RESPONSE TO PUBLIC COMMENTS RECEIVED BY THE STATES OF NEVADA AND UTAH ON THE AGREEMENT FOR THE MANAGEMENT OF THE SNAKE VALLEY GROUNDWATER SYSTEM AND THE SNAKE VALLEY ENVIROMENTAL MONITORING AND MANAGEMENT AGREEMENT

INTRODUCTION

On November 30, 2004, the United States Congress passed the Lincoln County Conservation, Recreation and Development Act of 2004 (PL 108-424). PL 108-424 contained a provision (Section 301[e] [3]) that required the States of Nevada and Utah (the States) to reach an agreement regarding shared interstate groundwater resources prior to any interbasin transfer from a groundwater basin shared by the States. Subsequent to the passage of this law, the States entered into discussions to craft an agreement consistent with the provisions of PL 108-424.

On August 13, 2009, the States released draft forms of the *Agreement for Management of the Snake Valley Groundwater System* (Agreement) and the *Snake Valley Environmental Monitoring and Management Agreement* (EMM Agreement) to the general public. The States invited written public comment on the Agreement and EMM Agreement through September 30, 2009, submitted to either State through the US Post Office or via e-mail. Websites were created by both States to better provide information on the Agreement and EMM Agreement and to provide a direct mechanism to submit comments via e-mail. To date, the States have received written comments from more than 200 groups and individuals.

In addition to inviting public comment on the Agreement and EMM Agreement, the States held several informational meetings to explain the contents of the agreements and to answer questions from the public. At the informational meetings, a presentation was given that summarized the Agreement and EMM Agreement and highlighted the key issues. The following list summarizes the date, and location, of these informational meetings:

- August 17, Baker, Nevada, 1 p.m. at the community gymnasium
- August 17, Delta, Utah, 7 p.m. at the Millard County Fair Building
- August 18, Salt Lake City, Utah, 10 a.m. at the Department of Environmental Quality Building #2
- August 20, Las Vegas, Nevada, 9 a.m. at the Southern Nevada Water Authority Board Meeting, Molasky Corporate Center
- August 24, Partoun, Utah, 4 p.m. at the West Desert High School
- September 25, Utah, 1 p.m. at the Border Inn
- September 25, Delta, Utah, 5 p.m. at the Millard County Fair Grounds

The States have reviewed comments received from the public and have jointly prepared this document to respond to those comments. These responses include both the States' responses to general questions and statements and notes where changes were made to the Agreement as a result of public comment. The States encourage the review of the final Agreement in conjunction with these responses in order to fully understand specific changes made to the Agreement.

Responses to Comments

1. No agreement is preferable to the proposed Agreement (89 comments)

Response: Many comments contend that no agreement between Nevada and Utah is preferable to the proposed Agreement, particularly related to the division of water between the States. Utah and Nevada disagree with this contention.

Many of these comments are premised on the misunderstanding that the SNWA pipeline project will be taking water that "belongs" to Utah. Both States are entitled to a portion of Snake Valley water because the Snake Valley Aquifer underlies part of each State. Congress recognized the need for a division of the interstate water resource in enacting Section 301(e)(3) of PL 108-424. The Agreement does not authorize any pumping projects or grant any water permits. More specific response to the actual division of the jointly-owned interstate water is set forth below.

Without an agreement, the only recourse available to the States would be an action for the equitable apportionment of the Snake Valley Aquifer in the U.S. Supreme Court, which is the only legal forum for one state to sue another. Bringing such an action by either State is fraught with challenges and uncertainties, since the Court has not decided a case apportioning interstate groundwater. Any such litigation would be lengthy and extremely expensive.

Further, all the Court could accomplish would be to apportion the water between the two States. It could not provide for a flexible system of joint management of the aquifer; provide for mitigation to existing water rights or for the numerous environmental protections, all of which are provided for in the Agreement. In addition, the Agreement specifically recognizes the rights of any water right owners to seek whatever legal remedies that may be available.

In short, the States believe the Agreement, with cooperative management, common goals and environmental protections, is highly preferable to individual state aquifer management agendas.

