

Ruling # 3739

ON PAGE # 135

1 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

2 STATE OF NEVADA

3 DIVISION OF WATER RESOURCES

4 In the Matter of Applications

5 53092, 53093 and 53369.

6
7 RENO CITY COUNCIL CHAMBERS

8 490 South Center Street

9 Reno, Nevada

10 November 14, 1989.

11 9:00 o'clock a. m.

12 APPEARANCES:

13 PETER G. MORROS, HEARING OFFICER

14 Mike Turnipseed, Chief, surface
water section

15 Garry Stone, federal water master.

16 For Westpac Utilities: Susan Oldham

17 For Truckee-Carson
Irrigation District: Lyman McConnell

18 For Diversified
19 Development: Ross deLipkau
20 Attorney at Law
Reno, Nevada

21 For Caughlin Ranch: Craig Howard
22 Attorney at Law
Reno, Nevada

23 For Real Party in
24 interest on 53369: David Hoy
Attorney at Law
Reno, Nevada

25

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EXHIBIT

tabbles

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MR. MORROS: We will be on the record, if everybody is ready.

By way of introductions, my name is Pete Morros. I am the State Engineer for the State of Nevada. There is one other member of the staff of the State Engineer's Office here today, and that is Mike Turnipseed, who is the chief engineer of the surface-water and adjudication section of the Division of Water Resources. I have also asked the Federal Water Master to sit with the State Engineer at this hearing, and the record will reflect the presence of Mr. Garry Stone, the Federal Water Master.

The purpose of this hearing is to receive any evidence or testimony concerning three applications to change Truckee River decreed water rights, those applications being 53092, 53093 and 53369. All three applications stand in the name of Westpac Utilities.

The matter before this hearing today is more or less fully set out in the notice dated October 4th, 1989, setting the time and place for this hearing. Originally, this hearing was scheduled for November 9th, 1989, and due to scheduling problems, that date was continued until today, at this time and place.

A copy of the two hearing notices, one dated October 4th, 1989, and the second one dated October 10th,

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1989, will be combined and entered into the record as State's Exhibit No. 1, hearing no objections, of course.

(State's Exhibit 1 was marked for identification and admitted into evidence.)

MR. MORROS: The authority for this hearing is set out under NRS 533.365 and 533.375. I might also indicate that two of these applications, more specifically, 53092 and 53093, have been protested, on June 15th, 1989, by the Truckee Carson Irrigation District.

Application 53369 has not been protested. All three applications have completed the statutory publication and protest period.

With that, I think I will ask for a statement of appearances on behalf of the applicant Westpac Utilities.

MS. OLDHAM: Susan Oldham, counsel for Westpac Utilities.

MR. MORROS: Protestants?

MR. McCONNELL: Lyman McConnell, for Truckee Carson Irrigation District.

MR. MORROS: Is there anybody else that is going to want to testify today, or present any evidence

1 or testimony for the record, concerning these applications?

2 MR. deLIPKAU: Yes. My name is Ross deLipkau,
3 Reno, Nevada. I am here on behalf of Diversified
4 Development, one of the real parties in interest.

5 MR. MORROS: On which applications?

6 MR. deLIPKAU: Application 53093. And I
7 would also like to make a statement at this point that
8 the application on 53093 seeks 4.33 cfs. The correct
9 amount should read 3.53 cfs.

10 MS. OLDHAM: That is correct from my perspective,
11 too. We would like to reduce the 4.33 to 3.53.

12 MR. MORROS: What application are we talking
13 about now?

14 MS. OLDHAM: 53093.

15 MR. McCONNELL: 93 or 92?

16 MS. OLDHAM: Okay. Now, you may be looking--
17 The other thing we wanted to do is take a look at the
18 notice, apparently, and maybe it's--maybe it's the
19 number we have on our applications that is incorrect.

20 The notice appears to us to have switched
21 53092 and 53093, relative to each claim number.

22 MR. MORROS: You mean there is a typographical
23 error, and that 53092 should refer to claim number 638?

24 MS. OLDHAM: Right. And vice versa: 53093
25 should refer to claim number 642.

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MR. MORROS: Well, the Application 53093, the original filed in the office of the State Engineer, refers to a portion of claim 638.

MS. OLDHAM: Does it? Then maybe our application numbers are incorrect at the top of our--

MR. MORROS: 53092 references claim number 642, with a diversion rate of 4.33 cfs.

MS. OLDHAM: Okay. Those two are switched, then, and our numbers that were at--that were put on our applications were incorrect, which may have been why--

MR. MORROS: Well, wait a minute, now.

MS. OLDHAM: 092 should be 4.33 cfs, not to exceed 377 acre feet, Fellnagle Ditch.

MR. McCONNELL: That's correct.

MS. OLDHAM: Okay. We were incorrect on that. That may change a couple of our exhibits, but we can--

MR. MORROS: Well, I want to make sure that there is no error on the part of the State Engineer's Office. You are not alleging that?

MR. deLIPKAU: Absolutely not.

MS. OLDHAM: Our mistake.

MR. McCONNELL: Well, is there a mistake? Because that is what the application says, what you just read.

1 MS. OLDHAM: Okay. Now, turning to 53092,
2 which I had previously misreferenced, the 4.33 cfs
3 should be 3.53.

4 MR. MORROS: All right. So the correction
5 that you are indicating for the record is, you are
6 indicating, for the record, that you want to reduce
7 the amount of diversion rate you are seeking to change
8 under Application 53092 from 4.33 cfs to 3.5 cfs; is
9 that correct?

10 MR. deLIPKAU: 53.

11 MR. MORROS: 3.53.

12 MS. OLDHAM: 3.53.

13 MR. MORROS: What about the acre-feet?

14 MS. OLDHAM: That's all correct. Apparently
15 that was one of the errata in the decree. It was not
16 properly calculated. But the 3.77 is correct.

(Discussion off the record.)

17 MR. MORROS: Back on the record.

18 MR. HOWARD: I am Craig Howard, and I am making
19 an appearance as attorney for Caughlin Ranch, another
20 real party in interest. And that is on claim 642 and
21 Application 53092.

22 Since the applicant is Westpac, Sue Oldham
23 will be handling the testimony, so that we don't have
24 duplications.
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MR. MORROS: All right.

MS. OLDHAM: Before we proceed further, we do have a request. Mr. Hoy, who is the real party in interest on 53369, requests that since that application was not protested, that it be granted at the outset of this hearing, so that he can take his leave and--

MR. MORROS: All right.

MS. OLDHAM: --not remain the entire proceeding.

MR. MORROS: I have no problem with that.

MR. McCONNELL: We want to make a public comment, even though we haven't protested.

MR. MORROS: No, I understand that.

MR. HOY: I am David Hoy, real party in interest on Application No. 53369, along with my brother Richard, who is present.

MR. MORROS: Go ahead, David. Do you want to just go ahead and make a statement for the record? If you have got to leave--

MR. HOY: All that I would like to say is that it is my understanding that there is no protest as to that application. It is in the best interests to have the water rights transferred. They are not being used on the property at the present time, and we do defer to Mrs. Oldham with respect to the

1 technical data that may be needed or required by the
2 State Engineer's Office to authorize the transfer.

3 MR. MORROS: If you would hold on for just
4 a minute, David. Mr. McConnell, do you have any
5 questions you wanted to ask of Mr. Hoy, before he
6 leaves?

7 MR. McCONNELL: No, I don't think so.

8 MR. MORROS: Does anybody else have any
9 questions of Mr. Hoy, before he leaves?

10 For the record, I want everybody to know that
11 I am personally acquainted with David Hoy and Dick
12 Hoy, also, his brother, who is also present. And at
13 this time, if there is anybody who wants to make a
14 motion that I recuse myself as far as this application
15 goes, they can do so at this time.

16 I want the protestants to the other two
17 applications, and any other parties to these proceedings,
18 to be aware of that fact.

19 MR. McCONNELL: How personally related are
20 you?

21 MR. MORROS: We are good friends, long-time
22 good friends.

23 MR. McCONNELL: It's pretty hard not to be
24 friends with people in Nevada.

25 MR. MORROS: I assume, then, that nobody has

1 any objections if I render a decision in the matter
2 of this application, 53369, as far as the approval or
3 denial, consistent with the statutory criteria, of
4 course.

5 Mr. Stone, do you have any questions of Mr.
6 Hoy?

7 MR. STONE: No.

8 MR. HOY: Thank you very much.

9 MR. MORROS: Thank you, David.

10 Mr. Arden?

11 MR. ARDEN: Yes. I don't believe I will be
12 making--

13 MR. MORROS: State your full name, for the
14 record:

15 MR. ARDEN: I'm Richard W. Arden. I am here
16 today as a real party in interest on claim 6380,
17 Application 53093, representing Bill Hanifin, Roberts
18 Trust and myself. But I will not be making any statements.
19 Westpac will be giving the testimony.

20 MR. MORROS: Boy, it is just not my day.
21 Mr. McConnell, I will have to again give you the
22 opportunity-- I'm personally acquainted with Mr. Arden
23 and Mr. Hanifin. They are also long-time friends.
24 So I will give you the opportunity to make a motion
25 that I recuse myself, if you so desire.

1 MR. McCONNELL: No, we don't have any desire,
2 unless it starts getting worse.

3 MR. MORROS: Let's go ahead and proceed.

4 MR. deLIPKAU: Could I make one statement?
5 That is, Mr. Robert McDonald and his son, Tim, are
6 basically Diversified Development, and you, of course,
7 as well as everybody in this room knows the McDonalds.

8 MR. MORROS: Yes.

9 MR. deLIPKAU: The same comment should be made.

10 MS. OLDHAM: Can we make the same comment
11 for--

12 MR. MORROS: Well, I am not--

13 MS. OLDHAM: We don't have a problem.

14 MR. MORROS: I am not that closely associated,
15 relating to a friendship, not with Mr. McDonald, as
16 Mr. Hoy, as the Hoy brothers and Rich Arden and Phil
17 Hanifin.

18 I just don't want there to be any inference
19 of impropriety on the part of the State Engineer. I
20 want all parties to be of that relationship.

21 It is certainly not going to influence my
22 decision, one way or the other, but anybody that wants
23 the State Engineer to recuse himself from participating
24 in the decision-making process, I will continue to
25 conduct the hearing but designate someone else to make

1 the decision, if it is so desired by any of the parties.

2 (Discussion off the record.)

3 MR. MORROS: Regarding the transcript, and
4 as provided in the notice setting the time and place
5 for this hearing, the cost of transcribing this hearing
6 will be borne on a pro rata basis by the applicants
7 and the protestants. The State Engineer will require
8 the original and one copy of the transcript. Anybody
9 else that desires a copy of the transcript will make
10 arrangements with the reporter to receive same.

11 The State Engineer has eight exhibits. We
12 have provided a list of those exhibits and a description
13 of those exhibits, which Exhibit No. 1, which is the
14 copy of the notice setting the time and place for this
15 hearing, has already been admitted for the record.

16 Exhibit No. 2 and 2A are copies of Applications
17 53092 and the supporting map to 53092.

18 The exhibit list that I have handed out to
19 everybody refers to Permit No. 53092. That should be
20 corrected to reflect application.

21 Exhibit 3 and 3A are a copy of Application
22 53093 and the supporting map to Application 53093.

23 Exhibit 4 and 4A are copies of the application
24 and map respectively.

25 Exhibit 5 is a copy of the TCID protest to

1 Application No. 53092.

2 Exhibit 6 is a copy of the protest to Applica-
3 tion No. 53093.

4 Exhibit 7 is a copy of a letter dated June
5 15th, 1989, under the signature of Clare Mahannah.
6 Exhibit No. 8 is a map which depicts the approximate
7 location of the points of diversion and place of use
8 of the Truckee River claims that are being sought to be
9 changed under the subject applications.

10 Any objections to any of those exhibits
11 being received into the record at this point?

12 MR. deLIPKAU: None, Mr. Morros. Could I
13 please see a copy of No. 7?

14 MR. MORROS: Certainly.

15 Any objections to those exhibits?

16 MR. deLIPKAU: No.

17 MR. MORROS: All right. Exhibits 2 through 8,
18 as I have described them, will be received into the
19 record.

20 (State's Exhibits 2 through 8
21 were received into evidence.)

22 MR. MORROS: Additionally, the State Engineer
23 will take administrative notice of any other records
24 or information in the records of the State Engineer's
25 Office that might be helpful in making a decision in

1 this matter.

2 Is there any desire for any opening statements,
3 or do you want to just go ahead and proceed with the
4 testimony and evidence?

5 MS. OLDHAM: Just go ahead and proceed.

6 MR. MORROS: All right. The procedure is
7 to allow the protestants to proceed with their case
8 first.

9 MR. McCONNELL: How would you like to proceed
10 on 53369?

11 MR. MORROS: Well, it has not been protested.
12 If you want to make a statement concerning that applica-
13 tion, you can go ahead and do so at this time.

14 MR. McCONNELL: All right. Basically, our
15 concern, and the reason I raise the question, our concern
16 is similar but not identical in all respects to the
17 concerns with the other two applications, primarily
18 53369 being an upstream diversion from our diversion at
19 Derby Dam presents the question of return flows on a
20 transfer, which is presented in our exhibit as concern
21 number one, in the letter that was submitted as Exhibit--
22 I guess Protestant's Exhibit No. 1.

23 MR. MORROS: Let the record reflect that we
24 have marked for identification purposes, as Protestant's
25 Exhibit No. 1, a copy of a letter dated November 10th,

1 1989, to Mr. Ross deLipkau, from Clare N. Mahannah,
2 professional engineer, referencing Applications 53092,
3 53093 and 53369.

4 MR. McCONNELL: I might mention for the record
5 that, when we sent this letter to Mr. deLipkau, it was
6 my impression he was representing the parties in this
7 thing. So, if I misunderstood that, I apologize.

8 MR. deLIPKAU: That is most acceptable. It
9 was delivered to the power company, the applicant, in
10 very quick order.

11 MR. McCONNELL: Fine. And then the second
12 concern is the insurance that the land of which the
13 water rights were appurtenant at one time and are
14 appurtenant at this time be no longer irrigated, and
15 that there be some assurances that that does not occur.
16 That is our main concern. The issue on return flows--
17 I understand, and I don't know how it was handled by
18 the State Engineer in the past, but it has been my
19 understanding that transfers within the Reno-Sparks
20 area have been on a one-acre-foot per one-acre-foot
21 basis, with consideration of return flows being taken
22 into account by the return flows from the Reno-Sparks
23 joint-treatment facility.

24 Application 53369 is a diversion downstream
25 from that treatment facility, and now has historically,

1 or would have had historic return flows to the system.

2 Our concern, primarily, in regard with
3 return flows is that once the treatment plant issue
4 has been resolved--that is, whether or not the
5 water that is being currently returned to the river
6 through the treatment plant and considered as return
7 flows--is taken out of the river, as the State Engineer
8 is aware, that issue is in the Ninth Circuit Court
9 of Appeals, with the Cities of Reno and Sparks taking
10 the position that they need not replace that water
11 that has been removed from the river, our concern
12 is that if that occurs, that there be some condition
13 on the transfers of these water rights that historic
14 return flows are allowed to remain in the river.

15 We have presented, in our letter, the request
16 of 50 percent return flows. And that is just based
17 on our understanding of how the Truckee River model
18 is currently analyzing return flows in the Truckee
19 Meadows on the model, approximately 50 percent.

20 So that is the request on condition--on
21 number one, with regard to the return flows.

22 Condition number two, to ensure that there
23 isn't a double diversion of the water and land upon
24 which the water was originally applied is no longer
25 irrigated, and assurances that that occurs.

1 That is pretty much what our concerns are
2 and what our public comments would be in regard to
3 Application 53369.

4 I might say one other thing: It is my
5 understanding, from looking at the application, that
6 prior--previously, 290 acre-feet was transferred off
7 of a 424 total right. And this application is asking
8 for 114 acre-feet to be transferred, which would mean
9 that total transfer from the property would be 300--
10 404, which would leave approximately 20 acre-feet, I
11 presume on the property; is that correct?

12 MR. MORROS: Could you respond to that, Miss
13 Oldham?

14 MS. OLDHAM: Our calculation had 108 left on
15 that. Maybe we should take a minute to find out what
16 the difference is.

17 MR. MORROS: Well, it is important.

18 MR. McCONNELL: If you look at the applica-
19 tion, I think it mentioned that 290 acre-feet have
20 been previously transferred, in the comment sections.

21 MR. MORROS: Well, what the remark section
22 says, under the application, is that this application
23 is supplemental to Permit 49918, filed June 12th, 1985,
24 which transferred approximately 290 acre-feet, out
25 of a total of 424 acre-feet, held by applicant's grantors,

1 Richard E. Hoy and David R. Hoy, under claim number 621.

2 As a result of the prior transfer of the land
3 to which the water is appurtenant--is appurtenant--
4 is no longer used for agricultural purposes.

5 And then, during 1988, Sierra had an average
6 of 50,871 residential customers, and delivered approxi-
7 mately 60,855 acre-feet of water. Maximum day of
8 delivery was 102.004 million gallons, which is 313.04
9 acre-feet.

10 Do you want to go off the record for just a
11 moment while you discuss that?

12 (Discussion off the record.)

13 MR. MORROS: Let the record reflect that
14 information provided from the State Engineer's Office
15 indicates that Permit 49918 was issued in an amount
16 not to exceed 290 acre-feet per year.

17 MR. McCONNELL: Shall I go on?

18 MR. MORROS: Continue, Mr. McConnell.

19 MR. McCONNELL: A question has come up in
20 regard to the applicant's holding of title of water
21 rights, or the actual diversion of water rights. As
22 you are aware, in our procedure, we certify ownership
23 of the applicant to the water rights that are being
24 changed. And it is my understanding that the power
25 company is not the current owner of that water right,

1 so we want to have something on the record as to how
2 that procedure is handled, so when the permit is
3 issued, to the power company, so that it is a full
4 understanding from everyone as to how the water right
5 is held.

