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November 14, 2008

Kenneth Parr  
Bureau of Reclamation  
705 N. Plaza St.  
Carson City, NV 89701

Re: Comments on TROA Rulemaking (RIN 1006-AA48)

Dear Mr. Parr:

On behalf of the Truckee-Carson Irrigation District ("TCID"), I hereby submit comments on the Operation of the Truckee River and Other Reservoirs and the proposed rulemaking to implement the Truckee River Operating Agreement ("TROA"). I appreciate the opportunity to comment on the proposed TROA rule, one that will affect not only the participants in the TROA negotiations but also all of the water users in the Truckee River Watershed.

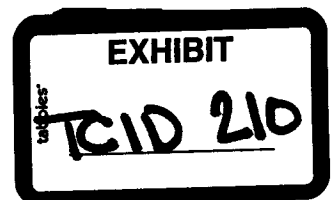
The TROA negotiators have been working on the agreement that is now being proposed for promulgation as a federal regulation for eighteen years. The public is being permitted 60 days in which to review, analyze and comment on the proposed regulation. Given the complexities of TROA, 60 days time is wholly insufficient to provide the kind of comprehensive comments that the TROA requires. Therefore, TCID requests an additional 120 days in which to complete its comment process.

#### Background

The Truckee River and its tributaries supply water to several hundred thousand individuals, to farms, ranches, businesses, and to flora and fauna over a vast area, stretching from the Sierra Nevada Mountains to the Stillwater Range in Churchill County. There are several thousand individuals and entities that own water rights from water supplied by the Truckee River and its tributaries. These water rights were adjudicated in the *Orr Ditch Decree, U.S. v. Orr Water Ditch Company*, Case No. Equity A-3 (D.Nev. 1944). The *Orr Ditch Decree* was finalized after the parties agreed to stipulate to its entry after they had entered into the Truckee River Agreement ("TRA") in 1935. The TRA was negotiated to settle all remaining disputes concerning the allocation of water from the Truckee River and to establish a scheme for the management of the reservoirs and resources associated with the Truckee River, including Lake Tahoe and what was to become Boca Reservoir.

The main participants in the negotiation of the TRA were the United States of America, TCID, the Washoe County Water Conservation District ("Conservation District"), and Sierra Pacific Power Company ("Sierra"). Sierra's water resource responsibilities have been taken over by the Truckee Meadows Water Authority ("TMWA") as of the year 2001. Parties of the Fifth Part, or other individuals using water rights from the Truckee River also signed the

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agreement. TCID, the Conservation District and Sierra were assigned responsibilities for managing the river, since they represented the major owners of water rights. TCID, under a contract with the U.S. Bureau of Reclamation, operates and maintains the Newlands Reclamation Project, one of the first projects established under the Federal Reclamation Act of 1902. The Newlands Project provides water to thousands of water right owners in an area from Fernley to Fallon, Nevada. The United States also was assigned a role since it had a major interest in facilities, including the dam at Lake Tahoe, Derby Dam, Lahontan Reservoir and the Newlands Project. The Federal Water Master, appointed by the *Orr Ditch* court also has a major role to play in the management of the River.

There are many important components of the TRA, but the most important ones are the management of the reservoirs and Lake Tahoe in order to meet Floriston Rates in the Truckee River. The main thrust of the TRA is the maintenance of a certain flow of water in the Truckee River to meet requirements for the generation of hydroelectric power and for irrigation and municipal and industrial uses. The rates of flow were established in the *General Electric Decree* of 1915 and are known as Floriston Rates. *United States v. The Truckee River General Electric Company*, Case No. 14861 (N.D. Cal. 1915). The rates vary from 300 cubic feet per second (cfs) to 500 cfs, depending on the time of year and the storage levels of water in Lake Tahoe. Floriston Rates are designed to ensure that there is sufficient flow in the river to satisfy power generation requirements under the *General Electric Decree*, and to ensure sufficient flows in the river so that downstream irrigation, domestic and municipal and industrial (M&I) demands are met. These would include demands of the Newlands Project under Claims 3 and 4 of the *Orr Ditch Decree* to store water in Lake Tahoe and Lahontan Reservoir and to allow diversions at Derby Dam for irrigation, domestic and livestock and for carryover storage. Without the TRA, the *Orr Ditch Decree* could not have been entered as a final decree. The stipulation entered into by the parties prohibits withdrawal from the stipulation and makes the stipulation irrevocable. Any changes, therefore, to the TRA requires the consent of all the parties to the TRA.

After the *Orr Ditch Decree* was entered, disputes arose concerning the amount of water that the United States had allocated for the Pyramid Lake Paiute Tribe of Indians ("PLIT"). These disputes culminated in several significant events, including a suit by the PLIT to force the Secretary of Interior to regulate diversions from the Truckee River to the Newlands Project and an attempt by the United States to reallocate water in the Truckee River from the Newlands Project to the PLIT. This attempt was halted by the United States Supreme Court in the case of *Nevada v. U.S.*, 463 U.S. 110 (1983). The Court ruled that the *Orr Ditch Decree* barred the United States from reallocating the water of the Truckee River once the decree was final. The Secretary of Interior has continued to regulate diversions from the Truckee River through the Newlands Project Operating Criteria and Procedures ("OCAP"), first promulgated in 1967, and amended in 1973, 1988 and modified in 1997. The OCAP is intended to ensure that the Newlands Project complies with all applicable decrees, including the *Orr Ditch Decree*.

After *Nevada v. U.S.* was decided, the PLIT filed a number of lawsuits asserting historic rights to flows in the Truckee River. The main suit against Sierra was filed in the Eastern District of California. As a result of that lawsuit, in 1989, Sierra and PLIT negotiated the Preliminary Settlement Agreement ("PSA"), which purports to set forth a process to settle

disputes between Sierra and PLIT over uses of waters in the Truckee River, but primarily allows for storage of water owned by Sierra in upstream reservoirs for drought protection for the Truckee Meadows. In return, the PLIT would be able to convert this drought protection water into Fish Credit Water if it is not needed by Sierra. The PSA was modified and then ratified by the United States. The PSA also became the foundation for the Initiative to settle, through federal legislation, certain litigation the PLIT had initiated. Thus was born the Truckee-Carson-Pyramid Lake Settlement Act, P.L. 101-618, 104 Stat. 3289, November 16, 1990 ("Settlement Act").

The Settlement Act includes provisions for congressional approval of the interstate allocations of water between Nevada and California and for the negotiation of the Truckee River Operating Agreement, which would use the PSA as its starting point. TCID was not made a party to the TROA negotiation despite the fact that it represents the interests of thousands of water right owners of Truckee River water. The TROA provisions of the Act also required that water rights along the Truckee River be protected. Moreover, the Act also contained a reservation that it was not to be construed to alter or conflict with any existing rights to use the Truckee River water in accordance with the applicable decrees, including the right of the Newlands Project to divert water at Derby Dam. Moreover, the Settlement Act contains the language that does not allow the Interstate Allocation or the TROA to take effect until the PLIT's claims to unappropriated water are resolved in a manner satisfactory to the State of Nevada and PLIT. P.L. 101-618, section 210(a)(2)(B).

#### **Current Operation, Distribution and Storage of Water of the Truckee River**

In 1913, the United States filed an action to quiet title to the waters of the Truckee River and its tributaries, including waters flowing in California that entered Nevada. *United States v. Orr Water Ditch Co.*, CV-N-73-0003 LDG, (D. Nev. 1944) ("*Orr Ditch Decree*"). This action was brought primarily on behalf of the farmers in the Newlands Project for irrigation of lands withdrawn under the Reclamation Act of 1902, and for the benefit of the Pyramid Lake Paiute Tribe of Indians for irrigation on the Indian Reservation. *Nevada v. U.S.*, 463 U.S. 110, 114-117 (1983). Claims 1 and 2 of the *Orr Ditch Decree* secured irrigation rights for the PLIT. Claim 3 of the Decree secured irrigation, domestic and power generation rights for the farmers in the Newlands Project, including a right to store up to 290,000 acre feet of water in Lahontan Reservoir. Claim 4 of the Decree secured rights in Lake Tahoe for the Newlands Project and other lands under the federal Reclamation Act, but specifically secured rights for the benefit of the Newlands Project as set forth in the *General Electric Decree*, governing releases of water from Lake Tahoe Dam. Thus, the *Orr Ditch Decree* adjudicated water rights not only in Nevada but also in California, as those rights relate to the Newlands Project.

An important component of the *Orr Ditch Decree* was the execution of the Truckee River Agreement ("TRA") in 1935. The TRA was a negotiated settlement of disputes among the parties to the *Orr Ditch Decree*. After the Temporary Restraining Order was issued in 1926 and the ensuing drought, the parties were motivated to finalize the decree. The TRA, as described above, set forth the principles under which the Truckee River would be operated and allowed for the stipulated entry of the *Orr Ditch Decree*. The TRA required the Truckee River to be operated on the basis of Floriston Rates, as established in the 1915 General Electric Decree.