2. No water should be exported out of Snake Valley (9 comments)

Response: Nothing in either Utah or Nevada's water law prohibits the transfer of water from one basin to another (*interbasin transfer).* While PL 108-424 requires Utah and Nevada reach an agreement regarding the division of water resources, protection for existing water rights and the

maximum sustainable use of the water resources prior to any interbasin transfer, nothing in the Agreement itself permits or prohibits any interbasin transfer. Any application for an interbasin transfer requires the full procedural process in accordance with each respective State's water law.

3. Agreement needs to wait for further Data / Studies (43 comments)

Response: Many of the comments were to the effect that additional studies need to be done prior to the signing of the Agreement. Most of the comments related to future studies regarding the nature of the Snake Valley aquifer and the availability of groundwater. Other comments reflect a desire to further study the ecology and air resources of Snake Valley.

As an initial matter, the States note that PL 108-424 specifically provided in Section 301(e) for a water resources study to be completed by the United States Geological Survey, State of Utah and the Desert Research Institute. This requirement produced the BARCASS and provided significant data to the States. In fact, during the 2007 session, Utah's legislature passed a joint resolution, H.J.R. 1, that that urged the Governor to "refrain from entering into an agreement with Nevada until all steps of the scientific study [BARCASS] required by [PL 108-424] are complete to ensure that there is an adequate scientific basis on which to form an agreement[.]"

In addition to the data provided in BARCASS and numerous prior studies, the States anticipate future studies will be completed and will be valuable in the overall bi-state management of the aquifer. The States are of the opinion that sufficient data currently exists for the purposes of the Agreement.

The States specifically designed the Agreement to incorporate new data and to allow for modifications to the Agreement as appropriate in light of these new data. Examples of this flexibility include:

a. Section 6.7 (now Section 8.1) of the Agreement provides for a 10-year delay in the processing of the SNWA Snake Valley applications before the Nevada State Engineer. The purpose of this hiatus is "to allow additional hydrologic, biologic, and other data to be collected in Snake Valley."

b. Section 1.3 "Available Groundwater Supply" is defined as the groundwater available for appropriation from the Snake Valley Groundwater Basin as presently determined by the Agreement or subsequently through further study and agreement by the two State Engineers.

c. In Section 2.7, the States agree to incorporate presently existing data, and also ongoing and future studies and other information into the process for administering and managing groundwater development in Snake Valley.

d. Section 3.1 (now Sections 3.1 and 3.4) specifically provides for the gathering and consideration of a multitude of additional studies, monitoring and data collection. All such additional information is to be examined as part of any process in revising the estimated Available Groundwater Supply of Snake Valley. All such data shall be shared between the States and will be available for public reviews.

e. Section 7.2 of the EMM Agreement provides for additional and extensive groundwater monitoring and data gathering studies to be done by SNWA at its cost, the result of which are to be made public.

Similar provisions for use of future data or studies are found in Sections 4 and 5 of the Agreement.

4. Concerns regarding what constitutes an adverse impact (41 comments)

Response: An Adverse Impact, by definition (Section 1.1), reduces a well's ability to produce Groundwater in a manner substantially similar to its historic production. An Adverse Impact is difficult to define in a natural system and is dependent on the circumstances of each individual situation. It is impossible to assign a numerical value to what constitutes an Adverse Impact in all cases. The occurrence of an Adverse Impact will be determined by the States on a case-by-case basis. Impacts may include not only a reduction in total available water production, but also to other impacts such as increased pumping lift costs and water quality degradation. With respect to a water right for a spring, Section 1.1 (b), a reduction in flow to an amount less than an existing permitted use and that can be demonstrated to be less than the spring's historical supply constitutes an Adverse Impact and is cause for mitigation. As stated in the Agreement Sections 6 and 1.1(a), pumping by a junior right (which would include SNWA if it is permitted water rights by Nevada) that causes an Adverse Impact to an existing permitted use is cause for mitigation.

In determining the specific cause for an Adverse Impact, to discern effects caused by SNWA's pumping, other pumping, and natural perturbations, the parties shall evaluate available historical data of local and regional nature, and will utilize proven hydrogeologic techniques, including analytical solutions and groundwater flow models, to differentiate between potential causes for impacts.

With respect to effects to resources other than existing water rights, Utah and SNWA have agreed to the EMM Agreement (Appendix C), whereby a Management Response and Operation Plan will be created and approved prior to the exportation of any groundwater by SNWA. The Operation Plan shall include identification and definition of early-warning indicators for effects to hydrologic, biologic and air resources and a defined range of responses to avoid, minimize and mitigate the indicated effects.

