BEFORE THE STATE ENGINEER, STATE OF NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES

***

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

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MOTION TO DISMISS FOR FAILURE TO JOIN UNITED STATES DEPARTMENT OF INTERIOR BUREAUS

COME NOW, the Confederated Tribes of the Goshute Reservation ("CTGR"), the Duckwater Shoshone Tribe, and Ely Shoshone Tribe (together the "Tribes"), and in accordance with the October 3, 2016 Interim Order on Pre-Hearing Scheduling, hereby submits this Motion to Dismiss the matter of SNWA Applications 53987 through 53992, inclusive, and Applications 54003 through 54021, inclusive, for failure to join the United States Department of Interior Bureaus in the present proceeding. In the alternative, the Tribes request the State Engineer to stay the present proceeding and take no action on the above-referenced water right applications until such time as the United States Department of Interior Bureaus are joined in this proceeding. This motion is supported by the Declaration of Rupert Steele, filed contemporaneously herewith, and the following points and authorities.

I. INTRODUCTION

In the December 10, 2013 Decision reviewing the Nevada State Engineer's March 22, 2012 ruling approving SNWA water right applications, Nevada State District Court Judge Estes remanded the matter to the State Engineer in part "to establish standards for mitigation in the

event of a conflict with existing water rights or unreasonable effects to the environment or the public interest." (December 10, 2013 Decision at pp. 2-3.) Specifically, Judge Estes correctly concluded that the existing Monitoring, Management, and Mitigation Plans ("MMM Plans"), which are required as a condition for SNWA water appropriations, lack objective standards as to when the mitigation will be required and implemented. For example, the State Engineer's ruling noted that if pumping has an adverse impact on the Swamp Cedars site sacred to the Tribes, SNWA could mitigate but failed to require a standard or trigger when that mitigation would be required. Judge Estes rejected the MMM Plans as inadequate and remanded this matter in part for a determination of objective standards for when mitigation is necessary. Judge Estes further found the MMM Plans lacking in detail as to how monitoring will be accomplished.

The MMM Plans are exhibits to two Stipulations for Withdrawal of (federal) Protests executed in 2006 and 2008 between SNWA and United States Department of Interior Bureaus ("DOI Bureaus"). As outlined in the MMM Plans, the DOI Bureaus are key members of the Executive Committee, Technical Review Panel, and Biological Working Group established to execute the responsibilities and activities outlined in the Plans. The Stipulations were entered to protect Federal Water Rights and Federal Water Resources, including Indian reserved water rights. The Stipulations further provide: "The DOI Bureaus and SNWA shall jointly explain or defend this Stipulation and Exhibits A and B to the State Engineer." The Stipulations (which incorporate the MMM Plans) cannot be amended, altered, or varied except by mutual written agreement of SNWA and the DOI Bureaus.

Judge Estes' remand to determine objective standards as to when mitigation must occur cannot possibly be accomplished without amending, altering, or varying the MMM Plans. Because written consent of the DOI Bureaus is required to amend the Stipulations and Plans, the

participation of the DOI Bureaus in this proceeding is required and necessary. In the absence of the DOI Bureaus participation, any amendment to the MMM Plans incorporated into the Stipulations would be legally invalid, and any objective standards established without the participation of the DOI Bureaus would be arbitrary and capricious. Moreover, setting standards affecting Federal Water Rights in the absence of the DOI Bureaus would violate the due process rights of the Tribal Protestants.

Now that the MMM Plans have been found to be legally flawed, the Stipulations entered to protect Federal Water Rights and Federal Water Resources are also flawed and should be terminated. To adequately protect Federal and Tribal interests, the DOI Agencies should join this proceeding. In their absence, this proceeding should be dismissed because SNWA cannot possibly meet the purpose of the remand from Judge Estes without the direct participation of the DOI Bureaus.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 1989, the Las Vegas Valley Water District (LVVWD) filed water rights applications in the Nevada State Engineer's (NSE) Office to appropriate public groundwater from four basins in eastern Nevada: Spring, Cave, Dry Lake, and Delamar valleys. The Southern Nevada Water Authority (SNWA) was formed after 1989 as a political subdivision and later acquired those water applications from LVVWD. The 1989 applications were to appropriate over 125,000 acre-feet of groundwater annually (afa) from the four basins. The SNWA thereafter proposed to construct and operate a pipeline to export that groundwater to Las Vegas, Nevada.

