Water Keepers
7143 Gardenvine Avenue
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October 11, 2011

Penny Woods, Project Manager
Bureau of Land Management
Nevada Groundwater Projects Office
Nevada State Office
P.O. Box 12000
Reno, Nevada, 89520-0006
By fax to 775-861-6689

Re: Clark, Lincoln, and White Pine Counties Groundwater Development DEIS

Dear Penny,

Thank you for the opportunity to comment on the Environmental Impact Statement.

Before any project and project related applications on BLM lands may be considered, the Federal Land Policy Management Act of 1976 (FLPMA), 43 USC 1701 et seq., requires the adoption of water right project including public involvement, and right-of-way regulations. It is not permissible to use a National Environmental Policy Act (NEPA) process as a substitute for, in the absence of, or in lieu of FLPMA regulations. In order for the project to go forward in the manner required by FLPMA, that is, in a responsible manner, the necessary regulations must be adopted.

FLPMA requires BLM to have an inventory of the affected lands that is suitable for the purposes of this project, but this inventory is incomplete and missing, and without this inventory and baseline description, it is impermissible for the project to proceed under both FLPMA and the National Environmental Policy Act

Absent the necessary inventory of all valleys and other lands affected by the project, this project cannot proceed.

> The Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern. This inventory shall be

> kept current so as to reflect changes in conditions and to identify new and emerging resource and other values. The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands. 43 USC 1711(a)

Past efforts to inventory BLM lands on the scale necessary have been broad surveys and are well known to be incomplete. It is quite literally true that we do not know what is on these lands, but we do know, for instance, that new plant species are being identified in the deserts on a regular basis.

FLPMA requires regulations that do not exist

BLM has not established rules and regulations regarding the criteria to be used for making determinations on water rights applications or for public involvement in right-of-way and other application processes necessary for the project. 43 USC 1701(a)(5), 1702(d). 1712(f), 1739(e) "It also requires the Secretaries to issue regulations specifying criteria and procedures to be used." House Report No. 94-1163, 1976 U.S. Code Congress and Administrative News, page 6175 at page 6195.

Instead, BLM appears to rely on the NEPA process for public input into its decisions on solar projects, on project rights-of-way decisions, and so on. This is a misunderstanding of and abuse of NEPA. The purpose of a final NEPA document is to provide the public with information they need to make informed recommendations to decision makers on the decision to grant, deny or modify an application. "Plaintiffs correctly assert that Congress has mandated implementation of the public participation provisions by regulation, leaving no discretion to the agency." Natural Resources Defense Council v. Jamison (1992) 815 F. Supp. 454, 468. Further, without regulatory criteria for the project decisions that are established through the Administrative Procedure Act, a significant basis on which to base an appeal is absent.

BLM/Department of Interior, the National Park Service/DOI, Bureau of Reclamation/DOI, U.S. Forest Service, Burueau of Indian Affairs, U.S. Fish and Wildlife Service, U.S. Geological Survey, Nellis Air Force Base, Army Corps of Engineers, Advisory Council on Historic Preservation, and any other federal agencies need to adopt regulations setting forth principles of coordination between them with respect to this project and public involvement.

For comparison, see Mountain States Legal Foundation v. Anrdus (1980) 499 F. Supp. 383, 395-396. "The confusion as to who exercises the real authority and discretion with respect to public lands and on what basis such discretion and authority are exercised could, to a large degree, have been avoided had the

Secretaries enacted rules and regulations governing their policies in these regards." Id., 396.

"The regulations required by FLPMA are even more extensive than those required by NFMA..." Dana and Fairfax, Forest and Range Policy, page 341, referring to the National Forest Management Act of 1976.

The water rights project and the corridor coupled with are impermissible uses inconsistent with multiple use

Multiple uses must be protected on BLM managed lands unless a specific use conflicting non-multiple use is identified in statute.

In its 1976 enactment of FLPMA, Congress specifically identified mining, grazing, and wilderness as uses that need not meet the multiple use standard. Congress did not specify water supply or groundwater production. While transportation corridors are addressed in FLPMA, a corridor project tied to a project that will remove water affecting public lands, federal and tribal water rights including federal reserved water rights appear be illegal.

Projects totally eliminating one or more designated uses must be reported to Congress

The project will eliminate one or more FLPMA principal or major uses that are defined as grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation and timber production (43 USC 1702(l)), and must be reported to Congress. 43 USC 1712(e). "The conferees adopted the House provisions for referral to Congress and possible veto of certain management decisions excluding public lands from one or more principle uses." House Conference Report No. 94-1724, 1976 U.S. Code Congress and Administrative News, page 6175 at page 6229.

