IN THE OFFICE OF THE STATE ENGINEER OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATION NUMBER 53989
FILED BY Las Vegas Valley Water District/SNWA
ON October 17, 20 1989

PROTEST

FILED
MAR 3 0 2011
STATE ENGINEER'S OFFICE

Comes now Duckwater Shoshone Tribe
Printed or typed name of protestant

whose post office address is 511 Duckwater Falls, Duckwater, Nevada 89314
Street No. or PO Box, City, State and ZIP Code

whose occupation is federally recognized Indian Tribe and protests the granting

of Application Number 53989, filed on October 17, ~~20~~ 19 89

by Las Vegas Valley Water District/SNWA for the

waters of underground (Basin 181) situated in Lincoln
an underground source or name of stream, lake, spring or other source

County, State of Nevada, for the following reasons and on the following grounds, to wit:
See Attachment.

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THEREFORE the Protestant requests that the application be DENIED
Denied, issued subject to prior rights, etc., as the case may be

and that an order be entered for such relief as the State Engineer deems just and proper.

Signed Virginia M Sanchez
Agent or protestant

Virginia Sanchez
Printed or typed name, if agent

HEATHER BRODERSON
Notary Public - State of Nevada
Appointment Recorded in Nye County
No. 08-0593-14 - Expires April 29, 2012

Address 511 Duckwater Falls
Street No. or PO Box

Duckwater, Nevada 89314
City, State and ZIP Code

775.863.0227
Phone Number

E-mail

Subscribed and sworn to before me this 21st day of March, 20 11

Heather Broderson
Notary Public

State of Nevada
County of Nye

+ $25 FILING FEE MUST ACCOMPANY PROTEST. PROTEST MUST BE FILED IN DUPLICATE.

ALL COPIES MUST CONTAIN ORIGINAL SIGNATURE.

ATTACHMENT

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATION NO. 53989-53990 FILED BY LAS VEGAS VALLEY WATER DISTRICT AND OWNED BY SOUTHERN NEVADA WATER AUTHORITY TO APPROPRIATE UNDERGROUND WATERS OF DRY LAKE VALLEY (HYDROGRAPHIC BASIN 181)	))))))))	PROTEST BY DUCKWATER SHOSHONE TRIBE

SUMMARY

Pursuant to Nevada Revised Statute ("NRS") 533.365, the Duckwater Shoshone Tribe ("Tribe" or "Protestant") hereby protests Application No. 53989-53990 ("Application" or "Applications"), which was filed by the Las Vegas Valley Water District ("LVVWD") on October 17, 1989, and later acquired by the Southern Nevada Water Authority ("SNWA"), to appropriate groundwater from Dry Lake Valley (Hydrographic Basin 181).

Protestant states as grounds and reasons for this Protest that: (1) there is not a sufficient amount of water available in the proposed source of supply; (2) the application and proposed use would conflict with existing water rights and impermissibly diminish the sources of and protectable interests in domestic wells; (3) the appropriation and proposed use would be environmentally unsound, unsustainable, and detrimental to the public interest on environmental grounds; (4) the appropriation and proposed use would be detrimental to the public interest on economic grounds and would unduly limit future growth and development in the export basin and in hydrologically connected basins; (5) the proposed use is not an appropriate long-term use of Nevada's limited water supply; (6) the Applicant

has not justified the need to import water from another basin; (7) the Applicant has not implemented a sufficient water conservation plan in the basin(s) in which water will be delivered; (8) the Applicant has not developed a sufficient conservation plan to protect affected basins; (9) the appropriation and proposed use would have unduly negative impacts on cultural, historic, and religious resources which would harm the public interest; (10) the appropriation and proposed use would violate federal and state laws that protect cultural, religious, and historic resources; (11) the appropriation and proposed use would violate the Tribes' rights under the Treaty of 1863 in Ruby Valley; (12) the appropriation and proposed use would violate the federal government's trust responsibility to the Tribe; (13) the appropriation and proposed use would unduly injure the Tribe's sovereignty and ability to regulate their territory; (14) the Applicant has not demonstrated the good faith intent or financial ability and reasonable expectation to actually construct the work and apply the water to the intended beneficial use with reasonable diligence; and (15) the Applicant has failed to demonstrate ability to access land containing point of diversion. These protest grounds are explained below.

INTRODUCTION

SNWA has filed applications to appropriate and transfer large amounts of water from surface and groundwater sources in eastern Nevada, including: Spring, Cave, Dry Lake, and Delamar Valleys, located in White Pine and Lincoln Counties. SNWA has also filed applications to appropriate and transfer large amounts of water from Snake Valley, which is located in Utah but extends hydrologically into eastern Nevada. Moreover, Spring and Snake Valleys are part of the Great Salt Lake Desert regional flow system, while Cave, Dry Lake, and Delamar Valleys are part of the Colorado regional flow system. SNWA's groundwater development project ("GWD Project") proposes an interbasin transfer of water via a 300+ mile pipeline to municipalities and other users in southern Nevada.

The Duckwater Shoshone Indian Reservation ("Reservation") is located in Duckwater Valley/Railroad Valley-North in Nye County, Nevada. The Reservation's current size is approximately 3,855 acres. The Tribe has water rights that date back at least as far as 1867, if not 1863, and the Tribe's reserved and secured rights are for both surface and ground water in an amount sufficient to fulfill the purposes of the Reservation, and to satisfy the present and future needs of the Reservation. *See Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963) (Arizona I); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). Moreover, tribal water rights are not limited to water sources that originate on tribal lands. *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956). Federal reserved water rights for the Tribe extend to groundwater in other basins or areas to the extent that water is necessary to accomplish any and all purposes of the Reservation. *Id.*

The subject basin has been part of the Tribe's aboriginal territory since time immemorial. The subject basin falls within the Tribe's treaty lands, defined by the Treaty of 1863 in Ruby Valley (13 Stat. 681-684) between the United States and Western Shoshone Tribes, including the Duckwater Shoshone. A large number of tribal trust resources and interests exist within the subject basin, in hydrologically connected basins, and in all areas potentially impacted by the SNWA GWD Project.

