed relevant. NRS 533.370(6).

III.

BURDEN OF PROOF

The State Engineer finds that the burden of proof to establish that the applications meet the standards of Nevada law rests with the applicant, SNWA. *See, Bacher v. Office of State Engineer, supra* at 1116 ("NRS Chapter 533 prescribes the general requirements that every

applicant must meet to appropriate water.”) The State Engineer bases the findings, conclusions and rulings below on substantial evidence. *Id.* at 1121.

IV.

PERENNIAL OR SAFE YIELD OF THE SOURCE

The State Engineer finds that an application must be denied if it would exceed the perennial yield or safe yield of the source. NRS 533. 371(4). The perennial yield of a groundwater reservoir may be defined as the maximum amount of groundwater than can be salvaged each year over the long term without depleting the groundwater reservoir. Perennial yield is ultimately limited to the maximum amount of natural discharge that can be salvaged for beneficial use. Perennial yield cannot be more than the natural recharge to groundwater basin and in some cases is less. If the perennial yield is exceeded, groundwater levels will decline and steady-state conditions will not be achieved, a situation commonly referred to as groundwater mining. Additionally, withdrawals of groundwater in excess of the perennial yield may contribute to adverse conditions such as water quality degradation, storage depletion, diminishing yield of wells, increased economic pumping lifts and land subsidence. State Engineer *Ruling 5726* at 26-27.

In most Nevada basins, groundwater is discharged primarily through evapotranspiration (ET). In those basins, the perennial yield is approximately equal to the estimated groundwater ET; the assumption being that water lost to natural ET can be captured by wells and placed to beneficial use. The Spring Valley Hydrographic Basin has a significant amount of discharge via ET and an uncertain amount of subsurface flow to adjacent basins. Historically, in basins similar to the Spring Valley Hydrographic Basin, the perennial yield has generally been established as equal to ET. *Id.* at 27.

The evidence adduced at the hearing as to the ET in Spring Valley was both uncertain and in conflict. The Applicant estimated it at 94,800 afy of groundwater based upon the testimony of Dr. Rowley and Dr. Fenstermaker. SNWA Exh. 258. Dr. Rowley testified that his approach to this estimate was “largely theoretical” and that other professionals disagreed with his theory. RT Vol. 6 at 1296, 1322-23. Dr. Fenstermaker testified to her use of remote sensing devices to determine ET, and based her calculations on sources which produced at most, and sometimes less than five years’ data. RT Vol. 4 at 759, 760. She could not say whether her data was representative of long term trends; and certainly had no “confidence [to predict consequences] over the 200-year time period.” *Id.* at 762. She described her theory as having a 68% accuracy rate, “for remotely-sensed data product . . . [an amount] considered quite good”. *Id.* at 768-769. She acknowledged an error range as high as 32 percent. *Id.* at 768. SNWA witness Watrus acknowledged that the applicant did not have “a lot of information on the precipitation” in the Valley, and testified that “recharge is not a measurable value.” RT Vol. 10 at 2565.

Witnesses for Protestant Cleveland Ranch presented evidence that the 19 wells, the subject of these applications, would capture only 50,000 afy of ET. RT Vol. 27 at 6040 (Mayo and Jones). Considering the 2007 State Engineer determination of 80,000 afy of ET in the Valley, 30,000 afy of ET is not captured by SNWA's proposal. *Id.* If SNWA were to pump 80,000-plus afy of groundwater, a substantial portion of that would be from storage. SNWA's 19 wells are "too few" and too deep to capture the ET. RT Vol. 27 at 6034 (Jones); CPB Exh. 11, Fig. 8. This results in groundwater mining. RT Vol. 27 at 6038-39) (Jones).

The State Engineer finds that testimony as to three factors cause SNWA's Spring Valley applications to fail to meet the perennial yield standard.

First, as set forth above, the State Engineer finds that the 19 applications presently pending will not capture Spring Valley ET, and if approved at the withdrawal rates sought, would result in groundwater mining.