To the extent that the project is inconsistent with BLM plans or require amendment of BLM plan, they are impermissible

BLM management decisions must implement land use plans. 43 USC 1712(e).

The absence of necessary regulations means that each BLM field office involved in the project will be inventing or reinventing the public involvement process in solar and right-of-way and other decisions, as well as the criteria to use in making solar project decisions; fully adequate financial assurances must be mandated

With no common criteria for project right-of-way and other decision-making and for public input into the processes, the lowest common regulatory denominators and developer district shopping can be expected.

The problem of individualized field office permit operation is currently demonstrated even within the same field office. Water Keepers sought involvement in project-related monitoring applications. Our first visit was successful with the employee handling right-of-way permits in question who was then switched to other duty. The new assigned staffer diligently went through the process of reinventing a process of that led to reduced public access and that was marked by conflicting statements from another staffer.

The DEIS must define, explain and review the applicability of federal public trust doctrine to the project

The Secretary of Interior is bound both by statutory duties and the public trust to protect public lands. Knight v. United States Land Association 1423 U.S. 161, 181 (1891).

The PEIS project water rights and right-of-way permit actions cannot be approved by BLM until it has defined and used its public trust authority to protect the ground and surface water resources, and the resources, fish and wildlife, and other multiple uses that are dependent on the waters that are in the project areas and other areas that may be affected by projects.

A thoroughgoing analysis of the application of the public trust doctrine to federal lands is in Law Professor Hope Babcock's article, "Grotius, Ocean Fish Ranching, and the Public Trust Doctrine: Ride 'Em Charlie Tuna" 26 Stanford Environmental Law Journal 3, at pages 54-65. (2007). Babcock refers to the analysis by Cathy Lewis in support of use of the federal public trust,

> [B]ecause federal statutes have not "wholly occupied" the field of water resources management and that "the finding of a duty on the part of a federal agency is entirely appropriate and a proper compliment to existing state law where the threatened harm is not addressed by a state resources protection statute. Babcock Footnote 272.

Felix Smtith, who has over 50 years of experience working on water management, fish and wildlife issues and who is retired from the U.S. Fish and Wildlife Service, has written to describe the public trust in water (including water quality) as a public trust in fish, other aquatic life and wildlife of those waters. He quotes the California Supreme Court in People v. Truckee Lumber Co. (116 Cal 397 -1897) regarding state ownership of wildlife resources, "The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state ... and the right and power to protect and preserve such property for the common use and benefit..." Smith notes that while the

state owns the fish resources in its waters in trust for the benefit of the people and future generations,

> Under the "Federal Endangered Species Act (FESA) - 1973, as amended, federal agencies are required to help restore and protect listed species/populations. Federal agencies are prohibited from carrying out activities or programs that would adversely affect critical habitat/ecosystems of endangered or threatened species. Preserving habitat/ecosystems for endangered species also benefits other species of that ecosystem. The conservation of endangered species requires the preservation, restoration and protection of suitable habitat for the long term. Felix E. Smith, Area of Origin Protection: Our Fisheries and Other Public Trust Interests May 10, 2010. Paper available on request.

BLM was first created by Executive Order in 1946 and gained statutory existence and authority for the first time in FLPMA in 1976. The project that the Solar PEIS addresses, and BLM management of earlier Solar and other right-of-way projects, suggests that BLM is operating the PEIS and existing solar projects by the seat of the pants. This is, of course, old news. "Most frustrating still, however, is the lack of support within the Department of Interior for the revitalization of BLM." Dana and Fairfax, Forest and Range Policy (1980), page 344.

<u>The DEIS comment period should be reopened until after the close of the comment period for the Nevada State Engineer hearing on Dry Lake, Delamar, Cave and Spring valleys that is underway at this time</u>

New information is being presented at the hearing through witnesses and cross-examination, and applicant and protestant information is being presented that responds to information in the DEIS and to comments made for the DIES.

<u>The EIS needs to include a complete listing of all applications to BLM related to the project</u>

A listing of all applications made to BLM including to any of its offices that are for or relating to the project by any applicant needs to be in the EIS, including any that have been withdrawn. The project, application date, type of NEPA document, application and NEPA disposition, current status and office location where the file may be reviewed and procedures to review them need to be on the list. These applications are part of the project.

The office locations where all such future applications may be viewed and the procedures to view them should also be in the EIS.

<u>The DEIS should be revised and recirculated for comment</u>

New information has come in and is coming in.

Sincerely,

Michael Garabedian, President
B.S. Forestry and Conservation
916-719-7296