

**IN THE OFFICE OF THE STATE ENGINEER  
OF THE STATE OF NEVADA**

IN THE MATTER OF APPLICATION 9330 FILED )  
TO APPROPRIATE THE WATERS OF THE )  
TRUCKEE RIVER FOR USE WITHIN THE )  
NEWLANDS RECLAMATION PROJECT, )  
WASHOE, STOREY, LYON, AND CHURCHILL )  
COUNTIES, NEVADA, ON REMAND FROM )  
THE THIRD JUDICIAL DISTRICT COURT OF )  
THE STATE OF NEVADA IN AND FOR THE )  
COUNTY OF CHURCHILL, CASE NO. 25004, )  
DATED OCTOBER 15, 2008. )

**RULING ON REMAND**

**#6122**

**GENERAL**

**I.**

**The Application**

Application 9330 was filed on September 9, 1930, and amended on March 9, 1931, by the Truckee-Carson Irrigation District (TCID) to appropriate 1,500 cubic feet per second (cfs), not to exceed 100,000 acre-feet annually (afa), of the water of the Truckee River and its tributaries to store in Lahontan Reservoir for domestic purposes and for the irrigation of 150,000 acres of land contained within the Newlands Reclamation Project in Washoe, Storey, Lyon and Churchill Counties, Nevada. The proposed point of diversion is described as being located within the NE¼ SW¼ of Section 19, T.20N., R.23E., M.D.B.&M.<sup>1</sup> In the Remarks section of Application 9330, the TCID stated:

This application is for the right to store waters of the Truckee River in Lahontan Reservoir and is in addition and supplemental to all of the rights now owned, held or acquired by the United States in and to the Truckee River and its tributaries.

This applicant intends to raise the control level of the Lahontan Dam 8 feet and thereby increase its storage capacity and [sic] additional 100,000 acre feet, making a total capacity of said Reservoir of 394,000 acre feet.

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<sup>1</sup> File No. 9330, official records in the Office of the State Engineer. Exhibit No. 2, public administrative hearing before the State Engineer, March 29, 1994. Hereafter, the exhibits from the 1994, 1996 and 2010 hearings will be referred to solely by exhibit number and citations to the transcripts from the various hearings will identify the transcript by date of the hearing. All exhibits and transcripts are official records of the Office of the State Engineer.

This application is made without any prejudice to the rights now held and acquired by the United States and/or the applicant and is expressly made additional and supplemental to such rights. The water proposed to be stored will be used in connection with and supplemental to the present rights of the United States and the applicant in the same manner and through the same system of works that waters of the Truckee River and its tributaries are now diverted, stored and used in the Newlands Reclamation Project, in the Counties of Churchill, Lyon, Storey and Washoe, State of Nevada.

The applicant hereby expressly waives, any claim of senior or prior right it may obtain by this application as against any upstream storage development hereafter jointly made on the Truckee River or its tributaries by the applicant and the Washoe County Water Conservation District or other organization of water users of the Truckee River.<sup>2</sup>

## II. The Truckee River

The Truckee River system consists of an interstate river with its headwaters in the Sierra Nevada Mountains. It has storage reservoirs at Lake Tahoe, Stampede Reservoir, Prosser Reservoir, Boca Reservoir, Independence Reservoir and Donner Lake. Storage water, along with natural flow, passes the California-Nevada state line serving irrigation, power and municipal (Reno and Sparks) water rights along the way and then flows into Pyramid Lake, the terminus of the Truckee River. Water rights of the Truckee River are the subject of the *Orr Ditch Decree*.<sup>3</sup>

## III. The Newlands Project

The Newlands Reclamation Project consists of the Derby Diversion Dam, the Truckee Canal (which conveys Truckee River water to irrigators along the canal and to Lahontan Reservoir), the Lahontan Dam and Reservoir, and an extensive system of canals and laterals which deliver water to Lahontan Valley farms and wetlands in the Carson River Basin. Midway through the lower Truckee River canyon, Derby Dam diverts Truckee River water into the Truckee Canal for use along the Truckee Canal and to the Carson River basin for storage in Lahontan Reservoir for use on the Carson Division, all as part of the Newlands Reclamation Project. Water rights on the Carson River are the subject of the *Alpine Decree*.<sup>4</sup> There is also a water right on the Carson River for the Newlands Project. Diversions from the Truckee River to

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<sup>2</sup> Exhibit No. 2 (emphasis added).

<sup>3</sup> Final Decree, *U.S. v. Orr Water Ditch Co.*, In Equity Docket No. A-3 (D. Nev. 1944).

<sup>4</sup> Final Decree, *U.S. v. Alpine Land and Reservoir Co.*, Civil No. D-183 BRT (D. Nev. 1980).

the Carson River basin and Lahontan Reservoir for the benefit of the Newlands Project are regulated by the Newlands Project Operating Criteria and Procedures.<sup>5</sup> The TCID is the contract operator of the Newlands Reclamation Project and is responsible to the U.S. Department of Interior, Bureau of Reclamation.<sup>6</sup>

#### IV. The 1994 Hearing

On October 20, 1993, the State Engineer provided notice of a December 1993 public administrative hearing on Applications 20998, 22541, 22542, 47047, 47121, 47209, 47264, 48061, and 48494. These are all applications to appropriate water of the Truckee River. On November 23, 1993, the State Engineer sent notice adding Application 9330 to the hearing calendar. By Notice dated December 3, 1993, the public administrative hearing was continued.<sup>7</sup>

On March 29, 1994, the public administrative hearing began with consideration of Application 9330. However, on March 30, 1994, a request was lodged and granted that the hearings be continued to allow the inclusion in the hearing process of several applications filed to appropriate Truckee River effluent waters and to enable the various parties to discuss an agreement as to their pending applications.

By Notice dated April 27, 1994, the State Engineer rescheduled the hearings to resume on May 31, 1994, and to include those applications filed by various entities to appropriate effluent from the Truckee Meadows Water Reclamation Facility. At the May 31, 1994, hearing, the State Engineer denied a request by Corkill Brothers, Inc. (Corkill Bros.) to intervene in the matter of Application 9330<sup>8</sup> on the basis that the request was not timely and because the TCID as the applicant was representing all water right holders within the irrigation district. The State Engineer also summarily denied Application 9330 on the threshold issue of the United States' refusal to allow the federal facilities, i.e., the Truckee Canal and Lahontan Reservoir, to be used in placing any water granted under Application 9330 to beneficial use.<sup>9</sup> The hearings continued through June 1 and 2, 1994, on the other applications noticed.

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<sup>5</sup> See, 43 C.F.R. § 418, as amended 62 Fed. Reg. 66442 (1997); Exhibit No. 152.

<sup>6</sup> Exhibit Nos. 108, 109 and 207.

<sup>7</sup> Exhibit No. 1.

<sup>8</sup> Transcript, pp. 223-224, May 31, 1994.

<sup>9</sup> State Engineer's Ruling No. 4117, dated May 31, 1994, official records in the Office of the State Engineer; Transcript, pp. 364-366, May 31, 1994.

Corkill Bros. appealed the denial of its request to intervene and the denial of Application 9330 to the Third Judicial District Court in accordance with NRS § 533.450. An appeal was also filed by the TCID. The District Court reversed the State Engineer's decision denying Corkill Bros.' request for intervention and remanded the matter to the State Engineer for further hearing without addressing the TCID's appeal or the merits of the case.<sup>10</sup>

**V.  
The 1996 Hearing**

Pursuant to the remand order in the Corkill Bros. case, the hearing on Application 9330 was reconvened by the State Engineer on January 31 through February 2, 1996. At the 1996 hearing, the parties in the matter of Application 9330 were the Applicant TCID, Intervenor Corkill Bros. and Intervenor U.S. Bureau of Reclamation (BOR). The Pyramid Lake Paiute Tribe (Tribe), Churchill County, Sierra Pacific Power Company, City of Fallon, Town of Fernley, Washoe County, and Cities of Reno and Sparks were granted interested party status which allowed them to file legal briefs. The Tribe, Churchill County, Sierra Pacific Power Company, BOR, Corkill Bros., City of Fallon and TCID filed post-hearing briefs.<sup>11</sup> The Tribe, Sierra Pacific Power Company and the BOR opposed Application 9330 and supported the Tribe's competing applications, Applications 48061 and 48494, which were filed to appropriate all unappropriated the waters of the Truckee River for instream flow for the benefit of Pyramid Lake's threatened and endangered species.

**VI.  
State Engineer's Ruling No. 4659**

On August 14, 1998, the State Engineer issued State Engineer's Ruling No. 4659 (Ruling No. 4659) which denied Application 9330 for two major reasons. First, the State Engineer ruled that the TCID did not have a reasonable expectation of placing the water to beneficial use based on the position taken by the U.S. Department of the Interior that it would not allow the federal facilities to be used for the conveyance, storage or delivery of any water appropriated under Application 9330. Second, the State Engineer concluded that the use of water as requested in Application 9330 would threaten to prove detrimental to the public interest.

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<sup>10</sup> Opinion, *Corkill Bros., Inc. v. R. Michael Turnipseed, State Engineer*, Third Judicial District Court, State of Nevada, January 31, 1995, Case No. 21869.

<sup>11</sup> Exhibit Nos. 116, 117, 118, 119, 120 and 121.

**VII.**  
**2008 State District Court Order**

The TCID appealed Ruling No. 4659 to the Third Judicial District Court of the State of Nevada in and for the County of Churchill. By Order dated October 15, 2008, the District Court remanded Ruling No. 4659 to the State Engineer and ordered the State Engineer to:

1. Hear additional evidence regarding the Truckee River Operating Agreement (TROA) and the Preliminary Settlement Agreement (PSA);
2. Define the public interest in this case;
3. Assign values and magnitudes to findings of detriment and benefit and indicate how the comparison of benefits and detriments lead to his conclusion; and
4. Hear additional evidence as to whether the current infrastructure can transport the additional water requested. If the State Engineer determines that the current infrastructure cannot be used to transport the additional water, then the State Engineer shall hear and consider additional evidence as to whether a substantial probability exists that the TCID has the financial ability and resources to construct any improvements required to transport the water as requested in Application 9330.<sup>12</sup>

**VIII.**  
**Hearing on Remand**

After all parties of interest were duly noticed by certified mail,<sup>13</sup> an administrative hearing was held regarding the matter of remanded Application 9330 on October 12 and 13, 2010, at Carson City, Nevada, before representatives of the Office of the State Engineer. In response to items 2 and 3 of the Court's Remand Order, the Notice of Hearing provided the parties and those with interested person status an opportunity to file briefs on the public interest issues remanded.

**FINDINGS OF FACT**

**I.**

**The TCID's Motion Requesting Rejection of the Truckee Meadows  
Water Authority's Public Interest Brief on Remand**

The TCID filed a motion<sup>14</sup> objecting to the public interest brief filed on remand by the Truckee Meadows Water Authority (TMWA) on the grounds that the TMWA is not an interested party in this proceeding because it did not protest Application 9330, it is not a successor in interest to a protestant of Application 9330, it is not entitled to "interested person" status because the regulation allowing that status was repealed in February 2009, it is not a successor in interest

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<sup>12</sup> Exhibit No. 122, pp. 15-16.

<sup>13</sup> Exhibit No. 123.

<sup>14</sup> Exhibit No. 132.

to an interested person under the former NAC § 533.100, and it was not allowed to intervene in the judicial review proceedings before the Third Judicial District Court. The TMWA responded to the TCID's motion on October 22, 2010.<sup>15</sup> The TMWA argues that it is a joint powers authority created primarily for the purpose of acquiring and operating the water utility of the former Sierra Pacific Power Company.

The State Engineer finds none of the parties granted interested person status was a formal protestant to Application 9330. The State Engineer is not concerned with the repeal of the regulation allowing for interested person status as the TMWA is stepping into the shoes of the Sierra Pacific Power Company as its successor utility. The State Engineer is not concerned with the Third Judicial District Court's decision not to allow the TMWA to intervene in the judicial proceeding. The State Engineer finds the TMWA provided sufficient argument in its opposition to the TCID's motion to justify allowance of it as a successor in interest to the Sierra Pacific Power Company for the purpose of briefing the public interest issues in this matter. The State Engineer finds based on the consideration of the parties' views and the prior decisions of the State Engineer, the TMWA is granted interested person status in this proceeding because it holds the water rights held by its predecessor Sierra Pacific Power Company, which was granted the same status.

## II.

### **United States Department of Interior, Bureau of Reclamation as Party**

At the 2010 hearing on remand, the TCID raised an objection to the BOR being a party to this proceeding because the BOR never filed a protest to Application 9330.<sup>16</sup> This issue was raised by the TCID at the initial 1994 hearing, and the State Engineer denied its objection and granted the BOR standing as a full party protestant.<sup>17</sup> The TCID did not raise this issue on appeal of the 1994 Ruling No. 4659.

The State Engineer finds he will not upset the former State Engineer's decisions as to the parties in this matter and finds it inappropriate that the TCID again attempts to raise this argument. The State Engineer finds that since the Third Judicial District Court granted full party intervenor protestant status to Corkill Bros. on the grounds of it being a water user within the

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<sup>15</sup> Exhibit No. 133.

<sup>16</sup> Transcript, p. 14, October 12, 2010.

<sup>17</sup> Ruling No. 4659, p. 5; Transcript, pp. 62-63, March 29, 1994; p. 210, May 31, 1994; p. 17, January 31, 1996; and p. 14, October 21, 2010.

Newlands Project, surely that the same court would affirm full party intervenor protestant status to the owner of the facilities that the TCID seeks to use under Application 9330. The State Engineer finds the BOR remains a full party protestant in this proceeding.

### III. History and Background<sup>18</sup>

In 1913, the United States sued to adjudicate water rights to the Truckee River for the benefit of the Pyramid Lake Indian Reservation and the planned Newlands Reclamation Project.<sup>19</sup> Thirty-one years later, in 1944, the United States District Court entered a final decree in the case pursuant to a settlement agreement.<sup>20</sup>

In 1926, the Federal District Court entered a Temporary Restraining Order which set forth the relative rights and priorities of the parties in said suit. In 1935, the United States, TCID, Washoe County Water Conservation District (Conservation District), Sierra Pacific Power Company (Power Company), and other users of the waters of the Truckee River became parties to the Truckee River Agreement by signing their names thereto.<sup>21</sup>

The parties to the Truckee River Agreement were desirous of raising and stabilizing the mean elevation of the surface of Lake Tahoe. To accomplish that objective they agreed, among other things, to the creation or acquisition of additional facilities for the storage of flood waters, and agreed to rates of flow in the Truckee River. Article XIII of the Truckee River Agreement provides that the Power Company, Conservation District and parties of the fifth part waived all objections to the restoration and maintenance of the Truckee Canal by the Truckee-Carson Irrigation District and/or the United States to a carrying capacity not exceeding 1,200 cfs and to the increase of the storage capacity of Lahontan Reservoir.<sup>22</sup>

Against the backdrop of the quiet title action to the waters of the Truckee River, Application 9330 was filed in 1930 by the TCID for additional storage at Lahontan Reservoir, but until the early 1990s, the TCID did not pursue the application. However, much has happened on the Truckee River since that time which requires consideration.

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<sup>18</sup> The State Engineer provided portions of this section in Ruling No. 4659. It is included in this Ruling for ease of reference.

<sup>19</sup> *Nevada v. U.S.*, 463 U.S. 110, 103 S.Ct. 2906, 2910, 77 L.Ed.2d 509 (1983).

<sup>20</sup> Final Decree, *U.S. v. Orr Water Ditch Co.*, In Equity Docket A-3 (D. Nev. 1944).

<sup>21</sup> Exhibit No. 200.

