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REC'D - BLM - NSO
9:00 AM
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October 1, 2012

Via Email and First Class Mail

Penny Woods, Project Manager
Bureau of Land Management
Nevada Groundwater Projects Office
Nevada State Office (NV-910-2)
P.O. Box 12000
Reno, Nevada 89520-0006

Re: Comments of the Confederated Tribes of the Goshute Indian Reservation On the Clark, Lincoln, and White Pine Counties Groundwater Development Project Final Environmental Impact Statement (FEIS)

Dear Ms. Woods:

On behalf of the Confederated Tribes of the Goshute Indian Reservation (Tribe), we submit these additional comments on the Southern Nevada Water Authority's (SNWA) Clark, Lincoln, and White Pine Counties Groundwater Development Project Final Environmental Impact Statement (FEIS). Counsel for the Tribe is authorized to state that the Duckwater Shoshone Tribe and the Ely Shoshone Tribe join in these comments.

The Bureau of Land Management's (BLM) responses to our previous comments are by turns both non-responsive and inadequate. We reiterate the Tribe's request that BLM: 1) Suspend this environmental review process until SNWA's water rights applications conclude, including any appeals; 2) Engage in formal, meaningful Tribal consultation with the Goshute Tribe on a government-to-government basis regarding the Tribe's cultural and water resources, including its federally reserved water rights; 3) Revise the Programmatic Agreement to ensure that Indian Tribes are afforded full decision-making authority with regard to their cultural resources, and those resources are adequately protected in accordance with both the letter and spirit of federal and Tribal laws; and, 4) Reinstate this environmental review process only after final information is available regarding the amounts of water SNWA may be authorized to pump, including more precise and accurate locations of wells and associated infrastructure. Should

BLM refuse to take these requested actions, BLM will have failed to take the “hard look” required by the National Environmental Protection Act (NEPA) and consideration of SNWA’s Right-of-Way (ROW) application must be postponed or it must be denied.

By aboriginal right and treaty guarantee, the Tribe has owned and occupied the lands encompassed by the proposed project since time immemorial. Whatever benefits the Project may provide to the City of Vegas cannot outweigh the destruction of the cultural resources and traditional ways of life of Indian people.¹ There are also fatal flaws with the timing of this requested review. It makes no sense to review ROW applications for a pipeline without knowing the amounts of water that SNWA will be authorized to pump or the approximate locations of the wells that it will be supplying. At this stage of the proposed project, BLM cannot make an informed and reasoned decision as the law requires. Moreover, without meaningful consultation, the Tribe’s cultural and water resources, including federally reserved water rights, are not likely to be adequately protected. Set forth below is an elaboration of the Tribe’s concerns. Our analysis shows unequivocally that the BLM has failed to comply with NEPA.

1. The Bureau of Land Management Has Failed to Acknowledge its Trust Obligation to the Tribe or Adequately Respond to the Tribe’s Argument that it Violated this Trust Duty

As the Tribe mentioned in its comments on the Draft EIS, BLM as a federal agency has a heightened duty to consult with federally recognized Indian tribes and protect Tribal resources. *See Seminole Nation*, 316 U.S. 286, 297 (“We have described the Federal Government’s fiduciary duties toward Indian tribes as consisting of ‘moral obligations of the highest responsibility and trust,’ to be fulfilled through conduct ‘judged by the most exacting fiduciary standards’”); *See Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995) (the federal trust responsibility “attaches to the federal government as a whole.”); *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 788 (9th Cir. 2006) (Because the federal government violated both NEPA and NHPA, it follows that it violated its minimum fiduciary duty to the Tribe). BLM completely fails to respond to this argument in the FEIS. BLM’s failure to respond to the Tribe’s comment, or recognize its federal trust obligation to protect Tribal resources, is unlawful. *See e.g. Klamath Water Users Protective Assn v. Patterson*, 204 F.3d 1206, 1213-14 (9th Cir. 1999), *opinion amended on denial of reh’g*, 203 F.3d 1175 (9th Cir. 2000), *cert. denied*, 531 U.S. 812 (2000)

¹ For the purposes of this Comment Letter, the term “cultural resources” includes without limitation the following: any place, object, burial, plant, animal, fish, water source, natural resource, or landscape determined by the Tribe to be culturally, traditionally, historically or religiously significant in accordance with Tribal law, custom and tradition. It also includes the use of those places, species, and resources.

