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October 6, 2017

Office of the State Engineer
Attn: Susan Joseph-Taylor, Deputy Administrator
901 S. Stewart Street, Suite 2002
Carson City, Nevada 89701

RE: Southern Nevada Water Authority water right applications being heard on remand

To Whom It May Concern:

The Eureka County Board of Commissioners provides the following input regarding the Southern Nevada Water Authority (SNWA) water right applications, being heard on remand, in Spring, Cave, Dry Lake, and Delamar valleys. We ask that the State Engineer consider and adopt these comments.

Eureka County Would Be Affected By Approval of the Applications

While the SNWA applications are not in Eureka County, the applications do affect Eureka County. First and foremost, the issue of approving applications that conflict with existing rights by requiring a monitoring, management, and mitigation plan (3M plan) is coincident and nearly identical to the same issue with the Kobeh Valley Ranch applications recently vacated through litigation that finalized just last week in the Nevada Supreme Court. Second, as a member of the Central Nevada Regional Water Authority (CNRWA), we have committed ourselves to CNRWA's mission "to protect the water resources in member counties so these counties will not only have an economic future, but their valued quality of life and natural environment is maintained." As such, we stand with the directly affected counties to protect their water resources and defend against their water being exported. Third, opening opportunities for large water users and purveyors to export water from rural Nevada is not bound to just the applications at hand and will have ripple effects well beyond the SNWA applications being considered. Because we could very easily find ourselves in a similar situation in Eureka County, we must defend against the precedent of rural residents being told they must accept unavoidable large-scale large-impacts to the water and water dependent resources required to maintain their livelihood in order to feed unfettered urban growth.

Legally Questionable Use of 3M Plan and Mitigation

In the above referenced Kobeh Valley Ranch (KVR) water rights case, the Nevada Supreme Court twice weighed in on the ambiguity of the State Engineer being legally authorized to conditionally grant water rights applications on the basis of future successful mitigation through a 3M plan. First, in 2015, the Supreme Court stated:

"The State Engineer and KVR submit that the State Engineer may conditionally grant proposed use

or change applications on the basis of future successful mitigation, thereby ensuring that the new or changed appropriation does not conflict with existing rights, in accordance with NRS 533.370(2). This court has never addressed whether the statute may be read in this manner, and we need not do so at this time." (*Eureka Cnty v. State Eng'r,* 131 Nev. Adv. Op. 84).

Just last week the Supreme Court referenced its 2015 Opinion and noted:

> "We acknowledged our concern that the State Engineer may have exceeded his authority by considering mitigation at all, but we did not reach that issue." (*State Eng'r v. Eureka Cnty* 133 Nev. Adv. Op. 71).

The fact that the Supreme Court provided reference to this issue—twice—when it could have easily remained silent in referencing it at all forewarns about what we argue is the lack of authority for the State Engineer to approve applications that will conflict with existing rights regardless of a 3M plan that would mitigate conflicts.

We assert that it is a misuse of 3M Plans to be used in the way SNWA proposes. There is no doubt conflicts with existing rights will occur if SNWA's applications are approved. It is apparent SNWA has not done the ground-work necessary including:

a) Configuring points of diversion and diversion rates of proposed wells to eliminate conflicts;
b) Improve water-use efficiency to eliminate the conflicts; or
c) Work cooperatively with existing water rights holders (including domestic well owners) to resolve conflicts, by mutual agreement, before the applications were considered by the State Engineer.

Approval of SNWA's applications would bypass these best management practices through "mitigation first" rather than "avoid conflicts" thereby paying lip service to the prior appropriation doctrine in name only.

SNWA was fully empowered to develop the 3M plan without consideration of the conflicted water rights holders whatsoever. The big problem is an unresolved issue that will come up if the applications are approved. SNWA pumping will create a conflict and the conflicted water right holder will object to the mitigation. What happens next? Is the objecting water rights holder relegated to much expense and effort litigating a mitigation measure they disagree with? How is this protection of their water right? If a known conflict will occur, the application must be denied.

