

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

IN THE MATTER OF APPLICATIONS 47047,)
47121, 47209, 47264, 48061 AND 48494)
FILED TO APPROPRIATE THE WATERS OF THE)
TRUCKEE RIVER AND ITS TRIBUTARIES)
WASHOE COUNTY, NEVADA)

RULING

4683

GENERAL

I.

Application 47047 was filed on July 1, 1983, by the Sierra Pacific Power Company ("SPPC") to appropriate 175.0 cubic feet per second (cfs) of water from the Truckee River for domestic and municipal purposes within the SPPC service area. The proposed point of diversion is described as being located at the Glendale Treatment Plant.¹ The application indicates it was filed to appropriate "any presently unappropriated water and any water which may become available for appropriation in the future."

Application 47047 was timely protested by the Pyramid Lake Paiute Tribe ("PLPT") on the grounds that: (1) the application failed to provide information required by NRS § 533.340(3) in that it did not specify the approximate number of persons to be served and the future requirement; (2) there is no unappropriated water in the Truckee River since the Tribe claims a right to all the unappropriated water with a priority date of 1859 based on the United States Supreme Court decision in Nevada v. U.S.; (3) existing unappropriated flows of the Truckee River are essential to the preservation of the endangered Cui-ui and threatened Lahontan Cutthroat Trout, thus, to permit the application would be a violation of the Endangered Species Act; and (4) since Reno and Sparks are not required to meter water use in those communities they are using more water than they beneficially need and until SPPC can demonstrate it can make beneficial use of the water rights it now holds, and demonstrate a need for additional water based

¹ Exhibit No. 6, public administrative hearing before the State Engineer, March 29-30, 1994, May 31-June 2, 1994, and January 31-February 2, 1996. (Hereinafter "Exhibit No.".)

upon the beneficial use requirement, no application should be granted.²

II.

Application 47121 was filed on August 4, 1983, by the Washoe County Department of Public Works, Sanitation Division ("WCDPW") to appropriate 9,000 cfs of water from the Truckee River for quasi-municipal purposes. The proposed place of use is in Pyramid Lake on unsurveyed land lying within the Pyramid Lake meander line, and on unsurveyed land within Washoe County south of the 5th standard parallel, which is the north line of Township 25 North, M.D.B. & M. The proposed point of diversion is described as being located within the NW¼ NW¼ of Section 17, T.20N., R.24E., M.D.B. & M.³ The application indicates it is filed for an approximate future requirement of a total consumptive use of 512,000 acre-feet annually (afa) with the source of the water being flood, waste, tail and other water not previously appropriated and which may become available for appropriation.

Application 47121 was timely protested by the PLPT,⁴ the United States Fish and Wildlife Service ("USFWS")⁵ and the Truckee-Carson Irrigation District ("TCID").⁵ The PLPT's protest was identical to that filed under Application 47047. The USFWS protested the application on grounds that: (1) the unappropriated water is presently being put to beneficial use in Pyramid Lake and is important to the maintenance of Pyramid Lake and the lower Truckee River since these water bodies provide habitat for the Federally endangered Cui-ui and threatened Lahontan Cutthroat Trout; and (2) should the surface elevation of Pyramid Lake decline

² Exhibit No. 19.

³ Exhibit No. 7.

⁴ Exhibit No. 21.

⁵ File No. 47121, official records in the office of the State Engineer.

the pelican rookery at Anaho Island may be lost or greatly reduced.

The TCID protested Application 47121 on the grounds that: (1) there is no unappropriated water in the Truckee River per the United States Supreme Court decision in Nevada v. U.S.; (2) the waters requested for appropriation have been historically diverted and beneficially used by the downstream users and in support of fishery and wildlife areas within the lower reaches of the Truckee and Carson River basins; and (3) a quasi-municipal application for unappropriated flood, waste and tail water is adverse to Washoe County regulations that require a developer to provide a firm year-round water supply in terms of certificated or decreed stream rights.⁵

III.

Application 47209 was filed on August 30, 1983, by the WCDPW to appropriate 175.00 cfs of water from the Truckee River for quasi-municipal purposes. The proposed place of use is within portions of Township 25 North, Ranges 18, 19, 20, 21, 22 and 23 East; Township 24 North, Ranges 18, 19, 20, 21, 22, 23 and 24 East; Township 23 North, Ranges 18, 19, 20, 21, 22, 23, 24 and 25 East; Township 22 North, Ranges 18, 19, 20, 21, 22, 23, 24 and 25 East; Township 21 North, Ranges 18, 19, 20, 21, 22, 23, 24 and 25 East; Township 20 North, Ranges 18, 19, 20, 21, 22, 23, 24 and 25 East; Township 19 North, Ranges 18, 19, 20, 21 and 22 East; Township 18 North, Ranges 18, 19, 20 and 21 East; Township 17 North, Ranges 18, 19, 20 and 21 East; Township 16 North, Ranges 18, 19 and 20 East; and Township 15 North, Ranges 18 and 19 East, M.D.B. & M. The proposed point of diversion is described as being located at the Glendale Treatment Plant.⁶ The application indicates it is filed for an approximate future requirement of a total consumptive use of 126,695 afa with the source of the water being flood, waste, tail and other water not previously appropriated and which may become

⁶ Exhibit No. 8.

available for appropriation.

