

1 Case No. 25219/25227
2 Dept No. Specially Assigned to Judge William A. Maddox

3
4 THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
5 IN AND FOR THE COUNTY OF CHURCHILL
6 BEFORE THE HONORABLE WILLIAM A. MADDOX, DISTRICT JUDGE

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8 In the Matter of :
9 Applications 47047, :
10 47121, 47209, 47264, :
11 48061 and 48494 Filed to :
12 Appropriate the Waters :
13 of the Truckee River and :
14 Its Tributaries Washoe :
15 County, Nevada, :

16 TRUCKEE-CARSON :
17 IRRIGATION DISTRICT, and :
18 Corkhill Brothers, Inc., :
19 Petitioners,

20 vs.
21 R. MICHAEL TURNIPSEED,
22 State Engineer, State of
23 Nevada, Department of
Conservation and Natural
Resources, Division of
Water Resources,
Respondent.

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20 TRANSCRIPT OF PROCEEDINGS
21 HEARING ON PENDING MOTIONS
22 FRIDAY, MAY 2ND, 2008, 2008
23 Fallon, Nevada



1 Reported By: ERIN T. FERRETTO, RPR, CCR #281

A P P E A R A N C E S

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2 FALLON, NEVADA, FRIDAY, MAY 2ND, 2008, 2008, 9:00 A.M.

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6 THE COURT: This is the Case No. 25219/25227 in
7 the Matter of the Applications as to 47047, 47121, 47209,
8 47264, 48061, and 48494 Filed to Appropriate the Waters of
9 the Truckee River and Its Tributaries, Washoe County,
10 Nevada; the Truckee-Carson Irrigation District is the
11 Petitioner and Corkhill Brothers, Inc., Petitioner, versus
12 Michael Turnipseed, the State Engineer.

3 Could the parties identify themselves and who they
14 represent.

15 MR. MACKEDON: Mike Mackedon, Corkhill Brothers.

16 MR. METCALF: Nathan Metcalf, Truckee-Carson
17 Irrigation District.

18 MR. VAN ZANDT: Good morning, your Honor. Michael
19 Van Zandt for Truckee-Carson Irrigation District.

20 MR. WOLZ: Michael Wolz from the Nevada Attorney
21 General's Office on behalf of the State Engineer, Tracy
22 Taylor, and with me today here in the courtroom is Susan
23 Joseph Taylor, the State Engineer's Office.

24 MR. SPRINGMEYER: Good morning, your Honor. Don

1 MR. WOLZ: I think he'd at least want to flip a
2 coin first.

3 THE COURT: This is the Third, I'm in the First,
4 and I'll be gone in January.

5 MR. WOLZ: I guess you do win in that
6 circumstance.

7 The fact that these applications were granted
8 wasn't the sole basis for why 9330 was denied, and without
9 going and completely rearguing that appeal here, it's
10 important to point out that one of the major issues there
11 is that the State Engineer found there was no reasonable
12 likelihood that that water would ever be able to be put to
13 beneficial use by TCID because federal agencies controlling
14 the diversion facilities said they would not allow it to be
15 used to divert the water, and that it was therefore
16 contrary to the public interest to grant a water right that
17 could not be put to beneficial use as applied for.

18 Now, that is hotly disputed by TCID, and that's a
19 decision pending before the other court, but to
20 oversimplify the State Engineer's decision in the extreme I
21 think is to say that this is merely a case if one is
22 granted, the other is denied. The State Engineer has taken
23 the position that both could -- I don't know if both could
24 have been granted, either could have been granted, one

1 could have been denied, they both could have been denied,
2 they needed to stand on their own merits and implying that
3 they are so intertwined that they have to be dealt with
4 together confuses the analysis here without reason.

5 As the Court has noted, the State Engineer takes a
6 narrow view of what he did in Ruling 4683, and that was
7 granted an in stream water right. The State Engineer
8 cannot be considered to have erred in failing to address
9 future anticipated uses.

10 TCID's argument today assumes that the State
11 Engineer can deny these applications because there is an
12 intention in the future to apply for storage rights;
13 however, if TROA is never signed and it is not signed yet,
14 it is still a contingency, if it is never signed, these are
15 still valid water rights even without storage rights.

16 If the State Engineer was to look at the storage
17 applications and view them as contrary to the public
18 interests, these rights would still be valid as approved.
19 These applications were approved independent of the
20 provisions of the Truckee River Operating Agreement, and
21 the Truckee River Operating Agreement does not and cannot
22 change how these water rights at issue here today may be
23 used.

24 Permits, as granted -- these permits as granted do

1 not allow for the storage of water rights as appropriated
2 by TROA. There may be no doubt as to the parties'
3 intention to eventually apply. I think the Truckee Meadows
4 Water Authority has applied for storage rights for certain
5 other water rights that they hold in order to effectuate
6 the provisions of TROA, they're moving forward to do
7 exactly that; however, the fact that remains is they
8 applied and that process is moving in that regard and TCID
9 is participating in that.

10 TROA itself anticipates and requires a change
11 application be filed, not only for the Tribe's rights but
12 for Sierra Pacific's rights. State law requires the change
13 applications be filed for storage under NRS 533.325, they
14 have to apply to the State Engineer under NRS 533.440, and
15 they have to apply specifically in order to get -- to use
16 that water in storage.

17 If you are -- if there's a claim -- there have
18 been implications at least that this water is already being
19 stored; if that is the case, then enforcement actions need
20 to be taken. The current reality, as that term is used by
21 TCID, that the State Engineer needs to look at the current
22 reality, the current reality is that these applications may
23 not be stored.

24 State Engineer's Ruling 4848, I think, is

1 instructive in this case. It was cited by TCID as an
2 example of how the State Engineer can look beyond the face
3 of an application; however, when you read what the State
4 Engineer did in that case, exactly the opposite is true.
5 In that case the State Engineer was addressing ground water
6 right applications for the construction and operation of
7 the Yucca Mountain Nuclear Repository.

8 THE COURT: When was that -- just as a matter of
9 interest, when was that done? That wasn't done -- was it
10 in the 90s or the 80s?

