

1 HANSON BRIDGETT LLP
MICHAEL J. VAN ZANDT, SBN 96777
2 mvanzandt@hansonbridgett.com
NATHAN A. METCALF, SBN 240752
3 nmetcalf@hansonbridgett.com
425 Market Street, 26th Floor
4 San Francisco, California 94105
Telephone: (415) 777-3200
5 Facsimile: (415) 541-9366

6 Attorneys for Churchill County, City of Fallon,
and The Truckee-Carson Irrigation District
7

8 **STATE WATER RESOURCES CONTROL BOARD**
9 **OF THE STATE OF CALIFORNIA**

10 In the Matter of Applications 31487 and
31488 filed by the United States bureau of
11 Reclamation, and Petitions to Change
License 3723 (Application 5169) of
12 Washoe County Water Conservation
District, License 4196 (Application 9247)
13 of Truckee Meadows Water Authority, and
Permit 11605 (Application 15673) and
14 License 10180 (Application 18006) of the
United States Bureau of Reclamation
15 Truckee River Watershed

**PETITION FOR RECONSIDERATION OF
DECISION 1651**

16
17 Pursuant to California Water Code §1120 *et seq.* and Title 23, California Code of
18 Regulations §768 *et seq.*, the Truckee Carson Irrigation District, the City of Fallon and Churchill
19 County (collectively "Petitioners") hereby petition the State Water Resource Control Board
20 (hereinafter "SWRCB" or "the Board") to reconsider Decision 1651 adopted on October 16, 2010.

21 **1. Name And Address Of The Petitioners**

22 The Petitioners are the Truckee Carson Irrigation District ("TCID") - its address is 2666
23 Harrigan Road, Fallon, Nevada 89406; the City of Fallon - its address is P.O. Box 1203, Fallon,
24 NV 89407; and Churchill County - its address is 55 North Taylor Street, Suite 156B, Fallon,
25 NV 89406.

26 **2. The Specific Board Action Of Which Petitioners Requests Reconsideration**

27 Petitioners requests that the SWRCB reconsider Decision 1651 related to the Truckee
28 River Watershed.

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3. The Date On Which The Order Was Made By The Board

Decision 1651 was adopted on October 16, 2010.

4. The Reasons the Action was Inappropriate or Improper

In Decision 1651 there is a critical lack of evidence and error in law related to: 1) the required analysis of injury to other water right owners, and 2) the availability of additional water on the Truckee River system to appropriate. Decision 1651 takes the incorrect legal position that junior water right owners cannot be injured as a result of the storage of a senior water right. As a result, the Decision 1651 fails to acknowledge that parties filing the subject applications and petitions did not meet their burden to show no injury, and disregards the substantial evidence in the record that shortages as a result of the operation of TROA will cause injury to water right owners in the Newlands Project. Likewise, it is legal error to allow the storage of previously appropriated water by the Pyramid Lake Paiute Indian Tribe in Nevada to be considered additional water for appropriation in California. Adoption of the correct legal position related to water availability clearly illustrates that there is no substantial evidence in the record of additional water to appropriate on the Truckee River system. Finally, the proposed operation of the subject petitions for change and applications under the Truckee River Operating Agreement circumvents the change and transfer process and allows the designation and change in uses of water in violation of California water law.

Petitioners reserve the right to file a writ of mandate seeking judicial review of Decision 1651 related to the issues addressed herein, as well as other issues raised during the hearing and closing briefs in this matter.

5. The Specific Action Which Petitioners Requests

Petitioners hereby respectfully request that the Board rescind Decision 1651, deny water right Applications 31487 and 31488, and deny petitions to change License 3723 (Application 5169), License 4196 (Application 9247), Permit 11605 (Application 15673), and License 10180 (Application 18006).

1 **POINTS AND AUTHORITIES**

2 **I. STANDARD OF REVIEW**

3 In accordance with California Water Code §1120 *et seq.* and Title 23, California Code of
4 Regulations §768 *et seq.*, any interested party may petition the SWRCB for reconsideration of a
5 decision or order based on any of the following conditions:

6 (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the
7 person was prevented from having a fair hearing;

8 (b) The decision or order is not supported by substantial evidence;

9 (c) There is relevant evidence which, in the exercise of reasonable diligence, could not
10 have been produced;

11 (d) Error in law.

