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

FILED
OCT 24 2011
STATE ENGINEER'S OFFICE

IN THE MATTER OF APPLICATION NUMBER 81067
FILED BY Southern Nevada Water Authority
ON August 12, 20 11

PROTEST

Comes now 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 81067, filed on August 12, 20 11

by Southern Nevada Water Authority for the

waters of stream situated in Spring Valley (basin 184)
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"

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
Agent or protestant

Alvin S. Marques
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

elkmounter@yahoo.com
E-mail

RECEIVED 2011 OCT 24 PM 4:13 STATE ENGINEER

Subscribed and sworn to before me this 24th day of October, 20 11

SANDRA BARELA
NOTARY PUBLIC-STATE of NEVADA
White Pine County · Nevada
CERTIFICATE # 03-79523-17
APPT. EXP. JAN. 13, 2015

Sandra Barela
Notary Public

State of Nevada
County of White Pine

**+ $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

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| IN THE MATTER OF APPLICATION NO. 81057 – 81074 FILED BY SOUTHERN NEVADA WATER AUTHORITY TO APPROPRIATE SURFACE WATERS OF SPRING VALLEY (HYDROGRAPHIC BASIN 184) | ) | ELY SHOSHONE TRIBE'S PROTEST |

Pursuant to Nevada Revised Statute ("NRS") 533.365, the Ely Shoshone Tribe ("Tribe" or "Protestant") hereby protest Application No. 81057 – 81074 ("Application"), which were filed by the Southern Nevada Water Authority ("SNWA") on August 11 and 12, 2011, to appropriate surface water from springs and streams in Spring Valley (Hydrographic Basin 184).

SNWA has filed applications to appropriate water from surface sources in Spring Valley, located in White Pine County, Nevada. SNWA's Groundwater Development Project ("GWD Project") proposes to pump and export groundwater from Spring Valley through an interbasin transfer of water via a 300+ mile pipeline to municipalities and other users in southern Nevada. As part of that GWD Project, SNWA has proposed mitigation measures that include irrigation of vegetation communities and supplying wildlife with water.

The Ely Shoshone Tribe's Reservation ("Reservation") covers approximately 1500 acres in Steptoe Valley and 1700 acres in White River Valley, Nevada. The subject basin has been part of the Tribes aboriginal territory, and even a centerpiece of Tribal activity and occupancy, since time immemorial.

## SUMMARY

Protestant states as grounds and reasons for this Protest that: (1) the proposed use of water is uncertain; (2) there is insufficient amount of water in proposed source of supply; (3) the application and proposed use would conflict with existing water rights and impermissibly diminish the sources of and protectable interests in domestic wells; (4) the appropriation and proposed use would be detrimental to the public interest on environmental grounds, environmentally unsound and unsustainable; (5) the appropriation and proposed use would have unduly negative impacts on cultural, historic, and religious resources which would harm the public interest; (6) the appropriation and proposed use would violate federal and state laws that protect cultural, religious, and historic resources; (7) the appropriation and proposed use would violate the federal government's trust responsibility to the Tribe; (8) the appropriation and proposed use would unduly injure the Tribe's sovereignty and ability to regulate its territory. These protest grounds are explained below.

## I. THE PROPOSED USE OF WATER IS UNCERTAIN

The proposed use of water is uncertain. The SNWA's GWD Project proposes to irrigate a number of land areas in order to provide mitigation for groundwater drawdown. Those mitigation measures are described in the hydrological and biological monitoring and mitigation plans for Spring Valley's Stipulated Agreements. The SNWA's above-referenced applications do not identify or describe that use, nor do they contemplate whether that use for mitigation purposes is of beneficial use and in the public's interest. Therefore, the Nevada State Engineer must reject an application for

water appropriation pursuant to (NRS § 533.370(5)) if the indended beneficial use is not clearly contemplated in the application.

If the intended use is made clear at a later time, the State Engineer must not approve the subject Application if the intended use will be for mitigation of the SNWA GWD Project given the uncertain status of the GWD Project and associated SNWA's groundwater applications in the subject basin.

## II. THERE IS INSUFFICIENT 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 proposed source(s), will exceed the sustainable use of the water supply.

The Application, if approved, would violate federal mandates that 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, and infringe on Indian water rights. In no way are the Indian water rights covered under the Stipulated Agreements entered into by SNWA and the Department of Interior agencies. Thus, the State Engineer must deny the Application pursuant to NRS 533.370(5).

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.

## III. 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. Overutilization and overappropriation at the proposed source of supply in the subject basin will negatively impact existing rights held by the Tribes. The Stipulated Agreements between SNWA and the Department of Interior agencies absolutely do not compromise or diminish Indian water rights in the subject basin or in hydrologically connected basins.

## IV. THE APPROPRIATION AND PROPOSED USE WOULD BE DETRIMENTAL TO THE PUBLIC INTEREST ON ENVIRONMENTAL GROUNDS, WOULD BE ENVIRONMENTALLY UNSOUND, AND WOULD BE UNSUSTAINABLE

The State Engineer should deny the subject Application pursuant to NRS § 533.370(5) because approval of the Applications 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. Diverting surface water from springs and streams for irrigation and mitigation purposes can adversely impact a multitude of natural resources. 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. 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.

