

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

IN THE MATTER OF APPLICATIONS 53987 )	
THROUGH 53992, INCLUSIVE, AND 54003 )	
THROUGH 54021, INCLUSIVE, FILED TO )	<b>PROPOSED RULING OF</b>
APPROPRIATE THE UNDERGROUND )	<b>THE CONFEDERATED</b>
WATERS OF SPRING VALLEY, CAVE )	<b>TRIBES OF THE GOSHUTE</b>
VALLEY, DRY LAKE VALLEY, )	<b>RESERVATION,</b>
(HYDROGRAPHIC BASINS 180, 181, 182 )	<b>ELY SHOSHONE TRIBE AND</b>
AND 184), LINCOLN COUNTY AND )	<b>DUCKWATER SHOSHONE</b>
WHITE PINE COUNTY, NEVADA. )	<b>TRIBE</b>
_____ )	

**GENERAL**

**I.**

**BACKGROUND**

In 1989, the Las Vegas Valley Water District filed 146 water right applications—25 of those Applications were to capture all remaining unappropriated water from Spring, Cave, Dry Lake and Delamar Valleys for an interbasin transfer to the Las Vegas area. The Southern Nevada Water Authority (“SNWA” or “Applicant”) assumed full interest in these Applications, by agreement with LVVWD on December 2, 2003. No action on the Applications was taken until about 2005. In August 2006, Protestants filed a petition for judicial review, arguing on statutory and due process grounds that the Applications should be re-noticed and that the period to file protests should be re-opened since 16-years of no action had passed. This appeal resulted in the Nevada Supreme Court’s decision in *GBWN v. Taylor II*, 126 Nev. Adv. Op. 20, 234 P.3d 912 (2010), which voided the State Engineer’s Rulings 5726 and 5875—rulings made during the pending judicial review—for Spring, Cave, Dry Lake, and Delamar Valleys. In February 2011, the State Engineer re-published the Applications and re-opened the protest period, and thereafter scheduled a six-week evidentiary hearing for the fall of 2011. Based on the hearing, the State Engineer issued Rulings 6164, 6165, 6166 and 6167.

Protestants appealed. And on December 10, 2013, the White Pine County District Court issued an order remanding the Rulings 6164-6167 back to the State Engineer to (1) add Millard and Juab counties to the mitigation plan, (2) recalculate water available for appropriation in Spring Valley assuring equilibrium will be reached in a reasonable time, (3) define standards, thresholds, or triggers so that mitigation of unreasonable effects from pumping are neither arbitrary or capricious, and (4) recalculate the appropriations from Cave, Dry Lake and Delamar Valleys to avoid over appropriations and conflicts with existing rights.

In 2017, the State Engineer held a two-week hearing on these four issues.

## **II. DESCRIPTION OF APPLICATIONS**

Application 53987 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (“cfs”) of underground water from Cave Valley Hydrographic Basin for municipal and domestic Purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SW1/4 NW1/4 of Section 22, T.6N., R.63E., M.D.B.&M, within Lincoln County.

Application 53988 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 10 cfs of underground water from Cave Valley Hydrographic Basin for municipal and domestic Purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SE1/4 SE1/4 of Section 21, T.7N., R.63E., M.D.B.&M, within Lincoln County.

Application 53989 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from Dry Lake Valley Hydrographic Basin for municipal and domestic Purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SE1/4 SW1/4 of Section 30, T.2S., R.64E., M.D.B.&M, within Lincoln County.

Application 53990 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 10 cfs of underground water from Dry Lake Valley Hydrographic Basin for municipal and domestic Purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the NE1/4 SE1/4 of Section 8, T.2S., R.65E., M.D.B.&M, within Lincoln County.

Application 53991 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from Delamar Valley Hydrographic Basin for municipal and domestic Purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SE1/4 NE1/4 of Section 4, T.5N., R.63E., M.D.B.&M, within Lincoln County.

Application 53992 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 10 cfs of underground water from Delamar Valley Hydrographic Basin for municipal and domestic Purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the NE1/4 NE1/4 of Section 15, T.6N., R.64E., M.D.B.&M, within Lincoln County.

Application 54003 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the NW1/4 NE1/4 of Section 20, T.8N., R.68E., M.D.B.&M, within Lincoln County.

Application 54004 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the NE1/4 SE1/4 of Section 25, T.9N., R.67E., M.D.B.&M, within Lincoln County.

Application 54005 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the NE1/4 NE1/4 of Section 14, T.9N., R.67E., M.D.B.&M, within Lincoln County.

Application 54006 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SE1/4 SE1/4 of Section 22, T.10N., R.67E., M.D.B.&M, within White Pine County.

Application 54007 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SE1/4 NW1/4 of Section 34, T.11N., R.66E., M.D.B.&M, within White Pine County.

Application 54008 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SW1/4 SW1/4 of Section 1, T.11N., R.66E., M.D.B.&M, within White Pine County.

Application 54009 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the NW1/4 NE1/4 of Section 36, T.13N., R.66E., M.D.B.&M, within White Pine County.

Application 54010 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SE1/4 SE1/4 of Section 25, T.14N., R.66E., M.D.B.&M, within White Pine County.

Application 54011 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the NE1/4 SE1/4 of Section 14, T.14N., R.66E., M.D.B.&M, within White Pine County.

Application 54012 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SE1/4 NE1/4 of Section 16, T.14N., R.67E., M.D.B.&M, within White Pine County.

Application 54013 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SW1/4 SW1/4 of Section 25, T.15N., R.66E., M.D.B.&M, within White Pine County.

Application 54014 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SW1/4 SW1/4 of Section 15, T.15N., R.67E., M.D.B.&M, within White Pine County.

Application 54015 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SW1/4 NW1/4 of Section 14, T.15N., R.67E., M.D.B.&M, within White Pine County.

Application 54016 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the NE1/4 SW1/4 of Section 7, T.15N., R.67E., M.D.B.&M, within White Pine County.

Application 54017 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the NW1/4 SE1/4 of Section 25, T.16N., R.66E., M.D.B.&M, within White Pine County.

Application 54018 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SE1/4 NE1/4 of Section 24, T.16N., R.66E., M.D.B.&M, within White Pine County.

Application 54019 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 10 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SW1/4 NE1/4 of Section 32, T.12N., R.68E., M.D.B.&M, within White Pine County.

Application 54020 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 10 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SE1/4 SE1/4 of Section 14, T.14N., R.67E., M.D.B.&M, within White Pine County.

Application 54021 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 10 cfs of underground water from the Spring Valley Hydrographic Basin for municipal and domestic purposes within Clark, Lincoln, Nye and White Pine Counties. The proposed point of diversion is described as being located within the SW1/4 NE1/4 of Section 33, T.16N., R.66E., M.D.B.&M, within White Pine County.

Under the remarks section the Applications, Item 12, the Applicant has indicated that they seek all unappropriated water within Spring, Cave, Dry Lake and Delamar Valleys and that they shall place the water to beneficial use within the LVVWD service area. Additionally, the Applicant states that the water may also be served to and beneficially used by lawful users within Lincoln, Nye and White Pine Counties and that water would be commingled with other water rights owned or served by the Applicant or its designee.

The Applications were originally filed by the LVVWD, but the Southern Nevada Water Authority ("SNWA" or "Applicant") became the successor in interest to the Applications by agreement with LVVWD on December 2, 2003

### **III. PROCEDURAL HISTORY**

More than 830 persons and entities filed protests to LVVWD's original set of 146 groundwater applications, which included the subject Applications 53987-53992 inclusive and 54003-54021 inclusive. The protest period ended in July 1990. However, the State Engineer took no action on the Applications for 16 years. In October 2005, the State Engineer notified about 300 people or entities by certified mail that a prehearing conference had been set for January 2006 to discuss issues related to a forthcoming protest hearing on the Applications. Hundreds of mailings were returned undelivered. Nonetheless, the prehearing conference went forth. Numerous attendees requested that the State Engineer re-notice the Applications and reopen the protest period due to the 16-year delay.

In March 2006, the State Engineer issued an order denying the Protestants' request to re-notice, and then scheduled a hearing on the Spring Valley Applications (54003-54021 inclusive) for September 2006. In July 2006, several of the Protestants petitioned for a declaratory order to re-publish notice of the Applications and re-open the period for filing protests. The State Engineer promptly issued an order stating that he would not re-publish the Applications and not re-open the protest period.

On August 22, 2006, some Protestants filed a petition for judicial review in the Seventh Judicial District Court regarding the State Engineer's denial of their request to re-publish

notice of the Applications and re-open the protest period. While the District Court reviewed the petition, there were several major developments regarding the Applications.

First, on September 8, 2006, the Applicant and the United States Department of Interior (DOI) agencies—the Bureau of Indian Affairs, National Park Service, Fish and Wildlife Service, and Bureau of Land Management—signed a “Stipulation for the Withdrawal of Protests” for Spring Valley (Spring Valley Stipulation). The DOI withdrew their protests against the Spring Valley Applications in exchange for, among other things, an agreed upon Hydrologic Monitoring, Management, and Mitigation Plan and a Biologic Monitoring, Management, and Mitigation Plan (Spring Valley 3M Plans), which were Exhibits A and B of the Spring Valley Stipulation.<sup>1</sup>

Second, several other protests were withdrawn prior to the hearing in this matter. Lincoln County Board of County Commissioners withdrew their protests pursuant to the Cooperative Agreement between Lincoln County, SNWA, and LVVWD, an agreement that provided Lincoln County with a share of any water granted to the Applicant from Spring, Cave, Dry Lake, and Delamar Valleys. In response to a hearing questionnaire sent out by the Nevada Division of Water Resources, Jane Lindley and Norman L. Lindley opted to withdraw their protests, as did Richard W. and Lesley Ann Sears.

Third, from September 11 to 29, 2006, the State Engineer held a hearing on the Spring Valley Applications. On April 16, 2007, the State Engineer issued a ruling rejecting Applications 54016, 54017, 54018, and 54021 and approving Applications 54003, 54004, 54005, 54006, 54007, 54008, 54009, 54010, 54011, 54012, 54013, 54014, 54015, 54019, and 54020 subject to monitoring and mitigation requirements and staged pumping limitations.