Second, SNWA and the United States have entered into a stipulation which caused the United States to withdraw its protests and present no evidence in this hearing. The parties to that stipulation intended to "avoid unreasonable adverse effects to wetlands, wet meadow complexes, springs, streams, and riparian and phreatophytic communities, and maintain the biological integrity and ecological health" in the "Area of Interest." SE Exh. 41 at Figure 1. The Stipulation affirms that SNWA will not so dehydrate the Basin and Range environment as to cause "degradation of scenic values of, and visibility from Great Basin National Park due to a potential increase in airborne particulates and loss of surface vegetation which may result from groundwater withdrawals by SNWA in the Spring Valley HB." SE Exh. 41.

The State Engineer finds that the United States withdrew its protests in return for SNWA's promises to "avoid unreasonable adverse effects" to the Basin and Range's existing "ecological health" and "scenic values." Yet, SNWA has applied to withdraw 80,000-plus afy of groundwater from Spring Valley, the entire amount of SNWA's estimated ET in Spring Valley. If the State Engineer were to approve the applications, and SNWA were to withdraw the entire amount of ET from Spring Valley, the "wetlands, wet meadow complexes, springs, streams and riparian and phreatophytic communities, . . . biological integrity and ecological health" of the area would be completely depleted; and SNWA would have breached its agreement with the United States. Alternatively, if SNWA were to withdraw 98,000-plus afy of groundwater from its 19 wells and still honor its agreement with the United States to preserve the springs, wetlands, phreatophytes, and avoid dust and particulate pollution, it could do so only by withdrawing water from storage, i.e. groundwater mining.

Third, the Applicant's agreement with the United States requires "mitigation" in the event its extraction of ET results in harm to springs, wetlands, etc. SE Exh. 41 Exh. A at 14 of 14. Though the mitigation measures are not clearly defined, they do include the use of surface and groundwater to respond to environmental harm, and SNWA "augmentation" of water supplies for the benefit of the United States from the same sources. The State Engineer finds that if SNWA were to implement these mitigation measures, it would use a portion of ET for which it

has not accounted in these proceedings. If SNWA were to pump what it considered to be the full measure of Spring Valley ET, it could “augment” federal water supplies only by withdrawing water from storage, i.e. groundwater mining.

The State Engineer finds that SNWA has taken inconsistent positions in its applications to this Office, and in its promises to the United States. SNWA did not disclose in its calculation of Spring Valley ET in its presentation to the State Engineer, the impacts of its obligations to the United States to preserve springs, wetlands, surface waters, and the phreatophytic community; nor did it disclose the impacts of its mitigation measures. The State Engineer finds that the SNWA calculations of perennial yield, the available ET in Spring Valley, are not established by substantial evidence.

V.

IMPACTS TO EXISTING RIGHTS

Nevada Revised Statute § 533.370(5) provides that the State Engineer shall reject an application where the proposed use conflicts with existing rights. Water rights that could potentially be adversely affected by the proposed applications include both ground-water rights and surface-water rights originating as springs on the valley floor or valley margins. SE Ruling 5726 at 35. The Goshutes make two points with respect to existing rights.

