

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

IN THE MATTER OF APPLICATION )  
NO. 53987 -53992, INCLUSIVE, AND )  
54003-54021, INCLUSIVE, FILED BY LAS )  
VEGAS VALLEY WATER DISTRICT )  
AND OWNED BY SOUTHERN NEVADA )  
WATER AUTHORITY TO APPROPRIATE )  
UNDERGROUND WATERS CAVE )  
VALLEY (HYDROGRAPHIC BASIN 180), )  
DRY LAKE VALLEY (HYDROGRAPHIC )  
BASIN 181), DELAMAR VALLEY )  
(HYDROGRAPHIC BASIN 182), AND )  
SPRING VALLEY (HYDROGRAPHIC )  
BASIN 184).

**PROPOSED RULING**

[Offered by the  
Duckwater Shoshone Tribe and  
Ely Shoshone Tribe]

**GENERAL**

**I.**

Application 54003 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined within NRS 243.035-243.040 (Clark), 243.210-243.225 (Lincoln), 243.275-243.315 (Nye), and 243.365-243.385 (White Pine). The proposed point of diversion is described as being located within NW1/4 NE1/4 of Section 20, T.8N., R.68E., M.D.B.&M. In Item 12, the remarks section of the application, it indicates that the water sought under the application shall be placed to beneficial use within the Las Vegas Valley Water District service area as set forth in Chapter 752, Statutes of Nevada 1989, or as may be amended. Further, that the water may also be served and beneficially used by lawful users within Lincoln, Nye, and White Pine Counties.

## II.

Application 54004 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within NE1/4 SE1/4 of Section 25, T.9N., R.67E., M.D.B.&M. This application, along with the others referenced below all contain the same remarks as those identified as to Application 54003.

## III.

Application 54005 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within NE1/4 NE1/4 of Section 14, T.9N., R.67E., M.D.B.&M.

## IV.

Application 54006 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SE1/4 SE1/4 of Section 22, T.10N., R.67E., M.D.B.&M.

## V.

Application 54007 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SE1/4 NW1/4 of Section 34, T.11N., R.66E., M.D.B.&M.

## VI.

Application 54008 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SW1/4 SW1/4 of Section 1, T.11N., R.66E., M.D.B.&M.

## VII.

Application 54009 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within NW1/4 NE1/4 of Section 36, T.13N., R.66E., M.D.B.&M.

### VIII.

Application 54010 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SE1/4 SE1/4 of Section 25, T.14N., R.66E., M.D.B.&M.

### IX.

Application 54011 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within NE1/4 SE1/4 of Section 14, T.14N., R.66E., M.D.B.&M.

### X.

Application 54012 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SE1/4 NE1/4 of Section 16, T.14N., R.67E., M.D.B.&M.

**XI.**

Application 54013 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SW1/4 SW1/4 of Section 25, T.15N., R.66E., M.D.B.&M.

**XII.**

Application 54014 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SW1/4 SW1/4 of Section 15, T.15N., R.67E., M.D.B.&M.

**XIII.**

Application 54015 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SW1/4 NW1/4 of Section 14, T.15N., R.67E., M.D.B.&M.

#### **XIV.**

Application 54016 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within NE1/4 SW1/4 of Section 7, T.15N., R.67E., M.D.B.&M.

#### **XV.**

Application 54017 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within NW1/4 SE1/4 of Section 25, T.16N., R.66E., M.D.B.&M.

#### **XVI.**

Application 54018 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SE1/4 NE1/4 of Section 24, T.16N., R.66E., M.D.B.&M.

**XVII.**

Application 54019 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 10 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SW1/4 NE1/4 of Section 32, T.12N., R.68E., M.D.B.&M.

**XVIII.**

Application 54020 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 10 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SE1/4 SE1/4 of Section 14, T.14N., R.67E., M.D.B.&M.

**XIX.**

Application 54021 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 10 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SW1/4 NE1/4 of Section 33, T.16N., R.66E., M.D.B.&M.

**XX.**

Application 53987 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SW1/4 NW1/4 of Section 22, T.6N., R.63E., M.D.B.&M.

**XXI.**

Application 53988 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 10 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SE1/4 SE1/4 of Section 21, T.7N., R.63E., M.D.B.&M.

**XXII.**

Application 53989 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SE1/4 SW1/4 of Section 30, T.2N., R.64E., M.D.B.&M.

**XXIII.**

Application 53990 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 10 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within NE1/4 SE1/4 of Section 8, T.2N., R.65E., M.D.B.&M.

**XXIV.**

Application 53991 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 6 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within SE1/4 NE1/4 of Section 4, T.5N., R.63E., M.D.B.&M.

**XXV.**

Application 53992 was filed on October 17, 1989, by the Las Vegas Valley Water District to appropriate 10 cubic feet per second (cfs) of groundwater from the Spring Valley Hydrographic Basin (184) for municipal and domestic purposes within Clark, Lincoln, Nye, and White Pine Counties as more specifically described and defined above. The proposed point of diversion is described as being located within NE1/4 NE1/4 of Section 15, T.6N., R.64E., M.D.B.&M.

## **XXVI.**

Applications 54003 – 54021, inclusive, and 53987 – 53992, inclusive, were protested by many people or entities. The number of applications protested by each person or entity varied from one application to all applications. The applications were protested by a large number of people and entities listed below.

## **XXVII.**

After all parties were duly noticed a public administrative hearing was held before the Office of the State Engineer on September 26 - November 18, 2011.

### **FINDINGS OF FACT**

#### **I.**

The State Engineer sent notice to all Protestants at their addresses of record in the Office of the State Engineer and to the Applicant regarding the schedule for the pre-hearing conference.

#### **II.**

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### **STATUTORY STANDARD TO GRANT**

NRS 533.370(1) provides the applicable authority for the State Engineer's decision as to whether he "shall approve an application submitted in proper form which contemplates the application of water to beneficial use if . . . [t]he applicant provides proof satisfactory to the State Engineer of the applicant's: (1) Intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and (2) Financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence."

### III.

#### STATUTORY STANDARD TO DENY

Pursuant to NRS 533.370(2) the State Engineer shall reject the application and refuse to issue the requested permit "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 protectable interests in domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest".

### IV.

#### STATUTORY STANDARD FOR INTERBASIN TRANSFERS

Pursuant to NRS 533.370(6), "[i]n determining whether an application for an interbasin transfer of groundwater must be rejected. . . the State Engineer shall consider: (a) Whether the applicant has justified the need to import the water from another basin; (b) If the State Engineer determines that a plan for conservation of water is advisable for the basin into which the water is to be imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out; (c) Whether the proposed action is environmentally sound as it relates to the basin from which the water is exported; (d) Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and (e) Any other factor the State Engineer determines to be relevant."

