

Rose Strickland
619 Robinson Court
Reno, NV 89503

October 18, 2017

Susan Joseph-Taylor, Hearing Officer
Office of State Engineer
901 South Stewart St. #2002
Carson City, NV 89701

Re: Written comments on SNWA water right applications (#53987 - 53992 and #54003-54021) hearing on remand of State Engineer rulings #s 6164-6167

Dear Hearing Officer Taylor,

It is clear from the evidence submitted by the applicant and protestants at the remand hearing on the State Engineer's approval of water rights for Southern Nevada Water Authority's (SNWA) proposed exportation project that the project cannot meet the four basic requirements of Nevada water law, nor the additional NRS requirements for interbasin water transfers. Nor did SNWA provide any substantial evidence at the remand hearing on how the State Engineer could meet the four remand requirements ordered by Judge Estes on December 10, 2013. It became clear to some of us who attended or watched the recent remand proceedings that SNWA was unable to offer its recommendations on how the State Engineer responds to the remand orders because its exportation project simply cannot meet the legal requirements of Nevada water law.

For these written comments, I researched Judge Estes's ruling as well as 2 other more recent related rulings and a presentation by State Engineer Jason King on an Overview of Water Resource Issues. I urge the State Engineer to consider these judicial findings, both individually and cumulatively in developing his responses to Judge Estes's remand orders and to reconsider his current, if legally unsuccessful, approach to approve applications which conflict with existing water rights and simply require a monitoring, management and mitigation plan (3M Plan) to resolve the conflicts by the junior appropriator, without the consent of the existing water rights holder, other affected stakeholders (local governments, neighbors) and Nevada citizens.

Judge Robert Estes's remand ruling: The judge summarized his remand orders (p. 2): "...recalculation of water available from the respective basins; for additional hydrological study of Delamar, Dry Lake, and Cave Valleys; and to establish standards for mitigation in the event of a conflict with existing water rights or unreasonable effects to the environment or to the public interest." His ruling was based on his finding that there was "...not substantial evidence in the record to support the decision." I believe that this remains true as SNWA has not presented sufficient information to the State Engineer to be able to meet the remand requirements.

The judge found (p.18) that "...granting water to SNWA is premature without knowing the impacts to existing water rights's holders and not having a clear standard to identify impacts, conflicts, and unreasonable environmental effects so that mitigation may proceed in a timely manner." Thus the remand order followed: objective standards must be established and stated as to when mitigation must

occur. The judge did not accept the deferring by the State Engineer and SNWA of identifying and setting standards for specific mitigation, identified in 3M Plans (p. 16) stating "...Not knowing where or how bad an impact is, is not the same thing as defining what an adverse impact is." The judge also cited statements (p.12) by the State Engineer on what reasonable impacts are ("a drawdown of less than 50 feet over a seventy-five year period is generally a reasonable lowering of the static water table"), but noted an absence of any specifics on what unreasonable impacts would be. And, the judge found (p. 20-21) that "...the engineer has relinquished his responsibilities to others "...for monitoring and mitigation and that without standards, any decision to mitigate is subjective and thus, "arbitrary and capricious."

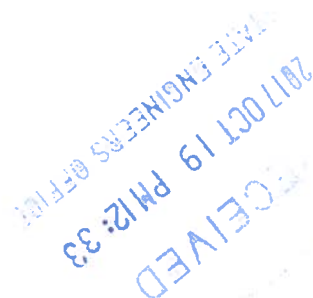
Judge Andrew Gordon ruling (8/23/17): The judge found in a legal challenge (Case No. 2:14-cv-00226-APG-VCF and Case No. 2:14-cv-00228-APG-VCF) to the Bureau of Land Management's (BLM) approval of the first phase of the massive water-redistribution pipeline that the "...BLM did not meet its obligations..." in 2 areas to mitigate certain types of lost habitat due to the extensive adverse environmental impacts of both the construction of the water pipeline as well as future groundwater pumping impacts. Because the EIS failed to explain how BLM or SNWA would mitigate the extensive losses of wetlands due to groundwater pumping, it violated the National Environmental Protection Act (NEPA) requirements for an EIS to at least discuss whether and how the project will comply with other environmental laws, specifically the Clean Water Act. Finding that (p. 27) "...It was therefore unreasonable for the BLM to embark on this project without determining, at least in broad strokes, how SNWA would replace or restore wetlands impacted by the project (or even whether compensating for the thousands of acres of destroyed wetlands is possible in the first place)," the judge remanded the EIS to the BLM for corrections. The judge also found (pp. 28-29) that the pipeline project does not comply with the specific requirement in the Ely Resource Management Plan that "...BLM must replace certain lost habitats (special status species, aquatic species) at a 2 to 1 ratio...a clear binding commitment on the agency." The judge stated "...On remand, BLM must consider how it might ensure compliance for all phases of the project with the clear-cut compensatory mitigation requirement established by the Ely RMP."