(Bureau of Reclamation has duty to operate dam to comply with Tribal water requirements in order to fulfill trust responsibility to protect Tribal "rights and resources.").

The United States' trust responsibility arose long before the enactment of the federal environmental laws, and the trust duty imposes independent and separate obligations on the BLM to protect Tribal rights and resources. Moreover, NEPA "does not diminish the Department's original trust responsibility to Indian tribes or cause it to disappear." *See Island Mountain Protectors*, 144 I.B.L.A. 168, 185 (1998) (BLM was required to consult with the Tribes to identify, protect and conserve trust resources, trust assets, and Tribal health and safety). The BLM's failure to adequately evaluate and mitigate impacts to Tribal cultural resources, including impacts to water resources, reserved water rights, culturally significant plants and animals, traditional and cultural practices, and religion, is therefore unlawful. Simply put, the BLM has not acted in accordance with its fiduciary relationship to the Tribe as required by federal law. This failure has grave consequences for the future of the Tribe.

2. The Bureau of Land Management Has Failed to Engage in Meaningful Tribal Consultation As Required by Law or Adequately Respond to the Tribe's Consultation Concerns

The FEIS fails to adequately respond to the Tribe's concern that meaningful Tribal consultation has not occurred. BLM states that it initiated "government-to-government" consultation in 2007, and that its Tribal consultation efforts are "extensive" and "ongoing." *See FEIS "Comments and Responses to Tribal Governments"* at 23. This claim is unsupported by any documentation in the FEIS. Moreover, it directly contradicts the information available to the Tribe. According to Goshute Tribal leaders, the BLM has failed to engage in meaningful Tribal consultation with individual Tribal governments on a "government-to-government" basis. Merely including the term "government-to-government" consultation in the FEIS response does not transform a general, informal, public meeting or two into a government consultation with a Tribal government. As the Tribe mentioned in its previous comments, the BLM has failed to consult separately with individual Tribal governments as required by law.

The obligation to provide meaningful and timely participation for the public is heightened with regard to sovereign Indian tribes that enjoy a special status under federal law. *See Worcester v. Georgia*, 31 U.S. (6 Pet) 515, 559 (1832)("Indian tribes have inherent powers of self-government protected by federal law"); *Confederated Tribes & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466 (9th Cir.1984)(Holding that FERC violated its duty of Tribal consultation because the "consultation obligation is an affirmative duty"); *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 608 F.3d 592, 609-610 (9th Cir. 2010)

(Holding that early consultation with tribes is encouraged by the National Historic Preservation Act's regulations "to ensure that all types of historic properties and all public interests in such properties are given due consideration. . ."). The BLM failed to fulfill its enhanced legal obligation to consult with, and meaningfully consider the positions of, the Goshute Tribe and other Indian tribes that would be significantly affected by this Project.

Contrary to the FEIS's assertions, meaningful Tribal consultation has not occurred. Not one meeting between the Tribal Government of the Confederated Goshute Tribes and BLM has occurred to date. Informal meetings and informational conferences simply do not constitute formal government-to-government consultation. As we have previously informed BLM, formal government-to-government consultation must occur with the Goshute Tribal government during a formal Tribal Council session that includes, at the Tribe's discretion, its Tribal attorneys and appropriate Tribal staff. In order for "government-to-government" consultation to occur, consultation must be held with a quorum of the Tribal Council as the Tribe's governing body (or its duly authorized delegate). Furthermore, the Tribe must have advance notice that a proposed meeting is considered government-to-government consultation. *See* 36 C.F.R. § 800.2(c)(2)(ii)(C) (Consultation with Indian tribes pursuant to the NHPA "must recognize the government-to-government relationship between the Federal Government and Indian tribes").

The consultation requirement is an ongoing duty. This makes sense, because meaningful consultation cannot occur in an information vacuum. For example, should SNWA obtain the right to extract groundwater, BLM must immediately consult with the Tribe once it receives information regarding the proposed location of wells and associated infrastructure. BLM must be required, as Trustee and in furtherance of both the letter and spirit of the law, to consult with the Tribe on a government-to-government basis as new information arises that may have significant impacts on Tribal cultural resources. Only the Goshute Tribe can inform the BLM whether a proposed well site, or associated infrastructure, may infringe on its cultural resources or traditional, ceremonial and religious practices. Without formal, ongoing Tribal consultation, significant, adverse impacts to Tribal cultural and water resources cannot be avoided or mitigated as required by law. *See South Fork Band Council Of Western Shoshone Of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) ("The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided")(internal citation omitted).

