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The Honorable Jim Gibbons
Governor, State of Nevada
101 North Carson Street
Carson City, Nevada 89701

Dear Governor Gibbons:

On January 28, 2010, the Nevada Supreme Court issued its opinion in the matter of *Great Basin Water Network, et al. v. State Engineer and Southern Nevada Water Authority*, 126 Nev., Advance Opinion 2. As you know, the Court's opinion has caused considerable concern in not only the water community but also with banking and lending institutions, and has led to the re-filing of hundreds of water right applications and associated protests. The concern goes not only to applications on file with the Division of Water Resources that have not yet been acted on, but to an additional 13,000 plus actions on water right applications, either denials or approvals, that took more than one year past the date for filing a protest. It is the approved applications that are causing the most consternation. If the State Engineer's action on those applications is called into question and the validity of water rights challenged, there is chaos in the world of development upon which banks have loaned money and projects built or in the development phase. The uncertainty of the status of those permitted water rights is of grave concern to many water right holders.

On February 28, 2010, during the 26th Special Session of the Nevada Legislature, a Motion to Express Legislative Intent (Attachment A) was entered into the Journal that urged the State Engineer to immediately hold a hearing on potential resolutions to the issues presented by the *Great Basin Water Network* decision. Pursuant to a Notice dated March 3, 2010 (Attachment B), on March 16, 2010, the State Engineer held a workshop

in Carson City¹ to consider the matter urged by the Motion to Express Legislative Intent. The workshop was well attended with one hundred twenty three people signing in on the workshop sign-in sheets. Written comments were submitted and all testimony was recorded by a court reporter during the course of the workshop.

The workshop was conducted in two separate phases. During the first phase, the participants were asked to provide input on their interpretation as to the impact of the Supreme Court's decision; how narrow or broad do they think it is, what water rights did they believe it impacts, and whether there should be a legislative change to address those impacts. The purpose of breaking the workshop into two segments was to first determine if there was a general consensus that the Supreme Court's decision creates a problem in Nevada water law and should there be a legislative fix. Until that threshold was crossed, the State Engineer did not want to address specific statutory amendments. While many at the workshop expressed great concern with the Supreme Court's decision and indicated that a legislative fix is required and that fix should be accomplished as soon as possible, others provided testimony that they did not believe that action should be hastily taken, that they would like the judicial process to run its course and that they did not believe there is a consensus as to a problem. Other testimony addressed the one-year rule and its lack of workability in the world today.

At the conclusion, of the March 16, 2010, workshop, the State Engineer asked the participants how they would like to proceed. Most agreed they would like the State Engineer to post all written comments and suggestions for statutory amendments on the Nevada Division of Water Resources webpage and provide a timeline for submitting additional comments and suggestions. Thereafter, the State Engineer issued a Notice of Workshop Timeframes (Attachment C), which provided timeframes for the submission of comments on the matter in general, proposed statutory amendments to the water law and comments thereto. All submissions were also posted to the Division of Water Resources webpage. The State Engineer advised the participants that, after the comment period, he would review the matter and decide what course of action to take next.

WRITTEN COMMENTS SUBMITTED AT WORKSHOP

At the workshop, written comments were submitted by Washoe County, Great Basin Water Network, NV Energy, Truckee Meadows Water Authority, Walter Leberski and other petitioners in the *Great Basin Water Network* case.

¹ The workshop was held at the Nevada Legislative building and was also broadcast to Las Vegas via the Legislative internet network. Inquiry has been made whether the State Engineer intends to travel to other parts of Nevada to conduct additional workshops. The remaining travel budget of the Division of Water Resources for this fiscal year is extremely limited and the spring/summer field work season has just begun. Additional travel in support of this workshop is not possible within the confines of the current fiscal resources; therefore, the State Engineer handled this matter in the most cost effective manner possible by utilizing the Division of Water Resources webpage.

Washoe County (Attachment D) Washoe County's comments indicate that a broad reading of the Supreme Court's decision has the potential to impact many of its permitted water rights, which may support already built and occupied developments. The County indicated that it should be noted that often times there are complex title issues related to changes of Truckee River *Orr Ditch* decreed water rights that prevents the State Engineer from taking action within the one-year time period. The County's comments state that the Supreme Court's decision finds that any application older than one year is no longer pending; however, it believes this finding is inconsistent with other provisions of Nevada water law that in general recognize five different statuses for any water right appropriation: pending application, permitted water right, denied water right, cancelled water right or withdrawn water right.² However, Washoe County believes the Supreme Court has now created a fifth category of "lapsed" water right, which is inconsistent with the provision of NRS § 533.370 that provides for the State Engineer to either *approve or reject* an application. The County indicates that while the Supreme Court proposes a possible remedy for applications that have been pending for more than one year (re-filing the application or re-opening the protest period), the Nevada Legislature already addressed the issue in NRS § 533.370(8). Washoe County requests that any proposed language for a statutory amendment apply to the section retroactively and should consider the following:

1. The re-opening of the protest period should only happen once.
2. Those applications that were specifically held in abeyance by a deliberate act of the State Engineer or a court finding to conduct studies or observe monitoring results should be exempt.

Great Basin Water Network ("GBWN") (Attachment D) GBWN believes that any legislative or administrative action designed to undermine the Supreme Court's opinion is unnecessary, inappropriate and would only lead to additional legal action and uncertainty. GBWN believes the Court's decision may be readily limited to the facts before the Court and to a limited number of closely analogous factual circumstances and does not portend the chaos that some have argued. Additionally, it states that since the Supreme Court is considering petitions for rehearing that may clarify or limit the scope of the ruling, no action should be taken while the matter is still before the Court. GBWN argues the principle of separation of powers requires the Legislature to allow the Judiciary to complete its process of construing the law and ensuring consistency with constitutional requirements. Thus, any limitation placed on the Court's decision must be narrowly focused. Its comments do indicate that, if after the courts have resolved the issues, there is still any genuine remaining ambiguity concerning the scope of the decision or its impacts that is a matter that can be addressed by the 2011 Legislature. However, it believes that any legislative action cannot impinge on the Court's ordered remedy concerning the Southern Nevada Water Authority ("SNWA") applications upon which it ruled. While the GBWN does not believe any legislative action is necessary, it might be

² The State Engineer notes the listing does not include abandoned or forfeited water rights.

willing to agree to a limitation that is carefully crafted to ensure that the Supreme Court's decision as to the SNWA's applications is preserved and that the ruling is applied in a manner that remedies the constitutional concerns raised in the case.

Walter Leberski (Attachment D) Mr. Leberski raises the issue that there are quite a few applications that have not been acted on within the one-year time period due to the fact that there are adjudications of pre-statutory vested water rights that are pending³ and the applications cannot be acted on until the adjudications are completed. Mr. Leberski is concerned that the Supreme Court's decision will impact those applications, some of which are quite old, because they do not fall under any of the statutory exceptions now found in the water law for not acting within one year.

NV Energy ("NVE") (Attachment D) NVE has concerns over applications it has on file that are past the one-year timeframe that go to its long-range planning efforts for the expansion of existing or construction of new facilities. While NVE believes a legislative solution needs to be crafted, it cautions against hastily crafting any amendment. NVE indicates that whatever solution is crafted it does not recommend the re-filing of applications, because this would result in the loss of priority, which is of vital importance and would be punitive against applicants. NVE believes there are two relatively simple solutions: (1) amend the transitory provisions of the 2003 amendment to NRS § 533.370, Senate Bill 336, Section 18 to make it clear the amendment was intended to apply retroactively to all applications on file since 1947 and (2) address the due process rights of "subsequent" protestants by amending NRS § 533.370(8) to re-notice applications that have not been acted on within a certain amount of time and re-open the protest period for those applications. However, NVE believes the re-noticing should apply to all applications and not just certain interbasin transfer applications. Finally, NVE believes the re-noticing should only trigger at the time the State Engineer is ready to take action on the applications.

Truckee Meadows Water Authority ("TMWA") (Attachment D) Although the TMWA firmly believes that the Supreme Court's decision should be substantially narrowed in future litigation, it does not believe that interested or affected parties should be left vulnerable to costly and lengthy litigation. It indicated that this being especially true when the issue before us results from the misinterpretation of a legislative act that was intended to avoid these very problems in the first instance. The TMWA indicates that the Supreme Court's interpretation of "pending" application is inconsistent with the manner in which many State Engineers have historically applied the one-year provision since it was added to Nevada's water law in 1947. The TMWA believes that the solution arrived at for restoring stability and consistency in Nevada water law should not turn on the ultimate result one believes should be reached in the *Great Basin Water Network* case. It believes that the merits of the *Great Basin* case involve broader and more significant

³ The State Engineer notes that while there are many adjudications pending, the Division of Water Resources does not have the staff or resources which to pursue and complete those adjudications.

questions and the TMWA believes it is entirely appropriate to ask that the Legislature address the issues. It provides two examples where the Legislature has amended Nevada water law to address court decisions and urges the State Engineer to recommend a solution similar to that adopted by the 1993 Legislature regarding the language "water already appropriated" and provided statutory amendment language to that effect. *See*, Suggested Language Version 1 in Attachment F. Finally, the TMWA suggests that the regulations applicable to hearings on protested applications be amended to allow for intervention of persons who have a significant interest in the matter, but who, for some good reason, did not file a timely protest.

TESTIMONY PROVIDED AT WORKSHOP

During the course of the workshop testimony was presented by the following people:

NV Energy (Jessica Prunty) NVE reiterated some of its written comments expressing its serious concern about the impacts the decision will have on applications it has pending for long-range planning for the expansion of existing and construction of new facilities. NVE believes the decision applies to applications, but not to existing permitted and certificated rights. NVE suggests that the Legislature go back into the 2003 amendments and amend the transitory provision to make it clear that the amendment was to apply retroactively to all applications that were on file back to 1947. It supports crafting some language to address the due process rights of persons who were not able to protest at the time of the initial protest period and suggests amending NRS § 533.370(8) to eliminate existing language about successors in interest and allowing for re-opening the protest period not only on interbasin transfers, but on all applications that have been pending for a certain amount of time. However, NVE suggests that the trigger time should be when State Engineer is ready to take action on the applications. It stresses that preservation of the priority date on original applications is of vital importance, that a legislative solution is appropriate and suggests that a special session should be called before the matter is remanded to the district court.

Truckee Meadows Water Authority (Gordon DePaoli) The TMWA testified that the broad holding of the case is that it applies to all applications on file for more than one year prior to July 1, 2003, which may either have to be re-noticed or re-filed, even if subsequent to July 1, 2003, those applications have been approved. The TMWA believes a special session is appropriate and referred to its written comments submitted for more detail. However, the TMWA believes that at this time the focus should be kept narrow to the very specific matter raised by the Supreme Court's decision.

Moapa Band of Paiute Indians ("Moapa Band") (Richard Berley) The Moapa Band testified that the implications of the Supreme Court's decision are not clear. The Moapa Band feels strongly that existing permits should be protected and that a legislative solution is appropriate. The Moapa Band did not weigh in heavily in favor of a special session, but indicated that this seems like a matter of an emergency nature. It testified that there may be a need to address the issue of re-opening protest periods for applications, but stated that is a completely different matter than to re-open granted permits for which all appeal periods have expired.

Virgin Valley Water District ("VVWD") (Michael Johnson) The VVWD testified that it is highly impacted by the Supreme Court's decision as the water district has numerous applications that were filed between 1989 and 1997 that have not been acted on to date.⁴ The VVWD prefers a legislative fix to the problem that protects the priority date of the earlier filings and wants the matter to be addressed in a special session. The VVWD has re-filed many of its applications; however, another entity beat it to the State Engineer's office and got applications on file that are now senior to the VVWD new filings.

Southern Nevada Water Authority ("SNWA") (Julie Wilcox) The SNWA believes that in 2003 the intent of the Legislature was clearly demonstrated and that was to preserve the status of applications that had not been acted upon. The SNWA testified that the Supreme Court's decision puts water resource plans in jeopardy and believes a legislative fix is necessary as soon as possible. It believes that a legislative remedy should explicitly state that the 2003 law was meant to be retroactive and supports a recommendation that applications for interbasin transfers of groundwater larger than 250 acre-feet which have not been acted on by the State Engineer within seven years be re-opened for new protests.

AFL-CIO (Danny Thompson) The AFL-CIO is in favor of a legislative fix as it is very concerned about the impacts of the Supreme Court's decision. It testified that the decision has financial impacts on bond documents or loan documents as it concerns the availability of water and the ability to loan for future construction is almost impossible right now and the decision throws out 100 years of water law and throws everything into turmoil. It testified that it is imperative to go back to the Legislature and have them clarify what was intended and a special session is appropriate given the economic conditions in Nevada.

Lincoln County Water District and Lincoln County ("LCWD/LC") (Dylan Frehner) The LCWD/LC testified that both entities have applications that could be impacted by the Supreme Court's decision. Lincoln County also has an agreement with the SNWA as to portions of its applications, including those water right applications in Cave, Dry Lake and Delamar Valleys, so it is immediately impacted by the decision. LCWD/LC agree

⁴ The State Engineer notes for the record he has attempted to move these applications forward, but was asked not to do so by the VVWD.

that a legislative fix is needed and because of the turmoil the decision has caused, there needs to be a quick fix, but the matter should also come back more fully before the 2011 Legislature. These entities believe the Court's decision only goes to applications and not towards permits that have already been granted.

Nevada Environmental Law Society and "the law school" ("NELS") (Michael DeLee) The NELS does not share the concern as to the 14,500 water rights that were talked about in the special session and does not feel those water rights are in jeopardy for a number of reasons: standing, appeal periods, etc. However, it believes there may be some concerns on pre-2002 water rights. However, the NELS does not support a special session and does not agree with NV Energy's proposal to open up protests to all parties after a certain period of time and supports the current legislative distinction as to interbasin transfers greater than 250 acre-feet. The NELS' comments went beyond the narrow issue of the workshop and the State Engineer is going to keep the review and analysis focused on the specific issue raised by the Legislature's motion.

Pardee Homes of Nevada ("Pardee") (Helen Foley) Pardee strongly support attempts to rectify the Supreme Court's decision and wants some type of action to retroactively change the law back to 1947. The testimony indicated that there is a concern with the financial viability of Nevada's economy and that a stable source of water is critical to that viability. Pardee feels that a special session is needed to rectify the situation immediately. However, it also believes the one-year provision of the water law is antiquated and outdated and needs to be modernized.

Great Basin Water Network and other Petitioners (Simeon Herskovits) The GBWN believes the actual meaning and import of the Supreme Court's decision has been a victim of a fair amount of exaggeration and overheated rhetoric. It testified that the decision dealt only with the rather extraordinary circumstances of the SNWA's 1989 applications and equal protection and due process concerns raised in the context of that case and that the decision only applies to the particular applications in the case before the Supreme Court. The GBWN does not believe there is any danger to the seniority of either pending applications or existing water rights or that the decision in any way implicates or calls into question any water rights that have been permitted, the sole exception being the actual applications and parties that were before the Supreme Court. The GBWN does not believe a legislative fix is necessary at all. It does not believe anyone's applications need to be re-filed because their seniority was expressly protected by the decision. The GBWN suggested that perhaps within the one-year timeframe applicants and protestants could be brought together to discuss timeframes for moving forward and an agreement obtained in accordance with the current statute on how to proceed. The GBWN believes it is appropriate to let the litigation takes its course, especially since there are petitions for re-hearing pending before the Supreme Court, which is more respectful of the basic principles of separation of powers and does not believe the Legislature can simply reverse the Court without creating constitutional implications. The GBWN does not agree there should be a special session hastily called,

but rather would prefer to allow the courts a chance to do their work and then, if there is still a problem, take that before the 2011 Legislature.

Nevada Cattlemen's Association (Dave Baker for Ron Cherry) The Nevada Cattlemen's Association has serious concerns regarding legislative action in response to the Supreme Court's decision. The Association prefers that no legislative action be taken until the courts have an opportunity to act and does not support a bill regarding the decision in a special session. It testified that the matter is more appropriately addressed during the regular session, if necessary, but only after the courts have issued their rulings.

Truckee-Carson Irrigation District and other water right owners in Nevada ("TCID") (Michael Van Zandt) The TCID believes the ruling very clearly does not apply to existing permitted and certificated water rights, but agrees the decision has caused confusion. The TCID is concerned about discretionary versus non-discretionary parts of Nevada water law. It testified that the mandatory one-year provision of the water law is a severe problem for the State Engineer's office given its limited resources and the complexity of some of the water right issues the office addresses. It indicated that the one-year language has no efficacy in a modern world given the types of issues, applicants with very complex projects and protestants with significant issues that need to be addressed, that it is too much of a burden for all involved and it is just not possible to process these applications in one year. It believes the time has come to repeal the one-year language and the Legislature needs to provide the State Engineer with much greater flexibility in dealing with applications. Given the great confusion and potential destabilization of water rights, it testified that a legislative fix is necessary and a special session is needed to fix it.

Washoe County (Vahid Behmaram) Washoe County is very concerned with the Supreme Court's decision and believes there is a potential that the decision could be interpreted to affect many rights it now holds. The County believes that ideally the Court will clarify the matter regarding the definition of pending application and the Legislature will then confirm the Court. It would support the legislative fix provided herein as Suggested Language Version 1.⁵ The County suggests as to the due process issue and re-opening of the protest period that there be an exception for applications that were deliberately held in abeyance as the result of an existing ruling of the State Engineer or Court.⁶ Washoe County does not support continual re-opening of protest periods, but rather believes that if it happens, it should only happen once.

Bruce Scott (engineer and water right surveyor) Mr. Scott testified that although there are conflicting opinions on the impact of the Supreme Court's decision, there is definitely a controversy and a lot of money is being spent on legal fees, filing fees for new applications and fees for filing protests. He indicated that a legislative response is

⁵ Attachment F to this report provides copies of the suggested statutory amendments submitted during the course of consideration of this matter.

⁶ For example, as was done in the case of Washoe County's applications in Honey Lake Valley.

important, but only appropriate to clarify the bigger picture. Mr. Scott felt that a very deliberate special session might be more appropriate rather than the issue becoming part of the regular session, but that a special session should not be allowed to hijack Nevada Revised Statute Chapter 533. He stated that what really matters is what the lenders think and if they are not going to lend because of the uncertainty raised by the decision, we have a big problem. Mr. Scott does not believe the one-year rule works today in that it does not recognize the complexity in applications, the State Engineer's need to gather good information and the protestants need to look at the applicant's data in their own thorough way. He testified that the one-year rule has been a relic for a long time.

Mike Turnipseed (former State Engineer 1990-2000) Mr. Turnipseed testified that during the 1990's legislative interim study committee he recommended removal of the one-year provision as applications and the science related to the review of applications is much more complex than it used to be. He indicated that the Legislature has been fully aware for years that there is a backlog of applications that have not been acted on within the one-year period. However, he also indicated that the exceptions for action found in NRS § 533.370 do not cover all the situations as to why the State Engineer has not acted, for example, pending adjudications. Mr. Turnipseed believes a special session is needed.

Hugh Ricci (former State Engineer 2000-2006) Mr. Ricci testified that there has to be a legislative fix and there is precedent for doing so, *see*, NRS § 533.324 "water already appropriated." He also testified that there is language in the legislative history for the 2003 amendment that indicated that it was to apply retroactively to all applications that were on file in the State Engineer's office at that time. Mr. Ricci believes a special session is needed.

Terrence Morasko (appellant in *Great Basin Water Network* case) Mr. Morasko suggests that if an application has not been moved on in seven years that it should be closed, but if it is not closed that the protest period be re-opened.

Rose Strickland (Toiyabe Chapter of the Sierra Club and Great Basin Water Network) Ms. Strickland does not believe there is a consensus that there is a problem; therefore, she questioned how language can be drafted to fix a problem when there is no agreement as to the problem. Ms. Strickland does not believe the Supreme Court did anything wrong nor did the Legislature in 2003 and a special session is not needed to fashion a quick fix to an unidentified problem.

Betsy Reike (consultant and former Area Manager United States Department of Interior, Bureau of Reclamation, Lahontan Basin) Mrs. Reike testified that the State Engineer should prepare a list that focuses on the conceptual issues we are trying to address.

Michael Buschelman (water rights surveyor) Mr. Buschelman testified that the 2003 legislation only spoke to municipal water rights as far as a retroactive clause and he believes we need to address more than just municipal applications.

WRITTEN COMMENTS SUBMITTED AFTER THE WORKSHOP

Additional comments were filed after the workshop by the Confederated Tribes of the Goshute Indian Reservation, Steve Erickson, Virgin Valley Water District, NV Energy, Hugh Ricci, EskDale Center, Terry Morasco, Rupert Steele, Truckee Meadows Water Authority, Vidler Water Company, Truckee-Carson Irrigation District, City of Reno, Moapa Band of Paiute Indians, Great Basin Water Network, Water Keepers, Truckee Meadows Water Authority, Toiyabe Chapter of the Sierra Club, Michael, DeLee, Churchill County and Wingfield Nevada Group/Tuffy Ranch Properties. Some of these comments express opinions as to the specific suggested statutory amendments that are addressed in the next section of this report and which are found in Attachment F, while other comments are more general and perhaps beyond that which the Legislature's motion intended for the State Engineer to consider. The State Engineer has kept the review and analysis focused on the specific issue raised by the Legislature's motion.

Rupert Steele (Attachment E) Mr. Steele believes the issue should be left to the courts, there is no need for a special session and if the matter needs addressing it should be done during the 2011 Legislature.

Terry Morasco(Attachment E) Many of Mr. Morasco's comments go to matters far beyond the narrow issue to be addressed in this workshop, that being should some Legislative action be taken in order to address the Supreme Court's decision in the *Great Basin Water Network* case. As already noted, the State Engineer is going to keep the review and analysis focused on the specific issue raised by the Legislature's motion.

EskDale Center (Attachment E) EskDale Center begins its comments by indicating that it is essential to provide due process protections in the potentially protracted consideration of large numbers of applications for large-scale municipal or industrial water-use projects, both in terms of the length of time involved and the cost associated with protest fees and legal representation. EskDale Center presents some questions in its submission requesting clarification of the status of the original applications and their associated protests in light of the re-filing of applications; however, these questions are far beyond the scope of the Legislative motion and are not specifically identified and addressed in the body of this report. EskDale Center believes it is at risk of losing its due process rights due to an action intended to protect those rights, that being it has to protest the new applications because they risk losing the standing they already have if they do not protest the new applications. Therefore, it suggests that some reference to and procedure for preservation of standing should be included in the final solution. EskDale suggests that a protest period should be opened when the request for approving applications is announced as this would preserve the priority date of the applications and avoid successor in interest issues, while allowing new protests to be filed. Finally, EskDale believes the judicial process should be allowed to proceed in reference to the SNWA case and that legislative intervention invites litigation. It believes the Supreme Court's decision is specific to only those SNWA applications that were before the Court

and indicates that if other protestants are affected by a lack of action by the State Engineer they can raise the issue themselves. It does not believe this case should affect the general body of decisions made by the State Engineer in past years.

Hugh Ricci (Attachment E) Mr. Ricci provided some suggested language and indicated that he was present during the 2003 Legislature and what he has submitted was introduced during the hearing before the Senate Natural Resources Committee on April 2, 2003, but he is not clear why it was not added to the statutory amendments as there was no objection to the language at that time.

NV Energy (Attachment E) NVE does not support Suggested Language Versions 2 or 3 and does support the proposal set forth in Suggested Language Version 1 and partially supports Suggested Language Version 4. NVE believes Version 1 would be the cleanest and most simple way to assure that the 2003 amendment, stating that applications not acted on within one year are still valid, would apply retroactively to all applications. As to Version 4, NVE does not recommend directly amending NRS § 533.370(3) to include retroactive application language in the body of the statute, but supports the proposed language in subsection (8) in part. It is NVE's opinion that the proposed amendment to (8)(d) addresses the due process concerns of interested persons who did not timely file a protest, while at the same time providing a trigger for re-noticing and re-opening the protest period, but does not support multiple re-noticing of applications. NVE does not support the proposed language of Version 4 (8)(e) setting forth retroactive language, as it believes this type of language should be part of the transitory provisions of the amending legislation and as suggested the language might support an interpretation that permitted and certificated rights would have to be re-opened.

Virgin Valley Water District (Attachment E) The VVWD fully supports the language as proposed in Suggested Language Version 3 and continues to strongly support the State Engineer requesting the Governor to call a special session as soon as possible to enact a remedy consistent with its letter.

Steve Erickson (Attachment E) Mr. Erickson indicates that in his opinion it is unnecessary, premature and inappropriate to seek a legislative solution to the Supreme Court's decision.

Truckee-Carson Irrigation District (Attachment E) Mr. Michael Van Zandt who testified at the workshop on behalf of the Truckee-Carson Irrigation District and other water clients submitted an amendment to NRS § 533.370 that could be considered during the regular legislative session. As for the changes to the 2003 law, he concurs with Suggested Language Version 1 that could be submitted in a special session with an edit that provides "without regard to whether the application was filed on or before July 1, 2002," and language that indicates the legislative intent was that the 2003 amendment was intended to be retroactive. *See*, Attachment F, Suggested Language Version 7.

Confederated Tribes of the Goshute Indian Reservation (“Confederated Tribes”) (Paul EcoHawk) (Attachment E) The Confederated Tribes have concerns with moving forward with legislative action and do not support a “quick fix” bill or any revisions to NRS § 533.370 at this time. The reasons for not supporting a quick fix are support for the Supreme Court’s decision, an opinion that legislative intervention is neither appropriate or needed before the scope of the case is clear and the courts have completed their business, its belief that the Court’s decision is expressly limited to a certain set of applications and thereby does not jeopardize the validity of permitted water rights or seniority of other applications not the subject of the Court’s decision and its statement that a quick fix bill would provide the SNWA with a significant advantage in its push for the groundwater development project. However, if the Legislature moves to modify NRS § 533.370, the Confederated Tribes recommend amending NRS § 533.370(8) to re-notice and re-open the protest period for applications that have not been acted on within a specified time. The Confederated Tribes made some recommendations that are beyond the scope of the specific issue raised by the Legislative motion that are not specifically identified and addressed in the body of this report. The Confederated Tribes do not support any version of the amendments submitted in their entirety. They are in support of Suggested Language Version 2 subsection (9)(d) for “any person interested,” Suggested Language Version 3 subsection (8)(d), and Suggested Language Version 4(8)(d)&(e). Regarding the various versions of suggested language, the Confederated Tribes support any amendment for re-noticing applications that have not been acted on within a specified period of time and re-opening the protest period on those applications.

