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

IN THE MATTER OF APPLICATION NUMBER .....

FILED BY Richard W. and Lesley Ann Sears

ON March 18, 2011, 20 .....

PROTEST

FILED
MAR 2 2011
STATE ENGINEER'S OFFICE

Comes now Richard W. Sears and Lesley Ann Sears
Printed or typed name of protestant

whose post office address is 1963 South 17th East HC10, Ely, Nevada 89301
Street No. or PO Box, City, State and ZIP Code

whose occupation is Attorney at Law and protests the granting

of Application Number 54019, 54020, 54021, filed on October 17, 1989, 20 .....

by Southern Nevada Water Authority fka Las Vegas Valley Water District for the

waters of underground waters of Basin 184 situated in White Pine
an underground source or name of stream, lake, spring or other source

County, State of Nevada, for the following reasons and on the following grounds, to wit:

See attached Brief and Argument

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STATE ENGINEERS OFFICE

THEREFORE the Protestant requests that the application be denied
Denied, issued subject to prior rights, etc., as the case may be

and that an order be entered for such relief as the State Engineer deems just and proper.

Signed [signature]
Agent or protestant

Printed or typed name, if agent

Address 1963 South 17th East HC10
Street No. or PO Box

Ely, Nevada 89301
City, State and ZIP Code

775 289-3804
Phone Number

rwsears@me.com
E-mail

Subscribed and sworn to before me this 18th day of March, 20 11

CHRISTINA JABLONSKY
Notary Public - State of Nevada
Appointment Recorded in White Pine County
No: 07-[illegible] - expires September 12, 2011

[signature]
Notary Public

State of Nevada

County of White Pine

**+ $25 FILING FEE MUST ACCOMPANY PROTEST. PROTEST MUST BE FILED IN DUPLICATE.**

**ALL COPIES MUST CONTAIN ORIGINAL SIGNATURE.**

| | |
|---|---|
| Richard and Lesley Ann Sears<br>Protestants<br><br>Vs.<br><br>Southern Nevada Water Authority, and its predecessor in interest: Las Vegas Valley Water District<br>Applicants. | Case Number: _____<br><br>Protest of Basin 184<br>Underground Water<br>Applications |

**Protest of Southern Nevada Water Authority (Las Vegas Valley Water District) Applications for Underground Water in Spring Valley Nevada, Basin 184.**

Applications:

| Number | Filing Date | Source | Use |
|---|---|---|---|
| 54019 | 10/17/1989* | Underground | Municipal |
| 54020 | 10/17/1989* | Underground | Municipal |
| 54021 | 10/17/1989* | Underground | Municipal |

## Introduction and Factual Assertions

In January 2010, the Nevada Supreme Court determined that the protest period on the foregoing applications, plus other applications in Basin 184 and other basins not subject to this protest, were improperly foreshortened by the State Water Engineer due to the Engineers failure to act upon these applications as required by law generated, in part, by SNWA's failure to timely set and proceed with hearings. The State Engineer's ruling is memorialized in State Engineer Ruling No. 5726 (April 16, 2007) now apparently rescinded. Shortly after the Supreme Court ruling, the Southern Nevada Water Authority refiled the same applications within the same basins subject to Ruling 5726 as well as other basins affected by the Supreme Court ruling.

The Protestants are residents of White Pine County, Nevada; property owners in Basin 184; and future residents of Basin 184. Protestants have a part time living quarter in Spring Valley and have house plans for a 3,000 square foot custom built home in the basin upon the property which now consists of 560 acres. The property is just south of Highway 50 on White Pine County Road 39. The property is about 8 miles north of property currently owned by SNWA commonly called the Harbecke Ranch. The Harbecke Ranch is the closest agricultural property to Protestants ranch. There are no ranches within thirty miles east or west of the parcel. The closest agricultural property is the Harbecke Ranch since no ranch is closer than about 15 miles in a northerly direction and even then those northern ranches are on the west side of the basin whereas Protestants ranch sits up against the eastern mountains.

