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

IN THE MATTER OF WATER RIGHT  
APPLICATIONS 31487 LITTLE  
TRUCKEE RIVER, and 31488  
PROSSER CREEK AND PETITIONS  
TO CHANGE APPLICATION NOS.  
5169 BOCA RESERVOIR, 9247  
INDEPENDENCE LAKE, 15673,  
STAMPEDE RESERVOIR, 18006  
PROSSER CREEK RESERVOIR,  
FILED BY THE UNITED STATES  
DEPARTMENT OF THE INTERIOR,  
BUREAU OF RECLAMATION,  
TRUCKEE MEADOWS WATER  
AUTHORITY, AND WASHOE  
COUNTY WATER CONSERVATION  
DISTRICT TO IMPLEMENT THE  
TRUCKEE RIVER OPERATING  
AGREEMENT

**JOINT CLOSING BRIEF FOR THE TRUCKEE  
CARSON IRRIGATION DISTRICT,  
CHURCHILL COUNTY, NV, AND CITY OF  
FALLON, NV.**

**Date: July 21, 2010**  
**Time: 9:00 a.m.**  
**Dept.: Coastal Hearing Room**

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1 **I. INTRODUCTION**

2 The hearing related to the Truckee River Watershed and the above referenced  
3 Applications and Change Petitions was held before the State Water Resources Control  
4 Board ("State Board") on July 21 - July 23, July 28 and 29, 2010. The January 30,  
5 2007 Notice of the Petitions and Applications and the April 19, 2010 Notice of Hearing  
6 raised several issues that the State Board believed would be key in this proceeding,  
7 including: 1) injure any legal user or water, 2) is water available to appropriate, 3) will  
8 the proposed change in effect initiate a new right, 4) the jurisdiction of the State Water  
9 Board, 5) what conditions, if any, should the State Board adopt? At the end of the  
10 hearing, the State Board allowed for closing briefs. The Protestants to this matter, the  
11 Truckee Carson Irrigation District ("TCID"), Churchill County, Nevada, and City of  
12 Fallon, Nevada, hereby file their Joint Closing Brief.

13 **II. BACKGROUND**

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

26 The factual and legal background related to the management of the Truckee  
27 River Basin and associated water rights is long and complex. This background was  
28 fully provided to the State Board in the Protests submitted related to these Applications

1 and Petitions. See SWRCB - 1 through 6. However, it is critical for the State Board to  
2 understand the impact of the operation of the Applications and Petitions through TROA  
3 on the present decrees and agreements which manage the operation of the Truckee  
4 River.

5 In 1913, the United States filed an action to quiet title to the waters of the  
6 Truckee River and its tributaries, including waters flowing in California that entered  
7 Nevada. This action was brought primarily on behalf of the farmers in the Newlands  
8 Project for irrigation of lands withdrawn under the Reclamation Act of 1902, and for the  
9 benefit of the Tribe for irrigation on the Indian Reservation. *Nevada v. US.*, 463 U.S.  
10 110, 114-117 (1983). This litigation resulted in the *Orr Ditch Decree, United States v.*  
11 *Orr Water Ditch Co.*, CV-N-73-0003 LDG, (D. Nev. 1944) ("*Orr Ditch Decree*"), which  
12 adjudicated water rights not only in Nevada but also in California, as those rights  
13 related to the Newlands Project.

14 An important component of the *Orr Ditch Decree* was the execution of the  
15 Truckee River Agreement ("TRA") in 1935. For the last 75 years, the Truckee River  
16 has been managed by the parties to the TRA, along with the Federal Water Master,  
17 appointed to administer the *Orr Ditch Decree*. The TRA set forth the principles under  
18 which the Truckee River would be operated and allowed for the stipulated entry of the  
19 *Orr Ditch Decree*. The TRA requires the Truckee River to be operated on the basis of  
20 Floriston Rates, as established in the 1915 General Electric Decree. *United States v.*  
21 *The Truckee River General Electric Company*, Case No. 14861 (N.D. Cal. 1915) ("GE  
22 Decree"). Floriston Rates measure the rate of flow in the Truckee River at the Iceland  
23 Gage, and consist of an average flow of 500 cubic feet per second (cfs) each day  
24 during the year, commencing March 1 and ending September 30 of any year, and an  
25 average flow of 400 cfs each day from October 1 to the last day of February of the next  
26 year.

27 The TRA was used as the basis for a stipulation that allowed the entry of the  
28 final *Orr Ditch Decree*. The signatories to the TRA include most of the same parties to

1 this proceeding: The United States of America; TCID; WCWCD; Sierra Pacific Power  
2 Company ("Sierra") who is the predecessor to TMWA, and such other users of the  
3 waters of the Truckee River and/or its tributaries, known as Parties of Fifth Part. The  
4 *Orr Ditch* Decree expressly incorporates the terms of the TRA, including the Floriston  
5 rate structure.

6 The Newlands Project is a reclamation project in western Nevada authorized for  
7 the reclamation and irrigation of land in the Carson and Truckee River watersheds. The  
8 Newlands Project contains the Lake Tahoe Dam and Derby Diversion Dam on the  
9 Truckee River, the Truckee Canal, Lahontan Dam and Reservoir, the Carson Diversion  
10 Dam, four pumping plants, and over 900 miles of canals, laterals and drains. The  
11 Newlands Project contains approximately 73,700 acres of water-righted lands of which  
12 approximately 59,000 acres are currently being irrigated with a diversion requirement  
13 of approximately 300,000 acre-feet. Water supplies for the Newlands Project are  
14 derived from direct diversions on the Truckee and Carson Rivers as well as releases of  
15 previously stored water in Donner Lake, Lake Tahoe, Prosser Creek Reservoir,  
16 Stampede Reservoir, Boca Reservoir, and Lahontan Reservoir. The date of priority for  
17 water rights in the Newlands Project in the Truckee River is 1902, as adjudicated in the  
18 *Orr Ditch* Decree and provided by Claims 3 and 4 of the Decree.

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

28



1 **III. ARGUMENT**

2 The burden is on Petitioners to show there will be no injury as a result of the  
3 proposed change and on the Applicant to prove there is unappropriated water  
4 available. Water Code §§1702 and 1375(d). In this proceeding there was a complete  
5 failure of proof regarding either issue. The Petitioners put on no substantive evidence  
6 regarding absence of injury and failed to meet their burden under California law. In  
7 fact, the only substantive evidence of injury was presented by the Protestants, which  
8 showed that through the operation of TROA that the proposed changes would cause  
9 shortages to the Newlands Project. Further, the Protestants provided evidence that as  
10 a result of approved and pending applications for unappropriated water in Nevada,  
11 which was not considered by the Applicant, that there is in fact no unappropriated  
12 water remaining in the Truckee River and its tributaries. Finally, in rebuttal, Protestants  
13 provided evidence indicating critical flaws in the Water Availability Analysis conducted  
14 by the Applicant, which should not be relied on by the State Board. As a result of this  
15 failure of proof, and the resulting injury to Newlands Project water rights, the Petitions  
16 and Applications should be denied.

17 The Petitioners proposed changes, allowing for exchanged diversions in  
18 Stampede, Independence, and Boca Reservoirs, amounts to the initiation of a new  
19 right under California law. Protestants provided clear evidence that the redistribution  
20 of storage over a large geographic scale to the upstream reservoirs that have much  
21 larger and independent contributing watershed has the potential to expand water  
22 availability or yield and will initiate a new right. This issue is even more problematic  
23 when considering the proposed storage under TROA in these reservoirs of *Orr Ditch*  
24 Decree water, including Claim 3 water, effectively creating a "super water right."

25 The general approach of the Applicants and Petitioners in this case was to  
26 direct the attention for the State Board to TROA and its associated Environmental  
27 Impact Report/Environmental Impact Statement ("EIR/EIS") to support the claim of  
28 benefits. However, when the discussion turned to injury or problems with the operation

1 of the proposed project, the proponents want the State Board to only look at the  
2 subject Applications and Petitions and to disregard their operation under TROA. It  
3 cannot be denied that the subject Applications and Petitions and the operation of  
4 TROA are one an the same and must be considered together. However, what the  
5 project proponents failed to address in this hearing is the operation of TROA. Once  
6 the water is stored under the Change Petitions, TROA allows for this water to be  
7 exchanged, traded, released, and credit stored under the operating rules of TROA.  
8 The Petitioners admitted that this would occur without any further proceedings before  
9 this Board. This is a clear violation of California's transfer and change requirements  
10 and should not be allowed.

11 Before TROA or Applications and Petitions can go into effect, the *Orr Ditch*  
12 Court must approve TROA and modify the Decree. Further, TROA specifically  
13 "supersedes" the TRA, which is also required for the operation of the Change Petitions.  
14 During this hearing there were a number of outstanding issues raised related to the  
15 operation of these Petitions and Applications under TROA and the resulting injury to  
16 existing rights that will not be finally resolved until the *Orr Ditch* Court acts. As a result,  
17 it is the Protestants' position that the State Board can not fully act until the issues with  
18 TROA are resolved, and that it is a better use of administrative and judicial resources  
19 to allow the *Orr Ditch* court to proceed first.

