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

FILED
MAY 28 2010
STATE ENGINEER'S OFFICE

IN THE MATTER OF APPLICATION NUMBER 79716
FILED BY SOUTHERN NEVADA WATER AUTHORITY
ON MARCH 22, 20 10, TO ~~APPROPRIATE~~ THE
WATERS OF Underground, [Huntsman North Well], Spring Valley, HA 184

PROTEST

Change Point of Diversion, Manner of Use, and Place of Use for...

Comes now The Ely Shoshone Tribe
Printed or typed name of protestant

whose post office address is 16 Shoshone Circle, Ely, Nevada 89301
Street No. or PO Box, City, State and ZIP Code

whose occupation is federally recognized Indian Tribe and protests the granting

of Application Number 79716, filed on March 22, 20 10

by Southern Nevada Water Authority ("SNWA") to appropriate the

waters of Underground Source [Huntsman North Well] situated in Spring Valley, Hydrographic Area 184
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:

Protestant states as reasons for this Protest that: (1) there is not a sufficient amount of water in the proposed source of supply for the appropriation and export of water proposed in this application; (2) the application and proposed use would conflict with existing water rights and impermissibly diminish the sources from which current domestic wells depend; (3) The Application and proposed export of water would be detrimental to the public on environmental grounds, would devastate environment from which the export is proposed, and would be environmentally unsound; (4) the Application and proposed export of water would have an adverse affect on wildlife and wildlife ecosystems in the basin(s) from which the export is proposed; (5) the appropriation and export of water proposed in this Application would be detrimental to the public interest on economic grounds and would excessively limit future growth and development in the basin(s) from which the export is proposed; (6) the need for interbasin transfer of water is not justified and is harmful to the basins of origin as well as the public interest; (7) the Application and proposed use would have detrimental impacts on cultural, historic, religious, traditional, aboriginal, and ancestral lands and sites, which would harm the public interest; (8) the Application and proposed use would violate federal law enacted to preserve cultural, historic, religious, traditional, aboriginal, and ancestral lands and sites; (9) the Applicant has not executed a proper conservation plan to protect the affected basins; (10) the Application and proposed use is not an appropriate long-term use of the State of Nevada's water; (11) the Application and proposed use would violate the Tribe's sovereign ability to regulate its territory; (12)The application and proposed use would thwart the federal trust responsibility toward the tribe and tribal resources; (13) the appropriation and export of water proposed in this Application would violate the Tribe's reserved water rights and thwart the intent of the tribal reserved water rights doctrine. The issues, claims, and bases for this protest are more fully set forth in the attachments(s).

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 [signature]
Agent or protestant

Aaron Waite, Attorney for Ely Shoshone Tribe
Printed or typed name, if agent

Address 16 Shoshone Circle
Street No. or PO Box

Ely, Nevada 89301
City, State and ZIP Code

(775) 289-3013
Phone Number

RECEIVED
2010 MAY 28 PM 3:08
STATE ENGINEERS OFFICE

Subscribed and sworn to before me this 27 day of May, 20 10

Melissa Parache
Notary Public

MELISSA PARACHE
NOTARY PUBLIC · STATE OF UTAH
7864 S. Redwood Rd.
West Jordan, UT 84088
My Commission Expires
October 06, 2011

State of Utah
County of Salt Lake

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

ALL COPIES MUST CONTAIN ORIGINAL SIGNATURE.

ATTACHMENT I

Ely Shoshone Protest Memorandum

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

IN THE MATTER OF APPLICATION NO. 79716 FILED BY SNWA TO CHANGE POINT OF DIVERSION, MANNER OF USE, AND PLACE OF USE OF THE WATERS OF THE STATE OF NEVADA	ELY SHOSHONE TRIBE'S PROTEST REGARDING APPLICATION TO CHANGE POINT OF DIVERSION, MANNER OF USE AND PLACE OF USE OF WATER FILED BY SOUTHERN NEVADA WATER AUTHORITY

Pursuant to Nevada Revised Statute (hereinafter "NRS") 533.365, the Ely Shoshone Tribe (hereinafter "Tribe") hereby protests Application Number 79716 (hereinafter "Application"), filed by the Southern Nevada Water Authority (hereinafter "SNWA") on March 22, 2010 change the point of diversion, manner of use and place of use of underground waters [Huntsman North Well] in Spring Valley, Hydrographic Area 184.

The Ely Shoshone Indian Reservation (hereinafter "the Reservation") is located near the town of Ely in White Pine County, in east central Nevada. The Reservation is comprised of seven separate parcels covering approximately 1500 acres in the Steptoe Valley hydrographic basin and 1700 acres in the White River Valley Basin to the west. The Steptoe Valley and White River Valley Basin are adjacent to and/or have interbasin connectivity with the affected basins from which the applicant seeks to draw water. The Reservation is located within the ancestral lands of the Ely-Shoshone Tribe, which tribal members have inhabited from time immemorial. The Treaty of 1863 (13 Stat. 681-684) between the United States and the Ely Shoshone Indians defined the exterior boundaries and purpose of their treaty lands in Nevada.

The Southern Nevada Water Authority (hereinafter "SNWA") has applied to appropriate and transfer massive amounts of water from the Spring, Snake, Cave, Dry Lake and Delamar Valleys of Eastern Nevada through a proposed pipeline which is to be

constructed across hundreds of miles of Nevada to Clark County (hereinafter referred to as "Proposed Project"). Under the subject application and other related applications, SNWA has applied to change the point of diversion, manner of use and place of use of the waters of the state of Nevada. The proposed place of use will be the same location for multiple change applications, and SNWA has requested to co-mingle the water rights in the same communal piping system with the same place of use.

Summary

Protestant states as reasons for this Protest that: (1) there is not a sufficient amount of water in the proposed source of supply for the change in the point of diversion and place of use proposed in this application; (2) the application and proposed change would conflict with existing water rights and impermissibly diminish the sources from which current domestic wells depend; (3) The Application and proposed change of water would be detrimental to the public on environmental grounds, would devastate the environment from which the export is proposed, and would be environmentally unsound; (4) the Application and proposed change would have an adverse affect on wildlife and wildlife ecosystems in the basin(s) from which the change is proposed; (5) the change proposed in this Application would be detrimental to the public interest on economic grounds and would excessively limit future growth and development in the basin(s) from which the export is proposed; (6) the need for a possible future interbasin transfer of water is not justified and is harmful to the basins of origin as well as the public interest; (7) the Application and proposed change would have detrimental impacts on cultural, historic, religious, traditional, aboriginal, and ancestral lands and sites, which would harm the public interest; (8) the Application and proposed change would violate federal law

enacted to preserve cultural, historic, religious, traditional, aboriginal, and ancestral lands and sites; (9) the Applicant has not executed a proper conservation plan to protect the regions affected by the change; (10) the Application and proposed change is not an appropriate long-term use of the State of Nevada's water; (11) the Application and proposed change would violate the Tribe's sovereign ability to regulate its territory; (12)The application and proposed change would thwart the federal trust responsibility toward the tribe and tribal resources; (13) the proposed change in this Application would violate the Tribe's reserved water rights and thwart the intent of the tribal reserved water rights doctrine.