Truckee Meadows Water Authority (“TMWA”) (Attachment E) The TMWA submitted two post-workshop comments. In the first, dated March 26, 2010, the TMWA continues to believe that the best way to address the instability and uncertainty created by the Supreme Court’s decision is to deal directly with the statute the decision misinterpreted and the solution it proposed does that and it continues to favor that solution. In its second comments dated April 2, 2010, it reaffirms its original comments and continues to support Suggested Language Version 1 along with the language suggested by Mr. Van Zandt in Suggested Language Version 7. The TMWA then provided its comments on Suggested Language Versions 2 through 6 and addresses issues with each indicating the proposals may cause more confusion than help in clarification of the issue. The TMWA continues to support a special legislative session to address the uncertainty and instability caused by the Nevada Supreme Court’s decision and supports adding some additional language to Suggested Language Version 7, that being, “This act becomes effective upon passage and approval, and applies retrospectively as well as prospectively, *but is not intended to change the result reached in the Supreme Court of the State of Nevada in that certain action entitled Great Basin Network, et al. v. Tracy Taylor, et al., Case No. 49718.*”

Vidler Water Company ("Vidler") (Attachment E) Vidler first concurs with Mr. Ricci's comments relative to the deleted language from the 2003 bill draft and indicates that it was clear to all who participated in 2003 that the intent of the legislation was that it was to apply to all outstanding applications as pending. Vidler indicates that there is a large segment of the Nevada economy with significant exposure to reporting requirements for or impacts from the Supreme Court's decision and its comments indicate that the financial sector is concerned about the breadth of the decision. Vidler agrees with others that the impacts to permitted and certificated water rights is probably not of much great concern; however, it believes this is still difficult to explain to a New York Banker or to give those bankers any comfort as to a borrower's water rights, which in turn affects a borrower's interest rates. At this time, Vidler supports the Suggested Language Version 3 and states that for the near term it believes this language accomplishes the goals enunciated by the Legislature during the Special Session. Vidler would concur with the additional language at the end of subsection 4. It believes the suggested deletion of subsection 8(d) is unnecessary and does not address the Legislative directive. Vidler provides additional comments on matters beyond the narrow issue to be addressed in this workshop and, as already noted, the State Engineer is keeping the review and analysis focused on the specific issue raised by the Legislature's motion.

City of Reno(Attachment E) The City of Reno is of the opinion that Suggested Language Version 1 is straightforward and will adequately remedy the concerns raised by the Supreme Court decision.

Moapa Band of Paiute Indians ("Moapa Band") (Attachment E) In its comments, the Moapa Band expressed its concerns that the Supreme Court's decision in *Great Basin Water Network v. State Engineer* could adversely affect the validity of permits granted by the State Engineer other than those directly involved in the case including those of the Moapa Band held in California Wash Hydrographic Basin. The water rights of concern to the Moapa Band were obtained as the result of a negotiated settlement, which benefited other parties besides the Moapa Band and avoided an extensive and extended battle about tribal claims for federally-reserved water rights, which would have had broad destabilizing effects in the region. The Moapa Band believes its concerns are shared by most other participants to the workshop who depend on the stability of Nevada water law. While the Moapa Band is reluctant to weigh in hard, it requests that whatever solution is ultimately arrived at address the following concerns: (a) all doubt should be removed regarding the continued validity of permits actually issued which are not the subject of pending court appeals; and (b) priority of rights should be preserved through a solution that does not require the re-filing of applications whether they have been ruled upon by the State Engineer or not. The Moapa Band has no strong opinion regarding whether to wait until the Supreme Court rules on the pending petitions for re-hearing, whether the legislative changes should be addressed in a special or regular session, whether the changes should be made in the "transitory" or codified portions of legislation, and whether the proposed solution should be narrow (such as focusing solely on retroactivity), broad (such as eliminating the one-year rule altogether), or broader (such

as reconfiguring the statutory scheme by importing features from the State's Administrative Procedure Act or elsewhere). The Moapa Band indicated that most of the suggested statutory amendments posted on the State Engineer's webpage would address its concerns, but notes as a technical matter that Version 5 may be counterproductive by the use of the "pending" in two places. Additionally, the Moapa Band does not oppose a solution that includes re-opening the protest period for applications on which the State Engineer has not acted within a certain period of time or which would otherwise broaden public participation.

Water Keepers (Attachment E) Water Keepers does not believe that another case will change the decision in the *Great Basin Water Network* case and the Supreme Court's decision should be respected. Water Keepers expresses the opinion that none of the proposals can do a better job than was done by the Supreme Court. Water Keepers indicates that an option that has not been proposed is for the State Engineer to recommend that the Nevada Legislature enter into the litigation that is before the Supreme Court; however, it then suggests that to have all three branches of government involved in the litigation would seem to defy common sense and suggests that it makes just as little sense for the legislature to enter into the case by passing a law.

Wingfield Nevada Group and Tuffy Ranch Properties ("Wingfield Group") (Attachment E) The Wingfield Group believes there are two sentences in the Supreme Court's decision that raise questions about the validity of the State Engineer's action in issuing permits, orders or rulings when the applications, if filed on or after January 1, 1947, but before July 1, 2002, was not acted upon within the one-year after the final protest date. It believes these questions not only affect the State Engineer's ability to manage the essential water resources of the State, but could also dramatically impact applicants, permittees and those seeking project financing. An additional concern raised by Wingfield Group was the Supreme Court's failure to address the effect of NRS § 533.370(3) which provides that if the State Engineer has not acted upon an application within one year after the final date for filing a protest, the application remains active. This language was added to the water law at the same time NRS § 533.370(b) was added in 2003 and now makes it unclear what effect it had on applications that had been pending for more than one year prior to July 1, 2003. If the Governor calls a special session, Wingfield Group suggests that the legislature should affirmatively address these questions as they relate to applications, permits, orders and rulings (other than the applications that are the subject of the specific lawsuit) to provide assurance to the State Engineer, the courts, applicants, permit holders, lenders and the general public that there will not be any disruption to water rights under Nevada's water laws. In its opinion, now is not the time to place additional impediments on successfully acquiring financing for projects within Nevada. Wingfield Group believes greater clarification is needed to address more than just applications pending on or before July 1, 2002, and greater clarification needs to be provided regarding permits already granted. Wingfield Group joins with Vidler Water Company, the Virgin Valley Water District and the Southern Nevada Water Authority in supporting Suggested Language Version 3, except for the

proposed change in subsection 8(d), because if the application is opened again to "any person" then further delays will likely result in moving water right applications through the administrative process.

Toiyabe Chapter of the Sierra Club ("Sierra Club") (Attachment E) The Sierra Club begins by noting that "[l]ess than a dozen of the 100+ attendees made any comments" during the course of the workshop and those who did comment did not agree on the definition of the problem which the workshop was intended to address. The Sierra Club expressed its concern that the workshop attendees could not even agree as to what water rights the decision would affect and that there was a diversity of opinion that also applied to proposed language to "fix" an undefined problem with no agreement on what language would be acceptable or effective or whether any legislative action was necessary at all. The Sierra Club is of the opinion that there was no common position on the need for another special session, with many opposing a special session instead supporting letting the Supreme Court clarify its ruling. The Sierra Club does not support the Governor calling a special session, but rather indicates that if there are any remaining problems after the Supreme Court clarifies its ruling those should be addressed with all due deliberation by the 2011 regular session.

Michael DeLee (Attachment E) Mr. DeLee does not believe a special session is needed for the following reasons: (1) there is no standing to challenge the decisions on water right applications already granted or denied; (2) NRS § 533.450 has already elapsed in which to challenge any permits granted or denied that took longer than one year; (3) of the fewer than 1,800 pending applications, less than half of those fall in the 1947 to 2002 date range and no bonds or other obligations would have been issued against pending applications without violating NRS § 533.030; and (4) the courts have not finished their review and will probably clarify matters given the outpouring of public concern. For the regular legislative session, Mr. DeLee indicates that Suggested Language Version 1 appears to be the most direct method of addressing the present concern and is similar to the 1993 legislative response to another case. Mr. DeLee objects to Suggested Language Version 6 because it removes the one-year mandate without also requiring the State Engineer to adopt any written procedure and reiterates his belief that the State Engineer should not be exempt from the Administrative Procedure Act.

Churchill County (Attachment E) Churchill County indicates that it holds water rights in various stages of perfection, including pending applications in Dixie Valley. Additionally, it indicates that there are probably more individual water right holders in Churchill County than any other County in the state due to Newlands Reclamation Project water rights. Protection of these water rights regardless of status, source, permitted versus decreed, is vital to the County and its residents. Churchill County fully understands the importance of due process and fairness from both the perspective of an applicant and a protestant. Churchill County indicates in reference to Governor Gibbons' press release of March 18, 2010, indicating a preference for clarification from the Supreme Court rather than a costly special session, it would support the Governor's

position in the interim. However, it believes significant changes are needed to NRS § 533.370. "In reviewing the current Statute [sic] and the six proposed versions on the State Engineer's web site, all are biased toward certain entities and circumstances; therefore the County does not endorse any of them." The County offers suggestions for consideration of overhauling NRS § 533.370 in either a special session of 2011 regular session' however, some of its suggestions are beyond the scope of the workshop issue. Churchill County's related suggestions include that: (1) any application not acted on regardless of the filing date should be considered pending; (2) all pending applications should retain their priority date removing the need to race to re-file applications; (3) the validity of permitted and certificated rights not currently under appeal should be maintained; (4) special interests in the current and proposed language, for example exemptions for municipalities or interbasin transfers, should be removed from the law; (5) NRS § 533.370(8) needs to be reworked so it is not just limited to interbasin transfers of groundwater and the current provision for re-noticing should not allow any interested person to protest, but rather should be limited to a person who is a successor in interest to a protestant or an affected water right owner, agency or local government. Churchill County takes the position that other potential Protestants not having a direct ownership or governmental interest in an affected water right should not be allowed to protest. There are other forums for environmental or citizen action type groups to be heard for most significant projects, such as the NEPA process where they can be heard.

Great Basin Water Network and Other Petitioners ("GBWN") (Attachment E) GBWN emphatically does not believe it is necessary or appropriate to pursue legislative action through a special session at this time because the Supreme Court is currently reconsidering the problematic aspects of its decision, which may eliminate the need for any intrusion on its decision, and the parties to the case are in discussion as to a mutually agreeable proposal to be presented to the Supreme Court that would eliminate the issues giving rise to any proposed legislative revisions. Additionally, the District Court has not received the case back on remand and so has not had an opportunity to examine the specific fact and equities in *this* case in order to determine the appropriate remedy. GBWN stresses that there are persons in rural eastern Nevada who want to have their voices heard on the issue, but who do not have internet access or email and urges the State Engineer to hold the process of considering public input open for an additional two-week period of time. GBWN thinks it is appropriate to consider legislation that is carefully crafted to ensure that: (1) the applicability of the Supreme Court's decision to the SNWA's 1989 applications is unimpeded; (2) the remedy provided in the decision to address constitutional concerns raised in the case is preserved intact; and (3) the Court's decision remains applicable to protested applications characterized by closely analogous factual and procedural circumstances. If any proposed legislation conforms to these parameters, GBWN could support legislation that places other un-protested applications beyond the scope of the ruling and clarifies that in general neither the continuing effectiveness nor the priority of applications or existing water rights is affected by the Court's decision. GBWN provides suggestions for parameters for proposed legislation and comments on the versions of suggested language for statutory amendments. It does

not support Suggestion Language Version 1 asserting that it is too sweeping and simplistic and negates the Supreme Court's decision. It might support Suggested Language Version 2 with several revisions. It finds Suggested Language Version 3 problematic; however, it finds that Suggested Language Version 4 takes into accounts GBWN's comments and suggests that if the State Engineer chooses to advocate for specific legislative changes, that Version 4 provides the most reasonable, balanced and straightforward approach. However, it suggests a change of seven years to five years in subsection 8(d) of Version 4. GBWN finds Suggested Language Versions 5 and 6 unacceptable

SUGGESTED AMENDMENTS

There is a strong consensus among the municipal water purveyors, former State Engineers and a few others, that statutory amendments are necessary and a special session should be called. Seven different versions of statutory amendments were either submitted to or provided by the State Engineer. These different versions are found in Attachment F to this report. The State Engineer did not originally identify any version by the person or entity submitting it in order to provide all submissions a fair review without the emotional aspect of who favored any specific suggestion. Suggested Language Version 1 was provided by the Truckee Meadows Water Authority, Version 2 was a compilation the State Engineer put together from those ideas presented during the 26th Special Session, Version 3 was submitted by the Southern Nevada Water Authority, Version 4 was submitted by the Great Basin Water Network, Version 5 was submitted by Hugh Ricci, Version 6 was submitted by the Truckee-Carson Irrigation District and Version 7 by Michael Van Zandt.

STATE ENGINEER'S ANALYSIS

Impact of Supreme Court's Decision.

Most of those who testified did not appear overly concerned that the Supreme Court's decision affects actions on water right applications that were taken by the State Engineer, whether approving or denying the application, that were older than one year past the protest date when acted on if they were not appealed. The State Engineer does not agree that language needs to be drafted in order to confirm the validity of those actions taken that were in excess of the one-year timeframe; however, in order to allay concerns he would not oppose language that affirms the validity of those previous actions.

Need for Special Session

The testimony and comments were split fairly evenly as to whether or not a special session is necessary to address the Supreme Court's decision. Those supporting a special session include: NV Energy, Truckee Meadows Water Authority, Virgin Valley Water District, Southern Nevada Water Authority, AFL-CIO, Lincoln County Water District/Lincoln County, Pardee Homes, Truckee-Carson Irrigation District, Bruce Scott, Michael Turnipseed, Wingfield Nevada Group/Tuffy Ranch Properties, and Hugh Ricci.

Those who do not agree a special session or perhaps any action is necessary include: Great Basin Water Network, Nevada Environmental Law Society, Nevada Cattlemen's Association, Rose Strickland, Toiyabe Chapter of the Sierra Club, Michael DeLee, Churchill County, Confederated Tribes of the Goshute Indian Reservation, Steve Erickson, EskDale Center and Rupert Steele.

The State Engineer's greatest concern arises from the testimony that financial institutions that loan money for projects in Nevada are now questioning the validity of water rights. The reality of the impact of the Supreme Court's decision and the economic situation Nevada finds itself in are causes for concern that should be weighed by you in your consideration of whether to call a special session and the Legislature in 2011 session. Additionally, is that fact that the Supreme Court's decision has made taking action on any potentially implicated applications questionable and parties have already asked for hearings to be postponed due to the uncertainty caused by the decision. The decision has caused somewhat of a stalemate in the State Engineer's ability to take action on applications pending with the Division of Water Resources with a priority date that pre-dates July 1, 2002. The State Engineer would support resolution of the uncertainty caused by the Supreme Court's decision as soon as the Governor or Legislature deems possible.

Should Applicants Be Required to Re-File Applications

No one supports the re-filing of applications that have not been acted on within the one-year timeframe and great concern was expressed about the loss of priority dates if the older applications are found not valid.

The State Engineer will not support any amendment which requires the re-filing of applications and therefore an assignment of a new, junior priority. The priority date of a water right is one of the paramount sticks in the bundle that comprises the property right of a water right. While the State Engineer agrees that action on applications should be taken as promptly as possible, the 1989 SNWA applications should not be deemed to determine policy for all pending water rights in Nevada. There are many, many applications held by many other entities for which action has been withheld due to things such as pending adjudications, negotiations on the Truckee River, title issues, the United States Department of Interior, Bureau of Land Management having made no decision on

applications for Desert Land or Carey Act entries, and applications filed for long-range planning by counties, municipalities and businesses for example. To mandate re-filing will only cause a constant rush of parties to beat each other to the State Engineer's office, the unnecessary expense of new application and protest fees, the confusion caused by the status of which applications are being acted on, potential issues as to status of protests in the face of multiple applications, additional and unnecessary work for applicants, protestants and the Division of Water Resources. The State Engineer believes there is absolutely no reason to ever support such a provision.

Re-opening protest periods

Several entities were in support of re-opening the protest period on applications that had not been acted on within a certain period of time. However, several parties expressed concern that protest periods should not be re-opened more than one time and perhaps there should be a trigger point as to when a protest period would be re-opened, for example, when the applicant and State Engineer are actually ready to move forward on the applications. One participant believes that not only should protested applications be re-opened, but all applications should be re-opened. However, others expressed an opinion that if their application was not originally protested it would be unfair to re-open the protest period. Finally, some expressed an opinion that the one-year rule does not work at all anymore.

The State Engineer agrees that the Supreme Court's decision has caused great uncertainty in Nevada water law that appears to have caused significant uncertainty for municipalities, businesses, lenders and others. The State Engineer does not agree with the comments or testimony that there is no problem. However, the State Engineer is cognizant of the comment made that the focus here should be kept narrow to the specific issue addressed by the Legislative motion. The State Engineer thought the remedy was enacted into law with NRS § 533.370(8) at least as to interbasin transfers of groundwater in excess of 250 acre-feet annually; however, it should be noted that reviser's notes to NRS § 533.370 indicate that the amendatory provisions of subsection 8 were specifically made not to apply to any applications that were filed prior to July 1, 2007. This exception exempted most of the applications of concern to those who oppose the large interbasin transfers of groundwater that are currently on file with the Division of Water Resources. Therefore, the State Engineer recommends that any amendment regarding re-opening protest periods would need to address this reviser's note.

Applications causing the most consternation

The bulk of the testimony and comments addressed applications that have been pending for quite some time and were filed for large interbasin projects.

The State Engineer agrees that it is the large interbasin projects that are causing the most concern with the public. The State Engineer appreciates the public's due

process concern as to the delay from the time the applications are filed and when action is actually taken. However, the State Engineer is also keenly aware that various entities must take into account long-range water planning and this planning is demonstrated in the filing of water right applications that tie up action in hydrographic basins. The State Engineer is also aware that when action has been taken by the State Engineer to move some of these applications forward, there has been many protestants who have attempted to slow the process by alleging they need years of time to prepare for any administrative hearing. This was true in the case of the SNWA applications where protestants requested years of delay prior to going to hearing and now the validity of those applications has been challenged by protestants. While the 2003 and 2007 Legislatures attempted to fashion a remedy for this reality and thought the remedy should be fashioned to address those types of projects, as mentioned, the Reviser's Note, exempted the current projects causing the most consternation from the provisions of NRS §533.370(8). The State Engineer recommends the Reviser's notes be amended to address the exemption of these applications in order to address the due process concerns raised by the Supreme Court's decision.

The one-year rule and its exceptions under NRS § 533.370(2)

The State Engineer agrees that the one-year rule is problematic and the exceptions found in NRS § 533.370 do not cover some of the reasons that applications have not been acted on for a number of years. The State Engineer would be supportive of amendments that eliminate the one-year time period and the associated exceptions. There are many different reasons the State Engineer does not act within one year, which are not covered by the exceptions. However, if a special session is called, the State Engineer supports keeping the focus very narrow to only address the issue raised by the Supreme Court's decision. Some of the other issues raised are far more complex and need far more analysis than the State Engineer believes should be attempted in a special session.

Retroactive Application of the 2003 Amendments

Most who commented or testified believe the Supreme Court got it wrong as to what the 2003 amendments intended to accomplish. They indicated a belief that the Legislature was aware of the backlog of applications and intended to keep those applications in an active status, otherwise known as "pending."

The State Engineer agrees that the 2003 amendments were intended to keep all older applications as active for whatever reason they had not been acted on and that the amendments were intended to apply retroactively. The issue now is how to address that fact and get these applications back to active status in order to avoid the chaos that is being created in Nevada's water appropriation process. However, the due process concerns raised by the *Great Basin Water Network* decision, that being how do new members of the public get to participate in a hearing on applications that are long past their protest period needs to be addressed. In that effort, the State Engineer provides

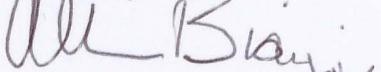
suggested statutory language identified as Version 8, Attachment G, which is an attempt to incorporate and address as many of the concerns as possible while trying to remain focused on the workshop issue. The State Engineer offers this language as a potential starting point for statutory amendment whether it is in a special or regular session. The State Engineer recommends that the Supreme Court first be allowed to address the petitions for re-hearing and then Legislative action be taken if necessary in order to restore stability to the water appropriation process in Nevada and address the due process concerns of protestants.

STATE ENGINEER'S RECOMMENDATION

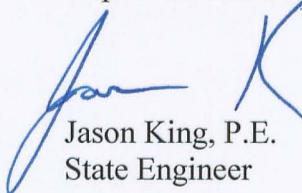
As a result of the uncertainty the Supreme Court Decision has caused and the resulting comments received, it would be our recommendation that Version 8 (Attachment G) be incorporated into a bill draft for consideration by the legislature – whether it be in a special session or the 2011 session.

Thank you for the opportunity to participate in the discussion of this very important issue and we hope this report adequately addresses the matter you and the Legislature intended.

Sincerely,



Allen Biaggi, Director
Department of Conservation and Natural Resources



Jason King, P.E.
State Engineer

ATTACHMENT

A

MOTION TO EXPRESS LEGISLATIVE INTENT AND TO BE ENTERED INTO THE JOURNAL

In January 2010, the Nevada Supreme Court issued its decision in *Great Basin Water Network v. Taylor* regarding the interpretation and application of Nevada Revised Statutes 533.370; specifically the effect of the requirement that the State Engineer act upon applications within one year unless certain criteria are met. At this time, the decision of the Nevada Supreme Court is to remand the matter to the District Court for consideration of the proper remedy for the failure of the State Engineer to act on applications within one year.

After calling the 26th Special Session, the Governor amended the original proclamation to include the subject of water law as it relates to the *Great Basin Water Network* decision. Two bill draft requests have been heard; one by the Senate on February 27th and one by the Assembly on February 28th.

After several hours of testimony, it is the sense of the Legislature that resolution of the issues raised by the *Great Basin Water Network* decision is of critical importance and that the Legislature should attempt to resolve these complex policy issues. However, the testimony has made clear that many of the parties potentially affected by the resolution of these issues will not be able to be heard in the remaining hours of the 26th Special Session.

It is essential that the Legislature's resolution of these issues strikes a fair and equitable balance between the rights of applicants and the rights of protestants. The Legislature recognizes that voiding the Southern Nevada Water Authority's applications and taking away its priorities because of the State Engineer's failure to act would be inequitable to the Water Authority and all other similarly situated applicants. At the same time, the Legislature recognizes that it would be inequitable to the protestants to deny them due process and a meaningful opportunity to be heard.

In order to strike the proper balance between these equally important interests, the Legislature must provide a forum where the affected parties can thoroughly discuss the impact of the case and craft the most constitutionally defensible remedies that take into account due process, fundamental fairness and the separation of powers. Hastily passing legislation during the waning hours of this special session, without sufficient deliberation, will only raise more issues than it solves and will likely cause unintended and potentially harmful consequences.

Therefore, in order to provide for public input, adequate notice, and due consideration of the complex questions presented, the Legislature hereby strongly urges the State Engineer to hold hearings on potential resolutions of the issues presented by the *Great Basin Water Network* decision. The State Engineer is urged to work with the interested parties who testified before the Legislature and to provide an opportunity for input from other parties who may be affected, directly and indirectly, by resolution of the issues presented.

The Legislature urges the State Engineer to consider, at a minimum, the following issues: protection of existing water rights, the status of pending applications, preservation of priorities, and application of the protest period provisions. Because time is of the essence due to the pendency of the litigation, the State Engineer is urged to commence such hearings immediately, and make every reasonable effort to conclude his work as quickly as possible.

Finally, the Legislature urges the State Engineer to take all appropriate steps to implement recommendations arising out of such hearings which may include but not be limited to: requesting the Governor to convene a special session or requesting a bill draft for consideration in the 2011 Legislative Session.

ATTACHMENT B

JIM GIBBONS
Governor

STATE OF NEVADA

ALLEN BIAGGI
Director

TRACY TAYLOR, P.E.
State Engineer



DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES

901 South Stewart Street, Suite 2002
Carson City, Nevada 89701-5250
(775) 684-2800 • Fax (775) 684-2811
(800) 992-0900
(In Nevada Only)
<http://water.nv.gov>

March 3, 2010

NOTICE OF WORKSHOP

On January 28, 2010, the Nevada Supreme Court issued its opinion in the matter of *Great Basin Water Network, et al. v. State Engineer and Southern Nevada Water Authority*, 126 Nev., Advance Opinion 2. The Court's decision has raised many questions as to the status of applications that are on file with the Nevada Division of Water Resources filed prior to the 2003 legislative amendments to NRS § 533.370(2)(b) and (4) and the status of water right permits and certificates that were issued more than one year after the date for filing a protest.

Nevada Revised Statute § 533.370(2) provides that the State Engineer shall approve or reject an application within 1 year after the final date for filing a protest. The statute provides exceptions to that one-year deadline. The portion relevant to the Court's opinion provides that the State Engineer may postpone action on municipal applications. NRS § 533.370(2)(b). However, subsection (4) provides that "If the State Engineer does not act upon an application within 1 year after the final date for filing a protest, the application remains active until acted upon by the State Engineer." The Nevada Supreme Court held that "We conclude that "pending" applications are those that were filed within one year prior to the enactment of the 2003 amendment." This decision calls into question the validity of subsection (4) as it applies to those applications that pre-date the 2003 legislative amendments.

During the 26th Special Session of the Nevada Legislature, a Motion to Express Legislative Intent was entered into the Journal. This motion indicates that resolution of the issues raised by the *Great Basin Water Network* decision is of critical importance. The Legislature urged the State Engineer to hold a hearing on potential resolutions of the issues presented by the *Great Basin Water Network* decision. Because there is no statutory basis for a formal hearing on this matter, the State Engineer has elected to hold a workshop. At this workshop, the State Engineer will consider, at a minimum, the

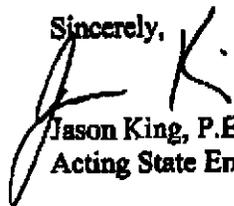
following issues: protection of existing water rights, the status of pending applications, preservation of priorities, and application of the protest period provisions. The State Engineer was encouraged to commence such immediately and make every effort to conclude work on this matter as quickly as possible.

Therefore, please take notice; the State Engineer is hereby convening a workshop to consider the matter raised by the Legislature's Motion to Express Legislative Intent. Accordingly, the workshop will convene at 12:30 p.m., Tuesday, March 16, 2010, at the Nevada Legislature, Room 1214, 401 South Carson Street, Carson City, Nevada, and will be teleconferenced to Room 4406 in the Grant Sawyer Office Building, 555 E. Washington, Las Vegas, Nevada.

We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the workshop. If special arrangements for the workshop are necessary, please notify me at the Nevada Division of Water Resources, 901 South Stewart, Second Floor, Carson City, Nevada, 89701, or by calling (775) 684-2800.

If you have any questions on this matter, feel free to call me.

Sincerely,



Jason King, P.E.
Acting State Engineer

ATTACHMENT

C

JIM GIBBONS
Governor

STATE OF NEVADA

ALLEN BIAGGI
Director

TRACY TAYLOR, P.E.
State Engineer



DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES

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(In Nevada Only)

<http://water.nv.gov>

March 17, 2010

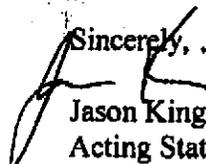
NOTICE OF WORKSHOP TIMEFRAMES

On January 28, 2010, the Nevada Supreme Court issued its opinion in the matter of *Great Basin Water Network, et al. v. State Engineer and Southern Nevada Water Authority*, 126 Nev., Advance Opinion 2. During the 26th Special Session of the Nevada Legislature, a Motion to Express Legislative Intent was entered into the Journal that urged the State Engineer to hold a hearing on potential resolutions of the issues presented by the *Great Basin Water Network* decision. On March 16, 2010, the State Engineer held a workshop to consider the matter raised by the Legislature's Motion to Express Legislative Intent.