<sup>22</sup> Exhibit No. 200.

The Pyramid Lake cui-ui fish species was identified in 1967 as being in danger of extinction under a predecessor statute to the federal Endangered Species Act and the U.S. Secretary of the Interior issued the first Newlands Project Operating Criteria and Procedures (OCAP) regulations that required Newlands Project farmers to use as much water from the Carson River as possible in order to minimize diversions from the Truckee River. The Interstate Compact between Nevada and California, which apportioned the waters of the Truckee River between the States, was passed by Nevada in 1969, amended and passed by California in 1970, and re-passed by Nevada in 1971; however, Congress failed to ratify the Compact.

In 1970, the Pyramid Lake Lahontan cutthroat trout was listed as a species in danger of extinction, and was reclassified in 1975 as threatened under the Endangered Species Act. Litigation that began in 1968, initiated by the Pyramid Lake Paiute Tribe (*Pyramid Tribe of Paiute Indians v. Hickel*) and in 1970 (*Pyramid Lake Paiute Tribe of Indians v. Morton*), resulted in a decision by the U.S. District Court in Washington, D.C., requiring the Secretary of the Interior to deliver to Pyramid Lake all Truckee River water not obligated by court decree or contract with the TCID.<sup>23</sup>

In the 1980s, various lawsuits were filed relating to Truckee River water, and negotiations began among state, federal and other interests in an attempt to resolve the many issues surrounding the use of the water of the Truckee River. Public Law 101-618, enacted by Congress in 1990 (Settlement Act),<sup>24</sup> includes elements which promote the enhancement and recovery of Pyramid Lake's threatened and endangered species, protect Lahontan Valley wetlands from further degradation, encourage the development of solutions for demands on Truckee River water, improve the management and efficiency of the Newlands Project, and promote the Fallon Paiute-Shoshone water issues settlement, the Pyramid Lake Paiute Tribe water issues settlement, and the California-Nevada interstate water apportionment.

In Ruling No. 4659, the State Engineer made a finding that much had happened on the Truckee River since the filing of Application 9330 and that Application 9330 cannot be looked at in a vacuum as if it were the year 1930. The public interest criteria reviewed by the State

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<sup>23</sup> Exhibit No. 153.

<sup>24</sup> Exhibit No. 220.

Engineer in Ruling No. 4659 considered the evidence of the public interest as of 1996. On remand, the Court directed the State Engineer to define the public interest in this case and to assign values and magnitudes to findings of detriment and benefit and indicate how the comparison of benefits and detriments lead to the final conclusion.

Prior to reconvening the hearing on remand, the State Engineer provided the parties and those with interested person status the opportunity to file briefs on the public interest issues remanded. After the hearing on remand, the State Engineer provided the parties the opportunity to file proposed rulings and specifically indicated that the parties did not provide enough in their pre-hearing briefs on defining the public interest and more specifically how to assign values and magnitudes.<sup>25</sup>

The State Engineer finds that the TCID in its proposed ruling on remand indicates its belief that the District Court is “looking for a qualitative analysis and comparison of the benefits and detriments in the analysis of whether granting Application 9330 would prove detrimental to the public interest under NRS § 533.370” and uses values and magnitudes such as “significant benefit” and “negative impact.” However, the TCID proposed a conclusion that merely stated “that there is no substantial evidence that the use of the water as proposed will threaten to prove detrimental to the public interest.”<sup>26</sup> The BOR asserts that the remand order requires the State Engineer to provide a more detailed explanation of his findings and conclusions and uses qualitative suggestions like the TCID did using such terminology as “significant adverse negative effects.”

The State Engineer accepts the arguments of both the TCID and the BOR and will use a qualitative analysis in the comparison of the benefits and detriments in the analysis of whether granting Application 9330 would prove detrimental to the public interest under NRS § 533.370.

#### IV. **Truckee River Operating Agreement (TROA) and Preliminary Settlement Agreement (PSA)**

The District Court remanded this matter to the State Engineer to hear additional evidence regarding the TROA and the PSA. The Court found that evidence of the final agreements for the TROA and the PSA would be material to the State Engineer’s decision whether to approve or

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<sup>25</sup> Transcript, p. 160, October 13, 2010.

<sup>26</sup> TCID’s Proposed Ruling on Remand, pp. 26 and 38.

deny Application 9330.

The TROA was mandated by Section 205(a) of Public Law 101-618 (Settlement Act)<sup>27</sup> and requires the Secretary of the Interior to negotiate an agreement with the States of California and Nevada for operation of the Truckee River reservoirs.<sup>28</sup> The general purpose of the TROA is to provide for more efficient and effective operation of the Truckee River Reservoirs to serve current and future water demands.<sup>29</sup> The PSA has been incorporated into and superseded by the TROA, primarily in Articles 4 and 7.<sup>30</sup> The PSA, and now the TROA, provides a means of drought relief storage for Reno/Sparks and enhancement of flows to Pyramid Lake by changing the operation of the Truckee River Reservoirs.<sup>31</sup> This would occur by the TMWA storing some of its single purpose hydroelectric water under Claims 5 through 9 of the *Orr Ditch* Decree when not required for the exercise of other valid *Orr Ditch* decreed water rights, and converting it to fish credit water for the benefit of Pyramid Lake.<sup>32</sup> This would also occur by the TMWA retaining some of its municipal and industrial water upstream in the Truckee River Reservoirs, and making it available as fish credit water for the benefit of Pyramid Lake fish.<sup>33</sup> This water provided for the benefit of the Pyramid Lake fish (flow to Pyramid Lake) would only occur when that water was not needed for the exercise of a valid *Orr Ditch* decreed water right.<sup>34</sup>

The water that may be stored in the Truckee River Reservoirs is based on water rights, for example, obtained by the TMWA and changed as necessary in accordance with Nevada water law.<sup>35</sup> The TROA does not create any new water rights, nor can it injure any existing water rights, including *Orr Ditch* Claim 3 water rights for use within the Newlands Project.<sup>36</sup> Further, the TROA provides that the operating agreement itself will not go into effect if the Tribe does not receive approval to store the unappropriated water currently permitted under water right Permits

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<sup>27</sup> Exhibit No. 220.

<sup>28</sup> Transcript, p. 136, October 12, 2010.

<sup>29</sup> Transcript, pp. 136, 170, October 12, 2010.

<sup>30</sup> Transcript, p. 139, October 12, 2010.

<sup>31</sup> Transcript, p. 138, October 12, 2010.

<sup>32</sup> Transcript, pp. 158-160, October 12, 2010.

<sup>33</sup> Transcript, p. 140, October 12, 2010.

<sup>34</sup> Transcript, p. 167, October 12, 2010.

<sup>35</sup> Transcript, pp. 119-120, 142, 167, October 12, 2010; State Engineer's Ruling No. 6035, dated March 19, 2010, official records in the Office of the State Engineer.

<sup>36</sup> Transcript, pp. 142-143, October 12, 2010; Exhibit No. 215 § 1(C)(1) and (2); Exhibit No. 220, § 205(a)(2)(D).

48061 and 48494.<sup>37</sup> The BOR asserts that the water applied for under Application 9330 is in direct competition with water granted to the Tribe under Permits 48061 and 48494.

The TCID argues that the TROA Final Environmental Impact Report/Environmental Impact Statement (“FEIR/EIS”) modeling results indicate that there will be additional shortages to the Newlands Project as a result of the operation of the TROA. Specifically, it asserts that Figure 3.23 of the FEIR/EIS indicates nine years of additional shortages to the Newlands Project over a 100-year period resulting from the operation of the TROA<sup>38</sup> and that the water applied for under Application 9330 would mitigate those shortages, if they occur.<sup>39</sup> However, the only evidence offered by the TCID in support of this assertion was refuted by the BOR witness who stated that the purported shortages would initially be the result of hydrology irrespective of the TROA<sup>40</sup> and that less water might be available in some circumstances because of the proper exercise of valid senior *Orr Ditch* Decree water rights which cannot now be effectively exercised.<sup>41</sup>

The TCID appears to have wanted to present evidence of the TROA and the PSA to argue that the State Engineer’s findings in Ruling No. 4659 related to the detriments to the protection of the threatened and endangered fish in the Lower Truckee River and Pyramid Lake cannot stand in light of the benefits that the TROA provides for endangered and threatened fish species preservation. The Settlement Act requires that the TROA provide for the enhancement of spawning flows for the Pyramid Lake fishery<sup>42</sup> and there are a number of provisions that provide for the protection of these fish species. The TROA has provisions that provide for the conversion of stored water as Fish Credit Water and Joint Program Fish Credit Water. It provides 6,700 acre-feet of water rights for water quality purposes and it also provides for a habitat restoration fund to implement fish habitat restoration at Pyramid Lake.<sup>43</sup>

Testimony provided by the BOR indicates that Pyramid Lake will receive more water under the TROA than it does without the TROA.<sup>44</sup> The TROA incorporates a number of credit

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<sup>37</sup> Transcript, p. 169, October 12, 2010.

<sup>38</sup> Exhibit No. 221, p. 3-107; Transcript, pp. 94-95, October 12, 2010.

<sup>39</sup> Transcript, p. 31, October 12, 2010.

<sup>40</sup> Transcript, pp. 189-190, October 12, 2010.

<sup>41</sup> Transcript, pp. 201-202, October 12, 2010.

<sup>42</sup> Exhibit No. 220 § 205(a)(2)(B).

<sup>43</sup> Exhibit No. 215 § 1.E4; Exhibit No. 215 § 2.C.2(f); Transcript, pp. 85-86. October 12, 2010.

<sup>44</sup> Transcript, p. 166, October 12, 2010.

water provisions that increase storage of water that is dedicated for the Truckee River and Pyramid Lake. The management of this water provides flow in the river to Pyramid Lake both to improve habitat for the fish species and also to maintain the elevation of Pyramid Lake.<sup>45</sup> The PSA as incorporated in the TROA provides a mechanism for the TMWA to retain excess municipal and industrial water upstream and store it in the federal reservoirs. In exchange for this municipal storage, the excess water would be turned over to the Tribe and converted to fish credit water, where it would be used for the benefit of Pyramid Lake fish.<sup>46</sup>

The TCID's argument is that a substantial amount of *Orr Ditch* water can be stored in the upstream reservoirs by the TMWA and the City of Fernley under the TROA, which can be converted to Fish Credit Water if it is not required for drought protection.<sup>47</sup> It is anticipated that the TMWA's change to storage will include a minimum of 12,000 acre-feet of water.<sup>48</sup> The storage of "Non-Firm M&I Credit Water" that can be converted to Fish Credit Water can increase to 20,000 acre-feet.<sup>49</sup> This includes conversion to Fish Credit Water of the TMWA's excess water rights that were the subject of State Engineer's Ruling No. 6035, and which previously remained in the river and available for downstream water users under the Truckee River Agreement.<sup>50</sup> The TMWA's TROA change applications granted in Ruling No. 6035 provided for approximately 13,650 acre-feet annually to be converted to storage and management under the TROA.<sup>51</sup>

The TCID argues that this same operation will be in place for the City of Fernley's Municipal Credit Water for storage of approximately 10,000 acre-feet of Truckee River surface water<sup>52</sup> and an agreement is already in place to utilize part of Fernley's water for the sole benefit of the Pyramid Lake and the Lower Truckee River.

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<sup>45</sup> Transcript, pp. 176-177, October 12, 2010.

<sup>46</sup> Transcript, pp. 139-140, October 12, 2010.

<sup>47</sup> Exhibit No. 215 §§ 7.A.4(b)(1), 7.B and 7.F; Transcript, pp. 87-89, October 12, 2010.

<sup>48</sup> Exhibit No. 215 § 12.A.4(d)(5).

<sup>49</sup> Exhibit No. 215 § 7.B.4(b).

<sup>50</sup> Exhibit No. 215 §§ 4.B.1 and 7.B.4(e). On December 14-17, 2009, there were hearings before the State Engineer related to approximately 58 change applications filed by TMWA, which are designed to implement the TROA ("TMWA Change Applications"). They provide for changes in diversion of Truckee River water and its storage in California reservoirs for beneficial uses allowed under the TROA. The State Engineer issued State Engineer's Ruling No. 6035, on March 19, 2010, granting the TMWA Change Applications subject to the TROA entering effect. Ruling No. 6035 is currently on appeal in the *Orr Ditch* Decree Court.

<sup>51</sup> See, Exhibit No. 801, Table 1, public administrative hearing before the State Engineer, December 14, 2009, official records in the Office of the State Engineer.

<sup>52</sup> Exhibit No. 215 §7.F.

The TCID also argues that the TROA also provides benefits to water quality in the Lower Truckee River. Under the TROA, water rights obtained under the Water Quality Settlement Agreement may be managed on a flexible 12-month schedule.<sup>53</sup> Reno, Sparks, and Washoe County will provide 6,700 acre-feet of water for water quality purposes no later than when the TROA takes effect.<sup>54</sup> Fish Credit Water can be converted to Water Quality Credit Water pursuant to the TROA § 7.B.4(f)(4) and conserved water may also be stored as Water Quality Credit Water.<sup>55</sup>

The gist of the TCID's evidence and argument are that under the TROA the average annual inflow to Pyramid Lake is greater, which would benefit cui-ui by maintaining Pyramid Lake at a higher elevation, and enhancing lake habitat and river access.<sup>56</sup> It asserts that under the TROA, the average annual inflow to Pyramid Lake is 9,730 acre-feet greater than under No Action and 5,240 acre-feet greater than under current conditions due in part to the conversion of municipal and industrial Credit Water to Fish Credit Water, significantly benefiting the cui-ui.<sup>57</sup> However, the TCID also presented evidence that early studies indicate that the population of adult female cui-ui will decline under the operation of the TROA.<sup>58</sup> Finally, it asserts that none of the analysis that was done for the TROA EIS/EIR was available in 1994 or 1996 when the State Engineer had the original hearings related to Application 9330.<sup>59</sup>

The State Engineer finds that the TCID's evidence and argument ignores one very major issue, which is that the TROA will not go into effect if the water applied for under Application 9330 is granted. The State Engineer finds the TCID's analysis of the water available under the TROA includes the unappropriated water already granted to the Tribe and appropriations not yet granted and assumes that storage of municipal and industrial water will always be available for fish. The State Engineer finds that Ruling No. 4659 indicates that every year approximately 440,000 acre-feet evaporates off Pyramid Lake, but that the inflow to Pyramid Lake in a 20-year span post-1967 is approximately 370,000 to 400,000 acre-feet. Additionally, the Cui-ui Recovery Plan indicates a baseline for recovery which includes the current inflow to Pyramid

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<sup>53</sup> Exhibit No. 215 § 7.E.1; Exhibit No. 240.

<sup>54</sup> Exhibit No. 215 § 1.E.4.

<sup>55</sup> Exhibit No. 215 § 7.E.3.

<sup>56</sup> Exhibit No. 221, pp. 3-266 & 267.

<sup>57</sup> Exhibit No. 221, p. 3-269.

<sup>58</sup> Exhibit No. 222; Transcript, pp. 95-99, October 12, 2010.

<sup>59</sup> Transcript, p. 206, October 12, 2010.

Lake, but requires an additional 110,000 acre-feet of water. The TCID argues that under the TROA the average annual inflow to Pyramid Lake is 5,240 - 9,730 acre-feet greater, which is far less than the 110,000 acre-feet the Recovery Plan indicates is needed above the inflow that is presently making it to the lake. The State Engineer has considered the evidence provided in the TROA and the PSA and finds it does not change his analysis that it would threaten to prove detrimental to take more water out of the Truckee River and move it over to another hydrologic basin. The State Engineer finds the TROA does not take away any water rights decreed for use in the Newlands Project.