I. THERE IS NOT A SUFFICIENT AMOUNT OF WATER AVAILABLE IN THE PROPOSED SOURCE OF SUPPLY

The State Engineer should deny the Application pursuant to NRS § 533.370(5), because there is insufficient water available for appropriation in the proposed source of supply. Pursuant to 533.370(5), "where there is no unappropriated water in the proposed source of supply . . . the State Engineer shall reject the application and refuse to issue the requested permit." The appropriation of this water, when added to the already approved appropriations in the basin of origin and hydrologically connected basins

within the same flow system, will exceed the perennial yield of those basins, also indicating that the the entire flow system is potentially fully appropriated, if not over-appropriated.

Indian tribes have senior rights to large amounts of water in the subject basin, no matter whether those amounts are quantified or not (see Section XI below). These federal reserved water rights and rights under treaty agreements are senior and take priority over water rights established later under Nevada state laws. The Application, if approved, would violate well-established federal legal principles that mandate, establish, and set aside water rights for Indian tribes. Moreover, the Application, if approved, would overly diminish the amount of water available to Indian tribes that is already set aside and appropriated under federal law or by treaty, and infringe on Indian water rights. It is well-established that the federal government has a trust responsibility to Indian tribes to preserve and protect tribal resources, including water. The Stipulations entered into by the SNWA and the U.S. Department of the Interior do not properly or adequately protect Tribal water rights or substitute for the required legal recognition and protection of the Tribe's water rights. It is noteworthy that affected Tribes have consistently objected to the Stipulations, which were negotiated and entered without the legally required consultation with affected Tribal governments. Moreover, the Tribe still has rights to large amounts of water within the aboriginal territory under the Treaty of 1863. Thus, the State Engineer must deny the Application pursuant to NRS 533.370(5) and 533.370(6)(d).

In addition, the State Engineer previously found that there is too much uncertainty, too little sound data, and too great of a risk of unsustainable overappropriation in the interbasin flow system, of which this basin is a part, for further appropriations to be permitted until substantial additional data were gathered and evaluated. That additional data gathering and evaluation have not been completed, and until that happens it would be premature to permit any additional appropriation from hydrologically interconnected basins within the carbonate rock province, including the basin targeted

by this Application. Thus, the State Engineer must deny the Application. The State Engineer has the discretion to require the Applicant to undertake the necessary hydrological study to collect scientifically sound data, fill the appropriate information gaps, reduce uncertainty, and reduce the risk of unsustainable water use and export.

II. THE APPLICATION AND PROPOSED USE WOULD CONFLICT WITH EXISTING WATER RIGHTS AND PROTECTABLE INTERESTS IN DOMESTIC WELLS

The State Engineer should deny the subject Application pursuant to NRS § 533.370(5) because the proposed appropriation and use would conflict impermissibly with and impair existing senior water rights and protectable interests in domestic wells in the basin targeted by this Application and hydrologically connected basins within the same interbasin flow system. When added to the previously approved appropriations in the subject basin and hydrologically connected basins within the same interbasin flow system, the proposed appropriation and use will exceed the perennial yield of the subject basin resulting in declining groundwater levels and unreasonable degradation of the level and quality of the water in existing wells. This will undoubtedly increase water costs to domestic and local users, which include members of the Tribe.

Groundwater sources in the subject basin and downgradient basins are interconnected via the Colorado flow system, and the subject basin is one of several basins that feeds the flow system. As such, overutilization and overappropriation in the subject basin will negatively impact existing reserved water rights held by Indian tribes, whether the Tribal reserved water rights have been adjudicated, quantified, or utilized. The Stipulated Agreements between SNWA and the Department of Interior agencies cannot substitute for a proper consideration, recognition, and protection of Indian water rights within the subject basin, within hydrologically connected basins, or within the Tribe's treaty lands

defined in the Treaty of 1863 in Ruby Valley. Neither can the Stipulated Agreements waive or substitute for properly considered Indian reserved water rights.

In addition, NRS § 533.024 provides that it is the policy of the State of Nevada to recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells, and importantly, to protect their supply of water from unreasonable adverse effects caused by municipal, quasi-municipal, or industrial uses that cannot be reasonably mitigated. Private homes and domestic wells of tribal members within the subject basin, and in downgradient basins will have their domestic wells adversely impacted by the Application, if approved, and SNWA has not demonstrated or devised reasonable mitigation. Thus, the State Engineer must deny the Application on those grounds.

The State Engineer has previously denied applications where the use of water conflicted with a basin designation order or where the use of the water would create a substantial cone of depression that would potentially draw nearby poor quality water. Nevada water laws only allow for a reasonable lowering of the water level. This Application, if approved, would cause a cone of depression around the well/pumping station. Due to the large amounts of water applied for by SNWA and the large number of proposed wells (applications) for the SNWA's GWD Project, if approved, the multitude of cones of depression would eventually coalesce and cause widespread drawdown and water quality problems. A cone of depression caused by this Application, if approved, and the entirety of other SNWA applications would conflict with existing rights and be detrimental to the public welfare.

III. THE APPROPRIATION AND PROPOSED USE WOULD BE ENVIRONMENTALLY UNSOUND, UNSUSTAINABLE, AND DETRIMENTAL TO THE PUBLIC INTEREST ON ENVIRONMENTAL GROUNDS AS IT RELATES TO THE BASIN FROM WHICH THE EXPORT IS PROPOSED AND IN HYDROLOGICALLY CONNECTED BASINS

The State Engineer should deny the subject Application pursuant to NRS §§ 533.370(5) and

533.370(6)(c), because approval of this Application and proposed use in SNWA's GWD Project, of which this Application is a part, would threaten to cause serious and irreparable environmental harms in the basin from which water is proposed to be appropriated and exported and in hydrologically connected downgradient basins within the same interbasin flow system. Therefore, this Application, if approved, would be detrimental to the public interest and would be environmentally unsound and unsustainable as it relates to the basin of origin and hydrologically connected basins. The Federal District Court for Nevada, in *United States v. Cappaert*, 375 F. Supp. 456 (D. Nev. 1974), found that pumping ground water was jeopardizing the survival of an endangered species due to lowering of the water level. The Court found that "Congress, state legislatures, local government, and citizens have all voiced their expression for the preservation of our environment . . . ."

