

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

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)
 LINCOLN AND WHITE PINE COUNTIES,)
 NEVADA)

**REPLY IN SUPPORT OF
 PETITION FOR
 DECLARATORY ORDER
 TO RE-NOTICE 16 YEAR OLD
 GROUNDWATER
 APPLICATIONS IN THE
 DELAMAR VALLEY, DRY
 LAKE VALLEY, CAVE
 VALLEY, SPRING VALLEY,
 AND SNAKE VALLEY**

The Petitioners now submit this reply in support of their petition to re-notice the Southern Nevada Water Authority's ("SNWA's") 34 groundwater applications in Delmar, Dry Lake, Cave, Spring, and Snake Valleys.

I. THE PETITION IS PROPERLY BEFORE THE STATE ENGINEER AND SNWA'S APPLICATIONS SHOULD BE RE-NOTICED TO PROTECT THE RIGHTS OF THOSE DENIED THEIR OPPORTUNITY TO PROTEST

SNWA argues that the State Engineer does not have the authority to re-notice the applications for protest. See Opposition Brief ("Opp. Br.") at 4. SNWA is incorrect. The State Engineer not only has the authority to re-notice the applications, but actually has a legal duty to do so in this unique situation where over 16 years have lapsed since the applications were filed.

As outlined in the Petition, the procedural due process guarantees of the Fourteenth Amendment to the United States Constitution prevent *State entities* from depriving a person of "life, liberty, or property, without due process of law." Amdt. 14, § 1. This guarantee, which

State 'S EXHIBIT 48
DATE: 9-11-06

applies to the Office of the State Engineer, is designed to protect an individual's right to be heard and to prevent unjust, irrational, and uninformed decisions by governmental entities. See Goldberg v. Kelly, 397 U.S. 254 (1970). Further, pursuant to NRS § 533.375, before "either approving or rejecting [a groundwater] application, the state engineer may require such *additional information* as will enable him to *guard the public interest properly*." NRS § 533.375 (emphasis added). The State Engineer needs the additional information that could only be provided by the potential, yet to be admitted, protestants to ensure that all existing rights, surface waters, domestic wells, and/or the local community's supply of water in the Spring, Snake, Delamar, Dry Lake, and Cave Valleys are adequately protected.

As explained in the Petition, re-noticing of SNWA's applications in these Valleys is necessary because since SNWA originally filed the applications on October 17, 1989 – over 16 years ago – several significant changes have occurred. Specifically, there are individuals who have since inherited property in the vicinity of SNWA's applications, and/or were too young to participate in 1989, but now wish to voice their concerns. See Ex. 41 at ¶ 9.¹ There are also hundreds of local residents and concerned citizens with domestic wells, existing rights, and interests that did not previously, but now live in the vicinity of the applications. See Ex. 2-48. Under Nevada Water law, these are individuals with "protectible interests." NRS § 533.024. Moreover, there are hundreds of individuals who filed protests in 1989 but failed to receive

¹ With respect to the heirs of property, it would be extremely unfair to refuse to recognize a protestant's ability to inherit a right to protest, as a successor-in-interest, when SNWA itself obtained rights to the applications as a "successor-in-interest to" the Las Vegas Valley Water District's ("LVWD's") applications. See Op. Br. at 2. The State Engineer should not afford the applicant – SNWA – successor-in-interest status while simultaneously denying the same successor-in-interest status to protestants of SNWA's applications.

actual notice of the State Engineer's January 5, 2006 pre-hearing conference on SWNA's 34 applications or notice of the upcoming hearings on SNWA's Spring Valley applications scheduled for September 11, 2006. See e.g. Ex. 27-35, 41, 45-47.

Contrary to SNWA's argument, nothing in NRS § 533 prohibits the State Engineer from re-noticing SNWA's applications if it deems such notice necessary to guard the public interest. In this respect, Petitioners' request is entirely consistent with NRS § 533.365 and with the 1922 Nevada Attorney General's opinion that protests filed after the 30 day protest period should not be recognized by the State Engineer. See AGO No. 1922-97 (Feb. 23, 1922). Following re-noticing of SNWA's applications, protests will only be allowed "within 30 days from the date of last publication." NRS § 533.365 (1).