The State Engineer finds first, that the Tribes provided substantial evidence, not rebutted, that their ancestral lands include Spring Valley, and that they have used Spring Valley and its resources since prehistoric times and continue to do so today. RT Vol. 26 at 5864 (Lahren). There are festival, ceremonial, village and burial sites there. *Id.* at 5865. Tribal members gather foods (pine nuts, chokecherries, willows, cattails, pickle weed) and plants used for medicinal purposes. RT Vol. 25 at 5661. They hunt for food (antelope, mule deer, rabbit, mud hens, sage grouse). *Id.* The Swamp Cedars area of Spring Valley has special significance for its natural resources, and because it is a place of spiritual importance. *Id.* at 5682. The springs of the Valley represent places of sustenance, including spiritual connections. RT Vol. 25 at 5683. The State Engineer finds that these non-consumptive uses of Spring Valley water and resources are beneficial and qualify as existing rights under the statute. NRS § 533.035 (beneficial use is the measure and the limit of the right to the use of water), § 533.070(1) (appropriation is limited to amount “reasonably . . . required for the beneficial use to be served”); *and see, Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743 (1996) (approving State Engineer’s requirement that water be put to a “beneficial use” as a matter of State policy). This is particularly so in comparison to those listed uses to which the water would be put in the basin of import: the beneficial use of water for food, medicine, and spiritual sustenance is clear in contrast to SNWA’s claim that its users “deserve to have grass in their backyard.” RT Vol. 29 at 6492; and see, RT Vol. 26 at 5684 (the loss of water, and the resultant loss of natural resources would “destroy [the] culture . . . and our language and the land” of Goshutes). The State Engineer rejects as completely without evidentiary support, SNWA’s attempt to equate Tribal spiritual beliefs with those of a naïve child frightened of the “boogeyman.” RT Vol. 26 at 5889.

Second, though the scientific evidence is uncertain as to amounts, the State Engineer finds there is substantial evidence of interbasin flow from the north end of Spring Valley into Tippet Valley, and eventually, into Deep Creek Valley, the site of the Tribes' Reservation. RT Vol. 26 at 5918 (Myers); RT Vol. 7 at 1493-96 (SNWA witness Burns, referring to SNWA Exh. 447 Figure 7-1). The applicant did not attempt to determine, or at least did not report "the impact of proposed pumping in Spring Valley on groundwater volumes in Tippet or Snake Valley;" SNWA's position is that those impacts would not be known until pumping occurs. RT Vol. 7 at 1583. The Tribes' witness, Dr. Myers, testified that the volume of flow from Spring into Tippet Valley was in the range of 2000 afy to 12,000 afy. RT Vol. 26 at 5929. SNWA provided testimony that any flow between the valleys would "most likely be minimal," an amount it testified could be 2000 afy. RT Vol. 7 at 1496, 1582. Testimony of Dr. Myers, deemed credible by the State Engineer, reveals impacts to the Tribes' Deep Creek Valley after several hundred years of pumping. RT Vol. 26 at 5918; CTGR Exh. 14 at 3, Figure 1. The State Engineer finds that the Goshutes have water rights within the Reservation which must be protected in this proceeding. *Winters v. United States*, 207 U.S. 564 (1907); *Arizona v. California*, 373 U.S. 546, 600 (1973); *United States v. Orr Water Ditch Co.*, 309 F. Supp.2d 1245, 2149 (D. Nev. 2004). The State Engineer finds that there is considerable uncertainty, due to the lack of evidence presented by the applicant, as to impacts of the applicant's pumping on the valleys north of Spring Valley. The State Engineer finds, however, that the evidence of impacts in the future is credible and substantial.

The State Engineer finds that SNWA's applications to extract and export 80,000 afy of water from Spring Valley every year, will adversely impact the existing rights of the Goshute Tribes with respect to its non-consumptive beneficial use of the waters and of water-fed resources of the Valley.

VI.

THREATS OF DETRIMENT TO THE PUBLIC INTEREST

The State Engineer "shall reject the application . . . if the State Engineer determines that: . . . The proposed use threatens to prove detrimental to the public interest." NRS § 533.371(6). The State Engineer has recently reviewed the history of interpretations of the concept of "public interest" in the statute. *Ruling 5726* at 37-43. We incorporate that history here.