12 Here, Petitioners contends that the SWRCB Decision 1651 constitutes an error in law and
13 is not supported by substantial evidence.

14 **II. BACKGROUND**

15 **A. Procedural History**

16 The State Board noticed Petitions for Change for Licenses 3723, 4196, 10180 and Permit
17 11605 (collectively referred to as "Petitions") and Applications to Appropriate Water by Permit
18 31487 and 31488 (collectively referred to as "Applications") on January 30, 2007. The applicants
19 and petitioners in the proceeding below are the United States Department of the Interior, Bureau
20 of Reclamation ("BOR"), the Truckee Meadows Water Authority ("TMWA") and the Washoe
21 County Water Conservation District ("WCWCD") (collectively "TROA Parties"). The Applications
22 and Petitions were submitted to implement one project, the Truckee River Operating Agreement
23 ("TROA"). The TROA project proponents are the TROA Parties, as well as the State of
24 California, the State of Nevada, the Pyramid Lake Paiute Indian Tribe ("Tribe") and the City of
25 Fernley, Nevada, all of whom appeared at the hearing in support of the Applications and
26 Petitions.

27 The protestants to this matter are TCID, Churchill County, Nevada and City of Fallon,
28 Nevada; Petitioners herein. The hearing related to the Truckee River Watershed and the above

1 referenced Applications and Change Petitions was held before the State Board on July 21 - July
2 23, July 28 and 29, 2010. On October 16, 2012, Decision 1651 was adopted, in which the
3 SWRCB conditionally approved water right the above referenced water right applications petitions
4 to change related to the Truckee River Watershed.

5 **B. Factual and Legal Background**

6 The factual and legal background related to the management of the Truckee River Basin
7 and associated water rights is long and complex. This background was fully provided to the State
8 Board in the Protestants' Joint Closing Brief and in the Protests submitted related to these
9 Applications and Petitions. See SWRCB - I through 6.

10 It is critical for the State Board to understand the impact of the operation of the
11 Applications and Petitions through TROA on the present decrees and agreements which manage
12 the operation of the Truckee River. In 1913, the United States filed an action to quiet title to the
13 waters of the Truckee River and its tributaries, including waters flowing in California that entered
14 Nevada. This action was brought primarily on behalf of the farmers in the Newlands Project for
15 irrigation of lands withdrawn under the Reclamation Act of 1902, and for the benefit of the Tribe
16 for irrigation on the Indian Reservation. *Nevada v. US.*, 463 U.S. 110, 114-117 (1983). This
17 litigation resulted in the *Orr Ditch Decree, United States V. Orr Water Ditch Co.*, CV-N-73-0003
18 LDG, (D. Nev. 1944) ("*Orr Ditch Decree*"), which adjudicated water rights not only in Nevada but
19 also in California, as those rights related to the Newlands Project.

20 An important component of the *Orr Ditch Decree* was the execution of the Truckee River
21 Agreement ("TRA") in 1935. For the last 77 years, the Truckee River has been managed by the
22 parties to the TRA, along with the Federal Water Master, appointed to administer the *Orr Ditch*
23 Decree. The TRA set forth the principles under which the Truckee River would be operated and
24 allowed for the stipulated entry of the *Orr Ditch Decree*. The TRA requires the Truckee River to
25 be operated on the basis of Floriston Rates, as established in the 1915 General Electric Decree.
26 *United States v. The Truckee River General Electric Company*, Case No. 14861 (N.D. Cal. 1915)
27 ("*GE Decree*"). Floriston Rates can only be changed by agreement of the TRA parties. Any
28 water saved under TRA inures to the benefit of all other parties who have a right to divert on the

1 Truckee River. In addition to adjudicating water rights, the decree incorporated the 1935 Truckee
2 River Agreement as binding among the parties to that agreement (including the United States,
3 TCID, the Conservation District, and TMWA's predecessor, the Sierra Pacific Power Company
4 (SPPC)). (App./Pet. Joint-6.)