Application 47209 was timely protested by the PLPT⁷ on grounds identical to those recited above with regard to Applications 47047 and 47121. Application 47209 was timely protested by the USFWS⁸ on grounds identical to those recited above with regard to Application 47121.

IV.

Application 47264 was filed on September 21, 1983, by the WCDPW to appropriate 175.00 cfs of water from the Truckee River for quasi-municipal purposes. The proposed place of use is within portions of Township 25 North, Ranges 18, 19, 20, 21, 22 and 23 East; Township 24 North, Ranges 18, 19, 20, 21, 22, 23 and 24 East; Township 23 North, Ranges 18, 19, 20, 21, 22, 23, 24 and 25 East; Township 22 North, Ranges 18, 19, 20, 21, 22, 23, 24 and 25 East; Township 21 North, Ranges 18, 19, 20, 21, 22, 23, 24 and 25 East; Township 20 North, Ranges 18, 19, 20, 21, 22, 23, 24 and 25 East; Township 19 North, Ranges 18, 19, 20, 21 and 22 East; Township 18 North, Ranges 18, 19, 20 and 21 East; Township 17 North, Ranges 18, 19, 20 and 21 East; Township 16 North, Ranges 18, 19 and 20 East; and Township 15 North, Ranges 18 and 19 East, M.D.B. & M. The proposed point of diversion is described as being located at the Glendale Treatment Plant.⁹ The application indicates it is filed for an approximate future requirement of a total consumptive use of 126,695 afa with the source of the water being flood, waste, tail and other water not previously appropriated and which may become available for appropriation.

⁷ Exhibit No. 23.

⁸ Exhibit No. 22.

⁹ Exhibit No. 9.

Application 47264 was timely protested by the PLPT¹⁰ on grounds identical to those recited above with regard to Applications 47047 47121, and 47209. Application 47264 was timely protested by the USFWS¹¹ on grounds identical to those recited above with regard to Applications 47121 and 47209.

V.

Application 48061 was filed on May 25, 1984, by the PLPT to appropriate a maximum of 3,000 cfs of the water of the Truckee River and its tributaries. The place of use is described as being the Truckee River downstream of Derby Dam, including the Marble Bluff Dam, the Pyramid Lake Fishway and Pyramid Lake within Section 19, the N½ of Section 20, Section 21, Section 22, the N½ of Section 23, the SE¼ of Section 14, and the S½ of Section 13, all within T.20N., R.23E.; Section 18, the NW¼ of Section 17, the S½ of Section 8, Section 9, the SE¼ of Section 4, and the W½ of Section 3, all within T.20N., R.24E.; the SW¼ of Section 34, the E½ of Section 33, the SE¼ of Section 28, Section 27, the E½ of Section 22, Section 15, Section 16, the S½ of Section 9, the E½ of Section 8, and Section 5, all within T.21N., R.24E.; the W½ of Section 32, the E½ of Section 31, the SW¼ of Section 29, Section 30, the W½ of Section 19, the W½ of Section 18, the SW¼ of Section 7, and the SW¼ of Section 6, all within T.22N., R.24E.; the E½ of Section 13, the E½ of Section 12 and Section 1, all within T.22N., R.23E.; Section 36, the SW¼ of Section 25, Section 26, the SW¼ of Section 23, Section 22, the NE¼ of Section 21, Section 15, Section 16 and unsurveyed portions of Section 17, all within T.23N., R.23E., M.D.B. & M.; and all of Pyramid Lake. The proposed point of diversion is described as being located within the SW¼ SE¼ of Section 17, T.23N., R.23E., M.D.B. & M.¹²

¹⁰ Exhibit No. 25.

¹¹ Exhibit No. 24.

¹² Exhibit No. 10.

The application indicates that the first component of the amount of water applied for set forth by month is as follows:

<u>Month</u>	<u>Flow (cfs)</u>	<u>Volume (af)</u>
January	150	9,226
February	150	8,333
March		
Week 1	200	2,778
Week 2	400	5,555
Week 3	500	6,944
Week 4-end of month	600	11,904
April		
Week 1	700	9,722
Week 2	800	11,111
Week 3	1,000	13,888
Week 4	1,500	26,784
May		
Week 1	2,000	27,776
Week 2	2,500	34,720
Week 3	3,000	41,664
Week 4	3,000	59,520
June		
Week 1	3,000	41,664
Week 2	3,000	41,664
Week 3	2,200	30,554
Week 4	2,200	39,284
July	150	9,226
August	150	9,226
September	150	8,928
October	150	9,226
November	150	8,928
December	150	<u>9,226</u>
		477,851 acre-feet annually (afa)

These flows are requested for the recreational purpose of natural spawning of Lahontan Cutthroat Trout and Cui-ui in the Truckee River below Derby Dam, to fulfill the purposes of the establishment of the Pyramid Lake Indian Reservation, to provide sustenance and income for the members of the Tribe, to prevent the loss of and to conserve the endangered Cui-ui and threatened Lahontan Cutthroat Trout, for operation of the Marble Bluff Dam and the Pyramid Lake Fishway in support of that fishery, and to maintain Pyramid Lake at a stable level to support the use of the lake for recreation. The application indicates that a second component of the amount of

water applied for is for the maintenance of the level of Pyramid Lake, for that purpose an average annual inflow of 400,000 acre-feet is required, and to that end it is the applicant's intent to appropriate all of the water in the Truckee River and its tributaries that is not subject to valid existing water rights.

