Permit No. 79825

TEMPORARY

THE STATE OF NEVADA

PERMIT TO CHANGE THE PUBLIC WATERS OF THE STATE OF NEVADA HERETOFORE APPROPRIATED

Name of applicant:	**THE UNITED STATES AS TRUSTEE FOR THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS ACTING THROUGH THE BUREAU OF INDIAN AFFAIRS AND THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS**
Source:	**TRUCKEE RIVER**
Basin:	**TRACY SEGMENT**
Manner of Use:	**WILDLIFE**
Period of Use:	**AS DECREED**
Priority Date:	**AS DECREED**

****

APPROVAL OF STATE ENGINEER

This is to certify that I have examined the foregoing application, and do hereby grant the same, subject to the following limitations and conditions:

This temporary permit, to change the place and manner of use of the waters of the Truckee River as heretofore granted under Claim 2, Truckee River Decree, is issued subject to the terms and conditions imposed in said decree and with the understanding that no other rights on the source will be affected by the change proposed herein. A suitable measuring device must be installed and accurate measurements of water placed to beneficial use must be kept.

This temporary permit does not extend the permittee the right of ingress and egress on public, private or corporate lands.

The issuance of this temporary permit does not waive the requirements that the permit holder obtain other permits from State, Federal and local agencies.

This temporary permit is issued subject to the continuing jurisdiction and regulation of the Orr Ditch Decree Court and the Federal Water Master.

This temporary permit expires one year from the date of issue and shall be exercised as described in either proposed Alternative 3 or 4 as set forth in the Environmental Assessment by the U.S. Department of the Interior dated June 2, 2002 that is the water will be taken in equal amounts over a certain number of months.

The amount of water described under Alternatives 3 and 4 will be delivered at a continuous diversion rate for the percentages described in each month set forth in each alternative.

This temporary permit is issued pursuant to the provisions of NRS 533.345 Section 2 and will expire 1 year after the approval of the permit at which time all rights herein granted shall revert to the right being changed by this temporary permit.

(Continued on Page 2)

The point of diversion and place of use are as described on the submitted application to support this permit.

The amount of water to be appropriated shall be limited to the amount which can be applied to beneficial use, **and not to exceed 68.63 cubic feet per second or 11,254.5 acre-feet as decreed.**

Work must be prosecuted with reasonable diligence and proof of completion of work shall be filed on or before:	**N/A**
Water must be placed to beneficial use and proof of the application of water to beneficial use shall be filed on or before:	**N/A**
Map in support of proof of beneficial use shall be filed on or before:	**N/A**

IN TESTIMONY WHEREOF, I, JASON KING, P.E.,

State Engineer of Nevada, have hereunto set my hand and the seal of my office, this 16th day of **July**, A.D. **2010**

Jason K. P.E.

State Engineer

Application No. 79825

APPLICATION FOR PERMISSION TO CHANGE POINT OF DIVERSION, MANNER OF USE AND PLACE OF USE OF THE PUBLIC WATERS OF THE STATE OF NEVADA HERETOFORE APPROPRIATED

THIS SPACE FOR OFFICE USE ONLY

Date of filing in State Engineer's Office MAY 0 7 2010

Returned to applicant for correction _____

Corrected application filed _____ Map filed FEB 0 2 2001 under 6 7 1 8 2 Sheet 2

The applicant See Attachment A

P.O. Box 256 (Street Address or P.O. Box) of Nixon (City or Town)

Nevada 89424 (State and Zip Code), hereby make(s) application for permission to change the

☐ Point of diversion ☒ Place of use ☒ Manner of use ☐ of a portion

of water heretofore appropriated under (Identify existing right by Permit, Certificate, Proof or Claim Nos. If Decreed, give title of Decree and identify right in Decree.)
United States of America v. Orr Ditch Co. in Equity No. A-3, Claim No. 2; in the Federal District Court of Nevada.