### V.

#### PROOF OF GOOD FAITH AND REASONABLE DILIGENCE

Nevada Revised Statute 533.370(1) provides that the State Engineer shall approve an application for water submitted in proper form which contemplates the application of water to

beneficial use. The Applicant must provide proof satisfactory to the State Engineer of their financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence. The State Engineer finds that he must address NRS 533.370(1) in three parts: (1) application submitted in proper form which contemplates the application of water to the beneficial use; (2) applicant's good faith effort to construct any work necessary to apply the water to the beneficial use; and (3) reasonable diligence to those efforts to construct the work to apply the water to beneficial use. These three parts of NRS 533.370(1) must be made clear by the Applicant.

The State Engineer finds that the Applications are inconsistent with applicant's stated intent "to deliver the water to Southern Nevada. In total, the Groundwater Project could provide as much as 184,655 acre-feet per year ("afy") to approximately two million residents in Southern Nevada."<sup>1</sup> The Applications identify that the place of use "is the area within Clark, Lincoln, Nye, and White Pine Counties."<sup>2</sup> The applicant confirms their intended place of use as "Southern Nevada,"<sup>3</sup> which includes "all of Southern Nevada, that would be North Las Vegas, Henderson, Boulder City, the water district service area, which is the unincorporated county, and the City of Las Vegas, the Big Bend Water District, as well as the City of Las Vegas through its waster water agency, and the Clark County Reclamation Agency through its wast water agency."<sup>4</sup>

The State Engineer finds that the place of use by the applicant is Clark County. The State Engineer finds that the applicant is proposing to construct work necessary to deliver water from Lincoln and White Pine Counties to the place of beneficial use in Clark County. The State Engineer finds that a good faith effort by the applicant to construct any work necessary to apply

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1 State Engineer Exhibit 091.

2 State Engineer Exhibits 003 – 021 and 042 – 047.

3 Transcript, vol 1, p. 24.

4 Transcript vol 1, p. 62-63.

the water to the intended beneficial use is only within Clark County. The State Engineer finds no good faith effort by the applicant to construct any work necessary to apply the water to the intended beneficial use in Lincoln, Nye, and White Pine Counties. The State Engineer finds that the Applications were not submitted in proper form which contemplates the application of water to beneficial use in the places of use stated on the Applications. The State Engineer finds that the applicant has not demonstrated any good faith effort to construct any work necessary to apply the water to beneficial use in Lincoln, Nye, and White Pine Counties. The State Engineer finds no reasonable diligence to those efforts to construct the work to apply the water to beneficial use in Lincoln, Nye, and White Pine Counties. The State Engineer finds that he cannot approve the subject applications pursuant to NRS 533.370(1).

## **VI.**

### **NO UNAPPROPRIATED WATER**

Pursuant to NRS 533.371(4), the State Engineer's appropriation of water cannot exceed the perennial yield or safe yield of the source. The perennial yield of a groundwater reservoir is the maximum amount of groundwater that can be salvaged each year over the long term without depleting the groundwater reservoir. Perennial yield cannot exceed the level of natural discharge, which occurs primarily through evapotranspiration (ET). For most basins in Nevada, it has been assumed that perennial yield is equal to ET and that water lost to natural ET can be appropriated for beneficial use. If the perennial yield is exceeded, groundwater levels will decline and steady-state conditions will not be achieved, and groundwater mining will occur which is prohibited by Nevada law.

Nevada law does not allow the State Engineer to appropriate groundwater from deep underground aquifers because appropriations are based on perennial yield. The applications

sought by the Applicant have proposed to capture all of the unappropriated water in the subject basins, or that water available for ET capture. Capturing groundwater that would otherwise be used in ET is limited to the shallow aquifer,<sup>5</sup> where phreatophytes pull groundwater from their roots. Testimony was provided that “[t]his does not look like an ET salvage project.” “Way too few wells” given the depth of the wells, which were “a thousand feet deep, seventeen hundred feet deep.”<sup>6</sup> In order to salvage ET, “a lot of shallow wells, not deep wells” are needed.<sup>7</sup> The Applicant provided testimony that “there is a maximum rooting depth for each of the [plant] species in Spring Valley. I would be surprised if it was more than 25 meters.”<sup>8</sup> The applications identify that “deep wells” will be used for groundwater pumping if approved.<sup>9</sup> The State Engineer finds substantial evidence that the applications would not be used to capture ET, or the perennial yield, but instead the applications would pump groundwater in deep aquifers.

Substantial evidence and testimony was provided that groundwater mining would occur if the applications were approved in the subject basins. The Applicant provided evidence that groundwater declines will increase over a 100-year period to 100-150 feet of drawdown.<sup>10</sup> Protestants also provided substantial evidence for a similar trend – groundwater declines are greater as time increases – but the area and depth of drawdown are much greater.<sup>11</sup> Water available for ET occurs within the shallow aquifer, not the deep water aquifer. The State Engineer finds that there is no substantial evidence to indicate that steady-state conditions would be reached in the subject basins within a reasonable amount of time. The State Engineer finds that there is substantial evidence from both Applicant and Protestants that indicates groundwater

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5 Testimony, vol. 27, p. 6029.

6 Testimony, vol. 27, p. 6034.

7 *Id.* 6034.

8 Testimony, vol. 7, p. 1632.

9 State Engineer Exhibits 3-21 and 42-47.

10 SNWA Exhibit 337, Appendix C, Plate 2.

11 CPG Exhibit 011, pp. 23-38; CTGR Exhibit 005, Appendix C; GBWN Exhibit 110, Ch. 3.3, Exhibit 3, 4.

mining will occur if the applications were approved.

## VII.

### CONFLICTS WITH EXISTING RIGHTS

Nevada Revised Statute 533.370(2) provides that the State Engineer shall reject an application and refuse to issue the requested permit where its proposed use or change conflicts with existing rights or with protectable interests in domestic wells as set forth in NRS 533.024. The Applicant has provided monitoring and mitigation plans<sup>12</sup> that require a process to monitor unexpected outcomes and mitigate any unavoidable impacts.<sup>13</sup> The Applicant has indicated that impacts to existing rights would occur from the proposed groundwater project. The State Engineer finds that NRS 533.370(2) explicitly identifies that water rights applications cannot be approved and must be rejected if the proposed use would impact existing rights. NRS 533.370(2) does not provide the State Engineer any justification of approval of water rights applications that may impact existing rights where the applicant plans to monitor and mitigate those impacts. Therefore, the State Engineer cannot approve water rights applications if sufficient information indicates conflicts or impairment of existing rights, even if an applicant provides a monitoring and mitigation plan. The State Engineer finds that monitoring and mitigation cannot be used as a substitute for potential impacts to existing rights.