On May 30, 2007, the Seventh Judicial District Court held, *inter alia*, that the State Engineer had provided proper notice and time to file protests. The Court also held that the State Engineer’s denial of the request to re-publish and re-open the protest period did not violate the Protestants’ rights for due process. The Court denied the petition for judicial review.

Protestants appealed the District Court’s order to the Nevada Supreme Court.

Meanwhile, on October 4, 2007, the State Engineer scheduled a hearing for the Delamar, Dry Lake and Cave Valley Applications (DDC Applications, 53987-53992).

On or about January 7, 2008, the Applicant and the United States Department of Interior (DOI) agencies—the Bureau of Indian Affairs, National Park Service, Fish and Wildlife Service, and Bureau of Land Management—entered into a “Stipulation for the Withdrawal of Protests” for the DDC Applications (DDC Stipulation). The DOI withdrew their protests against the DDC Applications in exchange for, among other things, an agreed upon Hydrologic and Biological Monitoring, Management, and Mitigation Plan (DDC 3M Plans), which was Exhibit A of the DDC Stipulation.<sup>2</sup>

---

<sup>1</sup> SE Exh 41.

<sup>2</sup> SE Exh 80.

On or about January 9, 2008, the Applicant and the Moapa Band of Paiute Indians entered into a “Stipulation for the Withdraw of Protests” of the DDC Applications.<sup>3</sup>

While the Protestants’ appeal was still pending in the Nevada Supreme Court, the State Engineer held the hearing on the DDC Applications from February 4 to 15, 2008. On July 9, 2008, the State Engineer issued Ruling 5875, which approved in part Applications 53987, 53988, 53991, and 53992 and approved in full Applications 53989 and 53990. These approvals were subject to monitoring and mitigation requirements.

Protestants petitioned for judicial review of Ruling 5875 to the Seventh Judicial District Court. The District Court vacated Ruling 5875, remanding the matter back to the State Engineer.<sup>4</sup> The State Engineer and the Applicant appealed that decision to the Nevada Supreme Court. The Supreme Court reversed the District Court’s order and remanded the matter back to the District Court with instructions to develop a proper remedy—either for the Applicant to file new Applications or for the State Engineer to re-notice the Applications and re-open the protest period.

On June 17, 2010, the Supreme Court withdrew its prior opinion and issued a new opinion in its place to clarify the scope of opinion as to the protested applications and the proper remedy.<sup>5</sup> The Supreme Court held that “the proper and most equitable remedy is that the State Engineer must re-notice the applications and re-open the protest period” and remanded the matter to District Court with instructions to remand it to the State Engineer for further proceedings.<sup>6</sup>

On remand, Applications 53987 - 53992 and 54003 - 54005 were sent for republication in the *Lincoln County Record* on January 26, 2011 and were last published on February 24, 2011. On March 26, 2011, the protest period ended and Applications 53987 - 53992 and 54003 - 54005 became ready for action. Applications 54006 - 54021 were sent for republication in the *Ely Times* on January 26, 2011 and were last published on February 25, 2011. On March 27, 2011, the protest period ended and Applications 54006 - 54021 became ready for action.

Promptly on April 1, 2011, the State Engineer issued a notice setting the hearing to begin on September 26, 2011. The State Engineer held a hearing on the Spring, Cave, Dry Lake, and Delamar Valley Applications between September 26 and November 18, 2011. Protestants at the hearing included the Great Basin Water Network, White Pine County, Nevada, Millard and Juab County, Utah, Ely Shoshone and Duckwater Shoshone Tribes, Confederated Tribes of the Goshute Reservation, and the Presiding Bishop of the Church of Latter-Day Saints on behalf of Cleveland Ranch.

In March 22, 2012, the State Engineer issued four rulings as to SNWA’s Applications. Ruling 6164 granted Applications 54003-54015 and Applications 54019 and 54020, which approved 61,127 acre-feet annually to the Applicant from Spring Valley and reserved 4,000 afa for future growth. These Applications were subject to staged development and compliance with

---

<sup>3</sup> SE Exh 79.

<sup>4</sup> *Carter-Griffin Inc. v. Taylor*, No. CV 0830008, Order (7<sup>th</sup> Judicial Dist. Ct. Nev. Oct. 15, 2009).

<sup>5</sup> *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 20, 234

<sup>6</sup> *Great Basin Water Network v. Taylor*, 126 Nev. Adv. Op. 20, 234 P.3d 920 (2010).

the Spring Valley 3M Plans. The State Engineer approved the Spring Valley 3M Plans, conditioned upon SNWA's compliance with that Plan that the State Engineer requires. Applications 54016, 54017, 54018 and 54021 were denied. Ruling 6165 approved Applications 53987 and 53988, which granted 5,235 afa in Cave Valley conditioned upon SNWA's compliance with DDC 3M Plans and any amendments to the DDC 3M Plans that the State Engineer may require. The State Engineer approved the DDC 3M Plans in Ruling 6165, 6166, and 6167. Ruling 6166 approved Applications 53989 and 53990 were granted for a total of 11,584 afa in Dry Lake Valley, also conditioned upon SNWA's compliance with the DDC 3M Plans and any amendments to the DDC 3M Plans that the State Engineer may require. Ruling 6167 granted Applications 53391 and 53392 for Delamar Valley and for a total of 6,042 afa, conditioned upon SNWA's compliance with the DDC 3M Plans and any amendments that the State Engineer may require.

On April 19, 2012, Protestants (Great Basin Water Network, White Pine County, Nevada, Millard and Juab County, Utah, Ely Shoshone Tribe, Duckwater Shoshone Tribes, Confederated Tribes of the Goshute Reservation, and the Presiding Bishop of the Church of Latter-Day Saints on behalf of Cleveland Ranch) variously appealed State Engineer Rulings 6164-6167 to the District Court in White Pine County.

After review of the appeal, the District Court issued an order on December 10, 2013 (filed December 13) stating "this Court will not disturb the findings of the Engineer save those findings that are the subject of this Order. This Court remands orders 6164, 6165, 6166 and 6167 for:

1. The addition of Millard and Juab counties, Utah in the mitigation plan so far as water basins in Utah are affected by pumping water from Spring Valley Basin, Nevada;
2. A recalculation of water available for appropriation from Spring Valley assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time;
3. Define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious in Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley, and;
4. Recalculate the appropriations from Cave Valley, Dry Lake and Delamar Valley to avoid over appropriations or conflicts with down-gradient, existing water rights."<sup>7</sup>

In January 2014, the State Engineer and the Applicant appealed the District Court's order to the Nevada Supreme Court. On February 6, 2015, the Nevada Supreme Court dismissed that appeal, finding that it lacked jurisdiction over the District Court's order because the District Court's order of remand was not an appealable, final judgment.<sup>8</sup>

The State Engineer held the hearing on remand for Applications 53987 through 53992, inclusive, and 54003 through 54021, inclusive, from September 25 through October 6, 2017.

---

<sup>7</sup> December 10, 2013 Decision at 23, CV-1204049 (7<sup>th</sup> Jud. Dist.).

<sup>8</sup> February 6, 2015 Decision at 3, No. 64815 (Nevada Supreme Court).



#### **IV. PARTICIPATING PROTESTANTS**

Great Basin Water Network and White Pine County represented by Simeon Herskovits and Iris Thornton of Advocates for Community and Environment.

The Confederated Tribes of the Goshute Reservation, Ely Shoshone Tribe, and Duckwater Shoshone Tribes represented by Paul Echo Hawk of Echo Hawk Law Office and Paul Tsosie.

The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints represented by Paul Hejmanowski of Hejmanowski & McCrea and by Severin Carlson of Kaempfer Crowell.

Millard County and Juab County represented by J. Mark Ward of the Utah Association of Counties.

#### **V. STATUTORY STANDARD TO GRANT**

Nevada Revised Statute 533.370(1)(c) provides that the State Engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if the applicant provides proof satisfactory of the applicant's intentions in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence and his financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

#### **VI. STATUTORY STANDARD TO DENY**

Nevada Revised Statute 533.370(2) provides that the State Engineer shall reject an application and refuse to issue the permit where there is no unappropriated water in the proposed source of supply, or where the proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS 533.024, or where the proposed use threatens to prove detrimental to the public interest.

#### **VII. STATUTORY STANDARD FOR INTERBASIN TRANSFERS**

The State Engineer finds that SNWA has applied for an interbasin transfer of water. Nevada Revised Statute 533.370(3) provides that in determining whether an application for an interbasin transfer of groundwater must be rejected, the State Engineer shall consider: (a) whether the applicant has justified the need to import the water from another basin; (b) if the State Engineer

determines that a plan for conservation of water is advisable for the basin into which the water is to be imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out; (c) whether the proposed action is environmentally sound as it relates to the basin from which the water is exported; (d) whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and (e) any other factor the State Engineer determines to be relevant.

## **FINDINGS OF FACT**

### **I.**

#### **THE ADDITION OF MILLARD AND JUAB COUNTIES, UTAH IN THE MITIGATION PLAN**

The District Court remanded Rulings 6164-6167 back to the State Engineer with instructions, in part, for “the addition of Millard and Juab Counties, Utah in the mitigation plan so far as water basins in Utah are affected by pumping of water from the Spring Valley Basin, Nevada.”<sup>9</sup> The second part of this instruction specifies that the State Engineer must consider how water basins in Utah are affected by SNWA pumping, which makes this an evidentiary matter. Accordingly, the State Engineer must determine if the Utah counties were properly included in SNWA’s 3M Plans—specifically the Spring Valley 3M Plan—to the extent that the counties will likely be impacted by SNWA’s pumping.