1. The source of water is Truckee River (Name of stream, lake, underground, spring or other sources.)
2. The amount of water to be changed 11,254.5 acre-feet (2,745 acres @ 4.1 acre-feet per acre). (Second feet, acre-feet. One second foot equals 448.83 gallons per minute.)
3. The water to be used for Wildlife, including instream flows for fish (cui-ui and Lahontan cutthroat trout). (Irrigation, power, mining, commercial, etc. If for stock, state number and kind of animals. Must limit to one major use.)
4. The water heretofore used for As decreed. (If for stock, state number and kind of animals.)
5. The water is to be diverted at the following point (Describe as being within a 40-acre subdivision of public survey and by course and distance to a found section corner. If on unsurveyed land, it should be stated.)
   There will be no diversion. The water is to remain in the Truckee River from Derby Dam to Pyramid Lake.
6. The existing point of diversion is located within (If point of diversion is not changed, do not answer.)
   As decreed, N1/2 SW1/4, Section 19, T20N, R23E, M.D.B.&M (Derby Dam).

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7. Proposed place of use (Describe by legal subdivisions. If for irrigation, state number of acres to be irrigated.)

Truckee River downstream of Derby Dam to the Pyramid Lake inlet as shown on the map accompanying Application No. 67182.

8. Existing place of use (Describe by legal subdivisions. If changing place of use and/or manner of use of irrigation permit, describe acreage to be removed from irrigation.)

As decreed on Pyramid Lake Indian Reservation bench lands.

9. Proposed use will be from As decreed (Month and Day) to As decreed (Month and Day) of each year.

10. Existing use permitted from As decreed (Month and Day) to As decreed (Month and Day) of each year.

11. Description of proposed works. (Under the provision of NRS 535.010 you may be required to submit plans and specifications of your diversion or storage works.)(State manner in which water is to be diverted, i.e. diversion structure, ditches, pipes and flumes or drilled well, pump and motor, etc.)

No new diversion works will be constructed.

12. Estimated cost of works N/A

13. Estimated time required to construct works N/A (If well completed, describe well.)

14. Estimated time required to complete the application of water to beneficial use As soon as approved.

15. Provide a detailed description of the proposed project and its water usage (use attachments if necessary):
(Failure to provide a detailed description may cause a delay in processing.)

There will be no diversion. The water is to remain in the Truckee River from Derby Dam to Pyramid Lake. The water duty and maximum rate of diversion indicated in the application and its attachments are based on the conditions specified by the State Engineer in Permit No. 78505-T.

16. Miscellaneous remarks:

This is an application for TEMPORARY change (1 year). Also See Attachment B.

(702) 341-5200
Phone No.

dspringmeyer@wrslawyers.com
E-mail

By Don Springmeyer, Esq.
Print or type name clearly

Signature Applicant or agent

Agent for Pyramid Lake Paiute Tribe
Company Name

3556 E. Russell Road, 2nd Floor
Street Address or P.O. Box

Las Vegas, Nevada 89120
City, State, Zip Code

APPLICATION MUST BE SIGNED BY THE APPLICANT OR AGENT

$150 FILING FEE AND SUPPORTING MAP MUST ACCOMPANY APPLICATION

Attachment A

The applicants are:

1) **The United States as trustee for the Pyramid Lake Paiute Tribe of Indians, acting through the Bureau of Indian Affairs.**

Debrah McBride, Acting Western Regional Director
Bureau of Indian Affairs
400 N. 5th Street, 14th Floor
Phoenix, Arizona 85001 Phone: (602) 379-6600

and

2) **The Pyramid Lake Paiute Tribe of Indians.**

John Jackson, Director of Water Resources
Pyramid Lake Paiute Tribe of Indians
P.O. Box 256
Nixon, Nevada 89424 Phone: (775) 574-1050

Attachment B

This application is filed pursuant to the attached Order dated February 28, 1984, in the case of United States v. Orr Water Ditch Co., Equity No. A-3, in the United States District Court for the District of Nevada and in the interest of comity among the United States, the Pyramid Lake Paiute Tribe of Indians and the State of Nevada. The applicants specifically reserve all of their rights, interests and authorities pertaining to this matter including, without limitation, all rights and authorities asserted in arguments previously made to the Orr Ditch Court in connection with the above referenced February 28, 1984 Order and the rights to contest the jurisdiction of the Nevada State Engineer and to seek de novo review in the Orr Ditch Court of any orders, decisions, rulings or other actions of the Nevada State Engineer.

The water to be transferred will be used during the irrigation season, through November 15, subject to the condition that no more than 25 percent of the total water right amount will be used in any month. In addition, no more than 68.63 cfs will be used at any time.