5. If an adverse impact occurs, how is it addressed? (41 comments)

Response: Section 6.6 allows an owner of an existing water right to pursue any and all remedies that would ordinarily be available. The water right holder **is not** required to contact SNWA.

Alternatively, Section 6.2 (now Section 8.3) of the Agreement provides that a water right holder from either Utah or Nevada, may at his/her sole discretion, contact SNWA if he/she believes the SNWA pumping has adversely impacted his/her water right. This section provides a detailed process, which can immediately respond to the water right holder's concerns in a number of ways.

In the event that a Utah water right holder and SNWA cannot agree on mitigation, Sections 6.3 through 6.4 establish an Interstate Panel of the Nevada/Utah State Engineers to determine whether an adverse impact has occurred and determine the proper remedy for such an impact.

6. Concerns about the Division of Water (26 comments)

Response: The States have received numerous comments relating to and questioning the division of water between the States. Most of these comments were from Utah entities or persons. The comments questioned both the methodology used and the actual amounts of water allocated to each State.

The States agree that the allocation of water is at the heart of the Agreement and appreciate the many comments submitted regarding this issue.

The division of water was required by Congress in its enactment of PL 108-424. The water resources of each State are owned by the States in their sovereign capacities and the States are the proper entities to divide the water between them. This matter was the first issue addressed by the States in the negotiation process and took up the majority of the time spent in the various negotiating sessions between the two States. It was the subject of intense debate.

At the beginning of the negotiations, the States examined and debated several different methodologies for dividing the water. The States finally agreed on the division of water into three categories. The division of water in the first two categories is based on conservative estimates of water availability (now Table 1). The third category (now Section 1.9 and Table 2) includes water estimated to be available under the more recent BARCAS Study, but requires the consent of both State Engineers before that water can be appropriated in either State. The States believe this methodology fulfills the directions of Congress to equitably divide the water, protect existing water rights in both States and provide for the maximum sustainable beneficial use of water.

As a result of the numerous comments and concerns over the proposed division of water between the States, the Agreement was modified to adjust the division of water and to clarify the distinction between allocated water and reserved water. The amount of water presently available to be allocated between the States is 108,000 acre feet per year (afy). An additional 24,000 afy is not presently available. Should future professional, unbiased and peer-reviewed studies support the findings of BARCASS that the available Groundwater resource is 132,000 afy; the additional 24,000 afy of water will be divided pursuant to Section 3.3 and Table 2 of the Agreement.

In short, Nevada's claim to Snake Valley Water started at one end of the spectrum, and Utah's started at the other end of the spectrum. The States each made various concessions to narrow the gap on their differences. As with all negotiations, in the end neither State received the full amount of water it desired. Nevertheless, the States believe the Agreement fairly divides the water based on the best available data.

7. The States received several comments suggesting that specific sections of the Agreement be modified or use stronger language (38 comments)

Response: The States believe that PL 108-424 directed the States to enter into an agreement to accomplish three important objectives: 1) the division of water resources in Snake Valley between the States; 2) the protection of existing water rights; and, 3) providing for the maximum sustainable beneficial use of the water resources. The most detailed provisions of the Agreement, Sections 3 (Available Groundwater Supply), 4 (Allocation and Management of Available Groundwater Supply), 5 (Categories of Available Groundwater Supply) and 6 (Identification and Mitigation of Adverse Impacts to Existing Permitted uses), were specifically crafted to address the requirements of PL 108-424 and the States believe that the language contained in these provisions is appropriate and sufficient for this purpose.

The States also intend that this Agreement, being essentially perpetual in nature, be structured to allow new data and changing circumstances to be incorporated, utilized and addressed by both States. Thus, where appropriate, the States avoided mandatory and rigid language and processes in favor of adaptive and collaborative structures. The States believe that this approach is appropriate in order to optimize the long-term management of the resources in Snake Valley shared by the States.