Protestants are unable to make use of their land and the underground water due to the applications listed above. Protestants are currently suffering direct economic harm and the loss of productive use of their property as a direct result of the foregoing applications and the State Engineers historic and current treatment of SNWA Applications in Basin 184. SNWA filed the precursors to the listed applications in the 1980s in order to obtain a priority right to the water. It is clear due to the passage of time and SNWA's failure properly to pursue setting hearings on the applications that their intent at the time of filing the application was not to seek an immediate use of the water, rather, they intended to obtain a priority right by filing before other potential users could file. No real action to obtain permits occurred on the Basin 184 applications until after 2005. This led to an unfair denial of water to other potential in-basin users because the

State Engineer did not permit the SMWA applications, or any other applications, and SNWA did not seek to have the State Engineer act on the applications.

Protestants currently have a pending application before the State Engineer for water for aquaculture. The application only seeks approximately 14 acre feet of underground water to be diverted from an existing well, for fish ponds on the property (Fish Farm Water). Protestants have already constructed a small pond and have begun raising brood stock in the pond consisting of largemouth bass and bluegill. Protestants lack sufficient water to do more than keep brood stock alive. Protestants plan on building a larger pond but cannot do so without a water permit from the State Engineer.

The Fish Farm Water was sought January 22, 2008 without protest following publication of the application. The Protestants have been awaiting action on that application since that date. Protestants have answered a set of questions from the State Engineers office seeking information on the evaporation and loss of water as well as the approximate size of the pond and associated facilities. The answers to those questions were provided months ago. Protestants have received no other contacts or information. Protestants have paid $2500 to a water engineer for the work done to date, $14,000 for electrical power for the well, plus $15,000 for machinery and equipment to develop the Fish Farm Water plus $12,000 for the well itself. Protestants cannot raise fish; cannot complete another pond; cannot turn their current investment into cash flow. Protestants are at risk of losing what little tax benefits their start up business generates without action on their applications now pending because of the failure to turn income on their business as required by the IRS.

Protestants have received no communication about the status of their application for Fish Farm Water. Protestants water application for Fish Farm Water is a non-consumptive use, yet, no action has proceeded from the State Engineer.

In addition to the Fish Farm Water, Protestants have applied for 2.5 cfs of agricultural water in order to raise agricultural crops during their retirement years. This Application was filed a few days after the Supreme Court of Nevada ruled in Docket Number 49718, *Great Basin Water Network, et al., vs. State Engineer*, 126 Nev., Advance Opinion 2 (2010). Approximately 320 acres of the 560 acres of the property have been determined to be appropriate for agricultural production. As an agricultural site, the property will also benefit the numerous songbirds, game birds, small game animals and large game animals in the basin and adjacent mountain range, including Mount Wheeler and associated park lands.

SNWA protested Protestants agricultural applications on the grounds there is insufficient water in the basin! This is very silly considering they are seeking to remove almost 100,000 acre feet of water from the basin. The only fair conclusion from the SNWA protest of Sears' application is there is insufficient water to grant either Sears's or SNWA's applications if the basin cannot spare 1,000 feet of water. Either that is the case or SNWA believes that no one should be able to live and farm in Basin 184. This attitude allows SNWA to control Nevada property simply by filing water applications and thus foreclosing all other uses. SNWA has more power than any other governmental entity to control the lifestyle of Nevadans. This is not what the legislature intended and is clearly contrary to law.

SNWA has no current uses for the water they seek to appropriate. The economic downturn means there are thousands of empty homes in Las Vegas and no users for 100,000 acre feet of water from Spring Valley, Nevada.

SNWA has applications for more than 44,724 acre feet of water in Basin 184. The active annual duty irrigation permits consisting of surface and underground water are approximately 16,224 acre feet of water. The total appropriation for the basin in December 2004 was 18,973.42 acre feet. The 2004 estimate for the perennial yield of the basin was 100,000 acre feet annually based upon the Nevada Division of Water Resources estimates.

