

IN THE OFFICE OF THE STATE ENGINEER

STATE OF NEVADA

State	'S EXHIBIT 45
DATE:	8-1-08

IN THE MATTER OF APPLICATIONS)	MOTION TO PRESENT EVIDENCE THAT
54022 THROUGH 54030, INCLUSIVE,)	AIR QUALITY IMPACTS THREATEN TO
FILED TO APPROPRIATE THE)	PROVE DETRIMENTAL TO THE PUBLIC
UNDERGROUND WATER OF THE)	INTEREST AND WILL RENDER THE
SNAKE VALLEY HYDROGRAPHIC)	PROPOSED INTERBASIN TRANSFER
BASIN (195), WHITE PINE COUNTY,)	ENVIRONMENTALLY UNSOUND AS IT
NEVADA)	RELATES TO THE SNAKE VALLEY
)	BASIN

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 STATE ENGINEER'S OFFICE

Pursuant to the Hearing Officer's order entered during the July 15, 2008 pre-hearing conference herein, Protestant Millard County respectfully submits the above-entitled Motion and the following Points and Authorities in support thereof:

I

**NRS 533.370(5) AND PROPOSED USES OF WATER THAT THREATEN TO PROVE
 DETRIMENTAL TO THE PUBLIC INTEREST**

- A. Air Quality Impact Evidence At a Protest Hearing is Relevant to The State Engineer's NRS 533.370(5) Duty to Reject Applications When the Proposed Use Threatens to Prove Detrimental to the Public Interest.**

Millard County wishes to put on evidence at the protest hearing to prove that air quality impacts from Applicant Southern Nevada Water Authority's ("SNWA's") proposed use of Snake Valley groundwater threatens to lower the water table throughout Snake Valley enough to deplete its fragile phreatophytic plant community, destabilize the valley soils and create a perpetual

Owens Valley style erosive dust bowl condition detrimental to the public interest. That point is highly relevant and material, because if it proves out then the State Engineer is statutorily required to reject SNWA's groundwater applications:

5. Except as otherwise provided in subsection 11, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectible interests in existing domestic wells as set forth in NRS 533.024, *or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit.*

NRS 533.370(5) (emphasis added).

B. SNWA Cannot Credibly Dispute That Any Air Quality Impacts From the Proposed Use of Snake Valley Groundwater Will Threaten To Prove Detrimental To the Public Interest.

SNWA cannot credibly or in good faith dispute that project-induced air quality impacts in Snake Valley would prove detrimental to the public interest. Such a position would conflict with SNWA's past position taken in the Spring Valley matter. There, SNWA voluntarily negotiated at arms-length for the dismissal of the protests of several federal agencies, by promising those agencies in a legally enforceable and binding contract commonly called the Spring Valley Stipulated Agreement,¹ to prevent, monitor and mitigate *regional air quality impacts caused by the proposed action's depletion of groundwater dependent vegetation* in the so-called Area of Interest.² The Spring Valley Stipulated Agreement was presented to the State Engineer for approval and incorporation into the State Engineer's overall ruling on the Spring Valley matter.

¹ The formal title of which is "Stipulation for Withdrawal of Protests," dated September 8, 2006, entered into by SNWA, United States Department of Interior, Bureau of Indian Affairs, Bureau of Land Management, Fish and Wildlife Service and National Park Service.

² The "Area of Interest" is a large geographical region expressly defined in the Stipulated Agreement to encompass both the Nevada and Utah side of Snake Valley and stretches well beyond Snake

By this action which SNWA no doubt undertook in all sincerity and good faith, SNWA signaled to the State Engineer, to the States of Nevada and Utah, to all counties in and around Snake Valley on both sides of the state line, to the United States Government and to all other Snake Valley stakeholders, protestants and interested persons that it regards project-induced air quality impacts in and around Snake Valley to be an important matter of public interest.

Consider the following excerpts from the Spring Valley Stipulated Agreement:

The common goals of the Parties are 1) to manage the development of groundwater by SNWA in the Spring Valley HB in order to 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 diversity and ecological health of the Area of Interest over the long term,

Id. at 4 (emphasis added).