#### V.

##### **Benefits of Unappropriated Water to Pyramid Lake**

The TCID attempted to show that no more than 251,000 acre-feet of water on an annual basis is needed to support recovery of the Pyramid Lake fish, thus, the Tribe does not need the full 477,851 acre-feet permitted under Permits 48061 and 48494.<sup>60</sup> The TCID also attempted to demonstrate that conditions have changed since 1996 and that the population of cui-ui has improved (based on a 1992 model run) and presumably the additional water that may flow to Pyramid Lake under the Tribe's permits is not necessary for cui-ui recovery.<sup>61</sup> On remand, the TCID offered no information on the current status of the cui-ui.<sup>62</sup> The State Engineer finds the evidence supports the appropriation by the Tribe of the full amount of water permitted in Applications 48061 and 48494<sup>63</sup> for the recovery of the Pyramid Lake fish.<sup>64</sup>

#### VI.

##### **Limitations on Diversion of Truckee River Water**

As noted above, the District Court directed the State Engineer to hear additional evidence as to whether the current infrastructure can transport the additional water requested. Application 9330 was filed to transport and store unappropriated water of the Truckee River through the federal facilities constructed in connection with the Newlands Reclamation Project, i.e., Derby Dam, Truckee Canal, and Lahontan Reservoir. Diversion of water into the Newlands Project from the Truckee River is controlled by the current OCAP.<sup>65</sup> The OCAP was developed through

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<sup>60</sup> Transcript, pp. 105, 107, October 12, 2010.

<sup>61</sup> Transcript, pp. 121-122, October 12, 2010; Exhibit Nos. 222 and 224.

<sup>62</sup> Transcript, pp. 122-123, October 12, 2010; Exhibit Nos. 222 and 224.

<sup>63</sup> Exhibit Nos. 10 and 11.

<sup>64</sup> Transcript, pp. 165, 181-188, 193, 197, October 12, 2010; Exhibit No. 221, pp. 3-262, 268 and 269.

<sup>65</sup> Exhibit No. 152.

a public process as a federal regulation<sup>66</sup> and in accordance with Section 10 of the Reclamation Act of 1902.<sup>67</sup> The OCAP has been confirmed by the courts and is intended to carry out the decision in the *Tribe v. Morton* case requiring a limitation on diversions from the Truckee River to the Newlands Project that is not otherwise decreed or in accordance with the contract between the TCID and the United States.<sup>68</sup> Congress also provided direction to the BOR in this regard through Section 209 of the Settlement Act.<sup>69</sup> This statute requires the BOR, in carrying out the provisions of that law, which include the TROA, to do so in a manner fully consistent with the *Tribe v. Morton* decision and in such a way that would not result in the increase in diversions of the Truckee River to the Newlands Project. While the TCID pointed out that the statute also provides that it does not abrogate the jurisdiction of the Nevada State Engineer,<sup>70</sup> this provision does not dictate that Application 9330 be approved. There is no requirement that all water that may be permitted under state law must be allowed to be diverted into the Truckee Canal for the Newlands Project. All diversions for use by the Newlands Project are subject to OCAP.<sup>71</sup>

The State Engineer finds that the OCAP limits diversions from the Truckee River to the Newlands Project irrespective of the source of that water right.<sup>72</sup> The OCAP limits the diversion of water from the Truckee River to the Newlands Project primarily through the use of storage targets for Lahontan Reservoir and a cap on overall diversions to Newlands Project facilities to meet the water demands of the Project in any given year.<sup>73</sup> These quantities fluctuate based on the current and anticipated demand.<sup>74</sup> The OCAP, even with these limitations, is intended to provide a full supply to the water righted acres in the Project.<sup>75</sup> This was adequately demonstrated by the evidence that even with the current flow limitation on the Truckee Canal, a full water supply was provided to the Newlands Project in 2009.<sup>76</sup> No evidence was provided regarding any water short year or specifically how Application 9330 would address any such shortage.

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<sup>66</sup> Transcript, p. 12, October 13, 2010.

<sup>67</sup> Exhibit No. 156.

<sup>68</sup> Exhibit No. 153; Transcript, pp. 10-11, October 13, 2010.

<sup>69</sup> Exhibit No. 220.

<sup>70</sup> Exhibit No. 220, § 210(b)(12).

<sup>71</sup> Exhibit No. 152, Transcript, p. 18, October 13, 2010.

<sup>72</sup> Exhibit No. 152, § 418.17.

<sup>73</sup> Transcript, pp. 13-14, October 13, 2010.

<sup>74</sup> Transcript, p. 14, October 13, 2010.

<sup>75</sup> Transcript, p. 14, October 13, 2010.

The State Engineer finds that currently Truckee River water is diverted into the Truckee Canal for Newlands Project use under Claim 3 of the *Orr Ditch Decree* and in accordance with the OCAP. The evidence indicates that water applied for under Application 9330 could only be diverted into the Truckee Canal if the canal capacity was expanded to greater than the 1,500 cfs, which is the diversion limit under Claim 3.<sup>77</sup> The State Engineer finds that testimony was presented that the maximum canal capacity in the future would be 500 cfs after the canal is rehabilitated at a current estimated cost of \$90 million dollars.<sup>78</sup> This cost estimate was based on recent studies by the BOR.<sup>79</sup>

## VII. Unappropriated Water

The *Orr Ditch Decree* did not declare the waters of the Truckee River fully appropriated.<sup>80</sup> During the 1996 hearing, the TCID presented evidence<sup>81</sup> and testimony<sup>82</sup> that in approximately half the years there is unappropriated water in the Truckee River that would meet the quantity of water requested under Application 9330. If the years of record 1918 through 1993 are considered, the TCID's evidence indicates the unappropriated flows would average approximately 237,000 acre-feet annually.<sup>83</sup> In arriving at this estimate of unappropriated water, the TCID took flow rates from a stream gage just below Derby Dam, considered all prior rights to the waters of the Truckee River below Derby Dam, and what it believes to be *cui-uis* fish flow requirements.<sup>84</sup> Other witnesses using the time frame of 1974 through 1993 and measuring from a gage at Nixon agreed there is unappropriated water in the Truckee River<sup>85</sup> and estimated the quantity to average from 370,930 to 403,150 acre-feet annually.<sup>86</sup> Evidence provided in the 2010

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<sup>76</sup> Transcript, p. 55, October 12, 2010.

<sup>77</sup> Transcript, p. 19, October 12, 2010.

<sup>78</sup> Transcript, pp. 21-24, October 13, 2010; Exhibit Nos. 157, 158 and 159.

<sup>79</sup> Transcript, pp. 21-24, October 13, 2010; Exhibit Nos. 157, 158 and 159.

<sup>80</sup> Final Decree, *U.S. v. Orr Water Ditch Co.*, In Equity, Docket No. A-3 (D. Nevada 1944).

<sup>81</sup> Exhibit No. 104.

<sup>82</sup> Transcript, pp. 209-264, January 31, 1996.

<sup>83</sup> It is important to note that this number is an average value taken from 76 years of record whose annual entries vary widely. The range for this period of record is 256 acre-feet (1931) to 1,719,957 acre-feet (1983). It is convenient to work with the average as long as it is clear that the unappropriated water is not available in all years.

<sup>84</sup> Transcript, p. 208, February 1, 1996; Exhibit No. 104.

<sup>85</sup> Transcript, pp. 463-471, June 1, 1994, and pp. 450-452, February 1, 1996.

<sup>86</sup> Transcript, pp. 463-470, June 1, 1994; Exhibit Nos. 92 and 93.

hearing showed that up to 525,000 acre-feet on an annual average basis is needed for the recovery of the cui-ui and to flow to Pyramid Lake.<sup>87</sup>

The State Engineer finds that in Ruling No. 4659, the State Engineer found there was unappropriated water in the Truckee River. Subsequently, in State Engineer's Ruling No. 4683, the State Engineer granted Applications 48061 and 48494 to the Tribe and issued permits for all of the unappropriated water in the Truckee River and its tributaries, subject to the Interstate allocation between California and Nevada.<sup>88</sup>

### VIII. Need and Use for Water under Application 9330

During the 1996 hearing, the State Engineer informed the Applicant early in the hearing process that he wanted to know how many days water was going to be available, how that water was to be taken, how such diversions would work under the OCAP and other federal law, and what land was to be irrigated.<sup>89</sup> The TCID presented testimony that due to present day regulations it would not need to increase the capacity of the Truckee Canal, and due to the OCAP, the storage in Lahontan Reservoir has been administratively reduced; therefore, the storage capacity is already available in the reservoir.<sup>90</sup> The testimony also indicated that perhaps water could be conceptually stored in the reservoir or moved off the project, infiltrated through the canal system to recharge the ground water, and later put into production wells to augment the supply to irrigated lands.

During the 2010 hearing, the TCID testified that the need for the water under the application would be to mitigate shortages caused by the TROA,<sup>91</sup> to provide irrigation to portions of farm fields that were not eligible for irrigation under OCAP,<sup>92</sup> to provide a domestic supply for the City of Fallon and Churchill County,<sup>93</sup> and to offset water that has been transferred from irrigation to other uses both within and outside the Newlands Project.<sup>94</sup> The TCID also stated that the capacity of the Truckee Canal would need to be increased to 1,200 cfs to deliver

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<sup>87</sup> Transcript, pp. 181, 182, 186, 197, 212-213, October 12, 2010.

<sup>88</sup> State Engineer's Ruling No. 4683, dated November 24, 1998, official records in the Office of the State Engineer.

<sup>89</sup> Transcript, pp. 65-66, March 29, 1994.

<sup>90</sup> Transcript, pp. 82-83, March 29, 1994.

<sup>91</sup> Transcript, p. 30, October 12, 2010.

<sup>92</sup> Transcript, pp. 30, 64, October 12, 2010.

<sup>93</sup> Transcript, p. 34, October 12, 2010.

<sup>94</sup> Transcript, p. 34-35, October 12, 2010.

the 100,000 acre-feet applied for in the application.<sup>95</sup> As with the prior hearings, the TCID did not provide any specifics as to the actual proposed use or quantity of water for each use or how and when that water would be put to beneficial use.

The evidence provided does not support any reasonable assertion that the TROA will cause a shortage to the Newlands Project or that the water applied for would actually mitigate for any perceived shortage. Evidence presented at the hearing clarified that water would not be provided to portions of a field if, in fact, that portion was not irrigated in the prior year or requested to be irrigated in the current year.<sup>96</sup> Any portion of a field could be irrigated if covered by a water right, which is currently provided by Claim 3 water.<sup>97</sup> In addition, the TCID acknowledged that the various transfers did not affect the supply of water to the Newlands Project and that the water sought under the application would be used for dust suppression on lands for which there is no longer a water right.<sup>98</sup>

When the flows on the Truckee River are high enough to consider whether there is unappropriated water available, then the flows on the Carson River are as a general fact also high; therefore, there would be times when there would be no storage capacity in Lahontan Reservoir to take any unappropriated water from the Truckee River and store it in Lahontan Reservoir.<sup>99</sup>

The State Engineer finds that the Applicant never sufficiently demonstrated how the water applied for could be diverted, stored and placed to beneficial use given the constraints imposed by the OCAP, canal capacity, storage capacity of Lahontan Reservoir and use of the federal facilities. The State Engineer further finds that the Applicant never satisfactorily explained how the waters requested for appropriation under this application would be put to beneficial use as filed for under the application. At the 1996 administrative hearing, the TCID could only speculate how it might take or use the waters. The speculative nature of the TCID's proposed use of the water did not change at the 2010 hearing, as the TCID did not provide further explanation or evidence as to how it might actually take and use the waters.

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<sup>95</sup> Transcript, p. 60, October 12, 2010.

<sup>96</sup> Transcript, pp. 30-31, October 13, 2010.

<sup>97</sup> Transcript, pp. 30-31, October 13, 2010.

<sup>98</sup> Transcript, pp. 58-59, October 12, 2010.

<sup>99</sup> Transcript, p. 25, October 13, 2010.

The State Engineer finds the evidence offered by the TCID was not sufficiently specific to the application as it was filed. The TCID confirmed that Application 9330 is intended to be a supplemental supply of water to the *Orr Ditch* Decree Claim 3 water and that Application 9330 is intended to serve the same lands to be served under Claim 3.<sup>100</sup> As more fully discussed in other parts of this Ruling, it is unlikely that any water could be diverted pursuant to Application 9330.

#### **IX. Use of Private Water in Federal Facilities**

Any water permitted for appropriation under Application 9330 would be private water held by the TCID with a priority date of 1930, which is a very junior priority date on the Truckee River. Nearly all the *Orr Ditch* decreed water rights have priority dates of the 1800s and a few have priority dates from the very early 1900s. An issue that was argued during the 2010 hearing on remand was whether or not the TCID would even be able or allowed to divert the water under Application 9330 into the Newlands Project facilities.

The BOR presented testimony to support an argument that water from Application 9330 could never be diverted. It asserts that because the water under Application 9330 would have to be in priority with the Claim 3 water (Claim 3 water has a 1902 priority date and Application 9330 has a 1930 priority date), the only time the TCID would be able to divert the water would be when the OCAP allows diversion of Truckee River water to meet the storage targets in Lahontan and Claim 3 water is being fully utilized. The BOR argues that only when all 1,500 cfs of Claim 3 water is being utilized, then and only then could this water be brought in to the Newlands Project.<sup>101</sup> Further, the BOR asserts that its authority to regulate whether water under Application 9330 could be taken into the Newlands Project comes from the Reclamation Act, the *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1973) decision, the Federal Government's ownership of the facilities, and the applicability of the OCAP § 418.18(a) to regulate all Truckee River waters.<sup>102</sup>

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<sup>100</sup> Transcript, p. 75, October 12, 2010.

<sup>101</sup> Transcript, pp. 14-15, October 13, 2010.

<sup>102</sup> Transcript, pp. 16-18, October 13, 2010.

The TCID argues that the entitlement to divert 1,500 cfs under the *Orr Ditch Decree* Claim 3 is tied directly to the 232,800 acres of land originally anticipated to be irrigated in the Newlands Project.<sup>103</sup> It admits that the Newlands Project never reached this acreage, and by the time the TCID and the government entered the 1926 Contract for the operation and maintenance of the Newlands Project the amount of water righted land was only 87,500 acres. The TCID also asserts that it is unclear whether the 1,200 cfs that was contemplated in the Truckee River Agreement is limited to Claim 3 water.<sup>104</sup>

The TCID refers to Section 418.18(a) of the OCAP that provides that diversions of Truckee River water at Derby Dam must be managed to maintain a minimal terminal flow to Lahontan Reservoir, except as otherwise provided under the OCAP<sup>105</sup> and refers to the government's witness who testified that Section 418.18(a) of the OCAP does not necessarily refer to any particular type of water, Claim 3 or non-Claim 3 water, and asserts that it is only the federal facility that is being regulated.<sup>106</sup> The TCID argues that the OCAP must be consistent with the *Orr Ditch Decree*, and if the Decree was modified to recognize the new appropriation under Application 9330, then the OCAP would have to be changed or modified in some way to recognize Application 9330.<sup>107</sup> Finally, it argues that the record is unclear whether the *Tribe v. Morton* decision was limited to a specific supply of water or was limited to Claim 3 water.<sup>108</sup>

The State Engineer finds there is no substantial evidence provided that the TCID has ever diverted the total quantity decreed under the *Orr Ditch Decree* for use in the Newlands Project; therefore, it did not provide sufficient evidence of a need for the water applied for under Application 9330. Application 9330 was filed for domestic purposes and the irrigation of lands contained within the Newlands Reclamation Project. The TCID presented argument as to many other uses to which the water could be put, such as selling it, but that is not the use applied for under the application and the State Engineer will not consider other manners of use not identified in Application 9330. The State Engineer finds that the remarks section of Application 9330

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<sup>103</sup> Exhibit No. 151.