5 The negotiation and promulgation of the TROA was provided for in the Truckee-Carson-
6 Pyramid Lake Settlement Act, P.L. 101-618, 104 Stat. 3289, November 16, 1990 (the "Settlement
7 Act"). TROA is intended to replace the Truckee River Agreement of 1935, which is currently used
8 to operate the Truckee River. The Applications and Petitions are an effort by the TROA
9 proponents to change the current management scheme of the Truckee River and implement
10 TROA. Under TROA, the Change Petitions provide for redistribution of storage within Boca,
11 Independence, Stampede, and Prosser Reservoirs. TROA also allows for the exchange and
12 trade of water in all the upstream reservoirs in California in contravention of the TRA.

13 **III. ARGUMENT**

14 **A. Decision 1651 Is Not Supported By Substantial Evidence**

15 **1. The Record Does Not Support the Water Availability Analysis in** 16 **Decision 1651**

17 Every water right application submitted to the State Board must include "sufficient
18 information to demonstrate a reasonable likelihood that unappropriated water is available for
19 appropriation." Water Code §1260(k). The burden to show unappropriated water is available
20 rests with the applicant.

21 [W]hen one enters a field of water supply and seeks by appropriation to take
22 water from such supply on the claim that there is more than sufficient for all
23 reasonable beneficial uses by those who have the prior and preferential right, it
24 would seem to comport with the principles of fairness and justice that the
25 appropriator, in whatever way the issue may arise, should have the burden of
26 proving that such excess exists.

27 *Peabody v. Vallejo*, (1935) 2 Cal. 2d 351, 381. "The absence of a fully appropriated declaration
28 as to a particular stream system does not raise a presumption that water is available for
appropriation from that source . . . the applicant will continue to be responsible for showing that
unappropriated water is available to supply the applicant." SWRCB Order WR 98-08 at p. 22.

1 Here, Petitioners provided evidence that as a result of approved and pending applications
2 for unappropriated water in Nevada that there is in fact no unappropriated water remaining in the
3 Truckee River and its tributaries. The Petitioners' main expert on this issue was Mr. Chris
4 Mahannah. See TCID-267. Mr. Mahannah is of the opinion that the entire Truckee River and
5 tributaries in both California and Nevada are fully appropriated and the Applications should be
6 denied. TR Vol. IV at pp. 928:24-929:17; TCID-267 at p. 6. Tellingly, the TROA Parties did not
7 cross examine or offer any rebuttal testimony to the facts and opinions presented by Mr.
8 Mahannah. Mr. Mahannah in his written and oral testimony provides a complete and detailed
9 reason why the Truckee River and its tributaries are fully appropriated. TCID-267 at pp. 4-6.
10 Roughly 95 percent of the flow in Truckee River is derived in California before it enters the State
11 of Nevada. TR. Vol. IV p. 923:2-4 and 923:23-924:1; TCID-267 at p. 2; SWRCB-7 at pp. 3-39
12 through 42. Thus, any water appropriated in Nevada on the Truckee River has its origin principally
13 in California.

14 Decision 1651 recognizes that the Nevada State Engineer issued Nevada Permits
15 Number 48061 and 48494 to the Tribe "for all the unappropriated water of the Truckee River and
16 its tributaries" Decision 1651 at p. 50. The currently permitted use for instream flows to
17 Pyramid Lake under these permits does not provide for any additional unappropriated water and
18 there cannot be unappropriated water above the 477,851 permitted to the Tribe. In addition, the
19 Tribe's right is in essence all remaining water in the system that occurs in high water years. See
20 TCID-211 and 212 (providing that rights can only be exercised in years where there are high
21 flows); TCID-207 at p 56. With the Tribe's permits 48061 and 48494 and the remaining pending
22 applications in Nevada, there clearly is no remaining unappropriated water in the Truckee River
23 system, including the tributaries. This issue was not addressed by the TROA Parties, who have
24 not met its burden under Water Code §1375(d) to prove that unappropriated water is available.