6 MR. MORROS: Well, procedurally, I can
7 indicate for the record, as far as the State Engineer's
8 Office is concerned, that permit won't be issued until
9 title is cleared to Westpac Utility, so that should
10 satisfy your concerns there.

11 MS. OLDHAM: And in this case, this may be
12 one that is provided over to the cities, and under
13 the agreement that we have on file with the State
14 Engineer for water treatment and distribution, it
15 would be certified over to Sierra Pacific. But it is
16 not an actual title transfer.

17 MR. MORROS: But the title would be clear
18 up to one of the parties in the agreement.

19 MS. OLDHAM: Right.

20 MR. MORROS: The lease agreements.

21 MS. OLDHAM: If you will recall, the IRS,
22 the recent change in the IRS ruling will change that,
23 and it is not going to be specifically leased over to
24 Westpac, but it is provided to the cities, and then the
25 water treatment distribution agreements, which presently

1 are on file with the State Engineer, but are being
2 amended by the cities, and will be refiled with the
3 State Engineer, will be the documents by which the
4 use of the water is provided.

5 MR. MORROS: Well, in that case, then, if
6 that goes into effect, then the applicant on these
7 change applications--the change applications, are
8 going to be the city or the county, rather than Westpac;
9 is that correct?

10 MS. OLDHAM: In the future, that's correct.

11 MR. MORROS: Does that satisfy your concerns
12 on that? It's a procedure that has been in effect for
13 quite some time. And the lease cannot be terminated
14 without the specific approval of the State Engineer.
15 That's a condition of the lease.

16 MR. McCONNELL: That is a condition of the
17 application, also, and the permit.

18 MR. MORROS: Well, the title will have to be
19 cleared up, up to, for the sake of discussion, let's
20 say the City of Reno, the title, as far as ownership
21 of the water right, would be cleared to the City of
22 Reno. Then the City of Reno and Westpac Utilities
23 enter into a long-term lease, which is, as I recall,
24 a 99-year lease, isn't it, Mrs. Oldham?

25 MS. OLDHAM: Yeah. The previous transactions

1 were 99-year leases. Presently, it's just forever,
2 subject to that it can't be transferred away without
3 the approval of the State Engineer.

4 MR. MORROS: Once that lease is entered into,
5 that water is leased to Westpac, then they file a
6 change application; then, if the permit is issued,
7 it is issued subject to that lease. The title is
8 clear; there is no cloud on the title. We won't issue
9 the permit until the title is clear.

10 Again, using the City of Reno, just for
11 discussion purposes, the title has to be cleared to
12 the lessor; is that correct? Or the lessee--lessor.

13 MS. OLDHAM: We try not to use the terms
14 lease or lessor anymore, because that is what the IRS
15 found to be taxable, was the lease transaction. There
16 is a right to use the water, that's--

17 MR. MORROS: All right. Well, whatever the
18 case happens to be.

19 MR. McCONNELL: So that the permit, then, will
20 be issued in the City of Reno, and then, by some kind
21 of lease agreement that is filed with the State
22 Engineer's Office, that the power--Westpac Utilities
23 will serve that water?

24 MR. MORROS: I would assume, if they want to
25 apply the new procedure in accordance with the IRS's

1 ruling, what they are going to have to do is transfer
2 title of the change application over to the City of
3 Reno.

4 But my point is, you can be assured that that
5 is going to be cleared up to the satisfaction of the
6 State Engineer before any permit is issued.

7 MR. McCONNELL: I am confident that will
8 occur. I was just trying to set the record straight
9 on the procedure, so that I fully understood it.

10 Do you want me to proceed now with 53092
11 and 53093?

12 MR. MORROS: Certainly.

13 MR. McCONNELL: All right. In our Exhibit
14 No. 1, our concern was not with return flows to the
15 District, because 53092 and 53093 are points of use
16 below Derby Dam, in the Wadsworth area.

17 Our concern was that those return flows make
18 up a portion of downstream water users' rights. And
19 in the future, if there isn't sufficient water in which
20 to make up those rights, then additional water would
21 have to be bypassed at Derby Dam, which would then
22 interfere with our ability to divert water in Derby Dam.

23 So, indirectly, we see that there could be
24 a possible problem with return flows. If these waters
25 are going to be used within the system and the water

1 returned through the treatment facilities, those return
2 flows will be made up. However, our concern is, as I
3 expressed earlier, with 53369, the condition of the
4 city in regard to its position with return of the
5 water to the river, and the possibility that those
6 waters could be removed without replacement.

7 And under those conditions, then, we are
8 asking that the condition for return flows be placed
9 on this transfer, assuming the water goes through the
10 treatment facilities and is later removed without
11 replacement.

12 Item No. 2, since it is my understanding that
13 these two applications are being transferred from only
14 a portion of the water rights and not the entire water
15 rights--they are made up of the claims 642 and 638--
16 that there is an assurance that the lands in which the
17 waters are transferred from are no longer irrigated,
18 inadvertently or advertently.

19 No. 3, we express concern that if water is
20 continued to be transferred from the Wadsworth area,
21 upstream, and water diminished in the use below Derby
22 Dam, there comes a time when there is a public outcry
23 for instream flows, and some ruling is made that requires
24 instream flows below Derby Dam, which would affect our
25 ability to divert water.

1 Under those circumstances, we are looking
2 for consideration from the transfers. If that should
3 occur, that a portion of that instream flow would be
4 made up of the water right that is currently being
5 irrigated in the area. Once it is transferred upstream,
6 that water wouldn't be available for instream flows
7 below Derby Dam.

8 Item No. 4 is our concern with the fact that
9 waters that are currently diverted are allowed to flow
10 below Derby is done so with the current state of the
11 conditions of Derby Dam, being a structure that was
12 constructed in 1903, that water is adequately passed,
13 as water is transferred upstream, and, in this case,
14 some 12 cfs or thereabouts.

15 The water that has to pass Derby will be
16 reduced; otherwise, it would be an impact on our
17 diversion right, if we had to pass the same amount of
18 water that we are currently passing, although the water
19 is being taken out upstream. It would be a double
20 whammy on our diversion right, and we are concerned
21 that the ability of the dam and the state of condition
22 of the diversion structure is not such that we will be
23 able to regulate the water to such a certain finite
24 degree, so we are asking that the transfer of that
25 water right be burdened with the pro rata share of cost

1 of ensuring that the water doesn't pass Derby Dam,
2 because of the transfer upstream is shared by the
3 water rights that are being moved upstream.

4 Our last item was just a concern with the
5 cfs and the acre-footage. We understand that there is
6 a limitation on the acre-footage, not to exceed, but
7 we are not sure as to how the water would be utilized
8 upstream in a cfs manner.

9 And if you took the cfs on a 365-day basis
10 and used it, it would exceed the acre-foot limit of
11 diversion.

12 We are not asking that the applications be
13 denied; we are asking that if the applications are
14 approved, that they be conditioned upon our concerns.

15 MR. MORROS: Does that conclude your position,
16 Mr. McConnell?

17 MR. McCONNELL: I think that does.

18 MR. MORROS: Are you going to have any witnesses
19 that you are going to want to testify on behalf of the
20 protestant?

21 MR. McCONNELL: No.

22 MR. MORROS: Any questions? Do the applicants
23 have any questions of Mr. McConnell, related directly
24 to the exhibit?

25 MR. deLIPKAU: Yes, I think I would like to

1 ask some questions of Mr. McConnell.

2 MR. MORROS: All right.

3 LYMAN McCONNELL

4 called as a witness on behalf of the applicants,
5 being first duly sworn on oath, was examined and
6 testified as follows:

7 CROSS-EXAMINATION

8 BY MR. deLIPKAU:

9 Q Mr. McConnell, if it can be proven that there
10 is no adverse effect upon the TCID water rights, would
11 TCID withdraw its protest?

12 A Currently, or in the future?

13 Q At today's hearing.

14 A I think that, upon presentation of information,
15 we would consider any information that is provided us.

16 Q Do you know whether or not the State Engineer
17 is required, when deciding whether or not to grant a
18 permit, he shall determine whether or not the contem-
19 plated application will impair existing rights?

20 A Yes.

21 Q Who owns Derby Dam?

22 A United States.

23 Q Who has the duty to repair Derby Dam?

24 A Truckee Carson Irrigation District.

25 Q What is the condition of the repair or state

1 of the current dam?

2 A In what regard?

3 Q Is it in good condition? Bad condition?

4 A It's in fairly good condition.

5 Q Is it in need of repair?

6 A That is a qualitative answer, I guess--or
7 question. It would depend upon what you are referring
8 to.

9 Q Would the TCID have a protest if the granting
10 of the permits do not impair the Truckee River decree?

11 A Well, I don't know if that question is
12 relevant, from the standpoint of helping the State
13 Engineer answer any questions.

14 Q Well, you are aware that the State Engineer,
15 under the Truckee River decree, is given the authority
16 to grant or deny applications to change, are you not?

17 A Well, that, together with state law, yes.

18 Q Now, if the State Engineer determines that
19 there is no violation of the Truckee River decree,
20 he is required to grant the application or applications,
21 isn't he?

22 A Well, I think that would be an argument that
23 could be made, but I don't necessarily agree with that.

24 Q Have you read the water law?

25 A Yes.

1 Q All right. You are familiar with it, then?

2 A Yes.

3 Q Isn't it true that the State Engineer, when
4 deciding whether or not to grant the three subject
5 applications, must also take into account the 1935
6 Truckee River agreement?

7 A I would presume so.

8 Q All right. And that the State Engineer, in
9 his decision, cannot grant an order which would violate
10 that agreement; is that not true?

11 A I would say so.

12 Q All right. And is it also not true that the
13 State Engineer, when deciding to act upon the three
14 applications, must take into account other court
15 decisions affecting storage and other similar matters
16 on the Truckee River stream system? Can you answer that
17 question?

18 Isn't it true that, when the State Engineer
19 determines whether or not to grant the three subject
20 applications, he must take into account the various
21 other court decisions affecting storage and similar
22 items on the Truckee River?

23 A I presume so, yes.

24 MR. deLIPKAU: I have no further questions,
25 Mr. Morros.

1 MR. MORROS: Miss Oldham?

2 CROSS-EXAMINATION

3 BY MS. OLDHAM:

4 Q Now, Mr. McConnell, how might a public trust
5 affect the water rights of TCID?

6 A Well, as I tried to explain, at one point
7 in time, when the water rights that are below Derby
8 Dam are transferred upstream, there won't be any
9 flow below Derby Dam. And at that point, there may
10 be a public outcry for instream flow. Currently, our
11 releases are in the neighborhood of 30 to 35 cfs below
12 Derby, and that is insufficient to satisfy any instream
13 requirement.

14 Q From a legal standpoint, would you agree with
15 such a ruling?

16 A Well, I don't know that I should give my
17 comments on that.

18 Q Well, if--could it come about in other ways?
19 For instance, could it come about as a result of outcry
20 on the level of Pyramid Lake?

21 A What is that?

22 Q The public-trust doctrine. Instead of an
23 instream requirement, it will be a lake-level require-
24 ment at Pyramid Lake.

25 A I suppose that is possible.

1 Q How do you feel about that? Is that one
2 easier?

3 A I still don't think that I have a comment on
4 that.

5 Q What I am trying to--what I am trying to ask
6 you is: If we are not sure how the public-trust doctrine
7 might come about, can we be sure that that transfer
8 of these water rights might be inconsistent with that?

9 A No, we can't. And that is why we are not
10 saying that those transfers need be reduced as a result
11 of that consideration at this time; it is only that they
12 be conditioned upon a potential for that occurring,
13 because we know that we have seen it on the horizon.

14 We have seen it in the State of California,
15 and we know the State of Nevada has to consider the
16 public interest that may just evolve into a similar
17 requirement.

18 Q Does the public-trust doctrine apply in Nevada?

19 A Well, it just depends upon how you interpret it.
20 Some people would say that the consideration of the
21 public interest is a public trust.

22 Q How about the water-rights lawsuits with the
23 City of Reno and Sparks? Are you a party to that lawsuit?

24 A Are you referring to the treatment plant?

25 Q Right.

1 A Yes, we are.

2 Q Are you a party to the proceedings that were
3 previously before the Ninth Circuit?

4 A Yes.

5 MR. MORROS: I'm sorry. When you say "previously
6 before the Ninth Circuit--"

7 MS. OLDHAM: Well, I believe-- Didn't the
8 Ninth Circuit--

9 THE WITNESS: They hold on to it, partially.
10 I don't think they dismissed it entirely.

11 BY MS. OLDHAM:

12 Q In attempting--

13 MR. MORROS: Wait a minute. Wait a minute.
14 What lawsuit are we talking about?

15 MS. OLDHAM: There was an appeal, I believe,
16 to the Ninth Circuit of the denial of the--denial of
17 the water--the request by the Reno-Sparks treatment
18 plant to be able to take a certain amount of water out
19 of the river.

20 MR. MORROS: You are referring to the proceeding
21 before Judge Foley?

22 MR. McCONNELL: Yes.

23 MR. MORROS: All right. My understanding--
24 and I want to make sure I am not missing anything--there
25 was a motion before the Ninth Circuit to dismiss that

1 appeal, and that was argued. And the court denied that
2 motion, which then the briefing and oral-argument
3 schedule was set up on the merits of the appeal. And
4 that's now, we are in the process of completing the
5 briefing and the oral arguments on the merits, which
6 the Ninth Circuit will have to render an opinion on.

7 And the issue is directly related to--well,
8 it's a jurisdictional issue, is what it is; isn't that
9 correct?

10 MS. OLDHAM: Right.

11 MR. MORROS: I just want to make sure that
12 I am not missing anything, since the State Engineer
13 is a party to the lawsuit. I want to make sure I
14 understand what I am being sued over.

15 MR. McCONNELL: Well, it is my understanding
16 the issue is--and that is what our concern is--that
17 Reno and Sparks takes the position that until they are
18 completed with the treatment of the water through the
19 treatment plant, they don't have to discharge it back
20 into the river. And if they don't have to discharge it
21 back to the river, there is no requirement to replace
22 it, if they decide to pipe it into land application.

23 BY MS. OLDHAM:

24 Q If that comes about, do you anticipate that
25 there would be a major disruption of all of the water

1 rights on the Truckee River downstream of Reno?

2 A Yes, I think so.

3 Q And do you think it might have a major
4 disruption on Sierra Pacific and its water rights?

5 A I think so.

6 Q Are you asking that the State Engineer sort
7 out what might happen as a result of that lawsuit in
8 this case?

9 A No.

10 Q Are the gates and controls of the Derby Dam
11 in need of repair?

12 A Currently, some of them are, yes.

13 Q Who is responsible for making those repairs?

14 A Well, between ourselves and the United States.
15 We are the Truckee Carson Irrigation District.

16 Q You contracted with the United States that
17 you would be responsible for making the repairs?

18 A That's correct.

19 Q Are you familiar with any provisions of the
20 Truckee--of the Orr Ditch decree that relates to the
21 maintenance and repair of the control structure?

22 A Not off the top of my head.

23 MS. OLDHAM: For the record, can we reference,
24 on the general provisions, page 2 of the general
25 provisions of the decree, the right-hand column, the

1 fourth paragraph down? Would you take a look at it?

2 MR. MORROS: On page 87?

3 MR. deLIPKAU: Yes.

4 MR. McCONNELL: This one is 89.

5 MS. OLDHAM: 87.

6 THE WITNESS: Are you talking about the
7 paragraph that begins with "The owner--"?

8 MS. OLDHAM: Right.

9 MR. MORROS: I guess I'm a little confused
10 on this, this issue related to Derby Dam. Are any of
11 the other decreed water users, other than TCID, sharing
12 in the maintenance of Derby Dam, or the control structures
13 related thereto, at the present time, Mr. McConnell?

14 MR. McCONNELL: The only people that share
15 in that are the people that own the water rights within
16 Newlands Project.

17 MR. MORROS: And they are assessed on an
18 annual basis? There is an assessment for maintenance,
19 which includes maintenance on that diversion structure?

20 MR. McCONNELL: That's correct. There is an
21 annual operation maintenance assessment that is made,
22 which includes all of the structures that we have
23 responsibility for maintaining.

24 MR. MORROS: But the decreed water right holders
25 on that main channel of the Truckee and the upstream

1 tributaries don't share in the annual maintenance assess-
2 ment for that structure, do they?

3 MR. McCONNELL: No.

4 BY MS. OLDHAM:

5 Q Did you assume that responsibility from the
6 United States?

7 A Yes.

8 Q To maintain, pursuant to that paragraph of
9 the Truckee--

10 A I don't know whether it was this paragraph
11 specifically mentioned in our agreement.

12 Q Does the decree apply to TCID, or did the
13 provisions of the decree apply specifically with
14 respect to TCID, or was the United States the real
15 party in interest?

16 A I can't answer that.

17 Q Do you know whether Sierra Pacific, Westpac
18 Utilities, has offered to help to get your dam repaired
19 within the structure of federal legislation?

20 A Yes.

21 Q Would our continuing to do that satisfy your
22 concern here: continue to attempt to get your dam
23 repaired through some sort of federal--

24 A I want to make it clear that, in our concerns
25 with this water-rights transfer was the proposition that

1 we were looking for conditional approval on the basis
2 of a pro rata sharing of the transfer of this water
3 upstream, assuming we are unable to control the
4 diversion.

5 We know that the diversion structure was
6 built in 1903. It's a very old structure at the present
7 time. It probably was constructed with the intent that
8 there would be downstream water flows provided. And
9 it has--you start getting into the area of less than
10 30 cfs, and you take a major portion of that up to
11 ten or 12 cfs, it starts becoming a little more difficult
12 to regulate, as the flow of the river varies.

