

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

IN THE MATTER OF APPLICATIONS )  
54073 AND 54074 FILED TO )  
APPROPRIATE THE UNDERGROUND )  
WATER FROM THE GARNET VALLEY )  
HYDROGRAPHIC BASIN (216) AND )  
THE HIDDEN VALLEY HYDROGRAPHIC )  
BASIN (217), CLARK COUNTY, )  
NEVADA. )

RULING ON REMAND

#5143

GENERAL

I.

Applications 54073 (Garnet Valley) and 54074 (Hidden Valley) were granted by State Engineer's Ruling No. 5008, dated March 20, 2001. Dry Lake Water, LLC, et al. (Dry Lake) appealed said ruling. By decision, dated December 18, 2001, the District Court remanded the matter to the State Engineer with instructions for the State Engineer to consider specific issues.

A review of Dry Lake's First Amended Petition, dated September 6, 2001, indicates that Dry Lake asserts that since it had an agreement with the Las Vegas Valley Water District (LVVWD) which provided that Dry Lake's junior water right application (Application 64038) in Hidden Valley may be heard before the LVVWD's senior application, the State Engineer erred in acting on the LVVWD's request to proceed with action on Applications 54073 and 54074. Dry Lake asserts that the State Engineer should not have acted on the request without considering the agreement because, the LVVWD's request to act on the applications postdates the agreement with Dry Lake.

Dry Lake further asserts that because, the applications were not published within 30 days after the applications were filed they are void. Dry Lake also asserts that because the applications were not acted upon within 1 year they are void, but that if additional studies were needed, which could delay the 1-year requirement, the procedures of NRS § 533.368 must be satisfied. If the applications were void, Dry Lake alleges it is

next in line for the appropriation of water in Hidden Valley. The State Engineer notes this is not a correct statement of the facts because, Nevada Power Company's Applications 62997 and 62999 are senior in this groundwater basin to Dry Lake's Application 64038.

The District Court remanded the matter to the State Engineer for the purpose of permitting him to interpret certain provisions of Nevada Water law: NRS § 533.360(1) regarding notice and NRS § 533.370(2) regarding time for acting upon an application, and any other statutory provisions he deems applicable, in the context of Dry Lake's contentions and to determine whether or not there is a basis for them. The State Engineer was ordered to consider matters regarding notice, time, cancellation and Dry Lake's alleged "existing rights," and to determine if the agreement makes any difference.<sup>1</sup>

#### **FINDINGS OF FACT**

##### **I.**

The State Engineer must begin his review of the District Court's remanded questions with some general background as to the group of applications jointly filed by the LVVWD, these two being part of that group, and their unprecedented nature in the history of the Office of the State Engineer, in the history of the state of Nevada, and for that matter in the history of the United States. This is done for the purpose of setting the stage as to why the applications were not acted upon in one year, and why there were problems with processing the applications to publication within 30 days.

Applications 54073 and 54074 were filed on October 17, 1989, by the LVVWD. These applications were among a group of 146 applications filed on the same day and, which requested the appropriation of all the unappropriated water from nearly the

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<sup>1</sup> The State Engineer notes that it was his understanding that any argument as to the agreement was removed from this case, but since the district court has ordered him to address it he will.

entire eastern 1/3rd of the state of Nevada for importation in part to Las Vegas. This project became known as the Cooperative Water Project. The water source on which the applications were filed, as discussed in State Engineer's Ruling No. 5008, is what is known as the carbonate-rock aquifer, which is part of the carbonate-rock terrane, which covers much of the eastern 1/3rd of Nevada, some of Utah and Idaho with flow that also reaches California.

The entire aquifer system(s) on which these applications were filed presented a "great unknown" as was explained in depth in State Engineer's Ruling No. 5008. As provided in the ruling, historically, the State Engineer determined if water was available for appropriation using a perennial yield analysis specific to the particular groundwater basin from which an applicant requests to appropriate water. Perennial yield is ultimately limited to the maximum amount of natural recharge that can be salvaged for beneficial use.

The perennial yield of the Hidden Valley groundwater basin, as established by the U.S. Geological Survey, is 400 acre-feet annually and the perennial yield of Garnet Valley is 400 acre-feet with an additional 400 acre-feet of subsurface inflow.<sup>2</sup> As noted in State Engineer's Ruling 5008, it is assumed that all of the recharge in Hidden Valley is discharged as subsurface outflow into Garnet Valley where it picks up that recharge and flows into California Wash. However, as also discussed in State Engineer's Ruling No. 5008, the true facts as to how much water is in the aquifer, how the ground water in the hydrographic basins is connected, and many other factors were unknown at the time the applications were filed, and are still unknown today.

The 146 applications filed by the LVVWD were requesting the appropriation of huge quantities of water from these unquantified

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<sup>2</sup> See, State Engineer's Ruling No. 5008, p. 7, dated March 20, 2001, official records in the Office of the State Engineer.

carbonate-rock aquifers of eastern and southern Nevada, quantities far beyond the estimated perennial yield for these groundwater basins. For example, in Hidden Valley alone, Application 54074 requested a 10 cubic feet per second diversion rate, which if pumped 24 hours a day for 365 days a year, expands out to an amount equaling approximately 7,240 acre-feet of water pumped annually. Those 7,240 acre-feet are more than 18 times the established perennial yield for the groundwater basin. This quantity is enough water for a city of approximately 25,000 to 30,000 people being requested just from this one groundwater basin, which has a perennial yield of 400 acre-feet annually.

All together the 146 applications totaled over 800,000 acre-feet of water.<sup>3</sup> Not only was the size and scope of the importation project unprecedented in the history of the state and the Office, it was from a source of water that is unknown even today if it is capturable. Great controversy exists as to whether this aquifer (or aquifers, if the limestone rocks have been broken into blocks) can support the appropriation of substantial quantities of water, or whether pumping even small quantities of water will have unreasonable impacts to the environment and existing water rights.

