
September 30, 2009

Snake Valley Agreement
c/o Utah Department of Natural Resources
Division of Water Rights
1594 West North Temple, Suite 220
Salt Lake City, Utah 84114

RE: Snake Valley

Thank you for the opportunity to comment on the Snake Valley Groundwater Draft Agreement. These comments are submitted on behalf of Joel Ban and Ban Law Office PC, a private public interest environmental law office.

**Facts**:

- The drafting of this agreement is based on a Congressional statute, the 2004 Lincoln County Land Act, which calls for a bi-state agreement that divides up the water of an interstate groundwater flow system in the Snake Valley. In other words, the diversion of water from the Snake Valley to Las Vegas is contingent upon an agreement between the two states.
- The impetus for the agreement is based on the Southern Nevada Water Authority's (SNWA) request to divert between 25,000-50,000 acre feet of water per year so that it can be piped 285 miles south to the Las Vegas Valley.
- Eighty four percent of the land in Snake Valley depends on groundwater for agriculture, springs, pasture, grazing, desert vegetation and wildlife is in Utah. SNWA's project could drop Snake Valley water tables so low that the aquifer would be permanently depleted and destabilized, and destabilizing soils while producing devastating dust storms that could send increased air pollution across the Wasatch Front.

- Negotiating teams from Utah and Nevada have been collaborating for several years and recently they released a draft agreement that is said to not approve any diversion of water from the Snake Valley, but merely constitutes a framework for the anticipated diversion to Las Vegas.
- The agreement is subject to public comment and must be approved by the governors of both states. The allocation is divided between allocated and unallocated water. The

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allocated water, or water that is already been appropriated in the Snake Valley favors Utah by a margin of 55,000 acre feet to 12,000 acre feet.

- So called unallocated water favors Nevada 36,000 acre feet to 5,000 acre feet. The agreement also provides for continuous monitoring to determine what adverse effects would incur upon pumping from the Snake Valley aquifer. The 41,000 acre feet unallocated portion is the so called "extra water" that exists in the Snake Valley.
- Eighty four percent or roughly five times the acreage of present and future potential Snake Valley irrigable and groundwater-dependent land is in Utah, and roughly three times the relative historical use of groundwater has been in Utah.

- The agreement also establishes a review and appeal process where anticipated adverse effects can be addressed through mitigation or compensation. Injured parties can pursue a claim with the SNWA that can either immediately offer mitigation or the claim can be appealed to a bi-state commission.
- Nevada would agree to address adverse impacts to Utah water right holders through Nevada Water Law and its state engineer. Alternatively, an injured water right holder could pursue a remedy through an alternate route, presumably in some type of court. A mitigation and compensation fund would also be established for injured water right holders.

**State Law**

Of foremost concern to any proposed water export should be the Utah State Water Code, and specifically the chapter on water exports. Utah Code Ann. §73-3a. This chapter applies to the proposed diversion since it explicitly states that:

> "[t]his chapter governs application procedures and criteria for the approval of applications for: (1) the appropriation of water from sources within the state of Utah for use outside the state". Utah Code Ann. §73-3a-103.

The appropriation of Utah groundwater clearly falls within the scope of this chapter. Explicit policy statements of this chapter are to ensure for the welfare of its citizens, conserve scarce water resources, provide adequate water supplies, and control water in a way thats in the public interest. Although in this case it appears the states have attempted to comply with the mandates of the U.S. Congress's Lincoln County Land Act its unclear if the states has or will comply with the requirements of this chapter of state law. As stated above the provisions of this chapter clearly apply to groundwater apportionments, and therefore application procedures are triggered whereby an applicant must apply with the Utah State Water Engineer. Utah Code Ann. §73-3a-106. Certain outlined notices must be filed as well in compliance with Utah Code Ann. §73-3a-107. Under this application process the state engineer can approve it if he/she finds that the application is consistent with Utah's water conservation policies and is not contrary to the public welfare. Utah Code Ann. §73-3a-108(1).

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Additionally the state engineer must consider the availability of water in Utah, the current and reasonably foreseeable demands for water in Utah, whether there are current and reasonably foreseeable shortages of water in Utah, and whether the water that is the subject of the application could be used to fulfill the current or anticipated water shortages in Utah. Id(2). If the application fails on any of these counts then the application must be rejected. Additionally, if the water use is approved then "[t]he state engineer may condition any approval to ensure that the use of the water in another state: (a) is subject to the same laws, rules, and controls that may be imposed upon water use within the state of Utah". Id(4).

Based on the above its certain that Nevada's request to divert water from Snake Valley must be rejected since we already currently suffer from water shortages within the state. Evidence of this is testimony from Utah ranchers like Cecil Garland who's springs are either greatly reduced or don't exist compared to water levels in the recent past. The water shortage will be much worse upon diversion since the Agreement acknowledges that adverse impacts will result, and will likely be severe since the hydrologically connected Spring Valley in Nevada will also be pumped. This will as explained above destabilize the ecology of the entire Great Basin since surface flows and ground flows are connected. This would dry up springs such as Fish Springs and destabilize aquifer dependent vegetation causing irreversible air quality impacts to the Wasatch Front.

