

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

IN THE MATTER OF APPLICATIONS)
63263, 63264, 63265, 63266 AND)
63267 FILED TO APPROPRIATE THE)
PUBLIC WATERS FROM AN UNDERGROUND)
SOURCE WITHIN THE FORTY MILE CANYON)
- JACKASS FLAT HYDROGRAPHIC BASIN)
(227A), NYE COUNTY, NEVADA.)

RULING ON REMAND

#5307

GENERAL

I.

Applications 63263 through 63267, inclusive, were filed on July 22, 1997, by the United States Department of Energy - Yucca Mountain Site Characterization Project Office (DOE) to appropriate 430 acre-feet annually from the underground waters of the Fortymile Canyon - Jackass Flat Hydrographic Basin, Nye County, Nevada. The stated manner of use is for industrial purposes. The remarks section of the applications indicates they were filed in order to provide water for meeting the DOE's responsibilities under the Nuclear Waste Policy Act with said uses including, but not limited to, road construction, facility construction, drilling, dust suppression, tunnel and pad construction, testing, culinary, domestic and other related site uses.¹

II.

Applications 63263, 63264, 63265, 63266 and 63267 were protested by Robert Loux, Executive Director of the Nevada Agency for Nuclear Projects, Ralph McCracken, farmer and Vice-President of the Southern Nye County Conservation District, Richard Nielsen, Executive Director of Citizen Alert, and Michael DeLee, farmer and Chairman of the Amargosa Water Committee.¹

¹ File Nos. 63263 through 63267, inclusive, official records in the Office of the State Engineer.

III.

In June 1999 the State Engineer held a pre-hearing conference and in November 1999, the State Engineer held a hearing on the protested applications. Administrative notice was taken of all records and information available in the Office of the State Engineer, specifically, those records of the administrative hearing held in September and October 1991 relative to an earlier application filed by the U.S. Department of Energy.

IV.

On February 2, 2000, the State Engineer issued State Engineer's Ruling No. 4848, which denied the applications on the grounds that the applications threatened to prove detrimental to the public interest. The State Engineer held that because the Nevada Legislature had determined the public interest through its determination of the policy of law in its enactment of NRS § 459.910, which provides that it is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada, granting the applications would threaten to prove detrimental to the public interest.

The DOE appealed the State Engineer's decision to the U.S. District Court, District of Nevada, and filed a Protective Notice of Appeal and Petition for Judicial Review in the Fifth Judicial District Court In and For the State of Nevada. The Federal District Court determined that while it lacked federal question jurisdiction, it did have jurisdiction by virtue of the fact that the United States was the plaintiff. However, the district court abstained from ruling on the merits based on *Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941), *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The court further found that the abstention doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), did not apply, and dismissed the complaint sending the matter back to the State District Court. The United States appealed the dismissal by the Federal District Court and in an

October 2001 decision the Ninth Circuit Court of Appeals held that abstention was not appropriate in this case and remanded the matter to the Federal District Court for decision on the merits.²

On July 23, 2002, the President of the United States signed House Joint Resolution 87, which approved the Yucca Mountain site for the development of a repository for the disposal of high-level nuclear waste and spent nuclear fuel pursuant to the Nuclear Waste Policy Act, as amended. On March 12, 2003, the United States District Court issued a decision in the litigation before it on a motion for summary judgment filed by the DOE and on a motion to stay the proceedings and a request for a status conference filed by the Nevada Agency for Nuclear Projects.³

In its Order, the District Court held that the State Engineer incorrectly (though not arbitrarily or capriciously) abused his discretion in relying on NRS § 459.910 as a legislative determination and declaration of the public interest. The Court held that if the validity of the Nuclear Waste Policy Act and the Joint Resolution are sustained by the District of Columbia Circuit, in the cases presently pending on those issues, then NRS § 459.910, as the State Engineer applied it as a veto to the NWPA, is in conflict with those congressional enactments as the manner in which it was applied was as a premature veto in violation of the statutory veto procedure found in the NWPA.

However, the District Court noted that the DOE had not cited to any language in either the Joint Resolution or the Nuclear Waste Policy Act, as amended, that addressed preemption of state law or the public interest. Nor had any authority been presented which establishes a national interest, or political interest, that

² United States v. Morros, 268 F.3d 695 (Ninth Circuit 2001).