13 So we are looking only for contribution to
14 the extent of a pro rata basis, if and when it becomes
15 necessary that improvements to the structure, that we
16 are obligated to maintain that structure, is not
17 adequate to control the flows, so that it doesn't
18 become a double-dipping, in a sense, from that stand-
19 point.

20 Q So, I am not sure if you answered my question
21 or not, which was: Would you be satisfied with Westpac
22 working with you and agreeing to assist TCID in getting
23 needed federal funding for those repairs; or are you
24 specifically asking for Westpac to come up with the
25 money?

1 A No, we are not specifically asking for anyone
2 to come up with the money. We are asking that the
3 State Engineer consider the fact that, as the water
4 rights are transferred downstream, that it becomes more
5 difficult to regulate flows; and in that consideration,
6 that there be pro rata sharing of the cost of trying
7 to control those structures.

8 It is similar to any other control structure:
9 that it is designed to do certain things. When you
10 change the applications, the design might not be
11 adequate to provide for changed circumstances.

12 MR. MORROS: Let me make sure I understand,
13 Mr. McConnell, what you are asking, and that is that
14 the permit be conditioned to the extent that, should
15 any modification of that diversion structure become
16 necessary at Derby, as a result of downstream water
17 rights being moved to points of diversion upstream,
18 then those applicants under those--or those permittees
19 under those permits, if and when they were approved,
20 be required to share in the cost of any modification
21 that might be required to that diversion structure
22 at some time in the future. Is that a fair statement?

23 MR. McCONNELL: That is a fair statement.

24 MR. MORROS: So you are anticipating that,
25 should all downstream decreed rights be eliminated--

1 again, just for the sake of discussion--below Derby
2 Dam, all of those rights are moved upstream, and Mr.
3 Stone, the Water Master, indicates that there is a
4 diversion requirement below Derby of about-- How much
5 was that?

6 MR. STONE: Around 30 to 35 cubic feet per
7 second, at the present time.

8 MS. OLDHAM: There is rights in excess of
9 that.

10 MR. STONE: Yes, there are rights in excess
11 of that, that are not being--that are not presently
12 being irrigated.

13 MR. MORROS: But not all of those rights
14 have historically called for water.

15 MR. STONE: That's correct.

16 MR. MORROS: I don't know whether Derby Dam
17 was designed originally with that in mind, but I doubt
18 it, since the dam itself was built at the turn of the
19 century, and the decree didn't become final until 1944,
20 or the Truckee River agreement.

21 I just want to make clear--I just want to be
22 able to clearly understand, you know, what is the
23 basis for your request or your concerns.

24 I am just anticipating that some time in the
25 future there may be a modification of that diversion

1 structure at Derby Dam required, because of the
2 elimination of or the movement of downstream water
3 rights to points of diversion upstream from Derby;
4 is that correct?

5 MR. McCONNELL: That's correct.

6 MR. MORROS: I guess I don't understand why
7 that should occur. But I am sure you have your reasons.

8 MR. McCONNELL: Why what should occur?

9 MR. MORROS: Any modification of Derby Dam
10 would be required under those conditions.

11 MR. McCONNELL: Well, currently, I suppose
12 what you are referring to is the fact that maybe,
13 perhaps the dam ought to be able to stop all flows,
14 and currently, we are not able to stop all flows.

15 MR. MORROS: Why would you be required to
16 stop anything other than what you are entitled to under
17 the decree?

18 MR. McCONNELL: Well, right now we are
19 required, under the decree, we are allowed to take up
20 to the 1500 cubic feet per second, but we are required,
21 for prior rights, to allow certain quantities of water
22 to bypass Derby Dam. And it is those certain quantities
23 that are in the neighborhood of 30 to 35 cfs that
24 we can meet at the present time.

25 However, as the water rights are transferred

1 upstream--this one being approximately 12 cfs out of
2 maybe 30 to 35 cfs--are transferred upstream, then
3 what happens is, then we would no longer be required
4 to allow 30 to 35 to bypass; we are only allowed--we
5 are only required to allow 20 to 25 to bypass.

6 Then it becomes a point in time when the
7 structure itself is not capable of maybe perhaps
8 monitoring or controlling flows to such a small amount.
9 And when you are talking about 500 cfs, or thereabouts,
10 in the river, and in fluctuating amounts, so, as it
11 becomes less and less water downstream, then it becomes
12 more and more difficult to regulate.

13 And if you don't regulate it, then the
14 water goes downstream, as it has in the past. And if
15 a permit is not-- The water is also taken out upstream,
16 so there is a double-dipping into the water source at
17 that time, which, in fact, is going to impair our
18 water-diversion right.

19 MR. STONE: Mr. Morros, as I may, as an
20 operational matter, part of the rights downstream are
21 now made up by leakage through Derby Dam.

22 MR. MORROS: I understand that. I was aware
23 of that. It's not a tight dam.

24 MS. OLDHAM: But there is a distinction, also,
25 between repair kinds of requirements and requirements,

1 I think, that might be the result of some sort of needed
2 design modification that we are talking about here.

3 It's leaking through the gates and control
4 structures, I understand, which could be made tight.

5 MR. MORROS: I'm just trying to determine
6 whether Mr. McConnell's request has merit or not. Under
7 the law, the State Engineer is required to evaluate
8 the economic impacts on a water district associated
9 with any proposed change. Obviously, if there would be
10 need for expenditures of funds to modify Derby Dam,
11 in any way, shape or form, at some time in the future,
12 as the result of these rights that are being proposed
13 to be moved from points of diversion below the Derby
14 Dam to upstream locations, then his concerns have
15 merit, under that provision of the statute.

16 MR. McCONNELL: I also raise it under a
17 general concern that, as water flows change in the
18 system, diversion structures have to change. If, say,
19 for example, there is a change in the flow in the river,
20 some diversion structures along the river may not be
21 adequate to divert the water that they were adequate
22 to divert previously. So you have a consideration or
23 concern that what is current and what is maintained is
24 current, and what operates under current conditions
25 may not operate adequately under changed conditions.

1 And that is what our concern is.

2 MS. OLDHAM: I think from our standpoint there
3 is a distinction between a repair condition and a
4 needed modification of the entire structure in order
5 to--

6 MR. MORROS: Well, I think that goes without
7 saying.

8 MS. OLDHAM: And the repair situation is a
9 requirement of the decree, and would not--the rights
10 we are talking about here are five cfs. The dam,
11 which--we don't believe that the dam is incapable of
12 controlling it to the degree of the five cfs we are
13 talking about, in its present design situation.

14 If there is a concern at this point, it is
15 the result of the gates being in need of repair, which
16 we have supported TCID and attempted to get monies
17 to help them out that way, and will continue to do so.
18 And I will state that for the record.

19 And I was just trying to find out if that was
20 adequate for the purpose of this application, with
21 respect to Mr. McConnell, or whether he was really
22 trying to determine some precedent for the future
23 that--

24 MR. McCONNELL: Well, we are not talking about
25 repair, because, if we can repair it, and we can

1 prevent the flow, then we don't have a problem.

2 We are talking about the circumstance that
3 we are not able to repair it, to modify it, so that
4 we can control five, ten, 15 cfs, when we are talking
5 about several hundred in the river. So it is not a
6 situation where we are asking for folks to contribute
7 toward our repair.

8 We are just looking toward the potential
9 problems in the future, which may involve some considera-
10 tion that you can't utilize the design structure that
11 was put in by the United States in 1903, but that
12 requires some modifications. And those modifications
13 have to be done. And that is what we are talking
14 about.

15 MR. MORROS: Well, under the decree, you
16 can divert up to 1500 cubic feet per second from the
17 Truckee River, but I think the Truckee canal pretty
18 well limits you to what, about 900, isn't it?

19 MR. McCONNELL: Well, this year we had up
20 to close to 950 at one time.

21 MR. MORROS: But that is just about the
22 capacity of the canal, isn't it?

23 MR. McCONNELL: That is getting very close,
24 yes.

25 MR. MORROS: Do you have any additional

1 questions?

2 BY MS. OLDHAM:

3 Q I just have one other, I guess. To the
4 extent that you have 500 cfs coming into the canal
5 at some point in time, in a normal year, when you have
6 got plenty of water, is that going to affect your
7 getting your entire right, or is it just going to affect
8 the timing of it?

9 A It just depends upon the timing and the
10 criteria for diversion.

11 Q In a normal water year, is what I am talking
12 about.

13 A Yeah. There may be times when we are not
14 able to take all of the diversion, but then there will
15 be times later on, in the irrigation season, when we
16 could. And that is what we are concerned about.

17 The circumstance that we are concerned about
18 is the timing, when we are required to pass certain
19 minimum flows past Derby as the result of downstream
20 irrigation. And that is going to be in the later part
21 of the summertime, primarily.

22 Q But you are not concerned about the time
23 when there are no requirements for bypassing flows?

24 A No.

25 MS. OLDHAM: No further questions.

1 MR. MORROS: Well, your protest is basically
2 the statement that if the applications are granted,
3 they may tend to adversely affect existing downstream
4 water rights. You know we have been through the
5 process of what the State Engineer can consider, as
6 far as a protest goes. And it has to be pretty much
7 limited to those issues brought up in the statement
8 on the protest. And that has pretty well been confirmed
9 by the Ninth Circuit also.

10 But, on the other hand, the law requires
11 the State Engineer to consider any potential economic
12 effects on an irrigation district that may be involved
13 in any of these changes.

14 So I want to get this clear in my mind as
15 to--I don't know whether you are speculating on future
16 modifications to Derby or whether your concerns have
17 merit, have foundation.

18 Let's just say, again, for discussion purposes,
19 suppose that all downstream decreed water rights were
20 approved and were moved upstream, and there was no flow
21 requirement to service priorities below Derby Dam. In
22 your mind, is there a possibility that Derby Dam would
23 have to be modified under those conditions?

24 MR. McCONNELL: Yes.

25 MR. MORROS: For what purpose?

1 MR. McCONNELL: Well, to ensure that the
2 water rights of the district are met, so that we could
3 divert the entire flow.

4 MR. MORROS: But the dam presently should be
5 accomplishing that.

6 MR. McCONNELL: The dam currently allows
7 certain waters to flow downstream, which are a require-
8 ment of downstream water rights, to meet downstream
9 water rights.

10 MR. MORROS: Well, what you are saying is
11 there would have to be modifications to the extent that
12 leakage to the dam and any other methods that is being
13 utilized now to service those downstream rights would
14 be limited so that TCID could more efficiently divert
15 whatever flows were available in the channel, with no
16 consideration for any downstream rights?

17 MR. McCONNELL: That's right. Because
18 currently, right now, the water flows downstream to
19 meet those rights. If the permits are approved, the
20 water will be taken out of the upstream. So, if the
21 water continues to flow downstream, now you have had--
22 you have taken and impaired the diversion rights of the
23 district. You see what I mean?

24 MR. STONE: Are you saying that you could not
25 shut Derby Dam off tight without some modification to

1 the existing structure?

2 MR. McCONNELL: That's probably correct.

3 MR. STONE: As opposed to a repair of the
4 present structure?

5 MR. McCONNELL: Yes, yes, because the gates
6 on them are cast-iron type gates. They are sliding
7 gates. They have the steps on the upstream side,
8 instead of the downstream side.

9 The bottom half moves up, and it catches
10 the top half. And that moves up. And the actual
11 structure itself maybe wasn't designed or constructed
12 in such a fashion to prevent entire flows from being
13 cut off.

14 We have attempted, on various occasions, to
15 try to stop leakage and stop the flows with replacement
16 of gates and those things, and have been completely
17 unsuccessful.

18 MR. MORROS: Basically you are saying that
19 when the river gets down to a flow of, say, 900 to
20 950 cfs at Derby Dam, then you are in a position to
21 divert the entire flow?

22 MR. McCONNELL: That's correct.

23 MR. MORROS: You are under no further
24 obligation to allow water to go on by to meet those
25 downstream priorities?

1 MR. McCONNELL: If those downstream priorities
2 are transferred upstream, that would be correct.

3 MR. MORROS: Any additional questions? Mr.
4 Stone?

5 MR. STONE: No, I have no questions.

6 MR. MORROS: Why don't we take about a ten-
7 minute break and then get started on the applicants.

(Recess.)

8
9 MR. MORROS: One thing I neglected to take
10 care of, when Mr. McConnell finished up, was the
11 exhibit that we marked as Protestant's No. 1, which
12 was the memo to Ross deLipkau from Clare Mahannah,
13 dated November the 10th, 1989, that I previously
14 described.

15 Any objections to this exhibit being received
16 into the record?

17 MR. deLIPKAU: No.

18 MR. MORROS: Then Protestant's Exhibit No. 1
19 will be admitted.

(Protestant's Exhibit No. 1
20 was admitted into evidence.)

21
22 MR. MORROS: I guess it is the applicant's
23 turn at this point.

24 Let's go off the record for just a minute.

(Discussion off the record.)
25

1 MR. MORROS: We have marked, for identification
2 purposes, seven exhibits for the applicant.

3 MS. OLDHAM: Eight, I believe.

4 MR. MORROS: Let's go off the record again.

(Discussion off the record.)

5
6 MR. MORROS: Eight; is that correct?

7 MS. OLDHAM: Yes. There is a pencilled-in
8 change to Exhibit 1, which is on the official copy and
9 mine, and I think it needs to be made so on yours, and
10 several of the others, as Applicant's No.--the first
11 block that has 53093, that should be 53092, claim 642.

12 MR. MORROS: Wait a minute. Okay. I'm sorry.

13 MS. OLDHAM: Is that right?

14 MR. MORROS: Okay.

15 MS. OLDHAM: Where it says 092, then it needs
16 to be three.

17 MR. MORROS: Let the record reflect that the
18 State Engineer has made those corrections to Exhibit No.
19 1, Applicant's Exhibit No. 1, that has been marked for
20 identification purposes.

21 Is Mr. Burns going to be providing some extra
22 testimony?

23 MS. OLDHAM: Yes.

24 MR. MORROS: All right. Mr. Burns, I will ask
25 you to state your full name for the record, and then

1 raise your right hand to be sworn.

2 MR. BURNS: Joseph I. Burns.

3 (Whereupon the witness was duly
4 sworn.)

5 JOSEPH I. BURNS

6 called as a witness on behalf of the applicant,
7 being first duly sworn on oath, was examined
8 and testified as follows:

9 DIRECT EXAMINATION

10 BY MS. OLDHAM:

11 Q Mr. Burns does Exhibit 2 accurately reflect
12 your background, education and experience?

13 A Yes, it does.

14 MR. MORROS: Any objections to Exhibit No. 2
15 being received into the record? Applicant's Exhibit No.
16 2, that exhibit is entitled Professional Background and
17 Experience of Joseph I. Burns, consulting civil engineer.
18 Mr. McConnell?

19 MR. McCONNELL: None.

20 MR. MORROS: All right.

21 (Applicant's Exhibit No. 2 was
22 admitted into evidence.)

23 MS. OLDHAM: Can we ask that he be qualified
24 as an expert, that you will stipulate that he be
25 qualified as an expert witness in engineering, civil

1 engineering, hydrology and hydraulics?

2 MR. McCONNELL: Certainly.

3 MR. MORROS: Hearing no objections, then,
4 Applicant's Exhibit No. 2 will be received into the
5 record.

6 BY MS. OLDHAM:

7 Q Mr. Burns, was Exhibit 1 prepared by you,
8 or under your direct supervision?

9 A Yes, it was.

10 Q Can you generally describe that exhibit, please.

11 A This shows the Truckee River system, starting
12 up at Lake Tahoe, and indicates the reservoirs in the
13 California area that feeds water to the Truckee system,
14 and carries the Truckee system out to Pyramid Lake.

15 It also shows the portion of the Carson River,
16 Lahontan Reservoir and the Carson River, going out to the
17 Fallon area. So it generally covers the Carson-Truckee
18 River systems.

19 MS. OLDHAM: This exhibit was intended to be
20 informational and to help us, if we needed to distinguish
21 the various locations.

22 We would offer it for that purpose.

23 MR. MORROS: Any objection?

24 MR. McCONNELL: No.

25 MR. MORROS: All right. Applicant's Exhibit

1 No. 1 will be received into the record.

2 (Applicant's Exhibit No. 1 was
3 received into evidence.)

4 BY MS. OLDHAM:

5 Q Mr. Burns, pursuant to your testimony in this
6 case, what were your duties and responsibilities requested
7 of you by Sierra Pacific?

8 A I was requested to take a look at the applica-
9 tions before the State Engineer and determine what
10 impact, if any, it would have on the downstream water
11 users, particularly TCID.

12 Q And what was the conclusion of your analysis?

13 A The conclusion is that there would be no
14 adverse effect on TCID, as to their water rights;
15 whereby the transfer of these applications into the
16 Truckee Meadows area.

17 Q Will you please generally describe the
18 analysis you performed.

19 A What we did, we took a look. We said that
20 we should take a look at the most adverse condition;
21 that is, what would be most likely to impact TCID.

22 So we took a look at a future condition and--
23 in which we would be utilizing--or the water rights
24 in the Truckee Meadows would be fully utilized. Also,
25 we assumed that the water rights downstream of Derby

1 Dam would be fully utilized, and water would be released
2 for that purpose.

3 And in the analysis that we made, we took a
4 look in the future at a condition which we were attempt-
5 ing to deliver 119,000 acre-feet of water M & I water
6 to the Truckee Meadows area.

7 And in that analysis, we had additional water-
8 supply sources that would support acquired irrigation
9 rights. And the analysis indicates that we could
10 support approximately 72,000 acre-feet of irrigation
11 rights that would be exercised in the Truckee Meadows
12 for M & I purposes.

13 And we assumed that the remaining irrigation
14 rights that were in the Truckee Meadows were being
15 exercised, water was being delivered for irrigation
16 purposes. And we operated this system with the Truckee
17 River model. And I think Mr. Morros is familiar with
18 the model.

