FILED
MAR 10 2008
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: 76162
FILED BY: TRUCKEE MEADOWS WATER AUTHORITY
ON: AUGUST 16, 2007 TO APPROPRIATE THE
WATERS OF: TRUCKEE RIVER

PROTEST & REQUEST TO

DENY APPLICATION 76162;
PETITION FOR HEARING
PURSUANT TO N.R.S. 533.365;
PETITION FOR HYDROLOGIC &
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: 76162 FILED ON: AUGUST 16, 2007 BY: 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:

- ◊ 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 HYDROLOGIC 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)
MAHANNAH & ASSOCIATES, LLC
P.O. BOX 2494
RENO, NV 89505
(775) 323-1804

2008 MAR 10 PM 2:10
STATE ENGINEER'S OFFICE

STATE OF NEVADA
COUNTY OF WASHOE
SUBSCRIBED AND SWORN TO BEFORE ME THIS 7th DAY OF MARCH, 2008
BY CHRIS C. MAHANNAH

RYAN TARVER
NOTARY PUBLIC
STATE OF NEVADA
APPT. No. 07-1034-2
MY APPT. EXPIRES MAY 25, 2010

_____

STATE OF: NEVADA
COUNTY OF: WASHOE

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

State of Nevada Division of Water Resources
Request for Notice

In regards to Application/permits numbers: 76161-76163 filed in the name of Truckee Meadows Water Authority

Please add the following individuals to the mailing list and send copies of all correspondence to the addresses below:

1. **Mr. Brad Goetsch, Manager**
   Churchill County
   155 N. Taylor St, Suite #153
   Fallon, NV 89406

2. **Mr. Rusty Jardine, Esq.**
   Churchill County Deputy District attorney
   155 N. Taylor St., Suite # 170
   Fallon, NV 89406

3. **Chris C. Mahannah, P.E.**
   Mahannah & Associates, LLC
   P.O. Box 2494
   Reno, NV 89505

I am the agent or representative for Churchill County.

This form accurately reflects the mailing address for the individuals identified above.

Signature: _____

Chris C. Mahannah, P.E., SWRS #976 (Agent)
Mahannah & Associates, LLC
P.O. Box 2494
Reno, NV 89505
(775) 323-1804

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 have been 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. Churchill County is also an owner of substantial surface water rights and continues to acquire surface rights with outright purchases or through their water right dedication ordinance. The surface rights are or will be used for decreed or municipal purposes. Chapter 3 of Churchill's water resource plan 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.

3. 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.

4. 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.

5. The Application proposes that the beneficial places of use will be set forth in secondary applications consistent with TROA. Although the TROA FEIS has recently been published, no ROD has been rendered nor has a storage contract been negotiated between

TMWA and the BOR. 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.

6. 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). Further, the TRA specifically provides that the waters of the Truckee River may be used for the development of electric power "provided, always, however that water used by the Power Company for development of electric power ... Shall be returned to the Truckee River immediately after such use." (See TRA Article XVII at p. 11). 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. Further, Stampeed Reservoir is being operated in violation of its California Permit. Specifically, water has been appropriated under the Orr Ditch Decree for storage in Stampeed Reservoir for beneficial use in the Newlands Project, but such water is not now being used for the benefit of the Project.

7. 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.

8. 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, growth within the Truckee Meadows Water Authority (TMWA) service areas and Pyramid Lake has the potential to reduce the amount of water available for diversion at Derby Dam.

9. Washoe Project reservoirs including 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.

10. 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.

11. 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, which do not provide return flows, will injure Newlands water users, especially in years of drought. The historic use of this water was for run-of-the-river <u>non-consumptive</u> hydroelectric generation upstream of the Truckee Meadows which is then utilized by consumptive Orr Ditch claims downstream including Claim 3.

12. This Application along with two other similar hydro applications filed by TMWA are all junior in priority to Claim 3 and appear to be double dipping in the amount of water sought to be stored. Prior protested applications filed by TMWA, et al sought to store the consumptive use fraction of Orr Ditch claims in the Truckee Meadows which are also served from the same flows sought to be changed under these hydro applications. How can one store the consumptive use fraction of a right plus a non-consumptive use right which served the downstream consumptive right without injury to downstream senior rights? They cannot! Under TROA Section 7.A.6 Fish Credit Water may be used for

incidental generation of electrical power. However, Fish Credit Water has limited uses and does not provide return flows to downstream users, thus causing injury.

13. The Applicant is not applying for a change in manner of use, but is actually attempting to change the timing of water use to the detriment of downstream water users. Under TROA Section 7.A.6, this water once converted to Fish Water, may still be used by the applicant to generate hydroelectric power. Thus, water that has historically been available to make Floristan Rates, will now be stored and released at the will of the Applicant, while still being able to generate power.