Protestants identify that existing water rights and permits would be impacted on the Cleveland Ranch and within grazing allotments, and that groundwater wells would need to be moved to new locations to access groundwater if the Spring Valley applications were approved.<sup>14</sup> Protestants also provided evidence that a large number of existing groundwater rights within the

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<sup>12</sup> State Engineer Exhibit 80, SNWA Exhibits 148-151.

<sup>13</sup> Transcript, vol. 1, p. 31.

<sup>14</sup> CPB Exhibit 011, pp. 68-69.

subject basins and adjacent basins would be impacted from the approval of the applications.<sup>15</sup> The State Engineer finds that the monitoring and mitigation process in and of itself does not prevent impacts to existing rights. Given the substantial evidence that existing rights would be impacted at the Cleveland Ranch and associated grazing allotments,<sup>16</sup> the State Engineer finds that applications 54009 – 54018, 54020, and 54021 conflict with existing rights.

The Applicant provided evidence that demonstrated pumping would cause impacts to existing rights in Spring Valley.<sup>17</sup> The Applicant identified that groundwater levels would decline 50 – 150 feet by the year 2117 within the region of applications 54003 – 54008 and 54019.<sup>14</sup> The Applicant did not provide any evidence of impacts on water rights below 50 feet of groundwater drawdown. Protestants provided evidence that groundwater levels would decline by 100 feet within 200 years after proposed pumping by the Applicant within the region covering applications 54003 – 54008 and 54019.<sup>18</sup> Other Protestants provided evidence that groundwater level declines in southern Spring Valley (within the region covering applications 54003 – 54008 and 54019) would reach at least 50 feet within 75 years.<sup>19</sup> The State Engineer finds that there is substantial evidence, both from the Applicant and Protestants, demonstrating that groundwater declines from pumping of applications 54003 – 54008 and 54019 would cause conflicts with and impair existing rights.

For Cave Valley, the Applicant provided evidence to suggest that groundwater pumping from applications 53987 and 53988 would have no impact on existing water rights.<sup>20</sup> However, the State Engineer finds that the Applicant provided conflicting evidence as to impacts on

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15 GBWN Exhibit 110, Ch.3.3, p. 3.3-106.

16 CPB Exhibit 011, pp. 2-69.

17 SNWA Exhibit 337, Appendix C: Table C-1, Plates 1, 2.

18 GBWN Exhibit 110, Ch.3.3, p. 3.3-102.

19 CTGR Exhibit 007, Part C, pp. 7-10.

20 SNWA Exhibit 337, Appendix C: Table C-2, p. C-5.

existing rights in Cave Valley – evidence provided by the Applicant demonstrated that impacts to existing rights would occur in Cave Valley by 2117, particularly in southern Cave Valley.<sup>21</sup> Protestants provided evidence that pumping from applications 53987 and 53988 would cause drawdown of up to 200 feet over 200 years.<sup>22</sup> The State Engineer finds that there is substantial evidence, both from the Applicant and Protestants, demonstrating that groundwater declines from pumping of applications 53987 and 53988 would cause conflicts with and impair existing rights.

For Dry Lake Valley, the Applicant provided evidence that no senior water rights (pre-1989) within the basin would be impacted by 2117 from over 50 feet of groundwater drawdown.<sup>23</sup> The Applicant provided evidence that predicted groundwater drawdown to be 50 – 150 feet in relatively confined zones around the points of diversion by 2117, and no impacts on existing rights.<sup>23</sup> Protestants provided evidence that predicted expansive areas of groundwater declines in Dry Lake Valley that range from 10 – 100 feet.<sup>24</sup> Protestants also provided evidence demonstrating that predicted drawdown would impact existing rights in Dry Lake Valley.<sup>25</sup> The State Engineer finds the approval of applications 53989 and 53990 would cause groundwater declines that impact existing water rights.

For Delamar Valley, the Applicant provided evidence that predicted groundwater pumping from applications 53991 and 53992 would cause groundwater level declines that ranged from 50 – 150 feet by the year 2117.<sup>21</sup> Protestants also provided evidence to indicate expansive groundwater declines in the range of 50 -100+ feet over a 200-year period throughout most of Delamar Valley.<sup>24</sup> The State Engineer finds that both the Applicant and Protestants provided

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21 SNWA Exhibit 337, Appendix C, Plate 2.

22 GBWN Exhibit 110, Ch.3.3, p. 3.3-102.

23 SNWA Exhibit 337, Appendix C, Table C-3, p. C-5.

24 GBWN Exhibit 110, Ch. 3.3, pp. 3.3-102 – 3.3-166.

25 GBWN Exhibit 110, Appendix F3.3.15. pp. 1-15.

substantial evidence that predicted drawdown would impact or conflict with existing water rights. The State Engineer finds the approval of applications 53991 and 53992 would cause groundwater declines that impact existing water rights.

The Applicant provided evidence to indicate groundwater pumping from the subject applications would cause groundwater drawdown in adjacent basins. Specifically, the Applicant demonstrated that pumping in Cave Valley would impact spring discharge in White River Valley.<sup>26</sup> The Applicant provided no evidence as to potential impacts on existing rights on adjacent basins. However, Protestants provided evidence that water rights in adjacent basins would be impacted, especially rights in Hamlin Valley (hydrographic basin 196).<sup>27</sup> The State Engineer finds that applications 54003 – 54008 and 54019 in southern Spring Valley would conflict with existing water rights in Hamlin Valley.

## VIII.

### **THREATENS TO PROVE DETRIMENTAL TO PUBLIC INTEREST**

Nevada Revised Statute 533.370(5) provides that the State Engineer must reject an application if the proposed use of the water threatens to prove detrimental to the public interest. In *Pyramid Lake Paiute Tribe v. Washoe County* (112 Nev. 743, 1996), the Nevada Supreme Court provided guidance for the State Engineer regarding the public interest criterion. On remand, the State Engineer determined that the following criteria helped to define the public interest under Nevada water statutes: (1) an appropriation must be for a beneficial use; (2) the applicant must demonstrate the amount, source and purpose of the appropriation; (3) if the appropriation is for municipal supply, the applicant must demonstrate the approximate number of persons to be served and the approximate future requirements; (4) the right to divert ceases when

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<sup>26</sup> SNWA Exhibit 337, Appendix C, Table C-5, p. C-8.

