

CERTIFICATE OF SERVICE

I hereby certify that a copy of Intermediate Order No. 1 and Notice of Hearing was served

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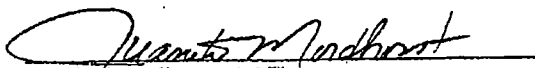
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**IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA**

IN THE MATTER OF PROTESTED)
APPLICATIONS 73783, 73791 THROUGH)
73800, 73849 THROUGH 73855, 73863)
THROUGH 73872, 73908 THROUGH 73917,)
73986, 73987, 74076 THROUGH 74085,)
74193 THROUGH 74202 AND RELATED)
SECONDARY APPLICATIONS.)

**INTERIM ORDER NO. 1
AND NOTICE OF HEARING**

GENERAL

I.

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

On February 16, 2006, February 23, 2006, and March 1, 2006, TMWA, the City of Reno and the City of Sparks by and through TMWA filed Applications 73849 through 73855,

¹ File No. 73783, official records in the Office of the State Engineer.

Applications 73863 through 73872 and Applications 73908 through 73917² for proposed changes with the same remarks as the above-referenced applications.

On March 13, 2006, the City of Sparks by and through TMWA filed Applications 73986 through 73987 for proposed changes with the same remarks as the above-referenced applications.

On March 28, 2006, TMWA filed Applications 74076 through 74085 for proposed changes with the same remarks as the above-referenced applications.

On April 13, 2006, TMWA, the City of Reno and the City of Sparks by and through TMWA and the City of Sparks by and through TMWA filed Applications 74193 through 74202 for proposed changes with the same remarks as the above-referenced applications. All of the above-referenced applications are hereby referred to as the "Primary Applications" under the provision of NRS § 533.440.

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

II.

The Primary Applications were protested by the City of Fallon, Churchill County and the Truckee-Carson Irrigation District (TCID) on many grounds as summarized below. The main focus of the protests is that the granting of the applications would violate the Truckee River Agreement (TRA) that allowed the *Orr Ditch* Decree to be entered and the TCID does not consent to a change of the TRA or the *Orr Ditch* Decree. They assert that any changes to the *Orr Ditch* Decree as contemplated by the Truckee River Operating Agreement (TROA) have not been accepted by the Decree Court; therefore, the Applicant cannot demonstrate beneficial use of the water, making the applications premature and speculative. It is alleged that use of water under the applications significantly alters the historical management scheme on the Truckee River thereby impacting existing rights and the Applicant currently may not use many of the proposed reservoirs. They

² Application 73916 has been withdrawn.

assert that use of water under the applications will injure existing rights adjudicated under the *Orr Ditch Decree*.

The protests also include allegations that the use of water as proposed under the applications violates NRS § 533.330, which provides that an application must be limited to one source for one purpose; violates NRS § 533.440 in several ways regarding the provisions for primary reservoir permits and secondary use permits; and violates NRS § 533.345 in that the applications do not provide sufficient information. They allege that use of water will negatively impact ground-water recharge in the Truckee Meadows and Carson Desert Hydrographic Basins thereby affecting ground-water users and threatening to prove detrimental to the public interest.

The Protestants also raise issues as to what quantity of water the State Engineer should use for the historical consumptive use under the water rights being changed, issues that the applications do not indicate the number of acres that were historically irrigated, that the applications do not indicate the actual amount of water in acre-feet that is contemplated for storage and that the applications are attempting to expand the season of use to year-round use as opposed to the historic use only during the irrigation season. Protestants allege that Nevada water law mandates that the State Engineer either approve or deny an application; therefore, an application cannot be contingent on subsequent conditions as is the case here. The Protestants request that any secondary permits for use of the water be given a new priority date as of the date of the application to prevent injury to existing users and assert that the Applicants have no right to divert and use water outside the Truckee Meadows.

III.

On January 14, 2008, TMWA requested the State Engineer schedule a prehearing conference in the matter of the above-referenced change applications and related protests. Pursuant to a notice dated January 29, 2008, the State Engineer scheduled a status conference for March 21, 2008, in order to bring the parties together to discuss the applications and related issues in an informal setting before deciding whether or not to proceed to an administrative hearing.

IV.

At the status conference, the Applicant indicated that the Primary Applications seek to add Truckee River reservoirs in California as points of diversion for storage of the consumptive use component of existing *Orr Ditch* decreed water rights. This consumptive use portion would then be the subject of the Secondary Applications for beneficial use. If the consumptive use portion is not diverted to storage in the California reservoirs, the Applicant wishes the water to remain in the Truckee River available for diversion at the current points of diversion at TMWA's treatment plants. In order to accomplish this storage in the California reservoirs, the Applicant indicated that there would need to be an adjustment to the flow of the Truckee River at Farad.³

V.

Prior to the status conference, the Applicant filed a Status Conference Memorandum. The Applicant argues that to a large extent the Protestants rely on allegations that the TROA will cause injuries to water rights and to the public interest, but that the TROA is just that, an agreement that provides for reservoir operations consistent with existing rights and changes to existing rights that are being sought. The Applicant asserts that the change applications do not reallocate water away from the Newlands Project and do not unravel the Floriston Rates management scheme.