*United States v. The Truckee River General Electric Company*, Case No. 14861 (N.D. Cal. 1915). The GE Decree, as it is called, allowed for the condemnation of the Lake Tahoe Dam and the assumption of rights to store and release water from Lake Tahoe by the United States. Such rights required the United States to release water from Lake Tahoe in order to maintain Floriston Rates (500 cubic feet per second (cfs) March 1 to September 30 and 400 cfs from October 1 to February 28). If the General Electric Company requested that Floriston Rates be reduced, then the difference was considered saved water and was stored for the benefit of the United States. Moreover, all water stored above the low water mark, up to four feet, belonged to the United States and the United States has the right to draw from such water for its own purposes, as later described in Claim 4 of the Orr Ditch Decree.

The TRA addressed issues on several levels, including allocating rights to the Truckee River, recognizing specific claims to be included in the final decree, setting rates of flow in the river, allowing for construction of supplemental reservoirs, recognition of privately owned stored water, setting of diversions by Sierra Pacific for Municipal and Domestic uses, allowing use of water for power generation, allocating of Diverted Flow to TCID and the Conservation District, and creating the framework for managing the Truckee River. The TRA was used as the basis for a stipulation that allowed the entry of the final *Orr Ditch* Decree and once a party signed the stipulation, the signing party could not rescind its signature and the execution of the stipulation is irrevocable. The TRA is incorporated into the *Orr Ditch* Decree as a part of the decree itself. See *United States v. Orr Water Ditch Company*, CV-N-73-0003 LDG at p. 86.

There are several kinds of waters identified in the TRA which are currently managed on the Truckee River. Diverted Flow means the total amount at any specified time of all water diverted from the Truckee River. The amount of Diverted Flow at any specified time shall be determined by adding: (1) the amounts of all waters diverted at such times from the Truckee River by conduits having their places of diversion in said river between Iceland Gage and Derby Dam (including Truckee Canal) and (2) the amount of water (if any) bypassed at Derby Dam in excess of Irrigation requirements below said Derby Dam as provided in the Truckee River Final Decree and subtracting from the result of such addition the aggregate of: (1) the amount of water diverted at such time for the generation of electrical energy or other power, and/or for the removal of ice and which is returned to the river, (2) the Natural Flow at Iceland Gage in excess of Floriston Rates, (3) the amount of Privately Owned Stored Water (other than Privately Owned Stored Water referred to in subparagraph (4) of paragraph (A) of Article III of the TRA) diverted at such times by said conduits.

Natural Flow, as defined by the TRA, means all water (including water contributing to Lake Tahoe) flowing in the Truckee River and its tributaries, exclusive of: (1) water artificially impounded in Lake Tahoe, Supplemental Reservoir, or elsewhere, and released in to said river, or its tributaries, and water diverted from any water shed (other than Truckee River water shed) and released into said river, or its tributaries; and (2) that portion of the flow of Hunter Creek actually diverted by Sierra Pacific Power Company in accordance with, and for the uses provided in, the Truckee River Final Decree. Water diverted from the Truckee River and/or its tributaries for irrigation, domestic, municipal and/or livestock watering purposes which, after use, is returned through seepage or otherwise to said river shall after its return to said river, be deemed part of the Natural Flow.

Privately Owned Stored Water means water (not including water impounded in Supplemental Reservoir after its release into the Truckee River or its tributaries, or water stored in and/or now contributing to water of Lake Tahoe, after its release into said river) impounded by any person under such conditions that the right to the use of such water shall be vested in such person, his successors or assigns.

For the last 73 years, the Truckee River has been managed by the parties to the TRA, along with the Federal Water Master. Several new reservoirs have been added to the Truckee River watershed that did not exist when the TRA was executed. These reservoirs are part of the Washoe Project and include Prosser Reservoir and Stampede Reservoir. The Washoe Project was authorized by Congress to provide upstream storage and drought protection for the Truckee Meadows and the Newlands Project. These reservoirs are managed in conjunction with the other reservoirs serving the Truckee River basin; however, Stampede Reservoir is primarily managed as storage for water for endangered and threatened fish in Pyramid Lake and the Lower Truckee River. This is as a result of a decision by the Secretary of Interior to use Stampede Reservoir water for Pyramid Lake and not for the Truckee Meadows or the Newlands Project. A suit by the Truckee Meadows entities against the Secretary ended when the Ninth Circuit Court of Appeals ruled in favor of the Secretary as having the authority under the ESA to reallocate the water to the endangered fish.

Supplemental Storage Water as defined in the TRA means the first 25,000 acre feet of water diverted and stored in Supplemental Reservoir during any year commencing October 1 and ending September 30. Supplemental Reservoir is the reservoir constructed on the Little Truckee River, known as Boca Reservoir. Additional Supplemental Storage Water is any water stored in Supplemental Reservoir in excess of Supplemental Storage Water. Truckee Canal Water means that part of the flow of the Truckee River to the extent of 1500 cubic feet per second, decreed to the United States, but owned by the Newlands Project water right owners, under the Orr Ditch Decree.

Floriston Rates are defined in the TRA as the rate of flow in the Truckee River as measured at the Iceland Gage, consisting of an average flow of 500 cubic feet per second (cfs) each day during the year commencing March 1 and ending September 30 of any year and an average flow of 400 cfs each day from October 1 to the last day of February of the next year. Reduced Floriston Rates means the rates of flow of water in the Truckee River measured at the Iceland Gage effective and in force during the period commencing November 1 and ending the following March 31, determined as follows: 350 cfs whenever the elevation of Lake Tahoe is below 6226.0 feet above sea level and not below 6225.25 feet, and 300 cfs whenever the water surface elevation of Lake Tahoe is below 6225.25 feet.

Article II of the TRA allows for the construction of Pondage by Sierra and Supplemental Reservoir by the Conservation District and the United States, later Boca Reservoir. Article III of the TRA addresses maintenance of Floriston Rates and Reduced Floriston Rates. This article sets limitations on when Floriston Rates can be changed and requires that before that can occur, the permission of the Conservation District, TCID and Sierra must be obtained. In addition, the United States and TCID must agree pursuant to their rights under the 1915 GE

Decree. Privately Owned Stored Water may also be released to make up Floriston Rates but there is a corresponding reduction in the draft from Lake Tahoe as a result. Thus, reductions in Floriston Rates result in more storage in Lake Tahoe. Releases from Boca Reservoir can also be used to make up Floriston Rates if the parties agree, including TCID.

### **TROA Is An Unnecessarily Complex Document That Will Require Additional Time to Fully Understand, If At All**

At over 250 pages, TROA is a long and complex document that changes in its entirety the management scheme of the Truckee River. The TROA is full of cross references and unique definitions, that test the reaches of the human brain. It also leaves one with the feeling that something is happening with the water, you just can never tell what or when. A reading of the TROA leaves one with the same feeling that a federal judge had when first encountering the federal Clean Water Act.

The Clean Water Act ("CWA") is an enigmatical piece of legislation. Filled with more sesquipedalian jargon than a year's subscription to any trade journal and a byzantine system of cross references; its intricacies are virtually indecipherable.

*Citizens' Coal Counsel v. Environmental Protection Agency*, 385 F. 3d 969, 971 (6th Cir. 2004).

TROA is not very well explained in the documentation, including the TROA Environmental Impact Statement and Environmental Impact Report ("EIS/EIR"). Never once in TROA or the associated documents is there an attempt to set forth any factual scenarios that would mimic real world conditions that the public can relate to and then attempt to describe how TROA works. The complicated system of exchanges under TROA makes it nearly impossible to track just exactly how and where water is being used, or who makes these determinations.

The TROA negotiation and development process took eighteen years and involved public and private entities and their consultants. These parties were given ample time to develop, scrutinize, and revise the proposed rule. The notice of the TROA proposed rule making gives 60 days to comment. Given the complexity of proposed rule, this is not nearly enough time to fully analyze and adequately comment on TROA. Therefore, TCID requests that the Bureau of Reclamation extend the time to comment on TROA for an additional 120 days to ensure adequate time to review and analysis the rule. This is especially appropriate here, where TROA proposes to change the management scheme of the Truckee River, and where Newlands Project water right owners had no voice in these negotiations.

### **TROA Violates the Orr Ditch Decree**

The *Orr Ditch* Decree prohibits anyone:

from ever taking, diverting, using or claiming any of the water so decreed, in any manner or at any time so as to in any way interfere with prior rights of any other persons or parties under this decree.