<sup>27</sup> GBWN 110, Ch. 3.3, Appendix F3.3.14, F3.3.15.

the necessity for the use of water does not exist; (5) the applicant must demonstrate the magnitude of the use of water; (6) for large appropriations, the State Engineer must consider whether the applicant has the financial capacity to develop the water and place it to beneficial use; (7) rotation in use is authorized to bring about a more economical use of supplies; (8) the State Engineer may determine whether there is over pumping of groundwater and reject applications if there is no unappropriated water in the source of supply; (9) the State Engineer may determine what is a reasonable lowering of the static water level in an area after taking into account the economics of pumping water for existing users and the effect of water use on the economy of the area; and (10) within an area that has been designated, the State Engineer may monitor and regulate the water supply. The State Engineer finds that all of the listed criteria must be met, where applicable, in order to prove public interest.

The State Engineer finds:

- (1) The Applicant identified the beneficial use for the subject applications would be “municipal and domestic.”
- (2) The Applicant demonstrated the amount of water, source and purpose of the appropriations as described under GENERAL I – XXV above.
- (3) The Applicant demonstrated the number of persons to be served by the appropriations was two million and the approximate future requirements of additional water for Clark County were provided.
- (4) The Applicant demonstrated necessity of the use.
- (5) The Applicant demonstrated the magnitude of the use of water.
- (6) The Applicant has the financial capacity to develop the water.
- (7) No determination as to potential rotation of use.

- (8) The applications would result in over pumping and widespread groundwater declines, and the applications for Spring, Cave and Delamar valleys exceed the perennial yield of the basins.
- (9) The applications would result in over pumping and widespread groundwater declines, exceeding a reasonable lowering of the static water level at the source of supply; the appropriations would have an unreasonably negative impact on the subject basins' economy in general.
- (10) Any designations must be monitored and managed.

The State Engineer finds that the Applicant has met criteria 1-6. The State Engineer finds that the Applicant has not meet criteria 8-10. The State Engineer finds that criterion 7 is not applicable at this time. The State Engineer finds that all of the public interest criteria established in his ruling following *Pyramid Lake Paiute Tribe v. Washoe County* have not been met, and thus, the appropriations would prove detrimental to the public interest.

Under criterion 9, above, the State Engineer shall consider whether over pumping and groundwater drawdown from the subject applications would exceed a reasonable lowering of the static water level at the source of supply and whether the appropriations would have an unreasonably negative impact on the subject basins' economy in general. The State Engineer, under section VII. Conflicts With Existing Rights, found that widespread drawdown would result from the appropriations and exceed a reasonable lowering of the static water level at the source of supply. The Applicant provided evidence as to whether the economy of White Pine and Lincoln Counties would be impacted from the appropriations. However, the Applicant provided no evidence or testimony as to the Tribal Protestants' economy in the subject basins. Tribal Protestants provided un rebutted testimony as to their general use and economy of the subject

basins.<sup>28</sup> Tribal Protestants provided testimony that their culture has existed in the subject basins since time immemorial, especially Spring Valley, and their culture exists today in a smaller area that includes the subject basins, but with a continuity of its values, traditions, and general traditional economy.<sup>29</sup> The State Engineer finds that the general economy for Tribal protestants occurs in the subject basins, especially Spring Valley, and includes a social network of Tribal people where plants, animals, and water are exchanged among members of their Tribes for hunting, gathering, and ceremonial purposes. Tribal Protestants provided testimony that groundwater drawdown would impact springs, plants, and animals of the subject basin, and subsequently would impact their capacity to use natural resources of the basin for their unique economy based on hunting, gathering, and ceremonies.<sup>30</sup> The Applicant provided testimony that plant communities would change and those plants that can survive on precipitation alone would take the place of native plants that could not survive the lowered water table.<sup>31</sup> Under criterion 9 above, the State Engineer finds that groundwater drawdown from the subject applications would have unreasonable and negative impacts on the subject basins' general hunting and gathering economy for Tribal Protestants. Thus, the State Engineer finds that the applications prove detrimental to the public interest.

From the Court's and Nevada Legislature's guidance, the State Engineer has found that it is in the public interest to facilitate augmentation of municipal water supplies when other water supplies are declining, so long as other public interest values are not compromised or could be mitigated. In addition, the State Engineer finds that Nevada water statutes exist to ensure that the public interest is protected, and therefore, any violation of the statutory provisions of Nevada

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28 Transcript, vol. 25, pp. 5642-5841; vol. 26, pp. 5847-5902.

29 Transcript, vol. 25, p. 5681.

30 Transcript, vol. 25, pp. 5678-5780,

31 Transcript, vol. 11, p. 2491; vol. 7, p. 1624.

water law threatens to prove detrimental to the public interest. The Applicant provided testimony regarding the decline of Colorado River water supplies and Clark County's interest in augmenting and diversifying its current water supplies.<sup>32</sup> The State Engineer finds that these public interest criteria have been met by the Applicant. The Applicant provided evidence that pumping from the subject applications would cause inevitable groundwater drawdown, over pumping of the source of supply, and exceed a reasonable lowering of the static water level at the point of diversion and source of supply over at least 100 years.<sup>33,34</sup> The burden of proof is on the Applicant to demonstrate that groundwater drawdown would not be detrimental to the public interest. *Bacher v. Office of State Engineer, supra* at 1116 (“NRS Chapter 533 prescribes the general requirements that every applicant must meet to appropriate water”). The Applicant offered monitoring and mitigation plans for the subject basins as a means to mitigate impacts on the public interests and resources. However, the State Engineer finds that the Stipulated Agreements and associated monitoring and mitigation plans have been violated on numerous counts by the Applicant (see below, IX. Environmentally Sound ). The State Engineer finds that because of the violations of the Stipulated Agreements he cannot consider those Agreements and the associated monitoring and mitigation plans in this ruling. The State Engineer finds that the violations of the Stipulated Agreements and associated monitoring and mitigation plans compromise public interest values and the groundwater pumping impacts cannot be mitigated, proving detrimental to the public interest.

The State Engineer has previously made public interest findings on whether an appropriation would impair endangered or threatened species in an area or degrade the quality of

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32 Transcript, vol. 1, pp. 62-102.