Application 48494 was filed on October 17, 1984, by the PLPT to appropriate a maximum of 3,000 cfs of water from the Truckee River and its tributaries under the same two components described in Application 48061 for recreational purposes located within the same place of use described under Application 48061. The proposed point of diversion is described as being located within the SW¼ SW¼ of Section 15, T.23N., R.23E., M.D.B. & M.¹³

Applications 48061 and 48494 were timely protested by the Carson Truckee Water Conservancy District ("CTWCD"), Washoe County Water Conservation District ("WCWCD"), TCID, DePaoli Brothers, Cities of Reno and Sparks, SPPC, and Washoe County on various grounds recited below. The CTWCD withdrew its protests to the applications on March 9, 1994.¹⁴ The DePaoli Brothers withdrew its protests to the applications on March 30, 1994.¹⁵ These withdrawals leave as protestants to Applications 48061 and 48494 the WCWCD, TCID, Reno/Sparks, SPPC and Washoe County.

The WCWCD protested Applications 48061 and 48494 on the grounds that: (1) there are other superior applications and the subject applications will adversely effect existing and potential rights; (2) it has yet to be determined whether the applicant can use decreed rights or unappropriated water for a fishery; and (3)

¹³ Exhibit No. 11.

¹⁴ File Nos. 48061 and 48494, official records in the office of the State Engineer.

¹⁵ Transcript, p. 187, public administrative hearing before the State Engineer, March 30, 1994. (Hereinafter "Transcript" will refer to the cumulative transcripts of these proceedings from March 29-30, 1994, May 31-June 2, 1994, and January 31-February 2, 1996).

the extent of the need, if any, for unappropriated water is yet to be determined.¹⁶

The TCID protested Applications 48061 and 48494 on the grounds that: (1) the waters of the Truckee River and its tributaries are fully appropriated as decreed in the Orr Ditch Decree; (2) the Orr Ditch Decree does not provide a water right for recreational flows to support a fishery on the lower Truckee River nor flows for the maintenance of the level of Pyramid Lake; and (3) the permitting of the application would result in the over-appropriation of the Truckee River and its tributaries and adversely affect all other decreed water right holders.¹⁷

The Cities of Reno and Sparks protested Applications 48061 and 48494 on the grounds that: (1) the Truckee River is fully appropriated or subject to pending applications which will fully appropriate the river; (2) any water right granted would conflict with and impair existing decrees and existing and potential rights (there are senior pending applications, including the Cities' applications to appropriate effluent water under Applications 29973 and 32954 and the Cities' rights to appropriate this effluent is virtually indisputable); (3) the applications do not comply with NRS § 533.335(3) in that they do not express the quantity desired for appropriation or that the quantity is necessary or reasonably required; (4) the proposed uses are not recognized as recreational or other beneficial uses; (5) instream uses are neither contemplated nor authorized by Nevada law, and there must be a physical diversion of the water; (6) there is no present necessity to appropriate or divert any water for the purposes of the Tribe's proposed uses; (7) the amount of water necessary or reasonably required for the Tribe's proposed uses is zero or unknowable, contingent, and variable so as to preclude the granting of a permit

¹⁶ Exhibit Nos. 28, 34.

¹⁷ Exhibit Nos. 26, 32.

for any identifiable amount (any permit granted should only be for that specific amount necessary or reasonably required); (8) the proposed use would threaten to prove detrimental to the public interest by threatening existing or contemplated activities vital to the economy and governance of the Truckee Meadows, by upsetting predictions and assumptions that underlie long-term planning, and by potentially infringing on the Cities' continued ability to provide crucial public services; (9) the Tribe has waived its right to appropriate water for its claimed uses as any such claims should have been presented to the Federal District Court during the process which decreed the waters of the Truckee River; and (10) any permits issued should require that the right shall remain appurtenant to the place of use and at no time may be severed or changed.¹⁸

The SPPC protested Applications 48061 and 48494 on the grounds that: (1) there are prior and senior applications to appropriate the same water; (2) the amount of water requested is not reasonably required for the applied for beneficial uses; (3) the applied for appropriation and beneficial uses are detrimental to the public interest; (4) the applied for appropriation and beneficial uses would conflict with and impair existing rights and decrees; and (5) the application is vague and not sufficiently specific to determine the amount of water required for the particular purposes indicated.¹⁹

Washoe County protested Applications 48061 and 48494 on the grounds that Washoe County has pending prior applications for the same water consequently there will be no unappropriated water in the source.²⁰

¹⁸ Exhibit Nos. 30, 36.

¹⁹ Exhibit Nos. 27, 33.

²⁰ Exhibit Nos. 31, 37.

VI.

On October 20, 1993, the State Engineer provided notice of a December 1993 public administrative hearing on Applications 47047, 47121, 47209, 47264, 48061 and 48494 and other applications filed to appropriate the waters of the Truckee River. On November 23, 1993, the State Engineer served an amended notice adding Application 9330 filed by the TCID to the hearings calendared. By Notice dated December 3, 1993, the public administrative hearing was continued.²¹

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

By Notice dated April 27, 1994, the State Engineer rescheduled the hearings to resume on May 31, 1994, and to include Applications 29973 and 32954, among others. The public administrative hearings resumed on May 31st through June 2, 1994, and January 31st through February 2, 1996.

VII.