20 The evidence of the supposed benefits from the Applications and Petitions  
21 comes almost exclusively from TROA EIR/EIS and the associated Truckee River  
22 Operating Model ("TROM") analysis. However, as the Protestants clearly showed,  
23 TROM is fatally flawed and cannot be relied upon to make critical water resource  
24 decisions. Finally, to the extent that the State Board grants the Applications and  
25 Petitions, the Protestants herein provide a number of conditions for approval that will  
26 help protect the water rights in the Newlands Project

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1           **A.     Petitioners Failed To Establish That The Proposed Changes Will Not**  
2           **Injure Existing Water Users, And Newlands Project Water Rights**  
3           **Will In Fact Be Injured**

4           California has long followed the “no injury” rule when changing the point of  
5           diversion, purpose of use, or place of use. See *Scott v. Fruit Growers Supply Co.*,  
6           (1927) 202 Cal. 47, 55 (“it is settled that even an appropriator of water may not change  
7           the point of diversion to the injury of others.”). The no injury rule applies to protect  
8           junior appropriators. SWRCB Order WR 85-4 at p. 14. A petition for change in a permit  
9           or license must “[i]nclude sufficient information to demonstrate a reasonable likelihood  
10          that the proposed change will not injure any other legal user of water.” Water Code  
11          §1701.2 (d). Further,

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

15          Water Code §1702 (emphasis added). Thus, the burden is on the Petitioners to show  
16          there is no injury resulting from the above referenced Change Petitions.

17          In this proceeding there is a total lack of evidence to support any finding that the  
18          proposed changes designed to implement TROA will not injure any legal water user.  
19          Under Water Code §1702, the Petitioners failed to establish that the change will not  
20          operate to the injury of any legal user, and the Petitions should be denied. The only  
21          evidence of injury was presented by the Protestants, and it showed shortages to the  
22          Newlands Project through the operation of TROA and the proposed changes.

23                   **1.     Petitioners Did Not Meet Their Burden Under Water Code**  
24                   **§1702**

25          The Petitioners offered three witnesses who were designated to address the  
26          issue of “no injury.” However, none of these witnesses conducted an independent  
27          analysis of injury, and appeared to rely mostly on the supposed protections of TROA  
28          as preventing injury. Mr. Marc Van Camp, the Petitioners’ main witness on the issue of  
injury, conducted no independent analysis of injury to other water users. Specifically,

1 he conducted no analysis related to the EIS/EIR or the modeling efforts. TR. Vol. I, p.  
2 254:18-23.<sup>1</sup> Likewise, Mr. Shahroody conducted no actual analysis of potential injury  
3 to existing water rights, apparently relying only on experience in determining there  
4 would be no injury from the operation of the change petitions. *Id.* at p. 259:10-22.

5 Although Mr. Van Camp acknowledges that the purpose of the Change Petitions  
6 are to implement TROA (TR. Vol. I, at p. 226: 5-16), he does not consider the  
7 operation of TROA in his injury analysis. Mr. Van Camp claims that the Change  
8 Petitions deal with previously stored water which is junior to other users, and restorage  
9 of water is done under existing priorities, therefore there is no injury. *Id.* at pp. 227:19-  
10 228:10; 238:15-239:4. However, as is evident on the face of the Change Petitions, as  
11 well as testified to by several witnesses, these changes are designed for one reason,  
12 to implement TROA. Water Code §1702 requires that the “petitioner shall establish . . .  
13 that the change will not operate to the injury of any legal user of the water involved.”  
14 Thus, the State Board must look at the operation of the changes, and that operation is  
15 TROA. This includes not only the changes that appear on the face of the Petitions, but  
16 also the water exchanges, trades, releases, and carryover storage anticipated by  
17 TROA. Joint Ex.-19. As discussed below, the only evidence presented related to the  
18 operation of TROA shows shortages to the Newlands Project.

19 In his injury analysis Mr. Van Camp also failed to consider the operation of  
20 TMWA’s change applications filed in Nevada, which purport to store water in the  
21 subject reservoirs. *Id.* at p. 229:11-230:2; See TCID-233 (indicating storage of TMWA’s  
22 water in the California upstream reservoirs).<sup>2</sup> The operation of TROA includes the

23 <sup>1</sup> “TR” refers to the transcripts of the Truckee River Hearing conducted on July 21 - July 23, July 28 and  
24 29, 2010. Each day of the hearing is represented in an independent volume of the transcripts, which are  
25 page numbered sequentially. Citation to the transcripts includes the volume number, page numbers and  
26 line numbers. For example, TR. Vol. I at p. 254:18-23 represents transcripts volume I at page 254, lines  
27 18 through 23.

28 <sup>2</sup> Mr. Van Camp relies on Water Code §§1230 - 1231 for his apparent position that the TMWA change  
applications do not have to be accounted for under the subject change petitions. TR. Vol. I, p. 229:23-  
230:2; TMWA 3-0 at ¶ 35, p. 14. However, the cited Water Code provisions do not allow for the State  
Board to ignore the impact of the TMWA change applications in considering the operation of the  
proposed changes. As indicated by its legislative history, this statutory provision was designed to  
protect the priority of existing water rights used to implement TROA, an issue not contested in these

1 storage and redistribution of TMWA's water under the Nevada change applications in  
2 these reservoirs. See Erwin testimony, TR. Vol. II at pp. 512:11-513:5; Phillips  
3 testimony, *Id.* at p. 528:24-529:22. In fact, as discussed below, it is the exercise of  
4 TMWA's rights that the TROA proponents claim are causing the shortages to the  
5 Newlands Project. Mr. Van Camp cannot adequately analyze the issue of injury when  
6 he does not consider the operation of TROA and the TMWA water rights.

7 Dr. Kenneth W. Knox, expert for the Protestants, was critical of the lack of injury  
8 analysis related to the Change Petitions. He states that:

9 The change petitions appear to be wholly reliant upon TROA. No  
10 additional or independent water resource engineering or analyses are  
11 evident that describe in detail the change in storage/release patterns, the  
12 amount of water physically and legally available at each of the discrete  
13 points of diversion, storage, and rediversion that are requested, the  
14 change in return flow amounts, timing, and location, and other critical  
factors that must be identified and quantified to demonstrate the requested  
change does not expand or enlarge the existing licenses/permit beyond  
their original adjudication to the detriment and injury of existing water  
rights in the Truckee River system.

15 Knox Opinion No 7, TCID-276B at p. 9. By failing to conduct an adequate analysis  
16 related to injury, the Petitioners have failed to meet their burden under Water Code  
17 §1702 and the Change Petitions should be denied.

18 **2. The Self Serving TROA Administrative Procures Do Not**  
19 **Establish That The Proposed Changes Will Not Operate To**  
20 **The Injury Of Any Legal User**

21 The standard answer by the Petitioners when addressing the issue of injury is  
22 to point to the administrative procedures of TROA as providing a remedy if there is an  
23 injury to an existing water right. See Van Camp testimony at TR. Vol. I, p. 228:11-18;  
24 Buchanan testimony *Id.* at p. 236:11-237:15. Mr. Shahroody claims that not only  
25 TROA, but also the Settlement Act (Joint Ex. 16), protects vested rights. *Id.* at pp.  
26 232:7-234:3.<sup>3</sup> The circular argument is that the Change Petitions designed to

---

27 proceedings. See AB 1327, Assembly Committee On Water, Parks And Wildlife, April 3, 2001 (TCID-  
28 284).

<sup>3</sup> The Settlement Act § 210(b)(13) states that nothing in the Act is intended to affect *Orr Ditch* rights or  
alter or conflict with existing rights. Joint Ex. 16. This does not mean that existing rights are not injured

1 implement TROA cannot injure existing rights because TROA is supposed to protect  
2 such rights. This self serving non-answer does not establish that the proposed  
3 changes will not operate to the injury of any legal user as required under Water Code  
4 §1702.

5 Further, the provisions of TROA most relied on by the proponents, §§1.C and  
6 2.B, only apply if there has already been an injury and the injured party seeks a  
7 remedy. TMWA 3-0 at ¶ 32, p. 13; USBR-7 at p.43; USBR-5 at p. 3; see also TROA  
8 §1.C.2, Joint Ex. 19 (providing a remedy once an owner of a water right does not  
9 receive amount of water they are entitled to). The process of appointing the TROA  
10 Administrator is at best biased, and does not ensure that Newlands Project water right  
11 owners will receive a fair remedy even after an injury has occurred. The person who  
12 hears a complaint is the Administrator, who is nominated by the TROA signatories with  
13 control by the Sovereign Parties. TROA §2.A.2, Joint Ex. 19; Buchanan testimony at  
14 TR. Vol. I, pp. 268:9-269:1; 278:8-279:8 (indicating that the TROA Administrator is  
15 nominated by nominating committee composed of one representative of the signatory  
16 parties, who may also petition for the Administrator's removal); McConnell testimony at  
17 TR. Vol. IV at pp. 856:21-858:10. Water Code §1702 requires the Petitioner to  
18 establish that the change will not operate to the injury of any legal user, not to show  
19 that there is an available remedy for an existing injury. Here, there is a failure of proof  
20 under Water Code §1702 and the Petitions should be denied.

21 **3. The Only Evidence Presented At The Hearing Indicated Injury**  
22 **To The Newlands Project As A Result Of Shortages Caused**  
23 **By TROA**

24 There was extensive testimony at the hearing related to evidence of increased  
25 shortages in the Newlands Project. This centered mostly on the TROA EIR/EIS

---

26 as a result of the operation of the Change Petitions through TROA. The State Board has an  
27 independent obligation to ensure there is no injury. Further, TROA must be approved by the *Orr Ditch*  
28 Court and the Decree modified to allow for the operation of TROA and the proposed changes. See  
Settlement Act §205(a)(4), Joint Ex. 16. Thus, as discussed below, it would appear a more prudent  
approach to allow the *Orr Ditch* Court to act first to ensure the Settlement Act requirements to protect  
existing decreed rights are accomplished through TROA and to allow for the modification of the Decree, if  
appropriate.