19 It is a model that has been developed by
20 working with many, many people and agencies, to give
21 us a technique in how we can address what will happen
22 to the river system if we make certain assumptions.

23 And in part of the assumptions that we had
24 in the model is that the present OPAC would be in place
25 for the Truckee Carson Irrigation District, and a total

1 demand for the Newlands Project of 320,000 acre-feet.

2 What we did, we operated the model with the
3 condition that the water rights were being fully
4 exercised downstream of Derby Dam. And from that
5 analysis, then we could develop what the shortages
6 would be of both in the Truckee division and the
7 Carson division of the Truckee Carson Irrigation District.

8 Then we moved, and what we did, initially,
9 when we started to take a look at this question, we
10 understood that all three applications were downstream
11 of Derby Dam. So the analysis we made, which is a
12 more severe case than if we have one of these applica-
13 tions upstream of Derby Dam--but we assumed that the
14 three applications were downstream of Derby Dam, and
15 that a diversion of approximately 670 acre-feet would
16 be required for those applications.

17 Then we made the assumption that that water
18 was not going to be diverted at those points, and
19 that we moved the 3581 acre-feet of the right, the
20 right for applying water to the land, moved that up
21 into the Truckee Meadows, and that right would then
22 be exercised in the Truckee Meadows as part of the
23 72,000 acre-feet of irrigation rights used for M & I
24 purposes.

25 We operated the model, and then we came up

1 again with the impact on TCID, which shortages would
2 they experience in the Truckee division and the
3 Truckee--and the Truckee division.

4 And the period that we used, we used the
5 hydrologic period of 1901 through 1980, which has been
6 sort of a standard period we have been using in many
7 of the negotiations or litigation. And what we came
8 up with--

9 Q Well, looking now at Exhibit--Applicant's
10 Exhibit 3, entitled Truckee River Model Development
11 and Description, was this prepared by you, or under
12 your direct supervision?

13 A Yes, it was.

14 Q Would you just generally describe what is in
15 that exhibit.

16 A Well, what this exhibit does, it gives a
17 little background on the Truckee River model, and how
18 it was started, and the various elements that went
19 into the model. So it is really to give a little
20 background on the model that we are using here, to
21 determine a study of the impact on the Carson and
22 Truckee River systems, when we make changes to the
23 system.

24 MS. OLDHAM: We were aware that the State
25 Engineer has become familiar with the Truckee River

1 model, but we thought, for the record, if we just put
2 together a description, that it might save time on the
3 record to provide the description of the model in this
4 format, rather than trying to do it all on the record,
5 especially recognizing that the protestant is also
6 fairly familiar with the model.

7 MR. MORROS: That is acceptable to the
8 State Engineer, as long as it is acceptable to the
9 protestant. I will take administrative notice of
10 all of the stated information associated with that
11 model, which the State Engineer's Office is familiar
12 with.

13 Is that satisfactory to you, Mr. McConnell?

14 MR. McCONNELL: Yes.

15 MS. OLDHAM: Then is Exhibit 3 admitted?

16 MR. MORROS: I certainly have no objection.
17 Mr. McConnell, do you have any objections to Applicant's
18 Exhibit No. 3 being admitted?

19 MR. McCONNELL: For what purpose?

20 MS. OLDHAM: Well, I think that is informa-
21 tional, as well as this is attempting to--this is
22 intended to be the background on the development of the
23 model. It doesn't have any information with respect
24 to the particular runs done for the analysis here, but
25 just how the model itself was developed, and the process

1 Mr. Burns went to.

2 MR. McCONNELL: For historical information,
3 I don't have any objection.

4 MR. MORROS: All right. Applicant's Exhibit
5 No. 3 will be received into the record.

6 (Applicant's Exhibit No. 3
7 was received into evidence.)

8 BY MS. OLDHAM:

9 Q Mr. Burns, was Exhibit, Applicant's Exhibit
10 4 prepared by you and under your supervision?

11 A Exhibit 4 is the water-supply impacts on
12 TCID. That is Exhibit 4.

13 Q Does this exhibit essentially summarize the
14 conclusions of your analysis?

15 A Yes, it does.

16 Q Could you describe that exhibit and the
17 conclusions that it contains.

18 A This summarizes the results of the analyses,
19 using the Truckee River model, under the conditions which
20 I previously stated; and that is, under the condition
21 of first operating the system with the 670 acre-feet,
22 which is the total quantity of diversion water under
23 these three applications, that that water was diverted
24 downstream from Derby.

25 Then the system was run by moving the 581

1 acre-feet of right, which we don't bring up the losses
2 associated with that diversion; bring 581 acre-feet
3 of water into the Truckee Meadows.

4 That is exercised as part of the 72,000 acre-
5 feet of irrigation rights used for M & I purposes.

6 Then the model was run, and we ended up then
7 with what the impact is. And in this case, we have
8 summarized the comparison or impact on TCID. And we
9 are taking a look at the shortages that would be--
10 that would result in both the Truckee division and
11 Carson division.

12 On page 2, of Exhibit 4, we have a table
13 title comparison of TCID shortages, values, 1,000
14 acre-feet.

15 We have the calendar year in which a shortage
16 would have occurred. Again, the period that we are
17 analyzing is the hydrologic period 1901 to 1980.

18 Then the next two columns are headed 670
19 acre-feet diverted downstream of Derby Dam. And under
20 that heading, we have two columns: 1, Truckee division,
21 which shows the shortage that would occur. For
22 example, in 1931, there would have been a shortage of
23 14,490 acre-feet in the Truckee division. And then,
24 similarly, the Carson division, in the year '31,
25 Carson division of the Newlands Project would have had

1 a shortage in the supply of 144,190 acre-feet.

2 Then the next two columns that are headed 581
3 acre-feet transferred to Westpac, that's moving 581
4 acre-feet of right from below Derby Dam up to the
5 Truckee Meadows.

6 And the result is--for example, in the
7 Truckee division, in 1931, note that the shortage in
8 the Truckee division is 4,230 acre-feet, which is less
9 than the shortage that would occur in the Truckee
10 division, if those rights have been exercised downstream
11 of Derby Dam.

12 Also Carson division, in the same manner,
13 it shows that we have a 143,830 acre-feet shortage
14 in 1931 in the Carson division, when we exercised the
15 right upstream of Derby. And that, again, is less
16 than the shortage that would have occurred if those
17 rights had been exercised downstream of Derby Dam.

18 Then take a look at the totals down at the
19 bottom. Notice that in the Truckee division it has
20 an accumulative shortage of 33,170 acre-feet for those
21 years. If the right had been exercised upstream, the
22 shortage would have been 32,410.

23 Similarly, the Carson division shortages
24 were greater if the rights were exercised downstream
25 of Derby. So the conclusion is, by operating the whole

1 system with all of the constraints, it comes out that
2 there is no adverse impact on TCID by moving these
3 rights upstream.

4 Q The years you have listed are the years of
5 shortages. Were there any shortages in other years
6 to TCID?

7 A No. These were the shortages in the period
8 of analysis.

9 Q So in the other 80 years not listed here,
10 was there any impact on TCID?

11 A No.

12 MR. MORROS: What you are saying, basically,
13 Mr. Burns, is that approval of these applications is
14 going to result in more water being available to TCID
15 in those--for the lack of a better term--drought years?

16 THE WITNESS: Yes.

17 MR. MORROS: Or at least that is what your
18 model is telling you.

19 THE WITNESS: Yes. Then, if you follow it
20 through, you can see why. It has to do with consumptive
21 use downstream, or taking it upstream and using it in
22 a way that there is a greater return to the river. And
23 these factors all come in to play.

24 For example, at Derby Dam, what we are talking
25 about here is that we must pass 670 acre-feet to divert

1 that water; you must divert the right plus the loss.

2 But if we move the water upstream into the
3 Truckee Meadows, then all that Westpac will exercise
4 is the face value of the right: 581 acre-feet.

5 MR. MORROS: Doesn't that basically support
6 Mr. McConnell's concerns related to depletion of those
7 flows below Derby Dam, that might result in triggering
8 something, such as the Public-Trust Doctrine, or some
9 type of requirement for instream flows?

10 THE WITNESS: Well, what we have in this
11 analysis is, as I said, a future condition. And we are
12 assuming--and in this analysis we are making sure that
13 all of the rights downstream of Derby Dam, the Indian
14 rights, that all of those rights are being met and
15 exercised.

16 And actually, that if all of those rights are
17 being exercised, the water supply from the river, it
18 is going to be more than the leakage coming past the
19 dam; that actually water will have to be released.

20 And those rights, I think, are first rights
21 on the river. And they will be exercised; and those
22 rights, I don't believe, can be moved. They will be
23 there. And with a, we assume, an 1859 right, we, in
24 all of our studies, indicate that that water will be
25 there, those rights will be met. And it will take more

1 than just the leakage from the dam to do that.

2 MR. MORROS: Well, what if things change?
3 What if conditions change? The dam is modified, and
4 there is no longer any leakage.

5 THE WITNESS: Well, I think it would be of
6 benefit to TCID and to Westpac. For example, just
7 last spring, when the Water Master was operating the
8 river, he was passing much more than Floriston rates
9 at Farad, because Independence had stored 3,000--they
10 have a first right, 3,000 acre-feet. OPAC had been
11 filled up to 25,000 acre-feet. No additional water
12 could be stored upstream in those reservoirs, or Prosser,
13 or Stampede, until TCID rights are met.

14 So the Water Master passes all of the water
15 down to Derby Dam. And I think TCID diverted about
16 an average of almost 900 second-feet per month. But
17 there was probably, I think, about 60 or 60-plus second-
18 feet passing the dam. They couldn't control it.

19 Now, that 60 second-feet could, if it had
20 not been passing the dam, have been stored upstream
21 by Westpac, because the right of TCID was being measured
22 by how much they could put in the canal.

23 So here is a case where having a facility that
24 will--you can't control water. It is not only important
25 at low flow, it's important at high flow. So I think

1 it's a benefit to both the TCID and of the other water-
2 right holders upstream.

3 MR. MORROS: Mr. Turnipseed, do you have any
4 questions?

5 MR. TURNIPSEED: Do you want to wait until
6 he is done? Okay.

7 EXAMINATION

8 BY MR. TURNIPSEED:

9 Q In your conclusion here, does this assume,
10 then, that 58 percent of the 58-percent rule, does
11 that--

12 THE WITNESS: You are referring to the critical-
13 year yield?

14 MR. TURNIPSEED: Critical-year yield; does
15 that assume, then, the 58 percent of water transfer is
16 going to M & I, and the other 42 percent is going on down-
17 stream?

18 THE WITNESS: This is being transferred up
19 with that 1.72 factor; that's correct.

20 BY MR. TURNIPSEED:

21 Q And also, then, with what comes back through
22 the sewage-treatment plant?

23 A That's correct.

24 Q But if those two--if either of those two
25 assumptions were to change, then the results would be

1 different?

2 A Yes, if you changed some of those assumptions.
3 But we are operating--this is falling within the
4 present operating rules, if you will, of PSC on how
5 the Sierra Pacific will handle the water rights and
6 transfer them up.

7 MR. TURNIPSEED: I see.

8 MS. OLDHAM: Maybe just as a legal aside,
9 we did get a copy of the statute, 533.370, which
10 talks about proposed changes of use: if, within an
11 irrigation district, must not adversely affect the cost
12 of water for other holders of water rights in the
13 district, then the efficiency of delivery.

14 For the record, we wanted to clarify that
15 the obligations with respect to the water rights being
16 transferred within the district--

17 MR. MORROS: But, if as a result of these
18 transfers, modifications have to be made to Derby,
19 and that cost has to be passed on to those water users
20 within that irrigation district, I think it falls
21 within the authority of this statute.

22 MS. OLDHAM: Well, I guess two premises of
23 that is the statute really talks about--it's conditioned
24 upon the fact that the transfer is within an irrigation
25 district, which it is not. This district--or this right

1 is not within an irrigation district.

2 But, secondly, I think we disagree with the
3 fact that the modifications are being required by the
4 transfer; that specifically, we think the modifications
5 are required now, and that our water rights are being
6 impaired as a result of those repairs not having been
7 done and the modifications not having been made.

8 You know, I don't know whether you call them
9 modifications--it's semantics--or repairs.

10 When we replaced the gates at Independence
11 Lake, we replaced the gate with a tight structure,
12 you know. We didn't go back in and fix the old cast-
13 iron gate. That wouldn't be the way you would go about
14 doing it on a reasonable basis. You put in a decent
15 control structure.

16 MR. MORROS: What you are saying is that there
17 is a distinction as to whether this statute is applicable
18 or not, and that distinction is whether it is directly
19 related to whether the change is proposed internally
20 within the district, or proposed to remove a water
21 right from within the district and take it to outside
22 use. In the absence of that, your position is that
23 533.370, 1-B, does not apply; is that correct?

24 MS. OLDHAM: Right. And further, that even--
25 you know, assuming arguendo that you apply it, that

1 TCID has an obligation under the Orr Ditch decree,
2 which was that section that we pointed out earlier, to
3 see that they have an efficient and effective control
4 structure, and that that obligation goes to Westpac
5 right now, that our water supplies are being affected
6 by that leaking at times when there are no rights,
7 that have a call on that water.

8 And for that reason, we have proceeded to
9 try and get those repairs done; through trying to get
10 federal assistance, knowing that TCID does have some
11 financial problems.

12 MR. MORROS: Okay.

13 MR. deLIPKAU: Mr. Morros, I would concur with
14 Westpac's position.

15 MR. MORROS: For some reason, I knew you would.

16 REDIRECT EXAMINATION

17 BY MS. OLDHAM:

18 Q Mr. Burns, turning now to Exhibit 5, Applicant's
19 Exhibit 5--let's take 5 and 6 together--were these
20 exhibits prepared by you, or under your direct supervision?

21 A Yes, they were.

22 Q Could you describe those two exhibits, please.

23 A Well, we start with Exhibit 5, which is
24 designated Case A, and thought we would take some kind
25 of a schematic, an application of some rates of flow,

1 and take a look at what happens if we move certain
2 rights around in the system.

3 And we started up at the top, and made an
4 assumption, say, there is 500 second-feet at--and
5 these, incidentally, are second-feet--500 second-feet
6 would stay essentially at Farad. That's on the upper
7 left-hand corner, just as before transfer.

8 Then we assume that there is a hundred second-
9 feet diverted in the Reno-Sparks area for M & I purpose.
10 And assuming a 50 percent return flow from that diversion,
11 so we have 400 second-feet, after the hundred-second-
12 foot diversion; 50 second-feet of return flow. Now
13 there is 450 second-feet in the river.

14 Then we have assumed that we have had a diversion,
15 an irrigation diversion, say, downstream of Vista,
16 upstream of Derby Dam, making the assumption that that
17 is ten second-feet.

18 And then, consumptive use is about 70 percent;
19 we have about 30 percent return flow, so three second-
20 feet of the ten diverted would return to the river.

21 So we end up with a flow of 443 second-feet
22 upstream, or at Derby Dam.

23 Then we make an assumption that there is a
24 requirement that 50 second-feet be passed below Derby
25 Dam for the water right holders downstream of Derby Dam.

1 Then we are taking a--identifying a diversion of ten
2 second-feet, and, again, a return flow of three second-
3 feet results in a total flow of 43 second-feet in the
4 river below that diversion and use.

5 And we end up that, Derby Dam, we have 443
6 second-feet; we have a 50-second-foot requirement of
7 flow below Derby Dam. And that results in a flow to
8 TCID of 393 second-feet.

9 And we are assuming here that that is a
10 right they are exercising under their OPAC, and they
11 are attempting to take the water that is available
12 to them over to Lahontan, or to the Truckee division.

13 Now, we assume, after transfer--let's
14 transfer the ten-second-foot diversion below Derby
15 Dam. Let's transfer that up into the Truckee Meadows
16 or the Reno-Sparks area. And let's exercise that
17 right for an M & I purpose. So now we have our 500
18 second-feet coming into Farad, now we divert 110 second-
19 feet from M & I purposes. And that 50 percent return-
20 flow, we have 55 second-feet coming back in the river.
21 So we have now 445 second-feet, say, at Vista. We have
22 our--still have our irrigation diversion between Vista
23 and Derby Dam. And we follow that through, and we end
24 up with 438 cubic feet per second at Derby Dam.

25 But since we have removed a diversion require-

1 ment or right downstream of Derby Dam, we no longer
2 have to put the 50 second-feet, but we have to leave
3 the 43 second-feet. We have taken out the effect of
4 that diversion.

5 So now we have 438 second-feet above Derby,
6 and we have the requirement to release 43. And that
7 leaves 395 second-feet to TCID.

8 And this, in a rather simple schematic way,
9 demonstrates what the impact is. We have a consumptive
10 use downstream; we move it up, change it to M & I use,
11 and it does have an impact, and it's a favorable impact
12 on TCID.

13 Q Is it favorable in all years?

14 A Yes. ASSUMES AG C.O. > 50 % IN ALL
YEARS

15 Q In other words, if TCID had a right to a
16 certain amount of water in a normal year, are they
17 going to get more water, or are they going to get the
18 same amount of water quicker?

19 A They would get--well, they would get the same
20 amount of water. You are assuming, in a normal year,
21 they would get up to their right, and they would get up
22 to their right.

23 Q So it really only--it has a favorable aspect
24 to it during drought years?

25 A Yes.

1 Q Case B, could you--

2 MR. MORROS: You are referring to Exhibit 6
3 now?

4 THE WITNESS: Exhibit 6, Case B, is this--
5 we simply took the irrigation that we are making,
6 essentially, between Vista and Derby, moved that into
7 the Truckee Meadows, and exercised that as an M & I
8 right. And in that case, we come back, we have now
9 110 second-feet.