The State Engineer has posted the written comments filed during the course of the workshop and suggested changes to Nevada water law that relate to the issue addressed in the workshop on the Nevada Division of Water Resources webpage.

PLEASE TAKE NOTICE, any person wanting to propose an amendment to Nevada water law that specifically addresses the matter addressed in the workshop may send their proposal to the State Engineer via the email link provided on the State Engineer's Workshop webpage or in writing submitted to the Office of the State Engineer, Attention Susan Joseph-Taylor, 901 S. Stewart Street, Suite 2002, Carson City, Nevada 89701, no later than **5:00 p.m., Friday, March 26, 2010.** Any proposed amendments submitted will be posted to the Workshop webpage and comments to the proposed amendments will be accepted through **5:00 p.m., Friday, April 2, 2010.** The State Engineer will then take the matter under further consideration.

Sincerely,


Jason King, P.E.
Acting State Engineer

ATTACHMENT D



Washoe County
Department of
Water Resources
4930 Energy Way
Reno, NV 89502-4106
Tel: (775) 954-4600
Fax: (775) 954-4610

March 16, 2010

Jason King, P.E.
Acting State Engineer
901 South Stewart Street, Suite 2002
Carson City, NV 89701

Subject: March 16th, 2009 Workshop

Dear Jason:

The attachment herewith presents certain facts relating to potential negative impacts of the Supreme Court ruling in the matter of *Great Basin Water Network, et al. v. State Engineer and Southern Nevada Water Authority*, 126 Nev., Advance Opinion 2 (the Ruling) on Washoe County and its water rights holdings. The attachment also provides some thoughts and ideas for the workshop.

Please do not hesitate to contact me at 954-4647 with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Vahid Behmaram", is written over a horizontal line.

Vahid Behmaram
Water Rights Manager

Attachment

cc. Rosemary Menard, Director
Peter Simeoni, Deputy District Attorney

Department of



Water Resources

Washoe County Department of Water Resources (WCDWR) operates 18 distinct water systems within 7 different hydrographic basins in southern Washoe County.

Washoe County holds in excess of 27,000 acre-feet of water rights associated with these water systems.

WCDWR also operates several water reclamation facilities. In accordance with the provisions of NRS, WCDWR has appropriated in excess of 5,500 acre-feet of treated effluent for purpose of providing reuse water supply to golf courses and other irrigation purposes. The reuse program also requires appropriation of return flow water rights. WCDWR holds in excess of 1,500 acre-feet of return flow water rights which are intended to satisfy the demands of down stream users of water within the Truckee River system, as decreed in the *United States v. Orr Water Ditch Co., et al, In Equity, No. A-3*, in the United States District Court for the District of Nevada (the "Orr Ditch Decree").

The appropriations referenced above are granted through filing of water rights applications with the office of the Nevada State Engineer. WCDWR holds in excess of 2500 permits, certificates and applications with the State Engineer.

The Ruling

On January 28, 2010, the Nevada Supreme Court issued its opinion in the matter of *Great Basin Water Network, et al. v. State Engineer and Southern Nevada Water Authority*, 126 Nev., Advance Opinion 2 (the Ruling). According to preliminary data from the State Engineer's office, a broad interpretation of this ruling could render approximately 14,600 existing permits, certificates and denied applications (statewide) as null and void. The data from the State Engineer also indicates that of the approximately 14,600 such permits, certificates and denied applications (statewide), 3101 are within Washoe County and quite possibly a large number of WCDWR's 2500 appropriations are within the 3101 affected by the ruling. It should be noted that many of the potentially affected permits have been approved by WCDWR and the State Engineer and support many approved, built and occupied developments, both residential and commercial in nature.

Reasons for re-consideration by the court

Nevada Revised Statutes (NRS) 533.370 (2) in part states that "the Nevada State Engineer shall approve or reject each application within 1 year after the final date for filing a protest." NRS did not define the consequences if the State Engineer does not act on an application within the prescribed period until the inclusion of certain amendments in 2003. Existing precedent within the office of the State Engineer since the enactment of this provision of the law in 1947 until 2003 when the issue was legislated, has been that an application not acted upon within the 1 year time period after the end of protest period is "Pending" and the State Engineer has in 14,600 instances has proceeded to approve or reject such "Pending" applications after the 1 year time period has lapsed. It should be noted that often times complex title issues relating to the Orr Ditch Decree water rights prevents action by the State Engineer within the 1 year time period.

In summary the Ruling concludes and defines that an application pending before the State Engineer is no longer pending 1 day after the end of the 1 year time period after the end of protest period. However this conclusion is not consistent with other provisions of the NRS.

In general NRS recognizes 5 different statuses for any appropriation of water rights (acknowledging that "forfeiture" is a post appropriation process and "vested" rights require an adjudication process) :

- 1) Permitted
- 2) Denied
- 3) Cancelled
- 4) Withdrawn
- 5) Pending application

A Permit is granted when the State Engineer upon review and in accordance with NRS signs and affixes his seal to a pending application.

An application may be denied, in accordance with the provisions of NRS, upon issuance of a ruling by the State Engineer. The ruling by the State Engineer is an appealable act.

Cancellations are only as a direct result of non compliance by the applicant. A cancellation is also an appealable act.

Withdrawn status is as a result of written request of the owner of the water right.

Therefore, absent any of these 4 states, an application is considered to be pending.

The Ruling in effect creates a sixth category, of "lapsed" status. This interpretation is inconsistent with the provisions of NRS 533. 370 because it states that the "*State Engineer Shall Approve or Reject...*"

Simple inaction by the State Engineer as a means of rejection of an application is not provided for in the NRS and not an appealable act. Furthermore, the proposed "lapsed" status by the court will create too many circumstances that are inconsistent with the prior appropriation doctrine which is so fundamental to the Nevada water law.

Standing, Intervention and provisions of protest period

The Ruling recognizes that applications pending determination by the State Engineer for prolonged periods of time may have negative impacts on people or entities without standing in the State Engineer hearings. The ruling proposes to possibly remedy this circumstance with reopening of the protest period.

This issue has been legislated prospectively in NRS 533.370 (8). Any proposed language to apply this section retroactively should consider the following:

- 1) The reopening of the protest period as described in NRS 533.370.(8) may only occur once**
- 2) Exempt those applications held in abeyance by deliberate act of the State Engineer in accordance with prior rulings and court findings to conduct studies or observe monitoring results.**

ADVOCATES FOR COMMUNITY AND ENVIRONMENT

Empowering Local Communities to Protect the Environment and their Traditional Ways of Life

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El Prado, New Mexico 87529

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March 16, 2010

Jason King, P.E., Acting State Engineer
Nevada Division of Water Resources
901 South Stewart St., Suite 2002
Carson City, NV 89701

Re: **March 16 Workshop on Great Basin Water Network v. Taylor**

Dear Mr. King:

I am writing on behalf of the Great Basin Water Network and other petitioners in *Great Basin Water Network v. Taylor* (collectively "GBWN") in connection with the March 16 Workshop on the Nevada Supreme Court's Opinion in that case, to provide you with GBWN's views regarding the proposal to pursue legislative or State Engineer action designed to alter the effects of the Supreme Court's holding in that case. GBWN believes that this initial workshop will be a worthwhile opportunity to begin identifying and considering the different positions various interested parties have concerning the Supreme Court's ruling. In order to genuinely account for and address those varying concerns and positions, and to realistically seek any consensus on how to respond to that ruling, we believe that it will be necessary to hold additional workshops and to provide an opportunity for interested parties who are unable to participate in person to submit written comments during the period of consideration of these issues.

Legislative or Administrative Action Designed to Undermine the Opinion in Great Basin Water Network v. Taylor is Unnecessary and Would Be Inappropriate:

The Supreme Court's decision in *Great Basin Water Network v. Taylor* is sound and should stand as written. There is no need for the Legislature to interfere. Far from portending chaos in Nevada water law, as some have argued, the decision readily may be limited to the specific facts before the Court, and to the very limited number of instances that may present closely analogous factual circumstances. Further, the Court presently is considering both SNWA's and the State Engineer's petitions for rehearing, and may use this opportunity to provide any genuinely warranted clarification or limitation of the scope of its ruling in the case. During at least the pendency of the Supreme Court's consideration of those petitions and potentially any rehearing, legislative interference would be patently premature. Such a premature invasion of one branch of government's province by another would only lead to additional litigation and legal uncertainty, especially since the Court's decision expressly was premised in part on fundamental due process concerns that cannot be legislated away.

The Supreme Court's Ruling Will Not Impact Other Existing Rights and Would Only Affect a Very Limited Number of Extraordinary Pending Applications or Existing Rights:

The Court's opinion in *GBWN v. Taylor* was informed by and turned on the extraordinary circumstances surrounding the 1989 water rights applications for SNWA's massive proposed Pipeline Project into rural Nevada. Indeed, the Court pointedly laid out the unique facts involved in this case at some length, basing its decision largely on the length of time that the applications had been pending, the massive quantity of water they involve, the fact that an unprecedented interbasin transfer is involved, the magnitude of the potential impacts, the scale and scope of the opposition and controversy generated by SNWA's applications, and the fact that so many of Nevada's citizens had been shut out of the process. The Court crafted its ruling in this case in specific relation to the particular problems raised by these facts, and the ruling seems likely to be construed narrowly by the courts and the State Engineer to apply only to these applications and, potentially, an extremely limited number of large-scale, protested, interbasin transfer applications that present similar extraordinary facts.

By Its Own Terms the Ruling Will Not Affect the Seniority of Pending Applications or Existing Permits:

Some people have claimed that the Supreme Court's recent ruling will erase the seniority of all long-pending water rights applications in Nevada and may affect already permitted rights, creating chaos at the State Engineer's Office. That claim is unfounded and, in fact, is contradicted by the language in the ruling. After concluding that in this particular, and obviously extraordinary, case the protest hearing process needed to be re-opened, the Court expressly refused to rule that the old applications could not still move forward because that "would be inequitable to SNWA and future similarly situated applicants." *Great Basin Water Network v. Taylor*, 126 Nev. Advance Opinion 2, at 15 (January 28, 2010). Plainly rejecting an outcome that would destroy the seniority of SNWA's old applications, the Court clearly stated that "applicants cannot be punished for the State Engineer's failure to follow his statutory duty." *Id.*

So, there is no validity to the claim that the ruling will jeopardize the seniority of anyone's water rights applications or the validity of permitted rights. That claim is directly at odds with the actual language of the Supreme Court's ruling, and thus seems to be nothing more than an empty threat being spread by special interests who have other reasons for wanting to attack the ruling. Given the limiting guidance provided by the Supreme Court, there is no need for the legislature to place additional limitations on the decision.

The Court Should Be Allowed To Complete Its Consideration of These Issues:

To the extent that there is genuine ambiguity and legitimate concern as to the breadth of scope of the Court's ruling in this case, that issue already has been presented to the Supreme Court by the State Engineer in his petition for rehearing. Thus, the Court currently is considering whether any additional clarification or limitation of scope is called for in its ruling. The principle of separation of powers requires the Legislature to allow the Judiciary to complete its process of construing the law and ensuring consistency with constitutional requirements.

Legislative Action Cannot Eliminate the Constitutional Deficiencies in This Case:

As noted above, the Court expressly noted that given the procedural failures in this particular case a different legislative outcome still would present insurmountable constitutional due process problems. Given the fundamental underlying procedural deficiencies in this case, the Legislature simply cannot override the ruling in this case by changing statutory language. Fundamental constitutional violations cannot be legislated away, and an effort to do so would only lead to additional litigation with even more far reaching and problematic implications for Nevada. The legislature acknowledged as much in its Motion to Express Legislative Intent. Thus, any limitation placed on the Supreme Court's decision must be narrowly focused.

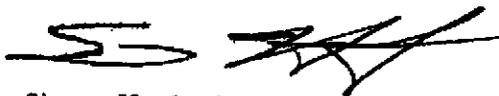
Parameters for Acceptable Potential Legislative Action:

Given the ongoing judicial consideration of the issues highlighted by the Legislature's Motion and addressed in this workshop, GBWN strongly believes that there is no current need for any legislative action that would intrude on the Judiciary's resolution of these issues. The Supreme Court will rule on the petitions for rehearing in the near future, and any remand to determine the precise contours of the appropriate remedy in the particular case at bar likely will be concluded within the following few months. Certainly, the courts will finish resolving the issues presented by the Supreme Court's ruling in this case within this year.

If, when the courts have resolved the issues raised about the scope of the ruling and the appropriate remedy in the case at bar, there still is any genuine remaining ambiguity concerning the ruling's scope and any legitimate concern over the ruling's impact, such concerns can be addressed appropriately at that time through narrowly crafted legislation during the 2011 Legislative Session. Any legislative action taken at that time must not impinge in any way on the Court ordered remedy as to SNWA's 1989 applications or the ruling's applicability to the limited set of applications that were for interbasin transfers, were protested, and which were filed more than a year prior to the 2003 legislative amendments and were not acted on within one year of being filed.

While GBWN does not believe any legislative limitation of the Supreme Court's ruling in this case is necessary or warranted, GBWN might be willing to agree to a limitation that is carefully crafted to ensure that the ruling's applicability to SNWA's 1989 applications is preserved and that the ruling is applied in a manner that remedies the constitutional concerns raised by the petitioners in this case. This position seems to be consistent with the position advanced by the State Engineer in the petition for rehearing that he has filed with the Supreme Court in this case.

Sincerely,



Simeon Herskovits
Attorney for the Great Basin Water Network

2010 MAR -8 AM 11:50

241 Fir Street
Elko, Nevada 89801
March 5, 2010

STATE ENGINEER
Mr. Jason King
Division of Water Resources
Department of Conservation and Natural Resources
901 South Stewart Street
Carson City, Nevada 89701

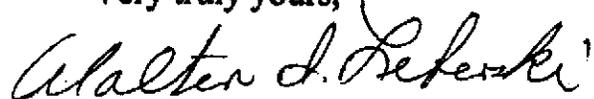
Dear Jason;

As you may know, I have worked on several basin adjudications in the northern part of the State. In those adjudications, I am aware of a number of applications for water, change of use or place of diversion that have not been acted upon for a number of years, primarily for the reason pending completion of the adjudication. Of course, I wonder how the recent Supreme Court decision would effect those pending applications, which some are quite old. It does not appear that any of the statutory exceptions would apply in those instances. It gets a bit close to home, as I have one in the Owyhee adjudication that is 19 years old, and is now subject to an agreement with the Indians, the other water users, the State Engineer and approved by Congress. I believe there are 1 or 2 more applications in that particular adjudication. I am aware of others in the other fork of the Owyhee River and Ruby Valley. I assume that other pending adjudications would have some under the same situation.

I am unable to attend the workshop to be held on the 16th, but did hope this type of situation could be considered in those discussions.

Thanks for your consideration.

Very truly yours,


Walter I. Leberski

STATE ENGINEER WORKSHOP TO CONSIDER
LEGISLATURE'S MOTION TO EXPRESS LEGISLATIVE INTENT

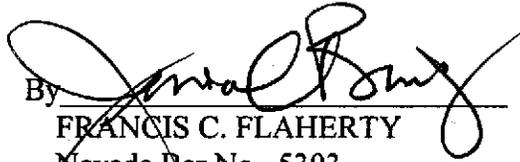
POINTS SUBMITTED BY NV ENERGY FOR CONSIDERATION

- ◆ NV Energy is a public utility providing energy services and products to 2.4 million people throughout the state, and thus holds an extensive water resource portfolio to supply water to existing and future power generation facilities. NV Energy engages in long range planning for expansion of existing and construction of new facilities, and thus holds numerous applications for water rights for operation of those future and expanded facilities.
- ◆ In the wake of the Nevada Supreme Court's ruling in *Great Basin Water Network, et al., v. State Eng'r, et al.*, 126 Nev. ___, 222 P.3d 665 (Adv. Opn. 2, January 28, 2010), NV Energy has concerns over the impact of the court's ruling upon our pending applications and believes a legislative solution needs to be crafted. However, we would caution against the hasty crafting of any amendment to protect against unintended consequences which could result if the amendment is rejected by the Legislature or has impacts which are not anticipated.
- ◆ The Legislature has directed the State Engineer to consider four issues in recommending that specific legislation be enacted: (1) protection of existing water rights, (2) status of pending applications, (3) preservation of priorities, and (4) applications of the protest period provisions.
- ◆ To that end, NV Energy posits that whatever legislative solution is ultimately recommended, that such solution not require the re-filing of affected applications. The preservation of priority is of vital importance. Also, the voiding of applications is not contemplated by the statutory water scheme and would be a punitive act against applicants. Moreover, there is ample court authority for the proposition that an administrative agency is not divested of its authority to act on a matter before it due to the agency's failure to comply with statutory deadlines, especially when important public rights, such as preservation of priority, are at issue. These legal principles are discussed at length in NV Energy's amicus brief filed in support of SNWA's petition for rehearing in the *Great Basin Water Network* litigation, which is submitted to the State Engineer as Exhibit 1 to Points.
- ◆ NV Energy believes there are two relatively simple solutions available to address the four concerns identified by the Legislature:
 1. The Legislature can amend the transitory provisions of the 2003 amendment to NRS 533.370, Senate Bill 336, section 18, to make it very clear that the amendment is intended to apply retroactively to all applications on file with the State Engineer since 1947. NV Energy posits that this is the "cleanest" way to deal with the retroactive application issue, which we believe would be approved by the Legislative Counsel Bureau. This amendment would protect existing applications and the priority of those applications, as well as ensure that the status of existing water rights is not called into question.

2. In order to address the Court's concern of the due process rights of "subsequent" protestants, NV Energy posits that an amendment to NRS 533.370(8) be made to re-notice applications that have not been acted on within a certain amount of time and re-open the protest period on those applications. Any such amendment should apply to all applications, not just certain interbasin transfer applications. Also, NV Energy submits that the re-noticing of applications and re-opening of the protest period must only be triggered at the time that the State Engineer is ready to take action on any given application.

SUBMITTED this 16th day of March, 2010.

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By 

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Attorneys for NV Energy

Exhibit 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREAT BASIN WATER NETWORK, a nonprofit
organization; *et al.*,

Appellants,

vs.

TRACY TAYLOR, in his official capacity as the
Nevada State Engineer; *et al.*,

Respondents.

No. 49718

ON APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
District Court Case No. CV0608119

BRIEF OF *AMICUS CURIAE* NV ENERGY

In Support of Southern Nevada Water Authority's
PETITION FOR REHEARING

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NV ENERGY

RECEIVED

MAR 15 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREAT BASIN WATER NETWORK, a nonprofit)
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED **ii**

INTRODUCTION **1**

PETITION FOR REHEARING STANDARD **1**

I. This Court’s Opinion **2**

**II. Granting the Request for Rehearing is Appropriate Because
 this Court Overlooked and Failed to Apply Governing Law** **2**

ARGUMENT **3**

**I. Nevada is a Prior Appropriation State, Where Priority Governs
 the Relative Rights of Water Users** **3**

**II. Voiding of Applications and Requiring New Filings Would Be a
 Punitive Act Against Applicants That Is Not Contemplated by
 Nevada’s Statutory Scheme** **6**

**III. Agencies Do Not Lose the Authority to Act on a Matter Due to the
 Agency’s Failure to Comply with Statutory Deadlines** **7**

CONCLUSION **11**

CERTIFICATE OF COMPLIANCE **12**

CERTIFICATE OF SERVICE **13**

TABLE OF AUTHORITIES CITED

I. CASES

<i>Alaska v. Johnson</i> , 958 P.2d 440 (Alaska 1998)	9
<i>Bailey v. State of Nevada</i> , 95 Nev. 378, 594 P.2d 734 (1979)	4, 5
<i>Barnhart v. Peabody Coal Co.</i> , 537 U.S. 149 (2003)	7, 8
<i>Binegar v. Eighth Judicial Dist. Court</i> , 112 Nev. 544, 915 P.2d 893 (1996)	7
<i>Brock v. Pierce County</i> , 476 U.S. 253 (1986)	7
<i>Corbett v. Bradley</i> , 7 Nev. 106 (1871)	9
<i>Desert Irrigation, Ltd. v. State of Nevada</i> , 113 Nev. 1049, 944 P.2d 835 (1997)	4
<i>Great Basin Water Network, et al., v. State Eng'r, et al</i> , 126 Nev. ___, 222 P.3d 665 (Adv. Opn. 2, January 28, 2010)	2
<i>Hendrickson v. Federal Deposit Ins. Corp.</i> , 113 F.3d 98 (7th Cir. 1997)	9
<i>In re Application of Filippini</i> , 66 Nev. 17, 202 P.2d 535 (1949)	3, 4
<i>Lobdell v. Simpson</i> , 2 Nev. 274 (1866)	4
<i>Mainor v. Nault</i> , 120 Nev. 750, 101 P.3d 308 (2004)	6
<i>Mills v. Martinez</i> , 909 So. 2d 340 (Fla. Dist. Ct. 2005)	9

<i>Nevada v. United States</i> , 463 U.S. 110, 114 (1983)	5
<i>Ophir Silver Mining Co. v. Carpenter</i> , 4 Nev. 534 (1869)	4
<i>Ormsby County v. Kearney</i> , 37 Nev. 314, 142 P. 803 (1914)	3
<i>Prosole v. Steamboat Canal Co.</i> , 37 Nev. 154, 140 P. 720 (1914)	3, 4
<i>Reno Smelting, Milling and Reduction Works v. Stevenson</i> , 20 Nev. 269, 21 P. 317 (1889)	4
<i>S. Nev. Homebuilders Ass'n v. Clark County</i> , 121 Nev. 446, 117 P.3d 171 (2005)	6
<i>Southwestern Bell Telephone Co. v. Federal Communications Comm'n</i> , 138 F.3d 746 (8th Cir., 1998)	9
<i>Southwestern Pennsylvania Growth Alliance v. Browner</i> , 121 F.3d 106 (3d Cir. 1997)	9
<i>Tadlock v. United States Dep't of Defense</i> , 91 F.3d 1335 (9th Cir. 1996)	9
<i>United States v. Alpine Land & Reservoir</i> , 27 F. Supp. 2d 1230 (D. Nev. 1998)	5
<i>United States v. Alpine Land & Reservoir Co.</i> , 291 F.3d 1062 (9 th Cir. 2001)	5
<i>United States v. Hennen</i> , 300 F. Supp. 256 (D. Nev. 1968)	3
<i>United States v. James Daniel Good Real Property</i> , 510 U.S. 43 (1993)	8
<i>United States v. Nashville, C. & St. L. R. Co.</i> , 118 U.S. 120 (1886)	7

Village League to Save Incline Assets, Inc. v. Nevada,
124 Nev. ___, 194 P.3d 1254 (Adv. Opn. 90, October 30, 2008) 9, 10

Washington v. State,
117 Nev. 735, 30 P.3d 1134 (2001) 6

II. STATUTES

NRS 533.040(2)	5
NRS 533.060	6
NRS 533.075	4
NRS 533.355(1)	3, 4
NRS 533.355(2)	3, 4, 5, 6
NRS 533.370	2, 6
NRS 533.370(2)	<i>passim</i>
NRS 533.370(7)	5
NRS 533.382	5
NRS 533.390(2)	6
NRS 533.395	6
NRS 533.410	6
NRS 533.425(1)(b)	5
NRS 534.080(3)	3, 4, 5
NRS 534.090	6
NRS 534.110(6)	4
1913 Nev. Stat. 192	3
2003 Nev. Stat. 2980-81	2

III. COURT RULES

NRAP 40(a)(1) 1
NRAP 40(c)(2)(ii) 1

IV. MISCELLANEOUS

Senate Report No. 755, 82nd Congress, 1st Session 3

1 I. This Court's Opinion.

2 In *Great Basin Water Network, et al., v. State Eng'r, et al.*, 126 Nev. ___, 222 P.3d 665 (Adv.
3 Opn. 2 at 3, January 28, 2010), this Court concluded that the State Engineer had violated his
4 statutory duty by failing to take action on SNWA's 1989 applications within one year after the final
5 protest date as required by NRS 533.370(2) and that none of the exceptions set forth in that statute
6 applied to SNWA's 1989 applications. *Id.* at ___, 222 P.3d at 669-70 (Adv. Opn. 2 at 8-10). This
7 Court then found that the 2003 amendment to NRS 533.370 exempting municipal use from the one-
8 year time frame did not apply retroactively to SNWA's 1989 applications.² *Id.* at ___, 222 P.3d at
9 670-71, (Adv. Opn. 2 at 11-15).

10 In attempting to determine what the consequence should be for the State Engineer's failure
11 to act, this Court was concerned about the respective inequities to applicants and "original and
12 subsequent protestants":

13 [v]oiding the State Engineer's ruling and preventing him from taking further action
14 would be inequitable to SNWA and future similarly situated applicants. And
15 applicants cannot be punished for the State Engineer's failure to follow his statutory
16 duty. Similarly, it would be inequitable to the original and subsequent protestants to
17 conclude that the State Engineer's failure to take action results in approval of the
18 applications over 14 years after their protests were filed.

19 *Id.* at ___, 222 P.3d at 672, (Adv. Opn. 2 at 15-16). Thus, this Court remanded the matter back to
20 the district court with instruction for that court to determine whether new applications must be filed
21 or whether the State Engineer must re-notice the original applications and re-open the protest period.
22 126 Nev. at ___, 222 P.3d at 667, 672 (Adv. Opn. 2 at 4, 16).

23 II. Granting the Request for Rehearing is Appropriate Because this Court Overlooked and Failed
24 to Apply Governing Law.

25 In its opinion, this Court made the decision not to craft a remedy and ordered the district
26 court to determine whether or not new applications must be filed. In doing so, this Court
27 inadvertently overlooked and failed to consider Nevada's prior appropriation doctrine, which is

28 ² The 2003 amendment also amended the statute to include what is now subsection 4, which provides that "[i]f the State Engineer does not act upon an application within 1 year after the final date for filing a protest, the application remains active until acted upon by the State Engineer." See 2003 Nev. Stat. 2980-81. This subsection was not addressed by this Court in its opinion.

1 grounded on principles of priority, *i.e.*, the commonly held precept of "first in time is first in right."
2 See *United States v. Hennen*, 300 F. Supp. 256, 261 (D. Nev. 1968) (*quoting* Senator McCarran's
3 Senate Report No. 755, 82nd Congress, 1st Session, p.2). The rights of the users of a water system
4 are dictated by the relative priorities of their rights. *In re Application of Filippini*, 66 Nev. 17, 30,
5 202 P.2d 535, 541 (1949). For any water right established after the enactment of Nevada's
6 comprehensive water code,³ the priority is determined by the date of the filing of the application to
7 appropriate water. See NRS 533.355(1),(2); NRS 534.080(3). Requiring the filing of new
8 applications undermines the fundamental precept of Nevada water law that "first in time is first in
9 right," as established by the Court's well settled water rights jurisprudence and codified by Nevada's
10 Legislature. It also punishes the applicant for the agency's inaction in contradiction of United States
11 Supreme Court and this Court's precedent.