The Applicant argues that today much of the flow of the Truckee River, both natural and released from Lake Tahoe and Boca Reservoir to meet Floriston Rates, may not be lawfully diverted at Derby Dam and must be allowed to flow to Pyramid Lake due to the Operating Criteria and Procedures (OCAP), which are federal regulations dealing with diversions from the Truckee River to the Newland's Project Carson Division. Additionally, the Applicant asserts that under the *Alpine Decree*, it was made clear that Truckee River water is only to be considered as a supplemental supply for the Carson Division and the Protestants' assertion that any unused water in the Truckee River is to inure to the benefit of TCID is simply wrong as a matter of law, and has been explicitly held to be wrong by the decision in *Truckee-Carson Irrigation District v. Secretary*, 742 F.2d 527, 531 (9th Cir. 1984). The Applicant argues that due to the urbanization of areas that used to be irrigated there are water rights that are not currently being exercised. These rights relied

³ Transcript, Status Conference, pp. 7 - 8.

on the Floriston Rates to provide water in order to exercise those rights, but since the rights are not currently being exercised, there exists water in the Truckee River that at times has been diverted to the Newlands Project, but which is not "Newlands Project water."

The Applicant indicates that these change applications are requesting to hold the consumptive use portion of those unexercised water rights in storage when they are not needed to meet current municipal and industrial demand, and the Floriston Rates will be adjusted accordingly. However, the non-consumptive portion of the right will remain in the Truckee River so that downstream users will be in the same position they would have been had the *Orr Ditch* decreed water rights been exercised for their original use.

The heart of the Applicant's argument is, that to the extent that the exercise of senior *Orr Ditch* Decree water rights makes less water available to divert to the Newlands Project than would be available if those rights were not exercised, there is no unlawful injury to Protestants' water rights as it is not "Newlands Project water."

The Applicant's Status Conference Memorandum provides its analysis of protest grounds and TMWA contends some are insufficient as a matter of law, some raise issues that are not for decision by the Nevada State Engineer, but rather may only be decided by the United States District Court or some other court, and some are issues that require clarification. The Applicant requests the State Engineer make an early decision that these issues will not be considered by him.

VI.

Prior to the status conference, Protestant TCID filed a Status Conference Report. The TCID's Status Conference Report focuses on the argument that the TROA is not a foregone conclusion and a number of actions remain to be taken before the TROA is adopted, promulgated and can go into effect. Thus, it argues it is premature for the State Engineer to take any steps toward an administrative hearing on the above-referenced applications. The TCID asserts that until the TROA is implemented, there is no way the water can be used as proposed by the applications or a determination can be made related to impacts to existing rights or whether use of the water as proposed would threaten to prove detrimental to the public interest. Therefore, the TCID asserts there is no benefit to reviewing the applications until the TROA is finalized. Additionally, it asserts

since there are also a number of other administrative and judicial proceedings required before the implementation of the TROA, those actions need to be taken in order to have a full understanding of how use of water under the applications will operate and whether the use will impact existing rights. The TCID argues that judicial economy dictates that the *Orr Ditch Decree* be modified before any action by the State Engineer related to the TROA, particularly since any appeal of the State Engineer's determination would be heard by the *Orr Ditch Decree Court*.

VII.

At the status conference, the State Engineer indicated that he is not going to address whether the TROA changes the *Orr Ditch Decree* and requested the Protestants narrow their protest issues to reflect that decision. The TCID filed a document titled "Narrowed Protest Issues to Truckee Meadows Water Authority Change Applications Filed for Storage with Beneficial Use Under the Truckee River Operating Agreement;" however, the TCID did not "narrow" its protest issues, but rather continues to allege that the State Engineer cannot make determinations under Nevada water law related to these change applications without considering the TROA and knowing how the *Orr Ditch Decree* will be modified. The City of Fallon joined in the TCID's narrowed protest issues⁴ and Churchill County indicated that it joins in asserting that until TROA is finalized and the appropriate modifications made to the *Orr Ditch Decree*, that Churchill County cannot adequately address the impacts the changes will have on existing water rights or the potential detriment to the public interest.⁵ The Applicant filed a response to the "narrowed protest issues."⁶

VIII.

On April 22, 2008, the TCID filed a Motion to Consolidate Truckee River Operating Agreement Change Applications, which requests the State Engineer add various applications held by Washoe County, the City of Reno and the City of Sparks and additional applications that have

⁴ City of Fallon's Joinder in Narrowed Protest Issues to Truckee Meadows Water Authority Change Applications Filed for Storage with Beneficial Use Under the Truckee River Operating Agreement, dated April 21, 2008.

⁵ Churchill County's Refinement of Protest Grounds as to Truckee Meadows Water Authority's Applications Filed for Storage with Beneficial Use Under the Truckee River Operating Agreement, dated April 21, 2008.

⁶ Response of Truckee Meadows Water Authority to Protestants' Narrowed and Refined Protest Issues, dated May 9, 2008. The State Engineer notes in the body of the document that the Applicant refers to TCID's original protest and not its "Narrowed Protest Issues."

been filed by TMWA to those under consideration at the time of the status conference. Churchill County joined in the motion to consolidate.⁷ Since that time, Washoe County, the City of Reno and the City of Sparks have withdrawn its applications; thus, making that portion of the motion moot. The TMWA opposed the consolidation on the grounds that to do so would result in delay of the proceedings and on the grounds that some of the issues are different.