The State Engineer has previously set forth criteria he found in Nevada water law for assessing whether the appropriation of water would threaten to be detrimental to the public interest. The State Engineer has previously decided that "reasonable and economical uses" would be in the public interest, as long as other public interests were not unreasonably compromised or could not be mitigated. While SNWA's GWD Project has developed monitoring plans, it should be made clear that monitoring plans absolutely are not adequate or sufficient mitigation. The State Engineer also has previously determined that to impair endangered or threatened species, or degrade the quality of water, would threaten to prove detrimental to the public interest. While the State Engineer must balance the economic and growth concerns for the state against environmental issues of concern, it is clear that negative environmental impacts that would result from the approval of this Application, among others within the SNWA GWD Project, outweigh strongly the use proposed by the SNWA GWD Project. The State Engineer must exercise discretion and balance in his interpretation of public interest. The severe and irreparable harms that would result from the approval of this Application, and others within the GWD Project, would

prove to be extremely detrimental to the public interest at national, state, tribal, and local levels. The State Engineer's analysis of this Application clearly would weigh in favor of protecting the environment from widespread impacts, despite whether or not monitoring programs have been developed and would be implemented. These grounds, in addition to the other environmental reasons below, strongly weigh in favor of the State Engineer denying this Application.

A. Unsustainable Use and Long-Term Hydrologic and Environmental Impacts

The State Engineer's discretion in evaluating whether an appropriation and proposed use would be "environmentally sound" includes environmental impacts tied to hydrology. The State Engineer is responsible for ensuring that there is sufficient water left in the basin from which the water would be exported to ensure that the basin would remain environmentally viable and ensure that the protection of the basin's environment and water would provide for future growth in the basin. Any appropriation of water in the subject basin also must not impact downgradient basins. It is clear that the legislative intent of 533.370(6)(c) is to protect natural resources of basins and prevent a repeat of the Owens Valley scenario, while providing for responsible use of available water. Within that scope, SNWA's GWD Project, which the subject Application is a part, is not a responsible use of available water, the appropriation(s) would not protect natural resources, and the appropriation and GWD Project would greatly limit and burden future economic growth and development within the export basin and hydrographically connected basins. Moreover, this appropriation and proposed use is not sustainable over the long-term, would cause unreasonable and irreversible impacts to water resources, and cause unreasonable and irreparable impacts on hydrologic-related natural resources that are dependent on those water resources. The Tribe relies on these natural resources in the subject basin and in

hydrologically connected basins for a large number of vital cultural and religious purposes.

B. Severe and Irreparable Harm to Ecosystems and Wildlife

As mentioned above, the State Engineer and the courts previously have considered harms to ecosystems and wildlife to be within the purview of the public interest. Accordingly and especially in this case, the State Engineer must consider whether harms to ecosystems and wildlife would be detrimental to the public interest. The proposed appropriation, export and use would result in severely lowered groundwater levels in the basin from which the appropriation and export is proposed and in hydrologically connected downgradient basins within the same interbasin flow system. Those declining groundwater levels will result in drying out springs, seeps, wetlands, wet meadows, and moist playas, and in killing off groundwater-dependent vegetation in the subject basin and hydrologically connected downgradient basins. This loss of water will cause significant direct harm to many wildlife species and their habitat in the basin from which this Application proposes to appropriate and export water and in hydrologically connected downgradient basins within the same interbasin flow system. Among the species that will be harmfully impacted by this loss of water are a number of federally and state protected species, including federally listed threatened and endangered species, which will be threatened with extinction as a result of the proposed appropriation and export of this water. Wildlife taxa likely to be harmfully impacted by the appropriation and export of water proposed in this Application, includes fish, amphibians, other aquatic species, groundwater-dependent mammals and other terrestrial species, bird species that depend on the springs, wetlands, wet meadows, and vegetation supported by groundwater, and a variety of invertebrates, including but not limited to rare butterfly species and springsnails. Threats to wildlife will include anything from actual extinction, threats to

extinction, and drastically altered distributions. In addition to NRS 533.370(6)(c), the appropriation and proposed use from this Application and others that are part of the GWD Project, are subject to NRS 533.367, which provides that there is clear demonstration of the public interest in that the sources of water for wildlife and ecosystems remain accessible and viable. These are components of important and necessary tribal cultural and religious resources.

The unique wildlife habitat areas and refugia likely to be harmed by the appropriation and export of water proposed in this Application and SNWA's GWD Project, of which this Application is a part, include but are not limited to Pahranagat National Wildlife Refuge, Kirch Wildlife Management Area, Key Pittman Wildlife Management Area, Moapa Valley National Wildlife Refuge, Overton Wildlife Management Area, Ash Meadows National Wildlife Refuge, Amargosa Valley Pupfish Station, the Desert National Wildlife Refuge Complex, Great Basin National Park, and Swamp Cedars/Shoshone Ponds Natural Area. Many of these protected areas are even considered globally and/or regionally unique and imperiled ecosystems and hold great cultural importance to the Tribe.

Because of these severe and irreparably harmful impacts, the State Engineer should deny this Application pursuant to NRS §§ 533.370(5), 533.370(6)(c) and 533.367.