Nevada Supreme Court ruling (No. 70157 on 9/27/17): The NV Supreme Court affirmed the previous district court's order to vacate permits to the Kobeh Valley Ranch, LLC (KVR) because the State Engineer failed to rely upon substantial evidence that KVR would be able to mitigate conflicts to prior water rights (drying up one spring on which a local rancher depended for stockwater) when approving its applications.

Jason King, State Engineer, "Overview of Water Resource Issues" (2/8/16): The State Engineer made this presentation (<https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/2504>) on critical management area designations (any basin in which withdrawal of groundwater consistently exceed the Perennial Yield of the basin).

The State Engineer also presented a map (Attachment) of all of Nevada's basins with each basin color-coded into the following categories, from less than 100% appropriated to over 300% over-appropriated:

- purple: < 90% PY
- blue: +/- 10% PY
- green: ≥ 100% PY and < 200% PY
- yellow: ≥ 200% PY and < 300% PY
- red: > 300% PY



There were 28 basins in the 200-300% category and 28 basins in the over 300% category, for a total of 56 basins over-appropriated by over 200%. There was no information on why these basins were over-appropriated or if additional basins will be over-appropriated in the future, including Spring, Cave, Delamar and Dry Lake Valleys, my immediate concerns.

The State Engineer's Groundwater Management Plan, (presumably for over-appropriated basins):

1. Curtail pumping
2. Curtail pumping
3. Curtail pumping
4. Curtail pumping

The State Engineer made three statements on what he called "Adaptive Management:"

- Effects from large scale groundwater pumping projects, or groundwater pumping near environmentally sensitive areas, cannot be predicted with **absolute** certainty.
- Water right applicants and the State Engineer should be able to use Adaptive Management techniques, i.e. monitoring, management and mitigation, in order to best manage the state's water resources.
- Mitigating Conflicts: Legislative Policy - should a large project be denied because a small spring or a couple of domestic wells could be dried up (conflict), when those uses could be mitigated through other means?
 - Water haul
 - Deepened well
 - Money

While no legislation was passed and according to the referenced court rulings, the State Engineer appears to be using this approach of approving water applications despite their known conflicts with existing water rights, as well as extensive damages to the environment and contrary to the public interest by simply requiring a non-specific 3M Plan (similar to Adaptive Management) by the applicant which may or may not be effective, rather than denying these applications.

Unintended consequences:

Although this 3M Plan approach appears to be favored by the State Engineer and large project proponents such as SNWA, I ask that the State Engineer consider unintended consequences of replacing the prior appropriations doctrine in administering Nevada water law. Here are some of my thoughts on this:

- The current security in having senior water rights and in domestic wells, both of which are specifically protected by NRS, would be disrupted. Anyone could apply for groundwater permits next to a home or farm or business and the State Engineer, without the consent of the existing water and well users, could approve the applicant's 3M Plan and the applications, leading to a takings of some or all of the existing water uses.
- What would be the State's liability under subsequent lawsuits because of violations of due process as well as takings of citizens' water rights, especially vested water rights, by this type of

ruling by the State Engineer?

- Ineffective and unenforced 3M plans could lead to the catastrophic loss of water due to exportation and other projects which cannot be effectively mitigated.
- This approach paves the way for continual groundwater depletion and increasing numbers of over-appropriated basins in Nevada.
- Under this scenario, future water decisions would be based on promises in 3M Plans instead of science and the State water law requirements.