FINDINGS OF FACT

I.

The State Engineer finds he will not consolidate those applications requested under the TCID motion into these proceedings. Every time another application or protest issue is added it further complicates the matter and causes it to become too unwieldy.

II.

VIOLATES THE TRUCKEE RIVER AGREEMENT, THE *ORR DITCH* DECREE AND ISSUES AS TO THE TRUCKEE RIVER OPERATING AGREEMENT

The State Engineer finds that while the Truckee River Agreement (TRA) requires the river to be operated on the basis of Floriston Rates, a change in the Floriston Rates under modern conditions, which includes other laws/regulations or judicial decisions issued since the time of the TRA and the *Orr Ditch* Decree does not in and of itself mean that the TCID's right to use water will be injured. The State Engineer finds the Applicant acknowledges that the retention of the consumptive use component in storage requires a change in the rate of flow of the Truckee River at Farad, but that does not necessarily mean that Protestants' water rights will be injured or the use of the water will threaten to prove detrimental to the public interest. That is a factual inquiry requiring evidentiary submissions.

The State Engineer finds that limits on the Protestant's right to use water under Claim Numbers 3 and 4 of the *Orr Ditch* Decree are also found in the *Alpine* Decree and in federal regulations referred to as the OCAP. The State Engineer finds support in the Applicant's argument that today much of the Truckee River water may not be lawfully diverted at Derby Dam and must

⁷ Churchill County's Joinder in Motion to Consolidate Truckee River Operating Agreement Change Applications, dated May 5, 2008.

be allowed to flow to Pyramid Lake. The State Engineer agrees that it is appropriate for him to initially make a determination on whether the proposed changes, which will be implemented by a modification in the Floriston Rates, will conflict with existing rights or threaten to prove detrimental to the public interest; however, this does not require him to analyze, accept or decide whether the TROA violates the *Orr Ditch* Decree or whether TROA itself impairs anyone's rights under the *Orr Ditch* Decree.

The State Engineer finds he agrees with TMWA that many of these issues presented by these protests are not for the State Engineer and he will not permit those issues to be brought into the consideration of these applications. The State Engineer finds that issues as to the TROA, whether the TROA can legally modify the *Orr Ditch* Decree or issues as to the petitions filed in California does not affect the analysis of whether storing the consumptive use portion of these water rights will conflict with existing rights or threaten to prove detrimental to the public interest. The State Engineer agrees with the Applicant and finds he is not the proper authority to "approve" the TROA in general or in the abstract; approval is for the *Orr Ditch* Decree Court. The State Engineer finds the historic management of the Truckee River based on the Floriston Rates has been modified based on limitations that are now in effect, such as the OCAP. The State Engineer finds the issue before him is whether storage of the consumptive use component of these change applications will injure the Protestants' water rights or threaten to prove detrimental to the public interest.

The State Engineer finds he does not believe the *Orr Ditch* Decree Court would act to modify the decree in the abstract without actual permits on change applications approved by the Nevada State Engineer before it. The *Orr Ditch* Decree instructs that persons whose rights are adjudicated thereby are entitled to change the point of diversion, place or manner of use and for 70 years that provision has been interpreted to mean that decreed water right holders must first file an application with the Nevada State Engineer before that change may be brought to the *Orr Ditch* Decree Court. This interpretation has been upheld by the federal courts⁸ and the State Engineer.

⁸ *U.S. v. Orr Ditch Company*, 914 F.2d 1302, 1308 (9th Cir. 1990); *U.S. v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 860 (9th Cir. 1983).

The State Engineer has repeatedly held that he is the proper authority to make a decision on a change application in the first instance. The State Engineer finds if the Protestants receive the water they are entitled to when entitled to it under the current state of the law there is no injury.

The State Engineer finds he agrees with TMWA that the following protest issues which are related to the violation of the Truckee River Agreement, violation of the *Orr Ditch Decree* or the TROA are not part of his review of these applications and are for the court to decide and dismisses those issues: TCID's narrowed protest issues 1, 3, 4, 5, 6, 7, City of Fallon's protest issues 1 (portion that alleges will breach TRA), 7, 8, 10, 11, 12, and Churchill County's protest issues 1 (whether TROA is a threat to Churchill County's water supply), 6, 8, 9, 10.

III.

NEVADA REVISED STATUTE § 533.330

The Protestants contend that the change applications violate NRS § 533.330 in that they are for more than one use. Nevada Revised Statute § 533.330 provides that:

No application shall be for the water of more than one source to be used for more than one purpose; but individual domestic use may be included in any application with the other use named.

The Protestants take the position that because the change applications propose either diversion to storage or direct diversion to municipal use that the applications seek to use water for more than one purpose. They also allege that the proposed change applications fail to adequately identify the beneficial use, place of use or specific project where the water will be applied. They argue that since three different secondary applications have been applied for under each primary application for different uses, that the Applicant is attempting to use the same water for multiple purposes at multiple places of use in violation of NRS § 533.330, which only permits a water right to be used for a single purpose at a single place of use.