<sup>104</sup> Exhibit No. 151, pp. 46-47 and 99.

<sup>105</sup> Exhibit No. 152.

<sup>106</sup> Transcript, pp. 43-44, October 13, 2010.

<sup>107</sup> Transcript, p. 51, October 13, 2010.

<sup>108</sup> Transcript, pp. 47-48, October 13, 2010; Exhibit No. 153.

repeatedly stated that the water applied for was to be supplemental to all of the rights now owned, held or acquired by the United States in and to the Truckee River and its tributaries for use in the Newlands Project. The State Engineer finds the TCID would have to forgo use of its Claim 3 water, which has a priority date of 1902, to use any water appropriated under Application 9330.

The State Engineer finds that the Secretary of the Interior and not the State Engineer has the authority to regulate the use of the federal facilities as to the diversion, conveyance, storage and distribution of water from the Truckee River for use within the Newlands Project. The State Engineer finds while the arguments raised by the BOR relate to its ability to regulate the federal facilities, whether as a result of regulation or court decision, this does not represent a final decision or ruling from the BOR that finally prevents the TCID from using or expanding the federal facilities to convey the water.

**X.  
Use of Federal Facilities - Lahontan Reservoir**

The District Court on remand ordered the State Engineer to hear additional evidence as to whether the current infrastructure can transport the additional water requested. The Court said that if the State Engineer determines that the current infrastructure cannot be used to transport the additional water, then the State Engineer shall hear and consider additional evidence as to whether a substantial probability exists that TCID has the financial ability and resources to construct any improvements required to transport the water as requested in Application 9330. The Court found, as a matter of law, that only evidence of a final decision or administrative ruling by the BOR that the facilities may not be expanded would suffice under NRS § 533.370(1) to find that the TCID does not have the ability to convey the water. The Court found that the record at that time indicated that testimony provided by the TCID showed that the current canal and reservoir could also maintain the additional water.

Application 9330 was filed in 1930 by TCID for additional storage at Lahontan Reservoir, with diversion into the Newlands Project at Derby Dam and through the Truckee Canal. The current capacity of Lahontan Reservoir is approximately 289,000 acre-feet at the top of the spillway weir. An additional 24,000 acre-feet of storage capacity is added with the flash

boards in place.<sup>109</sup> Protestant's witness acknowledged that there is currently physical capacity in Lahontan Reservoir to put an additional 100,000 acre-feet of water.<sup>110</sup> The record from the previous proceedings also indicates that Lahontan Reservoir could maintain the additional water.<sup>111</sup>

The TCID argues that the Truckee River Agreement, which was incorporated into the *Orr Ditch Decree*, provides that the United States will not object to the TCID taking privately obtained Truckee River water through the Truckee Canal and storing it in Lahontan Reservoir. The TCID asked the State Engineer to address the question of whether the United States legal ownership in the facilities is sufficient to deny the TCID the valid use of water rights it might hold separate and above those rights decreed for the Newlands Project. Article XIII of the Truckee River Agreement provides that the Power Company, Conservation District and parties of the fifth part waived all objections to the restoration and maintenance of the Truckee Canal by the TCID and/or the United States to a carrying capacity not exceeding 1,200 cfs and waived any objection to the increase of the storage capacity of Lahontan Reservoir.<sup>112</sup>

The State Engineer finds the TCID adds words and meaning to Article XIII that are not included in the actual language as Article XIII says nothing about taking privately obtained Truckee River water through the Truckee Canal and storing it in Lahontan Reservoir. The State Engineer finds the question of whether privately owned water may be taken through and stored in the Federal facilities was not definitively answered by any evidence or testimony presented at the hearing on remand. It is the State Engineer's understanding that the United States may execute contracts for the conveyance and storage of non-project water in Federal facilities when excess capacity exists, which means that without such a contract private water could not be taken through the Truckee Canal or stored in Lahontan Reservoir. The State Engineer finds the United States legal ownership in the facilities is sufficient to grant or deny the TCID the use of privately held water rights separate and above those water rights decreed for the Newlands Project. The State Engineer finds there is capacity in Lahontan Reservoir to store all or part of the water applied for under Application 9330.

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<sup>109</sup> Transcript, pp. 82-84, October 13, 2010.

<sup>110</sup> Transcript, pp. 84-85, October 13, 2010.

<sup>111</sup> Exhibit No. 122, p. 11.

<sup>112</sup> Exhibit No. 200.

## XI. Use of Federal Facilities - Truckee Canal

There presently exists a decreed right to divert 1,500 cfs of Truckee River water at Derby Dam through the Truckee Canal to the Newlands Project.<sup>113</sup> Testimony indicated that historically the canal capacity had been up to 1,000 cfs.<sup>114</sup> However, other records indicate that the maximum amount ever diverted is 967 cfs<sup>115</sup> and a witness for the TCID stated that the current maximum capacity of the canal is 900 cfs, but that it is currently limited to 350 cfs.<sup>116</sup> While Article XIII of the Truckee River Agreement waived any objections to the restoration and maintenance of the Truckee Canal by the TCID and/or the United States to a carrying capacity not exceeding 1,200 cfs and to the increase of the storage capacity of Lahontan Reservoir, since that agreement was enacted in 1935, the capacity of the canal has never been increased.

The TCID indicates that it does not know if the TCID currently uses all of the *Orr Ditch* Claim 3 water it is entitled to; however, the TCID Board president stated that the lands in the Newlands Project had a 100% supply for 2009, even when the canal capacity was limited to 350 cfs. The water diverted from the Truckee River to the Newlands Project in 2009 that contributed to the 100% supply was all Claim 3 water.<sup>117</sup>

The TCID testified that the current capacity of the Truckee Canal can transfer up to 900 cfs of water,<sup>118</sup> but that a capacity of 1,200 cfs is needed to divert the 100,000 acre-feet requested under Application 9330.<sup>119</sup> However, the witness indicated that all he was going on is what it says in the Truckee River Agreement. On January 5, 2008 a breach occurred in the Truckee Canal where a portion of the Truckee Canal embankment failed in a reach of the canal that passes through the City of Fernley, located about 12 miles downstream of Derby Diversion Dam. The Truckee Canal is currently under operational restrictions from the BOR and a court order restricting the maximum flow in the canal to 350 cfs.<sup>120</sup> With this limitation the TCID asserts it would take approximately four months to divert the hundred thousand acre-feet into the

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<sup>113</sup> Claim No.3, Final Decree, *U.S. v. Orr Water Ditch Co.*, In Equity Docket No. A-3 (D. Nev. 1944).

<sup>114</sup> Transcript, p. 55, January 31, 1996.

<sup>115</sup> Water Resources Data for Nevada, published by the U.S. Geological Survey for gaging station #10351300.

<sup>116</sup> Transcript, pp. 40-41, October 12, 2010.

<sup>117</sup> Transcript, pp. 54-59, 74-75, October 12, 2010.

<sup>118</sup> Transcript, p. 40, October 12, 2010.

<sup>119</sup> Transcript, p. 60, October 12, 2010.

<sup>120</sup> Transcript, pp. 18-19, 40-41, October 13, 2010; Exhibit Nos. 154 and 155.

Newlands Project, if no other water was in the canal.<sup>121</sup> The BOR argues that even with any such repairs that could increase the canal flow, no water would be allowed to be diverted under Application 9330 due to the OCAP.

The State Engineer finds that the TCID has never exercised its option to increase the capacity of the Truckee Canal as authorized under the Truckee River Agreement for use of the water rights already decreed for the Newlands Project. The State Engineer further finds that if the TCID has not found it feasible to increase the canal capacity to date, it is not likely it would find it feasible to increase the canal capacity with the approval of Application 9330. The State Engineer finds that the TCID's evidence that it would take four months to divert the water under current limitations implies that it would have to forgo taking the Claim 3 water to do so. The State Engineer finds the Truckee Canal cannot support taking the Claim 3 water and any water permitted under Application 9330 at the same time; thus, the current canal infrastructure cannot be used to transport the water if Claim 3 water is also being taken. The State Engineer finds the District Court found, as a matter of law, that only evidence of a final decision or administrative ruling by the BOR that the facilities may not be expanded would suffice under NRS § 533.370(1) to find that the TCID does not have the ability to convey the water. The State Engineer finds the TCID provided no evidence that it has taken any steps towards the resolution of this issue prior to the hearing on remand.

## **XII.**

### **Financial Ability and Resources to Construct Improvements**

The evidence presented at the 2010 hearing shows that the TCID cannot divert the water applied for under Application 9330 through the Truckee Canal as it currently exists today if it is also taking the water allowed for diversion to the Newlands Project under Claim 3 of the *Orr Ditch* Decree. Flow in the canal is currently limited to 350 cfs and cannot be increased absent significant repairs to the canal.

Testimony and evidence presented at the hearing on remand provided information on various repairs that could be made to the Truckee Canal and cost estimates for those repairs. However, the parties disagree about the extent of the repairs and the associated costs to fix the Truckee Canal. The TCID has submitted a proposal to the BOR that estimates the necessary repairs, which would consist of the installation of a rodent barrier, would cost \$4 million

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<sup>121</sup> Transcript, p. 66, October 12, 2010.

dollars.<sup>122</sup> The BOR has not rejected outright the TCID proposal, which is consistent with one of the alternatives for structural modification of the canal currently being considered.<sup>123</sup> It is the BOR's opinion that a full structural fix would be necessary in order to reduce the risk of canal failure in the Fernley Reach.<sup>124</sup> According to the BOR, the estimated cost is approximately \$90 million dollars to repair the entire length of the canal to a condition where it could flow 500 cfs.<sup>125</sup> The BOR's estimate for the 11-mile reach in Fernley where the breach occurred is \$20 million dollars.<sup>126</sup> However, there is no current proposal by the BOR to repair the Truckee Canal, and no fixed cost estimate that has been developed by the BOR for any such repairs.<sup>127</sup> The evidence demonstrated that currently it is estimated to cost \$90 million to repair the entire canal,<sup>128</sup> and even more if a new canal must be constructed if the Truckee Canal is not available.<sup>129</sup>

The TCID is a Nevada Irrigation District organized under Chapter 539 of the Nevada Revised Statutes. It is a non-profit political subdivision of the State whose sole purpose is the delivery of water as provided in Chapter 539.<sup>130</sup> It is empowered "to appropriate or otherwise acquire water in accordance with the law and also construct the necessary dams, reservoirs and works for the collection, storage, conservation and distribution of water for the district."<sup>131</sup> The TCID presented evidence of four potential sources of funding to make required repairs of the Truckee Canal: including 1) federal funds, 2) bonds and assessment authority under NRS Chapter 539, 4) grants, and 5) borrowing capacity.<sup>132</sup> There is no maximum amount of operation and maintenance fees the TCID can assess.<sup>133</sup>

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<sup>122</sup> Exhibit No. 256; Transcript, p. 48, October 12, 2010.

<sup>123</sup> Transcript, pp. 68-72, October 13, 2010.

<sup>124</sup> Transcript, pp. 21-25, October 13, 2010; Exhibit Nos. 157, 158 and 159.

<sup>125</sup> Transcript, pp. 61-64, October 13, 2010.

<sup>126</sup> Transcript, pp. 66-67, October 13, 2010; Exhibit No. 158, pp. 21-22.

<sup>127</sup> Transcript, pp. 76-77, October 13, 2010.

<sup>128</sup> Transcript, pp. 23, 73, October 13, 2010.

<sup>129</sup> Transcript, pp. 26-27, October 13, 2010.

<sup>130</sup> See, NRS § 41.0305; NRS § 43.080; NRS § 383.410.

<sup>131</sup> NRS § 539.230(1).

<sup>132</sup> Transcript, pp. 43-46, October 12, 2010.

<sup>133</sup> Transcript, pp. 51-52, October 12, 2010.

The TCID's current balance sheet indicates that its total assets, including all equipment and accounts, are \$20,321,220 dollars, and its liabilities are slightly over \$3 million dollars.<sup>134</sup> When considering TCID's assets against the present liability, the TCID indicates that it currently has the ability to borrow on the order of \$2.3 million dollars or greater sum of money, if necessary.<sup>135</sup> The TCID has successfully borrowed money in the past to finance a \$3 million dollar capitol project for the purchase of a power plant.<sup>136</sup> The TCID's witnesses testified that it has the financial ability to support any required repairs of the Truckee Canal, and that it is financially healthy and capable of either pursuing bonds or incurring some debt.<sup>137</sup>

The BOR's expert economist was of the opinion that the TCID could not successfully borrow \$65 or \$90 million dollars, but that the TCID does have the financial capability to meet a \$4 million dollar capital improvement.<sup>138</sup> The expert witness reviewed the TCID financial statements from 1990 through 2010,<sup>139</sup> including the balance sheet for 2010 provided by the TCID at the hearing,<sup>140</sup> and prepared a summary of this financial information upon which the conclusions were reached.<sup>141</sup> No contrary evidence was presented.

The evidence indicates that there are currently plans being developed and discussed to repair the Truckee Canal. The BOR is in the planning and feasibility process of addressing the required repairs before determining funding requirements.<sup>142</sup> However, there has not been a determination of the method of the fix, the associated costs, or what the flow of water will be once repaired.

The State Engineer finds that given the lack of a final decision by the BOR on the type of repairs needed and a final cost, that the State Engineer is unable to make a firm determination if the TCID can finance the repairs. The State Engineer finds the TCID generally testified at the

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<sup>134</sup> Exhibit No. 255.

<sup>135</sup> Transcript, p. 131, October 12, 2010.

<sup>136</sup> Transcript, p. 63, October 12, 2010.

<sup>137</sup> Transcript, pp. 43-46, 113-116, October 12, 2010.

<sup>138</sup> Transcript, pp. 139 and 141, October 13, 2010.

<sup>139</sup> Transcript, pp. 120, 126-127, October 13, 2010; Exhibit No. 161.

<sup>140</sup> Transcript, p. 127, October 13, 2010; Exhibit No. 255.

<sup>141</sup> Transcript, pp. 138, 139, October 13, 2010; Exhibit No. 162.

<sup>142</sup> Transcript, pp. 66-67, October 12, 2010.

2010 hearing that it could seek federal funds, increase assessments on water users, issue bonds or borrow money to fund any such repair; however, it did not provide any specifics on the amount of money available from any of these sources. The State Engineer finds the evidence demonstrated that currently it is estimated to cost \$90 million dollars to repair the entire canal,<sup>143</sup> and even more if a new canal must be constructed if the Truckee Canal is not available.<sup>144</sup> The State Engineer finds the evidence and testimony indicates the TCID does not have the ability to finance a \$90 million dollar repair, but rather only demonstrated the ability to finance \$2 to \$3 million dollars. The State Engineer finds that under current circumstances, the TCID does not have sufficient funds on hand and did not demonstrate the ability to borrow the current estimate of \$90 million dollars to repair the entire Truckee Canal to provide for diversions that may be necessary to beneficially use the water applied for under Application 9330, if it also intends to use its Claim 3 water.<sup>145</sup>

### XIII. Definition of Public Interest in this Case

The District Court ordered that:

as a matter of law, the State Engineer must first define the definition of “public interest” used by the State Engineer in the instant case. Furthermore, the Court finds as a matter of law that the State Engineer must assign values to the detriments and benefits and then weigh the detriments against the benefits to determine whether the TCID’s application would “threaten to prove detrimental” to the public interest. The findings must state what magnitude the detriment would be to the fish.