*Orr Ditch Decree* at p. 87. The model output data from the TROA Environmental Impact Statement and Environmental Impact Report ("EIS/EIR") indicates that TROA results in increased shortages to the Carson Division of the Newlands Project in seven years of the study period including an increase of approximately 8,000 acre-feet in Water Year 1934. Increase shortages can mean only one thing, in those years some Newlands Water right owners will not receive their vested water rights under TROA. As discussed below, TCID believes this TROA model is highly suspect. However, these results show shortages to the Newlands Project and a clear interference with decreed rights under TROA in violation of the *Orr Ditch Decree*. Although TROA anticipates modifying and amending the *Orr Ditch Decree*, this provision protecting vested water rights cannot be part of the envisioned modifications. Thus, based on the only evidence available related to the operation of TROA, it violates the *Orr Ditch Decree*.

TROA proposes to allow the use of historical return flows in a fashion that injures existing rights in violation of the *Orr Ditch Decree*. For example, the consumptive use portion of unused and excess agricultural rights converted to M&I purposes by TMWA will be stored in Truckee River reservoirs as M&I Credit Water for subsequent release to meet M&I demands, or if unused converted to Fish Credit Water and released at times different than the historical flow patterns. Subsequent releases of stored credit waters will likely occur during times when Truckee River streamflows are significantly less than the streamflows occurring at the time the water is stored and thus the potential for significant differences in stream conveyance losses. It is also not sufficient to say that the historical return flows will be left in the river at the time such consumptive use is stored in the reservoirs. If these historical flows are converted to Fish Credit Water and released when TCID is not allowed to divert, they will flow past Derby Dam to Pyramid Lake, thus causing additional shortages to the Newlands Project and to the communities of Fernley, Fallon and Churchill County.

TROA also claims that the credit waters stored in these upstream reservoirs will attain the characteristics of Privately Owned Stored Water (POSW). This means that such waters can be stored in the reservoirs and when released, no transportation losses are applied until the water reaches its new point of diversion. This means that water stored for drought protection by TMWA that normally would be diverted in the Reno/Sparks area will now be stored with no losses and converted into Fish Credit Water. The Fish Credit Water, when it is released, will have no transportation losses applied until it reaches Pyramid Lake. Thus for the distance from Sparks to Pyramid Lake, some fifty miles, there are no transportation losses applied and the water needed to transport such credit waters comes out of the flow in the river that would otherwise be available to divert by others along the river without regard to priority of appropriation. To declare that water that is not even decreed water such as fish water or fish credit water is permitted to have carryover storage and no transportation losses elevates this water above other decreed water with a clearly higher priority than decreed rights.

Under TROA, TMWA and Sierra are permitted to store hydroelectric power generation water, water that has a non consumptive use under the *Orr Ditch Decree*. To eliminate that water from flowing in the river by converting it to Fish Credit Water requires it to bypass Derby Dam. Normally, this non consumptive use by TMWA or Sierra would continue to flow in the

river and would be available for diversion by TCID. This is a direct and substantial impact on the Newlands Project.

The *Orr Ditch Decree* makes the TRA binding on signatory parties to that agreement, including TCID, the Conservation District, the United States and Sierra/TMWA. See *Orr Ditch Decree* at p. 86. As discussed below, TROA violates many provisions of the TRA. Because these parties are bound by the TRA, which is incorporated into the *Orr Ditch Decree*, violation of the TRA violates the *Orr Ditch Decree*.

#### **TROA Cannot Supersede the Truckee River Agreement, Which Is Binding on TROA Signatories**

As discussed above, the TRA has served the people and the users of Truckee River water for many years. It is easy to demonstrate that the entity that controls the flow of the river controls who will benefit and who will not benefit from the waters of the Truckee River. For many years, the Truckee River has been jointly managed by the United States, TCID, Sierra/TMWA, Washoe Conservation District, and the Federal Water Master. Now the TROA proposes to supplant this group with a new triumvirate of the United States, TMWA and PLIT. The Federal Water Master's role will be subsumed into an Administrator who is controlled by the triumvirate. The purpose of this power shift can only be for two purposes. First, the parties now wish the Federal Water Master and the courts to take less of a role in the administering of the decrees. Second, the parties now want to relegate TCID to a non role in deciding how the river will be administered. Since TCID is the government's contractor, the real parties impacted are the persons owning a significant percentage of the water rights in the Truckee River, i.e. the Newlands Project water right owners. The question must be asked: Is it fair to exclude TCID from making management decisions concerning the Truckee River when it has been directed by vote of the Newlands Project water rights owners to play such a role under the TRA? This is exactly what TROA does by superseding the provisions of the TRA, to which all parties are bound.

As a prelude to and a condition of the entering of the final decree in the *Orr Ditch* case, the parties entered into the TRA for the operation of the Truckee River. The TRA contains specific language which makes it binding on all of the signatories, including the United States, the Sierra/TMWA, TCID, the Washoe County Water Conservation District and the individual water right owners on the Truckee River. There is no provision for modifying the TRA. Instead the parties had stipulated to the entry of the final decree with the *Orr Ditch* Court incorporating by reference the provisions of the TRA into the decree. Therefore, the operation of the Truckee River under the Decree became integral to the adjudication of the rights of the parties to the water in the Truckee River itself. One cannot be divorced from the other. Thus, TROA cannot "supersede" the TRA as anticipated in TROA §5.A.1(a) without the agreement of TCID. There is a significant question whether any parties to the TRA can unilaterally dispose of and replace it with a different management scheme without the consent of all parties to the TRA.



The TROA states that the TRA will be superseded, but nowhere are these proposed changes identified or described.<sup>1</sup> However, what is clear is that TROA's proposed water storage and uses of Truckee River water will interfere with the implementation of Floriston Rates on the Truckee River.<sup>2</sup> The terms of the TRA limit when Floriston Rates can be changed, and require the permission of the Conservation District, TCID and Sierra Pacific Power Company before such changes can occur. In addition, the United States and TCID must agree pursuant to their rights under the 1915 GE Decree. Under TROA, an Administrator will oversee the management of the Truckee River at the direction of the TROA signatories (which does not include TCID). The TRA also calls for Reduced Floriston Rates under certain conditions that would also potentially be impacted by the proposed TROA changes, and are thus in violation of the TRA. Under TROA the signatories purportedly may agree to a reduction in flow rates in exchange for storage credit in the upstream reservoirs. As a result, less water may be available for diversion by the Newlands Project, Churchill County and the City of Fallon at Derby Dam. In turn, the Newlands Project may not have access to adequate amounts of water to meet their rights. By modifying the *Orr Ditch* Decree and changing the TRA, TROA changes the distribution and storage of water in the Truckee River Basin. This change in the distribution and storage of water harms the prior water rights of the farmers of the Newlands Project, which were guaranteed under the *Orr Ditch* Decree. The long and short of this is that the water is no longer saved for the benefit of all water users on the river but is saved only for TMWA and/or the PLIT. The water right owners in the Newlands Project are completely cut out of this process.

Water in Boca Reservoir or Lake Tahoe water may not be used as proposed under TROA. These water bodies are subject to the terms of the TRA, to which the TROA parties are bound. Changes in the flow from Boca Reservoir require the consent of TCID. Several new reservoirs have been added to the Truckee River watershed that did not exist when the TRA was executed. These reservoirs are part of the Washoe Project and include Prosser Reservoir and Stampede Reservoir. All Washoe Project Reservoirs, include Prosser Reservoir and Stampede Reservoir, must also be operated based on Floriston Rates. These reservoirs are managed in conjunction with the other reservoirs serving the Truckee River basin. TROA fails to show that the proposed diversion and use of water is consistent with the management regime of the Truckee River as set forth in the TRA and the *Orr Ditch* Decree. Moreover, any unused water in the Truckee River is to inure to the benefit of the Conservation District and TCID. Attempts to alter the division of unused water are in violation of the TRA and undermine the *Orr Ditch* Decree.

Article II of the TRA deals with the operation of "Pondage" and "Supplemental Reservoir" (Boca Reservoir) and their use to maintain river flows subject to the limitations and conditions prescribed in the TRA. Further, Article IV of the TRA deals with impounding water in Boca Reservoir, and the miscellaneous provisions of Article XXV of the TRA deal with the operation of Boca Reservoir and Lake Tahoe. TROA proposes to supersede the operation of the "Pondage"

<sup>1</sup> Attachment A and B represent correspondence between the United States and the State of Nevada in 2002 regarding proposed amendments to the *Orr Ditch* Decree and the TRA. This correspondence shows that the TROA parties envision that most of the provisions of the TRA will be supplanted by TROA.

<sup>2</sup> In the proceedings related to the change application filed by TMWA purporting to store and use water under TROA, the Nevada State Engineer and TMWA acknowledge that the TROA changes require "a change in the rate of flow of the Truckee River at Farad." Interim Order No. 1 dated September 10, 2008, at p. 7; Attachment C.

and "Supplemental Reservoir" provisions of the TRA and alters the use of Lake Tahoe. See TROA §5.A. TROA may not impact this operation nor interfere with existing rights.