The State Engineer requested the Applicant to provide a presentation at the status conference in order to more fully describe how these Primary Applications would work because, as filed, the State Engineer found them confusing. The Applicant indicated that the intent of the Primary Applications is to add the Truckee River reservoirs in California as points of diversion for

the consumptive use portion of the existing *Orr Ditch* decreed water rights, to the additional points of diversion already at TMWA Water Treatment Plants. The consumptive use portion of the water stored in the California reservoirs would then be the subject of secondary applications for beneficial use of the stored water. It indicated that, if the consumptive use portion was not diverted to storage in California, the water would remain available at the points of diversion of TMWA's Water Treatment Plants for treatment and distribution.

In order to address the confusion as to the Primary Applications, the Applicant described the water treatment plants as if they were storage reservoirs themselves, with beneficial use being made under secondary permits.⁹ If one thinks of all of the California Truckee River reservoirs and the Water Treatment Plants as storage facilities, then the Primary Applications are not for two uses of water as asserted by Protestants, but rather, they are merely storage permits for multiple storage facilities with use of the water to be made under secondary permits.

The State Engineer finds he does not agree with the Protestants argument. While it is true that Nevada Revised Statute § 533.330 provides that no one application shall be for the water of more than one source to be used for more than one purpose, it does not say that one cannot file multiple secondary applications for different uses under the primary/secondary application process. Here, the Primary Applications are only for storage and the Applicant's use will be under the secondary permits. However, as addressed below, the State Engineer believes for management and accounting purposes the Applicant should file an additional set of secondary applications.

Nevada Revised Statute § 533.055, provides that:

Water may be stored for a beneficial purpose. Water turned into any natural channel or watercourse by any person entitled to the use thereof, whether stored in Nevada or in an adjoining state, may be claimed for beneficial use below, and diverted from the channel or watercourse by such person, subject to existing rights, due allowance for losses to be made, as determined by the State Engineer.

The State Engineer finds that under the primary/secondary provision of Nevada water law found in NRS § 533.440, water is stored for other beneficial uses, as demonstrated by Nevada Revised Statute § 533.440, which specifically provides that proof of beneficial use is not required to

⁹ Transcript, p. 8.

be filed on storage permits. The State Engineer as an aside notes that water in storage may in some instances be a beneficial use of water, for example, if the water is stored for recreational or wildlife purposes at the place of storage. However, under these Applications, the water is being stored for the beneficial uses to be made under the secondary applications. Thus, the State Engineer finds the Applicant has not applied for more than one use under the Primary Applications. The State Engineer finds the only use under the primary applications is storage and overrules TCID's narrowed protest issue 9, Churchill County's protest issue 13.

IV.

SECONDARY APPLICATIONS

The Applicant has filed secondary applications for municipal and domestic purposes, for wildlife purposes, and for incidental hydroelectric power generation.¹⁰ The secondary applications for municipal and domestic use indicate that the consumptive use portion of the water released from the California reservoirs (Lake Tahoe, Boca Reservoir, Prosser Creek Reservoir, Stampede Reservoir, Donner Lake and Independence Lake), which was stored under the Primary Applications, would then be diverted into TMWA's Water Treatment Plants (Hunter Creek Reservoir, Highland Reservoir, Idlewild Treatment Plant, Glendale Treatment Plant, and Chalk Bluff Treatment Plant). Thus, the water is being moved from one storage facility to another downstream. However, the Primary Applications also note that water not stored will be directly diverted into TMWA's Water Treatment Plants, where it will be processed and released for use in the municipal water system. The State Engineer finds, for accurate accounting purposes, it will be necessary to differentiate between the consumptive portion stored and then released and the full duty portions of the water directly diverted into TMWA's Water Treatment Plants. Therefore, for management and accounting purposes, additional secondary applications should be filed for the use of the water that is directly diverted into TMWA's Water Treatment Plants and then used for municipal purposes.

¹⁰ For example, Applications S-73783-1, S-73783-2 and S-73783-3.

V.

NEVADA REVISED STATUTE § 533.440(2)

Citing to NRS § 533.440(2), the Protestants allege that the Primary Applications incorrectly name the source of water and fail to designate the points of diversion. They argue that the applications do not name the reservoirs in Exhibit B to the application as the "supply," but rather the reservoirs are named as the points of diversion and the points of diversion cannot be a storage facility. Additionally, Protestants allege that the Applicant has failed to provide sufficient evidence of storage capacity of the reservoir or existence of agreements for storage of water.

Nevada Revised Statute § 533.440 provides in applicable part that:

1. All applications for reservoir permits shall be subject to the provisions of NRS 533.324 to 533.435, inclusive, except those sections wherein proof of beneficial use is required to be filed. The person or persons proposing to apply to a beneficial use the water stored in any such reservoir shall file an application for a permit, to be known herein as the secondary permit, in compliance with the provisions of NRS 533.324 to 533.435, inclusive, except that no notice of such application shall be published.

2. The application shall refer to the reservoir for a supply of water and shall show by documentary evidence that an agreement has been entered into with the owner of the reservoir for a permanent and sufficient interest in such reservoir to impound enough water for the purpose set forth in the application.

The Applicant argues that the Protestants misunderstand or misconstrue what is actually happening here and that it has not filed "applications for reservoir permits." It has filed applications to divert a consumptive use component of an existing direct diversion water right into reservoirs which already exist and are located in California. It does not seek to appropriate water for a reservoir in Nevada. The source of the water is TMWA's existing water rights in the Truckee River.