As we said in summarizing the public interest concept in *Ruling 5726*:

The historical review points to a consistent thread throughout the decisions, that being, violating specific statutory provisions of Nevada's water law threatens to prove detrimental to the public interest. The State Engineers' expressions of the public interest were that it was important for the highest and best use of waters to be made and development of important industries should be encouraged. However, the State Engineer must exercise discretion in his

interpretation under the express authority granted in law and must look at all the interests involved as to any particular appropriation and balance them, but that the wants and necessities of the state should be weighed against local interests. The public interest analysis included looking at the benefits of a project, protection of threatened or endangered species, and protection of the quality of water sources, but indicated that water should be allocated to reasonable and economic use, so long as other public interest values will not be unreasonably compromised. Even though some wetlands habitat might be lost there is an overriding public interest value in putting water to its highest and best use by allowing water to be exported for municipal use. The State Engineer is not a land use planner and history has indicated that water resources should be developed, but cautiously, as it would threaten to prove detrimental to the public interest to allow large scale development of water resources to go forward in support of municipal development when the confidence in predictions as to water availability long-term without damaging impacts is low and dire consequences could result. That it is important to encourage the development of the resources to their reasonable and economic use is demonstrated in the legislative policy found in NRS § 540.011(1) which provides that besides protecting existing rights it is also the policy of the state to encourage efficient and non-wasteful use of the state's limited supplies of water resources. In granting water rights in resources where it is not known if there will be impacts, but there is concern there might be, the State Engineer's decisions have reflected a policy that the water belongs to the public and subject to existing rights may be appropriated, but development of the resources should be done in conjunction with significant monitoring and mitigation, if necessary.

The State Engineer finds the analysis of whether the use of water for a proposed project threatens to prove detrimental to the public interest must be addressed on a case-by-case basis. The State Engineer finds the statutory criterion, like beneficial use, is a dynamic concept changing over time, particularly as the Nevada Legislature provides more guidance as to the issues of importance.

Id. at 42-43.

In applying the principles described by this office in Ruling 5726, the State Engineer looks at several factors in this particular case: “the highest and best use of waters,” a balancing of “all the interests involved,” the “wants and necessities of the state” as opposed to just local interests, and the confidence, or lack of it, in long-term predictions of water availability and impacts. The State Engineer finds that there is another factor to assess here: the obligations imposed on this office in consequence of the public trust doctrine.

As stated previously, NRS 533.025 provides: “[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public.” *See also, Bacher v. Office of State Engineer, supra*, 122 Nev. at 1116 (“Water in

Nevada belongs to the public and is a precious and increasingly scarce resource.”) “Notably, NRS 533.025 does not provide that Nevada’s water belongs to the state; rather, it belongs to the public.” *Lawrence v. Clark County*, *supra*, 127 Nev. Adv. Op. No. 32, 254 P.3d 606. “[G]iven the public’s interest in Nevada’s waters and the law’s acknowledgment of that interest,” the Nevada Supreme Court confirmed, a few months prior to the hearings in this case, that the public trust doctrine applied to decisions about public resources. *Id.* at 607. Nevada holds its water resources “in trust for the people of the State that they may enjoy” them. *Id.* at 609. “[E]very Nevada citizen has a vested interest in the water . . . and expects the state’s natural resources to be preserved.” The Nevada Supreme Court cited with approval the following statement:

It is then appropriate, if not our constitutional duty, to expressly reaffirm the engineer’s continuing responsibility as a public trustee to allocate and supervise water rights so that the appropriations do not “substantially impair the public interest in the lands and waters remaining.” . . . “It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.” Our dwindling natural resources deserve no less.

Id. at 611 (citing, *Mineral County v. State, Department of Conservation*, *supra*, 117 Nev. 235 (Rose, J., concurring)). In determining whether to dispense with the State’s public trust resources, the State is obliged to determine “whether the dispensation satisfies ‘the state’s special obligation to maintain the trust for the use and enjoyment of present and future generations.’” *Id.* at 616.