11 MR. WOLZ: The Ruling 4848?

12 THE COURT: Yes.

13 MR. WOLZ: I don't have that date in mind. I have
14 a copy of that ruling at hand.

15 THE COURT: I just say that because I know there
16 was some litigation between the federal government and the
17 state at one point, and I think it was when I was U.S.
18 Attorney. I didn't have anything to do with it, but I just
19 say that it seems like that some of that may have been
20 going on when was U.S. Attorney. I wasn't -- actually the
21 Department of Justice was handling it, but I bring that
22 up --

23 MR. WOLZ: It was in the 90s, I can't tell you if
24 it was mid or late 90s off the top of my head, and that

1 litigation is in -- still pending in certain forms.

2 MR. VAN ZANDT: 2002, your Honor.

3 THE COURT: I was U.S. Attorney from '85 to '89,
4 so it wouldn't have been -- I think -- well, I think this
5 decision about wildlife being a beneficial use, water and
6 wildlife, seems like that decision came out when I was U.S.
7 Attorney, but go ahead.

8 MR. WOLZ: In that case, the United States
9 initially indicated that the water was going to be for
10 construction of the repository; however, at hearing the
11 witnesses then admitted it's not just construction, it's
12 also going to be for the operation of this facility and
13 they admitted they would not be applying for additional
14 applications, and it was based on those facts the State
15 Engineer specifically found that the storage of nuclear
16 waste, as encompassed under these applications, that's the
17 quote, "encompassed under these applications," would be
18 detrimental to the public interest and then denied those
19 applications.

20 He didn't go beyond the face of the applications,
21 he didn't say, "Okay, in the future the United States is
22 going to apply for additional water rights, therefore this
23 application has to be denied."

24 And there's a similar outcome in Ruling 5382,

1 which is also cited by TCID. In that case we're dealing
2 with a one-year temporary change application filed by the
3 Tribe, which was denied. They purchased land and the water
4 rights, they put a restrictive covenant on the land they
5 purchased that Truckee River water could not be used to
6 irrigate, then filed for a temporary change application.

7 The State Engineer said that that was contrary to
8 the public interest because after one year by the operation
9 of the temporary application process, it would revert back
10 to the land where it could not be used. The State Engineer
11 wasn't addressing future applications or future changes, he
12 looked at the actual impacts of that application as applied
13 for and didn't reach beyond it.

14 The assumption here is that the State Engineer
15 somehow has the authority to look at someone's intent in
16 the future and deny a current application. There are a lot
17 of water rights held in this state being used for
18 agriculture, for example, where is it the intent of the
19 permit holder to somehow change that water right to
20 municipal, sell it, make some money. The State Engineer
21 certainly couldn't deny someone an application for an
22 agriculture right because someday that person's intent is
23 to file a change application for another use; he has to
24 look at the application in front of him.

1 As a result, this matter simply is not right for
2 review. The rightness doctrine is concerned when a case
3 involves uncertain, contingent or future events and that
4 may not occur as opened. We simply have no applications
5 for storage, and many of these issues that are raised may
6 be relevant at this time, but may not be used for storage
7 right now.

8 If this was remanded to the State Engineer, to be
9 honest, I'm not sure what he would do, whether he would be
10 required to address generalities, assumptions and
11 hypotheticals about what's going to be done in the future,
12 and that is an advisory opinion and he is not allowed to
13 provide advisory opinion.

14 The Truckee River Operating Agreement may
15 anticipate storage but it doesn't authorize storage, only
16 the State Engineer gets to authorize storage. So the fact
17 that that is the intent doesn't change the fact that the
18 State Engineer will be addressing those issues in the
19 future.

20 The State Engineer, likewise, I don't believe, has
21 the authority to make a determination of the
22 appropriateness of the provisions of the Truckee River
23 Operating Agreement in the abstract. If this is remanded,
24 that's exactly what he is going to be asked to do, is to

1 look at TROA and its provisions and decide, is it in the
2 public interest? I don't believe that the State Engineer
3 is authorized to do that in a factual vacuum without an
4 application in front of him.

5 TCID's argument today also assumes that if TROA
6 did not exist, if the parties refused to sign it, that the
7 water that we're dealing with here today would not be put
8 to beneficial use. Well, that's not the case. The
9 applications as approved provide that that water will be
10 put to beneficial use and continue to be used as approved.

11 The terms of "actual use" and "proposed use" and
12 "intention" are being intermingled here inappropriately.
13 The fact that they have an intention to do something
14 doesn't mean that is the actual use of the water; the
15 actual use of the water is as approved.

16 There is an implication here that there's some
17 mechanism for by-passing NRS 533.440 which requires a
18 filing for application for storage. TCID also asserted in
19 its briefs that it would be in some way prevented from
20 responding to a storage application if such is filed; there
21 is just no support for that position.

22 The statute requires that the primary storage
23 right be filed and that notice of that be published.
24 Protest is allowed both on the primary and on the secondary

1 rights. TCID has in the past received actual notice of
2 both primary and secondary applications, storage
3 applications under NRS 533.440 and, in fact, participates
4 in TMWA's pending storage applications.

5 Every application that is filed with the State
6 Engineer's Office, notice of that is posted on its website.
7 In addition, under the State Engineer's instruction book,
8 TCID gets notice of every application that's filed on the
9 Truckee and the Carson Rivers. They will receive actual
10 notice and there's simply no basis to argue that they won't
11 be able -- unless they choose to -- be able to participate
12 in those proceedings.

13 There are some allegations and some arguments made
14 about the California change applications on the water
15 there. I will defer to co-counsel to discuss what those
16 mean since the State Engineer obviously isn't involved in
17 what's going on in California; however, I would say, again,
18 this is evidence of the administrative process to come.

19 TROA anticipates of the filing of these change
20 applications and there's no -- I don't think any argument
21 that can legitimately be made that they won't be followed
22 in Nevada as well.

23 TCID, of course, has argued that the -- well, that
24 there's a constitutional violation, a due process violation

1 in these cases because of bias. TCID has argued today that
2 that bias is not on the part of the State Engineer, per se,
3 but it's an institutional appearance of partiality.