12 Therefore, NV Energy urges this Court to grant SNWA's petition for rehearing on the limited
13 basis that this Court overlooked or failed to consider dispositive legal authority. Upon consideration
14 of the governing decisions and statutes discussed herein, this Court will be able to make the fully
15 informed decision that the appropriate consequence of the State Engineer's failure to act is the re-
16 noticing of applications and re-opening of the protest period. In fact, this is the remedy originally
17 sought by the Appellants in this case. Open. Br. at 29. This is the only result that will comport with
18 precedent and address this Court's concern that the "original and subsequent protestants" have a right
19 to be heard, without unduly penalizing SNWA and other similarly situated applicants and disturbing
20 Nevada's well settled prior appropriation doctrine.

21 ARGUMENT

22 I. Nevada is a Prior Appropriation State, Where Priority Governs the Relative Rights of Water 23 Users.

24 "The doctrine that a prior appropriation constitutes a prior right has long since been adhered
25 to in the jurisdictions embraced within the arid and semiarid region of this country[.]" *Prosole v.*
26

27
28 ³ In 1913, Nevada's comprehensive statutory water code was enacted. 1913 Nev. Stat. 192. Water rights established prior to that time are "vested," with a priority date established as of the date that the water was placed to beneficial use. *Ormsby County v. Kearney*, 37 Nev. 314, 352-53, 142 P. 803, 810 (1914).

1 *Steamboat Canal Co.*, 37 Nev. 154, 160, 140 P. 720, 722 (1914) (McCarran, J.).⁴ In 1889, this Court
2 definitively determined that the right to use water in the State of Nevada was governed by prior
3 appropriation. *Reno Smelting, Milling and Reduction Works v. Stevenson*, 20 Nev. 269, 282, 21 P.
4 317, 321-22 (1889) (right to use water in Nevada is governed by “principles of prior appropriation,”
5 as the “common-law doctrine of riparian rights is unsuited to the [arid] condition of our state”), *cited*
6 *in In re Application of Filippini*, 66 Nev. at 22, 202 P.2d at 537 (“doctrine of prior appropriation is
7 settled law of this state”); *see also Desert Irrigation, Ltd. v. State of Nevada*, 113 Nev. 1049, 1051
8 n.1, 944 P.2d 835, 837 n.1 (1997) (“Nevada, like most western states, is a prior appropriation state”).

9 The importance of being “first in time” is demonstrated in times of water shortage where the
10 priority of rights dictates who will receive water and who will not. In other words, the holders of
11 junior rights will be cut off from their water to protect the rights of senior users. *See Ophir Silver*
12 *Mining Co. v. Carpenter*, 4 Nev. 534, 543 (1869) (“priority of appropriation gives the superior
13 right”); NRS 534.110(6) (if the State Engineer determines that a hydrographic groundwater basin
14 is over-appropriated and there is not enough water to serve the needs of all ground water right
15 holders, he “may order that withdrawals be restricted to conform to priority rights”); *see also* NRS
16 533.075 (may rotate use of water on land, so long as it is done “without injury to lands enjoying an
17 earlier priority”).

18 The priority of any statutorily-acquired water right is determined by the date of the filing of
19 a water right application. NRS 533.355(1),(2); NRS 534.080(3). The filing of the application is the
20 “first step” to be taken to acquire the right to use water under Nevada’s statutory water scheme. *See*
21 *In re Application of Filippini*, 66 Nev. at 25-26, 202 P.2d at 538-39 (“appropriation is a method of
22 acquiring a right to the use of waters from the government”); *Ophir Mining Co.*, 4 Nev. at 543-44,
23 *quoted in Bailey v. State of Nevada*, 95 Nev. 378, 384, 594 P.2d 734, 738 (1979) (“the appropriation

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26 _____
27 ⁴ As early as 1866, this Court had recognized prior appropriation as one of two doctrines that form the basis
28 upon which to establish the right to use water. *See Lobdell v. Simpson*, 2 Nev. 274, 278-79 (1866). The other, the
“riparian doctrine,” is based on the theory that the right to reasonably use water arises by virtue of the ownership of land
which water flows upon or abuts. *See id.* at 276-77.

1 is not deemed complete until the actual diversion or use of the water, . . . the right relates to the time
2 when the first step was taken to secure it").⁵

3 If the application is approved, the permitting and certificating of the water right relates back
4 to the filing date of the application. *Bailey*, 95 Nev. at 384, 594 P.2d at 738; NRS 534.080(3); *see*
5 *also United States v. Alpine Land & Reservoir*, 27 F. Supp. 2d 1230, 1240 (D. Nev. 1998) (the right
6 relates back to the "first step" taken to secure that right); NRS 533.370(7) (permit approval noted
7 on original application, which sets forth filing, *i.e.*, priority, date); NRS 533.425(1)(b) (certificate
8 must indicate date of "appropriation"). The approval of an application to change the manner of use,
9 place of use, and/or the point of diversion of a water right, whether permitted or certificated, also
10 relates back to the date of filing of the base application. *See generally United States v. Alpine Land*
11 *& Reservoir Co.*, 291 F.3d 1062 (9th Cir. 2001); NRS 533.040(2) (priority of the right remains
12 undisturbed even if the water right is severed from the land to which it was originally appurtenant
13 and transferred to another place of use).

14 There can be no doubt that the value of an application is driven by its priority.⁶ Declaring
15 applications that the State Engineer has not acted upon within the one year time period of NRS
16 533.370(2) void would summarily strip those holding such applications of that value. Any new, or
17 substitute, applications filed by such divested holders will have a later priority date, thus relegating
18 any water rights approved under those new applications to a status junior to any other water right for
19 which an application was filed and approved in the interim. Such an outcome is clearly not
20 contemplated by Nevada water law.

21 The importance of priority of water rights in Nevada, the most arid state in this nation,⁷
22 cannot be overemphasized; it is the key to the administration, determination, and valuation of the
23 relative water rights of users of a water system. Thus, this Court is urged to direct the re-noticing
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25 ⁵ Even if an application is returned to the applicant for correction, it retains the priority date of the initial filing.
26 *See* NRS 533.355 (2).

27 ⁶ An application is property which can be conveyed. *See* NRS 533.382.

28 ⁷ "Nevada has, on the average, less precipitation than any other State in the Union." *Nevada v. United States*,
463 U.S. 110, 114 (1983).

1 of SNWA's applications and re-opening of the protest period on those applications. This is an
2 appropriate result that comports with the doctrine of prior appropriation and preserves the priorities
3 of applications.

4 II. Voiding of Applications and Requiring New Filings Would Be a Punitive Act Against
5 Applicants That Is Not Contemplated by Nevada's Statutory Scheme.

6 Requiring SNWA to file new applications will act as a forfeiture of the original applications'
7 priority.⁸ Aside from running counter to the doctrine of prior appropriation, this result is simply not
8 contemplated by NRS 533.370 or any of the related statutes governing applications to appropriate
9 water. "[I]t is the duty of this court, when possible, to interpret provisions within a common
10 statutory scheme 'harmoniously with one another in accordance with the general purpose of those
11 statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's
12 intent." *Southern Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173
13 (2005) (quoting *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001)).

14 The Nevada Legislature has specified when an application for water rights may be cancelled.
15 Upon receipt of an application, the State Engineer examines the application to determine whether
16 or not it is in the proper form. NRS 533.355(2). If it is not, the State Engineer's office returns it to
17 the applicant for completion or correction. *Id.* If the applicant does not return it within 60 days, the
18 State Engineer is required to cancel the application. *Id.*

19 The Legislature has also enacted very specific provisions regarding the loss of water rights.
20 See NRS 533.390(2) (cancellation of permit for failure to file statement of completion of work);
21 NRS 533.395 (permit may be cancelled due to failure of holder to perfect the application in good
22 faith and with reasonable diligence); NRS 533.410 (cancellation of permit for failure to file proof
23 of beneficial use); see also NRS 533.060 (surface water rights can be declared abandoned under
24 specific circumstances); NRS 534.090 (ground water rights may be lost by forfeiture if not used for
25 more than 5 consecutive years or by abandonment). Reading these statutes together, it is clear that

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28 ⁸ "[T]he law abhors a forfeiture." *Mainor v. Nault*, 120 Nev. 750, 776, 101 P.3d 308, 326 (2004).

1 the Legislature only contemplates the cancellation of an application or loss of a water right due to
2 the *holder's* lack of diligence, not the State Engineer's.

3 Also, unlike the specific cancellation, forfeiture and abandonment provisions set forth above,
4 the Legislature did not provide for any consequence to the applicant for the State Engineer's failure
5 to act within the time frame of NRS 533.370(2). The Legislature's "silence" in this regard is further
6 evidence of the Legislature's intent that cancellation or voiding of such applications is not
7 contemplated. *See Binegar v. Eighth Judicial Dist. Court*, 112 Nev. 544, 549, 915 P.2d 893, 899
8 (1996) (when the Legislature could have put limiting language in a statute but chose not to do so,
9 it must be presumed that it was the intent of the Legislature not to do so).

10 III. Agencies Do Not Lose the Authority to Act on a Matter Due to the Agency's Failure to
11 Comply with Statutory Deadlines.

12 The U.S. Supreme Court has made it clear that an administrative agency does not lose
13 authority to act on a matter before it due to its failure to comply with express statutory time limits,
14 unless the governing statute specifies a consequence for failure to comply with the timing provision.
15 *Brock v. Pierce County*, 476 U.S. 253, 259 (1986); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149,
16 159 (2003). Indeed, courts should be "most reluctant to conclude that every failure of an agency to
17 observe a procedural requirement voids subsequent agency action, especially when important public
18 rights are at stake." *Brock*, 476 U.S. at 260. Preventing an agency from acting when no statutorily
19 specified consequence exists, would be contrary to the "great principle of public policy, applicable
20 to all governments alike, which forbids that the public interests should be prejudiced by the
21 negligence of the officers or agents to whose care they are confided." *Id.* (quoting *United States v.*
22 *Nashville, C. & St. L. R. Co.*, 118 U.S. 120, 125 (1886)).

23 In *Brock*, a county in the State of Washington had received money from a grant funded by
24 the Comprehensive Employment and Training Act (CETA). 476 U.S. at 256. Because CETA
25 required the Secretary of Labor to issue a final determination as to the misuse of CETA funds by a
26 grant recipient within 120 days after receiving a complaint about such alleged misuse, and the
27 Secretary did not do so until after the 120 days, the county argued that the Secretary of Labor could
28 not compel the county to make repayment of the funds it had received. *Id.* at 257. The Court was

1 not persuaded by the proposition that the plain meaning of the statutory command that the Secretary
2 "shall" take action within 120 days conclusively demonstrated that Congress intended to bar any
3 action by the Secretary after that period had expired. *Id.* at 258. To the contrary, the Court held that
4 it cannot be assumed that a legislative body intended to divest an agency of its power to act when
5 there is no specific consequence for the agency's failure to act set forth in statute. *Id.* at 266. The
6 Court found that CETA's requirement that the Secretary "shall" take action within 120 days did not,
7 standing alone, prohibit the Secretary from acting after that time. *Id.* Rather, the 120-day provision
8 was meant "to spur the Secretary to action, not to limit the scope of his authority," so that untimely
9 action was still valid. *Id.* at 265.

10 The Supreme Court reiterated its reasoning in *Barnhart*, which involved the failure of the
11 Commissioner of Social Security to take timely action relating to health care benefits for retirees of
12 the coal industry. 537 U.S. at 152-54. In that case, various labor agreements between coal operators
13 and a union concerning health care benefits culminated in the congressional enactment of the Coal
14 Industry Retiree Health Benefit Act of 1992 ("Coal Act"). *Id.* One provision of the Coal Act
15 provided that the Commissioner "shall, before October 1, 1993," assign each retiree to an extant
16 operating company or related entity which would then be responsible for funding the assigned
17 retiree's benefits. *Id.* However, untimely assignments were made which were subsequently
18 challenged by the operating companies to whom the beneficiaries were assigned. *Id.* Nonetheless,
19 the Court held that the Commissioner had acted within his authority in making those assignments
20 despite the fact that they were made outside the statutorily prescribed time period. *Id.* at 164.

21 Relying on its previous decision in *Brock*, the *Barnhart* court again rejected the argument that
22 the term "shall," together with a specific deadline, leaves an agency without power to act after that
23 deadline. *Id.* at 158. As the Court emphasized, not "since *Brock*, have we ever construed a provision
24 that the Government 'shall' act within a specified time, without more, as a jurisdictional limit
25 precluding action later." *Id.* "We have summed it up this way: 'if a statute does not specify a
26 consequence for noncompliance with statutory timing provisions, the federal courts will not in the
27 ordinary course impose their own coercive sanction.'" *Id.* at 159 (*quoting United States v. James*
28 *Daniel Good Real Property*, 510 U.S. 43, 63 (1993)).

1 The reasoning set forth in *Brock* has been followed by Circuit courts and state courts alike.
2 See *Tadlock v. United States Dep't of Defense*, 91 F.3d 1335 (9th Cir. 1996) (agency's failure to
3 comply with three different mandatory statutory deadlines in a whistle-blower action did not bar
4 subsequent agency action); *Southwestern Bell Tel. Co. v. Federal Communications Comm'n*, 138
5 F.3d 746 (8th Cir. 1998) (agency retained power to act in determining the legality of proposed tariffs,
6 even though statute required action within five months and the agency took nine years); *Hendrickson*
7 *v. Fed. Deposit Ins. Corp.*, 113 F.3d 98 (7th Cir. 1997) (agency authorized to remove bank officer
8 after 90-day statutory deadline for removal decision); *Southwestern Pennsylvania Growth Alliance*
9 *v. Browner*, 121 F.3d 106 (3d Cir. 1997) (agency has power to act after 18-month statutory deadline
10 and can consider data applicable to post-deadline period); *Alaska v. Johnson*, 958 P.2d 440 (Alaska
11 1998) (holding that a court should not, and cannot, invent remedies to satisfy some perceived need
12 to coerce the courts and government into complying with statutory time limits); *Mills v. Martinez*,
13 909 So. 2d 340 (Fla. Dist. Ct. 2005) (holding that procedural rules, such as specific statutory timing
14 requirements, should be given a construction calculated to further justice, not to frustrate it).

15 Moreover, this Court in *Village League to Save Incline Assets, Inc. v. Nevada*, 124 Nev. ___,
16 194 P.3d 1254 (Adv. Opn. 90, October 30, 2008), held that the Nevada State Board of Equalization
17 (Board) was not divested of its authority to act after the statutory deadline established for completion
18 of equalization decisions. This Court's analysis of the issue centered upon the determination of
19 whether or not the statutory deadline was "mandatory" or "directory." *Id.* at ___, 194 P.3d at 1259-
20 60 (Adv. Opn. 90 at 6-9). While the decision was not founded upon *Brock* or its progeny, the Court
21 noted that the Legislature did not impose a penalty for non-compliance. *Id.* at ___, 194 P.3d at 1260
22 n.20 (Adv. Opn. 90 at 7 n.20) (quoting *Corbett v. Bradley*, 7 Nev. 106, 108 (1871) ("[i]f it be clear
23 that no penalty was intended to be imposed for non-compliance, then, as a matter of course, it is but
24 carrying out the will of the legislature to declare the statute . . . to be simply directory")). This Court
25 also took into account that the Board "might not have adequate time" to consider any appeal of
26 taxpayers contesting their assessments, and held that "[t]his court may construe a statute as directory
27 to prevent 'harsh, unfair or absurd consequences.'" *Id.* at ___, 194 P.3d at 1260-61 (Adv. Opn 90
28 at 7-9) (internal citation omitted). Thus, after review of the statute at hand and related statutes, this

1 Court determined that the word "shall" in the statute setting forth the deadline by which the Board
2 must issue equalization decisions, was directory, not mandatory, and concluded the Board was within
3 its authority to act outside of the statutory time period. *Id.*

4 The foregoing cases amply demonstrate that if no consequence is expressly provided for in
5 statute for an agency's failure to act within a prescribed time, the agency is not prohibited from
6 acting beyond the statutory time period. As discussed *supra*, there is no statutory language in NRS
7 Chapter 533 specifying any consequence for the State Engineer's failure to approve or deny an
8 application to appropriate water within the statutory time period of NRS 533.370(2). Moreover, as
9 a practical matter, as alluded to by SNWA in its Answering Brief, the State Engineer was unable to
10 act on the 1989 applications within the statutory time period. Ans. B. at 18-19. Requiring SNWA
11 to file new applications would effectively divest the State Engineer of his authority to act on the
12 applications solely because he has run beyond the timeline set forth in statute and would penalize
13 SNWA for that inaction. Such an effect would clearly be inconsistent with the holdings set forth in
14 the cases above because it would prejudice the interests of public citizens due to the inaction of the
15 officer to whose care their interests were entrusted.

16 Further, as in *Brock*, the instant case involves important public rights in preserving the
17 doctrine of prior appropriation and the priority of applications held by SNWA and other similarly
18 situated applicants, such as NV Energy. Any decision that allows for the potential abrogation of
19 those rights, which are essential to the administration of Nevada's water rights scheme, runs afoul
20 of the firmly established doctrine that a party must not be harmed when an agency does not act in
21 a timely manner through no fault of that party.⁹

22 In sum, these decisions provide more direction to this Court to enable it to resolve its present
23 quandary. SNWA cannot be required to file new applications as a result of the State Engineer not
24 approving or denying its 1989 applications within one year of the close of the protest period.

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27 ⁹ Significantly, not one of the cases discussed above includes a decision whereby the court determined the
28 proper recourse was to instruct an innocent party to restart the entire administrative process due to the agency's failure
to abide by a statutorily prescribed timeline. Nor did any of the cases divest the agency of its authority to act past the
statutory time period.

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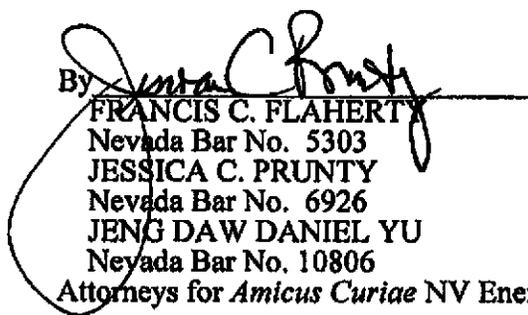
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CONCLUSION

For the foregoing reasons, this Court should grant SNWA's petition for rehearing to clarify that SNWA's applications are not void and to direct the re-noticing of the applications and re-opening of the protest period.

RESPECTFULLY SUBMITTED this 15th day of March, 2010.

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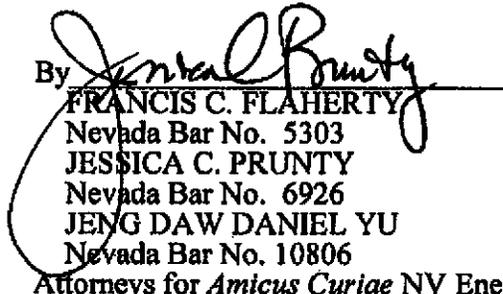
CERTIFICATE OF COMPLIANCE

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I hereby certify that I have read the foregoing brief and that, to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that the brief complies with all applicable provisions of the Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the memorandum regarding matters in the record to be supported by appropriate references to the record. I understand that I may be subject to sanctions in the event that this memorandum is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of March, 2010

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Nevada Rules of Appellate Procedure, I hereby certify that I am an employee of the law firm Dyer, Lawrence, Penrose, Flaherty, Donaldson & Prunty and that on this 15th day of March, 2010, I caused a true and correct copy of the foregoing *BRIEF OF AMICUS CURIAE* to be mailed, with first-class postage thereon prepaid to the following persons:

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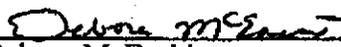
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Via Hand-Delivery

Jason King
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Re: **Nevada State Engineer Workshop Concerning *Great Basin Water Network*
Et al. v. State Engineer and Southern Nevada Water Authority
126 Nevada Advance Opinion 2, January 28, 2010
Our File No. 9476.0030**

Dear Mr. King:

I am writing this letter on behalf of the Truckee Meadows Water Authority. As you know, since 1977, I have been active in water matters in Nevada. I am also writing this letter as one who has and continues to represent persons and entities who hold Nevada water rights for a wide variety of beneficial uses.

At the conclusion of the recently completed 26th Special Session of the Nevada Legislature, the Nevada Legislature requested that the State Engineer work with interested parties to find a way to resolve the uncertainties and instability created in Nevada's water law by the Nevada Supreme Court's recent decision in *Great Basin Water Network v. State Engineer*, 126 Nevada Advance Opinion 2 (January 28, 2010). The uncertainty and instability arise because the broad holding in *Great Basin Water Network* suggests that applications on file with the Nevada State Engineer more than one year prior to July 1, 2003, may either have to be renoticed or refiled, even if subsequent to July 1, 2003, those applications were approved by the Nevada State Engineer. Although I firmly believe that the *Great Basin Water Network* holding should be substantially narrowed in future litigation involving other parties and different facts, interested and affected parties should not be left vulnerable to costly and lengthy litigation. That is especially true when the issue results from a misinterpretation of a legislative act that was intended to avoid these very problems in the first instance.

Background.

The Supreme Court's decision on this broad issue appears to be the result of its misinterpretation of the Legislature's intent with respect to Chapter 474 of the 2003 Laws of the State of Nevada. There, the Legislature determined that two provisions were to apply to "each such application that is pending with the office of the State Engineer on July 1, 2003." The two provisions which were to apply to such pending applications are:

(2) Except as otherwise provided in this subsection and subsection 7, the State Engineer shall approve or reject each application within one year after the final date of filing a protest. The State Engineer may:

* * *

(b) Postpone action if the purpose for which the application is made is municipal use.

* * *

3. If State Engineer does not act upon an application within one year after the final date for filing a protest, the application remains active until acted upon by the State Engineer.

The Nevada Supreme Court decided that the word "pending" did not include any applications which had been on file with the State Engineer longer than one year before the July 1, 2003 effective date of the Act.

The notion that an application which has been pending before the Nevada State Engineer longer than one year after the final date for filing of a protest cannot be acted upon, and must either be refiled or renoticed, is plainly inconsistent with the manner in which the Nevada State Engineer has historically applied the one year provision since it was added to Nevada's water law in 1947. I am unaware of any instance or situation where, because an application had not been acted upon within one year after the final date for filing a protest, the Nevada State Engineer required that the application be renoticed or refiled. That provision has not been interpreted and applied in that fashion for the 63 years that it has been in existence.

Because it has not been applied in that fashion for the last 63 years, there are hundreds, if not thousands, of such applications which were subsequently approved. Since approval, they have been relied upon by their owners to support every beneficial use allowed under Nevada's water law. The solution arrived at for restoring the stability and consistency in the administration of Chapter 533 and 534 of the Nevada Revised Statutes upset by this decision should not turn on the ultimate result one believes should be reached in the *Great Basin Water Network* case. The merits of *Great Basin Water Network* involve broader and more significant questions than the technicality used to either require renoticing or refile of those applications. The proper solution must be arrived at by considering its importance to those water right holders who, over the last 63 years, have applied for and received approval of applications more than one

year after the final date for filing a protest, and who are not now embroiled in, and who should not be placed in the position of having to become embroiled in, litigation.

At the outset, it is important to recognize that an applicant or a protestant, including those involved in *Great Basin Water Network*, is not without a remedy should the State Engineer fail to act within the one year period without satisfying one of the exceptions which allows for the postponement of action. To the extent that the one year requirement is a duty imposed upon the State Engineer by law, and it appears that that is an essential element of the ruling of the Supreme Court in *Great Basin Water Network*, an applicant or protestant would be entitled to compel action pursuant to a writ of mandamus filed either with a district court or in the Supreme Court. *Cf., Roundhill General Improvement District v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981). That remedy was available to either the applicant or the protestants in the *Great Basin Water Network* case, and for whatever reason, none of them chose to exercise it.

The Propriety of a Legislative Solution.

It is entirely appropriate to ask that the legislature address an issue arising from a court's interpretation of a statute and a subject matter properly in the legislative sphere. There are at least two Nevada water law examples where this has occurred. In *In Re Waters of Duff Creek*, 66 Nev. 17, 202 P.2d 535, the Nevada Supreme Court, deciding not to overrule an earlier Nevada Supreme Court case, *Authors v. Bryant*, 22 Nev. 242, 38 P. 439 (1894), held that a right to use water could be acquired by adverse use. Recognizing that its decision had the potential to upset one of the principal purposes of Nevada's comprehensive water law, that "order replace chaos in the appropriation, distribution and use of public water," the Supreme Court noted:

"As the 44th Session of the Nevada State Legislature has now convened, we direct the attention of the Legislature to the problem. We have found in compliance with our constitutional system of assigning separate powers to the executive, legislative and judicial branches of the government, that the fixing of a policy in this matter lies more properly in the sphere of the legislature, but we do not overstep in pointing out the problem nor in submitting for consideration our thoughts upon it."

66 Nev. at 29. That decision was made on January 28, 1949, and the Nevada Legislature amended the water law to effectively overturn its holding as of March 17, 1949.

In 1992, a Nevada district court, and in 1993, the United States Court of Appeals for the Ninth Circuit, ruled that under Nevada law one could not change the point of diversion, place of use, or manner of use of water unless the right to that water had been fully perfected by having been diverted at its permitted point of diversion and applied to its permitted manner of use at its permitted place of use. *See, United States v. Alpine Land and Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1993); *Pyramid Lake Paiute Tribe of Indians, et al. v. R. Michael Turnipseed, et al.*, in the Second Judicial District Court of the State of Nevada in and for the County of Washoe, No. CV-

91-2231 (August 31, 1992 Order). In reaching those conclusions, these courts interpreted the phrase "water already appropriated" in N.R.S. 533.325 and 533.345 to mean that the change sought must involve a right to water which had been fully perfected under state law.

After reviewing how the phrase "water already appropriated" had been historically interpreted and applied by the Nevada State Engineer, and after considering the importance of the proper interpretation of that term to present and future appropriators, and its consistency with sound water law policy, the Nevada Legislature approved Assembly Bill 337, which, in Section 1, provided that "water already appropriated includes water for whose appropriation the State Engineer has issued a permit but which has not been applied to the intended use before an application to change the place of diversion, manner of use or place of use is made." 1993 Laws of Nevada, Chapter 181 at 321. In section 2 of that bill, the Legislature declared that it had "examined the past and present practice of the State Engineer with respect to the approval or denial of applications to change the place of diversion, manner of use or place of use of water, and finds that those applications had been approved or denied in the same manner as applications involving water applied to the intended use before the application for change was made." The Legislature further declared that its intent was to "clarify, rather than change, the operation" of the relevant provisions in Nevada law, and to "thereby promote stability and consistency in the administration of chapters 533 and 534 of N.R.S." The Legislature ratified and approved each approval granted by the State Engineer before the effective date of the Act for a change in place of diversion, manner of use or place of use of water already appropriated, if the change was consistent with the interpretation of that term codified in Section 1 of the Act. Finally, the Legislature provided that the Act became effective upon passage and approval, and to the extent that it ratified previous decisions of the State Engineer in the manner described in Section 2 of the Act, "applied retrospectively as well as prospectively."