33 SNWA Exhibit 337, Appendix C, Plate 2.

34 Transcript, vol. 11, p. 2502 (Prieur).

water.<sup>35</sup> Protestants provided evidence indicating that the federally threatened Big Spring spinedace (*Lepidomeda mollispinis pratensis*) occurs in Dry Valley, and the federally endangered Pahrump poolfish (*Empetrichthys latos*) occurs in Spring Valley.<sup>36</sup> The Pahrump poolfish occurs at Shoshone Ponds and other areas which are groundwater-fed environments.<sup>37</sup> The Applicant provided evidence that groundwater drawdown in the area of Shoshone Ponds would be in the range of 50-150 feet within 100 years.<sup>33</sup> The State Engineer finds that groundwater drawdown from the subject applications in Spring Valley would impair the Pahrump poolfish and its habitat. The State Engineer also finds that groundwater drawdown in Dry Lake Valley would impair the Big Spring spinedace. The Stipulated Agreements and associated monitoring and mitigation plans do not ensure the protection of these species, but only ensure a process to monitor and mitigate impacts. Moreover, the State Engineer cannot consider the Stipulated Agreements and the associated monitoring and mitigation plans in this proceeding given the violations to the Stipulated Agreements by the Applicant (as mentioned in IX. Environmentally Sound). Therefore, the State Engineer finds that appropriations in Spring Valley and Dry Lake Valley prove to be detrimental to the public interest.

The State Engineer finds that the oldest and most well-established public interest criterion has been that of whether an appropriation would impair existing rights. As described above (in VII. Conflicts With Existing Rights), the State Engineer found that all of the subject applications (54003-54021 and 53987-53990) would impair existing rights. Therefore, the State Engineer finds that the subject applications 54003-54021 and 53987-53990 would prove detrimental to the public interest.

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35 Nevada State Engineer Supplemental Ruling on Remand from *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 1996.

36 GBWN Exhibit 110, Ch.3.7, Appendix F.3.7, Table 3.7-1.

37 GBWN Exhibit 110, Ch. 3.7, Appendix F.3.7, Table F3.7-6, p. F3.7-16.

Further, the State Engineer has previously found that the history of water appropriations in Nevada provides that water resources of the State must be developed cautiously and it would threaten to prove detrimental to the public interest to allow large-scale water developments in support of municipal development when there is low confidence in the predictions of groundwater drawdown, long-term water availability, impacts on hydrological-related natural resources, and where dire consequences could occur. The State Engineer finds that both Applicant and Protestants provided substantial evidence that demonstrated widespread groundwater drawdown will occur. The State Engineer finds that both the Applicant and Protestants provided substantial evidence demonstrating that a lowering of the static water level would not be confined to a reasonable level and would not be confined to a reasonable area around the point of diversion. The State Engineer finds that both Applicant and Protestants provided substantial evidence that groundwater drawdown would continue to increase in depth and area over time. The State Engineer finds that both Applicant and Protestants identified impacts to existing rights and impacts to hydrological-related natural resources. The State Engineer finds that the Applicant provided no assurance as to whether dire consequences would be avoided from the appropriations. The State Engineer finds that the Applicant primarily relied on the Stipulated Agreements and associated monitoring and mitigation plans to provide that assurance; however, the State Engineer finds that monitoring and mitigation does not provide assurance that dire consequences to impacts on hydrological-related natural resources can be avoided and the State Engineer cannot consider the Stipulated Agreements and associated monitoring and mitigation plans in this proceeding due to the violations by the Applicant. The State Engineer finds that the Applicant's violations of the Stipulated Agreements is not in the public interest (see below IX. Environmentally Sound). Therefore, the State Engineer finds that

the applications prove to be detrimental to the public interest.

The State Engineer also finds guidance as to the public interest from NRS 533.025, providing that: “[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public.”<sup>38</sup> “Notably, NRS 533.025 does not provide that Nevada’s water belongs to the state; rather, it belongs to the public.”<sup>39</sup> The Nevada Supreme Court confirmed that the public trust doctrine applied to decisions about public resources.<sup>40</sup> Nevada holds its water resources “in trust for the people of the State that they may enjoy” them.<sup>41</sup> The Nevada Supreme Court cited with approval the following statement:

It is then appropriate, if not our constitutional duty, to expressly reaffirm the engineer’s continuing responsibility as a public trustee to allocate and supervise water rights so that the appropriations do not “substantially impair the public interest in the lands and waters remaining.” . . . “It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.” Our dwindling natural resources deserve no less.<sup>42</sup>

In determining whether to dispense with the State’s public trust resources, the State is obliged to determine “whether the dispensation satisfies ‘the state’s special obligation to maintain the trust for the use and enjoyment of present and future generations.’”<sup>43</sup> The State Engineer finds that the appropriations would substantially compromise the use and enjoyment of present and future generations and thereby prove to be detrimental to the public interest.

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38 See also, *Bacher v. Office of State Engineer*, 122 Nev. 1110, 1116 (2006) (“Water in Nevada belongs to the public and is a precious and increasingly scarce resource.”)

39 *Lawrence v. Clark County*, supra, 127 Nev. Adv. Op. No. 32, 254 P.3d 606 (2011).

40 *Id.* at 607.

41 *Id.* at 609.

42 *Id.* at 611 (citing *Mineral County v. State, Department of Conservation*, 117 Nev. 235 (2001)).

43 *Id.* at 616.

## IX.

### ENVIRONMENTALLY SOUND

Nevada Revised Statute 533.370(6)(c) provides that in determining whether an application for an interbasin transfer of ground water must be rejected the State Engineer shall consider whether the proposed action is environmentally sound as it relates to the basin from which the water is exported. No operational or measurable criteria have been specified under NRS 533.370(6)(c) that form a basis for a definition of environmentally sound. Thus, the State Engineer has the discretion to interpret the meaning of environmentally sound. The State Engineer must then look to the legislative history, legislative intent, and Nevada water laws.

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. The State Engineer has previously found that the perspective he is to focus on for considering environmental soundness is that of hydrologic issues. Therefore, the State Engineer turns to the water law to define the parameters of whether the proposed use of the water is environmentally sound for the basin of origin. The State Engineer finds that this means whether the use of the water is sustainable over the long-term without unreasonable impacts to the water resources and the hydrological-related natural resources that are dependent on those water resources.

The legislative declaration under NRS 533.024 provides the State Engineer with additional guidance on what to consider in terms of environmental soundness. NRS 533.024(1) identifies that it is the policy of the State: “(a) To encourage and promote the use of effluent, where that use is not contrary the public health, safety or welfare, and where that use does not

interfere with federal obligations to deliver water of the Colorado River.” The State Engineer finds this to mean he shall consider whether the applicant is sufficiently using effluent prior to approval of additional water rights.

Nevada Revised Statute 534.020(2) provides that “[i]t is the intension of the Legislature, by this chapter, to prevent the waste of underground waters and pollution and contamination thereof”. This statute also empowered the State Engineer to take action to prevent any such waste, pollution, or contamination. The State Engineer finds that waste, pollution, and/or contamination of underground waters would be environmentally unsound; therefore, the State Engineer must consider whether the applications, either individually or collectively, may lead to waste, pollution and/or contamination of water.

