



November 30, 2020

Tim Wilson, P.E., State Engineer  
Nevada Division of Water Resources  
901 South Stewart Street, Suite 2002  
Carson City, Nevada 89701

**Re: Proposed Designation of 58 Groundwater Basins, 28 of Which Are Within the Region Represented by the Central Nevada Regional Water Authority**

Dear Mr. Wilson:

Thank you for providing this opportunity to provide comments on the Nevada Division of Water Resources' ("DWR's") proposed designation of 58 groundwater basins in Nevada. These comments are submitted by the Central Nevada Regional Water Authority ("CNRWA") – a nine-county unit of local government in the State of Nevada that collaboratively and proactively addresses water resource issues common to counties that contain a portion of Nevada's Central Hydrographic Region. CNRWA and its member counties have a number of serious concerns with DWR's proposal to designate these 58 hydrographic groundwater basins simultaneously following what appears to be an inadequate investigative and deliberative process. Although CNRWA's comments on DWR's proposed basin designations are focused chiefly on the 28 basins that lie within the Central Hydrographic Region, the problems and concerns identified in this letter pertain to all 58 of DWR's simultaneously proposed basin designations. The Central Nevada Regional Water Authority also supports the comment letters provided by its Member Counties.

#### **INTRODUCTION:**

Let us begin by stating clearly that CNRWA and its member counties do not oppose the designation of groundwater basins for additional administration across the board. Indeed, we support the designation and additional administration of groundwater basins when "due investigation" of the particular circumstances of a basin establishes that the basin's individual conditions warrant designation and provide a substantial factual basis for determining what additional management would be appropriate for that basin.

As detailed below, however, CNRWA believes that there are significant flaws in the way that DWR has pursued the simultaneous designation of this extraordinarily large number of basins. In our view, the process that has been adopted for these designations does not comply with either the letter or the spirit of applicable Nevada law. In general, this amounts to a failure of the part

of DWR to comply with the procedural requirements for the designation of a basin, let alone the simultaneous designation of 58 basins, pursuant to NRS 534.030 and related statutory provisions. As a result of these procedural deficiencies we believe the precipitously proposed designation orders for these basins should be withdrawn, and the State Engineer should follow a more thorough and deliberate process for determining whether to designate each of these basins on an individual basis – as generally has been the case with basin designations in the past.

In addition to the procedural deficiencies that infect all 58 of DWR’s proposed basin designations, a good number of the proposed orders also contain what appears to be an improper and unjustified blanket prohibition against any new irrigation use of water rights and resources in the affected basins. The inclusion of this blanket proscription against any new water right for irrigation use or any change of an existing water right to irrigation use is flawed both because it is not supported by the type of individualized investigation required by NRS 534.030(2) or an evidence-based determination that groundwater presently is being depleted within the designated area, as required under NRS 534.120(2). The blanket proscription against irrigation use for new water rights or change applications for existing rights also is inappropriate because it could unreasonably deprive existing water rights owners of the only means by which they may sustainably make economically beneficial use of their water rights, and because it could prevent the available water resources of the basins in question from being put to what in many instances is the only practicable economically beneficial long-term use within the basin in question or the county within which the basin is located.

Below is a more detailed explanation of our concerns over these apparent deficiencies in the basin designation process to date and the proposed orders designating the basins in question.

## **I. PROCEDURAL CONCERNS:**

### **A. Unwarranted Haste and Timing:**

On July 10, 2020, DWR issued notices for virtual hearings to be held on the designation of 11 hydrographic basins on August 12, 2020. In response to widespread objections over the timing for that hearing and the impropriety and inaccessibility of conducting such hearings solely via the internet, DWR withdrew those notices. DWR then issued notices for hearings on the dramatically increased number of 58 hydrographic basins. For these 58 basins DWR scheduled only 12 hearings, most of which dealt with several basins at once over a half-day hearing. Those hearings all were held over just seven days between October 12 and 26.

No information or reason was provided for why designation of such a large number of basins needed to be held on short notice, or why designation of any of these basins was necessary at the present time, in the midst of the coronavirus pandemic, when none of these basins currently are experiencing any acute drawdown of the groundwater table or related effects. Further, holding hearings during a time when affected water rights owners and other local stakeholders are busy gathering livestock and preparing for the winter months as well as harvesting their crops – deprived the people most directly affected by the proposed orders of a reasonable opportunity to participate meaningfully and to present their own testimony and evidence.

