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

IN THE MATTER OF PROTESTED)
APPLICATIONS 73783, 73791, 73792,)
73794 THROUGH 73800, 73849)
THROUGH 73855, 73863, 73865, 73868)
THROUGH 73872, 73908 THROUGH)
73915, 73917, 73986, 73987, 74076)
THROUGH 74085, 74193 THROUGH)
74202 AND RELATED SECONDARY)
APPLICATIONS S1, S2, S3 AND S4.)

RULING

#6035

GENERAL

I.

On February 1, 2006, the Truckee Meadows Water Authority (TMWA) filed Applications 73783, 73791, 73792, 73794 through 73800 to change the point of diversion, place and manner of use of various rights to use waters of the Truckee River. The applications indicate that the water is to be diverted to storage and used pursuant to secondary permits for beneficial uses allowed by the Truckee River Operating Agreement (TROA). The remarks sections of the applications indicate they are filed pursuant to NRS § 533.515, which provides for points of diversion outside of the state of Nevada when the place of use is within Nevada. The remarks sections of the applications also indicate they were filed as part of the implementation of the operating agreement described in Section 205(a) of Public Law 101-618. The applications seek to add reservoirs in California as points of diversion for storage of the consumptive use portion of the water rights, which is described as at least 2.5 acre-feet per acre per year. However, if the consumptive use portion of the water right is not diverted to storage, the applications indicate that the full duty of the water right is to remain in the Truckee River to be diverted at the currently allowed points of diversion at the TMWA's water treatment plants for municipal use. The final remark on the applications provides that any permit issued under them will enter into effect simultaneously with the entry into effect of the Truckee River Operating Agreement.[1]

On February 16, 2006, February 23, 2006, and March 1, 2006, the TMWA, the City of Reno and City of Sparks by and through the TMWA filed Applications 73849 through 73855, 73863, 73865, 73868 through 73872, 73908 through 73915 and 73917 to change the point of

[1] File Nos. 73783, 73791, 73792, 73794 through 73800, official records in the Office of the State Engineer.

diversion, place and manner of use of various rights to use waters of the Truckee River. The applications contain the same remarks as the above-referenced applications.[2]

On March 13, 2006, the City of Sparks by and through the TMWA filed Applications 73986 and 73987 to change the point of diversion, place and manner of use of various rights to use waters of the Truckee River. The applications contain the same remarks as the above-referenced applications.[3]

On March 28, 2006, the TMWA filed Applications 74076 through 74085 to change the point of diversion, place and manner of use of various rights to use waters of the Truckee River. The applications contain the same remarks as the above-referenced applications.[4]

On April 13, 2006, the TMWA, the City of Reno and City of Sparks by and through the TMWA and the City of Sparks by and through the TMWA filed Applications 74193 through 74202 to change the point of diversion, place and manner of use of various rights to use waters of the Truckee River. The applications contain the same remarks as the above-referenced applications.[5]

All of the above-referenced applications are hereby referred to as the "Primary Applications" under the provision of NRS § 533.440.

II.

Pursuant to the provisions of NRS § 533.440, four sets of secondary applications ("Secondary Applications") have been filed under all the referenced primary applications for municipal and domestic use of the stored water through the Truckee Meadows Water Treatment Plants, for use for wildlife purposes in the Truckee River from the upstream storage reservoirs to Pyramid Lake and for use for incidental hydroelectric power generation.

III.

The Primary Applications were protested by the City of Fallon (Fallon), Churchill County (Churchill) and the Truckee-Carson Irrigation District (TCID) on many grounds.[1,2,3,4,5] On March 21, 2008, the State Engineer held a status conference in the matter of the protested applications.

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[2] File Nos. 73849 through 73855, 73863, 73865, 73868 through 73872, 73908 through 73915, 73917, official records in the Office of the State Engineer.
[3] File Nos. 73986 and 73987, official records in the Office of the State Engineer.
[4] File Nos. 74076 through 74085, official records in the Office of the State Engineer.
[5] File Nos. 74193 through 74202, official records in the Office of the State Engineer.

Prior to the status conference, the Applicant filed a Status Conference Memorandum and presented an argument asserting that the Protestants allegations that the TROA will cause injuries to water rights and to the public interest should not be considered by the State Engineer. The Applicant also provided its analysis of the various protest grounds and contended that some grounds were insufficient as a matter of law, some raise issues that are not for decision by the Nevada State Engineer, but rather may only be decided by the United States District Court or some other court, and some are issues that require clarification and requested the State Engineer make an early decision regarding issues that will not be considered by him.

Protestant TCID also filed a Status Conference Report focusing its argument on the fact that the TROA is not a foregone conclusion and a number of actions remain to be taken before the TROA is adopted, promulgated and can go into effect. Thus, it argued that it is premature for the State Engineer to take any steps toward an administrative hearing on the applications.

At the status conference, the State Engineer held that he will not address the provisions of the TROA and requested the Protestants to narrow their protest issues to reflect that decision. The TCID filed a document titled *Narrowed Protest Issues to Truckee Meadows Water Authority Change Applications Filed for Storage with Beneficial Use Under the Truckee River Operating Agreement*;[6] however, the TCID did not narrow its protest issues, but rather continues to allege that the State Engineer cannot make determinations under Nevada water law related to these change applications without considering the TROA and knowing how the *Orr Ditch* Decree will be modified. Protestant TCID's "narrowed protest issues" are set forth in Appendix A to this ruling and were joined in by the City of Fallon.[7] Fallon also originally filed its own protests, which is set forth in full as Appendix C to this ruling.[8] Churchill refined its protest issues withdrawing its protest issues 3, 4, 11 and 13 and reaffirming its remaining protest claims[9] as set forth in Appendix B to this ruling. The Applicant filed a response to the narrowed protest issues.[10]

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[6] Exhibit No. 6, public administrative hearing before the State Engineer, December 14-17, 2009, official records in the Office of the State Engineer. Hereinafter exhibits from this hearing will be referred to by their exhibit number and the transcript will be referenced solely by page number.
[7] Exhibit No. 8
[8] Exhibit No. 104.
[9] Exhibit No. 7.
[10] The State Engineer notes, however, that the Applicant refers to TCID's original protest and not its narrowed protest issues.

Pursuant to State Engineer's Interim Order No. 1,[11] the State Engineer ruled on or dismissed many of the protest issues and Interim Order No. 2 clarified that a few additional protest issues were also ruled on by the State Engineer.[12] In those orders, the State Engineer made the following decisions:

A. Dismissed TCID/Fallon's narrowed protest issues 1, 3, 4, 5, 6, 7, 27, 32 (the portion of the protest issue regarding forfeiture), Fallon protest issues 1 (the portion that alleges the use of water under the change applications will breach the Truckee River Agreement), 7, 8, 10, 11, 12, 32, 41 (portion regarding forfeiture), and Churchill protest issues 1 (whether the TROA is a threat to Churchill's water supply), 6, 8, 9, and 10.

B. The State Engineer overruled TCID's/Fallon's narrowed protest issues 2, 9, 10, 11 (a portion), 12, 14, 17, 18, 19, 22, 23, 24, 25, 26 (portion regarding loss of priority date), 28, Fallon protest issues 2, 4 (portion concerning groundwater), 5, 9, 13, 15, 16, 17 (portion), 18, 20, 21 (loss of priority date) 22, 23, 24, 27, 28, 29, 30, 33, Churchill protest issues 1 (portion not dismissed), 2, 7, 13, 15, 18, 19, 20, 22, 23, and 24 (loss of priority date).

The protest issues that remained at the time of the administrative hearing and for consideration in this ruling were:

A. Abandonment - TCID narrowed protest issue 32 (portion) and Fallon protest issue 41 (portion);

B. Consumptive use and amount of acreage identified is more than consumptive use portion - TCID narrowed protest issues 15 and 29, Fallon protest issues 21 and 34 and Churchill protest issues 16 and 25;

C. Season of use - TCID narrowed protest issues 8 and 16, Fallon protest issues 14 and 22, Churchill protest issues 12 and 17;

D. Impacts to existing rights - TCID narrowed protest issues 13, 20 and 21, Fallon protest issues 19, 25 and 26, Churchill protest issues 14 and 21; and

E. Points of diversion and place of use outside the Truckee Meadows - TCID narrowed protest issue 26, Fallon protest issue 31, Churchill protest issue 24.

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[11] Exhibit No. 14.
[12] Exhibit No. 18.

IV.

The applications indicated that they seek to add reservoirs in California as points of diversion for storage of the consumptive use portion of the water rights; however, if the consumptive use portion of the water right is not diverted to storage, the applicant stated that it wanted the full duty of the water right to remain in the Truckee River to be diverted at the currently allowed points of diversion at the TMWA's water treatment plants for municipal use. The State Engineer found in Interim Order No. 1 that the Primary Applications are only allowed for storage, be it in the upstream reservoirs or in the treatment plants and that the only actual use of the water will be under the Secondary Permits. The State Engineer found that for accounting and management purposes that a fourth set of secondary permits needed to be filed for the use of water that is directly diverted into the TMWA's water treatment plants and then used for municipal purposes.

V.

The State Engineer notes that Interim Order No. 1 and Interim Order No. 2 specifically addressed and ruled on many of the protest issues in this matter and hereby are incorporated into this ruling.

VI.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held regarding the protested applications on December 14 -17, 2009, at Carson City, Nevada before representatives of the Office of the State Engineer.

FINDINGS OF FACT

I.

ABANDONMENT

In the TCID's narrowed protest issue 32 (portion) and Fallon's protest issue 41 (portion), the Protestants asserted that the water rights sought to be changed were subject to a declaration of abandonment. The State Engineer finds the Protestants withdrew the protest issue of abandonment at the administrative hearing and there is no evidence of abandonment of any water right in the record of this proceeding.[13]

[13] Transcript, pp. 9 - 10.

II.

TRUCKEE RIVER OPERATING AGREEMENT

Protestants continue to attempt to focus on the argument that the TROA is not a foregone conclusion and that a number of actions remain to be taken before the TROA is adopted, promulgated and can go into effect. The TCID asserts that until the TROA is implemented there is no way the water can be used as proposed by the applications or a determination can be made related to impacts to existing rights or whether the use of the water as proposed would threaten to prove detrimental to the public interest. At the status conference, the State Engineer held that he was not going to address whether the TROA changes the *Orr* Ditch Decree. Processing of the subject applications by the State Engineer and consideration of Decree modifications necessitated by the TROA by the *Orr Ditch* Court are two separate and distinct actions by two separate and distinct authorities. The State Engineer has the responsibility and authority to act on any application to appropriate or application to change considering criteria set forth in the Nevada Revised Statutes. He has the responsibility with or without the pending nature of the TROA and the *Orr Ditch* Court has jurisdiction and authority to review the State Engineer's determinations related to Truckee River water rights. While the State Engineer is conditioning the effective date of any permits under these applications on the submittal of proof that the *Orr* Ditch Decree has been amended, the TROA is irrelevant to the State Engineer's consideration of the subject applications. Recognizing these factors, the State Engineer concluded at the status conference that he would not address the provisions of the TROA and reaffirms that he need not consider the TROA itself in order to rule on these applications.

