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STATE ENGINEER'S OFFICE

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

IN THE MATTER APPLICATION 79772 FILED BY TRUCKEE MEADOWS WATER AUTHORITY TO CHANGE POINT OF DIVERSION, MANNER OF USE AND PLACE OF USE OF WATERS OF THE TRUCKEE RIVER	**PROTEST AND REQUEST TO DENY APPLICATION 79772; PETITION FOR HEARING PURSUANT TO N.R.S. 533.365**

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 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 application no. 79772 (the "Application") filed by Truckee Meadows Water Authority ("TMWA" or "Applicant"), to change the point of diversion, manner of use and place of use of Truckee River waters. TCID protests the application for the following reasons and on the grounds, to wit:

1. There currently exists neither the municipal demand nor capacity to apply the waters to beneficial use as described by the Applicant. The Application seeks to convert *Orr Ditch* decree surface water rights from irrigation to "Municipal/Domestic" ("M&I") use. The proposed places of diversion are the Truckee Meadows Water Authority's existing water treatment plants, from whence the water will placed into TMWA's existing water distribution system. On its face, the Application is obviously intended for development and municipal use in Truckee Meadows. However, according to its 2010-2030 Water Resources Plan forecast, TMWA has an estimated 2010 water demand of approximately 77,000 acre-feet, and a projected 2030 demand of approximately 97,000 acre-feet. *See* TMWA 2010-2030 Water Resources Plan

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at p. 12. [1] As of June 2009, TMWA had sufficient water resources to serve approximately 101,000 acre-feet of commitments. *Id.* at p. 58. Thus, TMWA's existing supplies exceed demand; there is no actual present M&I use of these waters as described in the Application. Water rights may not exist absent an actual beneficial use. *See* N.R.S. 533.035; N.R.S. 533.460. Further, under N.R.S. 533.370(5), the State Engineer shall reject an application that conflicts with existing rights or threatens detriment to the public interest. It is not in the public interest to allow these water rights to become detached from their appurtenant lands for conversion to a non-existent beneficial use. Accordingly, the Application should be rejected and no permit issued.

2. Given an opportunity to present evidence at a hearing, TCID would prove that TMWA's only possible use for the waters described in the Application is storage and conversion to fish credit water under the terms of TROA. Though TROA has not yet entered effect, there can be no doubt that TMWA is obligated to and will store the water described in the Application under the provisions of TROA. As noted above, there is no present municipal demand for this water. Unless the water is stored, it must either flow down the natural channel to Pyramid Lake or through the Truckee Canal into the Carson River. Neither location has been or can be claimed as a location of beneficial use for TWMA. TROA, on the other hand, explicitly contemplates that new water service commitments in the Truckee Meadows which rely on surface water rights will be stored under its terms. TROA §4.B. The ability to store, accumulate and release various categories of Credit Water is the cornerstone of TROA. *See* TROA § 7.A. Such changes to the point of diversion, manner of use and place of use of these waters--particularly the credit storing uses contemplated in TROA--conflict with the existing water rights of Newlands Project water users because those changes threaten to reduce return flows essential to the preservation of senior vested rights of downstream Newlands Project water users. Accordingly, the State Engineer should reject the Application and refuse to issue a permit, as required N.R.S. 533.370(5) and the *Orr Ditch* Decree.

3. If, as in previous applications to convert Truckee River waters from agricultural to M&I use, the State Engineer does not hold a new hearing but instead relies exclusively upon

[1] A complete copy of the Plan can be found at http://www.tmh2o.com/docs/your_water/2030WRP/Final/2030_WRP.pdf.

information from the November 14, 1989 hearing pursuant to State Engineer Ruling 3739 to make his ruling on this Application, then the facts and conditions required for harmless M&I conversion as identified in Ruling 3739 should be made express conditions of any permit issued for this Application. For over 20 years the State Engineer has relied on these conditions to protect the return flows that serve down stream water right owners. *See* Rulings 3875, 4005, 4008, 4009, 4010, 4011, 4449, 4486, 4514, 4582, 4521, 4729, 5811, 5938, and 5972. These conditions include but are not limited to: 1) the conversion to M&I must provide a 50% return flow for use by downstream water right owners, 2) Rule 17 (or "the 58% rule") requires, as a method of drought protection, that only 58% of each acre-foot of water converted be devoted to development in Truckee Meadows, leaving the remaining 42% to flow in the river for use by downstream water right owners, and 3) that the Truckee River Agreement's diverted flow requirement protects Newlands Project water right owners. Confronted with potentially changed conditions and an evolving legal landscape, in the interest of clarity TCID requests that any reliance upon these conditions be expressly and explicitly incorporated into the State Engineer's ruling.

TCID therefore respectfully requests that the State Engineer exercise his authority under N.R.S. 533.370(5) to summarily deny this Application and refuse to issue a permit because the Application's proposed changes threaten to prove detrimental to the public interest and conflict with existing water rights. In the alternative, TCID requests that the State Engineer either (1) hold a hearing on the Application and accept evidentiary submissions regarding changed circumstances, including the impact of TROA as it pertains to conflict with and injury to existing rights, or (2) expressly limit any permit granted without such hearing to the terms and conditions for harmless conversion to M&I use as previously established in the November 14, 1989 hearing pursuant to State Engineer Ruling 3739.

Dated this 9th day of June, 2010.

Respectfully submitted,

MICHAEL J. VAN ZANDT, ESQ.
Nevada Bar No. 7199
TIMOTHY D. FINDLEY, ESQ.
Nevada Bar No. 11567
Attorneys for the Truckee-Carson Irrigation District

JURAT

STATE OF CALIFORNIA)
)
COUNTY OF SAN FRANCISCO)

Subscribed and sworn to (or affirmed) before me on this 9th day of June, 2010, by Timothy D. Findley, who proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Signature: Sara A Wright (seal)

SARA A. WRIGHT
COMM. #1734119
NOTARY PUBLIC • CALIFORNIA
SAN FRANCISCO COUNTY
Comm. Exp. MARCH 25, 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 APPLICATION 79772; PETITION FOR HEARING PURSUANT TO N.R.S. 533.365

by the method indicated below:

Truckee Meadows Water Authority
P.O. Box 30013
Reno, NV 89520

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 9, 2010 in San Francisco, California.

Keith Kiley