Proposed Legislation.

The Truckee Meadows Water Authority urges the State Engineer to recommend a similar solution here. The instability and uncertainty created by *Great Basin Water Network* is best resolved by addressing the decision squarely and directly. The solution should clarify that in 2003 the Nevada Legislature intended that the amendments in section 2 of Chapter 474 apply to all applications, whether filed before or after July 1, 2003. It is especially important that it be made clear that the provisions of N.R.S. 533.370(4) are and always have been the law with respect to applications which have not been acted upon within the one year period. The Truckee Meadows Water Authority therefore suggests the following language for consideration by the State Engineer and ultimately the Nevada legislature:

AN ACT relating to water, clarifying certain statutory provisions to reflect established practice; and providing other matters properly related thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT A FOLLOWS:

Sec. 1. Section 18 of Chapter 474 of the 2003 laws of the State of Nevada is hereby amended to read as follows:

Sec. 18. The amendatory provisions of section 2 of this act apply to:

1. Each application described in NRS 533.370 that is made on or after July 1, 2003; and
2. Each such application that is pending with the office of the State Engineer on July 1, 2003, *without regard to how long before July 1, 2003 each such application was filed with the office of the State Engineer.*

Sec. 2. 1. The legislature declares that it has examined the past and present practice of the state engineer with respect to the approval or denial of applications as such approval or denial relates to their pendency on and before July 1, 2003, and finds that those applications have been approved or denied in a manner consistent with section 1 of this act.

2. The legislature intends by this act to clarify rather than change the operation of Section 18 of Chapter 474 of the 2003 laws of the State of Nevada with respect to the approval or denial of applications described in section 1 of this act, and thereby to promote stability and consistency in the administration of chapters 533 and 534 of NRS.

Sec. 3. This act becomes effective upon passage and approval, and applies retrospectively as well as prospectively.

The solution proposed by the Truckee Meadows Water Authority protects existing water rights, protects the status of pending applications, preserves priorities, and allows the application of protest period provisions to continue to be applied as previously applied by the Office of the Nevada State Engineer over the 63 year period since the 1947 amendment to Nevada's water law established the one year action provision.

Consideration of a Rule Allowing Intervention.

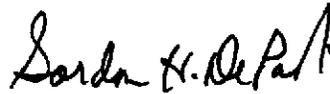
The adage "hard cases make bad law" is applicable to the *Great Basin Water Network* case. It appears that, in part, this case results from the inability of some persons to participate fully in the hearings on the applications which were at issue. I recognize that, in recent times, hearings before the State Engineer, particularly in situations involving large interbasin transfers of water, have become cumbersome, time consuming, and expensive. Nevertheless, I suggest that the State Engineer give consideration to a regulation which would allow intervention of persons who have a significant interest in a matter, but who, for some good reason, did not file a timely protest.

Jason King
Acting Nevada State Engineer
March 15, 2010
Page 6 of 6

I suggest that your Office review the provisions of the Nevada Administrative Code concerning intervention before the Public Utilities Commission of Nevada. Those provisions are at N.A.C. §§ 703.578 to 703.600. There may be some aspects of those provisions which might work for your Office.

I and my client appreciate the opportunity to provide our comments on this urgent and important issue.

Sincerely,



Gordon H. DePaoli

GHD:hd

cc: Mark Foree
John Erwin
Steve Walker

2010 MAR 15 PM 3:05
STATE ENGINEER'S OFFICE

ATTACHMENT

E

Comments from Rupert Steele

From: waterwebmaster@water.nv.gov
Sent: Friday, March 19, 2010 2:45 PM
To: Susan Joseph-Taylor
Subject: Comments from Rupert Steele

This important issue is best left to the courts to make the decision. The legislature would need to look at the policy during their regular session. There is no need for a "special" session to address this.

Comments from Terry Marasco

From: waterwebmaster@water.nv.gov
Sent: Wednesday, March 24, 2010 7:40 AM
To: Susan Joseph-Taylor
Subject: Comments from Terry Marasco

Changes to NV water law regarding interbasin water transfers exceeding 5,000 acre feet/year

Language developed to provide these effects:

Terry Marasco

For the current SNWA applications

1. For the refilled and original SNWA applications, the original applications take precedence over the refilled applications
2. For the refilled and original SNWA applications, the proponent must begin the project 5 years after the applications are approved, or the applications are voided.
3. For the refilled and original SNWA applications, the proponent shall show that the need will be there by at the 5 year span.
4. If the applications are voided, the original proponent cannot simply reapply for another five years but must compete with other applicants who may substantiate a greater need in a shorter period of time.

In general

5. An entity or person who purchases property in either basin of an interbasin transfer after the approval of the applications and the start of the project is allowed to protest such applications.
6. If an aquifer in Nevada is shared with another state, the NV SE shall notice the counties bordering the aquifer in the other state(s) and shall notice the Governor of those states(s).
7. The receiving area of the interbasin transfer must conduct an election of its registered voters and 60% of registered voters of the receiving area must approve of the transfer, and the proponent must fund the election.
8. The area from which the water is transferred must conduct an election of its registered voters and 60% of registered voters of the area from which the water is transferred must approve of the transfer, and the proponent must fund the election.
9. The proponent of any interbasin transfer must prove that financing of the project is secured by the time of the primary hearing of such transfer
10. The proponent of any interbasin transfer must provide a bond in the name of the basin from which the water is transferred in the amount of 10 times the cost of the transfer to provide funding for enforcement, mitigation, and compensation for the area from which the water is transferred.
11. The basin from which the water is transferred has the right to stop pumping if the groundwater table in the area from which the water falls within 5 feet above of the phreatophytic root level.
12. The basin from which the water is transferred has the right to stop pumping if wetlands, meadows, seeps, and springs are degraded stated in an agreement between the areas in question

ESKDALE CENTER
1100 Circle Drive - EskDale, Utah
84728

March 25, 2010

Mr. Jason King, P.E., Acting Nevada State Engineer
Nevada Division of Water Resources
901 South Stewart Street
Carson City, Nevada 89701

Comments on GBWN v. Taylor Workshop

Dear Mr. King:

Due to schedule conflicts EskDale Center was unable to send a representative to the March 16 workshop. We offer these comments related to our standing as protestants to Nevada water rights applications by SNWA for consideration in the possible judicial and legislative remedies being considered after the Nevada Supreme Court ruling in this action. It is essential to provide due process protections to protestants in the potentially protracted consideration of large numbers of applications for large-scale municipal or industrial water-use projects, both in terms of the length of time involved and the costs associated with protest fees and legal representation.

Define the status of previous applications and protests.

EskDale Center needs clarification of the status of the original applications and their associated protests.

- If the refiled SNWA applications stand, are the original applications withdrawn, denied, lapsed, or in some other status?
- Do the original valid protests attach to the new applications which reference the original applications, or must we refile our protests based on the new publication deadlines?
- If EskDale Center protests the refiled applications and the originals are kept active, will the protest fees be refunded?

EskDale Center finds itself in a form of double jeopardy, at risk of losing its due process rights due to an action intended to protect due process rights. We are compelled to take action to preserve standing we already have at the risk of unnecessarily expending precious resources.

Some reference to and procedure for preservation of standing should be included in the final solution.

Applications for large projects should be grouped.

The number of applications involved in large-scale projects place a burden on protestants. The State Engineer groups applications for such projects to promote efficiency and reduce costs. The same benefit should be available to protestants who generally have fewer resources compared to the applicant.

It is appropriate to charge the applicant for each application as is the current practice, because of document processing and research required of the State Engineer. However, once this processing is completed, related applications are processed in groups. The applicant should not be allowed to preempt protests by the sheer volume of applications.

The effects of large-scale water use may be local to a specific application, but integrated projects produce effects in combination when the same or interconnected aquifers are the points of diversion. Protestants should be able to protest blocks of applications which could affect their specific location and situation in the same way the State Engineer would structure the hearings. The ability to protest a specific application should not be reduced by this option.

Applications for integrated and large-scale water-use projects should be grouped at the time of application for processing efficiency, and single protests should be allowable for these groupings. A penalty for deception and subterfuge by applicants should be included.

Action on postponed applications should be treated as new applications.

Applications held for municipal development under the statute should be processed as new applications when rights are requested.

A protest period should be opened when the request for approving the applications is announced. This would preserve the priority date and avoid successor-in-interest issues, while allowing current users to present their impacts and avoid a challenge of standing by the applicant.

Allow the judicial process to proceed without intervention.

EskDale Center believes that the Nevada District Court should fulfill its directive by the Nevada Supreme Court to define the remedy in this case, and that this action is specific to this case. Intervention by the Nevada Legislature or the State Engineer invites further legal challenges and impedes both the applicant and the protestants in the exercise of their legal rights.

GBWN v. Taylor was a specific request for relief regarding these SNWA applications, and if other protestants to other applications affected by the lack of action by the State Engineer desire to take similar legal action, they are welcome to do so. This case should not affect the general body of decisions made by the State Engineer in past years.

The State Engineer should stay any actions, including the processing of SNWA's refiled applications, related to this decision pending action by the District Court to avoid having to undo the unintended consequences of hasty decisions in the face of uncertainty.

EskDale Center appreciates the opportunity to offer these comments in support of an equitable solution to the legal situation created by *GBWN v. Taylor*. We look forward to our continued involvement as protestants to the applications filed by SNWA as the State Engineer performs its duty under the laws of the State of Nevada as refined by judicial and legislative actions.

Sincerely,



EskDale Center
Jerald Anderson, Representative

Hugh H. Ricci, P. E.

I have attached an amendment to NRS 533.370 which I believe was the intention of the 2003 Legislature. The language in Sections 2 and 3 tries to give the state engineer direction as to what to do with applications that are one year and older. During hearings on SB 336 I was in attendance for most of the testimony regarding this language and the amendment I have offered is what was introduced during the hearing before the Senate Natural Resources Committee on April 2, 2003. I don't know how that language in the amendment was not in the bill as enrolled. As far as I can recall there was no opposition to this amendment during that hearing or any subsequent hearings on this bill. I would be happy to discuss this with you if you should have any questions.

Thank you for the opportunity to present this amendment.

MICHAEL W. DYER
SANDRA G. LAWRENCE*
JAMES W. PENROSE*
FRANCIS C. FLAHERTY
THOMAS J. DONALDSON
JESSICA C. PRUNTY

* ALSO ADMITTED IN CALIFORNIA



PAUL D. COTSONIS
TODD B. REESE*
SUE S. MATUSKA*
J. DANIEL YU

OF COUNSEL
MARGARET A. TWEDT*
HON. MICHAEL E. FONDI*

March 26, 2010

Via E-mail to jking@water.nv.gov

Jason King, P.E.,
Acting Nevada State Engineer
Division of Water Resources
901 South Stewart Street, Suite 2002
Carson City, Nevada 89701

Re: Comments by NV Energy

Dear Mr. King:

These comments are submitted by NV Energy to endorse certain proposed legislative changes to NRS 533.370, as posted on the Division of Water Resources website, to address issues which have arisen in the wake of the *Great Basin Water Network* case.

As an initial matter, NV Energy does not support the proposals set forth in **Versions 2 and 3** for several reasons, the most important of which is that we believe there is a significant danger that if the proposals are rejected by Legislature, the rejection will support an argument that the lack of action within one year does render the applications invalid, and worse yet, does call into question the validity of a permit or certificate based on an application not acted on within one year. *See Del Papa v. Board of Regents*, 114 Nev. 388 (1998).

NV Energy does support the legislative proposals set forth in Version 1 and partially supports the changes set forth in Version 4, with additional suggestions which are set forth below.

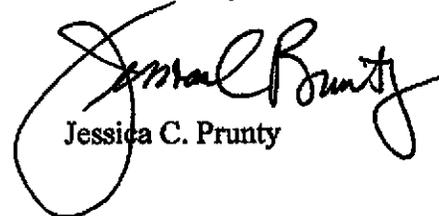
Version 1: It is our opinion that amending the *transitory* provision of the 2003 amendment would be the cleanest and most simple way to ensure that the 2003 amendment, stating that applications that have not been acted upon within one year are still valid, would apply retroactively to all applications on file with the State Engineer. Thus, NV Energy endorses this approach. We also believe that the Legislative Counsel Bureau would be more receptive to accomplishing the objective by way of this approach.

Version 4: This proposal would amend 533.370(3) and 533.370(8). For the same reasons set forth above, we do not recommend directly amending 533.370(3) to include retroactive application language in the body of the statute. Rather, we recommend amending the transitory language of the 2003 bill, as in Version 1.

Regarding the component of Version 4 that would amend 533.370(8) to re-notice and re-open the protest period for certain inter-basin transfer applications, NV Energy supports this language, in part. It is our opinion that the proposed amendment to (8)(d) addresses the due process concerns of interested persons who did not file a protest after the initial publication of an inter-basin transfer application, as articulated by the Nevada Supreme Court in the *Great Basin Water Network Case*, while at the same time providing a "trigger" for re-noticing and re-opening of the protest period. Without such trigger language, the State Engineer will be placed in the position of having to immediately re-notice and re-publish old applications, even if a hearing will not be held in the foreseeable future. If enough time lapses between that new protest period and the State Engineer taking action, it is highly likely that another protest period will have to be opened at that time.

NV Energy does not support the proposed section 533.370(8)(e) setting forth retroactive application language. As previously explained, we recommend that this type of retroactive application language be part of the transitory provisions of the amending legislation. Also, as the language suggested in 8(e) reads, it might be interpreted to require re-opening of permitted and certificated rights; thus, as an alternative, NV Energy suggests that additional language be added to the transitory provision to clarify that re-noticing and re-opening of the protest period does not apply to any application that the State Engineer has already approved.

Best Regards,
DYER, LAWRENCE, PENROSE,
FLAHERTY, DONALDSON & PRUNTY



Jessica C. Prunty

cc (via e-mail): Susan Joseph-Taylor, DWR Chief Hearing Officer
Renee Lequerica, Esq., NV Energy
Robert Ott, NV Energy



March 26, 2010

Via email and facsimile

(775) 684-2811

jking@water.nv.com

sjoseph-taylor@water.nv.com

Jason King, P.E. Acting State Engineer
Nevada Division of Water Resources
901 S. Stewart St., Suite 2002
Carson City, Nevada 89701

SUBJECT: COMMENTS TO THE PROPOSED LANGUAGE FOR REVISION OF NEVADA REVISED STATUES 533.370 RESULTING FROM THE NEVADA SUPREME COURT DECISION IN THE MATTER OF GREAT BASIN WATER NETWORK ET AL. V. STATE ENGINEER AND SOUTHERN NEVADA WATER AUTHORITY

Virgin Valley Water District (VVWD) fully supports the suggested language as proposed in "Suggested Language Version 3" from the Division of Water Resources website in order to clarify certain provisions within Nevada Revised Statues 533.370 and resulting from the Nevada Division of Water Resources workshop held on March 16, 2010. The workshop was held in response to the 26th Special Session of the Nevada Legislature's Motion to Express Legislative Intent.

VVWD is the water purveyor for an approximately three hundred fifty square mile service area in the northeast portion of Clark County, Nevada, which includes the community of Bunkerville and the City of Mesquite. Until recently, Mesquite has been one of the fastest growing small communities in the United States, with an estimated population in the service area of 23,300 as of 2009. Current permitted water rights consist of approximately 12,300 acre-feet of groundwater rights and 13,000 acre-feet of surface water rights from the Virgin River, for use in the designated service area.

VVWD has been proactive in securing and preserving water resources for its service area population. However, the recent Nevada Supreme Court decision (referenced above) on the

Virgin Valley Water District 500 Riverside Road Mesquite, Nevada, 98027

status of water right applications has the potential to severely and detrimentally impact VVWD's future water resources. VVWD holds several applications that are an integral part of VVWD's future water resource portfolio and which are necessary to support the future development in Mesquite and the surrounding service areas. These include several applications that were filed many years ago but upon which the State Engineer has not yet acted.

Upon learning of the Nevada Supreme Court decision in the late afternoon of January 28, 2010, as a significant precaution, VVWD re-filed applications that had been originally filed at various times from 1989 through 1997. VVWD re-filed the applications in an effort to maintain the senior priority status of VVWD's pending applications. Unfortunately, given the number of applications to be re-filed, conformance to an updated application form, and the distance from VVWD's office in Mesquite to Carson City, the applications were not filed until February 1, 2010. As a result, previously junior applications for water in the lower Virgin River hydrographic basin, originally filed with a later priority date of 1998, were re-filed by other parties on January 29, 2010. As a result, if appropriate steps are not taken at the legislative or judicial levels of government, these previously junior applications held by said other parties could be considered senior to VVWD's applications. This would be a severe, unjust, and damaging result to VVWD and the current and future residents Mesquite, Bunkerville, and the surrounding communities. This result would also be entirely inconsistent with the long history of water law in the State of Nevada.

While VVWD has filed an Amicus Curiae brief with the Nevada Supreme Court in support of Southern Nevada Water Authority's petition for rehearing, VVWD firmly believes that a legislative resolution confirming VVWD's senior water rights is far superior to additional lengthy, uncertain, and costly legal proceedings. Based on the foregoing, VVWD strongly supports the State Engineer's request that the Governor call a Special Session of the Nevada Legislature as soon as possible to enact a remedy consistent with this letter. As mentioned above, VVWD supports the language proposed as "Suggested Language Version 3" from the State Engineer's website for amending NRS 533.370. It appears that this revision to the statute would address and remedy these critical issues and would also comport with a long history of the State Engineer's treatment of water applications.

Sincerely,



William Peterson,
Interim General Manager
Michael Johnson,
Chief Hydrologist
Virgin Valley Water District

Susan Joseph-Taylor

From: waterwebmaster@water.nv.gov
Sent: Friday, March 26, 2010 2:43 PM
To: Susan Joseph-Taylor
Subject: Comments from Steve Erickson

It is unnecessary, premature and inappropriate to seek a legislative solution to the Supreme Court decision.

Michael J. Van Zandt

Dear Mr. King:

I am submitting a revised version of NRS 533.370 for consideration consistent with my comments at the public workshop on March 16, 2010. This language change could be submitted during a regular session of the Nevada Legislature.

As for the changes to the 2003 law, I concur with the language in Version 1 of the proposed language to be submitted in a special session of the Legislature, with the following changes:

Sec. 1. Section 18 of Chapter 474 of the 2003 laws of the State of Nevada is hereby amended to read as follows:

Sec. 18. The amendatory provisions of section 2 of this act apply to:

1. Each application described in NRS 533.370 that is made on or after July 1, 2003; and
2. Each such application that is pending with the office of the State Engineer on July 1, 2003, *without regard to whether the application was filed on or before July 1, 2002.*

Sec. 2 1. The legislature declares that it has examined the past and present practice of the state engineer with respect to the approval or denial of applications as such approval or denial relates to their pendency on and before July 1, 2003, and finds that those applications have been approved or denied in a manner consistent with section 1 of this act.

2. The legislature intends by this act to clarify rather than change the operation of Section 18 of Chapter 474 of the 2003 laws of the State of Nevada with respect to the approval or denial of applications described in section 1 of this act, *to make clear the legislature's intention that Section 18 of chapter 474 of the 2003 laws of the State of Nevada was intended to apply retroactively to applications pending with the state engineer on or before July 1, 2002.* and thereby to promote stability and consistency in the administration of chapters 533 and 534 of NRS.

Sec. 3. This act becomes effective upon passage and approval, and applies retrospectively as well as prospectively.

Thank you for consideration of these comments.

Sincerely,

MICHAEL J. VAN ZANDT
Partner

Hanson Bridgett LLP

Susan Joseph-Taylor

From: waterwebmaster@water.nv.gov
Sent: Friday, March 26, 2010 4:59 PM
To: Susan Joseph-Taylor
Subject: Comments from Confederated Tribes of the Goshute Reservation

EchoHawk Law Offices
505 Pershing Avenue
P.O. Box 6119
Pocatello, Idaho 83205
Phone: 208.478.1624
Fax: 208.478.1670

March 26, 2010

Mr. Jason King, P.E., Acting State Engineer
Nevada Division of Water Resources
901 South Stewart Street, Suite 2002
Carson City, Nevada 89701

RE: POST-WORKSHOP COMMENTS ON THE NEVADA STATE ENGINEER WORKSHOP TO CONSIDER LEGISLATURE'S MOTION TO EXPRESS LEGISLATIVE INTENT

Dear Mr. Jason King, Acting Nevada State Engineer:

This letter is on behalf of the Confederated Tribes of the Goshute Indian Reservation (CTGR), which is located in eastern Nevada and western Utah. CTGR has federally reserved water rights and utilizes surface and groundwater for multiple beneficial uses within the reservation. CTGR has concerns of whether it is appropriate at this time for the Nevada Legislature to move forward in modifying Nevada water law in response to Great Basin Water Network, et al., v. Taylor, et al., 126 Nev. __, 22P.3d 665 (Adv. Opn. 2, January 28, 2010), and how the Legislature might do so. The intent of this letter is to provide comments and suggestions on several aspects on the Legislature's Motion to Express Legislative Intent for consideration by the State Engineer.

The Legislature has directed the State Engineer to work with all affected parties toward a resolution and consider at least the following issues: (1) protect existing water rights, (2) preserve priority, and (3) applications of the protest period provisions.

CTGR does not support a 'quick fix' bill at this time in response to the Nevada Supreme Court's ruling on the Southern Nevada Water Authority's (SNWA) water appropriation applications (Great Basin Water Network v. Taylor, No. 49718 (Jan. 28, 2010)). In addition, the CTGR does not support revisions to NRS 533.370 at this time.

CTGR has four reasons for NOT supporting the proposed 'quick fix' bill and proposed revisions to NRS 533.370 at this time:

1. The Nevada Supreme Court's decision (No. 49718) forces the State Engineer and the Southern Nevada Water Authority to comply with statutory law. The Court found that the State Engineer violated his statutory duty by ruling on applications well beyond the one-year statutory limitation (over 15 years) without properly postponing action according to NRS 533.370(2). This was after the Seventh Judicial District Court of Nevada ruled that the State Engineer had acted "arbitrarily, capriciously and oppressively" in granting water

appropriation applications (Carter-Griffin, Inc v. Taylor, (October 19, 2009)). At SNWA's behest, its water applications lay dormant, and after many years, the State Engineer made hasty decisions on those applications, preventing participation from protestants and the public. The Supreme Court's decision is a particularly important finding because it directs the State Engineer to allow interested parties an opportunity to raise issues regarding these water appropriation applications that the State Engineer must take into consideration in issuing water applications, as is mandated by law. For the CTGR and other interested parties, this allows us an opportunity that we have not had before to bring forth significant sound legal, scientific, and socioeconomic concerns regarding water withdrawals and their potential effects on the environment, socioeconomics, and existing water rights. The Court's ruling does not prevent the SNWA from moving forward on their Ground Water Development (GWD) Project; rather, it reaffirms that the State Engineer must act within the confines of statutory laws and to consider those concerns from the public regarding this monumental proposed GWD Project.

2. Legislative intervention that undermines the Nevada Supreme Court ruling at this time is neither appropriate or needed before the case's scope is made clear. Moreover, the courts have not completed their business on this issue of water rights applications. It is premature and not in the best interest of the parties for the Administration or the Legislature to fix or undo what the Judicial Branch has yet to complete. Moreover, the Court is presently considering petitions for rehearing from SNWA and the State Engineer. Clarification and limitations by the Court are likely to be addressed at that time. It is of the utmost importance that the judicial due process is properly executed.

3. The Court's decision relates expressly to a limited set of water appropriation applications, not a large number or open-ended set of water rights applications. Thus, the Supreme Court's ruling does not jeopardize the validity of permitted rights or seniority of water rights applications. Moreover, the Court's language speaks directly to this issue.

4. The proposed 'quick fix' bill and Governor Gibbons' suggested revisions do not merit an urgent response and would provide SNWA with a significant advantage in their push for the GWD Project. Moreover, the urgent response places Nevadans at a distinct disadvantage in terms of corporate ownership and control of the public's water. The Nevada Supreme Court's recent ruling expressly identifies that distinct advantages to a particular entity are not permissible, especially when statutory laws are not followed by the State Engineer. SNWA has consistently pressured the State Engineer and Nevada Legislature to respond to their requests in a hasty fashion. As we have seen in several District and Supreme Court cases, those hasty decisions largely have limited interested party involvement and pushed SNWA's agenda, even at the expense of statutory violations. Therefore, any response to modify the NRS 533.370 should be acted upon only after sufficient time has been allowed for appropriately engaging any affected parties and the public to balance the needs of all of Nevada's citizens, rather than those of particular corporate entities and unsustainable metropolises.

If the Nevada Legislature goes forward with modifying NRS 533.370, then CTGR recommends the following:

1. Nevada water users and citizens deserve to have the Legislature and State Engineer give significant thought and discussion of how Nevada water law may be modified, taking into consideration the entire public, rather than corporate entities that aim to control the State's water resources. That said, calling a Special Session in 2010 to make any modification to NRS 533.370 does not provide enough time for meaningful thought and inclusion of all affected parties on this important issue. Rather, we suggest that a Session during 2011 would be more appropriate.

2. Pursuant to NRS 533.370 subsection (2), if the State Engineer postpones action to reject or approve an application due to water studies or court actions, then the State Engineer should be required to publish or provide access to those water studies or court

documents, linked with the corresponding water application number(s), on the NDWR website in order to provide the public and/or protestants with a means of tracking the progress and issues of pending water applications within a 7-year period identified in NRS 533.370 subsection (8)(d).

3. CTGR supports an amendment to NRS 533.370(8) to re-notice applications that have not been acted on by the State Engineer within a specified time, re-opening the protest period on those water applications.

4. Pursuant to NRS 533.370 subsections (8) and (9), an amendment should be added that requires the State Engineer to allow protests to be filed for a collection of applications that are part of an interbasin transfer and/or that exceed a specified amount of water.

5. Any modification to a current water right (e.g., change from irrigation purpose to municipal purpose) should require a re-application for water appropriation and the subsequent protest opportunity.

If the Nevada Legislature goes forward with modifying NRS 533.370, the CTGR makes the following recommendations regarding the Suggested Language Versions No.1-5 on the NDWR webpage <http://water.nv.gov/hearings/supremecourt.cfm>.

Version No. 1: CTGR does not support Version No. 1.

Version No. 2: CTGR does not support the proposed additional language added as NRS 533.370(3), nor proposed language for subsection (9)(e). CTGR supports the language change under subsection (9)(d) for "...any person interested...".

Version No. 3: CTGR does not support Version No. 3 other than subsection 8d.

Version No. 4: CTGR agrees with proposed changes in subsection 8d-8e, but does not support proposed language in subsection 4.

Version No. 5: CTGR does not support the proposed language for this version.

Regarding these various versions of suggested language changes to NRS 533.370, the CTGR strongly supports an amendment to NRS 533.370(8) to re-notice applications that have not been acted on by the State Engineer within a specified time, re-opening the protest period on those water applications.

