

IN THE OFFICE OF THE STATE ENGINEER  
OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATION 9330 FILED TO )  
APPROPRIATE THE WATERS OF THE TRUCKEE RIVER )  
FOR USE WITHIN THE NEWLANDS RECLAMATION )  
PROJECT, WASHOE, STOREY, LYON, AND CHURCHILL )  
COUNTIES, NEVADA. )

RULING ON  
REMAND  
**# 4659**

GENERAL

I.

Application 9330 was filed on September 9, 1930, and amended on March 9, 1931, by the Truckee-Carson Irrigation District ("TCID") to appropriate 1,500 cubic feet per second (cfs), not to exceed 100,000 acre-feet annually (afa), of the waters of the Truckee River and its tributaries for storage in Lahontan Reservoir for domestic purposes and the irrigation of lands contained within the Newlands Reclamation Project in Washoe, Storey, Lyon, and Churchill Counties, Nevada. The proposed point of diversion is described as being located within the NE¼ SW¼ of Section 19, T.20N., R.23E., M.D.B. & M.<sup>1</sup> The applicant indicated an intent to raise the control level of Lahontan Dam eight feet, thereby increasing its storage capacity by an additional 100,000 acre-feet, for a total storage capacity of 394,000 acre-feet.<sup>1</sup>

The application was filed for the right to store waters of the Truckee River in Lahontan Reservoir in addition and supplemental to all of the water rights then owned, held or acquired by the United States to the waters of the Truckee River and its tributaries.<sup>1</sup> It was proposed that the water would be applied in the same manner and through the same system of works that waters of the Truckee River and its tributaries are now diverted to the Newlands Reclamation Project.<sup>1</sup> The applicant also waived any claim of

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<sup>1</sup> File No. 9330, official records in the office of the State Engineer. Exhibit No. 2, public administrative hearing before the State Engineer, March 29, 1994. The Book Record identified as Exhibit No. 2 has the point of diversion being described as "dam now located in channel of Carson River at the following point: SE¼ Sec. 33, T.19N., R.26E." (Lahontan Dam); however, hand written above this description on the actual file copy is "diversion dam NE¼ SW¼ Sec. 19, T.20N., R.23E., M.D.B. & M." (Derby Dam).

senior or prior right it may obtain by the granting of Application 9330 as against any upstream storage development thereafter jointly made on the Truckee River by the applicant and Washoe County Water Conservation District ("WCWCD") or other organization of water users on the Truckee River.

## II.

The Truckee River system consists of an interstate river with its headwaters in the Sierra Nevada Mountains. It has storage reservoirs at Lake Tahoe, Stampede Reservoir, Prosser Reservoir, Boca Reservoir, Independence Reservoir and Donner Lake. Storage water, along with natural flow, passes the California-Nevada state line serving irrigation, power and municipal (Reno and Sparks) water rights along the way and then flows into Pyramid Lake, the terminus of the Truckee River. Water rights of the Truckee River are the subject of the Orr Ditch Decree.<sup>2</sup> Midway through the lower Truckee River canyon, Derby Dam diverts water into the Truckee Canal which transports Truckee River water to the Carson River basin for storage in Lahontan Reservoir, a part of the Newlands Reclamation Project.

## III.

The Newlands Reclamation Project, at the lower end of the Carson River system, consists of the Derby Diversion Dam, the Truckee Canal (which conveys Truckee River water to irrigators along the canal and to Lahontan Reservoir), the Lahontan Dam and Reservoir, and an extensive system of canals and laterals which deliver water to Lahontan Valley farms and wetlands. Water rights on the Carson River are the subject of the Alpine Decree.<sup>3</sup> Diversions from the Truckee River to the Carson River basin and Lahontan Reservoir for the benefit of the Newlands Project are

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<sup>2</sup> Final Decree, U.S. v. Orr Water Ditch Co., In Equity Docket No. A-3 (D. Nev. 1944).

