

IN THE OFFICE OF THE STATE ENGINEER RECEIVED
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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 SPRING)
VALLEY, CAVE VALLEY, DELAMAR)
VALLEY AND DRY LAKE VALLEY)
HYDROGRAPHIC BASINS (180, 181, 182)
AND 184), LINCOLN COUNTY AND)
WHITE PINE COUNTY, NEVADA.)
_____)

SE	'S EXHIBITS 154
DATE:	_____

**CPB'S REPLY IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE TESTIMONY
AND EVIDENCE RELATING TO THEORETICAL ET-CAPTURE WELLS**

"They've ... applied for a diversion rate from specifically 19 wells, and that's all the State Engineer is considering. He's not considering a different well field."

- Hearing Officer Taylor¹

CPB's motion simply asks the State Engineer to limit this hearing to the applications that are actually pending and to exclude evidence of hypothetical groundwater projects that could be developed to accomplish what SNWA apparently concedes the pending applications cannot – achieving equilibrium within a reasonable time without unreasonably lowering the water table. The State Engineer can only act on the applications that are pending, and can only approve them if the "proposed use" complies with Nevada law. See NRS §§ 533.325, 533.335, 533.370.

Because the State Engineer can only consider the applications SNWA has filed, the ability of 101 theoretical wells – for which applications have not been filed – to "show some prospect of reaching equilibrium" (Opposition at p. 2, l. 22) is not relevant. The District Court's

¹ Hearing Officer Taylor. See *Transcript of Proceedings*, Vol 11 (October 10, 2011) at p. 2507, ll. 11-21.

remand order requires SNWA to show that the pumping proposed by the applications it has filed has some prospect of reaching equilibrium. *See* Remand Order at p. 13, ll. 3-6.

SNWA's attempt to offer evidence of a hypothetical groundwater project that could capture ET without unreasonably lowering the water table is contrary to the clear instruction from the Hearing Officer in the last hearing, is contrary to Nevada law, is contrary to the District Court's remand order, and was rejected in Ruling 6164.

***SNWA Filed 19 Applications to Appropriate,
Not an Application for an Advisory Ruling on a Theoretical Well Field***

To protect both priority rights and water as a public resource, Nevada has a carefully crafted system for applying to appropriate water. It requires filing applications to pump a specific amount from a specific location and then submitting proof that, among other things, there is water available and the proposed pumping will not result in conflicts with existing rights. *See* NRS 533.335, NRS 533.340, and NRS 533.345. SNWA wants the State Engineer to depart from these laws to evaluate 101 hypothetical wells without the detail required in either an application to appropriate or an application to change a point of diversion. *Id.* SNWA has not established that it would have access to the theoretical 101 well sites. SNWA has not given public notice or notice to anyone who might be affected by these 101 wells. Considering 101 theoretical wells without the necessary applications makes it difficult not only for the State Engineer to evaluate the merits of such a well field, but also deprives the protestants and third-parties outside of these proceedings of their due process rights and an opportunity to fully understand SNWA's now modified proposal.

SNWA describes the Hearing Officer's statement that "all the State Engineer is considering" is the 19 applications at issue as "sua sponte" and not an "official ruling" (*see* Opposition at p. 7, ll. 3-4). Whether an "official" ruling or not, it is what Nevada law requires.

And the State Engineer recognized this in Ruling 6164, where he held that he would not consider alternative pumping scenarios:

At this time, the State Engineer is only considering the points of diversion for the Applications before him. If the Applicant wishes to change the points of diversion of the Applications, it must submit further applications to change the points of diversion to the State Engineer pursuant to NRS 533.345. If such applications are submitted, the State Engineer will consider pumping at the new points of diversion. Alternative points of diversion are irrelevant to the analysis of whether the proposed pumping unreasonably conflicts with existing rights for this hearing.

Ruling 6164 at 150. The State Engineer noted “alternative pumping scenarios” in the record but refused to consider them, limiting his analysis to “the specific decision that is before the State Engineer at this time,” i.e., the 19 Spring Valley applications. *See* Ruling 6164 at 129.

A theoretical well field, particularly one consisting of 101 theoretical wells, is also irrelevant to the analysis of whether a reduced award will result in a pumping regime, for 15 wells, reaching equilibrium in a reasonable amount of time as ordered by the District Court.

***The Applicant’s Theoretical Well Field is
an Improper Request for a Bailout from its Flawed Applications***

Ruling 6164 granted 15 of SNWA’s applications, subject to various conditions, for a cumulative amount of water not to exceed 61,127 afa to be pumped from the 15 approved points of diversion. *See* Ruling at pp. 216-217. The District Court has remanded this matter for an amended award less than the calculated E.T. for Spring Valley that has some prospect of reaching equilibrium. An applicant cannot look to the State Engineer to be bailed out from the consequences of its own flawed applications – applications that will never reach equilibrium and result in groundwater mining, as found by the District Court. There is nothing to prevent SNWA from applying for the 101 wells in its hypothetical scenario. Until it does so, evidence of such a groundwater project is irrelevant.

