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

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To: Great Basin Water Network
From: Simeon Herskovits and Iris Thornton
Date: August 3, 2016
Re: Statutory Changes Proposed to Legislative Commission Sub-Committee to Study Water

INTRODUCTION:

A number of governmental, quasi-governmental, and non-profit entities have raised legal concerns associated with the State Engineer's proposed change to Nevada's water law related to monitoring and mitigation of conflicts with existing rights in the water rights permitting process. In recognition of those concerns, at the request of the Great Basin Water Network we have prepared this memorandum to address the salient legal implications of the proposal, which appears designed to allow the State Engineer to grant water rights applications without first making a determination either that there is water available in the source to satisfy the proposed new use or that the proposed new use will not conflict with already existing water rights. Rather than making those two fundamental determinations about the viability of a requested new water right, which have been at the core of Nevada's water law since it first was codified more than a century ago, the proposed new statutory language would authorize the State Engineer to premise the grant of a new water right on the applicant's promise to develop a monitoring and mitigation program after the water right already has been granted to identify and address problematic impacts or conflicts that are likely to result from the grant of the new water right.

As explained below, this proposed statutory amendment would undermine the foundation of sustainable water development that has undergirded Nevada's water rights system since the State's early days and acted as a brake on the destructive over-appropriation of water sources in the State. The proposed new language is inconsistent with some of the most elemental principles governing Nevada's water law. In addition, the proposed statutory change would open the door to an administrative decisionmaking process that does not satisfy the requirements of the Takings and Due Process clauses of the United States and Nevada constitutions. As such, the statutory proposal would subject the State Engineer, and thus the State itself, to constitutional challenges under both of those clauses that would have a substantial likelihood of success and could expose the State to potentially open-ended legal and financial liability in connection with the grant of new water rights that cannot be squared with the rights of existing water rights holders.

EXECUTIVE SUMMARY

The Nevada State Engineer has proposed new statutory language that allows him to grant new water rights applications even if there has not been a showing either that water is available for the new use or that the new use will not conflict with senior existing water rights, so long as the State Engineer says he is satisfied that the applicant will engage in mitigation of such conflicts. The State Engineer has proposed that he be given essentially carte blanche discretion to determine what kind of "adaptive management" will be satisfactory, and that new water rights applicants be given a "right of mitigation" that would put the burden on the owners of senior existing water rights to prove that the new applicant needs to mitigate a conflict.

Deficiencies Compared to the Standards of other States and Federal Agencies and Courts:

The State Engineer's proposal falls far short of the requirements that sister western states and federal agencies have insisted on before relying on mitigation or adaptive management. Both federal agency guidance and federal case law require that specific information be developed and provided up front concerning the ability to manage affected natural resources, the thresholds that will trigger mitigation action, the specified concrete mitigation measures that will be implemented, and how the effectiveness of those mitigation measures will be assessed and improved as necessary. Similar specific information and demonstrable scientific viability also are required by other states in the West.

Because the State Engineer's proposed statutory changes do not provide any of the minimal requirements and safeguards that other agencies and legal authorities hold to be necessary, the Sub-Committee should reject those proposals of the State Engineer.

Constitutional Defects and Exposure to Likely Claims for Constitutional Violations:

Because the State Engineer's proposed amendment of NRS § 533.370 would allow water rights applications to be approved without opposing parties having an opportunity to challenge evidence regarding the effectiveness of the applicant's proposed mitigation plan, the change would result in violations of the Due Process Clause of the United States and Nevada Constitutions. Under binding U.S. and Nevada Supreme Court decisions stretching back decades it is clear that merely changing the statutory language as requested by the State Engineer will do nothing to remedy the procedural deficiency of the after-the-fact approach to mitigation that he seeks to take.

The proposed new statutory language also would encourage the State Engineer to approve water rights applications where there is not adequate unappropriated water available, which would result in new water uses taking water from already existing, senior, water rights. This approach would result in a plethora of gradually worsening conflicts between new and senior water rights holders, and in a proliferation of claims of unconstitutional takings by senior water rights holders. A review of the applicable federal and Nevada law indicates that there is a substantial likelihood that such takings claims by senior water rights holders would be successful and would expose the State to potentially immense financial liability and onerous court orders to restore water rights and depleted water systems on which those rights depend.