1 modeling results that indicates there will be additional shortages to the Newlands  
2 Project as a result of the operation of TROA. It is figure 3.23 of the EIR/EIS that  
3 represents these shortages, indicating nine years of additional shortages to the  
4 Newlands Project over a 100 year period resulting from the operation of TROA.  
5 SWRCB-7. These shortages occur in the dry years and approach as much as  
6 approximately 30,000 acre feet. Figure 3.23 was the only evidence before the State  
7 Board regarding shortages. TR. Vol. II at p. 446:14-17. Although the Protestants are  
8 critical of the modeling effort related to the TROA environmental review and would not  
9 quantitatively rely on the results derived, the shortages analysis conducted by the  
10 TROA parties at a minimum shows a disturbing qualitative trend of increased  
11 shortages resulting from TROA, especially in critical dry years.

12         Although it is Petitioners' burden to establish the change will not cause injury,  
13 witnesses for Protestants not only provided evidence of how increased shortages  
14 directly implicates Newlands Project water rights, they showed how these increased  
15 shortages will negatively impact farming operations and the agriculturally dependent  
16 economy of Lahontan Valley. *TCID-281; Churchill County-1*. Dr. Kenneth Knox  
17 provided expert testimony that, based on his review of the EIR/EIS, shortages to water  
18 rights in the Newlands Project will periodically occur by implementation of TROA, as  
19 determined through application of TROM. TR. Vol. IV, pp. 945:22-946:2; *see also* Knox  
20 Opinion No 10, *TCID-276B* at p. 12. Mr. Chris Mahannah also testified that the  
21 Petitioner's own evidence, i.e., the results of the model show increased shortages. TR.  
22 Vol. V, p. 1093: 4-5. Dr. Knox is of the opinion that "TROA does adversely impact the  
23 senior water rights owned/operated in the Newlands Project." Knox Opinion No 6,  
24 *TCID-276B* at p. 8. Further, he stated that "[i]n their present state the applications and  
25 petitions for change will impose additional shortages in time, amount and location that  
26 will injure vested water rights in the Truckee River system and should be denied." TR.  
27 Vol. IV, pp. 946:11-14; *see also* Knox Opinion No 4, *TCID-276B* at p. 7. Dr. Knox was  
28 particularly troubled by the increased shortages that will be caused by implementation

1 of TROA as described in figure 3.23 of the EIR/EIS. *Id.* at 974:19-976:1.

2 Potential reasons for the shortages were provided based on the ability under  
3 TROA to provide carry over and integrated storage, including alternate points of  
4 storage and rediversion. *Id.* at 992:2-994:9. Further, TROA allows for the storage and  
5 carry over of Claim 3 Water Quality Settlement Agreement water rights with a 1902  
6 priority in upstream reservoirs, providing a firmer yield than the similarly situated  
7 remaining Claim 3 rights in the Truckee Division of the Newlands Project. TR. Vol. V,  
8 pp. 1090:12-1091:5. Additionally, as discussed in detail below, the storage of the  
9 Tribe's unappropriated water, and the application of the 25 percent rule and the  
10 consumptive use component proposed under TROA, will result in injury to Newlands  
11 Project water rights. See generally Mahannah Rebuttal Report, TCID-287 at pp. 16-17.

12 The Petitioner's witnesses also testified that TROA showed shortages to the  
13 Newlands Project. Tellingly, Kenneth Parr, BOR Area Manger, admitted that even  
14 though he has a duty to protect the water right owners in the Newlands Project, the  
15 EIR/EIS concludes that TROA will cause shortages based on the methodology that  
16 was used. TR. Vol. I, pp. 74:5-75:1. Likewise Mr. Strekal, a fish and wildlife biologist  
17 for the Bureau of Indian Affairs, acknowledged that the model results showed  
18 shortages to the Newlands Project (TR. Vol. II at pp. 398:9--399:16.) and that in fact  
19 these model results are the only information related to shortages in the record (*Id.* at p.  
20 446:14-17).

21 Petitioners attempted to distance themselves from their own model results. For  
22 example, Mr. Strekel claimed effects of shortages on Newlands Project would not be  
23 discernible on a long-term average, identifying a difference on average of 40 acre feet  
24 per year. *Id.* at p. 362:15-23. However, on cross examination he admits that averaging  
25 the shortages diminishes the impact, and that increased shortages in the nine dry  
26 years is much more then 40 af. *Id.* at p. 399:8-25. Further, he admits that if shortages  
27 reduce a farmers ability to irrigate the impact can be severe. *Id.* at p. 400:1-8.

28 The Petitioners also attempt to demonstrate that the shortages to the Newlands



1 Project are strictly from the exercise of senior water rights. However, there is nothing  
2 in the analysis associated with figure 3.23 in the EIR/EIS that indicates this is strictly  
3 the source of the shortages. At best, the testimony related to this issue was non-  
4 committal. Mr. Strekal states initially that less water is available as a result of  
5 upstream senior water right holders (*Id.* at p 362: 7-13), but later testifies that there are  
6 a lot of factors that need to be considered when looking at figure 3:23 (*Id.* at 400:9-  
7 401:7), and that it is not a function of just senior water rights, but also hydrology (*Id.* at  
8 p. 409:9-13). Mr. Parr could only testify that “there's a relationship” between the full  
9 utilization of senior water rights and shortages demonstrated in the EIS/EIR. TR. Vol I  
10 at p. 97:12-17.

11 Here, not only have the Petitioners failed to meet their burden under Water  
12 Code §1702, but the only substantive relevant evidence presented to the State Board  
13 shows that the operation of these proposed changes will result in injury from shortages  
14 caused by the operation of TROA. Therefore, the State Board should deny the  
15 Change Petitions.

16 **4. Application of the 25 Percent Rule and Consumptive Use Rate**  
17 **Under TROA Use Will Cause Injury To Existing Rights**

18 The *Orr Ditch* Decree under the so called “25 percent rule” allows a water right  
19 owner to take up to 25 percent of their water in any given month for irrigation use. *Orr*  
20 *Ditch* Decree pp. 87 and 88, Joint Ex.-7. However, the Petitioners’ plan under TROA  
21 to convert water to storage at up to 25 percent in any month, not based on an irrigation  
22 schedule. The 25 percent rule was not intended to apply to storage or for the  
23 proposed uses under TROA. Further, this operation will result in injury to the  
24 Newlands Project as a result of the changes in the historic return flow pattern.

25 The written testimony of TMWA’s witness Don Mahin describes purchase of *Orr*  
26 *Ditch* Decree water rights from the Truckee Division as part of the Water Quality  
27 Settlement Agreement (“WQSA”) and the supposed benefit of credit storing this water  
28 under TROA. TMWA 4-0. Mr. Mahin testified that the plan is to store this water within

1 a four month period at a rate of 25 percent per month, which Mr. Mahin believed was  
2 not limited to irrigation use. TR. Vol. III. at pp. 619:18-622:10. However, on cross  
3 examination, Mr. Mahin was confronted with two general provisions of the *Orr Ditch*  
4 Decree that expressly limit the 25 percent rule to water for irrigation. *Id.*; see *Orr Ditch*  
5 Decree pp. 87 and 88, Joint Ex.-7 (expressly applying the 25 percent rule to “use for  
6 irrigation” and “when needed for irrigation.”) .

7 Mr. Mahannah in his rebuttal report agreed that the 25 percent rule applies only  
8 to irrigation water. TCID-287 at pp. 17; TR. Vol. V at p. 1091:17-1092:18. He believes  
9 the intent was to allow individual small farmers to call on their direct diversion irrigation  
10 rights at a rate of 25 percent per month to manage their water supply for farming  
11 practices. *Id.* Here, there could be 25 percent of the former irrigation right consumed  
12 during any month of the year, particularly during the fall, winter and spring seasons  
13 when crops are dormant or outdoor watering is not occurring.<sup>4</sup> “A direct [irrigation]  
14 diversion right can be converted to a storage right only to the extent there is no change  
15 in rate of diversion from the stream or in the period of the year during which the water  
16 is diverted.” State Water Rights Board Decision No. D-940 at p. 5 (1959). Mr.  
17 Mahannah opined that allowing one to store 25 percent in any one month without  
18 considering the initial use of that right and its respective consumptive use or return flow  
19 patterns has the potential to harm downstream rights. TCID-287 at p. 17; TR. Vol. V at  
20 pp. 1091:17-1092:18. Moreover Mr. Mahannah opined that allowing large blocks of  
21 M&I or instream flow water to be diverted or put into storage during the critical summer  
22 months under the 25 percent rule violates the Decree and is a cause of shortages. *Id.*

23 Further, Mr. Mahannah believed that providing additional upstream carry over  
24 storage for rights acquired under the WQSA and the Tribe’s unappropriated water  
25 rights in Nevada will effectively enhance the yield and reliability of water rights having

26 \_\_\_\_\_  
27 <sup>4</sup> Not only is this an issue with the WQSA water, but also with the operation of the Tribe’s Claim 1 and 2  
28 water, which under the TROA parties interpretation of the rule, would allow the Tribe to call on their large  
blocks of water (30,000 acre foot) at a 25% per month demand, effectively requiring all flow to pass  
Derby Dam at certain times of the year. *Id.*

1 an identical or junior priority as the 1902 Newlands Project rights. *Id.* at p. 16; TR. Vol.  
2 V at pp. 1090:12-1091:15. Instead, the timing of storage should mimic the historical  
3 return flows in time, location and amount so as to protect the existing rights of the  
4 Newlands Project. TCID-287 at p. 17. A potential solution according to Mr. Mahannah  
5 is to provide upstream storage to the Newlands Project to prevent the shortages  
6 discussed above. TCID-287 at p. 18; TR. Vol. V at pp. 1093:14-17, and p. 1096:7-16.