8. Concerns about air quality and health issues (45 comments)

Response: The States received comments expressing concern over impacts to air quality, especially along the Wasatch Front. Commenters requested installation of additional monitors outside the Snake Valley hydrologic area in addition to expanding the Agreement to provide standing to third parties (such as counties) to enforce the Agreement, along with concerns over

using the NAAQS as a measure of air pollution. Commenters also raised concerns over the unique threats posed by the soil in Utah's West Desert beyond just particulate matter (PM_{10}).

By entering this Agreement, and the attached EMM Agreement, Utah creates the framework to assure that the effects of groundwater depletion by any new authorized party in Snake Valley does not decrease air quality and thereby affect public health in Utah. The EMM Agreement provides that SNWA will install and operate an air monitoring station in Utah within one year of execution of the Agreement. Utah would gain at least nine years of baseline data before any withdrawals might begin. The station will monitor for both air quality and meteorological data and will remain operational for the duration of SNWA groundwater withdrawal. Baseline data is essential for the task of determining the natural variation in particulate matter, precipitation, and other air related values. Only then can Utah be in a position to assert and prove that subsequent alterations of the existing groundwater situation caused effects leading to unacceptable air quality deterioration, which is measured as changes in air measurements compared against the National Ambient Air Quality Standards for pollutants and PM_{10} and the Prevention of Significant Deterioration standards for air visibility.

While the States appreciate the comments pointing out that health effects occur in the presence of any air pollution, the States believe that the proposed framework provides the necessary tool for either State to address air quality issues related to implementation by the States of the federal Clean Air Act. Without the Agreement, each State's ability to responsibly deal with potential effects from any future groundwater withdrawals in Snake Valley is significantly reduced.

With respect to other materials which some commenters believe may become airborne, such as radioactive material, along with particulate matter, the States note that radiation levels are currently monitored by the Department of Energy and Desert Research Institute through the Community Environmental Monitoring Program (CEMP). CEMP sites have been collecting data on radiation levels in Utah's West Desert for 45 years as part of the 29 stations downwind and surrounding the Nevada Test Site in California, Nevada and Utah. Gamma radiation exposure rates measured at the CEMP sites are not significantly different than levels found at background sites in the U.S. With the Agreement and Monitoring and Management plan in place, the Technical Working Group can consider CEMP data as it makes its recommendation to the Management Committee to define early warning indicators to air resources in the Operation Plan.

With these measures in place the health of Utah's citizens are better protected with this Agreement than without it.

9. Concerns about continuous funding of the monitoring and management plan (20 comments)

Response: The State of Utah and the Southern Nevada Water Authority's funding for all projects is subject to appropriations by elected bodies (the Utah Legislature and SNWA's Board of Directors, respectively). Since the total cost associated with implementation of the EMM Agreement are unknown at this time, Utah and SNWA recognize that future appropriations need to be approved by the individual elected bodies as appropriate.

However, Section 10 of the EMM Agreement provides that SNWA will request that the Nevada State Engineer include the terms of the EMM Agreement as part of the permit terms and conditions in the event the Nevada State Engineer grants SNWA water rights in Snake Valley. It is expected that the requirements of the EMM Agreement will ultimately be made part of such permit terms and failure to comply with required monitoring and management requirements will subject the permits to cancellation or other sanctions.

10. Concerns about whether there is sufficient money in the mitigation fund (23 comments)

Response: Several comments expressed concern that the $3 million to be kept in the mitigation fund is insufficient.

Section 6.4 (now Section 8.5) of the Agreement states that $3 million be kept in a fund to mitigate potential impacts of the SNWA project in Snake Valley.

Section 6.4 (now Section 8.5) provides that SNWA establish and maintain a mitigation fund throughout the tenure of any water permits which may be issued by the Nevada State Engineer. The Section also clearly provides that "in no event will the balance of the mitigation fund be reduced below the $3 million."

In other words, any funds expended from the fund which depletes it below $3 million must be immediately replaced by SNWA. This provision is in no way intended to quantify SNWA's ultimate funding to prevent or mitigate damages caused by its project based on the criteria and other terms set forth in the Agreement. Rather, this is money which is to be immediately available to address or cure any impairment problems due to SNWA's pumping.

Section 8.5 now requires that the management of this fund will be conducted in accordance with the pronouncements of the Governmental Accounting Standards Board.