10 Of that, we are taking from the river, for
11 M & I, we have a 55 second-foot return; we have
12 limited the irrigation use between Vista and Derby,
13 and we end up with 445 second-feet above Derby Dam.

14 In this case, we still have the right being
15 exercised downstream, so we must release 60 second-feet.
16 Again, in this case, it indicates that we end up with
17 395 second-feet to TCID, which is greater or more water
18 under the before-transferred condition.

19 BY MS. OLDHAM:

20 Q What is the basis for saying it is greater
21 in both Exhibits 5 and 6?

22 A Notice indicated flows to TCID, in the before-
23 transfer, we have a line coming down that says "to TCID,
24 and there's 393 second-feet," Case A.

25 Then go down, after transfer, and note there

1 is 393 second-feet indicated there. And that also
2 appears on Case B as well.

3 Q But is that a result of operating criteria?

4 A It is the result of applying, yes, applying
5 the operating criteria and the nature of use of the
6 water, and where you use the water.

7 Q And is the greater amount that occurs in the
8 after-transfer related to the return flow of irrigation
9 versus M & I?

10 A Yes. And also, in the--when you are between
11 Vista and Derby Dam, but also it comes into play here,
12 the consumptive portion. But also, when you apply the
13 69-31 percent criteria in that irrigation diversion,
14 it's upstream, and that's counted in the 69-31. So it
15 ends up that the major difference is the consumptive
16 use versus the return flow from M & I.

17 Q Were Exhibits 7 and 8 prepared by you, or
18 under your direct supervision?

19 A Yes.

20 Q Can you describe what is in Exhibits 7 and 8.

21 A May I check? Is this 7?

22 Q Yes.

23 A Exhibit 7 is a listing of the water rights
24 that have been previously transferred from downstream;
25 that is, downstream of Vista, upstream, by--through the

1 State Engineer's Office, by Westpac.

2 Q That's 7, did you say?

3 How about 8? Could you describe that exhibit?

4 A Eight indicates that the subdivision approved
5 by the State Engineer's Office using these portions of
6 these downstream rights that were transferred up to the
7 Truckee Meadows.

8 Q Do you know, did any of these transfer have
9 an adverse impact on TCID?

10 A No.

11 Q Based on your total analysis and all of the
12 exhibits, do you have a conclusion whether the transfers
13 of the water rights under Applications 53369, 53092
14 and 53093 would adversely impact the rights of TCID?

15 A They do not adversely impact the rights of
16 TCID.

17 MS. OLDHAM: Thank you.

18 MR. MORROS: Mr. McConnell?

19 MR. deLIPKAU: Could I ask a few more questions?

20 MR. MORROS: Go ahead.

21 (Discussion off the record.)

22 DIRECT EXAMINATION

23 BY MR. deLIPKAU:

24 Q Mr. Burns, you earlier stated that you had
25 prepared what is called the Truckee River model; is

1 that correct?

2 A That's correct.

3 Q In two sentences, could you please describe
4 the Truckee River model.

5 A It's a model to permit as to operate the Truckee
6 and Carson River systems so that we can measure what
7 happened through the system by applying all constraints
8 on the system.

9 Q All right. Where else, besides today's
10 hearing, has the model been used?

11 A It has been used in Federal Court; it has
12 been used in negotiations; it has been used--well, it
13 is being now used by all the parties that are involved
14 on the Truckee River system. We have technical committees,
15 and that includes the tribe.

16 Q In answer to Mrs. Oldham's question, you
17 stated that if the three applications were, in fact,
18 granted, there would, in fact, be no adverse effect
19 upon TCID; is that correct?

20 A No adverse impact on the water rights; that
21 is correct.

22 Q Thank you. Would you please describe what
23 effect the granting of the three permits would have
24 upon the Truckee River decree?

25 A None.

1 Q All right. Would you please--

2 A You are applying the Truckee River decree
3 when you make the analysis.

4 Q I see. Would you please describe whether
5 or not the granting of the three applications would
6 impair or violate the Truckee River agreement of 1935.

7 A Not as far as I know.

8 Q All right. Do you know whether or not the
9 Truckee River agreement, in particular page 9, the 31-
10 69 percent ratio, could be maintained should the three
11 applications be granted?

12 A I don't know about what is on page 9, but
13 applying the 69-31, certainly could be and would be
14 applied.

15 Q All right. Let us assume that some superior
16 court or some superior governmental authority states
17 that the effluent could not be returned to the Truckee
18 River. Do you have that assumption in mind?

19 A Yes.

20 Q What would be the effect upon Westpac and
21 TCID, should that event occur?

22 A I assume the 69-31 percent would still apply,
23 and there would be adverse impact on both.

24 Q And how would that adverse impact occur?

25 A Because it's set up that 69 percent of the

1 diversions, instantaneous diversions between Farad and
2 Derby, you can add them all--the diversions cannot be
3 more than 69 percent of that total flow, and the 31
4 percent out of Derby Dam has to be met, so you have to
5 meet the 31 percent downstream.

6 If you are not putting the return flow in,
7 then you are going to back off on the water uses up-
8 stream.

9 Q So, basically, there would be a large curtail-
10 ment in water consumption and use within the Westpac
11 service area; is that not correct?

12 A It depends upon how much you take out.

13 Q All right. And it would be devastating?

14 A Well, again, it depends upon what the conditions
15 are.

16 Q Is it again your testimony that, should the
17 three applications be granted, there will be no adverse
18 effect or impact upon TCID?

19 A That's correct.

20 MR. deLIPKAU: No further questions, Mr. Morros.

21 MR. HOWARD: No questions.

22 MR. MORROS: Mr. McConnell?

23 CROSS-EXAMINATION

24 BY MR. McCONNELL:

25 Q Mr. Burns, on Exhibits 7 and 8, what was the

1 purpose of Exhibits 7 and 8? What was the purpose to
2 illustrate?

3 A I believe it was to illustrate what actions
4 had been taken on downstream water rights by moving
5 them upstream.

6 Q Is there any indication, as a result of the
7 fact that only 265 acre-feet have been used for
8 subdivision, whereas 4,289 acre-feet have been trans-
9 ferred downstream to upstream? Is there anything
10 intended to be shown by that?

11 A No.

12 Q You weren't implying that 4,000 acre-feet
13 was transferred upstream, and only using 265, and the
14 rest of it was to our benefit, then?

15 A No. But notice that some of this is upstream,
16 to Tracy Power Plant. No, this was just simply a matter
17 of actually what has happened.

18 Q Just for the record, to show what transfers
19 have occurred in the past, and where they have gone;
20 is that correct?

21 A Where part of them has gone; that's correct.

22 Q So it appears that a major portion of those
23 transfers went upstream, but they didn't go into the
24 Reno-Sparks area; is that correct?

25 A The Tracy Power Plant were retained at that

1 location.

2 Q And most of those transfers occurred when?

3 A I would have to check.

4 Q The fifties, sixties, or before?

5 A Whenever the Tracy Power Plant-- Mr. Furth
6 may be able to help us out.

7 Q With regard to your Exhibits 5 and 6, when
8 you made those illustrations, you were showing that the
9 amount of water that reaches Derby Dam during the year
10 of 443 or 438 cfs; is that correct?

11 A Yes.

12 Q And then the district then would divert 393
13 or 395, depending upon the circumstances?

14 A That is what would be available for the
15 district to divert.

16 Q So that assumes, then, that Derby Dam has
17 the ability to accurately divert quantities of water in
18 that amount?

19 A No. I think it has--Derby Dam has the ability
20 to release 50 second-feet to meet the downstream require-
21 ment.

22 Q And the transfer, if it occurred at Derby Dam,
23 then, Derby Dam, you assume that you could change that
24 release so it only required 43 cfs to be released below
25 Derby Dam?

1 Derby Dam?

2 A In this indication, that's correct.

3 Q All right. So you are assuming Derby Dam
4 has the ability, then?

5 A Well, I think we are assuming that, for the
6 entire system, that the, when you make the analysis--
7 we are assuming that this whole system--there are other
8 diverters, too--that they would be able to divert and
9 use this right. I think that is the basic assumption.

10 Q All right. On Case A, after transfer, you
11 show 43 cfs is going to Pyramid Lake; is that correct?

12 A No, it's being released at Derby Dam for
13 downstream users, because you know, Mr. McConnell,
14 you have to take into account the accretion. There is
15 more water than that that goes into Pyramid Lake.

16 Q All right. I wasn't trying to get to that
17 point. The point I am trying to make is that the
18 diversion below Derby was changed from to 43; is that
19 correct?

20 A That is correct.

21 Q In your illustration.

22 A That's correct.

23 Q Now, that is assuming, then, that ten cfs was
24 transferred upstream, and three had been historically
25 returned to the system, under your example?

1 A That's correct.

2 Q Now, if the ten was diverted after transfer,
3 in the Reno-Sparks area, and the Reno-Sparks sewer
4 effluent was not returned to the river, would there
5 still be then a requirement to divert 43 cfs past
6 Derby Dam?

7 A I don't know. I assume that those are down-
8 stream rights, and those rights would have to be met.

9 Q Okay. So what you are assuming, then, is
10 that the releases below Derby Dam would be reduced,
11 or taking into consideration return flows, historical
12 return flows from the prior irrigation, and, in this
13 case, instead of reducing the diversion below Derby
14 Dam cfs, the diversion was only reduced by seven cfs?

15 A That's correct; the consumptive-use portion.

16 Q And this was just for illustration purposes
17 only? You are not saying that three cfs is what the
18 return flows would have been?

19 A Well, I think that is probably a pretty good
20 estimate of about what is happening today. But it is
21 for illustrative purposes here.

22 Q But in these illustrations, that assumes that
23 the sewer effluent from Reno and Sparks should be
24 returned to the river?

25 A That's correct.

1 Q To reach a conclusion that there wouldn't be
2 any adverse impact on TCID water rights, you base that
3 on the Truckee River model runs; is that correct?

4 A Not only on the Truckee River model runs, but
5 also on how the system operates. For example, the Vista
6 to Derby, I think any movement of water from irrigation--
7 say Vista to Derby; I am only using that as an example--
8 up to Truckee Meadows, would be to the benefit of TCID.

9 There would be more water at Derby Dam for
10 diversion by TCID. That is because currently the
11 utility company returns approximately 50 percent through
12 the treatment plant; but also because of the 69-31
13 percent comes in to play. And that diversion between
14 Vista and Derby is part of the 69-31 percent computation.

15 Q But wouldn't that utility company be diverting
16 an additional ten cfs from the flows in the river?

17 A In this illustration, yes.

18 Q And wouldn't the flows of the river remain
19 constant at 500 cfs, theoretically, if you were releasing
20 water to meet the Floristan rights?

21 A In this example, we assume there is 500 second-
22 feet at Pyramid.

23 Q So the diversion, then, to the utility for the
24 transfer upstream, would increase; is that not true?

25 A That's correct; removing the ten second-feet

1 up and assuming it is diverted for M & I purpose.

2 Q From the standpoint of the model, does it
3 look at daily flows?

4 A No, it's monthly.

5 Q And I believe it's utilized in thousands of
6 acre-feet, is it not?

7 A That is correct.

8 Q So that--

9 A Excuse me. No, we don't round 2,000s of
10 acre-feet. Actually, the computer carries it down to
11 the acre-foot, and the print-out I think we have to the
12 nearest ten acre-feet.

13 Q If the model is basically a computer-generated
14 system, based on yours and Ron Hall's--or Mr. Hall's
15 understanding of it, the Truckee River agreement and the
16 Orr Ditch decree?

17 A No. I think it is more than that, because
18 what we have attempted to do is, as you know, work with
19 the Bureau of Reclamation, the Federal Water Master,
20 the Conservation District, your office, and trying to
21 make sure that in the model, the model will--the model
22 is nothing more than what you tell it to do.

23 But we have gone to treat lengths to try to
24 get input from everybody: Does this model, as it is
25 operating, fairly reflect and accurately reflect the

1 constraints on the system?

2 So I know it is not just our operation. I
3 think it has been, well, almost ten, 15 years attempting
4 at everybody's input of that model.

5 And we still have a technical committee that
6 meets once a month, and that is made up of all the
7 parties, the tribe, the Bureau, the State of California
8 is involved. So I think it's a model that is accepted
9 by all the parties operating on the river.

10 Q I think, generally, as a computer model, it
11 is good and useful for making comparisons. You can take
12 an 80-year history that has occurred, and you can attempt
13 to make modifications in the computer programming and
14 come up with assumptions for what might occur in the
15 future, and to make comparisons between those conditions;
16 is that correct?

17 A That is correct. And I think the--what is
18 significant are the differences. When you run the model
19 with all of these criteria, you change one, and it is
20 the difference that is significant.

21 Q Has the model ever been checked or verified
22 against actual conditions, to say whether or not the
23 accuracy of the model is within five percent, ten percent,
24 15 percent, 200 percent, one percent?

25 A No, in that sense, no. But what we have done,

1 of course, is to check all the data on the input, and
2 we have attempted to verify, in that sense. But in the
3 way you are talking about, no, that we can't produce
4 those historic events. With the model, we get said
5 assumptions and operate the model.

6 Q So if the model was off by five percent, there
7 could be a five percent error, either way?

8 A In this--from what?

9 Q From the numbers that were generated from your
10 comparisons.

11 A But then, if you--then you are comparing from
12 the model with this change in assumption, and then you
13 get a difference. That five percent wouldn't come in to
14 play. You would get a difference, and that difference
15 would be significant.

16 Q Now, does the model--I think you answered this
17 before--the model works on a monthly basis?

18 A Yes.

19 Q Rather than a daily basis?

20 A That's correct.

21 Q In regard to Exhibit No. 4, the values in
22 comparison of TCID shortages were done with TCID
23 receiving 320,000 acre-feet allocation, maximum?

24 A That's correct.

25 Q Then you are aware that that issue is currently

1 under review by the Federal District Court?

2 A Yes.

3 Q And has the TCID, in the past, been able to
4 achieve that 320,000 limitation?

5 A I am not sure.

6 Q Under normal operating conditions, have we
7 been restricted, or have we been limited to 320?

8 A No, you have not. You have been set a quota
9 each year.

10 Q If the usage on the project increased, what
11 effect would that have on the numbers that you have?

12 A I think basically it would reduce the flows
13 into Pyramid Lake. I do not believe it would change
14 the impact on your rights, because you would be operating
15 before and after the transfer with that--whatever demand
16 you want to put in. And again, you would be looking at
17 a difference.

18 Q Didn't you also say this was 119,000?

19 A That's correct.

20 Q So it is presuming that the Truckee Meadows
21 is operating at 119,000, and there is about 60-some
22 thousand return flows from the sewage-treatment plant?

23 A That's correct. And you're operating at the
24 119,000. So we would be exercising the upstream rights,
25 and in that way, today, all of the rights are not being

1 exercised. So there is water coming down, available to
2 you.

3 Q And the model's conclusion, after running
4 those comparisons, if 581 acre-feet is transferred
5 downstream to upstream, that TCID would average 430 acre-
6 feet per year of that 581; is that correct?

7 A That is correct. Now, we are assuming that we
8 are moving 581 from downstream of Derby, upstream to
9 Truckee Meadows, and says, like over the eight years,
10 there is an average of 438 acre-feet per year.

11 Q Is it correct, as we stated in our letter,
12 that the model utilizes approximately 50 percent return
13 flow?

14 A That's close. I think it's a little bit
15 different, but that's close.

16 Q I believe part of your testimony also involved
17 the Public Service Commission rule with regard to
18 1.72 factor; is that correct?

19 A That's correct.

20 Q Would you explain for me what that means.

21 A Well, it means that an applicant for service
22 from Sierra Pacific, through Reno and Sparks, would
23 require that 1.72 acre-feet of water be brought in in
24 order for the company to deliver one acre-feet of water.

25 Q And what is the purpose for that?

1 A The purpose is that Sierra Pacific, with their
2 water supply today, and their stored water, can and
3 are agreeing to support the irrigation rights up to that
4 yield of 58 percent. The 58 percent is the maximum
5 amount of water you can get from an irrigation right
6 in the Truckee Meadows. That's an annual basis.

7 And Westpac is agreeing to make up the
8 difference in that water, with their stored water.

9 Q I am not sure I understood that. Would you
10 try that again?

11 A That if you bring in a water right to Westpac,
12 that the most that you can generate water from that
13 right, for M & I purposes, is 58 percent. And Westpac
14 commits itself, when you bring that right to Westpac,
15 to support that right with stored water from Donner
16 and Independence.

17 Q What was the purpose of that?

18 A I think that rule was to permit additional
19 development of the Truckee Meadows, to bring in--the
20 developer must bring in the full water supply for his
21 development.

22 Q Well, if the developer brought in one acre-
23 foot, why couldn't Westpac use one acre-foot?

24 A Well, if he brings in one acre-feet, what he
25 is bringing, the 1.72 and the 58 percent of that, he is

1 bringing in a full supply. And with that full supply
2 that Westpac is agreeing to then use their storage to
3 support that right.

4 Fifty-eight percent is the maximum. Actually,
5 today, it is considerably less than that.

6 Q I guess I am having trouble understanding
7 this. Why was it developed, do you know? Do you know
8 why the 58 percent rule was developed?

9 A I think it was developed so that the procedure,
10 the water--the developer would bring in a full water
11 supply for his development.

12 Q If he needs one acre-foot, why wouldn't one
13 acre-foot be a full water supply?

14 A Well, because you only get, at the maximum,
15 58 percent of that out of the river. But if he brings
16 in 1.72, he is bringing those extra rights in, then he
17 would exercise the 1.72 in the river, and you will get
18 an acre-foot of supply.