#### **A. Interbasin Flow from Spring Valley to Snake Valley, Utah**

Millard County includes the southern and central portions of Snake Valley, Utah. Like Spring Valley, Snake Valley is part of the larger Great Salt Lake Desert Regional Flow System.<sup>10</sup> In this system, groundwater generally flows from Spring, Tippet, Snake and other valleys toward the terminal discharge area of the Great Salt Lake Desert. Neither SNWA nor Protestants dispute that there is interbasin flow of groundwater from Spring Valley to Snake Valley.<sup>11</sup> Nor do they dispute that one potential flow path occurs between southeastern Spring Valley and southern Snake Valley via the Limestone Hills and Hamlin Valley.<sup>12</sup>

What remains the subject of debate is how much groundwater flows from southern Spring Valley into southern Snake Valley. Prior studies have reported substantial variations in groundwater outflow from Spring Valley to Hamlin and Snake Valleys: 4,000 acre-feet (Rush and Kazmi, 1965); 8,000 to 12,000 acre-feet (Nichols, 2000); and 33,000 acre-feet (Welch et al., 2007).<sup>13</sup> A more recent study by Dr. David Prudic et al. (2015) estimated that interbasin

---

<sup>9</sup> December 10, 2013 Decision at 23, CV-1204049 (7<sup>th</sup> Jud. Dist.).

<sup>10</sup> SNWA Exh 545.

<sup>11</sup> SNWA Exh 507, p 7-1; GBWN Exh 281, pp. 21-24.

<sup>12</sup> SE Ruling 6164, p. 81.

<sup>13</sup> SNWA Exh 258, p. 7-8.

groundwater flow out of southern Spring Valley to Snake Valley ranged from 6,000 to 11,000 acre-feet.<sup>14</sup>

Both SNWA and Protestant expert witnesses agreed that the Prudic's estimate of 6,000 to 11,000 acre-feet of interbasin flow was reasonable, but GBWN expert witness Dr. Tom Myers seemed to give equal if not higher credence to Welch's 2007 USGS BARCAS estimate of 33,000 acre-feet, which was calculated using a water balance model and geologic and hydrologic conceptualizations.<sup>15</sup> The wide range of scientifically valid estimates of interbasin flow from Spring Valley to Snake Valley make it difficult for the State Engineer to use one study's estimate over the other. To make a decision about which estimate is most scientifically valid is not for the State Engineer to decide in this remand order. As Dr. Prudic admitted, even his "estimates of groundwater flow from southern Spring Valley to northern Hamlin Valley [and thus Snake Valley] still have considerable uncertainty."<sup>16</sup> Thus, any determination by the State Engineer to use one or the other estimate must err on the side of caution. But at most, the State Engineer finds that interbasin flow from Spring Valley to Snake Valleys, Utah, could be as much as 33,000 acre-feet, and this interbasin flow can affect the estimates of groundwater pumping impacts.

### **B. Spring Valley Pumping Impacts on Snake Valley, Utah**

That Snake Valley will be impacted from SNWA's groundwater pumping in Spring Valley was previously established during the 2011 hearing. In the 2017 hearing, SNWA submitted into evidence portions of the Bureau of Land Management's Final Environmental Impact Statement for the SNWA's Groundwater Development Project (GDP FEIS). In the BLM's approved Alternative F—with 114,129 afa pumped from Spring (84,400), Cave (11,500), Dry Lake (11,600), and Delamar (6,600) Valleys and with no groundwater pumping in Snake Valley—groundwater drawdown analyses (analyses using models developed by SNWA) showed that drawdown due to SNWA pumping in Spring Valley would extend into the Snake Valley hydrographic basin after more than 75 years of groundwater pumping, expanding even more by 200 years.<sup>17</sup>

Dr. Tom Myers, expert witness for the Great Basin Water Network, explained that groundwater pumping simulated in Alternative F "causes drawdown in southern Spring Valley and across the divide into Hamlin Valley . . . by effectively capturing the recharge in southern Spring Valley and preventing it from flowing into Hamlin Valley and from there into Snake Valley."<sup>18</sup> While the SNWA GDP FEIS gave no estimate of exactly how much of a reduction in interbasin flow the SNWA pumping would cause, Myers suggested that flow from Spring Valley to Hamlin and Snake Valleys would be halted. If indeed SNWA's groundwater pumping in Spring Valley would prevent up to 33,000 afa from entering Snake Valley, then impacts to Snake

---

<sup>14</sup> SNWA Exh 552, p. 133.

<sup>15</sup> GBWN Exh 281, p. 22.

<sup>16</sup> SNWA Exh 552, p. 135.

<sup>17</sup> SNWA Exh 478, pp. 182-183

<sup>18</sup> GBWN Exh 281, p. 47.

Valley are most likely higher than projected. Furthermore, the GDP FEIS estimated that interbasin flow reductions from Snake Valley would extend into Pine, Wah Wah, and Tule Valleys and as far as Fish Springs by 50 acre-feet after 200 years of SNWA's pumping.<sup>19</sup>

While this potential impact to the basins east of Snake Valley may be low, the District Court's order did not provide a lower limit cut-off from which the State Engineer was to consider SNWA pumping impacts on Utah counties. The State Engineer must interpret the District Court's order to include any amount of impact on Millard and Juab Counties, which include Pine, Wah Wah and Tule Valleys, up to Fish Springs.

In addition to the GDP FEIS results, SNWA submitted into evidence Prudic et al. (2015). Prudic stated that "some of the groundwater from southern Spring Valley is likely to be the source of flow to the springs near the Nevada-Utah state line or is lost to evapotranspiration along Big Springs and Lake Creek. Any remaining groundwater from southern Spring Valley would continue as northeastward regional flow through carbonate rocks on the east side of Snake Valley."<sup>20</sup>

In Ruling 6164 the State Engineer denied Applications 54016, 54017, 54018 and 54021, approving 61,127 afa. At the 2017 hearing, SNWA provided no evidence as to how the groundwater pumping of Applications constituting 61,127 afa would specifically impact Millard and Juab Counties. Instead, SNWA submitted into evidence the GDP FEIS. Alternative E simulated pumping of only 60,000 afa in Spring Valley, which is closer to the approved Application amounts but not inclusive of existing rights. Protestants did not present groundwater drawdown analyses regarding impacts on the Utah basins. Therefore, the State Engineer finds that he must rely on SNWA's latest evidence—the GDP FEIS results for Alternative F and Prudic et al. (2015)—in determining whether SNWA properly included Millard and Juab Counties into the Spring Valley 3M Plan.

### **C. The Addition of Millard and Juab Counties in the Spring Valley 3M Plan**

The District Court specifically directed that "Ruling 6164 is remanded to include Snake Valley, Utah in the mitigation plan."<sup>21</sup> The Court also specifically referenced in the order the addition of Millard and Juab Counties into the Spring Valley 3M Plan. As previously noted, impacts from SNWA pumping in Spring Valley are likely to extend beyond Snake Valley and into Pine, Wah Wah, and Tule Valleys, Utah. But in compliance with the District Court's order, the State Engineer is concerned only with the inclusion of Snake Valley, Utah.

SNWA submitted into evidence a new Spring Valley 3M Plan, dated June 2017.<sup>22</sup> This

---

<sup>19</sup> SNWA Exh 478, p. 185, 188.

<sup>20</sup> SNWA Exh 552, p. 134.

<sup>21</sup> December 10, 2013 Decision at 9, CV-1204049 (7<sup>th</sup> Jud. Dist.).

<sup>22</sup> SNWA Exh 592.

3M Plan includes hydrologic and biologic components. Section 2.1.1 states, “The hydrologic monitoring program includes the systematic measurement of a network of wells, piezometers, springs, streams, precipitation stations, and senior water right points of diversion (PODs). . . . The well and spring monitoring networks associated with the Spring Valley 3M Plan are presented on Figure 2-1 and Figure 2-2, respectively.”<sup>23</sup>

Figure 2-1 of the 3M Plan shows the network of SNWA monitor wells. In Snake Valley, Nevada, near Big Springs and Lake Creek, SNWA has one monitoring and test well that is a Basin Fill Well and one monitoring and test well that is a Carbonate Well. A planned SNWA monitor well of the Basin Fill type will also be located near Big Springs. In Hamlin Valley, located, south and southwest of Snake Valley, SNWA has three monitoring and test wells that are Basin Fill Wells, one Basin Fill Well for monitoring that is planned, and another planned well in the Limestone Hills that will be of the Carbonate Well type. No SNWA monitoring wells are located presently or are planned for the Utah side of Snake Valley—none occur either in Millard or in Juab Counties.

Figure 2-2 of the 3M Plan shows SNWA’s monitoring network for springs and streams. The only spring or stream monitoring site in Snake Valley is located at Big Springs, which is in southern Snake Valley and the southeast corner of White Pine County, Nevada. No spring and stream monitoring sites are located on the Utah side of Snake Valley—none in Millard County and none in Juab County.

However, the SNWA hydrologic monitoring network includes the Utah Geological Survey (UGS) set of monitoring wells. UGS has seven or eight Basin Fill monitoring wells located in Snake Valley, Millard County, Utah. UGS also has two gaging stations along Lake Creek, one near Dearden Springs and one near Clay Springs North.<sup>24</sup> These UGS monitoring wells and gaging stations of the Basin Fill type are included in the Spring Valley 3M Plan as part of the monitoring network.

SNWA provided no carbonate monitoring wells in Snake Valley, Millard County, Utah, as part of the 3M Plan.<sup>25</sup> The only carbonate monitoring well is located at the south end of the Snake Range just over the border of Snake Valley in Hamlin Valley.<sup>26</sup> SNWA provided evidence via Prudic et al. (2015) specifically identifying that “groundwater from southern Spring Valley would continue as northeastward regional flow through carbonate rocks on the east side of Snake Valley.”<sup>27</sup> Moreover, the District Court’s direction was not for Hamlin Valley or Snake Valley, Nevada, but for Snake Valley, Utah. Thus, the State Engineer finds that SNWA must include at least one carbonate monitoring well in Snake Valley, Utah. The location of this carbonate well shall be placed where it would have the highest likelihood of detecting groundwater drawdown.

Figures 2-1 and 2-2 of the 3M Plan show SNWA’s five Management Blocks for Spring Valley. None of them extend into Millard or Juab Counties, Utah. But under Section 2.1.3.6 and

---

<sup>23</sup> SNWA Exh 592, p. 2-2.

<sup>24</sup> SNWA Exh 592, p. 2-34.

<sup>25</sup> SNWA Exh 592, p. 2-34

<sup>26</sup> SNWA Exh 592, p. 2-12.

