

**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 DR)
LAKE VALLEY HYDROGRAPHIC BASINS)
(180, 181, 182 AND 184), LINCOLN COUNTY)
AND WHITE PINE COUNTY, NEVADA)

**JOINT CLOSING STATEMENTS FOR THE
DUCKWATER SHOSHONE TRIBE AND ELY SHOSHONE TRIBE**

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INTRODUCTION

The Duckwater Shoshone Tribe and Ely Shoshone Tribe (collectively “Tribes”) submit this joint closing statement in opposition to the applications submitted by the Southern Nevada Water Authority (“SNWA”). The Confederated Tribes of the Goshute Reservation (“CTGR”) are

submitting a separate closing argument, which the Duckwater Shoshone Tribe and Ely Shoshone Tribe adopt and incorporate by this reference.¹

The Tribes have been inextricably linked to the natural environment of their Great Basin aboriginal homelands since time immemorial. As the Duckwater Shoshone Tribal Chairman Virginia Sanchez testified, “our blood is in that land and our relationship to the natural world is what builds our cosmology, our belief, and how we live and understand our environment.” Reporter's Transcript, vol. 25 at 5767-5768. For millennia, the Tribes have relied upon Great Basin resources for their homes, food, and water. And in return, Tribal people have cared for the land and its water resources, identifying that their “relationship to the natural world is more than caretaker or stewardship. We have kinship.” RT, *id.* at 5769. The Tribes’ sustainable use, stewardship, and kinship with water resources within their environment have provided long-standing protection of water in the Great Basin.

Spring Valley has been an epicenter of Tribal activity and ceremonies. (CTGR Ex. 001, 005). The Tribes have used this valley as a gathering place of different Tribes and family groups, a ceremonial place, a site for festivals, and a place for hunting wild game and gathering plants for food and medicinal purposes. (CTGR Ex. 005). In addition to that significance and connection to Spring Valley, the Tribes are also strongly connected to the region given that it is the site of several massacres inflicted upon Tribal members’ ancestors. The Swamp Cedars Massacre area is sacred ground to the Tribes. The Tribes deem a large area of Spring Valley to be sacred, including the current plant and animal communities of the valley.

Despite an undisputed record of the Tribes’ long-standing connection to the natural environment for subsistence and religious purposes, SNWA has continued to move forward on

¹ For reasons not relevant to restate here, it is necessary for the CTGR to submit an independent closing argument. Incorporation of the CTGR closing argument pages combined with this Duckwater/Ely joint closing statement does not exceed the allotted fifty (50) page limit.

the groundwater pumping and exportation project that lies in the very heart of the Tribes' homeland. Instead of taking steps toward understanding Tribal concerns about the region and plan a project to avoid impacts, SNWA has cast the Tribes 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 31-34. SNWA has demonstrated loudly their attitude toward Tribal people by comparing the Tribes' oral histories and religious beliefs to those beliefs that a naïve child holds about "boogeyman" stories. RT Vol. 26 at 5889. In SNWA's attempt to demonstrate fairness for exporting Spring Valley water, the Agency stated that families in Las Vegas "deserve to have grass in their backyard," but SNWA provided no responses as to whether the Tribes' deserve to have their sacred lands and aboriginal homelands protected. RT Vol. 29 at 6492.

The SNWA has minimized the interests and concerns of the Tribes and other protestants during the hearing process, and then disingenuously asks the State Engineer and the State of Nevada to trust their good intentions based on a plan to monitor, manage, and mitigate the inevitable adverse impacts of the proposed groundwater project. Under Nevada law, the State Engineer cannot approve applications based on good intentions that monitoring and mitigation would prevent adverse impacts. SNWA has not, and cannot meet its burden of proof set forth in NRS 533.370(5).

JOINT CLOSING STATEMENT

The Duckwater Shoshone Tribe and Ely Shoshone Tribe are sovereign governments and federally-recognized Indian tribes. The Tribes' reservation lands were not "given" to the Tribes. The lands were reserved by the Tribes and recognized by the United States as the Tribes' permanent homelands. The Tribes' reservation lands represent just a small fraction of their vast

aboriginal homelands that cover large portions of Nevada and Utah. The undisputed evidence presented during the hearing demonstrates that these Tribes occupied the subject basins (and Spring Valley in particular) since prehistoric times and, as a number of tribal elders and leaders testified, since "time immemorial".