Rushing the process in this way does not, in our opinion, seem consistent with the State Engineer’s duties under NRS 534.030. NRS 534.030(2) appears to at least implicitly require, or assume, that the State Engineer will make known the reasons for which he “considers [a

groundwater basin] to be in need of administration” when he decides to hold a hearing on designation in the absence of a petition from the water appropriators in the basin in question. In addition, NRS 534.030(2) describes the purpose of such a hearing as being “to take testimony from those [well] owners to determine whether administration of that basin is justified.” By not providing an explanation of the factual basis for believing that administration of these basins is needed and by scheduling them so quickly, during the fall harvest season in the midst of the unprecedented current pandemic, the State Engineer effectively has deprived many of the affected water rights owners of a reasonable opportunity to participate meaningfully in the State Engineer’s decision making process regarding whether designation of these basins is justified and what additional management might be necessary and appropriate.

**B. Brevity and Cursory Nature of the Designation Hearings:**

As noted, the taking of testimony and public consideration of whether to designate all 58 groundwater basins was condensed into 12 hearings lasting only a few hours each which were held over seven days during the two-week period between October 12 and 26, 2020. For the vast majority of these basins the question of whether designation and additional management of the basin is justified was addressed in the context of a very short hearing that purported to cover several different basins at once (e.g., six basins each in Ely and Elko, seven each in Hawthorne and Winnemucca, and eight basins in each of two half-day hearings in Caliente). As a result of this extremely compressed hearing schedule, no more than a few minutes of time was devoted to explaining the purported justification for designating or imposing additional management in any of the basins. DWR did not provide, either in advance of or during the hearings, any substantial evidence or detailed information regarding the conditions in each basin that DWR believes necessitate designation and additional management.

The fact that the vast majority of these 58 basins received only a few minutes of attention during the designation hearings makes it implausible to suggest that each basin received the kind of factually specific individualized attention that would be required to accomplish what NRS 534.030(2) refers to as the “due investigation” underpinning a “determination whether administration of that basin is justified.” The extremely compressed hearing schedule and the brevity and cursory nature of the hearings simply do not meet the description of the process established and intended by the Nevada Legislature in NRS 534.030. Nor does this precipitous and truncated process appear to be consistent with the basic due process obligation to provide a reasonable opportunity for affected water rights owners and local stakeholders, whose property rights may be significantly harmed by the proposed orders, to meaningfully participate and present their own testimony and evidence.

**C. Failure to Provide Individualized Notice to Affected Water Rights Owners:**

In addition to the concerns regarding the scheduling of the designation hearings and the small amount of time provided for affected water rights owners to participate, we believe that DWR was obliged by the due process clauses of the Nevada and United States constitutions to mail individualized notice to all such owners whose property rights are at risk of being significantly harmed and potentially being effectively destroyed by the proposed designation orders. At least in the context of basins in which the proposed orders include additional management involving a proscription on new water right applications and change applications for irrigation uses, the potential harm or destruction of such water rights owners’ property rights already appears to be foreseeable, and the other proposed orders also open up that possibility following the basins’

designation. Given the threat to affected water rights owners' property rights posed by the proposed orders, and given that DWR has in its possession contact information for each water right owner in the subject basins, DWR ought to have provided at least individualized notice by mail to such water rights owners, as well as adequate time and information to prepare for and meaningfully present their own testimony and evidence. See *Jones v. Flowers*, 547 U.S. 220, 234-237 (2006); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 309-310, 313-315 (1950); *Bailey v. State*, 594 P.2d 534, 736-737 (Nev. 1979). Consistent with this due process jurisprudence, the Nevada Legislature has recognized that individualized notice is necessary in other proceedings which would be likely to affect a water right owner's property rights. NRS 533.095(4) (adjudications); NRS 534.037 (groundwater management plan hearing notice); NRS 534.090 (forfeiture and abandonment proceedings). Similar considerations and likely impacts to property rights are present where the State Engineer proposes to designate preferred uses or order curtailment in a basin, and so such action warrants, and indeed requires, individualized notice.

**D. Failure to Provide Adequate Information Re Basin-Specific Conditions:**

As noted briefly above, in neither the notices nor the hearings for the proposed designations of these 58 groundwater basins did DWR provide meaningful factual information regarding the specific conditions of the basins that could have supported a "due investigation" of whether designation of any of the basins is justified, as required by NRS 534.030(2). By the same token, DWR did not present factual information that would have constituted an adequate basis for an informed judgment by the State Engineer that groundwater presently is being depleted in the areas to be designated, which would have supported the designation of preferred uses in those areas, as presumed in NRS 534.120(2).