Protestants have very few full time neighbors in the Basin. The Eldridge family maintains ranches and homes in the Valley many miles to the north of Protestants. Art and Audrey Andrae live in the Valley twenty miles to the north of Protestants and have a small ranching operation on property popularly called the Yelland Ranch. The Mormon Church maintains a stake farm 14.6 miles north of Protestants property, the closes neighbor north west of Protestant. Protestants current neighbors who are users of water within approximately twenty square miles of Protestants are birds, small game animals, large game animals and sagebrush. Much of the water for the non-human neighbors comes from Protestants property and pond.

The largest non-governmental landholder in Spring Valley south of Highway 50 are Protestants. The other two landholders in that area are the U.S. Government and Southern Nevada Water Authority. Only SNWA has developed properties consisting of five or six ranches south of Protestants where they raise cattle, sheep, and agricultural products. Protestant has no complaint about SNWA's current ranching operations. Their

ranching operations --- in contrast to some others in the valley --- are efficient, clean, well run, professional ranching operations and a substantial benefit to the valley, its residents and its wildlife.

**Argument**

Protestants, as American citizens and Nevada residents, enjoy a fundamental legal right to own property, use their property for all legal uses, and develop the property within the law for the benefit of themselves and their successors. Fundamental rights are guaranteed to Protestants under both federal and state constitutional and statutory laws and are rights of substantial consequence. These rights are fundamental in the legal sense and may not be infringed without a compelling state interest and both procedural and substantive due process are required before these rights can be infringed. Recourse for violations of fundamental rights, specifically violations that result from state action, are available in USC § 1983, et seq.

In addition to federal and state relief for violations of fundamental rights, Protestants have a right to complain to the State Engineer, appear and raise arguments related to their water and property rights so long as the facts and evidence arise out of statutory rights. As an initial observation relevant to this Protest, "any water used in this state (Nevada) for beneficial purposes shall be deemed to remain appurtenant to the place of use" NRS 533.040(1). This statute codifies the common law of the United States that was adopted by the Nevada Constitution. The common law, and the foregoing statute stand for the rule that, the underground water of the state is not just water that is unrelated to a piece of land. Water is appurtenant to land, meaning water is "a legal accessory or accompaniment to a piece of land." *Webster's Seventh New Collegiate Dictionary*.

Protestants have underground water appurtenant to the 560 acres of land they own in Basin 184. This appurtenant water source is important because the Nevada Legislature has declared limitations on severing appurtenant water from the land: "If it is impracticable to use water beneficially at the place to which it is appurtenant, the right (to underground water) may be severed from the place of use . . ." NRS 533.040(2). To date, no case has been made supporting any theory before the State Engineer that it is impracticable to use water beneficially in Basin 184, some portion of which is water underneath Protestants property. Protestants have an immediate use for the water; SNWA clearly has no immediate use since they have failed to act on their applications made during the last century: 1989.

PROTESTANTS HAVE A RIGHT TO THE USE OF APPURTENANT WATER ON THEIR LAND WITHIN BASIN 184

The Nevada Legislature has set out two important principles that must be borne in mind when considering SNWA's applications, 1) water is appurtenant to land; and, 2) appurtenant water should not be severed from the land unless it is impracticable to use water at the place to which it is appurtenant. Once a determination has been made that it is impracticable to use water on the appurtenant land, then water can be severed from the place where it exists and sent elsewhere.

SNWA has shown by its actions that a great deal of water can be used appurtenant to the land in Basin 184. They currently own and operate substantial ranches that raise cattle, sheep and agricultural products and provide additional side benefits to the area wildlife. SNWA uses thousands of acre feet of water annually just for such appurtenant uses. Accordingly, SNWA and the State Engineer are estopped from denying that there

are uses of water appurtenant to land in Basin 184, appurtenant uses which SNWA currently makes to the benefit of themselves, local residents, and wildlife.