The common goal of the Parties is to manage the development of groundwater by SNWA in the Spring Valley HB to avoid an unreasonable degradation of the scenic values of, and visibility from Great Basin National Park *due to a potential increase in airborne particulates and loss of surface vegetation which may result from groundwater withdrawals by SNWA in the Spring Valley HB.*

Id. at 5 (emphasis added).

Further, it is in the Parties' best interests to cooperate in the collection and analysis of additional information regarding the relationship between the development of groundwater resources, loss of surface vegetation, drying of surface soils, increased susceptibility of land surfaces to wind erosion, and the long-term avoidance of unreasonable degradation of the scenic values of, and visibility from, Great Basin National Park.

Id. at 5-6.

Valley into other Utah valleys. See Figure 1 to the Stipulated Agreement.

The DOI Bureaus hereby expressly agree to withdraw their protests to the SNWA Applications and agree that the Nevada State Engineer may rule on the SNWA Applications based upon the terms and conditions set forth herein.

Id. at 6.

If the consensus of the TRP and BWG is that the proposed change(s) will not (4) cause unreasonable degradation of scenic values of, and the existing visibility from, Great Basin National Park, then the TRP and the BWG will recommend to the Executive Committee that protests not be filed to the proposed change(s).

Id. at 7.

The Parties agree that a copy of this Stipulation shall be submitted to the Nevada State Engineer at the commencement of the administrative proceedings scheduled to begin on September 11, 2006. At that time, the Parties shall request on the record at the beginning of the scheduled proceeding that the State Engineer include this Stipulation and Exhibits A and B as part of the permit terms and conditions in the event that he grants any of the SNWA Applications in total or in part.

Id. at 9.

Air quality as it relates to the vegetative and soil impacts from the feared depletion of the groundwater table, was a big enough matter of interest to SNWA and the Federal agencies, to induce them to negotiate for the protection against such impacts, to reduce those negotiations to an enforceable contract, and to submit that contract to the State Engineer for review and approval in the Spring Valley proceedings. It is not technically nor legally well taken for SNWA to now turn about in the Snake Valley proceedings and dismiss as not potentially detrimental to the public interest, *the very same air quality interests and concerns* which Millard County wishes to advance as part of its case.

II

NRS 533.370(6)(c) AND THE ENVIRONMENTAL SOUNDNESS OF PROPOSED INTERBASIN TRANSFERS AS IT RELATES TO THE VALLEY OF EXPORT

A. Air Quality Impact Evidence At a Protest Hearing is Relevant to The State Engineer's NRS 533.370(6)(c) Duty to Consider Whether SNWA's Proposed Interbasin Groundwater Transfer Is Environmentally Sound As it Relates to The Basin From Which the Water is Exported.

Millard County wishes to put on evidence at the protest hearing to prove that air quality impacts from SNWA's proposed interbasin transfer of Snake Valley groundwater threatens to lower the water table throughout Snake Valley enough to deplete its fragile phreatophytic plant community, destabilize the valley soils and create a perpetual Owens Valley style erosive dust bowl condition detrimental to the public interest. That point deserves statutorily required consideration by the State Engineer in determining whether SNWA's Snake Valley applications must be rejected, because the potential repeat of the Owens Valley debacle goes to whether SNWA's proposed action is environmentally sound as it relates to the basin from which the water is exported:

6. In determining whether an application for an interbasin transfer of groundwater must be rejected pursuant to this section, the State Engineer shall consider:

.....
(c) Whether the proposed action is environmentally sound as it relates to the basin from which the water is exported;

NRS 533.370(6)(c).³

³ In State Engineer Ruling 5726 (April 16, 2007) on SNWA's Spring Valley groundwater applications, the State Engineer squarely opined:

"While there are no definitions [in the statutes] of what environmentally sound is, there

B. State Engineer Ruling 5726 Does Not Support An Argument That Air Quality Impacts Are Irrelevant the State Engineer's NRS 533.370(6)(c) Duty To Consider Environmental Soundness In Interbasin Groundwater Transfer Protest Hearings