Early during the December 14-17, 2009, hearing, Protestants again attempted to inject the TROA as a factor in determinations the State Engineer was required to make. This attempt was precluded and the State Engineer reaffirmed that the TROA would not be considered in the evidentiary considerations by the State Engineer. However, during testimony presented by a witness for the Applicant, the witnesses outlined and described how Truckee River reservoirs would be operated under the TROA. Counsel for Protestants did not object during the course of the testimony; however, at the conclusion of the testimony, counsel for Protestants registered an objection citing to the preclusion of Protestants' reference to the TROA.

The State Engineer finds the comments by the witness were not material, but rather were considered explanatory and informational and not relevant, evidentiary or germane to factual

determinations to be made by the State Engineer and overrules the objection based on the fact the comments did not impact, affect or were otherwise prejudicial to required determinations by the State Engineer.

III.

TWENTY FIVE PERCENT PER MONTH RESTRICTION

During the course of the administrative hearing, Protestants again addressed an issue the State Engineer had already ruled on, that being the provision of the *Orr Ditch* Decree that provides that the maximum amount of water diverted in any one month should be restricted to 25 percent of the total water right. The State Engineer has already found that the Applicant has not requested to change this Decree provision and overruled the protest claim. The Protestants argue that the 25 percent right of diversion in any one month was only allowed for water rights used for irrigation and should not be allowed for storage. The State Engineer does not find any indication in the Decree that when water rights are changed to another manner of use that basic general principles established in the decree are superseded. However, if the total diversion rate is allowed to be diverted, the portion of the diversion rate that would account for the non-consumptive portion of the water right would not be in the river thereby potentially harming existing water right holders. The State Engineer finds that no more than 25 percent of the water right can be diverted to storage in any one month; however, the diversion rate should be adjusted to account for the consumptive and non-consumptive portion of the water right.

IV.

IMPACTS TO EXISTING RIGHTS - REDUCED FLORISTON RATES

The Protestants all alleged that the storage of water under the Primary Applications will cause injury to their existing water rights. TCID narrowed protest issues 13, 20 and 21, Fallon protest issues 19, 25 and 26, Churchill protest issues 14 and 21. Moreover, they allege that a change in the point of diversion downstream will have a negative effect on upstream and downstream users. TCID narrowed protest issue 26, Fallon protest issue 31, and Churchill protest issue 24.

The administration of the *Orr Ditch* Decree is distinctly different from other decreed streams in that the system is managed based on the Floriston Rates and Reduced Floriston Rates, which are rates of flow that were established by agreement in the Truckee River Agreement.[14]

[14] Exhibit No. 815.

Much has changed on the Truckee River system since the entry of the Truckee River Agreement in 1935 and entry of the Final *Orr Ditch* Decree in 1944. A review of the *Orr Ditch* Decree reveals that nearly all of the decreed water rights were for irrigation, but today most of the irrigated land has been converted to municipal areas. Thus, a more flexible and coordinated operation of the Truckee River system is warranted as long as existing *Orr Ditch* decreed water rights are satisfied. The statutory process for change applications, NRS § 533.345, is the mechanism designed and provided to address changing conditions. Certain parties have filed a motion with the decree court to modify or amend the Final *Orr Ditch* Decree requesting the court permit adjustment of the Floriston Rates and to allow for water that would have been released to meet Floriston Rates to be retained for storage. Those applications for storage are under consideration in this ruling.

The State Engineer finds that if the decree court does not allow for adjustment of the Floriston Rates, the Primary Applications under consideration in this ruling would violate the Truckee River Agreement and in turn the *Orr Ditch* Decree. The State Engineer finds since the request for permission to adjust the Floriston Rates is before the decree court, it is worthwhile to have the actual applications that would permit the storage of the water also available for the decree court's review at the same time. However, at this time any permits issued under the applications under consideration in this ruling are issued under the condition that they become effective when the decree court authorizes amendment of the *Orr Ditch* Decree. Because the question is also before the decree court, the State Engineer finds it timely to rule on the applications and condition them on proof of amendment to the decree.

V.

IMPACTS TO EXISTING RIGHTS - STATEMENTS OF HARM

The Protestants represent that their water rights will be adversely affected if water is allowed to flow past Derby Dam as a result of approval of the Primary and Secondary Applications "when TCID is not entitled to divert." However, such water then passing Derby Dam will result from Applicant's exercise of the consumptive use portion of prior and existing rights and therefore cannot impact rights of the Protestants. While the Protestants alleged that the storage of water under the Primary Applications will cause injury to their existing water rights they however did not provide any substantial evidence that demonstrated any evidence of harm and the State Engineer has not been able to independently find any evidence of possible harm. If the Floriston Rates are reduced by the consumptive use portion of the water right, that

being the amount that would have been consumed when the water right was used for irrigation, and the non-consumptive portion of the water right remains in the river at the same time storage is taking place, then the remainder of the Floriston Rates is otherwise being met and all the other water holders' water is in the river. Thus, there is no demonstrated harm no matter when the Applicant takes water into storage. The water rights of the Protestants will be in the river. The only evidence presented by the Protestants in an attempt to show harm was unsubstantiated statements with no factual evidence to support the statements.[15] The State Engineer finds these unsubstantiated statements do not rise to the level of substantial evidence. If the Floriston Rates are not being met, the State Engineer understands that the flow in the river drops drastically and irrigation in the Truckee Meadows is shut off fairly quickly by the water master.

The State Engineer finds the Protestants did not provide substantial evidence in support of TCID narrowed protest issues 13, 20, 21 and 26, Fallon protest issues 19, 25, 26 and 31, Churchill protest issues14, 21 and 24 and overrules the protest claims.

VI.

IMPACTS TO EXISTING RIGHTS - HISTORICAL PRACTICES

The Protestants advocate and argue that State Engineer action must protect "historical practices." In fact, the State Engineer's responsibility is to assure that proposed use or change of water does not conflict with existing rights.

Waters of the Truckee River were originally primarily used under rights for irrigation and power generation purposes. As conditions changed over time, less water was used for irrigation in the Truckee Meadows and the irrigation water rights were converted to municipal use. Because municipal use is variable and more water rights have been acquired to be available for use during times of drought, there are times when there is water in the river that has flowed downstream for use by downstream water users. Under Protestants' theory, this constituted establishment of "historical practices."

The State Engineer finds the subject applications under consideration in this ruling are simply a request to enable the Applicant to divert and use the consumptive use portion of its senior priority existing water rights. Thus, the State Engineer finds the proposed changes will not conflict with prior rights of the Protestants.

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[15] *See*, testimony of David Overvold.

VII.

CONSUMPTIVE USE - IRRIGATION OR MUNICIPAL

The Protestants raise issues as to what quantity of water the State Engineer should use for the historical consumptive use under the water rights sought to be changed to storage. They assert that if the State Engineer looks to the historical agricultural decreed use of the water for the consumptive use figure, the applications do not indicate the number of acres that were historically irrigated and also do not indicate the actual amount of water in acre-feet that is contemplated for storage. TCID narrowed protest issues 15 and 29, Fallon protest issues 21 and 34 and Churchill protest issues 16 and 25. The State Engineer notes that while the Protestants assert the applications do not indicate the number of acres historically irrigated, their expert witness report identified as Exhibit No. 2226 provides that the "total acreage associated with the base acreage stripped for all applications approximates 3,351 acres."[16] Therefore, the State Engineer finds little merit in that protest allegation regarding acreage. Additionally, each Primary Application specifically states the acre-foot duty to be changed and the Applicant submitted Exhibit No. 119 detailing the acreage under each original agricultural water right for a total of 3,362.58 acres of land. However, some of the water rights requested to be changed were withdrawn and the Applicant submitted Exhibit No. 125 which indicates that the irrigated acreage of the original water rights sought to be changed is 3,146.08 acres.

The Protestants assert that the State Engineer should not be using a consumptive use figure that relates back to the original decreed agricultural water use, but rather should be considering the consumptive use of the municipal water rights because the agricultural water rights had been changed to municipal water use quite some time ago.[17] In support of this argument, the Protestants cite to State Engineer's Ruling No. 5823 arguing that the exact same situation is presented with the applications under consideration in this ruling. However, the State Engineer finds that in this case the recitation to the finding in that case is not applicable and that matter being addressed here is not the exact same situation as was considered in that ruling. In Ruling No. 5823, the State Engineer was mainly addressing groundwater change applications that had already been converted from agricultural use to municipal use, which had not been previously limited by a consumptive use quantification of the agricultural water use. In that case,

[16] Exhibit No. 2226, p. 2.
[17] The consumptive use figure for municipal use provided by the Protestants is 2.0 acre-feet per acre of water right.

those Protestants were asserting that the new change applications should be used to limit the water right to the former consumptive use of the agricultural water right based on an allegation that the groundwater basin was severely over appropriated. In Ruling No. 5823, the State Engineer held that a change application is not the proper vehicle in which to address the issue of over appropriation of a groundwater basin. The State Engineer found that if that protestant had an issue with the initial granting of the groundwater right on the grounds that the basin was over appropriated that it should have protested the original application. The State Engineer also held that he was not going to go back and limit the water right to the historical agricultural consumptive use as the water right had already been changed to municipal use at full duty and the change under consideration was not a change in manner of use. Here, the Applicant, in recognition that a full duty change would interfere with existing rights, has requested only to store the consumptive use portion of the water right and the issue is which consumptive use figure protects existing decreed water rights. The State Engineer finds there is a distinction between the consumptive use figure that may be used for changes in the manner of use of a groundwater right in a particular basin and changes of surface water rights on a decreed stream where downstream water right holders' water rights are dependent on the non-consumptive return flow.

When the water rights the Applicant seeks to change here were converted to municipal use, the State Engineer allowed them to be converted from agricultural use to municipal use at the full duty of the water right because he believed the return flow from the municipal use would be higher than the return flow from the former agricultural use, and thereby found no reason to limit them as the municipal water use would actually make more water available in the river than there would have been if the rights had been used for agriculture. This additional water is really a windfall to the Protestants, but is not part of their decreed water right and they cannot insist on its continuance. In this case, the Applicant is requesting to use its water right to the full extent of the consumptive use of the right as measured when it was decreed. The State Engineer finds that, in this case, there is more to the correct measure of consumptive use than just the analysis that the water rights have already been changed to municipal use. The State Engineer finds the issue here is injury to existing rights and that injury is measured against the Protestants' water right at the time it was quantified in the *Orr Ditch* Decree, which was when the water rights the

Applicant is seeking to change were used for agriculture. The State Engineer finds the correct measure of consumptive use in order to determine injury is the agricultural consumptive use.