INTERBASIN EXPORT OF WATER

After the determination that there is no appurtenant use for the water, the State Engineer may authorize water exportation out of basins so long as certain determinations are made: among the determinations critical to this Protestant and these applications are "(d) [w]hether 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." NRS 533.370(6).

At first blush it seems evident that the appropriations by SNWA would benefit vast numbers of people in southern Nevada. Despite recent slowdowns in the development of southern Nevada it is likely that the attractions of the area will again become apparent to U.S. citizens and growth will again swallow up available land in southern Nevada. Such growth cannot occur without water and the water is not currently available to SNWA unless they develop in state resources to supplement water available from the Colorado River. The structure of NRS 533.370(6) indicates a balance of the benefits and burdens must be struck by the State Engineer: appropriate long term use in the benefiting basin (southern Nevada counties) versus stunted growth and stunted development in the burdened basin (Spring Valley, Nevada). The unavoidable corollary to growing southern Nevada will be stunting Spring Valley. Every foot of water leaving Basin 184 means Spring Valley will not have water for local development. It is apparent from the Protest SNWA filed against Sears, they intend to prohibit all growth in Basin 184. By stating there is insufficient water for Sears to raise crops, they mean there is

insufficient water for anyone to raise crops. Their act in protesting Sears's water applications is a clear violation of NRS 533.370(6) because the protest, without more, stops development in Basin 184. This falls squarely within the statutory language which does now allow cessation of development in the Basin at issue.

An injury is now created by SNWA's protest of Sears's application because Sears's applications are for uses within the Basin. Because SNWA clearly wants to improperly stunt the valley's development and growth, Nevada law does not permit the export: export is limited by the circumstances enumerated in 533.370(6).

No one wants to live in a dustbowl absent of all water. No beneficial uses of water appurtenant to land can be made when there is no water to be had. What then is an improper stunt of the valley? Clearly the State Engineer recognized the complete absence of water problem in Ruling 5726 by granting 40,000 acre feet of water (to be followed by an additional 20,000 acre feet in certain circumstances) and retaining the balance (conceivably 40,000 acre feet from perennial yield, by which the current permits of almost 20,000 acre feet currently existing must be further reduced) in the basin for local uses. In legal terms, balancing means the parties (or land) bear burdens and receive benefits in the balancing determination: but despite the imagined fairness of the ruling, fairness is not what happened after Ruling 5726. This is especially true when SNWA itself claims there is insufficient water for an appurtenant user to have 1,000 acre feet of agricultural water.

The implementation of Ruling 5726 did not carry out fairness. Limiting SNWA's exportation to 40,000 acre feet did not actually reserve 40,000 acre feet of underground water for in-basin beneficial use. Instead, from the 1989 applications filings up until and

throughout the implementation of Ruling 5726 all applications and all permitting activities in Basin 184 have substantially ceased. Even after the Supreme Court determination invalidating Ruling 5726 nothing has happened with applications in Spring Valley. Since the 1989 applications by SNWA and the 2007 decision to grant 40,000 acre feet there have been virtually no underground water permits granted to in-basin applicants other than SNWA. Rather than preserving water for local users (a benefit), the State Engineer's ruling and practice halted local users from any water (other than domestic wells in a basin where there are only a handful of residences) to benefit their property (a burden). In other words, in the balancing of interests SNWA received the *benefit* of their applications and purchased permits while the in basin residents got the *burden* of no applications being granted and simultaneously received no benefit from either the use of appurtenant water or benefit from the export of excess water. The State Engineer had a statutory duty to balance the interests of in-basin appurtenant users and export recipients: not place all the burdens on in-basin residents who had a beneficial use for the remaining water and all the benefit to SNWA and their southern Nevada customers.

