FILED
JUN 22 2006
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 APPLICATION 74085 FILED BY TRUCKEE MEADOWS WATER AUTHORITY TO CHANGE THE PLACE AND MANNER OF USE OF WATER HERETOFORE APPROPRIATED UNDER CLAIM 581 OF THE TRUCKEE RIVER DECREE AND PERMIT 70494

**PROTEST AND REQUEST TO DENY APPLICATION 74085 PETITION FOR HEARING PURSUANT TO N.R.S. 533.365; AND ENVIRONMENTAL STUDY PURSUANT TO N.R.S. 533.368**

COMES NOW THE TRUCKEE-CARSON IRRIGATION DISTRICT ("TCID"), by and through its attorneys, organized under Chapter 539 of the Nevada Revised Statutes, whose address is P.O. Box 1356, 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 74085 filed by Truckee Meadows Water Authority ("TMWA"), to change the place and manner of use of water heretofore appropriated under Claim No., 581 of the Orr Ditch Decree (or Truckee River Decree) and permit 70494. TCID protests the application for the following reasons and on the grounds, to wit:

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1. On information and belief, the purported water rights arise from the Truckee River Agreement ("TRA"), to which TCID is a party, and which is incorporated by reference into the Orr Ditch Decree (*U.S. v. Orr Water Ditch Co.*, et al., CV-N- 73-003. D. Nev. (1944)), and such rights arise, if at all, based upon an express agreement of the parties to the Truckee River Agreement and not otherwise, and granting the application would violate the compromise reached in the TRA that allowed the Orr Ditch Decree to be entered.

2. Any change to the compromise reached by the parties to the TRA requires the consent of the parties to that agreement, which consent is withheld by TCID.

3. The Application is defective because it attempts to effect a unilateral modification to the Orr Ditch Decree by changing the TRA, without consent, approval or notice, and attempts to modify the Orr Ditch Decree without approval of the Orr Ditch Court.

4. The Application proposes that the beneficial places of use will be set forth in applications for secondary permits consistent with the Truckee-River Operating Agreement ("TROA"). TROA is still in the environmental review process and there is no guarantee that it will be approved. Further, the Application fails to adequately identify a specific project where the water will be applied for beneficial use. The Applicant has not demonstrated feasability of beneficial use of the water, therefore, the Application is premature and speculative.

5. 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 inure 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.

6. The Applicant may not use Boca Reservoir or Lake Tahoe water as proposed in the Application. These water bodies are subject to the terms of the TRA, to which TMWA, a successor to the Sierra Pacific Power Company, is bound.

7. On information and belief, 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. Changes in the flow from Boca Reservoir requires the consent of 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.

8. All Washoe Project reservoirs, include 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 TCID under the proposed change applications.

9. The Application must comply with the TRA, unless and until consent of all parties is received. TCID does not consent. TROA was born from the Preliminary Settlement Agreement between Sierra Pacific and the Pyramid Lake Paiute Tribe of Indians (PLIT), which was recognized in the Truckee-Carson-Pyramid Lake Settlement Act, P.L. 101-618, 104 Stat. 3289, November 16, 1990 (the Act). The Act contains a reservation that it is not to be construed to alter or conflict with any existing rights to use the Truckee River water in accordance with the applicable decrees. The TRA is incorporated into the Orr Ditch Decree as a part of the decree

itself. See *United States v. Orr Water Ditch Company*, CV-N-73-0003 LDG at p. 86. Specifically, the Act states that TROA will "ensure that water is stored in and released from Truckee River reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch decree and Truckee River General Electric decree." 104 Stat 3305. Therefore, even under TROA, if adopted, the Application must comply with the TRA requirements for storage and maintenance of Floriston rates. The Applicant has made no showing that the proposed diversion of the water complies with the TRA, nor can it.

10. The proposed 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.

11. On information and belief, the granting of this Application would injure existing water rights adjudicated in the Orr Ditch Decree, and under the Orr Ditch 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.

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12. 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.

13. The Application incorrectly names the source of the water and fails to designate a point of diversion. NRS 533.440(2) specifies "the application shall refer to the reservoir for a supply of water." The Application does not specify the named reservoirs in Exhibit B as the "supply," rather the reservoirs are named as points of diversion, the source of supply for the Applications is actually tributaries to the Truckee River. The point of diversion cannot be a storage facility.

14. The Application fails to provide evidence of sufficient capacity in the named reservoirs or the existence of agreements for the storage of water. NRS 533.440(2) specifies "the application...shall show by documentary evidence that an agreement has been entered into with the owner of the reservoir for a **permanent** and sufficient interest in such reservoir to impound enough water for the purpose set forth in the application." No such evidence has been provided in the Application regarding sufficient capacity in each reservoir and no evidence has been provided to demonstrate that permanent storage agreements have been entered into with the United States. Likewise, TCID has not given Applicant permission to store credit storage or exchange water in Donner Lake, Lake Tahoe, or Boca Reservoir.