<sup>3</sup> Final Decree, U.S. v. Alpine Land and Reservoir Co., Civil No. D-183 BRT (D. Nev. 1980).

regulated by the Operating Criteria and Procedures (OCAP).<sup>4</sup> The Truckee-Carson Irrigation District is the contract operator of the Newlands Reclamation Project and is responsible to the U.S. Department of Interior, Bureau of Reclamation.<sup>5</sup>

#### IV.

On October 20, 1993, the State Engineer provided notice of a December 1993 public administrative hearing on Applications 20998, 22541, 22542, 47047, 47121, 47209, 47264, 48061, and 48494. These are all applications to appropriate waters of the Truckee River. On November 23, 1993, the State Engineer sent notice adding Application 9330 to the hearings calendared. By Notice dated December 3, 1993, the public administrative hearing was continued.<sup>6</sup>

On March 29, 1994, the public administrative hearing began with consideration of Application 9330. However, on March 30, 1994, a request was lodged and granted that the hearings be continued to allow the inclusion in the hearing process of several applications filed to appropriate Truckee River effluent waters and to enable various parties to discuss coming to an agreement as to their pending applications.<sup>7</sup>

By Notice dated April 27, 1994, the State Engineer rescheduled the hearings to resume on May 31, 1994, and to include those applications filed by various entities to appropriate effluent from the Truckee Meadows Water Reclamation Facility. At the May 31, 1994, hearing, the State Engineer denied a request by Corkill

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<sup>4</sup> See, 43 C.F.R. § 418, as amended 62 Fed. Reg. 66442 (1997).

<sup>5</sup> Exhibit Nos. 108 and 109, public administrative hearing before the State Engineer, Feb. 2, 1996.

<sup>6</sup> Exhibit No. 1, public administrative hearing before the State Engineer, March 29, 1994.

<sup>7</sup> Transcript, public administrative hearing before the State Engineer, March 30, 1994.

Brothers, Inc. to intervene in the matter of Application 9330<sup>8</sup> on the basis that the request was not timely and because the TCID as the applicant was representing all water right holders within the irrigation district. The State Engineer also summarily denied Application 9330 on the threshold issue of the United States' refusal to allow the federal facilities, i.e., the Truckee Canal and Lahontan Reservoir, to be used in placing any water granted under the application to beneficial use.<sup>9</sup> The hearings continued through June 1 and 2, 1994, on the other applications noticed.

Corkill Brothers, Inc. appealed the denial of its request to intervene and the denial of Application 9330 to the Third Judicial District Court in accordance with NRS § 533.450. An appeal was also filed by the Truckee-Carson Irrigation District; however, based on the district court's reversal of the State Engineer's decision denying Corkill Brothers, Inc.'s request for intervention, the matter was remanded to the State Engineer for further hearing without having ever addressed the TCID appeal or the merits of the State Engineer's summary denial of Application 9330.<sup>10</sup>

V.

Pursuant to the remand order in the Corkill case, the hearing on Application 9330 was reconvened on January 31 through February

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<sup>8</sup> Transcript, pp. 223-224, public administrative hearing before the State Engineer, May 31, 1994.

<sup>9</sup> State Engineer's Ruling No. 4117, May 31, 1994, official records in the office of the State Engineer. Transcript, pp. 364-366, public administrative hearing before the State Engineer, May 31, 1994. The ruling granting the motion to summarily deny Application 9330 was based on Exhibit No. 87, a letter from U.S. Assistant Secretary of Interior for Water and Science that states that the United States was not going to allow the use of federal facilities to transport, store or deliver the water requested for appropriation under Application 9330.

<sup>10</sup> Opinion, Corkill Bros., Inc. v. R. Michael Turnipseed, State Engineer, 3rd Judicial District Court, State of Nevada, January 31, 1995, Case No. 21869.

2, 1996. The parties in the matter of Application 9330 are the Truckee-Carson Irrigation District, the Intervenor Corkill Brothers, Inc. and the Intervenor U.S. Bureau of Reclamation. The Pyramid Lake Paiute Tribe, Churchill County, Sierra Pacific Power Company, City of Fallon, Town of Fernley, Washoe County, and Cities of Reno and Sparks were granted interested party status which allowed them to file legal briefs.

FINDINGS OF FACT

I.

"In 1913 the United States sued to adjudicate water rights to the Truckee River for the benefit of the Pyramid Lake Indian Reservation and the planned Newlands Reclamation."<sup>11</sup> "Thirty-one years later, in 1944, the United States District Court entered a final decree in the case pursuant to a settlement agreement."<sup>12</sup>

In 1926 the District Court entered a Temporary Restraining Order which set forth the relative rights and priorities of the parties in said suit. In 1935 the U.S., TCID, WCWCD, Sierra Pacific Power Company, and other users of the waters of the Truckee River became parties to the Truckee River Agreement by signing their names thereto.