4 None of the cases cited find a constitutional
5 violation based on an institutional appearance of
6 partiality. The courts have been very consistent in
7 stating that a constitutional violation is only found where
8 the bias is extreme and it's actual and it's found directly
9 within the finder of fact itself.

10 This generally involves pecuniary interests or
11 some action on part of the finder of fact that they are
12 biased. Most cases of bias do not rise to the
13 constitutional level; that is a matter of state law.
14 Policy, relationship, et cetera, are all questions to be
15 addressed by the legislature in determining whether there's
16 bias and it is not a constitutional issue.

17 The memorandum of understanding doesn't show bias
18 in this case, at least not on the part of the finder of
19 fact. No statement, and it is not a statement of the State
20 Engineer here, and no law cited would impune bias, not
21 even -- not to individuals and certainly not to entire
22 institutions. As a matter of fact, the Cinderella Career
23 case and the Aetna case, they would not even impune bias
24 between panel members because if one is biased does not

1 mean that the entire panel is biased.

2 That being said, that the actions of one
3 department can be imputed to a division, no law supports
4 that basic premise and their entire argument is based upon
5 it.

6 The memorandum of understanding didn't bind the
7 State Engineer to any action; it was conditional upon the
8 State Engineer's decision. It properly stated Nevada law
9 as it applies to beneficial use and, in fact, I don't
10 believe that any legitimate argument has been made or any
11 argument at all has been made that the use of water for
12 recreation, propagation of fish isn't a beneficial use, at
13 least in the abstract. To say that that statement exists
14 in a memorandum of understanding creates bias simply
15 doesn't make any sense.

16 Finally, legislative enactments not only cannot be
17 imputed as bias, but they're statements of public policy.
18 The State Engineer is required to follow the legislative
19 enactments. If that's the case, the entire State of Nevada
20 is bias, and I'm not sure who is going to get to make all
21 of these decisions. Of course, that's the second problem
22 here --

23 THE COURT: Probably get assigned to me.

24 MR. WOLZ: If they move you to California or

1 Arizona perhaps.

2 THE COURT: That, too. They haven't figured out
3 how to do that yet.

4 MR. WOLZ: The additional problem with the bias
5 argument here is the rule of necessity, where a finder of
6 fact has been granted sole or exclusive authority to hear a
7 matter, he has to do so, and that's exactly the case here.
8 There is no one authorized to address these applications
9 under state law other than the State Engineer, and there is
10 no provision of state law that would get us a new finder of
11 fact. He's given exclusive authority over applications.

12 The argument has been made in the briefs, well,
13 the law only requires that an application has to be filed
14 with the State Engineer, it doesn't say that he has to make
15 the decision, but that's incorrect. Every step in the
16 application process says that the State Engineer shall
17 consider, the State Engineer shall deny, the State Engineer
18 shall approve, the State Engineer may request additional
19 information, the State Engineer has been given exclusive
20 authority.

21 The Water Code itself states that the water can be
22 appropriated as provided in this chapter and not otherwise.
23 The decision in Filipini, which is often cited, states that
24 the water law not only lay down the method of procedure but

1 strictly limits it to that provided. There is simply
2 nowhere that this court can go to find another finder of
3 fact. Under the rule of necessity, the State Engineer has
4 to make that decision.

5 There has been an argument made that this Court
6 could use its equitable authority to appoint a new finder
7 of fact in these cases. The cases of the Nevada Supreme
8 Court on equity to not bear that argument out. In each of
9 those cases where the court has found that the exercise of
10 equitable jurisdiction to be appropriate has involved a
11 cancelation of an existing water right.

12 There has been actual beneficial use of that water
13 right and some sort of intervening or superseding fact that
14 had interfered with the parties' ability to comply with the
15 formats of the code, filing proofs of beneficial use,
16 et cetera. Those facts simply do apply in this case, and
17 none of these cases will get any kind of indication that
18 the State Engineer has the authority to reach out and find
19 someone else to decide these cases.

20 In addition, the provisions of NRS 233B, the
21 Administrative Procedures Act, have been cited several
22 times here. The State Engineer is expressly excluded from
23 the provision of the Administrative Procedures Act, and its
24 provisions are simply not relevant.

1 I will not spend the time to go through all the
2 cases, there were numerous cases cited on the bias issue, I
3 will not go through and point out the facts of those cases
4 other than to say that they are all factually
5 distinguishable and bear no likeness to the circumstances
6 before the Court today.

7 Switching gears a little bit, your Honor, to
8 address the issue of public interest, Nevada's water law
9 does not require the State Engineer to balance competing
10 applications for the same water. NRS 533.370 subparagraph
11 5 states:

12 The State Engineer must reject an
13 application if it threatens to prove
14 detrimental to the public interest.

15 That is the standard here. The applications here
16 were filed for recreation, for the propagation of fish;
17 that has been found to be in the public interest. There s
18 several statutes that -- excuse me -- have stated that is a
19 beneficial use, and the Supreme Court decision says exactly
20 that in the Morros decision, you referred to, it is a
21 beneficial use.

22 Now, there's some confusion, I believe, that's
23 been created. The argument has been made that the State
24 Engineer looked to the Tribe's use and determined that it

1 was in the public interest; however, looking at that
2 decision, what the State Engineer did was determine that
3 the use was a beneficial use. He was required to do that,
4 both as a step in the application process and, second,
5 because there were specific protests filed by the parties
6 that it wasn't a beneficial use, the State Engineer had to
7 address that.

8 So to take those findings and to cast them in the
9 light of finding something in the beneficial use is not
10 accurate to that decision, and I refer to the Court to
11 Ruling 4683, pages 20 and 22, where the State Engineer
12 discusses that, much of TCID's argument deals with the
13 denial of 9330 and you should have to look at both and
14 balance them and determine which one was more in the public
15 interest.

16 THE COURT: I have a question. What if Abersturi
17 was here and he had to decide the State Engineer is wrong
18 and sends it back and the engineer says, okay, fine, he
19 grants that; what effect does that have on this? Is that
20 an application prior to time, would that be a senior right?