The sort of evidence necessary to support a rational, informed order designating and, where appropriate, imposing additional administration in a basin would consist not only of a recitation of the historic perennial yield estimate for the basin, but also an inventory of existing permitted water rights and pending applications. It also would include substantial evidence regarding well pumping rates, crop acreage surveys, and data from production and/or monitoring wells showing current levels and trends of the water table. Unfortunately, in these designation proceedings it appears that the only factual information regarding the justification for designation that was provided by the State Engineer is to be found at the database web pages on the DWR website for which the State Engineer provided one footnote in each proposed order. These links lead only to the most basic information concerning the basin's historically estimated perennial yield and an inventory of existing water rights and pending applications in the basin. That minimal information simply is not sufficient evidence to justify designation or additional administration of a basin.

The omission of substantial concrete evidence regarding the conditions in the basins being considered for designation and additional administration prevents affected water rights owners, other local stakeholders, and the public in general from being able to determine whether an order designating a basin is properly justified. Thus, the result of this omission is a further denial of due process to affected water rights owners, and possibly to other property owners in the basins, insofar as it deprives them of the opportunity to review, evaluate and respond to such evidence. Even absent countervailing evidence from water rights owners and stakeholders, the omission of such necessary information from the proceedings that result in the designation of a basin indicates that there may not be a sufficient factual basis for designating the basin in question, which would render the order vulnerable to potential judicial reversal.

## II. IMPROPER DISCRIMINATION AGAINST IRRIGATION USES:

### A. Discrimination Against Irrigation Use of Water Without Justification:

CNRWA is particularly troubled by the inclusion of language in several of the proposed orders of designation that effectively proscribes any future permitting of either new water rights for irrigation use or any change of an existing water right from another beneficial use to an irrigation use. As noted above, the hearings for these basins did not present any meaningful information regarding the conditions in each individual basin that purportedly warrant designation or the type of additional management that is proposed for each basin. The proposed orders that include sections proscribing any new irrigation use or change of existing water rights to irrigation use do not include any discussion of the facts that might justify such a severe constraint on a traditionally permitted use which has been and continues to be vital to the continued economic viability of the basins themselves and the counties within which those basins are located.

The State Engineer's authority to designate preferred uses in a designated basin is derived from NRS 534.120. While the proposed orders cite to this statutory provision, they do not actually comport with the language of NRS 534.120. Specifically, the provision that "the State Engineer is authorized and directed to designate preferred uses of water within the respective areas so designated by the State Engineer *and from which the groundwater is being depleted,*" clearly implies that the State Engineer must first determine that groundwater is being depleted from a designated area before he is authorized to designate preferred uses of water in that designated area. NRS 534.120(2) (emphasis added). In none of the proposed orders or hearings, however, has DWR presented evidence that would support a finding, or judgment, that the groundwater of any basin presently is being depleted.

The summary imposition of a blanket proscription against "new" irrigation uses being proposed in many of the 58 designation orders with which we are concerned also seems inconsistent with the approach taken in State Engineer Order 1316, which was issued on October 7, 2020, just before the hearings discussed in these comments. In that order, addressing the investigation of perennial yield necessary to consider possible designation of the Dry Valley Hydrographic Basin (07-095) in Washoe County, the State Engineer presented a compendium of substantial evidence from previous "water resource investigations." *Order 1316* at 3-7. After reviewing substantial existing evidence, the State Engineer provided "any stakeholder with interests that may be affected by water right development within the Dry Valley Hydrographic Basin" with a three-month period within which to file a report regarding the basin's perennial yield, twelve days after which the State Engineer will hold a hearing to take comment on the submitted reports. *Id.* at 9. The State Engineer should require similar investigation and evidence prior to making determinations about the perennial yield and administration for the subject basins.

Notwithstanding the lack of both such evidence and a finding or judgment that groundwater is being depleted in any particular designated area, the orders imposing this additional form of administration in certain basins would institute not merely the designation of preferred uses contemplated in NRS 534.120 and included in some previous curtailment and designation orders, but also go so far as to extend an inflexible, bright line, ban on irrigation to change applications, as described above. This ban stands in contrast to the example of the order that designated preferred uses for Basin 101, where new irrigation rights were prohibited, but irrigation change applications were not. *See Order 722.*