The parties to the Truckee River Agreement were desirous of raising and stabilizing the mean elevation of the surface of Lake Tahoe. To accomplish that objective they agreed, among other things, to the creation or acquisition of additional facilities for the storage of flood waters, and agreed to rates of flow in the Truckee River. Article XIII of the Truckee River Agreement provides that the Power Company, Conservation District and parties of the fifth part waived all objections to the restoration and maintenance of the Truckee Canal by the Truckee-Carson Irrigation

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<sup>11</sup> Nevada v. U.S., 463 U.S. 110, 103 S.Ct. 2906, 2910, 77 L.Ed.2d 509 (1983).

<sup>12</sup> Ibid. Final Decree, U.S. v. Orr Water Ditch Co., In Equity Docket A-3 (D.Nev. 1944).

District and/or the United States to a carrying capacity not exceeding 1,200 cfs and to the increase of the storage capacity of Lahontan Reservoir.

Against the backdrop of the quiet title action to the waters of the Truckee River, Application 9330 was filed in 1930 by the TCID for additional storage at Lahontan Reservoir, but since 1930 the TCID never pursued the application. However, much has happened on the Truckee River since that time which requires consideration.

The Pyramid Lake Cui-ui fish species was identified in 1967 as being in danger of extinction under the federal endangered species act, and the U.S. Secretary of the Interior issued the first Newlands Project Operating Criteria and Procedures, regulations that required project farmers to use as much water from the Carson River as possible to minimize diversions from the Truckee River. The Interstate Compact between Nevada and California which apportioned the waters of the Truckee River between the states was passed by Nevada in 1969, amended and passed by California in 1970, and repassed by Nevada in 1971; however, Congress failed to ratify the Compact.

In 1970 the Pyramid Lake Lahontan Cutthroat Trout was listed as a species in danger of extinction, and was reclassified in 1975 to threatened under the Endangered Species Act. Litigation that began in 1968 by the Pyramid Lake Paiute Tribe (*Pyramid Tribe of Paiute Indians v. Hickel*) and in 1970 (*Pyramid Lake Paiute Tribe of Indians v. Morton*) resulted in a decision by the U.S. District Court in Washington, D.C., that the U.S. Bureau of Reclamation, specifically the Secretary of the Interior, was required to deliver to Pyramid Lake all Truckee River water in excess of valid Newlands Project water rights.

In the 1980's various lawsuits were filed relating to Truckee River waters, and negotiations began among state, federal and other interests in an attempt to resolve the many issues surrounding the use of the waters of the Truckee River. Public Law 101-618 enacted

by Congress in 1990 ("Settlement Act") includes elements which promote the enhancement and recovery of Pyramid Lake's threatened and endangered species and protection of Lahontan Valley wetlands from further degradation, encourage the development of solutions for demands on Truckee River waters, improve the management and efficiency of the Newlands Project, and which promotes the Fallon Paiute-Shoshone water issues settlement, the Pyramid Lake Paiute Tribe water issues settlement, and the California-Nevada interstate water apportionment.

The State Engineer finds much has happened on the Truckee River since the filing of Application 9330 and that Application 9330 cannot be looked at in a vacuum as if it were the year 1930. The public interest criteria by which the State Engineer is to review an application cannot ignore the realities of today and all that has taken place regarding the Truckee River since 1930.

## II.

Application 9330 was filed to transport and store unappropriated water of the Truckee River through the federal facilities constructed in connection with the Newlands Project, i.e., Derby Dam, Truckee Canal, and Lahontan Reservoir. At the 1994 hearing, the U.S. Bureau of Reclamation submitted a letter signed by Elizabeth Ann Rieke, Assistant Secretary of the U.S. Department of Interior for Water and Science, hereinafter referred to as the "Rieke letter".<sup>13</sup> In that letter, Ms. Rieke states that the U.S. Department of Interior would not allow the federal facilities to be used for the conveyance, storage, or delivery of any water appropriated under Application 9330 as the Department is firmly committed to implementing the Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Public Law 101-618).