To comply with federal law, BLM must engage in ongoing, meaningful government-to-government consultation with the Tribal government regarding Tribal cultural and water resources, including its federally reserved water rights. The BLM's violation of its consultation obligation led to the agency's failure to reasonably consider, evaluate, and mitigate impacts to

Tribal resources and Tribal culture. Should the project move forward, BLM must consult with the Tribe on an ongoing, formal basis in order to fulfill its enhanced legal obligations under federal law.

3. The Bureau of Land Management Has Failed to Comply with Federal Laws Protecting Tribal Cultural Resources or Adequately Respond to the Tribe's Comments Indicating Serious Deficiencies in the Record

Goshute people have inhabited these lands since time immemorial. Goshute culture is shaped by the Tribe's relationships with the mountains, streams, rivers, animals, fish and other places and living things in the Project area. Collectively, this can be referred to as the "cultural landscape." The Tribe has protected this cultural landscape through ceremonial and religious practices since time began. The Tribe's cultural ties to the Project area underscore the importance of BLM compliance with its duty under NEPA to base decisions on an adequate identification, assessment and mitigation of impacts to Tribal culture and resources.

The BLM has refused to afford the Tribe an appropriate role in the evaluation, monitoring, and mitigation of cultural resources. For example, BLM has refused to provide the Tribe with decision-making authority on mitigation issues. *See FEIS "Comments and Responses - Tribal Government"* at 24. BLM has further refused to ensure that Tribal monitors be assigned to participate in the Class III Survey process. *Id.* at 25. To appropriately identify cultural resources and protect them, it is critical that an Indian person with the traditional knowledge of the lands in question be onsite. *Id.* at 25. This is not a task that a scientist can perform with the same degree of sensitivity as a Tribal member who has traditional knowledge about his or her ancestral lands. Without at least one Tribal monitor present during the Class III survey, especially for sensitive areas likely to contain cultural resources, cultural resources cannot be adequately protected. BLM's argument that Tribal participation in the Class III survey "is beyond the scope of tribal consultation" misses the point: BLM should encourage, and in fact require, Tribal monitoring during any Class III survey of ancestral Tribal lands. *Id.* at 25.

A. *The FEIS Fails to Adequately Address and Mitigate Significant, Adverse Impacts to Tribal Cultural Resources or Respond to the Tribe's Concerns*

We reiterate our previously expressed concern that the magnitude of this proposed undertaking virtually ensures adverse impacts to cultural resources, including human remains and associated and unassociated funerary objects. The SNWA's full Right-of-Way request encompasses 306 miles of pipeline (including underground trenching and blasting); 323 miles of electric power lines; 7 electrical substations; 5 pumping stations; 6 regulation tanks; 3 pressure

reducing stations; 1 water treatment facility/buried storage reservoir; 431 miles of access roads; 12,303 acres of estimated construction surface disturbance; 11,289 acres of temporary disturbances area to be revegetated; and 1,014 acres of permanent disturbance. Additional subsurface and surface disturbance will occur once wellfield development begins. (For example, the FEIS accounts for a range of 144 to 174 underground groundwater production wells). Alternative "F" is almost as invasive in scope. This massive intrusion into the Goshute's aboriginal lands is unprecedented and presents enormous challenges to appropriately considering and mitigating impacts to cultural resources. It is therefore critical that the BLM responsibly execute its obligations under federal law. It has yet to do so.

BLM's response to Tribal concerns is insufficient. BLM merely states that it "is willing to disclose information to Tribes." See *FEIS "Comments and Responses - Tribal Government"* at 25. This response is vague and inadequate. It further responds that "Tribal consultation to identify and evaluate cultural resources and historic properties is an ongoing process, to occur during each tier of the Project." See *FEIS "Comments and Responses - Tribal Government"* at 25. Given that no Tribal consultation has yet occurred - and no concrete information has been provided about how efforts to meaningfully consult with Tribes will be improved in the future - BLM's response to Tribal concerns is wholly inadequate.