Beyond the lack of supporting evidence and inconsistency of approach shadowing DWR's proposed proscriptions against irrigation uses in a number of the 58 simultaneously proposed designation orders with which this letter is concerned, the imposition of such an inflexible barrier to any new water right for irrigation use and even any application to change an existing right to an irrigation use would be manifestly unjust and unreasonable to water rights owners, other interested stakeholders, and the counties within which the affected basins are located. In many of the subject basins, irrigation has been the lifeblood of local communities and families for generations and is an integral part of local economy and way of life, as reflected in rural counties' Water Resource Plans. Further, in many of these basins irrigation uses have long coexisted with temporary mining uses, with irrigation being the only viable long-term or permanent use of water in the basins and therefore being essential to the continued existence of rural communities in and around these basins. Because the proposed blanket proscriptions against changes to irrigation use of existing water rights could prevent the beneficial use of available groundwater where irrigation is the only viable permanent use, they could result in takings of at least some existing water rights.

The economies and tax bases of these rural communities depend on irrigation water rights that have sustained them since before Nevada's statehood. An outright ban on new irrigation rights and changes in use to irrigation would effectively strangle ranching and farming operations, which depend on the ability to purchase and change the purpose of use of water rights. Moreover, a ban on changes in purpose of use to irrigation would ensure that, with inevitable individual sales to various non-irrigation entities, eventually all irrigation water will be converted to non-irrigation uses, with no ability to revert to irrigation. Such permanent conversion would result in, not only a limitation on, but the eventual complete erosion of irrigated agriculture in the subject basins.

On a practical level, then, it does not make sense for DWR to impose an inflexible ban against change applications that would allow changes of existing water rights back and forth between permanent irrigation use and temporary mining or industrial uses. A more flexible approach that allows for case-by-case evaluation of change applications would be more consistent with the needs of local stakeholders and the goal of achieving balanced, sustainable groundwater use in these rural areas.

For all the reasons explained above, the State Engineer should not impose such blanket proscriptions. Instead, the State Engineer should provide for an individual case-by-case evaluation of what beneficial uses are viable and economically beneficial to the communities in the basins themselves and the counties within which the basins are located. That way the State Engineer can ensure that his determinations about which beneficial uses should be permitted and favored are based on concrete evidence reflecting the reality on the ground in the affected areas.

While CNRWA understands and appreciates DWR's interest in ensuring that Nevada's water is managed to sustain future generations of Nevadans, it simply is unacceptable to sacrifice the economies and culture of rural Nevada communities to achieve that goal. Moreover, it is unclear whether any analysis has been performed related to the impact the State Engineer's preferred use provisions would have on agricultural communities. CNRWA believes it is critical that such an analysis be performed prior to consideration of such drastic and damaging measures. CNRWA further urges the State Engineer to work with rural communities to develop creative sustainable solutions to Nevada's water scarcity challenges, solutions that respect the people who depend on

the resources they have invested in under Nevada's system of prior appropriation, a system that would be undermined by the State Engineer's proposed ban on new irrigation applications and changes to irrigation use in the subject basins.

**B. Appearance of an Effort to Effect a Major Change in Water Policy Across the State without Proper Authorization or Public Input and Debate:**

Finally, we wish to raise our concern that the proposed simultaneous designation of 58 basins across the state without proper individualized "due" investigations or specific fact-based determinations about whether groundwater is being depleted in those basins appears to be more of an attempt to effectuate a broad change in Nevada's water policy than an effort to respond on a basin-by-basin basis to the actual conditions and needs of each basin. The summary designation of so many basins and the imposition of a wholesale prohibition against new irrigation uses or changes in use of existing rights to irrigation uses in many of those basins seems to represent an attempt by DWR to institute a new water policy that is discriminatory against irrigation uses of groundwater even where that may be the only reasonable long-term use of water in some basins. We believe it is improper of DWR to attempt to impose a new water policy that systematically disadvantages and disallows irrigation uses without express direction from the Legislature to do so.

**CONCLUSION:**

For all of the reasons explained above, we urge DWR to withdraw the proposed designation orders addressed in this letter and, if DWR believes the specific conditions in these basins necessitate designation, to follow a more deliberate, open and thorough process of investigating whether the conditions in each basin justify designation on an individual basis. Such a basin-by-basin investigative process would be more consistent with the requirements and policy goals of NRS 534.030, 534.120 and other pertinent provisions of Nevada law. Where individualized investigations indicate that designation and additional administration is justified for basins, CNRWA would expect to be supportive of State Engineer orders designating and providing for additional administration of those basins as appropriate.

Respectfully submitted,

  
\_\_\_\_\_  
Jeff Fontaine

Executive Director  
Central Nevada Regional Water Authority

Cc: CNRWA Board of Directors