The U.S.' refusal is based on certain key provisions of that Act, including the California-Nevada interstate water allocation

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<sup>13</sup> Exhibit No. 87, public administrative hearing before the State Engineer, May 31, 1994.

and the Truckee River Operating Agreement, which will not take effect unless and until the claim of the Pyramid Lake Paiute Tribe to the remaining waters of the Truckee River is resolved in a manner satisfactory to the Tribe and the State of Nevada. Furthermore, that allowing TCID to use the federal facilities to divert additional Truckee River water would be in conflict with the Operating Criteria and Procedures provision for minimizing the diversion of Truckee River water to the project, would violate the directive in Public Law 101-618 to develop and implement a plan for the recovery of Pyramid Lake's endangered Cui-ui, and would be inconsistent with the Secretary of the Interior's trust responsibility to preserve and protect the Pyramid Lake fishery.

The TCID argues that the Truckee River Agreement, which was incorporated into the Orr Ditch Decree, provides that the United States will not object to the TCID taking privately obtained Truckee River water through the Truckee Canal and storing it in Lahontan Reservoir. The TCID wants the State Engineer to address the question of whether the United States' legal ownership in the facilities is sufficient to deny the TCID the valid use of water rights they might hold separate and above those rights decreed for the Newlands Project.

The question the "Rieke letter" presents for the State Engineer's determination is whether there is a reasonable expectation that the applicant will be able to apply the waters to the intended beneficial use in the manner indicated under the application. The applicant alleges that if Application 9330 were approved, use of the federal facilities to convey, store and deliver the water could be obtained; however, the applicant also recognizes that the United States owns and controls the facilities.<sup>14</sup>

The State Engineer recognizes the fact that there are probably

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<sup>14</sup> Transcript, p. 117, public administrative hearing before the State Engineer, March 29, 1994.

administrative or judicial processes in place to challenge the denial of the use of these federal facilities; however, what the State Engineer has in this case before him is U.S.' statement that such permission would be denied.<sup>15</sup> There were no qualifiers in the letter from the U.S. Department of the Interior. The State Engineer finds it is reasonable for him to accept at face value and rely on the U.S.' statement that "[i]f Application 9330 is approved, the Department would not allow the use of its facilities to convey, store or deliver any water appropriated pursuant to that application." Furthermore, the TCID did not present any viable alternatives for other ways to take delivery of the water.

The State Engineer finds that the Secretary of the Interior and not the State Engineer has the authority to regulate the use of the federal facilities as to the diversion, conveyance, storage and distribution of water from the Truckee River for use within the Newlands Project,<sup>16</sup> and the United States' refusal to allow use of the federal facilities to divert, transport and store this water is certainly germane to the issue of whether the applicant has a reasonable expectation of placing this water to beneficial use.

### III.

The Orr Ditch Decree did not declare the waters of the Truckee River fully appropriated.<sup>17</sup> The Applicant presented evidence<sup>18</sup>

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<sup>15</sup> Exhibit No. 87, public administrative hearing before the State Engineer, May 31, 1994.

<sup>16</sup> See, generally Pyramid Lake Paiute Tribe v. Morton, 354 F.Supp. 252 (D.D.C. 1972 and 1973); U.S. v. Alpine Land & Reservoir Company, 503 F.Supp. 877, 879 (D. Nev. 1980).

<sup>17</sup> Final Decree, U.S. v. Orr Water Ditch Co., In Equity, Docket No. A-3 (D. Nevada 1944).

<sup>18</sup> Exhibit No. 104, public administrative hearing before the State Engineer, January 31, 1996.

and testimony<sup>19</sup> that in approximately half the years there is unappropriated water in the Truckee River that would meet the quantity of water requested under Application 9330. If the years of record 1918 through 1993 are considered, the applicant's evidence indicates the unappropriated flows would average approximately 237,000 acre-feet annually.<sup>20</sup> In arriving at this estimate of unappropriated water, the applicant took flow rates from a stream gauge just below Derby Dam, considered all prior rights to the waters of the Truckee River below Derby Dam, and what it believes to be "Cui-ui fish flow" requirements.<sup>21</sup> Other witnesses using the time frame of 1974 through 1993 and measuring from a gauge at Nixon agreed there is unappropriated water in the Truckee River<sup>22</sup> and estimated the quantity to average from 370,930 to 403,150 acre-feet annually.<sup>23</sup> The State Engineer finds there is unappropriated water in the Truckee River.

IV.

The State Engineer instructed the applicant early in the hearing process that he wanted to know how many days water was

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<sup>19</sup> Transcript pp. 209-264, public administrative hearing before the State Engineer, January 31, 1996.