15. The Applicant has provided no evidence of a permanent water right to store the subject water under California law. They propose to divert water from a point in which they have no right or control. The water rights change petitions submitted to the California State

Water Resources Control Board by the United States/TMWA/Washoe County Water Conservation District for credit storage under TROA in Prosser Reservoir, Boca Reservoir, Stampede Reservoir, and Independence Lake as well as the two water rights applications for increasing the storage at Prosser Reservoir and Stampede Reservoir are still pending. Thus, the Application is premature and speculative.

16. 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.

17. 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.

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18. 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 acre feet per acre. 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." 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.

19. 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.

20. 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. See *United States v. Orr Water Ditch Company*, CV-N-73-0003 LDG at p. 88.

21. 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.

22. 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.

23. 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. 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.

24. Storage in up-stream reservoirs is to the detriment of Lake Tahoe. The water which is the subject of the Application, which would otherwise be credited into storage in Lake Tahoe, will result in an artificial decrease in the Lake Tahoe levels, adversely affecting water rights under Claims No. 3 and 4 of the Orr Ditch Decree. Further storage in up-stream reservoirs is counter to the 1990 Settlement Act which states that TROA may include "methods to diminish the likelihood of Lake Tahoe dropping below its natural rim . . ." Approval of the Application would have the exact opposite effect.

25. On information and belief, the purported Application will negatively impact Hydrographic Basin 87. The flow of the Truckee River is hydrographically linked to underground water. By storing water in upstream reservoirs that normally flowed in the river, the Application (in conjunction with the other similar applications filed for upstream storage) will negatively impact recharge of Hydrographic Basin 87. 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.

26. Based upon information and belief, the Applicant will divert a portion of their surface water rights that historically go to recharge Hydrographic Basin 87 to the named up-stream reservoirs. This will unreasonably lower the water table resulting in injury to others who have wells in the Truckee Meadows. The State Engineer must take into account whether the proposed change conflicts with protectable interests in existing domestic wells as set forth in NRS 533.370(5). These wells must then draw water that is hydrographically connected to the Truckee River, thus adversely affecting downstream water right owners.

27. Basin 87 is 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.

28. 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.

29. On information and belief, 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.

30. Storage of water at Stampede Reservoir which otherwise would be stored in Lahontan Reservoir can not be accomplished without agreement with TCID. No such agreement has been made in regards to this Application.

31. Upon information and belief, the proposed change Application will violate the 1991 Groundwater Management Agreement between Westpac Utilities, a division of Sierra Pacific Power Company, and TCID regarding surface water rights and use of shallow infiltration wells and/or Ranney Collectors.

32. The amount of acreage shown on the Application is more than the consumptive use portion. If approved, the Application should be limited to the actual consumptive use portion.

33. 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 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.

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."

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

35. On information and belief, the water rights at issue have been abandoned or forfeited due to non use.

THEREFORE, TCID respectfully requests that the State Engineer require hydrological and environmental impact studies 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.

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Dated this 20th day of June, 2006.

Respectfully submitted,

MICHAEL J. VAN ZANDT, Esq.
Nevada State Bar No. 7199
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Attorneys for Truckee-Carson Irrigation District

State of California )
)
County of San Francisco )

Subscribed and sworn to (or affirmed) before me this 20th day of June, 2006, by Michael J. Van Zandt, personally known to me or proved to me on the basis of satisfactory evidence to be person(s) who appeared before me.

TERESA BECHELLI
Comm. # 1379760
NOTARY PUBLIC - CALIFORNIA
City & County of San Francisco
My Comm. Expires Oct. 12, 2008

Teresa Bechelli
Notary Public

Notary Seal

## CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years, and that I am not a party to nor interested in this action. On the date stated below, I caused to be served a true and correct copy of the within **PROTEST AND REQUEST TO DENY APPLICATION NO. 74085; PETITION FOR HEARING PURSUANT TO N.R.S. 533.365; and ENVIRONMENTAL STUDY PURSUANT TO N.R.S. 533.368** by the method indicated below:

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.

and addressed to the following parties listed on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 21, 2006 in San Francisco, California.

Dené W. Tatmon

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

IN THE IN THE MATTER OF CHANGE APPLICATION NOS. 73783, 73791 through 73800, 73849 through 73855, 73863 through 73872, 73908 through 73917, 73986, 73987, 74076 through 74085, 74193 through 74202 FILED BY THE TRUCKEE MEADOWS WATER AUTHORITY

**Notice of Correction for TCID Protests Related to Change Applications Numbers 73783, 73791 through 73800, 73849 through 73855, 73863 through 73872**

The Truckee Carson Irrigation District ("TCID") hereby presents its Notice of Correction for TCID Protests Related to Applications Numbers 73783, 73791 through 73800, 73849 through 73855, 73863 through 73872.