The State Engineer's rationale for piling all the burdens on the in-basin users was to further study the valley and not allow any new permits until test pumping was completed by SNWA so that the effects of the pumping could be judged. As noted above, this halted all property development in the basin and only burdened the basin users with no concomitant benefit. Assuming the pumping caused no problems and in the future some permits will be issued, what is the timeline for that determination since as of today, no test pumping of 40,000 acre feet of water has occurred. Is ten years of study

a small burden that the in basin users should suffer without complaint? How about twenty years? For a 64 year old man, five years waiting for test pumping plus more years waiting for permits would spell the end of a lifetime: that is the effect of Ruling 5726 on Portestants at this point. If the State Engineer follows the same practice in ruling on the applications a second time a substantial abuse of discretion, and denial of fundamental rights will occur.

The burden on the in basin users is too high when compared to the grant of benefits to SNWA (0 acre feet of water to appurtenant users compared to 60,000 acre feet of water to exporter). A more proper balance would involve providing less initial water to the exporter and some initial water to the appurtenant user. As currently structured, the implementation violates the statutory requirements, violates fundamental rights of appurtenant users and is a clear abuse of the State Engineer's discretion in the balance struck in the earlier decision.

If the proper decision is to **cut back** on SNWA until pumping is completed, how can it be proper to **cut off** the in-basin applicants for the years this will take? This is especially true where there are only a handful of basin applicants. One better procedure is to use a similar ratio with in basin applicants as with out basin applicants: we are cutting **everyone** back by 66%; not cutting SNWA back by 66% and cutting others off completely, until pumping and studies are completed. Ruling 5726 failed to balance the benefits and the burdens in the water allocation and was a clear abuse of discretion by the State Engineer. Abuses of discretion can be relieved by a new Ruling that follows the law as well as by Nevada Courts and Federal Courts.

ANY OTHER RELEVANT FACTORS ARE IN THE MIX

The benefits and burdens to in Basin users are not just financial benefits and burdens. Even though financials quantify easily the Nevada Legislature did not limit the State Engineer's benefit/burden analysis to financial concerns: any other factor the State Engineer determines to be relevant must be thrown into the mix in balancing burdens and benefits.

Unfortunately, not only did the legislature fail to specify all the factors to be considered, the legislature also failed to describe the parties to be benefitted and burdened by a State Engineer's decision. Does the State Engineer analyze the benefits to landowners vs. end users? to water losers vs. water users? to counties vs. counties? to states vs. states? Similarly, the legislature did not specify how the competing interests should be compared: is it numerical: greatest benefit for greatest numbers? is it qualitative: city dwellers vs. rural users or animals vs. people or environment vs. people? What is clear is the State Engineer in past decisions has considered all these interests when making water decisions. What is also clear is the State Engineer failed to consider Nevada common law in the balancing decision made in Spring Valley, Nevada.

In this matter, the city vs. rural balance, the interests are thousands of prospective southern Nevada city residences vs. two or three current rural residences; thousands of prospective southern Nevada city residences vs. some deer and elk and miscellaneous critters eking out wilderness survival. While the comparison is stark and easily understood, the fairness role of the State Engineer is to ensure that minority interests are not trampled by the majority interests. Courts, even State Engineer-type courts, do not exist to protect the rights of the majority: majority rights require no protection from courts. The majority protects its rights by vote at the ballot box and influence in the

legislature; the majority has no need of courts. The State Engineer must protect those who have no other protections, the minority interests at risk to the majority; it must protect the weak interests from the strong interests. This statement is not some law school mumbo jumbo, or the ranting of an angry landowner. This statement is the foundation of both procedural due process and substantive due process in American law. The Nevada Supreme Court voiced this important principle in a water rights case in 1872, stating, in relevant part:

> "But that the interests of the public should receive a more favorable consideration than those of any individual, or that the legal rights of the humblest person in the state should be sacrificed to the weal of the many, is a doctrine which it is to be hoped will never receive sanction from the tribunals of this country. The public is in nothing more interested than in scrupulously protecting each individual citizen in every right guaranteed to him by the law, and in sacrificing none, not even the most trivial, to further its own interests. Every individual has the right, equally with the public at large, to claim a fair, impartial consideration of his case; for the rights of the public are no more sacred or entitled to greater protection in the law than those of the individual; . . .
> *Vansickle v. Haines, et al.*, 7 Nev. 249 (1872).