11. Concerns that the comment period for the Agreement is inadequate. The Agreement took four years to negotiate, yet only 45 days was given for comment (18 comments)

Response: The Agreement has been negotiated by representatives of both States whose primary duty is to protect the water resources and interests in their respective States. While PL 108-424 did not require any public comment period be provided in order for the Agreement to be signed, the States felt a public comment period would be helpful and that 45 days was sufficient opportunity. In addition to the comment period, the States held seven informational workshops concerning the Agreement, as well as numerous teleconference and personal visits with concerned citizens both in Utah and Nevada. The fact that more than 200 individual public comment letters were submitted to the States is an indication that the comment period was sufficient time for people to respond.

12. Concerns over subsurface interbasin flows into or out of Snake Valley and double counting the available water resources (26 comments)

Response: This concern appears to be based on the BARCASS estimate of interbasin flow from Spring Valley, Nevada to Snake Valley. The States are aware of the potential for interbasin subsurface flow and the estimates made in the BARCAS Study. BARCASS estimates 33,000 acre-feet of annual flow into southern Snake Valley from Spring Valley. This location, at the southern end of the Snake Range, is presently subject to rigorous study and monitoring by Nevada, Utah, SNWA, US Fish and Wildlife Service (FWS), National Park Service (NPS) and the Bureau of Land Management (BLM) and any decrease in flow from Spring Valley to Snake Valley will be detected by this monitoring program. An additional 16,000 acre-feet is estimated to flow into northern Snake Valley from Spring Valley, but this area at the northern end of the Snake Range is far removed from the points of diversion of the SNWA applications and unlikely to be impacted by their pumping.

The stated concern that this interbasin flow was appropriated by SNWA's Spring Valley permits and will therefore no longer flow into Snake Valley is not accurate. Prior to the publication of BARCASS, the Nevada State Engineer determined the perennial yield of Spring Valley to be 80,000 acre-feet. BARCASS estimated 76,000 acre-feet of groundwater evapotranspiration (ET) in Spring Valley, so the Nevada State Engineer determination of perennial yield matches closely with the ET estimate. SNWA was allocated 60,000 acre-feet in Spring Valley, but may only export 40,000 acre-feet for the first 10 years and demonstrate that the remaining 20,000 acre-feet can be exported without resulting in unreasonable depletion or impacts to existing uses. The water appropriated in Spring Valley is limited to Spring Valley ET, which leaves the basin's subsurface flow into Snake Valley unallocated.

In Snake Valley, BARCASS estimated 132,000 acre-feet of groundwater ET, with an additional 29,000 acre-feet of subsurface outflow. The Groundwater Supply was determined by the States to be 132,000, again leaving the subsurface outflow unallocated. Furthermore, the division of water between the States that can be allocated without future consensus between the States based upon new peer reviewed studies is limited to 108,000 afy. The States have fully considered interbasin flows in quantifying the water resources of Snake Valley and have determined that the resource is not over-allocated or double counted.

13. Concerns about long-term safe-yield issues. This includes the basis for the Available Groundwater Supply of 132,000 acre-feet, uncertainty, use of best available science, safe yield and perennial yield, climate change and issues related to reduction of Available Groundwater Supply (34 comments)

Response: The Available Groundwater Supply was found by agreement between the States to be 132,000 acre-feet per year (See Response No. 6 above). That amount is based on the natural pre-development evapotranspiration of groundwater in Snake Valley as estimated by the U.S. Geological Survey in the BARCAS Study. This study represents the best available science to date, and was completed in part to determine water budgets and available water resources in the area.

There is documented uncertainty with the BARCASS estimate of evapotranspiration in Snake Valley. Because of this uncertainty, the States have agreed to hold 24,000 acre-feet of water in reserve until such time as the States are confident that the reserved water can be developed without exceeding the Safe or Perennial Yield of the Snake Valley. The reserved water is more than 20% of the amount in the allocated and unallocated categories, and was determined by the States to be a sufficient safeguard to protect existing water users and the Basin from over-allocation of the resource. Water held in this reserved category cannot be developed until each State is satisfied that such water is available on an annual basis and will not adversely impact existing uses. Therefore, each State can set its own criteria for any study(s) needed to adequately demonstrate the safe or perennial yield of the Snake Valley Basin.

Lastly, Section 5.4 provides for a re-evaluation of Available Groundwater Supply and curtailment as necessary.

