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Concerns on the Snake Valley Water Settlement

The following is an outline of concerns of the Confederated Tribes of the Goshute Reservation (hereinafter "Tribe") in response to the proposed Snake Valley Water Settlement (hereinafter "settlement") between Utah and Nevada.

Position on the settlement

Executive and administrative precedence surrounding the reasoning of the settlement

Violation of Federal judicial precedence, treaties, and Federal Trust Responsibilities

Summary of Concerns

I. THE SETTLEMENT IGNORES THE CONFEDERATED TRIBES OF THE GOSHUTE RESERVATIONS RESERVED WATER RIGHTS.

For over a century, it has been understood federal law that Indian Tribes have rights to large, but often still unquantified amounts of water. When Indian reservations are created, natural resources, including water sufficient to satisfy the purposes of the reservation, are reserved automatically.[1] As a result, tribal reserved water rights represent an "exception to the general rule that allocation of water is the province of the states."[2] Although waters are open to appropriation under the laws of various Western states, such laws do not have jurisdiction over of federal reservations.[3] Unlike appropriative rights, Indian reserved water rights are not based on diversion and beneficial use, which are requisites to obtaining and maintaining a water permit under the appropriation system. Instead, under reserved rights, a sufficient amount of water is reserved to fulfill the purposes for which a reservation was established.[4] For further detail in these and other

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[1] *Arizona v. California*, 373 U.S. 546, 600 (1963); *Winters v. United States*, 207 U.S. 564 (1908)

[2] *Cohen's Handbook of Federal Indian Law*, Felix Cohen, Sec. 19.01(1)

[3] *Cappaert v. U.S.*, 426 U.S. 128, 143-145 (1976); *Fed. Power Commin v. Oregon*, 349 U.S. 435 (1955)

[4] *Cohen's* at Sec. 19.01(1); *Winters v. U.S.*, 207 U.S. 564

extremely consequential standing judicial precedence, treaties, and executive orders, please refer to Exhibit 1. The Tribes federally reserved water rights have been completely ignored in the settlement.

II. MOST LIKELY, THERE IS SIGNIFICANT INTERBASIN TRANSFER BETWEEN THE TRIBES CURRENT WATER SOURCE IN THE DEEP CREEK BASIN WITH THE SNAKE VALLEY BASIN.

To the aforementioned points, in conjunction with it exploratory technical field investments, the Tribe can claim a current and substantial interest in the water assets in the Deep Creek Basin, and by numerous technical accounts, by way of inter basin transfer trends, whereby the Deep Creek Basin has a reasonable propensity to serve as a significant recharge source for the Snake Valley Basin, the Tribe also claims substantial interest in Snake Valley allocations.

Insofar as this interest is reasonably consequential to the Tribes' well-being, especially in economically trying times, the Tribe is unsatisfied by the unchecked tenacity of the settlement to immediately allocate rights without sufficient technical data assuring the protection of the Tribes' interests in the water assets in an adjoined basin. And while the Tribe was provided a comment period, the Tribe impresses that it should have been consulted prior to any comment period, given its sound status in the past, as an interested party. It was not consulted or otherwise considered in the development of the settlement to date, and therefore feels the agreement is inherently premature.

Additionally, an authentic comment period requires the free availability of information surrounding the topic under scrutiny. To date, neither Utah nor Nevada will release the records, upon explicit request, deliberating basis for the development of the settlement, and so the Tribe is paralyzed in efforts to provide calculated and informed comment of the settlement.

III. THE SETTLEMENT VIOLATES UTAH'S OWN ADMINISTRATIVE PROCEDURE ACCORDING TO THE RULING ON THE TRIBE'S REQUEST FOR AN APPROPRIATION.

The Tribe finds the proposed settlement especially troubling because it provides for a 200,000 acre/foot allocation on technical grounds it deemed insufficient to allocate 50,000 acre/feet, only months before the agreement. On June 23, 2009, application number 17-217 (A77473) was effectively rejected, citing a lack of sufficient technical data for an immediate allocation. The settlement cites the exact same studies and data as the Tribe's request, but finds it sufficient to allocate four times the amount requested by the Tribe. The Tribe's requests for reconsideration has been accepted, but given the clandestine nature of the settlement's development in relation to the order of multiple congruent events, the Tribe believes that perhaps the reconsideration has merely been granted on political grounds.