<sup>20</sup> It is important to note that this number is an average value taken from 76 years of record whose annual entries vary widely. The range for this period of record is 256 acre feet (1931) to 1,719,957 acre feet (1983). It is convenient to work with the average as long as it is clear that the unappropriated water is not available in all years.

<sup>21</sup> Transcript, p. 208, Exhibit No. 104, public administrative hearing before the State Engineer, February 1, 1996.

<sup>22</sup> Transcript, pp. 463-471, public administrative hearing before the State Engineer, June 1, 1994, and pp. 450-452, public administrative hearing before the State Engineer, February 1, 1996.

<sup>23</sup> Transcript, pp. 463-470, public administrative hearing before the State Engineer, June 1, 1994. Exhibit Nos. 92 and 93, public administrative hearing before the State Engineer, June 1, 1994.

going to be available, how that water was to be taken, how such diversions would work under the Operating Criteria and Procedures and other federal law, and what land was to be irrigated.<sup>24</sup> The applicant presented testimony that due to present day regulations it would not need to increase the capacity of the Truckee Canal, and due to the Operating Criteria and Procedures the storage in Lahontan Reservoir has been administratively reduced, therefore, the storage capacity is already available in the reservoir.<sup>25</sup> The testimony also indicated that perhaps water could be conceptually stored in the reservoir or moved off the project, infiltrated through the canal system to recharge the ground water, and later put into production wells to augment the supply to irrigated lands.

When the flows on the Truckee River are high enough to consider whether there is unappropriated water available the flows on the Carson River are as a general fact also high; therefore, there would be times when there would be no storage capacity in Lahontan Reservoir to take any unappropriated water from the Truckee River and store it in Lahontan Reservoir. The State Engineer finds that the applicant never sufficiently demonstrated how the water applied for could be diverted, stored and placed to beneficial use given the constraints imposed by the Operating Criteria and Procedures, canal capacity, storage capacity of Lahontan Reservoir and use of the federal facilities. The State Engineer further finds that the applicant never presented a clear and concise case as to how the waters requested for appropriation under this application would be put to beneficial use as filed for under the application. At the administrative hearing, the applicant could speculate how it might take or use the waters; however, its evidence was not sufficiently specific to the

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<sup>24</sup> Transcript, pp. 65-66, public administrative hearing before the State Engineer, March 29, 1994.

<sup>25</sup> Transcript, pp. 82-83, public administrative hearing before the State Engineer, March 29, 1994.

application as filed.

V.

There presently exists a decreed right to divert 1,500 cfs of Truckee River water at Derby Dam through the Truckee Canal to the Newlands Project.<sup>26</sup> Testimony indicated that the canal capacity had been up to 1,000 cfs.<sup>27</sup> However, other records indicate that the maximum amount ever diverted is 967 cfs<sup>28</sup>. The Truckee River Agreement allowed the applicant to increase the size of the canal up to 1,200 cfs, yet since that agreement was enacted in 1935 that has never been done. The State Engineer finds that the applicant never exercised its option to increase the capacity of the Truckee Canal as authorized under the Truckee River Agreement for use of the water rights already decreed for the project. The State Engineer further finds that if the TCID has not found it feasible to increase the canal capacity to date, it is not likely it would find it feasible to increase the canal capacity with the approval of Application 9330.

VI.

The State Engineer finds there was no evidence presented that the approval of Application 9330 would interfere with existing water rights.

VII.

The crux of the decision in this matter is really NRS § 533.370(3) which provides that the State Engineer shall reject an application and refuse to issue the permit requested where the proposed use threatens to prove detrimental to the public interest. The State Engineer provided the applicant, intervenors and

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<sup>26</sup> Claim No. 3, Final Decree, U.S. v. Orr Water Ditch Co., In Equity Docket No. A-3 (D. Nev. 1944).

<sup>27</sup> Transcript, p. 55, public administrative hearing before the State Engineer, January 31, 1996.

<sup>28</sup> Water Resources Data for Nevada, published by the U.S. Geological Survey for gaging station #10351300.

interested parties the opportunity to submit pre-hearing briefs regarding whether the approval of Application 9330 would threaten to prove detrimental to the public interest. The Truckee-Carson Irrigation District, City of Fallon, Churchill County, and Corkill Brothers, Inc. submitted briefs in which they argued that the approval of Application 9330 did not threaten to prove detrimental to the public interest because it would benefit the public interest in the following ways.