As noted by the Applicant, the procedure to be followed in the filing of these change applications is complicated by their interstate nature. Nevada Revised Statute § 533.055 provides for the storage of water, whether stored in Nevada or in an adjoining state. Nevada Revised Statute § 533.515 provides that a change application may not be denied because the point of diversion or any portion of the works are situated in another state, but if the intended place of use is in Nevada,

the Applicant needs a permit. TMWA does not need a permit from the Nevada State Engineer to store any of this water in California. It needs a permit to use the water in Nevada and the use of water in Nevada of the water stored in the upstream reservoirs requires the use of the primary/secondary application process.

The State Engineer finds Item 1 on the actual Primary Applications indicate the source of water is the Truckee River. The State Engineer finds TMWA correctly named the source of water as the Truckee River. The State Engineer hereby overrules TCID's narrowed protest issue 10, and City of Fallon's protest issue 16.

The Protestants allege that TMWA has not shown by documentary evidence that an agreement has been entered into with the owner of the reservoir for a permanent and sufficient interest in such reservoir to impound enough water for the purpose set forth in the Primary Applications. The State Engineer finds these change applications present a very unique situation most likely not contemplated when the Nevada Legislature enacted NRS § 533.440. If the application was merely for a reservoir at a sewage treatment plant and use of water from that reservoir for one purpose on a stream wholly contained within the state of Nevada, the reservoir/primary – secondary permit provision of the law would be simple and straight forward. However, these applications present a much more complex case and common sense and some flexibility must be used to assist the State Engineer in his review.

As to the protest claim that TMWA has failed to provide sufficient evidence of storage capacity or existence of agreements for storage of water, the State Engineer finds this statutory criterion provides that the Applicant must demonstrate that an agreement has been entered into for a "permanent and sufficient interest in such reservoir to impound enough water for the purpose set forth in the application." NRS § 533.440(2). The State Engineer finds in this instance he is going to require that this statutory criterion be met before the Applicant can complete the diligence phase of placing water to beneficial use. The State Engineer finds the Applicant indicates that concurrently with the process before the State Engineer it is pursuing those agreements. The State Engineer finds that due to the uniqueness of these change applications and related issues, permits

can be issued subject to the Applicant obtaining those agreements and overrules TCID's narrowed protest issue 2, 11 (portion), and City of Fallon's protest issue 17 (portion).

VI.

**NO PROOF OF RIGHT TO STORE WATER IN CALIFORNIA, ENVIRONMENTAL
REVIEW PROCESS IS NOT COMPLETE**

Protestants allege that TMWA has provided no evidence of a permanent right to store water in California; thus, they are proposing to divert water from a point in which they have no right or control. They allege that since the TROA is not finalized and the environmental impact statement/environmental impact report has not been certified and since the water right change petitions that have been submitted to the California State Water Resources Control Board are still pending, the applications are premature and speculative. The State Engineer finds the steps to be completed which are contemplated under the Settlement Agreement and TROA are numerous, but are also interrelated and it is reasonable to pursue the different avenues at the same time. If this water being applied for were to be used in a power plant, the State Engineer would not require that every single step towards permitting that power plant be proven before a water right application would be granted and a permit issued. Many of the steps are accomplished during the diligence phase of placing the water to beneficial use. The State Engineer finds that permits have been granted to a municipality with points of diversion on federal land to which the applicant had not yet obtained access, but was to be obtained during the diligence phase of placing the water to beneficial use.¹¹ The State Engineer finds the process being accomplished through the Settlement Agreement and the TROA warrants some flexibility and does not require the California process, the TROA process or the environmental review process to be finished in order to review the applications and overrules TCID's narrowed protest issues 12, 14, 25, City of Fallon's protest issues 18, 20 (portion), 30 and Churchill County's protest issue 15 (portion), 23.

¹¹ See, State Engineer's Ruling No. 5465, pp. 17 - 18, dated January 4, 2005, official records in the Office of the State Engineer, in the matter of the Southern Nevada Water Authority's water right applications in Tikapoo Valley and Three Lakes Valley, where in the State Engineer held that, while it was true the applicant did not have right of entry to the proposed points of diversion, this did not prevent the State Engineer from granting the permits allowing the applicant to go forward in order to attempt to obtain access in order to prove beneficial use.

VII.

SECONDARIES NOT PUBLISHED

The Protestants complain that since the applications for secondary permits are not published in accordance with NRS § 533.440, the Applicant is attempting to bypass the notice provisions, thereby shifting the burden to potential protestants to monitor application filings and file additional protests. The State Engineer finds the Applicant is following the Nevada water law as established by the Nevada Legislature and overrules TCID's narrowed protest issue 14, City of Fallon's protest issue 20 (portion), and Churchill County's protest issue 15 (portion) are overruled.

VIII.