Sincerely,

/s/ Paul C. EchoHawk

GORDON H. DEPAOLI
JOHN P. FOWLER
JOHN F. MURTHA
STEPHEN S. KENT
NICHOLAS F. FREY
W. CHRIS WICKER
SHAWN B. MEADOR
R. BLAIN ANDRUS
DON L. ROSS
GREGG P. BARNARD
DALE E. FERGUSON
SHAWN G. PEARSON

WOODBURN AND WEDGE
ATTORNEYS AND COUNSELORS AT LAW
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CASEY W. VLAUTIN (1938-2001)
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March 26, 2010

Gordon H. DePaoli
E-MAIL: gdepaoli@woodburnandwedge.com
DIRECT DIAL: (775) 688-3010

Via Electronic Mail – jking@water.nv.gov

Jason King
Acting Nevada State Engineer
901 South Stewart Street, Suite 2002
Carson City, Nevada 89701

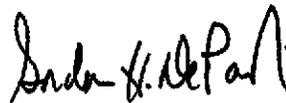
Re: Nevada State Engineer Workshop Concerning
Great Basin Water Network Case
Our File No. 9476.0030

Dear Mr. King:

The Truckee Meadows Water Authority has reviewed the suggestions for legislative changes with respect to the Great Basin Water Network case, which were posted immediately after the March 16, 2010 Workshop. For the reasons stated in my letter to you dated March 15, 2010, and at the March 16, 2010 Workshop, the Truckee Meadows Water Authority continues to believe that the best way to address the instability and uncertainty created by the Great Basin Water Network case is to deal directly with the statute that decision misinterpreted. The solution which the Truckee Meadows Water Authority has proposed does that, and it continues to favor that solution.

The Truckee Meadows Water Authority will review all additional information and suggestions provided by March 26, 2010, and will provide additional comments by the April 2, 2010 deadline.

Sincerely,


Gordon H. DePaoli

GHD:tka

cc: Mark Foree (via electronic mail)
John Erwin (via electronic mail)
Steve Walker (via electronic mail)

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April 2, 2010

Gordon H. DePaoli
E-MAIL: gdepaoli@woodburnandwedge.com
DIRECT DIAL: (775) 688-3010

Via Electronic Mail – jking@water.nv.gov
Jason King
Acting Nevada State Engineer
901 South Stewart Street, Suite 2002
Carson City, Nevada 89701

**Re: Nevada State Engineer Workshop Concerning
Great Basin Water Network Case
Our File No. 9476.0030**

Dear Mr. King:

The Truckee Meadows Water Authority has reviewed all of the comments posted on the Nevada Division of Water Resources web page regarding the referenced matter. It has also reviewed the seven suggestions which have been made for possible legislative changes. Those seven suggestions are labeled Versions 1-6 on the Nevada Division of Water Resources web page. The seventh suggestion is set forth in the letter to you from Michael J. Van Zandt.

For the reasons stated in my letter to you dated March 15, 2010, in my statement at the March 16 workshop and in my letter to you dated March 26, 2010, Truckee Meadows Water Authority continues to believe that the best way to address the instability and uncertainty created by the Great Basin Water Network case is to deal directly with the statute that decision misinterpreted. The legislative language which the Truckee Meadows Water Authority has proposed, Version 1, and the language which Michael Van Zandt has proposed each do that and the Truckee Meadows Water Authority supports either version.

Comments on Versions 2 Through 6

I will briefly comment on the other suggestions for legislative changes and explain why the Truckee Meadows Water Authority does not support those suggestions. I will address each by their "Version" number.

Version 2

Jason King
Acting Nevada State Engineer
April 2, 2010
Page 2 of 4

The proposed addition of a new N.R.S. 533.370(3) places language into the body of the statute which really belongs in the transitory provisions of any legislative changes. In addition, the language is somewhat confusing, particularly as to the status of applications filed after July 1, 2003, which were not acted upon within one year and which do not meet the requirements of Section 2 for postponement of action. In light of the fact that the Supreme Court in the Great Basin Water Network case did not mention the provisions added in 2003, which are now N.R.S. 533.370(4), this proposed change may further complicate, rather than clarify, the situation.

This Version 2 and Versions 3 and 4 in some way or another all propose a change which would retroactively require that applications filed after January 1, 1947 for "interbasin transfers of groundwater" in excess of 250 acre feet be noticed anew. To the extent that the suggestions are primarily designed to preserve the result reached in the Great Basin Network case for the litigants there, there should be a more direct way to do that. Moreover, these suggested changes will create some confusion.

First, the phrase "interbasin transfer of groundwater" was added to Nevada's water law in 1999. However, there may have been applications filed after January 1, 1947 and before 1999 which fit the definition. Would this provision apply to such applications, if any?

Second, a number of the proposed legislative changes, this one included, assume that the 1947 amendment to Nevada's water law which added the provision about action within one year would be construed as not applying to applications filed before January 1, 1947 (or the effective date of that statute, March 31, 1947). In my judgment, the 1947 amendment does apply to applications then on file in a prospective manner. In other words, the one year clock for applications pending on March 31, 1947, started to tick on that day.

The addition of what is proposed to be N.R.S. 533.370(9)(e) potentially requires the renoticing of applications which have been approved or rejected, but which are presently the subject of some judicial review proceeding. I do not know whether there are any applications which actually fit that description, but it is unfair and inappropriate to require such applications to be renoticed even if the issues raised in the Great Basin Network case were not raised in those cases.

Version 3

The new language proposed by Version 3 for N.R.S. 533.370(4) also inserts transitory language into the body of the statute. However, that language does achieve what is intended by Truckee Meadows Water Authority Version 1 and the Van Zandt language.

Version 3 would also amend N.R.S. 533.370(8)(d). In our judgment, any amendments to N.R.S. 533.370 not directly affected by the Great Basin Water Network decision should be left for a regular session of the legislature.

Jason King
Acting Nevada State Engineer
April 2, 2010
Page 3 of 4

Our concerns with the proposed new N.R.S. 533.370(8)(e) are the same as the concerns expressed above as to Version 2 and subsection 9(e). The suggested language could require the renoticing of applications which are presently under judicial review even if there was no issue in that proceeding like those involved in Great Basin Water Network.

Version 4

The new language suggested by Version 4 in N.R.S. 533.370(4) will create additional confusion. First, it suggests that applications filed before January 1, 1947, and not acted upon within one year did not remain active and therefore must be refiled. Alternatively, the suggested change assumes that the 1947 legislative change requiring action within one year does not apply to applications filed before 1947. As noted above, I believe the better interpretation is that after the 1947 amendment, the State Engineer had one year to act on all applications that had been filed prior to 1947 and not acted upon within one year. Moreover, the language leaves open what is to happen to applications filed after July 1, 2003, which have not been acted upon within one year and which do not meet the requirements for postponement of action under 533.370(2). Finally, the general exception for applications that are the subject to any pending appeal apparently would mean that an application filed between January 1, 1947, and July 1, 2003, which had been acted upon but which was the subject of a pending appeal would not remain active and therefore would be subject to a requirement of renoticing. Truckee Meadows Water Authority is the real party in interest as to at least one change application which fits that description.

Changes to N.R.S. 533.370(8)(d) should be addressed in a regular session of the legislature and not in connection with the special issues presented by the Great Basin Water Network decision.

The proposed new language for subsection 8(e) will also create confusion. It seems to require renoticing of an application for interbasin transfer of groundwater filed with the State Engineer after January 1, 1947, which had not been acted upon within 7 years, even if the application was acted upon, but after 7 years had elapsed.

Version 5

Version 5 proposes to move the substance of N.R.S. 533.370(4) and to a new N.R.S. 533.370(2)(d), but using slightly different language. A major problem with this suggested change is that it uses the word "pending," but does not deal directly with the Supreme Court's erroneous interpretation of the term "pending" in the Great Basin Water Network case. The language added in Sections 2 and 3 of this version is also confusing. I am particularly concerned about Section 3 and its reference to the applications pending prior to 2007.

Version 6

Jason King
Acting Nevada State Engineer
April 2, 2010
Page 4 of 4

Changes like those proposed in Version 6 in N.R.S. 533.370(2) should be considered in a general legislative session and not at this time in connection with the Great Basin Water Network decision. Moreover, Version 6 does not in any way address the critical issues raised by the Great Basin Water Network case.

Conclusion

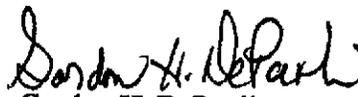
The Truckee Meadows Water Authority continues to believe that uncertainty and instability created by the Great Basin Water Network decision should be addressed in a special legislative session. Version 1 and the Van Zandt version best address the problems created by that decision. However, the Truckee Meadows Water Authority is willing to work with the proponents of Version 3 to arrive at a single proposal that those who favor legislative action can support.

It does not appear that Advocates for Community and Environment, the law firm representing Great Basin Water Network and other petitioners in that case, have presented any specific suggestions for your consideration. I also assume that the parties to that case have not reached an agreement allowing for the renoticing of applications involved there. Although I do not know whether legislative approval of Version 1, or the Van Zandt proposal, would change the result in the Great Basin Network case, it seems to me the best way to preserve that result, but not the rationale for it, is to add some language to Section 3 of Version 1 or the Van Zandt proposal as follows:

"This act becomes effective upon passage and approval, and applies retrospectively as well as prospectively, but is not intended to change the result reached by the Supreme Court of the State of Nevada in that certain action entitled Great Basin Network, et al. v. Tracy Taylor, et al., Case No. 49718."

Thank you for the opportunity to provide comments on this important matter.

Sincerely,


Gordon H. DePaoli

GHD:hd

cc: Mark Force (mforce@tmwa.net)
John Erwin (jerwin@tmwa.net)
Steve Walker (stevewalker@gbis.com)
Susan Joseph-Taylor (sjoseph-taylor@water.nv.gov)

March 26, 2010

Jason King, P.E.
Acting State Engineer
901 S. Stewart Street, #2002
Carson City, NV 89701

RE: Issues Surrounding NRS 533.370

Dear Mr. King,

Please accept these comments as part of the record relative to your workshop held March 16, 2010 on the impact of Great Basin Water Network v. Taylor, et al.

Before commenting on the specific language that has been offered, I would make a couple of general comments. First, Hugh Ricci's comments at the workshop relative to the deleted language from the 2003 bill draft were accurate. That language was illustrative of the need for the legislative amendments at that time and singularly, its removal, whether intentional or merely as an oversight has left the Nevada water community in this current dilemma. The intent of that legislation was clear to all of those who participated in 2003 and that was to consider all of the outstanding applications as pending.

Second, there is a large segment of the Nevada economy with significant exposure to reporting requirements for or impacts from this decision. The financial sector, whether in the form of SEC disclosures, market impacts to debt instruments such as bonds or loan covenants for large project financing are undoubtedly concerned about the breadth of the decision. While the probable (as opposed to possible) impact to permitted water rights is not wholly in chaos, the very real perception of the financial lending and financial regulatory community is quite a different animal. It is difficult enough to explain to a New York Banker the nature and legal attributes of a permitted water right, terms like water duty, consumptive use, or relative priority and all of the various terms we take for granted. It is quite an impossible task to give them any level of comfort from a decision such as this one as it relates to a borrower's water rights. It is also rather easy to understand that people and institutions that acquire bonds and other debt instruments that are directly or indirectly related to Nevada water rights will attribute greater risk to those instruments post-decision. The clear impact of those scenarios is to reduce the market price of those instruments, thus increasing the return via the carried interest rate due to the lower value. While the uncertainty exists, subsequent debt offerings will command higher interest rates thus increasing the costs to the rate payers.

It is paramount to the future of Nevada that there be a stable, predictable, fair and equitable system for the appropriation and development of the water resources in Nevada required for the economy to not only recover but to provide the opportunity for capital to continue to flow into Nevada which will certainly be followed by employment and the expansion of tax revenues. Not only must there be an effort to address this requirement for financial stability and predictability as it relates to the statutory section at hand but the entirety of the water rules, procedures and regulations must have far more certainty, scientific basis and fundamental soundness than has heretofore been the case. We have come to a point in the maturation of

Jason King, P.E.
Acting State Engineer
901 S. Stewart Street, #2002
Carson City, NV 89701

Page 2 of 2

this state where more than just our Nevada water community is watching the efforts of this workshop and the State Engineer's Office, the capital centers of this country and in fact, the world are invested here and they do and will demand more predictability.

To that end, you have received language styled Number 3 which appears to essentially expand on the State Engineer's earlier amendments. I believe that for the near term, this language accomplishes the goals enunciated by the Legislature's special session this spring.

I would concur with the additional language at the end of subsection 4 which is in addition to what you provided to the Legislature at the special session.

The suggested deletion of language in subsection 8(d) I believe is unnecessary and does not address the Legislation directive. Quite the contrary, the only parties that should have the opportunity to protest (read as participate) are those who are successors in interest or who are an affected water right owner, whether senior or junior in priority.

The State Engineer can and does hear from all interested parties but to participate as a protestant should require an affected water right which is why that language currently exists in the statute. As your office has seen over the past decade, there are many concerned parties who express their views both written and verbal and I have watched your office give every opportunity for their input. However, most of that input is of a policy nature and deals little with the specifics of the matters at hand. With every passing year your applications increase incrementally and I would think that it should be a requirement of the statute and any and all rules, regulations and procedures that you adopt that only those persons who are water right holders be allowed to participate in hearings dealing with appropriations.

There have been many occasional legislative amendments to water law over the many years and perhaps either during the interim or in the 2011 session we can embark on the beginning of streamlining the process and bringing clarity to some of these recurring issues and their solutions. Codifying the rules and procedures of your office will go a long way in assuring the scientific underpinnings, providing that fairness and certainty that the business and financial community requires in the 21st Century.

Sincerely,



Stephen D. Hartman
Vice President,
Corporate Counsel

Susan Joseph-Taylor

From: waterwebmaster@water.nv.gov
Sent: Friday, April 02, 2010 10:48 AM
To: Susan Joseph-Taylor
Subject: Comments from Terri Svetich

April 2, 2010

Jason King, P.E., Acting State Engineer
Division of Water Resources
901 So. Stewart St., Ste. 2002
Carson City, NV 89701-5250

RE: Comment on Proposed Amendments

Dear Mr. King:

On behalf of the City of Reno, thank you for the opportunity to comment on the proposed legislative remedies to the Nevada Supreme Court Decision. Our comment has also been entered into on-line comment form and submitted, however, to formally document the City's position; we are following up with this letter.

After reviewing the suggested language options submitted to your office last week, the City is of the opinion that Version No. 1 is straightforward and will adequately remedy the concerns raised by the Supreme Court Decision.

If you have any questions regarding the position of the City of Reno, please contact me at (775) 334-3314.

Sincerely,

E. Terri Svetich, P.E.
Acting Engineering Manager

Attachment: Version No. 1

Cc: Susan Rothe, Deputy City Attorney
John Flansberg, Interim Public Works Director
Cadence Matijevich, Special Events Event Coordinator

Susan Joseph-Taylor

From: Rich Berley [RBerley@zcvbs.com]
Sent: Friday, April 02, 2010 11:12 AM
To: Susan Joseph-Taylor; Jason King
Cc: Steven Chestnut; d_daboda@yahoo.com
Subject: Moapa Band of Paiutes - post-workshop comments
Attachments: Ltr to St Eng fwg workshop.pdf

Susan & Jason –

Attached are the post-workshop comments of the Moapa Band of Paiutes. Thank you for your work on this important matter.

Richard M. Berley

Ziontz, Chestnut, Varnell, Berley & Slonim
2101 Fourth Avenue, Suite 1230
Seattle, WA 98121
206-448-1230/phone
206-448-0962/fax
206-419-4889/cell

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MOAPA BAND OF PAIUTES

MOAPA RIVER INDIAN RESERVATION
BOX 340
MOAPA, NEVADA 89025
TELEPHONE (702) 865-2787

April 1, 2010

Jason King, P.E., Acting State Engineer
Nevada Division of Water Resources
901 South Stewart St., Suite 2002
Carson City, NV 89701

Re: Comments re Possible Revision of NRS 533.370 following *Great Basin* decision

Dear Mr. King:

At the workshop your office held on March 16, 2010, the Tribe expressed concern that the Nevada Supreme Court's ruling in *Great Basin Water Network v. State Engineer* could prejudice the Tribe if it is construed to affect the validity of permits granted by the State Engineer other than those directly at issue in that case.

The Tribe's Interest. The Tribe, as part of a complex series of settlements with its neighbors in southern Nevada, currently holds a groundwater permit in the California Wash Hydrographic Basin which was originally awarded to the Las Vegas Valley Water District based on applications filed in 1989. The State Engineer granted permit 54075 for 2,500 afy of groundwater in Ruling #5115 issued April 18, 2002, well after the one-year deadline for State Engineer action at issue in *Great Basin*. The Tribe also holds another application, 54076, which under Ruling #5115 is held in abeyance pending assessment of impacts from groundwater pumping under permit 54075. No court proceedings relating to 54075 or 54076 are pending.

The Tribe gave significant value in the settlements to obtain these state rights, and has signed third-party development agreements which depend on their validity. Other stakeholders in southern Nevada also benefited from the settlements. Among other benefits, the parties were able to avoid an extended and expensive battle about tribal claims for federally-reserved water rights, which could have had broadly destabilizing effects in the region. Through a separate related agreement, the Tribe also resolved potential disputes with its neighbors and the U.S. Fish and Wildlife Service about potential reductions in groundwater pumping which might be necessary to protect the Moapa dace, an endangered species.

The Tribe's Position. It was apparent at your workshop that the Tribe's concerns are

shared by most other participants who depend on the stability of Nevada water law. This is not always the case, as tribes typically have special water-related rights and claims which derive from our unique place in the nation's history and laws. In this instance, however, state water rights were a key component of settlements on which the Tribe legitimately relied to help us share in the growth and prosperity of the region. The legitimacy of our reliance is unaffected by the current economic downturn, as our development plans are moving forward.

As a tribe, we are protective of our own sovereignty, and are reluctant to weigh in hard to tell the Nevada legislature, or your agency, what to do. Whatever solution is ultimately arrived at should address the following concerns, which we and others expressed at the workshop, and which are apparently also shared by the legislature (and perhaps even by the *Great Basin* court itself): (a) all doubt should be removed regarding the continued validity of permits actually issued by the State Engineer which are not the subject of pending court appeals; and (b) priorities should be preserved through a solution which does not requiring re-filing of applications whether they have been ruled upon by the State Engineer or not.

The Tribe has no strong opinion regarding the following: (a) whether to wait until the Nevada Supreme Court rules on pending petitions for rehearing; (b) whether legislative changes should be addressed in a special or regular session; (c) whether changes should be made in the "transitory" or codified portions of legislation; and (d) whether the proposed solution should be narrow (such as focusing solely on retroactivity), broad (such as eliminating the one-year rule altogether), or broader (such as reconfiguring the statutory scheme by importing features from the State's Administrative Procedure Act or elsewhere).

Most of the suggested proposed changes to NRS 533.370 that have been posted to date on the State Engineer's website would address the Tribe's concerns. We note as a technical matter that version 5, which tries to solve the retroactivity problem by use of the word "pending" in two places (in the proposed revised subsection 2.d of NRS 533.370 and in section 3) may be counter-productive, as the Nevada Supreme Court interpreted "pending" narrowly in *Great Basin* to exclude applications backlogged for more than one year.

While the Tribe's primary concerns relate to the continued validity of issued permits and the preservation of priorities to avoid re-filing, we acknowledge that concerns regarding due process expressed by the Nevada Supreme Court may be valid. We are not opposed to a solution which would reopen protest periods for applications on which the State Engineer has not acted for more than a certain period, or which would otherwise broaden public participation.

Letter to Jason King, Acting Nevada State Engineer
April 1, 2010
Page 3

We hope these comments are useful. We appreciate the opportunity to participate in this process. Please feel free to contact us if you have any questions or concerns.

Very truly yours,

MOAPA BAND OF PAIUTES



Darren Daboda
Chairperson

Susan Joseph-Taylor

From: waterwebmaster@water.nv.gov
Sent: Friday, April 02, 2010 2:29 PM
To: Susan Joseph-Taylor
Subject: Comments from Water Keepers

MEMO TO: Nevada State Engineer
FROM: Water Keepers
HC 10 Box 10804, Ely, Nevada 89301
RE: Workshop on Motion to Express Legislative Intent,
February 28, 2010 by the Nevada State Legislature
DATE: April 2, 2010

Once an administrative or court decision is made it is unlikely that a decision in a different case at a later date can undo it. The nature of the law is that rulings establishing the rights of parties bring finality to the parties and to the determinations that are made. The obstacles to a party to it who wants to change a final decision are usually insurmountable. If this were not so, our legal system would break down; precedent would no longer be among its bedrock principles.

We know of no facts and no reason to think that the Supreme Court decision is any different.

The legislature has acted to respect the Supreme Court's carefully thought out decision. The parties in Great Basin Water Network vs. Nevada State Engineer, Supreme Court No. 49718, and others interested in the case should do the same.

None of the proposals show that anyone can do a better job on this than the Supreme Court. The State Engineer's role now is in the Supreme Court proceedings as the decision process there proceeds to finality.

An option that has not been recommended to the Engineer as far as we know is for the Office to recommend that the legislature enter into the litigation that is before the Supreme Court. However, to have all three branches of government involved in the litigation would seem to us to defy common sense. It makes just as little sense for the legislature to enter into the case by passing a law.

Michael Garabedian, President
916-719-7296

Susan Joseph-Taylor

From: Carl Savely [Carl.Savely@WingfieldNevadaGroup.com]
Sent: Friday, April 02, 2010 2:15 PM
To: Jason King
Cc: Susan Joseph-Taylor
Subject: Great Basin Water Network v. Taylor, et al
Attachments: wng_trp_comments_040210.PDF

Dear Mr. King,

Please accept the attached comments as part of the record relative to your workshop held March 16, 2010 on the impact of Great Basin Water Network v. Taylor, et al. These comments are being submitted on behalf of Wingfield Nevada Group Management Company and Tuffy Ranch Properties. Thank you for the opportunity to participate in the administrative process.

Carl Savely

Carl D. Savely
General Counsel
Wingfield Nevada Group Management Company
6600 N. Wingfield Parkway
Sparks, Nevada 89436
Direct Line: 775-321-5940
Main Line: 775-626-6000
Fax: 775-626-8925

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**COMMENTS TO THE STATE ENGINEER
REGARDING PROPOSED STATUTORY LANGUAGE
AND
POST WORKSHOP COMMENTS**

The Supreme Court's opinion in Great Basin Water Network ("GBWN") v. DWR and SNWA contains two sentences that raise questions regarding the validity of the State Engineer's action in issuing permits, orders or rulings when the application, if filed on or after January 1, 1947 but before July 2, 2002, was not acted upon within 1-year after the final protest date. These questions not only affect the State Engineer's ability to manage the essential water resources of the State, but could also dramatically impact applicants, permittees and those seeking project financing. The troubling language reads:

We conclude that "pending" applications are those that were filed within one year prior to the enactment of the 2003 amendment. And, in the absence of statutory language and legislative history demonstrating an intent that the amendment apply retroactively to SNWA's 1989 applications, we determine that the State Engineer could not take action on them under the 2003 amendment to NRS 533.370.

Not all action of the State Engineer in connection with filed applications results in the issuance or denial of a permit. Some actions result in the issuance of an order or ruling rather than the immediate approval or denial of a permit. Subsequent to January 1, 1947 the State Engineer has continually acted upon applications later than 1-year after the final protest date by issuing permits, orders or rulings. Further, many of these issued permits have become certificated rights. These actions have been relied upon by the State Engineer; federal, state and local agencies; and owners, permittees, lenders, and others.

If as the Supreme Court stated, the State Engineer could not take action on SNWA's applications without re-noticing or re-filing the applications, could the State Engineer act on irrigation, stock watering, mining, commercial, industrial or quasi-municipal permits because they were also subject to the same 1-year action period after January 1, 1947 and prior to the 2003 amendment?

An additional concern is raised by the Court's failure to mention, much less discuss, the effect of 533.370(3) which reads as follows:

If the State Engineer does not act upon an application within one year after the final date for filing a protest, the application remains active until acted upon by the State Engineer.

This language was added in 2003 in the very same amendment draft (1st Reprint) in which the language of 533.370(b) was added in 2003. The provision added in 2003 under 533.370(3) applied to applications for every manner of use allowed under Nevada water law. Because this provision was not mentioned by the Court, it is now unclear what effect it had on applications that had been pending for more than one year prior to July 1, 2003.

The legislature should, if the Governor calls a special session, affirmatively address these questions as they relate to all applications, permits, orders and rulings (other than the applications that are the subject of the GBWN v. DWR and SNWA litigation) to provide assurance to the State Engineer, the courts, applicants, permit holders, lenders and the general public that there will not be any disruption to water rights under Nevada's water laws. Now is not the time to place additional impediments on successfully acquiring financing for projects within Nevada.

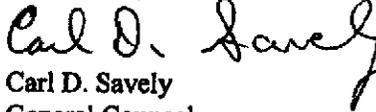
I am in agreement with the project financing and economic comments set forth in Vidler's letter dated March 26, 2010, and the comments regarding the propriety of a legislative solution set forth in the comments submitted by letter from Gordon DePaoli dated March 15, 2010.

Because the Court's decision raises questions about the potential validity of permits, orders and rulings, I believe it will provide greater clarification to the State Engineer, other federal, state and local agencies, permittees and lenders if the curative language addressed more than just the applications pending on or before July 1, 2002. As the State Engineer is aware, the action on some applications that occurred more than one (1) year after the expiration of the action period (as identified by the Court) resulted in the issuance of an order or ruling rather than the issuance of a permit.

I join with Vidler, Virgin Valley Water District and Southern Nevada Water Authority in supporting Statutory Change Version 3, except for the proposed change in subsection 8(d), as the preferred solution because it most clearly answers the questions raised by the Court's decision. I do not support the proposed change in subsection 8(d) because if the application is opened again to "any person" then further delays will likely result. It is reasonable to anticipate "any person" asking the State Engineer for the right to participate in such hearings will also ask for several years to collect and analyze relevant data (because they had not previously been involved with or working on the matter) and then allege due process violations in the event the State Engineer denied these requests.

My second preference, should the State Engineer decline to support Version 3, is Statutory Change Version 5, submitted by Hugh Ricci, the State Engineer in 2003.

Respectfully submitted,



Carl D. Savely
General Counsel

Susan Joseph-Taylor

From: waterwebmaster@water.nv.gov
Sent: Friday, April 02, 2010 4:26 PM
To: Susan Joseph-Taylor
Subject: Comments from Rose Strickland, Toiyabe Chapter of the Sierra Club

I attended the well-attended workshop on March 3, 2010 in Carson City. Less than a dozen of the 100+ attendees made any comments. Those who did comment did not agree on the definition of the problem which the workshop was attended to address. Some thought the Supreme Court decision applied only to water rights, some only to applications, some only to the SNWA applications, some to all applications and rulings back to 1947. The diversity of opinion also applied to proposed language to "fix" an undefined problem or problems, with no agreement on what language would be acceptable and effective or on whether any legislative action was necessary at all. There was likewise no common position on the need for another special session of the legislature, with many opposing a special session. Others supported letting the Supreme Court clarify its ruling, rather than any legislative action. This was not a choice on this webpage.