As noted in Ruling No. 5008, the appropriation of water from the carbonate-rock aquifer historically was not generally considered in the analysis of water available for appropriation in these particular groundwater basins. However, in 1984, the Water Resources Division of the United States Department of Interior, Geological Survey proposed a 10-year investigation of the entire Carbonate Terrane.<sup>4</sup> The study was proposed because, the water

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<sup>3</sup> The State Engineer notes this number was eventually significantly reduced by letter, but the applications as filed requested this amount under a diversion rate expanded analysis. The State Engineer further notes some of the applications have been withdrawn.

<sup>4</sup> Memorandum dated August 3, 1984, from Terry Katzer, Nevada

resources of the Carbonate Terrane were not well defined, the data was sparse and the hydrology and geology of the area are complex. It has been known since 1984 that to arrive at some reasonable understanding of the carbonate-rock aquifer system, substantial amounts of money would be required to develop the science, a significant period of study would be required, and that "unless this understanding is reached, the development of carbonate water is risky and the resultant effects may be disastrous for the developers and current users."<sup>5</sup>

It was believed that developing a better scientific understanding would identify possible additional water resources that could be developed, would further the attempts to define the perennial yield of this water source, would protect current users, would allow the State Engineer to better understand the system, which would allow management for the benefit of all the people, and would further the knowledge needed by the Federal agencies for protection of their water rights and water-resource related interests.<sup>6</sup>

It was noted in the proposal, that this was not the first time a comprehensive investigation of the hydrology of the Carbonate Terrane in Nevada was considered, and that area-wide studies had been conducted by four different organizations to date. The 1984 United States Geological Survey memo indicates that given the "myriad possible avenues of hydrologic connection between the various aquifers and flow systems and the uncertainties of recharge and discharge mechanisms and processes,

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Office Chief, Water Resources Division, United States Department of Interior Geological Survey, Carson City, Nevada, to Members of the Carbonate Terrane Society.

<sup>5</sup> Ibid.

<sup>6</sup> See, State Engineer's Ruling No. 5008, dated March 20, 2001, and State Engineer's Order No. 1169, dated March 8, 2002.

an investigation of the hydrology of the carbonate-rock aquifers in Nevada is undoubtedly a difficult undertaking."<sup>7</sup>

The State Engineer finds that as of 1984, five years prior to the LVVWD filings, the carbonate-rock aquifers were known to exist, not much specific data existed on the carbonate-rock aquifers or their relationship to the basin-fill/alluvial aquifers and it was well known that significant additional study was needed to understand the water systems.

## II.

State Engineer's Ruling No. 5008 discusses how in 1985 the Nevada Legislature authorized a program for the study and testing of the carbonate-rock aquifers of eastern and southern Nevada. The program was a cooperative effort between the State of Nevada and the Federal Government. The overall plan for the program was to study the carbonate-rock aquifers of southern, east-central, and northeastern Nevada as separate phases of work, with a summary of findings to be prepared at the end of each phase.

The State Engineer finds the 146 applications filed by the LVVWD were filed right about the time this report was issued, and generally were the first in line to appropriate this unknown and unquantified source of water. The State Engineer finds the applications presented an unprecedented situation for review by the Division of Water Resources, and resulted in unprecedented protests from persons all over the state of Nevada. The State Engineer finds that the United States Geological Survey and the Desert Research Institute proposed that a strategy of staging developments gradually and adequately monitoring the resulting hydrologic conditions was the way to continue to study the resource and obtain necessary information that eventually could be

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<sup>7</sup> Memorandum dated August 3, 1984, from Terry Katzer, Nevada Office Chief, Water Resources Division, United States Department of Interior Geological Survey, Carson City, Nevada, to Members of the Carbonate Terrane Society, Attachment at 7.

used to improve confidence in the predictions of the effects of additional development of the resource. The State Engineer finds this gradual staging and monitoring is a study of the resource.

### III.

The 146 applications generated huge amounts of controversy and the filing of approximately 3,600 individual protests. Nothing like it had even been experienced by the Division of Water Resources. Even other places in the nation were watching as the Cooperative Water Project was considered because, the project was one of the biggest groundwater importation projects in the history of the United States. Just reviewing the project, applications and maps presented a substantial challenge to the Division of Water Resources. At that time, the State Engineer recalls there had been a turnover in numerous staff members, new engineers were being trained, and the Office was preparing to move. Further, as noted by the Nevada Supreme Court in one of its decisions,<sup>8</sup> the State Engineer employs a relatively small staff and struggles under a backlog of thousands of applications with some applications waiting processing for decades. The State Engineer finds the LVVWD filings presented challenges to the Division of Water Resources never before experienced.

### IV.

Dry Lake argues that since notice of the Applications was not sent to publication by November 16, 1989, 30 days after the October 17, 1989, filing date, the applications are void.

Nevada Revised Statute § 533.360(1) provides that when an application is filed in compliance with the chapter, the state engineer shall within 30 days publish or cause to be published a notice of the application in the appropriate newspaper.

Nevada Revised Statute § 533.350 provides that all applications for permits shall be accompanied or followed by such

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<sup>8</sup> Pyramid Lake Paiute Tribe of Indians v. Washoe County, 112 Nev. 743, 918 P.2d 697 (1996).

maps and drawings as may be prescribed by the State Engineer, and such accompanying data shall be considered a part of the application. (Emphasis added.) A review of the Applications both indicate under the remarks found in item 12 that the supporting map was to be prepared as soon as possible. One of the issues that presented a unique challenge in this massive filing was what kind of map or maps should accompany a project such as this. Maps normally cover a quarter quarter section, a quarter section, a section, or maybe a few sections, but never had one covered 1/3rd of the state of Nevada. After the filing of the applications, discussions took place with Water Resources staff members as to what kind of map was going to work for a project of this magnitude. Many seemingly standard procedures did not work for a project of this size, and the maps for the project were not filed until March 22, 1990.

