FILED
MAY 18 2006
STATE ENGINEER'S OFFICE

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

IN THE MATTER OF
APPLICATION NUMBER: 73986
FILED BY: CITY OF SPARKS BY & THROUGH TRUCKEE MEADOWS WATER AUTHORITY
ON: MARCH 13, 2006, TO APPROPRIATE THE WATERS OF: TRUCKEE RIVER

PROTEST & REQUEST TO

DENY APPLICATION 73986;
PETITION FOR HEARING PURSUANT TO N.R.S. 533.365;
PETITION FOR HYDROLOGIAL & ENVIRONMENTAL STUDY PURSUANT TO N.R.S. 533.368

COMES NOW: CHURCHILL COUNTY

WHOSE ADDRESS IS: 155 NORTH TAYLOR STREET, SUITE 153, FALLON NV 89406

WHOSE OCCUPATION IS: A POLITICAL SUBDIVISION OF THE STATE OF NEVADA AND PROTESTS THE GRANTING OF APPLICATION NUMBER: 73986 FILED ON: MARCH 13, 2006 BY: CITY OF SPARKS BY & THROUGH TRUCKEE MEADOWS WATER AUTHORITY TO APPROPRIATE THE WATERS TRUCKEE RIVER SITUATED IN: WASHOE COUNTY, STATE OF NEVADA, FOR THE FOLLOWING REASONS AND ON THE FOLLOWING GROUNDS, TO WIT:

SEE ATTACHMENT "A"

THEREFORE, BASED ON THE FORGOING REASONS:

- ◊ THERE IS NO UN-APPROPRIATED WATER IN THE SOURCE,
- ◊ GRANTING OF THE APPLICATIONS WOULD CONFLICT WITH EXISTING RIGHTS,
- ◊ AND COULD PROVE DETRIMENTAL TO THE PUBLIC INTEREST

THEREFORE, FOR THE FOREGOING REASONS, THE PROTESTANT RESPECTIVELY REQUESTS THAT THE STATE ENGINEER REQUIRE A HYDROLOGICAL AND ENVIRONMENTAL STUDY TO BE CONDUCTED PURSUANT TO N.R.S. 533.368, THAT THE STATE ENGINEER HOLD A HEARING ON THE APPLICATION AND THAT THE APPLICATION BE: DENIED AND AN ORDER BE ENTERED BY THE STATE ENGINEER DENYING SAID APPLICATION.

SIGNED: _____

CHRIS C. MAHANNAH, P.E., SWRS#976 (AGENT)
WATER RESEARCH & DEVELOPMENT, INC.
P.O. BOX 5007
RENO, NV 89513
(775) 747-1100

STATE OF NEVADA
COUNTY OF WASHOE
SUBSCRIBED AND SWORN TO BEFORE ME THIS 16TH DAY OF MAY, 2006
BY CHRIS C. MAHANNAH

KEITH WEAVER
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 05-99986-2 - Expires September 6, 2009

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STATE OF: NEVADA
COUNTY OF: WASHOE

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$25 FILING FEE MUST ACCOMPANY PROTEST. PROTEST MUST BE FILED IN DUPLICATE.
ALL COPIES MUST CONTAIN ORIGINAL SIGNATURE.

ATTACHMENT "A"

1. Chruchill County and Fallon are experiencing rapid residential, commercial and industrial growth which relies upon waters associated with the Newlands irrigation project. Nearly all of the useable groundwater recharge within basin 101 occurs as a result of the irrigation project, therefore any actions which have the potential to reduce surface flows will impact recharge and the ability to serve the M&I uses. Churchill County's 2000-2025 and 2025-2050 water resource plans have identified groundwater within basin 101 and Newlands project surface water as their source of supply. These plans are currently being updated for shorter term planning which will rely upon groundwater and conjunctive use of surface and groundwater. The Dixie Valley importation alternative is the only new source of water for the basin, however the local sources of water will be developed until such time as the Dixie resource is economically viable. Chapter 3 of Churchill's water resource plan, which is of public record at the State Engineer's office, identified all of the threats to their water supply at that time. The Truckee River Operating Agreement (TROA) and these applications are an additional threat to those.