As BLM knows well, there are a vast number of documented cultural resources present in the Project area. For this reason, there is a critical need to incorporate Tribal monitors into the survey and cultural resources investigation process. See *FEIS*, Ch. 3.16 ("Cultural Resources") at 3:16-8-9. Currently, the *FEIS* and *PA* do not sufficiently comply with either the letter or the spirit of the law. BLM should require that Tribally-chosen Tribal representatives and Native American monitors participate in future Class III surveys and be present during all ground disturbance activities. With all due respect, persons meeting the Secretary of the Interior's qualifications for Class III surveys may not have the specific, traditional and cultural knowledge of a Tribal member indigenous to the lands in question here. See *FEIS* at 3:16-8. Furthermore, BLM should require that the Goshute Tribal Government be formally consulted as the locations of pipelines, power lines, wells, and associated infrastructure are further defined. This consultation obligation should be specific and tailored to meet the Tribe's needs. We remind BLM that the Tribe is not a signatory to the *PA*, and is therefore not limited by that Agreement's inappropriate constraints.

The large number of cultural resources identified in such a small area of the proposed project demonstrates the folly of analyzing environmental impacts to a pipeline without knowing even the approximate location of its water sources. See *FEIS* at 3:16-8 (In surveying just 11 percent of the project area through a files search, 657 cultural resources were identified and 184

of these resources are within 300 feet of the proposed ROWs or facilities). Without knowing the location of the pipeline, the Tribe cannot know the temporal extent of impacts to cultural resources. For this reason, the ROWs should not be granted unless and until SNWA's water rights applications are approved, and all appeals have been resolved.

Once water rights are adjudicated, and scientifically based locations of pipelines and associated infrastructure, including wells, are further defined, the BLM should formally consult with the Goshute Tribe, and other Indian tribes, to determine how to best identify, evaluate and mitigate potentially harmful impacts. This consultation would be in addition to any archeological survey that would be required, as archeologists are not qualified to address traditional Goshute values. Only the Goshute Tribe can do this. The Goshute Tribe must also be allowed to participate in the Class III survey; archaeological survey; and evaluation of cultural resources, including archaeological resources and culturally or religiously significant locations, on culturally appropriate and Tribally-approved terms. If SNWA obtains the right to extract groundwater, BLM must develop a culturally appropriate mechanism with the Tribe for making decisions. For example, a Memorandum of Understanding (MOU) between the Goshute Tribe and BLM regarding the identification, evaluation, and mitigation of cultural resources should be executed. BLM completely fails to respond to Goshute's suggestion that an MOU be entered into directly with the Tribe regarding cultural resources.

The Tribe is pleased that a Class III inventory will be performed. Again, however, the Tribe must participate in the inventory, including the identification and evaluation of archaeological and other cultural resources. Once the locations of wells and their associated pipelines are further determined, the Tribe must be consulted to determine whether the Tribe should participate in each region of the Class III survey, or only those portions of the survey where the Tribe determines cultural resources are most likely to occur. This determination must be made by the Tribe.

As the FEIS and PA are currently drafted, the Goshute Tribe is not afforded sufficient consultation, identification and mitigation rights and responsibilities with regard to cultural resources. The Tribe must be allowed to: 1) participate in the Class III inventory to the extent that the Tribe determines is appropriate; 2) participate in the identification and evaluation of cultural resources, including archaeological resources, to the extent the Tribe determines would be appropriate (this may include onsite monitoring); 3) determine whether cultural resources, including archaeological resources, are culturally or historically significant to the Tribe; 4) determine, in collaboration with BLM, National Register of Historic Places eligibility; 5) assess potentially significant effects to cultural resources to determine what type of mitigation measures would be culturally appropriate; and, 6) be empowered to provide its expertise in the

identification, evaluation, and mitigation of cultural resources in a meaningful way through a MOU or other Tribally specific agreement. BLM should require that the Project Applicant provide the necessary funding to ensure the Tribe's participation in surveying, monitoring, evaluating, and mitigating adverse impacts to Tribal cultural resources.