TCID has filed essentially identical protests to each of the above referenced change Applications filed by the Truckee Meadows Water Authority ("TMWA"). However, in the initial group of applications filed by TMWA, Application numbers 73783, 73791 through 73800, 73849 through 73855, and 73863 through 73872, TCID inadvertently put an incorrect date in reference to a Groundwater Management Agreement in protest point number 31. Protest point number 31 should read:

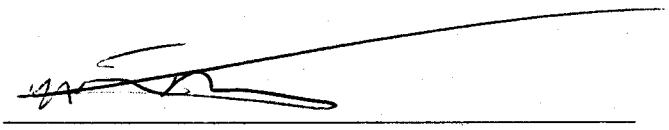
> Upon information and belief, the proposed change Application will violate the 1991 Groundwater Management Agreement between Westpac Utilities, a division of Sierra Pacific Power Company, and TCID regarding surface water rights and use of shallow infiltration wells and/or Ranney Collectors.

By letter dated April 21, 2008, TCID has notified TMWA's counsel of this correction. TCID therefore asks the State Engineer to take notice of the above referenced correction for protests associated with change Applications 73783, 73791 through 73800, 73849 through

73855, and 73863 through 73872.[1]

Date: April 22, 2008

MCQUAID BEDFORD & VAN ZANDT



MICHEL J. VAN ZANDT
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Irrigation District

1 In the subsequent protests filed by TCID related to Application numbers 73908 through 73917, 73986, 73987, 74076 through 74085, and 74193 through 74202, the date of the Groundwater Management Agreement was properly referenced as 1991.

## CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years, and that I am not a party to nor interested in this action. On the date stated below, I caused to be served a true and correct copy of the within

**Notice of Correction for TCID Protests Related to Change Applications Numbers 73783, 73791 through 73800, 73849 through 73855, 73863 through 73872**

by the method indicated below:

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 and addressed to the following parties listed below.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 22, 2008 in San Francisco, California.

Keith Kiley

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

IN THE IN THE MATTER OF CHANGE APPLICATION NOS. 73783, 73791 through 73800, 73849 through 73855, 73863 through 73872, 73908 through 73917, 73986, 73987, 74076 through 74085, 74193 through 74202 FILED BY THE TRUCKEE MEADOWS WATER AUTHORITY

**NARROWED PROTEST ISSUES TO TRUCKEE MEADOWS WATER AUTHORITY CHANGE APPLICATIONS FILED FOR STORAGE WITH BENEFICIAL USE UNDER THE TRUCKEE RIVER OPERATING AGREEMENT**

ORIGINAL

The Truckee Carson Irrigation District ("TCID") hereby presents its Narrowed Protest Issues To Truckee Meadows Water Authority Change Applications Filed For Storage With Beneficial Use Under The Truckee River Operating Agreement.

## I. Background

In February through March of 2006 the Truckee Meadows Water Authority ("TWMA" or "Applicant"), along the Cities of Reno and Sparks, filed the above referenced change applications ("Applications") with the State Engineer. These Applications propose to change the use of *Orr Ditch* Decreed water rights (*United States of America v. Orr Water Ditch Company,* Equity A-3 LDG U.S. Dist. Court, Nevada, September 8, 1944) ("*Orr Ditch*") "for Storage with secondary permits for beneficial uses allowed by the Truckee River Operating Agreement ["TROA"]." *See* Applications §3. Each Application further provides that "[a]ny permit issued under this application shall enter into effect simultaneously with the entry into effect of the Truckee River Operating Agreement." *See* Exhibit D of Applications. The Truckee Carson Irrigation District ("TCID") along with the City of Fallon and Churchill County (collectively "the

Protestants") have filed protest to each of these Applications.[1]

A Status Conference in this matter was held on March 21, 2008 before the State Engineer. Prior to the Status Conference, on March 14, 2008, TCID presented its Status Conference Report, arguing among other issues that the State Engineer should not act on the above referenced change applications until: 1) TROA is finalized, 2) the *Orr Ditch* Court has taken action to make the necessary modifications to the decree to implement TROA, and 3) the applications in California to store water under TROA are approved. At the Status Conference the State Engineer asked the Protestants to "narrow down" the protest issues. Specifically, the State Engineer and his staff stated that protest points related to TROA should be withdrawn, and that issues related to TROA and *Orr Ditch* Decree are not something the State Engineer is going to decide.