25 Decision 1651 inappropriately creates additional unappropriated water based on the legal
26 fallacy that "to the extent that water sought in Reclamation's applications is water appropriated to
27 the Tribe in Nevada, the Tribe gives its consent to store that water upstream in Stampede and
28 Prosser Creek Reservoirs." Decision 1651 at p. 51. As discussed below, this supposed

1 "consent" to store already appropriated water is in direct violation of the Water Code and cannot
2 provide substantial evidence that there is unappropriated water available for appropriation under
3 water right Applications 31487 and 31488. Here, the only substantial evidence before the
4 SWRCB indicates there is not sufficient unappropriated water to supply the subject Applications.

5 **2. The Record Does Not Support The No Injury Determination in**
6 **Decision 1651**

7 A petition for change in a permit or license must "[i]nclude sufficient information to
8 demonstrate a reasonable likelihood that the proposed change will not injure any other legal user
9 of water." Water Code §1701.2 (d). Further,

10 [b]efore permission to make such a change is granted the petitioner shall
11 establish, to the satisfaction of the board, and it shall find, that the change will not
12 operate to the injury of any legal user of the water involved.

13 Water Code §1702 (emphasis added). Thus, the burden is on the petitioner in the proceeding
14 below to show there is no injury resulting from the above referenced Change Petitions.

15 In this proceeding there was a complete failure of proof regarding absence of injury. The
16 TROA Parties put on no substantive evidence regarding absence of injury and failed to meet their
17 burden under California law. The only substantive evidence of injury was presented by the
18 Petitioners (protestants below), which showed that through the operation of TROA, that the
19 proposed changes would cause shortages to the Newlands Project. There was extensive
20 testimony at the hearing related to evidence of increased shortages in the Newlands Project.
21 This centered mostly on the TROA EIR/EIS modeling results that indicates there will be additional
22 shortages to the Newlands Project as a result of the operation of TROA. It is figure 3.23 of the
23 EIR/EIS that represents these shortages, indicating nine years of additional shortages to the
24 Newlands Project over a 100 year period resulting from the operation of TROA. SWRCB-7.
25 These shortages occur in the dry years and approach as much as approximately 30,000 acre
26 feet. Figure 3.23 was the only evidence before the State Board regarding shortages. TR. Vol. II
27 at p. 446:14-17.

28 Here, Decision 1651 disregards the evidence related to water shortages to the Newlands
Project caused by TROA and the operation of the subject Applications and Petitions and comes

1 to the incorrect legal conclusion that there is no legal injury to junior water right owners. As
2 discussed below, this is legal error. Thus, Decision 1651 not only neglects to address the TROA
3 Parties complete failure to meet their burden under Water Code §1702 related to injury, but
4 disregards the only substantial evidence in the record, which indicates shortages and injury to
5 water users in the Newlands Project.

6 **B. Error in Law**

7 **1. Decision 1651 Improperly Shifts the Injury Analysis Burden, and Will**
8 **In Fact Cause Legal Injury to Existing Water Rights In Violation of**
9 **California Law**

10 As discussed above, under Water Code §1701.2(d) and §1702 before the State Water
11 Board can grant permission to make a change in an appropriative water right, it must find that the
12 change will not operate to the injury of any legal user of the water involved. The burden of
13 proving no injury clearly lies with the petitioner in the proceeding below. Here, Decision 1651
14 improperly shifts the burden to protestants to show that injury will result from the petitions to
15 change. It is clear error in law to disregard the burden placed on petitioners under Water Code
16 §§1701.2 (d) and 1702. Further, the evidence provided in this matter shows there will be legal
17 injury to a junior water right owners in the Newlands Project from the operation of these changes
18 under TROA.

19 Despite the fact that the only evidence offered showed shortages to the Newlands Project,
20 the SWRCB citing to *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 805
21 states that:

22 [a] person who claims that a proposed change will cause injury 'must show the
23 change will interfere with his or her *right* to use the water, whatever the source of
24 that right may be.' It is not enough for a person to show that he or she will receive
25 less water as a result of the change. A person claiming injury must demonstrate
26 that he or she has a right to the greater amount of water claimed and that the
27 proposed change will interfere with that right.