³ United States of America v. State of Nevada, CV-S-00-268-RLH (LRL) (U.S. District Court, Dist. of Nevada, March 12, 2003) (order granting Defendants' Motion to Stay Proceedings and Request for Status Conference, denying Plaintiff's Motion for Summary Judgment).

is tantamount to the public interest criteria set forth in NRS § 533.370. However, the Court also noted that "[u]nfortunately, that is not the end of the matter."⁴

"If N.R.S. 459.910 is a premature veto of the NWPA, it may not be invoked as what amounts to a 'veto' of the water application process. Furthermore, it does not meet the requirements of N.R.S. 533.370 for making such a determination. It should be noted that N.R.S. 459.910 is not part of Nevada's Water Law statutes (either substantive or procedural)."⁵

The Federal District Court indicated that the Ninth Circuit Court of Appeals has not declared that Nevada's Water Law is preempted nor has the United States asked it to declare it so. "The State of Nevada and the State Engineer are obligated to follow Nevada's statutes, to the extent they are not found to be preempted."⁶ The Court further noted that the DOE's argument that the passage of the NWPA and the Joint Resolution constitutes a finding of public interest was meritless. "Even if those congressional actions do constitute a finding of public (versus national or political) interest in the establishment of a nuclear waste repository at Yucca Mountain, they do not constitute a preemption of state water law, an area of law that has been sacrosanct, particularly in the arid west."⁷ "The language, 'threatens to prove detrimental to the public interest,' suggests that the public interest involves public safety, specifically the safety of Nevada's citizens. Hopefully, the United States is not taking the position that the 'safety' of a state's citizens is preempted by the 'interest' of the national government to have a

⁴ Id. at 8.

⁵ Ibid.

⁶ Id. at 9.

⁷ Ibid.

singular nuclear waste repository."⁸

Is the Plaintiff [DOE] arguing that the federal government has completely taken over, preempted, the field of public interest? Is it contending its citizens do not have a right to the preservation of life if Congress has declared it has other interests? If there had been a determination that there was insufficient water, or that to grant the applications would require taking water from those with previously established rights, would the law require such a determination also be preempted? No! The determination here was based on the third prong of the same state statute that requires those two considerations. There have been no allegations or findings that N.R.S. 533.370 is preempted or unconstitutional. Plaintiff's demand, in its motion for summary judgment, however, requires that result. It appears to this Court that the thrust of the Ninth Circuit Opinions is that a mere statute (N.R.S. 459.910) does not establish public interest. This is in harmony with the Supreme Court's declarations that if Congress is going to preempt an area, it must specifically say so, or a state (and its citizens) must not establish laws that interfere with *legitimate* federal interests.

This Court agrees that N.R.S. 459.910 cannot be the basis for the refusal to grant the applications and so holds. It does not agree, however, that the remedy is to affirmative order the issuance of the water permits without following the mandated procedures. The remedy is to direct the conclusion of the state water application process, which the United States acknowledges, by its careful adherence thereto, is controlling.⁹

Accordingly, the Federal District Court remanded the consideration of water right applications to the Nevada State Engineer for further hearing on the issue of whether the use of the water applied for under the applications would threaten to prove detrimental to the public interest. The Federal District Court's Order noted that "while there may be evidence, or argument, available from the prior hearings which address the

⁸ Ibid.

⁹ Id. at 10.

economic and/or environmental impact of the repository, that mere statements and opinions by state officials will not suffice. Under the circumstances, there must be evidence supplied by experts to substantiate any finding and conclusion by the State Engineer."¹⁰

V.

In order to address the Federal District Court's order of remand, the State Engineer re-opened the public administrative hearing on the protested applications on August 20-21, 2003.

FINDINGS OF FACT

I.

In State Engineer's Ruling No. 4848,¹¹ the State Engineer addressed that the protest claims attempted to focus on the fact that the intended use of the water is not limited to site characterization, but rather is for the establishment of a repository. The applicant attempted to focus its argument to say that the intended use of the water is similar to any other industrial facility built in the State of Nevada. The DOE has requested the 430 acre-feet annually to meet its Nuclear Waste Policy Act responsibilities and the water would be used for all repository program phases, such as confirmation, construction, operation, possible retrieval and closure.¹² If the Yucca Mountain repository is authorized at the federal level, the water will be used for the construction and operation of a high-level nuclear waste repository.¹³

While the DOE has attempted to argue the water applied for

¹⁰ Id. at 11.

¹¹ Dated February 2, 2000, official records in the Office of the State Engineer.