TCID has attempted to narrow down the protest issues originally filed in relationship to the above referenced change Applications. However, TCID respectfully disagrees with the State Engineer, and does not believe the determinations required under Nevada water law related to these change applications can be adequately made without considering TROA and without knowing how the *Orr Ditch* Decree will be modified, if at all, and related impacts to the rights guaranteed under the Truckee River Agreement ("TRA"). [2]

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1 Additional TROA Change Applications have been filed by TMWA and Washoe County, the City of Reno and the City of Sparks. TCID will request a consolidated hearing on all TROA related Applications.

2 Before water can be beneficially used as contemplated by these Applications there must be changes to the water storage rights in the upstream reservoirs in California. TCID also believes that it is a waste of resources and time for Nevada to act on these Change Applications when it is unknown if or how the water will actually be stored in California.

## II. TROA and its Proposed Modifications to the *Orr Ditch* Decree Must be Considered by the State Engineer.

These Applications propose to change the point of diversion, manner and place of use of water rights that were adjudicated as part of the *Orr Ditch* Decree. Further, the Applications specifically state that they are filed as part of the implementation of TROA. *See* Exhibit D of Applications. Currently, the TRA controls the distribution and storage of water in the Truckee River Basin and 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. In order for these change Applications to go into effect there must be modifications to the *Orr Ditch* Decree and the TRA. Specifically, TROA must be submitted to the *Orr Ditch* Decree Court and the General Electric Decree Court (*United States v. Truckee River General Electric Co.,* Case No. 14861 (N.D. Cal. 1915)) for approval and possible modifications of the respective decrees. (*See* TROA §§12.A.4(b) and (c)). Further, TROA "supersedes all requirements of any agreements concerning the operation of the Truckee River Reservoirs including those of the Truckee River Agreement." TROA §5.A.1(a).

Without knowing how or if the *Orr Ditch* Decree or the TRA will be modified, the State Engineer cannot make the determinations related to these Applications required under Nevada law. A full understanding of how these Applications will operate and impacts to existing rights and the public interest cannot be determined until there is a finalized TROA. Otherwise, there is the potential for the State Engineer to rule in a manner that would be inconsistent with TROA as it would be finally adopted, if at all. The issues, facts, exhibits, and testimony required to

proceed on these Applications before the State Engineer are directly related to resolution of TROA. [3] Further, if the State Engineer were to approve these Applications, he would be doing so in direct contravention of the *Orr Ditch* Decree, which cannot under any circumstances be in the public interest.

### 1. The State Engineer Must Consider Existing Law When Approving Water Applications and Should Not Act on the Applications Until TROA is Finalized.

If the State Engineer takes action to approve these Applications it must either be based on existing law, or based on the assumption that TROA is in operation and the *Orr Ditch* Decree has been modified. Either approach would prove to be clear error on the part of the State Engineer. Under existing law, the Applications would clearly violate the *Orr Ditch* Decree and the TRA incorporated therein (see discussion below). However, TROA specifically contemplates modifications to the *Orr Ditch* Decree and proposes to supersede the TRA. Because these modifications and changes are not currently known, it would be clear error for the State Engineer to approve the applications based on TROA until it is finalized and the *Orr Ditch* Decree is appropriately modified.

It is TCID's position that the State Engineer cannot ignore existing law when making a determination of whether an application will injure existing rights or whether granting the application will prove detrimental to the public interest. The State Engineer historically has considered the provision of the *Orr Ditch* Decree and the TRA when making determinations related to change applications involving decreed water rights. *See* Ruling 289, March 27, 1958

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3 As stated in its Status Conference Report, TCID believes that a full and accurate record in this proceeding can only be developed after the conditions required for the implementation of TROA in Article 12 have been satisfied.

(The State Engineer examined and studied the *Orr Ditch* Decree and the TRA when faced with a change applications of decreed water rights.) [4] In the numerous rulings dealing with transfers within the Newlands Project, the State Engineer has always found that the *Orr Ditch* Decree and the *Alpine* Decree (*United States v. Alpine Land & Reservoir Co.,* Civil No. D-183 (D. Nev. 1980) set forth the procedure and authority in the matter of applications to change the point of diversion, manner, purpose or place of use of decreed waters of the Carson and Truckee Rivers. In fact, the current State Engineer has found it necessary to make determinations of whether proposed changes were in violation of the respective decrees. *See* Ruling 5759 (August 14, 2007) at p. 12 (the State Engineer approved transfer applications filed by the Nevada Waterfowl Association and the Nevada Department of Wildlife, concluding that "approval of the Applications will not violate the *Alpine* Decree or Nevada Water law."); *See also* Ruling 5760 (August 14, 2007) at p. 21 (the State Engineer approved a transfer application filed by Washoe County, the City of Reno and the City of Sparks, concluding that "approval of the Applications will not violate the *Orr Ditch* Decree or Nevada Water law.") Here, the State Engineer would be committing clear error if he approved the Change Applications, which cannot currently be accomplished under the *Orr Ditch* Decree.