Proposed Solution

Given the aforementioned elements, the Tribe respectfully requests the following:

- In a separate action, the State of Utah grant the Tribe's request for an immediate allocation of 20,000 Acre/Feet, representing a portion of the Tribe's federally recognized reserved water rights, which is consistent with the terms of the settlement.
- That the Tribe receive a graduated allocation of 5,000 acre/feet each additional year, not to exceed 50,000 Acre/Feet in total, at the same percentage-adjusted rates the settlement engages for testing and subsequent increase.

This agreement would allow the Tribe to protect its federally reserved water rights immediately while allowing the residents of the Deep Creek Basin to monitor any potential interbasin transfer.

The Tribe presumes, upon such an agreement, it has no apparent interest to further pursue any other applications or requests, and will immediately withdraw such items that exist to date. Further, it would guarantee all data and findings it earns from federal grant moneys, in turn made eligible by its state-affirmed water right, will be entirely and immediately available for the State of Utah to review as it pleases.

The Tribe feels such a request is reasonable and well within the realms of the technical and political position the state has taken with the settlement. It feels it presents a technically humble request and asks the state to make every effort to maintain an dialogue representative of genuine efforts to help the Tribe find resolve in its efforts to secure its nature resources interests.

EXHIBIT 1.

MEMORANDUM IN SUPPORT OF THE CONFEDERATED TRIBES OF THE GOSHUTE RESERVATIONS' CONCERNS AND PROPOSAL IN RESPONSE TO THE SNAKE VALLEY WATER SETTLEMENT

The federal government has a trust responsibility to Indian tribes to protect its resources which includes, but not limited to, protection of land, water, minerals, and children.[1] Specifically, water is clearly a resource covered under the federal trust responsibility protections. Congress has recognized the federal government's "trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources." *Western Water Policy Review Act of 1992,* Pub. L. No. 102-575, title XXX, Sec. 30002(9), *reprinted at* 43 U.S.C. Sec. 371. The courts have invoked the trust responsibility to limit federal administrative action regarding Indian tribes, particularly in the context of administration of tribal property by the Department of Interior. *Manchester Band of Pomo Indians v. U.S.,* 363 F. Supp. 1238, 1245-1247 ((N.D. Cal. 1973). The courts have likewise used the trust responsibility to limit federal agencies conducting any federal government action relating to Indian tribes and to hold agency action to a higher standard for dealings with Indian tribes or resources. *Nance v. EPA,* 645 F.2d 701, 711 (9th Cir. 1981) ("[i]t is fairly clear that any Federal government action is subject to the United States'

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[1] See *Cherokee Nation v. Georgia,* 30 U.S. 1, 17 (1831) (stating that the federal-tribal relationship is like that of a "ward to his guardian."); see also *Worcester v. Georgia,* 31 U.S. 515; See, e.g., Dep't of Justice Policy on Indian Sovereignty and Government-to-Government Relations with the Indian Tribes, available at www.usdoj.gov/otj/sovtrb.htm ("the Department shall be guided . . . by the United States' trust responsibility in the many ways in which the Department takes action on matters affecting Indian tribes"); 25 U.S.C. Sec. 458cc (Secretary of the Interior must encourage tribal self-governance by entering into agreements with tribes "consistent with the Federal Government's laws and trust relationship to and responsibility for the Indian people"); 25 U.S.C. Sec. 3701 (stating that "the United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes"); 25 U.S.C. Sec. 4043 (Special Trustee for American Indians must create a plan to "ensure proper and efficient discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians"); 25 C.F.R. Sec 225.1 (Secretary of the Interior "continues to have a trust obligation to ensure that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any minerals agreement); 20 U.S.C. Sec. 7401 ("[i]t is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children").

fiduciary responsibilities toward the Indian tribe"); *Paravano v. Babbitt,* 70 F.3d 539, 545 (9th Cir. 1995). Through many acts of Congress and numerous decisions of the United States Supreme Court, the federal government "has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 297 (1942). The standards of duty required of the United States government and its agencies as a trustee for tribes is "not mere reasonableness, but the highest fiduciary standards." *Menominee Tribe v. United States*, 101 Ct. Cl. 10, 19-20 (1944). Therefore, the federal government and its agencies must be thorough and vigilant when it comes to protecting and advocating for tribes and tribal resources.