28 Decision 1651 at p. 22. Further, Decision 1651 states that "[a] downstream appropriator,
however, cannot require the owner of an upstream reservoir to release previously appropriated
water." *Id.* at 24; citing *State Water Resources Control Bd. Cases*, 136 Cal. App. 4th at p. 743.
However, the *State Water Resources Control Bd. Cases* has no application in this matter. In

1 *State Water Resources Control Bd. Cases* the rights at issue were contract water rights. The
2 contract was interpreted as providing no right to water that Congress has directed must be used
3 for other purposes (e.g. endangered species). Here, the parties in this matter agreed to operate
4 the reservoirs with certain release requirements under the TRA. In addition to the contractual
5 obligations in the TRA, the water rights owners in the Newlands Project own Claim 3 Water
6 Rights under the *Orr Ditch Decree*. Junior appropriators can be injured by changes in diversion
7 and beneficial use of senior water rights. See State Board Order WR 85-4 at p. 14. Further,
8 Congress has specifically provided that Newlands Project water rights must be protected through
9 the operation of TROA. See Settlement Act at §210(b)(13). (App./Pet. Joint-16)

10 The water users in the Newlands Project have an interest in the water that is released
11 under the TRA to make Floriston Rates. This interest results from the compromises which
12 resulted in the agreed upon construction of the upstream reservoirs which allowed for the storage
13 in the first place. After over 77 years of storage and releases under the TRA, the Newlands
14 Project water right owners have relied on the long standing diversion pattern and releases on the
15 Truckee River. The continuation of the release and flow of water was guaranteed by the TRA.
16 These same water right owners have an interest in the waters in Stampede Reservoir as well, in
17 accord with the existing permit. However, unlike *State Water Resources Control Bd. Cases*,
18 there is no contractual limitation to access the previously stored water.

19 California has long followed the "no injury" rule when changing the point of diversion,
20 purpose of use, or place of use. See *Scott v. Fruit Growers Supply Co.*, (1927) 202 Cal. 47, 55 ("it
21 is settled that even an appropriator of water may not change the point of diversion to the injury of
22 others."). The no injury rule applies to protect junior appropriators. SWRCB Order WR 85-4 at p.
23 14. A junior water right owner is afforded protection when there is a long standing division pattern
24 and flow that is changed by a senior water right owner.

25 It is generally recognized that one who makes substantial expenditures in
26 reliance on long-continued diversion of water by another has the right to have the
27 diversion continued if his investment would otherwise be destroyed.

27 *Natural Soda Products Co. v. Los Angeles* (1943) 23 Cal. 2d 193, 197.

28 When the owner maintains the dam but alters the flow to increase his profit at the

1 expense of those below him, or merely to be arbitrary, it is reasonable to require
2 that the alterations shall not injure those who have relied on the customary
operation of the dam in the past.

3 *Id.* at 198.

4 Here, testimony presented by Lyman McConnell, former TCID Project Manager, describes
5 the agreements that the parties reached in the TRA, including agreement as to storage of water
6 and required flow in the Truckee River. (TCID-282) Ernest C. Schank, President of the TCID
7 Board of Directors discussed TCID's reliance on Floriston Rate water provided by the TRA and
8 the negative impact to the Newlands Project that would result from the shortages projected by
9 TROA, especially in critical dry years. (TCID-281).

10 Where the creator of the artificial condition intended it to be permanent, and a
11 community of landowners or water users has been allowed to adjust itself to the
12 presence and existence of the artificial watercourse or other artificial condition,
13 acting upon the supposition of its continuance, and this has proceeded for a long
14 time beyond the prescriptive period, the new condition will be regarded as though
it were a natural one, its artificial origin being then disregarded by the law as it
has been by the community. The creator of the artificial watercourse will be held
to have dedicated it to the use of the community that has by long time become
adjusted to it.

15 *Chowchilla Farms, Inc. v. Martin* (1933) 219 Cal. 1, 17; citing *Wiel on Water Rights*, volume 1,
16 section 60.