The allocation of "Diverted Flow" as provided in Article VII of the TRA is incorporated by reference in TROA and superseded. The parties to the TRA agreed that the rights to the use of Diverted Flow of the Truckee River shall be allocated in accordance with the TRA. The TRA provides that Diverted Flow (essentially all water rights that are diverted along the Truckee River) is allocated thirty-one percent to TCID for use in the Newlands Project and sixty-nine percent to the Washoe County Water Conservation District, subject to the rights of Sierra Pacific Power in Article V of the TRA (40 cfs plus diversions from Hunter Creek). If at any time the right to use the sixty-nine percent is not being exercised and there is water available at Derby Dam, then TCID is given the right under the TRA to divert and use that excess water.

The parties to the TRA agreed that saved water would flow in the river and that 31 percent of this diverted flow would be available for TCID to divert and place to beneficial use. TROA makes no provision for this term in the TRA, and the 31 percent diverted flow is being bypassed as a result of conversion of water to fish credit water which will in turn flow past Derby Dam and be made unavailable to TCID at times when TCID would otherwise be able to divert such water. In essence, TROA removes this water from the system by storing upstream and then converting it to fish credit water. If water is being declared as excess and allowed to be converted to Credit Water, such water is part of the Diverted Flow and should be managed in accordance with the terms of the TRA. The execution of the TRA is irrevocable.

TCID relies on the historic flow pattern of the Truckee River to provide water rights to the Newlands Project. TROA, and its system of credit storage, anticipates conversion of Truckee River water to Fish Credit Water. However, credit waters are not recognized under the *Orr Ditch Decree* or the TRA. TROA purports to have the authority to unilaterally alter the TRA without the consent of the parties to that agreement. Since the TRA was used as a stipulation by the parties to the *Orr Ditch Decree* to allow the entry of the Final Decree as compromised by those parties, it is presumptuous for the United States and the three Nevada entities involved in TROA to believe they can discard TRA in favor of a management scheme that provides "benefits" to only certain parties. Floriston Rates drive how Lake Tahoe and Boca Reservoir are operated. TROA purports to alter Floriston Rates without the consent of one of the main parties to the TRA who is most affected, TCID. The creation of Credit Waters in upstream reservoirs that interfere with Floriston Rates undermines the water available in the Truckee River to be diverted at Derby Dam.

#### **TROA Violates the Settlement Act (P.L. 101-618)**

TROA was born from the Preliminary Settlement Agreement between Sierra and PLIT, which was recognized in the Truckee-Carson-Pyramid Lake Settlement Act, P.L. 101-618, 104 Stat. 3289, November 16, 1990 (the Settlement Act). The Settlement Act contains a reservation that it is not to be construed to alter or conflict with any existing rights to use the Truckee River water in accordance with the applicable decrees. As discussed above, the TRA is incorporated into the *Orr Ditch Decree* as a part of the decree itself. TROA however allows water to be stored and released without permission of the owner, precludes certain storage and

release for decreed water rights and users, and provide benefits to non-water-righted uses at the expense of water-righted uses. These actions are in conflict with § 205(a)(2) of P.L. 101-618, which states that water is to be stored and released from Truckee River Reservoirs to satisfy exercise of water rights in conformance with both the *Orr Ditch* and *Truckee River General Electric Decree*. Therefore, TROA must comply with the TRA requirements for storage and maintenance of Floriston rates. As discussed above, TROA improperly attempts to change the material provisions of the TRA and *Orr Ditch Decree*. This is also a violation of the Settlement Act.

Further, as discussed below, the water resources computer model used to support the TROA is fatally flawed. However, even the model shows that under extreme drought conditions, an additional 8000 acre feet of shortages will occur in the Newlands Project. Thus, based on the only data available related to the proposed impacts, TROA clearly violates the Settlement Act, which prohibits any alteration or conflict with decreed rights. Given the manner in which the water will be credit stored under TROA, and the interference with historical flows in the Truckee River, TCID believes that the model used for TROA significantly understates the shortages to downstream water right owners, including the owners in the Newlands Project.

Among the purposes of the Settlement Act is to fulfill the goals of the Endangered Species Act. See §202(e). TROA is to provide enhancement of spawning flows in the lower Truckee River fishery to further this goal. See Settlement Act at §205(a)(2)(B). Finally, the Settlement Act is to aid in the recovery of cui-ui and Lahontan Cutthroat Trout. See § 207. However, it is not entirely clear that TROA provides a benefit to these sensitive fish species. At the hearing before the State Engineer related to unappropriated water, discussed in detail below, TCID attempted to introduce evidence that there is a large differential and reduction in the numbers of cui-ui under TROA than under present conditions. The exhibit evidencing this reduction is attached as Attachment D, and shows the differential is 93,000 adult female cui-ui under existing conditions and only 29,000 under TROA. The fact that cui-ui are better off without TROA was also recognized by the reviewers of the TROA model. (see discussion of the TROA model below). Model results in 1996 showed "that the cui-ui were better off without the Truckee River Operating Agreement (TROA) than with it." (November 14, 1996 Memorandum from Bill Sikonia; Attachment E). Further, the method of "fixing" the model to show a later benefit to the cui-ui was questioned. The TROA rule cannot go into effect when there are serious doubts related to the benefit of the Pyramid Lake fisheries and compliance with the Settlement Act.

#### **TROA Violates *Nevada v. U.S.*, 463 U.S. 110 (1983)**

In *Nevada v. U.S.*, 463 U.S. 110 (1983) the Supreme Court determined that the United States was prohibited, based on entry of the TRA and the *Orr Ditch Decree*, from reallocating the water of the Truckee River. TROA purports to create carryover storage rights in the upstream reservoirs and even removes water from storage in Lahontan Reservoir which is then stored in these upstream reservoirs, ostensibly for the purpose of preventing spills at Lahontan. These provisions are designed to hold water that is part of the Newlands Project water right owners carryover storage right in Lahontan, in the upstream reservoirs where it will be

converted to fish water for the benefit of the PLIT. This is exactly the type of reallocation that was barred by the U.S. Supreme Court in 1983.

#### **Credit Water Operations Under TROA Violates Existing Law and Injures Newlands Project Water Owners**

The TROA creates categories of water rights which do not exist under Nevada law or the *Orr Ditch* decree. The TROA purports to create Fish Credit, M&I credit, Joint Program Fish Credit and other categories of water not recognized elsewhere. Potential uses under TROA for fish credit water will injure Newlands Project water right owners, including the U.S. Fish and Wildlife Service. The *Orr Ditch* Decree water appropriated by the United States on behalf of the Newlands Project and the PLIT was for irrigation and domestic purposes. The historic use of this water was for irrigation, which provided for return flows which could be beneficially used by Newlands farmers. Likewise, the current use of this water for municipal and domestic use provides substantial return flows. However, uses under TROA for fish water do not provide return flows, resulting in injury to Newlands Project water right owners, especially in years of drought. The TROA is attempting to create new purposes for the use of the water without going through an approval process for the change of use of the water. This is a violation of the Reclamation Act and Nevada law.

The reduction in Floriston rates proposed by TROA is particularly disturbing since it could have the effect of diminishing the amount of water available to divert at Derby Dam. By allowing TROA signatories to agree to reduction in flow rates in exchange for storage credit in the upstream reservoirs, the TROA creates a situation where less water is available for the Newlands Project. TROA through its water storage credit and accounting mechanisms allows for priorities of water rights to be shifted in the upstream reservoirs and for carryover storage for TMWA and PLIT while denying these same benefits to the Newlands Project. In fact, at the same time that storage rights are being enhanced for other parties to the TROA, they are being diminished for the Newlands Project, where no such carryover storage right is allowed.

It is not clear how the accumulation of Credit Water in the various upstream reservoirs will work. However, given the limits on upstream storage capacity and the fact that most of the water stored upstream will eventually be converted to Fish Credit Water or is Fish Water, there is a strong likelihood that capacity in the upstream reservoirs will be exceeded. Thus, there may not be sufficient room to accommodate all of the entities seeking Credit Water storage. The Power Company alone may store 12,000 acre feet of Firm M&I Credit Water and 20,000 acre feet of Non Firm M&I Credit Water. The excess of the base amount of Non Firm M&I Credit water converts to Fish Water on April 15, unless there is a drought. An additional 4000 acre feet of Credit Water may be stored based upon conservation water. Further, water not needed for *Orr Ditch* Decree Rights and that is used for Single Purpose Hydroelectric Water may be converted to Fish Credit Water. Under Claim 5 alone of the *Orr Ditch* Decree, TMWA could use up to 325 cfs of water, meaning 235,000 acre feet in a year for hydroelectric power. Under the current TRA, this water must be returned to the Truckee River. Under TROA, however, this water can be credit stored in the upstream reservoirs, where it will eventually be converted to fish credit water and completely lost to any *Orr Ditch* Decree water right owners other than the PLIT.

