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October 5, 2018

Jason King, P.E., State Engineer
Nevada Division of Water Resources
901 S. Stewart Street, Suite 2002
Carson City, NV 89701

Re: Preliminary Comments of Moapa Band of Paiutes re Draft Order re Lower White
River Flow System

Dear Mr. King:

We submit these comments on behalf of the Moapa Band of Paiutes (Tribe) regarding the Draft Order circulated at the working group meeting at the Overton Community Center on September 19, 2018, regarding administration of six groundwater basins described in the Draft Order as comprising the Lower White River Flow System (LWRFS). These are preliminary comments, which were requested by the State Engineer in the course of what the Tribe viewed as an informal meeting with some, but not all, of the water rights holders and other entities interested in groundwater management in the region. The Tribe reserves the right to respond further if and when a more formal process ensues.

The Tribe appreciates that groundwater management in the LWRFS is difficult. The region is extremely dry and may be getting drier. Las Vegas is near the terminus of the system, and there is pressure to develop available water resources. The fully-appropriated Muddy River with senior water rights is clearly dependent on adequate groundwater, as is the endangered Moapa dace endemic to its springs. It appears highly unlikely that all permitted groundwater can be pumped without damage to senior rights and the Moapa dace. The Tribe understands the State Engineer's interest in slowing groundwater development in the region.

Nonetheless, in the Tribe's view, entry of the Draft Order is unnecessary, premature, and likely to have unintended consequences. It would also conflict with other mechanisms already in place which are also designed to protect the Moapa dace and senior rights. In the Tribe's view, the State Engineer's office should defer imposing a new and inconsistent management regime on this vast area at this time, and continue to manage regional groundwater through individual rulings as applications come to its attention.

In the course of several meetings, the State Engineer referenced with approval the prior multi-party process that led to a series of agreements in 2006, including a Memorandum of Agreement (MOA) that establishes specific restrictions on groundwater pumping if flows in the Muddy Springs area decline below certain levels. The MOA was negotiated at the behest of the U.S. Fish and Wildlife Service, which is responsible under the Endangered Species Act to protect the Moapa dace. The parties to the MOA, in addition to USFWS, include the Tribe, Southern Nevada Water Authority (SNWA), Moapa Valley Water District, Coyote Springs Investment LLC (CSI) and the Muddy Valley Irrigation Company (MVIC). The State Engineer is not a signatory, but representatives of the State Engineer's office have participated in multiple meetings called for under the MOA.

The State Engineer's office has stated that it wishes to build upon the structures and processes established under the 2006 MOA, and the Tribe agrees with this view. Strictly speaking, the regulatory roles of the USFWS (to protect endangered species) and the State Engineer (to administer water rights in priority), are not identical, but they are functionally similar here – protecting spring flows necessary for the dace also protects senior rights in the Muddy River.

The State Engineer's office has also repeatedly expressed support for and asked for guidance from the Hydrological Review Team (HRT) established under the MOA, which consists of representatives with hydrogeological expertise who regularly meet and discuss issues relating to the same groundwater region that would be addressed by the Draft Order.

The State Engineer's office has also repeatedly expressed a preference that the HRT reach consensus regarding hydrogeological issues so that regional water management can be based on the best available scientific knowledge. Many papers and analyses have been prepared and circulated by members of the HRT, and particularly by the Tribe's representatives. As you know, the members of the HRT do not fully agree in their interpretation of the available data, particularly regarding the relative contributions of drought and groundwater pumping to water level declines in the region following the Order 1169 aquifer test. The Tribe agrees that more work should be done within the HRT to attempt to reach consensus on this point. If the HRT cannot itself reach consensus, the MOA provides in certain instances for expert peer review of technical analyses, and peer review may be appropriate here. The State Engineer's office may also have ideas, resources or tools of its own which could help upgrade scientific examination of the region's hydrogeology.

Despite some disagreements, however, the HRT has *consistently* reached consensus, every year since 2006, on one point – that the spring-level-based pumping restrictions called for in the MOA should not be changed. In fact, this is the *only* mandatory function of the HRT under the MOA as it issues each of its Annual Determination Reports. The HRT has *never* failed to reach consensus on this point, despite the participants' different views of the groundwater system, and it last reached such consensus in April of 2018. The Tribe is concerned that the State Engineer, while urging the HRT to reach agreement, appears to be rejecting the one conclusion on which the HRT *has* reached agreement. The Draft Order, if entered, would not

only be inconsistent with the MOA, but would have the effect of jettisoning an extensive and carefully negotiated series of agreements executed contemporaneously with the MOA. As discussed below, this would likely lead to the reopening of settled disputes. In particular, it could force the commencement of a general adjudication to quantify the Tribe's reserved *Winters* rights, which in turn could further destabilize regional water management for an extended period. The Tribe does not want to be forced to embark on such an approach, and urges the State Engineer to be cautious before completely overturning reasonable expectations of the MOA parties, particularly those of the Tribe.