1. The additional waters stored under Application 9330 would allow the delivery of more water to the Newlands Project lands and provide some degree of drought protection. The farmers would receive their full entitlement more often, thereby producing more alfalfa and adding to the economy of the area.
2. Much of the additional water would find its way as recharge to the groundwater aquifers which provide domestic and municipal water for the local communities. This water could support additional commercial and municipal development which would benefit the communities, and prevent the drying up of domestic wells.
3. The influx of additional water to the aquifers would have a diluting effect on the high concentrations of groundwater pollutants. Thus, there would be a beneficial effect on water quality.
4. Public Law 101-618, the Truckee-Carson-Pyramid Lake Water Rights Settlement Act provides for the expansion of use of the Newlands Project to include recreation and fish and wildlife use, including water for wetlands, waterfowl habitat, fish propagation, boating and hunting, and these waters would add to those endeavors.
5. The additional water would protect and enhance the habitat of the threatened Peregrine Falcon and the endangered Bald Eagle.

The cities of Reno and Sparks, the Sierra Pacific Power Company, the Pyramid Lake Paiute Tribe, and the U.S. Bureau of Reclamation filed pre-hearing briefs asserting that the approval of Application 9330 would threaten to prove detrimental to the public interest in the following ways.

1. The approval of Application 9330 would result in more water diverted at Derby Dam and less water flowing in the lower Truckee River and into Pyramid Lake, and approval would accelerate the decline of the lake water surface resulting in negative impacts on recreation potential, water quality, and fish habitat.

2. Less water in the lower Truckee River would have a negative impact on the recovery of the Cui-ui fish, an endangered species whose only habitat is the Truckee River and Pyramid Lake. The spawning of the Lahontan Cutthroat Trout would also be negatively impacted by the reduced flows.

3. The approval of Application 9330 would cause a deterioration of the water quality in the lower Truckee River, and with lower flows the river is unable to assimilate the nutrient load.

4. The Settlement Act provides for several positive impacts if certain conditions are met: including, an equitable apportionment of the waters of the Truckee River between California and Nevada will be finalized; the upstream storage of water for a municipal and industrial drought water supply for Reno, Sparks, and Washoe County will be available; and the settlement of years of costly litigation would be accomplished. Section 210(a) of the Settlement Act requires that the Pyramid Lake Tribe's claims to the remaining waters of the Truckee River be resolved in a manner satisfactory to the State of Nevada and to the Pyramid Lake Paiute Tribe before the above-stated benefits can be realized. This requirement will not be satisfied if Application 9330 is

approved. Therefore, the public will lose the benefits of the Settlement Act if Application 9330 is approved.

The State Engineer finds that the legislature directed him to review whether an application threatened to prove detrimental to the public interest not whether it proved beneficial to a public interest. As noted by the counsel for the applicant, the State Engineer must take notice of and account for present circumstances,<sup>29</sup> and the State Engineer finds that he must consider the public interest of today and not that of 1930 when the application was filed.

#### VIII.

The United States Supreme Court noted that it has been said Pyramid Lake is widely considered the most beautiful desert lake in North America and its fishery has brought it worldwide fame.<sup>30</sup> Pyramid Lake has suffered declining water levels and decreases in its fishery resources as a result of all the existing decreed upstream diversions from the Truckee River, one of the largest being the diversion at Derby Dam for the Newlands Reclamation Project on the Carson River. The lake was 50 miles long and 12 miles wide in 1844, but its surface area had decreased by about 31 square miles by 1983.<sup>31</sup>

Sometime between 1938 and 1944 the Pyramid Lake Cutthroat Trout, a sub-species of the Lahontan Cutthroat Trout, became extinct.<sup>32</sup> Extinction was the result of a combination of factors such as physical impediments to upstream spawning runs, river

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<sup>29</sup> Transcript, p. 144, public administrative hearing before the State Engineer, March 29, 1994.

<sup>30</sup> Nevada v. United States, 463 U.S. 110, 114, 103 S.Ct. 2906, 2910, 77 L.Ed.2d 509 (1983).

<sup>31</sup> U.S. v. Alpine Land & Reservoir Co., 878 F. 2d 1217, 1220 (9<sup>th</sup> Cir. 1989).

