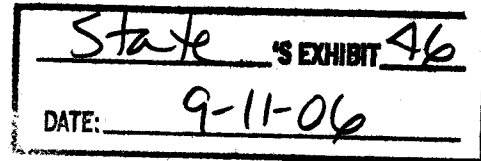


**BEFORE THE STATE ENGINEER, STATE OF NEVADA  
DEPARTMENT OF CONSERVATION AND NATURAL  
RESOURCES, DIVISION OF WATER RESOURCES**

IN THE MATTER OF APPLICATIONS  
53987 THROUGH 53992, INCLUSIVE,  
AND 54003 THROUGH 54030,  
INCLUSIVE, FILED BY LAS VEGAS  
VALLEY WATER DISTRICT TO  
APPROPRIATE THE UNDERGROUND  
WATERS OF DELAMAR VALLEY (182),  
DRY LAKE VALLEY (181), CAVE  
VALLEY (180), SPRING VALLEY (184),  
AND SNAKE VALLEY (195)  
HYDROGRAPHIC BASINS IN LINCOLN  
AND WHITE PINE COUNTIES, NEVADA

**OPPOSITION TO WESTERN  
ENVIRONMENTAL LAW CENTER'S  
PETITION FOR DECLARATORY  
ORDER TO RE-OPEN THE PROTEST  
PERIOD FOR APPLICATIONS IN THE  
DELAMAR, DRY LAKE, CAVE,  
SPRING, AND SNAKE VALLEYS**



COMES NOW, the Southern Nevada Water Authority (the "SNWA"), by and through its attorneys the law firms of KING & TAGGART, LTD and McQUAID BEDFORD & VAN ZANDT, LLP, and presents its Opposition to Petition for Declaratory Order to Re-open the Protest Period for Applications in the Delamar, Dry Lake, Cave, Spring, and Snake Valleys filed by the Western Environmental Law Center on behalf of the following persons and/or entities:

the Great Basin Water Network, Defenders of Wildlife, David C. Bagley, Clark W. Miles, Raymond E. Timm, Theodore Stazeski, Sheldon M. Edwards, Kathryn Hill, Kenneth F. Hill, Scotty Heer, Beth B. Anderson, Susan L. Geary, Donald W. Geary, Robert Ewing, Pamela and Bruce Jensen, Renee A. Alder, Robert J. Nickerson, Joyce B. Nickerson, Edward J. Weisbrot, Alexander Rose (in his capacity as Executive Director of the Long Now Foundation), Robert N. Kranovich, Pamela M. Pedrini, Rick Havenstrite, Terrence P. Marasco, Bryon Hamilton, John B. Woodyard, II, Laurie E. Cruikshank, Walter J. Benson, Selena L. Weaver, Mary E. Collins, Candi A. Ashby, Sally L. Gust, Bruce Ashby, Daniel Maes, Robert N. Marcum, Tara Foster, Donald A. Duff, Elisabeth A. Douglass, Jamie Deneris, Nomi Martin-Sheppard, Veronica F. Douglass, Abigail C. Johnson, Marie and James Jordan, Rutherford Day, the Great Basin Chapter of Trout Unlimited, Wilda K. Garber, the Utah Council of Trout Unlimited.

The subject petition for a declaratory order to re-open the protest period has no merit and should be dismissed by the State Engineer because: (1) the State Engineer has no authority to re-

open the protest period, to re-notice the Applications, or to accept untimely filed protests; (2) the statutory notice requirements for the Applications have been satisfied; and (3) Petitioners' claims of potential due process violations are not properly before the State Engineer, and otherwise have no merit.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. STATEMENT OF FACTS**

In October 1989, the Las Vegas Valley Water District ("LVVWD") filed a number of applications to appropriate groundwater in the Delamar, Dry Lake, Cave, Spring, and Snake Valleys in White Pine and Lincoln Counties in Eastern Nevada (the "Applications"). The SNWA is now the successor-in-interest to the Applications, all of which relate to SNWA's Clark, Lincoln and White Pine Counties Groundwater Development Project (the "Project"), which was proposed in order to develop and convey groundwater from seven hydrographic basins in northern Clark, central Lincoln and eastern White Pine Counties to SNWA purveyor members in the Las Vegas Valley and may, at the Lincoln County Water District's option, serve future customers in Lincoln County.