Regional water management under the Draft Order would vary greatly from management under the MOA and its associated agreements. In multiple ways, management under the Draft Order would directly harm the Tribe.

First, the Draft Order would wholly reject the MOA's approach that groundwater withdrawals from different locations within a large and geologically complex region make at least some difference. Ordinarily, moving a groundwater withdrawal from a point near a sensitive area to a point much farther away would be viewed as responsible water management, and the MOA provides as much, mandating geographic redistribution of pumping if spring flows decline below certain levels. In addition, the MOA also provides for different levels of pumping restrictions in different portions of the multi-basin region if and when spring flows decline. In particular, the MOA provides for stricter pumping reductions from areas clearly up-gradient from Muddy Springs (particularly SNWA and CSI rights in the Coyote Springs groundwater basin) than from others (particularly the Tribe's rights in California Wash, which, according to the Tribe's analyses, are down-gradient from the Springs). The Tribe sees no basis at this time for wholesale rejection of the MOA's pumping restriction regime at this time, when the HRT, by consensus, has thus far upheld it. The Tribe continues to have severe doubts that the best science supports treatment of this vast area as equivalent to a single basin when there is evidence of boundary conditions and different gradients within the region. The Tribe thinks additional analytical work remains to be done on this point by the HRT – with or without support of peer review or other mechanisms – and sees no basis for ignoring the HRT or acting inconsistently with its determinations.

As mentioned above, the 2006 MOA arose from extended negotiations that were designed not only to protect the Moapa dace, but also to provide some measure of reliable water rights, subject to agreed pumping restrictions, both for the Tribe and others. The MOA was one of a series of interdependent agreements negotiated contemporaneously in 2006.¹ As a result of these negotiations, regional parties, including the State of Nevada through the Department of Conservation and Natural Resources, supported a draft Water Settlement Agreement (WSA) that would recognize *Winters* rights for the Tribe.² The parties negotiating the WSA are committed to continuing to support it, and it awaits only approval by the federal government. The

¹ These agreements are assembled in a packet available for review electronically by the State Engineer's office at <https://www.dropbox.com/s/jja6uwmiej6hgm2i/Moapa%20Paiute%20Water%20Settlement%20Agreement.pdf?dl=0>. References to particular provisions are to the pdf page number within the packet.

² *Id.* at pdf 51 *et seq.* (WSA); pdf 107 (Department's letter of support).

agreements specifically provide valuable state water rights to the Tribe in the interim, however. To date, these rights include the following:

1. The right to consume up to 3,700 acre-feet of surface water in the Muddy River. The water is leased to the Tribe from Muddy Valley Irrigation Company. The maximum diversion rate is 11.5 cfs from April 1 to September 30 of each year, and 10.5 cfs from October 1 to March 31. The lease is for 99 years, with a 99-year renewal term. The priority date for these rights is the date of entry of the Muddy River decree, but the Tribe's surface water rights are contractually senior to other MVIC river rights.³

2. The right to withdraw up to 2,500 acre-feet of groundwater from the California Wash groundwater basin. The right is based on transfer to the Tribe of two 1989 applications filed by Las Vegas Valley Water District (LVVWD) requesting up to 10 cfs each, for a maximum of 14,480 acre-feet per year. Based on rulings from the State Engineer to date, withdrawal of only 2,500 afy has been permitted. These rights are subject to curtailment of up to 50% under the MOA if spring flows at the Muddy River headwaters decline to designated levels. However, under the MOA, the Tribe is entitled to receive up to an additional 520 afy of surface water from the Muddy River on an acre-foot-to-acre-foot basis from MVIC as "mitigation rights" upon implementation of such pumping restrictions.⁴

In addition to the above, the Tribe has acquired the right to withdraw up to 500 additional acre-feet of water in the Muddy Springs area through a water-rights purchase from Nevada Power Company. These rights have priority dates of 1966 and 1969. The Tribe has pending applications to change the point of diversion of these rights to California Wash, which are currently under protest by SNWA.