21 MR. WOLZ: It would have the -- it would be the
22 senior right because of the filing date, that's correct,
23 your Honor. That's the safety mechanism that we have in
24 this on the river in general. There would probably be

1 serious consequences in the Tribe's eyes as far as the
2 value of their water right. Obviously TCID, who would have
3 the priority, would then be taking -- I believe it was
4 100,000 acre feet, if I remember correctly, and then any
5 excess after that I guess the Tribe would be in line for,
6 but those two rights can exist side by side. All that
7 would be affected would be the value of Pyramid Lake Paiute
8 Tribe right in that circumstance, and that's still a
9 possibility.

10 The Pyramid Lake Paiute Tribe vs. Washoe County
11 case, sometimes referred to as the Honey Lake Decision,
12 which is kind the cornerstone of the public interest
13 analysis in Nevada, is not ambiguous about balancing
14 competing applications.

15 The argument was made there that the State
16 Engineer should have looked at other projects and the
17 economic viability of it, and the Supreme Court said:

18 However, the Nevada Legislature has not
19 adopted any water appropriation or
20 environmental protection statute requiring
21 or permitting the State Engineer to
22 evaluate alternatives before granting
23 permits.

24 That's pretty clear cut. Interestingly, the

1 dissent in that case dissented on the fact that the State
2 Engineer should have been required to balance these
3 competing applications and competing projects, and said:

4 Competing interests, public versus
5 private, that are presented by the protest
6 filed by the Paiute Tribe and Lassen County
7 should have been considered.

8 Now, if the standard was you have to take
9 competing applications and judge which one is most
10 beneficial, there would have been no need for the dissent
11 in the first case. The case isn't ambiguous, the State is
12 not in a position to take two applications from the same
13 source and decide which one is best for the State. He
14 takes them in order, which is precisely what he did and
15 determined that 9330 should be denied and this one should
16 be granted.

17 On the issue of whether more than one use has been
18 sought, the State Engineer cited specifically to State vs.
19 Morros, which stated that wildlife watering is within the
20 definition of recreation. The TCID argues that there's
21 some confusion on how this water will be used. There is no
22 confusion how the water will be used, its an in situ right,
23 in stream flow, that's the only manner in which it can be
24 used.

1 THE COURT: The only way this water can be used is
2 it flows into Pyramid Lake and, I guess, takes care of
3 evaporation, that's it, right?

4 MR. SPRINGMEYER: Right.

5 THE COURT: So you -- it takes care of the fish.

6 MR. WOLZ: I would also point out, your Honor,
7 that there was no clear protest before the State Engineer
8 on the issue of whether there was -- there was more than
9 one use, that seems to have been raised for the first time
10 on appeal and certainly was not raised by TCID. The amount
11 sought, similarly, is not ambiguous.

12 The State Engineer identified this is the amount
13 of the right. The State Engineer was not ambiguous at all
14 that this is a flood water right; it is available when
15 every other right on the river has been satisfied. There
16 will be years when zero water is available, there will be
17 years when the full amount may be there, that doesn't make
18 it unambiguous. It's very clear how this is supposed to
19 operate under the current applications. There is
20 sufficient water here.

21 TCID has raised some factual concerns, however,
22 that is a disagreement over factual finding. As the Court
23 is well aware, that's not the issue here. We're not here
24 to determine whether someone disagrees or even if there is

1 contrary evidence; we're here to determine whether there is
2 substantial evidence to support the State Engineer's
3 decision.

4 The TCID's expert testified that there is
5 available water; Pyramid Lake Paiute Tribe testified that
6 there is available water; the use, because of the priority
7 date, will not infringe on other rights as the permit
8 exists. The Tribe will only be able to take that water
9 which is unappropriated and has been allowed to let pass,
10 that is only the way that that water can be exercised
11 currently. There is, likewise, substantial evidence in the
12 record showing that this water is necessary and constitutes
13 a beneficial use.

14 The State Engineer based his conclusions on the
15 testimony of three different experts, and citations to the
16 record are in the brief. TCID clearly disagrees with that,
17 they're entitled to do so; however, that doesn't justify
18 remand.

19 There are arguments made on the reliability of a
20 computer model. First of all, that's a decision of weight
21 on the part of the State Engineer; second, he specifically
22 said he wasn't relying on that computer model.

23 Finally, there was some arguments made that --
24 that the Tribe had not adequately identified the works that

1 would be used to divert this water. Of course, it's an in
stream flow, no works are going to be used to divert the
3 water.

4 That appeared as an argument that, I think, raises
5 form over substance. We know now how it's going to be
6 diverted; it's going to be allowed to stay where it is. To
7 remand to clarify that issue would be a complete waste of
8 time and accomplish nothing; we already know how that is
9 going to operate.

10 And with that, your Honor, we'd ask that Ruling
11 4683 and 4683 be affirmed.

12 THE COURT: Aren't I also considering the denial
13 of 47047, 47121 and 47209; is that an issue before me?

14 MR. WOLZ: Those have not been appealed, your
15 Honor, so it's strictly --

16 THE COURT: The caption is incorrect in this case
17 then?

18 MR. WOLZ: The Ruling 4683 addressed all of those
19 applications; however, only the granting of 48061 and 48494
20 have been appealed, at least that's my understanding.

21 THE COURT: Mr. Springmeyer.

22 MR. SPRINGMEYER: Thank you, your Honor.

23 Your Honor, we would urge that this should be
24 relatively simple. The State Engineer ruled on an

1 application, the Court, functioning in its appellate
2 capacity, is asked to determine whether there was an abuse
3 of discretion by the State Engineer and was there
4 substantial evidence to support the ruling.

5 TCID wants to turn this into some kind of galactic
6 tribunal about everything that can possibly be argued about
7 on all of the water issues essentially between the Tribe
8 and the State of Nevada, the State of California, TCID and
9 everybody else, and that's not what this is for.

10 It's certainly the case that everybody involved in
11 TROA and other things have to go to different places,
12 there's no one place to deal with all of the water
13 problems. There's the State Water Resources Control Board
14 in California, there's the State Engineer in Nevada,
15 there's the Water Master on the Truckee River, there's the
16 Orr Ditch Decree court, there is no one place where
17 everybody can go and get everything solved and found out at
18 one time, that's just not the way our system is set up, and
19 it's certainly not the function of this Court to try and
20 pull in all of those other things and arguments when you're
21 looking at the question of: Did the State Engineer act
22 properly in granting this application? So I would urge the
23 Court that now is the time for decision, either reversing
24 or upholding, the State Engineer on those two rulings, 4683

1 and 4683A.