7 In a related issue, Mr. Van Camp claims no injury will result from the Change  
8 Petitions because the storage will remain within the quantities and seasons of use of  
9 the existing licenses and permits. TMWA 3-0 ¶ 34 at p. 14. However, as discussed  
10 above, TMWA's change applications will be stored in these reservoirs and exchanged  
11 under the TROA management system. Under the TRA and the *Orr Ditch Decree* this  
12 water has historically been released at up to 25 percent per month in the irrigation  
13 season as part of the Floriston rate water without storage and carryover ability. Mr.  
14 Van Camp failed to include the impact of proposed changes to TMWA's water rights  
15 under TROA in his analysis. TR. Vol. I at p 229:11-230:2. The only evidence related to  
16 the operation of TROA presented to the Board indicates shortages to the Newlands  
17 Project. Here, any former *Orr Ditch Decree* irrigation water rights, including TMWA  
18 and Fernley credit storage water and WQSA water rights, should not be stored at 25  
19 percent per month.

20 The TMWA water rights have been converted to municipal and industrial (M&I)  
21 use in some cases over 54 years ago. TCID-244B at p. 1 and Table 1. The conversion  
22 to M&I with a 50 percent return flow along with a 1.72 dedication rate ("58% Rule")  
23 historically protected down stream users. TCID-244B at p. 3. As argued by Mr.  
24 Mahannah, in order to currently protect downstream water users, these rights, which  
25 TMWA now proposes to store and use subject to these Change Petitions under the  
26 TROA regime, should be limited to the actual historical M&I consumptive use rate of 50  
27 percent. TCID-244B at pp. 6-7; TCID-287 at p 18; TR. Vol. IV at p 922:5-9.<sup>5</sup> Timing of

28 <sup>5</sup> If the State Board should elect to proceed with an irrigation consumptive use value, a 50 percent value

1 storage should mimic historical M&I consumptive use pattern. Further, the 25 percent  
2 rule referenced in the *Orr Ditch* Decree does not and should not apply to storage of the  
3 consumptive use portion of these non-irrigation rights. *Id.*

4 The Petitioners' response to this issue is generally that the Nevada State  
5 Engineer has allowed a diversion rate at 25 percent. TR. Vol. III at p. 622:1-10; TR.  
6 Vol. V at p 1096:17-1098:1. Further, the TROA proponents also rely heavily on Ruling  
7 6035 by the Nevada State Engineer (TMWA 1-5) granted TMWA's change  
8 applications, which is currently on appeal. Van Camp testimony, TR. Vol. I at pp.  
9 228:19-229:10. This is the same argument raised by TMWA in its July 15, 2010  
10 motion to exclude testimony, expert reports, and exhibits, claiming the State Board  
11 need not address issues already addressed by the Nevada State Engineer. As argued  
12 by TCID in its opposition brief of July 21, 2010, the State Board has an independent  
13 obligation to address specific issues under the California Water Code, including the  
14 issue of injury, and cannot defer to other non-final administrative proceedings in  
15 Nevada.

16 There is no final decision regarding TMWA's water rights and Nevada Ruling  
17 6035 has no res judicata effect preventing current litigation of this issue. As Mr.  
18 Mahannah points out, the *Orr Ditch* Court has not addressed this issue and it is not  
19 uncommon for the Court to overrule the State Engineer. TR. Vol. V at pp. 1102:21-  
20 1103:3. Ultimately, however, the *Orr Ditch* Court must address these issues directly  
21 related to administration of the Decree and decreed water rights, providing another  
22 reason why the State Board should wait to act on these Petitions until the issues  
23 involving the *Orr Ditch* Decree, including its modification to allow for these proposed  
24 changes under TROA, have been addressed. See TROA §12.A.4(4), Joint Ex.-19  
25 (providing TROA shall be submitted to the *Orr Ditch* Court for approval and  
26 "satisfactory confirmation of the consumptive use portion of Changed Diversion  
27 Rights.") Otherwise, there is a risk of inconsistent determinations related to the same  
28 is still more realistic based on actual irrigation practices in the Truckee Meadows. See TCID-280.

1 water rights.

2 **B. The Truckee River And Its Tributaries Are Fully Appropriated And**  
3 **The Applicants Water Availability Analysis Is Flawed**

4 A Water Availability Analysis is required by the California Water Code. Every  
5 water right application submitted to the State Board must include "sufficient information  
6 to demonstrate a reasonable likelihood that unappropriated water is available for  
7 appropriation." Water Code §1260(k). Before the State Board can grant a water right  
8 permit, it must find that there is "unappropriated water available to supply the  
9 applicant." Water Code §1375(d). "Unappropriated water does not include water being  
10 used pursuant to an existing right, whether the right is owned by the applicant, or by  
11 another person." 23 CCR §695. The burden to show unappropriated water is available  
12 rests with the applicant.

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

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

22 Water Availability Analysis ("WAA") was conducted by Mr. Shahroody for  
23 Stampede Reservoir (USBR-20) and for Prosser Creek Reservoir (USBR-21), both of  
24 which were duplicated in Mr. Shahroody's written testimony at USBR-7. However, the  
25 State Board cannot grant Applications 31487 and 31488 to appropriate water from  
26 Stampede Reservoir and Prosser Creek Reservoir for three reasons: 1) all water of the  
27 Truckee River and its tributaries have been fully appropriated, 2) the Water Availability  
28

1 Analysis of the Applicants is severely flawed, and 3) it is illegal to store the Tribe's  
2 Nevada permitted unappropriated water, which cannot be considered unappropriated  
3 water under the proposed California Applications.

4 **1. There Is No Unappropriated Water Available In The Truckee**  
5 **River Or Its Tributaries**

6 The evidence presented at the hearing by the Protestants clearly indicates that  
7 there is no unappropriated water in the Truckee River system, including its tributaries.  
8 The Protestants' main expert on this issue was Mr. Chris Mahannah. See TCID-267.  
9 Mr. Mahannah is of the opinion that the entire Truckee River and tributaries in both  
10 California and Nevada are fully appropriated and the Applications should be denied.  
11 TR Vol. IV at pp. 928:24-929:17; TCID-267 at p. 6. Tellingly, the Applicants did not  
12 cross examine or offer any rebuttal testimony to the facts and opinions presented by  
13 Mr. Mahannah. This opinion was shared by Dr. Knox, who believes the Applications  
14 for Stampede Reservoir and Prosser Creek Reservoir should be denied. TR Vol. IV at  
15 p 960:4-961:12; TCID-276B at pp. 9-11.

16 In fact, TROA proponents have historically expressed the opinion that the  
17 Truckee River system is fully appropriated. See Decision D 1056 (1962) at p. 3;  
18 Decision D 1173 at p. 2. (Sierra Pacific Power Company, predecessor to TMWA, and  
19 the WCWCD take the position that "there is no unappropriated water in the Lake  
20 Tahoe Basin which supplies the Truckee River."); See also Nevada State Engineer  
21 Rulings 5747 (TCID-205, p. 9) and 5972 (TCID-232) (the Tribe and TMWA support the  
22 determination by Nevada State Engineer that the Truckee River and tributaries are fully  
23 appropriated). In 1964 this Board's predecessor recognized that "Lake Tahoe is an  
24 area where unappropriated water is rapidly being depleted and, in the near future, it is  
25 probable that no unappropriated water will be available even for domestic or municipal  
26 use." Decision D-1200 (1964) at p. 3. This was well before consideration of several  
27 applications for unappropriated water in the Truckee River in Nevada, discussed  
28 below. Even though this system has not been declared fully appropriated in California

1 there is no presumption that water is available for appropriation. It is the Applicant's  
2 burden. SWRCB Order WR 98-08 at p. 22.

3 Mr. Mahannah in his written and oral testimony provides a complete and  
4 detailed reason why the Truckee River and its tributaries are fully appropriated. TCID-  
5 267 at pp. 4-6. Roughly 95 percent of the flow in Truckee River is derived in California  
6 before it enters the State of Nevada. TR. Vol. IV p. 923:2-4 and 923:23-924:1; TCID-  
7 267 at p. 2; SWRCB-7 at pp. 3-39 through 42. Thus, any water appropriated in  
8 Nevada on the Truckee River has its origin principally in California. There are a number  
9 of pending applications in Nevada for this water source that must be considered in  
10 granting any additional right to water on the Truckee River. See TCID-267 pp. 2-4.

11 TCID has the most senior pending right on the Truckee River in Application  
12 9330 filed in 1930 for 100,000 acre feet, which is currently before the Nevada State  
13 Engineer on remand. TR. Vol. II at pp. 352:20-353:4; TR. Vol. IV pp. 924:2-9. Further,  
14 there are also four applications filed by the BOR for 225,000 acre feet in Nevada  
15 seeking new appropriations in Stampede Reservoir that are still pending before the  
16 Nevada State Engineer. TR Vol. IV pp. 924:10-925:1. These waters were apparently  
17 not accounted for by Mr. Ali Shahroody, the author of the Applicants' WAAs. TR. Vol. II  
18 at p. 318:6-10. Mr. Mahannah was of the opinion that if State Board does not deny the  
19 Applications, then the senior pending applications in Nevada, from the same source,  
20 should be dealt with before acting on these pending Applications to appropriate. TR.  
21 Vol. IV at pp. 928:24-929:17; TCID-267 at p. 4. This opinion is shared by Dr. Knox.  
22 TCID-276B at pp. 5-6.