SNWA cannot legitimately rely on State Engineer Ruling 5726 for the notion that air quality evidence is irrelevant. A protestant in the Spring Valley hearing alleged that granting SNWA's Spring Valley applications means more water for Las Vegas Valley, which means more growth in Las Vegas Valley, which means more air pollution in Las Vegas Valley. The protestant said nothing about air quality in Spring Valley, the basin from which the water would be exported. In matters of proposed inter-basin water transfers, nowhere does NRS 533.070(6)(c) authorize the State Engineer to consider environmental soundness in the valley of destination. Instead, the environmental soundness question is statutorily limited to the "basin from which the water is exported." Hence, the State Engineer in Ruling 5726 correctly replied to the protestant's Las Vegas air quality concerns by observing "the State Engineer's authority in the review of the water right applications is limited to considerations in Nevada's water policy statutes." *Id.*, at 21.

On the other hand, Ruling 5726 does hold that it is certainly within the State Engineer's scope of statutory authority to consider, *in the valley from which the groundwater will be diverted*, whether the project is environmentally sound, that is, whether pumping 50,000 afa out of Snake Valley will turn Snake Valley into another Owens Valley type dust bowl. See footnote

examples of what environmentally sound is not, such as the Owens Valley project in California. The State Engineer believes that the legislative intent of NRS § 533.370(6)(c) was to protect the natural resources of the basin of origin and prevent a repeat of the Owens Valley while at the same time allowing for responsible use of the available water resources by the citizens of Nevada."

3 above.

Nor can SNWA legitimately rely on Intermediate Order No 1, dated October 4, 2007, (the "10-4-07 Order") regarding SNWA's Delamar, Dry Lake and Cave Valleys Applications. The 10-4-07 Order at 7-8 notes the following protest ground:

17. The applications will encourage and enable the uncontrolled population growth *in the Las Vegas Valley*, which will exacerbate existing problems of air quality, traffic and crime.

(Emphasis added.)

The 10-4-07 Order at 14 rejected this protest ground, noting that "decisions of growth control are the responsibility of other branches of government" and "whether growth exacerbates air pollution, traffic and crime is not within the State Engineer's jurisdiction."

The 10-4-07 Order at 9 noted the following additional protest ground:

31. The applications will negatively impact Nevada's environment in that it will lead to regional air pollution in violation of law.

The 10-4-07 Order did *not* reject protest ground no. 31. The only air-quality related protest ground, which the State Engineer rejected is the *growth-induced Las Vegas Valley* (destination basin) air pollution claim. Protest ground no. 31, which urged that granting the groundwater applications will negatively impact Nevada's environment by leading to regional air pollution, was not stricken by the 10-4-07 Order.

The unambiguous precedent that comes out of the Spring Valley Ruling and the 10-4-07 Order in the Dry Lake, Cave and Delamar Valleys matter, is this: Air pollution due to water-aided growth in the destination valley is not relevant to the State Engineer's determination of

Id. at 47.

whether the inter-basin transfer is environmentally sound in the valley from which the groundwater is exported. However, Owens Valley style air quality impacts flowing from the export of groundwater are certainly relevant, as bearing on whether the proposed action is “environmentally sound as it relates to the basin from which the water is exported.”⁴

C. In Any Event SNWA Cannot Credibly Dispute That Any Air Quality Impacts From the Proposed Interbasin Groundwater Transfer Will Render The Proposal Environmentally Unsound As it Relates to the Basin From Which the Water is Exported.

Based on the Stipulated Agreement language quoted in I B above, SNWA cannot credibly dispute that air quality impacts caused by the proposed interbasin transfer out of Snake Valley would render the proposal environmentally unsound. SNWA and the Federal agencies negotiated for the protection against such impacts, reduced those negotiations to an enforceable contract, and submitted that contract to the State Engineer for review and approval in the Spring Valley proceedings. The Stipulated Agreement’s reference at pages 5-6 to “the relationship between the development of groundwater resources, loss of surface vegetation, drying of surface soils, increased susceptibility of land surfaces to wind erosion, and the long-term avoidance of unreasonable degradation of the scenic values of, and visibility from, Great Basin National Park” reads like a would-be Millard County trial brief on air quality related environmental soundness, should Millard County proceed with its air quality case.