2 My asking the Court to take action is no different
3 from the Chairman asking the Governor, "We just want to get
4 something done." Of course, I urge you that we want you to
5 uphold but I'm not telling you to do it, in the same way
6 the Chairman wasn't telling the Governor to do it. The
7 Chairman was saying, "We sure want to get going," and I say
8 the same thing to you today, your Honor, "We sure want to
9 get going."

10 Remand and pulling in TROA and talking about
11 storage are all smoke screens to stall and delay and draw
12 this out forever. No matter what your Honor does, whoever
13 loses is going to go to the Nevada Supreme Court, so we may
14 as well get going and get up there.

15 And I would certainly, if there's any concern
16 about us trying to sneak something by TCID, if we ever
17 tried to store any of this water, I will commit on the
18 record that I will personally send, by Certified Mail, any
19 such applications to Mr. Van Zandt or his successors,
20 whoever they may be, representing TCID; there's going to be
21 no secret here.

22 And it is absolutely the case that the Tribe has
23 to go to the State Engineer to ask for a change application
24 to store any of this water, if we ever do it. If we don't,

1 if there's no TROA, some years we get nothing from this
2 because there's nothing for us to get, a low water year
3 there's zero, all of the senior rights are satisfied, maybe
4 not even them, and there is no unappropriated water as
5 defined by this permit, so nothing goes down the river and
6 goes into the lake.

7 On rare, huge water flow years, big snow packs,
8 rain events, flooding, all kinds of problems like that,
9 well, then there is water, then there's hundreds of
10 thousands of acre feet that goes down the Truckee River.
11 Our works are what nature put there, the banks, the bed, it
12 runs on down the river and it ends up in the lake, and
13 that's what we get.

14 THE COURT: Unless the canal breaks and it goes
15 into the neighborhood.

16 MR. SPRINGMEYER: Well, it could be or maybe it
17 gets shut off altogether, and the point being is this
18 stands on its own. TROA or no, this is a right and if
19 nature gives us the water, then we can have it; if nature
20 doesn't, we get zero. And every other right that's ever
21 been granted on the Truckee River gets satisfied first,
22 because the priority of this right is 1984.

23 And as your Honor probably knows from every other
24 water case you've ever had, a priority after the 30s or 20s

1 is not worth very much in Nevada. The priorities from 1868
2 are the ones that are worth a lot, that always gets
3 satisfied. A priority of 1984 is just a huge occasional
4 event.

5 If we ever decide to store any of this water, we
6 have to file the applications, they will get notice, they
7 can protest if they choose to, and the State Engineer will
8 hold a hearing or do whatever his statutory processes
9 require. Everybody gets a chance to say what they want to
10 say and then there will be a decision, that one will get
11 appealed, that one will go to the Nevada Supreme Court,
12 keep going.

13 That's not what we have here, that's not what we
14 have to decide. Trying to turn you this into a galactic
15 TROA tribunal is beyond the pale of what the proper
16 function of this appeal is. I can't even find a more
17 ridiculous phrase than "galactic tribunal." There's no one
18 place, it has to be fragmented, that's the way system is.
19 If the time comes, everybody has a chance because there's
20 so many places to go that everybody has got probably three
21 or four different places to complain if they don't like
22 what was done.

23 It is absolutely not the case that we are using
24 this water under this permit now because we don't have it

1 yet. The permit doesn't get issued until there is no
2 further appeal, and when the permit gets issued, that's
3 when we have an ability to use it; meaning if it shows up
4 coming down the river, we welcome it when it arrives at the
5 lake and that's how it's used. If it doesn't show up, we
6 shrug our shoulders and we hope for better next year.

7 If TROA runs aground on some reef, then that's the
8 way it goes. If TROA comes into effect, then a seminar on
9 what's required for TROA to ultimately go into effect would
10 entail an afternoon of presentation by 30 lawyers and 25
11 engineers, but to assume that one necessarily follows the
12 other is far from true.

3 And TCID is clearly committed to do everything it
14 can to dynamite TROA. If they succeed in that, we still
15 have this application, this permit and this water. We'd
16 never be able to store it, even if we wanted to, but it
17 still runs down the river and we would get it.

18 So that's what we urge the Court to think of here.
19 I am looking at this application, this ruling by the State
20 Engineer, did he do it right, did he think of the
21 appropriate bounds of his discretion, and am I reviewing it
22 in the appropriate appellate circumstance, not retrying the
23 whole case as Mr. Van Zandt wants to do.

24 And was there substantial -- the record is replete

1 with substantial evidence for what he did, so we would urge
2 you to bear down on what this is really about and not go
3 far afield into storage applications and into TROA and
4 State Resources Control Board and Stampede Reservoir.

5 There are places where all of that will happen and
6 everybody will be have a chance to complain and investigate
7 and contest until our children and grandchildren are
8 lawyers doing it for us.

9 THE COURT: As a practical matter, as long as it's
10 pending, what you want to happen to what is happening right
11 now?

12 MR. SPRINGMEYER: As a practical matter, no one
13 can get the water.

14 THE COURT: If there is no excess water over
15 senior priority rights --

16 MR. SPRINGMEYER: As a practical matter --

17 THE COURT: -- it flows into Pyramid Lake?

18 MR. SPRINGMEYER: Yep, it does. And it's not
19 being stored anywhere. We don't have any secret program
20 where we're squirrelling it away and nobody knows about it
21 and it's illegal. We're not, we don't. Either it's in the
22 river and it goes to the lake or it doesn't.

23 Thank you, your Honor.

24 MR. DEPAOLI: Gordon Depaoli, your Honor, on

1 behalf of the Truckee Meadows Water Authority.

2 Your Honor, couple of things. The Truckee Meadows
3 Water Authority filed a motion in 2004 to be substituted
4 into this case in place of Sierra Pacific Power Company,
5 whose water they purchased; the motion was opposed but I'm
6 not sure there was ever an order granting it.