The Truckee River system consists of an interstate river with its headwaters in the Sierra Nevada Mountains. It has storage reservoirs at Lake Tahoe, Stampede Reservoir, Prosser Reservoir, Boca Reservoir, Independence Reservoir and Donner Lake. Waters of the Truckee River pass the California-Nevada state line serving irrigation, power and municipal water rights along the way and then flow into Pyramid Lake, the terminus of the Truckee River. Historic water rights of the Truckee River are the subject of the

²¹ Exhibit No. 1.

Orr Ditch Decree.²²

FINDINGS OF FACT

I.

The State Engineer finds that at the May 31, 1994, administrative hearing an agreement between the SPPC, Washoe County, PLPT, WCWCD, and Cities of Reno and Sparks was introduced into the evidentiary record, and the State Engineer was requested to become a party to the agreement.²³ Pursuant to that agreement, the parties indicated they were desirous of having their applications and related protests resolved in a manner which satisfies the requirements of Section 210(a)(2)(B) of Public Law 101-618, Title II, Truckee-Carson-Pyramid Lake Water Rights Settlement Act ("Settlement Act").

The interstate allocation provided for in Section 210(a)(2)(B) of the Settlement Act provides that the Truckee River Operating Agreement shall not enter into effect until the PLPT's claim to the remaining waters of the Truckee River which are not subject to vested or perfected rights has been finally resolved in a manner satisfactory to the State of Nevada and the PLPT. The parties to the Agreement agreed that the State Engineer could postpone action on Applications 47047, 47121, 47209, 47264, 50561, 50562, and 50563 until after the Truckee River Operating Agreement becomes effective or December 31, 1997, whichever occurs first. The December 31, 1997, date was extended by agreement until December 31, 2001.²⁴

The parties to the Agreement further agreed that the State Engineer could issue a conditional permit to the PLPT under Applications 48061 and 48494. If the Truckee River Operating Agreement is not in effect by December 31, 2001, the conditional

²² Final Decree, U.S. v. Orr Water Ditch Co., In Equity Docket No. A-3 (D. Nev. 1944) ("Orr Ditch Decree").

²³ Exhibit No. 89.

²⁴ Amendment to Exhibit No. 89.

permit terminates, and the PLPT's applications would be heard and considered along with those applications deferred. If the Truckee River Operating Agreement is in effect on or before December 31, 2001, the parties agreed that any conditional permit issued by the State Engineer to the PLPT under Applications 48061 and 48494 could, without any further action, be considered a final permit. The parties also agreed that if the Truckee River Operating Agreement is not in effect by December 31, 2001, the State Engineer shall proceed to hear and decide those applications and protests referenced in the Agreement which had not been previously heard and decided.

The USFWS protested applications that were the subject of the hearing,²⁵ however, the USFWS did not appear at the time and place of the public administrative hearing on those applications. The Nevada Division of Wildlife ("NDOW") protested applications that were the subject of the hearing,²⁶ however, the NDOW also did not appear at the time and place of the public administrative hearing.

Nevada law provides that action can be postponed by the State Engineer in the case of a protested application upon written authorization to do so by both the applicant and the protestant(s).²⁷ The law does not provide for the State Engineer to be a party to such an agreement. The Agreement entered into evidence as Exhibit No. 89 does not include the USFWS, NDOW or TCID as signatories; therefore, the Agreement does not include all the relevant protestants and does not comply with the provisions of Nevada law.

There was some discussion at the administrative hearing as to whether the State Engineer had the authority to issue a conditional permit. The State Engineer finds that Nevada law mandates that he

²⁵ Applications 47121, 47209 and 47264.

²⁶ Applications 50561, 50562 and 50563.

²⁷ NRS § 533.370(2)(a).

either approve or deny an application, however, he can approve an application with conditions.²⁸ He finds nothing in Nevada law that provides for issuing the type of conditional permit envisioned in the Exhibit No. 89 Agreement.²⁹ The law provides that the State Engineer may cancel a permit if the permittee is not proceeding with good faith and due diligence to perfect the appropriation, but it does not provide for the termination of a permit based on future conditions which would result in placing the permit back to the status of an application as was requested by the signatories to the Agreement.

The State Engineer finds he is not a party to the Agreement nor could he be one, it is not binding upon him, it does not comply with Nevada law, and it purports to obligate the State Engineer to a course of action not sanctioned under Nevada law. The State Engineer further finds there is sufficient information before him to act on the applications under consideration in this ruling.

II.

Applications 47047, 47121, 47209 and 47264 were protested by the PLPT on the grounds that the existing unappropriated flows are essential to the preservation of the endangered Cui-ui and threatened Lahontan Cutthroat Trout, thus, to permit the applications would be a violation of the Endangered Species Act. Applications 47121, 47209 and 47264 were protested by the USFWS on the grounds that the unappropriated water is important to the maintenance of Pyramid Lake and the lower Truckee River, and if the surface level of Pyramid Lake declines the pelican rookery at Anaho Island may be lost or greatly reduced. The focus of these protests is that to take additional water away from Pyramid Lake would

²⁸ NRS § 533.370.

²⁹ According to Exhibit No. 89, a "conditional permit" would be in the form of a temporary permit. There is no provision in Nevada law for the State Engineer to issue a temporary permit of the type envisioned by the parties.

threaten to prove detrimental to the public interest.