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The Court could not discern from the findings what number level of fish existed, what levels were sought and what quantity of water was necessary to maintain existing levels.

Nevada Revised Statute § 533.370(5) provides that the State Engineer shall reject an application and refuse to issue the permit requested where the proposed use threatens to prove detrimental to the public interest. Prior to the 1996 hearing, the State Engineer provided the Applicant, Intervenors and Interested Parties the opportunity to submit pre-hearing briefs regarding whether the approval of Application 9330 would threaten to prove detrimental to the

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<sup>143</sup> Transcript, pp. 23, 73, October 13, 2010.

<sup>144</sup> Transcript, pp. 26-27, October 13, 2010.

<sup>145</sup> Transcript, p. 39, October 13, 2010.

public interest. Prior to the 2010 hearing, the State Engineer again provided an opportunity for the various parties to brief the public interest issues as identified by the Court in its remand order.

The TCID, City of Fallon, Churchill County, and Corkill Bros. submitted briefs in which they argued that the approval of Application 9330 does not threaten to prove detrimental to the public interest because it would benefit the public interest in the following ways:

1. The additional waters stored under Application 9330 would allow the delivery of more water to the Newlands Project lands and provide some degree of drought protection. The farmers would receive their full entitlement more often, thereby producing more alfalfa and adding to the economy of the area.
2. Much of the additional water would find its way as recharge to the groundwater aquifers which provide domestic and municipal water for the local communities. This water could support additional commercial and municipal development which would benefit the communities, and prevent the drying up of domestic wells.
3. The influx of additional water to the aquifers would have a diluting effect on the high concentrations of groundwater pollutants. Thus, there would be a beneficial effect on water quality.
4. The Settlement Act provides for the expansion of use of the Newlands Project to include recreation and fish and wildlife use, including water for wetlands, waterfowl habitat, fish propagation, boating and hunting, and these waters would add to those endeavors.
5. The additional water would protect and enhance the habitat of the threatened Peregrine Falcon and the endangered Bald Eagle.

The Cities of Reno and Sparks, TMWA, Tribe, and BOR filed pre-hearing briefs asserting that the approval of Application 9330 would threaten to prove detrimental to the public interest in the following ways:

1. The approval of Application 9330 would result in more water diverted at Derby Dam and less water flowing in the Lower Truckee River and into Pyramid Lake, and approval would accelerate the decline of the lake water surface resulting in negative impacts on recreation potential, water quality, and fish habitat.
2. Less water in the Lower Truckee River would have a negative impact on the recovery of the cui-ui fish, an endangered species whose only habitat is the Truckee River and Pyramid Lake. The spawning of the Lahontan cutthroat trout would also be negatively impacted by the reduced flows.
3. The approval of Application 9330 would cause a deterioration of the water quality in the Lower Truckee River, and with lower flows the river is unable to assimilate the nutrient load.
4. The Settlement Act provides for several positive impacts if certain conditions are met: including, an equitable apportionment of the waters of the Truckee River, Lake Tahoe and the Carson River between California and Nevada will be finalized; the upstream storage of water for a municipal and industrial drought water supply for Reno, Sparks,

and Washoe County will be available; and the settlement of years of costly litigation would be accomplished. Section 210(a) of the Settlement Act requires that the Pyramid Lake Tribe's claims to the remaining waters of the Truckee River be resolved in a manner satisfactory to the State of Nevada and to the Pyramid Lake Paiute Tribe before the above-stated benefits can be realized. This requirement will not be satisfied if Application 9330 is approved. Therefore, the public will lose the benefits of the Settlement Act if Application 9330 is approved.

As noted above, the District Court held that as a matter of law the State Engineer must first define the definition of "public interest" used by the State Engineer in the instant case and only after making that definition did it order as a matter of law that the State Engineer must assign values to the detriments and benefits and then weigh the detriments against the benefits to determine whether the use of water under the TCID's application would threaten to prove detrimental to the public interest.

In addressing this remand issue, the BOR argues that there are five public interest factors that are relevant to this decision: (1) effects on fish and wildlife resources; (2) effects on water quality; (3) effects on other water policy considerations, including the interstate allocation of water, settlement of water related litigation, and upstream drought storage for Reno, Sparks and Washoe County; (4) benefits to the TCID resulting from the proposed appropriation, including the ability of the Applicant to complete it; and (5) incidental benefits which might result from the appropriation. *See*, Ruling No. 4659, at 17-21. The TWMA argues that for a number of reasons the District Court is wrong on what Nevada water law requires the State Engineer do in reaching a decision on the public interest as framed by NRS § 533.370(5), and argues that the District Court has ignored the majority opinion in *Pyramid Lake Paiute Tribe v. Washoe County* in ordering the State Engineer to assign values to the detriments and benefits and then weigh the detriments against the benefits. The State Engineer agrees with the TMWA on this point, but in order to comply with the District Court's order, the State Engineer addresses the matter as ordered. However, the State Engineer finds attempting to define whether the use of the water threatens to prove detrimental to the public interest in the traditional sense of a definition very difficult, because it is not a definition, it is a conclusion based on the analysis of many facts that vary from case to case.

There is no definition in Nevada water law as to what is meant by the use of the water "threatens to prove detrimental to the public interest." The only Nevada Supreme Court case addressing this criterion is *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 918

P.2d 697 (1996) (commonly known as the Honey Lake case). In Supplemental Ruling on Remand No. 3787A,<sup>146</sup> the State Engineer noted the Court made the observation that the Nevada Legislature has not offered any guidance on the issue of what "threatens to prove detrimental to the public interest" means. However, the Supreme Court has distinguished the interest of the public at large versus private interests.<sup>147</sup> The State Engineer also noted that the Court made a correct observation in noting that public interest is a matter within the discretion of the State Engineer. Although Nevada water law does not define public interest, the former State Engineer found public interest considerations though out NRS Chapters 533, 534 and 540, some of those being:

1. The water of all sources above or beneath the ground belongs to the public. NRS § 533.025.
2. Subject to existing rights, all such water may be appropriated for beneficial use as provided in this chapter and not otherwise. NRS § 533.030(1).
3. The beneficial use of water is declared a public use. NRS § 533.050.
4. The Legislature has determined that it is the policy of the State of Nevada to continue to recognize the critical nature of the state's limited water resources. It is acknowledged that many of the state's surface water resources are committed to existing uses under existing water rights, and that in many areas of the state the available groundwater supplies have been appropriated for current uses. It is the policy of the State of Nevada to recognize and provide for the protection of existing water rights. It is also the policy of the state to encourage efficient and non-wasteful use of the state's limited supplies of water resources. NRS § 540.011(1).
5. The Legislature recognizes the relationship between the critical nature of the state's limited water resources and the increasing demands placed on these resources as the population of the state continues to grow. NRS § 540.011(2).
6. The Legislature recognizes the use of water for wildlife including the establishment and maintenance of wetlands and fisheries. NRS § 533.023.
7. Springs on which wildlife customarily subsist must be protected. NRS § 533.367.
8. The Legislature encourages the use of effluent where such use is not contrary to public health, safety or welfare. NRS § 533.024.
9. Water for recreational purposes from either underground or surface sources is declared to be a beneficial use. NRS § 533.030(2).
10. Livestock watering is declared to be a beneficial use. NRS § 533.490(1).
11. Springs and streams on which livestock subsist must be protected. NRS 533.495.
12. The law addresses not allowing the waste of water and allowing rotation among users. NRS §§ 533.075 and 533.530(1).
13. The law prohibits the pollution and contamination of underground water and directs the State Engineer to promulgate rules to prevent such. NRS § 534.020(2).

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<sup>146</sup> State Engineer's Supplemental Ruling on Remand 3787A, dated October 9, 1992, official records in the Office of the State Engineer.

<sup>147</sup> Primm v. Reno, 70 Nev. 7, 252 P.2d 835 (1953).

This former State Engineer also found that the following principles should also serve as guidelines in his determination of what constitutes "the public interest" within the meaning of NRS § 533.370.

1. An appropriation must be for a beneficial use. NRS § 533.030(1).
2. The applicant must demonstrate the amount, source and purpose of the appropriation. NRS § 533.335.
3. If the appropriation is for a municipal supply, the applicant must demonstrate the approximate number of persons to be served and the approximate future requirements. NRS § 533.340(3).
4. The right to divert ceases when the necessity for the use of water does not exist. NRS § 533.045.
5. The applicant must demonstrate the magnitude of the use of water, such as the number of acres irrigated, the use to which generated hydroelectric power will be applied, or the number of animals to be watered. NRS § 533.340.
6. In considering extensions of time to apply water to beneficial use, the State Engineer must determine the number of parcels and commercial or residential units which are contained or planned in the area to be developed, economic conditions which affect the availability of the developer to complete application of the water to beneficial use, and the period contemplated for completion in a development project approved by local governments or in a planned unit development. NRS § 533.380(4).
7. For large appropriations, the State Engineer must consider whether the applicant has the financial capability to develop the water and place it to beneficial use. NRS § 533.375.
8. The State Engineer may cooperate with federal authorities in monitoring the development and use of the water resources of the State. NRS § 532.170(1).
9. The State Engineer may cooperate with California authorities in monitoring the future needs and uses of water in the Lake Tahoe area and to study ways of developing water supplies so that the development of the area will not be impeded. NRS § 532.180.
10. Rotation in use is authorized to bring about a more economical use of supplies. NRS § 533.075.
11. The State Engineer may determine whether there is over pumping of groundwater and refuse to issue permits if there is no unappropriated water available. NRS § 534.110(3).
12. The State Engineer may determine what is a reasonable lowering of the static water level in an area after taking into account the economics of pumping water for the general type of crops growing and the effect of water use on the general economy of the area in general. NRS § 534.110(4).
13. Within an area that has been designated, the State Engineer may monitor and regulate water supply. NRS § 534.110(6).

In *United States v. Alpine Land & Reservoir Co. (County of Churchill v. Ricci)*, 341 F.3d 1172 (9<sup>th</sup> Cir. 2003), the Ninth Circuit Court of Appeals was addressing the State Engineer's decision regarding eight applications that were filed by the United States Fish and Wildlife Service (Service) to transfer 2,855 acre-feet of water from irrigation use to the Stillwater National Wildlife

Refuge to maintain wetland habitat. The transfers were in furtherance of a water right acquisition program that instructed the Service to acquire 75,000 acre-feet of water to fulfill the congressional directive set forth in Section 206(a) of Public Law 101-618, 104 Stat. 3289. Churchill County and the City of Fallon had protested the applications on the grounds that the State Engineer should study the cumulative effect on the public interest of the entire acquisition program and not just the eight applications that were currently before him for decision. The Ninth Circuit Court of Appeals held that the State Engineer has broad discretion under Nevada law to determine whether the use of water as proposed under an application will threaten to prove detrimental to the public interest. The Court noted that the Nevada Legislature has not provided an explicit definition of what constitutes a threat to the public interest under NRS § 533.370(3) [now 533.370(5)], but held that the State Engineer's authority is limited to considerations identified in Nevada's water policy statutes. Of those water policy considerations found in Nevada law, the Court noted that pursuant to NRS § 540.011(3), the Legislature has recognized the relationship between the quantity of water and the quality of water, and the necessity to consider both factors simultaneously when planning the uses of water, and that pursuant to NRS § 445A.305, the Legislature has declared that it is the policy of this State to maintain the quality of the waters of the State consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life and preserve water quality for the important industries, agriculture and economic development of the state.

However, also of note is a case that addressed protection of endangered species. In 1974, the Federal District Court for Nevada decided the case of *United States v. Cappaert*, 375 F. Supp. 456 (D. Nev. 1974) which states that the United States had shown the public interest lies in the preservation of endangered species. "Congress, state legislatures, local governments and citizens have all recently voiced their expression for the preservation of our environment, and the destruction of the Devil's Hole pupfish would go clearly against the theme of environmental responsibility."<sup>148</sup> However, the State Engineer notes that this public interest concern is not included within Nevada's water policy statutes.

In State Engineer's Ruling No. 5726, the State Engineer found that the public interest must be addressed on a case-by-case basis and that the statutory criterion is a dynamic concept changing over time. In Ruling No. 5726, the State Engineer reviewed other State Engineer's interpretations

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<sup>148</sup> *United States v. Cappaert*, 375 F. Supp. at 460.

of this criterion and found that:

The State Engineers' expressions of the public interest were that it was important for the highest and best use of waters to be made and development of important industries should be encouraged. However, the State Engineer must exercise discretion in his interpretation under the express authority granted in law and must look at all the interests involved as to any particular appropriation and balance them, but the wants and necessities of the state should be weighed against local interests. The public interest analysis included looking at the benefits of a project, protection of threatened or endangered species, and protection of the quality of water sources, but indicated that water should be allocated to reasonable and economic use, so long as other public interest values will not be unreasonably compromised.<sup>149</sup>

The State Engineer finds the following factors will define whether the proposed use of water under Application 9330 threatens to prove detrimental to the public interest in this case:

1. The State Engineer shall not carry out his or her duties pursuant to Chapter 533 in a manner that conflicts with any applicable provision of a decree or order issued by a state or federal court, an interstate compact or an agreement to which this State is a party for the interstate allocation of water pursuant to an act of Congress. NRS § 533.0245.

2. Public Law 101-618, which includes consideration of the interstate allocation of the water of the Truckee River, Carson River and Lake Tahoe, the protection of the Pyramid Lake fishery, protection of the Lahontan Valley wetlands, enhancement of the water quality in the Lower Truckee River, cui-ui and Lahontan cutthroat trout recovery and enhancement, Newlands Project improvements that shall not be implemented in a manner that would increase Truckee River diversions over those allowed under the Operating Criteria and Procedures or in any manner inconsistent with the decision in *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 255 (D.D.C. 1973).

3. Protection of existing rights. NRS § 533.370(5).

4. Water may be appropriated for beneficial use. NRS § 533.030(1).

5. Rights to the use of water must be limited and restricted to as much as may be necessary, when reasonably and economically used for irrigation, irrespective of the carrying capacity of the ditch. The balance of the water not so appropriated must be allowed to flow in the natural stream. NRS § 533.060.

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<sup>149</sup> State Engineer's Ruling No. 5726, p. 42, dated April 16, 2007, official records in the Office of the State Engineer.

6. The quantity of water which may be appropriated shall be limited to such water as shall be reasonably required for the beneficial use to be served. NRS § 533.070(1).

7. The applicant must demonstrate the magnitude of the use of water, such as the numbers of acres to be irrigated. NRS § 533.340.

#### XIV.

#### **Does the Use of the Water Threaten to Prove Detrimental to the Public Interest?**

##### A. Public Law 101-618

Nevada Revised Statute § 533.0245 provides that the State Engineer shall not carry out his or her duties pursuant to Chapter 533 in a manner that conflicts with any applicable provision of a decree or order issued by a state or federal court, an interstate compact or an agreement to which this State is a party for the interstate allocation of water pursuant to an act of Congress. In 1969, the Nevada Legislature ratified the California-Nevada Interstate Compact, which was to become the law of this state upon the compact becoming operative as provided in Article XXII of the Compact. While the United States Congress did not consent to the Compact by legislative act, the Compact still represents public interests considered very important by Nevada regarding water. Article I of the California-Nevada Interstate Compact indicates that a major purpose of the compact was to provide for the equitable apportionment of water between the two states. NRS § 538.600. This very important public interest in the equitable apportionment of the water of the Truckee River between California and Nevada is now found in Public Law 101-618, enacted by Congress in 1990 (Settlement Act).<sup>150</sup>

Besides the interstate allocation of the water of the Truckee River, Public Law 101-618 also includes elements which authorizes the acquisition of water rights for fish and wildlife, encourages settlement of litigation and claims, fulfills Federal trust obligations toward Indian tribes, fulfills the goals of the Endangered Species Act by promoting the enhancement and recovery of the Pyramid Lake fishery and protection of significant Lahontan Valley wetlands from further degradation and enhancement of the habitat, encourages the development of solutions for demands on Truckee River water, improves the management and efficiency of the Newlands Project, and promotes Fallon Paiute-Shoshone and Pyramid Lake Paiute Tribe water issues settlement, and provides for cui-ui and Lahontan cutthroat trout recovery and enhancement.