VIII.

CONSUMPTIVE USE - DUTY

In this case, the Applicant requests the State Engineer use a consumptive use figure, which is based on the Applicant's witness' analysis of a net potential consumptive use. The Applicant presented evidence in Exhibit No. 121 of a net potential consumptive use for alfalfa assuming a full water supply for an entire growing season of 2.9 acre-feet per acre. The Protestants allege this figure is higher than the historical consumptive use and if the State Engineer were to use that figure it would injure their water rights.

In Exhibit No. 2226, the Protestants provided their evidence to demonstrate that if downstream water rights and historical return flows are to be protected, the actual historical consumptive use of crops in the Truckee Meadows needs to be considered and not the net potential amount which could be consumed assuming ideal conditions. They note that ideal conditions must be weighed against actual historical conditions such as water supply limitations, variability in the length of the irrigation season, irrigation methods and field application efficiency, crop type and variable sources of supply.[18]

The Protestants first challenge the growing season presented by the Applicant (April 15 through October 31), which is approximately 200 days or 6.6 months asserting that the potential consumptive use can be limited by actual supply and that the irrigation season found in the *Orr* Ditch Decree Special Master's Report, provides for an irrigation season of 150 to 165 days.[19] The Special Master's Report notes that the defendants had testified that ordinarily the irrigating season in Reno begins about the middle of April, but that it varies considerably in different years and lasts for about five or five and a half months.[20] However, the Special Master's Report provides that there is great variance in the irrigation seasons on the Truckee River and in some years which are extraordinary, water may be needed earlier than April and very late in the fall. The Special Master deemed it best not to fix any period as an irrigation season, and to allow use of water at any time desired to the extent of the acre-foot limit. The Special Master noted that sometimes plowing has taken place in January or February and that sometimes it is desirable to

[18] Exhibit No. 2226, p. 2.
[19] Exhibit No. 2226, Tab 2.
[20] Exhibit No. 2226, Tab 2, p. 93.

irrigate as late as November or December.[21] The decree court accepted this recommendation and water for irrigation is allowed to be used at any time, provided that the amount applied to the land during any calendar year shall not exceed the quantity in acre-feet allowed to the land.[22]

The Protestants' witness provided evidence of the 1913 plane table maps that were made during the course of the *Orr Ditch* adjudication for the purpose of arguing that many of the original places of use had crops or ground conditions that would not have consumed water in the net potential amount. Their evidence also indicates that 33 - 34% of the 98 years that were analyzed the Floriston Rates were not met, which means the irrigation season was limited and the actual consumptive use of crops was less. The Protestants' witness also discussed field application efficiencies to demonstrate another factor that would limit actual consumptive use to a figure they claim is less than half the amount the Applicant suggests.[23] The witness also presented evidence as to the amount of water necessary for various crop types and variable sources of supply. The ultimate conclusion of the Protestants' witness is that if an agricultural consumptive use figure is used the figure should be 2.0 acre-feet per acre and that the diversion to storage should mimic the timing of when the water was diverted for the historical agricultural use.

The State Engineer finds that even though the decree court had the 1913 plane table maps in front of it during the original adjudication of the water rights on the Truckee River, it did not limit the decreed water rights in the manner argued by the Protestants. It did not find that certain acreage had potatoes on it at that time and limit that specific acreage to the total duty to 1.4 acre-feet per acre. Rather, it decreed most land duties of around 4.0 acre-feet per acre. The State Engineer finds this to be a recognition that crops and farms change. The State Engineer finds the *Orr Ditch* Decree recognizes this and provided water rights for those lands sufficient to irrigate a crop such as alfalfa. The State Engineer finds that perhaps at some time the net potential consumptive use may have been met on some of the farms; however, the State Engineer finds to use the net consumptive use figure proposed by the Applicants will most likely over project the actual historical consumptive use of the water rights as all the original farms were most likely not producing that perfect crop all at the same time. The State Engineer finds the Federal District Court in the adjudication on the Carson River has already held in the *Alpine* Decree that the net

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[21] Exhibit No. 2226, Tab 2, p. 94.
[22] *Orr Ditch* Decree, p. 87.
[23] Exhibit No. 2226, pp. 5-6.

consumptive use of surface water for irrigation of the lands above the Lahontan Reservoir is 2.5 acre-feet per acre.[24] Nevada Revised Statute § 533.070 provides that where water is to be diverted for irrigation purposes, or where the water is to be stored for subsequent irrigation purposes, the State Engineer in determining the amount of water granted shall take into consideration the irrigation requirements in the section of the state in which the appropriation is made and that the State Engineer shall consider the duty of water as heretofore established by court decree or by experimental work in such area as near thereto as possible. The State Engineer finds the evidence in this case propose a consumptive use figure from 2.0 to 2.9 acre-feet per acre. The State Engineer finds the 2.5 acre-feet per acre consumptive use figure used in the *Alpine* Decree is determinative in this matter and is within the range of figures provided by both the Applicant and Protestant in their evidence and overrules TCID narrowed protest issues 15 and 29, Fallon protest issues 21 and 34 and Churchill protest issues 16 and 25.

IX.

SEASON OF USE

Protestants allege that the applications are attempting to expand the season of use to year-round use as opposed to the historic use, which was only during the irrigation season. TCID narrowed protest issues 8 and 16, Fallon protest issues 14 and 22, Churchill protest issues 12 and 17. The Primary Applications request a season of use of January 1 through December 31. The *Orr Ditch* Special Master's Report notes that water is used in nearly every month of the year and did not recommend a specific season of use. The *Orr Ditch* Decree provides that water for irrigation is allowed to be used at any time provided the total amount used does not exceed the total water right. The *Orr Ditch* Decree provides for water rights to be changed and nothing in the decree indicates that a change in manner of use from agriculture to municipal means losing the right of year-round use. Therefore, there is no reason the same provision would not apply to these applications. The State Engineer finds that he will also issue these permits with a season of use "as decreed." In addition, all permits have been issued with the provision that they are under the continuing jurisdiction of the water master and these permits will be issued with the same provision.

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[24] *U.S. v. Alpine Land & Reservoir Co.*, Civil No. D-183 (D.Nev. 1980).

X.

POINTS OF DIVERSION AND PLACE OF USE OUTSIDE TRUCKEE MEADOWS

Protestant TCID asserts, on information and belief, that the Applicant intends with the secondary applications to use the water below the current points of diversion and that the Applicant has no right to divert and use water outside of the Truckee Meadows. TCID narrowed protest issue 26, Fallon protest issue 31, and Churchill protest issue 24. The State Engineer ordered the parties to file briefs addressing this protest issue.[25]

The TCID argues that NRS § 533.040(1)(2) provides that, under Nevada water law, water rights are necessarily appropriated as appurtenant to their places of use and that the State Engineer may only approve a change application if the applicant provides proof 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. NRS § 533.370(1)(c)(1). It asserts that since Pyramid Lake is outside of the Truckee Meadows that the TMWA cannot satisfy the requirements of NRS § 533.370 for proving good faith intent and ability to put the water to beneficial use at Pyramid Lake since the TMWA neither has nor reasonably expects to obtain legal authority and control over Pyramid Lake. It also asserts that the TMWA cannot establish appurtenancy of these rights to Pyramid Lake as a place of beneficial use as required by NRS § 533.040. The TCID cites to State Engineer's Ruling No. 5392 for the principle that change applications that strip water from the appurtenant place of use is not in the public interest when the applicant cannot show appurtenancy to a new place of use.

A second assertion by the TCID is that the TMWA does not have the authority to unilaterally store foreign waters at Donner Lake since TCID and TMWA own 9,500 acre-feet of storage rights in Donner Lake as tenants-in-common for the storage of privately-owned stored water not a decreed water right, and that the TMWA has no right or ability to store decreed water rights in Donner Lake since the TMWA does not control Donner Lake. The State Engineer finds this protest ground was overruled in Interim Order No. 1. TCID narrowed protest grounds 11 and 25.

The TMWA in response indicates that the Protestants claim appears to be an assertion that Nevada water law does not permit the TMWA to hold a secondary permit for *in situ* wildlife purposes with the place of use under the S-2 secondary applications being within the Truckee River

[25] Exhibit Nos. 33, 34, 35, 36, and 37.

system, extending from upstream reservoirs and into Pyramid Lake, but the place of use is not Pyramid Lake. The TMWA asserts that the essence of the Protestant's arguments is that no person may hold a water right for *in situ* purposes unless that person also owns or controls the stream or lake in which the use will occur, but Nevada law clearly does not so provide. The TMWA argues that the appurtenance doctrine is only related to the concept that water appropriated for irrigation is appurtenant to land irrigated. It notes that the Nevada Supreme Court held that a deed, which conveyed land "together with all singular tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining," included title to the water right appurtenant to the land in question and passed the water right as an appurtenance under the deed without it being expressly referenced in the deed.[26] However, the TMWA argues that doctrine clearly does not apply in every situation. For example, they argue water rights owned by the TMWA are not appurtenant to the TMWA's service area in the sense that ownership of those water rights passed with title to the land within the service area and on which the water is used.

The State Engineer has previously ruled on a similar argument raised by Churchill and Fallon. In State Engineer's Ruling No. 5760, the State Engineer addressed change applications filed by Washoe County, the City of Sparks and the City of Reno to change *Orr Ditch* decreed water rights from decreed uses to instream use for wildlife in the Truckee River between Derby Dam and the Pyramid Lake inlet. The protestants argued that the application could not be granted as the Applicant did not own or have the requisite legal right to place the water to beneficial use on the proposed place of use; therefore, granting the application would violate Nevada water law. The State Engineer held that wildlife use is a beneficial use of water under Nevada's water law and nothing in Nevada's water law indicates that only the owner of the river bed may hold a permit for use of water for wildlife. The owner of the bed and banks of the Truckee River in this case, being the States of California and Nevada, the United States and the Pyramid Lake Paiute Tribe, have made no complaint about the TMWA using water in the river for wildlife purposes; thus, in essence demonstrating an acquiescence to use of the water as proposed and raised no objection to the application. The *Orr Ditch* Court held discretion rests with the State Engineer to decide whether someone seeking to appropriate water for wildlife use, or to change the use of an existing water right to wildlife, is engaged in speculation and affirmed the State Engineer's decision.

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[26] *Zolezzi v. Jackson,* 72 Nev. 150, 297 P.2d 1081 (1956).