<sup>27</sup> SNWA Exh 552, p. 134.

Figure 2-12, the SNWA expanded Management Block 1 to include Hamlin Valley and southern Snake Valley in both Nevada and Utah.<sup>28</sup> This expanded zone, as seen on Figure 2-12, was termed “Analysis Area,” which includes the very northwest corner of Beaver County, Utah, and the southwest corner of Millard County, Utah. The District Court’s remand was specific in its order to include in the 3M Plan “Snake Valley, Utah” within Millard and Juab Counties. The State Engineer must interpret this in plain language, not just as the very southwest corner of Millard County, Snake Valley, Utah. The SNWA has provided no plan for monitoring, management or mitigation in Juab County, Utah, as per the District Court’s remand order. Before the State Engineer can approve the Spring Valley 3M Plan, SNWA must include in the 3M Plan the area of Snake Valley, Utah that falls within Millard and Juab Counties.

Not surprisingly then, Millard and Juab Counties expressed concern about Utah stakeholders who live further north in Snake Valley, such as Garrison, Utah, and Utah stakeholders who could be impacted by SNWA pumping in Spring Valley. SNWA expert witness Mr. James Prieur suggested that SNWA’s monitoring “into Hamlin Valley up to Dearden Spring forward . . . would indicate an early warning to detect any propagation moving in that flow path.”<sup>29</sup> Mr. Prieur also stated that in his expert opinion, “you would just not see an effect there, so the effects would not be associated with Spring Valley, SNWA pumping.”<sup>30</sup>

Such *a priori* certainty runs counter to SNWA’s Exhibits 478 and 552. Even SNWA’s own model used in the GDP FEIS predicted possible effects as far as Fish Springs, Utah. And Prudic et al. (2015) expressed substantial *uncertainty* in regards to interbasin flow. There is also uncertainty in SNWA’s groundwater flow models, which Prieur admitted to in saying, “all the limitations and all the issues with the regional flow model.”<sup>31</sup> The State Engineer finds that there is substantial uncertainty in how well SNWA’s groundwater models predict drawdown in Snake Valley—it could be less than predicted or it could be more.

When Millard and Juab Counties asked Mr. Prieur what protections were in place under the 3M Plan in the event that groundwater and spring monitoring near Eskdale registered an impact, Mr. Prieur responded that “You’d have to look at this in context of the entire picture,” referring to natural conditions and irrigation pumping.<sup>32</sup> Prieur affirmed that this was part of the investigation component of the 3M Plan. He also stressed that there are effects of local wells from Granite Peak Ranch, Baker, Garrison, and Eskdale, and “those wells are going to have much more effect and response to those sites than something that’s fifty, sixty miles away.”<sup>33</sup> Prieur continued saying, “Eskdale is so far away that to link that to the pumping that’s in Spring Valley is just not hydrogeologically sound.”<sup>34</sup> If Utah stakeholders registered an impact, Prieur stated that “they could make a request to the State Engineer and they can—then we [SNWA] would

---

<sup>28</sup> SNWA Exh 592, pp. 2-33, 2-34

<sup>29</sup> Transcript, vol. 3, p. 776.

<sup>30</sup> Transcript, vol. 3, p. 778.

<sup>31</sup> Transcript, vol. 3, p. 778.

<sup>32</sup> Transcript, vol. 3, p. 779.

<sup>33</sup> Transcript, vol. 3, p. 780.

<sup>34</sup> Transcript, vol. 3, p. 782.

respond to that investigation and put it in perspective.”<sup>35</sup> Yet, such a process is not defined or detailed in the 3M Plan.

As the Protestant LDS Church-Cleveland Ranch pointed out, the 3M Plan will govern SNWA’s GDP operations.<sup>36</sup> Given that SNWA’s project will not be built for several more decades, not the writers of the 3M Plan but future generations will have to interpret the 3M Plan.<sup>37</sup> And given that groundwater drawdown impacts on Snake Valley, Utah, may not occur for many more decades afterwards, the State Engineer agrees with Cleveland Ranch that the 3M Plan does not clearly spell out all its processes sufficient for future generations to interpret and implement the Plan. In particular, the State Engineer finds that the process for Utah stakeholders in Millard and Juab Counties to have SNWA conduct an investigation into possible SNWA-related pumping impacts must be properly established in the 3M Plan.

As is, the process Utah stakeholders might use to get an investigation going is described under Section 5.4 of the 3M Plan, which is vague and limited to: “SNWA will notify NSE when investigation and mitigation triggers are activated” and “NSE may also perform independent investigations” and “senior water right holders and other parties may pursue independent investigations.”<sup>38</sup> According to SNWA witness Mr. Prieur, it appears that Utah stakeholders have many ways in which they might avail themselves if they discover or suspect an impact due to SNWA pumping, including “they would either notify the State Engineer, the Nevada State Engineer, or there might be another process. They might notify the officials in Utah, or they can notify us.”<sup>39</sup> But again, the State Engineer finds that such a process is not specified or detailed in the 3M Plan, and thus it fails to meet the District Court’s remand order.

The State Engineer must also determine if SNWA properly included Snake Valley, Millard and Juab Counties, Utah, into the biologic components of the Spring Valley 3M Plan. SNWA expert witness Dr. Justin Huntington’s slideshow stated: “SNWA requested data derived from Landsat satellite imagery to quantify changes in shrubland habitat vegetation for the purpose of establishing baseline conditions and conducting long-term monitoring [in] its Spring Valley monitoring, management, and mitigation (3M) program.”<sup>40</sup> The data went back as far as 30 years to develop a natural range of variation—baseline conditions.<sup>41</sup> Millard and Juab Counties pinpointed one issue regarding SNWA’s development of baseline conditions and monitoring programs, asking Dr. Huntington whether SNWA requested him to use any data from Snake Valley. Dr. Huntington admitted that SNWA did not request data from outside Spring Valley—nothing from Snake Valley, Utah.<sup>42</sup> Dr. Brandt from SNWA also testified that SNWA did not use data from Snake Valley.<sup>43</sup> Yet the remote-sensing data for Snake Valley could be gathered

---

<sup>35</sup> Transcript, vol. 3, p. 780.

<sup>36</sup> Transcript, vol. 4, p. 814.

<sup>37</sup> Transcript, vol. 4, p. 814-815.

<sup>38</sup> SNWA Exh 592, p. 5-1.

<sup>39</sup> Transcript vol. 3, pp. 773-780.

<sup>40</sup> SNWA Exh 614, slide 13

<sup>41</sup> Transcript vol. 1, pp. 221-222.

<sup>42</sup> Transcript vol. 1, pp. 217-218.

<sup>43</sup> Transcript vol. 1, pp. 314-315.

and processed.<sup>44</sup> As stated in the 3M Plan under Section 2.2.2, “monitoring is established for northern Hamlin and southern Snake valleys to ensure avoidance of unreasonable effects include one native aquatic-dependent special status species, and one habitat type (shrubland habitat).”<sup>45</sup> In Figure 2-16 of the 3M Plan, this shrubland habitat to be monitored appears only on the Nevada side of Snake Valley, and not in Utah. In fact, the 3M Plan says plainly: “Monitoring for shrubland habitat is conducted in southern Snake Valley, Nevada.”<sup>46</sup> For the native aquatic-dependent special status species—the spring snail *Pyrgulopsis anguina* which is endemic to Snake Valley—monitoring its presence or absence will occur at Big Springs, Nevada, Dearden (Stateline) Springs, and Clayton Springs, Utah.<sup>47</sup> Other than Clayton Spring and Dearden Spring, no monitoring of environmental (biological) resources will occur in Utah. The State Engineer finds that this lack of monitoring effort in Utah does not properly addresses the District Court’s remand order to include Snake Valley, Millard and Juab Counties, Utah, in the 3M Plan.

The State Engineer also finds that the focus on two biological resources in Snake Valley is insufficient to comply with the District Court’s remand. The only biological resource to be monitored in Millard and Juab Counties, Utah, is the spring snail, *Pyrgulopsis, anguina*, which in Utah only occurs in two small springs in southern Snake Valley. SNWA provided evidence of other significant habitat types in Snake Valley, such as Pinyon-Juniper Woodlands, Sagebrush Shrublands, and many Springs and Water-Dependent Ecosystems.<sup>48</sup> SNWA also provided evidence that Snake Valley is home to Sagebrush Shrublands on which sage grouse depend for continued survival.<sup>49</sup> SNWA provided evidence that Springs and Water-Dependent Ecosystems are biodiversity hotspots.<sup>50</sup> Protestant Tribes’ witness Dr. Monte Sanford provided substantial evidence that many Springs and other Water-Dependent Ecosystems are Indian tribal ceremonial and sacred areas.<sup>51</sup> Dr. Monte Sanford also provided substantial evidence that Pinyon-Juniper Woodlands are used for Tribal traditional and subsistence purposes.<sup>52</sup> The State Engineer finds that these habitat types, and associated cultural uses, are in the public interest and must be included in the Spring Valley 3M Plan for Snake Valley, including the Utah side of Snake Valley.

## II. A RECALCULATION OF WATER AVAILABLE FOR APPROPRIATION FROM SPRING VALLEY

The District Court found that “the Engineer’s own calculations and findings, show that

---

<sup>44</sup> Transcript vol. 1, p. 222.

<sup>45</sup> SNWA Exh 592, p. 2-51.

<sup>46</sup> SNWA Exh 592, p. 2-52.

<sup>47</sup> SNWA Exh 592, p. 2-51 – 2-52.

<sup>48</sup> SNWA Exh 478, p. 3.5-3.

<sup>49</sup> SNWA Exh 478, p. 3.6-15.

<sup>50</sup> SNWA Exh 478, 3.7-13.

<sup>51</sup> CTGR Exh 21, p. 27; CTGR Exh 22, Appendix A; Transcript pp. 1486, 1488, 1496.