2. Other specific entities within Churchill County which rely upon Newlands Project waters are the: Fallon Paiute/Shoshone Tribe, City of Fallon, USF&WS, and NAS Fallon which would be harmed if these flows are reduced. These entities and Churchill County are owners of decreed Newlands project waters and permitted or certificated underground water which is recharged by the Project waters.

3. The County Commissioners have not been properly noticed pursuant to N.R.S. **533.363**. Such notice should be received by the county prior to the ready for action date such that the commissioners can properly notice and conduct public meeting pursuant to N.R.S. **533.363 (4).** This would allow the general public to lodge protests in addition to the commissioner recommendations which may be provided for consideration by the State Engineer.

4. Churchill County is a major producer of renewable geothermal power. Federal and State studies have identified Churchill County and the areas around and including basin 101 as the state of Nevada's leading area for future geothermal production. Additionally waters from the Truckee River and Lahontan are used to produce renewable Hydroelectric power. Geothermal royalties, hydroelectric power sales and taxes associated with production of geothermal energy have a significant impact on the Churchill County economy. Any long term reduction of river flows and ground water recharge in Churchill County has potential long term impact on production of renewable hydroelectric and geothermal energy and will harm the communities and state agencies which benefit from said energy production and use.

5. The Newlands Project is managed by TCID and the Bureau of Reclamation (BOR) and consists of the Truckee Division, served entirely from the Truckee River via the Truckee Canal, and the Carson Division which is served by commingled Truckee and Carson waters downstream of Lahontan reservoir. The entire Carson Division is contained

within Churchill County and the Swingle Bench and Hazen portions of the Truckee Division are within Churchill County, therefore nearly all the Project is contained within Churchill County. Therefore, any agreements with TCID ultimately affect Churchill County and its residents.

6. The water rights sought to be changed under this application arise from the Truckee River Agreement (TRA) which TCID is a party and ultimately incorporates Churchill County residents. This agreement is incorporated into the Orr Ditch Decree and granting the application would violate the compromise reached in the TRA that allowed the Orr Ditch Decree to be entered. The application attempts to effect a unilateral change to the Orr Ditch Decree by changing the TRA, without consent, approval or notice and attempts to modify the Decree without the approval of the Orr Ditch Court. Claim 3 of Orr Ditch specifically identified Newlands Project waters to be used for M&I uses which Churchill and Fallon have come to rely upon.

7. The Application proposes that the beneficial places of use will be set forth in secondary applications consistent with TROA. TROA is still in the environmental review process. The deadline for implementing TROA is 2009 which is rapidly approaching and there are still a number of issues to be negotiated. There have been endless delays to the implementation of TROA and there is no guarantee that it will be implemented. Further, the Application fails to adequately identify a specific project where the water will be applied for beneficial use. The Applicant has not demonstrated feasibility of beneficial use of the water, therefore, the Application is premature and speculative.

8. The Truckee River Agreement and the Orr Ditch Decree Control the Distribution and Storage of Water in the Truckee River Basin. The TRA is incorporated into the Orr Ditch Decree as a part of the decree itself. See U. S. v. Orr Water Ditch Company, CV-N-73-0003 LDG at p. 86. The TRA sets forth the principles under which the Truckee River would be operated and allowed for the stipulated entry of the Orr Ditch Decree. The parties to the Truckee River Agreement are: The United States of America; Truckee-Carson Irrigation District; Washoe County Water Conservation District (Conservation District); Sierra Pacific Power Company (Sierra), and such other users of the waters of the Truckee River and/or its tributaries, known as Parties of Fifth Part. The TRA required the Truckee River to be operated on the basis of Floriston Rates, as established in the 1915 General Electric Decree. United States v. The Truckee River General Electric Company, Case No. 14861 (N.D. Cal. 1915). For the last 70 years, the Truckee River has been managed by the parties to the TRA, along with the Federal Water Master. Several new reservoirs have been added to the Truckee River watershed that did not exist when the TRA was executed. These reservoirs are part of the Washoe Project and include Prosser Reservoir and Stampede Reservoir. These reservoirs are managed in conjunction with the other reservoirs serving the Truckee River basin. The Applicant has failed to show that the proposed diversion and use of water is consistent with the management regime of the Truckee River as set forth in the Truckee River Agreement and the Orr Ditch Decree. Moreover, any unused water in the Truckee River is to the benefit of the Conservation District and TCID. Attempts to alter the division of unused water are in violation of the TRA and undermine the Orr Ditch Decree.