While these applications were filed on October 17, 1989, the maps were not filed until March 22, 1990. The Applications were not complete and did not comply with NRS chapter 533 until the maps were filed, and the statute provides that an applicant can file their map after the actual application is filed.

As already noted, in the 1980's, the State Engineer's Office was struggling with a significant backlog of applications. More applications were being filed that could be physically processed by the staff of the agency. Further, the Office was in the process of preparing to move. As to the LVVWD filings, several factors created unique challenges. One challenge was just the physical processing of that many applications at the same time. Second, determining what kind of map to file. Third, the 146 applications generated enormous amounts of controversy.

The Office was working with the Applicant and moving the applications forward in the most expeditious manner it could. The processing of 146 applications takes time, and the Office was doing the best it could at that time. Further, when a group of

interrelated applications comes into the Office, they are not separated and worked on as if they were not a group, as was noted in the State Engineer's letter dated February 16, 1990.<sup>9</sup>

The filing of the applications was completed when the maps were filed on March 22, 1990. The applications were sent to publication on May 9, 1990. The State Engineer admits this is 18 days past the 30-day time frame for sending applications to publication, but there is nothing in the law that indicates that the Applicant should be punished by the Office's inability to process the applications more quickly. The engineering aspects of this massive filing were extremely complicated, and all the applications were interrelated.

The State Engineer finds that an application is not filed in compliance with the chapter and is not complete without the map. Nevada Water Law provides by statute that the map can follow after the filing of the application.<sup>10</sup> The State Engineer finds an application is not ready to go to publication until the map is also filed. The State Engineer finds while publication was 18 days late, this is harmless error, and the Applicant was fully aware of the problems and was working with the State Engineer's Office.

The State Engineer finds Nevada Water Law does not provide a penalty and does not support Dry Lake's argument that an applicant is penalized when the State Engineer cannot make the 30-day deadline, particularly when the inability to process the huge workload within 30 days is the result of the Applicant's filing. There is no complaint from the Applicant here. The State Engineer

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<sup>9</sup> File Nos. 54073 and 54074, official records in the Office of the State Engineer.

<sup>10</sup> NRS § 533.350.

finds others have argued that failure to meet statutory time lines results in the granting of an application, a position as meritless as the one taken by Dry Lake.

The State Engineer finds that while the letter of the law was not met, the spirit of working with Applicant was met to the best of the agency's ability at that time. The State Engineer finds these applications presented a situation the likes of which the Office had never had to address before. The State Engineer finds that the Office does not regularly separate a group of interrelated filings such as those in this instance into individual files to be considered separately, but rather works on them as a group, and may hold the entire group for processing if some of them need correcting or the filing of a map, etc.

The State Engineer finds it is his job to work with applicants in the best manner he can while, of course, always trying to meet statutory deadlines, but in this instance that was just not possible. The State Engineer finds he does not believe an applicant should be punished when his staff cannot meet the demands placed upon the agency nor is there any support for such argument in the Nevada Water Law.

v.

The District Court ordered the State Engineer to consider any other statutory provision of Nevada Water Law he deems applicable in the context of Dry Lake's contentions. Dry Lake did not raise the issue of NRS § 533.355(2) return for correction in its First Amended Petition nor in its Memorandum of Points and Authorities in Support of Amended Petition for Judicial Review, but does raise the issue in Petitioners' Reply in Support of Amended Petition for Judicial Review wherein Dry Lake argues that Applications 54073 and 54074 were cancelled in early 1990 pursuant to NRS § 533.355.

Nevada Revised Statute § 533.355(2) provides that if the application is found to be defective, it must be returned for correction or completion with the advice of the reasons it is

being returned, and the date of the return must be endorsed upon the application and a record made of it in the State Engineer's Office. If the applicant returns the application within the 60-day statutory time frame after it is returned, it will retain its priority date. If it is not timely returned, the state engineer shall cancel the application. However, if an applicant requests within the 60-day time frame an additional 60 days, the state engineer may extend the time for good cause shown.

Dry Lake argues that the LVVWD received notice no later than December 13, 1989, that the Applications needed to be corrected. Dry Lakes argues that since corrected applications were not returned by February 11, 1990, they were cancelled. Dry Lake's argument appears to center around a letter in the files dated December 13, 1989. This letter is not addressed to the applicant, but rather, it is addressed to the Clark, Nye, White Pine and Lincoln County Commissioners and indicates that the State Engineer's Office was awaiting the submittal of additional information before processing the Applications. Dry Lake is ignoring other statutory provisions and appears to assert that a state engineer's request for additional information is the same as a return for correction. Dry Lake is mistaken, as they are two different statutory provisions.

The applications at issue here were filed on October 17, 1989. There is no endorsement on either application that they were returned for correction nor is there a letter in the file to the Applicant indicating any deficiencies with these particular applications.<sup>11</sup> The December 13, 1989, letter to the counties from the State Engineer merely notified the relevant counties that the applications had been filed, but that the State Engineer was awaiting additional information, including the supporting maps before continuing to process the applications. This letter was

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<sup>11</sup> File Nos. 54073 and 54074, official records in the Office of the State Engineer.

not addressed to the Applicant, which if it was a returned for correction letter it would have been. As noted in the letter, the State Engineer was going to formally notice the counties under the provision of NRS § 533.363 at a later date.<sup>12</sup> This letter was sent merely as a courtesy advance notification, so that the counties could have adequate time to contemplate the complexity of the filings.