The Protestants also cite to State Engineer's Ruling No. 5392 asserting that it held that change applications which would have the effect of permanently stripping water rights from the appurtenant properties of their beneficial use are not in the public interest. The State Engineer finds the decision in State Engineer's Ruling No. 5392 does not support the Protestants' argument. That ruling dealt with the provisions of Nevada's water law regarding temporary change applications and the ability for the water to revert to the original place of use after the temporary change application expires and the improper use of the temporary change statute. In that case, the applicant attempted to use the temporary change application process, but had restricted the ability for the water to revert to its original place of use upon expiration of the temporary change arguing that the water right merely reverted to the status of nonuse. The State Engineer did not accept this argument and found the application was an improper use of the temporary change application process since in essence it was a permanent change. The State Engineer finds Ruling No. 5392 is inapplicable in this case and overrules the protest claim.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.[27]

II.

The State Engineer is prohibited by law from granting a permit to appropriate the public waters where:[28]

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.

[27] NRS Chapter 533.
[28] NRS § 533.370(5).

III.

The State Engineer concludes the Applicant seeks to change existing *Orr Ditch* decreed water rights.

IV.

The State Engineer concludes there is no substantial evidence to support the Protestants' claims the use of water as proposed under the change applications will conflict with their water rights.

V.

The State Engineer concludes there is no evidence that the use of the water as proposed will conflict with protectible interests in existing domestic wells.

VI.

The State Engineer concludes the use of the water as proposed does not threaten to prove detrimental to the public interest.

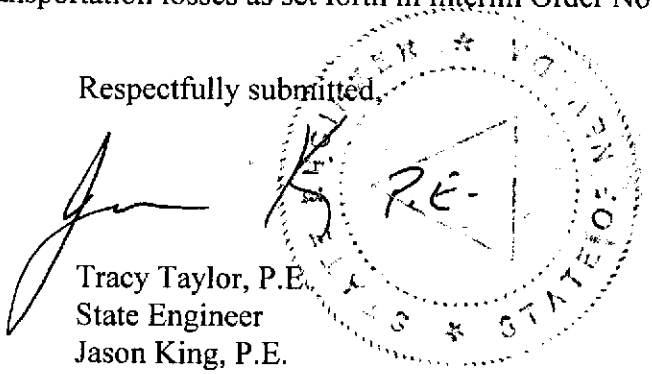
RULING

The protests to Applications 73783, 73791, 73792, 73794 through 73800, 73849 through 73855, 73863, 73865, 73868 through 73872, 73908 through 73915, 73917, 73986, 73987, 74076 through 74085, 74193 through 74202 are hereby overruled in part and upheld in part and the Primary Applications and related Secondary Applications S1, S2, S3 and S4 will be issued and become effective upon submission of proof that the *Orr Ditch* Decree has been amended to permit changes to the Floriston Rate. The base rights to the applications addressed in this ruling shall remain in full force and effect until such time that these permits become effective. The permits will be granted subject to:

1. Existing rights;
2. Consumptive use limitation of 2.5 acre-feet per acre;
3. No more than 25 percent of any water right can be taken into storage in any one month under a reduced diversion rate proportional to the consumptive and non-consumptive portions of the water right;
4. Payment of statutory fees;
5. Continuing jurisdiction of the Federal Water Master;

6. Monthly reporting to the State Engineer and the Federal Water Master within ten (10) days of the end of each month, which shall include the amount of water diverted to storage and the amount of water used under each secondary permit; and
7. Consideration of storage and transportation losses as set forth in Interim Order No. 1.

Respectfully submitted,



Tracy Taylor, P.E.
State Engineer
Jason King, P.E.
Acting State Engineer

Dated this 19th day of

March, 2010.

APPENDIX A

PROTESTS OF TRUCKEE CARSON IRRIGATION DISTRICT AND CITY OF FALLON[29]

1. On information and belief, the purported water rights arise from the Truckee River Agreement ("TRA"), to which TCID is a party, and which is incorporated by reference into the *Orr Ditch* Decree (*U.S. v. Orr Water Ditch Co.*, et al., CV-N-73-003. D.Nev. (1944)), and such rights arise, if at all, based upon an express agreement of the parties to the Truckee River Agreement and not otherwise, and any change to the agreement requires the consent of the parties, which consent is withheld by TCID, and granting the application would violate the compromise reached in the TRA that allowed the Orr Ditch Decree to be entered. Any such attempt to modify the TRA and/or the Orr Ditch Decree without the parties' consent or approval or without proper notice and without the approval of the *Orr Ditch* Court is defective.

2. The Application proposes that the beneficial places of use will be set forth in applications for secondary permits consistent with the Truckee-River Operating Agreement ("TROA"). TROA is still in the environmental review process and there is no guarantee that it will be approved. Further, the secondary permit applications identify at least three separate and distinct uses for the same water, including municipal, wildlife and power generation. The Applicant is attempting to use the same water for multiple purposes at multiple places of use in violation of NRS 533.330, which only permits a water right to be used for a single purpose at a single place of use. By these secondary applications the Applicant is attempting to circumvent the jurisdiction of the State Engineer over change applications, whether temporary or permanent.

3. The Truckee River Agreement and the *Orr Ditch* Decree control the distribution and storage of water in the Truckee River Basin. The TRA is incorporated into the *Orr Ditch* Decree as a part of the decree itself. See *U.S. v. Orr Water Ditch Company*, CV-N-73-0003 LDG at p. 86. The TRA sets forth the principles under which the Truckee River would be operated and allowed for the stipulated entry of the Orr Ditch Decree. The parties to the Truckee River Agreement are: The United States of America; Truckee-Carson Irrigation District; Washoe County Water Conservation District (Conservation District); Sierra Pacific Power Company (Sierra), and such other users of the waters of the Truckee River and/or its tributaries, known as Parties of Fifth Part. The TRA required the Truckee River to be operated on the basis of Floriston Rates, as established in the 1915 General Electric Decree. *United States v. The Truckee River General Electric Company*, Case No. 14861 (N.D. Cal. 1915). For the last 70 years, the Truckee River has been managed by the parties to the TRA, along with the Federal Water Master. Several new reservoirs have been added to the Truckee River watershed that did not exist when the TRA was executed. These reservoirs are part of the Washoe Project and include Prosser Reservoir and Stampede Reservoir. These reservoirs are managed in conjunction with the other reservoirs serving the Truckee River basin. The Applicant has failed to show that the proposed diversion and use of water is consistent with the management regime of the Truckee River as set forth in the Truckee River Agreement and the *Orr Ditch* Decree. Moreover, any unused water in the Truckee River is to inure to the benefit of the Conservation District and

[29] Exhibit No. 6.

TCID. Attempts to alter the division of unused water are in violation of the TRA and undermine the *Orr Ditch* Decree.

4. The Applicant may not use Boca Reservoir or Lake Tahoe water as proposed in the Application. These water bodies are subject to the terms of the TRA, to which TMWA, a successor to the Sierra Pacific Power Company, is bound.

5. On information and belief, the proposed storage and secondary use under TROA of the water proposed in the Application (in conjunction with the other similar applications filed for upstream storage) will interfere with the management of Floriston Rates on the Truckee River. Floriston Rates are defined in the TRA as the rate of flow in the Truckee River as measured at the Iceland Gage, consisting of an average flow of 500 cubic feet per second (cfs) each day during the year commencing March 1 and ending September 30 of any year and an average flow of 400 cfs each day from October 1 to the last day of February of the next year. Water in Lake Tahoe must also be released as required under the TRA to maintain Floriston Rates. The TRA sets limitations on when Floriston Rates can be changed and requires that before that can occur, the permission of the Conservation District, TCID and Sierra must be obtained. In addition, the United States and TCID must agree pursuant to their rights under the 1915 GE Decree. Changes in the flow from Boca Reservoir requires the consent of TCID. The TRA also calls for Reduced Floriston Rates under certain conditions that would also potentially be impacted by the proposed change. The proposed change applications purport to alter the TRA in violation of the aforementioned agreement.

6. All Washoe Project reservoirs, include Prosser Reservoir and Stampede Reservoir, must also be operated based on Floriston Rates. The operation of these reservoirs would also be altered to the detriment of TCID under the proposed change applications.

7. The Application must comply with the TRA, unless and until consent of all parties is received. TCID does not consent. The proposed TROA was born from the Preliminary Settlement Agreement between Sierra Pacific and the Pyramid Lake Paiute Tribe of Indians (PLIT), which was recognized in the Truckee-Carson-Pyramid Lake Settlement Act, P.L. 101-618, 104 Stat. 3289, November 16, 1990 (the Act). The Act contains a reservation that it is not to be construed to alter or conflict with any existing rights to use the Truckee River water in accordance with the applicable decrees. The TRA is incorporated into the *Orr Ditch* Decree as a part of the decree itself. *See United States v. Orr Water Ditch Company*, CV-N-73-0003 LDG at p. 86. Specifically, the Act states that TROA "will ensure that water is stored in and released from Truckee River reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch decree and Truckee River General Electric decree." 104 Stat 3305. Therefore, even under TROA, if adopted, the Application must comply with the TRA requirements for storage and maintenance of Floriston rates. The Applicant has made no showing that the proposed diversion of the water complies with the TRA, nor can it.

8. On information and belief, the granting of this Application would injure existing water rights adjudicated in the *Orr Ditch* Decree, and under the *Orr Ditch* Decree such a transfer cannot be approved if it will cause injury to an existing right under the decree. Potential uses under TROA for fish credit water will injure Newlands water users. The historic use of this

water was for irrigation, which provided for returns flows which could be beneficially used by Newlands farmers. Likewise, the current use of this water for municipal and domestic provides substantial return flows. However, uses under TROA for fish water do not provide return flows resulting in injury to Newlands Project farmers, especially in years of drought.

9. This Application along with other numerous similar applications filed by TMWA/Reno/Sparks are actually joint applications for storage of the consumptive portion and direct diversion of full diversion rate, which violates NRS 533.330 wherein an application must be limited to one source for one purpose.

10. The Application incorrectly names the source of the water and fails to designate a point of diversion. NRS 533.440(2) "specifies the application shall refer to the reservoir for a supply of water." The Application does not specify the named reservoirs in Exhibit B as the "supply", rather the reservoirs are named as points of diversion, the source of supply for the Applications is actually tributaries to the Truckee River. The point of diversion cannot be a storage facility.

11. The Application fails to provide evidence of sufficient capacity in the named reservoirs or the existence of agreements for the storage of water. NRS 533.440(2) specifies the "application ... shall show by documentary evidence that an agreement has been entered into with the owner of the reservoir for a permanent and sufficient interest in such reservoir to impound enough water for the purpose set forth in the application." No such evidence has been provided in the Application regarding sufficient capacity in each reservoir and no evidence has been provided to demonstrate that permanent storage agreements have been entered into with the United States. Likewise, TCID has not given Applicant permission to store credit storage or exchange water in Donner Lake, Lake Tahoe, or Boca Reservoir.

12. The Applicant has provided no evidence of a permanent water right to store the subject water under California law. They propose to divert water from a point in which they have no right or control. The water rights change petitions submitted to the California State Water Resources Control Board by the United States/TMWA/Washoe County Water Conservation District for credit storage under TROA in Prosser Reservoir, Boca Reservoir, Stampede Reservoir, and Independence Lake as well as the two water rights applications for increasing the storage at Prosser Reservoir and Stampede Reservoir are still pending. Thus, the Application is premature and speculative.