Fernley Credit Water (TROA §7.F) is Claim 3 water under the *Orr Ditch Decree*. It is TCID responsibility to manage this water under contract with the United States. There does not appear to be any authority for the management of this Claim 3 water under TROA. Further, transfer of this water to the TROA management scheme complicates TCID's management of Claim 3 waters. To our knowledge, Fernley has not filed with the state Engineer any transfer applications to allow the management of this water under TROA. If such a request is made, the State Engineer must consider the additional costs and impacts to efficiency to the Newlands Project resulting in transfer of Fernley Credit Water under TROA. NRS §533.370

#### **Newlands Project Credit Water Provides No Practical Benefit to the Newlands Project**

The provisions for Newlands Project Credit Water (NPCW) appear to place the operation and control of NPCW in the hands of the United States with little input and control by TCID. The Newlands Project receives relatively small benefits compared to the potential impacts from TROA, which will include reduced carryover storage, reduced water levels in Lahontan Reservoir, and increased Carson Division shortages. The provisions for NPCW appear to be much more restrictive in terms of actual credit water utilized by the Newlands Project compared to the current credit water provisions of OCAP. OCAP would have to be modified to accommodate the NPCW language in TROA.

There are several limits or overriding provisions of TROA that may affect Newlands Project Credit Water. Section 7.H of TROA governs Newlands Project Credit Water and provides that Newlands Project Credit Water may be established by exchanging an amount of Floriston Rate water or Truckee River flow in excess of Floriston Rates or Reduced Floriston Rates (which would have otherwise been diverted to the Newlands Project in accordance with Truckee Canal Diversion Criteria) with an equal amount of Fish Water or Fish Credit Water. This exchange may only occur if Floriston Rate Water or the flow of the Truckee River is allowed to flow to Pyramid Lake after the exchange. Newlands Project Credit Water may also be established by storing an amount of either Floriston Rate water or flow in excess of Floriston Rates or Reduced Floriston Rates that would have otherwise been diverted to the Newlands Project. The rate of flow of the Truckee River will be reduced by the amount of Newlands Project Credit Water established.

However, the establishment of Newlands Project Credit Water is limited to water availability, and may only be established when the water rights scheduled to establish such credit water are in priority to receive water and would not have been satisfied from return flow from water rights having a point of diversion upstream of the Truckee Canal. TROA § 7.H.2. TROA also provides that the United States may exchange or re-store Newlands Project Credit Water between Truckee River Reservoirs, with the consent of Nevada, provided such operations do not diminish the amount of Newlands Project Credit Water available for its intended purpose. This provision of TROA is in direct contrast to the original justification for storage of water in Stampede Reservoir, whose permit terms (as issued by the California State Water Resources Control Board) indicate that Stampede Reservoir was originally intended to supply water for irrigation in the Truckee Meadows and the Newlands Project. It appears that this provision of TROA would cause the U.S. Bureau of Reclamation to be in violation of the permit terms for Stampede Reservoir because Stampede Reservoir water would not be used

beneficially in the Newlands Project, and instead would be moved between Truckee River Reservoirs to facilitate releases of Fish Water to Pyramid Lake.

Section 7.H.8 of TROA provides that Newlands Project Credit Water not required for diversion to the Newlands Project (pursuant to Truckee Canal Diversion Criteria) shall be reclassified as Additional Boca Storage Water, Independence Lake Privately Owned Stored Water and Fish Water or Fish Credit Water depending on a set of characteristics and qualifications. As with many other TROA components, the obvious problem with this TROA provision is that it converts the Newlands Project's *Orr Ditch* decreed water rights to types of water that do not have a decreed water right -- Additional Boca Storage Water, Independence Lake Privately Owned Stored Water (which supplies the Truckee Meadows) and Fish Water or Fish Credit Water, for the benefit of Pyramid Lake. Bureau of Reclamation OCAP policies on the implementation of Newlands Project Credit Water also convert Newlands Project Credit Water to water for cui-ui recovery where Newlands Project Credit Water remains in storage in Truckee River reservoirs at the end of the irrigation season. These provisions interfere directly with Newlands Project water rights.

Under TROA §7.A.3(b), where Truckee River Water Rights are being limited based on water right priority, then Credit Water may only be established if the Credit Water for the Newlands Project has a right to receive water based upon its priority. Since the priority of NPCW water is based upon the Newlands Project priority (1902), and there are many water rights, especially in the Truckee Meadows, with earlier priorities, the Newlands Project may be precluded from establishing Credit Water Return flows to the Truckee River and may also override Credit Water. Another exception to the Credit Water accumulation would occur when, due to Changed Diversion Rights, Floriston Rates are less than 275 cfs from June to October or less than 120 cfs from November to May, or if establishment of Credit Water concurrently by several entities causes the flows in the Truckee River to be less than these flows. Thus, if TMWA, Fernley, Washoe Conservation District, and PLIT are all trying to establish Credit Water from Changed Diversion Rights, and this causes the Floriston Rates to drop, then no Credit Water will be allowed.

An overriding requirement exists because the United States and PLIT are required to maintain flows below Derby Dam at 50 cfs from November to May and 135 cfs from June to October. Thus, if Changed Diversion Rights are being used to establish Credit Water and this causes the flows in the Truckee River to drop below 50 cfs or 135 cfs based upon the foregoing schedule, again no Credit Water may be established. Given all the conditions that prohibit the formation of NPCW, there does not appear to be a realistic benefit to the Newlands Project water right owners.

#### **Donner Lake May Not Be Stored And Utilized As Proposed In TROA**

TCID in order to secure additional sources of water began leasing water from Donner Lake. This culminated with the purchase of a common interest with Sierra in 9500 acre feet of storage and water rights in Donner Lake in 1943. This water is referred to as "Privately-owned stored water" in the TRA. TCID and TMWA are the sole tenant-in-common owners of water rights in Donner Lake. Operation of Donner Lake is governed by an agreement related to

"Donner Lake Operation and Maintenance Cost Sharing and Use of Donner Lake Water," ("Agreement") entered into by TCID and Sierra Pacific, the predecessor in interest to TMWA in May 1943. The Agreement specifies all permissible uses of Donner Lake water and mandates that releases shall be for the sole use and benefit of the parties to the Agreement.

TROA proposes to impound, allocate, and schedule discharges of Privately Owned and Stored Water in Donner Lake. The proposed management of Donner Lake water within the management scheme of TROA violates the Agreement and will deprive TCID of the benefit of its interest in Donner Lake. TROA also contemplates the sale of Donner Lake water rights by TCID for use in implementing the provisions of TROA. TCID has no intention of selling its water rights in Donner Lake.

TROA, when mentioning Donner Lake water, does not acknowledge that TMWA only owns an undivided one-half interest in the water, and that the Donner Lake water even after it is used by TMWA is to be returned to the Truckee River after September 15 of each year so that it can flow downstream to Derby Dam to be diverted for the Newlands Project. The TROA falsely assumes that Donner Lake water can be partitioned. There is no proposal by TMWA to acquire all of Donner Lake water and TCID has no present intention of relinquishing such a right. Any effort by TMWA to trade Donner Lake water as Fish Credit water under the TROA operation would be a breach of the agreement between Sierra and TCID for the use of that water, to which TMWA is obligated. This issue is currently in litigation in Nevada County Superior Court in California.

The TROA operations call for Credit Water and Project Water to be used to meet increased minimum releases for Donner Lake. Included in the definition for Project Water contained in TROA is Privately Owned Stored Water (POSW) in Donner Lake, apparently including the water in Donner Lake owned by TCID. Under what authority can POSW owned by TCID be used to meet the increased minimum releases specified in TROA?

The section on Reservoir Operations in TROA purports to allow TMWA to exchange water in Donner Lake for Fish Credit Water. Since the water in Donner Lake owned by TMWA is an undivided one half interest in common with the TCID, any use of such water as Fish Credit Water can only be done with the express consent of TCID. Reference is also made in TROA to storage of credit water in Donner Lake. Likewise, no use of Donner Lake for credit storage under TROA can be made without permission from TCID. TCID has not given such permission and does not plan to allow such use of Donner Lake water.

**The Model Which Is The Basis For TROA Negotiations and Upon Which Potential Impacts From TROA were Determined Is Fatally Flawed**

In the Comments to the TROA Final EIR/EIS there were a number of comments from TCID and experts commenting on behalf of TCID, Churchill County, and the City of Fallon, that were critical of the model used to negotiate and develop TROA. The responses to these comments did not address the fundamental flaws in the TROA model. These flaws were known to the TROA negotiators and signatories as far back as 1996, yet it appears nothing was done to correct the errors and uncertainty in the model. Thus, the TROA management scheme,

which is based on this outdated and flawed model, is likewise flawed and cannot be relied up to predicted operational outcomes or to protect water rights in the Newlands Project.