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<sup>150</sup> Exhibit No. 220.

The State Engineer finds that one of the most important provisions of the Settlement Act for Nevada is the interstate allocation of the waters of the Carson River, Lake Tahoe and Truckee River between California and Nevada.<sup>151</sup> A final resolution as to the interstate allocations of these waters is of essential importance to Nevada and California, particularly since the interstate compact referenced above was never ratified by Congress. Its importance cannot be overlooked. Decades of work by both California and Nevada went into the determination of that allocation. Since California controls the headwaters of the Truckee River, it is of paramount importance for Nevada to have an interstate allocation of these waters by federal law, and the benefits of that allocation should not be taken lightly.

Public Law 101-618 provides in Section 210(a)(2)(B) that Section 204 (the interstate allocation), the Preliminary Settlement Agreement as modified by the Ratification Agreement, and the Operating Agreement, shall not take effect until the Pyramid Lake Paiute Tribe's claim to the remaining waters of the Truckee River which are not subject to vested and perfected rights has been finally resolved in a manner satisfactory to the State of Nevada and the Pyramid Lake Paiute Tribe. If a water right is granted under Application 9330, this provision will not be satisfied and the interstate allocation provision of the law will not take effect. The State Engineer finds the failure to achieve that interstate allocation would threaten to prove highly detrimental to the public interest.

#### B. Pyramid Lake

The United States Supreme Court noted that it has been said that Pyramid Lake is widely considered the most beautiful desert lake in North America and its fishery has brought it worldwide fame.<sup>152</sup> Pyramid Lake has suffered declining water levels and decreases in its fishery resources as a result of the existing decreed upstream diversions from the Truckee River, one of the largest being the diversion at Derby Dam for the Newlands Reclamation Project on the Carson River. The lake was 50 miles long and 12 miles wide in 1844, but its surface area had decreased by about 31 square miles by 1983.<sup>153</sup>

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<sup>151</sup> Exhibit No. 220 § 204.

<sup>152</sup> *Nevada v. United States*, 463 U.S. 110, 114, 103 S.Ct. 2906, 2910, 77 L.Ed.2d 509 (1983).

<sup>153</sup> *U.S. v. Alpine Land & Reservoir Co.*, 878 F. 2d 1217, 1220 (9th Cir. 1989).

Sometime between 1938 and 1944 the Pyramid Lake cutthroat trout, a sub-species of the Lahontan cutthroat trout became extinct.<sup>154</sup> Extinction was the result of a combination of factors such as physical impediments to upstream spawning runs, river pollution, and over-fishing during critical spawning periods.<sup>155</sup> The cui-ui, a lakesucker found only in Pyramid Lake, was federally listed as an endangered species on March 11, 1967.<sup>156</sup> In 1970, the Lahontan cutthroat trout was listed as a species in danger of extinction, but was reclassified to threatened status in 1975 because of the successful establishment of additional populations and hatchery rearing programs.<sup>157</sup>

Every year approximately 440,000 acre-feet of water evaporates off the surface of Pyramid Lake.<sup>158</sup> The inflow to Pyramid Lake in a 20-year span post-1967 indicates that approximately 370,000 to 400,000 acre-feet per year presently flow into the lake.<sup>159</sup> The Cui-ui Recovery Plan defines a baseline for recovery that includes the flows that are now going to Pyramid Lake, plus an additional 110,000 acre-feet.<sup>160</sup> The water levels of Pyramid Lake are a critical factor in the recovery of the threatened and endangered species since it affects the fish's ability to clear the delta to spawn.<sup>161</sup> Other critical factors include attraction flows, spawning flows and flows sufficient for the juveniles to return to Pyramid Lake. Several witnesses testified that further reduced flows will either result in the extinction of species or reversal of the recovery of the fish that has been made to date.<sup>162</sup> The State Engineer finds that the diversion of the 100,000 acre-feet applied for here by the TCID would be quite detrimental to Pyramid Lake and its fish and therefore use of the water would threaten to prove detrimental to the public interest.

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<sup>154</sup> Nevada Division of Water Planning, Dept. of Conservation and Natural Resources, Truckee River Chronology, III-15, July 1996.

<sup>155</sup> *Id.* at III-16.

<sup>156</sup> Exhibit No. 94.

<sup>157</sup> Nevada Division of Water Planning, Dept. of Conservation and Natural Resources, Truckee River Chronology, III-27-29, July 1996.

<sup>158</sup> Exhibit No. 94.

<sup>159</sup> Transcript, pp. 461-471, June 1, 1994.

<sup>160</sup> Transcript, pp. 489-491, Feb. 2, 1996.

<sup>161</sup> *See*, Testimony of Thomas Strekal, Paul Wagner, Chester Buchanan, Transcript, June 1-2, 1994, and February 1-2, 1996.

<sup>162</sup> *See*, Testimony of Thomas Strekal, Paul Wagner, Chester Buchanan, Transcript, June 1-2, 1994, and February 1-2, 1996.

### C. Cui-ui Recovery

The Settlement Act passed by Congress and signed by the President of the United States in 1990 is intended to settle several pending lawsuits over the water of the Truckee River. It addresses many issues and is contingent on many factors which are not yet in place. Section 207(a) directs the Secretary of the Interior to develop and implement a plan for the recovery of the endangered cui-ui fish in Pyramid Lake. The recovery plan calls for increasing flows to and increasing the elevation of Pyramid Lake. The State Engineer finds that the approval of Application 9330 would be contrary and adverse to the recovery of the cui-ui and Section 207(a) of the Settlement Act and therefore threatens to prove quite detrimental to the public interest as determined by Congress and the President therein.

### D. Endangered Species in the Carson River Basin

The TCID argues that endangered species issues exist in the Carson River basin, as well as the Truckee River basin, and this additional water would assist in the protection of those endangered species in the area of the Newlands Project. However, the TCID did not provide any evidence that Application 9330 would provide any benefit to such species, and whether those previously identified species are listed under the Endangered Species Act. Additionally, Application 9330 was not filed for wildlife purposes; it was filed for domestic and irrigation purposes. The State Engineer finds that applications are reviewed as they are filed and not as they might be used in some other speculated manner. The State Engineer finds it would threaten to prove detrimental to the public interest to grant an application for a manner of use not applied for or notice of published. The State Engineer finds it would threaten to prove detrimental to the public interest of protecting the threatened and endangered species in the Truckee River system to remove this water from the Truckee River when no beneficial use for endangered species in the Carson River Basin was applied for under the application. The State Engineer finds protection of Lahontan Valley wetlands is specifically provided for under Public 101-618, demonstrating that it is an important public interest consideration, but the Settlement Act does not provide that the TCID is the entity to carry out that protection. The State Engineer finds the interstate allocation of the Carson River provided for under the Settlement Act gives a level of assurance that water from the Carson River would be available for the protection of those wetlands.

#### E. Water Quality

Testimony provided indicates that there are water quality problems in the Lahontan Valley and in the Lower Truckee River.<sup>163</sup> The TCID argues that much of the additional water would find its way as recharge to the groundwater aquifers which provide domestic and municipal water for local communities, could support additional commercial and municipal development, prevent the drying up of domestic wells and have a diluting effect on high concentrations of groundwater pollutants. The Protestant argues that the approval of Application 9330 would cause a deterioration of water quality in the Lower Truckee River and lower flows in the river make it unable to assimilate nutrient load.

The State Engineer finds both of these public interest considerations have value, but while it may prove beneficial to Churchill County to remove this water from the Truckee River system and send it to the Carson River system for water quantity and quality enhancement in that area, it would threaten to prove quite detrimental to the public interest of protecting the water quality in the Lower Truckee River system to do so.

#### F. Beneficial Use

During the 1996 hearing, the State Engineer informed the Applicant early in the hearing process that he wanted to know how many days water was going to be available, how that water was to be taken, how such diversions would work under the OCAP and other federal law, and what land was to be irrigated.<sup>164</sup> The TCID provided testimony that indicated perhaps water could be conceptually stored in the reservoir or moved off the project, infiltrated through the canal system to recharge the groundwater, and later put into production wells to augment the supply to irrigated lands. During the 2010 hearing, the TCID testified that the need for the water under the application would be to mitigate shortages caused by the TROA,<sup>165</sup> to provide irrigation to portions of farm fields that were not eligible for irrigation under OCAP,<sup>166</sup> to provide a domestic supply for the City of Fallon and Churchill County,<sup>167</sup> and to offset water that has been transferred from irrigation to other uses both within and outside the Newlands

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<sup>163</sup> See, testimony of B.J. Selinder, Transcript, March 29, 1994, January 31, 1996, Paul Wagner, Transcript, June 1, 1994, Ali Shahroody, Transcript, February 2, 1996.

<sup>164</sup> Transcript, pp. 65-66, March 29, 1994.

<sup>165</sup> Transcript, p. 30, October 12, 2010.

<sup>166</sup> Transcript, pp. 30, 64, October 12, 2010.

<sup>167</sup> Transcript, p. 34, October 12, 2010.

Project.<sup>168</sup> However, the TCID did not provide any specifics as to the actual proposed use or quantity of water for each use and did not provide any specifics as what lands would be irrigated and when that water would be put to beneficial use.

The State Engineer finds that the Applicant never sufficiently demonstrated how the water applied for could be diverted, stored and placed to beneficial use given the constraints imposed by the OCAP, canal capacity, storage capacity of Lahontan Reservoir and use of the federal facilities. The State Engineer further finds that the Applicant never satisfactorily explained how the waters requested for appropriation under this application would be put to beneficial use as filed for under the application. At the 1996 administrative hearing, the TCID could only speculate how it might take or use the waters. The speculative nature of the TCID's proposed use of the water did not change at the 2010 hearing, as the TCID did not provide further explanation or evidence as to how it might actually take and use the waters and to grant the application under these circumstances would threaten to prove detrimental to the public interest.

#### G. Potential Benefits of Application 9330

There is a lack of evidence that the addition of the water applied for under Application 9330 into the Newlands Project would bring benefits to that area. The TCID provided only vague assertions as to how this water could be used and did not identify any specific benefits for, or quantify any use of, that water. It is clear that the approval of Application 9330 would take more water from the Lower Truckee River and Pyramid Lake, which presently receives the unappropriated water. This diversion would result in detrimental effects to the Lower Truckee River, Pyramid Lake, the threatened Lahontan cutthroat trout, and the endangered cui-ui. The State Engineer finds while the denial of Application 9330 would prevent the addition of any asserted benefits to the Newlands Project and surrounding area, denying the application does not remove or cause any detriment to any existing benefits that the area receives from the existence of the Newlands Project. The State Engineer finds that the approval of Application 9330 would threaten to prove detrimental to the public interest.

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<sup>168</sup> Transcript, p. 34-35, October 12, 2010.

#### H. Assignment of Values to Detriments and Benefits

The District Court found as a matter of law that the State Engineer must assign values to the detriments and benefits and then weigh the detriments against the benefits to determine whether the TCID's application "would threaten to prove detrimental" to the public interest. The findings must state what magnitude the detriment would be to the fish.

The evidence provided indicates that besides the water currently flowing to Pyramid Lake, that an additional 110,000 acre-feet is needed annually to preserve the fish and the lake level. There is no contradictory evidence that this amount of water is needed for the recovery and preservation of the Pyramid Lake fishery.

The State Engineer finds that significant consideration should be given to the Settlement Act and the interstate allocation of the water of the Truckee River. Nearly half a century of work went into the accomplishment of that interstate allocation and the State Engineer finds it provides a significant benefit to Nevada and should be given substantial weight in the public interest analysis. The State Engineer finds a water right exists for the Newlands Project and it makes no sense to issue another supplemental water right to replace the Claim 3 water that several courts have already found is sufficient for the Project. The State Engineer finds the speculative nature of the ability to place this water to beneficial use will be given a minor magnitude of importance on the public interest scale. The State Engineer finds that in balancing the interests, it would threaten to prove detrimental to the public interest to grant Application 9330.

#### XV.

##### **Application of NRS § 533.370(1)**

The TCID objected to the application of NRS § 533.370(1) that requires the applicant demonstrate its financial ability and reasonable expectation to construct the works and to apply the water applied for to the intended beneficial use with reasonable diligence. The TCID argues that this requirement, added to the water law in 1993 and further amended in 1995, does not apply retroactively to its application that was filed in 1930.<sup>169</sup>

In its remand order, the Third Judicial District Court ordered the State Engineer to take evidence on the issue of TCID's financial ability as part of the State Engineer's consideration of whether to grant or uphold denial of the application. The Court identified the TCID's objection as being that the State Engineer improperly applied NRS § 533.370(1) to the TCID's application,

which had been filed prior to the passage of the statute. The Court also set forth the State Engineer's response as being that NRS § 533.370(1) does apply to the application and the TCID was not deprived of due process as a result. The Court found that the State Engineer relied on evidence that did not support denial of the application, and determined that because this resolved the issue, it need not address the TCID's contention that the statute should not have been applied to its application. The Court then ordered additional evidence on this statutory requirement upon remand, indicating that the statute does apply to this application.<sup>170</sup> The TCID did not seek rehearing or other clarification from the Court.

The State Engineer has routinely applied this provision of the water code to applications filed before 1993, and no sound reason has been provided that it should not be so applied to the TCID's Application 9330.<sup>171</sup>

The provision in NRS § 533.370(1) at issue here applies to "applicants" without any further qualification as to the applicant's identity or the date the application was filed. The legislature stated that the purpose of the 1993 amendment to NRS § 533.370(1) is to require an applicant for a permit to provide satisfactory proof of the applicant's good faith intention to construct, with reasonable diligence, any necessary work to apply water to the intended beneficial use and to show the financial ability to construct the work.<sup>172</sup> Likewise, the same statute was further amended in 1995 requiring the applicant, for any diversion over 1 cfs to prove financial ability to construct the works necessary to place the water to beneficial use and the applicant's expectation to actually apply the water to its intended use. The amendment contains no qualifying language as to the age of the application. It applies to all applications, no matter when the application was filed. This is consistent with prior State Engineer rulings and the Third Judicial Court's order on remand in this proceeding.

Additionally, the fact that a statute operates on facts which were in existence before its enactment does not render the statute retroactive.<sup>173</sup> The presumption that statutes apply prospectively, unless the legislature clearly indicates that they should apply retroactively, does not

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<sup>169</sup> Transcript, pp. 15-16, October 12, 2010.

<sup>170</sup> Exhibit No. 122, p. 16.

<sup>171</sup> See for example, State Engineer's Ruling No. 5726, p. 25, dated April 16, 2007, official records in the Office of the State Engineer.

<sup>172</sup> A.B. 624 (Chapter 572), page 280, 1993.

<sup>173</sup> See, *Convention Properties v. Washoe County Assessor*, 106 Nev. 400, 402-03, 793 P.2d 1332 (1990).

apply to statutes that do not change substantive rights, but instead relate solely to remedies and procedure. In those instances, statutes are applied to any cases pending when enacted.<sup>174</sup> As the Nevada Supreme Court recognized in *Bacher v. State Engineer*, 146 P.3d 793 (2006), NRS § 533.370(1)(c)(2) has as its goal the protection against speculation. Its intent is to avoid issuance of permits which can never, or are unlikely to ever, satisfy the ultimate beneficial use requirement.