I. THERE IS NOT A SUFFICIENT AMOUNT OF WATER IN THE PROPOSED SOURCE OF SUPPLY FOR THE CHANGE PROPOSED IN THIS APPLICATION.

The Application should be denied because there may be insufficient water in the source of supply for the proposed change. Pursuant to NRS § 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 Application and its requested changes, when taken in conjunction with the existing appropriations and in the subject basin and in hydrologically connected basins, exceeds the perrenial yield of the source of supply in the basin. Evapotransporation is not indicative of surplus. The subject basin and hydrologically connected basins are already over-appropriated and a change in the point of diversion and place of use would cause hardship on the current appropriators and put a strain on the already over or fully appropriated

groundwater in the source of supply (particularly since SNWA has requested the proposed place of use to be the same location for multiple change applications and has requested to co-mingle the water rights in the same communal piping system with the same place of use).

Furthermore, additional studies must be conducted to determine how proposed changes will affect hydrologically connected basins and downgradient basins that are already over or fully appropriated. Additionally, the future acidification of the abandoned Roberston mine pits that will contaminate the Steptoe Valley aquifer will require the City of Ely, the Tribe, and other appropriators to obtain a new source of groundwater. The Application and its proposed appropriations will likely affect the water available in such over or fully appropriated basins, requiring that the deny the Application pursuant to NRS § 533.370(5).

In addition to the already appropriated water in the basin and hydrologically connected basins, there are Indian tribes that have rights to large, but often still unquantified amounts of water. (See Section 13 of this Protest for a more detailed discussion). These rights are paramount to water rights later perfected under state law. The above Application, if approved, would effectively deny Indian tribes their inherent rights to water by significantly decreasing the amount of water available in the source of supply as a result of the proposed change. As such, the State Engineer must deny the Application under NRS Sections 533.370(5).

II. THE APPLICATION AND PROPOSED CHANGE WOULD CONFLICT WITH EXISTING WATER RIGHTS AND DIMINISH THE SOURCE FROM WHICH CURRENT DOMESTIC WELLS DRAW WATER.

The Application should be denied because the proposed changes conflict with existing water rights. Pursuant to NRS 533.370(5) when "the proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells ... the State Engineer shall reject the application and refuse to issue the requested permit." Water in the subject source of supply is already over utilized and over appropriated based solely upon the existing appropriations and uses. Approval of the application and the resulting change will likely cause a decline in the source of supply's groundwater levels greatly limiting the ability of the source to provide for the existing senior appropriations. With the declining water levels caused by the proposed change, particularly caused by the co-mingling of the water rights and the communal piping system proposed in the Application and other change applications filed by SNWA, the ability of existing wells to draw water will be greatly limited. A drop on the water table caused by the change proposed in the Application would render many of these important wells useless.

In addition, the overutilization of the subject source of supply and subject basin, which will likely occur if SNWA's change applications are approved, threatens to stress and diminish surrounding basins, such as the neighboring Steptoe Valley and White River Valley Basins, and their existing rights and domestic wells. Groundwater sources in the subject basin and the Steptoe Valley and White River Valley Basins and in other hydrologically connected basins are interconnected. As such, overutilization in the subject basin will have detrimental effects upon the existing rights to groundwater in the Steptoe Valley and White River Basins and hydrologically connected basins, and will

also have adverse impacts on the Tribe and other residents of the Steptoe Valley and White River Basins and other hydrologically connected basins. This proposed use would also conflict with the Tribe's existing reserved "Winters" rights to water (see Winters v. United States, 207 U.S. 564 (1908); and Arizona v. California, 373 U.S. 546 (1963)), which requires denial of the Application under NRS 533.370(5). (See Section 13 of this Memo).

If the Application causes any decrease in the water table in the neighboring Steptoe Valley and White River Valley Basins, many of these senior wells will be rendered useless.

Additionally, the subject basin is a source of water for several basins located downgradient. If the Application is granted, the water supplied to downgradient basins may decrease, adversely affecting senior water rights located in such downgradient basins.

III. THE PROPOSED CHANGE WOULD HAVE AN ADVERSE IMPACT ON THE PUBLIC INTEREST ON ENVIRONMENTAL GROUNDS, WOULD DEVASTATE THE ENVIRONMENT IN THE AREA OF THE PROPOSED CHANGE AND IN HYDROLOGICALLY CONNECTED BASINS, AND WOULD BE ENVIRONMENTALLY UNSOUND.

The proposed change, including the proposed co-mingling of water rights and the proposed communal piping system, under the above Application and SNWA's Proposed Project and other change Applications, would likely cause catastrophic environmental harms in the basin in which the change or use of water is proposed and in hydrologically connected basins, and as a result, would harm the public interest and would be environmentally unsound as it relates to the source of supply and subject basin of origin.

According to 533.570(5) when a proposed use *or* change threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit. The severe environmental harms that would result from the proposed change and/or use would prove extremely detrimental to the public interest. Further, the extreme environmental consequences that would result from the proposed change and/or use do not make sense environmentally and would be environmentally unsound for the subject basin and all hydrologically connected basins, therefore the State Engineer must deny the Application.

This Application, SNWA's other change applications, the proposed co-mingling of water and communal piping system, and SNWA's Proposed Project threaten to lower the water table throughout the basin at issue enough to deplete its fragile phreatophytic plant community, destabilize the valley soils, destroy groundwater-dependent vegetation and wildlife, and create a perpetual Owens Valley style erosive dust bowl condition detrimental to the public interest. The losses from groundwater withdrawals associated with this and other change applications and the Proposed Project will result in an increase in airborne particulates and diminish air quality as a whole throughout the subject basin and hydrologically connected basins and will also negatively impact adjacent and nearby basins due to airborne particles and dust transported by wind. Such dust storms will negatively impact human and animal health as well as vegetation and crops in such basins and downwind communities.

The impacts of the declining groundwater levels resulting from this Application, SNWA's other change applications, the proposed co-mingling of water and communal piping system, and SNWA's Proposed Project will destroy the aesthetic beauty and

recreational value of the area by drying up springs, marshes, reducing stream flow, causing dust storms and decreased air quality, harming vegetation and wildlife, and causing other negative impacts, resulting in a harm to the public interest in the aesthetic and recreational value of the area. It will also decrease the water table in the basin and aquifers within the subject basin, the basins over which the project covers, and hydrologically connected basins, including the Steptoe Valley and White River Valley Basins.