**VIOLATES NRS § 533.345
CONSUMPTIVE USE**

Protestants assert that the Primary Applications violate NRS § 533.345 as they do not contain sufficient information as may be necessary for a full understanding of the proposed change. This allegation is based on the statement in the Primary Applications indicating that the consumptive use component "shall be at least 2.5 acre-feet per acre." The Protestants assert that if the applications are approved the consumptive use portion should be specified. They also complain that the applications (and in many instances the underlying permits and certificates) do not expressly state the number of acres to be used in determining the storage quantity under each right. Churchill County wants the consumptive use portion to be limited to actual consumptive use with a determination to be made yearly based upon the condition of the water year. The Protestants allege that applications are defective in that they do not state the actual amount of water in acre-feet that will be stored in the reservoirs. TCID's narrowed protest issue 15, City of Fallon's protest issue 21, and Churchill County's protest issue 16. And the Protestants allege that the amount of acreage shown on the applications is more than the consumptive use portion. TCID's narrowed protest issue 29, City of Fallon's protest issue 34, and Churchill County's protest issue 25. The State Engineer agrees that the actual figure(s) for what will constitute the consumptive use component is an issue that needs further exploration and clarification. The State Engineer finds that at the March 21, 2008, Status Conference the parties were instructed to provide the State Engineer a timeframe in

which they could supply a report on consumptive use; however, no party complied with the State Engineer's request. Therefore, as provided below the parties are being ordered to provide information on this portion of the protests.

IX.

PERIOD OF USE

Protestants allege that the granting of these applications will injure existing rights adjudicated in the *Orr Ditch Decree*. They allege that the potential use of water for fish credit water under TROA will injure Newlands Project water users. The Protestants also allege that historically the diversion of water was based on irrigation patterns and these applications for year-round use may cause injury to downstream users. TCID's narrowed protest issues 8, 16, City of Fallon's protest issues 14, 22, and Churchill County's protest issues 12, 17. The State Engineer finds the issue of season of use and injury to existing rights warrants further consideration. Therefore, as provided below the parties are being ordered to provide information on this portion of the protests.

X.

AMOUNT DIVERTED SHOULD BE LIMITED TO THE 25 PERCENT MAXIMUM MONTHLY AMOUNT IN ACCORDANCE WITH THE *ORR DITCH DECREE*

The Protestants assert that the amount diverted should be restricted to the 25 percent maximum monthly amount in accordance with the *Orr Ditch Decree*. The State Engineer finds the Applicant has not even requested to change this Decree provision and overrules the protest claim. TCID's narrowed protest issues 17, City of Fallon's protest issue 22, and Churchill County's protest issue 18.

XI.

APPLICATIONS DEFECTIVE

Protestants allege that the Primary Applications are defective because they do not provide information on the releases and use of the stored water; thus, the potential injury or impacts cannot be ascertained. The State Engineer finds the release and use of stored water is under Secondary Applications and overrules this protest claim. TCID's narrowed protest issue 18, City of Fallon's protest issue 23, and Churchill County's protest issue 19.

XII.

**RESERVOIR EVAPORATION AND SEEPAGE LOSSES,
CONVEYANCE LOSSES**

Protestants allege that any subsequent release of the stored water should be subject to reservoir evaporation and seepage losses as well as river conveyance losses. The Applicant concedes this issue and asserts that Sections 5.D and 5.E of the TROA provide that stored water is subject to such losses.¹² Nevada Revised Statute § 533.055 provides that water may be stored for a beneficial purpose and water turned into any natural channel or watercourse by any person entitled to its use, whether stored in Nevada or in an adjoining state, may be claimed for beneficial use below and diverted from the channel or watercourse subject to existing rights with due allowance for losses to be made as determined by the State Engineer. The State Engineer finds the TROA accounts for reservoir evaporation with losses calculated on a daily basis. The State Engineer finds the TROA provides that conveyance losses are to be calculated by the office of the Administrator of the TROA using procedures developed by the Administrator and the amount which will be allocated for each day will be based on the amount of water that each category supplies in proportion to the total flow entering the upstream end of the reach during that day. The State Engineer has reviewed the sections of the TROA that provide for losses and finds the methods delineated satisfy the statutory criterion that requires due allowance for losses and overrules this protest issue. TCID's narrowed protest issue 19, City of Fallon's protest issue 24 and Churchill County's protest issue 20.

XIII.

IMPACT TO EXISTING RIGHTS

Protestants allege that by diverting and storing water in upstream reservoirs water will be kept out of the river to the detriment of other water right holders, particularly in years of drought. In a related allegation, the Protestants assert that the Applicant has not demonstrated that the proposed storage of water can be accomplished without displacing water that would otherwise be stored to the benefit of the Newlands Project under the *Orr Ditch Decree*. TCID's narrowed protest

¹² Response of TMWA to Protestants' Narrowed and Refined Protest Issues.

issue 13, and City of Fallon's protest issue 19. Protestants also allege that storage in upstream reservoirs is to the detriment of Lake Tahoe, which will result in a decrease in the Lake level thereby adversely affecting water rights under Claims 3 and 4 of the *Orr Ditch Decree*. The State Engineer finds the Protestants made these allegations; thus, it is their burden to prove them. The State Engineer finds these are evidentiary issues that warrant further consideration as they directly go to the issue of injury to existing rights. Therefore, as provided below the parties are ordered to provide information on this portion of the protests. TCID's narrowed protest issue 20, City of Fallon's protest issue 25, and Churchill County's protest issue 21. The State Engineer finds issues of adverse impacts to existing rights warrants further consideration. Therefore, as provided below the parties are being ordered to provide information on this portion of the protests. TCID's narrowed protest issue 21, City of Fallon's protest issue 26, and Churchill County's protest issue 21.

XIV.