B. *The FEIS Fails to Adequately Address and Mitigate Significant, Adverse Impacts to Tribal Religious and Ceremonial Practices, Including Sacred Sites and Properties of Religious and Cultural Importance to the Tribe or Adequately Respond to Tribal Concerns*

For unexplained reasons, the BLM does not respond to the Tribe's argument that the FEIS fails to consider, evaluate or mitigate impacts to Tribal religious and ceremonial practices, including sacred sites. Many areas within the proposed project area are of particular cultural importance to the Tribe and its members. The Tribe has used these areas for ceremonies and other religious activities since time began. For many reasons, tribal religious traditions are inextricably tied to these cultural areas and the environment. Tribal members actively and regularly participate in Tribal ceremonies, festivals and other traditional activities within the proposed project area. Tribal members visit the area to pass traditional and religious information to the next generation, and to perform ceremonies and bless the spirits of their ancestors.

There is no justification for the complete absence of any reasonable consideration, evaluation, or mitigation of impacts to Tribal religious and ceremonial practices, including sacred sites, in the FEIS. BLM must engage in meaningful consultation with the Tribe once the locations of wellfields and associated infrastructure are further defined to appropriately consider this project's impacts to Tribal religious and ceremonial practices in accordance with federal law. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 976 (9th Cir. 2004) ("Native American sacred sites of historical value are entitled to the same protection as the many Judeo-Christian religious sites that are protected on the NRHP. . . ."); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 471 (1988) (In enacting the American Indian Religious Freedom Act (AIRFA), "Congress expressly recognized the adverse impact land-use decisions and other governmental actions frequently have on the site-specific religious practices of Native Americans, and the Act accordingly directs agencies to consult with Native American religious leaders before taking actions that might impair those practices"). In addition, the BLM must execute a confidentiality agreement with the Tribe regarding Goshute religious, ceremonial, and traditional practice to ensure that the locations of sacred sites are not inappropriately disclosed to the public. Again, this confidentiality agreement must be executed specifically with the Goshute Tribe; a generic confidentiality agreement is not sufficient.

4. The Bureau of Land Management Has Failed to Adequately Address and Mitigate Significant, Adverse Impacts to Tribal Water Resources or Adequately Respond to the Tribe's Concerns Regarding its Federally Reserved Water Rights

The proposed Project would be devastating to the Tribe's most vital resource: water. Tribal cultural and religious practices depend on water. Tribal subsistence methods are inextricably linked to the water. The Tribe has thrived in a cultural landscape with extremely limited water resources since time immemorial because of its traditional subsistence, ceremonial, and religious practices. Hundreds of geographic place names throughout the Tribe's aboriginal lands are based on sources of water. Water resources are used for religious ceremonies and retain their traditional Goshute names today. Every spring, creek, and stream has a historical and present-day use for the Tribe. The Tribe's water resources are already threatened by extinction due to non-Indian over-extraction. This Project would exacerbate existing issues by extracting immense amounts of water from the Tribe's aboriginal land base, threatening the Tribe's water resources and its ability to continue to use its traditional lands. Because the FEIS fails to adequately consider and mitigate impacts to the Tribe's water resources, including federally reserved water rights, it fails to comply with the law. *See Joint Bd. of Control of Flathead, Mission and Jocko Irr. Districts v. United States*, 832 F.2d 1127, 1131-1132 (9th Cir. 1987) (Bureau of Indian Affairs is obligated to operate irrigation project to protect Tribal water resources even in the absence of judicial quantification of Tribal water rights to stream flows).

In our previous comments, we noted that the BLM completely failed to consider impacts to the Tribe's reserved water rights as required by law. In response, BLM simply states that its analysis of potential impacts to all identified water sources "thus encompasses potential impacts to any federal reserved water rights that may later be identified in or adjudicated on these sources." *See FEIS Comments and Responses — Tribal Government* at 26. This is not correct. In fact, BLM has an affirmative duty to protect Tribal water rights as a federal agency with a trust obligation to Indian tribes. *Kittitas Reclamation Dist. v. Sunnyside Valley In-. Dist.* 763 F.2d 1032, 1035 (9th Cir. 1985) (Affirming reasonable federal emergency measures to protect Tribal water rights). At the very least, BLM should specifically require that impacts to Tribal water rights be analyzed separately in the FEIS. Here, there is no analysis of potential impacts to Tribal water rights whatsoever, let alone formal Tribal consultation or proposed mitigation measures. The BLM has failed, as Trustee, to affirmatively protect the Tribe's water rights against unlawful intrusion here. *See e.g. Parravano v. Babbitt* 70 F.3d 539, 545 (9th Cir. 1995) ("[W]hen it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statute or executive order, unless Congress has provided otherwise"); *Joint Bd. of Control of Flathead, Mission and Jocko Irr. Districts v. United States*, 832 F.2d 1127, 1131-1132 (9th Cir. 1987).