19 Q In other words, just because Sierra--

20 MR. MORROS: Let me interrupt. I just want
21 to interject one question.

22 Fifty-eight percent under what conditions?

23 THE WITNESS: Under a future condition, and
24 that with an increase in the demand, if we increase
25 the demand in the Truckee Meadows for MI purposes, we

1 would use more water in January and February, and it's
2 under this future condition, future development, that
3 the maximum you get would be 58 percent.

4 Today, because you have not developed a
5 demand, you are not using as much water in the winter-
6 time. We are down around 35, 40 percent.

7 MR. MORROS: Wasn't the 58 percent rule
8 developed based upon a critical-year yield? In other
9 words, under the worst scenario, you could only expect
10 58 percent of the face value of the water right to be
11 available in a drought year?

12 THE WITNESS: That's correct. I apologize.

13 MR. MORROS: That is what I wanted the record
14 to be clear on. I think the record was getting a little
15 confused. That is my understanding. If I am wrong,
16 somebody tell me differently.

17 THE WITNESS: That is exactly correct.

18 BY MR. McCONNELL:

19 Q So the purpose of that, then, the Public
20 Service Commission issued a rule that said in order for
21 the power company or Westpac to supply one acre-foot
22 of water in critical drought, they were going to have
23 to have 1.72 acre-feet to supply that; and critical
24 drought, I presume, is 1930-31 period?

25 A '31 and '34, and the period 1928-35.

1 Q Now, what would happen if that rule was changed,
2 and it went to 1-to-1?

3 A Well, the way the rule is set up now is that
4 Westpac can support up to 46,000 acre-feet of irrigation
5 rights, and up to 1.72. And beyond that, then you must
6 develop additional supply to support any additional
7 irrigation rights that you want to operate.

8 Q But then, if this model was operated on a
9 1-for-1 basis, with the rule changed, would that change
10 the rule?

11 A No, because the way the model is run here,
12 it was run with Rule 17; that up to 46,100 acre-feet
13 of irrigation rights, that were at the 1.72 ratio to
14 get up to that point.

15 Beyond that, then we are at a 1.0-to-1 ratio.
16 And that's the way this model was run.

17 And at that point, then, developers not only
18 have to bring in one acre-feet; they have to pay for
19 additional storage or additional support for that water
20 right.

21 Q Are these water-right transfers within the
22 46,000 or above the 46,000?

23 A These are within the 46,000.

24 Q So regardless of any proposed change with the
25 Public Service Commission, it is my understanding that

1 the power company has requested a change. The model
2 run wouldn't differ; is that correct?

3 A That's correct.

4 Q So if the Public Service Commission said you
5 no longer have to comply with Rule 17, would the power
6 company then be able to issue a will-serve letter for
7 additional water, because they now have 72 percent more?

8 MS. OLDHAM: I am going to object, because
9 we are starting to call for speculation that is beyond
10 the application. Maybe it's a misunderstanding of
11 what the discussion was.

12 MR. MORROS: Well, I don't know that it is
13 necessarily speculation. I think it's a scenario that
14 has a possibility of occurring. I, on many occasions,
15 have thought of it myself. And when this 58 percent
16 critical-year yield rule was being developed, the State
17 Engineer was supportive of that, because we felt it was
18 technically sound.

19 So if the Public Service Commission was to
20 change their mind and relax the rule, I am not so sure
21 the State Engineer would be willing to go along with
22 that, from a standpoint of signing off on subdivisions.

23 MS. OLDHAM: We aren't talking about relaxing
24 the rule. And that is why I objected, because I think
25 it was a mischaracterization of what was actually in

1 the hearing before the Public Service Commission.

2 MR. MORROS: Well, I am not so sure that that
3 was--and Mr. McConnell is probably in a better position
4 to define his own question than I am. But I think what
5 you are attempting to express, Mr. McConnell--and tell
6 me if I am wrong--is that there is the possibility that
7 the 58 percent critical-year yield rule could be
8 relaxed at some time in the future. And that is where
9 the question was coming from, wasn't it?

10 MR. McCONNELL: That's correct. I am concerned
11 that the information that has been provided to show
12 TCID benefits from these transfers could possibly
13 change.

14 MR. MORROS: I will overrule your objection
15 on that base. Go ahead.

16 THE WITNESS: We just finished a hearing before
17 the Public Service Commission, and going over with the
18 Commission, on the basis of the water supply for Westpac,
19 and that 1.72 was in there, and there was at least no
20 indication to me that that being changed. That is part
21 and parcel of the water-supply scenario here for Westpac.

22 There was no indication that that was being
23 relaxed or changed. I believe that the Public Service
24 Commission is still going with that concept, that we
25 can support up to 80,000 acre-feet delivery and using

1 the Rule 17 process of 1.72.

2 MR. MORROS: The simple, hard fact is--and
3 it's demonstrated by the record--is that, in a critical
4 year, the worst drought on record, the water supply
5 dwindles to 58 percent of the normal or--

6 THE WITNESS: For the annual amount.

7 MR. MORROS: The average yield.

8 THE WITNESS: That's correct.

9 MR. MORROS: And that's well-established.

10 THE WITNESS: That's correct.

11 MR. MORROS: So unless you have got some way
12 to supplement that water supply on those dry years,
13 from sources that are independent of the Truckee River
14 system, you are stuck with that as a water supply.

15 THE WITNESS: That's correct.

16 MR. MORROS: You can't perceive that unless
17 some other supply could be developed that would supplement
18 that during your dry years, there would be any reason
19 to change that.

20 We have to deal with reality, and the reality
21 is that the water ain't there in the dry years. It's
22 as simple as that.

23 MS. OLDHAM: It doesn't change the yield or
24 the right. And I don't think we ever said that to the
25 Commission.

1 THE WITNESS: No. I think that all of this
2 was presented to the Commission. It did not indicate
3 there would be any change to that.

4 MR. MORROS: I worry about that changing,
5 without the addition of another supply of water to
6 offset that.

7 MS. OLDHAM: We would not propose it.

8 MR. MORROS: I think the 58 percent was
9 adopted and embraced by the Public Service Commission
10 as a result of the power company's presentations to
11 the Commission during those series of hearings that
12 they conducted when this Rule 17 was being considered,
13 wasn't it?

14 THE WITNESS: As a matter of fact, those same
15 studies that were used at that hearing were used today,
16 and still have not changed.

17 MS. OLDHAM: I think that at the Commission
18 hearing, the point was that there is a limit to when
19 just bringing in 1.72 times the amount of acre-feet
20 actually provides us a water supply. When you get out
21 to that future condition, there is a point where we can
22 only do that so far. Then, at that point, we have got
23 to have some other storage option. And that is when
24 you go to the 1-for-1. You have one acre-foot, but
25 then you have got to have some other water right filling

1 it in, either a storage reservoir or, you know, ground-
2 water options or something else that supports it.

3 MR. MORROS: Well, I probably should qualify
4 my statement, too, when I say sources of water independent
5 of Truckee River, either that or additional storage.

6 MR. McCONNELL: I have no further questions.

7 MR. MORROS: Any redirect of Mr. Burns?

8 MS. OLDHAM: I do.

9 REDIRECT EXAMINATION

10 BY MS. OLDHAM:

11 Q Mr. Burns, during the period of shortages
12 that are reflected on your Exhibit No. 4, were the
13 water rights which are concerned with these applications
14 fully exercised?

15 A Yes.

16 Q Would there be any difference in your analysis
17 of impact, negative impact to TCID's rights if TCID
18 were to win their OPAC proceedings and have a greater
19 right of diversion?

20 A No, I don't think so.

21 Q Would there be any difference if we were
22 operating under the present conditions, as opposed to
23 operating under future conditions?

24 A No.

25 Q The conclusion would remain the same?

1 A That's correct. In fact, there is more water ,
2 available today, to them. The rights aren't fully
3 exercised upstream.

4 Q Was it more conservative, for the purposes
5 of this analysis, to assume a future condition?

6 A Yes.

7 Q Than a present condition?

8 A That's correct.

9 Q How so?

10 A Well, for example, today all of the rights
11 in the Truckee Meadows are not being exercised. There-
12 fore, that water goes on down the river.

13 In this analysis, we assumed and put in here
14 the exercising of all the rights in the Truckee Meadows.
15 We also have in this analysis that all of the rights
16 downstream of Derby Dam will be met, in this analysis.

17 So that was, I think, the most severe condition
18 that we could get. And then, the remaining water of
19 TCID, we wanted to be sure that the water would be there
20 for TCID.

21 Q Did you assume the future conditions so that
22 there would not be additional water going to TCID from
23 the 42 percent, as exists today, the excess water rights?

24 A Well, to the extent that all of our rights are
25 being exercised now. How much still remains, you would

1 have to go through the analysis. But we did want to
2 exercise all of the rights.

3 Q And with respect to the questions and answers
4 you gave on Exhibit 5, Mr. McConnell discussed what
5 would happen if Reno and Sparks failed to return their
6 effluent to the river. You indicated that there would
7 still be a requirement to have 31 percent show up at
8 Vista; is that correct?

9 A I assumed the Orr Ditch decree, still, in the
10 assumption that the Orr Ditch decree would still be
11 applicable.

12 Q Okay. As between the water that is going to
13 Pyramid Lake, or the water that is specified to make
14 up the water rights below Derby Dam, I should say, and
15 the water that's going to TCID, what would determine
16 whether the water went to the water rights below Derby
17 versus over to TCID?

18 A I think the right--the priority of the right--
19 and here we are saying the rights downstream of Derby
20 have a prior right.

21 Q So if there was an impact on TCID, it would
22 be as a result of this priority?

23 A I believe so.

24 MR. deLIPKAU: Is it also possible that, if
25 the effluent were not returned to the river, Sierra

1 Pacific would simply be required to deliver less water,
2 thereby leaving more water in the stream to make up
3 the TCID shortfall?

4 A I don't know. That may be a case. I don't
5 know how it would be handled to make up the shortfall.

6 Q That event hasn't yet occurred?

7 A It has not occurred; right.

8 MR. deLIPKAU: Thank you. No further questions,
9 Mr. Morros.

10 MR. McCONNEL: Just to follow-up on that last
11 question, I think that was the intent of our original
12 number one concern; and that is, if water is not returned
13 to the river, which the treatment plant is utilizing,
14 making up return flow, then there wouldn't be any
15 return flows, so that the water rights would have to be
16 reduced, then, to make up those return flows.

17 MR. MORROS: Wouldn't that concern extend to
18 any rights on the river system, regardless of whether
19 it was below Derby or not, as far as water availability
20 at Derby?

21 MR. McCONNELL: Certainly. But we are only
22 dealing with these transfers.

23 MR. MORROS: Well, the only reason I make that
24 remark is that, from the standpoint of that concern, I
25 don't think there is any distinction, any substantial

1 distinction between these transfers and any other
2 transfer, whether it was upstream or downstream.

3 MR. McCONNELL: That probably is correct.

4 MS. OLDHAM: And I think even--this has been
5 raised in other protests, I guess, by TCID, at this
6 point, to our water-right applications, and I don't
7 know to what degree it can or should be settled in this
8 case. But from Sierra Pacific's standpoint, we are not
9 agreeing that the whole brunt of what Reno and Sparks
10 might do from winning what would be a devastating blow
11 in this lawsuit falls upon Sierra Pacific.

12 The way we see it is that the decrees will
13 sort that out, and that the 6931 criteria will apply,
14 and that we will have an obligation to meet that.

15 And to the extent that that is less than what
16 we presently return today, that TCID will--being the
17 lower priority on the bottom of the river, will probably
18 take the remainder of the brunt. So it would be a shared
19 burden in that situation.

20 TCID would like to admit or agree that the
21 6931 criteria has to be met.

22 MR. MORROS: Well, I would think that, if
23 the end result of the lawsuit is that the effluent
24 doesn't have to be returned to the river in the form of
25 historic return flows, then I think all users on the

1 river, where there has been a conversion over to uses
2 other than irrigation, are going to be faced with
3 regulation by the Federal Water Master to account for
4 those return flows, because, under those circumstances,
5 approving those change applications would have an adverse
6 effect, in my mind, anyway.

7 (Recess.)

8 MR. MORROS: Does the Water Master have any
9 questions of the witness?

10 MR. STONE: No.

11 MR. MORROS: Mr. Turnipseed?

12 EXAMINATION

13 BY MR. TURNIPSEED:

14 Q I think you might have answered mine, but let
15 me just ask it again. We took a certain set of circum-
16 stances here, with a certain set of applications, and
17 you analyzed what the effect of TCID would be. But I
18 am not sure we got to a point in the future where, if
19 more and more changes go from the lower Truckee River
20 system up to the Truckee Meadows, if someday there may
21 be an effect.

22 A You are going to have to evaluate--

23 Q Each one, separately?

24 A Yes.

25 Q And then I guess we will, if all the water--if

1 all of the non-Indian irrigation rights in the lower
2 Truckee Meadows, in the lower Truckee River were
3 transferred to Truckee Meadows, and only the Indian
4 1859 priorities had to be passed at Derby, then you
5 are saying there probably would be an effect?

6 A Well, then it depends on: Are you going to--
7 how are you going to support those rights bringing it up?
8 How much supply are you going to have? You would have
9 to analyze it, and take a look--

10 Q That goes back to the 69-31?

11 A Yes.

12 MR. TURNIPSEED: That's all I have.

13 EXAMINATION

14 BY MR. MORROS:

15 Q I guess the thing that I wonder about is,
16 if we approve these changes and permits are issued
17 so the amount of water that can be committed to new
18 development under the decree of reliance is now down
19 to 58 percent of the face value of the right, assuming
20 that the right in the past has been exercised to a
21 hundred percent of its face value, when water supplies
22 were available, so under those conditions, there is 42
23 percent of that flow that will stay in the river, under
24 the 58-percent critical year criteria, plus whatever
25 return flows would be generated as a result of that

1 water being diverted and put to beneficial use for
2 municipal purposes, and then the effluent treated, and
3 effluent continuing to be discharged to the river,
4 but assuming that something happens in the future,
5 and the effluent is not discharged to the river, and
6 the State Engineer and the Federal Water Master are
7 unsuccessful in asserting the position of the historic
8 return flows, and there is a loss of those return flows,
9 isn't that more than compensated by the 58-percent
10 critical year yield rule?

11 A I don't think so, because when we get down
12 to where it is right now, we are saying that the water
13 is returned, we are analyzing that condition. But if
14 we divert that water away, and it doesn't return, I
15 think you are going to have to operate the whole system,
16 and it becomes a driving question and--

17 MR. MORROS: But you are not diverting a
18 hundred percent, you are only diverting 58 percent of
19 that water.

20 THE WITNESS: That's all we're getting in the
21 dry period, but we are exercising more than 58 percent
22 in other years.

23 BY MR. MORROS:

24 Q But you have not committed development to
25 anything beyond 58 percent.

1 A For up until that 80,000 acre-feet, that's
2 correct.

3 Q What reason would you have to divert more
4 than that in the wet years? I don't see how you can
5 divert more than 58 percent in a wet year and cut back
6 to 58 percent in the dry years, when you haven't committed
7 that demand to more than 58 percent. I don't understand
8 your reasoning there.

9 MS. OLDHAM: I guess it's--

10 MR. MORROS: No, he's the expert now. He's
11 the witness.

12 MS. OLDHAM: Well, there is a legal matter,
13 too, that has to do with--

14 MR. MORROS: It is not a legal matter; it is
15 a matter of available water supplies and diverting.
16 And counsel is not going to answer the question.

17 THE WITNESS: Well, in this example, I think
18 we are exercising--

19 BY MR. MORROW:

20 Q Let me try to simplify my question. If the
21 transfers are approved right now, you have to allow
22 a hundred percent of that water to go by Derby to serve
23 those rights downstream, in their present irrigation
24 status. If they are in priority, and they are entitled
25 to that water, TCID is not in a position to interfere

1 with that, because they have a junior priority. You
2 allow this right to be moved upstream and diverted,
3 and the use is being changed over to municipal use.
4 The 58-percent critical year yield rule applies now,
5 so you have reduced the demand on that right down to
6 58 percent of its critical value.

7 You are not going to commit new development
8 or new demand, based upon that right, the availability
9 of that water under that right, more than 58 percent
10 of that face value. So 42 percent of that right stays
11 in the river. Isn't that an advantage for TCID?

12 A Yes, definitely.

13 Q Well, that was my question.

14 A Okay.

15 MR. McCONNELL: Then my response is, what if
16 that changes?

17 MS. OLDHAM: How come he gets to talk?

18 MR. McCONNELL: Well, like I stated when we
19 started out with this whole proceeding, I don't have
20 any problem as long as everything stays the way it is.

21 MR. MORROS: Well, I don't have any problems
22 as long as everything stays the way it is, too. But we
23 can speculate on changes occurring, and they may occur.
24 And there is a possibility that we are not going to
25 prevail in the lawsuit. There is no question about that.

1 MR. McCONNELL: Okay. But so--

2 MR. MORROS: But that is not going to affect
3 the 58 percent, is my point. That has nothing to do
4 with the effluent or return flows.

5 MR. McCONNELL: The 58 percent is based on the
6 Public Service Commission ruling. It is not based on
7 the State Engineer's ruling.

8 MR. MORROS: Fifty-eight percent is based upon
9 Sierra Power's perception as to what they will have as
10 a reliable water supply in a drought year, in a drought
11 condition. And based upon the historic record of flows
12 in that area, their perception is that under the worst-
13 case scenario, which is the drought of the thirties,
14 only 58 percent of the face value of those water rights
15 is going to be available in the system.

16 It has nothing to do with the return flows
17 or anything else. It is simply that once the change
18 is approved, and it's changed over to municipal water,
19 then you are not going to commit more than 58 percent
20 of the face value of that water right.

21 MR. McCONNELL: Within the permit.

22 MR. MORROS: Well, Rule 17 applies. What you
23 are saying is, put it into permits, so even if conditions
24 change where that rule may be modified or lifted, you
25 want it to stay the same, as far as anything related--

1 related to anything where the original diversion or the
2 original right was below Derby.