These constitutional defects provide an even more compelling reason why the Sub-Committee should reject the State Engineer's proposals concerning mitigation plans and a "right of mitigation" in the water right application review process.

I. OVERVIEW OF NEVADA WATER LAW

For over 100 years, Nevada's water law has been structured and written to ensure that the State's water resources are soundly managed not only to serve the State's current population but also to preserve the scarce resource for use by future generations. Nevada water law, codified at NRS §§ 533 and 534, is guided by fundamental principles that have served the State and its limited water resources well by encouraging prudent decision making grounded in science. In addition, under the prior appropriation doctrine, which antedates Nevada's statehood, Nevada water law properly protects senior water rights by directing the State Engineer to grant new rights to appropriate water only where there is unappropriated water at the source of supply and only if the proposed appropriation will not conflict with existing rights to the use of that water.[1]

In addition to these limitations designed to ensure prudent water management, Nevada law also gives the State Engineer a substantial amount of discretion in water management decisions. For example, Nevada law permits the State Engineer to issue groundwater permits subject to "express conditions" that will serve to avoid potential conflicts.[2] However, the State Engineer's discretion is not boundless in this area and properly has been limited by the Supreme Court of Nevada which recently held that the State Engineer may not support a finding of no conflict with existing rights under NRS § 533.370(2) with an undeveloped monitoring and mitigation plan, because (1) doing so would violate the due process rights of protestants, and (2) because there must be substantial evidence that actually supports a finding of no conflict. Thus, any monitoring and mitigation plan must be sufficiently detailed and developed to support a determination by the State Engineer based on substantial evidence that a proposed appropriation will not conflict with existing rights.[3] Thus, the State Engineer's discretion is necessarily limited not only by Nevada's water law but also by its Constitution.

II. THE STATE ENGINEER'S PROPOSAL: LEARNING BY DOING

In a memorandum to the Legislative Counsel Bureau dated April 19, 2016, the State Engineer requested that the Legislature grant greater flexibility in permitting by allowing the State Engineer to grant water rights on the basis of undeveloped adaptive management or mitigation plans.[4] Specifically, the State Engineer has proposed a new subsection of NRS § 533.370 titled "mitigation of conflicts" which would give the State Engineer discretion to grant applications based on a commitment from applicants to develop mitigation plans after the application already has been granted that purportedly would address conflicts with existing rights under NRS § 533.370(2). Further, by granting a "right of mitigation" to an applicant, who holds no property right, the State Engineer's proposed language also places the burden on a senior water rights holder to demonstrate an entitlement to mitigation should a conflict occur, effectively elevating the rights of an applicant above those of a water rights owner.

The State Engineer's office already has the ability to approve applications with conditions, including a monitoring and mitigation plan.[5] So a provision like that proposed by the State Engineer is not necessary. The State Engineer, in effect, appears to be requesting that flexibility

[1] NRS § 533.370(2).
[2] *See* NRS § 534.110(5).
[3] *Eureka County v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1120-21 (Oct. 29, 2015).
[4] *See* Jason King Memorandum to Alysa Keller (April 19, 2016).
[5] *See* NRS § 533.110(5).

to grant water rights be boundless and that the mere proposal to develop and implement an actual monitoring and mitigation plan in the future should be sufficient to support the granting of an application as consistent with existing rights. This request appears to be based on the erroneous characterization of adaptive management as nothing more than "learning by doing" without the laying of a proper foundation first. However, that position is overly simplistic and indicates a need for clear limitations on the State Engineer's discretion. Adaptive management is not merely "learning by doing." Rather, it necessarily involves a number of components, including "(1) establishing the desired objectives for management of any particular resource, (2) proposing a management regime designed to achieve the desired objectives; (3) developing hypotheses and experiments to test whether the proposed management regime is in fact achieving the objectives; (4) setting up monitoring and testing programs to carry out the experiments and test the hypotheses 'on the ground;' and (5) adjusting the management regime in response to the information received from the monitoring and testing, if the outcomes turn out not to be as desired."[6] Importantly, proper implementation of adaptive management requires that, before deciding whether to grant an application significant up front planning must have taken place, including the identification of specific concrete mitigation measures to be implemented and thresholds that will trigger implementation of those measures. It would be simply, and fundamentally, unsound to allow the State Engineer to use the phrase "adaptive management" as a tool to avoid making the required finding of no conflicts at the time of deciding whether to grant an application. Absent a requirement that substantial evidence in the record must demonstrate that adaptive management will avoid impacts to existing rights, any statute providing for adaptive management will run afoul of both the Due Process Clause and the Takings Clause of the United States and Nevada Constitutions as explained below. As further outlined below, ample guidance exists to define proper adaptive management, including guidance from Department of Interior policy, Nevada's sister states, and federal caselaw.