7 THE COURT: I'll grant it on the record.

8 MR. DEPAOLI: I'm not going to do much more than
9 third what Mr. Wolz and Mr. Springmeyer have said. The
10 issues really are very narrow here in terms of the -- what
11 the State Engineer did in granting these -- the two
12 applications for the Pyramid Lake Tribe.

3 Counsel for TCID says that what the State Engineer
14 was required to do was to look at each pending application
15 in isolation and make a determination under the statutory
16 provisions whether the application should be granted or
17 denied. And if you look at this ruling, 4683, and if you
18 look at the ruling relative to Application 9330, you will
19 see that is exactly what the State Engineer did.

20 He did that and ultimately decided that the others
21 should not be granted, each standing on its own, and made
22 the determination to grant these applications standing on
23 their own. And the issues in this judicial review
24 proceeding are very narrow, was he correct that there is

1 unappropriated water, were there facts to support that?
Yes. Will this conflict with existing rights? No. Do
3 these applications threaten to prove detrimental to the
4 public interest? No.

5 There are facts that support all of those
6 determinations under the standard of review that is well
7 accepted in reviewing the State Engineer's decision, and in
8 my judgment they can't be reversed. Ruling 4683 ought to
9 be affirmed by this Court.

10 In terms of Ruling 4683A, the State Engineer got
11 it exactly right. There is no storage applications in
12 front of him and he, therefore, should make no decisions
13 about whether and to what extent necessary of the water
14 appropriated under these approved applications can be
15 stored, that can wait for another day.

16 There is an urging both in briefing this matter
17 and in this argument today to dive into why and what has
18 been said about the Truckee River Operating Agreement and
19 what's going on is not accurate, but there would be no
20 point in doing that because that's not issues before this
21 Court at this time.

22 If there are ever applications to store water
23 appropriated here, everyone will have their opportunity and
24 day to get into that. And so on behalf of the Water

1 Authority, we would urge the Court to also affirm the State
2 Engineer's ruling on remand and as -- I think we could all
3 agree, all of us who are here, whatever you do it's going
4 to go to the next level and we might as well move on.

5 Thank you, your Honor.

6 THE COURT: Let's take about 15-minute break, then
7 we'll come back and you can reply, and then we'll be done.

8 MR. VAN ZANDT: Thank you, your Honor.

9 (Recess.)

10 THE COURT: Do the petitioner -- we should say
11 we're back on the record and counsel are present.

12 Do the petitioners have any responses they want to
3 make to the argument made by the respondents?

14 MR. VAN ZANDT: Yes, your Honor, thank you,
15 Michael Van Zandt, Truckee-Carson Irrigation District.

16 The State of Nevada has raised an issue with
17 regard to Application 9330 and whether or not the sole
18 reason for denying it was based on the public interest
19 inquiry. Obviously the ruling itself has other reasons,
20 and one of them was that the bureau would not allow the
21 TCID to use federal facilities, but in the other case we've
22 argued that that is not a final decision and therefore
23 cannot be used to block us, but that's not an issue before
24 this Court.

1 THE COURT: Even if you win that, it doesn't --
2 that doesn't affect this case other than the amount of
3 water that is flowing down the Truckee River; you take
4 whatever you're going to take first because of the senior
5 rights.

6 MR. VAN ZANDT: That is correct. I wanted to note
7 for the record that there is an inquiry with regard to the
8 9330, TCID's application and the public interest, that's
9 really what we're arguing here.

10 So that brings me to the Yucca Mountain decision,
11 Ruling No. 4848. There the State Engineer went beyond the
12 four corners of the application and determined that in fact
13 there was something more intended than what was within the
14 application, and it went on to make that inquiry and
15 actually denied the application on that basis.

16 The fact that it came out in witness testimony
17 during the hearing, of course, was helpful to State
18 Engineer. The question for the Court, I suppose, is: Did
19 the fact that the witnesses in the 1994 hearing did not
20 reveal the intended use of the water for storage is not as
21 important as what happened in 1996, which we view as a
22 continuation of that hearing, because at that hearing TCID
23 attempted to get into the record information about the
24 Truckee River Operating Agreement as it was formulated at

1 that time and the State Engineer prevented us from doing
2 that.

3 So we tried to raise the issue and the State
4 Engineer took the position that he's taking here, that he's
5 not going to make an inquiry into TROA. Well, they're
6 saying there's no substantial evidence in the record on the
7 issue of storage, but the TCID tried to raise the issue and
8 was blocked from bringing it up.

9 And I think the fact that the witnesses didn't
10 reveal it voluntarily should not be the determining factor,
11 it's really what is the intent of that applicant and if the
12 protestant tries to raise the issue and is prevented from
13 making the inquiry, is that really getting a full and fair
14 hearing in front of the State Engineer with regard to that
15 issue.

16 THE COURT: Let me ask you this question: If you
17 were allowed to raise this issue about storage, you would
18 be opposed to letting them do it; is that correct?

19 MR. VAN ZANDT: Well, I don't know that it's
20 opposition as much as we would want to have an analysis of
21 exactly how it's going to be used and what impact it's
22 going to have on existing rights.

23 THE COURT: The best -- your greatest hope in a
24 decision on storage would be that it's denied; would that

1 be correct?

2 MR. VAN ZANDT: That it would be denied, yes, I
3 think that's probably right.

4 THE COURT: Isn't that what the Water Commissioner
5 did when he made this second decision basically saying:
6 No, I didn't grant them any storage rights? You've gotten
7 basically what you want, they don't have any storage
8 rights; if they're going to get them, they have to come
9 back and argue --

10 MR. VAN ZANDT: One of the issues we have, your
11 Honor, is when this application, if it's made for the
12 storage rights in upstream reservoirs --

13 THE COURT: How can it not be made? You say "if
14 it's made," the Water Commissioner clearly says in his
15 decision, "did not seek authorization for storage in
16 upstream reservoirs and permits for that and cannot be used
17 for storage." So he's basically saying, they didn't seek
18 authorization, they weren't permitted authorization for
19 storage, and what I've given cannot be used for that
20 purpose.