3 MS. OLDHAM: These rights have already been,
4 I guess, offered to the local governments, who have a
5 similar rule that applies to the 58 percent and are
6 going under these kind of rights. They are being
7 provided under the 58 percent rule, these particular
8 rights are.

9 I think, just to clarify the record a little
10 bit, the State Engineer, long before the Public Service
11 Commission ever ruled on Rule 17, had us providing
12 water rights on this basis, and that the going to the
13 Public Service Commission was an effort to have all
14 permits treated the same. Because the State Engineer
15 only had jurisdiction of subdivisions at that time, and
16 not over the commercial development.

17 So we then went to develop the rule at that
18 level, and subsequently to that, the cities all put
19 into effect the same. So we actually have three layers
20 of government that apply that rule at this point.

21 MR. McCONNELL: All we have asked is that
22 those conditions be placed on the permit. We haven't
23 asked that the water-right transfer be reduced; we
24 have asked that the conditions that are currently in
25 existence be placed on the permit. Because the problem

1 arises, for example--

2 MR. MORROS: Well, if the application is
3 approved, it is subject to existing rights, regardless
4 of whether they are junior or senior in priority.

5 The application cannot be approved if there
6 is any substantial evidence that it is going to adversely
7 affect existing rights.

8 MR. McCONNELL: And under current conditions,
9 as you understand it, it doesn't--you were to say it
10 doesn't. Now, if that is the case, then, I think all
11 we are asking is that you place into the permit the
12 conditions upon which you are making that determination.

13 MR. MORROS: Well, some time in the future,
14 if it is demonstrated that because of the change in
15 operating criteria on the river, or a change in the 58
16 percent rule, or whatever the case happens to be, that
17 there is some adverse effect occurring on existing
18 rights, which would not be there had not the changes
19 been approved, and I think the Federal Water Master
20 is in a position where he will have to exercise regula-
21 tion.

22 MR. McCONNELL: But say, for example, you
23 have somebody that has developed a subdivision on the
24 basis of current rules, and then, all of a sudden, those
25 permits were granted on current rules, and all of a

1 sudden, then the water is not available because the
2 return flows have to be taken out of that water.

3 Where is the water going to come from to make
4 up to the homes that are relying upon the water that
5 was there to build the homes with in the first place?

6 MR. MORROS: It's going to come from the
7 42 percent, the rights being penalized right now under
8 Rule 17.

9 MR. McCONNELL: Then you start changing the
10 circumstances under which you are analyzing this permit.
11 Now you are not limiting it to what you are saying is
12 current conditions, because now you are freeing up that
13 water availability. Then, at that point, maybe there
14 is an impact on us, because we haven't analyzed it
15 under that aspect.

16 MR. STONE: I guess I am the one that would
17 have to administer it. And my question to you would be--
18 just so I understand--are you saying that just on this
19 transfer--whatever the numbers are, I'm sorry--53092
20 and 53093, that if, in the future, some other thing
21 occurred, that I would administratively go in and
22 reduce these two applications, or these two transfers
23 to whatever subdivision they are appurtenant, made
24 appurtenant by the power company, or whatever happened?

25 I mean, wouldn't I have to--as we have already

1 discussed in the hearing, wouldn't it have to be done
2 on a carte blanc basis to every application that has
3 been done?

4 MR. McCONNELL: What I am saying is that
5 if you go back and look at some of these prior
6 applications, somebody is going to argue that there
7 wasn't any condition on those, and we have relied
8 upon them to build homes, and people are relying
9 upon that water supply, and we are not going to reduce
10 them.

11 MR. MORROS: But I don't see where there is
12 any difference between these applications and any
13 other change on the river.

14 MR. McCONNELL: Well, the difference is that
15 the issues weren't formed as well as they are today,
16 and they weren't brought to the forefront. And I think
17 this is just the pressues of what is occurring on the
18 river system, now that these issues are being brought
19 up.

20 But I am not saying that they didn't apply
21 in the past; just that nobody ever discussed them.

22 MR. STONE: Are you suggesting, again, for
23 clarification, that in the future any transfer appli-
24 cations that are presented to the State Engineer
25 have to be granted on the basis that somebody may file

1 or win an existing lawsuit?

2 I mean, I don't know how I could administer
3 that.

4 MR. McCONNELL: No. I'm asking them to be
5 conditioned upon the current conditions. You say they
6 are conditioned upon 58 percent yield or use, so if
7 that is the condition upon which they are granted, then
8 put that condition in the permit, and then we don't
9 have to worry about the fact of what you are saying
10 about the return flows, if, in fact, there is 42 percent
11 of the rights still in the river.

12 MS. OLDHAM: Can we look at it a little
13 different way? If you took this Exhibit 5 and said,
14 if the condition changed, that Reno and Sparks won
15 their lawsuit, then, if you diverted ten acre-feet,
16 you would have 3.1 coming back; you would have 3.1
17 percent of that right coming back.

18 You would be in absolutely no different
19 position than you are today. There wouldn't be any
20 advantage to TCID, but there would be no detriment to
21 TCID from the 31 percent.

22 In fact, because the transportation losses
23 on these ditches are all less than 31 percent-- Lagomarsino
24 was 30.

25 MR. STONE: Oh, on these ditches.

1 MS. OLDHAM: These ditches that we are talking
2 about here. Then you could have no impact. The worst
3 that could happen is, you would be at the same--that
4 you would have the same amount going to TCID under
5 the before-transferred and after-transferred conditions.

6 MR. MORROS: Well, my concern is that we are
7 generally talking about any future change applications
8 on the river, regardless of whether they are above or
9 below Derby. And your concerns related to these
10 applications are basically applicable to any future
11 change application on the Truckee system.

12 MR. McCONNELL: That's correct.

13 MR. MORROS: Do you have any evidence that
14 any of the changes up to this point, that have occurred,
15 where decreed rights have been changed over to municipal
16 use, has had any adverse effect on water availability
17 of the TCID's diversion at Derby?

18 MR. McCONNELL: No.

19 MR. MORROS: But, again, we go back to, as
20 long as the effluent continues to be discharged to the
21 river, we probably won't have a problem, as long as the
22 58 percent rule is in full force and effect. Actually,
23 this is going to result in more of a benefit to TCID
24 than a depletion.

25 MR. McCONNELL: Assuming we don't start upstream.

1 MR. MORROS: I mean, I am talking from the
2 standpoint of water being available at Derby for
3 diversion.

4 MR. STONE: Mr. McConnell, maybe I didn't
5 make myself clear. But if you attach a condition
6 of the 58 percent to this application or to the
7 permit, if, in fact, it is granted, my question was:
8 Does that mean that, in the future, if that is changed,
9 these applications are the ones that are affected by
10 that caveat in the--

11 MR. McCONNELL: Yes.

12 MR. STONE: Then my question is still: How
13 would you administer that, if it were only to affect
14 these applications?

15 MR. McCONNELL: Oh, I am not certain as to
16 what would happen with the other applications. I can
17 conceive of an attorney arguing that most applications
18 have been issued, and they are not conditioned, and
19 there is no change to them.

20 MR. MORROS: Those applications were issued
21 subject to existing rights, and I feel that the Federal
22 Water Master has continuing jurisdiction over that
23 river, and he has the authority to regulate those
24 diversions.

25 If conditions change, and he has to exercise

1 that authority, as an officer of the court, I think he
2 can proceed to do so.

3 MR. McCONNELL: I perceive a reluctance to
4 condition the permits upon current conditions.

5 MR. MORROS: Well, at this point there is a
6 reluctance. If we had dealt with this issue the first
7 time the change application came before the State
8 Engineer-- I don't know that it's necessary. I think
9 what you are asking for is already there, is what I am
10 saying, Mr. McConnell.

11 Perhaps Mr. Stone feels differently about it.

12 MR. McCONNELL: Well, we have dealt with quite
13 a bit of litigation, with an innovative attorney, and
14 all I am trying to do is foreclose as many problems as
15 possible in the future. And I understand what you are
16 saying. But, on the other hand, that shouldn't foreclose
17 the issue of permits based on current conditions.

18 MR. MORROS: All right.

19 MR. McCONNELL: If there is a particular
20 problem with that, go back and say that all your previous
21 ones were under the same conditions.

22 MS. OLDHAM: I don't think we could accept
23 these permits as far as accepting them for will-serve
24 letter, if they were--if they were conditioned on current
25 conditions, and, if anything changed, all of a sudden

1 we don't have a water supply for the customers that we
2 are relying on.

3 We are relying upon our entire water supply
4 the same way, and I agree there are several very
5 imaginative attorneys out there who could come up with
6 an argument that could throw the whole world topsy-
7 turvy, as far as water rights go.

8 But we can't protect against them, and, in
9 fact, you know, being the last right on the river,
10 being the--you know, in terms of priority, and being
11 at the bottom of the river, I think--you know, I under-
12 stand TCID's concerns. But, at the same time, we can't
13 protect and take the brunt of the Truckee Meadows of
14 everything that might come up from an imaginative
15 standpoint in the future.

16 We are looking to go on and to fight those
17 types of deals, as they come down, and those types of
18 lawsuits, as they are filed. And we--but we can't
19 rely on a water supply on that basis.

20 MR. MORROS: I think there are enough safe-
21 guards in place, through the water-quantity review
22 process, the statute water-quantity review process,
23 where, if there was an attempt to commit the water
24 supply under these rights to new development in the form
25 of new subdivisions, new condominium developments, or

1 planned-unit developments, whatever the case happens to
2 be, above and beyond the 58 percent--in other words,
3 some condition changed and the power company came to
4 us with--or developer came to us with the subdivision
5 that had been signed off by the power company, on the
6 basis that now they were dealing with 70 percent
7 critical-year yield instead of 58 percent critical-
8 year yield, then they would be put in a position before
9 the State Engineer would consider approval of that
10 subdivision, or signing off on that subdivision, of
11 demonstrating to the State Engineer that there is not
12 going to be an impact, again, on those downstream
13 rights.

14 MR. STONE: Is it your contention--is it
15 just because it is below Derby, or is this your conten-
16 tion on any future transfers in the Truckee River
17 system, excluding TCID?

18 MR. McCONNELL: Well, right now, we are just
19 dealing with these transfers.

20 MR. STONE: Yes, but I am trying to understand,
21 because I have to administer it. So I am wondering--

22 MR. McCONNELL: Well, our position, basically,
23 is that the irrigation rights previously had return
24 flows. Those return flows are made up of returns
25 through the treatment plant. If that is gone, then our

1 position would be that the return flows have to be
2 made up.

3 MR. MORROS: And I am in full accordance.

4 MR. STONE: I agree.

5 MR. MORROS: Those return flows have to be
6 accounted for. That has been my position all along.
7 It hasn't changed. And I see no reason to even consider
8 changing it.

9 MR. STONE: Furthermore, you are entitled to--
10 what is it--69-31? There is that breakdown that is
11 in the Truckee River agreement, which is part of the
12 decree, that is ongoing. So, as the diversions--if
13 the diversions increase up here, I guess the entitlement
14 would increase. That's why I feel the protection is
15 built into the decree, is what I am trying to suggest,
16 Lyman.

5
17 MR. McCONNELL: Well, I just respectfully
18 disagree with that. I want to make sure that it is
19 fully understood what our position is, and our position
20 is, if current conditions remain, fine. But if they
21 don't remain, then we have got problems.

22 MR. MORROS: But you are putting me in a
23 position of having to rule on the merits of these
24 applications based upon--

25 MR. McCONNELL: Current conditions.

1 MR. MORROS: No, based upon a speculation
2 that the current conditions are going to change at
3 some time.

4 MR. McCONNELL: No, I am asking you to rule
5 on them under current conditions.

6 MR. MORROS: Under current conditions, then,
7 there doesn't appear to be any evidence of adverse
8 effect.

9 MR. McCONNELL: As long as the current
10 conditions are conditioned in the permit.

11 MR. STONE: Current conditions meaning the
12 reverse flow through the 58 percent relationship,
13 et cetera?

14 MR. McCONNELL: Yeah.

15 MR. MORROS: How about if a condition was
16 included in the terms of the permit that approval of
17 this permit does not in any way negate or waive the
18 right of the Federal Water Master to regulate diversions
19 under this permit?

20 MS. OLDHAM: Under the Orr Ditch decree and
21 the Truckee River agreement?

22 MR. MORROS: Yes.

23 MS. OLDHAM: We would agree with that. And
24 we would agree that the conditions of the Orr Ditch
25 decree and Truckee River agreement must be met.

1 MR. MORROS: And if you want to take it one
2 step further, and with the full understanding that
3 historic return flows have to continue to be accounted
4 for.

5 MR. deLIPKAU: No, we couldn't say that,
6 because we don't know--

7 MR. MORROS: You couldn't say that, but I can
8 say it, if I want to.

9 MR. deLIPKAU: Well, okay, you could say it,
10 if you want to. But if a superior governmental authority,
11 in whatever form, Congress, U.S. Supreme Court, State
12 Supreme Court, says you can't put the water in--the
13 effluent in the river, then what Westpac is faced with
14 is meeting the criteria under the decree and under the
15 agreement. And that might have a catastrophic effect
16 on Reno, which legally is fine. If Westpac serves
17 40 percent of the volume of water next year, as it did
18 this year, then that's too bad. But everybody will be
19 in the same position.

20 All we want these three applications to be
21 is approved in the same condition as all of the other
22 Truckee River applications to change are. The other
23 applications, now permits, do not have conditions that
24 the Water Master expressly reserves the right to
25 administer.

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MR. STONE: But I do.

MR. deLIPKAU: I realize that is implied in all of the permits, so I think we would go along with that condition, at least my client could, and Westpac also. But these three applications certainly cannot take the brunt of this superior governmental authority saying you can't put the effluent back in the river.

We don't know what will happen. We don't know how that decree or statute will be formed.

MS. OLDHAM: There would be a whole process of interpreting the decrees and how they apply after that. But that would have to--

MR. MORROS: I am just seeking a solution to this dilemma, you know. I think Mr. McConnell's objections and his concerns have some merit. And how are we going to deal with it? .

MR. deLIPKAU: Well, I would like to kind of summarize where we are and--

MS. OLDHAM: We can't even agree that, in the future, 50 percent will always return. You know, you don't know that. Appliances will become more efficient in the future. There may be efficiencies relative to the system that are going to occur over time. With respect to conservation, one thing we know we have to

1 meet is the 69-31 criteria and the decrees. And we
2 would always agree to meet those decrees; and to be
3 subject to the authority of the Federal Water Master
4 and his--in his rights and authority to--

5 MR. MORROS: The only other alternative is
6 just to totally disqualify the Truckee River as a
7 source of municipal water for development in the
8 Truckee Meadows area.

9 MS. OLDHAM: Because of some imaginative
10 lawsuits which we don't agree with, with the positions
11 that are being taken.

12 MR. MORROS: I don't know. Maybe we are at
13 that point.

14 MS. OLDHAM: I don't believe we are. I think
15 water rights are property rights, under Nevada law. They
16 are controlled by the decree. We have already been
17 through U.S. versus Nevada, which says that the decree
18 is--stands, and it is controlling, and that that is--
19 and we firmly believe that that will be the case.

20 And if these other lawsuits-- It doesn't take
21 much to file a lawsuit. All it takes is a piece of
22 paper and I don't know how many dollars, at this
23 point.

24 MR. MORROS: And an attorney, I guess.

25 MS. OLDHAM: Yeah.

1 MR. deLIPKAU: That's easier than money.

2 MS. OLDHAM: We can't protect against claims
3 that people are going to make; that someone ought to
4 tear down Tahoe Dam, for instance. Those things are
5 going to happen. But they are not right.

6 MR. McCONNELL: But, on the other hand, as
7 we have discussed, we are not talking about future
8 contingencies, we are talking about today's contingencies.
9 But I hear reluctance on their side to even agree to
10 the conditions of today's conditions, so that leaves
11 me a little concerned about what the intent is in the
12 future, from the standpoint of changing those conditions.

13 And if we are making a ruling under today's
14 conditions, I don't see any problem with conditioning
15 the permit on today's conditions.

16 MR. MORROS: Well, I don't know exactly the
17 wording that you are striving for. Do you have something
18 that you wanted to add, Mr. Arden?

19 MR. ARDEN: If I may, I would like to make
20 a statement. I think it has been fully--

21 MR. MORROS: State your full name for the
22 record.

23 MR. ARDEN: Richard W. Arden.

24 MR. MORROS: Do you want to raise your right
25 hand-- If you are going to make a statement-- Are you

1 going to testify on your own behalf?

2 MR. ARDEN: I am just going to make a comment,
3 and then, if you feel that--

4 MR. MORROS: Is it in the form of--

5 MR. ARDEN: No. I am just going to take the
6 data that was presented, and kind of make a point, if
7 I can.

8 (Whereupon Richard W. Arden was
9 duly sworn.)

10 MR. MORROS: Mr. Arden, go ahead.

11 MR. ARDEN: I think that it has been pointed
12 out that if we continue to use the rights under claim
13 638 for irrigation, which is below Derby Dam, TCID
14 would not have been getting any benefit of that water
15 that has to pass by Derby Dam, to give us the right to
16 use it on that property.

17 I think, in this particular case, we can show
18 that it is--if you want to speculate, that you have to
19 remove the effluent from the Truckee River and pipe it
20 to some other point, that this water right will have
21 less effect on TCID than any transfer above Derby Dam.

22 I could theoretically go ahead and divert the
23 water up above Derby Dam, and take no return flow from
24 it, and I would still have the same status that I
25 would under the present irrigation right, because there

1 is no return flow that is benefitting TCID right now.

2 So if you really want to get into the issue
3 of speculation on return flow and what is going to
4 happen to it, it is going to have greater impact when
5 you change then existing water rights within the
6 Truckee Meadows, than if you change it below Derby Dam
7 on TCID.