Thank you for considering my comments in developing your responses to Judge Estes's remand orders.

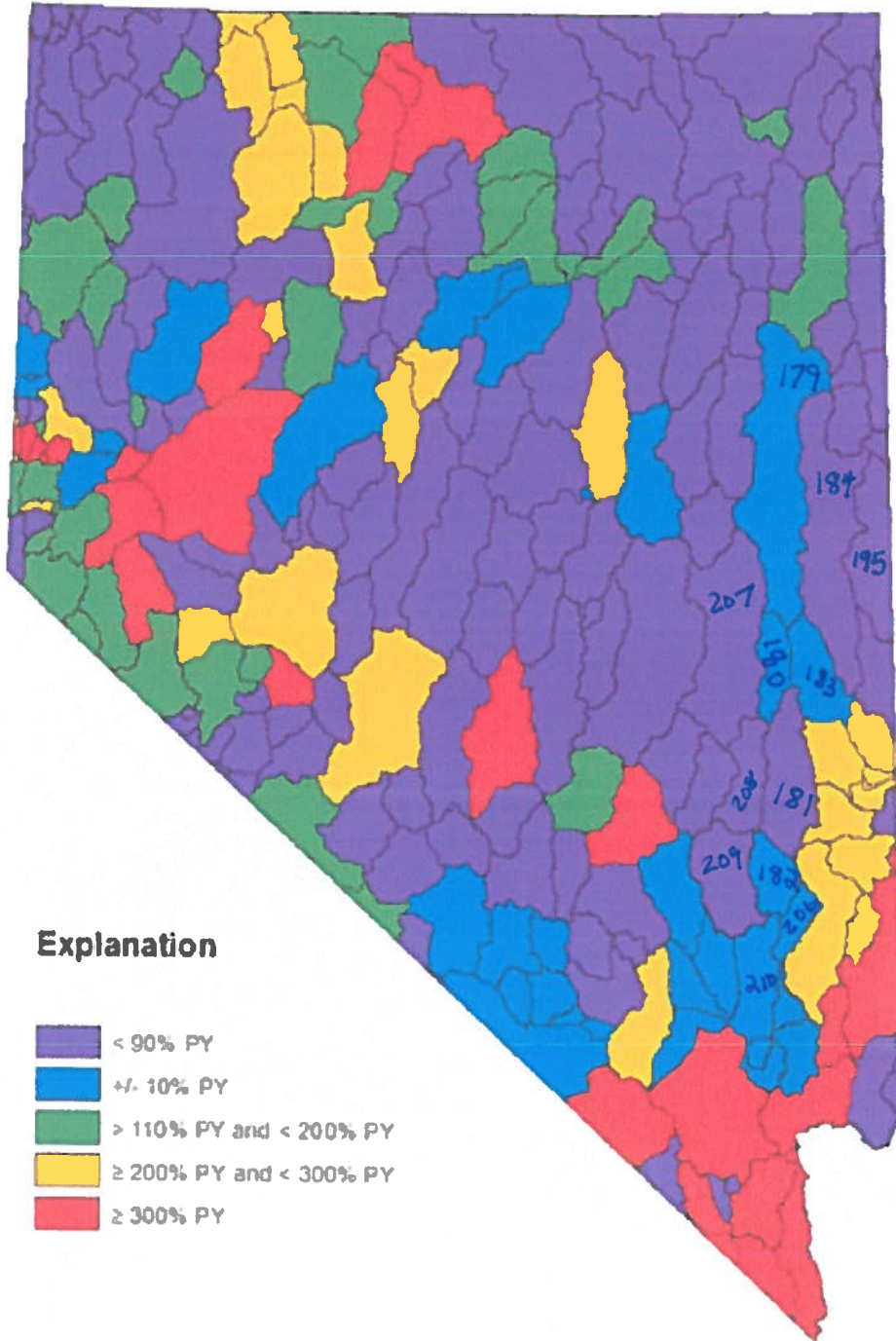
Sincerely,



Rose Strickland

Attachment

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