The majority of Indian tribes are not utilizing, to the full extent, their legal entitlement of reserved water rights. "For political and institutional reasons, the United States has failed to secure, protect, and develop adequate water supplies for many Indian tribes." *Cohen's*, at 1221 (citing National Water Comm'n, *Water Policies for the Future: Final Report to the President and to the Congress of the United States* 474-475 (1973) (stating that "In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations it set aside for them is one of the sorrier chapters.")).

One important factor of the federal governments failure to protect Indian water rights is money. *Id.* Another factor is the impact of the Endangered Species Act (ESA), 16 U.S.C. Sec. 1531 et seq. *Id.* The ESA requires that before a federal agency authorizes, funds, approves or undertakes an activity that may adversely impact a threatened or endangered species or critical habitat, the Fish and Wildlife Service, or the National Marine Fisheries Service must determine the biological impacts of the proposed action. *Id.* Such impacts are assessed against a baseline of existing activities that already have an impact on the species. *Id.* Indian water rights, even if adjudicated or awarded as part of a settlement act, are not included in the baseline unless such

water rights are in actual use, which few tribal reserved rights are. Since vested or perfected non-Indian water rights form a part of the baseline, then the exercise of senior but unvested tribal water rights could be prohibited because of potential impacts on threatened or endangered species or habitat, while junior non-Indian rights are permitted to continue because they are part of the existing baseline. *Id.* This can pose a serious problem for unvested, but legally sound tribal reserved rights.

Another reason for the federal government's failure to develop and protect Indian water rights is due to conflicts of interest. The Department of the Interior is responsible for advancing and protecting the interests of the Indian tribes and for representing a variety of public interests in land and resources, which often compete with Indian water rights interests. *Id.* at 1223. However, when Congress represents both tribal and competing federal interests in water, such dual representation does not breach the federal trust responsibility of the tribe. *Nevada v. U.S.*, 463 U.S. 110, 135 (1983). In Nevada, which involved a conflict of interest, the Supreme Court Stated:

> It may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this...the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent.

463 U.S. 110, 128 (1983). Therefore, if a tribe does not trust the federal government to adequately promote its interests, tribes can intervene in the water appropriation litigation. *White Mountain Apache Tribe v. Hodel*, 784 F.2d 9221, 924-925 (9th Cir. 1986); *New Mexico v. Aamodt*, 537 F.2d 1102, 1106 (10th Cir. 1976). In light of the above, the Tribe will have to determine whether the United States can adequately fulfill its fiduciary responsibility toward the

Tribe regarding its reserved water rights and utilize that decision in how to proceed.

A. "Winter's Doctrine" Protects Tribal Reserved Rights

The vast majority of tribal rights to water arise under the implied reservation doctrine first promulgated in 1908 in *Winters v. United States*, 207 U.S. 564 (1908) *Cohen's,* at 1171. In *Winters v. United States*, the United States Supreme Court ruled that tribal right to water was impliedly reserved in the agreement establishing the reservation. *Winters,* at 565. The policy of confining Indian tribes to reservations implied that the tribes would have the means, including water, to fulfill the federal government's purpose of transforming them to hunters and gatherers to an agrarian, pastoral people. *Cohen's*, at 1172. The creation of the reservation impliedly reserved water rights. *Winters v. U.S.*, 207 U.S. 564. This reserved water right vests on the date that Congress reserves the land, *Arizona v. California*, 373 U.S. 546, 600 (1963); and remains regardless of non-use. *Hackford v. Babbit*, 14 F.3d 1457, 1461 (10th Cir. 1994). Therefore, pursuant to the "Winters Doctrine" Indian tribes, at the time their Congress reserved their lands, had enough water set aside by Congress for their present and future needs, and that those water rights are reserved in order to carry out the purposes for which the lands were set aside; and that such rights are paramount to water rights later perfected under state law. *Winters v. U.S.,* 207 U.S. at 576-577; see also *Arizona v. California,* 373 U.S. 546, 600-601 (1963).

Winters and *Arizona* established that Indian reserved rights to water are determined by federal, not state, law. *Cohen's*, at 1174. Indian rights and interests in property are set forth and protected by federal law and state jurisdiction over Indian property interests within Indian country is preempted unless expressly authorized by Congress. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 667, 670 (1974); *Johnson v. M'Intosh,* 21 U.S. 543; *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S 251 (1992) (however, see

analysis regarding McCarran Amendment, sec. I (2), *supra*. In fact, Congress has expressly recognized that state law is preempted regarding Indian water rights. 43 U.S.C. Sec. 371; 25 U.S.C. Sec. 1322(b): 28 U.S.C. Sec. 1369(b).