17 A change in the flow of a stream that appears to be permanent usually leads to
18 costly adjustments by those interested, as they come to regard the artificial
19 condition as permanent. It is therefore reasonable that they should receive as
much protection as if the condition were natural.

20 *Natural Soda Products Co.* at p. 197.

21 Decision 1651 recognizes that the TRA is binding among the parties, including the same
22 parties to the present matter. Decision 1651 at p. 5. However, it fails to protect the historic flows
23 in the Truckee River as part of the agreements reached in the TRA, which results in shortages
24 that will negatively impact water users in the Newlands Project. The paradigm shift between the
25 TRA and TROA for the downstream users is the difference in pooling resources in the upstream
26 reservoirs under TRA and the discrete segregation of resources under TROA. Under the TRA,
27 the parties may save water by agreeing to reduce Floriston Rates. App/Pet. Joint-6, TRA, Article
28 III. That saved water may be stored in Lake Tahoe or Boca Reservoir, or may be exchanged into

1 Prosser Creek Reservoir. However, once that saved water is released, it is released for the
2 benefit of any party to TRA that has a current right to the water. Under TROA, water that is saved
3 is saved only for the benefit of the entity who intends to store the water. And the saving entity is
4 the only entity that may call on that water in the same water year. However, if the water is not
5 needed by the saving entity, the water continues to be stored, but is changed to be dedicated for
6 the benefit of one other single entity on the river to the detriment of all other entities which may be
7 entitled to divert under the *Orr Ditch Decree*. In fact, the water gets converted from a senior
8 priority water right to the most junior water right on the Truckee River, that is the Pyramid Lake
9 Paiute Tribe of Indians water rights under its applications 48061 and 48494, with a priority date of
10 1994. Only the Tribe may call on that converted water, and only the Tribe may use the water.
11 This is unreasonable and does not provide the fullest beneficial use of water under Water Code
12 §100. The water must flow in the river and cannot be diverted by any other water right owner on
13 the river, even if there is a current right to divert and there is insufficient flows in the river to satisfy
14 the decreed demands. In essence, the water that is deemed to be not needed by the one TROA
15 party is being transferred to another entity with the lowest priority on the river, a concept that is
16 completely alien to the TRA scheme.

17 The storage and release of water under the TRA is a long term agreed upon artificial
18 condition on the Truckee River. The parties to the TRA have committed the water to the storage
19 and flow patterns prescribed in the TRA, and the water users in the Newlands Project have made
20 investments and have come to rely on this historic flow pattern. The operation of the subject
21 Applications and Petitions completely undercuts the TRA, changes the storage and flow regime of
22 the TRA, resulting in shortages negatively impacting the Newlands Project. The determination in
23 Decision 1651 that the downstream users have no right to previously stored water and cannot be
24 injured is legally incorrect. See Decision at pp. 24 and 31.

25 **2. It Is Legal Error For Decision 1651 To Consider Water Appropriated In**
26 **Nevada As Available For A New Appropriation In California**

27 As discussed above, Decision 1651 incorrectly considers the Tribe's appropriation under
28 Nevada applications 48061 and 48494 as additional water available for appropriation and storage

1 in California. The Tribe's application for unappropriated water in Nevada were granted for
2 477,851 acre feet of water for instream/in situ use in the Truckee River, and do not allow for
3 storage. TCID-211 and 212. As a matter of law, the Tribe must file change applications to obtain
4 Nevada State Engineer approval in order for the water to be stored as anticipated by TROA. TR.
5 Vol. IV at p. 926:12-25; TCID-267 at pp. 7-8; see also TCID 208 at p. 12 (June 13, 2008 Nevada
6 State Court decision stating that under Nevada law the Tribe must obtain the Nevada State
7 Engineer's approval to store unappropriated water.) Importantly, the State Engineer in granting
8 these applications declared that the Truckee River and its tributaries are fully appropriated. See
9 TCID-211 and 212 ("This permit is issued for all the unappropriated water on the Truckee River
10 and its tributaries . . . [and is] "issued subject to any interstate allocation of the Truckee River";
11 TR. Vol. IV at p. 925:6-15. (emphasis added)