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. The proposed use and diversion of water impacts the Tribal use of the water and the sanctity of the water for religious purposes, resulting in public interests that would be unreasonably compromised. While the State Engineer must balance the economic and growth concerns for the state against environment issues of concern, it is clear that environmental impact concerns that would result from the approval of this Application, among others within the SNWA GWD Project, strongly outweigh the use via the SNWA GWD Project. The State Engineer must exercise discretion and balance his interpretation of public interest. The severe and irreparable harms that would result from the approval of this Application, and others in within the GWD Project mitigation measures, would prove to be extremely detrimental to the public interest, at federal, state, and local levels. The State Engineer's analysis of this Application clearly would weigh in favor of protecting the environment from impacts, despite whether or not mitigation 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 pursuant to NRS § 533.370(5) to protect the public's interest.

### A. Unsustainable 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 proposed source to ensure that the source would remain environmentally viable and ensure that the protection of the environment. The SNWA's GWD Project mitigation measures, which the subject Application is a part, is not responsible use of available water and the appropriation(s) would not protect natural resources. Moreover, there remains too much uncertainty as to whether mitigation measures of irrigating land areas will actually be an effective mitigation measure. 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.

### 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 stream and spring-dependent ecosystems and wildlife would be detrimental to the public interest. The proposed appropriation would result in adverse impacts on water supply and the ability of spring and stream-dependent ecosystems to remain in a natural state. This loss of water will cause significant direct harm to many wildlife species and their habitat. The appropriation and proposed use from this Application 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. Because of these severe and irreparably harmful impacts, the State Engineer should deny this Application pursuant to NRS § § 533.370(5) and 533.367.

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

The natural water is needed to protect cultural and religious uses of water for Native Americans. The natural habitat for Native Americans and their uses of landscapes and water is a natural state of the ecosystems. These areas cannot be recreated or artificially sustained with irrigated water while still maintaining their cultural significance.

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. The subject basin has been part of the Tribe's aboriginal territory since time immemorial. The appropriation of water from surface water sources under the Application , if approved, will cause severe and irreparable harm to cultural resources, sacred sites, traditions, and tribal history no matter if the intended use is for irrigation and/or mitigation measures under the GWD Project. Cultural resources likely to be harmed by the appropriation of water proposed under this Application 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. Cultural resources also include spring ecosystems and various wildlife and plant species that the Tribes hold sacred and use in religious practices. 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 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.

## V. 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 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. 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

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1 State Engineer's Ruling #5276 dated April 16, 2007, in the matter of applications 54003 through 54021.

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 no matter whether the application involves interbasin transfer or whether the application is only within the subject basin.

The Application will cause unreasonable damage, and in many cases outright destruction, of historical, cultural, and religious resources and sites. As such, the State has the authority to and must deny the Application pursuant to NRS § § 533.370(5).

## VI. 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 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, and Executive Order 13007 and Executive Order 13175 and other tribal consultation requirements. 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, executive orders, or state and federal court

decisions that guide the protection 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).

## VII. THE APPROPRIATION AND PROPOSED USE WOULD VIOLATE THE FEDERAL GOVERNMENT'S TRUST RESPONSIBILITY TO THE TRIBE AND THEREBY DETRIMENTAL TO THE PUBLIC INTEREST AND WELFARE

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. That trust responsibility has been crafted from numerous regulations and landmark court decisions to protect Indian resources, including but not limited to, the protection of rights to land and water. Under 20 USC § 7401 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 Indian 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 on 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. Thus, the federal government's trust responsibility standard is to be thorough and vigilant in protecting tribal resources, including water resources and rights.

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] As such, the State Engineer is subject to NRS § 533.0245, which states that the "State Engineer [is] prohibited from carrying out duties in conflict with certain decrees, orders, compacts or agreements. The State Engineer shall not carry out his or her duties pursuant to this chapter in a manner that conflicts with any applicable provision of a decree or order issued by a state or federal court, an interstate compact or an agreement to which this State is a party for the interstate allocation of water pursuant to an act of Congress."

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 divest the federal government and its implementing agencies from the trust and fiduciary obligation to protect the Tribe's water rights and resources. As such, the State Engineer should

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2 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).

deny the Application under NRS § § 533.370(5).

## VIII. 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 regulates its water resources and works to protect water resources that are critical cultural and religious resources for tribal members. The cultural significance of water, proper use and protection of water, and Indian use of water for cultural and religious purposes, now and into the future, are all essential components in the Tribe's ability to regulate its territory and provide services to tribal members. The Tribe and its sovereign governmental powers have been repeatedly affirmed to be in the public interest. As such, the Application and its artificial use of water as mitigation, 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 water in ways that will unduly injure the Tribe's water resources and rights and cultural use of water 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. This is a highly relevant factor that the State Engineer should consider to be within the public interest. Therefore, the State Engineer should deny the Application under NRS § § 533.370(5).

## IX. PROTESTANT RESERVES THE RIGHT TO AMEND THIS PROTEST AS MAY BE WARRANTED BY FUTURE DEVELOPMENTS

SNWA's proposed GWD Project is on a scale never before seen in Nevada. 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 the subject Protest to include such issues as they develop.

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

The Tribe hereby 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 GWD Project and filed pursuant to NRS § 533.365, including but not limited to the attached Protest.