III. CONSTITUTIONAL IMPLICATIONS OF THE STATE ENGINEER'S PROPOSED STATUTORY CHANGE

As explained below, nothing in Nevada's existing water law prevents the State Engineer from relying on a monitoring and mitigation plan in approving water rights applications, as long as that plan satisfies the basic minimum standards that both federal and state courts have held to be required in such circumstances. Despite this fact, the Legislature is being asked to change Nevada's statutory law so as to include language that would authorize the State Engineer to approve new applications, without first having to make the age-old basic determinations about the availability of water and the potential destruction of already existing water rights, based only on vague assurances that a mitigation plan with meaningful specific and concrete provisions will be developed in the future.

Such a change to Nevada's law would eliminate the basic guarantee of scientific integrity and reliability in the management of Nevada's most vital natural resource that has served the State reliably for over a century since it first was put into place in 1913. It would significantly

[6] Janet C. Neuman, *Adaptive Management: How Water Law Needs to Change*, 31 Envtl. L. Rep. 11432 (2001); *see also* National Research Council, Comm. on Endangered & Threatened Fishes in the Klamath River Basin, *Endangered and Threatened Fishes in the Klamath River Basin: Causes of Decline and Strategies for Recovery*, 333-35 (2004) (outlining eight key steps of adaptive management); J.B. Ruhl & Robert L. Fischman, *Adaptive Management in the Courts*, 95 Minn. L. Rev. 424, 430 (2010).

increase the already evident tendency to approve applications where there is not sufficient water available.

Authorizing the State Engineer to rely on a vague promise of a future monitoring and mitigation plan, and to approve applications without the kind of concrete specific information that has uniformly been held to be necessary to support such decisions, would set the State Engineer up for a process that would not be consistent with the requirements of the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 8(5) and 8(6) of the Nevada State Constitution.

A. Due Process Problems

As noted, the requested new statutory language would allow the State Engineer to grant a water right application on the basis of a vague determination that conflicts can be mitigated without substantial evidence demonstrating that mitigation is feasible and will be effective. Yet, under the law, those who protest an application are limited in their opportunity to review and contest the evidence supporting the decision to grant the application to the "up front" administrative review process. Once an application has been granted, protestants are not provided with, let alone guaranteed, any opportunity to challenge the adequacy of the monitoring and mitigation plan or the evidence regarding the viability or efficacy of any proposed mitigation measures. As both the Nevada and United States Supreme Courts have held, basic notions of fairness and due process require that evidence be presented and subjected to challenge before an agency makes a decision on an application or claim.[7]

This is not to say that a monitoring and mitigation plan could not provide for its own refinement and improvement, as contemplated under proper definitions and applications of adaptive management. However, as discussed above, certain minimum data and concrete mitigation measures and triggers must be present at the time of the State Engineer's decision for that decision to provide both an adequate factual basis for sound decisionmaking and an adequate opportunity for interested parties to present opposing evidence.

