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RESPONSE TO THE NEVADA STATE ENGINEER ON REQUEST FOR GROUND WATER BY SOUTHERN NEVADA WATER AUTHORITY WATER RIGHT APPLICATIONS IN SPRING, DRY LAKE, CAVE AND DELAMAR VALLEYS

My name is Harvey Hutchinson RCE 20501 Calif., 194 E. Paradise Ln., Alpine, Utah 84004. My specialty is old water projects and the procedures the United States of America followed to change federal lands and water to private owners, tribes, state trust lands and states. As a citizen of the United States of America and Utah I protest this filing for the following reasons.

1. I have abstracted the federal land laws and decisions affecting the transfer of Federal Reserved Lands in all the Western states including Nevada. I find that the proposed project is contrary to the reserved land laws for School Trust Lands and for the Indian Reservations.

a. I question the authority of the State Engineers of Nevada and Utah to approve a request that dewaters and causes subsidence to 100,000 acres of Utah School Trust Lands without the School Trust's Funds being fully compensated for the mining of the minerals (water) under their lands, and the damage of its lands in perpetuity because of subsidence. (See Attachment 1 on the opinion as to who owns the water and all revenues on Utah School Trust Lands.)

It is my professional engineering opinion that before the applications for ground water are approved, the Trust Lands benefits which are taken must be agreed to be paid for. A rough estimate of cash flow of at least Utah Trust lands is about $50,000,000 per year in perpetuity indexed for inflation, as payment to Utah School Trust Lands for the water and the subsidence damaged areas underneath and above its lands.

b. The Indian lands or water cannot be taken without being contrary to the Supreme Court Decision Winter vs. United States, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908). I quote.

"The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation... ...the Lands were arid, and, without irrigation, were practically valueless. . . . But extremes need not be taken into account. By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. . . . The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. (United States v. Rio Grande Dam & Irrig. Co. 174 U.S. 702, 43L. ed. 1141, 19 Sup. Ct. Rep. 770; United States v. Winans, 198 U.S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662).

...That the government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888 and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste, and took from them the means of continuing their old habits, yet did not leave them the power to change to new ones."

My professional engineering opinion is that this subsidence would eventually destroy the Tribal Lands for the purposes of the Indians and would break the treaties between United States and the Indians.

2. Subsidence is caused when the underground aquifers are drawn down by deep turbine pumps causing the soil on top of the aquifers to drain, dry and crack open corrupting the aquifers and making the land unstable, modifying the land surface and damaging the vegetation and surface.(See Attachment 2, pictures of the Escalante Valley subsidence.)

When water is removed from some areas, the soils on the surface compact and subside. In other areas soils cling together by apparent cohesion and bridge. The instability of the bridging soil may not be obvious but can fail in a dramatic fashion during an earthquake which releases huge amounts of energy making huge damaging shock waves. This is particularly damaging to the aquifers and the surface lands.

In Summary:

1. The filings do not address compensation for School Trust Lands nor Indian Lands.

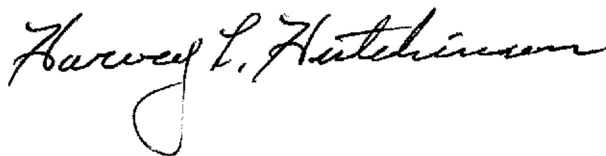
2. If approved it violates sound engineering principles and approves land subsidence full knowing it could led to failure of the system.

3. Water from this source may not last in perpetuity causing failure of the cities in the future.

4. This project as proposed may be against the law because of treaties between the United States and the Indians.

I have studied the Colorado River and engineered projects in this basin. I have determined that there is at least one project that is feasible to provide water to Southern Nevada besides the one being proposed. It will cost much less, will produce more water, has almost no environmental damage, does not cause subsidence and most important will last in perpetuity.

Harvey L. Hutchinson R.C.E. California



ATTACHMENT #1

AN ABSTRACT FOR TITLE TO GROUND WATER AS AN APPURTENANCE TO UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS

By
Ronald K. Christensen, Attorney, Ph.D., P.E. and Harvey L. Hutchinson, P.E.[1]

Executive Summary

This abstract shows that School Trust lands Congress set aside for the funding of common schools in the State of Utah have appurtenant ground water rights that must be recognized by the State of Utah. School Trust lands reserved in 1855 never became subject to the homestead and other public land disposition laws, including the Homestead Acts of 1866 and 1870 and the Desert Land Act of 1877 and thus have always maintained rights to the ground water found beneath these lands as one of the rights and appurtenances of the land. As for the other School Trust Lands that were reserved in 1894 under the Utah Enabling Act, 1894 that Act cancelled all homestead and public land disposition laws including the Desert Land Act of 1877 as far as those laws applied to the School Trust Lands. That cancellation of the homestead and land disposition laws made by express Act of Congress, restored rights to ground water as part and parcel to those School Trust Lands.