¹² Transcript, p. 364, public administrative hearing before the State Engineer, November 8, 1999.

¹³ Transcript, pp. 20-21, public administrative hearing before the State Engineer, November 8, 1999.

will be used like any other water right appropriation for mining or other industrial use in Nevada, that is just not the case. These applications are for use of water to build and run a facility the likes of which have never before been seen in the history of mankind. The use of water under these applications is for a facility to store more than 77,000 tons of high-level nuclear waste from throughout the United States and 42 other countries for tens of thousands of years under a mountain in southern Nevada. The Yucca Mountain Nuclear Waste Repository project is unprecedented and unique. The closest thing is a waste isolation pilot plant in New Mexico that has only been in operation a few years.¹⁴

Black's Law Dictionary defines industry as "[a]ny department or branch of art, occupation, or business conducted as a means of livelihood or for profit; especially, one which employs much labor and capital and is a distinct branch of trade."¹⁵ A nuclear waste repository does not fit into this definition of industry. This nuclear waste repository is in a class of its own.

The State Engineer is aware that after the litigation in Nevada v. Watkins,¹⁶ which in effect required the DOE's water right application to be processed by the State Engineer, the State Engineer issued Ruling No. 3870,¹⁷ which granted the application for a specified period of time for site characterization purposes only. The State Engineer did find in the site characterization phase of the project that water used for dust control and drilling

¹⁴ Transcript, public administrative hearing, August 21, 2003, p. 203, official records in the Office of the State Engineer.

¹⁵ Citing to Dessen v. Department of Labor and Industries of Washington, 190 Wash. 69, 66 P.2d 867, 869. BLACK'S LAW DICTIONARY 698 5th Ed. 1979.

¹⁶ 914 F.2d 1545 (9th Cir. 1990), cert. denied, 111 S.Ct. 1105 (1991).

¹⁷ Dated March 2, 1992, official records in the Office of the State Engineer.

and sinking shafts was a beneficial use of water and was not detrimental to the public interest.

By letter dated January 10, 2002, the Secretary of Energy, Spencer Abraham notified Governor Kenny Guinn that he intended to recommend to the President of the United States the approval of the Yucca Mountain site for the development of a nuclear waste repository. In the DOE's *Yucca Mountain Science and Engineering Report* at 1.5, 1.6, 1.9 the DOE states that upon the Secretary of Energy's notification to the Governor of his decision to recommend development of the repository at Yucca Mountain, site characterization is complete.¹⁸ Thus, it is clear from DOE's own document that site characterization ends upon the Secretary's decision.

The State Engineer finds site characterization was complete upon the Secretary's decision to recommend the Yucca Mountain site for development to the President. The State Engineer finds that the use of water requested under these applications is not at all like any other industrial application, but rather is for a singularly unique project. The State Engineer finds that the nuclear waste repository project for which the use of water is applied is unprecedented not only in Nevada, but in the world.

II.

In State Engineer's Ruling No. 3870, the State Engineer also found that while it was in the public interest of the citizens of the United States to find a site to store the Nation's high level nuclear waste, it may not be in the public interest of U.S. Citizens to have Nevada singled out as the only site being

¹⁸ If, after the close of the public comment period and the completion of site characterization activities, the Secretary decides to recommend the site, the NWPA requires the Secretary to notify the governor and legislature of the State of Nevada and wait at least 30 days before submitting the recommendation to the President.

studied. The State Engineer found that it was in the public interest to understand, using the best science and technology known to man, the consequences of this storage being at Yucca Mountain or any other site, but that it may not be in the public interest of the citizens of the State of Nevada to 1) have the decision based on ignorance or political reasons rather than scientific grounds, 2) continue with site characterization on only one site in the country, thus creating huge economic incentives pushing for approval of Yucca Mountain as suitable for nuclear waste storage, and 3) have the State of Nevada be the ultimate guardian of a potentially very dangerous substance.

In February 2002, the State Engineer denied the request for extending the site characterization permits, because the Secretary of Energy was recommending the Yucca Mountain site to the President indicating that the site was suitable for the intended purpose; therefore, site characterization must have been completed and the water right permits were no longer needed for site characterization.