As discussed above, the Nevada Supreme Court, in its recent decision in *Eureka County v. State Engineer*, has confirmed that the State Engineer's request for the authority to approve applications based on future unwritten monitoring and mitigation plans would violate the due process rights of protestants in State Engineer proceedings.[8] In that case, the State Engineer granted applications based on a monitoring and mitigation plan that would not be developed until a later date. In striking down the State Engineer's reliance on this undeveloped monitoring and mitigation plan, the Court noted that "the opportunity to challenge the evidence must be given before the State Engineer grants proposed use or change applications," because "'[t]he due process clause forbids an agency to use evidence in a way that forecloses an opportunity to offer

[7] *Eureka County v. State Engineer*, 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1120 (Oct. 29, 2015); *Ohio Bell Tel. Co. v. Public Utilities Comm'n of Ohio*, 301 U.S. 292, 301-05 (1937)(Cardozo, J.); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) ("the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation"); *Revert v. Ray*, 95 Nev. 782, 786-87, 603 P.2d 262, 264-65 (1979) (judicial review of State Engineer decisions presupposes that those decisions be based on evidence presented before the decision is made, that all interested parties have a full and fair opportunity to be heard concerning that evidence, and that decisions not be made on the basis of "post hoc" evidence and analysis conducted after the decision already has been made).

[8] *Eureka County*, 131 Nev. Adv. Op. 84, 359 P.3d at 1120-21.

a contrary presentation."[9] Thus, "allowing the State Engineer to grant applications conditioned upon development of a future 3M Plan when the resulting appropriations would otherwise conflict with existing rights, could potentially violate protestants' rights to a full and fair hearing on the matter, a rule rooted in due process.[10] Consistent with federal caselaw, the Court further held that the State Engineer must base a decision to grant a water rights application on substantial evidence, and further, a finding of no impact to existing rights can only be made based on a mitigation plan that is substantial enough to support such a finding.[11]

In his request for legislative changes to the NRS § 533, the State Engineer has not addressed the due process concerns of the Nevada Supreme Court in *Eureka County v. State Engineer* and has in effect requested the Legislature to override them.

B. Takings Problems

Concerns have been raised over whether allowing new water rights applications to be granted on the basis of what would amount to a promise of mitigation – without a determination having been made that there actually is unappropriated water available to satisfy the application or that mitigation actually is feasible and can be effective enough to allow the new appropriation to be put to use without conflicting with existing water rights – would run afoul of the Constitutional Takings Clause. The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation."[12] A review of the applicable law suggests that the proposed change to Nevada's statutory water law will expose the State Engineer, and thus the State itself, to two types of takings challenges, both of which appear to have good prospects for success.

The first type of challenge would be based on the fact that under the State Engineer's proposed language the State Engineer would be permitted to rely on a monitoring and mitigation plan that is only at a preliminary conceptual stage of development (the efficacy of which therefore cannot even be assessed) as a substitute for the analytically necessary and fundamental determinations that (1) unappropriated water actually is available at the source of supply for the new use; and (2) the proposed new use actually can occur without conflicting with existing water rights (i.e., that it will not result in an unsustainable double appropriation that effectively would take away the water already committed to senior water uses). Granting a new water right application where it cannot be demonstrated that there is water available or that it will not conflict with existing rights creates a high likelihood, if not a certainty, that the new water use in fact will be premised on taking water that already is subject to prior appropriations by senior water rights holders. Permitting such a double appropriation of water properly would be viewed as a physical taking of the property rights of senior water rights holders and would be subject to a per se takings analysis and a strict obligation on the part of the State of Nevada to compensate senior water rights holders.[13]

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[9] *Id*. at 1120 (quoting *Bowman Transp.,* 419 U.S. at 288 n.4).
[10] *Id*. (citing *Revert v. Ray*, 95 Nev. at 787, 603 P.2d at 264).
[11] *Id*. at 1121.
[12] U.S. Const. Amend. V; *see also* Nevada Const., Art. I, § 8(3). ("Private property shall not be taken for public use without just compensation").
[13] *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) ("[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes [the whole interest]

The holders of affected senior water rights would have a substantial basis to sue the State Engineer for an unconstitutional takings if the State Engineer were permitted to grant new water rights absent a showing that unappropriated water is available or that the new water use would not conflict with existing water rights. It seems likely that such water rights holders would sue for violation of the Takings Clause at the time of the State Engineer's decision, before waiting for the destruction of their water rights, on the basis of the evidence that tended to show the unavailability of additional, or "new," water for the new water rights – the type of facts the State Engineer has sought to circumvent through reliance on vague future monitoring and mitigation proposals.