In sum, either through 1855 reservation or through Enabling Act cancellation of laws that might otherwise have taken the ground water from the land, School Trust Lands in the State of Utah hold rights to use the ground water beneath those lands. There is no need to apply the so-called *Winters* doctrine of implied federal reserved water rights, because ground water rights are held on School Trust Lands as a result of prior reservation and/or cancellation of any federal and territorial laws to the contrary prior to Utah statehood.

Introduction

This abstract shows that School Trust lands Congress set aside for the funding of common schools in the State of Utah by federal law and state law and constitution have appurtenant ground water rights that must be recognized by the State of Utah. By federal law, School Trust Lands have been reserved for the funding of schools in the State of Utah and are now held in trust by the State for the education of the children of Utah. This abstract shows that those reserved lands included appurtenant rights to ground water as a right of the land either through United States Congressional reservation prior to the opening of the lands for homesteading or through Congressional cancellation of any laws that might have otherwise removed the appurtenant ground water rights from the land. The School Trust lands therefore have ground water rights that cannot be taken by the State of Utah or used by others without compensation to the School Trust.[2]

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[2] See *Lassen v. Arizona Highway Dept.*, 385 U. S. 458 (1967).

Reservation of School Trust Lands Ground Water Rights Prior to the Homestead Laws

In the United States, setting aside School Trust Lands was an established practice in the new States since the Northwest Ordinance of 1785. Under authority of that act Section 16 in every township was reserved for use to support the common schools in each newly created state in the United States. An 1855 Act[3] reserved Sections 16 and 36 for the support of common schools and two townships for the support of a university specifically for the Utah Territory and states resulting therefrom. The pertinent portions of that Act are included in the Appendix.

At the time of this 1855 Act, ground water was by law part and parcel with the land and no law had ever been enacted to sever it from the land. Therefore, just as any mineral or other component of the earth, the right to use the water beneath the land was by law reserved by Congress as a part of the land in Sections 16 and 36 of every Township within the territory and State of Utah.[4] No implied reservation under the so-called *Winters* Doctrine of federal reserved water rights is needed or applicable here.[5] Rather, by force of the law then in effect in 1855, Congress necessarily reserved ground water found beneath the land for the schools of Utah because it went with the land and Congress did not except it from the reservation.

Because these lands had been reserved long prior to the homestead law, none of the homestead laws became applicable to these lands. The homestead laws applied to "public land" and public land did not include reservations of land for public purposes.[6] Since, Sections 16 and 36 were not public lands, the homestead laws did not apply.[7] That means that the homestead laws of 1866, 1870 and the Desert Land Act of 1877 never became applicable to Sections 16 and 36 of each Township of Utah and thus never did, and never could have severed the right to use ground water from those lands.

Thus, when Sections 16 and 36 were eventually conveyed to the School Trust by land patent, pursuant to the Utah Enabling Act, 1894 and Utah Constitution Articles XX, Sections 1 and 2, the United States by land patent (the Enabling Act grant) granted and conveyed to the School

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[3] **Congress February 21, 1855, *An Act to establish the Office of Surveyor-General of Utah, and to grant Land for School and University Purposes***

[4] *Willow Creek Irrigation Company vs. Michaelson*, 21 Utah 248, 60 P. 943 (1900) (Ground water had been decided **"to be a component part of the earth, and hence the private property of the owner of the land through which it percolated."**(bolding added)).

[5] *Winters v. United States* 207 U.S. 564 (1908).

[6] "(1) 'public lands' are such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations,' as hereinafter defined." *FPC v. Oregon*, 349 U.S. 435 (1955), 49 Stat. 838, 16 U.S.C. § 796 (1) and (2).