<sup>52</sup> CTGR Exh 22, Appendix A: Tribal Cultural Areas of the Goshute and Western Shoshone Peoples in Spring and Snake Valleys.



equilibrium, with the SNWA's present award [of 61,127 afa], will never be reached and that after two hundred (200) years, SNWA will likely capture but eighty-four (84%) of the E.T."<sup>53</sup> The Court also found that the State Engineer violated his own standards with the award to SNWA, making the award to SNWA arbitrary and capricious. Thus, the Court remanded Ruling 6164 back to the State Engineer for "A recalculation of water available for appropriation from Spring Valley assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time."<sup>54</sup>

#### **A. Standards and Authority Used by the State Engineer**

Under Nevada Revised Statute 533.370(2), the State Engineer must reject an application and refuse to issue the requested permit where there is no unappropriated water in the proposed source of supply or where its proposed use or change conflicts with existing rights or threatens to prove detrimental to the public interest.

How the State Engineer determines the amount of groundwater available for appropriation Spring Valley, or any other hydrographic basin, is based on his estimation of perennial yield. To comply with the Court's order of recalculating the amount of water available for appropriation from Spring Valley, the State Engineer must hold true to his established standard of perennial yield. This, the State Engineer has defined as:

The perennial yield of a groundwater reservoir may be defined as the maximum amount of groundwater that 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. The perennial yield cannot be more than the natural recharge to a groundwater basin and in some cases is less.<sup>55</sup>

Pumping groundwater in excess of perennial yield will deplete groundwater stores such that steady state conditions (i.e., equilibrium) will not be achieved. This is groundwater mining. It is the policy of the State Engineer not to permit groundwater mining. Groundwater mining threatens to prove detrimental to the public interest (NRS 533.370(2)) because it "may contribute to adverse conditions such as water quality degradation, storage depletion, diminishing yields of wells, increased pumping costs, and land subsidence."<sup>56</sup> Accordingly, groundwater mining is not environmentally sound, and the State Engineer must reject SNWA's Applications for an interbasin transfer of groundwater if the proposed action is not environmentally sound as it relates to Spring Valley (NRS 533.370(3)(c)).

So, the State Engineer must make a balanced determination, based on substantial and

---

<sup>53</sup> December 10, 2013 Decision at 23, CV-1204049 (7<sup>th</sup> Jud. Dist.).

<sup>54</sup> December 10, 2013 Decision at 23.

<sup>55</sup> SE Ruling 6164, p. 56.

<sup>56</sup> SE Exh 140, Ruling 6164, p. 56.

sound evidence, on whether or not SNWA's pumping of the 61,127 afa in Spring Valley to capture ET would reach equilibrium within a reasonable time. In Ruling 6164, the State Engineer used information from SNWA for an adjusted water budget estimate of 84,100 afa of groundwater ET—the determination of perennial yield.<sup>57</sup> The State Engineer then rounded to the nearest thousand, placing its official estimation at 84,000 afa.<sup>58</sup> The District Court remanded Ruling 6164 back to the State Engineer, in part, “for an award less than the calculated E.T. for Spring Valley, Nevada, and [so] that the amended award has some prospect of reaching equilibrium in the [groundwater] reservoir.”<sup>59</sup>

### **B. Does Spring Valley Reach Equilibrium in a Reasonable Time?**

SNWA provided an expert report asserting that “effective capture of ET discharge by a pumping rate of 61,127 afy in Spring Valley is impossible because the permitted volume of pumping is less than the volume of ET discharge.”<sup>60</sup>

But effective capture of all ET is not the State Engineer's standard. The standard is an amount that can be salvaged over the long term without depleting the groundwater reservoir. This perennial yield standard is limited by discharge—not more but it can be less.

SNWA and Protestants dispute whether Spring Valley will reach equilibrium in a reasonable time with SNWA's pumping program. To address this issue, SNWA updated their groundwater model to be consistent with Ruling 6164, including the following changes: they excluded the four SNWA Applications near Cleve Creek alluvial fan that were denied; they used 84,100 afy as the estimate of ET discharge; they changed the pumping rate to 61,127 afy; they set the design objective to capture ET within a reasonable time; they included staged development per Ruling 6164; and they redistributed the pumping wells inside the ET discharge area.<sup>61</sup> In the updated model, or what SNWA termed the “ET-Capture Scenario,” ET dropped from 80,193 afy in 2005 to 37,026 afy in year 2050 to 16,890 afy in 2125 to 15,087 afy in 2250. Change in groundwater storage went from 11,849 afy in 2050 (full buildout) to 2,539 afy in 2125 to 1,825 afy in 2150 to 751 afy in 2250.<sup>62</sup> Based on simulations, SNWA claims that “After 200 years of full production, the ET-capture wells have captured 98 percent of their water production from the ET discharge. The remainder is captured from transitional storage (1 percent) and from interbasin flow (1 percent). Therefore, it is reasonable to conclude that the permitted pumping, as represented and simulated in the ET-capture scenario, effectively captures the entire volume of water from ET discharge, within a reasonable period of 75 to 200 years, and within the model's level of uncertainty.”<sup>63</sup> Based on Figure 6.1 of SNWA's Exhibit 475, it does appear that the ET-capture model scenario for Spring Valley would reach equilibrium by about 200 years, but not

---

<sup>57</sup> SE Exh 140, Ruling 6164, p. 76.

<sup>58</sup> SE Exh 140, Ruling 6164, p. 90.

<sup>59</sup> December 10, 2013 Decision at 13.

<sup>60</sup> SNWA Exh 475, p. 2-2.

<sup>61</sup> SNWA Exh 475, p. 2-1

<sup>62</sup> SNWA Exh 475, p. 5-3 – 5-4.

<sup>63</sup> SNWA Exh 475, p. 6-2 – 6-3.

yet by 75 years. SNWA also posited that the ET-capture scenario simulation illustrates that SNWA groundwater pumping would not be groundwater mining because the ET-capture well production would be derived from captured ET rather than transitional storage.<sup>64</sup>

Upon further inspection of the evidence on record, SNWA's ET-capture model scenario is based on "permitted groundwater production of 61,127 afy [] distributed among 101 ET-capture wells." SNWA distributed the 101 wells within the Spring Valley groundwater ET discharge area, or the evapotranspiration area.<sup>65</sup> The 101 wells included 15 wells (Applications) approved by the State Engineer in Ruling 6164. However, the State Engineer has not approved the other 86 wells for SNWA's groundwater pumping project. The State Engineer agrees with the assessment of Dr. Jones, expert witness for the Protestant LDS Church-Cleveland Ranch, as to his testimony that it was incorrect for SNWA's to include in their model 101 pumping wells rather than the 15 approved Applications (wells) in Ruling 6164.<sup>66</sup> The State Engineer finds that SNWA's groundwater modeling results—results intended to show that their pumping program would result in equilibrium within a reasonable time—is arbitrary, not reasonable, and not based on sound and substantial evidence.

The Protestant LDS Church-Cleveland Ranch hydrology experts also ran a groundwater model to address the Court's remand order. The Church's expert witness Dr. Jones obtained from SNWA their new updated CCRP model and ran new simulations using procedures similar to SNWA.<sup>67</sup> These simulations only included the 15 wells (Applications) approved by Ruling 6164, not the full suite of 101 wells used by SNWA.<sup>68</sup> Dr. Jones also extended the simulation period out from 200 to 2,000 years to determine when equilibrium might be achieved. He reduced the maximum rate of pumping to 61,000 afy. Then he produced a baseline condition simulation and a simulation with approved SNWA wells from Ruling 6164. In his expert report, coauthored with Dr. Mayo, they used the model output of a 2000-year simulation to generate "a flow budget for all sources and sinks associated with the simulations. Net flow was calculated by subtracting the baseline simulation values from the predictive simulation values."<sup>69</sup>

Jones and Mayo produced several significant findings. According to their expert report, groundwater storage was still decreasing even between 1000-2000 years. In fact, the system never reached equilibrium between groundwater recharge and SNWA pumping, and so for 2,000 years there was continuous groundwater mining.<sup>70</sup> They stated that "At the end of 2,000 years, a total of 10,000,000 acre-feet of groundwater storage are removed from the valley."<sup>71</sup> Moreover, Dr. Mayo provided testimony that SNWA's pumping would actually "remov[e] water from adjacent basins, transferring it to Spring Valley and then that water being piped to Las Vegas."<sup>72</sup> Dr. Jones

---

<sup>64</sup> SNWA Exh 475, p. 8-1.

<sup>65</sup> SNWA Exh 475, p. 4-3, 4-4.

<sup>66</sup> Transcript, pp. 1182-1183.

<sup>67</sup> Transcript, pp. 1184-1185.

<sup>68</sup> Transcript, pp. 1183-1184.

<sup>69</sup> CPB Exh 19, p. 25.

<sup>70</sup> CPB Exh 19, p. 25.

<sup>71</sup> CPB Exh 19, p. 26.

<sup>72</sup> Transcript pp. 1186-1187.

also agreed that SNWA pumping would cause a reversal of interbasin flow.<sup>73</sup> Modeling results demonstrated significant amounts of net change in interbasin flows, especially Hamlin, Lake, and Steptoe Valleys.<sup>74</sup> The State Engineer finds Jones' and Mayo's results to be scientifically sound and based on substantial evidence. The State Engineer also finds, based on their evidence, that pumping groundwater from SNWA's 15 approved Applications will not achieve equilibrium between recharge and discharge.

### **C. Recalculating Water Available for Appropriation**

The State Engineer finds that reduced appropriations and modifications of pumping locations are needed to ensure equilibrium is reached within a reasonable time and to ensure that SNWA's pumping does not conflict with existing rights in Spring Valley and adjacent basins. SNWA provided no alternative calculations for the amount of water available. And without further modeling and analysis as to the aforementioned issues, it is impossible to recalculate the water available for SNWA appropriations in Spring Valley.

## **III. DEFINE STANDARDS, THRESHOLDS OR TRIGGERS SO THAT MITIGATION OF UNREASONABLE EFFECTS FROM PUMPING OF WATER ARE NEITHER ARBITRARY NOR CAPRICIOUS IN SPRING, CAVE, DRY LAKE AND DELAMAR VALLEYS**

The District Court's third issue in the remand order instructed the State Engineer to "define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious in Spring Valley, Cave Valley, Dry Lake Valley and Delamar Valley."<sup>75</sup> Thus, the order pertained to all four Rulings: 6164-6167. The order also pertained to the monitoring, management, and mitigations plans (3M Plans) approved by the State Engineer in Rulings 6164-6167 and that were a stipulation(s) between the SNWA and Federal agencies.<sup>76</sup>

---

<sup>73</sup> Transcript pp. 1187.