The State Engineer finds that on the basis of this record there are conflicting interests between the demands to import water by a metropolitan Water Authority and the threats to the lives, economies, cultures and environment of the rural area targeted for water export. On this record, the State Engineer finds that there remains now, as there was in 2007, “great uncertainty, and no party’s ability to quantify impacts with any degree of certainty” with regard to proposed extraction and import of water. *Ruling 5726* at 53. Balancing the interests, taking into account the interests of the State as a whole, considering the substantial conflict and uncertainty in the evidence as to the effects of extraction and export of water, and considering the overriding obligation imposed upon this office to “protect the people’s common heritage of streams, lakes, marshlands and tidelands,” the State Engineer concludes on the basis of this record that the applications “threaten detriment to the public interest.”

The State Engineer finds that there is benefit to the entire State in preserving the rich diversity of its communities and its cultures, and in protecting as part of this State’s remarkable heritage, the pristine, and as one member of the public said, “unbearabl[y]” beautiful Basin and Range country. With respect to the members of the public, the State Engineer heard testimony questioning whether it was “okay to destroy one community to save another.” RT Vol. 10 at 2131-32. There was testimony about rural communities’ ingrained principle of water conservation. RT Vol. 10 at 2214-17. There was testimony about economic depression in the Great Basin arising simply from the pendency of these applications. *Id.* at 2313. We heard

testimony from an economist about the value to the state as a whole of the presence of vibrant rural areas and healthy urban areas, together. RT Vol. 22 at 5009-11 (Kilkenny).

With respect to the Goshutes, the State Engineer is confronted with credible and un rebutted testimony that this is a culture that existed long before the arrival of non-Indians to what is now the State of Nevada, and that exists today in a smaller area but with continuity of its values and traditions. See, RT Vol. 25 at 5681 and following; CTGR Exh. 0001. Spring Valley remains part of Goshute customs and traditions even though outside of the Reservation boundaries. *Id.* SNWA’s application seeks to “eliminate the loss of water that normally would occur through evapotranspiration” in Spring Valley. RT Vol. 11 at 2502 (Prieur). If approved, the water table in Spring Valley would be lowered. *Id.* The Valley known to Goshute people for centuries will change, though SNWA cannot say whether its pumping would entirely eliminate the phreatophytes in the Valley. *Id.* at 2509. It offers testimony that other plants, those that can survive on less water or with a deeper water table, would take the place of native plants that could not survive the lowered water table. *Id.* at 2491 (Marshall); *id.* at Vol. 7, 1624 (McClendon). Whether the Swamp Cedars, critical to Goshute people, will survive is not known. Whether the plants that provide food and medicine for Goshute people will survive, is also not known. Wetlands will contract; meadows would replace wetlands; meadows will become shrublands; springs would be reduced or disappear. RT Vol. 8 at 1767-69 (McClendon); *and see* RT Vol. 24 at 5369. Because of “high uncertainty” in its models, according to SNWA (RT Vol. 12 at 2640), the State Engineer was not provided with information about precisely which springs, wetlands, meadows and plants will be dewatered and will disappear. The State Engineer finds credible the testimony from the Corporation of the Presiding Bishop as to predicted drawdowns in specific areas of Spring Valley (based upon the 19 applications) and the drying of springs and streams. *See*, CPB_011 Fig. 9 through Fig. 13.

The State Engineer agrees with those courts that have determined that protection of Indian rights is in the public interest. *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988)(protecting the Tribe’s customary fishing ground serves the public interest); *Winnebago Tribe of Nebraska v. Stovall*, 216 F.Supp.2d 1226 (D.Kan.2002), *aff’d*, 341 F.3d 1201 (10th Cir. 2003)(public interest is served by assuring viability of tribal self-government, self-sufficiency, and self-determination); *Crow Creek Sioux Tribal Farms Inc. v. U.S. Internal Revenue Service*, 684 F.Supp.2d 1152 (D.S.D. 2010)(expressing sensitivity to the public interest in protecting land important to a Tribe’s cultural heritage). In addition, SNWA “would not disagree with” the statement that it is in the public interest to preserve Tribal traditions and cultures. RT Vol. 1 at 146 (Mulroy).