This application is for a temporary change, not to exceed 1 year, pursuant to NRS 533.345.

The right sought under this temporary change application voluntarily will be exercised in conjunction with other Tribal water rights used for wildlife purposes so as to avoid limitations on diversions of Truckee Meadows water rights pursuant to Article VII (B) of the Truckee River Agreement.

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ENTERED

FEB 28 1984

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
Brenda Gorbet DEPUTY

RECEIVED
AND FILED

FEB 29 10 38 AM '84

CAROL C. FITZGERALD
CLERK
BY Brenda Gorbet
DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, and PYRAMID LAKE PAIUTE TRIBE OF INDIANS, Plaintiff-Intervenor, v. ORR WATER DITCH COMPANY, et. al., Defendants.	In Equity No. A-3-2-WEC FINAL ORDER GRANTING THE STATE OF NEVADA'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF THE UNITED STATES' APPLICATION FOR CHANGE IN USE AND CHANGE OF PURPOSE

The State of Nevada asks this Court to dismiss the United States' Petition for A Change in Place and Purpose of Use filed on April 2, 1979. The State asks this Court to dismiss the petition without prejudice. This would allow the United States to refile its Petition after a showing that the petitioners have applied for said change and received an unfavorable ruling from the Nevada State Engineer. The United States seeks permission to use the unused portion of the water rights on the Pyramid Lake Paiute Reservation, initialy awarded for agricultural purposed, for the fishery purposes. The Pyramid Lake fishery currently has an acute need

of additional water for both the endangered Cui-Ui and the threatened Lahontan Cutthroat trout. Carson-Truckee Water Conservancy District v. Watt, 549 F.Supp. 704, 706-708, 710-711 (D. Nev. 1982). These fishery purposes are consistent with the recent U.S. Supreme Court ruling in Nevada v. United States, ____ U.S. ____, 103 S.Ct. 2906 (1983), per Justice Brennan's concurring opinion.

The decision in United States v. Orr Ditch Water Company, In Equity, D. No. A-3 (D. Nev. 1944), is binding on all parties and is controlling. Nevada v. United States, supra. The September 8, 1944 Decree, at p. 88, provides:

> Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree. (Emphasis added).

This Court interprets ". . .in the manner provided by law. . ." to mean in accordance with Nevada state procedure for allowing changes.

The Pyramid Lake Paiute Tribe (Tribe) and the United States oppose the Motion to Dismiss. They note that, historically, they have attempted to avoid review of their applications by the State Engineer. That is the reason for their history of invoking this Court's jurisdiction. The United States and Tribe argue that the State of Nevada has consistently, in other cases, opposed the provision of additional water for the Pyramid Lake

fishery. Further, they assert that it is unreasonable to expect a state official (here, the State Engineer) to differ from the state's posture of opposing water for the fishery.

They also note that considering the application for fishery water in the state administrative system would be inconsistent with Cappaert v. United States, 426 U.S. 128, 96 S.Ct. 2062 (1976). In Cappaert, the Supreme Court held that federal water rights are not dependent upon state law or state procedures. Caeppert, however, is distinguishable from the present case. In this case, there is no claim that the United States must establish a reserved right under Nevada law (State's Reply to Memoranda in Opposition to Motion to Dismiss, p. 6). The existing establishment of the reserved right, in this case, distinguishes this case from Caeppert.

In an attempt to apply state procedural requirements (e.g., requiring that an application for change in use be presented to the State Engineer), Nevada looks to Arizona v. San Carlos Apache Tribe, ___ U.S. ___, 103 S.Ct. 3201 (1983). In San Carlos Apache Tribe, the Supreme Court interpreted the McCarran Amendment, 43 U.S.C. §666, to allow and encourage state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications. While a determination made by the Nevada State Engineer is not identical to a decision by a state court, the Supreme Court's theme of "cooperative federalism" will be accomplished by requiring an initial State Engineer determination of water rights.

The United States and the Tribe attempt to distinguish away the San Carlos Apache Tribe decision as being applicable only to general stream adjudications. Since presenting an application to the State Engineer would not be part of a general stream adjudication, they argue that San Carlos Apache Tribe is inapplicable. They assert that the better use of the State Engineer's expertise would be to allow the State Engineer to testify in an evidentiary capacity.