The Department of Interior Bureaus (the Bureau of Indian Affairs, the Bureau of Land Management, the National Park Service, and the Fish and Wildlife Service) (hereinafter "DOI Bureaus") filed timely protests to the granting of SNWA's water applications. The DOI Bureaus'

protests were filed to meet Federal obligations "to protect their state and federal water rights . . . and other water-dependent resources."

On September 8, 2006, DOI Bureaus and SNWA signed the "Stipulation for Withdrawal of Protests" (hereinafter "Spring Valley Stipulated Agreement"), withdrawing protests by the DOI Bureaus in exchange for SNWA's Hydrologic and Biologic "Monitoring, Management and Mitigation Plan for Development of Groundwater in the Spring Valley Hydrographic Basin Pursuant to the Application Nos. 54003 through 54021 by the Southern Nevada Water Authority" (the Spring Valley "3M Plan"). The 3M Plan (Exhibits A and B of the Spring Valley Stipulated Agreement) was an essential part of the Agreement. The Spring Valley Stipulated Agreement has been previously marked and admitted. For reference a copy is attached hereto as **Exhibit 1**.

The Goshute Tribal Chairman Rupert Steele found out about the Stipulated Agreement later during a meeting with the BLM. (Steele Decl. ¶ 12.) Neither the BIA nor any of the other DOI Bureaus had consulted with the Goshute Tribes regarding the Spring Valley Stipulated Agreement (Steele Decl. ¶ 12-16.)

From September 11 to 29, 2006, the NSE held the Spring Valley hearing for water applications 54003-54021. Following the hearing, the NSE approved applications in Spring Valley for 40,000 afa of groundwater, and the NSE approved an additional 20,000 afa for staged development over a ten-year period.

On January 7, 2008, DOI Bureaus and SNWA signed a "Stipulation for Withdrawal of Protests" for Delamar, Dry Lake and Cave Valley Hydrographic Basins (hereinafter "DDC Stipulated Agreement"), withdrawing protests by the DOI Bureaus in exchange for SNWA's "Hydrologic and Biological Monitoring, Management and Mitigation Plan for Development of

Groundwater in the Delamar, Dry Lake and Cave Valley Hydrographic Basins Pursuant to the Application Nos. 53987 through 53992 by the Southern Nevada Water Authority". The DDC Stipulated Agreement has been previously marked and admitted. For reference a copy is attached hereto as **Exhibit 2**. As with the Spring Valley Stipulated Agreement, the DOI Bureaus did not consult with the Goshute Tribes before signing the DDC Stipulated Agreement (Steele Decl. ¶ 6-12). In February of 2008, the State Engineer held a hearing on SNWA's water applications for Delamar, Dry Lake, and Cave Valley hydrographic basins. The NSE approved 18,755 afa to be pumped and exported from those three valleys.

Great Basin Water Network then challenged the NSE's grant of water rights to SNWA. On January 28, 2010, the Nevada Supreme Court in *Great Basin Water Network et al.*, v. *Nevada State Engineer and SNWA*, ruled that because "the 1989 water appropriation applications were not pending in 2003 . . . the State Engineer violated his statutory duty by failing to take action within one year after the final protest date."

On June 17, 2010, the Nevada Supreme Court issued an opinion that an equitable remedy was warranted. The Court determined that the "State Engineer must re-notice SNWA's 1989 applications and reopen the period during which appellants may file protests." The matter was remanded to the District Court with instructions to remand the matter further to the State Engineer to issue proceedings consistent with the Nevada Supreme Court's decision.

On October 18, 2010, the Nevada State Engineer issued a *Second Informational Statement Regarding Southern Nevada Water Authority Water Right Applications in Spring, Cave, Dry Lake, and Delamar Valleys*, identifying that republication of SNWA's applications were scheduled for February 2011, followed by a 30-day protest period and subsequent administrative hearings in October and November 2011.

Over the next eleven months and before the new 2011 hearing, the DOI Bureaus again failed to meet their legal obligation to consult with the Goshute Tribes regarding the Stipulated Agreements.

During October and November 2011, the NSE held a six-week hearing on SNWA's 1989 water rights applications. The CTGR participated in the administrative hearing along with the Ely Shoshone Tribe and the Duckwater Shoshone Tribe and numerous other protestants. Incredibly, the DOI Bureaus were completely absent from the hearing. Both the Spring Valley Stipulated Agreement and DDC Stipulated Agreement were entered as exhibits for the hearing (NSE's 2011 Exhibits 41 and 80.)