Not only does the State Engineer look to the *Orr Ditch* Decree, but he also looks to the TRA in making determinations related to transfer of decreed water rights on the Truckee River. In Ruling 5185 (December 6, 2002) and 5714 (February 8, 2007) the Pyramid Lake Paiute Tribe

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4 The State Engineer has also specifically recognized that the TRA modifies the *Orr Ditch* decree "and as a consequence in part modifies divertible flows as fixed in the Decree." Ruling 289 at p. 1.

of Indians ("Tribe") filed for a temporary transfer of its *Orr Ditch* claims 1 and 2 water rights. [5] TCID protested, arguing among other issues, "that applications intend to effect a unilateral modification of the *Orr Ditch* Decree by changing the Truckee River Agreement without notice, approval or consent by the *Orr Ditch* Court," and violates Article VII of the TRA. Ruling 5185 at p. 33-34. The State Engineer reviewed the TRA and provided a detailed analysis of its Diverted Flow requirement, ultimately determining that the change applications could not affect any rights of TCID to divert under the TRA. Finally, in Ruling 4659, which denied TCID's application for unappropriated water, the State Engineer not only looked to the provisions of the TRA, but also looked at the supposed benefits of implementation of the Settlement Act (Title II of Pub. L. No. 101-618, 104 Stat. 3249, (1980)), including the future implementation of TROA. [6] Here, it would be clear error not to consider the TRA when analyzing the impacts from the changes proposed in the Applications.

Not only have the State Engineer looked at impacts from existing laws in the form of judicial decrees, but has also considered the impacts from the negotiated settlement that gave rise to TROA. In the Honey Lake Case (*Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743 (Nev. 1996), Washoe County was granted an application by the State Engineer to import groundwater from Honey Lake Basin. The application was opposed on environmental and economic grounds, and after judicial review, remanded to the State Engineer by the district

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5 Ruling 5714 deals with the transfer of the same *Orr Ditch* water rights and the State Engineer adopted and incorporated his find from Ruling 5184.

6 TCID has appealed Ruling 4659 and has asked the court to remand the determination in light of the material evidence in TROA, which was not considered by the State Engineer at the time of the hearings in Ruling 4659.

court because the State Engineer did not properly consider vital public interest issues. On remand in Ruling 3786A, the Tribe protested on the grounds that it "would threaten to prove detrimental to the public interest if the implementation of the Honey Lake Water Importation Project is not coordinated and integrated with the outcome of the Truckee River settlement negotiations". *Id.* at p. 10. The State Engineer specifically considered evidence in the record related to impacts from the negotiated settlement, and found the negotiated settlement did not impact the transfer applications at issue. On appeal, the Supreme Court agreed and found that

> [w]ith regard to the proposed negotiated settlement, the State Engineer found 'no evidence that the approval of the intra-basin changes affects the ongoing Truckee River Settlement negotiations.' In addition, the State Engineer also found that 'there is no evidence in the record that the water pumped from Honey Lake Valley could not or will not be coordinated and integrated with the negotiated settlement on the Truckee River. 112 Nev. at 752.

Here, there can be no doubt that TROA and the proposed modification to the *Orr Ditch* Decree are directly related to the Change Applications in this matter, and in fact must occur before the proposed changes can be accomplished. The modifications to the *Orr Ditch* Decree and a full record related to the implementation of TROA should be before the State Engineer before he takes any actions on these Applications.

On their face, these Applications are inconsistent with the *Orr Ditch* Decree as it is currently written and it would certainly be detrimental to the public interest to approve these change Applications counter to this existing law. Further, it would be a waste of administrative economy to approve the change Applications contingent on the proposed TROA regulation that may well change before it is finally implemented. When the proposed modifications to the Decree are brought before the *Orr Ditch* Court objections may be filed. The *Orr Ditch* judge

may not agree with the way TROA is written and not allow the modifications to the Decree as envisioned by the TROA signatories. This could well result in changes to TROA which were not anticipated by the State Engineer in approving these Applications. Moreover, the modifications to the Decree could entirely contradict any determination made by the State Engineer here, resulting in remand. It is a much better use of resources to wait until TROA is finalized so that there are consistent determinations made related to the changes anticipated in these applications.

For example, the State Engineer during the Status Conference suggested that perhaps there could be a limited hearing on the issue of consumptive use. These Applications should not be dealt with in a piecemeal fashion. The State Engineer's function when faced with a water application is to approve or reject it. NRS 530.370. Making a determination on consumptive use, with the ultimate approval waiting on finalization of TROA, makes no sense. Further, TROA specifically contemplates that the *Orr Ditch* Court must approve "a satisfactory confirmation of the consumptive use portion of Changed Diversion Rights, and the *Orr* Ditch Court's approval therefore shall be obtained." TROA §12.A4(b). Considering the *Orr Ditch* Court must address TROA before it is implemented, it is much better use of resources to allow the court to determine <u>all</u> issues related TROA before the State Engineer takes any steps towards its implementation.