Contrary to the United States' and Tribe's position, is the trend of "cooperative federalism" as outlined in Nevada v. United States, supra, and United States v. Alpine Land & Reservoir Co., 697 F.2d 851 (9th Cir. 1983). In Alpine, the Ninth Circuit addressed the United States' concern that federal interests will be ignored by the Nevada State Engineer. The appellate court stated, "We agree with the district judge that the notice and protest procedures of Nevada law are adequate to allow exploration of these issues, when they arise, before the state engineer." 697 F.2d at 858. While the subject of Alpine is different than in the present case, the confidence placed in the Nevada procedural law is applicable.

As are outlined in the affidavit of Nevada State Engineer, Peter G. Morros, there are practical justifications for requiring that applications be made to the State Engineer. These reasons are uncontradicted. The state has presented these uncontradicted facts which would entitle it to a judgment as a matter of law. The United States and Tribe have failed to

overcome this factual obstacle. Avila v. Travelers Insurance Co., 651 F.2d 658 (9th Cir. 1981); British Airways Board v. The Boeing Co., 585 F.2d 946 (9th Cir. 1978); Jones v. Halekulani Hotel, Inc., 557 F.2d 1308 (9th Cir. 1977); Soto v. City of Sacramento, 567 F.Supp. 662, 668-669 (E.D. Calif. 1983).

First, in all two hundred eighty-four (284) changes of use and purpose, each change was initiated by presentation to the State Engineer. Further, the United States has (in the past) utilized the State Engineer review process (Morros affidavit, p. 3).

Second, the State Engineer has the manpower, staff, and expertise to make a determination of the beneficial use. Further, he is experienced at addressing claims for fishery uses (Morros affidavit, p. 3). This Court has no more resources than did U.S. District Judge Frank Norcross in 1940. In Judge Norcross' Memorandum Decision and Order, in United States v. Orr Water Ditch Co., et. al., In Equity A-3 (June 26, 1940), he, too, defers to the requirement that the Raffetto application be made first to the Nevada State Engineer.

Third, Nevada law has established notice procedures and other procedures that facilitate an efficient administration of applications for change in use and purpose. One such policy provides for notification of change applications to the Federal District Court Water Master (Morros affidavit, p. 3). Further, Nevada state law, Nevada Revised Statute (N.R.S.) 533.030(2), allows characterization of fishery water needs as a beneficial

use of water rather than a waste of water.

Fourth, requiring the State Engineer's action on all applications for change in use (including the United States' and Tribes' petition) would ensure a uniform treatment of all applications made. The Supreme Court recognized the need for the uniformity of use of the Truckee River. Nevada v. United States, supra, 103 S.Ct. at 292-293.

The nature of this case requires examination of the original Orr Water Ditch case, Judge Norcross' 1940 Memorandum Order, and the affidavit of Nevada State Engineer Peter Morros. A Federal Rule of Civil Procedure, Rule 12 Motion to Dismiss is a judgment on the pleadings alone. Federal Rule 12(c), however, allows this Court to characterize Nevada's Motion to Dismiss as a Motion for Summary Judgment. The United States and Tribe have been allowed to supplement their pleadings and argue this case pursuant to the prescriptions of Federal Rules of Civil Procedure 12(c) and Local Rule 16(g), Local Rules of the District of Nevada.

IT IS THEREFORE ORDERED that summary judgment is granted the State of Nevada on the issue of presentation of the United States' Application for Change in Use and Change of Purpose. FRCivP 56. The petition must be presented to the Nevada State Engineer for his review and action. The State is ordered to submit a concise Proposed Finding of Fact, Conclusion of Law, and Judgment consistent with this ruling. Local Rule 16(f), Local Rules of the District of Nevada.

As in United States v. Walker River Irrigation District, In Equity C-125, this Court reserves jurisdiction to consider change applications. By the State's own consent (Reply in Support of Nevada's Motion to Dismiss Petition by the United States for Change in Place and Purpose of Use, pp. 9-10), this Court retains jurisdiction to entertain an appeal from the decision of the State Engineer and to conduct a de novo review, if necessary.

DATED at Reno Nevada, this 25th day of February, 1984.

Walter E. Craig
United States District Judge