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STATE ENGINEER'S OFFICE

BEFORE THE STATE ENGINEER, STATE OF NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES

IN THE MATTER OF CHANGE APPLICATIONS NOS. 68543 FILED BY JOANN H. MCCLOSKEY TO CHANGE THE POINT OF DIVERSION, MANNER OF USE AND PLACE OF USE OF WATER APPROPRIATED UNDER THE RECLAMATION ACT OF 1902 FROM THE TRUCKEE DIVISION OF THE NEWLANDS PROJECT

PROTEST AND REQUEST TO DENY APPLICATION 68543; PETITION FOR HEARING PURSUANT TO NRS 533.345

COMES NOW THE TRUCKEE-CARSON IRRIGATION DISTRICT ("TCID"), by and through its attorney, a political subdivision of the State of Nevada, organized under Chapter 539 of the Nevada Revised Statutes, whose address is 2666 Harrigan Road, Fallon, Nevada, 89407-1356, with responsibilities under contract to operate and maintain the Newlands Reclamation Project and to deliver water to landowners who have contracted either with the United States or with TCID, and to comply with water rights decrees for water rights appropriated by the United States under the Reclamation Act (43 U.S.C. 371, et seq.), and as a party to the water rights decree of the Truckee River, known as the Orr Ditch Decree (*U.S. v. Orr Water Ditch Co.,* equity A-3-LDG U.S. District Court, Nevada, September 8, 1944), hereby protests the granting of change application 68543 filed by Joann H. McCloskey to change the point of diversion, manner of use and place of use of appropriated waters of the Truckee River, situated in Churchill County, State of Nevada, for the following reasons and on the grounds, to wit:

1. Section 209(c)(1) of Public Law 101-618 (November 16, 1990) establishes a criteria and goals that an average of not less than 75% of actual diversion under applicable operating criteria and procedures shall be delivered to satisfy the exercise of water rights within

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the Newlands Project for authorized project purposes. The applicant seeks to transfer water rights from 30.8 acres with an entitlement of 4.5 acre feet per acre, for a total annual duty of 138.6 acre feet. The Operating Criteria and Procedures ("OCAP") also imposes requirements with respect to efficiency improvements with respect to losses in the Truckee Canal involving conveyance efficiency. The granting of this transfer application would adversely impact conveyance efficiency and the ability to achieve the referenced objecting and requirements, which will shift the burden to achieve these objectives on other water right owners within the District, and specifically those on the Truckee Division of the Project. Approval of this transfer will adversely affect the cost of water to other water right owners within the District, lessen the District's efficiency in its delivery and use of the water, and may result in a decreased amount of water available to other water right owners because of efficiency requirements. Such results are against the public interest, and under N.R.S. 533.370, the State Engineer is required to disapprove an application if the proposed transfer may result in such additional costs or losses.

2. Public Law 101-618 (November 16, 1990), and specifically § 209(b), limits the increase of diversions of the Truckee River water to the Newlands Project. This transfer, if approved, will effectively transfer water from within the Newlands Project to instream flows outside of the Project. Accordingly, unless additional diversions are authorized, other users within the Truckee division of the Project will have to absorb the loss of additional water needed to meet efficiency requirements, particularly when losses due to delivery of water through the system are considered. The approval of this transfer will also adversely limit the amount of water available for "return flow irrigation" which is encouraged under Alpine, *infra.*, p. 892.

3. Under the Reclamation Act of June 17, 1902, and as decreed in the case of *United*

States v. Orr Ditch Co. ("Orr Ditch Decree"), on September 8, 1944, Derby Dam and the Truckee Canal were established for the benefit of the landowners within the Newlands Project for irrigation, generating power, and supplying the inhabitants of cities and towns within the Project, including water for domestic and other purposes. The decreed water rights are appurtenant to the lands within the Project. Under § 209(a) of Public Law 101-618, the Project is to be operated and maintained for the purposes of municipal and water supply in Lyon and Churchill Counties, including the Fallon Indian Reservation, recreation, water quality and any other purpose recognized as beneficial under the laws of the State of Nevada. If this transfer is approved, the public interest will be violated in that the water so transferred will have a negative impact on groundwater sources relied upon by towns and municipalities within the Reclamation Project, will negatively impact flows to the wetlands and may adversely affect water quality.

4. The water rights sought to be transferred in this application are subject to the pre-existing contractual rights and obligations as manifested in water right contracts entered into initially with the United States Bureau of Reclamation or TCID, and which are administered by TCID. The provisions of these contracts provide that the water available to the applicants' property is an allocable share of available water in any given irrigation year to all of the Project water users. Accordingly, in a water shortage irrigation season, the burden of the loss of the water proposed for transfer will have to be assumed by other users within the Project on a pro rata basis.

5. The referenced contracts provide for the payment of operation and maintenance charges, which become a lien upon the water as well as the real property benefitted by the water and provides for the withholding of the delivery of water if the payments are not made. The

contract also provides TCID with the right to impose a lien against the property benefitted by the water. In the event that this transfer is approved, the lien rights of TCID will be effectively unenforceable, particularly in view of the fact that the water is being transferred to instream flows for "wildlife," thus depriving the District of the ability to enforce payment of the "O&M" charges, potentially to the detriment of all other users within the Project who will have to assume and pay an increase in those charges . Further, since the proposed transfer is to instream flows, TCID will not have the ability to withhold deliveries of the water in the event of non-payment of the O&M charges. The proposed transfer of the water rights will be detrimental to the interests of the public at large, in violation of N.R.S. 533.370.

THEREFORE, TCID respectfully requests that the State Engineer hold a hearing on application 68543 and that application 68543 be denied and an order be entered by the State Engineer denying said application.

Dated this 31st day of May, 2002.

Respectfully submitted,

MICHAEL J. VAN ZANDT, ESQ.
Nevada Bar No. 7199
Attorney for the Truckee-Carson
Irrigation District

Subscribed and sworn before me this 31 day of May, 2002.

SAMANTHA HUBLEY
Commission # 1239190
Notary Public - California
San Francisco County
My Comm. Expires Oct 22, 2003

Notary Public

State of California
County of San Francisco

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PROOF OF SERVICE

Re: In the Matter of Change Application No. 68543

I am employed in the City and County of San Francisco, California, I am over the age of eighteen years and not a party to the within action; my business address is 221 Main Street, 16th Floor, San Francisco, California, 94105. On May 31, 2002, I served the following document(s):

- **PROTEST AND REQUEST TO DENY APPLICATION 68543; PETITION FOR HEARING PURSUANT TO NRS 533.345**

on the parties listed on the attached list through their attorneys of record, by placing a true copy thereof in a sealed envelopes as listed on the attached Service List for service as described below:

[A] By First Class Mail - I caused each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein following ordinary business practices.

[B] By Personal Service -- I caused each such envelope to be personally delivered to the addressee by a member of the staff of this law firm on the date last written below.

[C] By Personal Service - I caused each such envelope to be delivered to a courier employed by Silver Bullet Messenger Service who personally delivered each such envelope to the office of the addressee on the date last written below.

[D] By Federal Express -- I caused each such envelope to be delivered to Federal Express Corporation at San Francisco, California, with whom we have a direct billing account to be delivered to the office of the addressee on the next business day.

[E] By Facsimile -- I caused such document to be served *via facsimile* electronic equipment transmission (fax) on the parties in this action by transmitting a true copy to the above listed fax numbers.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 31, 2002, at San Francisco, California.

Margarita Bermudez

SERVICE LIST

[A] Joann H. McCloskey
P.O. Box 2114
Helena, MT 59635-2114