The State Engineer finds there is nothing in the record of these Applications that they were returned for correction. The State Engineer finds the applications were not complete until a map was filed, and the maps did not arrive at the Office of the State Engineer until March 22, 1990. The State Engineer finds that he was not able to process the applications until they were complete. The State Engineer finds the records indicate the State Engineer was working with the Applicant as to all the filings concurrently, and the supplemental information and supporting map were filed on March 19 and 22, 1990, respectively.<sup>13</sup> The State Engineer finds that the December 13, 1989, letter to the counties is not a return for correction letter nor indicates the applications were returned for correction as asserted by Dry Lake. The letter provides no direction to the Applicant that corrections were needed and as stated earlier was addressed to the counties not the Applicant. The State Engineer finds Dry Lake's argument as to the December 13, 1989, letter is without merit.

#### VI.

Dry Lake argues because NRS § 533.370(2) requires the State Engineer process applications within a 1-year statutory deadline from the final date for filing a protest, and since that was not done, the applications at issue here are void. There are several

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<sup>12</sup> See, letter dated May 9, 1990, File Nos. 54073 and 54704, official records in the Office of the State Engineer.

<sup>13</sup> File Nos. 54073 and 54074, official records in the Office of the State Engineer.

reasons these applications were not processed within the 1-year time frame. First, as previously noted, the applications themselves overwhelmed an agency already struggling under a significant backlog. Second, the importation project is unprecedented, and the filings raised many complex and controversial issues. Third, additional studies were needed past those that had already been conducted because, as discussed in Ruling No. 5008, no determination could be made as to whether there was unappropriated water available due to the complexities and the unknowns of the system.

The State Engineer notes that over the years other entities have argued that failure to act within the 1-year statutory time frame should result in an application being granted. This argument cannot be accepted as it does not take into consideration whether there is even water available to be appropriated in a groundwater basin, whether the appropriation would impact existing rights or whether any of the issues raised by any protest that may have been filed has merit or not. Dry Lake now makes the opposite argument, which is that failure to act within the 1-year statutory time frame voids an application. This argument also lacks merit.

The State Engineer first notes that nothing in Nevada Water Law supports either argument; there are no clear statutory consequences for not acting within the 1-year time frame, and given the dramatic impact that would be caused if either argument were to be accepted, the State Engineer does not believe the legislature would intend such consequences, and it would be inappropriate to conclude such an intent. Further, allowing either argument to prevail will be inconsistent with past practices and will bring great instability to Nevada Water Law and to those holding water right applications, permits and certificates. A rule that all applications not acted on within the 1-year statutory time frame are granted or void would create

havoc across the state and is unacceptable in light of the workload of the Office of the State Engineer.

The 1-year statutory time frame is a statutory relic left from a much simpler time when processing water right applications was considerably different than what is presented to the State Engineer today. The population of the state of Nevada was less than 100,000 people until the 1950's. Between 1905 and 1950, a little over 13,000 water right applications had been filed, averaging about 288 applications for each year. Between 1950 and 1979 about 27,000 water right applications were filed averaging about 931 applications per year. Between 1980 and the present an additional 28,900 water right applications were filed averaging about 1,313 applications per year.

Today there are over 3,100 water right applications pending that have not been acted on within the 1-year statutory time frame and of those over 1,470 are protested applications. While not specifically researching all 3,100 files, the State Engineer doubts that very few have agreements between the applicant and protestant to postpone action. There are approximately 5,906 active water right permits and 13,922 active certificated water rights on file with the Office of the State Engineer, and of those approximately 4,800 were applications that were not acted on within the 1-year statutory time frame prior to the water right being granted. This translates to approximately 25% of the active permitted and certificated water rights that exist in Nevada today would be affected if a court were to determine they were void because they had not been acted on within the 1-year statutory time frame. The havoc such a determination could cause is unimaginable. Are these water rights that are used in municipal systems all over the state? Do these rights represent 30%, 50% or 70% of the water being used by people in the state of Nevada today? The 1-year statutory provision has presented problems to

the agency for decades as noted by the Nevada Supreme Court,<sup>14</sup> and the legislature has been aware for years there has been a substantial backlog of applications.

Second, the importation project is unprecedented. The filings raised many complex and controversial issues. The issues are not easily resolved and involved many, many parties. For example, in this instance, not only was the project unprecedented, there were approximately 3,600 protests filed. And, as is discussed in State Engineer's Ruling No. 5008, the quantity of water available in the source was and is an unknown still today.

Third, additional studies were needed past those that had already been conducted because, as discussed in Ruling No. 5008, no determination could be made as to whether there was unappropriated water available or not due to the complexities and the unknowns of the system and the fact that these applications were requesting water from the carbonate-rock aquifer system.

Dry Lake argues that if studies were needed the State Engineer had to comply with the provisions of NRS § 533.368. Dry Lake misstates the relevant statutory law the parties were acting under at the time these applications were filed. Nevada Revised Statute § 533.370(2) was amended in 1999 to address NRS § 533.368, which was not even enacted until 1991. Therefore, Dry Lake is mistaken as to assertion that NRS § 533.368 had to have been complied with in 1989-1990 time frame.

Until 1999, NRS § 533.370(2) provided that:

Except as otherwise provided in subsection 5, the state engineer shall either approve or reject each application within 1 year after the final date for filing protest.

However:

(a) Action can be postponed by the state engineer

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<sup>14</sup> Pyramid Lake Paiute Tribe of Indians v. Washoe County, 112 Nev. 743, 918 P.2d 697 (1996).

upon written authorization to do so by the applicant or, in the case of a protested application, by both the protestant and the applicant; and

(b) In areas where studies of water supplies are being made (emphasis added) or where court actions are pending, the state engineer may withhold action until it is determined there is unappropriated water or the court action becomes final.