On February 2, 2002, the Governor of the State of Nevada responded to the Secretary of Energy's notification that he intended to recommend the site to the President. In that response, the Governor noted that President Bush has promised the people of Nevada that the Yucca Mountain project would not be advanced against the imperatives of sound science. Nevada has challenged the very core of DOE's science in a lawsuit over the DOE's site suitability guidelines. The Governor's response noted that in a January 2002 meeting and findings of the Nuclear Waste Technical Review Board it was found there was little doubt that the science could not presently support the suitability of the Yucca Mountain site. On January 24, 2002, the Nuclear Waste Technical Review Board issued a report concluding that the technical basis for DOE's repository performance estimates at Yucca Mountain is weak to moderate.

On July 23, 2002, the President of the United States signed House Joint Resolution 87, which approved the Yucca Mountain site for the development of a repository for the disposal of high-level nuclear waste and spent nuclear fuel pursuant to the Nuclear Waste Policy Act, as amended.

The State Engineer finds the Governor's response indicates that documents by the very federal agency tasked by Congress with independently assessing the scientific process used by the DOE underscore the lack of any credible evidence supporting the suitability of Yucca Mountain for a nuclear waste repository.

III.

The Federal District Court's order provided that mere statements and opinions by state officials will not suffice. "Under the circumstances, there must be evidence supplied by experts to substantiate any finding and conclusion by the State Engineer."¹⁹ With all due respect to Judge Hunt, the State Engineer explains below how statements made by the Governor and Legislature of the State of Nevada cannot be considered "mere statements of public officials."

The Constitution of the State of Nevada provides that the "supreme executive power of this State, shall be vested in a Chief Magistrate who shall be Governor of the State of Nevada."²⁰ When the Governor of the State of Nevada gave his Notice of Disapproval of the Proposed Yucca Mountain Project, the Governor noted that "Nevada strongly opposes the designation of Yucca Mountain for nuclear waste disposal because the project is scientifically flawed, fails to conform to numerous laws, and the policy behind it is ever changing and nonsensical. The Department of Energy has so compromised this project through years of mismanagement that Congress should have no confidence in any representation made by

¹⁹ Id. at 11.

²⁰ Constitution of the State of Nevada, Article 5, §1.

DOE about either its purpose or its safety."²¹ The Governor's disapproval reviewed how Nevada has already borne more than its fair share of the nation's radioactive waste burdens, and that many of these contaminants remain in the ground to this day. It reviewed how Nevada is already being forced by the DOE to play host to the world's largest low-level and mixed radioactive waste disposal facility at the Nevada Test Site. The Governor's disapproval was based on the DOE's bad science, bad law and bad public policy. The Governor's Notice of Disapproval provides further review of the bad science noting that the Nuclear Regulatory Commission recently identified 293 unresolved technical issues in 9 critical areas, such as volcanism, seismic integrity of the site, and rapid groundwater flow through the area. It also provides further review as to the legal issues, national security and public policy.

When the Governor sent his Notice of Disapproval, he was not speaking as a "mere public official," he was speaking for the citizens of the State of Nevada and as the State of Nevada. He was elected to speak for and transact the business of government for Nevada's citizens, and is responsible for the faithful execution of the laws of Nevada.²² The members of Nevada's Legislature are elected by the people of the State of Nevada; therefore, resolutions passed by the Legislature are the voices of the people. In 1989 and 1995, the Legislature of the State of Nevada passed Assembly Joint Resolutions 4, 6 and 26, which express the Legislature's refusal to consent to the placement of a repository for high-level radioactive waste in Nevada, and express the overwhelming opposition of the residents of Nevada to

²¹ Exhibit No. 70, attachment E, p. 1, public administrative hearing August 20, 2003, official records in the Office of the State Engineer.

²² Constitution of the State of Nevada, Article 5 §§ 6, 7.

permitting Nevada to become the dumping ground for nuclear waste generated in other states and by foreign countries.²³

One of the inalienable rights under Nevada's Constitution is that all men and women have the right of pursuing and obtaining safety.²⁴ The people of the State of Nevada have spoken through their Legislature and Governor that it is not in the public interest of the citizens of Nevada to use the water that belongs to that public²⁵ for a purpose, which is so adamantly opposed by the public.

The guidance in Nevada Water Law as to what constitutes the public interest was addressed in State Engineer's Supplemental Ruling on Remand 3787A.²⁶ In that decision, the State Engineer exercised his discretionary authority, and based upon the lack of a statutory definition, came up with some criteria for defining the public interest. The first two he identified are that the water of all sources above or beneath the ground belongs to the public,²⁷ and that all such water may be appropriated for beneficial use and not otherwise.²⁸ When the Nevada Supreme Court²⁹ had the opportunity to review the State Engineer's decision it distinguished the interest of the public at large versus private interests and noted that the determination of public interest is a matter within the discretion of the State Engineer. The Ninth Circuit Court of Appeals recently addressed the very issue of

²³ Exhibit No. 70, attachments B, C and D.