9. The proposed storage and secondary use under TROA of the water proposed in the Application (in conjunction with the other similar applications filed for upstream storage) will interfere with the management of Floriston Rates on the Truckee River. Floriston Rates are defined in the TRA as the rate of flow in the Truckee River as measured at the Iceland Gage, consisting of an average flow of 500 cubic feet per second (cfs) each day during the year commencing March 1 and ending September 30 of any year and an average flow of 400 cfs each day from October 1 to the last day of February of the next year. Water in Lake Tahoe must also be released as required under the TRA to maintain Floriston Rates. The TRA sets limitations on when Floriston Rates can be changed and requires that before that can occur, the permission of the Conservation District, TCID and Sierra must be obtained. In addition, the United States and TCID must agree pursuant to their rights under the 1915 GE Decree. Releases from Boca Reservoir can also be used to make up Floriston Rates if the parties agree, including TCID. The TRA also calls for Reduced Floriston Rates under certain conditions that would also potentially be impacted by the proposed change. The proposed change applications purport to alter the TRA in violation of the aforementioned agreement. Reduction in Floristan Rates for the benefit of upstream storage for M&I drought protection and growth within the Truckee Meadows Water Authority (TMWA) service areas has the potential to reduce the amount of water available for diversion at Derby Dam.

10. Washoe Project reservoirs includeing Prosser Reservoir and Stampede Reservoir, must also be operated based on Floriston Rates. The operation of these reservoirs would also be altered to the detriment of the Newlands Project under the proposed change applications.

11. The Application fails to adequately identify the beneficial use of the water, the specific place of use, or a specific project where the water will be applied for beneficial use. The proposed place of use for the applications will be subsequently "set forth in applications for secondary permits consistent with the Truckee River Operating Agreement." The Applicant has not demonstrated feasibility of beneficial use of the water; therefore, the Application is premature and speculative.

12. The granting of this Application would injure existing water rights adjudicated in the Orr Ditch Decree, and under the Decree such a transfer cannot be approved if it will cause injury to an existing right under the decree. Potential uses under TROA for fish credit water will injure Newlands water users. The historic use of this water was for irrigation, which provided for return flows which could be beneficially used by Newlands farmers. Likewise, the current use of this water for municipal and domestic provides substantial return flows. However, uses under TROA for fish water do not provide return flows resulting in injury to Newlands Project farmers, especially in years of drought.

13. This Application along with other numerous similar applications filed by TMWA/Reno/Sparks are actually joint applications for storage of the consumptive portion and direct diversion of full diversion rate, which violates NRS 533.330 wherein an application must be limited to one source for one purpose.

14. The Applicant has not demonstrated that the proposed water can be stored in the reservoirs without displacing water that would otherwise be stored to the benefit of the Newlands Project. Since nearly the entire Newlands Project is contained within Churchill County, any reduction to Newlands produces direct harm to health, welfare and future of Churchill's economy and residents.

15. The Application fails to provide a full understanding of the proposed change. Because negotiations for TROA are ongoing, the agreement has not been finalized, and the Draft environmental impact statement/environmental impact report ("DEIS/EIR") has not been certified the Application is inadequate pursuant to NRS 533.345 wherein any application to change the place of diversion, manner of use, or place of use must contain "...such information as may be necessary to a full understanding of the proposed change." This is particularly true because the applications for secondary permits have not been filed and the potential impacts cannot be fully understood until TROA is finalized, if at all, and the beneficial uses and places of use are identified. It is noted that such secondary permits are not published in accordance with NRS 533.440 and thus, even though the actual points of diversion and the source of such diversions are not shown in the Application, the Applicant(s) are attempting to bypass the notice provisions, thus shifting the burden to potential protestants to monitor application filings for the subsequent secondary permits and file additional protests at that time.

