

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

IN THE MATTER OF APPLICATIONS 53987)
THROUGH 53992, INCLUSIVE, AND 54003)
THROUGH 54021, INCLUSIVE FILED TO)
APPROPRIATE THE UNDERGROUND)
WATERS OF SPRING VALLEY, CAVE)
VALLEY, DELAMAR VALLEY AND DRY)
LAKE VALLEY HYDROGRAPHIC BASINS)
(180, 181, 182 AND 184), LINCOLN COUNTY)
AND WHITE PINE COUNTY, NEVADA)

CLOSING ARGUMENT

CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION

Curtis G. Berkey, Esq.
Scott W. Williams, Esq.
Alexander, Berkey, Williams & Weathers LLP
2030 Addison Street, Suite 410
Berkeley, California 94704
Telephone: (510) 548-7070
Facsimile: (510) 548-7080
E-mail: cberkey@abwwlaw.com
E-mail: swilliams@abwwlaw.com

Aaron Waite, Esq.
The Cooper Castle Law Firm LLC
5275 S. Durango Drive
Las Vegas, NV 89113
(702) 435-4175 Telephone
(702) 877-7472 Facsimile
E-mail: awaite@ccfirm.com

Paul EchoHawk, Esq.
V. Aaron Contreras, Esq.
EchoHawk Law Offices
505 Pershing Avenue, Suite 100
Pocatello, ID 83201
Telephone: (208) 478-1624
Facsimile: (208) 478-1670
E-mail: paul@echohawk.com

Attorneys for Confederated Tribes of the Goshute Reservation

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INTRODUCTION

The Confederated Tribes of the Goshute Reservation demonstrate here that the applications of Southern Nevada Water Authority should be denied because proposed extraction and export of water “conflicts with existing rights,” and “threatens to prove detrimental to the public interest” of the citizens of Nevada. NRS § 533.371(5) and (6).

Goshute and Shoshone people have inhabited the Great Basin since time immemorial. *See*, Confederated Tribes of the Goshute Reservation (CTGR) Exh. 001.¹ The wealth of the Basin’s resources has sustained the tribes for centuries. In return, the tribes have used those resources with care and wisdom such that today, the Great Basin contains water resources so significant that the Southern Nevada Water Authority (SNWA) proposes to spend multiple billions of dollars to extract, and transport that water to Nevada’s largest metropolitan area. As one Tribal member testified, “Native Americans are probably the first conservationists.” Reporter’s Transcript (“RT”), Vol. 25 at 5834.

Goshute people have been stewards of the Great Basin resources throughout the centuries. These are their aboriginal lands. RT Vol. 25 at 5704-05. It is part of the Goshute creation story that they were placed on these lands, and they were assigned the responsibility to take care of them. RT *id.* at 5769. This obligation is more than that of caretaker; Goshute people are in “kinship” with the earth. *Id.* It is a relationship which defies easy translation in the English language.

¹ The Confederated Tribes of the Goshute Reservation are referred to here variously as “Goshutes” or “Tribes.”

Goshutes' "beneficial use"² of water is part of the Tribes' traditions, and is largely non-consumptive. Since the beginning of time, Tribal members have hunted, fished, gathered plants for food and medicine, and conducted their ceremonies with thanks and with respect for the wealth of resources provided them.

Despite a demonstrated record over the centuries of Tribal stewardship of these lands and waters, SNWA refers to these Tribal people (and their neighbors) as "anti-project zealots," people who live in a "dream world," people who "don't care about the best interests of the state as a whole," "blinded by personal prejudice against SNWA," and "disingenuous." RT Vol 1, at 31, 32, 33, 34. SNWA equates the Tribes' spiritual beliefs, a faith which has nurtured Goshute people for centuries, with those of a naïve child frightened of the "boogeyman." RT Vol. 26 at 5889. On the basis of these attitudes, SNWA aggressively pursues the water protected and sustainably used in the Great Basin by Native people, their rancher neighbors, and the plants and wildlife of this "pristine" geography. SNWA's vigor, driven by its belief that families in Las Vegas "deserve to have grass in their backyard," causes the Agency to dismiss the rights and the history of the Goshute people, and to fail to respect the residents and environment of the Basin. RT Vol. 29 at 6492.

In their closing argument, the Goshutes address the Water Authority's demand for the Basin water, the plans for which have been in development for more than twenty years at considerable cost. The Tribes challenge SNWA's claim that it is somehow deserving of the Great Basin's water because it encompasses the "economic engine" of Nevada. The Tribes

² Properly understood, the concept of beneficial use includes non-consumptive as well as consumptive uses under federal and state law.

challenge the justification of SNWA's demand to expropriate massive quantities of Great Basin water and the assertion that such huge withdrawals will be without significant adverse consequence to the Goshute people and the people of the State of Nevada.

The Tribes suggest that the ultimate question facing the State Engineer is one of risk. Who should bear the risk if SNWA's claim of minimal impacts to the resources and the people of the Basin, turns out to be wrong? Given the limits of our ability to know how water collects, dissipates, increases, or moves underground, given the limits of science, and given the potential for catastrophic consequences of the sort that afflict Owens Valley, California, the fundamental issue is where the risks of uncertainty should be assigned. SNWA argues that the risks arising from further disturbance of the water balance in the Great Basin should be assigned to those people who have sustainably carved out lives for themselves in that Basin and Range country, the "dreamers" disconnected from reality, and the "anti-project zealots." For SNWA, the cost of a project that subsequently fails to fully extract these water resources is a matter of dollars, a lot of them undeniably; it is nonetheless, a loss which may be overcome. For Goshute people and their neighbors, extraction and export of this water carries with it risk of loss of the world as they know it, and for Native people in particular, the end of a very long history of conservation of these resources and perhaps the end of Goshute culture itself.

STATEMENT OF THE CASE

The State Engineer has considered these applications previously. *Ruling 5726* (2007). Following hearings, the applications were granted in part. *Id.* at 56. The decision was reversed on appeal to the Nevada Supreme Court, on procedural grounds. *Great Basin Water Network v. Taylor*, 234 P.3d 912 (2010). This hearing on remand followed.

Though the Applicant and Protestants had four years in which to refine and expand their second presentations to the State Engineer, one theme has remained constant. In 2007, the State Engineer found “that due to the great uncertainty, and no party’s ability to quantify impacts with any degree of certainty, caution is warranted as it cannot definitively be said that there will or will not be unreasonable impacts, if those impacts would continue for an unreasonable period of time if pumping were ceased[,] or if any impacts, reasonable or unreasonable, are environmentally sound.” *Ruling 5726* at 53. Despite diligent efforts by scientists from SNWA and the Protestants, there remains to this day “great uncertainty” as to the extent of impacts of the extraction and export of this water.

STATEMENT OF FACTS

Confederated Tribes of the Goshute Reservation

The Tribes focus on the SNWA applications in Spring Valley, known in the Shoshone language as *Paha Tiveha*, “water valley” in English. RT Vol. 25 at 5681³. Spring Valley has always been a part of Goshute territory, and remains so today. CTGR Exh. 0001; RT Vol. 25 at 5681. The Tribes address as well the hydrologic connections between northern Spring Valley and Tippet Valley, the valley next to their Reservation.