The provisions of NRS § 533.370(1)(c)(2) allow the State Engineer to require satisfactory proof that an applicant has a "reasonable expectation . . . to apply the water to the intended beneficial use with reasonable diligence." The authority of the State Engineer to require proof of the ability to put water to beneficial use with reasonable diligence is not a new substantive requirement. Nevada Revised Statute § 533.370(1)(c)(2) has always been a part of Nevada water law.

Nevada law has always required that water eventually be placed to beneficial use to perfect a water right.<sup>175</sup> Beneficial use is the basis, the measure and the limit of the right to appropriate water in Nevada and if an applicant does not have the financial ability to build a project it cannot demonstrate that the water will be placed to beneficial use in a timely manner.

Clearly, NRS § 533.370(1)(c)(2) makes a procedural change. It allows the State Engineer to require an applicant to provide proof regarding already existing substantive requirements at the beginning of the process, before a permit is issued. There is no sound reason why granting the State Engineer the specific authority to require such a showing before Application 9330 was granted should be considered a substantive change when he could have required that showing under existing law.

The provisions of NRS § 533.370(1)(c)(2) do not in any way change any substantive requirements of Nevada law. The only retrospective aspect here arises from the fact that Application 9330 was pending when the statute was enacted. There is, however, no impairment of any constitutional property interest resulting from its operation here. It simply requires that an applicant, as a matter of procedure, make a showing before, rather than after a permit is granted,

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<sup>174</sup> See, *Valdez v. Employers Insurance Company of Nevada*, 123 Nev. 21, 162 P.3d 148, 154 (2007).

<sup>175</sup> See, NRS §§ 533.380(1); 533.400; 1913 Stat. of Nev., Chap. 140, §§ 65; 69; 1929 Nev. Comp. Laws §§ 7950; 7954. If it is not, the permit is cancelled. See, *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 944 P.2d 835 (1997).

that the water will be applied to beneficial use with reasonable diligence.<sup>176</sup> The State Engineer finds he properly applied NRS § 533.370(1)(c)(2) to Application 9330.<sup>177</sup>

### **CONCLUSIONS OF LAW**

#### **I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>178</sup>

#### **II.**

The State Engineer is prohibited by law from granting a permit under an application or change application to appropriate the public waters where:<sup>179</sup>

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

#### **III.**

Nevada Revised Statute § 533.035 provides that beneficial use shall be the basis, the measure and the limit of the right to the use of water. Nevada Revised Statute § 533.060 provides that the right to use water must be limited and restricted to as much as may be necessary when reasonably and economically used for a beneficial purpose. Nevada Revised Statute § 533.070 provides that the quantity of water that may be appropriated is limited to such water as shall be reasonably required for the beneficial use to be served. Nevada Revised Statute § 533.370(1) requires that an applicant provide the State Engineer with proof satisfactory of his intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence and the financial ability and reasonable expectation to actually construct the work and apply the water to the intended beneficial use with reasonable diligence.

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<sup>176</sup> See also, *Holloway v. Barrett*, 87 Nev. 385, 390-91, 487 P.3d 501 (1971).

<sup>177</sup> NRS § 533.370(1)(c)(2) is also a legislative expression that it is detrimental to the public interest to allow an applicant to control water resources through the issuance of a permit which the applicant cannot perfect. In that sense, it is one more reason why granting Application 9330 under these facts threatens to prove detrimental to the public interest.

<sup>178</sup> NRS Chapter 533.

<sup>179</sup> NRS § 533.370(5).

Application 9330 was filed for a supplemental water right. Supplemental water rights, including water rights for irrigation, are rights that have a place of use appurtenant to the same place of use as an existing water right and are only available for use when the underlying base water right is inadequate to meet the demands.<sup>180</sup> In this case, the underlying base right is *Orr Ditch Claim 3*, which allows a maximum diversion rate of 1,500 cfs for up to 232,800 acres of irrigated land, for storage in Lahontan Reservoir, for supplying inhabitants of cities and towns, and domestic and other purposes.<sup>181</sup> No evidence was provided that the base right does not adequately meet the demands of the Newlands Project uses. The TCID speculated that the water under Application 9330 would be used for expanded irrigation, domestic, dust suppression and other purposes. None of these uses is certain and none of these uses would be supplemental to the base right; rather, they constitute a new appropriation that was not contemplated by Application 9330. Even if such uses were considered as supplemental to the base right, the base right is sufficient to cover these additional uses. The TCID provided no evidence to support the need for a supplemental right. Since the TCID proposes to use the Truckee Canal, a federal facility, to divert water under Application 9330, the OCAP would control those diversions. The evidence shows that the OCAP intends to provide a full water supply to valid water rights within the Newlands Project which are supplied in part from diversions from the Truckee River under Claim 3. The State Engineer concludes that the TCID has not demonstrated that such water could be put to beneficial use.

#### IV.

The issue of the authority of the United States with respect to the regulation of the use of the Newlands Project facilities and of its obligations under relevant federal law have been well litigated and are no longer subject to reasonable challenge.<sup>182</sup> As stated above, the TCID has not demonstrated the need for the water or that the water could be put to beneficial use. Further, it has been amply shown that the OCAP precludes the TCID from ever placing the water applied for to beneficial use. The approval of Application 9330 will not alter the authority of the United States to

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<sup>180</sup> See for example, State Engineer's Ruling No. 6035, dated March 19, 2010, official records in the Office of the State Engineer.

<sup>181</sup> Exhibit No. 151.

<sup>182</sup> See, *United States v. Alpine Land and Reservoir Co.*, 887 F.2d 207, 211-213 (9th Cir. 1989); *Truckee-Carson Irrigation District v. Secretary*, 742 F.2d 527, 531-32 (9th Cir. 1984); *Pyramid Lake Paiute Tribe v. Hodel*, 878 F.2d 1215 (9th Cir. 1989); *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972).

regulate through the OCAP diversions to the Carson Division from the Truckee River. It will not change the obligations of the United States under *Tribe v. Morton* to "assert its statutory and contractual authority to the fullest extent possible" to preserve water for the Tribe. It will not alter the obligations of the United States under the Endangered Species Act. It will not affect the ultimate decision concerning the scope and extent of that authority and those obligations in relation to how much water should be diverted from the Truckee River to the Carson Division of the Project.

The United States regulates diversions from the Truckee River to the Carson Division of the Newlands Project because the Truckee River is a supplemental supply to water from the Carson River. The OCAP determines how much Truckee River water is needed to meet that purpose. Application 9330 purports to supplement that already supplemental water supply.

If the United States has the authority to regulate diversions from the Truckee River in the manner in which it has regulated those diversions to date, then the granting of Application 9330 would necessarily result in the imposition of further offsetting reductions under the OCAP. Even if the OCAP did not apply to Application 9330 (which it does), Application 9330 is superfluous because diversion under the *Orr Ditch Decree* would be increased to the levels needed to properly supplement the Carson River supply with Truckee River water. In either case, the TCID has no reasonable expectation to be able to apply this additional supplemental supply of water to its intended beneficial use with reasonable diligence.

Additionally, the issue of ownership of the facilities versus ownership of the water right was addressed by the United States District Court in *U.S. v. Alpine Land and Reservoir Company* where the Court stated that the United States may have title to the irrigation works, but as to appurtenant water rights it maintains only a lien-holder's interest.<sup>183</sup> The Court recognized that the United States owns the physical facilities and has authority to regulate those facilities, which it does through the OCAP.<sup>184</sup> The Secretary of the Interior is authorized to transfer operation and management of irrigation works to project land owners once payments for a major portion of the project lands are made, but title to the reservoir works remains in the government,<sup>185</sup> and nothing

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<sup>183</sup> *U.S. v. Alpine Land and Reservoir Company*, 503 F. Supp. 877, 879, (D. Nev. 1980).

<sup>184</sup> Transcript, p. 44, October 13, 2010.

<sup>185</sup> Transcript, p. 44, October 13, 2010.

in the law tells the State Engineer otherwise. The State Engineer concludes there is no reasonable expectation that the TCID can place the waters to beneficial use as applied for under the application. The application anticipates use of the federal facilities to transport and store the waters applied for and the United States has shown that under the OCAP no diversion of water to the Truckee Canal under Application 9330 would occur.

V.

The Truckee River Agreement does not assist the TCID in this regard either. As discussed above, the Truckee River Agreement merely provided that certain parties waived their objections to the increase in capacity of the Truckee Canal up to 1,200 cfs and to the increase in storage of Lahontan Reservoir.<sup>186</sup> Article XVI of the Truckee River Agreement refers to upstream reservoirs, such as Boca, and not Lahontan.<sup>187</sup> The Truckee River Agreement, which was executed approximately five years after Application 9330 was filed, does not mention Application 9330 nor does it consider any other water right supporting this capacity other than Claim 3 since the Truckee River Agreement was incorporated into the *Orr Ditch* Decree which provides Claim 3 water to the Newlands Project. This was the subject of considerable testimony in the 1996 hearing and again in the 2010 hearing.

The State Engineer concludes that the TCID cannot overcome the threshold issue of being able to place the waters to beneficial use as applied for under the application.

VI.

Section 205(a)(2)(D) of the Settlement Act requires that the TROA 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 the Truckee River General Electric decree.<sup>188</sup> The State Engineer concludes that the additional evidence provided concerning the TROA and the PSA confirms that neither will have an impact on the water rights or water supply to the Newlands Project and thus, does not form any basis upon which to approve Application 9330.

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<sup>186</sup> Exhibit No. 200.

<sup>187</sup> Exhibit No. 200; Transcript, p. 41, October 13, 2010.

<sup>188</sup> Exhibit No. 220.

## VII.

The evidence provided shows that the existing infrastructure, the Truckee Canal, cannot transport the additional water under Application 9330 because the diversion of this water is precluded by the OCAP (as well as the current exercise of rights under Claim 3 which is part of the OCAP) and, even if the OCAP did not preclude such diversion, the capacity of the canal is not sufficient to divert this additional water if Claim 3 water is also being diverted. To provide for adequate canal capacity for both water rights, the canal requires improvements, which are currently estimated to cost up to \$90 million dollars. The State Engineer concludes that the TCID does not have the financial ability to construct the necessary improvements.

## VIII.

The State Engineer must deny an application that threatens to prove detrimental to the public interest. In Ruling No. 4659, the State Engineer found that the approval of Application 9330 threatens to prove detrimental to the public interest for multiple reasons:

- “[D]etrimental to Pyramid Lake and its fisheries.”<sup>189</sup>
- “[C]ontrary and adverse to the recovery of cui-ui and Section 207 of the [Settlement Act].”<sup>190</sup>
- “[D]etrimental to the public interest to jeopardize the [California-Nevada] interstate allocation [of the Truckee River].”<sup>191</sup>
- “[D]etrimental to the public interest of protecting the threatened and endangered species in the Truckee River system.”<sup>192</sup>
- “[D]etrimental to the public interest of protecting the water quality in the Lower Truckee River.”<sup>193</sup>

Based on these considerations, the State Engineer ultimately ruled that the approval of Application 9330 would threaten to prove detrimental to the public interest.<sup>194</sup>

As discussed above, the Third Judicial District Court remanded this matter to the State Engineer and, among other things, directed that on remand the State Engineer: (1) define public

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<sup>189</sup> Ruling No. 4659, p. 17.

<sup>190</sup> Ruling No. 4659, p. 17.

<sup>191</sup> Ruling No. 4659, pp. 17-18.

<sup>192</sup> Ruling No. 4659, p. 18.

<sup>193</sup> Ruling No. 4659, p. 18.

<sup>194</sup> Ruling No. 4659, p. 21.

interest for purposes of his decision; (2) assign values and magnitudes to his findings of detriment; and (3) indicate how the comparison of benefits and detriments lead to his final conclusion.<sup>195</sup> The State Engineer reads the Remand Order to require a more detailed explanation of his findings and conclusions that approval of Application 9330 threatens to prove detrimental to the public interest, and not as reversing Ruling No. 4659's conclusions on the public interest issue or requiring new evidence on it.<sup>196</sup>

The State Engineer makes public interest findings on a case-by-case basis.<sup>197</sup> The definition of the public interest to be considered by the State Engineer is limited to considerations that are identified in Nevada's water policy statutes.<sup>198</sup> More specifically, the State Engineer makes public interest determinations after assessing policy considerations based on Nevada law.

The State Engineer has explained how to apply these policy considerations in Ruling No. 5726:

The State Engineers' expressions of the public interest were that it was important for the highest and best use of waters to be made and development of important industries should be encouraged. However, the State Engineer must exercise discretion in his interpretation under the express authority granted in law and must look at all the interests involved as to any particular appropriation and balance them, but that the wants and necessities of the state should be weighed against local interests. The public interest analysis included looking at the benefits of a project, protection of threatened or endangered species, and protection of the quality of water sources, but indicated that water should be allocated to reasonable and economic use, so long as other public interest values will not be unreasonably compromised.<sup>199</sup>

The Remand Order instructed the State Engineer to define the public interest for purposes of this decision.<sup>200</sup> For the purposes of this application, the public interest considerations are: (1) the State Engineer's responsibility to carry out his duties in a manner that does not conflict with any interstate compact; (2) the provisions of Public Law 101-618, which includes consideration of

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<sup>195</sup> Exhibit No. 122, pp. 15-16.

<sup>196</sup> Exhibit No. 122.

<sup>197</sup> Ruling No. 5875, pp. 23-25 dated July 9, 2008, official records in the Office of the State Engineer; *see*, Exhibit No. 122, p. 14.

<sup>198</sup> *United States v. Alpine Land & Reservoir Co.*, 341 F.3d 1172, 1183 (9<sup>th</sup> Cir. 2003) (citing *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 748, 918 P.2d 697, 700 (1996)).

<sup>199</sup> Ruling No. 5726, p. 42, dated April 16, 2007, official records in the Office of the State Engineer.

<sup>200</sup> Exhibit No. 122, Remand Order, p. 15.

the interstate allocation of the water of the Truckee River, Carson River and Lake Tahoe, the protection of the Pyramid Lake fishery, protection of the Lahontan Valley wetlands, enhancement of the water quality in the Lower Truckee River, cui-ui and Lahontan cutthroat trout recovery and enhancement; (3) that water may be appropriated for beneficial use; (4) that the right to the use of water must be limited and restricted to as much as may be necessary and the balance of the water not so appropriated must be allowed to flow in the natural stream; (5) that the quantity of water which may be appropriated shall be limited to such water as shall be reasonably required for the beneficial use to be served; and (7) the applicant must demonstrate the magnitude of the use of water, such as the numbers of acres to be irrigated.

The State Engineer's determination is based on both record evidence, as provided in the proceedings leading to Ruling No. 4659, and on briefs filed by the parties. Each conclusion and its evidentiary basis are explained below.

A. Responsibility to Carry out Duties in a Manner that Does Not  
Conflict with Interstate Compact

The interstate allocation of the waters of Lake Tahoe, the Truckee River, and the Carson River between California and Nevada is an important focus of a public interest consideration. Granting Application 9330 would threaten the interstate allocation because the allocation is contingent on the TROA implementation, and the TROA implementation cannot occur if Application 9330 is granted.<sup>201</sup> The importance of this public interest benefit was discussed in Ruling No. 4659, which provided that:

A final resolution as to the interstate allocations of the water on the system is of essential importance to Nevada and California. That allocation is a key ingredient in the management and resolution of issues on the entire river system. Its importance cannot be overlooked. Decades of work by both California and Nevada went into the determination of that allocation. Since California controls the headwaters of the Truckee River, it is of paramount importance for Nevada to have an interstate allocation of these waters by federal law, and the benefits of that allocation should not be taken lightly. The State Engineer finds it would threaten to prove detrimental to the public interest to jeopardize that interstate allocation by the granting of Application 9330.<sup>202</sup>

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<sup>201</sup> See, Exhibit No. 220 § 210(a)(2)(B) and Exhibit No. 215 § 12.A.4(f).