**Federal Law**

Although its clear that the intent of this agreement is to avoid litigation at least between the two states its unclear that the proposed apportionment could be justified based on U.S. Supreme Court rulings on interstate water apportionments. These decisions that mostly relate to surface water disputes can provide guidance on the current groundwater situation. First on the question of whether Utah water law is relevant to the above situation we know that it is since Justice Holmes ruled in 1911 that "enforced priorities on an interstate stream on the theory that when all states through which it flowed had adopted the same system of water law, they estopped themselves from asserting the power to ignore out of state priorities". Bean v Morris, 221 U.S. 485 (1911). This holding is critical since it means that since both states recognize fundamental tenets of Western Water Law and prior appropriation Nevada is not unable to ignore Utah Water Law.

Other important holdings that relate to the current situation include that equitable apportionment will protect only those rights to water that are "reasonably required and applied". Wyoming v. Colorado, 259 U.S. 419, 484 (1922). "Especially in those Western States where water is scarce, "[t]here must be no waste …..of the 'treasure' of a river. Only diligence and good faith will keep the privilege alive." Washington v. Oregon, 297 U.S. 517, 527 (1936). In Wyoming v. Colorado the states had a duty to employ "financially and physically feasible" measures "adapted to conserving and equalizing the natural flow". 259 U.S. At 484. "We think that doctrine lays on each of these states a duty to exercise her right reasonably and in a manner calculated to conserve the common supply". Id. Justice Marshall in, Colorado v. New Mexico stated "[w]e conclude that it is entirely appropriate to consider the extent to which reasonable conservation

measures by New Mexico might offset the proposed Colorado diversion and thereby minimize any injury to New Mexico users."

The SNWA would likely argue that the circumstances of the economic situation in Nevada dictate that it would be equitable to divert the water to Southern Nevada since they are the major economic engine of the state. The Supreme Court also considered that there may be countervailing equities that support the diversion of water across state lines where there would be support for diversion in one state that would cause detrimental water loss in another state. Again in Colorado v. New Mexico an example was given that would perhaps justify such a diversion, but in doing so, the state seeking the diversion would need to demonstrate with **clear and convincing** evidence that the benefits of the diversion **substantially** outweigh the harm that may result.

The anticipated harm is likely to be substantial in terms of loss of livelihoods in the ranching industry, significant damage to the entire ecology of the Great Basin—including Great Basin National Park and other ecological gems, potential dust storms that could cause greatly reduced air quality, as well as potential radiological pollution along the Wasatch Front. See UPHE comments. The benefit, if any, would be short term profit for developers and more insidious growth in the Las Vegas Valley.

**Indian Water Rights and Federally Critical Lands**

One area of discussion that has as yet received little to no attention is how this diversion may affect the Goshute Indian Tribe. This tribe's reservation is located proximate to the Snake Valley in the southern third of the Deep Creek Mountain Range. Although much of its water is supplied by surface flows originating from the Deep Creeks water is supplemented by area springs and groundwater that is also likely to be hydrologically connected to area surface flows. In Winters v. United States, 207 U.S. 564 (1908), the U.S. Supreme Court held that when the U.S. sets aside an Indian Reservation it impliedly reserves sufficient water to fulfill the purposes of the reservation. There was no indication from this agreement whether the Goshutes would be able to meet their water needs based on the agreed allocation of water between Utah and Nevada. For instance, if reduced flows impact the reservation and its water supply there is no mechanism within the agreement to either mitigate, compensate, or otherwise ensure that the reservation has sufficient water to meet its needs. Its entirely unclear how pumping at the levels proposed could impact springs and underground water flows within the near-by Goshute Indian Reservation.

The same principle applies to critical federal lands such as Great Basin National Park, an area that is of tremendous importance, and one that is heavily reliant on groundwater fed springs. Although there was some consideration of the wildlife reserve at Fish Springs the same consideration does not seem to have been given to Great Basin NP. Its entirely possible that pumping out of both Spring Valley and Snake Valley could impact this Park and the reservation, and so to only focus on the two states ignores the fact that there are superseding water rights holders. For all these areas of concern the devastation to be caused by the proposed aquifer pumping will only be identified as an adverse effect long after the damage has been done. This

is because it takes time after pumping has occurred for the damage to become obvious. That is to say that once the problem has been identified then it will already be far too late to correct the problem. The agreement seems to acknowledge that ecological damage will not be remedied through shutting off the pumps, since instead, some type of mitigation or compensation will be offered to the injured party. Although it should go without saying that once Las Vegas development is built based on Great Basin water its obvious that this remote yet ecologically vital area will suffer long before any Las Vegas developments do.

On a personal level I am an individual who recreates in the west desert including Great Basin National Park and believe that this agreement and associated water diversion could not be any more short sighted and ill-conceived. We are talking about an ancient aquifer that straddles the border of the two driest states in the entire Country. Nevada is the driest followed by Utah as the second driest. Regardless of one's position of whether Las Vegas should grow even more than it already has to resort to a proposal that will undoubtedly decimate an entire ecosystem, many livelihoods, and potentially inflict harm to millions of individuals along the Wasatch Front due to reduced air quality is not an idea that should be endorsed. To divert huge quantities of water to the Las Vegas Valley may economically benefit the few individuals that invest in Las Vegas real estate or golf courses, but these benefits weighed against the guaranteed harm that will result to the thousands perhaps millions of individuals is indefensible.

I ask that the state of Utah not sign this agreement for the reasons articulated above. The agreement is not in conformance with Utah Law, precedent from the U.S. Supreme Court, and does not even consider the interests of critical and superseding autonomous parties such as sovereign tribal nations or National Parks. In short, this agreement does not even come close to serving the public interest. Therefore state leaders including the Governor of Utah should not be a party to this agreement.

Sincerely,

/s/ Joel Ban

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