

Great Basin Water Network
Statement of Concerns with AB 298 – 1st Reprint

AB 298 Redefines “Perennial Yield” and “Unappropriated Water” to Permit Unsustainable Groundwater Mining

The new proposed definitions for “perennial yield” and “unappropriated water” would dramatically change and effectively reverse longstanding concepts of these terms in Nevada water law and policy.

The development or use of groundwater resources must be done sustainably —the amount of water that can be taken out of a groundwater system annually cannot exceed the amount of water that is replenished in the system over the same amount of time. If more water is taken out than comes in, withdrawals eventually and inevitably deplete the system. Because groundwater systems in Nevada’s arid climate would take centuries to recover if they were depleted by over-extraction of water, the universally agreed standard was that such over-extraction must be prevented. This is known as groundwater mining and is illegal under Nevada law.

Perennial yield and unappropriated water determinations have been made by the Nevada State Engineer, based on scientific evidence provided by their office, USGS, and others. Scientists and experts have been at the helm, with the opportunity for interested community members to participate.

AB 298 puts politics into this process, and its definitions would authorize and potentially encourage the extraction of more water from groundwater systems than is replenished. AB 298 would fail to limit the extraction of quantities of water over and above the amount that is naturally replenished and discharged from the system. Instead, the “unreasonably or continuously decreasing” language for perennial yield sanctions over-extraction. Instead of adding clarity to the law, this opens the door to never-ending litigation on what is or is not considered “unreasonable,” removing the clarity and enforceability of current definitions within orders from the State Engineer. By not protecting the environment or public interest under the definition of unappropriated water, and allowing for capture outside of the recharge or discharge of a source of supply, this bill once again opens the door groundwater withdrawals that would have devastating long term impacts on human, plant, and animal communities.

There is no need to change the established, widely approved, definitions and standards that have governed Nevada water policy for decades, or to place them within the Nevada Revised Statutes. These determinations should be left to technical experts in hydrology and geology, as has been the case for decades.

AB 298 Redefines “Environmental Soundness” to Permit Succession of Species and Fails to Protect Existing Plant and Wildlife Communities in Interconnected Groundwater Basins

The definition of “environmental soundness” offered in this bill undermines meaningful environmental protection by:

- (1) failing to specify that unreasonable harmful impacts to *existing* wildlife and plant communities are prohibited;
- (2) improperly limiting protection to species that directly depend on groundwater, thereby excluding from protection wildlife and plant communities that depend on surface conditions and waters that are supplied from groundwater sources; and
- (3) excluding wildlife and plant communities that may be harmfully impacted in hydrologically connected basins within the same inter-basin flow system, where the basin from which water is to be transferred is part of an inter-basin flow system.

These deficiencies must be addressed in order to prevent potentially massive environmental devastation.

AB 298's 3M Plan Provisions Are Unnecessary, Would Drastically Weaken Protections for Existing Rights and the Environment, and Remove Judicial Review

AB 298 weakens the standard for monitoring, management, and mitigations plans ("3M Plans") in the context of evaluating water rights applications. Nevada water law already allows for 3M Plans to be used in order to avoid or eliminate prohibited conflicts between new water rights or transfers of water and existing water rights or domestic wells. The current law also permits 3M Plans to avoid harmful impacts that would threaten the public interest and more specifically threaten environmental soundness in the context of inter-basin transfers of water.

Both Nevada District Court and Supreme Court opinions have made clear that the only requirement is that a 3M Plan be an actual plan with adequate information, standards, and measures that enable the State Engineer to make an informed decision about whether the proposed plan would be effective at detecting, preventing, and if necessary mitigating (i.e., eliminating) prohibited conflicts or harmful impacts. That standard is consistent with the one that has prevailed in other states and in the federal system, as well.

AB 298 undermines those standards. The bill fails to require that a 3M plan be accompanied by substantial evidence demonstrating it will be feasible and effective in eliminating a conflict with or unreasonable harmful impact. It narrows monitoring requirements to existing rights holders and "important environmental resources," which is an ambiguous term and undercuts the responsibility to monitor impacts on the entire groundwater system. Triggers must be quantified and thresholds calculated.

Also, as written the bill creates at least two loopholes that would exempt later amendments to a 3M Plan from any judicial review. This would improperly prevent Nevada courts from fulfilling their constitutional role of ensuring that the law is being properly implemented.

AB 298 Improperly Prioritizes "Mitigation Water", Presumes Such Water Will be Available, and Provides No Protection for Existing Rights or Resources Impacted by the Withdrawal of Mitigation Water

AB 298 creates an unsound presumption that so-called "mitigation water" can be relied on. The bill improperly prioritizes the promise of mitigation water over other mitigation measures without requiring a genuine demonstration that the applicant actually will be able to provide such water of sufficient quantity and quality at the time when impermissible conflicts or impacts are likely to occur. AB 298 proposes a dangerous blanket exemption from the permitting process for any proposal to take water from another location and use it as mitigation water. By failing to ensure that the same problems will not be replicated in new areas, this endangers even more water systems and regions of the State by shifting impacts to different locations without providing protection to existing water rights or the environment likely to be impacted by the withdrawal of mitigation water. If anything, the first priority in terms of mitigation measures should be the reduction of pumping by the applicant.

AB 298 Would Profoundly and Retroactively Alter Nevada Water Law

AB 298 would fundamentally change, not clarify, Nevada's water law. The changes proposed in AB 298 would eliminate the objective, quantified standards that currently limit the withdrawal of groundwater to the amount that is naturally replenished in order to protect the groundwater system's long-term sustainability or viability. Far from clarifying or strengthening fundamental long-established policy of Nevada's water law and practice as claimed in Section 20, AB 298 as written opens the door to systematically excessive and unsustainable extraction and consumption of groundwater. Section 21 of AB 298 is unacceptable because it would make this bill's radical alteration of longstanding Nevada water law retroactively applicable to past permits of water rights and pending water rights applications. This appears to be a clear attempt by SNWA to rewrite the rules after numerous losses in court based on a failure to meet prudent legal and scientific requirements.