

**BENEFITS OF A UTAH/NEVADA AGREEMENT
ON THE ALLOCATION AND MANAGEMENT
OF THE SNAKE VALLEY AQUIFER**

I. INTRODUCTION

Snake Valley includes a large area in southwestern Utah and southeastern Nevada. Water use in the Snake Valley aquifer has developed slowly in both States. In 1989, however, the Southern Nevada Water Authority (SNWA) filed applications with the Nevada State Engineer to appropriate approximately 50,000 acre-feet of water from Snake Valley in Nevada to be piped to Clark County (Las Vegas) as part of a system of pipelines in central and eastern Nevada intended to transport rural groundwater to municipal uses.

There is little doubt that some unappropriated water exists in Snake Valley. One issue is how much water is available and how that unappropriated water should be divided between the two States. Some water “belongs” to Nevada and some “belongs” to Utah. Another issue is how to ensure, as much as possible, that the additional withdrawals in Nevada do not unreasonably impact existing rights and sensitive ecosystems in Utah. A third issue is how generally the two States should manage this interstate aquifer.

A federal statute creating easements for the SNWA project pipelines requires the States to settle these issues before SNWA pumps Snake Valley water. Thus, Utah and Nevada officials have for the last three years actively negotiated an agreement for the allocation and management of the aquifer. A draft of that Agreement is now ready for public review and comment.

This document outlines the Utah/Nevada Snake Valley Water Agreement (“Agreement”) and describes the legal and practical consequences if no agreement is executed or implemented.

II. NATURE OF THE PROBLEM

A. Allocating the Snake Valley aquifer requires dividing a natural resource shared between two sovereign States.¹ It is not the same as a traditional water dispute between private parties and is governed by different considerations, including these:

1. The “equal footing doctrine,” which provides that as a matter of federal constitutional law all States admitted to the Union stand on the same footing as the original States.
2. Each State therefore owns and regulates its own water resources and cannot dictate to another how to manage its resources. Further, the jurisdiction of the Utah State Engineer and Utah’s courts do not extend into Nevada, and *vice versa*.
3. Where a groundwater aquifer is located in two States, each receives an equitable share so long as the right of the other to its share is not unduly infringed. When one State takes what it believes is its share and a controversy arises, three possible solutions arise: (1) a negotiated settlement; (2) an interstate compact; or (3) an original action in the U.S. Supreme Court seeking equitable apportionment of the joint resource.
4. Priorities of existing water rights and the areas of water origin are key elements in an equitable apportionment analysis, although the U.S. Supreme Court may consider many other things. In the Snake Valley Aquifer, the majority of the recharge occurs in Nevada and flows down gradient into Utah, while the majority of historic discharge (use) has occurred in Utah.

¹ Some have argued that any water SNWA takes “steals” Utah’s water. This is incorrect, since Nevada is legally entitled to an equitable portion of the Snake Valley water.

5. A recent Act of Congress, Public Law 108-424, authorizing pipeline rights-of-way for the SNWA Project, provides that, prior to SNWA pumping Snake Valley water, Utah and Nevada must divide the Snake Valley groundwater. The Act further requires that the Agreement allow for maximum sustainable beneficial use of the water resource and protection for existing water rights. This is the Agreement Utah and Nevada have negotiated.

6. Utah and Nevada have some disagreement over the aquifer's long-term safe yield, because studies differ as to the amount of water available. The aquifer has unique characteristics, and the use has been relatively small. The most recent USGS "BARCASS" Study finds the aquifer discharges more water than did prior studies. Utah has not been comfortable with the BARCASS figures and has urged the use of more conservative estimates.

7. The concept of "sustainable beneficial use" is common to Utah and Nevada law, meaning that aquifer diversions cannot exceed long-term recharge.

8. Some Utah water legal concepts, such as "reasonable use," described below, which governs Utah groundwater along with the prior appropriation doctrine, are relevant.

III. COMPONENTS OF THE AGREEMENT

One benefit of the Agreement is that it allows the States rather than the U.S. Supreme Court² to divide the water in the aquifer. While neither party gets everything it wants, the parties have control over and flexibility regarding their respective interests and how to protect them.

² The only forum in which one state may sue another in the U.S. Supreme Court.

The Agreement protects the interests of Utah and its water users, provides mitigation if harm occurs, and creates a system for the protection of sensitive ecosystems and species.