21 So to the degree that when you say "if they
22 apply," that clearly says they have to if they want use it
23 or you have the right to protest their use.

24 MR. VAN ZANDT: We've had assurances of counsel

1 for the Tribe that, in fact, they're going to make the
2 application, but I'll point out to Court on page nine of
3 the Tribe's brief in opposition to the supplemental
4 petition, 4683A, it's page nine, footnote nine, there's a
5 statement made in there in fact no Nevada permit is needed
6 to store water in Stampede Reservoir, so we certainly take
7 Mr. Springmeyer on his word that they're going to file that
8 application.

9 MR. SPRINGMEYER: That's not what I said, your
10 Honor. I said if we file an application, I guarantee it
11 will get to Mr. Van Zandt.

12 THE COURT: I think the State Water Commissioner
13 is saying that you don't have a permit for storage.

14 MR. SPRINGMEYER: I agree with you, I don't assert
15 that I have a permit for storage, and there will be no
16 storage of this permitted water without another application
17 asking to do so.

18 THE COURT: So that, I think -- it just seems to
19 me that resolves that issue.

20 MR. VAN ZANDT: Well, your Honor, I respectfully
21 disagree. Like I said, it would change the nature of the
22 inquiry to the State Engineer which was applied for here.
23 There's no question that they intend to store the water,
24 they've intended it all along from the first day the

1 application was filed to store this water, and they have
withheld that information from the State Engineer. TCID
3 tried to bring it up in the 1996 hearings and we were
4 blocked, and that's the unfortunate situation we're in.

5 There was some talk about the balancing of the
6 competing applications, and certainly it's not our position
7 that the State Engineer should have balanced the competing
8 applications but should have made a determination that
9 TCID's application standing alone is not detrimental to the
10 public interest merely because it might take water away
11 from the Tribe and its application and that's, in essence,
12 what the State Engineer did.

13 He looked over at the Tribe's competing
14 application and decided on the public interest inquiry that
15 giving the water to TCID would take away from the fish and
16 from Pyramid Lake and, therefore, that was detrimental to
17 the public interest. And I think your Honor, kind of
18 seeing that we could actually have our application approved
19 and all it really does is reduce the total amount of high
20 flows in the river that would go to Pyramid Lake, so we
21 think that was error by the State Engineer to actually try
22 to compete the applications one against the other when
23 that's not the what statute requires the State Engineer to
24 do.

1 The Honey Lake Decision was brought up and
2 Mr. Wolz was right, there was no evaluation of alternatives
3 but that's exactly what the State Engineer did in these two
4 cases. He looked at 9330, saw that it was potentially
5 taking water away from the Tribe's application and,
6 therefore, found it was detrimental to the public interest
7 on that basis. We don't think that's appropriate.

8 On the issue of multiple uses, your Honor, we --
9 in our -- you know, our reply brief that was filed back
10 March 31st, 2005, on the main petition, page 12, we
11 addressed the issue of the multiple uses.

12 This issue was brought up at the hearing, it was
13 brought up by the cities of Reno and Sparks, Sierra
14 Pacific, and TCID had an allegation that the applications
15 were ambiguous in the way the requests were made for
16 appropriation so TCID joined in the urging of the State
17 Engineer to make inquiries on those multiple uses, and so
18 we're not bringing up this issue for the first time on
19 appeal as was indicated by Mr. Wolz.

20 Mr. Springmeyer, on behalf of the Tribe, is making
21 an argument that somehow we're trying to turn you into a
22 galactic tribunal; we're certainly not interested in doing
23 that. What we are trying to do is make sure that the
24 proper inquiries are made with regard to the issues that

1 should have been considered by the State Engineer.

2 This Court made a determination on the remand to
3 the State Engineer that he should have considered the
4 change from the Truckee River Agreement to the Truckee
5 River Operating Agreement if, in fact, that was going to
6 happen. We have a confession from the Tribe that that is,
7 in fact, what is going to happen ultimately with this water
8 right. For the State Engineer not to make the public
9 interest inquiry in the context of changing the Truckee
10 River Agreement to the Truckee River Operating Agreement we
11 see as denying the reality of what's going on.

12 So we're proceeding under some kind of a legal
13 fiction that the Tribe will be constrained from doing
14 something but the issue is, your Honor, they will get the
15 entitlement to the unappropriated water. Once they get the
16 entitlement to the unappropriated water, then as -- even as
17 a junior water right holder, they will have the right to
18 begin to tell senior water right holders exactly how much
19 water they can take, and when and if they think that we
20 overstep what our rights are.

21 Because it directly affects how much water is
22 available to them, there will be a lot of pressure on the
23 senior water right holders to, you know, tow the line and
24 make sure that we put in conservations, that we do things

1 that, you know, enhance the amount of water ultimately that
2 will flow to Pyramid Lake.

3 The fact of the matter is that the Tribe gets the
4 benefit of the unappropriated water right now, it's not
5 stored upstream; if it's not diverted at Derby Dam, I think
6 Mr. Mackedon's point is: What are we really approving here
7 in terms of water right entitlement?

8 It's not a firm supply, it's not something that
9 can be relied on in any given year, but it's something that
10 cannot actually be quantified and we never heard any real
11 rebuttal to my arguments about the quantity. There is no
12 support in the record, your Honor, for the 477,000 acre
13 foot number, it just doesn't exist.

14 The Tribe's experts all testified to a much lower
15 number. Now, we're concerned if we're talking about an
16 actual number that they are entitled to of that, that gives
17 them the opportunity to try to pressure the system to
18 actually get that number out of the river. The
19 entitlement, according to what the State Engineer said, it
20 should be the excess flows. If it's really the excess
21 flows, they're talking about a much, much smaller number.

22 The Nevada water law requires that they actually
23 get a number, not just everything that is left in the
24 river, and we say that the number that was supported by the

1 evidence, even by the Tribe's expert, was about
2 307,000 acre feet. That would leave sufficient water if,
3 in fact, the unappropriated water that exists in the river
4 to approve TCID's application would still have enough water
5 left over for the Tribe.