23 The main issue related to the availability of unappropriated water appears to be  
24 the Tribe's permits for unappropriated water in Nevada. TCID-211 and 212.<sup>6</sup> It is  
25 unclear from the record exactly what the Tribe intends to do with this water and how  
26 this water is related to the subject Applications. It appears that the intent of the

27 <sup>6</sup> Although referred to as "unappropriated water," the Tribe has been granted a permits for instream use  
28 of this water. The term comes from the prolonged proceedings in Nevada for the remaining water in the  
Truckee River. See TROA §12.A.6, Joint Ex.-19

1 Applicants may be to store part of the Tribe's unappropriated water permits granted in  
2 Nevada under Application 31487 and 31488. TCID-267 at pp. 6-7. Regardless, this  
3 water has already been appropriated and cannot support the subject Applications.  
4 Further, to the extent that this water is currently being stored in Stampede Reservoir,  
5 not only does it not support a new appropriation, but its storage is illegal.

6 The Tribe's application for unappropriated water in Nevada are Applications  
7 48061 and 48494. TCID-211 and 212. These applications were granted for 477,851  
8 acre feet of water for instream/in situ use in the Truckee River, and do not allow for  
9 storage. TCID-211 and 212. As a matter law, the Tribe must file change applications  
10 to obtain Nevada State Engineer approval in order for the water to be stored as  
11 anticipated by TROA. TR. Vol. IV at p. 926:12-25; TCID-267 at pp. 7-8; see also TCID  
12 208 at p. 12 (June 13, 2008 Nevada State Court decision stating that under Nevada  
13 law the Tribe must obtain the Nevada State Engineer's approval to store  
14 unappropriated water.) Importantly, the State Engineer in granting these applications  
15 declared that the Truckee River and its tributaries are fully appropriated. See TCID-211  
16 and 212 ("This permit is issued for all the unappropriated water on the Truckee River  
17 and its tributaries . . . [and is] 'issued subject to any interstate allocation of the Truckee  
18 River'"); TR. Vol. IV at p. 925:6-15. (emphasis added)<sup>7</sup> As a result, the TROA parties  
19 presumably agree that the Truckee River is fully appropriated. *Id.*; see TROA §§1.E.1  
20 and §12 A.4, Joint Ex.-19 (recognizing that Nevada Permits 48061 and 48494 fully  
21 appropriated the Truckee River and Tributaries in Nevada).

22 As discussed below, it is unclear how the Tribe's unappropriated water is going  
23 to be used. However, it is clear that the currently permitted use for instream flows to  
24 Pyramid Lake does not provide for any additional unappropriated water. There

25 <sup>7</sup> Apparently, the Applicant believes that only the Truckee River in Nevada is fully appropriated. TR. Vol. I  
26 at p. 272: 7-12; Vol. II at p. 287:12-17. However, not only is this irrelevant because 95% of the Truckee  
27 River water in Nevada originates in California, but it is incorrect. The permits granted in Nevada clearly  
28 state that the Truckee River and its tributaries, which principally arise in California, are fully appropriated.  
TCID-211 and 212. Mr. Shahroody eventually had to admit that the Truckee River and its tributaries in  
California, including the little Truckee River, are fully appropriated according to the Nevada State  
Engineer. TR. Vol. II at p. 311:7-22.



1 certainly cannot be unappropriated water above the 477,851 permitted to the Tribe. In  
2 addition, the Tribe's right is in essence all remaining water in the system that occurs in  
3 high water years. See TCID-211 and 212 (providing that rights can only be exercised  
4 in years where there are high flows); TCID-207 at p 56. With the Tribe's permits 48061  
5 and 48494 and the remaining pending applications in Nevada, there clearly is no  
6 remaining unappropriated water in the Truckee River system, including the tributaries.  
7 This issue was not addressed by the Applicant, who has not met its burden under  
8 Water Code §1375(d) to prove that unappropriated water is available.

9 It is difficult to determine exactly what the Tribe is doing with its unappropriated  
10 water. In the same line of questioning, Mr. Shahroody states that there is no storage  
11 right for this water and that it is flowing to Pyramid Lake, but later states that the water  
12 is being stored in Stampede under the existing Stampede Reservoir permit. TR. Vol. II  
13 at pp. 317:4-318:5. He claims they are storing unappropriated water in Stampede  
14 Reservoir and no authorization from Nevada is necessary. *Id.*; TR. Vol. III at pp.  
15 633:25-634:19. However, he contradicts himself and acknowledges that the Tribe  
16 must file a change application in Nevada to store this water. *Id.* at p. 339:12-14.

17 The Applicant claims that the Tribe gives consent to storage of unappropriated  
18 water. TR. Vol. II at pp. 288:1-5 and 301:8-15; USBR-7, fn. 2 at p. 9. The Tribe cannot  
19 simply grant permission to store its water permitted in Nevada as a new appropriation  
20 in California. TCID-287 at p. 2. This water is already appropriated and cannot be used  
21 to support a new appropriation. "Unappropriated water does not include water being  
22 used pursuant to an existing right, whether the right is owned by the applicant, or by  
23 another person." 23 CCR §695 (emphasis added). Under Water Code §§1231 and  
24 1232 the State Board must recognize the Tribe's permits for unappropriated water  
25 granted by the Nevada State Engineer, and they cannot be used in this proceeding to  
26 create more water.<sup>8</sup>

27 <sup>8</sup> Water Code §§1231 and 1232 provides an appropriation in Nevada made pursuant to TROA, as  
28 described in §205 of the Settlement Act (Joint Ex.-16), shall have full force and effect in California. TROA  
§1.E.1. provides for the Tribe's appropriation under Nevada applications 48061 and 48494. Joint Ex.-19.

1                                   **2.     The Applicants Water Availability Analysis Is Flawed And**  
2                                   **Does Not Support Granting A New Appropriation**

3                                   Mr. Mahannah presented rebuttal testimony related to the Applicant's WAAs  
4 and testified to a number of deficiencies. TCID-287 at pp. 1-10. The WAAs submitted  
5 by the BOR should be rejected due to their substantial deficiencies and Applications  
6 31487 and 31488 should be denied. *Id.* In addition to several critical flaws in the  
7 analysis, Mr. Mahannah was also critical of the WAAs failure to address the impact of  
8 the permits and applications in Nevada for the remaining unappropriated water and the  
9 fact that the system is fully appropriated. *Id.* at 1-2. The TROA proponents elected not  
10 to cross Mr. Mahannah on the substance of his WAA rebuttal report. TR. Vol. V at pp.  
11 1094:20 -1101:20. Dr Knox was also critical of the analysis because of a lack of  
12 engineering or technical analysis provided that describes the physical and legal water  
13 availability, the proposed schedule of storage/releases, and/or the change in water  
14 deliveries and return flow patterns that may impact downstream rights. TR. Vol. IV at p.  
15 944:17-23.

16                                   The first major flaw in the WAAs is that they incorrectly assumes a flow regime  
17 below Derby Dam which is inconsistent with the unappropriated water permits granted  
18 to the Tribe under Permits 48061 and 48494. The WAAs assume a Pyramid Lake  
19 inflow target from Flow Regime 1 (USBR-7, Table 2, page 10) which totals  
20 approximately 251,000 afa and is roughly half the 477,851 afa granted to the Tribe  
21 under permits 48061 and 48494. TCID-287 at p. 3; TR. Vol. II at p. 315:13-21. This  
22 directly conflicts with the testimony presented at the February 1996 hearing before the  
23 Nevada State Engineer defending the need for instream flows to protect fish species.  
24 TCID-287 at pp. 4-5; TR. Vol. V at pp. 1079:22-1083:20. At that hearing Mr. Strekal  
25 and Mr. Wagner both claimed a need of over 400,000 afa inflow to protect the fish and  
26 maintain the elevation of Pyramid Lake *Id.*; TCID-288 at pp. 522-523, 545. Mr. Wagner  
27 also provided testimony that late spring flows of 700 – 4,000 cfs were needed below  
28 Derby Dam for re-establishment of riparian Cottonwood seedlings. TCID-288 at p. 548.

1 The WAAs used flow regime 1 which has a total annual value of approximately  
2 251,000 acre feet and maximum flow of about 1000 af in a month. USBR-7 at p. 10.  
3 The Applicant's artificial reduction in demand below Derby inflates any WAA result at  
4 an upstream location such as Stampede and Prosser, and the Applicant should have  
5 considered the permitted instream/*in situ* water right demand below Derby which is the  
6 477,851 afa. TCID-287 at p.5.

7 The second flaw is that the WAAs fails to consider the physical or flood limit  
8 capacities of the reservoirs which severely limits the ability to store water. TCID-287 at  
9 p. 5-7; TR. Vol II at p 335:5-14; TR. Vol. V at pp. 1083:17-1085:8. Mr. Mahannah  
10 demonstrated that in all but five (5) years (1973, 1980, 1993, 2003, 2005) out of the  
11 nineteen (19) years analyzed for Stampede Reservoir, end-of-month storage values  
12 exceeded the flood control or physical limits, some by a substantial margin. TCID-287  
13 at p. 6; TCID-298. A similar analyses was conducted for Prosser Creek Reservoir. *Id.*;  
14 TCID-299. Mr. Shahroody admitted that although Stampede Reservoir cannot store  
15 more then 226,500 acre feet, he did not limit his calculation of available water in Table  
16 3 of the WAA. TR. Vol. II p. 326:3-18 and 335:5-14. However, as pointed out by Mr.  
17 Mahannah, the title of his Table 3 is "Estimates of Available Water For Storage in  
18 Stampede Reservoir," and the purpose of the Applications is to store water. He opined  
19 that if you don't have the room to store the water, then the WAA is a meaningless  
20 analysis. TR. Vol. V at p. 1086: 11-15; TCID 287 at pp. 6-7.