[7] The Desert Land Act severed, for purposes of **private acquisition, soil and water rights on public lands**, and provided that such water rights were to be acquired in the manner provided by the law of the location. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142 (1935) See also *Nebraska v. Wyoming*, 325 U. S. 589, 325 U. S. 611-616 (1945). "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are **inapplicable** to lands **which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose.**" *United States v. O'Donnell*, 303 U.S. 510, 303 U. S. 501. See *United States v. Minnesota,* 270 U. S. 181, 270 U. S. 206 (1926) and 349 U.S. 448 (1955). "The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of possessory rights on **public lands** asserted under local laws and customs. *Jennison v. Kirk*, 98 U.S. 453. (1878) (bolding added).

Trust the ground water along with the land as a component part and appurtenance to the land conveyed.[8]

Congressional Cancellation of Homestead Laws and Territorial Laws for Remaining School Trust Lands

Later, in the 1894 Utah Enabling Act, Congress set aside the remaining School Trust Lands for the schools of Utah and expressly repealed any federal or territorial law in conflict with the Act. That repeal expressly removed any cloud from School Trust Land ground water rights that might otherwise be claimed. But, again it is important to note that in 1894, by law ground water remained part and parcel with the land as much a part of the land as the earth and minerals.

With the Act of February 28, 1891 Congress reserved School Trust Lands Section 2 and 32.[9] Again, the ground water beneath the land was by law a component part of the land and the property of the landowner, the United States. So that reservation included the ground water as part of the reserved land. Thus, there was no implied reservation. Rather an actual and express reservation of ground water rights by the 1891 Act.

However, it can be argued that the ground water law at the time was wrong and in conflict with the surface water laws. It is true that subsequent Utah water law eventually had to recognize that the surface water and ground water systems are interconnected and that ground water beneath the surface often becomes the supply for adjacent landowners and often is the supply for surface water. The law thus over time had to be changed to recognize that hydrologic fact. But, first the 1896 transfer of surveyed School Trust Lands at least set a priority date of January 4, 1896 for School Trust Land ownership of the ground water.[10] Any subsequent surface or ground water appropriations did not and could not appropriate the School Trust Land ground water rights that by express reservation and title transfer was appurtenant to and part of the land. Second, as is explained next, the 1894 Utah Enabling Act expressly repealed any federal or territorial laws that might somehow be interpreted to the contrary.

The pertinent sections of the 1894 Utah Enabling Act including Sections 6, 8, 12, and 20 are provided in the Appendix. Section 6, 8, and 12 describe and set aside the lands for the School Trust and state that those lands are expressly reserved for the funding of the schools of Utah. Then Section 20 repeals any prior federal law whether Congressional or Territorial that conflicts with Sections 6, 8, and 12. Section 20 reads.

> SEC. 20 That all acts or parts of acts in conflict with the provisions of this act, whether passed by the Legislature of said Territory or by Congress, are hereby repealed.

Thus, the Homestead laws including the 1866 and 1870 Homestead Acts and the 1877 Desert Land Act are expressly repealed in relation to the School Trust Lands thereby expressly

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[8] *Willow Creek Irrigation Company vs. Michaelson*, 21 Utah 248, 60 P. 943 (1900).
[9] Act of February 28, 1891, citation currently unknown.
[10] *United States v. State of Wyoming*, 331 U.S. 440 (1947).

canceling any severance of the ground water rights from the School Trust Lands that otherwise might could be argued.[11]

So, each School Trust Land patent authorized by the 1894 Utah Enabling Act, by express Congressional enactment, included as a part of the rights conveyed with the land, the right to use the ground water found beneath the land at no later than a January 4,1896 priority. Thus, the *Winters* Doctrine of implied federal reserved rights and subsequent court decisions finding lack of *Winters* Doctrine implied federal reserved rights for school trust lands in other States do not apply to the school trust lands of the State of Utah. The State of Utah School Trust has express acts of Congress that first reserve the ground water as part of the land and second preserve ground water rights for School Trust Lands in the State of Utah by express repeal of any laws that might be to construed the contrary.

Utah Water Law Expressly Protects the Prior Existing Rights of the School Trust Lands

As for the effect of Utah state water law, first the Utah State Constitution in Article XX, Section 2 declares that the School Trust Lands are school and institutional trust lands held in trust for the education of the children of Utah.

> **Article XX, Section 2. [School and Institutional Trust Lands.]**
> Lands granted to the State under Sections 6, 8, and 12 of the Utah Enabling Act, and other lands which may be added to those lands pursuant to those sections through purchase, exchange, or other means, are declared to be **school and institutional trust lands**, held in trust by the State for the respective beneficiaries and purposes stated in the Enabling Act grants.