Pursuant to NRS 533.360 and subsequent to the filing of these Applications, the State Engineer caused notice of the Applications to be published once a week for four (4) consecutive weeks in a newspaper of general circulation and printed and published in the county where the water was to be appropriated. The Petitioners do not dispute that each of the subject Applications were noticed by the State Engineer in October of 1989. *See* Petition, at pgs. 9, 23.

The notice of the Applications (and amendments filed thereto) set forth all of the statutorily-required information, including that the application has been filed, the date of the filing, the name and address of the applicant, the name of the source of the appropriation, the

location of the place of diversion, and the purpose for which the water is to be appropriated. *See* NRS 533.360(1).

In response to the original notice of Applications, several of the Petitioners herein filed protests to the Applications, including the following: Rutherford Day (54003, 54004, 54005), Walter J. Benson (54021), James Jordan (54026), Marie Jordan (54022), Abigail C. Johnson (54006), Candi Ashby (54011), Sally Gust (54020), Bruce Ashby (54013), Tara Foster (54020), Rick Havenstrite (54014), Daniel Maes (54021), Selena Weaver (54018, 54019), Joanne Garrett (54027), Mary E. Collins (54017), and Robert Marcum (54019). The remaining Petitioners did not timely file written protests to any of the Applications.

On October 26, 2005, the State Engineer issued a Notice of Pre-Hearing Conference for water right Applications 53987-53992 and 54003-54029. The Notice indicates that the Pre-Hearing Conference was to be held on January 4, 2006. None of the above-referenced Petitioners who had not previously filed protests appeared at the pre-hearing conference.

By its Intermediate Order and Hearing Notice dated March 8, 2006, the State Engineer ordered that a hearing be held beginning Monday, September 11, 2006, on the Applications pertaining to the Spring Valley basin. Applications dealing with appropriations from the other basins were deferred to later dates.

The instant Petition was filed on July 6, 2006. The Petitioners' claims may be grouped into three categories. First are persons or entities who did not receive notice of the Applications because: (a) after 1989 they moved, purchased property, inherited property, changed legal status from minor to age of majority, or formed their organization, or (b) they lived outside the geographic area of the Applications. Second are persons who received notice of the Applications and filed protests, but who did not receive actual notice of the pre-hearing conference because

they changed their address and did not notify the State Engineer or because of alleged mail-handling problems at the Ely County, Nevada post offices. Third are persons who received notice of the Applications but did not respond for various reasons, e.g., they were confused by the process, too ill to participate, have moved outside of the vicinity of the Applications, are deceased, or have been discouraged from responding to the notice because of financial difficulty. None of these categories of Petitioners or their arguments justifies the reopening of the statutorily mandated protest period.

## II. ARGUMENT

### A. **The Petition Should Be Denied Because The State Engineer Has No Authority To Re-open The Protest Period, To Re-Notice The Applications, Or To Accept Untimely Filed Protests.**

Chapter 533 of the Nevada Revised Statutes allows any person interested in an application for a permit to appropriate water to file a written protest against the granting of the application, and requires that the protest be filed within thirty (30) days from the date of last publication of the notice of application. NRS 533.365(1). The Nevada Attorney General has previously opined that the State Engineer is without authority to receive and file such protests after the 30-day period for filing has elapsed. The Attorney General states:

The statute in this regard should be strictly construed, as the State Engineer has no inherent powers and, therefore, if any protests are tendered to you for filing after the statutory period of thirty days, you should not file the same or take any official cognizance thereof.

AGO No. 1922-97 (Feb. 23, 1922) (emphasis added); *see also* AGO No. 1963-99 (holding that a state agency, the Public Service Commission, does not have any inherent powers because “[a]ll its powers and jurisdiction, and the extent and nature of the same, must be found within the statutory or constitutional provisions creating it).