Cases dealing with the potential for contradicting determinations related to decreed water rights have avoided any inconsistencies by deferring to the decree court. The case *Mineral County v. State, Dep't of Conservation and Natural Resources*, 117 Nev. 235 (2001) involves a petition for writ of prohibition to prevent the Department of Conservation and Natural Resources from granting additional rights to withdraw surface water or groundwater from Walker River

System, adjudicated under the Walker River Decree. The Petitioners claimed that future actions by the State Engineer will threaten to decrease water flows to Walker Lake. The court found that the decree court, which had continuing involvement in the monitoring of the Walker River, was the proper forum for the redress that Petitioners seek. The *Mineral County* court reasoned "because the Decree involves the allocation of interstate waters between California and Nevada, we believe that a consistent and controlling interpretation by a federal court of competent jurisdiction is more appropriate." *Id.* at 245. Likewise here, the consistent and controlling interpretation by the *Orr Ditch* Decree Court related to TROA is necessary, and the State Engineer should not act on these Applications until TROA is finalized and the Decree is appropriately modified.

In *U.S. v. Alpine Land Reservoir Co.*, 174 F.3d 1007 (9th Cir. 1999), Churchill County brought an action in Nevada State court challenging a decision of the State Engineer to grant Fish and Wildlife Service's water rights transfer applications. The Nevada Court declined to dismiss for lack of jurisdiction and the State Engineer moved in Federal Court to enjoin further Nevada Court proceedings. The United States District Court for the District of Nevada granted the State Engineer's motion pursuant to the *Alpine* Decree which adjudicated the water rights at issue. The Ninth Circuit Court of Appeals upheld the determination and found that the "Alpine and Orr Ditch Decrees were complex and comprehensive water adjudications for which conflicting federal and state constructions would be entirely unworkable, the district court's retention of jurisdiction was intended to be exclusive." *Id.* at 1013. Here, there exists a potential for the State Engineer to make findings related to the Applications which will conflict and be entirely unworkable based on the finalized TROA and possible modifications to the *Orr Ditch* Decree.

Therefore, the State Engineer should not act on these Applications until TROA is finalized, reviewed by the *Orr Ditch* Court, and possible modifications to the Decree approved.

**2. The Modifications to the *Orr Ditch* Decree and the TRA Proposed by TROA Implicate TMWA's Change Applications, and Will Cause Injury to Newlands Water Users.**

The Final Environmental Impact Statement/Environmental Impact Report ("FEIR/EIS") for TROA specifically acknowledges that there will be shortages to the Newlands Project that result from the operation of TROA. Thus, there is evidence that there will be injury to existing water rights that will result from the operation of TROA. It is impossible to determine if these shortages are the result of storage and use of the water under TMWA's Applications without getting into a discussion and analysis of TROA. Moreover, the model and modeling methodology used in preparing the FEIR/EIS to support TROA is highly suspect. TCID is attempting to understand the modeling that supports TROA in order to determine how and why TROA causes man-made shortages to the Newlands Project. [7] It is also entirely possible that the impacts to the Newlands Project have been underestimated under TROA. If this is the case, TROA may well have to be modified before it is promulgated as a final regulation or before any modifications are made to the *Orr Ditch* Decree, if at all. The *Orr Ditch* Decree provides that the points of diversion and the place and manner of use may be changed, so long as it is "without injury to the rights of other persons whose rights are fixed by this decree." *See Orr Ditch* Decree at p. 88. Thus, if there are shortages as a result of the operation of TROA, then the proposed

7 TCID has asked for information related to the model, including the additional model runs conducted as part of the FEIS/EIR. Further, the Bureau of Reclamation and the Protestants have agreed to develop a TROA operations model workshop to further understand the model used to support TROA.

modifications to the Decree as envisioned by TROA cannot go into effect.

There are a number of provisions in TROA that make changes to the TRA that TCID believes will, if approved, ultimately cause injury to existing water rights and prove detrimental to the public interest. Moreover, there are provisions in the TRA related to storage and flow of water in the Truckee River which are directly implicated by the proposed storage and use under the Applications at issue in this proceeding. TROA supersedes the Floriston Rate mechanism that has managed the River for over 70 years and is incorporated into Article III of the TRA. *See* TROA §5.A. In fact, the Applicant acknowledges that the Truckee River flow at Farad will need to be adjusted to accommodate the proposed changes in storage and use in the Applications. *See* TMWA's Status Conference Memorandum at p. 18. Also, the allocation of "Diverted Flow" as provided in Article VII of the TRA is incorporated by reference in TROA and superseded. TCID relies on the historic flow pattern of the Truckee River to provide water rights to the Newlands Project. TROA, and its system of credit storage, are directly related to these change Applications, which anticipate secondary uses as fish credit water. It will take an analysis of TROA to determine if Newlands Project water rights are injured as a result of the proposed changes in these Applications. Further, the impacts from the proposed changes in the Floriston Rate mechanism and to flows in the Truckee River provided for in the TRA are not currently known, and will not be known until the *Orr Ditch* Court has reviewed and approved such changes.