With the change, particularly with co-mingling of water and a communal piping system, aquifer collapse will occur and cannot be reversed. Such degradation and outright destruction of groundwater would interfere with humans, animals, wildlife and vegetation from relying on such sources and would prove to be both environmentally unsound in the basins of origin and harmful to the public interest. Additionally, the subsidence of aquifers and basins that will likely result will devastate the landscape, environment and ecosystem in the subject basin and hydrologically connected basin, including the Steptoe Valley and White River Valley Basins. The depletion of groundwater associated with the change will also likely result in the permanent devastation of vegetation and wildlife in such basins and the public interest in and dependence on such vegetation and wildlife will suffer as a result.

The basin at issue in the Application is located within the aboriginal territory of the Tribe. The devastation to the environment that will result from the drawdown of groundwater associated with this and other change applications, the co-mingling of water and communal piping system, and the Proposed Project will have lasting negative impacts on tribal history and culture (see Section 7 of this Memorandum for a more

detailed discussion), which will in turn have a negative impact on the public interest as a whole by divesting the public of many historical and cultural sites and artifacts.

The State Engineer is required to deny this Application under NRS Sections 533.370(5) because: (1) the severe effects that a diminished level of groundwater resulting from the change would have on the ecosystem and environment, air quality, basin groundwater quality and availability, human and animal health, and aesthetic and recreational value of the basins; (2) the negative impact such consequences would have on the public interest; and (3) because the negative impacts resulting from the change would be environmentally unsound.

IV. THE APPLICATION AND PROPOSED CHANGE WOULD HAVE AN ADVERSE IMPACT ON WILDLIFE AND WILDLIFE ECOSYSTEMS IN THE BASIN FROM WHICH THE EXPORT IS PROPOSED AND IN HYDROLOGICALLY CONNECTED BASINS.

Pursuant to NRS Section 533.367, "before a person may obtain a right to the use of water from a spring or water which has seeped to the surface of the ground, the person must ensure that wildlife which customarily uses the water will have access to it." Further, NRS Sections 533.370(5) require the State Engineer to deny applications and refuse to issue requested permits that threaten to prove detrimental to the public interest.

The change proposed in this Application and SNWA's other change applications, including the co-mingling of water and the communal piping system, will significantly decrease groundwater in the proposed source of supply and basin at issue in this Application and in hydrologically connected basins which will in turn have a devastating impact on wildlife and wildlife habitat. The decrease in groundwater will result in loss of

surface vegetation, drying of surface soils, wetlands, drying of surface springs, ponds, and marshes, and other wildlife habitat on which much wildlife depends. The species that will be harmfully impacted by the decrease in groundwater include, but are not limited to, a number of federally and state protected species, including federally threatened and endangered species, which will face potential extinction because of the loss of water and vegetation resulting from the appropriation and export or use of water. Many of these species have historical and cultural significance to the Tribe.

Because of the hydrologic connection between the subject basin and the Steptoe Valley and White River Valley Basins, the decrease in groundwater that will result from this Application's proposed change would dry up surface vegetation, surface soils, wetlands, surface springs, ponds, and marshes, and other wildlife habitat in such basins and devastate the wildlife in the region. As a result of the harms that will befall the wildlife and wildlife environment due to the Application, because the public interest in wildlife will be harmed, and because the Application is environmentally unsound, the State Engineer should reject this Application pursuant to 533.367, 533.370(5) and 533.370(6)(c).

V. THE CHANGE PROPOSED IN THIS APPLICATION WOULD BE DETRIMENTAL TO THE PUBLIC INTEREST ON ECONOMIC GROUNDS AND WOULD EXCESSIVELY LIMIT FUTURE GROWTH AND DEVELOPMENT IN THE BASIN(S) FROM WHICH THE SOURCE OF SUPPLY IS LOCATED AND IN HYDROLOGICALLY CONNECTED BASINS.

SNWA's proposed change will result in declining levels of groundwater in the source of supply and subject basin as well as in hydrologically connected basins, including the Steptoe Valley and White River Valley Basins. Such a decrease will not

only result in a decline in groundwater, but will also dry up aboveground water sources, such as springs, ponds, marshes, and wetlands on which current and future economic activities and growth depend. NRS Sections 533.370(5) requires the State Engineer to deny applications and refuse to issue requested permits that threaten to prove detrimental to the public interest, including actions which would limit the future growth and development in the basin from which the use or change is proposed.

Economic activities that would be negatively impacted, and possibly eliminated altogether as a result of the Application's proposed change, SNWA's other change applications, and the Proposed Project, include but are not limited to: livestock and ranching, domestic uses of water, mining, recreation, fishing, hiking, camping, hunting, farming and irrigation, etc. The resulting outcomes would be detrimental to the public interest, both locally and nationally. The citizens of the state of Nevada, the residents of the affected basins, including hydrologically connected basins, consumers of products originating from such basins, and tourists and travelers to the area would be negatively impacted.

Further, many people depend on the area and water-based activities for their livelihood. SNWA's proposed change in this Application, other change applications, and Proposed Project would prove disastrous to those who lose their livelihood as a result of the Proposed Project and to those who depend on such persons for employment, services or products.

In addition to the harm to existing economic enterprises, the proposed change under the Application, SNWA's other change applications, and SNWA's Proposed Plan would severely limit future economic growth. Development and expansion of existing economic

ventures would also be unduly constrained. It is possible that SNWA will use the change in the future to combine the water in the subject Application with water in the Proposed Project. The economic feasibility of such a project is doubtful and future economic projections do not support a project of this scale or magnitude. Particularly in such turbulent economic times, another factor negatively impacting economic growth and development can be devastating to individuals, towns, cities, and states. As such, the proposed change in this Application, SNWA's other proposed changes, and the Proposed Project are detrimental to the public interest and unduly limit future economic growth. Therefore, the State Engineer should deny this Application pursuant to both 533.370(5) and 533.370(6)(d).

VI. THE APPLICATION AND PROPOSED CHANGE MAY BE AN UNJUSTIFIED AND IMPROPER INTERBASIN TRANSFER OF GROUNDWATER.

It is possible that SNWA will use the change in the future to combine the water in the subject Application with water in the Proposed Project. If this occurs, SNWA has failed to justify the need to import water from the subject basin. Pursuant to NRS § 533.370(6) before the State Engineer can approve an application for an interbasin transfer, the applicant is required to "justif[y] the need to import the water from another basin." The import of water into Clark County from the subject basin is not justified because the applicant has other options to satisfy its water demands based on water resources within Clark County. The applicant should be required to supply its demands through conservation. Per capita water usage in Clark County far exceeds the water usage of other similarly situated western cities and water users. The water users within the subject basin and surrounding basins should not have to suffer because of the wasteful

water practices of the Applicant and its clients.

Furthermore, conservation is a significantly less expensive option compared with importation of water from the subject basin. The Applicant must demonstrate that it has utilized every effort to increase available water within the basin in Clark County through conservation, before it can even begin to be justified in attempting to import water from other basins, including the subject basin.