Importantly, with respect to SNWA's 34 applications, any decision by the State Engineer not to re-notice SNWA's 16 year old applications and re-open the protest period will effectively deprive Petitioners of their property interest in protecting their personal and the community's supply of water for personal consumption, local businesses, ranches, and wildlife habitat without due process of law. In making this claim now, without going directly to District Court, the Petitioners are: (1) informing the State Engineer of its legal obligations under the U.S. Constitution and Article 1, § 8 (5) of the Nevada Constitution; and (2) in so doing, giving the State Engineer the opportunity to make the right decision in advance of the hearings and, thereby, promoting timely, just, and efficient resolution of SNWA's groundwater applications. Indeed, if the Petition is denied, the Petitioners will be compelled to seek judicial review of the State Engineer's decision. The salient issue on review will be compliance with the procedural due process guarantees of the Fourteenth Amendment to the U.S. Constitution and Article 1, § 8 (5)

of the Nevada Constitution. In this respect, Petitioners' due process claims are both extremely relevant and properly before the State Engineer's office.²

II. THE NOTICE REQUIREMENTS WERE NOT SATISFIED FOR THOSE WHO FILED PROTESTS BUT FAILED TO RECEIVE NOTICE OF THE UPCOMING HEARINGS

In addition to the problem discussed above with many individuals being denied the opportunity to file protests, there are also many individuals who received notice of SNWA's initial applications, filed protests, but never received notice of the State Engineer's January 5, 2006 pre-hearing conference on the applications or notice of the upcoming hearings scheduled to begin on September 11, 2006. Contrary to the argument of SNWA, this lack of notice is not legal.

SNWA maintains that the State Engineer is not required to provide actual notice or guarantee that "the county assessor's office has accurate, up-to-date mailing addresses" or even that "the United States Postal Service properly delivers the mail." Op. Br. at 6. According to SNWA, therefore, "any claim that the State Engineer failed to provide adequate notice under NRS 533.360 should thus be rejected." SNWA is incorrect.

At the outset, the relevant statutory provision for providing notice of hearings on

² SNWA's citation to Humboldt Lovelock Irrigation Light & Power Co. v. Smith, 25 F. Supp. 571 (D. Nev. 1938) for the proposition that "the Nevada Water Code does not deprive citizens of any constitutional rights" is not applicable here. In Humboldt Lovelock Irrigation Light & Power Co., the Court reviewed the judicial review provisions of Nevada Water law which afford affected individuals the right to notice and the "full opportunity to be heard" before any final decision is rendered. The Court held that the process for reviewing orders and decisions of the State Engineer thus satisfied the constitutional minimum requirements. Here, no process is being afforded Petitioners in this case.

SNWA's applications is not NRS § 533.360 (notice of applications) but NRS § 533.365 (3) (notice of hearings). SNWA's extended discussion on the requirements for noticing applications in NRS § 533.360 and insistence that newspaper publication was sufficient is, therefore, entirely off base. The relevant statutory language for the purposes of providing notice of hearings on SNWA's applications is found in NRS § 533.365 (3) which states that if the State Engineer decides to hold hearings, he "shall give notice of the hearing *by certified mail* to both the applicant and the protestant. The notice must state the time and place at which the hearing is to be held and must be mailed at least 15 days before the date set for the hearing." NRS § 533.365.3 (emphasis added). This is a mandatory, non-discretionary duty as the statute expressly provides that the State Engineer "shall" give notice of the hearing by certified mail to each protestant and such notice "must state the time and place" where the hearing will be held. See id.

Here, the State Engineer failed to provide notice of the hearings to approximately 219 original protestants. According to the State Engineer's own evidence (in the form of returned mail), approximately 219 of the original, 1989 protestants *never* received notice, via certified mail, of the State Engineer's January 5, 2006 pre-hearing conference or notice of the upcoming hearings schedule to begin on September 11, 2006. Approximately 26 of these individuals have been identified by the Great Basin Water Network. See Ex. 41 at ¶ 9; Ex. 27-35, 45-47 (Declarations from individuals). For example, Walter Benson from Ely, Nevada protested application number 54021 but never received a certified mail letter of either the pre-hearing conference on this application or notice of the upcoming hearings scheduled to begin this fall. See Ex. 27. The same is true for Selena Weaver, Mary Collins, Candi Ashby, Sally Gust, Bruce Ashby, Daniel Maes, Robert Marcum, Tara Foster, Marie and James Jordan, and Rutherford Day.