21 Mr. Mahannah in his rebuttal report took Table 3, Column 19 from the Stampede  
22 WAA (USBR-20 and USBR-7), which is the additional amount of water available, and  
23 corrected for the first two flaws described above. TCID-287 at pp. 7-9; TR. Vol. V. at p.  
24 1085:9-1086:15. Correcting for the 477,851 afa demand below Derby and the flood  
25 and/or physical capacity limits of the reservoir, the amount of additional available water  
26 at Stampede Reservoir ranges from 0 – 29,167 afa and averages 11,369 afa, which is  
27 considerably below the additional storage volume Application 31487 is seeking of  
28 100,500 af. *Id.*; TCID-300. The average available unappropriated water from 80,700

1 as estimated by Mr. Shahroody is reduced to 11,000 acre feet. This is a huge  
2 deficiency in the WAA's analysis, which should not be relied on by the State Board.  
3 TR. Vol. V at p. 1085:14-1086:6. Mr. Mahannah also calls into question the need for  
4 additional storage or water to appropriate because there is only one year (1995) of  
5 operation where annual storage accretion in Stampede Reservoir exceeded the  
6 permitted amount of 126,000 afa. TCID-287 at p. 9; TCID-301.

7 Third, the WAA is a static historic analysis base on selected years and selected  
8 months considering only end-of-month historical data, without considering any future  
9 conditions under TROA. TCID-287 at pp. 9-10; TR. Vol. V at p. 1079:11-18. TROA by  
10 its very nature is designed to store water in the upstream reservoirs, which will result in  
11 higher end-of-month storage values. It is Mr. Mahannah's opinion that using only  
12 selected years and static historical data, which will change under future TROA  
13 operations, does not adequately address the amount of available water. *Id.* A robust  
14 river / storage accounting model such a *Riverware*® should have been employed to  
15 perform the WAAs and take into consideration future conditions. *Id.*

16 Finally, the WAAs incorrectly includes water that is already within the permitted  
17 allotment as available water in addition to the amount stored in the reservoir. TCID-287  
18 at p. 10; TR. Vol. V at p 1086:18-1087:11. In USBR-7, Table 3, Column [2] there are  
19 numerous years and months where the amount of additional available water is  
20 computed within the existing permitted amount of 126,000 af. *Id.* Mr. Shahroody did  
21 not include downstream entitlement, including the permitted demand, nor did he  
22 include Claim 1 and 2 or other decreed rights below Derby in his analysis. TR. Vol. II at  
23 p. 321:6-13; TR. Vol. V at p. 1083:17-20. It is Mr. Mahannah's opinion that the WAAs  
24 should be rejected due to their substantial deficiencies and Applications 31487 and  
25 31488 should be denied.

26 **3. Current Storage Of Unappropriated Water In Stampede Does**  
27 **Not Support The Applications And Violates The Stampede**  
28 **Permit Terms And California and Nevada Law**

What is most disturbing about the testimony related to the Tribe's permits in

1 Nevada is the admission that they are currently storing their unappropriated water in  
2 Stampede. TR. Vol. 1 at p. 263:14-21; TR. Vol. II at pp. 317:4-318:5; TR. Vol. III at p.  
3 633:25-635:13. The current permit for Stampede authorizes storage up to 126,000 af  
4 and use only in Truckee Meadows and in the Newlands Project. Permit 11605,  
5 SWRCB-3. However, the primary function of Stampede Reservoir is now for the  
6 unpermitted storage and release of fish water to benefit the threatened and  
7 endangered species in Pyramid Lake. TR. Vol. 1 at p. 130:14-19; see also general  
8 discussion of Stampede Reservoir in McConnell testimony, TCID-282 at pp. 10-13.  
9 Mr. Shahroody also acknowledged that the BOR routinely does not comply with the  
10 126,000 storage limit in Stampede Reservoir. USBR-20, Figure 3; TR. Vol. II at pp.  
11 305:17-306:12.; see also TCID-287 at p. 9. Further, the BOR does not comply with the  
12 30 day fill rule. TCID-287 at p. 9; TCID-291 and 292. Although the permit has never  
13 been modified, the BOR has apparently given permission for this exclusive use to  
14 benefit fish. TR. Vol. 1 at pp. 130:12-131:13. However, the BOR cannot authorize a  
15 change in the terms and conditions of a water right permit. Only the State Board can  
16 do this. Water Code §1701; SWRCB Order WR 85-4 at p. 11. The fact that  
17 unappropriated water is already stored in Stampede or is allowed by the BOR has “no  
18 force or effect.” *Id.*

19 In fact, the storage of unappropriated water in Stampede Reservoir is a violation  
20 of both Nevada and California law. As discussed above, it is will be necessary as a  
21 matter of state law for the Tribe to file change applications to obtain Nevada State  
22 Engineer approval in order to store this water. This has not happened in violation of  
23 Nevada law. In California, the present use of Stampede Reservoir, including the  
24 storage of unappropriated water, is a direct violation of 23 CCR §731, which provides  
25 that

26 [a]ny person who obtains a permit or license for a particular place of use  
27 and thereafter transfers an existing water right for the same place of use  
28 to another place of use without the prior approval of the board shall forfeit  
all rights under the permit or license.

1 The Tribe's storage of unappropriated water in Stampede Reservoir and Stampede's  
2 exclusive place of use in the lower Truckee River and Pyramid Lake is an unpermitted  
3 change in the place of use. The BOR has never modified the Stampede Reservoir  
4 permit to allow this change in place of use in violation of 23 CCR § 731.<sup>9</sup>

5 Thus, the storage and unpermitted release of the Tribe's unappropriated water  
6 has occurred without a determination by either Nevada or California as to whether the  
7 change to storage conflicts with existing rights or is detrimental to the public interest.  
8 See TCID-208 at p. 12 (requiring this determination before storage). Further, the  
9 amount stored routinely exceeds the permitted amount of 126,000 af. USBR-20, Figure  
10 3; TR. Vol. II at pp. 305:17-306:12.; see also TCID-287 at p. 9. Not only do these facts  
11 weigh against granting any additional right to unappropriated water, but faced with the  
12 information the State Board should take action, including forfeiting all the rights under  
13 the permits involved. 23 CCR § 731.

#### 14 **C. The Change Petitions Effectively Initiate A New Water Right**

15 When changing a point of diversion, place of use, or purpose of use the  
16 petitioner must prove that the proposed change will not effectively initiate a new right.  
17 23 CCR §791(a). "Neither the amount of water applied for, nor the season of  
18 diversion, as stated in the application as first filed, can subsequently be increased in  
19 the application or in a permit or license issued on the application." 23 CCR §699.

20 There are several factors the State Board should consider in evaluating whether a  
21 change in the point of diversion initiates a new right, including whether it involved the  
22 same source, the hydrologic connectivity, geographic scale of the proposed change,  
23 water availability and no injury. Mahaney November 28, 2006 Memorandum to Steven

24 \_\_\_\_\_  
25 <sup>9</sup> In fact, the use of this water without a change has been questioned by State Board staff. In a June 10,  
26 1980 memorandum, State Board staff concluded that the BOR's releases of Stampede Reservoir water  
27 to aid in restoration of the Pyramid Lake fishery are not consistent with any water rights in California.  
28 TCID-132. Likewise, an April 3, 1994 SWRCB memo questions whether US Fish & Wildlife's proposed  
drawdown of Stampede Reservoir to benefit Pyramid Lake fish may violate California water law because  
Stampede water rights are not permitted for this purpose and place of use. TCID-139. Finally, a May 13,  
1994 letter to the Division of Water Rights reiterates that a petition for change must be filed in order to  
release water from Stampede to Pyramid Lake. TCID-141.

1 Herrera, TCID-197 at pp. 9-10.

2 The source of water is a critical component of the entitlement, which cannot be  
3 changed without initiating a new right. Each application for a permit to appropriate and  
4 the associated notice of application must expressly identify the source of the water.  
5 Water Code §§1260 and 1301. "The common law and statutory regime governing  
6 changes supports the conclusion that the addition of a new source, regardless of  
7 whether it would increase the amount of water available to be converted, constitutes  
8 the initiation of a new right." TCID-197 at p. 7.

9 An example of an attempted initiation of a new right by a petition to  
10 change a point of diversion is where the original appropriative right is  
11 acquired with a point of diversion on a stream tributary to a much larger  
12 watercourse. Moving the point of diversion from the tributary to the larger  
13 watercourse makes the source for the water right different and increases  
14 the reliability of the right. Such a change in point of diversion is not  
15 permitted by Division 2, Part 2 of the Water Code.

16 SWRCB Order WR 79-22 at p. 9, fn. 6.

17 The Petitioners' main witness related to whether the Change Petitions initiate a  
18 new right was Mr. Marc Van Camp. TMWA-3.0 On Rebuttal, Mr. Mahannah disagreed  
19 with the analysis conducted by Mr. Van Camp, particularly for changes in points of  
20 diversion and redistribution seeking to move storage rights upstream on the Little  
21 Truckee River from either Boca or Stampede Reservoirs into Independence Lake.  
22 TCID- 287 at pp. 10-16; TR. Vol. V at pp. 1087:12-1090:11. First, there are large  
23 geographic scale differences between reservoirs, with Stampede Dam and Boca Dam  
24 located approximately 15 and 21 miles downstream of Independence Dam  
25 respectively. *Id.* Second, even though Independence Creek is a tributary to the Little  
26 Truckee River, it has historically gone dry on occasion and was not hydrologically  
27 connected to the Little Truckee at all times. *Id.* Mr. Van Camp failed to analyze  
28 whether Independence Creek has ever dried up resulting in no flow to the Little  
Truckee River. TR. Vol. I at p. 242:7-12.