The State Engineer also finds guidance for environmental soundness under Nevada Revised Statute 533.367, which provides that “before a person may obtain a right to the use of water from a spring or water which has seeped to the surface of the ground, the person must ensure that wildlife which customarily uses the water will have access to it.” While this provision of the water law does not specifically apply to an appropriation of ground water, it is a clear demonstration of the public interest in that the sources of water for wildlife remain accessible and viable.

Nevada Revised Statute 534.110(4) provides that a groundwater right “relates to a specific quantity of water and that the right must allow for a reasonable lowering of the static water level at the appropriator's point of diversion.” The law provides clear guidance for the State Engineer in that the static water level can be reasonably lowered at the point of diversion; however, the State Engineer finds that NRS 534.011(4) does not allow water level declines at multiple points of diversion to coalesce and cause widespread groundwater declines. The State

Engineer finds that reasonable lowering of the static water level is restricted to the point of diversion as specifically stated in the statute.

The State Engineer also finds that an appropriation that may cause groundwater drawdown and impacts on hydrological-related natural resources can be required as a condition of the approval of an application to ensure environmental soundness. A monitoring, management and mitigation program may provide information suitable for an early warning process of potential impacts on hydrological-related natural resources in the subject basins.

First, the State Engineer finds that he must consider whether the use of ground water in the subject basins is sustainable over the long-term without unreasonable impacts to the water resources and the hydrological-related natural resources that are dependent on those water resources. The Applicant provided evidence that predicts groundwater drawdown in all of the subject basins over next 100 years caused from the Applicant's Plan of Development (POD) and drawdown tended to increase over time.<sup>44</sup> Protestants provided substantial evidence that predicts greater amounts of groundwater drawdown over a 75 – 200+ year time horizon, which includes drawdown exceeding 200 feet.<sup>45,46,47,48</sup> Protestants also submitted evidence that demonstrated groundwater drawdown is not confined to the subject basins, but groundwater drawdown expands to other hydrologic basins just after 75 years of pumping.<sup>49</sup> Protestants also provided evidence that predicts recovery of groundwater levels and spring discharge to be hundreds of years under the Applicant's POD.<sup>50,51</sup> Subsidence would be an inevitable consequence from that

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44 SNWA Exhibit 337, Appendix C.

45 CPB Exhibit 010, Figure 203.3.2-5.

46 CPG Exhibit 011.

47 CTGR Exhibit 007, Part C.

48 GBWN Exhibit 003, Part C

49 CPB Exhibit 010, Figure 203.3.2.4

50 GBWN Exhibit 003, Part C, p. 12-15.

51 GBWN Exhibits, 11-12.

groundwater drawdown.<sup>52</sup> The State Engineer finds that the hydrologic impacts caused by the Applicant's POD are unreasonable and unsustainable in the long-term.

Substantial evidence was provided that predicts complete changes in vegetation communities, including evidence by the Applicant<sup>53</sup> and by Protestants.<sup>54</sup> The State Engineer finds that groundwater pumping from the applications would cause unsustainable and unreasonable impacts on the hydrological-related natural resources that are dependent on those water resources.

Second, the State Engineer finds that he must consider NRS 533.024(1)(a) – it is the policy of the State to encourage and promote the use of effluent – in his decision of whether the approval of an application for an interbasin transfer is environmentally sound. The Applicant has in place a program where nearly all of the wastewater from the service area is treated and reused.<sup>55,56</sup> The Applicant previously has met this standard, which previously has been approved by the State Engineer.<sup>57</sup> The State Engineer finds that the Applicant has met the obligations of reusing effluent and considers this part of the requirement of NRS 533.370(6)(c) to be environmentally sound.

Third, the State Engineer finds that he must consider whether an appropriation of groundwater for an interbasin transfer prevents the waste, pollution and contamination of underground waters pursuant to NRS 534.020(2). Given the predicted water shortages on the Colorado River that would affect water available to citizens of Clark County and the need for SNWA to secure water resources that will ensure that the citizens of Clark County have

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52 CPB Exhibit 011, p. 40.

53 SNWA Exhibit 037.

54 GBWN Exhibits 057, 061-62.

55 SNWA Exhibit 005.

56 Testimony, vol 1, p. 64.

57 SNWA Exhibit 006.

sufficient household water in the future,<sup>58</sup> the State Engineer finds that an approval of the applications does not constitute waste of underground waters. Some evidence was presented as to groundwater salinity due to pumping from the application amounts.<sup>59</sup> However, that evidence did not identify how salinity would impact groundwater sources, rather it focused on how salinity may impact vegetation communities. The State Engineer finds no substantial evidence that identifies groundwater would be polluted or contaminated from the approval of the subject applications. The State Engineer finds that the applications would be environmentally sound pursuant to NRS 534.020(2).

Fourth, the State Engineer must consider NRS 533.367 – the applicant must ensure that wildlife which customarily uses water from springs and seeps will have access to it – in his decision as to whether the approval of an application would be environmentally sound. The Applicant provided evidence that 17 springs (15 with water rights, 2 with no water rights) in Spring Valley, no spring impacts in Cave, Dry Lake and Delamar valleys, and 2 springs in White River Valley would be impacted from a greater than 50-foot drawdown or result in reduced flows by the year 2117.<sup>60</sup> The State Engineer finds that a drawdown analysis for springs with a minimum of a 50-foot drawdown lacks sufficient resolution to identify many potential impacts. Protestants provided substantial evidence that predicted extensive impacts on springs with at least 10-foot drawdown within two hundred years, including 29 springs in Steptoe Valley, 34 springs in Spring Valley,<sup>61</sup> 212 springs throughout the subject basins and adjacent basins by 75 years, and 307 springs throughout the subject basins and adjacent basins by 200 years.<sup>62</sup>

Protestants also identified that all springs on Cleveland Ranch would go dry between the years

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58 SNWA Exhibits 206, 209.

59 CPG Exhibit 007, p. 3.

60 SNWA Exhibit 258, Appendix C

61 GBWN Exhibit 110, Appendix F3.3.10.

62 GBWN Exhibit 110, Ch.3.3, p. 3.3-106.

2029 and 2045.<sup>63</sup> The State Engineer finds that the approval of the subject applications would have extensive impacts on springs in Spring Valley and adjacent basins, causing many to go dry, and thus causing wildlife that customarily uses those springs for water to lose access to that water. The State Engineer finds that such an impact pursuant to NRS 533.367 is not environmentally sound.