Further, many basins other than just the subject basin will be negatively impacted by the change and the possible export or use of water proposed in the Application. Many basins are hydrologically connected to the subject basin and as such, a decrease in groundwater in a new area or source of supply in the subject basin as a result of the proposed change will also result in a decrease of groundwater in hydrologically connected basins and valleys, including the Steptoe Valley and White River Valley Basins, where the Tribe's Reservation is located. As such, the State Engineer should deny this Application pursuant to 533.370(6).

VII. THE APPLICATION AND PROPOSED CHANGE WOULD HAVE DETRIMENTAL IMPACTS ON CULTURAL, HISTORIC, RELIGIOUS, TRADITIONAL, ABORIGINAL AND ANCESTRAL LANDS AND SITES, WHICH WOULD HARM THE PUBLIC INTEREST.

The Application and proposed change will lead to marked damage, and in some cases outright destruction, of cultural, religious, historic, and traditional resources and sites. NRS Section 533.370(5) and 533.370(6)(e) state respectively that the State Engineer must deny an application when the proposed use will interfere with the public interest and that the State Engineer can consider any relevant factor when determining whether to deny an application.

Shoshone people once inhabited an enormous geographic region that included territories in parts of present-day California, Montana, Idaho, Nevada, Utah, and Wyoming. Bureau of Land Management, *Draft: Clark, Lincoln, and White Pine Counties Groundwater Development Project Ethnographic Assessment*, 3-1 (Nov. 2009). Anthropologists have divided the Shoshone into three groups based on territorial occupations: the Western Shoshone (which includes the Goshute), the Northern Shoshone and Bannock, and the Eastern Shoshone. *Id.* These bands shared a similar language classified by linguists as "Shoshonean." *Id.* The Western Shoshone territory extended from Death Valley, California through central Nevada into northwestern Utah. *Id.* The Ely Shoshone Tribe is a band of the Western Shoshone. The basin at issue in this Application falls within the ethnographic aboriginal territory of the Shoshone as a whole, particularly the Western Shoshone.

The change proposed in the Application as well as SNWA's other change applications and the possible future export or use of water proposed in the Application would lead to acute degradation as well as destruction of traditional, religious, cultural, ancestral, aboriginal and historic resources and Tribal aboriginal lands in the basin targeted in this Application and in hydrologically connected basins, including the Steptoe Valley and White River Valley Basins. Further, the negative impact on archaeological sites through the inevitable handling and treatment of archaeological material and sites by the change or possible future export or use proposed in the application and the construction of the myriad of pipelines, including the communal piping system proposed in the Application, through the region would be culturally devastating, not only to the Tribe and other Indian tribes, but to the public as a whole.

For thousands of years, the ancestors of the present Ely Shoshone tribal members, as well as other Shoshone bands, used the basin at issue in the Application and hydrologically connected basins for cultural, religious, and resource purposes. In many instances, such uses continue to the present day. Traditional use areas for the Western Shoshone that would be negatively impacted by the proposed change could include, but are not limited to, the Spring, Snake, Cave, Dry Lake, and Dry valleys and Delamar Settlement Camp. Areas such as Swamp Cedars, Turnley Spring, Spring Creek, and Snake Creek Burial Cave, Swallow Ranch, Swamp Cedars, Snake Creek Burial Cave, Spring Creek Spring, Lehman Cave, Turnley Spring, Warm Springs, Cave Valley Cave, Big Spring Shoshone Village Site, Battle Sites in Lincoln County, Bennett Pass, Dry Lake Valley, Oak Springs Summit, Pipe Spring, Patronage Valley, Maynard Lake/Red Tail Hawk Site, Storied Rocks, Delamar Valley/Delamar Dry Lake/Delamar Flats, Delamar Settlement Camp, Arrow Canyon Range, Arrow Canyon Valley, Coyote Spring, Coyote Spring Valley, Honeymoon Trail, Kane Springs Wash, Hidden Valley, Salt Song Trail, Wipe, Sheep Range, Monte Neva Hot Springs, Ash Springs, Ash Springs Rock Art Site, Black Canyon, as well as many other sites within or adjacent to the basin at issue in this Application and other applications filed by SNWA to export or use water from Spring, Snake, Cave, Dry Lake, and Delamar Valleys hundreds of miles to Clark County. Bureau of Land Management, *Draft: Clark, Lincoln, and White Pine Counties Groundwater Development Project Ethnographic Assessment*, 6-1–6-25 (Nov. 2009).

Examples of cultural, traditional, religious, ancestral, aboriginal and historic resources that would likely be injured or destroyed by the proposed change in this Application and other SNWA change applications, and the possible future export or use

of water include, but are not limited to tribal and ancestral sacred and ritual sites; water and biological resources; locations associated with traditional beliefs concerning tribal origin, cultural history, or the nature of the world; locations where religious practitioners went or go either in the past or the present, to perform ceremonial activities based on cultural rules of practice; ethnohistoric habitation sites; trails; places from which plants, animals, minerals, and waters possessing healing powers or used for other subsistence purposes, may be taken; tribal, ancestral and Native American prehistoric village and dwelling sites; tribal and ancestral graves and burial sites; tribal and ancestral massacre and battle sites; and sites containing tribal and ancestral artifacts, drawings and other culturally significant items. Additionally, some of these locations are considered sacred to particular Native American individuals and tribes.

The above resources and sites, as well as and other resources and sites, that would be damaged or possibly destroyed if this Application is approved constitute an important part of the cultural and historical legacy of the Tribe, other tribes, residents of Nevada, and the Nation as a whole. Such damage or injury to cultural resources would harm the public interest. As such, the State Engineer should deny this Application pursuant to NRS Sections 533.370(5) and 533.370(6)(e).

VIII. THE APPLICATION AND PROPOSED CHANGE WOULD VIOLATE FEDERAL LAW ENACTED TO PROTECT CULTURAL, HISTORIC, RELIGIOUS, TRADITIONAL, ABORIGINAL AND ANCESTRAL LANDS AND SITES.

As noted above, NRS Sections 533.370(5) and 533.370(6)(e) require the State Engineer to deny an application when the proposed use or change will conflict with the public interest and that the State Engineer can consider any relevant factor when determining whether to deny an application. Various federal cultural preservation

laws have been enacted to protect Native American cultural, traditional, religious, historic, and ancestral sites. These laws include but are not limited to the National Historic Preservation Act (hereinafter "NHPA"), the Native American Graves Protection and Repatriation Act of 1990 (hereinafter "NAGPRA"), American Indian Religious Freedom Act of 1978 (hereinafter "AIRFA'), and Executive Order 13007 – Indian Sacred Sites (EO 13007).

SNWA's proposed change(s) and the possible future use and/or export of water from in this Application and its other applications will violate some or all of the above laws due to the detrimental impacts that the nature of the change and the export or use of water will have on such sites. The State Engineer cannot approve the Application if it will violate federal law. Further, if a State Engineer allows state entities, such as SNWA, to violate federal law, such a practice would be against the public interest. Therefore, the State Engineer should deny SNWA's Application under 533.370(5) and 533.370(6(e)).