This provision of the law allowed an applicant and protestant to agree to postpone action, but also separately provides the State Engineer with the authority to withhold action where studies of water supplies are being made. This provision of the law has not been interpreted by the State Engineer to be conjunctive, that is requiring agreement among the parties before the State Engineer can decide whether to proceed with action or not. It is the State Engineer who determines when more study is needed, and in this case the applicant already knew more study was required and proceeded on its own to study the area in anticipation that the State Engineer would need additional information. If the provision is interpreted to be conjunctive, the ability to move studies forward could be thwarted by an applicant or protestant not willing to agree to postpone. The language of the statute in effect at the time these applications were filed did not require a determination by the State Engineer that studies were needed, but rather allowed the State Engineer to postpone if studies were underway, and in this case, as discussed below, they were under way. Everyone knew that more study was needed as to the appropriation of water from the carbonate-rock aquifer. If this applicant or a protestant could not provide the necessary data within one year from the protest date it makes no sense to just cut them off, particularly when the next applicant or protestant in line has to provide the same information. Without sufficient information all that would have resulted would have been denial of all the applications for carbonate-rock aquifer water, including Dry Lake's applications. The following facts demonstrate a study

period was necessary for proceeding with the LVVWD and carbonate-rock aquifer system applications. Many of the protestants presented arguments that too little was known about the carbonate-rock aquifer system and much more study was necessary before the State Engineer could consider the LVVWD's applications. In fact, petitions were filed asking the State Engineer to stay acting on the applications. In Petitioners' Memorandum of Points and Authorities in Support of Amended Petition for Judicial Review they completely take out of context a statement of the State Engineer.<sup>15</sup> They cite to the State Engineer's statement that he has no latitude in sending the applications to publication. This statement was made in the context of petitions to stay action on the applications.

A pre-hearing conference was held in January 1991.<sup>16</sup> A status conference was then held in September 1991, and at that status conference the State Engineer indicated, "[w]e had initially thought the only way we could attack this animal would be to go basin-by-basin."<sup>17</sup> The State Engineer indicated that:

We are going to begin with the basins that had the least amount of protests. As we got further into that prehearing conference it was evident we weren't talking about individual basin recharge versus discharge; that the applicant was seeking to appropriate water more on a regional basis. At any rate, at the prehearing conference there was a cry, so to speak, from the protestants that there wasn't enough information coming out of the applicants in order for them to prepare an adequate case or prepare their protest. So we ordered that there be informational briefings, one in each of the counties affected by these appropriations.

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<sup>15</sup> Memorandum at p. 10.

<sup>16</sup> Transcript, public administrative hearing before the State Engineer, September 17, 1991.

<sup>17</sup> Transcript, p. 6, public administrative hearing before the State Engineer, September 17, 1991.

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[T]his is strictly a status conference to see how far we have come since January and how much information has been developed, how much information has been exchanged, how much information has yet to be developed, and how much information is yet to be exchanged.

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I don't want to make this an evidenciary [sic] hearing. I don't expect to hear any testimony or any statements... Our main purpose for being here today is to see how negotiations have gone along, to see how studies have come along, ...<sup>18</sup> (Emphasis added.)

The State Engineer held meetings throughout the region in 1991 and 1992 just trying to figure out how to proceed and how to conduct hearings with many, many participants. Status conferences were held and motions were filed asking the State Engineer to delay acting on the applications for a several year period of time while additional study was undertaken.<sup>19</sup> It was well known from the 1984 USGS memo and the 1989 legislative report<sup>20</sup> that significant study had to be done as to the water source, and that no one entity could conduct the study.

Additional status conferences were held in March 1992 and August 1992.<sup>21</sup> Also, during this time (1992 through 1995), the LVVWD was preparing a series of reports to further the study process in the valleys where it had requested appropriations. See, for example:

1. Hydrology and Interactive Computer Modeling of Ground and

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<sup>18</sup> Id. at 6-8.

<sup>19</sup> File Nos. 54073 and 54074, official records in the Office of the State Engineer.

<sup>20</sup> See, State Engineer's Ruling No. 5008.

<sup>21</sup> Transcript, public administrative hearing before the State Engineer, March 18, 1992, and August 13, 1992, official records in the Office of the State Engineer.

- Surface Water in the Lower Virgin River Valley, Primarily in Clark County, Nevada;<sup>22</sup>
2. Addendum to Hydrology and Interactive Computer Modeling of Ground and Surface Water in the Lower Virgin River Valley, Primarily in Clark County, Nevada;<sup>23</sup>
  3. Environmental Report of the Virgin River Water Resource Development Project, Clark County, Nevada;<sup>24</sup>
  4. Hydrology and Steady State Ground-Water Model of Coyote Spring Valley, Clark and Lincoln Counties, Nevada;<sup>25</sup>
  5. Hydrology and Steady State Ground-Water Model of Three Lakes Valley South, Clark County, Nevada;<sup>26</sup>
  6. Hydrology and Steady State Ground-Water Model of Three Lakes Valley North, Clark County, Nevada;<sup>27</sup>
  7. Hydrology and Steady State Ground-Water Model of Tikaboo Valleys North and South, Clark and Lincoln Counties, Nevada;<sup>28</sup>

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<sup>22</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 1, Hydrographic Basin 222 (1992).

<sup>23</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 1-A, Hydrographic Basin 222 (1993).

<sup>24</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 2, Hydrographic Basin 222 (1992).

<sup>25</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 3, Hydrographic Basin 210 (1992).

<sup>26</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 4, Hydrographic Basin 211 (1992).

<sup>27</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 5, Hydrographic Basin 168 (1992).

<sup>28</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 6, Hydrographic Basin 169A & B (1992).