Eureka County supports use of water monitoring, management, and mitigation plans (3M plans). This is evidenced in the legislation we spearheaded in the 2013 session (SB 133) that creates the only reference in the Water Law to 3M plans and the State Engineer's apparent ability to require "a monitoring, management and mitigation plan as a condition of appropriating water for a beneficial use" (NRS 533.353). We agree that mitigation must be part of the equation in managing Nevada's scarce water resources, but it should be a tool of last resort. **Mitigation is only appropriate to address impacts that come to pass over time that were not known, or were not likely or probable, or were not predicted or highly certain when the water rights applications were considered**. 3M plans should only be used to ascertain, identify, and mitigate unknown or highly uncertain impacts; not the known, predicted, or highly certain impacts of a new water application. Some impacts and conflicts can be predicted to a high

degree of certainty based on the data considered and an understanding of the hydrogeology of the area.

Proposed Mitigation through Replacement/Substitute Water

SNWA proposes to provide replacement/substitute water as a mitigation option. There are many substantial issues with this concept.

The replacement/substitute water concept has major takings implications, especially related to impacts on vested rights. In the Kobeh Valley case, the Nevada Supreme Court stated there needed to be evidence before the State Engineer of what the mitigation would entail and whether it would indeed **"fully restore the senior water rights"** at issue. The Supreme Court was skeptical that mitigation water from a different source can adequately replace senior rights in all situations:

> "This is setting aside the further, specious assumption that water from a different source would be a sufficient replacement. Take, for example, the testimony given by an existing rights holder before the State Engineer that he had seen problems before with piping in water for animals because the pipes can freeze and interfere with the flow in the extreme winter cold. Given these, seemingly supported, concerns over such potential problems, it is therefore unclear that substitution water, if available, would be sufficient." *Eureka Cnty v. State Eng'r,* 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1119–20 (2015).

We understand that water rights are a usufructuary right but question whether certain rights such as vested surface water rights can be knowingly dried up with the anticipation that they will eventually be "replaced" with groundwater. We do believe that impacts to vested surface rights that crop up and were unknown at the time an application was considered can be made whole through mitigation with groundwater rights that are supplementary to the surface right but not a wholesale "replacement" of the underlying right. We argue that even though usufructuary rights, water rights are protected in their source (i.e., surface water).

Usufructuary rights are obtained in the public waters of the state. *State v. Sixth Judicial Dist. Court in & for Humboldt Cty.*, 53 Nev. 343, 1 P.2d 105, 107 (1931) ("Under a long line of decisions in this and other western states no title can be acquired to the public waters of the state by capture or otherwise, but only a usufructuary right can be obtained therein."). In *City of Santa Maria v. Adam*, 211 Cal. App. 4th 266, 296, 149 Cal. Rptr. 3d 491, 516 (2012), as *modified on denial of reh'g* (Dec. 21, 2012), the California Court explained a usufructuary water right as:

> "The right of using and enjoying and receiving the profits of property that belongs to another. ..." (Black's Law Dict. (6th ed. 1990) p. 1544, col. 2.) One commentator has explained that the usufructuary water right is the right to take water from the watercourse, or, as in our case, from the groundwater basin. (Anderson, *Water Rights as Property in Tulare v. United States* (2007) 38 McGeorge L.Rev. 461 (hereafter, Anderson).) "One uses a watercourse by diverting water from it. Diversion is the use, and the detached substance of the water is the 'fruit' that the running water yields...." (*Id. at p. 496*, fn. omitted.) Anderson argues that this usufructuary right is separate from the right that attaches once the water is diverted from its source. That is, the usufructuary right "is a right to use a watercourse, to avail oneself of its fruits by diversion, which thereafter provides (1) an opportunity (2) to use beneficially (3) the diverted water. The former is the use

entitled by the water ri[redacted] the latter, the use that is enabled by [redacted]exercise." (*Ibid.*) "Thus, a water right holder 'uses' a watercourse in precisely the same way that the holder of a profit à prendre 'uses' a servient tenement: by taking material from it." (*Id.* at p. 511, fn. 115.)