It is hard to predict whether courts will view such takings challenges as ripe upon the State Engineer's decision or whether they will require the passage of time and the accrual of evidence that the new water rights are reducing the availability of water for the senior water rights. But it seems certain that either at the outset or after impacts have occurred courts will find that the practical elimination of some or all of the senior water right constitutes an unconstitutional taking under the *per se* test. This eventuality will expose the State to an unascertainable but potentially immense level of financial liability to provide "just compensation" to such harmed senior water rights holders.

The State Engineer's proposed change also could give rise to a second type of legal challenge under the Takings Clause, because it would allow the State Engineer to grant a new water right where there may not be sufficient water available, effectively taking water away from existing water rights owners and granting it to other private parties. The absolute prohibition of a governmental taking for any purpose other than a public purpose is one of the most fundamental rules under the Takings Clause.[14] Unlike the more commonly encountered type of takings claims, violation of the public use clause of the Takings Clause does not merely require compensation to be repaid to the injured property owner, rather the public use clause prevents the governmental confiscation in the first place. Therefore, enforcement of the public use clause would require that the government restore the taken or destroyed property to the owner.

As explained, the proposed new statutory language would authorize the State Engineer to grant new water rights to applicants in situations where neither the availability of water not the ability to avoid conflicts with existing rights can be demonstrated, and where no demonstrably effective monitoring and mitigation program is in place. By opening the door to such ungrounded decisions, the proposed new language would lead to an unpredictable number of instances in which the property rights of existing water right holders effectively have been taken in order to confer the benefit of using that same water on other new private water right owners. Any such decision would violate the public use clause within the Takings Clause, and consequently would

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or merely a part thereof.") (citations omitted); *United States v. Causby*, 328 U.S. 256, 265-66 (1946); *Transportation Co. c. Chicago*, 99 U.S. 635, 642 (1878) ; *ASAP Storage Inc. v. City of Sparks*, 123 Nev. 639, 647-648, 173 P.3d 734, 740 (2007); *Culley v. Elko County*, 101 Nev. 838, 841-42, 711 P.2d 864, 866 (1985); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-37 (1982) (per se takings rule applies regardless of how small a portion of the property is physically removed from the owner's control); *United States v. General Motors Corp.*, 323 U.S. 373, 378-84 (1945) (per se takings rule applied to temporary deprivation of owner's right to occupancy and use); *Tulare Lake Basin Storage Dist. v. United States*, 49 Fed. Cl. 313, 318-205 (2001).

[14] *See Kelo v. City of New London*, 545 U.S. 469, 477 (2005); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984); *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798); *Armendariz v. Penman*, 75 F.3d 1311, 1320-21 (9th Cir. 1996); *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123, 1128-29 (C.D. Cal. 2001).

be subject to judicial relief that either would prevent the new water right from being permitted or would force the State to rescind the permit and reverse any effects that have been caused to the senior water rights holder. In the context of groundwater systems that already will have suffered depletion and damage from the decisions to grant unsustainable new water rights, the constitutional requirement to restore senior water rights could well present nightmarish difficulties for the State.

IV. PROPER MITIGATION OR ADAPTIVE MANAGEMENT: FEDERAL AND STATE GUIDANCE

A. U.S. Department of Interior and U.S. Bureau of Reclamation Adaptive Management Guidance

According to DOI and BOR, adaptive management is not simply "learning by doing" as the State Engineer would suggest. Rather it is "much more than simply tracking and changing management direction in the face of failed policies, and, in fact, such a tactic could actually be maladaptive. An adaptive approach involves exploring alternative ways to meet management objectives, predicting the outcomes of alternatives based on the current state of knowledge, implementing one or more of these alternatives, monitoring to learn about the impacts of management actions, and then using the results to update knowledge and adjust management actions."[15] DOI notes that adaptive management is appropriate where (1) natural resources are responsive to management, but (2) there is uncertainty about the impacts of management interventions.[16] Adaptive management generally can be divided into two phases: (1) the setup phase; and (2) an iterative phase.[17] The DOI and BOR include five components in the set-up phase of adaptive management, which would be applicable to the State Engineer's permitting process: (1) Stakeholder involvement; (2) Objectives; (3) Management alternatives; (4) Predictive models; and (5) Monitoring protocols.[18] The iterative phase "uses these elements in an ongoing cycle of learning about system structure and function, and managing based on what is learned."[19] It is a process that involves assessment of the problem, designing a management program, implementing that program, monitoring results, evaluating those results, and adjusting management in response to those results.[20] According to the DOI, "[a]n adaptive approach actively engages stakeholders in all phases of a project over its timeframe, facilitating mutual learning and reinforcing the commitment to learning-based management."[21]