On March 22, 2012, the Nevada State Engineer issued a decision on the SNWA water applications. The State Engineer provided four separate rulings: (1) Spring Valley Ruling #6164 appropriated 61,127 afa; (2) Delamar Valley Ruling #6167 appropriated 6,042 afa; (3) Dry Lake Valley Ruling #6166 appropriated 11,584 afa; (4) Cave Valley Ruling #6165 appropriated 5,235 afa.

On April 19, 2012, the Tribes appealed alongside Great Basin Water Network and the LDS Church. In December 2013, the Nevada District Court reversed the State Engineer's decision, which concluded:

a. The addition of Millard and Juab counties, Utah in the mitigation plan so far as water basins in Utah are affected by pumping water from Spring Valley Basin, Nevada;

b. A recalculation of water available for appropriation from Spring Valley assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time;

c. Define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious . . . and;

d. Recalculate the appropriations from Cave Valley, Dry Lake and Delamar Valley to avoid over appropriations or conflicts down-gradient, existing water rights.

(December 10, 2013 Decision at p. 23.) A copy of the Court's decision is attached as **Exhibit 3**.

In January 2014, the SNWA and the NSE appealed that decision to the Nevada Supreme Court. On February 6, 2015, the Nevada Supreme Court dismissed those appeals finding that it lacked jurisdiction over the lower court's order. "Insofar as the district court remanded this matter for the State Engineer to resolve the substantive issue," the Nevada Supreme Court ruled, "we conclude that the district court's order of remand was not an appealable, final judgment."

The current proceeding before the State Engineer is, in part, to address the Nevada District Court's ruling that the SNWA/DOI Bureaus MMM Plans are legally flawed and must have objective standards for determining when mitigation of adverse impacts is necessary.

III. ARGUMENT

A. Proceeding without the United States DOI Bureaus violates the plain terms of the Stipulations for Withdrawal of Federal protests.

In his December 10, 2013 Decision, Judge Estes explained at length his finding that the MMM Plans contain no objective standards as to when the mitigation part of the MMM Plans go into effect. (Decision at pp. 13-18.) The Court remanded the case back to the State Engineer to: "Define standards, thresholds or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious in Spring Valley, Dry Lake Valley, Delamar Valley." (Decision at p. 23.) Moving forward to attempt to establish "objective standards" for the MMM Plans without the DOI Bureaus violates clear provisions of the Stipulated Agreements.

First, the Spring Valley Stipulated Agreement provides: "The DOU Bureaus and SNWA shall ***jointly*** explain or defend this Stipulation and Exhibits A and B [the MMM Plans] to the State Engineer." (Exhibit 1 at p. 9) (emphasis added). The Stipulated Agreement states clearly that a defense or explanation of the Stipulation requires both SNWA and the DOI Bureaus.

Proceeding in the present hearing process before the State Engineer without the DOI Bureaus is a violation of this provision of the Stipulated Agreement.

Second, paragraphs 17 and 18 of the Spring Valley Stipulated Agreement State:

> 17. This Stipulation may be amended by mutual written agreement of the Parties.
>
> 18. This Stipulation sets forth the entire agreement of the Parties and supersedes all prior discussions, negotiations, understandings or agreements. No alteration or variation of this Stipulation shall be valid or binding unless contained in an amendment in accordance with paragraph 17.

(Exibit 1 at p. 12.) Under the plain language of the Stipulation, any amendment, alteration, or variation of the MMM Plans will require the signed agreement of the DOI Bureaus. Establishing "objective standards" for the MMM Plans is an amendment, alteration, and variation of the terms of the MMM Plans, which are exhibits to the Stipulations and incorporated therein by reference. Accordingly, proceeding in this current hearing process without the DOI Bureaus is a violation of the plain terms of the Stipulated Agreements.

Paragraph 19 of the Spring Valley Stipulated Agreement provides: "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, except that the Stipulation may be used in any future proceeding to interpret and/or enforce its terms." This current proceeding is a new proceeding not originally contemplated by the parties and the Stipulations should not be offered as evidence in support of the SNWA applications. In any case, the current proceeding is not to "interpret and/or enforce" the terms of the Stipulations. Rather, the purpose of the current proceeding is establish additional standards to amend the MMM Plans to conform to Judge Estes' December 10, 2013 Decision. Thus, use of the

Stipulated Agreements in this proceeding absent the consent of the DOI Bureaus is not permitted.