"A usufructuary water right is the right to take water from the water source; the water source is the property and the water itself is the 'profit' or fruit thereof. (Anderson, supra, 38 McGeorge L.Rev. at p. 496.) Once an appropriator diverts the water from the stream or pumps it from the ground, the right to the substance of the water is no longer usufructuary. Although the appropriator does not own the water in the sense of having title to the individual water molecules, the appropriator does have 'the sole and exclusive right to use the same for the purposes for which it was appropriated.'" *City of Santa Maria v. Adam*, 211 Cal. App. 4th 266, 301–02, 149 Cal. Rptr. 3d 491, 520 (2012), *as modified on denial of reh'g* (Dec. 21, 2012).

What happens to the prior right that is mitigated or the underlying right being "replaced? Is it forfeited (or abandoned)? What about the priority date of the "replaced" right including where a groundwater right is the date of the application but may be mitigating an older surface water right? The Supreme Court recently weighed in on the messiness of all of this in the Kobeh Valley Ranch case. It is so legally cumbersome that the only way to address this issue is to deny the applications.

Further, there are many cascading effects related to drying up of surface water and replacing with groundwater. For instance, ranchers are held accountable by federal land management agencies for grazing impacts to riparian areas adjacent to springs and streams. Many ranchers are already under a magnifying glass with grazing restrictions in these areas. Drying up of springs and placing water in a trough supplied with a well would create other undue regulatory impacts on rancher's grazing permits. This is in addition to the impacts to wildlife that rely on the vegetation around the springs. Also, in addition to the loss of forage around springs, wildlife, wild horses and livestock would be forced to increase grazing pressure in other areas to supplement forage lost around a spring thereby creating a feedback loop that was not the fault of the senior water rights holder.

Approval of the Applications Would Violate NRS 533.085

NRS 533.085 provides that nothing "shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired **or affected** by any of the provisions of this chapter..." (emphasis added). Nearly all, if not all, of the surface water in the basins at issue are vested prior to 1905, even if claims have not yet been filed on all of them. Impacts to surface water expressions due to SNWA groundwater appropriations will create impacts to and affect vested water rights (or claims). We argue that mitigation cannot occur on a vested right (or claim) without agreement by the vested right holder which is not guaranteed in SNWA's 3M plan. Additional legal questions arise such as can a vested right can be replaced with another source of water since vested rights have different classes of priority based on their source of water (pre-1905 for surface water and pre-1939 for groundwater). Also, if there is mitigation of undetermined claims of vested right, how will this have bearing on future adjudications?

Due to Identified Conflicts Den of Applications Is the Only Option

Based on our input above and the identified conflicts the SNWA applications would create if approved, the only viable option to address these concerns, issues, and legal implications is to deny the applications. The State Engineer must never support mitigation as justification to grant applications that conflict with existing rights. Mitigation should never be justification for unreasonable and conflicting appropriations of water. Granting a right of mitigation to any appropriator whose appropriation may conflict with an existing water right subverts the prior appropriation doctrine. We support the concept that mitigation, through 3M plans or otherwise, is appropriate for impacts and conflicts that occur or are identified over time which were not known or identified when water rights applications were first considered and approved. However, this is not the case with the SNWA applications at hand. Putting mitigation ahead of full protection of existing water rights abuses existing water right holders, ignores the hard work that proper management demands, and makes the State of Nevada pay lip service to the prior appropriation doctrine in name only.

Thanks you for taking into consideration our input on this important matter.

Respectfully,

J.J. Goicoechea, DVM, Chairman
Eureka County Board of Commissioners

Cc: Central Nevada Regional Water Authority