The Tribe is using its water rights in an environmentally responsible manner. Currently, much of the Tribe's surface water rights in the Muddy River are subleased back to SNWA, which receives credit following the water's entry into the Colorado River at Lake Mead under Intentionally Created Surplus (ICS) guidelines administered by the U.S. Bureau of Reclamation. Such surface water is thus not withdrawn at all from the Muddy River. Much of the Tribe's groundwater rights have been earmarked for a series of solar power projects, which are particularly water-efficient, in the western portion of the Tribe's reservation. One solar project is fully operational, and agreements covering at least three more are in different stages of development. It would be ironic and unfortunate for the region if such water uses were curtailed under the regime suggested by the Draft Order. Additional portions of the Tribe's groundwater rights are earmarked for the Tribe's Travel Plaza at the Valley of Fire exit off I-15, which at this point constitutes the Tribe's only other significant economic development, and also requires small quantities of water. The Tribe has invested extensively in the Travel Plaza and cannot tolerate significant curtailment, particularly if a proposed cutback would not appear to provide any benefit to senior rights or the Moapa dace.

³ *Id.* at pdf 28 *et seq.* (Water Supply Agreement); pdf 35-37 (surface water provisions, contractual seniority).

⁴ *Id.* at pdf 30 *et seq.* (groundwater provisions); pdf 38-41 (mitigation rights).

As we understand the Draft Order, the State Engineer would implement a new system of pumping restrictions so that total pumping from the LWRFS does not exceed the average pumping of the last three years. Under the State Engineer's calculations, if all permitted rights became active, this would lead to curtailment of all permitted rights junior to March 31, 1983. In addition to the concerns outlined above, the Tribe is concerned about inconsistencies in the way its rights are described in the handouts distributed by the State Engineer's office at the Overton meeting, which suggest that the Tribe's rights are even more vulnerable than they should be under the proposed new regime:

1. The State Engineer's listing of water rights continues to list the Tribe's 500 afy of purchased water rights as belonging to Nevada Power Company. These rights are based on the Tribe's ownership of a portion of permit 22949 (340 afy) and all of permit 25310 (160 afy). These rights have priority dates of 1966 and 1969 respectively, so they would be extremely valuable under the regime of the Draft Order. Timely reports of conveyance were filed by the Tribe with the State Engineer, so the Tribe is concerned that the Tribe is not listed as owner.

2. The Tribe's groundwater permits acquired from LVVWD authorizing withdrawal of 2,500 afy have a 1989 priority date, but much of the Tribe's current pumping is listed under permit 76643, which is listed as having an extremely junior priority date of 2008. This is an error that is prejudicial to the Tribe. Application 76643 requested an additional point of diversion within California Wash to withdraw a portion of its existing groundwater rights and specifically provided for continuation of the 1989 priority date.⁵ The State Engineer approved the application, with the proviso that the overall water duty of 2,500 afy for the Tribe's 1989 rights not be exceeded. Application 76643 should thus be considered in the nature of a change rather than a new right with a junior priority date. While 1989 rights would be junior to the potential 1983 cutoff date, we assume that under the Draft Order, rights would be curtailed in priority, so 2008 rights would likely be curtailed far earlier than 1989 rights. Treatment of withdrawals under permit 76643 as having a 2008 priority date rather than 1989 would thus be extremely detrimental to the Tribe, as well as inconsistent with the terms of the application itself. The Tribe's rights would be among the very first curtailed, and, as indicated above, the result could be termination or curtailment of the Tribe's water-efficient solar projects and Travel Plaza, even though, under the Tribe's analyses, pumping from this point of diversion far from and downgradient of Muddy Springs should have negligible impacts on the date or senior rights.

The net effect of the approach proposed in the Draft Order could be to force the Tribe to commence, or ask the federal government to commence on its behalf, a general adjudication of water rights in the region including quantification of the Tribe's *Winters* rights. Until now, instead of litigating its reserved *Winters* rights, the Tribe has negotiated and cooperated with other regional right-holders and agencies to resolve potential disputes in a practical manner. Replacing the MOA and its associated agreements with the new regime called for under the Draft Order would jeopardize the careful balance achieved through these processes. In a general

⁵ Application 76643, attachment, sec. 2.

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adjudication, the Tribe's *Winters* rights on the Muddy River would have an 1873 priority date, while groundwater rights associated with the 1980 addition to the Reservation would have a 1980 priority date. We see no benefit to regional water management in forcing a major new adjudication with its associated massive expense, delay and uncertainty, for the questionable benefit of advancing the Tribe's groundwater rights from a 1989 to a 1980 priority date, so that the Tribe could jump in line before the somewhat arbitrary 1983 cutoff date indicated in the Draft Order. The Tribe respectfully requests that the State Engineer rethink its approach and defer implementing a new regime that would totally change water management for an indeterminate period with unknown benefits and potentially huge detriments to the Tribe and others in the region.

Very truly yours,

ZIONTZ CHESTNUT

A handwritten signature in blue ink that reads "Richard Berley". The signature is written in a cursive style with a large initial "R" and "B".

Richard M. Berley