16. Exhibit D of the Application describes the intent to store only the consumptive use portion of the water right and includes incomplete and vague language that the consumptive use portion shall be at least 2.5 af/ac. This is problematic for two reasons. First, it appears the language is vague to allow the Applicant at some later time to attempt to increase the storage rate beyond the specified 2.5 acre feet per acre. If the Application is approved, it should specify that "the consumptive use portion shall not exceed the actual consumptive use portion of the water right, as determined by the State Engineer." The actual consumptive use under the decreed use of the base rights will vary from year to year depending upon climatic conditions, irrigation season, drought and other factors, therefore the historic consumptive use may be less than 2.5 af/ac in some years. A historic consumptive use analysis needs to be conducted and imposed annually on any waters to be stored under TROA. Second, the Application (and in many instances the underlying permits and certificates) does not expressly state the number of acres to be used in determining the storage quantity under each right. The Application should specifically state the number of acres associated with the underlying water right. Moreover, the Application does not state the actual amount of water in acre feet that will be stored in the reservoirs, making the Application defective.

17. The Application for "Primary Storage" and "Secondary Uses" will dramatically alter the flow regime of the Truckee River with potential injury to Newlands Project water right owners. The Application specifies the proposed period of use as January 1 to December 31 of each year, whereas the existing period of use is generally "as decreed." The underlying water rights for the claims in the Orr Ditch Decree were originally used for irrigation purposes, thus the historical diversion pattern was on an irrigation pattern. The

Orr Ditch Decree does not specify a prescribed irrigation season rather it is purposely left open to allow for flexibility in changing hydrologic conditions. Although the prior change permit was issued without restricting the municipal use to a historical diversion pattern, the permits generally contain language to the effect that the permit is issued subject to the terms and conditions of the Orr Ditch Decree and "with the understanding that no other rights on the source [Truckee River] will be affected by the change proposed herein." Further, the prior change permit was issued allowing municipal and domestic uses for a period of use specified "as decreed." Year-round use of water historically used on an irrigation pattern may cause injury to downstream rights and that proposed storage of these rights increases the potential for injury to downstream rights. If the Applicant is allowed to store these water rights in the non-irrigation season with subsequent releases for municipal use or for conversion to fish water, the regime of the Truckee River will be dramatically altered resulting in potential injury to existing water right owners. The proposed period of use should be restricted to the "irrigation season" as determined each year by the Federal Water Master.

18. The amount diverted (either into storage or by direct diversion) should be restricted to the 25 percent maximum monthly amount in accordance with the Orr Ditch Decree.

19. The Application is defective because there is no information provided regarding the releases and use of the stored water and thus the potential injury or impacts cannot be ascertained.

20. It is understood from review of the TROA DEIS/EIR that the stored water will be used as (1) subsequent municipal releases and diversions or (2) the expanded uses under TROA to include conversion to fish water, releases for minimum instream flows, and releases for the broader lower Truckee River streamflow objectives. Any subsequent releases of the stored water should be subject to reservoir evaporation and seepage losses as well as river conveyance losses to the new point of diversion in order to prevent such losses from being incurred by the Newlands Project.

21. By diverting water and storing it in up stream reservoirs, the Application is keeping water out of the river to the detriment of other water right holders, particularly in years of drought. The Truckee Division is entirely dependent upon the flows diverted at Derby and the Carson Division is heavily dependent upon those flows especially during drought periods. Further, agreements would be required with users of both Truckee and Carson River waters for modification of certain established water rights. No such agreement has been obtained.

22. The purported Application will negatively impact Hydrographic Basin 87 and 101. The flow of the Truckee River is hydrologically connected to all the groundwater basins it flows through. By storing water in upstream reservoirs that normally flowed in the river and ditch systems, the Application (in conjunction with the other similar applications filed for upstream storage) will negatively impact recharge of Hydrographic Basin 87 and 101. Further, TMWA currently utilizes Hydrographic Basin 87 as a source of substantial water which is pumped from the basin. By storing water up-stream they are in effect

utilizing the water twice to the detriment to other water users whose water will now recharge the basin, especially in times of drought. Removing this water from the basin prevents it from partially recharging the aquifer. Well pumping then must use other groundwater that is hydrographically connected to the Truckee River, thus affecting flows in the river for downstream users. Basins 87 & 101 are designated by the State Engineer under Chapter 534 of the NRS, and moving surface water from the basin will have a detrimental effect on the groundwater. Furthermore, in 1995 the State Engineer issued Order #1116 associated with Basin 101 which curtailed underground appropriations to 4,000 gallons per day. This order was based upon recognition that the annual recharge to ground water aquifers in Basin 101 from irrigation will be significantly reduced by changes in the operation of the Project, reduction in diversion to the Project, and retirement of significant irrigated acreage through the Lahontan Wetlands buy-out of irrigation rights.