8 Do you follow what I am saying?

9 MR. McCONNELL: I follow what he's saying,
10 but our position is that it is going to have an impact
11 on the rights below Derby Dam, which are prior and
12 senior to ours. And if those return flows aren't
13 there to make up their rights, then it is going to come
14 out of our junior rights. So it has an impact on us.

15 MR. MORROS: Well, I am not so sure I follow
16 that. What you are saying, if the right ceases to be
17 exercised below Derby, and is exercised upstream at a
18 58 percent level, then there is going to be some impact
19 on those other downstream users below Derby, because
20 the return flows are not going to be available.

21 But if you are not diverting--if you are not
22 exercising your right in the form of an irrigation right
23 down there, you are not diverting water from the river,
24 isn't that going to be of some benefit to those down-
25 stream users, especially a downstream user that might

1 be junior in priority to these rights?

2 MR. McCONNELL: You are talking, again, under
3 current conditions; right? The 58 percent limitation
4 on the use and return flows in the treatment plant?
5 And all I am saying is that that is all we have asked
6 for.

7 MR. MORROS: Well, go ahead, Mr. deLipkau.
8 You said that you had the closing statement you wanted
9 to make.

10 MR. deLIPKAU: I think where we are and what
11 we have to look to is NRS 533.370, Subsection 3, which
12 states, in essence, that the State Engineer shall approve
13 an application, if filed in proper form, if there is,
14 one, unappropriated water in the proposed source; or,
15 number two, that the proposed use of the water does not
16 tend to impair the value of existing rights; or, three,
17 otherwise would be detrimental to the public interest.

18 That law applies also to applications for
19 change, as well as applications to appropriate.

20 The Truckee River decree, on page 88, under
21 which we are all guided, states that applications to
22 change are authorized in accordance with law. The
23 law referred to in the decree is NRS 533.370.

24 What we have clearly proved, through the
25 testimony of Mr. Burns, is that the contemplated three

1 applications, if changed, would not cause a detrimental
2 effect to others on the stream system. These obviously
3 are not applications to appropriate; they are to change.
4 The change does not tend to impair the value of existing
5 rights.

6 That is the sole grounds upon which the
7 TCID protested. The sole ground has been met. And,
8 in fact, the amount of water to TCID will, in fact,
9 be improved.

10 The applications, if approved, will not violate
11 the Truckee River decree; it will not violate the
12 1935 agreement. Rather, both of those instruments
13 can be fully met by the implementation of the three
14 applications.

15 It should also be pointed out--and I request
16 the State Engineer take judicial notice of the prior
17 applications approved by him, as depicted on Westpac's
18 Exhibits 7 and 8.

19 I would like to put to rest once and for all
20 the 58 percent rule and how it works.

21 Briefly stated, if a developer comes to
22 either Reno or Sparks with a project--and I am going to
23 use round numbers--his contemplated project needs 5.8
24 acre-feet per annum, under current rules, he is required
25 to deliver to the government ten acre-feet.

1 That means that 4.2 acre-feet are allowed to
2 flow in the river. That's 4.2. If the same ten acre-
3 feet were utilized for irrigation purposes, there would
4 be some consumption, there would be some seepage,
5 and there would be some return flow.

6 I believe the testimony of Mr. Burns stated
7 that 30 percent would return to the river. Therefore,
8 just at that use, we have excess water in the river
9 by that conversion.

10 Now, the 5.8 acre-feet that is returned into
11 this development, approximately 50 percent or 2.9 acre-
12 feet is returned to the treatment plant. Adding those
13 two situations up, the hypothetical development would
14 return 7.1 acre-feet to the river.

15 Therefore, that hypothetical would create more
16 water for the benefit of TCID and downstream water
17 users.

18 Mr. State Engineer, it is my request that the
19 three applications be granted with the routine and
20 usual conditions imposed thereupon. Obviously, under
21 the decree, and under the State Engineer's authority,
22 he and the Water Master have continuing jurisdiction
23 over these three applications, if granted, as well as
24 the other many hundreds of applications that are, in
25 fact, now permits. Thank you.

1 MR. MORROS: Mr. McConnell, did you have
2 anything in the form of a closing statement?

3 MR. McCONNELL: Just briefly. Once again,
4 a hypothetical is under current conditions. And as we
5 stated earlier, we don't have any problems with these
6 transfers, if they are conditioned upon current
7 conditions.

8 And just to respond a little bit to the
9 hypothetical that Mr. deLipkau gave, that would
10 indicate that we should be rolling in water, I just
11 cite one example: the difference between the drought
12 in 1977 and the drought of 1988, in the sense that
13 the use in Reno and Sparks went up from 40-some thousand
14 acre-feet to 60,000-some acre-feet.

15 And under his circumstances, we ought to
16 receive more water in 1988 than 1977, but failed to
17 do so.

18 So although the model and the arguments are
19 there, the water use doesn't always pan out the way
20 that models and people might put them down on paper.

21 Our concerns are that our water rights can
22 be impaired if current conditions change. And we
23 are asking that the application be continued upon
24 current conditions.

25 In addition, we feel that it is equitable and

1 fair that any additional expense for modernization of
2 structures, in order to prevent the loss of water
3 to the district, should be borne by those that stand
4 to benefit.

5 The example was given by Miss Oldham that
6 they repair the dam at Independence for their sole
7 benefit. If we were to repair the dam at Derby, we
8 would expect it to be for our benefit. But in this
9 case, the benefit is to just maintain water, if it is
10 necessary in the future, that would have been there
11 anyhow, except for the transfer upstream.

12 We are not asking for anything that isn't
13 equitable and proportional; and that the State Engineer
14 or Water Master, or some other third party, could do
15 the independent determination as to whether there is
16 a repair or a modification necessary. I am not asking
17 that it be part of the repairs.

18 We are asking the State Engineer to consider
19 the public interest and potential public trust in the
20 future for transferring all downstream water rights
21 upstream, and the need for instream flows, and the
22 potential that that puts on us at Derby Dam, since we
23 are the last diverters along the river at that point.

24 And we feel that, if that is going to occur
25 in the future, and all indications seem to be that

1 downstream water rights are being moved upstream, then
2 the future is, in that regard, and then we ask the
3 State Engineer to consider that, in these transfers,
4 we further ask the State Engineer to ensure that the
5 water--or the land where the water is currently used,
6 will not be irrigated in the future, to ensure there
7 would be an adverse impact.

8 And with regard to our first point, which was
9 the speculation or the treatment-plant water not being
10 returned to the river, that speculation can be removed
11 by conditioning the transfers on current conditions,
12 at 58 percent utilization, and 50 percent return flow,
13 to the river system, through the treatment plant. That
14 is the current conditions; no impact on the district.

15 MR. MORROS: Does anybody else have anything
16 that they would like--any statements that they would
17 like to make for the record?

18 MS. OLDHAM: I don't want to repeat anything
19 that Ross has said, but I did want to make a couple of
20 comments.

21 MR. MORROS: All right.

22 MS. OLDHAM: The current conditions are
23 terribly undefined in this hearing. We haven't made
24 an attempt to establish what the current conditions are,
25 under any set of circumstances.

1 If, in the future, there is a change in the
2 amount of sewage that a household puts out, if there
3 is a change in the amount of the usage, if there is--
4 there is other things that could occur that could be
5 considered changed conditions, we can't lose the water
6 supply to the particular person that it's gone to,
7 and we are relying on having a particular water supply
8 that is available to the applicant.

9 For that reason, we, if these water rights
10 were conditioned on current conditions, we would
11 consider that to be an insecure water supply, as such,
12 and one that would not be acceptable as in reliance
13 on will-serve letter, something we couldn't issue a
14 will-serve letter based upon.

15 The company is perfectly willing to accept
16 a condition that would recognize and accept the juris-
17 diction of the Water Master, as it exists, to regulate
18 to use his jurisdiction under the decrees, and to
19 provide solutions in the future as issues do come up,
20 and water rights are affected in major ways by varying
21 circumstances.

22 We don't agree that it would be proper for
23 the State Engineer to condition any permit. I think
24 we are concerned with respect to these permits and
25 these hearings, but we also know TCID has asked that

1 all future applications have similar conditions in
2 other protests that they have filed. And we would
3 like to get that resolved, once and for all.

4 We are sorry that it hasn't been resolved,
5 and we haven't been able to have a discussion prior
6 to these hearings, in order to try and work it out.

7 It does seem like these particular permits,
8 as Mr. Arden has pointed out, are permits that are
9 less subject to problems as a result of future conditions
10 than other applications may be in the future.

11 We would continue to attempt to discuss the
12 matter with TCID, but we really aren't in a position,
13 during these hearings, to try and get this issue resolved.
14 I guess what I am trying to say is that, in the future,
15 I think we are going to face this issue again. These
16 particular permits are not subject to any kind of
17 negative impact as a result of the future conditions
18 mentioned, due to the fact, as Mr. Arden explained,
19 but also to the fact that the return flows from the
20 transportation losses on these particular permits are
21 less than the 31 percent criteria.

22 Therefore, even under the decree, they would
23 never be impacted by--they would not be impacted by a
24 transfer, even under a future condition.

25 With respect to point number two in Mr.)

1 McConnell's--or Mr. Mahannah's memo, certainly we will
2 notify and would notify the Water Master, to see that
3 a double diversion did not occur. We do that in the
4 regular course of things and matters, and we would
5 continue to do that.

6 I think we have stated our position with
7 respect to the gates sufficiently, in the earlier
8 record, and we don't feel responsible for paying for
9 those gates. We do think there is a benefit, contrary
10 to what Mr. McConnell said, there is a direct benefit
11 to TCID in fixing those gates, because that is water
12 that could otherwise be stored, when no one else has a
13 right to it below Derby. And we think that they have
14 an obligation to fix it, not only for themselves, but
15 for other water-right holders, including ourselves,
16 to properly operate and to allow us to be storing it
17 in upstream storage, rather than allowing that water
18 to dribble down to Pyramid Lake, when it's not necessary.

19 The diversion rate point I think we corrected
20 in our earlier discussions.

21 MR. McCONNELL: Just one final thing.

22 MR. MORROS: We are going to have to come to
23 an end here.

24 MR. McCONNELL: Just one sentence. I just
25 wanted to remind you that the evidence presented here,

1 showing there was no impact on the district, was based
2 on current conditions.

3 MS. OLDHAM: We don't--well, it is based on
4 some current conditions; it is also based on a future
5 water-supply condition of 119,000 acre-feet of water
6 being supplied to the Truckee Meadows. So, in a lot
7 of respects, it dealt with future conditions.

8 MR. McCONNELL: I understand that, but, I mean,
9 what I am referring to is, to current conditions is
10 58 percent limitation, as well as the 50 percent return
11 flow.

12 MS. OLDHAM: But with respect to a future
13 condition which exercised all of those water rights;
14 did not exercise just 58 percent. It exercises the
15 whole right.

16 MR. MORROS: Any other comments, or does
17 anybody else wish to make a statement for the record?

18 Hearing none, we are going to take about a
19 ten-minute recess, and then I think that I am going to
20 rule on the matter of these applications. I see no
21 reason to delay it.

22 " (Recess.)

23 MR. MORROS: There is a little housekeeping
24 chore we will have to deal with first, and that is the
25 matter of the Applicant's exhibit. I apologize for

1 not taking care of this. We have received into the
2 record Applicant's Exhibits 1, 2 and 3. Is there any
3 objection to Exhibits 4, 5, 6, 7 and 8 being received
4 into the record?

5 MR. McCONNELL: No.

6 MR. MORROS: All right. Applicant's Exhibits
7 4, 5, 6, 7 and 8 will be received into the record.

8 (Applicant's Exhibits 4, 5, 6,
9 7 and 8 were received into
10 evidence.)

11 MR. MORROS: First, I will take up the matter
12 of Application 533369, which was filed by Westpac
13 Utilities, to change the point of diversion, place and
14 manner of use of a portion of the Truckee River decreed
15 water right under claim number 621.

16 There were no protests filed to that appli-
17 cation, and, therefore, it is not necessary for the
18 State Engineer to rule, as is required in the case of
19 a protested application. That application to change
20 will be approved, and it will be subject to the same
21 terms and conditions that will be imposed in the matter
22 of Applications 53092 and 53093.

23 Additionally, before approval can occur under
24 53369, the question of title will have to be cleared up.
25 It is my understanding that, with the IRS ruling, that

1 title under these rights will pass to either Washoe
2 County or the City of Reno, or the City of Sparks, and
3 that there then will be an agreement entered into
4 between those entities and Westpac Utilities, for
5 delivery of the water to the developments proposed to
6 be served by these water rights; is that correct?

7 MS. OLDHAM: I believe all of these water
8 rights are Reno and Sparks, are they not?

9 MR. MORROS: Well, whatever the case may be.

10 MS. OLDHAM: Washoe County is a little bit
11 different issue.

12 MR. MORROS: All right. But before approval
13 of 53369 can occur, that title matter will have to be
14 cleared up. I want there to be a full understanding of
15 that.

16 Going now to Applications 53092 and 53093,
17 those applications were protested by the Truckee Carson
18 Irrigation District on the grounds that, if the
19 applications were granted, it may tend to adversely
20 affect existing downstream water rights.

21 We have taken evidence and testimony into
22 the record today in this proceeding, and it is my
23 finding that there does not appear to be substantial
24 evidence to support a finding that approval of those
25 applications would adversely affect downstream rights

1 or any other rights on the stream system.

2 The decree specifically provides, on page
3 88--I am referring now to the Truckee River decree--
4 No. A-3, U.S. District Court, District of Nevada, that
5 persons whose rights are adjudicated hereby, their
6 successors or assigns, shall be entitled to change,
7 in the manner provided by law, the point of diversion
8 and the place of use, means, manner or purpose of
9 using of the waters to which they are so entitled, or,
10 of any part thereof, so far as they may do so without
11 injury to the right of other persons whose rights are
12 fixed by this decree.

13 There doesn't appear to be any evidence that
14 approval of these applications to change would result
15 in any injury to the rights of any other persons whose
16 rights are fixed by this decree. And that is specifically
17 my finding.

18 The diversion rate under 53092, it has been
19 requested by the applicant that diversion rate be
20 reduced to 3.53 cfs; is that correct?


21 MR. deLIPKAU: That's correct.

22 MR. MORROS: And it is my finding that that is
23 appropriate and consistent with the representation
24 that has been made to the State Engineer as to the
25 amount of water desired to be changed under Application

1 53092.

2 Relating to the request by the protestant,
3 Truckee Carson Irrigation District, regarding the
4 modifications at Derby Dam, it appears that there is
5 some basis for the concern expressed by the protestant
6 that there may, at some time in the future, have to be
7 some modifications made to Derby Dam in order to ensure
8 that the protestant will be able to divert the amounts
9 of water that they are entitled to under the decree,
10 but at this point, I think the record demonstrates that
11 that is somewhat speculative. And until such time as
12 it can be demonstrated that those modifications are
13 necessary, I don't feel that the State Engineer has
14 the authority to require that the applicant be responsible
15 for any of the costs that might occur at sometime in the
16 future.

17 The protestant also requested that assurances
18 be given that the existing place of use that these
19 rights are attached to in the form of decreed irrigation
20 rights, that the water deliveries to those lands be
21 ceased completely, and that no further irrigation be
22 allowed on those lands, and certainly, if the permits
23 are issued, it would be the responsibility of the
24 Federal Water Master to assure that there are no
25 deliveries of water made to those lands for the purposes



1 of irrigation, or, for that fact, any other purpose.
2 And I think the Federal Water Master would be able to
3 accomplish that without any substantial hurdles to clear.

4 Mr. Stone has assured me he doesn't think
5 that there is any problem.

6 I am going to issue the permits under
7 Applications 53092 and 53093, when the title problem
8 is cleared up and clarified on the records of the
9 State Engineer, subject to existing rights, and also
10 subject to the continuing jurisdiction and regulation
11 by the Federal Water Master, as provided in the Truckee
12 River decree.

13 I don't think that that condition is any
14 different than the implied conditions that have been
15 attached to any other change applications that have been
16 approved on the Truckee River system. I think that if,
17 at any time in the future, it can be demonstrated to
18 the Federal Water Master that there is a need for
19 additional regulation of the diversions under these
20 rights, or any other rights that may exist on the
21 Truckee River, that the Federal Water Master does have
22 the authority and the jurisdiction to accomplish that
23 additional regulation, as an officer of the court.
24 And should anybody object to any regulation, additional
25 regulation, by the Federal Water Master, or any additional

1 administration under the decree by the Federal Water
2 Master, then certainly they have an appeal procedure
3 that is available to them, to the Federal District
4 Court. And that is basically outside the jurisdiction
5 of the State Engineer. But these permits will be
6 issued, subject to existing rights, and subject to the
7 continuing jurisdiction of the Federal Water Master.
8 And that, I think, goes right to the heart of the
9 provision and the decree, that the rights cannot be
10 exercised if they in any way injure the rights of any
11 other persons whose rights are fixed by the Truckee
12 River decree.

13 Additionally, the permits under these appli-
14 cations will not be issued until, of course, the
15 statutory permit fees are submitted to the State
16 Engineer's Office.

17 With that, I will declare this hearing closed.

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STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, Richard A. Williams, a notary public in and for the County of Washoe, State of Nevada, do hereby certify:

That on Tuesday, November 14, 1989, at the hour of 9 o'clock a. m., at the Reno City Council Chambers, Reno, Nevada, I was present and reported the proceedings had and the testimony given in said hearing in verbatim stenotype notes, which were thereafter caused to be transcribed by me;

That the foregoing transcript, consisting of pages 1 through 136, inclusive, constitutes a full, true and accurate transcript of my said stenotype notes, to the best of my knowledge, skill and ability.

Dated at Reno, Nevada, this 6th day of December, 1989.

Richard A. Williams, CSR