The State Engineer is obliged to determine “whether the dispensation [of this public trust resource] satisfies ‘the state’s special obligation to maintain the trust for the use and enjoyment of present and future generations.’” *Lawrence, supra*, at 616. The State Engineer concludes on the basis of this record that granting these applications, and permitting the transport of water from Spring Valley to Southern Nevada will not maintain the Basin and Range country for the use and enjoyment of future generations of Nevadans.

The remaining question is whether the SNWA monitoring and mitigation plan will protect the public interest. Stated differently, the question is whether approval of the applications by this State Engineer subject to implementation of the plans, is consistent with the “special obligations” imposed upon this office by the public trust doctrine. The monitoring and mitigation plans were SNWA’s promise to the United States in return for the federal agencies’ agreement to withdraw their opposition to these applications. SE Exh. 41; SNWA Exhibits 149, 365. The plans lack meaningful criteria and do not provide confidence that the public trust resource will be protected. The plans do not define an “adverse consequence” from pumping which would trigger implementation of mitigation. RT Vol. 11 at 2418. SNWA has deferred that determination to circumstances following the commencement of pumping: it is a site-specific” decision made on conditions at a particular site. *Id.* There are no detailed mitigation measures in the plan; one cannot determine what actions will be taken in response to what threatened harms. *Id.* at 2422. SNWA states that mitigation too, is “site-specific.” *Id.* at 2424. The categories of mitigation measures do not provide confidence that harms will be avoided or mitigated if they occur. *Id.* at 2424; SNWA Exh. 149 at 39. Neither the State Engineer nor any members of the public are involved at any stage, including the reporting of an adverse consequence, in these plans. *Id.* at 2441, 2442. The determination of harm and the determination of mitigation measures are decisions by committee, with resort to an unnamed third party neutral if the committees fail to reach consensus. SE Exh. 41 at Exh A page 9 of 14, and page 11-12 of 14. The plans lack entirely any discussion of enforceability; nor do they assign responsibility for enforcement. As a “public trustee” (*Lawrence, supra* at 611) with a duty to insure that dispensation of the public’s water will not impair the public interest, the State Engineer finds that the monitoring and mitigation plans proposed by SNWA will not suffice to protect the public trust resource or the public interest from threatened harm.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action.

II.

The State Engineer concludes on the basis of this record that the applications conflict with existing rights, and there is no substantial evidence on which to base a determination that water is available in the Spring Valley hydrographic basin for withdrawal without exceeding the perennial yield. The State Engineer concludes that the applicant’s promises to the United States (SE Exh. 41) to “avoid unreasonable adverse effects to wetlands, wet meadow complexes, springs, streams, and riparian and phreatophytic communities” and to preserve the “scenic value” of the Basin and Range country are inconsistent with its applications to remove all water otherwise “lost” to evapotranspiration in the basin. The State Engineer concludes that if these applications were approved, and if the applicant were to honor its promise to the United States, the applicant could remove the full measure of authorized water only by groundwater mining, a violation of Nevada law. The State Engineer concludes that if approved, these applications

would violate existing rights of the Goshutes, both in their beneficial use of water resources of Spring Valley and their federal reserved water rights.

III.

The State Engineer concludes on the basis of this record that the proposed extraction and export of water from Spring Valley threatens to prove detrimental to the public interest, and violates the state's "special obligation to maintain the [public water] trust for the use and enjoyment of present and future generations." *Lawrence, supra* at 616. The State Engineer also concludes that the public interest and the public trust resource are not sufficiently protected by the applicant's proposed monitoring and mitigation plan.

RULING

The protests to Applications 54003 through 54021 are hereby upheld in part and to the extent consistent with the findings and conclusions above. The applications are denied on the grounds that they conflict with existing rights, seek to withdraw water in excess of the basin's perennial yield, and threaten to prove detrimental to the public interest.

Respectfully submitted,

Jason King, P.E.
State Engineer

Dated this _____ day of
_____, 2012.