Fifth, the State Engineer can consider whether a monitoring and mitigation plan will ensure the environmental soundness of an appropriation. Substantial evidence and testimony was provided on Stipulated Agreements with Department of Interior agencies/bureaus and the Agreements' associated monitoring and mitigation plans for the subject basins.<sup>64</sup> However, the State Engineer finds that the Stipulated Agreements between the Applicant and Department of Interior agencies were violated on several counts in this proceeding. Count 1: The Stipulated Agreements states that the Parties "shall not seek to . . . prejudice any other Parties or protestants, including any Indian Tribe."<sup>65</sup> The State Engineer finds that the Stipulated Agreements and associated monitoring and mitigation plans were used by the Applicant to prejudice Protestants, including Indian Tribes. Count 2: The Stipulated Agreements and their associated monitoring and mitigation plans were refiled in the current proceeding with no evidence that the Department of Interior agencies, including the Bureau of Indian Affairs, authorized such action. The Stipulated Agreements state that "[e]xcept as expressly provided herein, the Parties agree that the Stipulation shall not be offered as evidence or treated as an admission regarding any matter herein and may not be used in proceedings on any other application or protest whatsoever."<sup>66</sup> The State Engineer finds that the Stipulated Agreements

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63 CPG Exhibit 011, pp. 49-50.

64 State Engineer Exhibits 41, 79, 80, 95; SNWA Exhibits 148-151.

65 State Engineer Exhibit 41, Paragraph 1, p. 6; Exhibit 80, Paragraph 2, p. 5.

66 State Engineer Exhibit 41, Paragraph 19, p. 12; Exhibit 80, Paragraph 19, p. 10.

were offered as evidence and treated as an admission regarding matters within the Agreements and were used unlawfully in a new hearing on water applications within the subject basins.

Count 3: The Stipulated Agreements state that “at any future date if all the permits issued by the Nevada State Engineer pursuant to the SNWA Applications are cancelled, then this Stipulation shall be of no further force and effect among the Parties.”<sup>67</sup> The State Engineer finds that the Nevada Supreme Court's remand requiring renote and rehearing of the subject applications resulted in the Stipulated Agreements to no longer be valid in the present hearing. Count 4: The Stipulated Agreements state that “[t]he DOI Bureaus and SNWA shall jointly explain or defend this Stipulation and Exhibits A and B to the State Engineer.”<sup>68</sup> The State Engineer finds that the DOI Bureaus were absent from the hearings and thus the Stipulated Agreements were not jointly explained or defended as required. Count 5: The Stipulated Agreements call for monitoring and mitigation within the Area of Interest,<sup>69</sup> which includes hydrographic basins beyond the subject basins. The State Engineer finds that the Applicant's proposed monitoring and mitigation plan only covers a fraction of the Area of Interest. The State Engineer also finds that groundwater drawdown would eventually occur in adjacent basins, including at least but not limited to Steptoe Valley, White River Valley, Tippetts Valley, and Snake Valley. The State Engineer finds that the Applicant excluded monitoring and mitigation in those valleys, which is violation of the Agreements. Count 6: Government-to-government consultation with the Tribal Protestants was required for the Stipulated Agreements in 2006 and 2008 by Executive Order 12898, but that consultation did not occur.<sup>70</sup> Government-to-government consultation was also required prior to the refiling the Stipulated Agreements in the current proceeding pursuant to EO 12898, EO

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<sup>67</sup> State Engineer Exhibit 41, Paragraph 2, p. 6.

<sup>68</sup> *Id.* Paragraph 9, p. 9.

<sup>69</sup> State Engineer Exhibit 41, Figure 1; State Engineer Exhibit 80, Figure 1.

<sup>70</sup> Testimony, vol. 25, pp. 5677, 5718, 5722-5724, 5742, 5754, 5759, 5777, 5801-5805,

13175, and Presidential Memorandum for the Heads of the Executive Departments and Agencies dated November 5, 2009; however, that consultation did not occur. The Applicant has used the Stipulated Agreements and associated monitoring and mitigation plans extensively in this proceeding to provide evidence of protection of the public interest and environmental soundness. The State Engineer finds that the Stipulated Agreements have been violated based on substantial evidence that consultation did not occur. Because of these violations, the State Engineer shall give the Stipulated Agreements and associated monitoring and mitigation plans no consideration as to whether proposed pumping from the applications would be environmentally sound and within the public interest. The State Engineer finds that he cannot use the Stipulated Agreements and various associated monitoring and mitigation plans in his decision to appropriate groundwater from the subject basins.

## **X.**

### **LONG-TERM USE AND FUTURE GROWTH AND DEVELOPMENT IN THE BASIN OF ORIGIN**

Nevada Revised Statute 533.370(6)(d) provides that in determining whether an application for an interbasin transfer of groundwater must be rejected, the State Engineer shall consider whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported. By letter dated March 22, 1990, the Applicant identified that they seek all of the unappropriated groundwater in the subject basins.

Tribal Protestants provided testimony as to the impacts from the appropriations on their future economic growth and development in the subject basin, particularly Spring Valley.<sup>71</sup>

Tribal Protestants provided testimony that they use the subject basins for hunting wildlife,

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<sup>71</sup> Testimony vol. 25, pp. 5794-5796.

gathering plants for food and medicinal purposes, and ceremonial/religious purposes.<sup>72</sup> The State Engineer finds that those economic activities from the Tribes are inextricably linked to groundwater as associated hydrological-related natural resources. Tribal Protestants provided testimony that those activities would be lost if the hydrological-related natural resources were lost due to the approval of the applications. The State Engineer finds that future economic growth and development for Tribal Protestants, which is based on a hunting and gathering economy, would be unduly limited by the appropriations in Spring Valley.

## XI.

### ANY OTHER RELEVANT FACTOR

Nevada Revised Statute 533.370(6)(e) provides that the State Engineer may consider any other factor he determines to be relevant as to whether an application for an interbasin transfer of groundwater must be rejected. Tribal Protestants provided substantial evidence and testimony as to the importance of a sacred place called Swamp Cedars Massacre Site located in Spring Valley.<sup>73</sup> The area is both a globally unique environment and an Indian sacred place. Swamp cedar trees require a shallow perched groundwater table. The Swamp Cedars area has multiple springs that bring groundwater to the surface.

The State Engineer finds substantial evidence that applications 54014 and 54015 would cause over 100 feet of groundwater drawdown within 100 years of pumping at the Swamp Cedars area.<sup>74</sup> The State Engineer finds substantial evidence that demonstrates that applications 54010, 54011, 54012, 54013, 54014, 54015, 54016, 54017, 54018 and 54021 individually and collectively contribute to groundwater drawdown at the Swamp Cedars site.<sup>75</sup> The State Engineer

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<sup>72</sup> Testimony vol. 25, pp. 5660-5661, 5677-5686, 5793.