B. Where the DOI Bureaus play a central role in MMM Plan Executive Committee, TRP, and BWG, it is impossible to establish objective standards for mitigation or amend the MMM Plans in any reasonable way without the participation of the DOI Bureaus.

The remand order from Judge Estes requires amendment, alterations, and variations to the MMM Plans. The DOI Bureaus are a party to the Stipulations and primary members of the implementing mechanisms. Representatives from the DOI Bureaus are members of the Executive Committees, Technical Review Panels (TRP's), and Biological Working Groups (BWG's) established by the MMM Plans to implement their provisions. SNWA and the DOI Bureaus have competing interests. One party to an agreement cannot solely determine "objective" standards. Allowing SNWA to solely determine the objective standards for when mitigation will occur under the MMM Plans would be arbitrary and capricious. Judge Estes correctly observed that "even a cursory examination of the stipulation reveals that between SNWA, the Federal agencies and existing water right holders, the goals and motivations of each party will certainly conflict." (December 10, 2013 Decision at p. 17.). No other party can adequately represent the interests of the United Stated in protecting Federal Water Rights or Federal Resources threatened by SNWA's proposed groundwater pumping. The DOI Bureaus are indeed indispensable parties in the present proceeding to meet Judge Estes' order on remand.

C. Proceeding without the United States DOI Bureaus violates the due process rights of the Tribal Protestants and is inconsistent with the role of the federal government in fulfilling its trust responsibility to the Tribes.

Although the Nevada Rules of Evidence do not strictly apply in this proceeding, Nevada law dictates that the State Engineer's hearing rules must be reasonable. *See* N.R.S. 532.120. To be fair and reasonable, the process for amending the MMM Plans to establish objective

standards must include input from the DOI Bureaus, which are parties to the Stipulations and members of the Executive Committees, Technical Review Panels (TCP's), and Biological Working Groups (BWG's) established under each MMM Plan. Proceeding to establish "objective standards" under the MMM Plans without including the DOI Bureaus is a violation of the due process rights of the Tribes, which rely on the DOI Bureaus to protect Federal Water Rights, including the unadjudicated water rights of the Goshute Tribes.

It is also undisputed that the United States DOI Bureaus have a federal trust responsibility to safeguard the interests of the Tribal Protestants and unadjudicated Indian water rights within the Area of Interest impacted by the SNWA project. There is no dispute that the Goshute Reservation lies well within the Area of Interest for the proposed SNWA groundwater applications. If the United States agencies cannot be joined in this proceeding because of sovereign immunity, then this SNWA application review process should be dismissed or stayed until such time as the DOI Bureaus participate.

Although the Rules of Evidence do not strictly apply in this proceeding, constitutional principles of due process do governing this proceeding. *See United States v. Orr Ditch Co.*, 391 F.3d 1077 (9th Cir. 2004). The practice and procedure adopted by the State Engineer cannot conflict with basic due process protected by the United States and Nevada Constitutions. *Cf.* N.R.S. 532.120 ("The State Engineer may adopt regulations, not in conflict with law, governing the practice and procedure in all contests before the Office of the State Engineer.") The Nevada Supreme Court has recognized that judicial relief is available from a manifest abuse of discretion. *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 265 (Nev. 1979). The applicable standard of review of the decisions of the State Engineer presupposes the fullness and fairness of the administrative proceedings. *Id.* All interested parties must have had a full opportunity to be

heard, and the State Engineer must have clearly resolved all the crucial issues presented. When these procedures, grounded in basic notions of fairness and due process, are not followed, and the resulting administrative decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion, the Nevada Supreme Court has stated it will not hesitate to intervene. *Id.*

Reviewing the present absence of the DOI Bureaus in light of Nevada Rule of *Civil* Procedure 19 is instructive. NRCP 19 provides:

> NRCP 19 – JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION
>
> **(a) Persons to Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.
>
> **(b) Determination by Court Whenever Joinder Not Feasible.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

NRCP 19.

