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

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STATE ENGINEER'S OFFICE

IN THE MATTER OF APPLICATION NUMBER 77438
FILED BY WILLIAM HERNSTADT
ON OCTOBER 2, 2008
TO CHANGE THE POINT OF DIVERSION, PLACE AND MANNER OF USE OF A PORTION OF WATER HERETOFORE APPROPRIATED

PROTEST

Comes now Charles W. Pettee, on behalf of the United States Department of the Interior, National Park Service, whose post office address is 1201 Oak Ridge Drive, Suite 250, Fort Collins, Colorado, 80525, whose occupation is Chief, Water Rights Branch, Water Resources Division, National Park Service, and protests the granting of Application 77438 for the following reasons and on the following grounds, to wit:

See Exhibit A attached.

THEREFORE the protestant requests that the application be denied.

Signed: _____
Agent or protestant

Charles W. Pettee
Printed or typed name, if agent

Address: 1201 Oak Ridge Dr., Suite 250
Street No. or P.O. Box No.

Fort Collins, CO 80525
City, State and Zip Code No.

Subscribed and sworn to before me this 21st day of January, 2009.

Notary Public, Sally V Campos

State of Colorado
County of Larimer

My Commission expires 9/12/2010.

SALLY V CAMPOS NOTARY PUBLIC STATE OF COLORADO My Commission Exp

IN THE MATTER OF APPLICATION 77438

EXHIBIT A

Protest by Charles W. Pettee, on behalf of
the United States Department of the Interior,
National Park Service

I. Death Valley National Monument was created by Presidential Proclamation in 1933 to preserve unusual features of scenic, scientific, and educational interest. The national significance of Death Valley and its environs was reaffirmed in October 1994 through enactment of the California Desert Protection Act. The Act acknowledged Death Valley's extraordinary and inestimable value, increased its area, and changed the area's status to that of a National Park. The Act specifically charged the Secretary of the Interior and all other officers of the United States to take all steps necessary to protect the reserved water rights and water resources of the Park, which includes the Devil's Hole detached management unit.

II. The mission of the National Park Service (NPS) may be paraphrased from 16 U.S.C. 1, as conserving scenery, natural and historic objects, and wildlife, and providing for enjoyment of the same in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations.

III. The NPS is entitled to Federal reserved water rights for reserved lands within Death Valley National Park. The priority dates for reserved rights are senior to the appropriation sought by this application. These rights have not been judicially quantified.

In the eastern part of the Park, Grapevine, Keane Wonder, Nevares, Texas, Travertine and Saratoga Springs provide water for park facilities, domestic use, public campgrounds, resorts, vegetation, wildlife, public enjoyment, scenic value and other related needs. Nevares, Texas, and Travertine Springs collectively discharge about 2,000 gallons per minute (about 3,200 acre-feet per year) and are critical for domestic and commercial use.

The Park supplies water for visitors from the above-named springs. For example, in 1995, water from these springs supported approximately 262,000 overnight campers in Death Valley NP campgrounds, 74,500 motel/hotel rooms rented to park visitors, 220 National Park Service employees and their families (at the height of the visitor season), 400 resort employees and a population of 60 Native Americans.

IV. A unique and endangered species of pupfish exists at Devil's Hole, a detached unit of Death Valley National Park in Nevada, within the Amargosa Desert hydrographic basin. A decision by the U.S. Supreme Court (later refined by the U.S. District Court) determined that a Federal reserved water right exists at Devil's Hole for the purpose of maintaining a water level of no more than 2.7 feet below a brass pin located on the rock wall of Devil's Hole. This level was determined to be the minimum elevation needed to

inundate the shelf on which the pupfish spawn (Cappaert v. United States, 1976). Recent data indicate that the water level in Devil's Hole has been declining since about 1988.

V. The proposed appropriation is located within the Amargosa Desert hydrographic basin, which is part of the Death Valley regional flow system (Harrill, et al., 1988).

VI. In 1979, the Nevada State Engineer (NSE) designated the Amargosa Desert hydrographic basin as a basin coming under the provisions of Chapter 534 NRS. Additional management considerations are warranted in a designated basin.

VII. On November 4, 2008, the NSE issued Order 1197, which stated that "...any application to change the point of diversion of an existing ground-water right to a point of diversion closer to Devils Hole, described as being within a 25 mile radius from Devils Hole within the Amargosa Desert Hydrographic Basin, will be denied."

VIII. Application 77438 seeks to change the point of diversion and place of use of 9 acre-ft within the Amargosa Desert hydrographic basin. The proposed point of diversion is located about 13 miles from Devils Hole, and is approximately 1 mile closer to Devils Hole than the existing point of diversion.

IX. The applicant also recently filed application 77437 to move a water right from 19 miles away to the same proposed point of diversion as application 77438. Together, the combined duty at the new point of diversion would total 43 acre-ft per year.

X. Order 1197 states that "...For projects that require changes of multiple existing rights, the State Engineer may compare the net impact to Devils Hole of the proposed changes to the impacts to Devils Hole of the base rights." The net impact of the two applications will be greater than either application filed separately.

XI. The NPS protests the granting of this application on the following grounds:

The proposed point of diversion is closer to Devils Hole and granting of said application would conflict with Order 1197.

The combined impact under applications 77437 and 77438 will be greater than the base rights and is therefore in conflict with Order 1197.

The NPS reserves the right to amend this exhibit as more information becomes available.

REFERENCES CITED

Cappaert v. United States, 426 US 128, 1976.

Harrill, J.R., Gates, J.S., and J.M. Thomas, 1988. Major ground-water flow systems in the Great Basin region of Nevada, Utah, and adjacent states: U.S. Geological Survey Hydrologic Investigations Atlas HA-694-C, 2 sheets.

Nevada Department of Conservation and Natural Resources, 1992. Hydrographic Basin Statistical Summary, Ground Water Basins 001-232: unpublished report, Division of Water Resources and Water Planning, Carson City, Nevada.