IMPACTS TO GROUND-WATER BASINS

Protestants allege that by removing surface water formerly used for irrigation there will be a negative impact to ground-water recharge in Hydrographic Basins 87 (Truckee Meadows) and 101 (Carson Desert). The State Engineer had repeatedly held that he cannot force people to continue irrigating in order to supply ground-water recharge and overrules TCID's narrowed protest issues 22, 23, 24, City of Fallon's protest issues 27, 28, 29, and Churchill County's protest issue 22.

XV.

SECONDARY APPLICATIONS SHOULD GET A NEW PRIORITY DATE, AUTHORITY TO HAVE POINTS OF DIVERSION AND PLACE OF USE OUTSIDE OF TRUCKEE MEADOWS

Protestants allege that any secondary use below the original point of diversion should be treated as a new application with a priority date as of the date of the change application to prevent injury to existing water right holders. Further, that the Applicant has no right to divert and use water at diversion points outside of the Truckee Meadows. The State Engineer finds there is nothing in Nevada water law that provides the Applicant should lose its priority date and overrules the protest claim. The State Engineer finds it is the Protestant that asserts that the Applicant has no

right to divert and use water at diversion points outside of the Truckee Meadows; therefore, it is the Protestants burden to prove this issue. TCID's narrowed protest issue 26, City of Fallon's protest issue 21, and Churchill County's protest issue 24.

XVI.

STORAGE IN STAMPEDE

The Protestants allege that the Applicant cannot store water in Stampede Reservoir that would otherwise be stored in Lahontan Reservoir without TCID's agreement. The State Engineer finds he is not the appropriate authority to determine what other water can be stored in Stampede Reservoir or if the TCID's consent is needed and dismisses that issue for a court to decide. TCID's narrowed protest issue 27, and City of Fallon's protest issue 32.

XVII.

VIOLATES AGREEMENT BETWEEN WESTPAC AND TCID

Protestants allege that the Primary Applications will violate a 1991 Ground-water Management Agreement between Westpac Utilities and TCID. The 1991 Agreement between Westpac and TCID is an agreement that was signed in order to resolve a protest to Application 55675, which was an application whereby Westpac was transferring a ground-water right, known as the Dixon right, from its original location in South Truckee Meadows to a new well located at Westpac's Glendale Water Treatment Plant. The gist of the agreement is that they agreed to a corridor of land within one-half mile from the center of the river and TCID agreed not to protest transfers within the corridor of existing Westpac ground-water rights, Westpac agreed not to apply to transfer additional water rights from outside the corridor to inside the corridor unless accompanied by a like transfer of water outside the corridor unless the water right being transferred to the corridor is not a Westpac ground-water right subject to the pumpage limitation set forth in the State Engineer's letter to Westpac dated February 12, 1986, Westpac agreed to limit its pumping within the corridor to 12,733 acre-feet per year and other miscellaneous provisions. The State Engineer finds this agreement has nothing to do with the transfers under consideration here and a disagreement between these two entities is not for his decision and overrules the protest claim. TCID's narrowed protest issue 28, and City of Fallon's protest issue 3.

XVIII.

ABANDONMENT/FORFEITURE

Protestants assert that the water requested for change under the Primary Applications has been abandoned or forfeited due to non-use. The State Engineer finds the Nevada Legislature has eliminated forfeiture as to surface-water rights (NRS § 533.060) and dismisses this portion of the protest claim. The State Engineer finds the Protestants will have to provide specific evidence as to its alleged claims of abandonment. TCID's narrowed protest issue 32, and City of Fallon's protest issue 41.

NOTICE

PLEASE TAKE NOTICE, pursuant to the authority set forth in Nevada Revised Statutes § 533.365, 533.370 and 533.375, the State Engineer hereby sets an administrative hearing to consider the matter of protested Applications 73783, 73791 through 73800, 73849 through 73855, 73863 through 73872, 73908 through 73917, 73986, 73987, 74076 through 74085, 74193 through 74202 and related secondary applications.

Accordingly, the hearing will begin promptly at **9:00 a.m., on Monday, January 12, 2009, continuing through Friday, January 16, 2009, to be held at the Tahoe Hearing Room, Nevada Division of Water Resources, 901 South Stewart Street, Second Floor, Carson City, Nevada.**

The exchange of documents, witness lists and descriptions of witness testimony will take place in two simultaneous exchanges and are to specifically address the issues identified by the State Engineer below.

Initial Evidentiary Exchange: The parties are hereby ordered to serve on each other and the State Engineer in Carson City, service meaning received by the party served, no later than Friday, October 24, 2008, an exhibit list, a witness list, a reasonably detailed summary of the testimony of each witness, and copies of any documentary evidence intended to be introduced into the hearing record. If a witness is not identified in the exchanges as testifying on direct as to a certain topic, the witness may not be allowed to testify to the unidentified topic in his or her direct testimony. If a witness is to be presented to provide expert testimony, the evidentiary exchange shall include a written report prepared and signed by

the witness, which shall contain a complete statement of all opinions to be expressed and the basis and reasons for those opinions, identification of the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or in support of the opinions and a statement of qualifications of the witness. The parties may choose to exchange documents via computer compact disk in PDF 20 x 20 dpi format. Notebooks over 3 inches in width will not be accepted.

