

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

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STATE ENGINEER'S OFFICE

IN THE MATTER OF CHANGE
APPLICATION 76163 FILED BY TRUCKEE
MEADOWS WATER AUTHORITY TO
CHANGE THE PLACE AND MANNER OF
USE OF WATER HERETOFORE
APPROPRIATED UNDER
CLAIM NO. 8 OF THE TRUCKEE RIVER
DECREE

**PROTEST AND REQUEST TO
DENY APPLICATION
76163; PETITION FOR HEARING
PURSUANT TO N.R.S. 533.365;
AND ENVIRONMENTAL STUDY
PURSUANT TO N.R.S. 533.368**

ORIGINAL

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 76163 filed by Truckee Meadows Water Authority ("TMWA"), to change the place and manner of use of water heretofore appropriated under Claim No. 8 of the Orr Ditch Decree (or Truckee River Decree).

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. The Application, which contemplates secondary uses allowed under TROA, 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. Further, 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 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 feasibility of beneficial use of the water, therefore, the Application is premature and speculative.

4. 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 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. Further, Stampede Reservoir is being operated in violation of its California Permit. Specifically, water has been appropriated under the Orr Ditch Decree for storage in Stampede Reservoir for

beneficial use in the Newlands Project, but such water is not now being used for the benefit of the Project.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. On information and belief, the granting of this Application would injure existing

water rights adjudicated in the Orr Ditch Decree, and under Nevada Water law and 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, which do not provide return flows, will injure Newlands water users, especially in years of drought. Moreover, conversion of a non consumptive water right under this claim to a consumptive use or to instream flows deprives downstream water right owners of the return flows for beneficial use.

11. Applications for multiple uses violates Nevada Water law. This Application along with other numerous similar applications filed by TMWA/Reno/Sparks are actually joint applications for storage, for multiple uses at multiple places, from multiple sources and direct diversion of full diversion rate, which violates NRS 533.330 wherein an application must be limited to one source for one purpose. The Applicant must specify the source of the water, the beneficial use of this water as well as the secondary place of use.

12. 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.

13. 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 the Applicant permission to store credit storage or exchange water in Donner Lake, Lake Tahoe, or Boca Reservoir.

14. 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.

15. 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.

16. 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 there has been no Record of Decision (“ROD”) on the Final environmental impact statement/ environmental impact report (“FEIS/EIR”), 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 propose uses under secondary permits 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.

17. The Applicant has filed change applications for Orr Ditch Decree claims 6, 7 and 8, which all relate to the generation of electric power. 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 TCID.

18. 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.” Historically, and as required under the TRA and the Orr Ditch Decree, diversions for the generation of electric power were provided from the flow of the river for a single pass at the Applicant’s power plants as a non-consumptive use of water that is returned to the river flow for downstream use. If the Applicant is allowed to store these water rights with subsequent releases for conversion to fish water, the regime of the Truckee River will be dramatically altered resulting in potential injury to

existing water right owners.

19. The Applicant is attempting to aggregate and separately transfer non-consumptive water rights that are essentially the same water by seeking the full diversion rate associated with each power plant. Diversions for the generation of electric power into the TMWA's power plants is a right to divert the flow of the river, not a right to a certain volume of water. Water diverted for the Fleish power plant (Claim 6) returns to the river, is again diverted to the Verdi power plant (Claim 7) and returned to the river, and then diverted to the Washoe power plant (Claim 8) and returned to the river for beneficial use. The Applicant may not cumulatively seek to store hydroelectric water rights which are historically returned to the river and subsequently used by downstream water right owners.

20. The Applicant claims non-consumptive secondary uses. However, once water is converted 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 533.3703 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.

21. 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.

22. The Application with a priority date of October 27, 1902 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.

23. By converting this non-consumptive use water to Fish Credit Water, the Applicant is attempting to designate and limit the use of return flow from single pass hydroelectric water that has historically been available to all water uses in the river. 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.

24. The Applicant is not applying for a change in manner 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 Floriston Rates, will now be stored and released at the will of the Applicant, while still being able to generate power.

25. The Application attempts to store water in the upstream reservoirs that will displace water that is otherwise stored for subsequent release to make Floriston Rates at a time that TCID may divert, thus injuring Newlands Project water right owners.

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

would have the exact opposite effect.

31. On information and belief, the purported Application will negatively impact Hydrographic Basin 87. Although these changed rights are in Hydrographic Basin 91, the proposed change would result in reduced river flows through Truckee Meadows reducing groundwater recharge/discharge in 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.

32. 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). The Application will unreasonably lower the water table resulting in injury to others who have wells in the Truckee Meadows. These wells must then draw water that is hydrographically connected to the Truckee River, thus adversely affecting downstream water right owners.

33. Basin 87 is designated by the State Engineer under Chapter 534 of the NRS, altering historical return flows patterns by approving this application will have a detrimental effect on the groundwater and prove detrimental to the public interest.

34. 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, Lake Tahoe, and Boca Reservoir from TCID, (3) TROA has not been finalized and there are a number of remaining contingencies before its implementation, 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.

35. 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 its power plants. Moreover, a change in the point of diversion downstream will have a negative effect on upstream and downstream users.

36. 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.

37. 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.

38. 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 or 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 Claim Nos. 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 as 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."

39. 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.

40. 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 6th day of March, 2008.

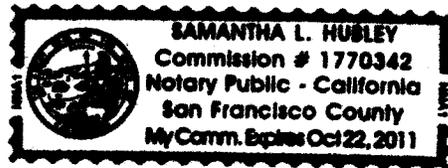
Respectfully submitted,

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State of California)
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Subscribed and sworn to (or affirmed) before me this 6th day of March, 2008, by Michael J. Van Zandt proved to me on the basis of satisfactory evidence to be person(s) who appeared before me.

Samantha L. Hubley
Notary Public



Notary Seal

CERTIFICATE OF SERVICE

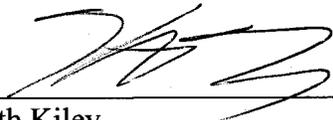
I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years, and that I am not a party to nor interested in this action. On the date stated below, I caused to be served a true and correct copy of the within

PROTEST AND REQUEST TO DENY APPLICATION NO. 76161; 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 below.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 6, 2008 in San Francisco, California.



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