<sup>73</sup> CTGR Exhibit 5; Testimony vol. 25, pp. 5682-5683, 5720-5721, 5772, 5799-5801.

<sup>74</sup> CPB Exhibit 011, Figure 12.

<sup>75</sup> *Id.* pp. 23-36.

finds that 100 feet or more of groundwater drawdown is unreasonable in all areas that would affect the survival and vigor of swamp cedar trees – both northern and southern swamp cedar sites. Testimony from the Applicant identified that most plants in Spring Valley have a maximum rooting depth of 25 meters<sup>76</sup>, and other plants – those that can survive on less groundwater or a deeper water table – would take the place of native plants that could not survive the lowered water table.<sup>77</sup> Tribal Protestants provided testimony that if water is removed from the Swamp Cedars area, “It will be a big impact. Those cedars will die. The sagebrush will die. The grass will die. Animals will die. And there's no other way around – around that. We can't live without water” and “need that water to survive.”<sup>78</sup> The State Engineer finds that the swamp cedar trees are unlikely to survive without the shallow, perched water table. Tribal protestants provided testimony that ancestral “spirits are yet there. And it's connected to the water and the Swamp Cedars. And if. . . that water is taken and the spirit and the resources die, are changed dramatically, we cannot preserve our culture.”<sup>79</sup> The Swamp Cedars, prior to the massacre, was an area of celebration, “now it's a place of mourning.”<sup>80</sup> The State Engineer finds that the loss of swamp cedar trees would cause unreasonable adverse impacts on Tribal Protestants; thus, the State Engineer cannot approve applications 54010, 54011, 54012, 54013, 54014, 54015, 54016, 54017, 54018 and 54021 pursuant to NRS 533.370(6)(d) and 533.370(6)(e).

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76 Testimony, vol. 7, p. 1632.

77 Testimony, vol. 11, p. 2491; vol. 7, p. 1624.

78 Testimony, vol. 11, p. 5800.

79 Testimony, vol. 25, p. 5772.

80 Testimony, vol. 25, p. 5801.

## CONCLUSIONS OF LAW

### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.

### II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:

- A. there is no unappropriated water in the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectable interests in existing domestic wells as set forth in NRS 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

The State Engineer concludes on the basis of this record that there is unappropriated water in the subject basins, there is substantial evidence that the proposed use will conflict with existing rights in the subject basins, there is no evidence to indicate whether the proposed use would conflict with protectable interests in existing domestic wells, and there is substantial evidence that the use appropriations and proposed use threaten to prove detrimental to the public interest; thus, pursuant to NRS 533.370(5), the law mandates the rejection of the water right applications.

### III.

The State Engineer concludes that the Applicant did not provide proof satisfactory of its intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence. Thus, the State Engineer cannot approve the

applications pursuant to NRS 533.370(1).

#### IV.

The State Engineer concludes, based on the findings, that there is substantial evidence that the Applicant's proposed action is not environmentally sound as it relates to the basins of origin, there is substantial evidence that the proposed action is not an appropriate long-term use and will unduly limit future growth and development in the basins of origin, and there is substantial evidence that the proposed use will cause the loss swamp cedar trees at the Swamp Cedars Massacre Site, an Indian religious and cultural place. Therefore, the State Engineer must reject the applications pursuant to NRS 533.370(6).

#### RULING

The protests to Applications 53987, 53988, 53989, 53990, 53991, 53992, 54003, 54004, 54005, 54006, 54007, 54008, 54009, 54010, 54011, 54012, 54013, 54014, 54014, 54015, 54016, 54017, 54018, 54019, 54020 and 54021 are hereby upheld in part and the applications are hereby denied on the grounds that approval will conflict with existing rights, threaten to prove detrimental to the public interest, are not environmentally sound, are not an appropriate long-term use and will unduly limit future growth and development in the basins of origin, and will cause the loss swamp cedar trees at the Swamp Cedars Massacre Site, an Indian religious and cultural place.

Dated: January 27, 2012.

By



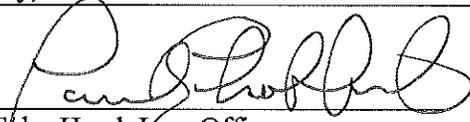
Paul C. Echo Hawk  
Echo Hawk Law Offices  
P.O. Box 6119  
Pocatello, Idaho 83205-6119

Attorneys for Duckwater Shoshone Tribe  
and Ely Shoshone Tribe

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27<sup>th</sup> day of January, 2012, a true and correct copy of the foregoing was served on the following counsel of record by depositing the same for mailing by US Mail, postage prepaid, addressed to the following:

|  |   |
|--|---|
| Dana Walsh<br>Southern Nevada Water Authority<br>1001 S. Valley View Blvd. MS#485<br>Las Vegas, Nevada 89153                                   | Great Basin Water Network and Protestants<br>2nd Big Springs Irrigation Company, et al.<br>Simeon Herskovits<br>Advocates for Community and Environment<br>94 Highway 150<br>El Prado, New Mexico 87529                     |
| Richard W. and Lesley Ann Sears<br>1963 South 17th East HC 10<br>Ely, Nevada 89301   | George Benesch<br>190 W. Huffaker Lane, Suite 408<br>Reno, Nevada 89511-2092  |
| Juab County and Millard County, Utah<br>J. Mark Ward<br>Utah Association of Counties<br>5397 Vine Street<br>Murray, Utah 84107                 | EskDale Center<br>Jerald Anderson<br>1100 Circle Drive<br>EskDale, Utah 84728   |
| U.S. Department of Agriculture<br>Forest Service<br>Jeanne A. Evenden<br>324 25th Street<br>Ogden, Utah 84401                                  | Scott Williams<br>ALEXANDER, BERKEY, WILLIAMS &<br>WEATHERS, LLP<br>2030 Addison Street, Suite 410<br>Berkeley, CA 94707  |
| Long Now Foundation<br>Laura Welcher<br>Director of Operations<br>Fort Mason Center<br>Building A<br>San Francisco, California 94123Nye County | Corporation of the Presiding Bishop of the<br>Church of Jesus Christ of Latter-day Saints<br>Severin A. Carlson<br>Kaempher Crowell, Renshaw, Gronauer &<br>Fiorentino<br>510 W. Fourth Street<br>Carson City, Nevada 89703 |
| Henry C. Vogler IV<br>HC 33 Box 33920<br>Ely, Nevada 89301   |   |

  
Echo Hawk Law Offices