⁴ In the matters relating to State Engineer Rulings 5465 and 5506, it does not appear that any of the protestants raised the claim that the proposed action would not be “environmentally sound as it relates to the basin from which the water is exported,” for purposes of NRS 533.070(6)(c). In any event, the State Engineer’s later rulings, namely Ruling 5726 and the decision in its 10-4-07 Order not to reject protest no. 31 regarding the environmental impact to regional air quality (see discussion above), would appear to be

III

THE CLAIMS IN MILLARD COUNTY'S PROTESTS THAT LOWERING THE GROUNDWATER TABLE WILL THREATEN PHREATOPHYTES, CAUSE OTHER NEGATIVE IMPACTS, AND ADVERSELY AFFECT THE PUBLIC INTEREST PROVIDE SUFFICIENT NOTICE OF AIR QUALITY ISSUES, ESPECIALLY IN LIGHT OF STATUTORY MANDATES TO CONSIDER PUBLIC INTEREST DETRIMENTS AND ENVIRONMENTAL SOUNDNESS, AND STATUTORY PERMISSION TO GO BEYOND THE PROTESTS TO CONSIDER ISSUES THAT ARISE UNDER NRS 533 OR ARE OTHERWISE NECESSARY TO A FULL UNDERSTANDING OF THE RIGHTS INVOLVED.

- A. **Sufficient Notice and Preservation of An Air Quality Claim is Found in Millard County's Protest Language Asserting that Lowering the Groundwater Table Will Threaten Phreatophytes, Cause Other Negative Impacts and Adversely Affect the Public Interest.**

Millard County protested all of SNWA's predecessor's Snake Valley applications, nos. 54022-54030 inclusive. The relevant portion of each protest of Millard County reads identically as follows:

Appropriation and use of this magnitude *will lower the water table* and degrade the quality of water from existing wells, *cause other negative impacts* and will adversely affect existing rights *adverse to the public interest*.

Millard County Protests at ¶ 3 (emphasis added).

That the appropriation of the water sought in the instant Application, when added to the other pending Applications and to the already approved appropriations and dedicated uses in the Snake Valley Basin, *will lower the static water level in Snake Valley Basin*, will adversely affect the quality of the remaining groundwater and will further threaten springs, seeps *and phreatophytes* which provide water and habitat critical to the use and survival of wildlife, grazing livestock and other surface existing uses.

the most recent and therefore the most reliable precedent on the issue.

Millard County Protests at ¶ 6 (emphasis added). Air quality impacts are an undeniable direct consequence of phreatophytic loss.

B. Construing Millard County's Protests As Having Sufficiently Raised and Preserved an Air Quality Claim is Consistent With the State Engineer's Statutory Duties to Determine Whether Air Quality Impacts Threaten Detriment to the Public Interest and Consider Whether Air Quality Impacts Render the Proposed Action Environmentally Unsound in the Valley of Export.

Points I and II above establish that evidence of air quality impacts caused by lowering the Snake Valley groundwater table is highly relevant to the above-described duties of the State Engineer arising under NRS 533.370(5) and NRS 533.370(6)(c). This practical reality of these statutory mandates underscores the appropriateness of construing Millard County's protests as having sufficiently noticed and preserved an air quality claim.

C. In Any Event, Controlling Statutory and Administrative Code Provisions Clearly Authorize, If Not Outright Encourage, the State Engineer To Go Beyond the Protests to Consider Issues Arising Under NRS 533 or Otherwise Necessary For A Full Understanding of the Rights Involved.

NRS 533.365(3) states in part that the "State Engineer shall consider the protest, and may, in his discretion, hold hearings and require the filing of such evidence *as he may deem necessary to a full understanding of the rights involved.*" (Emphasis added.) A full understanding of the rights involved is simply not possible without taking evidence of air quality impacts caused of SNWA's proposed interbasin transfer of 50,000 afa from Snake Valley.

NRS 533.365(1) does not require precise exactitude in describing and preserving claims when filling out protests. The requirement instead is to "set[] forth *with reasonable certainty* the grounds of such protest[.]" (Emphasis added.)