Article II of the TRA deals with the operation of "Pondage" (Stampede Reservoir) and "Supplemental Reservoir" (Boca Reservoir) and their use to maintain river flows subject to the limitations and conditions prescribed in the TRA. Further, Article IV of the TRA deals with

impounding water in Boca Reservoir, and the miscellaneous provisions of Article XXV of the TRA deal with the operation of Stampede Reservoir and Lake Tahoe. However, TROA supersedes the operation of the "Pondage" and "Supplemental Reservoir" provisions of the TRA and alters the use of Lake Tahoe. *See* TROA §5.A. The Applications at issue here specifically contemplate storage in Stampede, Boca, and Lake Tahoe under the TROA management scheme. *See* Application Exhibit B. The impact of this operation on existing rights and the potential for detrimental impact to the public interest cannot be determined because TROA is not finalized and the *Orr Ditch* Decree has not been modified to allow such changes.

In its Protests, TCID raised a number of issues related to potential impacts to water rights resulting from changes in storage and changes in Truckee River water flow from the proposed implementation of TROA. TROA anticipates shortages in the Newlands Project, and it is unclear from the information currently available how or why these shortages are caused. Further, there has been no determination whether these shortages will ultimately be acceptable. Until the conditions required for the implementation of TROA are completed (*See* TROA Article 12), TROA itself is finalized, and the appropriate modifications are made to the *Orr Ditch* Decree, TCID cannot adequately address the impacts these change Applications will have on existing water rights or the potential detriment to the public interest. Therefore, TCID cannot withdraw protest points related to TROA, the TRA, or the *Orr Ditch* Decree.

## III. Narrowed Protest Points

1. On information and belief, the purported water rights arise from the Truckee River Agreement ("TRA"), to which TCID is a party, and which is incorporated by reference into the

*Orr Ditch* Decree (*U.S. v. Orr Water Ditch Co.*, et al., CV-N- 73-003. D. Nev. (1944)), and such rights arise, if at all, based upon an express agreement of the parties to the Truckee River Agreement and not otherwise, and any change to the agreement requires the consent of the parties, which consent is withheld by TCID, and granting the application would violate the compromise reached in the TRA that allowed the Orr Ditch Decree to be entered. Any such attempt to modify the TRA and/or the Orr Ditch Decree without the parties' consent or approval or without proper notice and without the approval of the *Orr Ditch* Court is defective.

2. The Application proposes that the beneficial places of use will be set forth in applications for secondary permits consistent with the Truckee-River Operating Agreement ("TROA"). TROA is still in the environmental review process and there is no guarantee that it will be approved. Further, the secondary permit applications identify at least three separate and distinct uses for the same water, including municipal, wildlife and power generation. The Applicant is attempting to use the same water for multiple purposes at multiple places of use in violation of NRS 533.330, which only permits a water right to be used for a single purpose at a single place of use. By these secondary applications the Applicant is attempting to circumvent the jurisdiction of the State Engineer over change applications, whether temporary or permanent.

3. 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 inure 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.

4. The Applicant may not use Boca Reservoir or Lake Tahoe water as proposed in the Application. These water bodies are subject to the terms of the TRA, to which TMWA, a successor to the Sierra Pacific Power Company, is bound.

5. On information and belief, 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. Changes in the flow from Boca Reservoir requires the consent of 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.

6. All Washoe Project reservoirs, include 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 TCID under the proposed change applications.

7. The Application must comply with the TRA, unless and until consent of all parties is received. TCID does not consent. The proposed TROA was born from the Preliminary Settlement Agreement between Sierra Pacific and the Pyramid Lake Paiute Tribe of Indians (PLIT), which was recognized in the Truckee-Carson-Pyramid Lake Settlement Act, P.L. 101-618, 104 Stat. 3289, November 16, 1990 (the Act). The Act contains a reservation that it is not to be construed to alter or conflict with any existing rights to use the Truckee River water in accordance with the applicable decrees. The TRA is incorporated into the *Orr Ditch* Decree as a part of the decree itself. *See United States v. Orr Water Ditch Company*, CV-N-73-0003 LDG at

p. 86. Specifically, the Act states that TROA "will ensure that water is stored in and released from Truckee River reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch decree and Truckee River General Electric decree." 104 Stat 3305. Therefore, even under TROA, if adopted, the Application must comply with the TRA requirements for storage and maintenance of Floriston rates. The Applicant has made no showing that the proposed diversion of the water complies with the TRA, nor can it.