<sup>32</sup> Nevada Division of Water Planning, Dept. of Conservation and Natural Resources, Truckee River Chronology, III-15, July 1996.

pollution, and over-fishing during critical spawning periods.<sup>33</sup> The Cui-ui, a lakesucker found only in Pyramid Lake, was federally listed as an endangered species on March 11, 1967.<sup>34</sup> In 1970, the Lahontan Cutthroat Trout was listed as a species in danger of extinction, and was reclassified to threatened status in 1975 because of the successful establishment of additional populations and hatchery rearing programs.<sup>35</sup>

Every year approximately 440,000 acre-feet per year evaporates off Pyramid Lake.<sup>36</sup> The inflow to Pyramid Lake in a 20 year span post-1967 indicates that approximately 370,000 to 400,000 acre-feet per year presently flow into the lake.<sup>37</sup> The Cui-ui Recovery Plan indicates a baseline for recovery which includes those flows that are now going to Pyramid Lake, plus an additional 110,000 acre-feet.<sup>38</sup> The water levels at Pyramid Lake are a critical factor in the recovery of the threatened and endangered species since they affect the fish's ability to clear the delta to spawn.<sup>39</sup> Other critical factors include attraction flows, spawning flows and flows sufficient for the juveniles to return to Pyramid Lake. Several witnesses voiced the opinion that further reduced flows will either

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<sup>33</sup> Id. at III-16.

<sup>34</sup> Exhibit No. 94, public administrative hearing before the State Engineer, June 1, 1994.

<sup>35</sup> Nevada Division of Water Planning, Dept. of Conservation and Natural Resources, Truckee River Chronology, III-27-29, July 1996.

<sup>36</sup> Exhibit No. 94, p. 3, public administrative hearing before the State Engineer, June 1, 1994.

<sup>37</sup> Transcript, pp. 461-471, public administrative hearing before the State Engineer, June 1, 1994.

<sup>38</sup> Transcript, pp. 489-491, public administrative hearing before the State Engineer, Feb. 2, 1996.

<sup>39</sup> See Testimony of Thomas Strekal, Paul Wagner, Chester Buchanan, public administrative hearing before the State Engineer, June 1-2, 1994, and February 1-2, 1996.

result in the extinction of species or reversal of the recovery of the fishery that has been made to date.<sup>40</sup> The State Engineer finds that the diversion of the 100,000 acre-feet applied for here would be detrimental to Pyramid Lake and its fisheries.

**IX.**

Public Law 101-618 signed by the President of the United States in 1990 is intended to settle some of the pending lawsuits on the Truckee River. It addresses many issues and is contingent on many factors which are not yet in place. Section 207(a) directs the Secretary of the Interior to develop and implement a plan for the recovery of the endangered Cui-ui fish in Pyramid Lake. The recovery plan calls for increasing flows to and increasing the elevation of Pyramid Lake. The State Engineer finds that the approval of Application 9330 would be contrary and adverse to the recovery of the Cui-ui and Section 207(a) of Public Law 101-618.

**X.**

Public Law 101-618 provides for an interstate allocation of the waters of the Carson River, Lake Tahoe and Truckee River between California and Nevada.<sup>41</sup> A final resolution as to the interstate allocations of the water on the system is of essential importance to Nevada and California. That allocation is a key ingredient in the management and resolution of issues on the entire river system. Its importance cannot be overlooked. Decades of work by both California and Nevada went into the determination of that allocation. Since California controls the headwaters of the Truckee River, it is of paramount importance for Nevada to have an interstate allocation of these waters by federal law, and the benefits of that allocation should not be taken lightly. The State Engineer finds it would threaten to prove detrimental to the public

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<sup>40</sup> See Testimony of Thomas Strekal, Paul Wagner, Chester Buchanan, public administrative hearing before the State Engineer, June 1-2, 1994, and February 1-2, 1996.

<sup>41</sup> Public Law 101-618 Section 204.

interest to jeopardize that interstate allocation by the granting of Application 9330.

**XI.**

The applicant argues that endangered species issues exist in the Carson River basin, as well as the Truckee River basin, and this additional water would assist in the protection of those endangered species in the area of the Newlands Project. It is not the State Engineer's job to choose one endangered species over another. While it may prove beneficial to the public interest of Churchill County to remove this water from the Truckee River system and send it to the Carson River system for endangered species that may exist there, the State Engineer finds it would threaten to prove detrimental to the public interest of protecting the threatened and endangered species in the Truckee River system to do so.