1 Third, Mr. Mahannah conducted an analysis of the contributing watersheds and  
2 sub-watersheds, concluding that Boca, Stampede and Independence are vastly  
3 different. TCID-287 at pp. 11-15; TCID-265; TCID-295; TR. Vol. V at pp. 1087:12-  
4 1090:11. The Independence watershed (7.8 mi<sup>2</sup>) is much smaller than Stampede  
5 (128.7 mi<sup>2</sup>) and Boca (36.4 mi<sup>2</sup>). *Id.* Further, there are fifteen (15) individual sub-  
6 watersheds which are tributaries to Boca and Stampede, 12 of which are a tributary to  
7 Stampede alone, that do not contribute to Independence. *Id.*

8 Mr. Mahannah concluded:

9 Due to the vastly different geographic scales, 21+ miles between points of  
10 diversion, and potential to expand water availability or yield due to much  
11 larger contributing watershed areas for Boca and Stampede compared to  
12 Independence, the changes in points of diversion contemplated will initiate  
13 a new right by enlarging the existing right and adding a new source.

13 TCID-287 at pp.15-16. *Id.*<sup>10</sup> Specifically, Mr. Mahannah outlined the Petitioners'  
14 anticipated operation of capturing water released from Independence to Stampede  
15 which can then be released and captured at Boca and labeled as TMWA  
16 Independence water. This practice typically happens in the fall (Joint-20, page 19,  
17 lines 13-14) expanding the ability to store more water in Independence. *Id.*; TR. Vol V  
18 at p. 1090:5-11. On Cross examination, Mr. Van Camp acknowledged that Boca and  
19 Stampede watersheds are much larger than Independence, and that water could move  
20 down from Independence Lake under these Petitions that otherwise might have spilled,  
21 thereby increasing the storage capacity of the original Independence License. TR. Vol.  
22 I at pp. 248:4-249:6. "Moving the point of diversion from the tributary to the larger  
23 watercourse makes the source for the water right different and increases the reliability  
24 of the right," thus, initiating a new right. SWRCB Order WR 79-22 at p. 9, fn. 6.

25 Mr. Mahannah also addressed the issue of storage of *Orr Ditch* Water rights  
26

27 <sup>10</sup> Dr. Knox also testified the Change Petitions are to accommodate the implementation of TROA and will  
28 cause a change in the amount, time and location of the water stored in the reservoirs, requiring a new  
priority. TR. IV at pp. 942:22-944:4.



1 under TROA, including Claim 3 rights acquired pursuant to the Water Quality  
2 Settlement Agreement (WQSA) and the consumptive use portion of TMWA's acquired  
3 rights. TCID-287 at p. 16; TR. Vol. V at pp. 1090:12-1091:16. TROA contemplates  
4 credit storing this water in the subject reservoirs and providing carry over storage to  
5 provides a ensure a more reliable water supply. *Id.* Mr. Mahannah referred to this as a  
6 "super water right," with essentially the same priority, but because of storage and carry  
7 over it provides a firmer yield than the similarly situated remaining Claim 3 rights in the  
8 Truckee Division. *Id.* Further, this change in point of diversion from Derby Dam to  
9 upstream storage certainly constitutes a massive change in geographic scale, thus  
10 initiating a new water right. *Id.* Such storage should be rejected or at a minimum suffer  
11 a loss in priority. Mr. Mahannah's suggested solution is to provide upstream storage  
12 with carry over storage capability to all *Orr Ditch* Claim 3 rights, including rights in the  
13 Newlands Project. TR. Vol. V at pp. 1095:25-1096:16 and p. 1102:4-14.

14 **D. The Proposed Operation Of TROA Circumvents The Change And**  
15 **Transfer Process**

16 The Water Code provides provisions for the change in point of diversion, place  
17 of use, or purpose of use (§1700 *et seq.*), for a temporary change (§1725 *et seq.*)  
18 defined as a transfer or change of a water right for a period of less than one year  
19 (§1728), and for a long term transfer (§1735 *et seq.*). Each of these requires some  
20 sort of notification to the State Board. Here, the Petitioners have filed for Change  
21 Petitions providing for multiple and common places of diversion in Stampede,  
22 Independence, and Boca Reservoirs, as well as multiple places of redivertion for uses  
23 under TROA. However, there is no intent to file anything with the State Board related  
24 to any subsequent operation of these reservoirs under TROA, including TROA's  
25 exchanges, trades, credit storage, and releases. See Joint Ex.-19; see *also* Knox  
26 testimony at TCID-267B at p. 8.

27 Petitioner treat this change as if it is only a change in point of diversion.  
28 However, they conveniently forget that under TROA they are also changing the place

1 of use and purpose of use. Mr. Erwin testified that under TROA, once there is credit  
2 water in the reservoirs, then they will move the water from one reservoir to another.  
3 TR. Vol. I at pp. 86:23-87:8. Further, he testified that these operation would occur  
4 without filing another change petition, because it is anticipated that the subject  
5 Petitions will accomplish what TROA is intended to do. *Id.* Likewise, Mr. Van Camp  
6 testified that these Petitions and Applications will allow for the implementation of  
7 TROA. *Id.* at p. 250:14-251:4. Finally, Mr. John Sarna testified that they intend to  
8 move water between reservoirs and among reservoirs without any formal transfer  
9 proceeding before the this Board, except for California Credit waters. TR. Vol. III. at pp.  
10 643:4-644:2.

11 It is entirely unclear how the Petitioners can move water around under TROA's  
12 system of exchanges, trades and releases without providing any notice to this Board or  
13 other concerned water right owners on the Truckee River. "The public has a right to  
14 rely on the Board's records and to a great extent the Board relies upon the holders of  
15 rights that it administers for information to keep the Board's records current". SWRCB  
16 Order WR 74-35 at p 1. As discussed above, there is evidence before the State Board  
17 that the operation of TROA will cause shortages. However, through the operation of  
18 TROA water users in the Newlands Project will receive no notice and no ability to  
19 determine where water is being stored and exchanged and what is causing shortages.

20 As Dr. Knox testified, it is proper that these operations under TROA come  
21 before this Board for change petitions to provide the opportunity for review and  
22 evaluation by the State Board and other interested parties to understand the potential  
23 impact on existing water rights, and to protest the changes. TCID-276B at p. 9; TR.  
24 Vol. IV at pp. 1002:21-1003:11.

25 Moreover, the ability of the applicant to circumvent the change of water  
26 right process in California in the future for water stored in these reservoirs  
27 under these applications, as some form of carte blanche management  
28 authority, is not in the public interest.

TCID-276B at p. 9.

1           **E.     The Orr Ditch Court Should Act First To Modify The Decree To Allow**  
2           **For The Operation Of TROA And To Address Changes To The TRA**  
3           **Floriston Rate Structure**

4           The State Board has administrative authority to exercise the adjudicatory and  
5 regulatory functions of the state in the field of water resources.” Water Code § 174.  
6 However, under California’s system for the adjudication and the determination of rights  
7 on a water system it is the Court that reserves jurisdiction to change or modify a  
8 decree. Water Code § 2900. “The retention of jurisdiction to meet future problems and  
9 changing conditions is recognized as an appropriate method of carrying out the policy  
10 of the state to utilize all water available.” *Pasadena v. Alhambra*, (1948) 33 Cal. 2d  
11 908, 937; see also SWRCB Order WR 90-6 at p. 30 (1990). “Courts regularly affirm  
12 the expansive retention of jurisdiction in cases involving water rights.” *Central and*  
13 *West Basin Water Replenishment Dist. v. Southern Cal. Water Co.*, (2003) 109 Cal.  
14 App. 4th 891, 903; citing *City of L. A. v. City of Glendale*, (1943) 23 Cal.2d 68, 81. The  
15 allocation of storage space falls within this broad provision to retain jurisdiction to meet  
16 future changed conditions. *Id.* Further, when there is a private agreement between the  
17 parties, the respective rights and obligations of the applicant and protestants is not  
18 within the jurisdiction of the State Board, which should condition the permit subject to  
19 the private agreement. State Water Rights Board Decision D-1131 at p. 4 (1963) & D-  
20 1132 at p. 4.

21  
22           In this proceeding Mr. Lyman McConnell, former TCID Project Manager,  
23 provided testimony related the operation and management of the Newlands Project  
24 and the settlements and compromises of the parties with interests in water in the  
25 Truckee River and its tributaries leading to the Truckee River Agreement (“TRA”) and  
26 the *Orr Ditch* Decree. TCID-282; TR. Vol. IV at pp. 835-850. His testimony describes  
27  
28

1 how the same parties currently before the State Board reached an agreement through  
2 the 1935 TRA to provide for the management of water resources on the Truckee River.  
3 *Id.*; Joint Ex.- 6. Mr. McConnell testified that each party to the TRA, including the  
4 United States, agreed to abide by its terms. TCID-282 at. 4. Mr. Rieker, BOR Special  
5 Studies Manger, also acknowledges that the TRA is binding among the parties to the  
6 Agreement. TR. Vol. 1 at p. 151:9-21; USBR-3 at p. 6.  
7

8 The TRA sets forth the principles under which the Truckee River operates on  
9 the basis of Floriston Rates. Article III of the TRA sets limitations on when Floriston  
10 Rates can be changed and requires that before that can occur, the permission of the  
11 WCWCD, TCID and Sierra must be obtained. TCID-282 at p. 5; Joint Ex.-6. As  
12 testified to by Mr. Chad Blanchard, Chief Deputy Water Master, the Floriston rates are  
13 intended to meet the diversion requirements for agriculture, municipal, industrial,  
14 domestic, as well as power generation demands on the Truckee River within Nevada.  
15 TR. Vol. I at p. 128:17-20; Joint Ex. 20 at p. 6, ¶13. Further, it was the intent to  
16 incorporate the Floriston Rate structure into the *Orr Ditch* Decree through the TRA to  
17 meet all these requirements and satisfy decreed rights *Id.* at p. 169:18-170:20; TR.  
18 Vol. 1 at p. 151:9-21; USBR-3 at p. 6.  
19

20  
21 This Board's predecessor has recognized that water rights on the Truckee River  
22 are "defined" by the above mentioned decrees and agreement, including the GE  
23 Decree (Joint Ex.-2) , the Truckee River Agreement (Joint Ex.-6), and the *Orr Ditch*  
24 Decree (Joint Ex.-7). State Water Rights Board Decision D-1056 (1962) at p. 5.