IX. THE APPLICANT HAS NOT EXECUTED A SUFFICIENT CONSERVATION PLANS TO PROTECT THE AFFECTED BASINS.

NRS Section 533.370(6)(b) requires the State Engineer to deny an application if the Applicant has not demonstrated that a plan for the conservation of water has been adopted and is being effectively carried out. SNWA has not demonstrated that it will implement a conservation plan that is able to effectively minimize adverse impacts on the fragile environment and ecosystems that would be impacted by the change of the point of diversion, the place of use and the manner of use of water from the subject basin to the proposed source of supply. Due to the nature of the delicate and already water-scarce desert, SNWA should be required to use the latest advances to ensure adequate protection of the areas of impact. SNWA's conservation plan, monitoring plan, and mitigation plan

is insufficient for protecting the area. The current per capita water use in SNWA's service area is far above that of similarly situated western cities. With current and projected economic realities, a decrease in Las Vegas population is already occurring, thereby eliminating the need for this project and questioning the revenue base to support it. Therefore, because SNWA has not submitted such a plan, the State Engineer should deny the Applications pursuant to NRS Section 533.370(6)(b).

X. THE APPLICATION AND PROPOSED CHANGE IS NOT AN APPROPRIATE LONG-TERM USE OF NEVADA'S WATER

Under 533.370(6)(d), the State Engineer must deny the Application if the proposed action is not an appropriate long-term use of water. SNWA's proposed change and the subject Application, which may one day become part of the Proposed Project, do not take into consideration the long-term needs and uses of Nevada's water as a whole. Instead, SNWA self-servingly has applied to change the point of diversion, manner of use and place of use of much of the water from a massive portion of this already dry and arid state, effectively devastating the subject basin and hydrologically connected areas. SNWA should pursue other more cost-effective alternatives rather than cause devastating impacts to countless communities, their economies, the environment, cultural and historical sites, and tribal lands and reservations. The State Engineer should not allow SNWA to suddenly change the point of diversion, manner of use, and place of use of water proposed in this application, which would have an impact on the Ely Shoshone Reservation as well as tribal aboriginal lands. As such, the State Engineer should deny the Application pursuant to NRS Section 533.370(5) and 533.370(6)(d).

XI. THE APPLICATION AND PROPOSED CHANGE WOULD VIOLATE THE TRIBE'S SOVEREIGN ABILITY TO REGULATE ITS TERRITORY

Indian tribes are sovereign nations. See *Worcester v. Georgia,* 31 U.S. 515, 559 (1832) (stating that Indian tribes are "distinct, independent political communities"); see also *U.S. v. Wheeler,* 435 U.S. 313, 323-324 (1978) (stating that "[t]he powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.'"). Evidencing this fact, Indian tribes are not bound by the United States Constitution and not bound federal laws of general applicability and clearly not by state laws. See *Talon v. Mayes,* 163 U.S. 376 (1896) (stating that "as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the fifth amendment."); *U.S. v. Wheeler,* 435 U.S. 313; *Worcester v. Georgia,* 31 U.S. at 559-561 (stating that "[t] he Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, *in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter"*)(emphasis added)). In other words, Indian tribes are independent governments with inherent powers not stemming from the laws of the United States. *Worcester v. Georgia,* 31 at 559 (stating that "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."); *U.S. v. Wheeler,* 435 U.S. 313.

Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice. *Cohen's Handbook of Federal Indian Law*, Felix Cohen, at Sec. 4.01(1)(a). As such, Indian tribes have plenary and

exclusive power over their members and their territory subject only to the limitations imposed by federal law.[1] *Worcester v. Georgia,* 31 U.S. 515, 561. It has long been recognized that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory..." *U.S. v. Wheeler,* 435 at 323. "Indian nations have extensive powers over their property." *Cohen's,* at Sec. 4.01(2)(d).

As a result of the clearly accepted sovereign nature of Indian tribes, the Ely Shoshone Tribe has exclusive power over its territory. It is under the power of the Tribe, not SNWA and not the State Engineer, to regulate its territory, including the water which feeds such lands. Pursuant to its sovereign powers, the Tribe is adamantly opposed to SNWA's Application to change point of diversion, manner of use and place of use of the waters of the State of Nevada, as well as SNWA's other change applications, the Proposed Project, and the future possibility of SNWA's exportation of water from the subject region.

NRS 533.370(6)(d) states that when determining whether an application for an interbasin transfer of groundwater must be rejected the State Engineer shall consider "(e) Any other factor the State Engineer determines to be relevant." A situation, such as this, where a change application, which will alter the point of

[1] Federal limitations over tribal plenary power may come from treaties and statutes, but such limitations must be clearly expressed pursuant to the Indian law canons of construction. *Cohen,* at Sec. 4.01(1)(c). Such treaties, agreements, statutes and executive orders must be liberally construed in favor of the Indians. *Choctaw Nation v. U.S.,* 318 U.S. 423, 431-432 (1943) (quoting *Tulee v. Washington,* 315 U.S. 681, 684-685 (1942) (". . . in interpreting treaties and agreements with the Indians [which are to be construed] in a spirit which generously recognizes the full obligation of this nation to protect the interests of [the Indians]"). Further, all ambiguities are to be resolved in favor of the Indians. *McClanahan v. Ariz. State Tax Comm'n,* 411 U.S. 164, 174 (1973) (stating that "any doubtful expressions in [treaties] should be resolved in the Indians' favor."). In line with the federal trust responsibility is that water contracts and documents such as treaties and agreements, are to be construed in favor of the tribes. *U.S. v. Gila Valley Irrigation Dist.,* 31 F.3d 1428, 1438 (9th Cir. 1994); *U.S. v. Ahtanum Irrigation Dist.,* 236 F.2d 321, 340 (9th Cir. 1956). Further, courts have recognized that Congress has "plenary and exclusive authority" over Indian affairs. *U.S. v. Lara,* 541 U.S. 193, 200 (2004); *Washington v. Confederated Bands & Tribes of the Yakima Nation,* 439 U.S. 463, 470 (1979).

diversion, manner of use, and place of use, and co-mingle water into a communal piping system, with the future possibility of exporting water from basins adjacent to or in close proximity to a federally recognized Indian tribe, thereby infringing the tribe's right to govern itself and its territory is highly "relevant" to whether an application for an interbasin transfer should be rejected. Further, 533.370(5) provides that where a proposed use or change "threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit." The Application and its proposed change would violate the Tribe's sovereign authority over its Reservation and territory, and as such, is detrimental to the public interest. Therefore, the Application should be denied under NRS 533.370(6)(d) and 533.370(5).

XII. THE APPLICATION AND PROPOSED USE WOULD THWART THE FEDERAL TRUST RESPONSIBILITY TOWARD THE TRIBE AND TRIBAL RESOURCES.