In *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743 (1996), the Supreme

Court of Nevada recognized the bounds of the State Engineer's authority. The Court rejected the argument that the State Engineer had the power to determine the policy considerations that define the public interest, and held that the State Engineer does not determine policy and cannot create new laws: "[W]e can find no indication that Nevada's legislature intended that the State Engineer determine public policy in Nevada by incorporating another state's statutes and vesting the state with the authority to reevaluate the political and economic decisions made by local government." 112 Nev. at 748-749. The Court concluded that the State Engineer did not commit a dereliction of duty by not including guidelines from another state's laws to define the public interest. *Id.* at 751.

Where, as here, the notice requirements for water appropriation applications are to be "strictly construed," and where the State Engineer "has no inherent powers," the State Engineer does not have authority to re-open the protest period, to re-notice the Applications, or to accept untimely filed protests. Any of these actions would both violate the terms of the notice statute and result in the State Engineer exceeding the limits of his authority. The statute and the interpretations of the same state unequivocally that the State Engineer is without authority to receive and file protests after the 30-day period for filing has elapsed. Put simply, the State Engineer does not have the inherent power to re-write Nevada Water Law so that untimely filed protests may be heard.

Accordingly, there is no basis in statute or case law to support the Petitioners' claim that the State Engineer has any authority to re-open the protest period, to re-notice the Applications, or to accept untimely filed protests.

**B. The Petition Should Be Denied Because The Statutory Notice Requirements For The Applications Have Been Satisfied.**

The Petitioners have not provided any facts which demonstrate that the SNWA has failed

to satisfy all of the statutory notice requirements for the subject Applications. The Petitioners argue, incorrectly, that the SNWA failed to satisfy the notice requirements because some of the Petitioners “never received [actual] notice of SNWA’s applications.”<sup>1</sup> Petition, pg. 2. The statute only requires that the applications be noticed *by publication* in the county where the water will be appropriated. NRS 533.460(1). WELC’s reference to notices to domestic well owners within 2500 feet of proposed wells for municipal use with a specified rate of diversion is unavailing because that statute was passed by the Legislature after 1989 and does not apply to SNWA’s applications. See NRS 533.360(3).

Given that the statute does not require the State Engineer to provide actual notice, but instead, notice by publication, the State Engineer is not required to guarantee: (1) that each person with a protectible interest be made aware of the applications; (2) that the county assessor’s office has accurate, up-to-date mailing addresses; or (3) that the United States Postal Service properly delivers the mail. Any claim that the State Engineer failed to provide adequate notice under NRS 533.360 should thus be rejected, and the Petition to re-open the hearings should be dismissed.

Petitioners also suggest that the statutory requirement for a timely protest need not apply where there is a long delay between the original filing of applications and the scheduling of a hearing for the same. There is no basis in Nevada Water Law or elsewhere for Petitioners’ claim that the delay between filing the Applications and the State Engineer’s scheduling of a hearing on the Applications somehow constitutes a waiver of the statutory requirement of a valid, timely

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<sup>1</sup> It should be noted that the Petitioners have not provided any direct, authenticated evidence through personal declarations which demonstrates that the State Engineer possessed accurate mailing addresses for the Petitioners but neglected to provide the statutorily-required notice of either the Applications or any pre-hearing conferences. See Petition, Exhibit Nos. 2 through 50.

protest. *See* Petition, pg. 9. For example, the State Engineer has ruled on applications for water rights on the Truckee River that were filed in 1931 and hearings were not held until 1998. State Engineer Ruling No. 4659.

**C. The Petitioners' Claims Of Potential Due Process Violations Are Not Properly Before The State Engineer, Have No Merit, And Should Be Dismissed.**

Although Petitioners claim that due process violations may result if they are not permitted to fully participate in the hearings, such a constitutional claim is not properly determined by the State Engineer. Petitioners do not cite to any Nevada statute or case law—and the Applicant is not aware of any—that gives the State Engineer the authority to adjudicate such constitutional questions. As discussed earlier in subsection “A,” *supra* at pg. 4, the State Engineer has no inherent powers and the extent of his jurisdiction should be strictly construed and limited by the statutory provisions which created the agency.