<sup>74</sup> CPB Exh 19, p. 27-29.

<sup>75</sup> December 10, 2013 Decision at 23, CV-1204049 (7<sup>th</sup> Jud. Dist.).

<sup>76</sup> December 10, 2013 Decision at 14, CV-1204049 (7<sup>th</sup> Jud. Dist.). The stipulations are marked as SE Exh 41 and 80. "Federal agencies" or "DOI bureaus" that were signatories of the stipulations included: National Park Service, Fish and Wildlife Service, Bureau of Land Management, and the Bureau of Indian Affairs.

### **A. Background on Stipulations and 3M Plans**

SNWA and Federal agencies executed two stipulations: the Spring Valley Stipulation and the DDC Stipulation.<sup>77</sup> The State Engineer entered both as exhibits for the 2011 hearing. The Spring Valley Stipulation contained both a Hydrologic 3M Plan and Biologic 3M Plan as Exhibits A and B of the Stipulation, respectively. The DDC Stipulation contained its 3M Plan as Exhibit A therein. As the State Engineer found in Ruling 6164, “By its terms, the Stipulation, and its exhibits, set forth the guidelines for the elements of the monitoring plan [3M Plan].”<sup>78</sup>

In the 2011 hearing, SNWA submitted into evidence detailed 2011 3M Plans.<sup>79</sup> SNWA stated, in their Spring Valley Hydrologic 2011 3M Plan, that “Exhibit A to the Stipulation requires development of a hydrologic monitoring plan.”<sup>80</sup> The Spring Valley Biological 2011 3M Plan stated, “The Spring Valley Biological Monitoring Plan (3M Plan) is a component of a stipulated agreement” between SNWA and Federal agencies.<sup>81</sup> The title bore its purpose: “Biological Monitoring Plan for the Spring Valley Stipulation.”

The same was true for the 2011 DDC 3M Plans. The 2011 DDC Hydrologic 3M Plan stated, “Exhibit A to the Stipulation requires development of a hydrologic monitoring plan.”<sup>82</sup> The DDC Biological 3M Plan stated, “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.<sup>83</sup> Appendix A of Exhibit 366 is the DDC Stipulation. Similar to the Spring Valley 3M Plan, the DDC Plan’s title bore its purpose: “Biological Monitoring Plan for the Delamar, Dry Lake and Cave Valley Stipulation.”

As the State Engineer previously found, the “the Stipulation is important to the consideration of the Applications for a number of reasons.”<sup>84</sup> The State Engineer listed the following reasons:

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

---

<sup>77</sup> The Spring Valley Stipulation is marked as SE Exh 41. The DDC Stipulation (or Stipulation for Delamar, Dry Lake, and Cave valleys) is marked as SE Exhibit 80.

<sup>78</sup> SE Exh 140, Ruling 6164, p. 104. This statement was also used in Rulings 6165, 6166, and 6167.

<sup>79</sup> SNWA Exh148, 149, 365, 366.

<sup>80</sup> SNWA Exh 149 at 5.

<sup>81</sup> SNWA Exh 365 at 1-1.

<sup>82</sup> SNWA Exh 148 at 5.

<sup>83</sup> SNWA Exh 366 at 1-1.

<sup>84</sup> SE Exh 140, Ruling 6164, pp. 103-104. This statement was also used in Rulings 6165, 6166, and 6167.

Applications will not conflict with existing water rights or with protectable interests in existing domestic wells.<sup>85</sup>

The State Engineer also previously found that the Stipulations, referencing in particular the 3M Plans attached as exhibits, “established a technical framework and structure” and “management elements” for the 2011 3M Plans.<sup>86</sup> “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].”<sup>87</sup> Moreover, these “technical review teams . . . work together to accomplish the goals of the Stipulation.”<sup>88</sup> The State Engineer also previously found in Ruling 6164, under “Compliance with the Federal Stipulation,” 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.”<sup>89</sup> The BWG meetings developed and implemented the Biological Monitoring Plan (“BMP”).<sup>90</sup> The State Engineer finds that these working groups, technical teams, and committees remain a vital part of the Stipulation and its requirements.

In granting SNWA’s Applications in Ruling 6164-6167, the State Engineer ruled that the Applications were “conditioned upon the Applicant’s compliance with that Plan [3M Plans].”<sup>91</sup> For the 2017 hearing on remand, SNWA submitted into evidence two 2017 3M Plans (Spring Valley 3M Plan and DDC 3M Plan, both dated June 2017).<sup>92</sup> These 2017 3M Plans replace the previous 2011 3M Plans.<sup>93</sup> SNWA has asked the State Engineer “To accept the two 3M Plans [the 2017 3M Plans] as a component of the permit terms so that the compliance of these plans are part of the permit terms for the permits.”<sup>94</sup> Accordingly, the State Engineer finds he must rely on the 2017 3M Plans to determine whether SNWA has complied with the District Court’s remand order and whether they can be used as conditions of SNWA groundwater permits.

## **B. Defining Unreasonable Effects**

The District Court found that in Rulings 6164-6167, the State Engineer “avoided any mention of what is unreasonable” in terms of effects from SNWA pumping. “Nor did he state . . . what constitutes an impact, potential or otherwise. There is no standard to know how much of an impact is unreasonable . . . before mitigation is necessary.” The Court continued, saying that

---

<sup>85</sup> SE Exh 140, Ruling 6164, p. 104.

<sup>86</sup> SE Exh 140, p. 104.

<sup>87</sup> SE Exh 140, p. 104.

<sup>88</sup> SE Exh 140, p. 104.

<sup>89</sup> SE Exh 140, p. 179.

<sup>90</sup> SE Exh 140, p. 179.

<sup>91</sup> SE Exh 140, p. 217. This statement was also used in Rulings 6165, 6166, and 6167.

<sup>92</sup> SNWA Exh 592: Spring Valley 3M Plan; SNWA Exh 593 DDC 3M Plan.

<sup>93</sup> SNWA Exh 592, p.1-2; the 2011 3M Plans are marked as SNWA Exh 365, 366, 148, 149;

<sup>94</sup> Transcript p. 334.

there was “no real plan or standard of when mitigation would be implemented. Without a stated, objective standard, the ruling is arbitrary or capricious.”<sup>95</sup> Thus, the State Engineer is obligated to determine whether SNWA specifically stated and defined what constitutes unreasonable effects and to determine whether the definition of unreasonable effects is objective, in accordance with the remand order, and otherwise not arbitrary and capricious.

In so doing, the State Engineer notes that the original language of “unreasonable effects” comes from the Stipulations between SNWA and Federal agencies. Recital G of the Spring Valley Stipulation provides the first “common goal of the Parties” is to “manage the development of groundwater by SNWA in the Spring Valley HB without causing injury to Federal Water Rights and/or unreasonable adverse effects to Federal Resources in the Area of Interest.”<sup>96</sup> Recital H uses similar language but aims to more specifically “avoid unreasonable adverse effects to wetlands, wet meadow complexes, springs, streams, and riparian and phreatophytic communities (hereafter referred to as Water-dependent Ecosystems) and maintain the biological integrity and ecological health of the Area of Interest over the long term.”<sup>97</sup> Exhibit A and B to the Stipulation, the 3M Plans which were expressly “attached to the Stipulation and made a part thereof,” also referenced these. What constitutes “unreasonable effects” was never fully defined in the Stipulation. But synonyms were provided, including: “avoid injury” and “avoid and/or mitigate any effects” and “biological integrity” and “ecological health.”<sup>98</sup> Though these are not the clear-cut standards the District Court is looking for, the State Engineer finds that to they are the proper starting point for what is unreasonable.

In response to the District Court’s remand order to define an unreasonable effect, SNWA rejected the Stipulation synonyms of “injury” and “any effects” and “biological integrity” and “ecological health.” Instead, SNWA provided in their 2017 3M Plans a much more detailed breakdown, crafting the following definition: “unreasonable effects are effects to hydrologic and environmental resources that

- a. conflict with senior water rights or protectable interests in existing domestic wells;
- b. jeopardize the continued existence of federally threatened and endangered species;
- c. cause extirpation of native aquatic-dependent special status animal species from a hydrographic basin’s groundwater discharge area;
- d. cause elimination of habitat types from a hydrographic basin’s groundwater discharge area; or
- e. cause excessive loss of shrub cover that results in extensive bare ground.”<sup>99</sup>

A more detailed explanation of and justification for these effects is provided in the 3M Plans’ companion document, “Technical Analysis Report Supporting the Spring Valley and Delamar,

---

<sup>95</sup> December 10, 2013 Decision at 17, CV-1204049 (7<sup>th</sup> Jud. Dist.).

<sup>96</sup> SE Exh 41, p. 4.

<sup>97</sup> SE Exh 41, p. 4.

<sup>98</sup> SE Exh 41, Exhibits A and B therein.

<sup>99</sup> SNWA Exh 592, p. 1-2.

Dry Lake, and Cave Valleys, Nevada, 3M Plans,” dated June 2017.<sup>100</sup> These definitions of unreasonable effects are, SNWA asserted, “in accordance with the Remand Order and Nevada water law.”<sup>101</sup>

The State Engineer disagrees. And the reasons are many.