One of the basic principles in Indian law is the mandate that the federal government has a trust or fiduciary relationship with Indian tribes. *Cohen's,* at 418. The federal government has a trust responsibility to Indian tribes to protect their resources which include, but are not limited to, protection of land, water, minerals, and children.[2]

[2] See *Cherokee Nation v. Georgia,* 30 U.S. 1, 17 (1831) (stating that the federal-tribal relationship is like that of a "ward to his guardian."); see also *Worcester v. Georgia,* 31 U.S. 515; See, e.g., Dep't of Justice Policy on Indian Sovereignty and Government-to-Government Relations with the Indian Tribes, available at www.usdoj.gov/otj/sovtrb.htm ("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"); 25 U.S.C. Sec. 458cc (Secretary of the Interior must encourage tribal self-governance by entering into agreements with tribes "consistent with the Federal Government's laws and trust relationship to and responsibility for the Indian people"); 25 U.S.C. Sec. 3701 (stating that "the United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes"); 25 U.S.C. Sec. 4043 (Special Trustee for American Indians must create a plan to "ensure proper and efficient discharge of the Secretary's trust

Specifically, water is clearly a resource covered under the federal trust responsibility protections. Congress has recognized the federal government's "trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources." *Western Water Policy Review Act of 1992,* Pub. L. No. 102-575, title XXX, Sec. 30002(9), *reprinted at* 43 U.S.C. Sec. 371.

The courts have also invoked the trust responsibility to limit federal administrative action regarding Indian tribes, particularly in the context of administration of tribal property by the Department of Interior. *Manchester Band of Pomo Indians v. U.S.,* 363 F. Supp. 1238, 1245-1247 ((N.D. Cal. 1973). The courts have likewise used the trust responsibility to limit federal agencies conducting any federal government action relating to Indian tribes and to hold agency action to a higher standard for dealings with Indian tribes or resources. *Nance v. EPA,* 645 F.2d 701, 711 (9th Cir. 1981) ("[i]t is fairly clear that any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribe"); *Paravano v. Babbitt,* 70 F.3d 539, 545 (9th Cir. 1995). Through many acts of Congress and numerous decisions of the United States Supreme Court, the federal government "has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 297 (1942). The standards of duty required of the United States government and its agencies as a

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responsibilities to Indian tribes and individual Indians"); 25 C.F.R. Sec 225.1 (Secretary of the Interior "continues to have a trust obligation to ensure that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any minerals agreement); 20 U.S.C. Sec. 7401 ("[i]t 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 for the education of Indian children"); "It is the entire government, not simply the Department of the Interior, that has a trust responsibility with Tribal governments. And it is time the entire government recognized and honored that responsibility." President George H.W. Bush, Statement Reaffirming the Government-to-Government Relationship between the Federal Government and Indian Tribal Governments, 1991 Pub. Papers 662 (June 14, 1991). See also Klamath & Modok Tribes, 304 US 119 (1938), and US v. Adair, 723 F.2d 1394, 1410 (9th Cir. 1983) (cert. denied 467 US 1252, 1983).

trustee for tribes is "not mere reasonableness, but the highest fiduciary standards." *Menominee Tribe v. United States*, 101 Ct. Cl. 10, 19-20 (1944). Therefore, the federal government and its agencies must be thorough and vigilant when it comes to protecting and advocating for tribes and tribal resources.

As noted above, NRS 533.370(6)(d) allows the State Engineer to consider any relevant factor when determining whether a transfer application should be denied. Additionally, 533.370(5) provides that where a proposed use or change "threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit." The State Engineer should take into consideration the federally mandated trust responsibility that the federal government has toward Indian tribes. SNWA's application and proposed change and possible future interbasin transfer would effectively divest not only the Tribe of its inherent rights to govern itself, but also divest the federal government, including federal agencies, of its trust responsibility to protect the interests and resources of the Tribe. Further, depriving the Tribe of its inherent right to govern itself and depriving the federal government of its trust responsibility toward Indian tribes is "detrimental to the public interest." Therefore, State Engineer should deny the above Application under NRS 533.370(6)(d) and 533.370(5).

XIII. THE APPROPRIATION AND CHANGE PROPOSED IN THIS APPLICATION WOULD VIOLATE THE TRIBE'S RESERVED WATER RIGHTS AND THWART THE INTENT OF THE TRIBAL RESERVED WATER RIGHTS DOCTRINE.

For over a century, it has been understood that Indian tribes have rights to large, but often still unquantified amounts of water. Such rights are predicated on the concept that the creation of Indian reservations reserved not only the land, but also reserved the

right to enough water to fulfill the purposes of the reservation. *Arizona v. California,* 373 U.S. 546, 600 (1963); *Winters v. United States,* 207 U.S. 564 (1908).

In *Winters v. United States*, the United States Supreme Court ruled that tribal right to water was impliedly reserved in the agreement establishing the reservation. *Winters,* at 565. The policy of confining Indian tribes to reservations implied that the tribes would have the means, including water, to fulfill the federal government's purpose of transforming them to hunters and gatherers to an agrarian, pastoral people. *Cohen's*, at 1172. The creation of the reservation impliedly reserved tribal water rights as well. *Winters v. U.S.*, 207 U.S. 564. This reserved water right vests on the date that Congress reserves the land, *Arizona v. California*, 373 U.S. 546, 600 (1963) and remains regardless of non-use. *Hackford v. Babbit*, 14 F.3d 1457, 1461 (10th Cir. 1994).

As a result of *Winters* and its progeny, tribal reserved water rights represent an "exception to the general rule that allocation of water is the province of the states." *Cohen's Handbook of Federal Indian Law*, Felix Cohen, Sec. 19.01(1). Under prior appropriation systems, such as the system in Nevada, waters were opened up to appropriation under the laws of various Western states, however these laws did not affect the rights of federal reservations. *Cappaert v. U.S.,* 426 U.S. 128, 143-145 (1976); *Fed. Power Commin v. Oregon,* 349 U.S. 435 (1955). Unlike appropriative rights, Indian reserved water rights are not based on diversion and beneficial use. Instead, under reserved rights, a sufficient amount of water is reserved to fulfill the purposes for which a reservation was established. *Cohen's* at Sec. 19.01(1); *Winters v. U.S.,* 207 U.S. 564. In other words, the "use it or lose it" philosophy that guides appropriation systems like Nevada does not apply to tribal reserved rights. Therefore, pursuant to the "Winters

Doctrine" Indian tribes had enough water set aside by Congress for their present and future needs, and that those water rights are reserved in order to carry out the purposes for which the lands were set aside; and that such rights are paramount to water rights later perfected under state law. *Winters v. U.S.,* 207 U.S. at 576-577; see also *Arizona v. California,* 373 U.S. 546, 600-601 (1963).