12 Before the State Board can grant a water right permit, it must find that there is
13 "unappropriated water available to supply the applicant." Water Code §1375(d). Water Code
14 §§1231 and 1232 provides an appropriation in Nevada made pursuant to TROA, as described in
15 §205 of the Settlement Act (Joint Ex.-16), shall have full force and effect in California. Section
16 210(a)(2)(B) of the Settlement Act provides that TROA "shall not take effect until the Pyramid
17 Lake Tribe's claim to the remaining water of the Truckee River which are not subject to vested
18 and perfected rights has been fully resolved in a manner satisfactory to the State of Nevada and
19 the Pyramid Lake Tribe." TROA §1.E.1. provides for the Tribe's appropriation under Nevada
20 applications 48061 and 48494, requiring this water to flow to Pyramid Lake. Joint Ex.-19. Further,
21 TROA also explicitly states that the Tribe's unappropriated water rights shall be confirmed by the
22 *Orr Ditch* Court for TROA to go into effect.

23 The Tribe's Nevada Permits 48061 and 48494 have full force and effect in California and
24 thus drastically limit the amount of unappropriated water available. Under California law, the
25 water that is already appropriated, including the Tribe's appropriation in Nevada, cannot be
26 considered for re-appropriation under a new and different California Application. Unappropriated
27 water does not include water being used pursuant to an existing right, whether the right is owned
28 by the applicant, or by another person." 23 CCR §695 (emphasis added). As acknowledged in

1 footnote 37 of the Decision 1651, there is no storage component to these rights, and under both
2 the Nevada Permits and TROA it must remain in the River and flow to Pyramid Lake. Further, the
3 Tribe cannot give its consent to store water under Nevada Permits 48061 and 48494. According
4 to the logic of the Decision 1651, anyone having an *Orr Ditch* Decree right could "consent" to
5 storage in an upstream reservoir including the Newlands Project Claim 3 rights. Consent to store
6 and the right to store are two completely different concepts. The Tribe has no right to store this
7 water and it is legal error to consider its water available for appropriation. Allowing the Tribe to
8 store its water, for which it has no permit, and the BOR to store this newly appropriated water
9 under Decision 1651 amounts to a doubling of the amount of water appropriated.

10 **3. The Proposed Operation Of Petitions for Change and Applications**
11 **Under TROA Circumvents The Change And Transfer Process and**
Allows Multiple uses in Violation of California Water Law

12 The Water Code provides provisions for the change in point of diversion, place of use, or
13 purpose of use (§1700 *et seq.*), for a temporary change (§1725 *et seq.*) defined as a transfer or
14 change of a water right for a period of less than one year (§1728), and for a long term transfer
15 (§1735 *et seq.*). Each of these requires some sort of notification to the State Board. "The public
16 has a right to rely on the Board's records and to a great extent the Board relies upon the holders
17 of rights that it administers for information to keep the Board's records current". SWRCB Order
18 WR 74-35 at p 1. Decision 1651 conditionally approves Change Petitions providing for multiple
19 and common places of diversion in Stampede, Independence, and Boca Reservoirs, as well as
20 multiple places of rediversion for uses under TROA. However, there is no intent to file anything
21 with the State Board related to any subsequent operation of these reservoirs under TROA,
22 including TROA's exchanges, trades, credit storage, and releases.

23 Through the operation of TROA water users in the Newlands Project will receive no notice
24 and no ability to determine where water is being stored and exchanged and what is causing
25 shortages. The SWRCB, without citation to any authority takes the position that "[a]dditional
26 notice or procedures are not generally required, however, when operations are conducted in
27 accordance with the terms of a permit or license." Decision 1651 at p. 27. This is in direct
28 contravention of the requirement to provide notice when there is a change in point of diversion,

1 place of use, or purpose of use, and is a clear violation of California water law.