Contrary to the State Engineer's suggestion, guidance from the DOI and BOR make it clear that adaptive management is far more than simply learning by doing, and that a valid adaptive management plan requires significant work up front identifying specified mitigation measures as well as thresholds and triggers for implementation of those measures before an assessment of the plan's adequacy can be made. Consistent with the adaptive management guidance provided by

[15] U.S. Dep't of the Interior Adaptive Management Technical Guide, at 1.
[16] Dep't of Interior Adaptive Management Applications Guide, at v (2012), available at https://www2.usgs.gov/sdc/doc/DOI-Adaptive-Management-Applications-Guide-27.pdf.
[17] U.S. Bureau of Reclamation Adaptive Management Workshop Manual to Assist in the Prevention, Management, and Resolution of Water Resource Conflicts ("USBR Adaptive Management Manual"), at 1 (2011).
[18] *See* Dep't of Interior Adaptive Management Applications Guide, at vi (2012); *see also* USBR Adaptive Management Manual, at 1.
[19] USBR Adaptive Management Manual, at 1.
[20] U.S. Dep't of the Interior Adaptive Management Technical Guide, at 5.
[21] *Id*. at v.

DOI and BOR, when conditioning the grant of an application on monitoring and mitigation, the State Engineer first, at the very least, must be required to make a determination that the subject natural resources will be responsive to management (i.e., can be managed in a way that would make mitigation feasible and effective in eliminating or preventing any potential conflicts). If he determines that they will be responsive to management, then he must be presented with a developed adaptive management plan which includes the above five components of the set-up phase of an adaptive management program *prior to* issuing permits. Such an approach would be consistent with the sound approach adopted by the DOI and BOR and upheld by courts.

B. Adaptive Management Guidance from Sister States

Several states in the West utilize adaptive management in the context of water management. Adaptive management provisions enacted by sister states provide valuable guidance to Nevada and uniformly require far more substance than the Nevada State Engineer suggests is necessary in terms of a monitoring and mitigation plan. In general, states that permit adaptive management have imposed concrete requirements on water managers which are designed to guide agencies in the permitting process. For example, in Colorado, a "'[p]lan for augmentation' means a detailed program, which may be either temporary or perpetual in duration, to increase the supply of water available for beneficial use in a division or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water, or by any other appropriate means."[22] Similarly, Montana has enacted detailed guidelines for the use of monitoring and mitigation plans in the context of water permitting.[23] Oregon also views adaptive management as requiring more concrete specifics and scientific rigor than the State Engineer's proposal.[24]

The approaches taken by these other western states provide more meaningful guidance to water managers as well as requiring concrete safeguards to protect the property rights of existing water rights holders. The frameworks implemented in these states also make clear that adaptive management may not be used as a tool to avoid an assessment of whether there will be injury to existing water rights holders, but rather as a tool to ensure that injury to existing rights is avoided in the first place. The approach taken by these other western states provides useful guidance to Nevada as it contemplates the potential addition of monitoring and mitigation or adaptive management provisions to its water law.

C. Adaptive Management Guidance from Federal Caselaw

The State Engineer's proposed change to Nevada law runs contrary to long-standing legal precedent related to monitoring and mitigation in the context of federal environmental law. For instance, in the NEPA context federal courts have held that an EIS must discuss a mitigation plan and proposed mitigation measures thoroughly enough to ensure that the environmental effects of a project have been meaningfully analyzed.[25] Merely listing potential mitigation measures

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[22] Colo. Rev. Stat. § 37-92-103; *see also* Colo. Rev. Stat. § 37-92-305(3), (6), (8); *see also Weibert v. Rothe Bros, Inc*., 618 P.2d 1367, 1373 (Colo. 1980) (noting that the sufficiency of a plan for augmentation is judged by the no injury standard applicable to the evaluation of the application itself).