Winters and *Arizona* also established that the substance and scope of tribal water rights are determined by federal law. Other courts have also held that tribal water rights are "defined by federal, not state law." *U.S. v. Adair,* 723 F.2d 1394, 1410-1411 & n. 19 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985); *U.S. v. McIntire,* 101 F.2d 650, 654 (9th Cir. 1939); *Arizona v. San Carols Apache Tribe,* 463 U.S. 545, 571 (1983); *Colo. River Water Conservation Dist. V. U.S.*, 424 U.S. 800, 813 (1976).

Under the Winters Doctrine, the impact on junior state appropriators cannot operate to divest tribes of their federal water rights. *Cohen's*, at 1175. In the *Winters* case, the non-Indian appropriators on the Milk River had been using the water for irrigation for some years prior to the tribal use, however the Court held that the tribes' use was senior to, or had priority over, the junior state-law rights, and that the tribal rights could be asserted even though it would deprive the non-Indian irrigators of the water they had been using and on which they had been relying. *Winters v. U.S.,* 207 U.S. at 568-569. It is clear then, that "[f]rom its inception, then, the *Winters* doctrine contemplated that junior non-Indian users could [be forced to] forfeit their water [rights] when tribes asserted their reserved rights." *Cohen's*, at 1175. The impact on state water users is not a factor in the determination or scope of the federal law right to an implied reservation of

water. *Colville Confederated Tribes v. Walton,* 752 F.2d 397, 405 (9th Cir. 1985); *New Mexico v. Aamodt,* 537 F.2d 1102, 1113 (10th Cir. 1976).

According to NRS Section 533.370(5) "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." Further, NRS 533.370(6)(d) allows the State Engineer to consider any relevant factor when determining whether an interbasin transfer application should be denied. It is clear that under *Winters*, *Arizona*, and similar cases, the Tribe has rights to enough water needed to fulfill the purposes of its Reservation. The Tribe's inherent right to water has been recognized for over a century and such rights are paramount to SNWA's Application to change the point of diversion, manner of use, and place of use. Pursuant to the Winters Doctrine, no actions may be taken that could interfere with the Tribe's reserved water rights. The above Application and proposed use would: (i) conflict with the Tribe's reserved water rights, (ii) be detrimental to the public interest in the affected basin and hydrologically connected basins, and (iii) is highly relevant to a determination regarding the Application's denial. Therefore, the State Engineer is required to deny the Application under NRS Sections 533.370(5) and 533.370(6)(d).

XIV. THE TRIBE RESERVES THE RIGHT TO AMEND THIS PROTEST AS MAY BE NECESSARY BY FUTURE DEVELOPMENTS.

Because of the immense nature of SNWA's Proposed Project, it is impossible to anticipate all potential adverse impacts without further study. The Tribe reserves the

right to conduct further research and discovery regarding such impacts. Additionally, new scientific or other data and changed circumstances may reveal different grounds for this protest. As a result, the Tribe reserves the right to amend the subject protest to include such issues as they develop.

XV. THE TRIBE HEREBY INCORPORATES OTHER PROTESTS TO SNWA'S APPLICATIONS BY REFERENCE.

The Tribe incorporates by 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 by SNWA to change the point of diversion, manner of use, and place of use of the waters of the State of Nevada, and/or to any Application that is included in SNWA's groundwater Proposed Project and filed pursuant to NRS Section 533.365, including but not limited to the attached protest.

ATTACHMENT II

Additional Protest Memorandum

ATTACHMENT TO PROTEST OF THE ELY SHOSHONE TRIBE AGAINST APPLICATION NO. 79716, FILED MARCH 22, 2010, BY THE SOUTHERN NEVADA WATER AUTHORITY

This attachment lists and briefly describes the reasons and grounds for this protest of The Ely Shoshone Tribe ("Protestant") against Application Number 79716. The Southern Nevada Water Authority ("SNWA" or "Applicant") has filed this Application to change the point of diversion, manner of use, and place of use of the waters from the underground basin(s) in Spring Valley, Hydrographic Area 184, which may in the future become a part of its massive proposed network of wells and pipelines stretching across eastern Nevada from Clark County through Lincoln County and into White Pine County (the "Pipeline Project").

In sum, Protestant asserts as reasons and grounds for this Protest that: (1) there is insufficient unappropriated water in the proposed source of supply to support the application or the proposed use; (2) the proposed use would conflict impermissibly with existing water rights and protectable interests in domestic wells; (3) the proposed use would be detrimental to the public interest on environmental grounds and would be environmentally unsound as it relates to the basin from which the water is proposed to be exported; (4) the proposed use would be detrimental to the public interest on economic grounds and would unduly limit future growth and development in the basin from which the water is proposed to be exported; (5) the proposed action is not an appropriate long-term use of water; (6) the Applicant has not justified the need to import water from another basin; (7) the Applicant does not have and is not effectively implementing an adequate or reasonable plan for conservation in the area of proposed use; and (8) 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. These protest grounds are further explained below.

1. **There Is Insufficient Water Available In The Proposed Source of Supply:**

The State Engineer should deny the subject applications pursuant to NRS § 533.370(5), because there is insufficient water available for change in the point of diversion, place of use, or manner of use, or appropriation in the proposed source of supply. The change in the point of diversion, place of use, or manner of use 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. The State Engineer already has designated a number of hydrologically connected basins within the same flow system as the basin that is targeted by this Application, effectively acknowledging that those basins and potentially the entire flow system are fully appropriated, if not over-appropriated.

In addition, the State Engineer previously has found that there is too much uncertainty, too little sound data, and too great a risk of unsustainable overappropriation in the interbasin flow system, of which this basin is a part, for further changes in the point of diversion, place of use, or manner of use, or appropriations to be permitted until substantial additional data were gathered and evaluated. That additional data gathering and evaluation have not been completed and until they are it would be premature to permit any additional change or appropriation from hydrologically

interconnected basins within the carbonate rock province, including the basin targeted by this Application.

2. **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 change in the point of diversion, place of use, or manner of use or 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 change or appropriation and use will exceed the perennial yield of the subject basins resulting in declining groundwater levels and unreasonable degradation of the level and quality of the water in existing wells.

Additionally, the basin within which this Application proposes to change in the point of diversion, place of use, or manner of use or appropriate and export water is the source of water for hydrologically connected downgradient basins where it already has been appropriated by senior water rights holders.

3. **The Change Proposed In This Application Would Be Detrimental To The Public Interest On Environmental Grounds And Would Be Environmentally Unsound As It Relates To The Basin From Which The Export Is Proposed:**

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 SNWA's Pipeline Project, of which this Application could become a part, would threaten to cause serious environmental harms in the basin from which water is proposed to be changed and possibly exported and in hydrologically connected downgradient basins within the same interbasin flow system, and therefore would be detrimental to the public interest and would be environmentally unsound as it relates to the basin of origin.