On behalf of the Tribal Councils for Duckwater and Ely Tribes, we thank the State Engineer and his staff for accommodating the Tribal elders and leaders during their testimony here. It is not a usual practice for Tribal elders to testify in state administrative proceedings, particularly to address the protection of Tribal water resources, cultural resources, and the sensitive topic of tribal sacred sites. During this hearing, the State Engineer heard testimony from tribal elders and leaders who spoke of their Tribe's unique connection to Spring Valley. This testimony from Tribal leaders and elders was confirmed by expert testimony. While Spring Valley is not located within the boundaries of the Tribes' Reservations, Tribal elders and leaders consistently explained that their understanding of tribal lands is not limited to Reservation boundaries that were arbitrarily imposed by the government. Their testimony and stories about the Tribes' historic and present uses of Spring Valley for cultural and traditional purposes was confirmed by the research and cultural mapping of Round River's Gavin Noyes, who provided a map (CTGR Ex. 001) outlining the Western Shoshone peoples's historic and present use of the Spring Valley area for hunting, gathering, and visiting of sacred sites for tribal religious practices. These findings were gathered from personal interviews of nearly all available tribal elders who related oral histories of hunting and gathering locations in Spring Valley as well as places of deep spiritual significance. Rupert Steele, a tribal elder and former Chairman for the Goshutes, introduced himself during the hearing by speaking in his native Goshute language. He spoke of the many plants and animals in Spring Valley that are a vital part of the Goshute culture

and traditions and refuted the idea of plant succession driven by groundwater drawdown as being "environmentally sound". He also explained in detail the central role of water in Goshute traditions, including how it is used in Tribal ceremonies and prayers. Goshute Tribal members Ed Naranjo, Milton Hooper, Charlene Pete, Ely Tribal Chairman Alvin Marques, and Duckwater Tribal Chairman Virginia Sanchez all testified powerfully the importance of water to their Tribes and the irreversible impact removal of water from Spring Valley will have on the survival of their tribal culture and traditions. Preserving and protecting Tribal culture and traditional uses in Spring Valley is in the public interest and should be given great weight by the State Engineer in considering SNWA's applications. Even Ms. Mulroy of SNWA acknowledged correctly that preservation of Tribal traditional uses in Spring Valley is in the public interest.

Under the Supreme Court's *Winters* doctrine and well-settled federal law, the Tribes' reservation lands have a present-day, implied reserved water right for sufficient water necessary to irrigate all practicably irrigable acreage on their tribal lands. The priority date for this right dates back to the time their reservations were recognized by the federal government. The Goshute Reservation is located in Tippett and Deep Creek Valleys and is just to the Northeast of Spring Valley. The evidence presented in this hearing shows that the reservation is lower in elevation than Spring Valley and that the general groundwater flow is generally from South to North and West to East in this part of the great basin flow system. While the modeling information presented showed uncertain impact on Goshute Reservation itself, it is clear enough that additional baseline data will provide a better understanding of the proposed project's impact on Goshute water resources. That is why the USGS, with funding from the BIA, recently determined it necessary to conduct an additional study to reassess the impact of the project on the Goshute reservation. (CTGR Ex. 016). The State Engineer should deny the SNWA applications

until this study is complete and impacts are better understood.

There were noticeably empty chairs here next to the Tribes' legal counsel during the five-week hearing--chairs that should have been occupied by attorneys for the United States, which is charged with a trust responsibility to protect tribal interests. The federal Indian trust responsibility is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes. *Seminole Nation v. United States*, 316 U.S. 286 (1942). This trust obligation of the federal government was first recognized by United States Supreme Court Chief Justice John Marshall in the 1831 case *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Since then, the trust responsibility doctrine has been at the center of numerous other Supreme Court cases, thus making it one of the most important principles in federal Indian law. This trust responsibility obligates the federal government's agencies, particularly the BIA, to protect tribal treaty rights, lands, assets, and resources. This legal duty and moral obligation includes the protection of the tribal water resources, cultural uses, and sacred sites threatened by SNWA's proposed project.