I believe that the small number of comments at the workshop and on this webpage reflect uncertainty about what "problem" needs to be corrected and, most strongly, reluctance to support any changes to Nevada Water Law which are done quickly without careful deliberation and consideration of the interests of all water rights holders.

No special session is necessary. If there are any remaining "problems" after the Supreme Court clarifies its ruling, then those should be addressed with all due deliberation by the Nevada Legislature in its 2011 regular session.

Susan Joseph-Taylor

From: waterwebmaster@water.nv.gov
Sent: Friday, April 02, 2010 4:52 PM
To: Susan Joseph-Taylor
Subject: Comments from Michael DeLee

A special session is not needed at this time for at least four reasons: 1. There is no standing to challenge the "14,500" water rights already issued; 2. NRS 533.450 has already elapsed in which to challenge any permits granted or denied that took longer than 1 year; 3. Of the fewer than 1,800 pending applications, less than half of those fall in the 1947 to 2002 date range and no bonds or other obligations would have been issued against pending applications without violating 533.030; and 4. The courts have not finished their review and will probably clarify matters given the outpouring of public concern.

For a regular legislative session Suggested Language Version 1 appears to be the most direct method of addressing present concern and is similar to the 1993 legislative response to the Pyramid Lake case in the 9th Circuit made during that regular session (legislative history available upon request).

Suggested Language Version 6 is objectionable because it removes the legislative 1-year mandate without also requiring the State Engineer to adopt any written procedures. This change may be acceptable if NRS 233B is amended so that the State Engineer is no longer exempt from the State Administrative Procedure Act.

Thank you.



Office of the Churchill County Manager

April 2, 2010

Mr. Jason King, P.E.
Ms. Susan Joseph-Taylor, Esq.
Nevada Division of Water Resources
901 S. Stewart Street, 2nd Floor
Carson City, NV 89701

Re: Churchill County Comments on § NRS 533.370

Dear Jason & Susan:

Churchill County (County) is a municipal water purveyor who owns surface and underground water rights in various stages of perfection, including pending applications in Dixie Valley. Additionally, the Newlands Reclamation Project lies almost wholly within the County and receives water from the Carson and Truckee Rivers administered through the Alpine and Orr Ditch Decrees, respectively. Upstream development and interests have and will continue to threaten those supplies and there has been considerable litigation and legislation (PL 101-618, TROA) on a variety of issues surrounding the Truckee and Carson Rivers. Additionally, the County probably has more individual water right owners than any other County in the state due to Newlands Project water rights. Protection of these water rights regardless of source, status, permitted verses decreed is vital to the County and its residents.

The County being a water right owner, purveyor, potential project proponent (Dixie Valley) and concerned with protection of existing rights, fully understands the importance of the due process and fairness issues from both an applicant and protestant perspective which have come to light as a result of the 28 January 2010 Nevada Supreme Court decision and proposed changes to NRS 533.370. In light of Governor Gibbons 18 March press release indicating a preference for clarification from the Supreme Court rather than a costly Legislative special session, the County is supportive of this process in the interim, however believes significant changes are needed to NRS 533.370. In reviewing the current Statue and the six proposed versions on the State Engineer's web site, all are biased toward certain entities or circumstances; therefore the County does not endorse any of them. The County offers the following suggestions for consideration in overhauling 533.370 in either a special session or 2011 Legislative session:

1. **533.370 Sec. 2:** As stated by many at the 16 March workshop conducted by the State Engineer, Section 2 requiring action on an application within a year of the RFA date is a dated relic from 1947 and is not applicable today. There

are many reasons why applications are not acted on within a year including: pending adjudications, pending studies, economic conditions, applicant/protestant requests for delay, unknown or misfiled applications being discovered after the State Engineer's database implementation, State Engineer staffing/processing limitations, etc. Many of the suggested edits to this section render it essentially meaningless; therefore it is the County's recommendation to remove it altogether. All pending applications, as defined below, filed prior to the removal of this section should be considered pending and not placed in jeopardy for failure to act on them within a year following RFA date. The removal of Section 2 should apply retrospectively to all pending applications.

2. **Pending:** Any application not acted upon by the State Engineer, regardless of filing date should be considered "pending". It should not matter whether filed before or after 1947, 1 July 2002/2003 or any other date.
3. **Priority:** All pending applications should retain the priority date of their filing date or that of the changed base right(s). This would remove the need and race to re-file applications and protests which have recently flooded the State Engineer's office. This has created situations where the re-filings have changed priorities among entities and is creating chaos in the State Engineer's office and entities having pending applications.
4. **Permitted/Certificated Rights:** A broad interpretation of the Supreme Court's decision has some fearing the validity of permitted and certificated water rights. The validity of any permitted and certificated water right which is not currently under appeal pursuant to 533.450 should be maintained regardless of filing date or time it took the State Engineer to act on it. Many permits have been totally or partially abrogated several times over and permits often times have multiple owners which may have differing positions. If existing permitted and certificated rights, who's owner(s) have come to rely on or are being used to serve the public, are called into question, it would truly create chaos of unknown magnitude including further lending and economic uncertainty.
5. **Special Interests:** Special interests in the current or any proposed changes to the Statue should be removed. For example, 533.370 2(b) exempts municipal use applications from Section 2 or Section 8 only applies to interbasin transfers. Why should municipal applications receive special treatment or only interbasin transfers be re-opened for protests? The water law should provide fair and equitable treatment for all applicants and protestants.
6. **Protests & Due Process:** Section 8 needs to be reworked to include the following considerations:
 - a. This section should not just be limited to interbasin groundwater transfers. NRS 533.370 (5) and 533.3703 (1), in part requires the State Engineer to consider the consumptive use of a proposed change, availability of unappropriated water and conflict with existing rights. Therefore, whether X acre feet is evapotranspired by an alfalfa crop within the basin or put in a pipeline and exported from the basin, the hydrologic effect on the basin is the same.

- b. If the State Engineer does not act upon an application in which the duty amount exceeds 200 afa within 5 years after the final date for filing a protest, then one year prior to holding an administrative hearing on or granting the applications, the State Engineer shall provide notice and publication of the application and a new protest period in the same manner as when the application originally was submitted, in accord with NRS 533.360 through 533.369 with "person interested" under 533.365 (1) limited as follows:
- c. Any application re-opened for protest should be limited to a person who is a successor in interest to a protestant or an affected water right owner, agency or local government. Other potential Protestants not having a direct ownership or governmental interest in an affected water right should not be allowed to protest. There are other forums for environmental or citizen action type groups to be heard for most significant projects, such as the NEPA process where they can be heard.

Thank you for the opportunity to provide input in these very critical water rights issues facing the State of Nevada.

Sincerely,



Brad T. Goetsch, County Manager

cc: Norman Frey, Churchill County Commissioner
Rusty Jardine, Churchill County Civil Deputy D.A.
Chris Mahannah, P.E., Mahannah & Associates, LLC
Steve Bradhurst, Central Nevada Regional Water Authority
BJ Selinder, Public Policy Innovations

ADVOCATES FOR COMMUNITY AND ENVIRONMENT

Empowering Local Communities to Protect the Environment and their Traditional Ways of Life

Post Office Box 1075

El Prado, New Mexico 87529

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VIA E-MAIL

April 2, 2010

Jason King, P.E., Acting State Engineer
Nevada Division of Water Resources
901 South Stewart St., Suite 2002
Carson City, NV 89701
Email: jking@water.nv.gov

**Re: March 16 Workshop on Great Basin Water Network v. Taylor
Comments on proposed statutory language**

Dear Mr. King:

I am writing on behalf of the Great Basin Water Network and other petitioners in *Great Basin Water Network v. Taylor* (collectively "GBWN") to provide comments to the proposed statutory revisions submitted in the wake of the March 16, 2010, workshop on the Nevada Supreme Court's Opinion in that case. First, let me state emphatically that GBWN does not believe it is necessary or appropriate to pursue legislative action through a special session of the Nevada Legislature at this time. A special session, or any legislative action, at this time would be inappropriate because the purportedly problematic aspects of the Nevada Supreme Court's opinion in that case: (1) currently are being reconsidered by the Court and therefore may be addressed by the Court in such a way as to eliminate or minimize the need for any intrusion by one branch of government on another's province; (2) as the State Engineer and SNWA know because they initiated the process, the the parties to the case currently are discussing a mutually agreeable proposal to the Court that would eliminate all or virtually all issues giving rise to any of the proposed legislative revisions; and (3) the specific nature and scope of the Court's ruling in this case have not even been finally determined because the District Court has not received the case back on remand and so has not had an opportunity to examine the specific facts and equities in *this* case in order to determine what remedy is, in fact, appropriate, as the District Court expressly is required to do by the Supreme Court's ruling.

In addition, GBWN stresses to the State Engineer that there are additional interested persons in rural eastern Nevada who want to have their voices heard on the issue of whether to take legislative action and, if so, what type of legislation to recommend, but who do not have internet access or email. Some of these Nevadans have not had an adequate opportunity to review the various legislative proposals and related materials posted on the State Engineer's web sites and submit written responses to the State Engineer by today. We echo the remarks of Assemblyman David Bobzien at the Legislature's Public Lands Committee meeting on March 18th, and urge

you to hold the process of considering public input open for an additional time in light of the fact that no special session of the Legislature would be called before June at the very earliest, and the fact that the Parties presently are discussing a possible compromise outcome in the Supreme Court which could profoundly change the landscape for any potential legislation. We do not suggest an open-ended process, but believe that an additional two weeks for public comment is warranted and that the State Engineer should wait until he has considered all public comment before refusing to hold any additional public workshop or hearing.

While GBWN does not believe any legislative intrusion on the Supreme Court's ruling in this case is appropriate at this time, in the spirit of constructive discussion of what potential legislation might be appropriate at some point GBWN offers the following comments and recommendations.

In general, GBWN thinks it would be appropriate to consider legislation that is carefully crafted to ensure that: (1) applicability of the Supreme Court's ruling in *GBWN v. Taylor* to SNWA's 1989 applications is unimpacted; (2) the remedy provided in that ruling to address the constitutional concerns raised by the Petitioners in that case is preserved fully intact; and (3) the ruling remains applicable to protested applications characterized by closely analogous factual and procedural circumstances. Provided it conforms to those parameters, GBWN could support legislation that places other un-protested applications beyond the scope of the ruling and clarifies that in general neither the continuing effectiveness nor the priority of applications or existing water rights is affected by the ruling. This position seems to be consistent with the position advanced by the State Engineer in the petition for rehearing he has filed with the Supreme Court in that case.

More particularly, if legislation is proposed to ensure that the Supreme Court's ruling in *GBWN v. Taylor* is not given too broad a scope, such legislation should conform to the following parameters:

- The ruling's application to SNWA's 1989 applications and to other factually analogous protested applications should be left unaffected;
- The factors to be considered in determining how closely analogous the facts of other applications are to these applications should include: (1) the length of time the application was pending before action by the state engineer; (2) the level of protest and controversy concerning the action proposed by the application; (3) the extent to which original protestants, successors in interest to original protestants, or other parties who have demonstrated an interest in protesting the application would otherwise be excluded from participating in the State Engineer's decisionmaking process; and (4) the magnitude of the amount of water at issue and/or the potential impacts from the proposed action; and
- All other applications, regardless of whether they were filed prior to or after the 2003 amendments to NRS 533.370, that are pending and have been pending for five or more years should be subject to new publication, protest period, and protest hearing procedures that are the same as the procedures for new applications, i.e., those set forth in NRS 533.360 to 533.369, inclusive.

Again, GBWN believes no action should be taken that would interfere with the Supreme Court's current consideration, or the Parties' current discussions over a potential agreed resolution, of these issues, or with the court's final ruling as to the appropriate remedy in this particular case. However, once the judicial process truly has concluded, if there still are legitimate grounds for concern over the ruling's scope of application, GBWN would be willing to cooperate in crafting and would support a legislative measure that conforms to the parameters outlined above.

GBWN's comments on the six legislative proposals posted on the State Engineer's web site are set forth below.

VERSION 1:

The language proposed in Version 1 is too sweeping and simplistic. It would have the effect of negating the Supreme Court's ruling in *Great Basin Water Network v. Taylor* as to SNWA's 1989 applications and would fail to make any provision for the possibility of similarly inequitable and impermissible situations in closely analogous cases. It also fails utterly to address the fundamental inequity inherent in allowing applicants to dictate open-ended delays, without requiring new publication and protest periods to ensure a fair opportunity for affected people to protest. Accordingly, this proposal is unacceptable to GBWN. As noted in GBWN's comments submitted in advance of the State Engineer's March 16 Workshop, legislative action cannot negate the constitutional violations that arose in that case. By the same token, an overly simplistic approach to legislation, such as Version 1, would permit and possibly encourage the replication of such constitutionally defective procedures.

VERSION 2:

GBWN might support the changes proposed by Version 2, with several revisions. The addition to section 3 in Version 2 is problematic, because it would create a conflict between sections 3 and section 8(d) with regard to SNWA's 1989 applications. With regard to those applications, the ruling makes clear that the State Engineer's failure to act within a year of the filing date *does* affect the status of the approval granted and that at the very least, supplemental hearings must be held. GBWN suggests that if the State Engineer wishes to adopt a variation of Version 2, there must be language added to section 3 exempting applications that are the subject of a pending appeal or court order as of January 31, 2010.

Subsection 9(d) - 8(d) in the statute as it currently stands - is too narrow. It must be modified to provide for a new publication process and protest period that conforms to the provisions for new applications, as proposed in Version 4.

New subsection 9(e) is unacceptable because it would exempt all of SNWA's 1989 applications that already have been acted on by the State Engineer, except those in Cave, Dry Lake, and Delamar Valleys, and the small number of potentially analogous applications addressed elsewhere in these comments. It also should be made clear that in the case of applications or permits that are the subject of pending appeals, re-publication, a new protest period, and supplemental hearings will be required.

VERSION 3:

The addition to section 4 in Version 3 is problematic, because it would create a conflict between sections 4 and section 8(d) with regard to SNWA's 1989 applications that have been acted on by the State Engineer. In the circumstances of SNWA's 1989 applications, the Supreme Court's ruling makes clear that the State Engineer's failure to act within a year of the filing date *does* affect the validity of the approval granted. The ruling also makes it clear that in these, and presumably analogous, circumstances, at the very least, re-publication, a new protest period, and supplemental hearings are required. GBWN suggests that if the State Engineer moves forward with some variation of Version 3, language be added exempting applications that are the subject of a pending appeal or court order as of January 31, 2010.

Version 3 also should make clear that in the case of applications or permits that are the subject of pending appeals, re-publication, a new protest period, and supplemental hearings will be required pursuant to a revised version of subsection 8(d) along the lines proposed in Version 4.

VERSION 4:

Version 4 takes into account the concerns expressed in both GBWN's comments and the critiques of the other 5 versions offered in this letter by GBWN. Accordingly, GBWN suggests that if the State Engineer chooses to advocate for specific legislative language changes, Version 4 provides the most reasonable, balanced, and straightforward approach. It preserves the Supreme Court's holding with respect to SNWA 1989 applications and a very limited class of factually analogous applications, while limiting the decision's reach to one that is manageable for the State Engineer's Office.

One change that should be considered in addition to those already contained in Version 4 is the change of seven years to five years in subsection 8(d). Several petitioners in *GBWN v. Taylor* and other members of the public have pointed out that other statutory regimes more typically employ a five-year period as the timeframe that triggers re-consideration of pending proposals.

VERSION 5:

Version 5 is unacceptable to GBWN as the proposed language would have the effect of negating the Supreme Court's statutory holding in *Great Basin Water Network v. Taylor*. As noted in GBWN's comments submitted in advance of the State Engineer's March 16 Workshop, legislative action cannot eliminate the constitutional deficiencies in that case. The Legislature cannot override the ruling by changing statutory language, and should not consider a proposal such as Version 5 that would encourage repetition of the same constitutional violations.

VERSION 6:

Version 6 is unacceptable to GBWN as it does away with the one year action requirement of 533.370(2), replacing the word "shall" with the word "may." This proposed change would set the stage for situations similar to the one addressed by *Great Basin Water Network v. Taylor*, in which applications are permitted to lay dormant for many years to the disadvantage of protestants and other interested members of the public. While GBWN recognizes that it is not

always possible for the State Engineer to act within one year on a given application, it is essential that the rights of the public to participate in the process be preserved and that postponement of consideration of applications be limited to certain narrow circumstances laid out by statute.

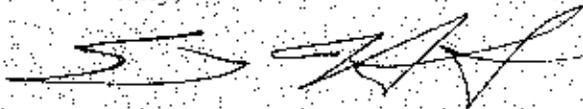
While GBWN supports the general concept outlined in section 2(d), it is necessary to provide protestants with sufficient time to prepare protest cases. Experience has demonstrated that 90 days frequently will be insufficient where applications are complex or controversial and there has been significant delay between filing and hearing. GBWN would suggest at least 12 months time between the end of the new protest period of covered applications and any hearings held on such applications.

Under Version 6, subsection 8(d) also would need to be amended along the lines proposed in Version 4. Section 8(d)'s protest provisions should not be limited to successors in interest.

* * *

Again, as noted in the letter submitted by GBWN in advance of the March 16 workshop, and in our comments at that workshop, GBWN does not believe that legislative action with regard to the Supreme Court's ruling in *GBWN v. Taylor* is necessary or appropriate at this time. Legislative action should not be pursued until the Supreme Court's re-consideration of these issues and the Parties' current negotiations are concluded. At that time, GBWN would be willing to support legislation such as that proposed by Version 4, which was drafted to: (1) eliminate any undue burden on the State Engineer and any undue threat to the validity or priority of virtually all applications and existing rights; and (2) preserve the ruling's applicability to SNWA's 1989 applications and ensure that the constitutional violations involved in that case are adequately addressed.

Sincerely,



Simeon Herskovits
Attorney for Great Basin Water Network, et al.

ATTACHMENT

F

**SUGGESTED LANGUAGE
VERSION 1**

AN ACT relating to water, clarifying certain statutory provisions to reflect established practice; and providing other matters properly related thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Sec. 1. Section 18 of Chapter 474 of the 2003 laws of the State of Nevada is hereby amended to read as follows:

Sec. 18. The amendatory provisions of section 2 of this act apply to:

1. Each application described in NRS 533.370 that is made on or after July 1, 2003; and
2. Each such application that is pending with the office of the State Engineer on July 1, 2003, *without regard to how long before July 1, 2003 each such application was filed with the office of the State Engineer.*

Sec. 2 1. The legislature declares that it has examined the past and present practice of the state engineer with respect to the approval or denial of applications as such approval or denial relates to their pendency on and before July 1, 2003, and finds that those applications have been approved or denied in a manner consistent with section 1 of this act.

2. The legislature intends by this act to clarify rather than change the operation of Section 18 of Chapter 474 of the 2003 laws of the State of Nevada with respect to the approval or denial of applications described in section 1 of this act, and thereby to promote stability and consistency in the administration of chapters 533 and 534 of NRS.

Sec. 3. This act becomes effective upon passage and approval, and applies retrospectively as well as prospectively.

**SUGGESTED LANGUAGE
VERSION 2**

NRS 533.370 Approval or rejection of application by State Engineer: Conditions; exceptions; considerations; procedure.

1. Except as otherwise provided in this section and [NRS 533.345](#), [533.371](#), [533.372](#) and [533.503](#), the State Engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if:

(a) The application is accompanied by the prescribed fees;

(b) The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water; and

(c) The applicant provides proof satisfactory to the State Engineer of:

(1) His intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and

(2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

2. Except as otherwise provided in this subsection and subsections ~~43~~ and ~~124~~ and [NRS 533.365](#), the State Engineer shall approve or reject each application within 1 year after the final date for filing a protest. The State Engineer may:

(a) Postpone action upon written authorization to do so by the applicant or, if an application is protested, by the protestant and the applicant.

(b) Postpone action if the purpose for which the application was made is municipal use.

(c) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to [NRS 533.368](#) or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

3. For those applications filed before July 1, 2003, that took longer than 1 year after the final date for filing a protest to take action on and did not meet the requirements of section 2, but have since been approved or rejected, the status of those rights are preserved. Applications filed before July 1, 2003 that have not been acted upon and do not meet the requirements of section 2, remain active and their status and priorities are preserved.

4. Except as otherwise provided in subsection ~~124~~, the State Engineer shall approve or reject, within 6 months after the final date for filing a protest, an application filed to change the point of diversion of water already appropriated when the existing and proposed points of diversion are on the same property for which the water has already been appropriated under the existing water right or the proposed point of diversion is on real property that is proven to be owned by the applicant and is contiguous to the place of use of the existing water right. The State Engineer may:

(a) Postpone action upon written authorization to do so by the applicant or, if the application is protested, by the protestant and the applicant.

(b) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to [NRS 533.368](#) or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

54. If the State Engineer does not act upon an application within 1 year after the final date for filing a protest, the application remains active until acted upon by the State Engineer.

~~65.~~ Except as otherwise provided in subsection ~~124~~, 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. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

76. In determining whether an application for an interbasin transfer of groundwater must be rejected pursuant to this section, 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.

87. If a hearing is held regarding an application, the decision of the State Engineer must be in writing and include findings of fact, conclusions of law and a statement of the underlying facts supporting the findings of fact. The written decision may take the form of a transcription of an oral ruling. The rejection or approval of an application must be endorsed on a copy of the original application, and a record must be made of the endorsement in the records of the State Engineer. The copy of the application so endorsed must be returned to the applicant. Except as otherwise provided in subsection 132, if the application is approved, the applicant may, on receipt thereof, proceed with the construction of the necessary works and take all steps required to apply the water to beneficial use and to perfect the proposed appropriation. If the application is rejected, the applicant may take no steps toward the prosecution of the proposed work or the diversion and use of the public water while the rejection continues in force.

98. If:

(a) The State Engineer receives an application to appropriate any of the public waters, or to change the point of diversion, manner of use or place of use of water already appropriated;

(b) The application involves an amount of water exceeding 250 acre-feet per annum;

(c) The application involves an interbasin transfer of groundwater; and

(d) Within 7 years after the date of last publication of the notice of application, the State Engineer has not granted the application, denied the application, held an administrative hearing on the application or issued a permit in response to the application,

→ the State Engineer shall notice a new period of 45 days in which any person interested ~~who is a successor in interest to a protestant or an affected water right owner~~ may file with the State Engineer a written protest against the granting of the application. Such notification must be entered on the Internet website of the State Engineer and must, concurrently with that notification, be mailed to the board of county commissioners of the county of origin.

(e) The provisions of subsection 9(d) apply retroactively to all applications involving an interbasin transfer of groundwater in excess of 250 acre-feet per annum filed with the State Engineer after January 1, 1947 that, as of the effective date of this subsection 9(e): (i) have not been acted upon by the State Engineer; or (ii) are the subject of a pending appeal pursuant to NRS 533.450.

109. Except as otherwise provided in subsection 110, a person who is a successor in interest to a protestant or an affected water right owner who wishes to protest an application in accordance with a new period of protest noticed pursuant to subsection 8 shall, within 45 days after the date on which the notification was entered and mailed, file with the State Engineer a written protest that complies with the provisions of this chapter and with the regulations adopted by the State Engineer, including, without limitation, any regulations prescribing the use of particular forms or requiring the payment of certain fees.

110. If a person is the successor in interest of an owner of a water right or an owner of real property upon which a domestic well is located and if the former owner of the water right or real property on which a domestic well is located had previously filed a written protest against the granting of an application, the successor in interest must be allowed to pursue that protest in the same manner as if he were the former owner whose interest he succeeded. If the successor in interest wishes to pursue the protest, the successor in interest must notify the State Engineer on a form provided by the State Engineer.

124. The provisions of subsections 1 to 76, inclusive, do not apply to an application for an environmental permit.

132. The provisions of subsection 87 do not authorize the recipient of an approved application to use any state land administered by the Division of State Lands of the State Department of Conservation and Natural Resources without the appropriate authorization for that use from the State Land Registrar.

143. As used in this section:

(a) "County of origin" means the county from which groundwater is transferred or proposed to be transferred.

(b) "Domestic well" has the meaning ascribed to it in [NRS 534.350](#).

(c) "Interbasin transfer of groundwater" means a transfer of groundwater for which the proposed point of diversion is in a different basin than the proposed place of beneficial use.

[63:140:1913; A 1945, 87; 1947, 777; 1949, 102; 1943 NCL § 7948]—(NRS A 1959, 554; 1973, 865, 1603; 1977, 1171; 1981, 209, 359; 1989, 319; 1991, 759, 1369; 1993, 1459, 2082, 2349; 1995, 319, 697, 2523; 1999, 1045; 2001, 552; 2003, 2980; 2005, 2561; 2007, 2017)

**SUGGESTED LANGUAGE
VERSION 3**

NRS 533.370 Approval or rejection of application by State Engineer: Conditions; exceptions; considerations; procedure.

1. Except as otherwise provided in this section and [NRS 533.345](#), [533.371](#), [533.372](#) and [533.503](#), the State Engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if:

(a) The application is accompanied by the prescribed fees;

(b) The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water; and

(c) The applicant provides proof satisfactory to the State Engineer of:

(1) His intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and

(2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

2. Except as otherwise provided in this subsection and subsections 3 and 11 and [NRS 533.365](#), the State Engineer shall approve or reject each application within 1 year after the final date for filing a protest. The State Engineer may:

(a) Postpone action upon written authorization to do so by the applicant or, if an application is protested, by the protestant and the applicant.

(b) Postpone action if the purpose for which the application was made is municipal use.

(c) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to [NRS 533.368](#) or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

3. Except as otherwise provided in subsection 11, the State Engineer shall approve or reject, within 6 months after the final date for filing a protest, an application filed to change the point of diversion of water already appropriated when the existing and proposed points of diversion are on the same property for which the water has already been appropriated under the existing water right or the proposed point of diversion is on real property that is proven to be owned by the applicant and is contiguous to the place of use of the existing water right. The State Engineer may:

(a) Postpone action upon written authorization to do so by the applicant or, if the application is protested, by the protestant and the applicant.

(b) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to [NRS 533.368](#) or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

4. If the State Engineer does not act upon an application within 1 year after the final date for filing a protest, the application remains active until acted upon by the State Engineer. This subsection 4 applies prospectively as well as retroactively to all applications ever filed with the State Engineer. If an application was filed with the office of the State Engineer before the effective date of this subsection 4, and the State Engineer approved that application more than 1 year after the final date for filing a protest, the State Engineer's failure to act upon the application within 1 year after the final date for filing a protest does not affect the validity of the approval granted, and such failure to act shall not be used to challenge, contest, or dispute the validity of the approved application, permit, or certificate, or any order or ruling issued by the State Engineer.

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. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

6. In determining whether an application for an interbasin transfer of groundwater must be rejected pursuant to this section, 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.