A. Harm to Wildlife and Wildlife Habitat:

The proposed change and possible 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 vegetation that is groundwater-dependent in the subject basin and hydrologically connected downgradient basins. This loss of water will cause significant direct harm to many wildlife species and to wildlife habitat in the basin from which this Application proposes to change the point of diversion, place of use, or manner of use and possibly 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 change and possible

export of this water. The list of species 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 insects, including rare butterfly species.

The wildlife habitat areas and refugia likely to be harmed by the change in the point of diversion, place of use, or manner of use or appropriation and possible export of water proposed in this Application and SNWA's Pipeline Project, of which this Application may become 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 Shoshone Ponds Natural Area.

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

B. Degradation of Air Quality:

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 vegetation that is groundwater-dependent in the subject basin and hydrologically connected downgradient basins. This pervasive desiccation, in turn, will make these previously moist and/or vegetated areas dramatically more susceptible to greatly increased mobilization of sediment, or dust. In other words, the desiccation of these areas 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. In addition to causing severe respiratory problems, the particulate matter that will be mobilized in dust storms in these areas is likely to contain radioactive fallout that heretofore has been held in place by the groundwater-fed moisture in the soil and vegetation. These dust storms also will dramatically degrade the aesthetic and recreational value of the basins in which they occur and additional downwind areas. Because of these harmful impacts, the State Engineer should deny this Application pursuant to NRS §§ 533.370(5) and 533.370(6)(c).

C. Destruction of Recreational and Aesthetic Values:

The severe decline in groundwater levels that will result from this Application and SNWA's Pipeline Project, of which this Application may become a part, will kill off vegetation and wildlife, eliminate many of the springs and wet areas, and degrade air quality and visibility in the basin expressly targeted by this Application and hydrologically connected downgradient basins in the same interbasin flow system. These impacts will profoundly degrade the aesthetic values and appeal of all these basins and additional downwind areas. Similarly, the loss of water, wildlife, clean air, and good visibility will destroy the recreational uses and value of these basins

and additional downwind areas. For these reasons, as well, the State Engineer should deny this Application pursuant to NRS §§ 533.370(5) and 533.370(6)(c).

D. Degradation of Water Quality:

The groundwater drawdown that would be caused by the change in the point of diversion, place of use, or manner of use or appropriation and possible 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. Because such an outcome would be detrimental to the public interest and would be environmentally unsound 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 Cultural Resources:

The environmental harms described above also will lead to the pronounced degradation, and in some instances destruction, of cultural resources in the basin expressly targeted in this Application and in hydrologically connected basins within the same interbasin flow system. Cultural resources likely to be harmed by the change in the point of diversion, place of use, or manner of use or appropriation and possible export of water proposed under this Application and SNWA's entire Pipeline Project, of which this Application is a part, include but are not limited to Native American ritual worship and other sacred sites, prehistoric Native American village or dwelling sites, Native American graves or burial sites, and scenes of historic massacres of Native Americans. These and other cultural resources that would be damaged if this Application is approved constitute an important part of Nevada's, and the Nation's, historical and cultural legacy. Therefore, the State Engineer should deny this Application pursuant to NRS § 533.370(5) because the proposed change and use would cause degradation of cultural resources that would be detrimental to the public interest.

4. <u>The Change in the Point of Diversion, Place of Use, and Manner of Use and Possible Future Exportation 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</u>:

A. Undue Limitation Of Future Economic Activity and Growth In Basin Of Origin:

As detailed elsewhere in this Protest Attachment, permitting the change in the point of diversion, place of use, or manner of use and possible 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 development for both year-round and vacation use, and potential future energy development. 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).

B. Undue Economic Harm Will Extend To The Economies And Communities of Downgradient 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 Pipeline Project radiates outward into downgradient hydrologically connected basins within the same interbasin flow system and to downwind basins. Thus, the change and possible export proposed in this Application also would cause the same host of economic harms to the rural economies and communities of other basins, including but not limited to the White River Valley, Pahranagat Valley, and Moapa Valley. Therefore, the State Engineer should deny this Application pursuant to NRS § 533.370(5) because it would be detrimental to the public interest.

5. <u>The Proposed Action Is Not An Appropriate Long-Term Use Of Nevada's Water</u>:

Given the numerous more cost-effective alternatives available to SNWA and the devastating impacts to rural communities, and their economies, and to the environment, SNWA's rural water grab is not an appropriate long-term use of Nevada's scarce resources. The State Engineer should require SNWA to actively pursue alternatives to the rural water grab, such as desalination and conservation, before granting water rights to SNWA from the subject valleys. 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.

6. <u>The Applicant Has Not Justified The Need To Import Water From Another Basin</u>:

By the same token, SNWA has not justified the need to import water from another basin, which this Application may in the future take part in. SNWA has available to it other more feasible and cost-effective options, such as increased water conservation and the use of desalination for downstream Colorado River users in exchange for additional Colorado River water. 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 downgradient basins in the same flow system, when more cost-effective and environmentally sound alternatives are readily available to the Applicant. The current per capita water use in SNWA's service area currently far exceeds that of similarly situated western cities. Thus, there is significant potential for more cost-effective conservation alternatives, which would avoid the devastating impacts to the basins of origin. Additionally, given the current population, housing, and water use trends, the water demand projections that SNWA has been using to justify the Pipeline Project are no longer credible. So, 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.

7. **The Applicant Has Not Implemented A Sufficient Conservation Plan:**

Given the fragility of rural Nevada's high desert ecosystems and the absolutely vital role their scarce water resources play in supporting rural economies, agriculture, and flora and fauna, it should be mandatory for 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 sister western cities – before being permitted to transfer groundwater from rural basins of origin to SNWA's service area to feed its growth and excessive per capita water use.

SNWA's conservation plan falls far short of meeting this goal. The current per capita water use in SNWA's service area currently far exceeds that of similarly situated western cities. The State Engineer should require SNWA to submit a conservation plan that utilizes all feasible conservation strategies to achieve concrete conservation goals that are at least as aggressive as those of the most conservation-minded other western cities. Unless SNWA submits such a plan, the State Engineer should deny the applications pursuant to NRS § 533.370(6)(b).

8. **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:**

A. Changed Circumstances, Uncertain Intent, Doubtful Financing:

To date, the Applicant has not provided the State Engineer or the public with a cost projection for the pipeline project, of which this Application may become a part. Estimates for such a project, however, are in the tens of 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 such a 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 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.

B. 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.

9. **Protestant Reserves The Right To Amend This Protest As May Be Warranted By Future Developments**:

SNWA's proposed groundwater export project, of which this Application may become a part, is on a scale never before seen in Nevada, or in the United States. Thus, it is not possible to anticipate all potential adverse impacts without further study. New scientific or other data and changed circumstances may uncover different bases for this protest. Accordingly, the above-named Protestant reserves the right to amend the subject protest to include such issues as they develop.

10. **Incorporation Of Other Protests To SNWA's Applications By Reference:**

The above-named Protestant additionally incorporates by 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 groundwater export project and filed pursuant to NRS § 533.365.