Second Evidentiary Exchange: The parties are hereby ordered to serve on each other and the State Engineer in Carson City, service meaning received by the party served, no later than Friday, December 5, 2008, an additional exhibit list, witness list, witness testimony summaries or documentary evidence intended to be introduced at the administrative hearing that may be necessary in response to the other parties' first evidentiary exchange. This exchange is meant only to provide evidence that becomes necessary in rebuttal to the original exchange. It is not intended to be the first time a party presents evidence as to their case-in-chief. Again, the parties may choose to exchange documents via computer compact disk in PDF format. **There will be no additional evidentiary exchanges or rebuttal cases allowed.** If the parties choose to exchange documents via computer compact disk, those arrangements are to be made between the parties themselves.

Nevada Administrative Code § 533.290 requires that exhibits introduced into evidence must be in a readily reproducible form, on paper that is 8½" x 11" or foldable to that size. Larger charts, maps, drawings and other material will not be admitted into evidence, but may be used for demonstrative purposes. The submission of exhibits submitted on computer compact disks or any other media, other than paper that is 8½" x 11" or foldable to that size, will be considered on a case-by-case basis. An original and one copy of each exhibit must be submitted to the State Engineer with exhibit numbers identified as provided below. Computer presentations, such as power-point slides, must be copied on paper that is 8½" x 11" and offered into evidence. Facilities are not available for copying documents during the hearing.

For the presentation of excerpts from large documents, the State Engineer will allow the submission of excerpts, but upon request, the person or entity serving such document must make

the entire document available to whomever requests it. If excerpts from a larger document are served and the person upon whom it is served requests to have the entire document in either a hard copy or in a PDF format on a computer compact disk, the person serving said document has 10 days from the date of receipt of the request to place the requested copy in the U.S. Mail.

The parties can agree to document receipt in a digital format and the digital standard will be PDF 20 x 20 dpi files. Any document, report, etc. that any participant intends to refer to must be provided as an exhibit during the administrative hearing and served upon the other participants and the State Engineer in advance.

If any computer models are presented as evidence, the parties must provide the electronic data files necessary to run the model during the initial evidentiary exchange and the models must be completed in freely available codes, for example MODFLOW. Failure to provide this information will render any such evidence inadmissible. The use of any computer, projector or other type of equipment in the hearing room must be arranged in advance with the information technology people with the Office of the State Engineer.

The order for the administrative hearing will be as follows, noting that the order is subject to change as may be necessary during the course of the administrative hearing or if settlement is reached with any of the parties prior to the administrative hearing. The Protestant the TCID will present its case first followed by Protestant Churchill County and then City of Fallon. The Protestants will present their cases on Monday, Tuesday and Wednesday, January 12th, 13th and 14th. The Applicant will present its case on Thursday and Friday January 15th and 16th. The State Engineer hereby orders the administrative hearing is to focus on the following issues:

1. Injury to existing rights.
2. Quantification of consumptive use.
3. Requested change in season of use.
4. Abandonment.

The Protestants are hereby ordered to file a brief by Friday, October 24, 2008, on the protest claim that TMWA does not have the authority to have points of diversion and places of use

outside of the Truckee Meadows. The Applicant may file a response to the Protestants' brief by **Friday, November 14, 2008.**

Pursuant to NRS § 533.365(4), the technical rules of evidence do not apply to administrative hearings before the State Engineer.

The parties are assigned the following exhibit numbers for the initial evidentiary exchange:

State Engineer	1 - 100
TMWA	101 - 600
City of Fallon	601 - 800
TCID	801 - 1000
Churchill County	1001 - 1200

The Applicant TMWA is to provide copies of the Primary Applications, Secondary Applications and Protests as part of its initial evidentiary submission.

The parties are assigned the following exhibit numbers for the secondary evidentiary exchange:

TMWA	2000 - 2100
City of Fallon	2101 - 2200
TCID	2201 - 2400
Churchill County	2401 - 2600

As set forth in Nevada Administrative Code 533.220, the hearing will be reported by a certified court reporter. The court reporter will file an original and one copy of the transcripts with the State Engineer. Anyone wanting a copy of the transcript should make arrangements with the court reporter. The costs of the transcript will be borne by the Applicant and Protestants as set forth in the Nevada Administrative Code.

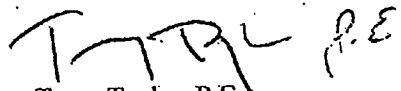
You or your designated representative should plan to attend the hearing for the purpose of presenting evidence or testimony in support of your position concerning the protested applications. Legal counsel not licensed to practice law in the state of Nevada or licensed, but not maintaining an office in the state of Nevada, is required to comply with Supreme Court Rules 42 and 42.1. The Verified Application to Associate form that needs to be filed with the Nevada State Bar can be

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found on the Nevada Division of Water Resources website found at www.water.nv.gov Forms Room - Miscellaneous Forms. Nevada Supreme Court Rule 43 provides an exception for lawyers employed by or representing the United States Government.

We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the hearing. If special arrangements for the hearing are necessary, please notify the Hearings Section of the Nevada Division of Water Resources, 901 South Stewart, Suite 2002, Carson City, Nevada, 89701, or by calling (775) 684-2800.

Respectfully submitted,


Tracy Taylor, P.E.
State Engineer

TT/jm

Dated this 10th day of
September, 2008.