C. Degradation of Cultural, Traditional, Historic, and Sacred Resources

The environmental harms described above also will lead to the pronounced degradation, and in some instances destruction, of cultural resources, traditions, sacred sites, etc, in the basin expressly targeted in this Application and in hydrologically connected basins. The subject basin has been part of the Tribe's aboriginal territory since time immemorial. The groundwater drawdown from this Application, if approved, and the entirety of the GWD Project will cause severe and irreparable harm to

cultural resources, sacred sites, traditions, and Tribal history. Cultural resources likely to be harmed by the appropriation and export of water proposed under this Application and SNWA's entire GWD Project, of which this Application is a part, include but are not limited to: Native American ritual worship and various sacred sites, prehistoric Native American village or dwelling sites, Native American graves or burial sites, and scenes of historic massacres of Tribal ancestors. Cultural resources also include spring ecosystems and various plant and animal species that the Tribe holds sacred and hold religious importance. These and other cultural resources that would be damaged or destroyed if this Application is approved constitute an important part of the Tribe's, Nevada's, and the Nation's, historical and cultural legacy that numerous state and federal mandates have sought to protect. Therefore, the State Engineer should deny this Application pursuant to NRS § 533.370(5) because the proposed appropriation and use would cause degradation of cultural resources that would be detrimental to the public interest.

D. Degradation of Water Quality

The State Engineer has the authority to consider whether the degradation of water quality within the subject basin and in downgradient basins within the same groundwater flow system would be detrimental to the public interest. The groundwater drawdown that would be caused by the appropriation and export of water proposed in this Application would lower the static water table in both the basin fill and carbonate rock aquifers within the affected basins to such an extent that brackish groundwater and other pollutants would infiltrate those aquifers. The consequence of this infiltration of poor quality groundwater and other pollutants would be significant degradation of groundwater quality in the basin expressly targeted by this Application and downgradient hydrologically connected basins

within the same interbasin flow system. This degradation of groundwater quality would prevent humans, livestock, and wildlife from relying on the groundwater from these aquifers, as they have throughout history. These impacts would be environmentally unsound and unsustainable, bearing long-term and irreversible impacts on water quality. The quality of water in the subject basin and hydrologically connected basins is highly important as cultural resources, traditional teachings, and religious practices. Because such an outcome would be detrimental to the public interest and would be environmentally unsound and unsustainable in the basin of origin, the State Engineer should deny this Application pursuant to NRS §§ 533.370(5) and 533.370(6)(c).

E. Degradation of Air Quality

It is within the purview of the State Engineer to consider whether the degradation of air quality will be detrimental to the public interest due to a specific action on the subject Application. The proposed appropriation, export, and use would result in severely lowered groundwater levels in the basin from which the appropriation and export is proposed and in hydrologically connected downgradient basins within the same interbasin flow system. Those declining groundwater levels will result in more xeric and causing groundwater-dependent vegetation to die off in the subject basin and hydrologically connected downgradient basins. This pervasive desiccation, in turn, will cause previously moist and/or vegetated areas to be more susceptible to increased mobilization of particulate matter, heavy metals, and other chemicals harmful to public health. In other words, the desiccation of these ecosystems will result in much more frequent and severe dust storms in the basin expressly targeted by this Application and in downgradient hydrologically connected basins in the same flow system. These dust storms likely will have catastrophic impacts on human and animal health in those

basins and in additional downwind communities, where members of our Tribe live and/or where our sister tribes live. In addition to causing severe respiratory problems, the particulate matter that will be mobilized in dust storms in these areas may contain radioactive fallout that heretofore has been held in place by the groundwater-fed moisture in the soil and vegetation. Because of these harmful impacts to the public interest, the State Engineer should deny this Application pursuant to NRS §§ 533.370(5) and 533.370(6)(c).

F. Destruction of Recreational and Aesthetic Values

Another major environmental consideration within the purview of the State Engineer's decision on this Application is the destruction of recreational and aesthetic values. These values are important to the public on local, regional, and national levels. The severe decline in groundwater levels that will result from this Application and SNWA's GWD Project, of which this Application is a part, will kill off vegetation and wildlife, eliminate a large number of globally and regionally unique mesic ecosystems, and degrade air quality and visibility in the basin expressly targeted by this Application and hydrologically connected downgradient basins. These impacts will profoundly degrade the aesthetic values and appeal of all these basins and additional downwind areas for members of our Tribe. Similarly, the loss of water, wildlife, clean air, and good visibility will unduly harm the recreational uses and value of these basins and additional downwind areas. For these reasons, the State Engineer should deny this Application pursuant to NRS §§ 533.370(5) and 533.370(6)(c).

IV. THE APPROPRIATION AND EXPORT OF WATER PROPOSED IN THIS APPLICATION WOULD BE DETRIMENTAL TO THE PUBLIC INTEREST ON ECONOMIC GROUNDS AND WOULD UNDULY LIMIT FUTURE GROWTH AND DEVELOPMENT IN THE BASIN FROM WHICH THE EXPORT IS PROPOSED

The appropriation and proposed use would unduly limit future economic activity and growth in basin of origin. As detailed elsewhere in this Protest Attachment, permitting the appropriation and export of water proposed in SNWA's Application will exceed the perennial yield of and lead to declining groundwater levels in the basin from which the export is proposed. In addition to the other effects that this drawdown will cause, it will eliminate specific sources and the overall available supply of groundwater in the basin to support both existing economic activities and potential future economic growth in the basin of origin. Existing economic activities that would be undermined include livestock and other ranching uses, domestic uses, mining and prospecting uses, and recreational uses including self-guided and outfitter-led hiking, camping, fishing, hunting, birding, and the like. Future economic growth and development that would be unduly limited include the expansion of all of the above-listed activities, particularly the expansion of businesses related to recreational tourism, as well as residential and municipal developments for both year-round and vacation use, and potential future alternative energy developments that members of our Tribe may utilize and gain employment through. Many people would be negatively impacted from the proposed appropriation and SNWA's GWD Project, including residents of the subject basin, residents of hydrologically connected basins, citizens of Nevada, tourists and travelers, and consumers of products originating from such basins. In light of the undue economic harm the proposed use would cause in the basin of origin, the State Engineer should deny this Application pursuant to NRS § 533.370(6)(d).

Undue economic harm will extend to the economies and communities of hydrologically connected and downwind basins. These economic harms will not be limited to the basin expressly targeted in this Application, but rather will extend outward as the groundwater depletion from SNWA's GWD Project radiates outward into downgradient and hydrologically connected basins within the same

interbasin flow system and to downwind basins. Thus, the appropriation and export proposed in this Application also would cause the same host of economic harms to the rural and tribal economies and communities of other basins. Development of new and expansion of existing economic ventures would be unduly constrained because of inaccessibility to water. Therefore, the State Engineer should deny this Application pursuant to NRS § 533.370(5) because it would be detrimental to the public interest.