The TROA model employs techniques that obscure the procedure and make it hard for the most expert reviewers to discern the underlying relationships. The model upon which TROA rests so heavily is unreliable in critical respects. There are limitations in the FORTRAN model that cause unintended consequences in the output. As pointed out by Principia in its comment letter to the Final EIR/EIS, "the computer program embodying the TROA model consists of more than 72,000 lines of convoluted FORTRAN language contained in 173 subroutines." (Attachment F at p. 3) This makes it practically impossible for any independent and unbiased reviewer to follow the steps the program takes or to test the logic to evaluate whether the program computations are indeed being performed as intended, and as reported. For example, Principia noticed that:

each planned action taken on the water system is coded within a program subroutine that is found to have complex, undocumented, and sometimes unexpected interactions with different parts of the program that represent other segments of the flow system. It is thus made impossible for any independent reviewer to evaluate whether, or not these interactions were intentional, and if so why, or merely accidental stemming from the manner in which the program has evolved during the past two decades.

(Attachment F at p.3)

The TROA model is chaotic, and small changes in the inputs, model calculations or computer hardware result in large changes in the outputs. Principia determined that the model is unreasonably sensitive to the computer architecture and FORTRAN-language compiler routinely used to convert the source code to a usable or executable form. (Attachment F, at p.5) In other words, when used on different computers or with different FORTRAN-language compilers, the TROA model predicts quantitatively different results. Such differences indicate either the use of dangerously poor programming practices or the inherently chaotic behavior of the flow system as modeled, or some combinations of both. In order to reproduce the results of the model, it must be run on the exact same make and model computer and compiled with the same program that translate human readable instructions to machine instructions as the BOR. If this is not done, the minute variations in the calculations that result from using a different make and model of computer or a different compiler cause the model to predict an outcome that can change dramatically. It is believed that the computer hardware originally used by the BOR has since failed, and even the BOR can no longer reproduce the results originally obtained for the TROA EIS/EIR.

The TROA model makes predictions that appear to be driven by the results expected by parties to the TROA negotiations. Principia determined that the TROA model cannot produce a negative result. (Attachment F, at p. 6) The model and the proposed TROA operations are intricately linked. In particular, the model does not implement the agreement using a set of defined rules to operate. Instead, it seeks to find water for the benefit of TROA, and thus can never produce a result where it demonstrates that less water is available under the TROA.



Since the TROA model cannot invalidate the hypothesis that the Agreement is beneficial, it cannot serve as a basis that the Agreement is indeed beneficial.

To our knowledge there has not been developed a Users Manual or Guide for the TROA model. Although the responses to comments in the FEIS/EIR indicated that an official manual was being prepared and would be distributed, such a manual remains unavailable. Not even rudimentary documentation seems available for the TROA model program. It is therefore virtually impossible for any independent and unbiased reviewer to follow the steps the program does take, evaluate values embedded as facts into it, and test the logic to evaluate whether the program computations are indeed being performed as intended, and as reported.

The model issues complained about by TCID and its experts are substantiated by comments by TROA reviewers who were asked to document and conduct a quality assurance review of the TROA model. These reviewers were asked to review the functional logic in the model and assure it accurately represents legal and operational requirements in the TROA and other legal documents that will regulate the operation of the Truckee River. (February 24, 1994 Request for Service; Attachment G) These experts who had unlimited access and were specifically tasked to review the TROA model, raise many of the same issues with the model that were raised by TCID and its experts, and indicate that the model is fatally flawed and no reliability should be placed on the model or the predicted outcomes of TROA.

Bill Sikonia, then an employee of the United States Geological Survey (USGS) was asked to document and quality assure review of the TROA model. He described the difficulty in understanding the model and determined it was pointless to continue the process and impossible to fully understand. (Bill Sikonia Memorandum dated July 26, 1996; Attachment H) Among the problems cited by Mr. Sikonia is that the model development did not adhere to good coding practices, the code is convoluted and it cannot be determined what parts of the overall program or of a single subroutine perform certain functions. (Attachment H at p. 1) Further, he states:

It is extremely difficult to separate whether operations are simply personal estimates (usually with little justification) on processes and constants, or whether the choices are actually based on rational analysis or dictated by court cases. The model has almost no internal documentation describing the model's operation, the reasoning behind choices, the flow of logic, or anything else.

*Id.* The "code is almost impossible to understand," and the meaningless variables in the model are impossible to read because "they change many times (as many as twenty times) within a single subroutine." *Id.* at p.2. In a memorandum from Bill Sikonia dated August 20, 1996, he confirms that the cryptic nature of the subroutines applied to the TROA model have variable meanings and resulting in incorrect processing. (See Attachment I) His conclusion is that "[b]ecause of the lack of a clear understanding of the model's operation, I do not think one can assure the model results are valid. (In fact, I have examples of coding errors that definitely change model results.)" (July 26, 1996 Memo; Attachment H at p. 3.)

In a memorandum dated November 14, 1996 Mr. Sikonia was also critical of the political influence in the TROA modeling process. (See Attachment E). He indicates that when unfavorable results were revealed, a change or process parameter would be incorporated "to give the politically acceptable 'more reasonable' result." Specifically, model results that show that the endangered cui-ui are better off without TROA presented a "problem" that need to be fixed to show the "favorable" results of TROA. *Id.* It appears the inconsistencies with the model were ignored in an effort to make TROA work. Further, he indicates that "it is nearly impossible to tell if the model does correspond properly, or to distinguish arbitrary and personal choices from imposed court decisions." (Attachment H at p. 2)

Mr. Sikonia is not alone in his opinion of the model. His coworker on the documentation and quality assurance project, Bill Greer, stated that:

I agree with Bill Sikonia's comments on the difficulties we have encountered in our task. In many places the code is extremely convoluted, making it difficult to tell where or how or under what conditions a particular calculation is made; many calculated quantities are constrained by a number of upper and/or lower limits, some of which appear either superfluous or irrelevant; some switches, which prescribe the path the computer follows through the code, are undefined or incompletely defined, so that the conditions under which a particular path is followed are unclear; some portions of the code are apparently never used, but nevertheless remain in place; many temporary variables are assigned names which have no connection with what they represent; in many cases, the same temporary variable name is used over and over within a subroutine to represent different quantities; and in a number of subroutines, hydrologic quantities are calculated using coefficients or factors which, apparently, are not explained or justified anywhere.

(August 5, 1996 Memo from Bill Greer, Attachment J)

Kenn D. Cartier, who worked over a year towards documenting and reviewing the TROA model while employed by the Geological Survey in Nevada, was also of the opinion that "the existing code has large sections which are virtually indecipherable and could not be understood without a major re-write and extensive consultation with the program's principal author." (November 12, 1996 Letter from Kenn D. Cartier to William Bettenberg; Attachment K). Further, he states that "the TROA model is such a patchwork of assumptions, physical and political simplifications, and convoluted code that it is difficult to say what the output results might represent or whether they approach a realistic representation of the water system." *Id.* Likewise, David Robertson, a software expert, was of the opinion that "no mere human could in good conscience profess to understand it in detail and prove that the results are 'right.' It is far too complex, convoluted, and baroque for that." (November 12, 1996 letter from David Robertson of Robertson Software, Inc. to Bill Bettenberg of the DOI; Attachment L). Mr. Robertson also describes why the "model is hopelessly complex for anyone to understand." Among the numerous issues he points to is the model's extreme sensitivity.

These comments confirm the concerns of TCID related to the TROA model. This model was the basis of negotiations and presumably allowed the TROA signatories to negotiate the new storage, release, and distribution requirements of TROA. This model is also the basis of the impacts analysis conducted in the FEIS/EIR. To our knowledge the TROA model has never been modified and the criticisms of the model have never been addressed. It would be an abuse of discretion to now carry forward the error filled assumptions of the model and change the management regime of the Truckee River based on TROA.

**The Required Resolution of Unappropriated Water in the Settlement Act and TROA has Not Occurred, And Unappropriated Water Cannot Be Managed As Envisioned Under TROA**

In 1930, TCID filed with the Nevada State Engineer applications 9330 to appropriate water on the Truckee and Carson Rivers for 100,000 acre feet. The PLIT subsequently filed competing Applications 48061 and 48494 for 477,851 acre feet of unappropriated water in the Truckee River. Hearings were conducted before the State Engineer related to these competing applications in 1994 and 1996. On November 24, 1998 the Nevada State Engineer entered State Engineer's Ruling 4683 granting PLIT's applications. This ruling was appealed by TCID, the City of Fallon and the Corkill Brothers, to the Nevada Third Judicial District Court, in case numbers 25219/25227 and remanded back to the State Engineer to consider the material evidence in TROA. The State Engineer granted the Tribe's applications in Ruling on Remand 4683A. This determination was upheld on appeal by the Nevada Third Judicial District Court, and is currently on appeal before the Nevada Supreme Court (Case No. 52329). There is a stay in effect that prevents the State Engineer from issuing the permits to PLIT.