14. The Applicant has failed to analyze the detrimental impact of TROA operations under the Operating Criteria and Proceedures (OCAP), which increases the potential for shortages to the Newlands Project. The Applicant may not store water under TROA operation scheme in such a manner that will cause shortages in the Newlands Project and interfere with existing rights.

15. Storage in upstream reservoirs is to the detriment of Lake Tahoe. The water which is subject of the Application, which would otherwise be credited into storage in Lake Tahoe, will result in an artificial decrease in Lake Tahoe levels, adversely affecting water rights under Claims 3 and 4 of the Orr Ditch Decree. Further storage in upstream 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 opposite effect.

16. The Application with a priority date of October21, 1909 will be converted under TROA to Fish Credit Water and will be given a carry over right and a higher priority when it spills, elevating it to a more senior right adverse to Orr Ditch claims 3 and 4, resulting in injury.

17. The Applicant claims non-consumptive secondary uses. However, once water is converted to Fish Credit Water within the TROA management scheme there are no assurances that water use is limited to non-consumptive uses, including but not limited to reservoir and storage losses, resulting in injury to downstream users. Under NRS 533.370 the State Engineer must not only consider the consumptive use of the water right in determining whether to approve a proposed change, but he must also ensure that the proposed manner of use is consistent with the Orr Ditch Decree.

18. Under TROA Section 7.C.5 this water may be converted or exchanged as credit water for a number of purposes other than those specified in the application. Present modeling by the Applicant fails to track storage, release, and use of credit water. Thus, the Application does not provide the State Engineer with the information required to determine if existing rights are impacted or whether the Application will prove detrimental to the public interest.

19. This Application along with the two other similar hydro applications are all seeking storage of the full diversion rate associated with each hydro plant. Since the rights are

non-consumptive and water diverted at the upstream plant (Fleish, Application 76161) is re-diverted by down stream plants (Verdi, Appliction 76162 and Washoe, Application 76163), the amount allowed for storage, if any, should be limited only one plant.

20. The Applicant has filed change applications for Orr Ditch Decree claims 6, 7 and 8, which all relate to hydroelectric generation. Similar change applications have not been filed for Orr Ditch Decree claims 5 and 9 as provided under Section 7.C.1 of TROA. The Applicant should file all TROA change applications at the same time to avoid piece-meal litigation, to conserve administrative resources, and to avoid additional costs to Churchill County and other Protestants.

21. 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.

22. 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 to 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, Stampeed Reservoir, and Independence Lake as well as the two water rights applications for increasing the storage in Prosser Reservoir and Stampeed Reservoir are still pending, therefore the Application is premature and speculative.

23. 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. The applications seek to store these rights in Donner, Independence and Stampeed which is not directly allowed under present storage contracts and the current TRA. Currently this water can be stored and released as part of the Floristan Rate in Tahoe, Boca, and Prosser as the Tahoe Prossser Exchange. 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.

24. 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 ROD for FEIS has not been signed, 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.

25. 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."

26. 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.

27. It is understood from review of the TROA FEIS/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.

28. 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.

29. 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 hydrologically connected to the Truckee River, thus affecting flows in the river for downstream users. 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.

30. 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.

31. 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.

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

33. 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.

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

    a) The diversion shall be according to a new priority based on the date of the underlying change application.
    b) The Applicant and other TROA Signatories have failed to model and track the accumulation and use of Fish Credit Water and to demonstrate that the proposed change of rights under the TROA change applications do not injure downstream water rights, including rights for the Newlands Project. The Applicant shall demonstrate that the new RiverWare model will properly account for evaporation and conveyance losses particularly as Fish Credit Water is converted for exchanged to other types of water under TROA.
    c) The establishment of Fish Credit Water shall not be cumulative, but rather limited under the three rights to historic diversions at a single plant for Claims 6, 7 and 8.
    d) The reduction in power diversions and conversion to Fish Credit Water shall be capped based on historical diversions at the power plants and not up to the maximum decreed diversion rate under the various claims. The Applicant shall be required to demonstrate the historical diversions for each plant to then determine the monthly caps based on historical diversions.

e) Any subsequent releases of the stored water shall be subject to reservoir evaporation and seepage losses as well a river conveyance losses to the new point of diversion in order to prevent such losses from being incurred by downstream users.
f) Proposed accounting forms shall be approved by the State Engineer and the Federal Water Master tracking by right and priority the 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.
g) 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.
h) 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.
i) 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.
j) 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.
k) The permit is issued subject to uses for a period of use specified "as decreed."
l) Ensure any water stored under these hydro claims is not the same water also sought to be stored under applications seeking to store the consumptive use fraction of Orr Ditch claims in the Truckee Meadows.