**XII.**

Testimony provided indicates that there are water quality problems in the Lahontan Valley and on the lower Truckee River.<sup>42</sup> In this instance, while it may prove beneficial to the public interest of Churchill County to remove this water from the Truckee River system and send it to the Carson River system for water quality enhancement there, the State Engineer finds it would threaten to prove detrimental to the public interest of protecting the water quality in the lower Truckee River system to do so.

**XIII.**

While it is clear that the addition of water into the Newlands Project would bring benefits to that area, the approval of Application 9330 would take more water from the lower Truckee River and Pyramid Lake which presently receives the unappropriated water. This diversion would result in detrimental effects to the lower Truckee River, Pyramid Lake, the threatened Lahontan Cutthroat

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<sup>42</sup> See, testimony of B.J. Selinder, March 29, 1994, January 31, 1996, Paul Wagner, June 1, 1994, Ali Shahroody, February 2, 1996.

Trout, and the endangered Cui-ui. While the denial of Application 9330 prevents the addition of the described benefits to the Newlands Project and surrounding area, it does not remove any existing benefits that the area receives from the existence of the Newlands Project. The State Engineer finds that the approval of Application 9330 would threaten to prove detrimental to the public interest.

### CONCLUSIONS

#### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>43</sup>

#### II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters of Nevada where:<sup>44</sup>

- A. there is no unappropriated water at the proposed source;
- B. the proposed use conflicts with existing rights; or
- C. the proposed use threatens to prove detrimental to the public interest.

#### III.

The issue of ownership of the facilities versus ownership of the water right was addressed by the United States District Court in U.S. v. Alpine Land and Reservoir Company where the Court stated that the United States may have title to the irrigation works, but as to appurtenant water rights it maintains only a lien-holder's interest.<sup>45</sup> The Court recognized that the United States owns the physical facilities. The Secretary of Interior is authorized to

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<sup>43</sup> NRS Chapter 533.

<sup>44</sup> NRS 533.370.

<sup>45</sup> U.S. v. Alpine Land and Reservoir Company, 503 F.Supp. 877, 879, (D. Nev. 1980).

transfer operation and management of irrigation works to project land owners once payments for a major portion of the project lands are made, but title to the reservoir works remains in the government,<sup>46</sup> and nothing in the law tells the State Engineer otherwise. The State Engineer concludes there is no reasonable expectation that the applicant can place the waters to beneficial use as applied for under the application. The application anticipates use of the federal facilities to transport and store the waters applied for and the United States has indicated its refusal to allow the federal facilities to be used for that purpose. Therefore, the applicant cannot overcome the threshold issue of being able to place the waters to beneficial use as applied for under the application.

IV.

The State Engineer concludes that there is unappropriated water in the Truckee River. However, there is no evidence as to how much water the applicant could capture over and above the existing decreed amount for the project given the physical and legal constraints, and there is no evidence that the applicant could put the water to beneficial use given the United States' refusal to allow use of the federal facilities.

V.

The equitable apportionment of the Truckee River waters between California and Nevada, the settlement of litigation, and the upstream drought storage for Reno, Sparks, and Washoe County are important public benefits under Public Law 101-618 that would not be available if Application 9330 were approved. These benefits substantially serve the public interest, and outweigh the potential benefits in the Newlands Project area; therefore, the State Engineer concludes that it would threaten to prove detrimental to the public interest to jeopardize those benefits.

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<sup>46</sup> Ibid.

VI.

The State Engineer recognizes that the approval of Application 9330 would bring benefits to the Newlands Reclamation Project and the communities contained therein. The State Engineer concludes that approval of Application 9330 would decrease flows in the lower Truckee River and degrade water quality which would accelerate the decline of the Pyramid Lake water level, increase pressure on the threatened Lahontan Cutthroat Trout, and interfere with the implementation of the recovery of the endangered Cui-ui thereby proving detrimental to the public interest.

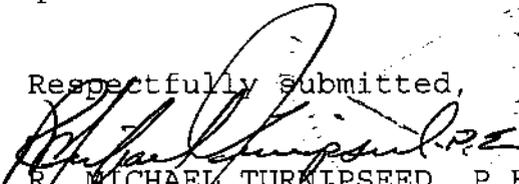
VII.

The State Engineer concludes after weighing the negative impacts that would be caused by the granting of Application 9330 that the approval of said application would threaten to prove detrimental to the public interest.

RULING

Application 9330 is hereby denied on the grounds that its approval would threaten to prove detrimental to the public interest.

Respectfully Submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/SJT/cl

Dated this 14th day of  
August, 1998.