13. The Applicant has not demonstrated that the proposed water can be stored in the reservoirs without displacing water that would otherwise be stored to the benefit of the Newlands Project.

14. The Application fails to provide a full understanding of the proposed change. Because negotiations for TROA are ongoing, the agreement has not been finalized, and the Draft environmental impact statement/environmental impact report ("EIS/EIR") has not been certified the Application is inadequate pursuant to NRS 533.345 wherein any application to change the place of diversion, manner of use, or place of use must contain "...such information as may be necessary to a full understanding of the proposed change." Applications for secondary permits are just now being filed and the potential impacts cannot be fully understood until TROA is

finalized, if at all, and the beneficial uses and places of use are analyzed. It is noted that such secondary permits are not published in accordance with NRS 533.440 and thus, even though the actual points of diversion and the source of such diversion are not shown in the Application, the Applicant(s) are attempting to bypass the notice provisions, thus shifting the burden to potential protestants to monitor application filings for the subsequent secondary permits and file additional protests at that time.

15. Exhibit D of the Application describes the intent to store only the consumptive use portion of the water right and includes incomplete and vague language that the consumptive use portion shall be at least 2.5 acre feet per acre. This is problematic for two reasons. First, it appears the language is vague to allow the Applicant at some later time to attempt to increase the storage rate beyond the specified 2.5 acre feet per acre. If the Application is approved, it should specify that "the consumptive use portion shall not exceed the actual consumptive use portion of the water right, as determined by the State Engineer." Second, the Application (and in many instances the underlying permits and certificates) does not expressly state the number of acres to be used in determining the storage quantity under each right. The Application should specifically state the number of acres associated with the underlying water right. Moreover, the Application does not state the actual amount of water in acre feet that will be stored in the reservoirs, making the Application defective.

16. The Application for "Primary Storage" and "Secondary Uses" will dramatically alter the flow regime of the Truckee River with potential injury to Newlands Project water right owners. The Application specifies the proposed period of use as January 1 to December 31 of each year, whereas the existing period of use is generally "as decreed." The underlying water rights for the claims in the Orr Ditch Decree were originally used for irrigation purposes, thus the historical diversion pattern was an irrigation pattern. The Orr Ditch Decree does not specify a prescribed irrigation season rather it is purposely left open to allow for flexibility in changing hydrologic conditions. Although the prior change permit was issued without restricting the municipal use to a historical diversion pattern, the permits generally contain language to the effect that the permit is issued subject to the terms and conditions of the Orr Ditch Decree and "with the understanding that no other rights on the source [Truckee River] will be affected by the change proposed herein." Further, the prior change permit was issued allowing municipal and domestic uses for a period of use specified "as decreed." Year-round use of water historically used on an irrigation pattern may cause injury to downstream rights and that proposed storage of these rights increases the potential for injury to downstream rights. If the Applicant is allowed to store these water rights in the non-irrigation season with subsequent releases for municipal use or for conversion to fish water, the regime of the Truckee River will be dramatically altered resulting in potential injury to existing water right owners. The proposed period of use should be restricted to the "irrigation season" as determined each year by the Federal Water Master.

17. The amount diverted (either into storage or by direct diversion) should be restricted to the 25 percent maximum monthly amount in accordance with the Orr Ditch Decree. See *United States v. Orr Water Ditch Company*, CV-N-73-0003 LDG at p. 88.

18. The Application is defective because there is no information provided regarding the releases and use of the stored water and thus the potential injury or impacts cannot be ascertained.

19. It is understood from review of the TROA DEIS/EIR that the stored water will be used as (1) subsequent municipal releases and diversions or (2) the expanded uses under TROA to include conversion to fish water, releases for minimum instream flows, and releases for the broader lower Truckee River streamflow objectives. Any subsequent releases of the stored water should be subject to reservoir evaporation and seepage losses as well as river conveyance losses to the new point of diversion in order to prevent such losses from being incurred by the Newlands Project.

20. By diverting water and storing it in up stream [sic] reservoirs, the Application is keeping water out of the river to the detriment of other water right holders, particularly in years of drought. Further, agreements would be required with users of both Truckee and Carson River waters for modification of certain established water rights. No such agreement has been obtained.

21. Storage in up-stream reservoirs is to the detriment of Lake Tahoe. The water which is the subject of the Application, which would otherwise be credited into storage in Lake Tahoe, will result in an artificial decrease in the Lake Tahoe levels, adversely affecting water rights under Claims No. 3 and 4 of the Orr Ditch Decree. Further storage in up-stream reservoirs is counter to the 1990 Settlement act which states that TROA may include "methods to diminish the likelihood of Lake Tahoe dropping below its natural rim ..." Approval of the Application would have the exact opposite effect.

22. On information and belief, the purported Application will negatively impact Hydrographic Basin 87. The flow of the Truckee River is hydrographically linked to underground water. By storing water in upstream reservoirs that normally flowed in the river, the Application (in conjunction with the other similar applications filed for upstream storage) will negatively impact recharge of Hydrographic Basin 87. Further, TMWA currently utilizes Hydrographic Basin 87 as a source of substantial water which is pumped from the basin. By storing water up-stream they are in effect utilizing the water twice to the detriment to other water users whose water will now recharge the basin, especially in times of drought. Removing this water from the basin prevents it from partially recharging the aquifer. Well pumping then must use other groundwater that is hydrographically connected to the Truckee River, thus affecting flows in the river for downstream users.

23. Based upon information and belief, the Applicant will divert a portion of their surface water rights that historically go to recharge Hydrographic Basin 87 to the named up-stream reservoirs. This will unreasonably lower the water table resulting in injury to others who have wells in the Truckee Meadows. The State Engineer must take into account whether the proposed change conflicts with protectable interests in existing domestic wells as set forth in NRS 533.370(5). These wells must then draw water that is hydrographically connected to the Truckee River, thus adversely affecting downstream water right owners.

24. Basin 87 is designated by the State Engineer under Chapter 534 of the NRS, and moving surface water from the basin will have a detrimental effect on the groundwater.

25. The application is premature, speculative, and detrimental to the public interest as there are a number of conditions that must occur before the water may be utilized as proposed in the application, including: (1) no permanent agreement to store water in the named reservoirs, (2) no permission to store water in Donner Lake from TCID, (3) TROA has not been finalized, and (4) the California State Water Resource Control Board has not issued permits to store this water under California law. Nevada law mandates that the State Engineer either approves or denies an application, and an application can not be contingent on subsequent conditions. NRS 533.370. At this time there is insufficient information for the State Engineer to act.

26. On information and belief, Applicant intends with the secondary use to use the water below the current point of diversion. Any secondary use below the original point of diversion should be treated as a new application with a priority date as of the date of the change application to prevent injury to existing water right owners. Further, the Applicant has no right to divert and use water at diversion points outside of Truckee Meadows. Moreover, a change in the point of diversion downstream will have a negative effect on upstream and downstream users.

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

28. Upon information and belief, the proposed change Application will violate a 1991 Groundwater Management Agreement between Westpac Utilities, a Division of Sierra Pacific Power Company and TCID.

29. The amount of acreage shown on the Application is more than the consumptive use portion. If approved, the Application should be limited to the actual consumptive use portion.

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

a. Assure that all irrigated lands and residual acreage associated with prior transfers do not receive any Truckee River water either inadvertently or directly.

b. The diversion shall be according to a new priority based on the date of the underlying change application.

c. The period of use for the first diversion either into storage or for direct diversion at the water treatment plants must be restricted to the irrigation season specified by the Federal Water Master.

d. The first diversion either into storage or for direct diversion must be restricted to the 25 percent maximum monthly amount in accordance with the Orr Ditch Decree.

e. The consumptive use portion to be stored in the reservoirs shall not exceed the actual consumptive use portion of the water right as determined by the State Engineer, calculated based on a specified number of acres provided in the permit.

f. The non-consumptive use portion shall remain in the river to protect the historical flow regime of the Truckee River.

g. Any subsequent releases of the stored water shall be subject to reservoir evaporation and seepage losses as well as river conveyance losses to the new point of diversion in order to prevent such losses being incurred by downstream users.

h. Proposed accounting forms shall be approved by the State Engineer and the Federal Water Master tracking by right and priority amounts of water including but not limited to diversion to storage, direct diversion, exchanges, conversion to fish water, subsequent reservoir releases, reservoir losses, and river conveyance losses.

i. Conditions to insure that the proposed storage of water can be stored in the reservoirs without displacing water that would otherwise be stored to the benefit of the Newlands Project.

j. NRS 533.440(1) provides that there is no notice requirements for secondary permits. Here, the unknown and speculative nature of the secondary uses in the application could result in injury to other water right owners. Therefore, there should be a specific notice requirement for secondary uses with this Application, if approved.

k. The transportation component of the water should be stored in Lake Tahoe for use by other water owners entitled to diversions under the Orr Ditch Decree.

l. The permit is issued subject to the terms and conditions of the Orr Ditch Decree and with the understanding that no other rights on the source Truckee River will be affected by the change proposed.

m. The permit is issued subject to uses for a period of use specified as decreed.

31. Since the full scope of this project is unknown and referenced subsequent secondary recovery applications will be filed which are not published, TCID reserves the right to add or amend this Protest as more information becomes available.

32. On information and belief, the water rights at issue have been abandoned or forfeited due to non use.

APPENDIX B

PROTEST OF CHURCHILL COUNTY[30]

1. Chruchill [sic] County and Fallon are experiencing rapid residential, commercial and industrial growth which relies upon waters associated with the Newlands irrigation project. Nearly all of the useable groundwater recharge within basin 101 occurs as a result of the irrigation project, therefore any actions which have the potential to reduce surface flows will impact recharge and the ability to serve the M&I uses. Churchill County's 2000-2025 and 2025-2050 water resource plans have identified groundwater within basin 101 and Newlands project surface water as their source of supply. These plans are currently being updated for shorter term planning which will rely upon groundwater and conjunctive use of surface and groundwater. The Dixie Valley importation alternative is the only new source of water for the basin, however the local sources of water will be developed until such time as the Dixie resource is economically viable. Chapter 3 of Churchill's water resource plan, which is of public record at the State Engineer's office, identified all of the threats to their water supply at that time. The Truckee River Operating Agreement (TROA) and these applications are an additional threat to those.

2. Other specific entities within Churchill County which rely upon Newlands Project waters are the: Fallon Paiute/Shoshone Tribe, City of Fallon, USF&WS, and NAS Fallon which would be harmed if these flows are reduced. These entities and Churchill County are owners of decreed Newlands project waters and permitted or certificated underground water which is recharged by the Project waters.