The Goshutes entered into a Treaty of Peace with the United States in 1863. It was not a land cession treaty. The Goshute Reservation was created within Goshute aboriginal territory by Executive Orders in 1912 (No. 1539) and 1913 (No. 1903). The previously nomadic Goshute and Shoshone people were forced onto the Reservation lands. RT Vol. 25 at 5704-05 (Naranjo). The very name Goshute came from the waters of the Great Basin. RT Vol. 10 at 2237 (Pete) (“Goshute means a gray Ute. . . . The gray mud that we use to do our medicine, and the water that flows in each perennial stream that we use for our religious ceremony, and our spirit lies deep in each tributary.”) The Tribes’ confinement did not prevent them from continuing their traditions throughout their aboriginal lands. Spring Valley was a home for Goshutes who moved seasonally to take full advantage of the water, game, and plants throughout their lands. “Spring Valley was central to them.” RT Vol. 26 at 5864 (Lahren). Goshute Shoshone people have used Spring Valley since prehistoric times and continue to do so today. *Id.* at 5874. Most of the festival sites of these people are in Spring Valley; there are village sites there. *Id.* at 5865. Spring Valley was the most extensive gathering area within Goshute territory, with an abundance

³ The Confederated Tribes of the Goshute reservation are composed of Goshute and Shoshone people.

of pine nuts, chokecherries, willows, cattails, pickle weed, and other plants used for food, and for medicinal and ceremonial purposes. RT Vol. 25, at 5661. Today, Tribal members hunt in Spring Valley where antelope, mule deer, rabbit, mud hens and sage grouse thrive. *Id.* The Swamp Cedars area within Spring Valley is an especially significant site today for hunting, gathering and ceremonies. *Id.* at 5682.

Spring Valley has spiritual significance for Goshute and Shoshone people. Goshute people went to Spring Valley headwater areas to collect water for ceremonies. *Id.* at 5681. The Swamp Cedars is a site of massacres in the 19th Century; on two occasions, Goshute and Shoshone people were attacked and killed by non-Indians. RT Vol. 26 at 5858. Those who died in the massacres, men, women and children, are buried there, and those places are therefore “sacred,” “hallowed ground.” RT Vol. 25 at 5682. Goshute people are conscious whenever they are in Spring Valley that they have ancestors buried in Swamp Cedars. *Id.* at 5682.

The springs in Spring Valley have independent significance: they are a direct connection for Goshute people with Mother Earth, both down into the ground and up into the mountains. *Id.* at 5683 (Steele). “Water controls the entire behavior of the cultural group [Goshute Shoshone]. . . all their hunting and gathering activities are associated with water and seasonality. . . [T]he seasonal round is focused on water and through the use of water through time.” RT Vol. 26 at 5874 (Lahren).

The loss of the springs in Spring Valley would destroy the connection between Goshute people and the earth, would deprive them of the purifying waters of the springs, and would degrade the spiritual connection between Goshutes and water, and Goshutes and the animals that depend upon the water and the plants it nourishes. *Id.* at 5683. If the springs are gone, “part of

us has left us,” as Tribal Elder Steele testified. *Id.* at 5684. That loss would “destroy our culture . . . and our language and the land.” *Id.* “. . . [W]ithout water, we will not be whole again.” *Id.* The Reservation land is owned by the United States, and held by it in trust for the Goshutes. If the water drained from the valleys, and the “pristine” Reservation lands were denuded, the Goshutes could not even sell it and move. *Id.* at 5713 (Naranjo). It is the last of their lands; it is all they have left. *Id.*

The impact will be felt on future generations. “If we do not have certain species of plants and animals, . . . to teach our younger generation, it – it will seem to have gone by the wayside and – and starts the progression to cultural genocide.” *Id.*

Great Basin Residents

Indian people were not the only witnesses who testified to the stifling impact on their lives, economies and futures of the plans to extract and export their water. Witnesses during the public comment hearing were likewise eloquent.

One fourth generation resident of Lincoln County was blunt and echoed the sentiments of many who testified:

Las Vegas says it needs the water to grow. Southern Nevada Water Authority, by taking the water . . . from the other counties, potentially takes away the ability of the smaller counties to continue, and grow, and prosper the same as Clark County wants to do.

Lincoln County does not have the same amount of people that Clark County does, but the people who live in Lincoln County live, and breathe, and earn a living, and have families just the same as the people in the Clark County do. Why is it okay to destroy one community to save another?

RT Vol. 10 at 2131-32 (Hornbeck). She also noted a significant failure of the SNWA proposed monitoring and mitigation plan, a failure which was also identified in subsequent expert testimony:

By the time pumping impacts are noticed it will be too late. Billions of dollars will have been spent and all of the new growth in Clark County will have been established and [be] dependent on that water. Turning off the pumps will be a political and social impossibility. Once the water table is down so low the destruction to the land and the people in our county will be irreversible. Why is that okay?

Id. at 2132-33. Others expressed similar beliefs and fears that once the water was moving out of the Great Basin, it would never stop moving out. RT Vol. 10, 2171 (Phillips); 2195 (Gilbert); 2299 (Hill).

Other witnesses took issue with SNWA's disdain for, and its branding of everyone who voices opposition:

. . . I was very offended by the SNWA's statement describing all of us who oppose this application as "zealots," and that we have a personal vendetta against the Southern Nevada Water Authority. This is untrue. My concern regarding this project is the health and safety, environmental, economic justice of our state, the whole state, not just southern Nevada.

Id. at 2194 (Gilbert). One Tribal member expressed this in slightly different words:

You know, our Native people welcomed the Euro-Americans to this country in friendship, and yet . . . we were treated like dirt. And the same is happening to us. Nobody wants to listen to the little people, the small people, the minorities, and the ranchers in the Great Basin face the same thing. . . . We have desires to better our Reservation for our kids, for economic development. If we have no water, we can't do that. And that's the very thing that the people of Las Vegas are saying: We need the water for economic growth.

Id. at 2235 (Naranjo).

Other witnesses related sentiments markedly similar to those of Goshute people and testified to their preservation of the resources of the Great Basin, and their cultural connections to this land:

We are generations of people that have been stewards on this property. As kids we were taught how to conserve water. Our parents were taught how to conserve water, and that's what we have done. If you allow this water to go out of this basin, we won't even have water to drink. . . . And we're not asking water for swimming pools, or fountains, or another golf course. We're asking for the water to be able to live here. . . .

So my point is: This land is our heritage and our souls, and if you take our water, we're done.

Id. at 2214-2217 (Hiatt).

Witnesses took issue with the frequent statements from SNWA that its constituencies are the "economic engine" of Nevada and therefore entitled to some primacy in the use of Nevada's carefully preserved resources. The President of the Board of the Great Basin National Heritage Area stated:

In 2006, the Congress of the United States formally recognized White Pine County, Nevada, and Millard County, Utah, as representative of the Great Basin and nationally significant because of the unique topography, classic western landscapes, isolated high desert valley, mountain ranges, ranches, mines, historic railroads, archeological sites and Tribal communities. . . . In opening statements one of the Southern Nevada Water Authority people portrayed Spring Valley as the vast empty place with no real SNWA [sic] assets, past or future. I beg to differ.

Id. at 2247. The next witness portrayed the Great Basin as having a beauty that "was almost unbearable." *Id.* at 2249.

As to their future, Great Basin witnesses were realistic both as to the impossibility of economic development without adequate water, and as to the current economically depressing effect of the mere fact that SNWA is seeking the water. A Farm Bureau witness stated:

As the opportunity for agriculture in this area has diminished, because of the 1989 water applications of the Las Vegas Valley Water District . . . We [have] a tremendous potential for growth, both here in Lincoln County and in White Pine County, . . . but because of those 1989 applications, everything has stopped. Everything becomes subject to, secondary to those applications. There are many areas here that could be developed, but people are simply not willing to put out the money for applications, and engineering and all that goes to start the process when they know that there's no hope that they will ever be heard or approved.