Since the turn of the century, the elevation of Pyramid Lake has dropped nearly 80 feet³⁰ creating an often impassable delta preventing fish from passing up the Truckee River to spawn in the lower reaches of the river. The Pyramid Lake Cutthroat Trout became extinct sometime between 1938 and 1944.³¹ The Pyramid Lake Cui-ui fish, which today only exists in Pyramid Lake and the lower reaches of the Truckee River, was identified in 1967 as being in danger of extinction under the Endangered Species Preservation Act.³² Restriction of river access and elimination of spawning habitat caused a steady decrease in the size and frequency of Cui-ui spawning runs.³³ In 1966, only three year classes (1942, 1946, and 1950) existed. In 1983, an additional year class (1969) comprised 97% of the spawning run.³⁴ In 1970, the Lahontan Cutthroat Trout was listed as a species in danger of extinction (reclassified in 1975 to threatened) under the Endangered Species Conservation Act of 1969.³⁵

³⁰ Exhibit No. 94, p. 3, and Exhibit No. 95.

³¹ Nevada Division of Water Planning, Department of Conservation and Natural Resources, Truckee River Chronology, III-15, July 1996.

³² Id. at III-23, Exhibit No. 94, p. 3

³³ Exhibit No. 94, p. 9.

³⁴ Ibid.

³⁵ Nevada Division of Water Planning, Department of Conservation and Natural Resources, Truckee River Chronology, III-25, 29, July 1996.

Every year approximately 440,000 acre-feet evaporates off Pyramid Lake,³⁶ and the average annual inflow to Pyramid Lake in a 20-year span post-1967 is approximately 370,000 to 400,000 acre-feet.³⁷ The water levels at Pyramid Lake are a critical factor in the recovery and preservation of the threatened and endangered species since they affect the ability of the fish to pass beyond the delta to spawn.³⁸ Other critical factors include attraction flows, spawning flows and flows sufficient for the juveniles to return to Pyramid Lake. Several expert witnesses voiced the opinion that further reduced flows will either result in the extinction of species of fish or reversal of the recovery of the fishery that has been made to date.³⁹

The Cui-ui and Lahontan Cutthroat Trout have been listed as endangered and threatened species, respectively. There has been lengthy litigation and untold monies spent toward the recovery of the endangered fishery at Pyramid Lake. The State Engineer finds the waters requested for appropriation under Applications 47047, 47121, 47209 and 47264 have in the past been available for the endangered and threatened species in Pyramid Lake and to remove this flow from the system would conflict with the Endangered Species Act and threaten to prove detrimental to the public interest.

III.

The Cities of Reno and Sparks protested Applications 48061 and 48494 on the grounds that the waters applied for are subject to

³⁶ Exhibit No. 94, p. 3. The evaporation of 440,000 afa is from the lake at its current size in surface area. As the lake elevation rises, the surface area of the lake will increase causing even more loss by evaporation.

³⁷ Transcript, pp. 461-471, June 1, 1994. Exhibit No. 92.

³⁸ See Testimony of Thomas Strekal, Paul Wagner, Chester Buchanan, June 1-2, 1994, and February 1-2, 1996.

³⁹ Ibid.

pending applications (there are senior pending applications, including the Cities' applications to appropriate effluent water under Applications 29973 and 32954) that will fully appropriate the river and any water right granted would conflict with and impair existing rights. SPPC protested Applications 48061 and 48494 on the grounds there are senior applications to appropriate the same water. Washoe County protested the applications on the grounds that it also has senior pending applications for the same water consequently there will be no unappropriated water in the source.

A permit was granted under Application 29973 on February 15, 1995, and action has been stayed on Application 32954, which is a reservoir application for effluent waters generated by the Truckee Meadows Water Reclamation Facility, and effluent waters are not part of the unappropriated water under consideration in this ruling. The State Engineer finds this decision only applies to the unappropriated flow of the river system and does not include any effluent water subject to regulation under the provisions of NRS § 533.440. Therefore, pending Application 32954 does not prevent the State Engineer from taking action on Applications 48061 and 48494.

Pursuant to this ruling, the State Engineer finds the granting of permits under Applications 47047, 47121, 47209 and 47264 would threaten to prove detrimental to the public interest and denies those applications.

Application 9330, similarly filed by the TCID for the unappropriated water of the Truckee River, was denied pursuant to State Engineer's Ruling No. 4659, dated August 14, 1998.

The State Engineer finds the protest issues addressing senior pending applications are moot since there are no pending senior applications for these same waters that must be considered.

IV.

Applications 48061 and 48494 were protested on the grounds that the waters of the Truckee River and its tributaries are fully appropriated as decreed in the Orr Ditch Decree, and that the

permitting of Applications 48061 and 48494 would result in the over-appropriation of the Truckee River and its tributaries and adversely affect all other decreed water right holders.

The State Engineer finds that the Orr Ditch Decree did not declare the waters of the Truckee River fully appropriated, and as discussed in the next section of this ruling there is unappropriated water in the Truckee River.

V.

The protestant TCID alleges that the applicant failed to show that there exists sufficient unappropriated water to allow the granting of Applications 48061 and 48494, specifically, alleging that the PLPT used average flows to Pyramid Lake over a 20-year period without accounting for decreed rights which may not have been used every season during that 20-year period.