<sup>202</sup> Ruling No. 4659, pp. 17–18.

This interstate allocation conclusion is also consistent with two other water policy public interest considerations expressed by the State Engineer. The first is the public interest policy consideration to “cooperate with California authorities in monitoring the future needs and uses of water in the Lake Tahoe area and to study ways of developing water supplies so that the development of the area will not be impeded.”<sup>203</sup> Specifically, the interstate allocation facilitated by implementing the TROA will provide certainty in both California and Nevada regarding current and future water use. Examples include use of Lake Tahoe water,<sup>204</sup> snowmaking water,<sup>205</sup> and limitations on California use of the Truckee River.<sup>206</sup> Second, the public interest benefit associated with the interstate allocation is consistent with the State Engineer’s direction to balance the “wants and necessities of the state . . . against local interests.”<sup>207</sup> The State Engineer concludes that the interstate allocation of these waters is a major benefit to the State of Nevada. If Application 9330 is granted, then this benefit will not materialize, thus the use of water under Application 9330 is a major detriment to the public interest.

#### B. Fish and Wildlife Resources

This public interest determination considers the effect of Application 9330 on fish and wildlife resources. In Ruling No. 4659, the State Engineer found that the approval of Application 9330 would be detrimental to the public interest because it would harm the Pyramid Lake fishery.<sup>208</sup> The State Engineer also found that approving Application 9330 would be detrimental to the public interest because it would be “contrary and adverse to the recovery of cui-ui and Section 207(a) of [the Settlement Act].”<sup>209</sup> As noted by the State Engineer, “[t]he water levels at Pyramid Lake are a critical factor in the recovery of the threatened and endangered species since they affect the fish’s ability to clear the delta to spawn. Other critical factors include attraction flows, spawning flows and flows sufficient for the juveniles to return to

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<sup>203</sup> *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. at 746, 918 P.2d at 699.

<sup>204</sup> Exhibit No. 220 § 204(b)(1).

<sup>205</sup> Exhibit No. 220 § 204(b)(2)(A).

<sup>206</sup> Exhibit No. 220 § 204(c)(1).

<sup>207</sup> Ruling No. 5726, p. 42.

<sup>208</sup> Ruling No. 4659, pp. 16-17.

<sup>209</sup> Ruling No. 4659, p. 17.

Pyramid Lake.”<sup>210</sup> These statements are supported by the expert witness testimony in the record.<sup>211</sup>

The State Engineer’s conclusions in Ruling No. 4659 regarding detrimental effects to listed species associated with Section 207(a) of the Settlement Act apply with even greater force now that the TROA is in place. Section 207(a) calls for the Secretary to “expeditiously revise, update, and implement plans for the conservation and recovery of cui-ui and Lahontan cutthroat trout” in a way that is consistent with the TROA and other authorities.<sup>212</sup> While the recovery plan itself does not rely on the TROA for the recovery of the cui-ui, it does rely on the in stream use of the unappropriated water in the Truckee River, water that is now permitted by the State Engineer to the Tribe to support the cui-ui and other fish and wildlife.<sup>213</sup> Without the unappropriated water going to benefit Pyramid Lake fish, there will be no finalization of the TROA.

In turn, the TROA provides multiple benefits to the Truckee River fish while protecting existing water rights. The TROA, for example, protects the cui-ui by providing for storage of the unappropriated water in upstream reservoirs, subject to requirements of applicable State law, and the release of that water when it would be most beneficial to the fish in the Truckee River.<sup>214</sup> Application 9330 threatens these benefits because they are contingent on the TROA implementation, and the TROA implementation cannot occur if Application 9330 is granted.

The State Engineer’s own rulings, federal statutes, and U.S. Supreme Court precedent support assigning a significant magnitude to the public interest benefits associated with the Pyramid Lake fish and listed fish recovery. The State Engineer has held that “protection of threatened or endangered species” is a basis to make an affirmative public interest determination.<sup>215</sup> As stated by Congress in the Endangered Species Act, listed species “are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its

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<sup>210</sup> Ruling No. 4659, p. 16.

<sup>211</sup> ROA at 926-87; 992-1052; and 1553-1680. References to “ROA” are to the Record on Appeal as provided to the district court and to the Bates stamped page numbers as set forth in the Notice of Availability of Record on Appeal and Summary of Record filed with the Third Judicial District on or about October 11, 2006.

<sup>212</sup> Exhibit No. 220, Section 207(a).

<sup>213</sup> See, Application Nos. 48061 and 48494.

<sup>214</sup> See, TROA §§ 5.B.6(a)(5), 5.B.8 (a) and 7.C.5.

<sup>215</sup> Ruling No. 5726, p. 42.

people.”<sup>216</sup> The U.S. Supreme Court reinforced the high value placed on listed species and their habitats: “examination of the language, history, and structure of the [Endangered Species Act] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”<sup>217</sup> Reading these authorities together, the State Engineer assigns a significant value to protecting the listed species of the Pyramid Lake fishery. This conclusion is amply supported by the record in this case as discussed by the State Engineer in Ruling No. 4659.<sup>218</sup>

In assessing the public interest under Nevada law based upon the evidence in this record, it is not the State Engineer’s role to ascertain if there is some number of endangered fish that should be adequate and some minimum quantity of water to maintain that number of fish. It is his role to understand the consequences of approval of the requested appropriation on the endangered fish, and to consider those consequences in the context of the public interest review of the effect on fish and game resources. Here, the evidence shows that granting Application 9330 would threaten these significant public interest benefits because they are contingent on the TROA implementation, and the TROA implementation cannot occur if Application 9330 is granted.

Experts testified that the Cui-ui Recovery Plan calls for the acquisition of 110,000 acre feet of water above the amount of unappropriated water that was already flowing to Pyramid Lake, and that amount of water is necessary for the recovery of the cui-ui.<sup>219</sup> Experts likewise testified that the elevation of Pyramid Lake is important in the recovery of the cui-ui and Lahontan cutthroat trout, both because it aids in their ability to spawn in the Truckee River, and provides improved water quality in the lake itself.<sup>220</sup> The State Engineer concludes that Application 9330 is directly at odds with the need for the unappropriated water to continue to flow to Pyramid Lake and therefore has a negative impact thereby threatening to prove detrimental to the public interest.

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<sup>216</sup> 16 U.S.C. § 1531(a)(3).

<sup>217</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (U.S. 1978).

<sup>218</sup> Ruling No. 4659, p. 6-7, 5-17; *See also*, Ruling No. 4683, pp. 25-28.

<sup>219</sup> Ruling No. 4659, p. 16; ROA at 931, lines 1-18; 933, lines 13-25; 936, line 17 through 937, line 11; 953, lines 7-21; 960, line 3 through 961, line 3, 965, lines 10 through 966, line 14; 981, lines 5-15; 995, line 6 through 997, line 24; 1000, lines 4-22; 1004, line. 5 through 1005, line 19; 1596, lines 1-11; 1620, line 16 through 1621, line 24.

<sup>220</sup> Ruling No. 4659, pp. 16-17; ROA 937, line 12 through 939, line. 25; 941, line 20 through 942, line. 8; 974, line. 5 through 978, line. 25; 986, line. 13 through 987, line. 8; 998, lines. 2-12; 1000, line. 23 through 1003, line. 14; 1008, line.3 through 1009, line. 21; 1031, linen 8 through 1032,line 12; 1562, line. 2 through 1566, line 4; 1618, line 4 through 1619, line 6; 1622, lines 3-25; 1642, lines 4-17; 1648, line 6 through 1649, line. 21.

### C. Water Quality

Ruling No. 4659 also found that the proposed removal of Truckee River water from the Truckee River basin under Application 9330 would be detrimental to the public interest because such removal would diminish water quality in the Lower Truckee River.<sup>221</sup> This conclusion applies today with even greater force now that the TROA has been executed because the TROA provides benefits to water quality through several provisions. Section 7.E provides for the storage of water quality credit water pursuant to the *Truckee River Water Quality Settlement Agreement*.<sup>222</sup> In order to prevent credit water accumulation from diminishing river water quality, Section 7.A.5 in general restricts accumulation of credit waters if such action would reduce flows at the Sparks gage to less than 275 cfs from June through October, or less than 120 cfs from November through May. Section 8.T provides criteria for Stampede Fish Water and Fish Credit Water operations to ensure that water quality credit water is available at times required by the *Truckee River Water Quality Settlement Agreement*. Application 9330 seeks to remove a significant quantity of water from the Lower Truckee River which would result in an adverse effect on the water quality in the river. The State Engineer concludes that the magnitude of this detriment is significant because maintaining adequate water quality in the Lower Truckee River assists in protecting multiple beneficial uses of water in the River.

### D. Potential Benefits to Applicant

The final public interest consideration addresses the benefits that could potentially accrue to the Applicant if Application 9330 were granted. The TCID alleged a number of benefits it asserts would result from approval of Application 9330. *See*, Ruling No. 4659 at 13. However, the only benefits that are relevant to the public interest determination were those benefits related to the proposed manner and place of use as stated on the face of Application 9330 and benefits related to water to “be used in connection with and supplemental to the present rights of the United States and the applicant in the same manner” upon an undefined 150,000 acres of land somewhere within the TCID’s boundaries.<sup>223</sup> The water sought under Application 9330 would be supplemental and subordinate to the water diverted to the Newlands Project under *Orr Ditch*

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<sup>221</sup> Ruling No. 4659, p. 18.

<sup>222</sup> *See*, brief filed by the City of Reno and the City of Sparks in this action, dated September 20, 2010.

<sup>223</sup> *See*, Amended Application 9330 (1931).

Claim 3. As described above, the TCID has not demonstrated that it would ever be able to divert the water sought in Application 9330 because it failed even to show that it can divert and apply to beneficial use all Claim 3 water that it already controls.

The TCID's evidence on benefits lacks specificity. The TCID did not demonstrate where the water will be used, if the water is to supplement or provide additional water (presumably to irrigate additional acres) to the TCID, and how or where the water will be diverted. Without at least some definite plan details, the State Engineer is unable to assess the benefits of the proposed appropriation on the public interest, or even to determine what those benefits might be.

The TCID also generally refers to incidental public interest benefits associated with Application 9330, such as groundwater recharge, dilution of groundwater pollution, recreation, and to the habitat for the peregrine falcon and bald eagle. The TCID failed to provide concrete evidence or specifics on such potential benefits and these are not uses applied for under Application 9330. Without specific and concrete proof on these potential benefits, they remain unproven assertions. No one, much less a qualified expert, testified as to how much of this requested water is necessary for groundwater recharge and dilution of groundwater pollution, or as to the number of peregrine falcons and bald eagles which existed, or as to how much additional water was needed for their habitat and whether these species are listed under the Endangered Species Act. Such vague and unsubstantiated assertions do not provide a basis upon which the State Engineer may properly make a public interest determination.

Ruling No. 4659 acknowledged that these potential benefits of Application 9330 were at best speculative and indeterminate.<sup>224</sup> Moreover, Ruling No. 4659 recognized that any public interest benefits in the Lahontan Valley would continue under the existing Claim 3 water supply: Application 9330 would not reduce water flowing to the Lahontan Valley wetlands; it would not reduce groundwater recharge in Lahontan Valley; it did not increase shortages to Project farmlands during periods of drought; it would not decrease recreational opportunities in Lahontan Valley; its denial is not adverse to endangered, threatened or sensitive species in Lahontan Valley, and it is not adverse to Lahontan Valley wetlands.<sup>225</sup> The State Engineer concludes that the original conclusions of Ruling No. 4659 remain valid since none of the Application 9330 water presently flows to Lahontan Valley, but rather it flows to Pyramid Lake.

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<sup>224</sup> Ruling No. 4659, p. 18.

## IX.

The Remand Order also directs the State Engineer to indicate how the comparison of benefits and detriments leads to a final conclusion. Remand Order at 16. On balance, the State Engineer concludes that Application 9330 threatens to prove detrimental to the public interest based on the public interest considerations described above.

Turning first to the effect on fish and game resources, Application 9330 threatens to prove detrimental to the public interest. TCID presented evidence that was, at best, speculative concerning fish and game benefits associated with Application 9330. *See*, Ruling 4659 at 13, 18. In contrast, there was a large volume of evidence presented that Application 9330 would be harmful to fish and wildlife resources, including endangered fish species. Specifically, Application 9330 would make less water available for Pyramid Lake and its listed fish species, which as discussed above receive a significant degree of protection under the Endangered Species Act. Application 9330 would also prevent the TROA implementation, such that none of the TROA or Settlement Act benefits will be realized. On balance, therefore, Application 9330 presents a real and concrete harm to fish and wildlife resources that are not counteracted by speculative, general assertions that it will provide limited fish and wildlife benefits if granted. Based on this comparison, Application 9330's detriments to fish and game resources outweigh its speculative minimal potential benefits.

Second, Application 9330 would threaten to prove detrimental to the public interest because it could impair water quality in the Truckee River. Application 9330 would remove water from the Truckee River that is to be used for water quality purposes under the TROA. The TROA effectively implements portions of the Water Quality Settlement Agreement. The TCID has not offered any countervailing evidence of potential public interest benefits that outweigh this concern.

Third, Application 9330 threatens to prove detrimental to the public interest because it will have significant negative effects on water policy concerns. Specifically, granting Application 9330 would prevent the TROA implementation, which would trigger many negative public interest consequences, such as: no interstate allocation of the Truckee River, the Carson

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<sup>225</sup> Ruling No. 4659, pp.18-19.

River, or Lake Tahoe; reduced water to protect Northern Nevada's largest metropolitan areas against drought; and impediments to settlement of longstanding water rights litigation on the Truckee River. The TCID has not provided any evidence that granting Application 9330 would provide public interest benefits that outweigh this concern.

The final basis for comparison of public interest factors concerns alleged public interest benefit that the TCID might derive if Application 9330 were granted. Given the physical limitations on canal capacity and the legal limitations of the OCAP, the TCID has demonstrated, at best, that a limited number of water users could potentially benefit from Application 9330 water in unknown, infrequent years. But any potential, limited public interest benefit asserted by the TCID is undermined by the TCID's lack of specific information regarding the place of use and the nature of use for Application 9330 water. In contrast, the record is replete with concrete evidence of harm to the public interest that will occur if Application 9330 is granted. On balance, the multitude of public interest detriments outweighs the small number of speculative public interest benefits that the TCID could derive from Application 9330. For these reasons, the State Engineer concludes that the use of water under Application 9330 threatens to prove detrimental to the public interest.

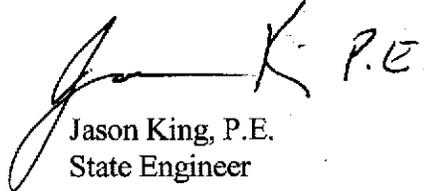
## **XI.**

The State Engineer concludes after weighing the negative impacts that would be caused by the granting of Application 9330 that the approval of said application would threaten to prove detrimental to the public interest.

**RULING**

Application 9330 is hereby denied on the grounds that the TCID has not shown a need for the water or how it will place the water to beneficial use, has not shown it has the financial ability to construct improvements required to deliver the water, and the approval of Application 9330 would threaten to prove detrimental to the public interest. Each of these grounds provides an independent basis for denial of the application.

Respectfully submitted,

 P.E.  
Jason King, P.E.  
State Engineer

Dated this 8th day of  
June, 2011.