V. THE PROPOSED USE IS NOT AN APPROPRIATE LONG-TERM USE OF NEVADA'S WATER

Nevada Revised Statute § 533.370(6) provides that the State Engineer, in his determination of whether an application for an interbasin transfer of water must be rejected, shall consider whether the proposed action is an appropriate long-term use. As described in Section IV, the appropriation and export of water from the subject basin would unduly limit economic growth and development within the subject basin, and hydrologically connected basins, and thus be detrimental to the public interest. Population projections and economic growth and development projections in Clark County have proved to be inaccurate, especially in this time of severe economic recession. In contrast, the subject basin, and adjacent areas, have been cued for numerous alternative energy projects that include but are not limited to wind energy facility projects, solar energy facility projects, and electrical transmission line arrays. These types of projects spur additional economic growth and activity. Some of these projects will require water appropriations and this Application and other applications under SNWA's GWD Project would be greatly detrimental to these energy projects in the subject basin and the corresponding need for additional economic growth and development that would transpire as a result of the construction and operation of those facilities. Moreover, the State Engineer must allow for

unanticipated economic growth in the subject basin. The legislative history shows clearly that the State Engineer'sdecisions to approve or reject water appropriation applications must not unduly limit future economic growth.

Given the numerous more cost-effective alternatives available to SNWA and the devastating impacts to rural communities, to economies, to the environment, and to the Tribe, SNWA's GWD Project and this Application are not appropriate long-term use of Nevada's scarce resources. The State Engineer should require SNWA to actively pursue alternatives to the pumping and exportation of water under this Application before granting water rights to SNWA from the subject basin. In the meantime, the State Engineer should deny the applications pursuant to NRS § 533.370(6)(d) as an inappropriate long-term use of water.

VI. THE APPLICANT HAS NOT JUSTIFIED THE NEED TO IMPORT WATER FROM ANOTHER BASIN

By the same token, SNWA has not justified the need to import water from another basin. Nevada Revised Statute § 533.370(6) provides that before the State Engineer can approve an application for an interbasin transfer, the applicant must have "justified the need to import the water from another basin." At least two issues are relevant here. First, this Application is not justified because the Applicant has numerous other more feasible and cost-effective options, such as increased water conservation among other options. The State Engineer should not permit such a massive interbasin transfer project, which is likely to be so economically and environmentally damaging to the basins of origin and hydrologically connected basins, when alternatives are available to the Applicant that are more economically sound, environmentally sound, sustainable, and drastically in favor of the public

interest and welfare. While the SNWA has instituted a water conservation plan for the Las Vegas area, the transition toward water conservation has been markedly slow over the last two decades. Thus, there is significant potential for more cost-effective conservation alternatives, which would avoid the devastating impacts to the basins of origin and potentially spur innovative water conservation technologies and industries in the Clark County and other areas of Nevada. Implementing significant water conservation policies and regulations can be accomplished fairly rapidly and do not require several decades to implement. Second, this Application has not justified the need to import water from another basin given the current population, housing, and water-demand trends within the import basin – the water demand and population projections that SNWA has been using to justify the GWD Project are not credible. As such, the State Engineer should deny the applications pursuant to NRS § 533.370(6)(a) because SNWA has not justified the need to import water from another basin.

VII. THE APPLICANT HAS NOT IMPLEMENTED A SUFFICIENT WATER CONSERVATION PLAN

Nevada Revised Statute § 533.370(6) provides that in determining whether an application for an interbasin transfer of groundwater must be rejected, the State Engineer shall consider whether a water conservation plan is advisable for the basin into which the water is imported and whether the applicant has demonstrated that the water conservation plan has been adopted and is being effectively carried out. While SNWA established a goal in the early 1990s of 25% conservation by 2010 and surpassed that goal in advance, the water conservation plan and the 25% goal are not sufficient measures by which the State Engineer should approve an application. By the same reasoning, the State Engineer would have the discretion to accept a SNWA water conservation plan of 1% conservation in 25, 50, or even 100

years. The legislative intent of NRS 533.370(6) is to require a sufficient and highest practicable level of water conservation for the basin into which the water is imported so as to make an interbasin transfer a last resort. SNWA's current water conservation plan and goals are insufficient because substantial water conservation gains still can be obtained in Clark County and the Las Vegas Valley, at a fraction of the cost of the SNWA's GWD Project and without detriment to the public interest and welfare. As such, the State Engineer must require SNWA and its client water districts to achieve the highest practicable level of water conservation – as measured by reference to presently available technologies and methods and to the highest conservation levels achieved by conservation-minded water-scarce municipalities – before being permitted to transfer groundwater from the subject basin and other GWD Project basins. The State Engineer must require SNWA to submit a conservation plan that utilizes all feasible conservation strategies to achieve the highest conservation goals that are at least as aggressive as those of the most conservation-minded other western cities. The State Engineer must also require SNWA to submit a conservation plan that compares those conservations measures to the GWD Project in terms of cost and timelines for export and import basins. Unless SNWA submits such a plan, the State Engineer should deny the Application pursuant to NRS § 533.370(6)(b).

VIII. THE APPLICANT HAS NOT DEVELOPED OR IMPLEMENTED A SUFFICIENT CONSERVATION PLAN TO PROTECT THE AFFECTED BASINS

Several provisions in Nevada water laws require sufficient safeguards to be in place to protect affected basins from unreasonable and detrimental harms due to water appropriations and/or interbasin transfers of water. First, NRS § 533.370(6)(c) provides that the proposed action is environmentally sound as it relates to the basin from which water is exported. As explained in Section III above, the

Application and the GWD Project as a whole are environmentally unsound, unsustainable, and will have long-term environmental impacts within the subject basin and hydrologically connected basins within the same flow system. While biological and hydrological monitoring plans have been developed by SNWA, these plans are insufficient on numerous counts, including but not limited to being scientifically flawed and generally insufficient.