The protestant TCID presented evidence⁴⁰ and testimony⁴¹ in support of its application that in approximately half the years there is unappropriated water in the Truckee River. If the years of record 1918 through 1993 are considered, the protestant's evidence indicates the unappropriated flows would average approximately 237,000 cfs at Derby Dam with considerably higher flows in some years and practically no flow in others. In arriving at this estimate of unappropriated water, the TCID used flow rates from a stream gauge just below Derby Dam, considered all prior rights to the waters of the Truckee River below Derby Dam, and what it believes to be "Cui-ui fish flow" requirements.⁴² Witnesses for the applicant PLPT, using the time frame of 1974 through 1993 and measuring from a gauge at Nixon, agreed there is unappropriated

⁴⁰ Exhibit No. 104.

⁴¹ Transcript, pp. 209-264, January 31, 1996.

⁴² Transcript, p. 208, Exhibit No. 104, February 1, 1996.

water in the Truckee River⁴³, and estimated the quantity to average from 370,950 to 403,150 afa.⁴⁴ The shorter time frame was used since the Operating Criteria and Procedures for the Newlands Reclamation Project did not become effective until 1967.

The protestant's argument seems to ignore the facts of the reality of the flows being applied for under Applications 48061 and 48494. The PLPT under these applications is requesting in essence an instream/in situ right to the high flows in excess of decreed or existing water rights on the system in order to sustain the threatened and endangered fishery at Pyramid Lake. In many years these flows will not exist at all and in other very rare years there may be more than a million acre-feet of excess flow. It is convenient to work with the average flows as long as it is clear that the entire quantity of unappropriated water is not available in most years.

Pyramid Lake on the Pyramid Lake Reservation is a terminal lake at the end of the Truckee River system. It is downstream from all other water rights and water uses. There is uncontroverted evidence in the record that the amount of Truckee River water that reaches Pyramid Lake exceeds the amount of water recognized in the Orr Ditch Decree.⁴⁵ The State Engineer finds there is unappropriated water in the Truckee River in quantities that vary significantly from year to year, but in some years is sufficient to satisfy the amount applied for under these applications.

⁴³ Transcript, pp. 463-471, June 1, 1994, and pp. 450-453, February 1, 1996.

⁴⁴ Transcript, pp. 463-471, June 1, 1994. Exhibit Nos. 92 and 93, June 1, 1994.

⁴⁵ Exhibit Nos. 92 & 93, and Transcript, pp. 462-471, June 1, 1994. See also, United States Geological Survey records at Nixon gage (10351700) where in the water year 1983 nearly 1.9 million acre-feet entered Pyramid Lake.

VI.

The protestant TCID alleges that the Orr Ditch Decree does not provide a water right for recreational flows to support a fishery on the lower Truckee River nor flows for the maintenance of the water level of Pyramid Lake, and another protestant alleged that the PLPT had waived any right for the uses claimed under Applications 48061 and 48494 in the Orr Ditch Decree Court.

The water applied for here is unappropriated water. Unlike those water rights recognized in the Orr Ditch Decree and subject to the continuing jurisdiction of that court, the water at issue here was not decreed pursuant to the Orr Ditch Decree. Instead this unappropriated water is subject to the provisions of Nevada water law relative to the appropriation of water not previously appropriated. It is true that the water rights of the PLPT set forth in the Orr Ditch Decree do not include a right for fisheries or recreation, but pursuant to these applications the Tribe is seeking such a water right through the state appropriation process.

"Federal reserved rights cannot be acquired under state water laws."⁴⁶ The State Engineer finds that whether the PLPT did or did not waive its claim to a reserved water right for fisheries purposes for the reservation in the Orr Ditch Decree Court is irrelevant as the State Engineer cannot grant a reserved right under Nevada water law. The PLPT is in the same position as any other applicant applying for water under Nevada law for the purposes requested.

VII.

Other protestants allege that the recreational uses as applied for are detrimental to the public interest in that the instream/in situ uses are neither contemplated nor authorized by Nevada law.

⁴⁶ U.S. v. Truckee-Carson Irr. Dist., 649 F.2d 1286, 1298 (1981) (citing FPC v. Oregon, 434 U.S. 435, 444 (1955), U.S. v. Cappaert, 508 F.2d 313, 320 (9th Cir. 1974), *aff'd*, 426 U.S. 128 (1976)).

The Nevada Legislature has recognized the public benefit in uses of water other than the historical beneficial uses of irrigation, mining, municipal, etc. NRS § 533.030(2) provides that the use of water from any stream system for recreational purposes is declared a beneficial use. In 1988 the Nevada Supreme Court held that wildlife watering is encompassed in the NRS § 533.030 definition of recreation as a beneficial use of water.⁴⁷ Use of water in situ in a natural lake was recognized as being a beneficial use of water for recreation and wildlife and subject to appropriation. Use of water instream, like use in situ, is a beneficial use of water. Then in 1989 NRS § 533.023 was enacted and provides that wildlife includes the establishment and maintenance of fisheries and other wildlife habitats.

Applications 48061 and 48494 indicate they were filed for recreational purposes. The State Engineer finds the applications are filed for a beneficial use of water and that use is for wildlife (a threatened and endangered fishery), a use encompassed in the definition of recreation, and to grant permits under these applications does not threaten to prove detrimental to the public interest.

VIII.

The protestant TCID alleges that the applications are ambiguous in that each requests an appropriation of "all the water in the Truckee River and its tributaries not subject to existing rights," but the applications also indicate they were filed for 477,851 afa each. It is unclear to the protestant whether the request is for 477,851, 955,702 afa or all the water. The protestant further alleges that a request for "all the water" is not sufficiently specific to support a water right application. The State Engineer finds that Nevada water law requires an application contain the specific amount of water applied for in

⁴⁷ State v. Morros, 104 Nev. 709 (1988).

terms of cubic feet per second⁴⁸, and the description of "all the water" is not sufficiently specific. The State Engineer further finds Applications 48061 and 48494 are two separate applications requesting a total combined duty of 477,851 afa from two separate points of diversion.