²⁴ Constitution of the State of Nevada, Article 1, §1.

²⁵ NRS § 533.025.

²⁶ Dated October 9, 1992, official records in the Office of the State Engineer.

²⁷ NRS § 533.025.

²⁸ NRS § 533.030(1).

²⁹ Pyramid Lake Paiute Tribe v. Washoe County, 112 Nev. 743, 918 P.2d 697, (1996).

public interest and held as follows:

The Nevada legislature has not provided an explicit definition of what constitutes a threat to the public interest under N.R.S. section 533.370(3). [footnote omitted] By its silence, the legislature has left the task of defining "public interest" to the State Engineer and ultimately, to the Nevada Courts. In *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, the Nevada Supreme Court reviewed the State Engineer's effort, directed by the state district court, to undertake this task in considering a number of transfer applications in Washoe County. 918 P.2d 697, 698-99 (Nev. 1996). In defining "public interest," the State Engineer identified thirteen policy considerations contained in Nevada's water statutes that should guide any assessment of the public interest, including factors such as whether an appropriation of water rights is for a beneficial use...³⁰

In Nevada, water can only be appropriated for what is considered a beneficial use.³¹ The State Engineer finds that the overwhelming opposition to the Yucca Mountain Nuclear Waste Repository as demonstrated by the Governor's response to the Secretary of Energy's notice of decision to recommend the site, the Governor's Notice of Disapproval in great part based on lack of science to support the suitability of the site, and the passage by the Nevada Legislature of Resolutions 4, 6 and 26 is a clear indication that use of water for said project would not be considered a beneficial use of the water that belongs to the public of Nevada.

IV.

When a State Engineer is appointed to serve, an oath of office is given that is set forth in the Constitution of the State of Nevada.³² The State Engineer solemnly swears to support, protect and defend the constitution and government of the United

³⁰ County of Churchill v. Ricci, 341 F.3rd 1172 (9th Circuit 2003).

³¹ NRS § 533.030(1).

³² Constitution of the State of Nevada, Article 15, § 2.

States, and the constitution and government of the State of Nevada, and to bear true faith, allegiance and loyalty to the same, any ordinance, resolution or law of any state notwithstanding, and to well and faithfully perform all duties of the office of the state engineer. The State Engineer finds in this very special case, neither the Nuclear Waste Policy Act, as amended, nor House Joint Resolution 87 express the public interest of the people of the State of Nevada as set forth under NRS § 533.370, and that the reasons supporting the Governor's response to the Secretary of Energy's letter of intent to recommend the site to the President, the Governor's Notice of Disapproval and the Resolutions of the Nevada Legislature are a direct expression that it would threaten to prove detrimental to the public interest to grant use of the public's water for purposes under the DOE's water right applications.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³³

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:³⁴

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

³³ NRS chapters 533 and 534.

³⁴ NRS § 533.370(3).

III.

The State Engineer concludes that the supreme executive power of the State of Nevada is vested in the Governor of the State of Nevada. The Governor, through the reasons supporting his response to Secretary Abraham's intent to recommend the site, through his Notice of Disapproval, and the Legislatures passage of its Resolutions, have established that it would threaten to prove detrimental to the public interest to approve the DOE's water right applications.

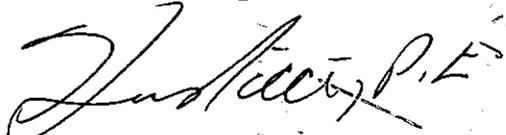
IV.

The State Engineer concludes that a state engineer has broad discretion in determining what threatens to prove detrimental to the public interest under NRS § 533.370(3). The State Engineer concludes, based on the findings referenced, that the use of water as proposed under these applications is not a beneficial use of the public's water, and therefore, to approve said applications would threaten to prove detrimental to the public interest.

RULING

Applications 63263, 63264, 63265, 63266 and 63267 are hereby denied on the grounds that the use of the waters belonging to the public of the State of Nevada as contemplated under said applications would threaten to prove detrimental to the public interest.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer

HR/sjt/jm

Dated this 7th day

of November, 2003.