We hear a lot of talk about Las Vegas being the – carrying the burden, the financial burden for all of the state, being the financial or economic engine for the state. I'm sorry. I believe that's a false premise, and it just exhibits a socially elitist attitude, that they continually hear this idea that one society or one community is more important than another, and I don't believe that's correct.

Id. at 2313(Mangum). That “socially elitist attitude” was of course, expressed bluntly by SNWA in the first day of these hearings, as it referred to the respectful, thoughtful, hard working, and concerned people of the Great Basin as “zealots,” “disingenuous,” and “living in a dream world.”

The themes expressed by the residents of the Great Basin, Native and non-Native, were explored by the experts throughout the hearing. As one economist stated:

. . . economics is about choice and about the allocation of scarce resources. It's not about a choice of allocating ground water to either a small number of ranchers or a large number of urbanites. It's about ensuring the long run inhabitability of the state, a state beyond just one city's limits or not. Society is created to have cities and deserts. It's my expert opinion that we should not be creating deserts to grow those cities. . . . A wonderful Las Vegas is surrounded by a beautiful state and I think I should stop there.

RT Vol. 22 at 5009-11 (Dr. Kilkenny).

The Hydrology of Spring Valley

Although the applicable principles of hydrology are well known to the State Engineer, they are restated here for clarity of the Tribes' analysis.

Perennial yield is the limit of water that may be extracted.

Fundamentally, the amount of groundwater available for SNWA's appropriation in the Spring Valley is based upon that basin's "perennial yield." *Ruling 5726* at 26; RT Vol. 24 at 5365 (Dr. Bredehoeft).

The perennial yield of a ground-water reservoir may be defined as the maximum amount of ground water that can be salvaged each year over the long term without depleting the ground-water reservoir. Perennial yield is ultimately limited to the maximum amount of natural discharge that can be salvaged for beneficial use. Perennial yield cannot be more than the natural recharge to a ground-water basin and in some cases is less. If the perennial yield is exceeded, ground-water levels will decline and steady-state conditions will not be achieved, a situation commonly referred to as ground-water mining. . . .

In most Nevada basins, ground water is discharged primarily through evapotranspiration (ET). In those basins, the perennial yield is approximately equal to the estimated ground-water ET; the assumption being that water lost to natural ET can be captured by wells and placed to beneficial use.

Ruling 5726 at 26-27. In its previous ruling on this Basin, the State Engineer was confronted with competing scientific analyses of ET, and averaged the two found to be compelling, to reach 80,000 acre feet per year ("afy") of ET. The State Engineer then concluded that existing consumptive ground water uses, domestic use, and the potential for future growth consumed another 20,000 afy. The State Engineer concluded that 60,000 afy of water was available in Spring Valley for extraction and export. *Id.* at 52.

Extraction of the perennial yield creates stresses to the groundwater basin.

If SNWA had commenced pumping in Spring Valley, the pumps would have extracted water from storage, previous discharge in the Basin, increased recharge, or all three. RT Vol. 24 at 5364. This new pumping would upset the previously-existing equilibrium within the water system; it creates a "new stress on the system." *Id.* at 5368. In seeking balance again, the water

system responds to the new stress “by reducing the amount of discharge.” *Id.* This initial pumping would have reduced ground water discharge into streams, springs, or evapotranspiration. “This means that in the vicinity of phreatophyte plants that draw water directly from the water table, the water table declines, and the plants can no longer get water and they die. The head decline produced by the pumping lowers heads in the vicinity of the springs, and the spring flow declines. The head declines in the vicinity of streams that receive groundwater that creates base flow, and the streamflow declines.” GBWN Exh. 277 at 2-3 (Bredehoeft). It could diminish the yield of existing wells. *Id.* at 5364-65, 5367. Ultimately, if discharge is reduced sufficiently such that it equals withdrawal by pumping, the system would again be in equilibrium, a state that “you can maintain indefinitely.” *Id.*

Extraction of perennial yield will adversely affect springs, surface waters, wetlands, vegetation and wildlife in the basin.

According to SNWA, though its extraction and export proposal is intended to capture the ET in Spring Valley (system discharge), it is not intended to eliminate entirely the phreatophytic plant community in the Basin. RT Vol. 11 at 2490-91; *id.* at 2502. (SNWA’s position may not be clear, however. A SNWA witness agreed that the pumping would lower the water table, and that the “purpose of that was to, among other things, to [sic] eliminate the loss of water that normally would occur through evapotranspiration.” *Id.* at 2502 (Prieur).) There is no doubt that the water table will be lowered as result of SNWA pumping. *Id.* By lowering the water table, SNWA intends to capture the water that normally would have been lost to evapotranspiration. *Id.* SNWA does not know whether the pumping would eliminate all native phreatophytes in the Valley, because it “depends on the pumping and so forth.” *Id.* at 2509. SNWA expects an

impact to the plant community from the extraction of water, lowering of the water table, and the loss of plant life; but it also expects “ a transition of the plant community that would not necessarily result in the extinction or extermination of any one plant community.” *Id.* at 2491 (Marshall); *id.* at Vol. 7, 1624 (“[L]owering the groundwater will cause a – potentially cause a shift in some of the vegetation, but there’s other types of vegetation that’s adapted to those conditions”) (McClendon).

In response to questions from the State Engineer, SNWA witness McClendon described his vision of Spring Valley after 75 years of pumping:

. . . less wetlands, but we would still see wetlands out there [a]s long as irrigation was still taking place, as long as we were seeing flows from springs. We would still see the meadows . . . They would have taken over from the wetlands. In other areas they have contracted. The shrubs have moved in. There will be some areas where there has not been a change in depth to water. And the meadows will also have changed to shrublands. . . . We would see an increase in the shrubs coming in on sites that were groundwater dependent. . . . So you would definitely see changes, and they would be changes that you could recognize as [“]oh, I would remember over there, this used to have more grass and now it has more shrubs.[“] . . . more shrubs, less grass . . . a shift over to things like sagebrush.

RT Vol. 8 at 1767-1769. SNWA intends to capture what Dr. Bredehoeft refers to as “nonbeneficial ET.” RT Vol. 24 at 5368. As he testified, they are “defining most of the ET as nonbeneficial; and therefore it’s available to be salvaged.” Regardless of SNWA’s actual intent, virtually all of the computer models agree that there will be water drawdown and that impacts will invariably follow. RT Vol. 24 at 5388-5391 (Bredehoeft).

SNWA and the Protestants agree that there will be impacts to Spring Valley from pumping 91,000 afy, year after year, and exporting it to Southern Nevada. If the intent of SNWA was to avoid all impacts to Spring Valley, “to preserve all of this vegetation,” the springs,

wetlands, meadows and streams, “then you don’t have anything to be salvaged, and therefore your perennial yield, essentially, is zero. You’ve got no perennial yield.” RT Vol. 24 at 5369 (Bredehoeft). To assert, as SNWA does, that there is perennial yield in Spring Valley subject to capture and export, is to acknowledge that the removal of water will impact the water levels in the Valley and everything that now depends on the current levels of water.

Precisely which springs, meadows, streams, wetlands, species of vegetation and wildlife will suffer impacts, and the degree of those impacts, is highly uncertain. Simulated impacts on Spring Valley based upon computer model runs, according to SNWA, are not likely to reflect actual impacts “in the real world.” RT Vol. 12 at 2640 (Watrus). According to SNWA’s witness, “Again, there’s high uncertainty in this model at this time. In the future, these models could be made more accurate, have a better precision to them, make better forecasts of what will happen. But really it comes down to there’s still no management within this model, . . .” *Id.* at 2640; *and see, id.* at 2654 (“There’s a lot of uncertainty in these two [model] predictions.”) (Watrus), at 2656 (recharge estimates may not be accurate because “It is just impossible to know exactly what recharge is, so it’s a highly uncertain number.”)(Watrus); at 2664 (With respect to predictions of reduction of spring flow, “[T]herefore, the predictions have a high level of uncertainty.”)(Watrus).