IX.

The protestant TCID alleges that the deferral of the administrative hearing and any action on those applications listed in the Exhibit No. 89 Agreement precludes the State Engineer's consideration of the additional evidence those protestants may have presented, and which when given consideration may affect his decision regarding the PLPT's applications. The State Engineer finds that several of the protestants did not even appear at the public administrative hearing. The State Engineer finds that Nevada law makes it discretionary with the State Engineer whether to hold an administrative evidentiary hearing⁴⁹, and nothing in the law requires any protestant to put on a case. A protestant could decide not to appear at the hearing and merely have its protest considered on the merits of its filed written protest. The State Engineer finds that the deferral of the presentation of additional evidence as to the applications subject to the Agreement set forth in Exhibit No. 89 does not preclude full consideration of the merits of the applications and issues raised by the protests.

X.

The protestant TCID alleges that the PLPT has used a USFWS model which is not validated in order to calculate the amount of water needed to support spawning of the Cui-ui. The protestant alleges the model is in error for predicting the water level of Pyramid Lake necessary for spawning through the delta, and that the PLPT has failed to show that additional waters are needed for the

⁴⁸ NRS § 533.335(3).

⁴⁹ NRS § 533.365(3).

recovery of the Cui-ui, or that the stabilization of the water level of Pyramid Lake is necessary for the spawning or recovery of the Cui-ui or the Lahontan Cutthroat Trout or the recreational purposes of Pyramid Lake. Other protestants allege that the amount of water needed for the fishery at Pyramid Lake has not been determined, is zero, unknowable, variable or so contingent that a permit should not be granted under the applications.

The State Engineer finds that the model is not the critical factor to determine whether the flows requested for appropriation are necessary, rather, reality is the critical factor in this determination, and whether these flows can be placed to the beneficial use applied for under these applications. Nevada law requires a determination that the water will be put to a beneficial use, and that the right to use of water shall be limited to so much as is necessary for the beneficial use.⁵⁰ These applications are to prevent any further degradation to the threatened and endangered species of fish in Pyramid Lake and are for a beneficial use of the waters of Nevada. Several expert witnesses voiced the opinion that further reduced flows will either result in the extinction of species of fish or reversal of the recovery of the fishery that has been made to date.⁵¹ While the water applied for under Applications 48061 and 48494 has been reaching the lake in the last decades, species of fish have become endangered and threatened, therefore, less unappropriated water reaching the lake would only exacerbate the problem. The State Engineer finds the amount of water represented in the applications is a quantity reasonable and necessary for the use applied for under Applications 48061 and 48494. The State Engineer finds the unappropriated water applied for under Applications 48061 and 48494 is necessary to maintain the

⁵⁰ NRS § 533.060.

⁵¹ See Testimony of Thomas Strekal, Paul Wagner, Chester Buchanan, Transcript, June 1-2, 1994, and February 1-2, 1996.

threatened and endangered species in Pyramid Lake, and is reasonably required for that purpose.

XI.

The protestant TCID alleges that the PLPT has failed to demonstrate that the amount of water it seeks will not interfere with existing rights to the waters of the Truckee River. The State Engineer finds it is the protestant who alleged that the appropriation would interfere with existing rights, therefore, it is the protestant's burden to prove said claim. Other protestants based their protest claims on their senior pending applications and allege that granting water rights under Applications 48061 and 48494 would interfere with those senior water rights, if those senior applications were granted. The State Engineer finds that by this ruling he is denying those senior applications. The State Engineer further finds the granting of water rights under these applications will not interfere with existing rights since any permits granted under Applications 48061 and 48494 will have junior priority dates and the water right can only be exercised in those years where there are high flows in the river in excess of the senior water rights. The State Engineer finds that the permitting of these applications will not result in the over-appropriation of the Truckee River, and the permitting of these applications will not adversely affect any other senior water right holders based on the junior priority dates of the permits granted under Applications 48061 and 48494.

XII.

The protestant TCID alleges that the points of diversion under the applications are downstream of the place of use, therefore, since there has been no showing as to how the applicant plans to divert and make use of said waters the applications should be denied. Nevada water law does not require that water be actually

diverted away from the water system to be a valid appropriation,⁵² however, the application must list a proposed point of diversion in accordance with NRS § 533.335(5).

Application 48061 identifies its point of diversion as being at the point where the Truckee River meets Pyramid Lake, and identifies the place of use as the Truckee River downstream of Derby Dam, including the Marble Bluff Dam, the Pyramid Lake Fishway and Pyramid Lake. Application 48494 identifies its point of diversion as Marble Bluff Dam and the place of use is the same as that identified under Application 48061. The PLPT has in essence applied for an instream/in situ right to support the threatened and endangered fishery and the only diversion of water from the river system will be into the Pyramid Lake Fishway at Marble Bluff Dam which parallels the river and bypasses the delta formed at the mouth of the river. The point of diversion at Marble Bluff Dam while downstream from Derby Dam is at the place where water will physically be removed from the natural course of the river into the fishway and the point of diversion at the confluence of the Truckee River with Pyramid Lake is to assure that the water, when available, gets downstream to a certain point, i.e., the lake. The State Engineer finds that a point of diversion downstream from a portion of the place of use is not a reason to deny an instream/in situ application.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁵³

⁵² State v. Morros, 104 Nev. 709 (1988).