8. On information and belief, the granting of this Application would injure existing water rights adjudicated in the *Orr Ditch* Decree, and under the *Orr Ditch* 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.

9. 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.

10. The Application incorrectly names the source of the water and fails to designate a point of diversion. NRS 533.440(2) "specifies the application shall refer to the reservoir for a supply of water." The Application does not specify the named reservoirs in Exhibit B as the "supply", rather the reservoirs are named as points of diversion, the source of supply for the

Applications is actually tributaries to the Truckee River. The point of diversion cannot be a storage facility.

11. The Application fails to provide evidence of sufficient capacity in the named reservoirs or the existence of agreements for the storage of water. NRS 533.440(2) specifies the "application ... shall show by documentary evidence that an agreement has been entered into with the owner of the reservoir for a permanent and sufficient interest in such reservoir to impound enough water for the purpose set forth in the application." No such evidence has been provided in the Application regarding sufficient capacity in each reservoir and no evidence has been provided to demonstrate that permanent storage agreements have been entered into with the United States. Likewise, TCID has not given Applicant permission to store credit storage or exchange water in Donner Lake, Lake Tahoe, or Boca Reservoir.

12. The Applicant has provided no evidence of a permanent water right to store the subject water under California law. They propose to divert water from a point in which they have no right or control. The water rights change petitions submitted to the California State Water Resources Control Board by the United States/TMWA/Washoe County Water Conservation District for credit storage under TROA in Prosser Reservoir, Boca Reservoir, Stampede Reservoir, and Independence Lake as well as the two water rights applications for increasing the storage at Prosser Reservoir and Stampede Reservoir are still pending. Thus, the Application is premature and speculative.

13. 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.

14. 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 ("EIS/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." Applications for secondary permits are just now being 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 analyzed. 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.

15. 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 acre feet per acre. 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." 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.

16. 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 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.

17. 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. See *United States v. Orr Water Ditch Company*, CV-N-73-0003 LDG at p. 88.

18. 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.

19. 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.

20. 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. 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.

21. Storage in up-stream reservoirs is to the detriment of Lake Tahoe. The water which is the subject of the Application, which would otherwise be credited into storage in Lake Tahoe, will result in an artificial decrease in the Lake Tahoe levels, adversely affecting water rights under Claims No. 3 and 4 of the Orr Ditch Decree. Further storage in up-stream reservoirs

is counter to the 1990 Settlement Act which states that TROA may include "methods to diminish the likelihood of Lake Tahoe dropping below its natural rim . . ." Approval of the Application would have the exact opposite effect.

22. On information and belief, the purported Application will negatively impact Hydrographic Basin 87. The flow of the Truckee River is hydrographically linked to underground water. By storing water in upstream reservoirs that normally flowed in the river, the Application (in conjunction with the other similar applications filed for upstream storage) will negatively impact recharge of Hydrographic Basin 87. 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.

23. Based upon information and belief, the Applicant will divert a portion of their surface water rights that historically go to recharge Hydrographic Basin 87 to the named up-stream reservoirs. This will unreasonably lower the water table resulting in injury to others who have wells in the Truckee Meadows. The State Engineer must take into account whether the proposed change conflicts with protectable interests in existing domestic wells as set forth in NRS 533.370(5). These wells must then draw water that is hydrographically connected to the Truckee River, thus adversely affecting downstream water right owners.

24. Basin 87 is 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.

25. 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.

26. On information and belief, 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.

27. Storage of water at Stampede Reservoir which otherwise would be stored in Lahontan Reservoir can not be accomplished without agreement with TCID. No such agreement has been made in regards to this Application.

28. Upon information and belief, the proposed change Application will violate a 1991 Groundwater Management Agreement between Westpac Utilities, a Division of Sierra Pacific Power Company and TCID.

29. The amount of acreage shown on the Application is more than the consumptive use portion. If approved, the Application should be limited to the actual consumptive use portion.

30. 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 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.

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.

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

32. On information and belief, the water rights at issue have been abandoned or forfeited due to non use.

THEREFORE, TCID respectfully requests that the State Engineer require hydrological and environmental impact studies 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.

Date: April 18, 2008

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## CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years, and that I am not a party to nor interested in this action. On the date stated below, I caused to be served a true and correct copy of the within

**Narrowed Protest Issues to TMWA Change Applications Filed for Storage with Beneficial Use Under the TROA**

by the method indicated below:

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 and addressed to the following parties listed below.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 18, 2008 in San Francisco, California.

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