Winters and *Arizona* also established that the substance and scope of tribal water rights were determined by federal law. Other courts have also held that tribal water rights are "defined by federal, not state law." *U.S. v. Adair,* 723 F.2d 1394, 1410-1411 & n. 19 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985); *U.S. v. McIntire,* 101 F.2d 650, 654 (9th Cir. 1939); *Arizona v. San Carols Apache Tribe,* 463 U.S. 545, 571 (1983); *Colo. River Water Conservation Dist. V. U.S.*, 424 U.S. 800, 813 (1976).

Implicit in the Winters Doctrine is that the exercise of tribal water rights has the potential to "disrupt" non-Indian water users because tribal reserved rights arise under federal law, and because they are often put to actual use after state appropriation rights are established. The impact on junior state appropriators, however, cannot operate to divest tribes of their federal water rights. *Cohen's*, at 1175. In the *Winters* case, the non-Indian appropriators on the Milk River had been using the water for irrigation for some years prior to the tribal use, however the Court held that the tribes' use was senior to, or had priority over, the junior state-law rights, and that the tribal rights could be asserted even though it would deprive the non-Indian irrigators of the water they had been using and on which they had been relying. *Winters v. U.S.,* 207 U.S. at 568-569. It is clear then, that "[f]rom its inception, then, the *Winters* doctrine contemplated that junior non-Indian users could [be forced to] forfeit their water [rights] when tribes asserted their reserved rights." *Cohen's*, at 1175. The impact on state water users is not a factor in the determination or scope of the federal law right to an implied reservation of water. *Colville Confederated Tribes v. Walton,* 752 F.2d 397, 405 (9th Cir. 1985); *New Mexico v. Aamodt,* 537

F.2d 1102, 1113 (10th Cir. 1976). In addition to the superiority of federal law, the Supreme Court in *Arizona* established that water is impliedly reserved to fulfill the purposes of the Indian reservations regardless of how those reservations were established. Therefore, reservations created by executive order or statute have the same water rights as those established by treaty or agreement. *Cohen's*, at 1176.

B. Date of Priority

Priority is arguably the most important element of the doctrine of prior appropriation. Western appropriation rights are ranked in chronological order, from the most senior to the most junior according to their priority dates. *Cohen's,* at 1179. First in time, first in right is the principle used by the court systems in quantifying water rights in the West and guarantees that in times of shortage, senior appropriators receive the full amount of their right before junior appropriators receive water from the same system. See *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S.800, 805 (1976). Indian tribal water rights are affected by the date of priority. In order to mesh Indian water rights with the appropriation system used in the West, tribal reserved rights require priority dates to establish their seniority.

The priority date of tribal water rights depends on the type of water right involved and whether the use of the water existed before the establishment of the reservation. If water was reserved for uses or purposes that did not exist before the reservation was established, the priority dates is the date the reservation was established (whether the reservation was established through treaty or executive order). However, if water was reserved to continue an aboriginal practice, then the priority date is time immemorial. *Cohen's,* at 1179.

As a result, there are differing dates that the Goshute Tribe may use to determine the tribal priority date for *Winters* water rights including the date the Treaty with the specific tribe was signed or time immemorial.

Treaty Date

One scenario on which the Goshute Tribe could base its priority date is the treaty date, which is October 12, 1863. The Treaty with the Shoshoni-Goship (also known as the Treaty of Peace and Friendship or the Treaty of 1863) was entered into between the United States government and the Goshute Tribe in 1863.

Utilizing the priority date of 1863 based on the Tribe's treaty would give the Tribe water rights senior to any user in the Valley.

The *Winters* case ruled that the tribal right to water was impliedly reserved in the agreement establishing the reservation. The Treaty with the Shoshoni-Goship upon which the Tribe would base its priority date was a treaty of peace. The treaty did not formally create a reservation, however, it laid out, in detail, the "boundaries of the country claimed and occupied" by the Tribe and made a promise for a reservation to be formally established in the future.