SNWA described at some length the “limitations” of the model used to produce the USGS “Death Valley Regional Ground Water Flow System Model Update.” RT Vol. 11 beginning at 2564 (Watrus); SNWA Exhs. 340 and 408. SNWA testified that the “major limitations in the model that lead to uncertainty in the model results” included the

“hydrogeologic framework,” “precipitation recharge,” and “historical anthropogenic data.” *Id.* at 2565 – 2568. The witness described the model results as “highly uncertain.” *Id.* at 2568.

The Goshutes cannot know from this record whether the Swamp Cedar area of Spring Valley will survive SNWA’s extraction and export of groundwater from the valley. They cannot know whether pickle weed and pine nut gathering areas will survive the lowering of the water table. They cannot know whether the mule deer, rabbits, grouse and other animals hunted today will survive the lowered water table, or drying of springs, the loss of plants that depended upon that water, and the out-migration of animals that seek water. They cannot know whether sacred burial sites will suffer subsidence from the loss of underlying water, whether headwaters containing spiritually purifying water will disappear, whether ceremonial sites that have sustained them for centuries will still exist.

Despite an enormous expenditure of money on experts and years of effort, it appears that the ability to predict the future impacts of groundwater extraction is limited. Nonetheless, SNWA vigorously pursues permits to extract the water, content to place the risks of irreparable harm entirely on the Goshutes and their neighbors.

The monitoring and mitigation plans will not protect the resources.

Because SNWA does not know exactly what damages will be inflicted on Spring Valley and its environs and those who depend upon it, it offers a monitoring and mitigation project in an effort to address the uncertainties in the science. It states that SNWA will watch, adjust its activities as needed, and mitigate the harms. This too, is fraught with uncertainties. The record does not provide the State Engineer or the public with any confidence that damage will be discovered, harmful pumping will stop, and damage will be fully mitigated. Again, it is the

Goshutes and other residents of the Great Basin who bear the risk of deficiencies in the monitoring plan. It is they, not the residents of Southern Nevada, who will suffer irreversible harm.

The plans' failure to identify harm and provide for meaningful response

The monitoring and mitigation plan is built around the stipulation between SNWA and the federal agencies. State Engineer Exh. 41. SNWA exhibits 149 (hydrologic monitoring) and 365 (biological monitoring) describe generally the nature of these plans, but without detail as to substance or procedure. The plans contain no standards for determining when an “adverse impact” from pumping exists. RT Vol. 11 at 2418. That determination is to be done on a “site-specific” basis depending on conditions at that site. *Id.* There are no detailed mitigation measures in the plans; no discussion of what specific mitigation measures would be available under specific circumstances; nor any discussion of how those measures would be implemented. *Id.* at 2422. Again, such detail is not offered by SNWA because, in its view, mitigation is also “site-specific.” *Id.* at 2424. The plans list “categories” of mitigation measures: redistribution of pumping, provision of consumptive water supplies, augmentation of Federal and existing water rights holders’ supplies, reduction or cessation of pumping, and “other measures.” *Id.* at 2424, and SNWA Exh. 149 at 39. In SNWA’s view, it would be “premature” to identify specific “triggers” for specific mitigation measures “without further collection of baseline data for both Spring Valley and DDC stipulations.” *Id.* at 2428.

As the hearing officer summarized: “It’s site-specific. There are no specific criteria right now. They’re still gathering a range of data.” *Id.* at 2431. This is an extraordinary state of affairs. After years of study, the development highly complex computer models, and two

hearings before the State Engineer, SNWA does not have sufficient data to know what impacts will occur and what mitigation responses, if any, might prevent further harm.

The State Engineer, the Tribes, and the public do not know from these plans what SNWA activities might be considered harmful to the water supply or the Spring Valley ecosystem, or what might be done in response to those activities. The members of the public who expressed concern that pumping, once begun, may never stop, are justified in their concern.

The plans' failure to provide for certainty and enforceability

Problems arising from the plans' failure to identify harm and mitigation, are compounded by the procedural irregularities in these plans. It is no comfort that reports of concern about SNWA water extraction and export would be referred to a committee. There are no Tribal members, ranchers, representatives of local counties, or other residents of the Great Basin (other than, perhaps, federal employees) on those committees. *Id.* at 2441, 2442. There is no Tribal participation in the plans' Biological Review Team, Technical Review Panel, Biological Working Group, or Executive Committee. *Id.* at 2470. An environmental disaster, under these plans, would be referred to a committee for discussion. Absent consensus on the existence of harm and the appropriate response, the matter would be referred to an Executive Committee. Absent consensus there, it would go to a neutral third party, not identified in the plans. Responsibility for enforcement of the neutral third party's decisions is not assigned; whether the neutral third party's decision is enforceable at all in any forum is not addressed. State Engineer Exh. 41 at Exhibit A page 9 of 14, and page 11-12 of 14.

The State Engineer is certainly able to perform his/her duties in response to public concerns. But the SNWA plans have no role for the State Engineer.

Recovery from harm is not reasonably possible

Inadequacies in avoidance and mitigation of harm are compounded by the potential scenarios involving overpumping, followed by immediate cessation of pumping, and the consequences. To illustrate the point, Dr. Bredehoeft outlined what he described as a “simple” hypothetical valley. RT Vol. 24 at 5397. The valley is 100 miles long, 25 miles wide. Recharge enters the valley at one end; a spring discharges at the other. A pump is installed in the middle of the valley, pumping out all recharge. *See generally*, GBWN Exh. 277 Table 4. In this hypothetical, the monitoring plan called for action if the spring discharge was reduced by 10%. The mitigation called for immediate cessation of pumping.

In the hypothetical, Dr. Bredehoeft considered the consequences of various well locations. If the well were 4 miles from the spring, the reduction in the discharge at the spring was apparent within a couple of years; at 10 miles, within 12 years; at 50 miles, within 230 years. *Id.* at 5399, Exh. 277 Table 4. With the pump 50 miles from the spring, even following cessation of pumping the spring’s discharge continues to decline. If this were Spring Valley and SNWA’s monitoring and mitigation plan were in place, that could easily lead to a conclusion by SNWA’s Technical Review Panel or Executive Committee that the pumping 50 miles away was unrelated to the reduction in spring discharge and the damage would continue indefinitely. But assuming that hurdle is overcome and the pump is shut off, theoretically there would be an opportunity for the system to recharge and recover. But according to this simple hypothetical, this will be a very long wait. It took 230 years for the spring to exhibit a 10% reduction. At 1,000 years following discovery of the harm, the spring flow would continue to decline to about 50% of its original flow. GBWN Exh. 277 at Table 5. Dr. Bredehoeft concludes: “It’s not like we can go out there

and pump for a hundred years . . . and then we stop and let the system recover. The system is not going to recover in that kind of time.” RT Vol. 24 at 5402.

SNWA of course severely criticizes Dr. Bredehoeft’s testimony. The agency offered a 25 page written report (SNWA Exhibit 428) and extensive oral testimony. *See*, Vol 11 beginning at 2356. In particular, Dr. Bredehoeft’s “simple” illustrative hypothetical was criticized for being simple, asserting that it has no applicability to a complex system such as SNWA’s proposed water extraction and export project in Spring Valley. SNWA misses the point, perhaps intentionally. Particularly in a complex system such as Spring Valley, Bredehoeft demonstrates that monitoring and mitigation may well not be the safety net SNWA describes. Damage to the Spring Valley water resources may not appear for a long time; when they do appear, they may not appear with clarity, such that the SNWA committees reach “consensus;” and even in response to prompt quick mitigation, the water resources may take an even longer time to recover.