The court goes on to note that if the public interest was to overrule the individual interest, it would be proper to immediately lynch people who displeased the mob. Clearly, Nevada courts do not approve such actions.

In other words, the process used to burden individuals must be fair; the result of the process must also be fair. Government can take rights away from individuals; but Government must do so in a fair and just manner. Government cannot take rights away

from one, and give them to another, simply because in a judges view the "public weal" demands the transfer.

In this case, appurtenant water use is deprived from an appurtenant user without any due process and without paying any price to the loser. Ruling 5726 said 40,000 acre feet goes south, test pumping occurs and then perhaps another 20,000 acre feet goes south. What ruling 5726 effectively did was freeze for an unknown and perhaps unknowable period of time all appurtenant uses without discussion, without balancing interests, without payment to the in-basin appurtenant user. If the State Engineer duplicates Ruling 5726 after new hearings the harm created in the original ruling will be compounded on Sears and his family.

The legislature, by NRS 533.370(6) gave the State Engineer authority to look at the in-basin user, the minority interest in this matter, and factor in their interests in the balancing test. It cannot be gainsaid that SNWA elbowed its way into Spring Valley, used its governmental power and wealth to file applications, sat on the applications for years, objected to later applications and appear at grossly delayed hearings and argue "we need the water, we represent the majority interests of this state, the majority needs this water for growth and for the financial benefit of the entire state of Nevada because we represent the taxes, business interests and quality of life upon which Nevada depends." These statements are reflected in the text of Ruling 5726 indicating the State Engineer heard this argument, respected this argument, and substantially ruled in favor of this argument. The majority interest was heard and won a substantial victory; the interests of in-basin appurtenant users were ignored just at their applications were ignored. This wrong should not be repeated.

The reason Ruling 5726 was a substantial but not total victory (other than the requirement of rehearing) was because SNWA was not awarded everything it wanted, some water was left pending testing and some water was left for future in-basin needs. Thus, SNWA got a temporary but substantial victory, a few unknown future users (not all future users are unknown because any definition of future users must include SNWA since they maintain a majority of the ranches and applications in the basin) may receive some water, but current non-governmental in-basin users lost everything: their applications were frozen, their future permit chances were lost, no certificates were issued, their interests were never considered, their business interests were ignored, and insufficient water was left in the basin for appurtenant uses. If the State Engineer repeats the results of the prior balance in any new decision, in-basin users Richard and Lesley Sears, will be wronged again.

Some might say, Sears should have protested and appeared and argued in 2007. Sears could not do so, the protest period was long closed and hearings on the 1989 Applications were not heard until 2007 due to procedural delays encouraged and enjoyed by SNWA. Not only was Sears' minority interest never considered in the mix of factors to be considered, it was never presented so it could never be heard. Sears' factors could not be heard, not because of some failure by Sears, but due to procedural due process failures by the State Engineer's office and objections by SNWA to allowing new protesters to present their interests in the proceeding. The Supreme Court found this failure to follow the law sufficient reason to remand this matter to Judge Robison for a second look: commanding Robison to open the protest.

It is now clear that Sears was not at fault for SNWA's failure to set hearings or the State Engineer's failure to follow the law: but Sears is the one who has been paying the price for these failures because Sears cannot develop appurtenant water. This wrong long endured may well be repeated and continue forever into the future unless the State Engineer exercises his discretion in a way that fulfills his statutory, common law and Supreme Court imposed duty: protect the minority in-basin appurtenant user in any rulings issued! This legal duty does not just mean leave a small amount of water for in-basin users (meaning the governmental entity will ultimately wind up with the water), the legal duty means grant permits to non-SNWA users who wish to develop their property: give the individual a fair shake. If granting individual basin users water means cutting SNWA back from 60,000 acre feet to 59,000 acre feet, then SNWA should be cut back, the individual should not be cut off.

Dated: March 18, 2011

Richard W. Sears

Lesley Anne Sears