First, we must look to the origin of use of the term “unreasonable effect,” as it relates to SNWA’s Applications. And, as mentioned, the term comes from the Stipulations between SNWA and Federal agencies. The Spring Valley Stipulation at Recital H provides one level of better understanding as to how to define unreasonable effects:

- (1) avoid unreasonable adverse effects to wetlands, wet meadow complexes, springs, streams, and riparian and phreatophytic communities (hereafter referred to as Water-dependent Ecosystems) and maintain the biological integrity and ecological health of the Area of Interest over the long term . . .*
- (2) avoid any effects to Water-dependent Ecosystems within the boundaries of Great Basin National Park.*<sup>102</sup>

The Spring Valley Stipulation at Exhibit B, under section Common Goals and section Mitigation Requirements, provides another:

- (1) avoid unreasonable adverse effects caused by such [SNWA] groundwater development to Water-dependent Ecosystems and maintain and/or enhance the baseline biological integrity and ecological health of the Area of Interest over the long term;*
- (2) avoid any effects to Water-dependent Ecosystems within the boundaries of Great Basin National Park;*
- (3) The Parties have determined it is in their best interests to cooperate in data collection and analysis related to groundwater levels and the maintenance of Water-dependent Ecosystems within the Area of Interest;*
- (4) The goal of the Parties is to avoid the aforementioned Water-dependent Ecosystem effects . . . [and they] shall make all reasonable efforts to achieve this goal. If this goal is not achieved, SNWA shall mitigate any Water-dependent Ecosystem effects so as to ensure the baseline biological integrity and ecological health of Water-dependent Ecosystem are maintained and/or enhanced over the long term.*<sup>103</sup>

Accordingly, the State Engineer finds that the Stipulations provided key information about what constituted an unreasonable effect. In part, the Stipulations foresaw an unreasonable effect to be

---

<sup>100</sup> SNWA Exh 507, pp. 2-2 – 2-4.

<sup>101</sup> SNWA Exh 592, pp. 1-3.

<sup>102</sup> SE Exh 41, p. 4.

<sup>103</sup> SE Exh 41, Exhibit B therein at pp. 2 and 10.



any adverse effect, reasonably attributable to SNWA's GDP pumping, below baseline conditions of Federal Water Rights, Federal Resources, Water-dependent Ecosystems, and the biological integrity and ecological health of Spring Valley.

Second, the District Court's remand order specifically highlighted the three principal components of the 3M Plans attached as Exhibits to the Stipulations, which referenced the goals set forth in Recital H.<sup>104</sup> In doing so, the remand order was clear in directing SNWA and the State Engineer as to the first steps in defining unreasonable effects.

Third, SNWA set unreasonable effects to be, in no uncertain terms, catastrophic harm. The greatest possible impact—in other words, the most extreme effect possible. Before SNWA would classify an impact to be an unreasonable effect, they or the State Engineer would have to demonstrate that SNWA pumping caused an endangered species to be in jeopardy of extinction, or caused the extirpation of a water-dependent species, or caused the complete elimination of habitat areas like Swamp Cedars from Spring Valley, or some other extreme effects. Regarding habitat areas, SNWA expert witness Mr. Zane Marshall testified that the 3M Plans' "standard is a basin-wide standard that's intended to ensure that we don't lose habitats . . ." <sup>105</sup> However, for habitat areas like Swamp Cedars, which SNWA termed "terrestrial woodland habitat" in their Spring Valley 3M Plan, SNWA defined an unreasonable effect to be "elimination of terrestrial woodland habitat from Spring Valley groundwater discharge area." <sup>106</sup>

Why SNWA defined unreasonable effects for Swamp Cedars, for example, to be total elimination of Swamp Cedars defies reason. Tribal witness Dr. Monte Sanford provided substantial evidence that Swamp Cedars is an Indian ceremonial gathering area and tribal cultural use area, a site of the largest massacre of Indian people in US history, a site of three Indian massacres at times of their ceremonial gatherings, a site where the swamp cedar trees are the spiritual embodiment of their slain ancestors, a place where the spring waters is for special medicine and healing, and also a site formally listed on the National Register of Historic Places.<sup>107</sup> Goshute Tribal elder Rupert Steele testified that the die-off of swamp cedars from SNWA pumping would have an "adverse effect on our way of life. The effects are the trees ability to heal, the affects of plants ability to heal. It . . . does not have that vigor and life to provide that healing. Healing proper[ties] that we call upon when we use those in our medicinal use and ceremonies. It would have an adverse effect on, on our way of living." <sup>108</sup> Similarly, regarding the die-off of swamp cedars trees from groundwater pumping, Goshute Tribal Chairman Virgil Johnson testified that "It would be catastrophic. . . . And we would rather not face that catastrophic event because it will effect us as Native Americans in that area." <sup>109</sup>

When the Protestant Tribes questioned SNWA witness Mr. Marshall whether there was "any tribal input in developing this definition," Mr. Marshall conceded: "Not directly, no." <sup>110</sup>

---

<sup>104</sup> See for example, SE Exh 41, Exhibit B therein at pp. 1-2. Also see DDC Stipulation.

<sup>105</sup> Transcript vol. 1, p. 369.

<sup>106</sup> SNWA Exh 592, pp. 3-41 and 3-43 and 3-45; SNWA Exh 507, Section 2.2.

<sup>107</sup> CTGR Exh 21; CTGR Exh 22, Appendix A; Transcript pp. 1486-1493.

<sup>108</sup> Transcript, p. 1608.

<sup>109</sup> Transcript, p. 1609.

<sup>110</sup> Transcript, p. 882.

Mr. Marshall then seemed to suggest that he considered indirect input—“from the perspective of input from the Tribes from previous hearings and the concern raised regarding the Swamp Cedar area of critical environmental concern, this list of [un]reasonable effects includes that consideration.”<sup>111</sup> Mr. Marshall conceded that SNWA was the sole decision maker in crafting the definition of unreasonable effects and that SNWA did not meet with or seek input from any Tribal representatives in the development of the 2017 3M Plans.<sup>112</sup> And Mr. Steele’s testimony validated the fact that the Tribes were not consulted regarding SNWA’s new 2017 3M Plans.<sup>113</sup>

The State Engineer finds that because SNWA gathered no input from the Tribes in determining what constituted an unreasonable effect for Swamp Cedars and other Tribal cultural areas and habitat types, then SNWA’s standard and definition of unreasonable effects is neither sound nor environmentally sound nor in accordance with laws and regulations nor in accordance with applicable conservation and management plans for these habitats and species of concern potentially affected by the SNWA groundwater pumping. The State Engineer agrees with the Tribes that the definition for unreasonable effects, particularly for Swamp Cedars and other habitat areas and species of concern, is set to a catastrophic level. The State Engineer finds that the definition of (or standard for) unreasonable effects is not reasonable to a rational mind, is extreme and unrational, not objective, arbitrary and capricious.

This finding applies to both SNWA’s 2017 3M Plans, the Spring Valley 3M Plan and the DDC 3M Plan.<sup>114</sup>

### **C. Thresholds and Triggers for Mitigation of Unreasonable Effects**

Because SNWA’s definition of unreasonable effects was arbitrary and capricious, any subsequent thresholds or triggers set for management and mitigation are also thereby arbitrary and capricious. And there are other issues with the thresholds and triggers.

For example, in northern Hamlin and Southern Snake Valleys, SNWA will monitor Big Springs, Dearden Springs, and Clayton Springs North for the rare and endemic spring snail *Pyrgulopsis anguina*. These are the only places where the snail lives. The monitoring data that will be collected on this species will be presence/absence data. What happens if the snail populations drop by 50%? By 90%? What if only one snail remains in each spring? We do not know because it is not in the 3M Plan. Investigation and management apparently would not be triggered even if there were no spring snails left in any of the three springs. Investigation of the snail will be triggered only if monitoring well 383533114102901 is triggered presumably by its water level and no other parameter. But that trigger is not apparent in the section that describes

---

<sup>111</sup> Transcript, p. 882.

<sup>112</sup> Transcript, p. 883-884.

<sup>113</sup> Transcript, p. 1605.

<sup>114</sup> SNWA Exh 507, p. 1-2; SNWA Exh 592, p. 1-2; SNWA Exh 593, p. 2-2 – 2-4.

triggers for the snail, Section 3.4.2.1 and Table 3.10 of the Spring Valley 3M Plan.<sup>115</sup> “If investigation indicates cause of water level change at monitor well 383533114102901 is the result of SNWA GDP pumping, SNWA will conduct annual presence/absence monitoring of the longitudinal gland pyrg [*Pyrgulopsis anguina*] at Big Springs, Dearden Springs, and Clayton Springs North.”<sup>116</sup> The mitigation trigger then turns back to hydrologic data at some other site known as HAM1008M.<sup>117</sup> And mitigation actions are then to provide collaboration and funding. Collaboration and funding for water availability. Collaboration and funding for habitat improvements. Collaboration and funding for habitat expansion and habitat creation. Collaboration and funding for establishing habitat or populations elsewhere.<sup>118</sup> According to the Oxford Dictionary, mitigation is defined as “the action of reducing the severity, seriousness, or painfulness of something.” Collaboration and funding are not mitigation. Accordingly, the State Engineer finds that SNWA’s investigation, management, and mitigation thresholds and triggers lack specifics as required by the District Court’s remand order. Furthermore, SNWA’s has left unknown what they will do with the presence/absence data of the spring snail, or how that data will feed into investigation, management, and mitigation efforts. These issues must be specified in order to comply with the Court’s order and approved by the State Engineer.

Swamp Cedars is another example. Swamp Cedars is what SNWA terms “terrestrial woodland habitat.”<sup>119</sup> SNWA will focus its monitoring and mitigation on the Swamp Cedars Area of Critical Environmental Concern (ACEC) and the SNWA-owned “Osceola Property.” About 40% (1,500 acres) of the terrestrial woodland habitat is the Swamp Cedars ACEC.<sup>120</sup> The Osceola Property is less than half the size of the Swamp Cedars ACEC.<sup>121</sup> A total area—by rough approximation—of about 2,250 acres. However, the Swamp Cedars Massacre Site *Bahsahwahbee* listed on the National Register of Historic Places is 14,175 acres,<sup>122</sup> which wholly encompasses the Swamp Cedars ACEC. And even though these 14,175 acres are not all swamp cedar woodlands, there are significant areas outside of the ACEC to the north that are swamp cedar woodlands or other sacred and ceremonial areas needed for the continuance of Tribal traditional and ceremonial activities.<sup>123</sup> These were not included in SNWA’s 3M Plans.

As to the thresholds and triggers for the Swamp Cedars ACEC, two points must be highlighted. First, “the investigation trigger is activated if any tree-covered area for the Swamp Cedar ACEC, compared to the baseline maximum tree cover area, falls within 5% of the lower limit of the baseline percent range in cover.”<sup>124</sup> The maximum baseline tree cover area is 44 acres, and SNWA set the investigation trigger at 35 acres, a 20% difference.<sup>125</sup> Given the testimony

---

<sup>115</sup> SNWA Exh 592, p. 3-49 and 3-51.