Yet again, SNWA is prepared to place on the water resource, and on the Goshute people who depend upon it, the risk that their remarkably imprecise, incomplete monitoring and mitigation plan will not avoid, detect, or cure significant harm.

SNWA pumping is likely to cause impacts in Tippet and Deep Creek Valleys

Goshute people still inhabit, and still carry on their traditions in their aboriginal territory including especially, *Paha Tiveha*, “water valley,” or Spring Valley as it is known today. Undeniably, withdrawal of 91,000 afy of water from Spring Valley for decades will adversely impact the springs, streams, meadows, cedars, pine nuts, elk, grouse and other resources in that Valley on which Goshutes depend. There is another threat, however. There is substantial evidence of the existence of inter-basin flow between northern Spring Valley, around the Red

Hills, and into Tippet Valley. Though the threat is obvious, evidence of direct impact to the Reservation lands, in Deep Creek Valley, adjacent to Tippet Valley, reveals impacts after “several hundred years.” RT Vol. 26 at 5918 (Myers).

Here again, SNWA acknowledges the considerable uncertainty surrounding the fact, amount, and direction of groundwater flows between Snake Valley and adjacent basins. In describing a SNWA exhibit, Exhibit 447 Figure 7-1, SNWA witness Burns stated that the Agency acknowledged the existence of “exchange across these [Spring Valley] boundaries,” but in amounts the Agency believed to be “minor,” a statement not otherwise quantified. RT Vol. 7 at 1493. SNWA has made no studies to measure water movement in areas where it deemed such movement “unlikely.” *Id.* at 1494. It acknowledged that in the boundaries between Spring and Tippet Valleys, and Spring and Snake Valleys, it “could see some minor amount of flow” (again unquantified). *Id.* at 1495, 1496 (“We don’t give you or anybody a volume, but what we can infer from that information is that it’s [inter-basin flow is] most likely minimal.”); but see, *id.* at 1582 (witness defines “minor flow” as 2000 afy, possibly a “thousand,” but “I really don’t know the quantity of flow.”). SNWA acknowledged these rather unspecific conclusions were not based on a clear understanding of the hydrogeology. *Id.* (Witness: “There’s no well data there, so I don’t think we particularly know. . . I don’t think anyone’s even certain it’s saturated there.”) SNWA did not test the area. *Id.* at 1496. In summary, SNWA’s expert acknowledged that it was “fair to say that [he doesn’t] know for sure, whether there’s flow between these valleys [Spring and Tippet].” *Id.* at 1581.

SNWA did not report “the impact of the proposed pumping in Spring Valley on groundwater volumes in Tippet or Snake Valley.” *Id.* at 1583. Those specific impacts, according to SNWA’s expert, would not be known until pumping occurs. *Id.*

The Tribes’ hydrologist, Dr. Myers, agreed that there is “uncertainty” as to interbasin flows between Spring and Tippet Valleys. RT Vol. 26 at 5946. But his modeling suggests that there are flows from Spring into Tippet in the range of 2000 afy to 12,000 afy. *Id.* at 5929. If there are interbasin flows from Spring to Tippet, Dr. Myers modeling reveals that those flows are reduced by SNWA’s pumping in Spring Valley. There are impacts then to the Valleys which previously received those unimpaired flows. Dr. Myers’ analysis revealed that, depending upon the distribution of SNWA wells and pumping⁴, withdrawal of water from Spring Valley would cause drawdown in Tippet Valley within 200 years, and within Deep Creek Valley “within several hundred years.” *Id.* at 5918; CTGR Exh. 14 at page 3, Figure 1.

Goshute people have these kinds of time periods well in mind. Goshutes “strictly adhere to the seventh-generation rule” prevalent across Indian country. RT Vol. 25 at 5672. “[W]e like to plan three generations ahead. And we look back at three generations.” *Id.* When looking ahead, Goshutes “take what has worked and what has not.” *Id.* at 5673. Planning to protect Goshute people three generations from now is well within a 200-year time frame.

⁴ This raises a persistently odd theme to SNWA’s application for permits to withdraw and export water from this Valley. The applications pending before the State Engineer are for 19 wells at specific locations in Spring Valley. See, RT Vol. 11 at 2507. In the words of the Hearing Officer, the State Engineer is considering those specific 19 wells and “is not considering a different well field.” *Id.* at 2507-08. Yet, a SNWA witness agrees that the “water authority is actually contemplating 50 or a hundred more wells.” RT Vol. 12 at 2642. And the Draft Environmental Impact Statement for the pipeline intended to transport this water to Southern Nevada, has as a “preferred alternative,” a widely distributed pumping system. See, CTGR Exh. 14 at 2. The State Engineer must rule on the pending applications. But the State Engineer and the Parties are unable to ignore the great likelihood that SNWA will seek to change the number and location of points of withdrawal, drastically altering the analyses of likely impacts of groundwater pumping.

Goshute people's access to water resources on their Reservation is threatened by SNWA's applications. Those impacts may be seen within 200 years, within three generations. They may be seen earlier or later. There seems to be a consensus that flows between these basins occur. They are either "minimal," or somewhere in the range of 2000 to 12,000 afy. Distributed pumping in Spring Valley, according to Dr. Myers' model, will cause groundwater drawdown in Tippet Valley, drawdown that will reach the Reservation in several hundred years.

The issue is surrounded with uncertainty. SNWA asserts that adverse impacts to Goshute interests in Tippet and Deep Creek Valleys will not be known until after SNWA has begun extracting water from Spring Valley. Yet again, the State Engineer is confronted with uncertainty as to impacts. And the Goshutes are saddled with the risks.

SNWA's pumping would degrade the values of a continued "pristine" and "unbearably" beautiful Spring Valley.

SNWA's disdain for the spiritual values of Goshute people (equating them to a belief in the "boogeyman"), for the "dreamers" and "zealots" who reside in the Great Basin, and for those residents deemed selfish enough to challenge the demands of the purported "economic engine" of the State of Nevada, requires a response. First, there is the eloquence of the Great Basin residents themselves; their testimony completely belied SWNA's accusations. If the Agency were a person instead of an entity, one would hope that such a display of disrespect would generate apologies and an effort to enlist all citizens of Nevada in a collaborative effort to address state-wide water needs. Second, the suggestion that the resources of other areas of Nevada may be mined to supply Southern Nevada because it is "the" economic driver of the State, is indeed a false construct.

The agricultural economist who testified for Great Basin Water Network pointed out that prospects for future economic growth and prosperity in the remote Lincoln and White Pine Counties is quite good, assuming of course that the water is available. RT Vol. 22 at 4983-84 (Kilkenny). She states the obvious:

Over the 70 years since 1940, a similarly remote, very low-density place in an actually hotter, less hospitable desert location grew into the Las Vegas/Paradise metropolitan area. It could not have grown without its water resources. In 1928, there were fewer people in Clark County than even Lincoln or White Pine County today – that meant less than 4000 people. Who would have thought at the time that the county needed or deserved more water.

Id. at 4985-86. Her point, in her words, is that “expectations, because you are not constrained, can lead to growth, and expectations that you will be constrained, leads to self-fulfilling lack of growth.” *Id.* at 4987-88.