14. Federal and Tribal Issues (12 comments)

Response: The States have received comments from the U.S. Department of Interior (DOI) on behalf of the BLM, the NPS and the FWS.

Comments were also submitted by the Confederated Tribes of the Goshute Reservation and the Ely Shoshone Tribe. The comments of the DOI and the Tribes will be addressed separately.

a. **Comments by the DOI**

The States appreciate the generally positive comments of the DOI regarding the Agreement.

The DOI has expressed concerns that the Agreement does not do enough to protect "beneficial use" of water on federal land that are not covered by a water right "but are none-the-less protected by state laws."[1] The States are puzzled by this assertion since neither Nevada nor Utah law recognizes such rights. The only instance such rights would be recognized is where such resources are located within a National Park or a similar federal reservation where a reserved water right exists.[2] Further, nothing in PL 108-424 mentions such rights or their protection as part of the Agreement. That being noted, the States believe the Agreement, together with the EMM Agreement, contains adequate protections for the above mentioned resources.

[1] Nevada believes that the DOI comments misconstrue the provisions of NRS §533.370 relating to the Nevada State Engineer's statutorily conferred determination as to whether a specific application to appropriate water in the State of Nevada "threatens to prove detrimental to the public interest" and is "environmentally sound as to the basin from which water is exported." These statutory provisions are jurisdictional in nature and apply only when the Nevada State Engineer is considering the merits of a pending application. Nothing in these provisions confers any substantive water right or any other right to the beneficial use of the waters of the State of Nevada on any individual or organization.

[2] The States note for the record that the federal legislation that created Great Basin National Park (16 U.S.C.A. § 410mm-1(h)) specifically limits federal claims to those types of reserved rights associated with National Forests and, very narrowly, the Lehman Caves National monument:

> Nothing in this subchapter shall be construed to establish a new express or implied reservation to the United States of any water or water-related right with respect to the land described in section 410mm of this title: *Provided*, That the United States shall be entitled to only that express or implied reserved water right which may have been associated with the initial establishment and withdrawal of Humboldt National Forest and the Lehman Caves National Monument from the public domain with respect to the land described in section 410mm of this title. **No provision of this subchapter shall be construed as authorizing the appropriation of water, except in accordance with the substantive and procedural law of the State of Nevada**. (Emphasis added).

Thus, any reserved water rights in and to Great Basin National Park are secondary in nature. See U.S. v. New Mexico, 438 U.S. 696, 98 S.Ct. 3012:

> The United States, in setting aside the Gila National Forest from other public lands, *held* to have reserved the use of water out of the Rio Mimbres only where necessary to preserve the timber in the forest or to secure favorable water flows, and hence **not to have a reserved right for aesthetic, recreational, wildlife-preservation, and stockwatering purposes**. That this was Congress' intent is revealed in the limited purposes for which the national forest system was created and in Congress' deference to state water law in the Organic Administration Act of 1897 and other legislation. While the Multiple-Use Sustained-Yield Act of 1960 was intended to broaden the purposes for which national forests had previously been administered, Congress did not intend thereby to reserve additional water in forests previously withdrawn under the 1897 Act. (Emphasis added)

DOI notes that the Agreement seems to focus more on mitigating Adverse Impacts to water rights rather than avoiding the problem in the first instance. DOI notes that this is somewhat inconsistent with the EMM Agreement which seeks to avoid Adverse Impacts before they happen. The States believe that the Agreement does seek to prevent adverse impacts from occurring in the first instance. DOI recommends that federal representatives be included as non-voting members of the Technical Working Groups set up pursuant to the EMM Agreement. Utah and SNWA are willing to discuss this request with the appropriate federal agencies. In particular, given its statutory duties regarding the implementation of the Endangered Species Act, Utah and SNWA believe that it may be appropriate to have the FWS sit as a member of the TWG.

b. **Comments by the Goshute Tribe**

The Goshute Tribe comments that it holds federal reserved water rights and should have been specifically consulted during the negotiation process and prior to the release of the final draft Agreement. Further, the Tribe is concerned that additional pumping of water from Snake Valley will impair its reserved water rights.

As noted elsewhere herein, Congress, in enacting PL 108-424, contemplated state-to-state negotiations between Nevada and Utah relative to the allocations and management of Snake Valley groundwater. No tribal (or even federal) participation in the negotiation process was contemplated or provided for.