***SNWA's Own 3M Plan Fails to Take
into Account the Theoretical 101 ET-Capture Wells***

SNWA's current proposed 3M plan features a system of monitoring wells situated between the proposed 15 wells that are subject of the applications before the State Engineer. Specifically, the 3M Plan Area for the GDP is set forth in Figure 1-1 of SNWA Exh. 592. Figure 1-1 only references the 15 wells under consideration by the State Engineer, as the 3M plan does not contemplate the impacts of a well field with 101 wells.

SNWA's 3M plan identifies various management blocks, including but not limited to Management Block 1 (consisting of permit numbers 54003 through 54009 and 54019) (SNWA Exh. 592 at 2-17, Management Block 2 (consisting of permit numbers 54010 through 54015 and 54020) (SNWA Exh. 592 at 2-20), and Management Block 3 which contains the Cleveland Ranch (SNWA Exh. 592 at 2-23. None of the five management blocks; however, contemplate the theoretical 101 ET-capture wells.

If the 101 theoretical wells were relevant to this proceeding, as claimed by SNWA, those wells would have to be incorporated into SNWA's 3M plan. Nor does the 3M plan appear to contemplate additional sentinel monitoring wells to provide protection in the new theoretical well field – protection that was specifically ordered by the District Court – in the form of defined standards, thresholds and triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary or capricious. We certainly cannot assume that even if SNWA's 3M plan for a well field of 15 wells was deemed adequate in light of the District Court's Remand Order that the 3M plan would remain adequate for the pumping of 101 theoretical wells.

***SNWA Gave no Consideration to Sustainability
or Equilibrium at the Time the Original Applications Were Filed***

SNWA has put itself in this position. SNWA, at page 3 of its Opposition, complains that if it had known that capturing ET was a factor, its original applications would have looked vastly

different. SNWA certainly should have known that ET capture was a factor. In any case, this complaint is inconsistent with the testimony of SNWA's own, Kay Brothers, who never stated that any consideration was given to sustainability of the project or the project ever reaching equilibrium, when the points of diversion for the applications under review were selected in the late 1980's. Ms. Brothers specifically stated:

I worked with Mr. Terry Katzer to look at perennial yield in basins in the eastern and central valleys. We did water right inventories of these basins to ascertain what the unappropriated or available water would be...We then filed the applications, and I was involved in siting the well – well sites and staking them in the field...

Transcript of Proceedings, Volume 1 (9/26/2011) p. 175, ll. 12-25.

There has never been any consideration given to sustainability or equilibrium under these applications. It has all been about priority and tying up whatever water might be available. There is no evidence whatsoever that SNWA conducted any real in depth study as to sustainability and equilibrium until the recent proceedings.

***SNWA's Theoretical Well Field Completely
Disregards the District Court's Remand Order***

The District Court's Remand Order did not give SNWA a second bite at the apple to present new theories on how it might be able to capture the 61,127 afa awarded in Ruling 6164. Judge Estes found that natural discharge in Spring Valley is almost entirely caused by E.T. This, he found, is the water available for beneficial use.

Natural discharge in Spring Valley is almost exclusively E.T. . . . E.T. occurs by plants and phreatophytes discharging the groundwater from the basin through use. In Spring Valley, this is the water sought for beneficial use. Of course, to do so, the phreatophytes must be completely eliminated. . . .

He noted, however, that recovery of the E.T. will require a reasonable lowering of the water table:

Obviously, any water-well cannot capture all of the E.T., and while pumping and E.T. are both occurring, the water table drops.

Remand Order at p. 10, ll. 20-27


Judge Estes unequivocally stated that there must be a recalculation of water available for appropriation in Spring Valley, assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time. *See* Remand Order at p. 23, ll. 17-19. The District Court also held that there must be an “amended award that has some prospect of reaching equilibrium in the reservoir.” *See* Remand Order at p. 13, ll. 4-6. An award of 61,127 afa cannot reach equilibrium. Offering a theoretical well field of 101 wells cannot be found anywhere in the Remand Order. The State Engineer must, therefore, only consider the applications before him and adjust the award consistently based on the District Court’s instructions and not SNWA’s modified wishes.

Conclusion

For the reasons stated above, CPB respectfully requests that the State Engineer issue a pre-hearing order excluding any testimony or evidence by SNWA referencing the theoretical ET-capture wells.

DATED this 5TH day of September, 2017.

HEJMANOWSKI & McCREA LLC and
KAEMPFER CROWELL

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Church of Jesus Christ of Latter-Day Saints, a
Utah corporation on behalf of the Cleveland
Ranch**

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2017, a true and correct copy of the foregoing CPB'S REPLY IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE TESTIMONY AND EVIDENCE RELATING TO THEORETICAL ET-CAPTURE WELLS was served on the following persons by electronic service according the parties' agreement, and by depositing the same for delivery with the United States Postal Service, first-class postage prepaid, addressed to the following:

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