In Ruling No. 4659 dated August 14<sup>th</sup> 1998, the State Engineer denied TCID's Application 9330 to appropriate 100,000 acre-feet annually of the unappropriated water of the Truckee River for use in the Newlands Project. On appeal, TCID requested that the Court supplement the record with the Draft TROA in order to allow the Court to understand the potential impacts of Application 9330 and PLIT's competing applications for unappropriated water on existing water rights, including storage rights for drought protection. Further, TCID argued that the State Engineer was not given the opportunity to make his decision based upon the PLIT's actual planned use of unappropriated water under TROA, namely storage and conversion for drought protection. This was because PLIT's competing applications 48061 and 48494 will be used in a markedly different manner under TROA than what was presented to the State Engineer when he made his determination regarding unappropriated water. (See TROA §§ 7.A.4(b)(2) and 7.C.2). Third Judicial District Court of the State of Nevada, Churchill County (Case No. 25004) has remanded TCID's application back to the State Engineer and is ordered to hear additional evidence regarding TROA and the PSA. October 15, 2008 Order, Attachment M at 15. Further, the court remanded the unappropriated water matter back to the State Engineer to make a determination of the relative impacts of granting Application 9330, including the impacts to the endangered cui-ui fish in Pyramid Lake, based on the additional material evidence of the TROA management scheme. *Id.*

Section 210(a)(2)(B) of P.L. 101-618 does not allow the TROA or the Interstate Allocation of waters under the Settlement Act to occur until the PLIT's claims to unappropriated water are resolved in a manner satisfactory to the PLIT and the State of Nevada. Further, reference is made in TROA to the Pyramid Lake Tribe's interest in water under State Engineer Ruling 4683. Specifically, PLIT's Applications are contemplated as part of the TROA management scheme. See TROA §5.A.1(e) ("Floriston Rate Water shall be used to serve Orr Ditch Decree Water Rights, including changes to such rights, and to the extent not needed to serve such rights, may be used to serve Pyramid Tribe's rights under Nevada State Engineer Ruling No. 4683 and other Truckee River water rights under permits issued by the Nevada State Engineer prior to 1983."); see also TROA §§ 7.A.4(b)(2) and 7.C.2). However, TROA fails to recognize that TCID's application predates PLIT's by some fifty years. The parties are awaiting final resolution of the issue of unappropriated water. Until this final determination, it is premature to assume that only the PLIT will be awarded this water, that PLIT will receive all the water in Ruling No. 4683, or that PLIT will be "satisfied" with the final outcome of the competing claims to unappropriated water. TCID has the priority application and the TROA proposed rulemaking can not include the use of unappropriated water until a final determination is made.

The water that the PLIT claims is essentially flood waters of the Truckee River, yet the TROA treats these "excess waters" as if the PLIT has a primary right to store them detrimentally to other decreed rights on the river with a higher priority. For example, the PLIT is able to store these waters and provide for carryover storage of these waters in upstream reservoirs, when the Newlands Project is prevented from diverting decreed waters from the Truckee River for drought protection and is never allowed to provide carryover storage in Lahontan Reservoir to anywhere near the capacity of the reservoir. The TROA tilts the shortage of water equation firmly toward shortages for the Newlands Project with its decreed rights and tilts the excess water equation firmly in favor of PLIT, which has no decreed rights to the so called unappropriated water. The Newlands Project has significant excess capacity for carryover storage water but is not permitted to use this capacity, even in years where the Carson River is predicted to provide low amounts of water. This management provision of TROA flies in the face of the decreed rights of the Newlands Project water right owners.

The TROA purported management of unappropriated water is further complicated by additional applications for this water on file by other TROA signatories. The Bureau of Reclamation ("BOR") filed applications 15664, 24310, 24311, and 24312 to appropriate waters of Little Truckee River for storage in Stampede Reservoir in 1954 and 1968. (Attachment N). In 2005 the State Engineer, in an attempt to take action on these applications, inquired as to the BOR's intention. (See May 11, 2005 letter from Susan Joseph-Taylor to Kirk Rodgers, BOR Regional Director, Attachment O). Because these applications are "potentially important to the TROA process and future implementation, the BOR requested the State Engineer to "continue to hold the Stampede related Water Right Applications 15664, 24310, 24311, and 24312 in abeyance until TROA is approved and implemented." (See letter to Susan Joseph-Taylor from Donna E. Tegelman, BOR Regional Resource Manager, dated August 2, 2005 at p. 2; Attachment P). The BOR took the position that "it would appear prudent for the State Engineer to defer any formal action on the Applications in question until the TROA process and the related California water right actions have been completed." *Id.* These applications are still pending before the State Engineer, who apparently accepted the position presented by the

BOR. Further, in December 19, 2003 the BOR filed in California an Application to Appropriate Water, Application 31487. (Attachment Q) This application purports to appropriate 226,500 acre-feet of water from the Truckee River system for storage in Stampede Reservoir and is intended to accommodate implementation of TROA.

The signatory parties to TROA, including the United States and PLIT, agreed that once the State Engineer has "issued permits to Pyramid Tribe based upon Ruling No. 4683," that "the Truckee River and its tributaries, in Nevada, is fully appropriated and therefore closed to any new appropriations." *see* TROA §12.A4(f); *see also* §1.E.1. What is not clear is status of the BOR's applications in relation to the PLIT's applications and the management of this water under TROA. If the Truckee River system river is fully appropriated, then California Application 31487 and the Nevada BOR applications, seeking new appropriations, must include the unappropriated water sought under PLIT's Applications.<sup>3</sup> Either that, or the BOR has additional competing applications for unappropriated water.

If the BOR's applications are for additional water above and beyond the water sought to be appropriated by PLIT's Applications, then it raises a serious question of the availability of instream unappropriated water as requested by PLIT. The State Engineer approved PLIT's Applications for a total combined duty of 477,851 acre-feet annually. However, what the State Engineer did not consider was that the BOR, under TROA, would file an application in California to appropriate 226,500 acre-feet of water from the Truckee River system for storage in Stampede Reservoir. The storage of 226,500 acre-feet of unappropriated water in California under TROA, in addition to TCID's application for 110,000 acre-feet, brings into serious doubt the availability of an instream flow sufficient to meet PLIT's Applications, and in turn PLIT's "satisfaction" with the unappropriated water issue. Further, the TROA management provisions related to unappropriated water can not now go into effect and must be reconsidered given the potential for far less water than assumed in Ruling 4683A.

#### **The TROA Negotiation Process Violated the Federal Advisory Committee Act**

The manner in which the TROA was negotiated has exacerbated the difficulty of understanding how the TROA will operate because apparently there are no minutes of the negotiation sessions and the meetings were not conducted under the auspices of the Federal Advisory Committee Act (FACA). The FACA was enacted in 1972 to control the growth and operation of the "numerous committees, board, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government." 5 U.S.C. App. 2, § 2(a). An "advisory committee" is defined as

<sup>3</sup> Water sought to be appropriated in Nevada would necessarily be from the same source as a similar application filed in California. As stated in the TROA Executive Summary, "[m]ost of the runoff in the Truckee River basin originates in the Sierra Nevada in California. A portion of that runoff is stored in Federal reservoirs—Lake Tahoe and Prosser Creek, Stampede, Boca, and Martis Creek Reservoirs—and non-Federal reservoirs—Donner and Independence Lakes—located in California (and a portion of Lake Tahoe is in Nevada). Operation of these reservoirs regulates much of the flow in the Truckee River basin in most years." *See* TROA Executive Summary at p.3.

any committee . . . which is established or utilized by one or more agencies in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government.

5 U.S.C. App. 2, §3.

The TROA negotiation process falls under FACA because the TROA meetings were intended to obtain information or viewpoints from individual attendees. The TROA meetings were comprised of a static group composition, i.e., the same attendees at each meeting use the group was used as a source of consensus advice or recommendations. These meetings were established by the BOR (the Administrator) to obtain advice or recommendations for federal officers in the executive branch; and the committee is not composed wholly of full-time, or permanent part-time federal employees. 5 U.S.C App. 2. §3.

Under the Settlement Act §205(a) the Secretary shall negotiate an operating agreement with the State of Nevada and the State of California, after consultation with such other parties as may be designated by the Secretary, the State of Nevada or the State of California. The Settlement Act specifically contemplates consultation with other parties with the purpose of obtaining advice and recommendations. The TROA negotiated agreement dated January 2008 indicates that it was "negotiated by representatives of the TROA mandatory signatories," which includes the State of Nevada, the State of California, PLIT, and TMWA (previously Sierra Pacific Power Company). These negotiations were held at the direction of the Secretary of Interior with the intent of meeting the requirements of Settlement Act §205. According to the FIER/EIR for TROA §2, on December 10, 1990, the Department of the Interior (Interior) conducted an organizational meeting to discuss its obligations and responsibilities—timing, direction, organization, coordination, and cooperation—for implementing P.L. 101-618, including negotiation of TROA. On February 20-21, 1991, Interior conducted the first of many working meetings to "draft a management plan for the preparation of the Truckee River Operating Agreement over the next 3 or 4 years." This group of 14 parties, including private, non governmental entities, negotiated the terms of the proposed Negotiated Agreement (hereafter simply referred to as Negotiated Agreement). Numerous negotiating sessions, technical meetings, drafting sessions, and public plenary meetings have been conducted since the first meeting. These meeting constitute an advisory committee under FACA.