23. The application is premature, speculative, and detrimental to the public interest as there are a number of conditions that must occur before the water may be utilized as proposed in the application, including: (1) no permanent agreement to store water in the named reservoirs, (2) no permission to store water in Donner Lake from TCID, (3) TROA has not been finalized, and (4) the California State Water Resource Control Board has not issued permits to store this water under California law. Nevada law mandates that the State Engineer either approves or denies an application, and an application can not be contingent on subsequent conditions. NRS 533.370. At this time there is insufficient information for the State Engineer to act.

24. The Applicant intends with the secondary use, to use the water below the current point of diversion. Any secondary use below the original point of diversion should be treated as a new application with a priority date as of the date of the change application to prevent injury to existing water right owners. Further, the Applicant has no right to divert and use water at diversion points outside of Truckee Meadows. Moreover, a change in the point of diversion downstream will have a negative effect on upstream and downstream users.

25. The amount of duty shown on the Application is more than the consumptive use portion. If approved, the Application should be limited to the actual consumptive use portion based on a historical consumptive use analysis. This determination should be made annually based upon the condition of the water year. For example, under a decreed use during extreme drought, the decreed use may be cut off in June therefore the consumptive use would be well below 2.5 af/ac. Storage of 2.5 af/ac under this scenario would cause a depletion to the river beyond the historic decreed use.

26. Since the full scope of this project is unknown and referenced subsequent secondary recovery applications will be filed which are not published, Churchill County reserves the right to add or amend this Protest as more information becomes available.

27. If such applications are approved any permit should be issued subject to the following specific conditions:

a) Assure that all irrigated lands and residual acreage associated with prior transfers do not receive any Truckee River water either inadvertently or directly.
b) The diversion shall be according to a new priority based on the date of the underlying change application.
c) The period of use for the first diversion either into storage or for direct diversion at the water treatment plants must be restricted to the irrigation season specified by the Federal Water Master.
d) The first diversion either into storage or for direct diversion must be restricted to the 25 percent maximum monthly amount in accordance with the Orr Ditch Decree.
e) The consumptive use portion to be stored in the reservoirs shall not exceed the historic actual consumptive use portion of the water right as determined by the State Engineer, calculated based on a specified number of acres provided in the permit on an annual basis based upon hydrologic conditions for that year.
f) The non-consumptive use portion shall remain in the river to protect the historical flow regime of the Truckee River.
g) Any subsequent releases of the stored water shall be subject to reservoir evaporation and seepage losses as well as river conveyance losses to the new point of diversion in order to prevent such losses being incurred by downstream users.
h) Proposed accounting forms shall be approved by the State Engineer and the Federal Water Master tracking by right and priority amounts of water including but not limited to diversion to storage, direct diversion, exchanges, conversion to fish water, subsequent reservoir releases, reservoir losses, and river conveyance losses.
i) Conditions to insure that the proposed storage of water can be stored in the reservoirs without displacing water that would otherwise be stored to the benefit of the Newlands Project.
j) NRS 533.440 (1) provides that there is no notice requirements for secondary permits. Here, the unknown and speculative nature of the secondary uses in the application could result in injury to other water right owners. Therefore, there should be a specific notice requirement for secondary uses with this Application, if approved.
k) The transportation component of the water should be stored in Lake Tahoe for use by other water owners entitled to diversions under the Orr Ditch Decree.
l) The permit is issued subject to the terms and conditions of the Orr Ditch Decree and with the understanding that no other rights on the source Truckee River will be affected by the change proposed.
m) The permit is issued subject to uses for a period of use specified "as decreed."