⁵³ NRS Chapter 533.

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:⁵⁴

- A. there is no unappropriated water at the proposed source, or
- B. the proposed use conflicts with existing rights, or
- C. the proposed use threatens to prove detrimental to the public interest.

III.

The State Engineer concludes that the approval of Applications 47047, 47121, 47209, and 47264 would threaten to prove detrimental to the public interest by taking unappropriated water away from Pyramid Lake that in the past has been available for threatened and endangered species of fish. The State Engineer concludes, that while these applications may have a public benefit, removing this flow from the Truckee River system for a public use would conflict with the Endangered Species Act and thereby threaten to prove detrimental to the public interest.

IV.

The State Engineer concludes the Truckee River was not declared fully appropriated by the Orr Ditch Decree. There is unappropriated water in the Truckee River, and the approval of Applications 48061 and 48494 will not over-appropriate the Truckee River. The approval of Applications 48061 and 48494 will not and cannot by law impair existing rights.

⁵⁴ NRS § 533.370(3).

V.

The State Engineer concludes his decision as to Applications 48061 and 48494 only applies to the unappropriated flow of the river system and does not include any effluent subject to regulation under the provisions of NRS § 533.440.

VI.

The State Engineer concludes that Applications 48061 and 48494 do not need to be denied because Nevada law does not require physical diversion of water from a stream system upstream of the place of use or at all,⁵⁵ and thereby do not threaten to prove detrimental to the public interest.

VII.

The Nevada legislature directs the State Engineer to review whether an application may threaten to prove detrimental to the public interest not whether it proves beneficial to a public interest. The United States Supreme Court noted that it has been said Pyramid Lake is widely considered the most beautiful desert lake in North America and its fishery has brought it worldwide fame.⁵⁶ Pyramid Lake has suffered declining water levels and decreases in its fishery resources resulting from many factors, including the exercise of all the existing decreed upstream

⁵⁵ State v. Morros, 104 Nev. 709, 766 P.2d 263 (1988) (no absolute diversion requirement precludes granting of in situ water right to water of Blue Lake).

⁵⁶ Nevada v. United States, 463 U.S. 110, 114, 103 S.Ct. 2906, 2910, 77 L.Ed.2d 509 (1983).

diversions from the Truckee River. The lake was 50 miles long and 12 miles wide in 1844, but its surface area had decreased by about 31 square miles by 1983.⁵⁷

Sometime between 1938 and 1944 the Pyramid Lake Cutthroat Trout, a sub-species of the Lahontan Cutthroat Trout, became extinct.⁵⁸ Extinction was the result of a combination of factors such as physical impediments to upstream spawning runs, river pollution, and over-fishing during critical spawning periods.⁵⁹ The Cui-ui, a lakesucker found only in Pyramid Lake, was federally listed as an endangered species on March 11, 1967.⁶⁰ In 1970, the Lahontan Cutthroat Trout was listed as a species in danger of extinction, and was reclassified to threatened status in 1975 because of the successful establishment of additional populations and hatchery rearing programs.⁶¹ Every year approximately 440,000 acre-feet evaporates off Pyramid Lake,⁶² and the average annual inflow to Pyramid Lake in a 20-year span post-1967 is approximately

⁵⁷ U.S. v. Alpine Land & Reservoir Co., 878 F.2d 1217, 1220 (9th Cir. 1989).

⁵⁸ Nevada Division of Water Planning, Dept. of Conservation and Natural Resources, Truckee River Chronology, III-15, July 1996.

⁵⁹ Id. at III-16.

⁶⁰ Exhibit No. 94.

⁶¹ Nevada Division of Water Planning, Dept. of Conservation and Natural Resources, Truckee River Chronology, III-27-29, July 1996.

⁶² Exhibit No. 94, p. 3.

370,000 to 400,000 acre-feet.⁶³

The State Engineer concludes the waters applied for under Applications 48061 and 48494 are for a beneficial use of water allowed under Nevada law, are reasonably necessary for that beneficial use, and use of said waters does not threaten to prove detrimental to the public interest.

RULING

The State Engineer hereby denies Applications 47047, 47121, 47209 and 47264 on the grounds that to grant permits under the applications would threaten to prove detrimental to the public interest as they would take water away from Pyramid Lake that is critical to the long-term survival of the threatened and endangered species of fish in the lake.

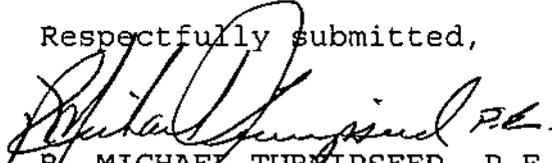
The State Engineer hereby rejects the protests of the Washoe County Water Conservation District, the Truckee-Carson Irrigation District, the Cities of Reno and Sparks, the Sierra Pacific Power Company and Washoe County and approves Applications 48061 and 48494 subject to limitations set forth in this ruling and subject to:

1. all other existing water rights on the Truckee River and its tributaries;
2. any interstate allocation of Truckee River water;
3. a total combined duty of 477,851 acre-feet annually; and

⁶³ Transcript, pp. 461-471, June 1, 1994.

4. payment of statutory permit fees.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/cl

Dated this 24th day of
November, 1998.