<sup>116</sup> SNWA Exh 592, p. 3-52.

<sup>117</sup> SNWA Exh 592, p. 3-53.

<sup>118</sup> SNWA Exh 592, p. 3-55.

<sup>119</sup> SNWA Exh 592, p. 2-48.

<sup>120</sup> SNWA Exh 592, p. 3-41.

<sup>121</sup> SNWA Exh 592, p. 2-43, Figure 2-16.

<sup>122</sup> CTGR Exh 21, p. 33.

<sup>123</sup> CTGR Exh 21.

<sup>124</sup> SNWA Exh 592, p. 3-42.

<sup>125</sup> SNWA Exh 592, p. 3-43.

from the Tribes as to the greater region and significance of *Bahsahwahbee*, the State Engineer finds the investigation trigger for Swamp Cedars is not based on substantial evidence and disregards Tribal and public interest of *Bahsahwahbee* as a National Historic Property.

The second point regarding thresholds and triggers involves the mitigation trigger for Swamp Cedars. As stated in the Spring Valley 3M Plan, “the mitigation trigger is activated if annual tree-cover area for the Swamp Cedars ACEC, compared to the baseline maximum tree cover area, falls below the lower limit of the baseline percent range in cover for a period of five consecutive years as a result of SNWA GDP pumping.”<sup>126</sup> On cross-exam of Mr. Marshall, the Tribes demonstrated, with Marshall conceding, that a 100% of the swamp cedars woodland could be eliminated before the mitigation trigger was activated, before SNWA would be required to mitigate.<sup>127</sup> Based on Figure 3-8 of the Spring Valley 3M Plan, the baseline maximum tree cover area is 44 acres. The lower limit of the baseline percent range in cover is 25%. If swamp cedars woodland area drops 25% for four consecutive years, then that is a 100% loss—SNWA’s unreasonable effect. SNWA would not be required to mitigate, per the 3M Plan, unless after the fifth year there were still no swamp cedar trees **and** SNWA found that the loss of the swamp cedars was caused by SNWA GDP pumping. Accordingly, the State Engineer finds this mitigation trigger to be unsound, not based on substantial evidence, and not reasonable to a rational mind. The mitigation trigger is arbitrary and capricious.

These finding applies to both SNWA’s 2017 3M Plans, the Spring Valley 3M Plan and the DDC 3M Plan.<sup>128</sup>

A third point that must be clarified in the 3M Plans is specific, objective details on how it will be determined that hydrological and environmental effects will be attributable to SNWA GDP pumping. As is the 3M Plans leave this to be decided by SNWA. Without specific, objective details on how this will be accomplished, the investigation and management and mitigation triggers and thresholds remain arbitrary and capricious.

#### **D. Stipulation Components Lost in the 2017 3M Plans**

The original 3M Plans were exhibits to the Stipulations and made a part thereof. The SNWA’s 2017 3M Plans are a part of the Stipulations, but are also intended to address the District Court’s remand order. However, critical elements of the original 3M Plans were not included in the 2017 3M Plans. For example, Protestant Tribes questioned Mr. Marshall about a technical review panel, biological working group, and executive committee that were established in the original 3M Plans of the Stipulations.<sup>129</sup> Mr. Marshall admitted that the technical review panel, biological working group, and executive committee were not included in the 2017 3M Plans for Spring Valley and DDC Valleys.<sup>130</sup>

---

<sup>126</sup> SNWA Exh 592, p. 3-42.

<sup>127</sup> Transcript, pp. 886-891.

<sup>128</sup> SNWA Exh 507, p. 1-2; SNWA Exh 592, p. 1-2; SNWA Exh 593, p. 2-2 – 2-4.

<sup>129</sup> SE Exh 41, Exhibits A and B therein; SE Exh 80, Exhibit A therein.

<sup>130</sup> Transcript, pp. 880-881.

In the Tribes' closing statement, they asserted that the State Engineer has the authority to enforce the terms of the Spring Valley and DDC Stipulations. They cited Nevada Administrative Code (NAC) 533.310 regarding Stipulations, which provides: 1) With the approval of the State Engineer, the parties may stipulate to any fact in issue, either by a written stipulation introduced into evidence as an exhibit or by an oral statement entered in the record; 2) Such a stipulation is binding only upon the parties to the stipulation and is not binding on the State Engineer; 3) The State Engineer may require proof by independent evidence of the stipulated facts. (Added to NAC by St. Engineer, eff. 2-8-95.) The State Engineer agrees with the Tribes so far as he grants SNWA Applications and makes the 3M Plans part of permit terms and conditions. Further, the State Engineer finds that the technical review panel, the biological working group, and the executive committee were essential parts of the Stipulations. He also finds that because they were not included in the 2017 3M Plans, these Plans lack oversight and transparency and a process for resolutions for the SNWA 3M Plans and processes. Dropping these essential parts of the original 3M Plans is unsound, an abuse of discretion, and arbitrary and capricious.

The Tribes contend that SNWA has violated the terms of the Stipulations. First, the Tribes stated in their closing that the Stipulations "required the Department of Interior Bureaus and SNWA to jointly or – to jointly explain or defend this stipulation and Exhibits A and B to the State Engineer."<sup>131</sup> The Tribes noted that the Federal bureaus were absent both the 2011 hearing and 2017 hearing.<sup>132</sup> The Tribes also claimed that no changes to the Stipulations can be without written agreement.<sup>133</sup> Mr. Marshall admitted that there had not been any written agreement.<sup>134</sup> As such, the Tribes assert that "Because the proposed [2017] 3M Plans were developed and submitted in direct violation of the clear requirements of the stipulations, they are deficient as a matter of law and therefore be rejected by the State Engineer."<sup>135</sup>

The State Engineer agrees and finds that before he can approve the Applications, the new proposed 3M Plans must be in accordance with the Stipulations, complying with all terms and conditions and exhibits attached thereto.

## CONCLUSION OF LAW

### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination under NRS Chapters 533 and 534.

### II.

---

<sup>131</sup> Transcript, p. 2033; SE Exh 41, p. 9; SE Exh 80.

<sup>132</sup> Transcript, p. 2033.

<sup>133</sup> Transcript, p. 2033; SE Exh 41, p. 12; SE Exh 80.

<sup>134</sup> Transcript, p. 779-880.

<sup>135</sup> Transcript, p. 2034.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:

- A. There is no unappropriated water at the proposed source;
- B. The proposed use or change conflicts with existing rights;
- C. The proposed use or change conflicts with protectable interests in existing domestic wells as set forth in NRS § 533.024; or
- D. The proposed use or change threatens to prove detrimental to the public interest.

The State Engineer concludes, based on the above findings, that there is no unappropriated water for export from the subject basins, that there is substantial evidence that the proposed use will conflict with existing rights and protectable interests in existing domestic wells, and that the proposed use of the water threatens to prove detrimental to the public interest; thus, under NRS § 533.370(5), the law mandates denial of the water rights applications.

### **III.**

In determining whether an application for an interbasin transfer of groundwater must be rejected, the State Engineer shall consider:

- A. Whether the applicant has justified the need to import the water from another basin;
- B. If the State Engineer determines that a plan for conservation of water is advisable for the basin into which the water is to be imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out;
- C. Whether the proposed action is environmentally sound as it relates to the basin which the water is to be exported;
- D. Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and
- E. Any other factor the State Engineer determines to be relevant.

The State Engineer concludes that, based on the findings, the Applicant's use of water is not environmentally sound as it relates to the basin of origin.

### **IV.**

The State Engineer also concludes that, based on the finds, the SNWA has not complied with the District Court's remand order.

## **RULING**

The protests to Applications 54003-54021, inclusive, and Applications 53987-53992, inclusive, are hereby upheld. Applications 54003-54021, inclusive, and 53987-53992, inclusive, are hereby denied.

Respectfully submitted,

---

JASON KING, P.E.  
State Engineer

Dated: January 19, 2018

Submitted by:

By: \_\_\_\_\_

Paul C. Echo Hawk  
Echo Hawk Law Office  
P.O. Box 4166  
Pocatello, Idaho 83205

Attorney for Protestant Confederated Tribes of the Goshute Reservation,  
Protestant Ely Shoshone Tribe, and Protestant Duckwater Shoshone Tribe

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing PROPOSED RULING OF THE CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION, ELY SHOSHONE TRIBE, AND DUCKWATER SHOSHONE TRIBE was served on the following counsel of record by depositing the same for mailing, at Pocatello, Idaho, with the United States Postal Service and addressed to the following:

Paul G. Taggart, Esq.  
Taggart & Taggart, Ltd.  
108 North Minnesota Street  
Carson City, Nevada 89703

Dana R. Walsh, Esq.  
Southern Nevada Water Authority  
1001 South Valley View Boulevard, MS #485  
Las Vegas, Nevada 89153

Severin A. Carlson  
Kaempfer Crowell  
50 West Liberty Street, Suite 700  
Reno, Nevada 89501

Paul R. Hejmanowski  
Hejmanowski & McCrea LLC  
520 S 4<sup>th</sup> Street, Suite 320  
Las Vegas, Nevada 89101

Scott W. Williams  
Curtis Berkey  
Berkey Williams, LLP  
2030 Addison Street, Suite 410  
Berkeley, California 94704

Simeon Herskovits  
Iris Thornton  
Advocates for Community & Environment  
P.O. Box 1075  
El Prado, New Mexico 87529

Rob Dotson  
Dotson Law  
One East First Street, 16<sup>th</sup> Floor  
Reno, Nevada 89501

J. Mark Ward  
Utah Association of Counties  
5397 Vine Street  
Murray, Utah 84107

John Rhodes  
Rhodes Law Offices, Ltd.  
P.O. Box 18191  
Reno, Nevada 89511

Attention: Jerald Anderson  
EskDale Center  
1100 Circle Drive  
EskDale, Utah 84728

DATED this 19<sup>th</sup> day of January 2018.

---

Paul C. Echo Hawk  
Echo Hawk Law Office