The States acknowledge that the Goshute Tribe claims federal reserved water rights. However, those rights have yet to be defined and quantified. The States believe there is little chance that the surface water rights of the tribe, which are fed by snowmelt high in the Deep Creek Mountains will be adversely affected by any additional groundwater pumping in Snake Valley. However, should impairment occur to any of the Tribe's rights, the Tribe would have the same protections provided other water right holders according to Utah and Nevada state law.

The Tribe also notes that the Utah State Engineer recently rejected a Tribal application for a large amount of groundwater, and argues this is inconsistent with the Agreement. While the Utah State Engineer's decision is under reconsideration, Utah notes that the initial rejection of the Tribe's application by the Utah State Engineer has nothing to do with the Agreement. The Agreement does not grant any water rights. It merely allocates the Snake Valley groundwater resources between the two States, and provides for the joint management of the aquifer.

c. **Comments by the Ely Shoshone Tribe**

The Ely Shoshone Tribe filed comments similar to those of the Goshute Tribe, such as its exclusion from the negotiation process and its claimed federal reserved water rights. On these issues the States reiterate their reply to the Goshutes' comments above.

Specifically, regarding the Shoshone reserved water rights, the States believe there is little chance the Tribe's water rights for their reservation in Steptoe Valley near Ely will be affected by any withdrawals of water from Snake Valley.

The Shoshone Tribe also expresses concern over the effect of withdrawals from Snake Valley on various resources within Snake Valley, which the Tribe claims as part of their ancestral homeland.

The States note that the Tribe does not own or control any land or resources within Snake Valley, and such land and resources are owned or come from under the jurisdiction of the States, federal agencies or private individuals. Nevertheless, the States believe the Agreement and the associated EMM Agreement provides adequate protection for those resources.

15. Concerns about signatories/responsible parties (11 comments)

Response: PL 108-424 required an *agreement* (emphasis added) regarding the division of water resources. Congress did not mandate or contemplate an interstate compact between Nevada and Utah. As such, there is no requirement for either the governors or the legislatures of the respective States be signatories to the agreement. The offices of the State Engineers are organizationally located within the natural resource agencies of the two States. Both organizations are headed by directors who are appointed by their respective governors. Functionally, it is most appropriate for the directors to enter into and be signatories to the Agreement in order to bind their respective organizations, including the State Engineers, to its terms and conditions.

Throughout the negotiation process, the governors of Nevada and Utah have been frequently and thoroughly briefed on the terms, conditions and implications of the Agreement and must provide their respective directors with their concurrence to proceed with signature.

16. Concerns that there is no need to rush the signing of the Agreement. Additionally, the 10 year delay will only cause the number of protestants to the SNWA filing to further be reduced or rendered ineffective (3 comments)

Response: The Agreement in no way prejudices any protestant's ability to pursue his/her respective protests before the Nevada State Engineer. The Agreement is specifically intended to

fulfill the purposes set forth in PL 108-424 and does not grant to SNWA or any other party any water rights or in any manner predetermine how the Nevada State Engineer will ultimately rule on SNWA's applications. Additionally, pursuant to NRS 534.370(10), successors in interest to a protest are allowed to pursue that protest in the same manner as if he/she were the former owner whose interest he succeeded.

17. The Agreement should bind any successor of SNWA or any entity that may contract to put water into the SNWA pipeline (3 comments)

Response: The parties intended SNWA's obligations to be binding on any successors in interest and the Agreement (See Section 8.7) and the EMM Agreement (See Section 16) have been amended to clarify this concern. Concerns regarding entities that are not a party to either agreement will be addressed on a case-by-case basis in the future by the Nevada State Engineer.

18. Concerns that the State's negotiating teams violated their respective open meeting laws (6 comments)

Response: Under Utah's Open and Public Meetings Act, UCA §52-4-102, et seq. the Utah negotiating team is not a "public body" as defined by the Act and therefore the Act is inapplicable. Section 52-4-201 provides that meetings of "public bodies" are to be open to the public, with certain exceptions. Section 52-4-103(7) defines "public body" as "any administrative, advisory, executive or legislative body of the State . . . that is created by the Utah Constitution, Statute, rule, ordinance, or resolution. . ." The Utah Snake Valley negotiating team does not fall within the definition of a "public body." The Utah negotiating team was designated by the Executive Director of the Department of Natural Resources with the approval of then Governor Huntsman. Therefore, any meeting of the Utah negotiating team is not subject to the Utah Open and Public Meetings Act.