8. Evaluation of the Maxey-Eakin Method for Calculating Recharge to Ground-Water Basins in Nevada;<sup>29</sup>
9. Hydrology and Steady State Ground-Water Model of Coal and Garden Valleys, Lincoln and Nye Counties, Nevada;<sup>30</sup>
10. Hydrology and Steady State Ground-Water Model of Snake Valley, East-Central Nevada, and West-Central Utah;<sup>31</sup>
11. Hydrology and Steady State Ground-Water Model of Pahroc Valley, Lincoln and Nye Counties, Nevada;<sup>32</sup>
12. Hydrology and Steady State Ground-Water Model of Cave Valley, Lincoln and White Pine Counties, Nevada;<sup>33</sup>
13. Hydrology and Steady State Ground-Water Model of Spring Valley, Lincoln and White Pine Counties, Nevada;<sup>34</sup>
14. Environmental Report Covering Selected Hydrographic Basins in Clark, Lincoln, Nye and White Pine Counties, Nevada;<sup>35</sup>
15. Research and Analysis of Delayed Yield Effect;<sup>36</sup>

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<sup>29</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 7 (1992).

<sup>30</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 8, Hydrographic Basins 171 & 172 (1993).

<sup>31</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 9 (1993).

<sup>32</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 10, Hydrographic Basin 208 (1993).

<sup>33</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 11, Hydrographic Basin 180 (1993).

<sup>34</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 13, Hydrographic Basin 184 (1994).

<sup>35</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 14 (1994).

<sup>36</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 15 (1995).

16. Hydrology and Steady State Ground-Water Model of Dry Lake and Delamar Valleys, Lincoln County, Nevada;<sup>37</sup> and
17. Mountain Front Runoff and Ground-Water Recharge in East Central Nevada.<sup>38</sup>

During this time frame of study, in August 1993 another pre-hearing conference was held,<sup>39</sup> and in January 1994 the State Engineer held the first hearing on the Cooperative Water Project applications covering Virgin River applications.<sup>40</sup>

The State Engineer finds that action was postponed on these applications because studies were taking place in order to further the information necessary for the State Engineer to consider all the applications. The State Engineer finds since the 1980's the Division of Water Resources has worked under a substantial backlog of applications and the legislature is fully aware of this fact and has not changed Nevada Water Law enacting the penalty Dry Lake argues for and finds he does not believe the legislature would intend such an impact.

#### VII.

As noted in Ruling No. 5008, undertaking one comprehensive study of the regional aquifer system was next to impossible for any one individual or entity to take on by itself. Therefore, to continue to study the area required the actual pumping of water. In the mid-1990's, applicants were pushing to move forward.

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<sup>37</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 16 (1994).

<sup>38</sup> Las Vegas Valley Water District, Cooperative Water Project, Water for Nevada's Future, Report No. 17 (1995).

<sup>39</sup> Transcript, public administrative hearing before the State Engineer, August 3, 1993, official records in the Office of the State Engineer.

<sup>40</sup> Transcript, public administrative hearing before the State Engineer, January 1-12, 1994, official records in the Office of the State Engineer.

As noted in Ruling No. 5008, from December 1993 to April 1994 an aquifer test of wells in the carbonate-rock aquifer was conducted under Applications 55450 and 58269, whereby 2,900 gallons per minute (6.46 cubic-feet per second) was pumped for 121 days for a total of 1,500 acre-feet of water.<sup>41</sup> This quantity of water is far less than that being requested under the LVVWD's applications. Water levels in several carbonate and alluvial wells were monitored throughout the test, and discharge from certain springs within the Muddy River Springs Area groundwater basin was also measured.

In January 1995, the State Engineer conducted a public administrative hearing to consider the Moapa Valley Water District's Applications 55450 and 58269,<sup>42</sup> which were filed for a total appropriation of 8 cubic feet per second of water from the carbonate-rock aquifer out of the Arrow Canyon well in the Muddy River Springs Hydrographic Basin. Applications 55450 and 58269 were protested by Nevada Power Company, the U.S. National Park Service, and the U.S. Fish and Wildlife Service all raising concerns about the impact of pumping water from the carbonate-rock aquifer system water. At the administrative hearing, protestants made arguments that the pump test should run for a minimum of one year, and that the diversion rates pumped were not realistic to what was actually being requested under the applications; therefore, the results did not accurately reflect the potential long-term impacts.

As a result of the protests, the Moapa Valley Water District submitted a phased aquifer test plan to the State Engineer for approval. The plan had two phases, a 72-hour pump test and a 120-

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<sup>41</sup> See, State Engineer's Ruling No. 5008, dated March 20, 2001, citing to State Engineer's Ruling No. 4542, dated June 19, 1997, official records in the Office of the State Engineer.

<sup>42</sup> State Engineer's Ruling No. 4243, dated October 27, 1995, official records in the Office of the State Engineer.

day pump test. In State Engineer's Ruling No. 4243 on Applications 55450 and 58269, he noted that flows from the springs in the Moapa Wildlife Refuge had to be monitored as the first step in protecting the habitat of the endangered Moapa Dace,<sup>43</sup> that there was a degree of uncertainty inherent in the estimates of water availability,<sup>44</sup> and that pumping under some of the water rights issued in the source would help lead to better information.

The State Engineer found in State Engineer's Ruling No. 4243 that the results from the 121-day pump test were not sufficient to accurately predict long-term impacts to the carbonate and alluvial aquifers, but that a realistic way to assess long-term impacts was to allow additional pumping of the Arrow Canyon well while implementing a comprehensive monitoring program on wells in the carbonate and alluvial aquifers, the springs in the Muddy River Springs Area, and the Muddy River.<sup>45</sup> The State Engineer noted that it was not possible to predict the pumping rate that would cause unacceptable conditions with the information presently on record. The State Engineer in Ruling No. 4243 set up a program to continue study of the carbonate-rock aquifer by allowing additional pumping at diversion rates incrementally increasing through the year 2004 accompanied by significant monitoring.