Under the provisions of the FACA, federal agencies sponsoring advisory committees must: 1) arrange meetings for reasonably accessible and convenient locations and times; 2) publish adequate advance notice of meetings in the *Federal Register*; 3) open advisory committee meetings to the public; 4) make available for public inspection, subject to the Freedom of Information Act, papers and records, including detailed minutes of each meeting; and 5) Maintain records of expenditures. Moreover, members of the federal advisory committee must file financial disclosure forms on an annual basis. None of these requirements were met with regard to the TROA advisory committee. Under FACA, the BOR, a Federal agency seeking advice on the management of the river and in setting U.S. policy must charter the advisory committee so that potential conflicts of interest are revealed and the public may

evaluate the source of the various inputs to the decision making process. For example, in this case most of the computer modeling for the TROA was accomplished by Sierra Pacific. Moreover, most of the drafting of the document was done by the attorney for Sierra Pacific. Without these facts being revealed, it is difficult to evaluate the TROA in a truly impartial light. Also the public could not participate in the process when there were no Federal Register notices for the meetings, no formal minutes were kept, and no registering of financial interests were filed by the major participants.

### **TROA Violates the Separation of Powers Doctrine**

Separation of powers is a legal and political doctrine under which the executive, legislative and judicial branches of government are kept distinct, to prevent abuse of power. Under TROA an Administrator is nominated by a committee composed of one representative of each Signatory Party, and the Sovereign Parties (United States, Nevada, California, and PLIT) must agree on the nominee. TROA §2.A.2. The Administrator can be removed only by action of these same parties. TROA §2.A.5. The Administrator in essence takes the place of the *Orr Ditch* Court appointed Water Master. TROA §2.A.1. The Water Master was appointed to carry out and enforce the provisions of the Decree, and the orders and instructions of the court. *Orr Ditch* Decree at p. 87. The potential of replacing the Water Master with the Administrator who is appointed based on the preference of the TROA Signatories interferes with the *Orr Ditch* Court's authority and violates the separation of powers doctrine.

Further, the Truckee River Special Hearing Officer is responsible to hear disputes arising under TROA, and no judicial action may be commenced until exhaustion of the action before the Special Hearing Officer. The Special Hearing Officer is appointed by a four-member appointing committee comprised of one representative appointed by each of the Sovereign Parties. TROA §2.B.2(a). These provisions grant entirely too much decision making power related to the management of the Truckee River to the TROA Signatories. Even if the *Orr Ditch* Court may ultimately hear a dispute involving decreed water rights, the initial administrative determination will be tainted with bias and the burden will likely be placed on those parties who are not signatories to TROA.

### **TROA Violates Nevada Water Law**

TROA violates a number of Nevada Water code provisions, as described below, and attempts to take authority away from the Nevada State Engineer and the *Orr Ditch* Court and places it in the hands of the TROA Administrator and Signatory Parties. As discussed above, the appointment of the TROA Administrator and Special Hearing Officer is controlled by the TROA Signatory Parties. TROA §2.A.2. Further, as discussed below, many TROA provisions violate Nevada water law. Thus, TROA, by taking away the authority of the State Engineer, deprives non-signatories of a fair and impartial tribunal to make a determination of rights that conflict with those of the TROA signatories.

Under TROA, water rights owners will store water in the upstream reservoirs in California and will purportedly place the water to beneficial uses in California and Nevada as set forth in applications for secondary permits. The secondary permit applications already filed

under TROA by TMWA identify at least three separate and distinct uses for the same water, including municipal, wildlife and power generation. Under TROA, the use of the same water for multiple purposes at multiple places of use violates NRS §533.330, which only permits a water right to be used for a single purpose at a single place of use. By the use of multiple secondary applications, TROA attempts to circumvent the jurisdiction of the State Engineer over change applications, whether temporary or permanent. Thus, the State Engineer and the *Orr Ditch* Court will be deprived of their authority to review changes in manner and place of use and will not be allowed to determine for each change whether it is detrimental to the public interest or if it will injure existing water rights.

The storage, accumulation, trade, exchange, and multiple uses of water under the TROA management scheme violates NRS §533.040, which requires that water used for beneficial purposes to remain appurtenant to a single place of use. Under TROA, there is no way for the State Engineer or other water users to determine when water is traded or exchanged and whether it remains appurtenant to the place of use. As discussed above, NRS §533.330 water may only be used for a single purpose and at a single place, its place of appurtenancy. TROA allows changes without any notice so that it is impossible to determine if the water is being used at the single place of appurtenancy.

Under §NRS 533.045, the right to divert water ceases when necessity for its use does not exist, and water may not be diverted or used except at such times as the water is required for a beneficial purpose. Further, the right to use water is limited to the amount necessary, and when water is not necessary it must be allowed to flow in the river and cannot be considered to have been appropriated. NRS §533.060. TROA's provisions, allowing carry over storage and conversion to fish credit water, violates these statutory provisions. If the water is not necessary, then there is no right to divert and store it under TROA, and the water should remain in the river and not be credit stored. Requiring water that is not necessary for use to remain in the river is also in line with the TRA saved water and diverted flow requirements discussed above.

Appropriate losses for storage and conveyance of water must be determined by the State Engineer. NRS §533.055. TROA §5.E.1 specifies conveyance losses shall be calculated by the Administrator using procedures developed by the Administrator. This is a clear violation of NRS §533.055 and directly interferes with the authority of the State Engineer.

TROA circumvents the Nevada transfer statute requirements. Under NRS §533.345 a water right owner must file an application with the State Engineer when there is a proposed change in manner of use, point of diversion, or place of use. Further, such changes only allow a water right to be used for a single purpose at a single source. NRS § 533.330. However, TROA allows for storage of the water and use of any part a water right for any of the multiple secondary uses. Under TROA, changes can be made without any notification to other water users, or the State Engineer. NRS § 533.440(1). TROA provides for changes in water rights and allows water to be "exchanged" or re-stored. TROA § 7.A. "Exchange" means

the transfer of water from one category to another by Trade, In-Lieu Release, retaining water in accordance with Section 8.K.2(a), diverting water and replacing the water with a compensating Release pursuant to Section 6.C.1(c), or



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foregoing the right to divert water from a stream and replacing that water by converting an equal amount of water in a reservoir pursuant to Section 7.A.3(a)(3).

TROA specifically contemplates exchanging water by diverting it and replacing water with a compensating release, including exchanges for Fish Water or Fish Credit Water specifically designed to flow to Pyramid Lake. Further, once water is credit stored, it may be traded by Scheduling Parties with approval of the TROA Administrator. TROA § 8.P. The State Engineer will have no opportunity to approve these "trades." Under TROA, the water user is permitted to decide when, how much and where the water can be transferred to during any given year without any further scrutiny by the State Engineer or any further ability by TCID to object, or any opportunity to challenge the change in court. In essence, the TROA process completely undercuts and circumvents the transfer process in the State of Nevada, and as established by the *Orr Ditch* Court. Further, these transfers under TROA qualify as an interbasin transfer requiring additional statutory requirements the State Engineer must meet.

Once these water rights are in storage, TROA is the only mechanism that dictates their use. Under TROA, an Administrator will oversee the management of the Truckee River at the direction of the TROA signatories (which does not include TCID). The TROA signatories purportedly may agree to a reduction in flow rates in exchange for storage credit in the upstream reservoirs. As a result, TROA specifically contemplates less water to the Newlands Project. When this projected condition exists, it can lead to only one result, less water available to meet the vested water rights under the *Orr Ditch* Decree to meet the needs of the Newlands Project water users. It is this type of impact that the State Engineer must analyze in determining whether or not to approve a change application.

#### Conclusion

TROA should not be promulgated as a regulation until all parties to the Truckee River Agreement are satisfied, and all water right owners on the Truckee River are given an opportunity to participate in the negotiations. There are significant issues with the manner in which TROA was negotiated and in which it was constructed and analyzed. Negotiations must begin again and this time the BOR must comply with the provisions of FACA and conduct an open, unbiased and fair negotiation process. Moreover, the BOR must use an up to date and modern mathematical water model to analyze and understand TROA.

Sincerely,

 on behalf of

Michael J. Van Zandt

cc: TCID