Although the treaty did not formally create the reservation, it is still quite likely that the Tribe could date its priority back to the treaty date rather than the Executive Order date. This is because courts have held that *Winters* rights have a priority as of the date the United States *promised to create a reservation*, not the date on which the reservation boundaries were finally delineated. *State ex rel. Martinez v. Lewis,* 116 N.M. 194, 861 P.2d 235 244 (N.M. App. 1993) (hereinafter "*Martinez*"). In the *Martinez* case, the treaty at issue was a peace treaty, which did not directly involve the transfer of any land but which contained a promise of a future reservation. In holding that the Tribe's water rights could hold the treaty priority date, the Court

stated that "[a]ny contrary holding would be a crabbed interpretation of the dealings between the Indians and the United States, an interpretation the weight of authority teaches us to avoid . . . [and] the very *Winters* doctrine upon which Indian water rights are based." *Id.* at 244. Therefore, under *Martinez,* a peace treaty, or a treaty that promises to create a reservation but does not actually do so, is sufficient to secure a priority date according to the date of such treaty.

Like the treaty in *Martinez,* the Treaty with the Shoshoni-Goship was also a peace treaty. In addition to being a peace treaty it also delineated the boundaries in which the Goshute Shoshone Tribe was to reside and made a distinct promise of a future reservation. The Treaty with the Shoshoni-Goship states that the "boundaries of the country claimed and occupied" by the Tribe are "[o]n the north by the middle of the Great desert; on the west by Steptoe Valley; on the south by the Tooedoe or Green Mountains; and on the east by Great Salt Lake, Tuilla, and Rush Valleys." *Treaty with the Shoshoni-Goship,* Article 5. The Treaty further makes a promise of a formal reservation: "[t]he said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life which they now lead, and become settled as herdsmen or agriculturists, he is hereby authorized to make such reservation for their use." *Id.* at Art. 6. The treaty also refers to the Tribe as "hunters or herdsman." *Id.* at Art. 7. Further, regarding the treaty, the Tribe has stated the following:

> October 12, 1863, Tabby, Autosome, Tints-pa-gin and Harry-nap, the designated chiefs of the Shoshone-Goship Tribe, signed a "Treaty of Peace and Friendship" at Tale (Tooele) Valley. This treaty required that we give up our wandering and live on a reservation and that the Government would compensate us for the destruction of game. The treaty was ratified by Congress and signed into law on January 17, 1865 by President Abraham Lincoln. The federal government and Mormon Church organized Indian farms for our people near Ibapah, Utah. We farmed and adopted much of the white mans culture, some of us even adopted his religion. A permanent reservation was established south of Ibapah in 1914.

http://www.goshutetribe.com. It is clear then, that although the treaty did not formally designate the legal boundaries of the Reservation, that it established general reservation boundaries to which the tribe was confined and that it contemplated that the Tribe would convert to an agricultural society, including agriculture, irrigation, and herding, and made the promise of a future reservation. Under *Martinez*, therefore, the Goshutes have a strong argument that its priority date begins on the treaty date.

Further, the Indian law canons of construction, which require all agreements, treaties, statutes and executive orders to be construed liberally in favor of tribes and also require any ambiguities in a treaty or other agreement or law to be construed in favor of the Indians, support a treaty priority date.

Time Immemorial

Another scenario by which the Goshute Tribe could measure its priority date is under the doctrine of time immemorial. Tribal water rights reserved for purposes that predate the creation of the reservation, such as aboriginal uses, carry earlier priority dates. Many traditional or aboriginal tribal uses, practices and customs required water and if such uses, practices and customs were confirmed by the document that created the reservation, the right to water for such purposes continues with a priority date of time immemorial. *U.S. v. Adair,* 723 F.2d 1394, 1414 (9th Cir. 1983); *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754, 764 (Mont. 1985). For example, water reserved to maintain fisheries for tribes historically engaged in or dependent on fishing has a priority date of time immemorial.