Second, NRS § 533.370(6)(d) provides that an application for interbasin transfer of water must not unduly limit future growth and development. The subject basin's future growth and development is already under way with the construction and operation of alternative energy projects and transmission lines, among other things. Predicting the amount of groundwater needed for future growth and development in the subject basin may be difficult, but the State Engineer should require SNWA to do so as part of a monitoring and mitigation plan for the export basin and/or as part of the water conservation plan for the import basin. SNWA has failed to provide reasonable and sufficient projections of future growth and development for the export basin. Just as SNWA's population and water demand projections did not predict that the Las Vegas Valley would experience an economic bust and substantial loss of population (and therefore much reduced water demand), SNWA's attempts to forecast future growth and economic development in the subject basin are also highly flawed.

Third, NRS § 533.367 provides that an applicant must ensure that wildlife which customarily uses surface water from seeps or springs (which is linked to groundwater) will have continued access to that water. The Application and proposed use will cause a cone of depression and impact water from seeps and springs, and subsequently restrict or truncate water supply for wildlife that customarily use or rely on such water sources. The biological and hydrological monitoring plans do not provide safeguards from these potential impacts because: (1) monitoring plan and early detections in the plans are highly flawed; (2) monitoring and early detection for such purposes have proven to be insufficient in

the past; (3) cones of depression are very likely to impact springs, seeps, and associated wildlife resources in the initial area of the cone of depression; and (4) cones of depression are likely to move downgradient and adversely impact downgradient springs, seeps, and associated wildlife.

Fourth, NRS § 533.020 provides that it is the intention of the Nevada Legislature to prevent the pollution and contamination of groundwater. A cone of depression and lowering of the water level that would result from the approval of this Application, and others associated with the GWD Project, is very likely to negatively affect water quality by drawing in low quality water and cause areas to coalesce. Such impacts will occur within the subject basin and in downgradient basins within the same flow system. SNWA has not provided a means to prevent these unreasonable and adverse impacts to the subject basin, nor do the monitoring plans ensure that early detection will offset those impacts because once the groundwater impacts have been realized the impacts will persist over the long-term.

IX. THE APPROPRIATION AND PROPOSED USE WOULD HARM THE PUBLIC INTEREST ON THE GROUNDS THAT CULTURAL, HISTORIC, AND RELIGIOUS RESOURCES THAT ARE INEXTRICABLY LINKED TO WATER RESOURCES WOULD BE UNREASONABLY IMPACTED

Nevada Revised Statutes §§ 533.370 and 533.370(6)(e) provide that the State Engineer must deny an application when the application and proposed use threatens to prove detrimental to the public interest, and that the State Engineer shall consider any other factor he determines to be relevant, respectively. The Nevada Legislature and the State Engineer have clearly demonstrated that natural resources, which by definition includes historic and cultural resources, endangered species, water quality, among other resources, are of public interest. By establishing the State Historic Preservation Office under NRS §383, the legislature deemed the preservation of historic and cultural resources and

sites to be in the public interest. Moreover, the State Engineer has previously stated that he believes "that the legislative intent of NRS § 533.370(6)(c) was to protect the natural resources of the basin of origin . . . ."[1] The State Engineer also has found that while "NRS § 533.370(6)(c) requires the State Engineer to consider environmental issues . . . the perspective he is to focus on is that of hydrologic issues." Moreover, the "State Engineer finds this means whether the use of the water is sustainable over the long-term without unreasonable impacts to the water resources and the hydrologic-related natural resources that are dependent on those water resources." Because it is within the purview of the Nevada Legislature to protect natural resources that are dependent on water resources, which include historic, cultural, and religious resources, of the basin of origin from impacts from water appropriations and proposed uses, the State Engineer therefore must consider the impacts on historic, cultural, and religious resources within the subject basin.

The Application and proposed use from the subject basin will result in groundwater drawdown in the subject basin and in hydrologically connected basins and will cause unreasonable damage, and in many cases outright destruction, of historical, cultural, and religious resources and sites. As such, the State Engineer has the authority to and must deny the Application pursuant to NRS §§ 533.370(5), 533.370(6)(c), and 533.370(6)(e).

X. THE APPROPRIATION AND PROPOSED USE WOULD VIOLATE FEDERAL AND STATE LAWS THAT PROTECT HISTORIC, CULTURAL, AND RELIGIOUS RESOURCES

The appropriation and proposed use would violate numerous federal and state laws that are in place to protect historic, cultural, and religious resources and sites. Approval of this Application would

1 State Engineer's Ruling #5726 dated April 16, 2007, in the matter of applications 54003 through 54021.

violate the following, but not limited to: state-level SHPO requirements, the National Historic Preservation Act, American Indian Religious Freedom Act of 1978, Religious Freedom Restoration Act, Native American Graves Protection and Repatriation Act of 1990, Executive Order 13007, and the Treaty of 1863 in Ruby Valley. Nevada Legislature's intent of giving the State Engineer authority to approve water applications has never been to do so in a manner that would violate state and federal mandates, or state and federal court decisions that guide the protection of historic, cultural, and religious resources and sites. Approval of this Application and the export of water will violate some or all of the above-listed laws due to irreparable and detrimental impacts on cultural resources and sites. While the State Engineer generally must look to Nevada water law to make appropriation decisions, he cannot violate federal and state laws. As such, the State Engineer's purview is to make decisions that are not in violation of law. To do otherwise is against the public interest and welfare. Therefore, the State Engineer must deny the Application under NRS §§ 533.370(5), 533.370(6)(c), and 533.370(6)(e).