For White Pine and Lincoln Counties, the dark shadow of SNWA’s land purchases and applications to extract and export the Counties’ water resources, has hung over the counties since 1989. The impact is not surprising. “[F]ear of a future shortage can dampen the enthusiasm for development.” *Id.* at 4989. The same is true for Clark County. Pat Mulroy, the general manager of SNWA, in 2006 observed:

“ . . . State Engineer Tracy Taylor will have hearings in September [2006] and then decide whether to approve the agency’s proposal to pump the water more than 200 miles south. If he does not, Mulroy said, the economic effect on Las Vegas will be immediate. Even before the agency could appeal the decision in court, lenders who bankroll construction and business expansion in Las Vegas would begin turning down loans,” she said. Without the rural water, “the whole economic confidence of Southern Nevada would start eroding,” she said. “There’s a whole market collapse that would happen.”

GBWN Exh. 274 at 6 (quoting an article in the *Las Vegas Sun*). In short, SNWA denigrates the residents and communities of the Great Basin because they allegedly lack a future of economic growth, having itself stifled their prospects for economic growth.

Even accounting for the economic depression caused by SNWA's looming extraction of critical resources, the continued existence of a pristine and breathtakingly beautiful Great Basin with its water resources intact, has considerable value to the entire State of Nevada and its visitors from throughout the world. Dr. Kilkenny quantifies that value at \$2.85 billion over a 70-year period. GBWN Exh. 066 at 3. But the number is less important than the principle.

Although the natural and human communities in the basins are priceless in terms of the historical and cultural heritage they contribute to Nevada and the nation, and in terms of the biological and economic diversity they support, one is required to estimate the dollar values for use in deciding whether the loss of the values is reasonable as part of the price of SNWA's proposed groundwater withdrawal. However, it should be borne in mind that such an attempt to quantify these values in simple dollar terms carries a high risk of undervaluing them.

Id. at 2. She then notes the various categories of value of water resources, including "non-use."

The fifth benefit is the value that people anywhere, even people who never visit the area or directly use the water, place on the existence of the nature of the natural amenities in their place. . . . [T]he non-market values are the most fundamental benefits. They're the most difficult to quantify, and they're the most fundamental because they're not paid for. Do we benefit from sunlight? Yes, we do. . . . Do we pay for it? No, we don't. Does that mean we don't benefit? No.

RT Vol. 22 at 4995.

Nevada and its people are richer for the existence of Tribal communities, ranching communities, small towns, open space, "pristine" mountains and meadows, and the people who have preserved those "unbearab[ly]" beautiful places by making their livings in respectful and sustainable ways. Should these communities be destroyed by the extraction and export of critical

water resources, Nevada as a whole will pay a price not only in the billions of dollars for the SNWA plumbing, but also in the billions of dollars for the irremediable loss of a precious heritage.

ARGUMENT

I. SNWA's Application Should be Denied Because the Confederated Tribes of the Goshute Reservation Have Water Rights Protected by Federal Law That the SNWA Cannot Impair.

When the United States created the Goshute Reservation, it reserved sufficient water to meet the purposes for which the Reservation was created and to enable the Tribes living there to meet their current and future needs for a sustainable community. The reserved water rights doctrine is a foundational principle in federal Indian law. *Winters v. United States*, 207 U.S. 564 (1907). In *Winters*, the U.S. Supreme Court implied a reservation of water for irrigation purposes from an 1899 agreement between the United States and the Gros Ventre and Assinboine Indians in Montana that created the Fort Belknap Reservation. The rationale for the decision was that a reservation of arid land without water would defeat the purpose of the reservation.

The same rationale applies here. The Goshute lands are likewise arid. The creation of a home for the Goshute people could not have been accomplished without a reservation of water for purposes essential to their survival. It is noteworthy that *Winters* does not require that the agreement, treaty or executive order creating the reservation expressly reserve a specific quantity of water. Rather, water rights are reserved by implication because they are indispensable to accomplishing the purpose of the land reservation.

Several important principles pertinent to this case derive from the Goshutes' federal reserved water rights. First, such rights arise from interests in land; it is not necessary for the Goshutes to prove that water was used at the time the reservation was created. The right is not based on diversions or conventional notions of beneficial use. *United States v. Anderson*, 591 F. Supp. 1 (E.D. Wash. 1982), *rev'd in part on other grounds*, 736 F.2d 1358 (9th Cir. 1984). Second, the Goshutes' federal reserved water right includes groundwater as well as surface sources. *In re the General Adjudication of All Rights to Use Water in the Gila River System & Source*, 989 P.2d 739 (Ariz. 1999). Third, a tribal federal reserved water right may be asserted at any time and in any forum where the proceedings implicate the right. Fourth, a federal reserved water right cannot be lost through application of state law doctrines of abandonment, forfeiture, non-use or failure to perfect the right. *United States v. Orr Water Ditch Co.*, 309 F. Supp. 2d 1245, (D. Nev. 2004); *Hackford v. Babbitt*, 14 F.3d 1457 (10th Cir. 1994). Fifth, the priority of the Goshute federal reserved water right is no later than the creation of the Reservation, and the priority may be time immemorial. *Arizona v. California*, 373 U.S. 546, 600 (1963). As such, the Goshutes' reserved water right is most likely prior and paramount to any rights SNWA may assert in this proceeding.

Although the U.S. Supreme Court has established standards for quantifying Indian reserved water rights, quantification is not necessary to make the Goshutes' water right enforceable in the Nevada State Engineer water rights application proceeding. Moreover, Indian water rights have legal efficacy in the absence of an adjudicated decree defining the scope of the right. *United States v. Orr Water Ditch Co.*, 309 F. Supp.2d at 1249. In that case the Nevada federal district court confirmed that Indian reserved water rights exist independently of decrees

entered in general stream adjudications: “The adjudication of a water right is irrelevant to the determination whether the water right is a federal reserved right or a state water right. . . . At most, a stream adjudication and the resulting decree can only recognize water rights that exist pursuant to either state or federal law.” Thus, the State is obligated to respect the Goshutes’ reserved water right even though it is not adjudicated or quantified.

To the same effect is *Klamath Water Users Protective Association v. Patterson*, 204 F.3d 1206 (9th Cir. 2000). In that case, the Ninth Circuit Court of Appeals ruled that the Bureau of Reclamation is obligated to operate a water control dam to ensure that the water rights of Indian tribes in the basin are fulfilled. The fact that there had been no quantification of the tribes’ senior rights was irrelevant to the enforceability of such rights against the Bureau of Reclamation. *See also, Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States*, 832 F.2d 1127 (9th Cir. 1987) (Bureau of Indian Affairs is obligated to operate Flathead Irrigation Project to satisfy first the senior water rights of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, even though such rights had not been quantified or proved in court).

In light of these fundamental principles of federal Indian law, the State may not authorize extraction of water that impairs or interferes with the reserved water rights of the Goshute Tribes. It is axiomatic that, as the U.S. Supreme Court has noted in an Indian water rights case, “[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law.” *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983). Indian water rights are “federal water rights” and are not “dependent upon state law or procedures.” *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985) (quoting *Cappaert v. United States*, 426 U.S.

128, 145 (1976)). In this case, the State Engineer's duty to "follow federal law" means that SNWA's application cannot be granted if it interferes or impairs the Goshute's federal reserved water right. The "powerful federal interest in safeguarding those rights from state encroachment" requires this result. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. at 571.⁵

There is no minimum quantum of interference that the Goshute Tribes must prove to trigger the duty on the part of the State Engineer to avoid impairment to the Tribes' water rights. Scientific certainty of massive depletions from aquifers connected to the Goshute water supply is not necessary to show impairment. Rather, in light of the strong federal policy in securing and protecting Indian reserved water rights, it is sufficient to show interference in the form of shifting entirely to the Tribes the risk that SNWA's claims of no impact will turn out upon further investigation and analysis to be wrong. Granting SNWA's application would in fact shift that risk, which impermissibly impairs the Tribes' reserved water right.