As set forth above, that trust includes the ground water rights of the School Trust Lands. Eventually, in 1935, the Utah legislature changed Utah's law with respect to ground water. But, that 1935 law, which remains the law today, protects all prior existing ground water rights including those held by the School Trust. That law states:

> "All waters in this state, whether above or under the ground are hereby declared to be the property of the public, **subject to all existing rights to the use thereof.**"
> 105§100-1-1 Utah Code (1935); Utah Code Ann.§ 73-1-1 (2010).

Since the School Trust Lands owned prior existing ground water rights, the ground water rights of the School Trust Lands were not affected by the 1935 ground water law and all School Trust Lands continue to hold rights to use the ground water found beneath the surface of those Trust Lands. Further, by Utah Constitution Article XX, Sections 1[12] and 2, this law could not have affected the School Trust Lands ground water rights without amendment of the Utah Constitution.

[11] See *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142 (1935).
[12] Section 1 specifically excludes School Trust Lands from its definition of State Public Lands.

PERTINENT PORTIONS OF THE ACT OF CONGRESS, FEBRUARY 21, 1855
AN ACT TO ESTABLISH THE OFFICE OF SURVEYOR-GENERAL OF UTAH, AND TO GRANT LAND FOR SCHOOL AND UNIVERSITY PURPOSES

"Sec. 2. ***And be it further enacted,*** That when the lands in said [Utah] territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, **sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory, and in the States and territories hereafter to be created out of the same."**

"Sec. 3. ***And be it further enacted,*** That when the lands in said territory shall be surveyed as aforesaid, a quantity of land equal to two townships shall be, and the same is hereby, reserved for the establishment of a university in said territory, and in the State hereafter to be created out of the same, to be selected under the direction of the legislature, in legal subdivisions of not less than one half section, and to be disposed of as said legislature may direct."

PERTINENT PORTIONS OF THE UTAH ENABLING ACT, 1894

SEC. 6 That upon the admission of said State into the Union, sections numbered two, **sixteen,** thirty-two and **thirty-six** in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress; or other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby **granted to said State for the support of common schools,** such indemnity lands to be selected within said State in such a manner as the Legislature may provide, with the approval of the Secretary.

SEC. 8 That lands to the extent of two townships in quantity, authorize by the **third section of the act of February twenty-one, eighteen hundred and fifty-five**, to be reserved for the establishment of the University of Utah, are hereby granted to the State of Utah for university purposes, to be held and used in accordance with the provisions of this section; and any portions of said lands that may not have been selected by said Territory may be selected by said State.

SEC. 10. That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such land shall not be subject to pre-emption, homestead entry, or any other entry under the **land laws of the United States,** whether surveyed or un-surveyed, but shall be surveyed for school purposes only.

SEC. 12 That in lieu of the grant of land for the purposes of internal improvement made to new states by the eighth section of the act of September fourth, eighteen hundred and forty-one, which section is hereby repealed as to said State, and in lieu of any claim or demand by the State of Utah under the act of September twenty-eighth, eighteen hundred and fifty, and section twenty- four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands to certain states, which grant, it is hereby declared, is not extended to said State

of Utah, the following grants of land are hereby made to said State, for the purposes indicated, namely:

For the establishment of permanent water reservoirs for irrigating purposes, five hundred thousand acres; for the establishment and maintenance of an insane asylum, one hundred thousand acres; for the establishment and maintenance of a school of mines in connection with the university, one hundred thousand acres; for the establishment and maintenance of a deaf and dumb asylum, one hundred thousand acres; for the establishment and maintenance of a reform school, one hundred thousand acres; for establishment and maintenance of State normal schools, one hundred thousand acres; for the establishment and maintenance of an institution for the blind, one hundred thousand acres; for a miners' hospital for disabled miners, fifty thousand acres. The United States penitentiary near Salt Lake City and all lands and appurtenances connected therewith and set apart and reserved therefore are hereby granted to the State of Utah.

The said State of Utah shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act; and the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the Legislature of the State may provide.

SEC. 20 That all acts or parts of acts in conflict with the provisions of this act, whether passed by the Legislature of said Territory or by Congress, are hereby repealed.

ATTACHMENT 2

Aerial View showing the January 2005 flooding in the Escalante Valley

Earth fissures caused by land subsidence and subsequently enlarged by water erosion.

Figure 16, Beryl-Enterprise Area Ground Subsidence and Cracking

Source: Utah Geological Survey, 2005