XI. THE APPROPRIATION AND PROPOSED USE WOULD VIOLATE THE TRIBE'S RIGHTS UNDER THE TREATY OF 1863 IN RUBY VALLEY

Just as the State Engineer cannot approve an application that would be in violation of federal or state laws, the State Engineer cannot approve the Application because it would violate the Tribe's treaty rights. It is well-settled by the United States Constitution and Supreme Court precedent that Treaties are the supreme law of the land. Tribal treaty rights may only be abrogated by the United States Congress, which the Supreme Court has determined has "plenary authority" of Indian affairs. State governments do not have the authority to regulate Indian land or resources without the consent of Congress and the affected Tribe. The State Engineer has the authority to deny the Application on those grounds pursuant

to either NRS §§ 533.370(5) or 533.370(6).

The Treaty of 1863 in Ruby Valley designates and recognizes certain Indian treaty lands. The United States has a legally recognized trust responsibility to protect those treaty lands and Tribal interests associated therewith. Protecting these federally recognized treaty lands are clearly within the public interest. . As discussed above, Western Shoshone tribes have federal reserved water rights that extend beyond their reservation lands and various decreed or permitted rights under State law. The Tribe has rights to large amounts of water, no matter if those rights have been adjudicated, decreed, quantified, or utilized. Such water rights, to some extent, are predicated on the fact that the Treaty of 1863 in Ruby Valley designates a large land area, including the subject basin and hydrologically connected basins, with associated water rights to fulfill the purposes the Tribe. Water withdrawal that will impact treaty rights exercised on that land also impermissibly infringes on the Treaty. Those rights remain regardless of non-use or being unquantified. *Hackford v. Babbit*, 14 F.3d 1457, 1461 (10th Cir. 1994).

The Tribe holds federal reserved water rights in an amount of water necessary to accomplish the purposes of the Reservation. The Tribe is entitled to protection from harmful groundwater pumping that will infringe upon or diminish water necessary to satisfy the Tribe's reserved water right. It is important to emphasize that the Tribe's water rights may be protected against off-reservation groundwater diversions that are hydrologically connected with the Tribe's reserved water. *Cappaert v. U.S.*, 426 U.S. 128 (1976). The rights bestowed upon the Tribe from the Treaty of 1863 in Ruby Valley are paramount to water rights later perfected under state laws. Moreover, prior appropriation systems and laws, as in Nevada, do not affect the rights of the Tribe's treaty lands and Reservation. *Power Commin v. Oregon*, 349 U.S. 435 (1955).

Because the subject Application, among other applications that are part of SNWA's GWD

Project, if approved, would violate the Tribe's water rights within treaty lands, the State Engineer must deny the Application pursuant to NRS §§ 533.370(5) and 533.370(6)(e). NRS § 533.370(5) states that "where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells . . . or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit."

Furthermore, the SNWA GWD Project, of which this Application is a part, if approved and operational, is predicted to cause widespread groundwater drawdown even in separate basins that are hydrologically connected. If the State Engineer were to approve this Application, among others that are part of the GWD Project, it would violate the Tribe's rights reserved and guaranteed under the Treaty of 1863 in Ruby Valley. Pursuant to NRS § 533.370(5) and 533.370(6)(e), the State Engineer must consider the Application's infringement on Tribal treaty rights as a basis to deny the Application. For these reasons, the State Engineer must deny this Application.

XII. THE APPROPRIATION AND PROPOSED USE WOULD VIOLATE THE FEDERAL GOVERNMENT'S TRUST RESPONSIBILITY TO THE TRIBE AND THEREFORE PROVE DETRIMENTAL TO THE PUBLIC INTEREST

Congress and the federal government, as representatives of the public interest and welfare, have made clear that the federal government bears a critical trust or fiduciary relationship with Indian tribes. This trust responsibility was initially recognized and has been repeatedly reaffirmed by the United States Supreme Court and numerous Executive Orders recognizing the supreme legal importance of treaties and the unique government to government relationship between the United States and sovereign Indian tribal governments. That trust responsibility has also been incorporated innumerous regulations

and landmark court decisions to protect Indian resources, including but not limited to, the protection of rights to land and water related to Indian lands. Under 20 USC § 7401 Congress declared: it is "the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people." The Secretary of Interior in 25 CFR § 225.1 states that the Secretary "continues to have a trust obligation to ensure that the rights of a tribe or individual Indians are protected in the event of a violation." The Department of Justice's Policy on Indian Sovereignty and Government-to-Government Relations with the Indian Tribes states that "the Department shall be guided . . . by the United States' trust responsibility in the many ways in which the Department takes action on matters affecting Indian tribes." The federal-tribal relationship and the federal government's responsibility to protect Indian resources are in the public interest, not only on a national level but within states, including Nevada. *Cherokee Nation v. Georgia*, 30 US 1, 17 (1831); *Klamath & Modoc Tribes*, 304 US 119 (1938). Congress has recognized the federal government's "trust responsibilities to protect Indian water rights." *See* 43 USC § 371. There is a large list of federal mandates, policies, and federal court decisions regarding the federal government's trust responsibilities to protect the Tribe's interests, resources, and rights.[2] Thus, the federal government's trust responsibility standard is to be thorough and vigilantly followed in protecting tribal resources, including water resources and reserved water rights.

Because of the federally mandated trust responsibility to the Tribe is in the public interest and relates specifically to water resources, the State Engineer should consider this highly relevant factor in making a decision on this Application. This Application and proposed use, if approved, would ignore the federal government and its agencies from the trust and fiduciary obligation to protect the Tribe's

2 *See, e.g.*, Cherokee Nation v. Georgia, 30 US 1, 17 (1831); Seminole Nation v. US, 316 US 297 (1942); Worcester v. Georgia, 31 US 515; Manchester Band of Pomo Indians v. US, 363 F. Supp. 1238, 1245-1247 (ND Cal 1973); Nance v. EPA, 645 F.2d 701, 711 (9th Cir 1981); Menominee Tribe v. US, 101 Ct Cl 10, 19-20 (1944); Pardvano v. Babbitt, 70 F.3d 539, 545 (9th Cir 1995).

water rights and resources within the Tribe's aboriginal territory, treaty lands, or Reservation. As such, the State Engineer should deny the Application under NRS §§ 533.370(5) and 533.370(6)(e).