3. The County Commissioners have not been properly noticed pursuant to N.R.S. 533.363. Such notice should be received by the county prior to the ready for action date such that the commissioners can properly notice and conduct public meeting pursuant to N.R.S. 533.363(4). This would allow the general public to lodge protests in addition to the commissioner recommendations which may be provided for consideration by the State Engineer. **WITHDRAWN**

4. Churchill County is a major producer of renewable geothermal power. Federal and State studies have identified Churchill County and the areas around and including basin 101 as the state of Nevada's leading area for future geothermal production. Additionally waters from the Truckee River and Lahontan are used to produce renewable Hydroelectric power. Geothermal royalties, hydroelectric power sales and taxes associated with production of geothermal energy have a significant impact on the Churchill County economy. Any long term reduction of river flows and ground water recharge in Churchill County has potential long term impact on production of renewable hydroelectric and geothermal energy and will harm the communities and state agencies which benefit from said energy production and use. **WITHDRAWN**

5. The Newlands Project is managed by TCID and the Bureau of Reclamation (BOR) and consists of the Truckee Division, served entirely from the Truckee River via the Truckee Canal, and the Carson Division which is served by commingled Truckee and Carson waters downstream

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[30] Exhibit No. 102.

of Lahontan reservoir. The entire Carson Division is contained within Churchill County and the Swingle Bench and Hazen portions of the Truckee Division are within Churchill County, therefore nearly all the Project is contained within Churchill County. Therefore, any agreements with TCID ultimately affect Churchill County and its residents.

6. The water rights sought to be changed under this application arise from the Truckee River Agreement (TRA) which TCID is party and ultimately incorporates Churchill County residents. This agreement is incorporated into the Orr Ditch Decree and granting the application would violate the compromise reached in the TRA that allowed the Orr Ditch Decree to be entered. The application attempts to effect a unilateral change to the Orr Ditch Decree by changing the TRA, without consent, approval or notice and attempts to modify the Decree without the approval of the Orr Ditch Court. Claim 3 of Orr Ditch specifically identified Newlands Project waters to be used for M&I uses which Churchill and Fallon have come to rely upon.

7. The Application proposes that the beneficial places of use will be set forth in secondary applications consistent with TROA. TROA is still in the environmental review process. The deadline for implementing TROA is 2009 which is rapidly approaching and there are still a number of issues to be negotiated. There have been endless delays to the implementation of TROA and there is no guarantee that it will be implemented. Further, the Application fails to adequately identify a specific project where the water will be applied for beneficial use. The Applicant has not demonstrated feasibility of beneficial use of the water, therefore, the Application is premature and speculative.

8. The Truckee River Agreement and Orr Ditch Decree Control the Distribution and Storage of Water in the Truckee River Basin. The TRA is incorporated into the Orr Ditch Decree as part of the decree itself. See U.S. v. Orr Water Ditch Company, CV-N-73-0003 LDG at p. 86. The TRA sets forth the principles under which the Truckee River would be operated and allowed for the stipulated entry of the Orr Ditch Decree. The parties to the Truckee River Agreement are: The United States of America; Truckee-Carson Irrigation District; Washoe County Water Conservation District (Conservation District); Sierra Pacific Power Company (Sierra), and such other users of the waters of the Truckee River and/or its tributaries, known as Parties of Fifth Part. The TRA required the Truckee River to be operated on the basis of Floriston Rates, as established in the 1915 General Electric Decree. United States v. The Truckee River General Electric Company, Case No. 14861 (N.D. Cal. 1915). For the last 70 years, the Truckee River has been managed by the parties to the TRA, along with the Federal Water Master. Several new reservoirs have been added to the Truckee River watershed that did not exist when the TRA was executed. These reservoirs are part of the Washoe Project and include Prosser Reservoir and Stampede Reservoir. These reservoirs are managed in conjunction with the other reservoirs serving the Truckee River basin. The Applicant has failed to show that the proposed diversion and use of water is consistent with the management regime of the Truckee River as set forth in the Truckee River Agreement and the Orr Ditch Decree. Moreover, any unused water in the Truckee River is to the benefit of the Conservation District and TCID. Attempts to alter the division of unused water are in violation of the TRA and undermine the Orr Ditch Decree.

9. The proposed storage and secondary use under TROA of the water proposed in the Application (in conjunction with the other similar applications filed for upstream storage) will

interfere with the management of Floriston Rates on the Truckee River. Floriston Rates are defined in the TRA as the rate of flow in the Truckee River as measured at the Iceland Gage, consisting of an average flow of 500 cubic feet per second (cfs) each day during the year commencing March 1 and ending September 30 of any year and an average flow of 400 cfs each day from October 1 to the last day of February of the next year. Water in Lake Tahoe must also be released as required under the TRA to maintain Floriston Rates. The TRA sets limitations on when Floriston Rates can be changed and requires that before that can occur, the permission of the Conservation District, TCID and Sierra must be obtained. In addition, the United States and TCID must agree pursuant to their rights under the 1915 GE Decree. Releases from Boca Reservoir can also be used to make up Floriston Rates if the parties agree, including TCID. The TRA also calls for Reduced Floriston Rates under certain conditions that would also potentially be impacted by the proposed change. The proposed change applications purport to alter the TRA in violation of the aforementioned agreement. Reduction in Floristan [sic] Rates for the benefit of upstream storage for M&I drought protection and growth within the Truckee Meadows Water Authority (TMWA) service areas has the potential to reduce the amount of water available for diversion at Derby Dam.

10. Washoe Project reservoirs includeing [sic] Prosser Reservoir and Stampede Reservoir, must also be operated based on Floriston Rates. The operation of these reservoirs would also be altered to the detriment of the Newlands Project under the proposed change applications.

11. The Application fails to adequately indentify the beneficial use of the water, the specific place of use, or a specific project where the water will be applied for beneficial use. The proposed place of use for the applications will be subsequently "set forth in applications for secondary permits consistent with the Truckee River Operating Agreement." The Applicant has not demonstrated feasibility of beneficial use of the water; therefore, the Application is premature and speculative. **WITHDRAWN**

12. The granting of this Application would injure existing water rights adjudicated in the Orr Ditch Decree, and under the Decree such a transfer cannot be approved if it will cause injury to an existing right under the decree. Potential uses under TROA for fish credit water will injure Newlands water users. The historic use of this water was for irrigation, which provided for return flows which could be beneficially used by Newlands farmers. Likewise, the current use of this water for municipal and domestic provides substantial return flows. However, uses under TROA for fish water do not provide return flows resulting in injury to Newlands Project farmers, especially in years of drought.

13. This Application along with other numerous similar applications filed by TMWA/Reno/Sparks are actually joint applications for storage of the consumptive portion and direct diversion of full diversion rate, which violates NRS 533.330 wherein an application must be limited to one source for one purpose. **WITHDRAWN**

14. The Applicant has not demonstrated that the proposed water can be stored in the reservoirs without displacing water that would otherwise be stored to the benefit of the Newlands Project. Since nearly the entire Newlands Project is contained within Churchill County, any

reduction in Newlands produces direct harm to health, welfare and future of Churchill's economy and residents.

15. The Application fails to provide a full understanding of the proposed change. Because negotiations for TROA are ongoing, the agreement has not been finalized, and the Draft environmental impact statement/environmental impact report ("DEIS/EIR") has not been certified the Application is inadequate pursuant to NRS 533.345 wherein any application to change the place of diversion, manner of use, or place of use must contain "...such information as may be necessary to a full understanding of the proposed change." This is particularly true because the applications for secondary permits have not been filed and the potential impacts cannot be fully understood until TROA is finalized, if at all, and the beneficial uses and places of use are identified. It is noted that such secondary permits are not published in accordance with NRS 533.440 and thus, even though the actual points of diversion and the source of such diversions are not shown in the Application, the Applicant(s) are attempting to bypass the notice provisions, thus shifting the burden to potential protestants to monitor application filings for the subsequent secondary permits and file additional protests at that time.

16. Exhibit D of the Application describes the intent to store only the consumptive use portion of the water right and includes incomplete and vague language that the consumptive use portion shall be at least 2.5af/ac. This is problematic for two reasons. First, it appears the language is vague to allow the Applicant at some later time to attempt to increase the storage rate beyond the specified 2.5 acre feet per acre. If the Application is approved, it should specify that "the consumptive use portion shall not exceed the actual consumptive use portion of the water right, as determined by the State Engineer." The actual consumptive use under the decreed use of the base rights will vary from year to year depending upon climatic conditions, irrigation season, drought and other factors, therefore the historic consumptive use may be less than 2.5 af/ac in some years. A historic consumptive use analysis needs to be conducted and imposed annually on any waters to be stored under TROA. Second, the Application (and in many instances the underlying permits and certificates) does not expressly state the number of acres to be used in determining the storage quantity under each right. The Application should specifically state the number of acres associated with the underlying water right. Moreover, the Application does not state the actual amount of water in acre feet that will be stored in the reservoirs, making the Application defective.

17. The Application for "Primary Storage" and "Secondary Uses" will dramatically alter the flow regime of the Truckee River with potential injury to Newlands Project water right owners. The Application specifies the proposed period of use as January 1 to December 31 of each year, whereas the existing period of use is generally "as decreed." The underlying water rights for the claims in the Orr Ditch Decree were originally used for irrigation purposes, thus the historical diversion pattern was on an irrigation pattern. The Orr Ditch Decree does not specify a prescribed irrigation season rather it is purposely left open to allow for flexibility in changing hydrologic conditions. Although the prior change permit was issued without restricting the municipal use to a historical diversion pattern, the permits generally contain language to the effect that the permit is issued subject to the terms and conditions of the Orr Ditch Decree and "with the understanding that no other rights on the source [Truckee River] will be affected by the change proposed herein." Further, the prior change permit was issued allowing municipal and

domestic uses for a period of use specified "as decreed." Year-round use of water historically used on an irrigation pattern may cause injury to downstream rights and that proposed storage of these rights increases the potential for injury to downstream rights. If the Applicant is allowed to store these water rights in the non-irrigation season with subsequent releases for municipal use or for conversion to fish water, the regime of the Truckee River will be dramatically altered resulting in potential injury to existing water right owners. The proposed period of use should be restricted to the "irrigation season" as determined each year by the Federal Water Master.

18. The amount diverted (either into storage or by direct diversion) should be restricted to the 25 percent maximum monthly amount in accordance with the Orr Ditch Decree.

19. The Application is defective because there is no information provided regarding the releases and use of the stored water and thus the potential injury or impacts cannot be ascertained.

20. It is understood from review of the TROA DEIS/EIR that the stored water will be used as (1) subsequent municipal releases and diversions or (2) the expanded uses under TROA to include conversion to fish water, releases for minimum instream flows, and releases for the broader lower Truckee River streamflow objectives. Any subsequent releases of the stored water should be subject to reservoir evaporation and seepage losses as well as river conveyance losses to the new point of diversion in order to prevent such losses from being incurred by the Newlands Project.