The next step in testing and study of the resources of the carbonate-rock aquifer system came in 1997 when the State Engineer addressed filings by Nevada Power Company in Coyote Springs Valley, upgradient from Hidden and Garnet Valley, but believed to contribute flow to Hidden and Garnet Valleys.<sup>46</sup> In State

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<sup>43</sup> Id. at 8.

<sup>44</sup> Id. at 9.

<sup>45</sup> Id. at 13.

<sup>46</sup> State Engineer's Ruling No. 4542, dated June 19, 1997, official records in the Office of the State Engineer.

Engineer's Ruling No. 4542,<sup>47</sup> the State Engineer addressed Nevada Power Company's Application 46777 filed to appropriate 55.0 cfs, not to exceed 40,000 acre-feet annually, of ground water from the Coyote Springs Valley. This is an enormous quantity of water at an unheard of diversion rate. The Nevada Department of Wildlife and U.S. Fish and Wildlife Service who were concerned about the discharge from the Muddy River Springs protested the application. In Ruling No. 4542, the State Engineer again discussed the carbonate-rock aquifer as a regional flow system, addressed that the quantity available for appropriation was unknown, and whether additional diversion would interfere with the spring flow in the Muddy River Springs Area groundwater basin or with existing water rights. The State Engineer discussed the aquifer test referred to above, noted the point of diversion requested was 9 miles north of the Arrow Canyon well, that the well requested as the point of diversion had been pumped tested as part of the MX missile program and the well had demonstrated a capacity to pump a significant quantity of water. As noted in the ruling, "[d]ata to address the question of interference with existing water rights is currently being sought through a monitoring plan conducted by Moapa Valley Water District under Permits 55450 and 58269."<sup>48</sup> "The State Engineer has previously stated, in the ruling under Applications 55450 and 58269, that the only way to know whether or not long term pumping of the carbonate aquifer at high diversion rates will affect the alluvial aquifer, springs, Muddy River and water right holders is to allow pumping to occur and monitor the aquifers, springs and river through a comprehensive monitoring program."<sup>49</sup>

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<sup>47</sup> State Engineer's Ruling No. 4542, dated June 19, 1997, official records in the Office of the State Engineer.

<sup>48</sup> State Engineer's Ruling No. 4542, p. 10, dated June 19, 1997, official records in the Office of the State Engineer.

<sup>49</sup> Ibid.

The State Engineer ultimately permitted an additional quantity of water to be appropriated under the Nevada Power Company Application in Coyote Springs Valley,<sup>50</sup> and merged monitoring plans with other water rights permitted in the region.

The State Engineer finds NRS § 533.370(3) provides that the State Engineer must reject applications where there is no unappropriated water. The State Engineer finds studies were taking place before and after the filing of the LVVWD applications and is still needed today to determine the question of if unappropriated water is available from the carbonate-rock aquifer, whether there will be impact to existing rights or whether appropriation of water from this source will threaten to prove detrimental to the public interest.

The State Engineer finds in light of the lack of knowledge the applications could not have been acted on in the 1-year statutory time frame, but rather significant study needed to be done and was done by the process of acting on some applications in order that information could be obtained by pumping some initial water rights, installing monitoring wells and monitoring the springs in the surrounding area, before additional appropriations of water could be allowed. The State Engineer finds real world pumping data was necessary to further the knowledge and see how the aquifer was going to react to pumping stresses. The State Engineer finds that is what was to be accomplished by the water

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<sup>50</sup> The State Engineer denied the remaining water right requested for appropriation under Nevada Power Company's 1983 application on Coyote Springs Valley, and in 1999 denied applications filed by Nevada Power Company in Garnet Valley, California Wash and Hidden Valley for reasons unrelated to the water source, that is that Nevada Power Company already had enough water to serve the demands of the Harry Allen power plant. However, a stipulation in settlement of litigation has revived those applications, but they are junior in priority to the LVVWD's applications, but senior to Dry Lake's application in Hidden Valley, and will have to be considered before Dry Lake's application.

rights granted in the 1995 and 1997 rulings, which provided that pumping of water rights was conditioned on data being collected to study the potential impacts and if any additional water was available for appropriation from the carbonate-rock aquifer in the geographic area that is also relevant in this case. The State Engineer finds this is the same reasoning behind the granting of additional water rights under Applications 54073 and 54074.

The State Engineer finds that the statutory 1-year deadline did not have to be met, because action was postponed so that necessary studies could continue. The State Engineer finds his authority to await studies is not dependent on agreement between the applicant and protestant. The State Engineer finds a point was reached where the study process had to continue through the actual pumping of water, because the question of unappropriated water was so amorphous. The State Engineer finds that through the permitting of other applications the study process continued and is continuing today, and this is the only way the necessary information can be obtained.

The State Engineer finds that most everyone involved with filing for appropriations on the system appears to have understood and accepted this fact. The State Engineer finds there is nothing in Nevada Water Law that provides if he does not act within the 1-year time frame that the application is void and the State Engineer does not believe the legislature ever intended such a consequence. The State Engineer finds that by granting the LVVWD a substantial quantity of water in the Hidden Valley and Garnet Valley hydrographic basins it presented the opportunity for continued testing of the carbonate-rock aquifer system, but by an entity with water to mitigate potential impacts.

The State Engineer finds that if Dry Lake's argument were allowed to be successful everyone loses as far as the carbonate-rock aquifer is concerned. It could result in the denial of all of the applications before the State Engineer for carbonate-rock

aquifer water because, the State Engineer is unable to say with certainty there is unappropriated water available, existing rights will not be impacted or whether appropriation of the water threatens to prove detrimental to the public interest. This would result in no progress ever being made forward as to whether this is a significant resource that can be tapped to serve the citizens of Nevada. The State Engineer finds study of the regional flow system has been taking place for over a decade. If Dry Lake's argument were accepted that all pending applications over 1-year old are void it would create complete havoc in the state of Nevada as many, many applications that were acted on past the 1-year time frame are for water that is being used today. The State Engineer finds the carbonate-rock aquifer system is too complex with potential irreversible impacts to act quickly or imprudently on pending applications.