In *Winters v. United States*, the United States Supreme Court held that the establishment of a reservation for Indian purposes implied the creation of a federal reserved water right sufficient to fulfill the Government's purposes in establishing the reservation. 207 U.S. 564, 576-77 (1908). The right to water has a priority date which is based upon the date of creation of the Tribe's Reservation or the earliest date of aboriginal water use by the Tribe. Here, the Goshute Tribe has a priority date of time immemorial, or 1863 (when the Treaty of 1863 was executed between the United States and the Goshute Shoshone Indians). See *1863 Treaty of Peace and Friendship*. At the very latest, the Tribe has a priority water date of 1912 or 1914 pursuant to subsequent Executive Orders creating the Tribe's Reservation. See also Exec. Order No. 1539 (1912); Exec. Order No. 1903 (1914).

As we previously mentioned, the Goshute Tribe is entitled to flows of the quantity, force, quality, and timing necessary to satisfy the Tribe's subsistence and ceremonial water needs. See *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983). The reserved water right is not limited to waters located on the Reservation. Rather, it extends off-reservation to whatever waters and sources of water are necessary to satisfy the Tribe's needs. See *Arizona v. California*, 373 U.S. 546, 595 n. 97 (1963) (awarding rights in an off-reservation river); *Winters v. United States*, 207 U.S. 564 (upholding the right of the United States to obtain an injunction restraining upstream, off-reservation diversions in the Milk River and its tributaries); *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 325 (9th Cir. 1956) (holding that the Yakima Tribe's reserved water rights in Ahtanum Creek included waters which originated off reservation, regardless of whether upstream users held riparian or appropriative rights).

The fact that the Goshute Tribe's reserved water rights have yet to be judicially determined in no way affects the legality or enforceability of the right. Reserved water rights are vested, presently existing rights, regardless of whether they have or have not been adjudicated. BLM is therefore obligated to engage in formal Tribal consultation with the Goshute Tribe regarding how to best protect the Tribe's federally reserved water rights. Moreover, SNWA has an existing duty to refrain from diverting water or taking other actions which may interfere with the exercise of the Tribe's reserved water rights. See *Winters v. United States*, *supra*.

Under federal law, the Tribe's reserved right is "paramount" or "senior" to all other water rights. *United States v. Adair*, 723 F.2d at 4142-14. Based on this priority, the Tribe, or the United States acting on behalf of the Tribe, may enjoin or limit any junior appropriator from depleting the waters of the valley aquifers that provide groundwater resources to the Tribe, even if this action would result in economic hardship to non-Indian interests. *Arizona v. California*, 373 U.S. at 597. Other users must refrain from interfering with the right, regardless of the fact

that it has not been judicially quantified. For these reasons, the FEIS's failure to evaluate potentially significant impacts to tribally reserved water rights is unlawful. *Compare Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 480 (9th Cir. 2000)(The EIS "extensively" analyzed the issues that would affect the Tribe's reserved rights and concluded that the impacts would not be significant).

The FEIS's failure to consider the Tribe's reserved water rights renders it inadequate under the law. As trustee, BLM has a duty to protect the Tribe's reserved water rights, including both water quantity and quality.² According to the Tribe, the loss of water is the loss of life. The very existence of the Tribe and Tribal culture depends on water. Without an unpolluted water source capable of supporting not only the Tribe but all the plants and animals that survive within the Goshute cultural landscape, the Tribe and its traditional way of life will be irreparably harmed. The FEIS unlawfully fails to address the Tribe's federally reserved water rights. As Trustee, the BLM must suspend this environmental review so that potentially significant, adverse impacts to the Tribe's reserved water rights can be fully analyzed. Without such careful analysis, the BLM cannot demonstrate that it has reasonably considered adverse impacts to Tribal water rights and SNWA's ROW applications must be denied.