Determining whether a party should be joined under Rule 19 is a three-step process. *See EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005); *Glancy v. Taubman Ctrs.*,

Inc., 373 F.3d 656, 666 (6th Cir. 2004).[1] First, a court must consider whether the absent party is subject to mandatory joinder as a required party under Rule 19(a). The DOI Bureaus are arguably required to be joined in this proceeding since they voluntarily entered the Stipulations, which require that SNWA and the DOI Bureaus "jointly explain or defend" the Stipulations. *See Stipulation, SE Exhibit 41* at pg. 9. Second, if the absent party is a required party, the court must assess whether it is feasible to join that party (i.e. whether joinder of the absent party will deprive the court of the ability to hear the case). The Tribal Protestants assert that joinder of the DOI Bureaus is feasible. The Bureaus entered a Stipulation stating that they would jointly explain or defend the Stipulation to the State Engineer with SNWA. The State Engineer should provide notice of the purpose of this proceeding to the DOI Bureaus and invite their participation. It should be the responsibility of the Bureaus to determine whether to join or assert sovereign immunity as a defense to participation. Third, if the absent party cannot be joined, the court must analyze the Rule 19(b) factors to determine whether the court should continue without the absent party or dismiss the case because the absent party is indispensable. *Id.* In this case, if the United States cannot be joined, this proceeding should be dismissed because without their participation amendment of the MMM Plans to establish objective standards for mitigation is legally impermissible and practically impossible. Without the participation of the United States DOI Bureaus, the State Engineer's present proceeding cannot

[1] In most cases the defendant will initiate the compulsory joinder analysis by motion. See FED. R. CIV. P. 12(b)(7) (allowing a party to move to dismiss for "failure to join a party under Rule 19"). The court, however, may raise the issue itself *sua sponte* ("of its own accord"). *Glancy*, 373 F.3d at 676; *see Citizens Against Casino Gambling in Erie Cnty. v. Kempthorne*, 471 F. Supp. 2d 295, 312 (W.D.N.Y. 2007) ("[T]he issue of indispensability . . . is one that courts have an independent duty to consider *sua sponte*, if there is reason to believe dismissal on such grounds may be warranted."). 47. *See Glancy*, 373 F.3d at 66.

accomplish the purpose of the remand order from Judge Estes. *Cf. Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 879 (9th Cir. 2004).

A central part of the Tribal Protestants argument in this motion is that Federal Water Rights and Federal Resources under the MMM Plans cannot be adequately protected without the direct participation of the United States DOI Bureaus. In their absence, who is representing their interests? SNWA does not represent those interests. And it is not the role of Tribal Protestants to protect those interests. Finding otherwise would turn the federal trust responsibility on its head and would result in the unprecedented scenario of forcing Indian tribes to attempt to protect Federal Water Rights and unadjudicated tribal water rights in a State forum.

The federal statute known as the McCarran Amendment, 43 U.S.C. § 666[2], has been interpreted to allow the United States to be joined as a party in a State water adjudication proceeding involving unadjudicated Indian water rights. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 811-12 (1976). The joinder of the United States DOI Bureaus is necessary for a reasonable and fair proceeding to establish objective standards under the MMM Plans as ordered by Judge Estes.

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[2] **43 U.S.C. § 666 (a) Joinder of United States as defendant**

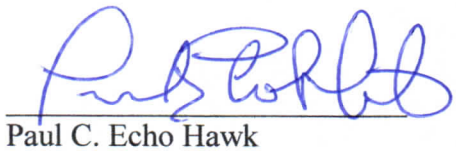
Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

IV. CONCLUSION

For the foregoing reasons, the Tribal Protestants assert that this proceeding should be dismissed for failure to join the United States DOI Bureaus. In the alternative, the State Engineer should stay the proceeding and invite the DOI Bureaus to participate.

DATED this 13th day of October 2016.

ECHO HAWK LAW OFFICE



Paul C. Echo Hawk

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION TO DISMISS FOR FAILURE TO JOINT UNITED STATES DEPARTMENT OF INTERIOR BUREAUS was served on the following counsel of record by depositing the same for mailing, at Pocatello, Idaho, with the United States Postal Service and addressed to the following:

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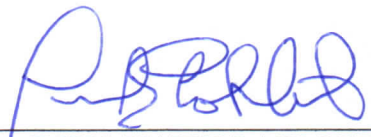
DATED this 13th day of October 2016.



For ECHO HAWK LAW OFFICE