Moreover, it is not necessary for the Tribes to show conclusively that surface and ground water within the boundaries of the Goshute Reservation will be depleted by SNWA's pumping. In *Winters* itself, the Milk River, the source of the water protected by the reserved rights doctrine, originated outside the Fort Belknap Reservation boundaries. As the Ninth Circuit has observed in an Indian water rights case, "[t]he suggestion that much of the water of Ahtanum Creek originates off the reservation likewise is of no significance. . . . Most streams in [the West] originate in the mountains and far from the lands to which their waters ultimately become appurtenant." *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956). As a

⁵The McCarren Amendment does not authorize encroachment on Goshute water rights. This is not a general stream adjudication in a judicial proceeding. In any event, the Amendment is a purely procedural statute that "in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1973).

result, the Goshute reserved water right is not limited to the waters or water sources that originate on or are physically located on the Goshute Reservation.

It is not disputed that there are interbasin groundwater flows between the valley SNWA targets for massive withdrawals of groundwater, Spring Valley, and the neighboring valley, Tippett. The Tribes' expert's models reveal impacts to Reservation groundwater within "three generations," the time period in which Goshute people have for centuries, "looked forward" in their duty to protect their resources and their people. SNWA challenges these assessments, and insists that it be authorized to begin its massive water extractions now and "monitor" the results later. SNWA's proposal, surrounded by a sea of uncertainty, tells the Goshute people that they, not Southern Nevada, should be assigned the risks of irreparable loss arising from pumping. That cavalier assignment of risk to Indian people of the Great Basin is consistent with SNWA's disdainful attitudes toward them, as made clear in its remarks during the hearing.

Under Nevada Revised Statute 533.370(5), the State Engineer must deny any water withdrawal application "where its proposed use . . . conflicts with existing rights." The Goshutes' reserved water right qualifies as an existing right under this statutory provision. By its terms, the provision is not limited to rights derived from or recognized by state law. It plainly includes existing rights under federal law. Further, in keeping with the commonly understood meaning of existing water rights, the provision does not require judicial recognition of the right in the form of an adjudicated decree or quantification. Although the term "conflicts" is not defined, certainly its meaning is sufficiently broad to encompass the kinds of impairment shown by the Goshute Tribes here.

II. Granting SNWA's Water Rights Applications Threatens to Prove Detrimental to the Public Interest

The public interest to be served in identifying the appropriate use of waters of the Great Basin, requires an assessment of the interests of the entire citizenry of Nevada, not just those of Southern Nevada Water Authority or its customers. The residents of the Great Basin who testified in the public comment portion of this hearing had it right. The best interests of all Nevada are not served by depriving smaller, rural, pristine and beautiful areas of a primary resource required for growth and development, and for survival. RT Vol. 10 at 2131-32 (“Why is it okay to destroy one community to save another?”) The best interests of Nevada are not served by demonizing residents of a rural area who seek to preserve a resource of benefit to the entire state, and who have learned to use the state’s resources wisely and sustainably. *Id.* at 2194 (Witness is offended by being characterized as a “zealot” when her interests are in “economic justice of our state, the whole state, not just southern Nevada.”) The interests of the entire public of Nevada are best served by protecting the state’s rich, diverse, communities and history. *Id.* at 2217 (“This land is our heritage and our souls, and if you take our water, we’re done.”) The public’s interest is not served by arguing that residents of Las Vegas “deserve to have grass in their backyard,” especially when the water for that backyard lawn comes at the expense of destruction of an entire region of the state. RT Vol. 29 at 6492 (SNWA closing argument); RT Vol. 10 at 2214 (Public comment: “We are generations of people that have been stewards on this property. . . . And we’re not asking for water for swimming pools, or fountains, or another golf course. We’re asking for the water to be able to live here.”) It is in the public interest of all residents of the State of Nevada to allow Native communities within the State to continue their

centuries-old rich traditions, spiritual practices, stewardship of the state's natural resources, and "kinship" with the Earth.

In addition, there are threats to the public interest in making decisions when surrounded by scientific uncertainty as to the consequences. SNWA pumping may, or may not, wipe out Swamp Cedars in Spring Valley and destroy sites sacred to Goshute people. SNWA pumping may or may not eliminate native grasses on which wildlife feed, depriving Goshutes of the ability to hunt game for subsistence purposes. SNWA pumping will certainly eliminate some springs; whether it eliminates those springs of spiritual and cultural significance to Goshutes, the springs which connect them with the Earth, is not known. SNWA water extractions will affect interbasin flows in the direction of the Goshute Reservation; whether they will cause a cascade of irreparable changes to the groundwater in Tippett and Deep Creek Valleys, is unknown.

Goshute people and their neighbors can find no comfort in SNWA's monitoring and mitigation plans, SNWA's proposed solution to the current high levels of uncertainty. The Tribes and local counties play no role on those monitoring or mitigation plans. The plans are wholly unspecific. One cannot determine from the plans what injuries might trigger a response, or what the response might be. One cannot be reassured that decisions made by committee, by consensus, with appeals, with unknown decision-makers, and without enforcement, will protect the water resources or those that depend upon it.

Nevada Revised Statutes 553.370 requires the State Engineer to reject an application and refuse to issue the permit if the proposed use "threatens to prove detrimental to the public interest." The Nevada Legislature has not defined the term "public interest" or provided guidelines to govern the State Engineer's implementation of this provision. Nor have the Nevada

courts provided a definition that applies to all cases. *See, e.g., Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 748, 918 P.2d 697 (1996) (Thirteen guidelines developed by the State Engineer “adequately defined the public interest in this case,” and the State Engineer was not required to consider economic factors and alternative projects as part of the public interest analysis). “By its silence, the legislature has left the task of defining ‘public interest’ to the State Engineer. . . .” *United States v. Alpine Land & Reservoir Company*, 341 F.3d 1172, 1181-1182 (9th Cir. 2003). As the State Engineer has noted, the public interest factor “must be addressed on a case-by-case basis.” *Ruling Number 5875* (Cave Valley, Dry Lake Valley and Delamar Valley, October 19, 2009), at page 23, *vacated on other grounds, Great Basin Water Network v. Taylor*, 234 P.3d 912 (Nev. 2010).

The Ninth Circuit Court of Appeals has suggested that the Nevada Supreme Court believes that the State Engineer’s authority to define the public interest is “limited to considerations identified in Nevada’s water policy statutes.” *United States v. Alpine Land & Reservoir Company*, 341 F.3d at 1182 (citing *Pyramid Lake Paiute Tribe of Indians v. Washoe County, supra*). The State Engineer’s authority is not so limited, particularly in cases where tribal reserved water rights are asserted and the State Engineer has obligations arising under federal law. The Nevada Supreme Court in *Pyramid Lake Paiute Tribe* rejected arguments that the State Engineer should draw from the statutes of other states in defining the public interest in Nevada, but nothing in that decision suggests the exercise of discretion is cabined by policies expressly set out in Nevada statutes.