See Ex. 28-35, 45- 47. All of these individuals protested specific applications but for whatever reason never received their certified mail letters. Most of these individuals reside in Ely, Nevada where the establishment of the “new” Ely Post Office likely resulted in mail forwarding errors resulting from changes in regional zip codes. See Ex. 41 ¶ 9.

Notably, in this instance, the State Engineer had reason to know that its attempt at notice had gone awry. As mentioned earlier, the State Engineer determined, based on the number of returned mailings that approximately 219 of the original protestants never received notice. The State Engineer had knowledge that its attempt at notice had failed. In this circumstance, when the State Engineer “learns that its attempt at notice has failed, due process requires [the State Engineer] to *do something more* before [depriving the protestants of their property rights].” Jones v. Flowers, 126 S. Ct. 1708, 1714 (2006) (emphasis added).

As recently explained by the Supreme Court, when a “letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so.” Id. at 1716 (citing Small v. United States, 136 F. 3d 1334, 1337 (D.C. Cir. 1998)). This is especially true where the subject matter of the notice concerns such an important issue as the one presented in this case. Indeed, under Nevada Water law, the hearings on SNWA’s applications provide the *only* opportunity for individual protestants to present evidence in opposition to SNWA’s applications – the only opportunity to protect and defend their interests. Thus, while the State Engineer “may have made a reasonable calculation” on how to reach each of these protestants, it had “good reason to suspect when the notice was returned that [each individual protestant] was ‘no better off than if the notice had never been sent.’” Id. (quoting Malone v. Robinson, 614 A.2d 33, 38 (D.C. App.1992)). In this situation, the State Engineer is required to take further “reasonable

steps” to try and provide actual notice to the individual protestants. See id. In this case, such reasonable steps to provide actual notice of the hearings could include: (1) trying to actually determine where these people live; (2) re-sending the letters via regular mail so that a signature is not required; and/or (2) posting notice on the front door. Petitioners, however, are not aware that the State Engineer took any such steps in this case. Of course, the most efficient means of rectifying the situation would be to grant the Petition and re-notice SNWA’s 34 applications in newspapers of general circulation in the Snake, Spring, Delamar, Cave, and Dry Lake Valleys.

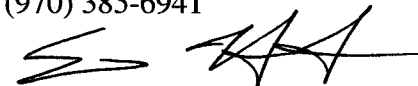
CONCLUSION

For the forgoing reasons, the Petitioners respectfully renew their request that the State Engineer re-notice SNWA’s 34 applications in the Spring, Snake, Cave, Dry Lake, and Delamar Valleys.

Respectfully submitted this 19th day of July, 2006.

 for

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CERTIFICATE OF SERVICE

I hereby certify that on July 19th 2006, I mailed a copy of this document to the following

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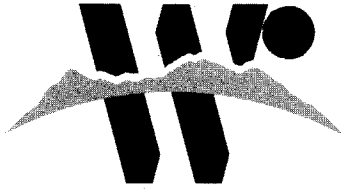
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July 19, 2006

VIA FEDERAL EXPRESS STANDARD OVERNIGHT MAIL

Tracy Taylor, State Engineer
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Nevada Office of the State Engineer
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Re: Notice of Change of Address and Reply in Support of Petition for Declaratory Order to Re-Notice 16 Year Old Groundwater Applications in the Delmar Valley, Dry Lake Valley, Cave Valley, Spring Valley, and Snake Valley

Dear Mr. Taylor:

Enclosed for filing in the Carson City Office, please find an original and one copy of:
1) Notice of Change of Address for Attorney Nicole U. Rinke; and 2) Great Basin Water Network, et al.'s Reply in Support of Petition for Declaratory Order to Re-Notice 16 Year Old Groundwater Applications in the Delmar Valley, Dry Lake Valley, Cave Valley, Spring Valley, and Snake Valley. Complete copies of the notice and of the reply have also been sent to the Las Vegas Office.

If you have any questions regarding this filing please do not hesitate to contact me by phone at (505) 751-0351, ext. 11. Thank you for your attention to this matter.

Sincerely,

Dina M. Gonzales
Administrative Coordinator – Southwest Office