5. The Bureau of Land Management Must Postpone or Deny SNWA's Right of Way Applications Pursuant to the FEIS Until Further Information Regarding Wellfield Development and Groundwater Pumping Rates are Available

BLM cannot reasonably consider significant, adverse and cumulative impacts to Tribal cultural and water resources until the judicial review of the State Engineer's decision granting in part SNWA's water rights application. The FEIS completely fails to consider the interdependent relationship between a right of way application for pipelines and the development of wells and associated infrastructures. It further fails to consider the interdependent relationship between the amount of water that SNWA will be authorized to pump and SNWA's ROW application. Such inappropriate segmentation continues to make it impossible to reasonably evaluate and mitigate potentially significant and cumulative impacts to cultural and water resources. The BLM must defer its consideration of SNWA's ROW applications until SNWA's water rights application concludes, including any appeals. *See Thomas v. Peterson*, 753 F.2d 754, 761 (9th Cir.

²As noted in the Review provided by Grassetti Environmental Consulting attached to our previous comments, the FEIS utilizes an inappropriate water model which vastly underestimates the drawdown effects this Project would have on groundwater resources, leading to a vastly underestimated analysis of potential effects on other critical natural resources, as well as federally reserved Tribal water rights. We renew our grave concern that the FEIS's analysis is based on an inappropriate scientific model that vastly underestimates the effects of this Project on water, natural, and cultural resources here.

1985)(Holding that the Forest Service must prepare and consider an environmental impact statement that analyzes the *combined impacts* of the road and the timber sales that the road is designed to facilitate)(emphasis added); 40 C.F.R. § 1508.25(a)(1) (CEQ regulations require “connected actions” to be considered together in a single EIS); 40 C.F.R. § 1508.25(a)(2) (CEQ regulations require that “cumulative actions” be considered together in a single EIS).

The BLM’s environmental review is premature. It puts the cart before the horse to conduct environmental reviews before the agency knows how much water will be pumped, where the pumping will occur, the duration of the pumping, and the monitoring and review procedures that are in place. SNWA has not yet secured the necessary water rights for the Project. SNWA’s water rights applications have been appealed to the Nevada State court. Once the amount of groundwater that SNWA is authorized to extract has been finally determined, including any appeals, SNWA would likely evaluate where it is most likely to begin wellfield exploration and development. Only after SNWA has evaluated where wellfield development will likely occur - based on the final adjudication of its water rights applications - should this environmental review process be reinstated and SNWA’s ROW applications be considered. At that point, BLM and SNWA must consult with the Tribe regarding SNWA’s proposed wellfield locations and the likelihood that cultural resources and water resources will be impacted, including which mitigation measures would be culturally appropriate. See *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002)(Connected, cumulative, and similar actions must be considered together to prevent an agency from dividing a project into multiple actions which collectively have a substantial cumulative impact); *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir.1998) (Agency must take requisite “hard look” at the possible mitigating measures).

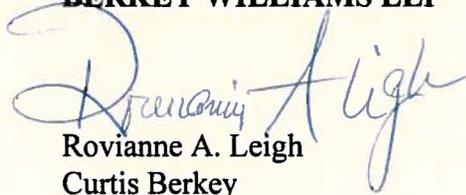
The goal of NEPA is to provide a “full and fair discussion of significant environmental impacts” so that decision makers and the public are informed of reasonable alternatives which would minimize adverse impact to the environment. See *High Sierra Hikers Assn v. Weingardt*, 521 F.Supp.2d 1065, 1072-1073 (N.D. Cal. 2007). With the limited information currently available regarding SNWA’s water rights applications (including appeals) or the intended location of wells to supply this pipeline, it is simply not possible to take the required “hard look” at this time. This oversight makes it impossible to provide a “reasonably thorough” discussion of environmental impacts or an analysis of proposed mitigation measures. *City of Carmel By-The-Sea v. United States Dep’t of Transp.*, 123 F.3d 1142, 1151 (9th Cir. 1997).

Penny Woods, Project Manager
Bureau of Land Management
Nevada Groundwater Projects Office
October 1, 2012
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For these reasons, the BLM's response to the Tribe's comments on the inadequacy of the environmental review fails to address the Tribe's concerns.

Sincerely,

BERKEY WILLIAMS LLP

A handwritten signature in blue ink, appearing to read "Rovianne A. Leigh". The signature is written in a cursive style with a large initial "R".

Rovianne A. Leigh
Curtis Berkey