It is well settled in Nevada “. . . that the water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method of procedure but strictly limits it to that provided.” *Application of Filippini*, 66 Nev. 17, 27 (1949). In a challenge to the constitutionality of the Nevada Water Code, the federal district court in Nevada held that the Nevada Water Code does not deprive citizens of any constitutional rights.

*Humboldt Lovelock Irrigation Light & Power Co. v. Smith*, 25 F. Supp. 571 (D. Nev. 1938).

Additionally, as demonstrated earlier in subsection “B,” *supra* at pg. 6, even if the Petitioners' claims of due process violations were considered by the State Engineer, they have failed to demonstrate that notice by publication of the Applications was deficient in any respect. Regarding the State Engineer's notice by mailing of the pre-hearing conference, the State Engineer is permitted to rely on a protestant to update the State Engineer's records to reflect any

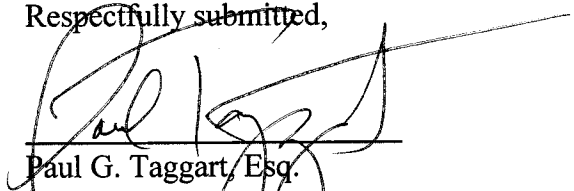
address changes after a protest is filed. Otherwise, the State Engineer would be presented with a unreasonable burden of searching for any protestant's new address whenever a notice regarding a protested water application is mailed. Accordingly, the due process claims have no merit and should be rejected.

**III. CONCLUSION**

For the foregoing reasons, the SNWA requests that the Petition for Declaratory Order to Re-open the Protest Period for Applications in the Delamar, Dry Lake, Cave, Spring, and Snake Valleys be denied.

Dated: July 13, 2006

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of KING & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of the OPPOSITION TO WESTERN ENVIRONMENTAL LAW CENTER'S PETITION FOR DECLARATORY ORDER TO RE-OPEN THE PROTEST PERIOD FOR APPLICATIONS IN THE DELAMAR, DRY LAKE, CAVE SPRING, AND SNAKE VALLEYS, addressed to:

By **U.S. POSTAL SERVICE**: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed to:

**SEE ATTACHED SERVICE LIST**

By **FACSIMILE**: I transmitted via facsimile from the law offices of KING & TAGGART, a true and correct copy of the above-identified document, in the ordinary course of business, to the individual and facsimile number listed below:

**SEE ATTACHED SERVICE LIST**

By **E-MAIL**:

**SEE ATTACHED SERVICE LIST**

By **HAND DELIVERY**, via:

Reno-Carson Messenger Service

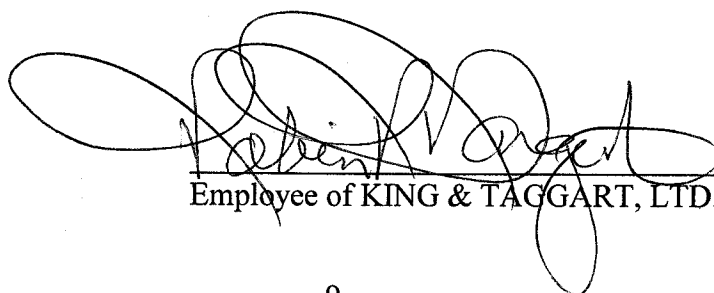
interoffice-type messenger

other type of delivery service: \_\_\_\_\_

by placing a true and correct copy of the above-identified document in an envelope containing the above-identified document, in the ordinary course of business, addressed to:

**SEE ATTACHED SERVICE LIST**

DATED this 13<sup>th</sup> day of July, 2006.

  
\_\_\_\_\_  
Employee of KING & TAGGART, LTD.

**SERVICE LIST**

**By U.S. POSTAL SERVICE:**

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