#### VIII.

On September 28, 1999, an Agreement and Restrictive Covenant was filed in the Office of the State Engineer in reference to Application 54074. This agreement between the LVVWD and Dry Lake indicates that Dry Lake holds Application 64038, which is junior in priority to the LVVWD's Application 54074. The Agreement further indicates that Dry Lake also has other applications to appropriate water from the carbonate-rock aquifer. The agreement provides that the LVVWD was willing to agree that the State Engineer may consider Dry Lake's application prior to and without regard to the LVVWD's superior priority. As previously noted, this agreement does not account for the fact that Nevada Power Company has applications that have not been acted on with priorities senior to Dry Lake's and does not bind the State Engineer.

When the LVVWD requested the State Engineer act on Applications 54073 and 54074 he did so, because the applications are in the name of the LVVWD. The State Engineer acknowledges the

agreement was in the application file, but since it was the LVVWD as the applicant requesting that he take action he did not take the agreement into consideration and it makes no difference to his decision. He is not a party to the agreement, and does not resolve contract disputes between private parties.

Over the years, a couple of these agreements have been presented to the State Engineer as to the LVVWD filings. They were apparently a way the LVVWD was attempting to deal with others with pending applications in particular groundwater basins junior to the LVVWD's filings. However, these agreements have always caused State Engineers concern. The State Engineer is not a signatory to these agreements and he believes such an agreement is not binding on him. Nevada is a prior appropriation system as established under Nevada Water Law, and priorities of appropriation mean a great deal. The agreement has the ability to cause disruption and controversy among appropriators. It does not provide that the LVVWD's application was assigned to Dry Lake, and it does not and cannot change the priority date of Dry Lake's application.

An example of the problems it could cause is that while the agreement says that the State Engineer may consider Dry Lake's application before the LVVWD's, it makes no reference to the fact that there is another application held by Nevada Power Company between their two applications and Nevada Power Company has a right to have its application heard before Dry Lake's as it has a priority senior to Dry Lake's application. The agreement does not say that the LVVWD ultimately will give up its priority or application, but rather only indicates that the applications could be considered out of order. The LVVWD cannot subordinate its priority by agreement. In accordance with NRS § 533.355, the priority date on the application is what it is in the records of the Office of the State Engineer. It is established by law, not some arbitrary agreement among applicants and protestants. What

happens when the LVVWD comes to the State Engineer, asks him to act on its application, and then the State Engineer comes to find out there is only enough water for the LVVWD's appropriation? Does he cut Dry Lake off? Its priority date is junior. What happens when the State Engineer acts on Nevada Power Company's senior application and finds out there is not enough water for Nevada Power Company's water right and Dry Lake's. Does he cut off Dry Lake's water? This would create havoc.

Dry Lake argues that in the context of NRS § 533.370(3) the agreement demonstrated "existing rights" the State Engineer should have considered. Again, the State Engineer believes Dry Lake misinterprets the law. Existing rights under NRS § 533.370(2) refers to water rights, not contract rights, and Dry Lake has no water rights in these groundwater basins. Dry Lake is attempting to twist the law into meaning something it was never intended to mean.

The State Engineer finds since the Applicant requested that he take action he did not take the agreement into consideration and it makes no difference to his decision. He is not a party to the agreement, and does not resolve contract disputes between private parties. The State Engineer finds the agreement did not create water rights, and therefore, need not be considered under the provision of NRS § 533.370(2).

#### **IX.**

The water right applications filed by Dry Lake, like those filed by the LVVWD, are requesting to appropriate water from the carbonate-rock aquifer(s). It is unknown to this date if any water can be appropriated from this source. It was known that significant study was needed to understand that question and is still needed today. Study has been on going under particular water right applications for years. It was understood that because no single entity could do the study, proceeding with a few of the applications from this water source was an approach that

could be taken to obtain hard science. The granting of water rights in 1995 and 1997 and making them part of the study process was the method decided upon in approaching the problem of needing additional information.

The State Engineer in State Engineer's Ruling No. 5008, indicated that the only way the additional science was going to be obtained, since the many paper studies done to date have not helped answer the questions, was to grant smaller, but yet significant, quantities of water to stress the system and see how it reacts. The State Engineer finds that all the theoretical models in the world mean very little without real world data entered into them. That is exactly what he decided to do under Ruling No. 5008 at the request of the Applicant, and by doing so added another piece to the study from a different hydrographic basin.

The State Engineer finds when the LVVWD requested he act on Applications 54073 and 54074, and further substantially reduced the quantity of water requested under those applications, it gave him an opportunity to use those applications to further the study of the aquifer(s). The State Engineer finds those applications were granted in part, because the LVVWD has water resources it can use to mitigate impacts to the environment or existing water rights. The State Engineer finds those applications were also granted in part due to the Governor's concern over electric power production being sufficient for the uses in Nevada, and the Governor's energy plan, which was to expedite the building of some power plants in Nevada. The State Engineer finds that Dry Lake has no "existing water rights" because, the agreement did not and could not create water rights.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>51</sup>

**II.**

The State Engineer concludes he has addressed the issues remanded by the District Court.

**RULING**

The District Court remanded this matter to the State Engineer for further consideration, which he has done. After reviewing the arguments made pertaining to NRS §§ 533.355, 533.360, 533.370, and the agreement, the State Engineer affirms State Engineer's Ruling No. 5008.

HUGH RICCI, P.E.

*Hugh Ricci, P.E.*  
State Engineer

HR/SJT/jm

Dated this 22<sup>rd</sup> day of  
July, 2002.

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<sup>51</sup> NRS chapters 533 and 534.