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

2009 JUL -1 PM 2:26

STATE ENGINEER'S OFFICE

IN THE MATTER OF TEMPORARY CHANGE APPLICATION 78507T FILED BY CITY OF FERNLEY	**PROTEST AND REQUEST TO DENY TEMPORARY CHANGE APPLICATION 78507T; PETITION FOR HEARING PURSUANT TO N.R.S. 533.365**

FILED
JUL 01 2009
STATE ENGINEER'S OFFICE

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 2666 Harrigan, P.O. Box 1356, Fallon, Nevada, 89406-1356, 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 temporary change application 78507T filed by City of Fernley, to temporarily change the place and manner of use of water heretofore appropriated under Claim 3 of the *Orr Ditch* Decree (or Truckee River Decree). TCID protests the application for the following reasons and on the grounds, to wit:

1. The temporary transfer, if granted, would adversely affect the cost of water for other holders of water rights in the Newlands Project and lessen the efficiency of the Newlands Project in the delivery or use of water rights served by TCID in violation NRS 533.370(1)(b).

2. 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*

DL

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.

3. 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. Such an injury will occur because transfer of this water right reduces the total amount of water available to be diverted at Derby Dam to the Newlands Project.

4. The application is defective because it attempts to effect a unilateral modification to the *Orr Ditch* Decree by changing the Truckee River Agreement, without consent, approval or notice, and attempts to modify the *Orr Ditch* Decree without approval of the *Orr Ditch* Court.

5. Application 78507T in conjunction with Application 78508T seek the temporary transfer of over 6,000 afa of water. TCID plans its diversions at Derby Dam related to the joint needs of both the Truckee Division and Carson Division of the Newlands Project. Under the proposed applications, Fernley could call on its water rights and negatively impact TCID's ability to plan the required diversions needed to meet the Newlands Projects needs. This is especially problematic given the current restrictions on diversions at Derby Dam as well as in times of low flow on the Truckee River.

6. All contracts for water delivery in the Newlands Project contain a provision that shortages to Claim 3 water under the *Orr Ditch* Decree will be shared equally among all project participants. Under application 78507T Fernley can in essence call on the water for wildlife

purposes and request that the water not be diverted into the project. Thus, Application 78507T provides Fernley with a higher priority than the rest of Claim 3 water rights. This is in violation of the contract to provide water and will cause injury to other water right owners who should stand on equal footing and share in Project shortages.

7. TCID's Operations and Maintenance Contract with the United States Bureau of Reclamation places responsibility for distribution and diversion of Claim 3 water under the *Orr Ditch* Decree with TCID. The unilateral decision by the City of Fernley to transfer this water to Pyramid Lake interferes with TCID's rights under the contract to be the exclusive entity with authority to distribute and divert Claim 3 water for the benefit of the Newlands Project. The application also adversely affects the correlative rights of the other water right owners in the Newlands Project to have the water distributed under the control of the elected Irrigation District Board of Directors for TCID.

8. The application if approved will have the effect of transferring water outside of the boundaries of the Newlands Project, thus creating water shortages in the Newlands Project, decreasing efficiencies, and increasing costs to the remaining water right owners.

THEREFORE, TCID respectfully requests that the State Engineer hold a hearing on Application 78507T and that Application 78507T be denied and an Order be entered by the State Engineer denying said application.

///

///

///

///

///

Dated this 30th day of June, 2009.

Respectfully submitted,

MICHAEL J. VAN ZANDT, ESQ.
Nevada Bar No. 7199
NATHAN A. METCALF
Nevada Bar No. 10404
Attorney for the Truckee-Carson
Irrigation District

JURAT

STATE OF California)
COUNTY OF)
SAN FRANCISCO) ss:

Subscribed and sworn to (or affirmed) before me on this 30th day of June, 2009 by Michael J. Van Zandt, personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Nina Zentner (Notary Seal)

NINA ZENTNER
COMM. #1767362
NOTARY PUBLIC-CALIFORNIA
SAN FRANCISCO COUNTY
My Comm. Expires Oct. 8, 2011

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 TEMPORARY CHANGE APPLICATION 78507T; PETITION FOR HEARING PURSUANT TO N.R.S. 533.365;

by the method indicated below:

City of Fernley
595 Silver Lace Blvd.
Fernley, NV 89408

Mr. Paul Taggart
Taggart & Taggart Ltd.
108 N. Minnesota Street
Carson City, NV 89703

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 30, 2009 in San Francisco, California.

Keith Kiley