Memorandum

To: Chief Justice Hardesty
Date: 24 June 2021
From: Bevan Lister in consultation with Tom Baker, Doug Busselman and others
Subject: Instances where the State Water Engineer acted outside of the law

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Following are a few examples of matters where courts determined that the State Engineer did not follow Nevada Water Law – this is merely a representative sample, not an exhaustive list:

Rehearing of Great Basin Water Network v. State Engineer (Number 49718)…The Nevada Supreme Court determined that the State Engineer failed to take action on 1989 water appropriation applications within the year that was required. The Supreme Court also required a re-notice of the Southern Nevada Water Authority's application process with opportunity provided for filing protest.

Two cases (Case Number 15-CV-00227; Case Number 15-CV-101395, Case Number 15-CV-101396 and 15-CV-10297) involving attempts by the State Engineer to Order Curtailment of irrigation water rights of supplemental water rights (2015 & 2016)

Two cases involving mitigation (Eureka I – Ruling 6127 and Eureka II – Case Number 70157) where Kobeth Valley Ranch applications conflicted with existing water rights.

Also Case Number CV-120409 and consolidated cases (Judge Estes ruling in March of 2020) included matters related to 3M plans approved by the State Engineer.

Two cases involving attempts by the State Engineer to bring about forfeiture of water rights:

- Case Number – CV 0853016 (3J Cattle, LLC v State Engineer)
- Case Number – CV-21097 (Egger Enterprises, LLC v State Engineer)

Included above are actual cases where individuals took action to appeal a ruling by the State Engineer and the court found in favor of the individual. We are aware that there are uncounted instances where the ruling of the State Engineer was not appealed simply because the individual had neither the will or finances to pursue the matter in court (i.e. the permitting of water to the Lincoln/Vidler partnership in Kane Springs Valley supporting **speculation** as a beneficial use). At this point there is no way to research or quantify these instances.

In the history of the State Engineer, one of the most glaring omissions of following the law is in the holding of certain applications without action for decades. Water applications filed throughout the state by municipal users have been granted a special status that allows those applications to sit without action, functionally closing those basins to water acquisition.

There are also several other instances that are currently under litigation, so we are not sure if it is appropriate to mention them here.

Current issues that raise concern –

Many of the cases listed above, and many currently proposed actions indicate that the State Engineer does not like process – particularly 'due' process (refusal to notify before curtailment, gathering of data to support actions, notifying counties or water districts of proposed actions, etc.)

Creating of 'Super' basins where there is no concept in current Nevada Law to combine numerous connected (or not) hydrologic units into a single management unit. Or arbitrarily adding hydrologic units to these 'super' basins without data to support.

Arbitrarily combining surface and ground water management, then lobbying the legislature to declare 'legislative intent' for conjunctive management.

Again, this discussion is not exhaustive, simply representative of areas both that are documented/judged to be outside of the law and those we interpret to be outside of the law.

Nevada water law should be, and can be, very simple and straight forward. Most of the efforts over the last three decades to 'improve' the law, have diluted it and confused it.

The prior appropriation doctrine, as originally written in Nevada Water Law, provides for a straightforward, orderly allocation of this most precious resource when applied uniformly.