6 Thank you, your Honor.

7 THE COURT: Mr. Mackedon?

8 MR. MACKEDON: I don't have anything helpful to
9 say, your Honor. Thank you.

10 THE COURT: Well, I'm limited in my -- what I can
11 do or can't do in these kinds of cases, and the fact of the
12 matter is I'm acutely aware of because I hear more
13 petitions for judicial reviews than anyone else in the
14 state because of being in Carson City.

15 What I'm looking to in the first instance is
16 whether or not there's substantial evidence in the record
17 to support the findings of the lower tribunal, and then as
18 far as the law goes of whether or not they -- we review
19 that de novo giving deference to the body below on its
20 interpretation of the law.

21 Here, the Water Commissioner, he approved
22 Application No. 48061 and 48494; and in doing that, he
23 found that there was that amount of water in good years, I
24 guess, available. He then went on to find that the

1 proposed use was a beneficial use and necessary for that
2 use, and it did not threaten to prove detrimental to the
3 public interest.

4 There was evidence in the record -- there was
5 substantial evidence in the record to support his findings,
6 and I don't find that he -- that he ran awry of the law.
7 So in terms of -- I'm not reviewing anything he did de novo
8 in that regard.

9 You know, as a practical matter sometimes, and I
10 just -- why I do this I don't know because I get in trouble
11 every time I do it -- it could very well be that we are
12 putting the well-being of fish over the well-being of
13 people at times, and I don't know the wisdom of that, but
14 it's not -- it's not my function to decide that.

15 It is, in fact, the Legislature's, you know, when
16 you talk about bias, a state bias, that may very well be
17 that there is one but that, if I understand correctly, is
18 what legislators do that and members of the judiciary
19 aren't supposed to do that.

20 The idea of somebody sending a letter to the
21 Governor somehow or another affects the State Engineer, you
22 know, I know living in Carson City as many years as I have,
23 I think I've known nearly every water -- every State
24 Engineer -- I know I know Pete Morros, I'd see him in the

1 Old Globe all the time -- he disagreed with the Governor as
2 often as he agreed with him. I think he went through two
3 or three governors. We had Roland Westergard, now
4 Turnipseed -- he's not around?

5 MR. SPRINGMEYER: Two since then.

6 THE COURT: Two since then.

7 So, yeah, in theory they work for the Governor but
8 that doesn't mean that they do what the Governor tells them
9 to do, or even that the Governor tells them what to do in
10 situations like this.

11 So this idea of bias, I don't understand that
12 argument and I don't find that he was, and most especially
13 that if he had a bias that it would rise to the level of
14 violating the constitution or depriving anybody of due
15 process.

16 I'm sure that every State Engineer has an idea the
17 direction he'd like to see things go in this state in
18 regards to water, but then again, because he's in the
19 executive branch he's entitled to do that as long as it
20 doesn't overflow into situations like this.

21 So really what I've got to look at is the decision
22 he made and was there evidence to support the decision, and
23 did he -- did he run awry of the law at all. In this case
24 I don't find he did, so I uphold the decisions made by the

1 State Engineer in Case Nos. 48061 and 48494.

2 I want to emphasize again, I think that to some
3 degree you're reading more into -- and that's basically my
4 decision. I'm going to ask Mr. Wolz to prepare an order,
5 submit that to me in Carson City, the original, let
6 opposing counsel, the respondents, the petitioners review
7 that, if you can submit a joint order, fine; if not, then
8 you file whatever objections you have to the order within
9 seven calendar days.

10 How long will it take you to prepare it? I don't
11 want just that I upheld it, I want all the rationale.

12 MR. WOLZ: About a week -- a week, I would think.

13 THE COURT: So you'll have that in by -- this is
14 what, May --

15 MR. WOLZ: May 2nd.

16 THE COURT: -- May 3rd, so just to be safe,
17 May 17th -- actually May 18th, no later than May 18th. If
18 you all have objections, you'll have until May 25th.

19 I'll tell you what, if the objections are a lot
20 then I'm inclined to hold in hearing and get those resolved
21 one way or the other. I say that because sometimes I get
22 two absolutely different orders and everybody is arguing
23 over it, and I can sign one or the other, or I could write
24 my own decision but I'm not going to do that.

1 This is something Judge Russell has got me doing
2 now. I used to write my own decisions, so it may be if the
3 objections are strong enough that -- I think you see what
4 I've said.

5 And then the final thing is that I think that some
6 of the objections you have are as a result of reading too
7 much into what the State Engineer said, and this is a
8 really, really limited grant of water in terms of
9 407,000 acre feet junior to all other rights, and it's
10 specifically for the use that it was asked for, which is, I
11 assume for those fish, and anything else they'd have to go
12 back to the State Engineer and get permission to use that
13 water for anything else, and there isn't any other way.

14 So when you limit it that way, which is what I
15 think he does, then I don't need to remand anything to him,
16 and that's my decision.

17 MR. WOLZ: Your Honor, may I -- could I please
18 make a note just for calendaring? May 18th is a Sunday, I
19 could have that either --

20 THE COURT: Am I looking -- did Huff give me the
21 wrong -- yeah, this is April, you're right.

22 MR. WOLZ: I could either do that on the 19th or
23 16th, as the Court prefers.

24 THE COURT: 16th and then the 23rd -- I was

1 looking at April -- the 16th and then any objections filed
by the 23rd.

3 Anything else then?

4 MR. SPRINGMEYER: Thank you, your Honor.

5 MR. VAN ZANDT: Thank you, your Honor.

6 THE COURT: Court is in recess.

7 (At 11:15 a.m., court adjourned.)

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1 STATE OF NEVADA)
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I, ERIN T. FERRETTO, an Official Reporter of
the Second Judicial District Court of the State of Nevada,
DO HEREBY CERTIFY:

That I was present in the above-entitled
Court on FRIDAY, MAY 2ND, 2008, and took verbatim
stenotype notes of the proceedings had upon the matter
captioned within, and thereafter transcribed them into
typewriting as herein appears;

That the foregoing transcript, consisting of
pages 1 through 82, is a full, true and correct
transcription of my stenotype notes of said proceedings.

DATED: This 22nd day of May, 2008.

ERIN T. FERRETTO, CCR #281