2 Further, Decision 1651 recognizes that the Application 31487 and 31488 seek multiple
3 beneficial uses; including: domestic, municipal, industrial, irrigation, fish culture, recreational
4 uses, conservation of Pyramid Lake Fishery, fish and wildlife protection and enhancement
5 (including wetlands), power, and instream water quality enhancement. It then provides that under
6 the operation of TROA the water may be used "for any of these common purposes of use
7 requested in the applications and petitions." Decision 1651 at p. 59. This is a violation of Water
8 Code § 1700, which requires that "[w]ater appropriated under the Water Commission Act or this
9 code for one specific purpose shall not be deemed to be appropriated for any other or different
10 purpose."

11 **IV. CONCLUSION**

12 Petitioners hereby respectfully request that the Board rescind Decision 1651 and deny
13 water right Applications 31487 and 31488 and deny License 3723 (Application 5169), License
14 4196 (Application 9247), Permit 11605 (Application 15673), and License 10180 (Application
15 18006).

16
17 DATED: November 15, 2012

HANSON BRIDGETT LLP

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19 By: 

MICHAEL J. VAN ZANDT
NATHAN A. METCALF

Attorneys for Churchill County, City of Fallon,
and The Truckee-Carson Irrigation District

1 **SERVICE LIST OF PARTIES TO EXCHANGE INFORMATION**

2 **TRUCKEE CARSON IRRIGATION DISTRICT**

3 Michael J. Van Zandt
4 Hanson Bridgett LLP
5 425 Market Street, 26th Floor
6 San Francisco, CA 94015
7 (415) 777-3200
8 mvanzandt@hansonbridgett.com

**CALIFORNIA DEPARTMENT OF WATER
RESOURCES**

James Mizell
1416 Ninth Street, room 1118
Sacramento, CA 95814
(916) 653-8826
esoderlu@water.ca.gov

7 **CITY OF FERNLEY**

8 Paul G. Taggart
9 Taggart & Taggart, Ltd.
10 108 North Minnesota Street
11 Carson City, NV 89703
12 (775) 882-9900
13 paul@legaltnt.com

CHURCHILL COUNTY

Craig Mingay
Churchill County District Attorney's Office
165 N. Ada Street
Fallon, NV 89406
(775) 423-6561
cmingay@churchillda.org

12 **PYRAMID LAKE PAIUTE TRIBE
CONSERVATION**

13 Don Springmeyer
14 Christopher W. Mixson
15 Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP
16 3556 E. Russell Road, 2nd Floor
17 Las Vegas, NV 89120
18 (702) 341-5200
19 dspringmeyer@wrslawyers.com
20 cmixson@wrslawyers.com

**WASHOE COUNTY WATER
DISTRICT**

Michael A. T. Pagni
P.O. Box 2670
Reno, NV 89505
(775) 788-2020
mpagni@mcdonaldcarano.com

18 **TRUCKEE MEADOWS WATER AUTHORITY**

19 Gordon H. DePaoli
20 Woodburn and Wedge
21 6100 Neil Road, #500
22 Reno, NV 89511
23 (775) 688-3000
24 gdepaoli@woodburnandwedge.com
25 dferguson@woodburnandwedge.com
26 jill.willis@bbklaw.com
27 stefanie.hedlund@bbklaw.com

CITY OF FALLON

Michael F. Mackedon
P.O. Box 1203
Fallon, NV 89407
(775) 423-2106
fallonlaw@phonewave.net

U.S. Bureau of Reclamation

Stephen R. Palmer
Office of the Solicitor
Department of Interior
2800 Cottage Way, Room E-1712
Sacramento, CA 95825
(916) 978-5683
steve.palmer@sol.doi.gov

1 STATE OF NEVADA
John W. Hoffman
2 429 West Plumb Lane
Reno, NV 89509
3 (775) 322-4081
office@htag.reno.nv.us
4

5 Daniel M. Fuchs
Deputy Attorney General
6 State of California
Department of Justice
7 1300 I Street, Ste. 125
P. O. Box 944255
8 Sacramento, CA 94244-2550
daniel.fuchs@doj.ca.gov
9

10
11 Dated: November 15, 2012



Keith Kiley

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