Nor did the Court suggest that the thirteen considerations identified by the State Engineer for that case are exclusive. The State Engineer’s recent decisions reflect the view that the public

interest “is a dynamic concept changing over time.” *Ruling 5726* (Spring Valley, April 16, 2007) at page 43. Consistent with that notion, the practice of the State Engineer has been to take an expansive view of the considerations that define the public interest. *See, e.g., Supplemental Ruling No. 2776* (Little Fish Valley) (“The State Engineer must therefore exercise discretion in his interpretation under the express authority granted by law. The State Engineer must, to the extent possible, make a factual determination of all interests involved in any particular appropriation. . . . It is not unusual that more than one public interest is determined or defined.”).

The State Engineer’s decisions applying the public interest criterion appear to be premised on the concept that the water for which application has been made “belongs to the public” and may be appropriated subject to existing rights. *See, e.g., Ruling 5726* (Spring Valley, April 16, 2007) at page 43. The groundwater resources of the Great Basin are indeed, a resource of the public of the entire state. There are existing rights to that water, and some of the holders of those rights are Protestants in this proceeding. The Goshutes are among them. The Goshutes hold a reserved water right, a property right protected by federal law. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). The public interest here includes protection of the Tribes’ reserved water rights, the Tribes’ critical interests in the springs, streams, meadows, wetlands, plants and animals used for food, and ceremonial, burial and other sacred sites.

Though there remains in 2011, considerable uncertainty as there was in this case in 2007, as to impacts from withdrawals of groundwater in the Spring Valley, some facts are clear. The waters of Spring Valley at this point, are in equilibrium. SNWA seeks to capture the perennial yield in that valley, which in effect is the evapotranspiration, the discharge from the water system. The evapotranspiration, of course, is what has sustained the Goshute people since time

began – the springs which provide both water, and spiritual connections and sustenance; the wetlands which support the Swamp Cedars of immeasurable significance to Goshute people; the plant life from which the Goshutes harvest pine nuts, grasses, pickle weed and other plants for food, medicinal, and ceremonial purposes; the grasses and other plant life which support the wild life (elk, deer, grouse and others) on which they have depended forever; and the ceremonial sites at which Goshutes since time began have given thanks and offered prayers, ceremonies which always require water.

Federal courts have recognized in a wide variety of contexts that the protection of Indian rights is in the public interest. For example, a district court enjoined the construction of a marina in the tribe's customary fishing ground, noting that "the public interest will be served" by honoring the tribe's rights as confirmed by treaty. *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1516 (W.D. Wash. 1988). Further, in *Winnebago Tribe of Nebraska v. Stovall*, 216 F. Supp.2d 1226, 1233 (D. Kan. 2002), *aff'd*, 341 F.3d 1201 (10th Cir. 2003), the district court enjoined the imposition of the state's motor fuel tax on sales at a tribal gasoline station, and accepted the plaintiffs' argument that "the public has a significant interest in assuring the viability of tribal self-government, self-sufficiency, and self-determination." *See also, Crow Creek Sioux Tribal Farms, Inc. v. U.S. Internal Revenue Service*, 684 F. Supp. 2d 1152 (D. S.D. 2010) (expressing sensitivity to "the public interest" in protecting land that is important to tribal "cultural heritage."). Because the Goshute Tribes' water rights are governed by principles of federal law, which the State Engineer is obligated to respect, the concept of the public interest set out in these authorities should be used as guidance to define the nature of the public interest at stake in this case. The Goshutes' interest in protecting their land, water, culture and self-

determination qualify as public interests the State Engineer must assess. The primacy of federal law requires it, and nothing in Nevada law prohibits it. And even SNWA agrees that it is in the public interest to preserve Tribal cultures and traditions. RT Vol. 1 at 146.

CONCLUSION

As these hearings commenced, the Southern Nevada Water Authority revealed through its vocabulary its attitude towards the citizens of Nevada who reside outside of its metropolitan area and who oppose these applications. SNWA describes them as “zealots,” “dream world” residents, “blinded” by prejudice, “disingenuous,” and short-sighted in their failure to agree to sacrifice their communities to feed the “economic engine” of the State. Its attitude toward the Native people who cared for the Great Basin for centuries preserving its extraordinary wealth and beauty, is also one of disdain: spiritual, ceremonial, cultural practices which have sustained Goshutes since time began are equated with a child’s belief in the boogeyman.

As the hearings ended, SNWA’s attitudes toward the residents of the Great Basin were unchanged. “Southern Nevada deserves a quality of life like everyone else. Families deserve to have grass in their backyard.” RT Vol. 29 at 6493.

It is an astonishing proposition.

SNWA’s language, and the attitudes it reveals, perhaps explains its willingness to saddle the resources and population of the Great Basin with all of the risks of a very risky project. SNWA cannot tell the State Engineer with certainty what consequences will arise from its extraction and export of significant quantities of groundwater from Spring Valley. SNWA admits there will be impacts, but cannot quantify or identify them. SNWA says the State

Engineer and the citizens of Nevada need not worry because they have an agreement with federal agencies to monitor and mitigate – but its plans refuse to identify harms which will trigger responses, and refuse to identify the responses which will cure the harms.

What is apparent to the Confederated Tribes of the Goshute Reservation is that if authorized, SNWA's extraction and export of groundwater from *Paha Tiveha*, Spring Valley, will interfere with its existing water rights in its aboriginal lands and within its Reservation boundaries. SNWA's groundwater pumping, in addition, constitutes a severe threat to the interests of the public of the State of Nevada, in that the economic future of an entire region would be sacrificed to feed the desires of SNWA's constituencies.

The SNWA applications fail to meet the requirements of Nevada law, and should be denied in whole.

DATED: December 22, 2011

Respectfully submitted,

ALEXANDER, BERKEY, WILLIAMS & WEATHERS LLP



Scott W. Williams

Curtis Berkey

Counsel to Confederated Tribes of Goshute Reservation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the CLOSING ARGUMENT was served by U.S. mail, first class postage prepaid, on December 22, 2011, on the following:

Dana Walsh, Esq.
Southern Nevada Water Authority
1001 S. Valley View Blvd, MS #485
Las Vegas, NV 89153

Paul Taggart, Esq.
Taggart & Taggart
108 North Minnesota Street
Carson City, NV 89703

Steven O. Sims, Esq.
Brownstein, Hyatt, Farber, Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202

Robert A. Dotson, Esq.
Laxalt & Nomura, Ltd.
9600 Gateway Drive
Reno, NV 89521

Simeon Herskovits, Esq.
Advocates for Community and Environment
P. O. Box 1075
El Prado, NM 87529

Richard W. and Lesley Ann Sears
1963 South 17th East Hc 10
Ely, NV 89301

Laura Welcher, Director of Operations
Long Now Foundation
Fort Mason Center
Building A
San Francisco, CA 94123

J. Mark Ward, Esq.
Utah Association of Counties
5397 Vine Street
Murray, Utah 84107

EskDale Center
Jerald Anderson, Esq.
1100 Circle Drive
EskDale, Utah 84728

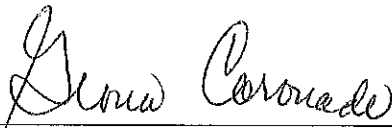
US Department of Agriculture Forest Service
Jeanne A. Evenden, Esq.
324 25th Street
Ogden, Utah 84401

Henry C. Vogler IV
HC 33 Box 33920
Ely, NV 89301

George Benesch, Esq.
190 W. Huffaker Lane, Suite 408
Reno, NV 89511-2092

Corporation of the Presiding Bishop of the Church
of Jesus Christ of Latter Day Saints
Severin A. Carlson, Esq.
Kaempher, Crowell, Renshaw, Gronauer &
Fiorentino
50 W. Liberty Street, Ste. 900
Reno, NV 89501

John Rhodes
P. O. Box 18191
Reno, NV 89511



Gloria Coronado