7. If a hearing is held regarding an application, the decision of the State Engineer must be in writing and include findings of fact, conclusions of law and a statement of the underlying facts supporting the findings of fact. The written decision may take the form of a transcription of an oral ruling. The rejection or approval of an application must be endorsed on a copy of the original application, and a record must be made of the endorsement in the records of the State Engineer. The copy of the application so endorsed must be returned to the applicant. Except as otherwise provided in subsection 12, if the application is approved, the applicant may, on receipt thereof, proceed with the construction of the necessary works and take all steps required to apply the water to beneficial use and to perfect the proposed appropriation. If the application is rejected, the applicant may take no steps toward the prosecution of the proposed work or the diversion and use of the public water while the rejection continues in force.

8. If:

- (a) The State Engineer receives an application to appropriate any of the public waters, or to change the point of diversion, manner of use or place of use of water already appropriated;
- (b) The application involves an amount of water exceeding 250 acre-feet per annum;
- (c) The application involves an interbasin transfer of groundwater; and
- (d) Within 7 years after the date of last publication of the notice of application, the State Engineer has not granted the application, denied the application, held an administrative hearing on the application or issued a permit in response to the application,

→ the State Engineer shall notice a new period of 45 days in which ~~any interested person who is a successor in interest to a protestant or an affected water right owner~~ may file with the State Engineer a written protest against the granting of the application. Such notification must be entered on the Internet website of the State Engineer and must, concurrently with that notification, be mailed to the board of county commissioners of the county of origin.

(e) The provisions of subsection 8(d) apply retroactively to all applications involving an interbasin transfer of groundwater in excess of 250 acre-feet per annum filed with the State Engineer that, as of the effective date of this subsection 8(e): (i) have not been acted upon by the State Engineer; or (ii) are the subject of a pending appeal pursuant to NRS 533.450. The date of priority for any application renoticed pursuant to this subsection 8 remains the same, and shall not be changed, altered, modified or abrogated by virtue of the application being renoticed pursuant to this subsection 8.

9. Except as otherwise provided in subsection 10, a person who is a successor in interest to a protestant or an affected water right owner who wishes to protest an application in accordance with a new period of protest noticed pursuant to subsection 8 shall, within 45 days after the date on which the notification was entered and mailed, file with the State Engineer a written protest that complies with the provisions of this chapter and with the regulations adopted by the State Engineer, including, without limitation, any regulations prescribing the use of particular forms or requiring the payment of certain fees.

10. If a person is the successor in interest of an owner of a water right or an owner of real property upon which a domestic well is located and if the former owner of the water right or real property on which a domestic well is located had previously filed a written protest against the granting of an application, the successor in interest must be allowed to pursue that protest in the same manner as if he were the former owner whose interest he succeeded. If the successor in interest wishes to pursue the protest, the successor in interest must notify the State Engineer on a form provided by the State Engineer.

11. The provisions of subsections 1 to 6, inclusive, do not apply to an application for an environmental permit.

12. The provisions of subsection 7 do not authorize the recipient of an approved application to use any state land administered by the Division of State Lands of the State Department of Conservation and Natural Resources without the appropriate authorization for that use from the State Land Registrar.

13. As used in this section:

(a) "County of origin" means the county from which groundwater is transferred or proposed to be transferred.

(b) "Domestic well" has the meaning ascribed to it in [NRS 534.350](#).

(c) "Interbasin transfer of groundwater" means a transfer of groundwater for which the proposed point of diversion is in a different basin than the proposed place of beneficial use.

[63:140:1913; A 1945, 87; 1947, 777; 1949, 102; 1943 NCL § 7948]—(NRS A 1959, 554; 1973, 865, 1603; 1977, 1171; 1981, 209, 359; 1989, 319; 1991, 759, 1369; 1993, 1459, 2082, 2349; 1995, 319, 697, 2523; [1999, 1045](#); [2001, 552](#); [2003, 2980](#); [2005, 2561](#); [2007, 2017](#))

SUGGESTED LANGUAGE VERSION 4

NRS 533.370 Approval or rejection of application by State Engineer: Conditions; exceptions; considerations; procedure.

1. Except as otherwise provided in this section and [NRS 533.345](#), [533.371](#), [533.372](#) and [533.503](#), the State Engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if:

(a) The application is accompanied by the prescribed fees;

(b) The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water; and

(c) The applicant provides proof satisfactory to the State Engineer of:

(1) His intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and

(2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

2. Except as otherwise provided in this subsection and subsections 3 and 11 and [NRS 533.365](#), the State Engineer shall approve or reject each application within 1 year after the final date for filing a protest. The State Engineer may:

(a) Postpone action upon written authorization to do so by the applicant or, if an application is protested, by the protestant and the applicant.

(b) Postpone action if the purpose for which the application was made is municipal use.

(c) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to [NRS 533.368](#) or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

3. Except as otherwise provided in subsection 11, the State Engineer shall approve or reject, within 6 months after the final date for filing a protest, an application filed to change the point of diversion of water already appropriated when the existing and proposed points of diversion are on the same property for which the water has already been appropriated under the existing water right or the proposed point of diversion is on real property that is proven to be owned by the applicant and is contiguous to the place of use of the existing water right. The State Engineer may:

(a) Postpone action upon written authorization to do so by the applicant or, if the application is protested, by the protestant and the applicant.

(b) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to [NRS 533.368](#) or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

4. If the State Engineer does not act upon an application within 1 year after the final date for filing a protest, the application remains active until acted upon by the State Engineer. This subsection 4 applies retroactively to all applications filed with the State Engineer between January 1, 1947 and July 1, 2003, except applications that are subject to any pending appeal, petition for judicial review, or court order as of January 31, 2010.

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. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

6. In determining whether an application for an interbasin transfer of groundwater must be rejected pursuant to this section, 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.

7. If a hearing is held regarding an application, the decision of the State Engineer must be in writing and include findings of fact, conclusions of law and a statement of the underlying facts supporting the findings of fact. The written decision may take the form of a transcription of an oral ruling. The rejection or approval of an application must be endorsed on a copy of the original application, and a record must be made of the endorsement in the records of the State Engineer. The copy of the application so endorsed must be returned to the applicant. Except as otherwise provided in subsection 12, if the application is approved, the applicant may, on receipt thereof, proceed with the construction of the necessary works and take all steps required to apply the water to beneficial use and to perfect the proposed appropriation. If the application is rejected, the applicant may take no steps toward the prosecution of the proposed work or the diversion and use of the public water while the rejection continues in force.

8. If:

(a) The State Engineer receives an application to appropriate any of the public waters, or to change the point of diversion, manner of use or place of use of water already appropriated;

(b) The application involves an amount of water exceeding 250 acre-feet per annum;

(c) The application involves an interbasin transfer of groundwater; and

(d) Within 7 years after the date of last publication of the notice of application, the State Engineer has not granted the application, denied the application, held an administrative hearing on the application or issued a permit in response to the application, then, not less than one year and not more than two years prior to holding an administrative hearing on or granting the application, the State Engineer shall provide notice and publication of the application and a new protest period in the same manner as when the application originally was submitted, in accord with NRS 533.360 through 533.369. ~~notice a new period of 45 days in which a person who is a successor in interest to a protestant or an affected water right owner may file with the State Engineer a written protest against the granting of the application.~~ Notice of this new protest period shall ~~Such notification must~~ be entered concurrently on the Internet website of the State Engineer and must, concurrently with that notification, be mailed to the board of county commissioners of the county of origin.

(e) The provisions of subsection 8(d) apply retroactively to all applications involving an interbasin transfer of groundwater in excess of 250 acre-feet per annum filed with the State Engineer after January 1, 1947.

~~9. Except as otherwise provided in subsection 10, a person who is a successor in interest to a protestant or an affected water right owner who wishes to protest an application in accordance with a new period of protest noticed pursuant to subsection 8 shall, within 45 days after the date on which the notification was entered and mailed, file with the State Engineer a written protest that complies with the provisions of this chapter and with the regulations adopted by the State Engineer, including, without limitation, any regulations prescribing the use of particular forms or requiring the payment of certain fees.~~

10. If a person is the successor in interest of an owner of a water right or an owner of real property upon which a domestic well is located and if the former owner of the water right or real property on which a domestic well is located had previously filed a written protest against the granting of an application, the successor in interest must be allowed to pursue that protest in the same manner as if he were the former owner whose interest he succeeded. If the successor in interest wishes to pursue the protest, the successor in interest must notify the State Engineer on a form provided by the State Engineer.

11. The provisions of subsections 1 to 6, inclusive, do not apply to an application for an environmental permit.

12. The provisions of subsection 7 do not authorize the recipient of an approved application to use any state land administered by the Division of State Lands of the State Department of Conservation and Natural Resources without the appropriate authorization for that use from the State Land Registrar.

13. As used in this section:

(a) "County of origin" means the county from which groundwater is transferred or proposed to be transferred.

(b) "Domestic well" has the meaning ascribed to it in [NRS 534.350](#).

(c) "Interbasin transfer of groundwater" means a transfer of groundwater for which the proposed point of diversion is in a different basin than the proposed place of beneficial use.

[63:140:1913; A 1945, 87; 1947, 777; 1949, 102; 1943 NCL § 7948]—(NRS A 1959, 554; 1973, 865, 1603; 1977, 1171; 1981, 209, 359; 1989, 319; 1991, 759, 1369; 1993, 1459, 2082, 2349; 1995, 319, 697, 2523; 1999, 1045; 2001, 552; 2003, 2980; 2005, 2561; 2007, 2017)

SUGGESTED LANGUAGE VERSION 5

Amendment to NRS 533.370

Section 1. Section 533.370 is hereby amended to read as follows:

NRS 533.370 Approval or rejection of application by State Engineer: Conditions; exceptions; considerations; procedure.

1. Except as otherwise provided in this section and [NRS 533.345](#), [533.371](#), [533.372](#) and [533.503](#), the State Engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if:

(a) The application is accompanied by the prescribed fees;

(b) The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water; and

(c) The 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.

2. Except as otherwise provided in this subsection and subsections 3 and **[11] 10** and [NRS 533.365](#), the State Engineer shall approve or reject each application within 1 year after the final date for filing a protest. The State Engineer may:

(a) Postpone action upon written authorization to do so by the applicant or, if an application is protested, by the protestant and the applicant.

(b) Postpone action if the purpose for which the application was made is municipal use.

(c) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to [NRS 533.368](#) or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

(d) If the state engineer does not act on an application on a presently pending application within 1 year after the final date for filing a protest, the application remains active until acted upon by the state engineer. This section shall apply to all applications filed after its effective date and to all applications previously filed that are pending on or after the effective date.

3. Except as otherwise provided in subsection 11, the State Engineer shall approve or reject, within 6 months after the final date for filing a protest, an application filed to change the point of diversion of water already appropriated when the existing and proposed points of diversion are on the same property for which the water has already been appropriated under the existing water right or the proposed point of diversion is on real property that is proven to be owned by the applicant and is contiguous to the place of use of the existing water right. The State Engineer may:

(a) Postpone action upon written authorization to do so by the applicant or, if the application is protested, by the protestant and the applicant.

(b) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to [NRS 533.368](#) or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

[4. If the State Engineer does not act upon an application within 1 year after the final date for filing a protest, the application remains active until acted upon by the State Engineer.]

[5] 4. 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 protectable 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. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

[6] 5. In determining whether an application for an interbasin transfer of groundwater must be rejected pursuant to this section, 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.

[7] 6. If a hearing is held regarding an application, the decision of the State Engineer must be in writing and include findings of fact, conclusions of law and a statement of the underlying facts supporting the findings of fact. The written decision may take the form of a transcription of an oral ruling. The rejection or approval of an application must be endorsed on a copy of the original application, and a record must be made of the endorsement in the records of the State Engineer. The copy of the application so endorsed must be returned to the applicant. Except as otherwise provided in subsection [12] 11, if the application is approved, the applicant may, on receipt thereof, proceed with the construction of the necessary works and take all steps required to apply the water to beneficial use and to perfect the proposed appropriation. If the application is rejected, the applicant may take no steps toward the prosecution of the proposed work or the diversion and use of the public water while the rejection continues in force.

[8] 7. If:

- (a) The State Engineer receives an application to appropriate any of the public waters, or to change the point of diversion, manner of use or place of use of water already appropriated;
- (b) The application involves an amount of water exceeding 250 acre-feet per annum;
- (c) The application involves an interbasin transfer of groundwater; and
- (d) Within 7 years after the date of last publication of the notice of application, the State Engineer has not granted the application, denied the application, held an administrative hearing on the application or issued a permit in response to the application,

→ the State Engineer shall notice a new period of 45 days in which a person who is a successor in interest to a protestant or an affected water right owner may file with the State Engineer a written protest against the granting of the application. Such notification must be entered on the Internet website of the State Engineer and must, concurrently with that notification, be mailed to the board of county commissioners of the county of origin.

[9] 8. Except as otherwise provided in subsection [10] 9, a person who is a successor in interest to a protestant or an affected water right owner who wishes to protest an application in accordance with a new period of protest noticed pursuant to subsection [8] 7 shall, within 45 days after the date on which the notification was entered and mailed, file with the State Engineer a written protest that complies with the provisions of this chapter and with the regulations adopted by the State Engineer, including, without limitation, any regulations prescribing the use of particular forms or requiring the payment of certain fees.

[10] 9. If a person is the successor in interest of an owner of a water right or an owner of real property upon which a domestic well is located and if the former owner of the water right or real property on which a domestic well is located had previously filed a written protest against the granting of an application, the successor in interest must be allowed to pursue that protest in the same manner as if the successor in interest were the former owner whose interest he or she succeeded. If the successor in interest wishes to pursue the protest, the successor in interest must notify the State Engineer on a form provided by the State Engineer.

[11] 10. The provisions of subsections 1 to [6] 5, inclusive, do not apply to an application for an environmental permit.

[12] 11. The provisions of subsection [7] 6 do not authorize the recipient of an approved application to use any state land administered by the Division of State Lands of the State Department of Conservation and Natural Resources without the appropriate authorization for that use from the State Land Registrar.

[13] 12. As used in this section:

- (a) "County of origin" means the county from which groundwater is transferred or proposed to be transferred.
- (b) "Domestic well" has the meaning ascribed to it in [NRS 534.350](#).

Section 2. The legislature intends to clarify rather than change the operation of NRS 522.370 with respect

to the approval or denial of an application within the one year period which was placed in statute in 1947. The legislature in the 2003 session attempted to protect those applications that were over one year past the final date for filing a protest by amending NRS 533.370 because of inaction by the state engineer. The legislature in 2003 was aware of the backlog of files in the state engineer's office over one year and attempted to give the state engineer direction and clarify the status of those applications. The 2007 session of the Legislature amended NRS 533.370 to now notice applications that are 7 years or more to allow additional protests.

Section 3. *This act becomes effective upon passage and approval for any applications on file with the state engineer for any application that was pending prior to the 2007 amendment of NRS 533.370 and will apply retrospectively.*

**SUGGESTED LANGUAGE
VERSION 6**

NRS 533.370 Approval or rejection of application by State Engineer: Conditions; exceptions; considerations; procedure.

1. Except as otherwise provided in this section and NRS 533.345, 533.371, 533.372 and 533.503, the State Engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if:

(a) The application is accompanied by the prescribed fees;

(b) The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water; and

(c) The applicant provides proof satisfactory to the State Engineer of:

(1) His intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and

(2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

2. Except as otherwise provided in this subsection and subsections 3 and 11 and NRS 533.365, the State Engineer ~~may~~ **shall** approve or reject each application within 1 year after the final date for filing a protest. The State Engineer may:

(a) Postpone action upon written authorization to do so by the applicant or, if an application is protested, by the protestant and the applicant.

(b) Postpone action if the purpose for which the application was made is municipal use.

(c) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to NRS 533.368 or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

(d) For any other reason the State Engineer deems necessary postpone his decision.

In the event that the State Engineer decides to postpone decision on the application for more than five (5) years, the State Engineer shall republish notice of the application within 90 days of the date the State Engineer intends to make his decision or of the date the State Engineer intends to notice any preliminary hearing or hearing on the application. The State Engineer shall allow new or additional protests if such additional publication is accomplished.

3. Except as otherwise provided in subsection 11, the State Engineer shall approve or reject, within 6 months after the final date for filing a protest, an application filed to change the point of diversion of water already appropriated when the existing and proposed points of diversion are on the same property for which the water has already been appropriated under the existing water right or the proposed point of diversion is on real property that is proven to be owned by the applicant and is contiguous to the place of use of the existing water right. The State Engineer may:

(a) Postpone action upon written authorization to do so by the applicant or, if the application is protested, by the protestant and the applicant.

(b) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to NRS 533.368 or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

4. If the State Engineer does not act upon an application within 1 year after the final date for filing a protest, the application remains active until acted upon by the State Engineer.

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. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

6. In determining whether an application for an interbasin transfer of groundwater must be rejected pursuant to this section, 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.

7. If a hearing is held regarding an application, the decision of the State Engineer must be in writing and include findings of fact, conclusions of law and a statement of the underlying facts supporting the findings of fact. The written decision may take the form of a transcription of an oral ruling. The rejection or approval of an application must be endorsed on a copy of the original application, and a record must be made of the endorsement in the records of the State Engineer. The copy of the application so endorsed must be returned to the applicant. Except as otherwise provided in subsection 12, if the application is approved, the applicant may, on receipt thereof, proceed with the construction of the necessary works and take all steps required to apply the water to beneficial use and to perfect the proposed appropriation. If the application is rejected, the applicant may take no steps toward the prosecution of the proposed work or the diversion and use of the public water while the rejection continues in force.

8. If:

(a) The State Engineer receives an application to appropriate any of the public waters, or to change the point of diversion, manner of use or place of use of water already appropriated;

(b) The application involves an amount of water exceeding 250 acre-feet per annum;

(c) The application involves an interbasin transfer of groundwater; and

(d) Within 7 years after the date of last publication of the notice of application, the State Engineer has not granted the application, denied the application, held an administrative hearing on the application or issued a permit in response to the application, the State Engineer shall notice a new period of 45 days in which a person who is a successor in interest to a protestant or an affected water right owner may file with the State Engineer a written protest against the granting of the application. Such notification must be entered on the Internet website of the State Engineer and must, concurrently with that notification, be mailed to the board of county commissioners of the county of origin.

9. Except as otherwise provided in subsection 10, a person who is a successor in interest to a protestant or an affected water right owner who wishes to protest an application in accordance with a new period of protest noticed pursuant to subsection 8 shall, within 45 days after the date on which the notification was entered and mailed, file with the State Engineer a written protest that complies with the provisions of this chapter and with the regulations adopted by the State Engineer, including, without limitation, any regulations prescribing the use of particular forms or requiring the payment of certain fees.

10. If a person is the successor in interest of an owner of a water right or an owner of real property upon which a domestic well is located and if the former owner of the water right or real property on which a domestic well is located had previously filed a written protest against the granting of an application, the successor in interest must be allowed to pursue that protest in the same manner as if he were the former owner whose interest he succeeded. If the successor in interest wishes to pursue the protest, the successor in interest must notify the State Engineer on a form provided by the State Engineer.

11. The provisions of subsections 1 to 6, inclusive, do not apply to an application for an environmental permit.

12. The provisions of subsection 7 do not authorize the recipient of an approved application to use any state land administered by the Division of State Lands of the State Department of Conservation and Natural Resources without the appropriate authorization for that use from the State Land Registrar.

13. As used in this section:

(a) "County of origin" means the county from which groundwater is transferred or proposed to be transferred.

(b) "Domestic well" has the meaning ascribed to it in NRS 534.350.

(c) "Interbasin transfer of groundwater" means a transfer of groundwater for which the proposed point of diversion is in a different basin than the proposed place of beneficial use.

[63:140:1913; A 1945, 87; 1947, 777; 1949, 102; 1943 NCL § 7948]—(NRS A 1959, 554; 1973, 865, 1603; 1977, 1171; 1981, 209, 359; 1989, 319; 1991, 759, 1369; 1993, 1459, 2082, 2349; 1995, 319, 697, 2523; 1999, 1045; 2001, 552; 2003, 2980; 2005, 2561; 2007, 2017)

**SUGGESTED LANGUAGE
VERSION 7**

Sec. 1. Section 18 of Chapter 474 of the 2003 laws of the State of Nevada is hereby amended to read as follows:

Sec. 18. The amendatory provisions of section 2 of this act apply to:

1. Each application described in NRS 533.370 that is made on or after July 1, 2003; and
2. Each such application that is pending with the office of the State Engineer on July 1, 2003, **without regard to whether the application was filed on or before July 1, 2002.**

Sec. 2 1. The legislature declares that it has examined the past and present practice of the state engineer with respect to the approval or denial of applications as such approval or denial relates to their pendency on and before July 1, 2003, and finds that those applications have been approved or denied in a manner consistent with section 1 of this act.

2. The legislature intends by this act to clarify rather than change the operation of Section 18 of Chapter 474 of the 2003 laws of the State of Nevada with respect to the approval or denial of applications described in section 1 of this act, **to make clear the legislature's intention that Section 18 of chapter 474 of the 2003 laws of the State of Nevada was intended to apply retroactively to applications pending with the state engineer on or before July 1, 2002,** and thereby to promote stability and consistency in the administration of chapters 533 and 534 of NRS.

Sec. 3. This act becomes effective upon passage and approval, and applies retrospectively as well as prospectively.

ATTACHMENT G

**SUGGESTED LANGUAGE
VERSION 8**

NRS 533.370 Approval or rejection of application by State Engineer: Conditions; exceptions; considerations; procedure.

1. Except as otherwise provided in this section and [NRS 533.345](#), [533.371](#), [533.372](#) and [533.503](#), the State Engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if:

- (a) The application is accompanied by the prescribed fees;
- (b) The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water; and
- (c) The 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.

2. Except as otherwise provided in this subsection and subsections 3 and 11 and [NRS 533.365](#), the State Engineer shall approve or reject each application within 1 year after the final date for filing a protest. The State Engineer may:

- (a) Postpone action upon written authorization to do so by the applicant or, if an application is protested, by the protestant and the applicant.
- (b) Postpone action if the purpose for which the application was made is municipal use.
- (c) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to [NRS 533.368](#) or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

(d) Postpone action in areas where there are ongoing adjudications of pre-statutory vested water rights.

(e) Except as otherwise provided in subsection 7, if the state engineer does not act on a presently pending application within 1 year after the final date for filing a protest, the application remains active until acted upon by the state engineer. This section 2(e) applies retroactively to all applications filed with the state engineer between January 1, 1947, and July 1, 2003, except applications that are the subject of any pending appeal, petition for judicial review, or court order as of January 31, 2010.

3. Except as otherwise provided in subsection 11, the State Engineer shall approve or reject, within 6 months after the final date for filing a protest, an application filed to change the point of diversion of water already appropriated when the existing and proposed points of diversion are on the same property for which the water has already been appropriated under the existing water right or the proposed point of diversion is on real property that is proven to be owned by the applicant and is contiguous to the place of use of the existing water right. The State Engineer may:

- (a) Postpone action upon written authorization to do so by the applicant or, if the application is protested, by the protestant and the applicant.

(b) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to [NRS 533.368](#) or where court actions are pending, withhold action until it is determined there is unappropriated water or the court action becomes final.

~~4. If the State Engineer does not act upon an application within 1 year after the final date for filing a protest, the application remains active until acted upon by the State Engineer.~~

45. 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 protectable 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. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

56. In determining whether an application for an interbasin transfer of groundwater must be rejected pursuant to this section, 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.

67. If a hearing is held regarding an application, the decision of the State Engineer must be in writing and include findings of fact, conclusions of law and a statement of the underlying facts supporting the findings of fact. The written decision may take the form of a transcription of an oral ruling. The rejection or approval of an application must be endorsed on a copy of the original application, and a record must be made of the endorsement in the records of the State Engineer. The copy of the application so endorsed must be returned to the applicant. Except as otherwise provided in subsection 12, if the application is approved, the applicant may, on receipt thereof, proceed with the construction of the necessary works and take all steps required to apply the water to beneficial use and to perfect the proposed appropriation. If the application is rejected, the applicant may take no steps toward the prosecution of the proposed work or the diversion and use of the public water while the rejection continues in force.

78. If:

- (a) The State Engineer receives an application to appropriate any of the public waters, or to change the point of diversion, manner of use or place of use of water already appropriated;
- (b) The application involves an amount of water exceeding 250 acre-feet per annum;
- (c) The application involves an interbasin transfer of groundwater; and
- (d) Within 7 years after the date of last publication of the notice of application, the State Engineer has not granted the application, denied the application, held an administrative hearing on the application or issued a permit in response to the application, the State Engineer shall provide notice and publication of the application and a new protest period in the same manner as when the application was originally submitted, in accord with NRS 533.360 and 533.363, of 45 days in which a person who is a successor in interest to a protestant or an affected water right owner may file with the State Engineer a written protest against the granting of the application.

~~Such notification of this new protest period shall~~ must be entered concurrently on the Internet website of the State Engineer, ~~and must, concurrently with that notification, be mailed to the board of county commissioners of the county of origin.~~ The applicant must pay the cost for re-publication. Re-publication must occur 6 months prior to any pre-hearing conference, administrative hearing or granting the application.

(e) The date of priority for any application re-noticed pursuant to this subsection 78 remains the same as the date of original filing.

89. Except as otherwise provided in subsection 10, a person who is a successor in interest to a protestant or an affected water right owner who wishes to protest an application in accordance with a new period of protest noticed pursuant to subsection 8 shall, within 45 days after the date on which the notification was entered and mailed, file with the State Engineer a written protest that complies with the provisions of this chapter and with the regulations adopted by the State Engineer, including, without limitation, any regulations prescribing the use of particular forms or requiring the payment of certain fees.

940. If a person is the successor in interest of an owner of a water right or an owner of real property upon which a domestic well is located and if the former owner of the water right or real property on which a domestic well is located had previously filed a written protest against the granting of an application, the successor in interest must be allowed to pursue that protest in the same manner as if the successor in interest were the former owner whose interest he or she succeeded. If the successor in interest wishes to pursue the protest, the successor in interest must notify the State Engineer on a form provided by the State Engineer.

104. The provisions of subsections 1 to 6, inclusive, do not apply to an application for an environmental permit.

112. The provisions of subsection 7 do not authorize the recipient of an approved application to use any state land administered by the Division of State Lands of the State Department of Conservation and Natural Resources without the appropriate authorization for that use from the State Land Registrar.

123. As used in this section:

(a) "County of origin" means the county from which groundwater is transferred or proposed to be transferred.

(b) "Domestic well" has the meaning ascribed to it in NRS 534.350.

[63:140:1913; A 1945, 87; 1947, 777; 1949, 102; 1943 NCL § 7948]—(NRS A 1959, 554; 1973, 865, 1603; 1977, 1171; 1981, 209, 359; 1989, 319; 1991, 759, 1369; 1993, 1459, 2082, 2349; 1995, 319, 697, 2523; 1999, 1045; 2001, 552; 2003, 2980; 2005, 2561; 2007, 2017; 2009, 597)