21. By diverting water and storing it in up stream [sic] reservoirs, the Application is keeping water out of the river to the detriment of other water right holders, particularly in years of drought. The Truckee Division is entirely dependent upon the flows diverted at Derby and the Carson Division is heavily dependent upon those flows especially during drought periods. Further, agreements would be required with users of both Truckee and Carson River waters for modification of certain established water rights. No such agreement has been obtained.

22. The purported Application will negatively impact Hydrographic Basin 87 and 101. The flow of the Truckee River is hydrologically connected to all the groundwater basins it flows through. By storing water in upstream reservoirs that normally flowed in the river and ditch systems, the Application (in conjunction with the other similar applications filed for upstream storage) will negatively impact recharge of Hydrographic Basin 87 and 101. Further, TMWA currently utilized Hydrographic Basin 87 as a source of substantial water which is pumped from the basin. By storing water up-stream they are in effect utilizing the water twice to the detriment to other water users whose water will now recharge the basin, especially in times of drought. Removing this water from the basin prevents it from partially recharging the aquifer. Well pumping then must use other groundwater that is hydrographically connected to the Truckee River, thus affecting flows in the river for downstream users. Basins 87 & 101 are designated by the State Engineer under Chapter 534 of the NRS, and moving surface water from the basin will have a detrimental effect on the groundwater. Furthermore, in 1995, the State Engineer issued Order #1116 associated with Basin 101 which curtailed underground appropriations to 4,000 gallons per day. This order was based upon recognition that the annual recharge to ground water aquifers in Basin 101 from irrigation will be significantly reduced by changes in the operation of

the Project, reduction in diversion to the Project, and retirement of significant irrigated acreage through the Lahontan Wetlands buy-out of irrigation rights.

23. The application is premature, speculative, and detrimental to the public interest as there are a number of conditions that must occur before the water may be utilized as proposed in the application, including: (1) no permanent agreement to store water in the named reservoirs, (2) no permission to store water in Donner Lake from TCID, (3) TROA has not been finalized, and (4) the California State Water Resource Control Board has not issued permits to store this water under California law. Nevada law mandates that the State Engineer either approves or denies an application, and an application can not be contingent on subsequent conditions. NRS 533.370. At this time there is insufficient information for the State Engineer to act.

24. The Applicant intends with the secondary use, to use the water below the current point of diversion. Any secondary use below the original point of diversion should be treated as a new application with a priority date as of the date of the change application to prevent injury to existing water right owners. Further, the Applicant has no right to divert and use water at diversion points outside of Truckee Meadows. Moreover, a change in the point of diversion downstream will have a negative effect on upstream and downstream users.

25. The amount of duty shown on the Application is more than the consumptive use portion. If approved, the Application should be limited to the actual consumptive use portion based on a historical consumptive use analysis. This determination should be made annually based upon the condition of the water year. For example, under a decreed use during extreme drought, the decreed use may be cut off in June therefore the consumptive use would be well below 2.5 af/ac. Storage of 2.5 af/ac under this scenario would cause a depletion to the river beyond the historic decreed use.

26. Since the full scope of this project is unknown and referenced subsequent secondary recovery applications will be filed which are not published, Churchill County reserves the right to add or amend this Protest as more information becomes available.

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

a.) Assure that all irrigated lands and residual acreage associated with prior transfers do not receive any Truckee River water either inadvertently or directly.

b.) The diversion shall be according to a new priority based on the date of the underlying change application.

c.) The period of use for the first diversion either into storage or for direct diversion at the water treatment plants must be restricted to the irrigation season specified by the Federal Water Master.

d.) The first diversion either into storage or for direct diversion must be restricted to the 25 percent maximum monthly amount in accordance with the Orr Ditch Decree.

e.) The consumptive use portion to be stored in the reservoirs shall not exceed the historical actual consumptive use portion of the water right as determined by the State Engineer, calculated based on a specified number of acres provided in the permit on an annual basis based upon hydrologic conditions for that year.

f.) The non-consumptive use portion shall remain in the river to protect the historical flow regime of the Truckee River.

g.) Any subsequent releases of the stored water shall be subject reservoir evaporation and seepage losses as well as river conveyance losses to the new point of diversion in order to prevent such losses being incurred by downstream users.

h.) Proposed accounting forms shall be approved by the State Engineer and the Federal Water Master tracking by right and priority amounts of water including but not limited to diversion to storage, direct diversion, exchanges, conversion to fish water, subsequent reservoirs releases, reservoir losses, and river conveyance losses.

i.) Conditions to insure that the proposed storage of water can be stored in the reservoirs without displacing water that would otherwise be stored to the benefit of the Newlands Project.

j.) NRS 533.440(1) provides that there is no notice requirements for secondary permits. Here, the unknown and speculative nature of the secondary uses in the application could result in injury to other water right owners. Therefore, there should be a specific notice requirement for secondary uses with this Application, if approved.

k.) The transportation component of the water should be stored in Lake Tahoe for use by other water owners entitled to diversions under the Orr Ditch Decree.

l.) The permit is issued subject to the terms and conditions of the Orr Ditch Decree and with the understanding that no other rights on the source Truckee River will be affected by the change proposed.

m.) The permit is issued subject to uses for a period of use specified "as decreed."

APPENDIX C

PROTESTS OF CITY OF FALLON[31]

1. The Application, if granted, would be contrary to and violate the Act [Truckee-Carson-Pyramid Lake Settlement Act, P.O. 101-618, 104 Stat. 3289, November 16, 1990], including but not limited to Section 210(b)(13) because it would conflict with vested and perfected water rights of the City of Fallon and other Newlands Project water right owners by reducing waters appropriated to and necessary under the Orr Ditch Decree for diversion to the Newlands Project and will further violate the Act by breaching the TRA.

2. The granting of this application would conflict with, injure and impair existing vested and permitted groundwater rights owned by the City of Fallon which supply its municipal water system upon which its 9,100 residents rely, specifically including but not limited to Permit Nos. 19859, 19860, 26168, 40869 and 55507.

3. Because the proposed use of the water in this Application conflict with existing rights, granting this Application would per se be detrimental to the public interest of the State of Nevada.

4. The Application, if granted, would be detrimental to the public interest of the State of Nevada because it would reduce water available to supply existing Orr Ditch Decree water rights, including the City's Newlands Water Rights, for use upon lands within the Newlands Project, said lands being the aquifer recharge areas for the City of Fallon's municipal water utility system, consequently depleting the groundwater supply from which the City of Fallon's above described appropriated Nevada groundwater rights rely to supply its residents drinking water.

5. The Application, if granted, would present a hazard and danger to the health, safety and welfare of the residents of the City of Fallon and the surrounding community at large because it would jeopardize the sole drinking water supply of the City's 9,300 residents, said result being directly contrary to the public interest of the State of Nevada to enhance public municipal drinking water supplies. Pyramid Lake Pauite [sic] Tribe of Indians v. Washoe County, 112 Nev. 743, 918 P.2d 699 (1996).

7. Any change the compromise reached by the parties to the TRA requires the consent of the parties to that agreement, which on information and belief, consent is withheld by TCID.

8. The Application is defective because it attempts to effect a unilateral modification to the Orr Ditch Decree by changing the TRA, without consent, approval or notice, and attempts to modify the Orr Ditch Decree without approval of the Orr Ditch Court.

9. The Application proposes that the places of beneficial use will be set forth in applications for secondary permits consistent with the proposed TROA. TROA is still in the environmental review process and there is no guarantee that it will be approved by the parties, and more importantly as an acceptable modification to the Orr Ditch Decree. Further, the Application fails

[31] Exhibit No. 104.

to adequately identify a specific project where the water will be applied for beneficial use. The Applicant has not demonstrated feasibility of beneficial use of the water, therefore, the Application is premature and speculative.

10. The Applicant may not use Boca Reservoir or Lake Tahoe water as proposed in the Application. These water bodies are subject to the terms of the TRA, by which TMWA, a successor to Sierra, is bound.

11. On information and belief, the proposed storage and secondary use under TROA of the water proposed in the Application (in conjunction with the other similar applications filed for upstream storage) will interfere with the management of Floriston Rates on the Truckee River. Floriston Rates are defined in the TRA as the rate of flow in the Truckee River as measured at the Iceland Gage, consisting of an average flow of 500 cubic feet per second (cfs) each day during the year commencing March 1 and ending September 30 of any year and an average flow of 400 cfs each day from October 1 to the last day of February of the next year. Water in Lake Tahoe must also be released as required under the TRA to maintain Floriston Rates. The TRA sets limitations on when Floriston Rates can be changed and requires that before that can occur, the permission of the Conservation District, TCID and Sierra must be obtained. In addition, the United States and TCID must agree pursuant to their rights under the 1915 GE Decree. Changes in the flow from Boca Reservoir requires the consent of TCID. The TRA also calls for Reduced Floriston Rates under certain conditions that would also potentially be impacted by the proposed change. The proposed change applications purport to alter the TRA in violation of the aforementioned agreement.

12. All Washoe Project reservoirs, include Prosser Reservoir and Stampede Reservoir, must also be operated based on Floriston Rates. The operation of these reservoirs would also be altered to the detriment of water right owners in the Newlands Project including the City of Fallon under the proposed change applications.

13. The proposed Application fails to adequately indentify the beneficial use of the water, the specific place of use, or a specific project where the water will be applied for beneficial use. The proposed place of use for the applications will be subsequently "....set forth in applications for secondary permits consistent with the Truckee River Operating Agreement." The Applicant has not demonstrated feasibility of beneficial use of the water; therefore, the Application is premature and speculative.

14. Granting of this Application would injure existing water rights adjudicated in the Orr Ditch Decree, and under the Orr Ditch Decree such a transfer cannot be approved if it will cause injury to an existing right under the decree. Potential uses under TROA for fish credit water will injure Newlands water users. The historic use of this water was for irrigation, which provided returns flows which could be beneficially used by Newlands water users and the City of Fallon's use of said recharge water for its municipal water supply. Proposed uses under TROA for fish water do not provide return flows resulting in injury to Newlands Project water right owners including the City of Fallon, especially in years of drought.

15. This Application along with other numerous similar applications filed by TMWA/Reno/Sparks are actually joint applications pursuant to the TROA for storage of the consumptive portion and direct diversion of full diversion rate, which violates NRS 533.330 wherein an application must be limited to one source for one purpose. Moreover all these TROA applications must be analyzed together in an environmental and/or hydrologic study pursuant to N.R.S. 533.368.

16. The Application incorrectly names the source of the water and fails to designate a point of diversion. NRS 533.440(2) specifies "the application shall refer to the reservoir for a supply of water." The Application does not specify the named reservoirs in Exhibit B as the "supply," rather the reservoirs are named as points of diversion, the source of supply for the Applications is actually tributaries to the Truckee River. The point of diversion cannot be a storage facility.