[23] Mont. Code Ann. § 85-2-362.

[24] Or. Rev. Stat. § 541.890(1).

[25] *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998); *see* 40 C.F.R. §§ 1508.20, 1508.25(b)(3).

without analyzing or evaluating their effectiveness is not sufficient to fulfill the requirements of NEPA.[26] The 9th Circuit's decision in *Pacific Coast Federation of Fishermen's Associations v. Blank*, also makes clear that "[m]itigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.'"[27] The court in *Pacific Coast* further underscored the fact that "[s]uch discussion necessarily includes an assessment of whether the proposed mitigation measures can be effective."[28] As a general matter, in the NEPA context, an agency cannot defer its assessment of the effectiveness of mitigation measures until after a decision is made, as the "courts have ruled that agencies should discuss mitigation measures, along with an assessment of whether they can be effective, in the EIS."[29] Additionally, the "omission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects."[30]

The logic driving this consistent line of federal court decisions is as straightforward as it is inexorable. At a minimum, prior to granting a water rights application, the State Engineer must have sufficient information to enable him to determine what the likely impacts of the proposed new use will be, what thresholds or triggers for mitigation are acceptable, what mitigation measures will be used, and when and how the effectiveness of those mitigation measures will be measured and evaluated. Because it lacks any of those specific requirements, the State Engineer's proposal falls far short of the basic standard of soundness, or acceptability, established by this substantial body of federal caselaw in analogous agency decisionmaking contexts.

V. CONCLUSION

Nevada is the driest state in the nation, and its water law is designed both to reflect that fact and to encourage prudent decision-making based on sound science. Nevada's water law is carefully designed to balance the limited nature of Nevada's water resources with the demands Nevada's population places on them. The State Engineer already has had ample discretionary authority and flexibility in allocating water, while being limited by certain minimal statutory and Constitutional requirements. Those minimal statutory constraints were established with sober foresight by the legislators and water managers who carefully shaped Nevada's water law and water policy with the State's long term health and economic wellbeing in mind. While the need to at least meet those bottom line requirements has occasionally been inconvenient for the proponents of unsustainable proposals, those minimal standards of sustainability generally have served Nevada well, and cannot be weakened without seriously jeopardizing Nevada's long-term future.

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[26] *South Fork Band Council of Western Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (requiring "an assessment of whether the proposed mitigation measures can be effective"); *Okanogan Highlands*, 236 F.3d at 473; *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998).
[27] 693 F.3d 1084, 1103 (9th Cir. 2012) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)).
[28] 693 F.3d at 1084 (citing *S. Fork Band Council of W. Shoshone of Nev.*, 588 F.3d at 727).
[29] *Methow Valley Citizens Council*, 490 U.S. at 352; *Neighbors of Cuddy Mountain*, 137 F.3d at 1381 (finding that agency failed to provide "an estimate of how effective the mitigation measures would be if adopted"); *see also S. Fork Band Council of W. Shoshone of Nev.*, 588 F.3d at 727 (a discussion of mitigation measures necessarily includes "an assessment of whether the proposed mitigation measures can be effective.").
[30] *Methow Valley Citizens Council*, 490 U.S. at 352.

While acknowledging that his predecessors have permitted significant overappropriations across the State, the State Engineer now asks for even looser standards in granting new water rights. However, the State Engineer already enjoys significant flexibility in water management and permitting that allows him to prudently and sustainably manage the water resources of the State. The historical record of overappropriation illustrates why it is essential for the law to restrain and guide the State Engineer in a well-grounded manner to prevent the uninformed approval of applications and further overappropriation of Nevada's scarce water resources.

In addition, the State Engineer's proposal would expose the State to burdensome Constitutional challenges and would jeopardize the property rights of Nevadans who have relied on their water rights for generations. It is critical that the Legislature carefully consider the impacts to property owners' rights under the Takings and Due Process clauses in order to avoid exposing the State to these challenges.