1. Allocation of the Long-Term Safe Yield

The Agreement allocates the Snake Valley water resources using three categories of water which, in total, give each State half of the water in the Snake Valley aquifer. This concept protects water rights in place prior to 1989, allocates additional water to Utah and Nevada, and relies on conservative water estimates.

CATEGORY 1

ALLOCATED WATER: Totals 67,000 acre-feet and protects all existing Utah and Nevada water rights with a priority date prior to October 17, 1989. Utah is allocated 55,000 acre-feet and Nevada 12,000 acre-feet in this category

CATEGORY 2

UNALLOCATED WATER: Totals 41,000 acre-feet of unappropriated water which, when added to Category 1, totals 108,000 acre-feet. This is a more conservative amount than identified in the BARCASS study as potentially available for use in Snake Valley. In Category 2, Utah is allocated 5,000 acre-feet and Nevada 36,000 acre-feet. This means that any approval of SNWA applications by the Nevada State Engineer must be limited as a consequence of the

Agreement to no more than 36,000 acre-feet—rather than the 50,000 acre-feet SNWA applied for.³

CATEGORY 3
RESERVED WATER:

Totals 24,000 acre-feet of water which may eventually be available for appropriation without exceeding the long-term safe yield of the aquifer, depending on the impact of Categories 1 and 2 development. Utah is allocated 6,000 feet of the Reserved Water and Nevada 18,000 acre-feet. The Agreement provides that neither State Engineer may allow appropriations of Reserved water unless both agree that data demonstrate the water can be sustainably withdrawn without impacting uses under Categories 1 and 2 and/or over-drafting the aquifer. Further testing and data-gathering must take place before any Reserved water can be diverted. The total of all three Categories is the amount of ground water BARCASS estimates is consumed annually through evapotranspiration in Snake Valley.

2. Monitoring and Data Gathering.

The Agreement requires the States to jointly identify on-going areas of concern, including available groundwater supplies, groundwater levels, and effects of additional pumping

³ Further, under Nevada law, when water is exported out of the basin of origin, a reasonable amount of unappropriated water must be left in the basin of origin – 10% was left when the Nevada State Engineer approved SNWA’s Spring Valley application.

on existing water rights, wetlands, springs and riparian areas. All such data will be shared and publicly available. Further, the States agree that the sustainable groundwater supply includes a prohibition on “groundwater mining” (use that exceeds long-term recharge), degradation of water quality, and harm to the physical integrity of the Snake Valley groundwater basin.

A critical provision of the Agreement provides that the Nevada State Engineer will hold SNWA’s Snake Valley Applications in abeyance for ten years to allow both states and the USGS to conduct further studies and data gathering in an effort to obtain more information on the Snake Valley aquifer and the quantity of water available for appropriation without causing unreasonable adverse impacts to the aquifer, including effects on current water rights and environmental concerns. This means that SNWA will not have any Snake Valley water rights and therefore will not pump any Snake Valley water until at least 2019. If and when the SNWA applications come before the Nevada State Engineer for consideration, all data gathered during the ten year abeyance period may be submitted to and considered by the Nevada State Engineer. Without this ten year abeyance period, the SNWA applications are currently scheduled to be heard in the fall of 2011.

3. Identification and Mitigation of Adverse Impacts

Under Utah law, the rule of reasonableness requires that a prior groundwater user cannot demand that groundwater levels remain the same as when he first made his appropriation. But, any drop in groundwater levels must be “reasonable.” It is contrary to public interest to keep the aquifer completely full just to support existing water levels. Impairment issues are typically addressed through costly litigation, and the issues are more problematic when diversions are in an adjoining State.

As a special protection for Utah water users, the Agreement provides a process to identify and mitigate adverse impacts from SNWA pumping on existing water rights. SNWA must respond within ten days to any written complaint by a water user that SNWA's pumping impairs his rights. If acceptable mitigation cannot be agreed upon, the matter is referred to an interstate panel comprised of both State Engineers. As long as SNWA pumps from Snake Valley it must maintain a \$3 million mitigation fund, which may be used to deepen wells, reimburse pumping costs or provide other mitigation measures. This process will be simpler and less costly than litigating an impairment case with SNWA in Nevada courts, although such litigation by an affected water user is not precluded. The Agreement's monitoring and mitigation provisions protect Utahns in Snake Valley more than water users in any other part of Utah.

4. **ENVIRONMENTAL MONITORING AND MITIGATION**

The Agreement requires extensive monitoring and mitigation to address environmental concerns, including potential impacts on sensitive species and damage to wetlands and air quality. The details of this process is set forth in a separate agreement between Utah and SNWA which will be attached to the primary Agreement. A significant focus of providing for environmental mitigation is that it intends to prevent the listing of certain species under the Endangered Species Act, which could cause the U.S. Fish and Wildlife Service to exert control over Snake Valley water to protect critical habitats.