Priority Date Assessment for Utah and Nevada

a. Utah

Although Utah began keeping records of its surface water rights in 1903 and ground water rights in 1935, water used before such dates can be established by filing a "diligence claim" with the Utah Division of Water. http://www.waterrights.utah.gov/ wrinfo/default.asp. Many of the rights held by current water rights' users in the Deep Creek Valley date back to 1880. However, the Tribe's treaty predates many of the water rights for the ranchers in the deep creek valley.

b. Nevada and Southern Nevada Water Authority

The Nevada Division of Water Resources is responsible for administering and enforcing Nevada water law, including the adjudication and appropriation of groundwater and surface water in the state. The administrative head of this division is the State Engineer, whose office was created by the Nevada Legislature in 1903. The purpose of the 1903 legislation was to "account for all of the existing water use according to priority." http://water.nv.gov/ Water%20Rights/Water%20Law/state_role.cfm.

The State Engineer's Office was established and began issuing permits in 1903. *Email from Robert H. Zeisloft, P.E., Section Chief, Surface Water and Adjudication Sections, Nevada Division of Water Resources to Beth Parker, Goshute Tribal Attorney*, June 1, 2009. However, "claims of vested rights continue to be filed with [the] office even today. These are filed to establish "claims" on the use of water prior to 1903 for surface water sources, and are just that, claims, until the particular source is adjudicated." *Id.*

The 1903 act was amended in 1905 to set out a method for appropriation of water not already being put to a beneficial use. It was not until the passage of the Nevada General Water Law Act of 1913 that the Nevada Division of Water Resources was granted jurisdiction over all wells tapping artesian water or water in definable underground aquifers. The 1939 Nevada

Underground Water Act granted the Nevada Division of Water Resources total jurisdiction over all groundwater in the state." http://water.nv.gov/ Water%20Rights/Water%20Law/state_role.cfm.

The Southern Nevada Water Authority (hereinafter "SNWA") is a coalition of five water conservancy districts in Southern Nevada. In April 2007, Nevada State Engineer Terry Taylor authorized SNWA to pump up to 40,000 acre-feet of water annually from the aquifer that lies underneath Spring Valley, west of Great Basin National Park. SNWA also wants to take groundwater out of Snake Valley, on the Utah-Nevada border and pump the water through a 285-mile pipeline to southern Nevada. SNWA had requested 91,000 acre-feet annually.

The Goshute Tribe has and continues to oppose SNWA's proposals because of the likelihood that SNWA's actions would have a negative impact on the Tribe's reserved rights to water. On January 18, 2008, the Goshute Tribe sent a formal request to the BLM seeking cooperating agency status in the BLM's Environmental Impact Statement ("EIS") of SNWA's proposals. The Bureau of Land Management denied the Goshute's request to become a cooperating agency. In affirming the decision of the Nevada BLM Director, the Interior Board of Land Appeals stated that a decision granting or denying a request to become a cooperating agency under NEPA is within the discretionary authority of the lead agency (BLM). It also stated that although the United States owes a general trust responsibility to Indian tribes, this responsibility does not impose a duty beyond complying with applicable statutes and regulations and that even though Goshute Reservation's groundwater may be affected by the project, such effects do not give Goshute jurisdiction by law.

Because of the BLM's refusal to allow the Tribe to participate as a cooperating agency,

the Tribe is prepared to take the following steps. First the Tribe will comment, during the comment period, on all possible aspects of the Draft EIS. The Tribe will then file a motion to reconsider with the Interior Board of Land Appeals. If the Tribe's request is denied again, then it is prepared to seek judicial review.

Currently, SNWA is on a timeline to miss a Scheduling Order deadline. On October 28, 2008, the Nevada State Engineer issued Interim Order No. 2 and a Scheduling Order which set the date for the public hearing on SNWA's applications to appropriate groundwater in the Snake Valley for September 29, 2009. As part of the Scheduling Order, SNWA was supposed to develop a hydrologic groundwater model and present specific results of that model to the State Engineer. Concurrently, SNWA has been working with the BLM to prepare an EIS (to which the BLM denied the Tribe cooperating agency status). SNWA wants to address the model and the EIS at the same hearing. However, SNWA has stated that it will not be able to complete the modeling effort, which was supposed to be completed by June 19, 2009 so it could be used in the September hearing. As a result of its failure to meet the deadline, SNWA is requesting an additional year to allow it to complete modeling efforts. *Ltr. From Kay Brothers, Deputy General Manager, Engineering and Operations of SNWA to Jason King, Acting State Engineer, State of Nevada*, March 30, 2009.

Now that the June 19, 2009 deadline has passed, the Tribe should request that SNWA's application for groundwater in the Snake Valley be denied due to SNWA's failure to comply with the Scheduling Order.