Instead of properly protecting Tribal resources and interests in accordance with the federal trust responsibility, the Department of Interior agencies and BIA in this proceeding stood silent through the protest filing period--forcing the Tribes to appear in this proceeding to defend their own interests. The absence of the federal agencies was caused by the so-called "Stipulated Agreements"--back room deals signed in 2006 and 2008 between the federal agencies and SNWA. These agreements were entered by the BIA and other DOI agencies without any consultation with the Tribes they impact.

During the hearing, there was much discussion about Tribal consultation, and for good reason. Government-to-government consultation with Tribal governments is required of federal

agencies when policies or other actions implicate tribal interests. In 2009, President Obama held a historic meeting in Washington DC with leaders of Tribes invited from over 500 federally-recognized Tribes. During that meeting the President announced the issuance of a Presidential Memorandum reaffirming the Executive Order requiring Tribal government-to-government consultation. This federal consultation requirement was in place well before the stipulations were entered in this proceeding--yet consultation did not happen. The Tribal leader witnesses testified uniformly that no government-to-government consultation occurred prior to the stipulations, and that there was a lack of consultation in the NEPA process for the SNWA proposed groundwater project.

To add insult to injury, the federal agencies have remained silent and absent in this proceeding although the stipulations have been used again in this proceeding and referenced extensively by SNWA to support its applications and prejudice the Tribes' protests. SNWA has asserted that mitigation and monitoring program outlined in the stipulations addresses many of the environmental concerns raised by the Tribes and protestants. However, SNWA's own witnesses confirmed that the Tribes play no direct role in the mitigation and monitoring program.

The State Engineer should strike the stipulations from the record and give them no consideration as support for SNWA's applications for the following reasons:

1. The Department of Interior agencies, including the Bureau of Indian Affairs, did not undertake required government-to-government consultation with the Tribes prior to entering the Stipulated Agreements in 2006 and 2008. Tribal government-to-government consultation is required prior to entering the stipulations by Executive Order 12898.

2. No consultation with the Tribe took place prior to the re-filing of the Stipulated Agreements in the current Nevada State Engineer proceeding on SNWA's water rights applications for Spring, Cave, Dry Lake, and Delamar valleys. Because these stipulations directly implicate the Tribe's traditional and cultural resources and water resources, government-to-government consultation must have occurred before the stipulations were re-filed in this current proceeding. See Executive Order 12898; Executive Order 13175; Presidential Memorandum for the Heads of Executive Departments and Agencies dated November 5, 2009.
3. No evidence has been presented that the DOI agencies, including the BIA, authorized the re-filing of the Stipulated Agreements in this second proceeding on the SNWA water rights applications for Spring, Cave, Dry Lake, and Delamar Valleys. Paragraph 19 states in part: "Except as expressly provided herein, the Parties agree that the Stipulation shall not be offered as evidence or treated as an admission regarding any matter herein and may not be used in proceedings on any other application or protest whatsoever. The Master Exhibit List shows that the Stipulated Agreements have been admitted in evidence and they have been used as evidence by SNWA extensively in support of their current groundwater applications that are the subject of this hearing. This is a clear violation of Paragraph 19. The current proceeding is a new proceeding and involves new protests by three (3) Tribes (CTGR, Ely Shoshone, and Duckwater Shoshone). Use of Stipulations in a new proceeding involving new protests is also a violation of the Stipulations.

4. Paragraph 1 of the Stipulations states that the Parties (SNWA in particular) “shall not seek to . . . prejudice any other Parties or protestants, including any Indian Tribe.” SNWA has used the Stipulated Agreements extensively in the current NSE Hearing to prejudice the Tribes' protests.
5. Paragraph 2 of the Stipulation provides in part that “at any future date if all the permits issued by the Nevada State Engineer pursuant to the SNWA Applications are cancelled, then this Stipulation shall be of no further force and effect among the Parties. The Nevada Supreme Court's remand required re-notice and rehearing on the SNWA's applications. This necessarily means that the prior permits issued by the NSE were cancelled and the Stipulations are of no further force and effect.

Paragraph 9 of the Stipulation states in part: “The DOI Bureaus and SNWA shall jointly explain or defend this Stipulation and Exhibits A and B to the State Engineer.” During the 3-week presentation by SNWA, SNWA explained and defended the Stipulations at length. This is a violation of the Stipulations since the DOI Bureaus, including the BIA, have been and still are completely absent from any participation of any kind in the current NSE Hearing from September 26, 2011 through today's closing arguments.

