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

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2010 APR 13 PM 1:45
STATE ENGINEER'S OFFICE

IN THE MATTER OF APPLICATION NUMBER 79445
FILED BY Washoe County
ON February 1, 20 10, TO APPROPRIATE THE
WATERS OF Underground

PROTEST

Comes now U.S. Bureau of Indian Affairs
Printed or typed name of protestant

whose post office address is 2600 N. Central Ave., 4th Floor, Phoenix, AZ 85004
Street No. or PO Box, City, State and ZIP Code

whose occupation is Federal Government Agency and protests the granting

of Application Number 79445, filed on February 1, 20 10

by Washoe County to appropriate the

waters of Underground situated in Washoe County
Underground 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 Exhibit A.

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 Catherine Wilson
Agent or protestant

Cathy Wilson, Deputy Regional Director of Trust Services
Printed or typed name, if agent

Address 2600 N. Central Ave. 4th Floor
Street No. or PO Box

Phoenix, AZ 85004
City, State and ZIP Code

602-379-6600
Phone Number

Subscribed and sworn to before me this 12th day of April, 20 10

Velda M Garcia
Notary Public

Notary Public State of Arizona
Maricopa County
Velda M Garcia
My Commission Expires
05/24/2011

State of Arizona
County of Maricopa

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

**ALL COPIES MUST CONTAIN ORIGINAL SIGNATURE.**

Exhibit A

Information In Support of the Protests of the U.S. Bureau of Indian Affairs
In the Matter of Nevada Water Right Application for Permit Nos. 79438 Through 79450

On February 1, 2010, Washoe County (Applicant) filed thirteen *Applications for Permits to Appropriate the Public Waters of the State of Nevada.* The Application Nos. 79438 through 79450 requests to withdraw a combined diversion rate of 65 cubic feet per second (cfs) of groundwater for municipal purposes from the Smoke Creek Desert (No. 021) hydrographic area, Washoe County, Nevada. The Pyramid Lake Indian Reservation (Reservation) is located approximately 35 miles northeast of Reno, Nevada and extends into several hydrographic basins, including the Smoke Creek Desert Basin.

The U.S. Bureau of Indian Affairs (BIA) is the legal owner of about 475,000 acres of Indian trust land and associated water rights on the Reservation in northwestern Nevada. By order of the Commissioner of the General Land Office made on December 8, 1859, the lands comprising the Pyramid Lake Indian Reservation were withdrawn from the public domain for use and benefit of the Indians and this withdrawal was confirmed by order of the President on March 23, 1874. See, Orr Ditch Decree; and United States v. Orr Water Ditch Co. (9th Circuit Court of Appeals decision dated April 7, 2010, at page 5271). Approximately 41,000 acres of the Reservation extends into the Smoke Creek Desert hydrographic basin.

The Tribe has reserved water rights that were reserved and secured by the United States at the time of the creation of the reservation, with a priority date no later than the creation of the reservation, in a quantity sufficient (both surface and groundwater) 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*); and *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). 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 rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation. Holders of federal reserved rights enjoy greater protection from groundwater pumping then do holders of state law rights to the extent that greater protection may be necessary to maintain sufficient water to accomplish the purpose of a reservation. *In Re The General Adjudication of All Rights to Use Water in the Gila River System and Source,* 195 Ariz. 411, 989 P.2d 739 (Ariz. Sup. Ct.1999) (*en banc*). Federal reserved water rights may be protected against off-reservation groundwater diversions, which are hydrologically interrelated with the reserved waters. *Cappaert v. United States*, 426 U.S. 128 (1976). The essential purpose of Indian reservations is to provide Native American people with a permanent home, an abiding place, and a livable environment. *In Re The General Adjudication of All Rights to Use Water in the Gila River System and Source,* 35 P.3d 68 (Ariz. Sup. Ct. 2001) (*en banc*), citing *Winters* and *Arizona I*.

The BIA on behalf of the Pyramid Lake Paiute Tribe, protests the granting of Application Nos. 79438 through 79450, inclusive, for the following reasons:

1. The combined proposed discharge rate for the thirteen applications exceeds the perennial yield of the Basin, as currently determined by the State Engineer.

2. The applications do not clearly describe the proposed works, the estimated cost of the works, the number and types of units to be served, or the annual consumptive use. Nor is it clear that the diversions sought are necessary and in an amount reasonably required for the beneficial uses applied for.

3. The cumulative effects of the diversions proposed by the applications will lower the groundwater levels within the Pyramid Lake Indian Reservation portion of the Smoke Creek Desert Basin, thereby increasing the costs of supplying irrigation water within the Reservation portion of the Basin.

4. The proposed applications will adversely affect springs and flowing wells within the Pyramid Lake Indian Reservation portion of the Smoke Creek Desert Basin.

5. The proposed diversions have the potential to reduce the underflow of the groundwater from Smoke Creek Desert Basin to Pyramid Lake Valley Hydrographic Basin (No. 81). Groundwater levels in the area suggest flow is from Smoke Creek Desert Basin to Pyramid Lake. See, Maurer (1993). The potential loss of groundwater may reduce water volume and surface elevation in Pyramid Lake.

6. The proposed diversions may damage habitat for wildlife and species that are endangered or threatened under the Endangered Species Act, including the endangered cui-ui and the threatened Lahontan cutthroat trout in Pyramid Lake.

7. The economic development of the Pyramid Lake Indian Reservation will be harmed if water and water-related resources of the Reservation are diminished or impaired as a result of the diversions proposed by these applications.

8. The applications should not be considered or granted until the adjudication proceedings granted by the State Engineer on July 22, 2009 for the Smoke Creek Desert Hydrographic Basin, are conducted.

9. The proposed applications are apparently re-filed applications corresponding to pending Application Nos. 63992-64004, which themselves are re-filed applications by the Applicant which were denied by the State Engineer for not being in the public interest (Ruling No. 4599). Application Nos. 79438-79450 should be denied for the same reason and upon the same findings.

The BIA reserves the right to amend and supplement its exhibit and protests of Application for Permit Nos. 79438 through 79450 to the extent that more information relevant to the protest becomes available.

## Literature Cited

Nevada State Engineer's Water Rights Database/Website, March 2010.

Maurer, Douglas K., 1993, Hydrogeologic Setting and Hydrologic Data of the Smoke Creek Desert Basin, Washoe County, Nevada, and Lassen County, California, Water Years 1988-90, U.S. Geological Survey Water-resources Investigations Report 93-4043