The same is true for Nevada. Under Nevada's Open Meeting Law, more specifically NRS 241.015(3), a "public body" means "any administrative, advisory, executive or legislative body of the State or a local government." The negotiating team does not fall within that criteria and as such is not subject to the Nevada Open Meeting Law.

19. The Agreement should consider the entire Great Salt Lake Basin regional flow system and not be limited to Snake Valley (3 comments)

Response: The States believe this comment misconstrues Section 301(e)(3) of P.L. 108-424. The States believe the Agreement as drafted is consistent with, and meets the objectives of Section 301(e)(3).

20. Concerns that all species be monitored, not just the least chub or species that have been petitioned for listing under the ESA (7 comments)

Response:

a. Comments were made regarding specific species or habitat types not included in the proposed Tier I or II areas. This agreement is a vehicle to draft a Biological Monitoring Plan, it is not the Plan. Species and habitats identified in the agreement are based on the best available knowledge with the understanding that additional species, habitats, and areas may be included as identified in the process of drafting the Biological Monitoring Plan through The Nature Conservancy's Conservation Action Planning process.

b. Failure to provide a definition of "adverse impacts" to environmental resources. The Management Response and Operation Plan will be completed prior to the beginning of the Operational Period which will define potential adverse impacts, early warning indicators, and management response actions to avoid impacts.

c. Comments regarding the need to include monitoring in Nevada and adding Nevada personnel to the TWG. The EMM Agreement is an agreement between Utah and SNWA, and within this agreement, there is no avenue for inclusion of requirements for any monitoring or management in Nevada. Biological and hydrological monitoring requirements within Nevada will be determined by the Nevada State Engineer as a condition of a permit should water rights be allocated to SNWA. However, the resources most likely to be impacted in the South Snake Valley are already being monitored under the Spring Valley Monitoring Plan. Early warning sites and indicators and phreatophytic shrublands will be identified in the Biological Monitoring Plan that has not yet been developed. These comments will be considered when drafting the Plan. Utah and SNWA support the sharing of data and trend information with the BWG/TRP in Nevada. Coordination of data sharing can be included in the Management Response and Operation Plan.

21. Concerns regarding SNWA's limited party status to the Agreement

Response: The States received several comments regarding the need for and/or propriety of SNWA executing the Agreement. Given the existence of SNWA's pending applications to appropriate Nevada groundwater in Snake Valley, the States believe that it is appropriate for SNWA to be a limited party to the Agreement in order to make several commitments regarding SNWA's proposed development of groundwater in Snake Valley. The commitments agreed to by SNWA obligate SNWA to establish an alternative process for addressing claimed injuries by owners of an Existing Permitted Use, including the establishment of a $3,000,000 mitigation fund (See Response No. 10 above), and to execute the EMM Agreement. The States believe that the contractual certainty attendant to SNWA's execution of the Agreement warrants the inclusion of SNWA as a limited party.

22. Concerns regarding applicability of Agreement to SNWA's successors in interest and other interbasin transfers

Response: The States received several comments expressing concern that the requirements of the Agreement and EMM Agreement should apply both to any successors in interest to SNWA's Applications and any other interbasin transfer of groundwater from Snake Valley. The States agree with these comments and have clarified the Agreement and EMM Agreement to ensure that such eventualities are covered.

Specifically, Sections 5.5, 6.2 and 6.6 (now 6.5) have been modified to require that any interbasin transfer of groundwater, utilizing either Nevada or Utah water rights in excess of 1,000 afy, shall be required as part of the permit issued by the State Engineer with jurisdiction of such water rights to have: 1) an Environmental Monitoring and Management Plan substantially similar to the EMM Agreement; and 2) a binding obligation to address injury to Existing Permitted Uses substantially similar to the obligations agreed to by SNWA in the Agreement.

The obligations of SNWA previously located at Sections 6.1, 6.2, 6.4 and 7.2 of the Agreement have been consolidated at Sections 8.3 through 8.5 and successor in interest provisions have been added to both the Agreement and EMM Agreement.