According to NAC 533.210(1), the permissible issues at the protest hearing are not strictly limited to the contents of the application and any protests. Rather, those issues "may

include any issues that may arise under 533 and 534 of NRS.” Points I and II above establish that the air quality evidence Millard County wishes to present is highly relevant to issues arising under NRS 533.370(5) and NRS 533.370(6)(c). NRS 533.375 provides that the State Engineer may, before approving or rejecting an application, “*require such additional information as will enable him to guard the public interest properly...*”(Emphasis added). Moreover, if “appropriate and relevant” the State Engineer may pursue issues that “arise for the first time during the hearing.” NAC 533.210(2). Add to this the fact that NAC 533.200 allows the State Engineer to “take administrative notice of or accept into evidence by reference to their contents” “[f]acts of which judicial notice may be taken by the courts of this state[,]” and it is clear that the State Engineer may treat Millard County’s protests the same way Courts treat notice pleadings, liberally construing the documents to achieve substantial justice and preserve a fair hearing of important issues like Owens Valley style regional air quality impacts caused by SNWA’s proposed Snake Valley interbasin transfer.

IV

INTENSE PUBLIC INTEREST IN REGIONAL AIR QUALITY IMPACTS TRANSCENDS STATE BOUNDARIES

Air quality environmental impacts do not recognize or respect state boundaries. The population centers of Reno and Carson City are unfortunately only too aware of this fact given the recent onslaught of smoke and haze caused by wildfires in California. This impact felt in Carson City, unfortunate as it is, hopefully reinforces a greater understanding for Millard County’s concerns over feared air quality impacts in Utah due to the proposed pumping and interbasin transfer of 50,000 afa just across the state line on the Nevada side.

Protestant Ely Band of the Shoshone Tribe on and information and belief, plans to assert an air quality case of its own. It makes no sense for the State Engineer to consider regional air quality impacts in one corner of the region (Ely Shoshone Reservation) and not in another relatively nearby corner (Millard County) whose protestant is ready and willing to present a comprehensive air quality case.

V

CONCLUSION

Hearing Millard County's air quality impact case is necessary for the State Engineer to reasonably carry out its statutory duties under NRS 533.370(5) and (6)(c) to reject a proposed groundwater use of it threatens to prove detrimental to the public interest and to consider environmental soundness in determining whether to reject a proposed interbasin groundwater transfer. SNWA's actions in the Spring Valley Stipulated Agreement clearly and irrefutably reinforce what a critically important matter of public interest and environmental soundness it is to prevent, monitor and mitigate air quality impacts resulting from SNWA's proposed Snake Valley interbasin transfer. Given SNWA's part in the Stipulated Agreement's air quality impact recitals, SNWA is in no position to dismiss Millard County's desire to put on an air quality case as somehow irrelevant. Millard County's protests sufficiently raise, preserve, and justify the opportunity for Millard County to bring an air quality impact case, especially given the State Engineer's statutory mandate to consider whether Owens Valley style air quality impacts threaten to prove detrimental to the public interest and/or render the SNWA project environmentally unsound. Even if Millard County's protests by themselves were deemed to not sufficiently notice and preserve air quality claims, the controlling statutory and administrative code

provisions clearly authorize if not encourage the State Engineer to consider those claims. The level of public interest in the kind of air quality impacts feared from SNWA's proposed Snake Valley interbasin transfer is broad, pervasive, and intense. In short, by allowing Millard County's air quality case the State Engineer will achieve a win-win: Compliance with the duties of NRS 533.370(5), (6)(c) and the exercise of good policy judgment in this matter of high public interest.

Dated this 1st day of August, 2008

A handwritten signature in black ink, appearing to read "Mark Ward", written in a cursive style.

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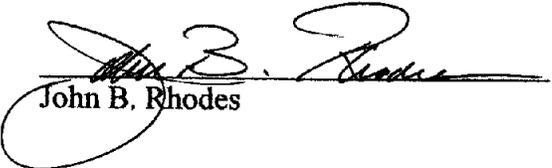
Attorneys for Protestant Millard County, Utah

CERTIFICATE OF SERVICE BY HAND - DELIVERY

I certify that the foregoing Motion was served on the Applicant Southern Nevada
Water Authority by hand delivering a copy thereof, on August 1, 2008, to the Law

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