Even if the terms of the stipulations had not been breached (which they have been), SNWA's witnesses have consistently acknowledged during cross-examination that the Tribes have been all but ignored in the so-called mitigation and monitoring plans under the stipulations. The Area of Interest under the stipulations is clearly defined as including Tippet Valley, Deep Creek Valley, and the Goshute Reservation. Figure 1 attached to the stipulations is a clear map defining the Area of Interest as including the Tribe. Yet neither Tribal leaders nor technical staff were or are part of any of the monitoring panels under the stipulations. Ed

Naranjo even testified that Tribal requests to participate in the monitoring process have been rejected. It is ironic (and telling) that SNWA's environmental staff studied a dozen species of amphibians in Spring Valley but didn't consider Tribal uses of the same eco-system in Spring Valley. The witnesses also confirmed that IF (or WHEN) monitoring of the pumping project demonstrates unreasonable environmental impacts, there is NO ENFORCEABLE mechanism in the stipulations to stop harmful groundwater from continuing. This loose "mitigation and monitoring" program is no substitute for real protection of tribal interests by the federal trustee.

SNWA also pointed to the EIS process conducted by the BLM in asserting that the Tribal government-government consultation process was followed for the SNWA proposed project. But the list of so-called "consultations" was reviewed and rejected by Ed Naranjo, who has been the Tribal Administrator and Tribal Council member at relevant times. He testified that the meetings listed in the DEIS were not consultations according to the Tribes' understanding and were not in accordance with the Tribes' consultation policy, which requires prior notice and decision-makers from the Tribal government and federal government. Trainings and informational sessions attended by staff and conducted by contractors or the project proponent are not Tribal government-to-government consultation. The Tribal protestants here have not signed the self-serving programmatic agreement referenced in the DEIS and have not entered data sharing agreements. Mr. Naranjo testified that the BLM will not even provide to the Goshute Tribe cultural information about the Goshute tribe itself in the affected basins unless the Tribe signs an agreement waiving important legal rights—including the right to use the Tribe's own cultural information to protect those resources in proceedings such as this.

The Tribal leaders, members, and elders who testified in this hearing focused heavily on their concerns about the impact of the proposed groundwater pumping project on the Swamp

Cedars massacre site. Even SNWA's own projections predict a groundwater drawdown in the Swamp Cedars area of 100 feet, which would kill the Swamp Cedars. Tribal witnesses were unequivocal in stating the devastating impact on Tribal culture and traditions if this area is transformed by a loss of groundwater.

The Tribes' cultural and spiritual connection Spring Valley is clear and undisputed and its preservation is an invaluable part of the public interest. This is particularly true for the Swamp Cedars area, which according to a number of accounts was the site where 300 Indians including many women and children were murdered. Dr. Lahren's report and tribal oral history demonstrates that this was not a battle site with opposing military forces, but a massacre.


At one point in this hearing SNWA suggested that Tribal cultural and spiritual beliefs about Spring Valley and Swamp Cedars were like a child's belief in the "boogeyman". This reference was a shocking and offensive to the tribal leaders and elders sitting in the hearing room. One of the Tribal member witnesses left the room in tears during this line of questioning.

The Swamp Cedars massacre site is not fairy tale—it is documented in historical literature and oral histories passed down through tribal elders. Tribal cultural and spiritual beliefs connected with the Swamp Cedars are not like a mythical belief held by a naive child; the State Engineer heard the tribal members testify that they are deep, sincere religious beliefs held by tribal members of all ages. The Swamp Cedars site is not a bedtime story told to scare children, but part of a rich oral history handed down through tribal generations by elders who are, as Mr. Noyes aptly stated, the Tribes' "wisdom-keepers".

Rupert Steele testified about the Tribes' decision-making principle he called the Seventh Generation principle, which requires decision-makers to consider the three past generations and

the impact of their decision on the three future generations. There is wisdom in this principle. The Tribes respectfully request the State Engineer to consider the impact of the proposed groundwater project on the seventh generation and accordingly deny the SNWA groundwater applications.

Dated: December 23, 2011

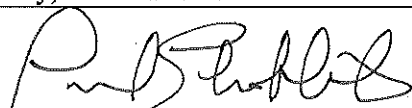
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2011, a true and correct copy of the foregoing was served on the following counsel of record by depositing the same for mailing by US Mail, postage prepaid, addressed to the following:

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