In summary, among other things the Agreement:

- ◆ fairly apportions Snake Valley water 50/50 to each State;
- ◆ places outside limits on how much water SNWA can pump;

- ◆ provides for a ten year delay on the consideration of the SNWA Snake Valley Applications to allow for further data-gathering and the strict monitoring of the potential effects of SNWA pumping;
- ◆ protects all existing Utah and Nevada water rights;
- ◆ provides several measures to mitigate adverse impacts to Utah water users without litigation and establishes a mitigation fund;
- ◆ addresses many of environmental concerns; and
- ◆ gives Utah and Nevada joint management authority over the Snake Valley aquifer rather than relying on uncoordinated actions in each state.

IV. IS THE AGREEMENT BETTER THAN NO AGREEMENT?

For political, environmental, and even cultural reasons, the Snake Valley component of the SNWA project has generated tremendous opposition throughout Utah. The intensity of these feelings leads some observers to believe Utah simply cannot reach an acceptable agreement with Nevada dividing the Snake Valley aquifer – in other words, no Agreement would be better than the Agreement outlined here. That view is misguided.⁴

⁴ Utah and Nevada officials have been in negotiations concerning the Agreement for three years. During that time, confidentiality restrictions have prevented Utah officials from responding to the consistent negative reports concerning Snake Valley issues. Now that it is possible to provide a response, Utah officials hope that interested parties will consider the Agreement, and the reasoning behind it, objectively and impassionately.

Similarly, some observers believe that P.L. 108-424 gives Utah a “veto” over the project, and Utah should use that veto. But this view is incorrect because the statute specifies no such veto. Utah must, at the least, negotiate in good faith toward an agreement. Failure to do so could mean BLM looks for alternative ways to interpret the law or, more likely, Congress repeals it.⁵

Without an Agreement, Utah’s only legal remedy if Nevada’s development of Snake Valley water harms Utah interests is an original action in the U.S. Supreme Court seeking a decree apportioning the aquifer. Bringing such an action is fraught with challenges and uncertainty, in addition to the cost of the litigation (which could be very high). For example, a plaintiff in an original action must have permission from the Supreme Court to file the lawsuit based on the showing of actual, present harm. The size of SNWA’s project means certain areas can be pumped while others rest. In the future, when and if SNWA’s Snake Valley pumping appears to create the harm necessary for Utah to get the Supreme Court’s permission for a lawsuit, Nevada could cease pumping from Snake Valley for a time and, depending on many factors, Utah may or may not be able to proceed. Further, the equitable apportionment doctrine is so complex and unpredictable that it is impossible to predict Utah’s odds of prevailing in such a lawsuit. Another example: even if Utah were to prevail in an equitable apportionment suit, there is no guarantee the U.S. Supreme Court would address adverse impacts on specific water rights or provide “mitigation” for such impacts or the environmental harm SNWA pumping could cause. This consideration is especially important because the mitigation the Agreement

⁵ Absent the unusual P.L. 108-424 provisions, Utah would have no say in Nevada’s use of Snake Valley water. Utah could do nothing to prevent that use until impairment occurs to Utah water rights, likely years from now.

provides to holders of Utah water rights in Snake Valley is more protection than Utah law requires. Such protection could be lost in a lawsuit.

In short, Utah's top water officials have, in conjunction with their lawyers, considered the related facts, issues, and law and determined that a negotiated agreement is preferable to pursuing long and costly litigation at some future time. The proposed Agreement is a better way to address and mitigate potential adverse effects of the SNWA project in Snake Valley than a lawsuit would be. And it is much better than no agreement or having Utah try to "veto" the Nevada project when Utah has no authority to exercise such a veto. This point is critical in a broader sense, because Utah officials would resist the involvement of Nevada officials in Utah water policy decisions. And, indeed, there may be Utah projects for which Nevada's support would be helpful. Further, failure to reach an agreement could increase tensions related to other water issues, such as management of the Colorado River. Finally, the Agreement gives Utah an important opportunity, mandated by Federal law, to address the numerous and complex issues involved with the development and future management of Snake Valley water resources. Utah should respond wisely and take full advantage of that opportunity. In this regard, the Agreement fairly divides the Snake Valley aquifer whether or not the SNWA project is built.