XIII. THE APPROPRIATION AND PROPOSED USE WOULD UNDULY INJURE THE TRIBE'S SOVEREIGNTY AND ABILITY TO REGULATE ITS TERRITORY

The Tribe is a sovereign nation with exclusive powers of self-governance over its territory, recognized by treaties, the Constitution, legislation, administrative practice, and judicial decisions. The Tribe exercises sovereign power in regulating its own territory. Incumbent in that regulatory authority, the Tribe has a sovereign right to regulate and protect its water resources. The Tribe's water and regulation of that water, now and into the future, is an essential component in the Tribe's ability to regulate its territory and provide services to tribal members. This is consistent with the long-standing federal policy of promoting tribal self-government, self-determination, and economic self-sufficiency. The Tribe and its sovereign governmental powers have been repeatedly affirmed to be in the public interest. As such, the Application, and others that are part of the GWD Project, if approved, falls strictly counter to the public interest on this element. Therefore, the State Engineer should deny the Application under NRS §§ 533.370(5).

Moreover, appropriating and conducting an interbasin transfer of water in ways that will unduly injure the Tribe's water resources and rights will concomitantly injure the Tribe's ability for tribal self-governance, its ability to regulate its territory, and its ability to provide necessary benefits and services to its members on or off reservation lands. This is a highly relevant factor that the State Engineer should consider with the interbasin transfer decision. Therefore, the State Engineer should deny the Application under NRS §§ 533.370(6)(e).

XIV. THE APPLICANT HAS NOT DEMONSTRATED THE GOOD FAITH INTENT OR FINANCIAL ABILITY AND REASONABLE EXPECTATION TO CONSTRUCT THE WORK AND APPLY THE WATER TO THE INTENDED BENEFICIAL USE WITH REASONABLE DILIGENCE

The current economic recession has severely altered the economic boom trajectory that Las Vegas had been undergoing for many years. As a result of the recession, Las Vegas Valley population base has decreased, a large number of homes are now vacant, and demand for water has been truncated. It is highly uncertain at this point in time as to whether the Las Vegas economy will rebound. It is also highly uncertain as to when the economy will rebound, and to what extent that economic rebound will affect the Las Vegas Valley. In contrast, the trajectory for eastern Nevada is moving in a positive direction. A multitude of alternative energy projects have been cued for eastern Nevada and are all in the public interest as Congress, the federal government, and the Nevada Legislature have similar initiatives to establish Nevada as leader in alternative energy developments and provide such clean energy to the public.

To date, the Applicant has not provided the State Engineer or the public with a cost projection for the pipeline project. Estimates for such a project, however, are in the billions of dollars. As SNWA's top management has stated, SNWA does not plan to build this Project in the near future and may never build it, saying they simply want to ensure that they have the option of doing so should they decide to in the future. *See* Brendan Riley, *Authority Keeps Pipeline Options Open: Mulroy Wants Construction Permits in Hand*, Las Vegas Review Journal, Feb. 12, 2009, *available at* http://www.lvrj.com/news/39483777.html. Further, General Manager Patricia Mulroy has publicly conceded that with the profound economic downturn that has settled with particular severity on

southern Nevada, SNWA's financial base has dramatically contracted, calling into question its ability to construct the GWD Project. *See* I-Team, *Dire Predictions Made on Las Vegas Water Supply*, Channel 8 Eyewitness News, Feb. 11, 2009, *available at* http://www.lasvegasnow.com/Global/story.asp?s=9829711. Because it appears that SNWA may never construct the project, or at least not within a reasonable time frame, and that SNWA's ability to obtain financing for the project is highly doubtful, the State Engineer should deny the Application pursuant to NRS § 533.370(1)(c) as a speculative request to tie up Nevada's water resources indefinitely.

The Applicant has not conducted reasonable diligence to construct the GWD Project. Partial completion of ROW grants/NEPA process does not constitute reasonable diligence on SNWA's part to ensure that Nevada's water will be put to beneficial use. The only thing that the partial progress in the NEPA process and BLM ROW ensures is that SNWA intends to have the necessary grants and permits in place if such a need arises in the future. Even if BLM rights-of-way are granted by the BLM, there is no assurance that the water will be put to beneficial use within a reasonable amount of time. Moreover, the highly uncertain economic future in Las Vegas area provides rationale to deny this Application. Because of these reasons, the State Engineer should deny the Application under NRS § 533.370(1)(c).

Moreover, the Application does not clearly describe the place of use, the proposed works, the estimated projects costs of the works, the number and types of units to be served, or the annual consumptive use. It is also not clear as to whether the diversions sought by the Application, and others that are part of the SNWA GWD Project, are necessary and/or in an amount reasonably required for the beneficial uses that have been applied for.

XV. FAILURE TO DEMONSTRATE ABILITY TO ACCESS LAND CONTAINING POINT OF DIVERSION

The Applicant has not demonstrated a reasonable expectation or ability to put the water to beneficial use because it does not have access to the lands on which the potential point of diversion is located. In some instances, the Applicant has not even begun the process to establish access, showing that Applicant does not have the intention to and is not likely to develop the water in a reasonable time with due diligence. Thus, the State Engineer should deny the Application under NRS § 533.370(1)(c).

XVI. PROTESTANT RESERVES THE RIGHT TO AMEND THIS PROTEST AS MAY BE WARRANTED BY FUTURE DEVELOPMENTS AND RECEIPT OF ADDITIONAL INFORMATION

SNWA's proposed GWD Project is a massive project and adverse impacts from the Project are certain and they are likely to be both intensive and extensive over various spatial and temporal scales. New scientific or other data, and changed circumstances, may uncover different bases for this Protest. Accordingly, the Tribe reserves the right to amend and supplement the subject Protest of the Application to include such issues and information as they are developed and become available.

XVII. INCORPORATION OF OTHER PROTESTS TO SNWA'S APPLICATIONS BY REFERENCE

The Tribe hereby incorporates by this reference as though fully set forth herein and adopts as its own, each and every reason or ground for other protests to this Application and/or to any Application filed that is included in SNWA's GWD Project and filed pursuant to NRS § 533.365, including but not limited to the attached Protest.