17. The Application fails to provide evidence of sufficient capacity in the named reservoirs or the existence of agreements for the storage of water. NRS 533.440(2) specifies "the application ... shall show by documentary evidence that an agreement has been entered into with the owner of the reservoir for a permanent and sufficient interest in such reservoir to impound enough water for the purpose set forth in the application." No such evidence has been provided in the Application regarding sufficient capacity in each reservoir and no evidence has been provided to demonstrate that permanent storage agreements have been entered into with the United States. Likewise, TCID has not given Applicant permission to store credit storage or exchange water in Donner Lake, Lake Tahoe, or Boca Reservoir.

18. The Applicant has provided no evidence of a permanent water right to store the subject water under California law. They propose to divert water from a point in which they have no right or control. The water rights change petitions submitted to the California State Water Resources Control Board by the United States/TMWA/Washoe County Water Conservation District for credit storage under TROA in Prosser Reservoir, Boca Reservoir, Stampede Reservoir, and Independence Lake as well as the two water rights applications for increasing the storage at Prosser Reservoir and Stampede Reservoir are still pending. Thus, the Application is premature and speculative.

19. The Applicant has not demonstrated that the proposed water can be stored in the reservoirs without displacing water that would otherwise be stored to the benefit of the Newlands Project under the Orr Ditch Decree.

20. The Application fails to provide a full understanding of the proposed change. Because negotiations for TROA are ongoing, the agreement has not been finalized, and the Draft environmental impact statement/environmental impact report ("DEIS/EIR") has not been certified the Application is inadequate pursuant to NRS 533.345 wherein any application to change the place of diversion, manner of use, or place of use must contain "....such information as may be necessary to a full understanding of the proposed change." This is particularly true because the applications for secondary permits have not been filed and the potential impacts cannot be fully understood until TROA is finalized, if at all, and the beneficial uses and places of use are identified. It is noted that such secondary permits are not published in accordance with NRS 533.440 and thus, even though the actual points of diversion and the source of such

diversion are not shown in the Application, the Applicant(s) are attempting to bypass the notice provisions, thus shifting the burden to potential protestants to monitor application filings for the subsequent secondary permits and file additional protests at that time.

21. Exhibit D of the Application describes the intent to store only the consumptive use portion of the water right and includes incomplete and vague language that the consumptive use portion shall be at least 2.5 acre feet per acre. This is problematic for two reasons. First, it appears the language is vague to allow the Applicant at some later time to attempt to increase the storage rate beyond the specified 2.5 acre feet per acre. If the Application is approved, it should specify that "the consumptive use portion shall not exceed the actual consumptive use portion of the water right, as determined by the State Engineer." Second, the Application (and in many instances the underlying permits and certificates) does not expressly state the number of acres to be used in determining the storage quantity under each right. The Application should specifically state the number of acres associated with the underlying water right. Moreover, the Application does not state the actual amount of water in acre feet that will be stored in the reservoirs, making the Application defective.

22. The Application for "Primary Storage" and "Secondary Uses" will dramatically alter the flow regime of the Truckee River with potential injury to Newlands Project water right owners including the City of Fallon. The Application specifies the proposed period of use as January 1 to December 31 of each year, whereas the existing period of use is generally "as decreed." The underlying water rights for the claims in the Orr Ditch Decree were originally used for irrigation purposes, thus the historical diversion pattern was on an irrigation pattern. The Orr Ditch Decree does not specify a prescribed irrigation season rather it is purposely left open to allow for flexibility in changing hydrologic conditions. Although the prior change permit was issued without restricting the municipal use to a historical diversion pattern, the permits generally contain language to the effect that the permit is issued subject to the terms and conditions of the Orr Ditch Decree and "with the understanding that no other rights on the source [Truckee River] will be affected by the change proposed herein." Further, the prior change permit was issued allowing municipal and domestic uses for a period of use specified "as decreed." Year-round use of water historically used on an irrigation pattern may cause injury to downstream rights and that proposed storage of these rights increases the potential for injury to downstream rights. If the Applicant is allowed to store these water rights in the non-irrigation season with subsequent releases for municipal use or for conversion to fish water, the regime of the Truckee River will be dramatically altered resulting in potential injury to existing water right owners. The proposed period of use should be restricted to the "irrigation season" as determined each year by the Federal Water Master.

22. The amount diverted (either into storage or by direct diversion) should be restricted to the 25 percent maximum monthly amount in accordance with the Orr Ditch Decree. See United States v. Orr Water Ditch Company, CV-N-73-0003 LDG at p. 88.

23. The Application is defective because there is no information provided regarding the releases and use of the stored water and thus the potential injury or impacts cannot be ascertained.

24. It is understood from review of the TROA DEIS/EIR that the stored water will be used as (1) subsequent municipal releases and diversions or (2) the expanded uses under TROA to include conversion to fish water, releases for minimum instream flows, and releases for the broader lower Truckee River streamflow objectives. Any subsequent releases of the stored water should be subject to reservoir evaporation and seepage losses as well as river conveyance losses to the new point of diversion in order to prevent such losses from being incurred by owners of water rights in the Newlands Project including the City of Fallon.

25. By diverting water and storing it in up-stream reservoirs, the Application seeks to keep water out of the Truckee River to the detriment of other water right holders, particularly in years of drought in direct violation of the Orr Ditch Decree. Agreements for such diversions out of the Truckee River would be required not only with water right owners on both Truckee and Carson River waters but modification of the Orr Ditch Decree and the Alpine Decree would be necessary of certain established water rights.

26. Storage in up-stream reservoirs is to the detriment of Lake Tahoe. The water which is the subject of the Application, which would otherwise be credited into storage in Lake Tahoe, will result in an artificial decrease in the Lake Tahoe levels, adversely affecting the City of Fallon's water rights under Claims No. 3 and 4 of the Orr Ditch Decree. Further storage in up-stream reservoirs is counter to the Act which states that the operating agreement (now proposed TROA) may include "methods to diminish the likelihood of Lake Tahoe dropping below its natural rim ..." Approval of the Application would have the exact opposite effect.

27. On information and belief, the purported Application will negatively impact Hydrographic Basin 87. The flow of the Truckee River is hydrographically linked to underground water. By storing water in upstream reservoirs that normally flowed in the river, the Application (in conjunction with the other similar applications filed for upstream storage) will negatively impact recharge of Hydrographic Basin 87. Further, TMWA currently utilizes Hydrographic Basin 87 as a source of substantial water which is pumped from the basin. By storing water up-stream they are in effect utilizing the water twice to the detriment to other Orr Ditch Decree water right owners including the City of Fallon whose waters flowing in the Truckee River for delivery into the Newlands Project will now instead be depleted through recharge to Basin 87, especially in times of drought. Removing this water from Basin 87 prevents it from partially recharging the aquifer. Well pumping then must use other groundwater that is hydrographically connected to the Truckee River, thus affecting flows in the river for downstream users.

28. Based on information and belief, the Applicant will divert a portion of their surface water rights that historically go to recharge Hydrographic Basin 87 to the named upstream reservoirs. This will unreasonably lower the water table resulting in injury to others who have wells in the Truckee Meadows. The State Engineer must take into account whether the proposed change conflicts with protectable interests in existing domestic wells as set forth in NRS 533.370(5). These wells must then draw water that is hydrographically connected to the Truckee River, thus adversely affecting downstream water right owners including the City of Fallon.

29. Basin 87 is designated by the State Engineer under Chapter 534 of the NRS, and moving surface water from the basin will have a detrimental effect on the groundwater.

30. The application is premature, speculative, and detrimental to the public interest as there are a number of conditions that must occur before the water may be utilized as proposed in the application, including: (1) no permission from the Orr Ditch Court to modify the Decree or the TRA, (2) no permanent agreement to store water in the named reservoirs, (3) no permission to store water in Donner Lake from TCID, (4) TROA has not been finalized, and (5) the California State Water Resource Control Board has not issued permits to store this water under California law. Nevada law mandates that the State Engineer either approves or denies an application, and an application can not be contingent on subsequent conditions. NRS 533.370. At this time there is insufficient information for the State Engineer to act.

31. On information and belief, Applicant intends with the secondary use to use the water below the current point of diversion. Any secondary use below the original point of diversion should be treated as a new application with a priority date as of the date of the change application to prevent injury to existing water right owners. Further, the Applicant has no right to divert and use water at diversion points outside of Truckee Meadows. Moreover, a change in the point of diversion downstream will have a negative effect on upstream and downstream users.

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

33. Upon information and belief, the proposed change Application will violate the agreement between Sierra and TCID.

34. The amount of acreage shown on the Application is more than the consumptive use portion. If approved, the Application should limited to the actual consumptive use portion.

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

a. Assure that all irrigated lands and residual acreage associated with prior transfers do not receive any Truckee River water either inadvertently or directly.

b. The diversion shall be according to a new priority based on the date of the underlying change application.

c. The period of use for the first diversion either into storage or for direct diversion at the water treatment plants must be restricted to the irrigation season specified by the Federal Water Master.

d. The first diversion either into storage or for direct diversion must be restricted to the 25 percent maximum monthly amount in accordance with the Orr Ditch Decree.

e. The consumptive use portion to be stored in the reservoirs shall not exceed the actual consumptive use portion of the water right as determined by the State Engineer, calculated based on a specified number of acres provided in the permit.

f. The non-consumptive use portion shall remain in the river to protect the historical flow regime of the Truckee River.

g. Any subsequent releases of the stored water shall be subject to reservoir evaporation and seepage losses as well as river conveyance losses to the new point of diversion in order to prevent such losses being incurred by downstream users.

h. Proposed accounting forms shall be approved by the State Engineer and the Federal Water Master tracking by right and priority amounts of water including but not limited to diversion to storage, direct diversion, exchanges, conversion to fish water, subsequent reservoirs releases, reservoir losses, and river conveyance losses.

i. Conditions to insure that the proposed storage of water can be stored in the reservoirs without displacing water that would otherwise be stored to the benefit of the Newlands Project.

j. NRS 533.440(1) provides that there is no notice requirements for secondary permits. Here, the unknown and speculative nature of the secondary uses in the application could result in injury to other water right owners. Therefore, there should be a specific notice requirement for secondary uses with this Application, if approved.

k. The transportation component of the water should be stored in Lake Tahoe for use by other water owners entitled to diversion under the Orr Ditch Decree.

l. The permit is issued subject to the terms and conditions of the Orr Ditch Decree and with the understanding that no other rights on the source Truckee River will be affected by the change proposed.

m. The permit is issued subject to uses for a period of use specified "as decreed."

40. Since the full scope of this project is unknown and referenced subsequent secondary recovery applications will be filed which are not published, the City of Fallon reserves the right to add or amend this Protest as more information becomes available.

41. On information and belief, the water rights at issue have been abandoned or forfeited due to non use.