25 The effect of the 1944 final decree and the 1915 decree and 1935  
26 agreement ratified by it is to provide for releases of water stored in Lake  
27 Tahoe, Boca Reservoir, and Donner and Independence Lakes in  
28 accordance with agreements of the parties and under control of a  
watermaster appointed by the court.

1 *Id.* at p. 7. The Secretary of Interior has regulated diversions from the Truckee River  
2 through the Newlands Project Operating Criteria and Procedures (“OCAP”), first  
3 promulgated in 1967, and amended in 1973, 1988 and modified in 1997. However, the  
4 OCAP must comply with all applicable decrees, including the *Orr Ditch* Decree. OCAP  
5 §418.3, Joint Ex.-9; TCID-276B at p. 7; see also Rieker testimony, TR. Vol. I at pp.  
6 141:11-142:14.

7 **1. The *Orr Ditch* Court Should Act First To Modify The Decree**  
8 **Before The State Board Acts In This Proceeding**

9 There was extensive discussion during the hearing on whether, and to what  
10 extent, TROA modifies the TRA. This question can easily be resolved by looking  
11 directly at TROA, which specifically states that it supersedes the TRA (TROA  
12 §5.A.1(a)) and provides for reduced Floriston rates to allow for credit storage (TROA  
13 §5.A.3(a)). Joint Ex.-19; TCID-282 at p. 6; TR. Vol. IV at pp. 853:24-855:13. Further,  
14 there can be no doubt that the proposed changes before the State Board directly  
15 implicate *Orr Ditch* decreed water rights. See TMWA 4-0 (describing the purchase and  
16 storage of *Orr Ditch* Decree water as part of the Water Quality Settlement Agreement.)

17 Under TROA, the Change Petitions provide for redistribution and exchange of  
18 storage within Boca, Independence, Stampede, and Prosser.<sup>11</sup> The testimony of  
19 TMWA’s witness Marc Van Camp acknowledges that TMWA plans to store *Orr Ditch*  
20 water in Boca, Stampede, Independence, Prosser and other reservoirs. TMWA 3-0 at  
21 ¶35; see also TCID-233 (seeking to add the California Reservoirs as additional points  
22 of diversion for TMWA’s *Orr Ditch* Decree water rights).<sup>12</sup> The storage of TMWA’s  
23 water rights in California requires a change in the TRA Floriston Rate Structure. See  
24 Nevada State Engineer Interim Order No 1. at p. 4, TCID-259. Likewise, it is Fernley’s  
25 intention to credit store Claim 3 *Orr Ditch* water rights under TROA. Evangelatos

26 <sup>11</sup> The January 30, 2007 Notice of the Petitions and Applications provides that the points of diversion  
27 and rediversion for the proposed changes include numerous points of diversion identified in the *Orr*  
28 *Ditch* Decree, including Derby Dam and Truckee Canal, which supplies Claim 3 water from the Truckee  
River to the Newlands Project. TCID-198 at pp. 9-11.

<sup>12</sup> Exhibit TCID-233 is the first application filed by TMWA in Nevada and is essentially identical to the  
other 59 applications.

1 testimony at TR. Vol. II pp. 469:21-470:20. Clearly it is the intent of the Petitioners to  
2 store and manage *Orr Ditch* Decree water rights in the subject reservoirs under the  
3 operation of TROA.

4 As discussed above, the operation of the subject Applications and Petitions and  
5 TROA are one and the same and must be considered together. See Parr Testimony at  
6 TR. Vol. I at p. 60. In order for TROA to go into effect and for the Change Petitions to  
7 be effective, the *Orr Ditch* Decree must be modified, including the required adjustments  
8 to the TRA Floriston rate structure. TROA §12.A.4(a), Joint Ex.-19; Settlement Act  
9 §205(a)(5), Joint Ex.-16. Further, these changes under TROA are specifically  
10 designed to change the allocation of storage space in the upstream reservoirs, and  
11 thus implicate the continuing jurisdiction of the *Orr Ditch* Court. See *Central and West*  
12 *Basin Water Replenishment Dist. v. Southern Cal. Water Co.*, (2003)109 Cal. App. 4th  
13 891, 903.

14 As Mr. McConnell testified, the *Orr Ditch* Decree Court has continuing and  
15 exclusive jurisdiction over decreed water rights. TCID-282 at p. 7. Because the  
16 Applications and Petitions can only be analyzed in the context of TROA, and TROA  
17 can only take effect after the *Orr Ditch* Decree is modified, the State Board cannot  
18 properly and adequately evaluate the effect of the proposed changes on existing water  
19 rights. Further, the Applications are inconsistent with the *Orr Ditch* Decree as it is  
20 currently written and it would certainly be detrimental to the public interest and counter  
21 to existing law to approve the Applications and Petitions. It is not sufficient to condition  
22 the approval of the Applications and Petitions on the *Orr Ditch* Decree Court's approval  
23 of TROA, especially when we have no idea how the Decree will be modified or how  
24 TROA will be impacted. "The Water Board cannot ignore the detailed statutory and  
25 regulatory requirements it must meet in issuing a permit to appropriate water and  
26 cannot satisfy a duty imposed on it by the state Constitution and the Water Code in  
27 issuing a permit by placing it in a condition to a permit." *Central Delta Water Agency v.*  
28 *State Water Resources Control Bd.*, (2004)124 Cal. App. 4th 245, 262. It is a better

1 use of judicial and administrative economy for the State Board to wait to act on the  
2 change petitions and applications until TROA is approved by the *Orr Ditch* Decree  
3 Court and the Decree is modified.

4 Further, at the hearing there were several issues raised that directly impact  
5 potential injury, but are also issues directly related to the *Orr Ditch* Decree. The issue  
6 of consumptive use and the "25 percent rule" are currently on appeal in the *Orr Ditch*  
7 Court. See TROA §12.A.4.(b), Joint Ex.-19 (requiring the *Orr Ditch* Court to confirm the  
8 consumptive use portion of Changed Diversion Rights). As suggested by Mr.  
9 McConnell, it should be the *Orr Ditch* Court that acts first on the Applicants' attempted  
10 change in the management scheme of the Truckee River to implement TROA before  
11 the State Board can act on the subject Applications and Petitions. TCID-282 at p. 7.<sup>13</sup>

12 **2. The Petitioners Should Not Be Allowed To Make Unilateral**  
13 **Changes To The Agreed Upon Management Of The Truckee**  
14 **River System**

15 As with the above discussion, the *Orr Ditch* Court must address the issue of  
16 superseding the TRA with TROA. There is no provision in the TRA that allows a party  
17 to withdraw from the Agreement. TCID-282. at. 4; Joint Ex.-6. The TRA is a private  
18 agreement between the parties to this proceeding, and their respective rights and  
19 obligations are not within the jurisdiction of the State Board, which should conform any  
20 approval subject to the TRA. State Water Rights Board Decision D-1131 at p 4 & D-  
21 1132 at p. 4 (1963). Here, the State Board should wait until the *Orr Ditch* Court  
22 addresses the issue of the TRA in the context of the proposed modification to the  
23 Decree.<sup>14</sup>

23 <sup>13</sup> The *Alpine* decree (*United States v. Alpine Land & Reservoir Co.*, 3:73-CV-003 (Nev. 1980), which  
24 adjudicated water rights on the Carson River and is interpreted in conjunction and consistent with the  
25 *Orr Ditch* Decree, requires that water right changes in California or Nevada shall be made directly to the  
26 decree court. TCID-134 at p. 162.

26 <sup>14</sup> Mr. McConnell also testified about the agreements reached in the TRA that led to resolution of  
27 competing application in Boca Reservoir, Independence Reservoir, and Donner Lake, decided on  
28 November 3, 1938 in decision D435. TCID-282:8-13; TR. Vol. IV at pp. 841-844. It was agreed that  
Boca Reservoir would be operated to maintain Floriston rates. TR. Vol. I p. 82:5-14; *Id.* at p. 172:20-23;  
see also State Water Rights Board Decision D-1056 (1962) at p. 6. Here, the proposed TROA  
modifications are in direct conflict with agreements and concessions made that allowed for the granting  
of the Boca application under Decision D435. See TRA Art. XII, Joint Ex.-6) (requiring TCID withdraw its

1 Likewise, the proposed TROA changes directly implicate the Prosser Exchange  
2 Agreement. In anticipation of construction of the Prosser Creek Reservoir, certain  
3 parties entered an Agreement for Water Exchange Operation of Lake Tahoe and  
4 Prosser Creek Reservoir (Prosser Exchange Agreement) on June 15, 1959. Joint Ex.-  
5 3. The Prosser Exchange Agreement was signed by the United States, TCID, the  
6 WCWCD and Sierra (TMWA's predecessor). As provided in the testimony of Mr.  
7 Rieker, the Prosser Exchange Agreement, as stated by the *GE Decree* Court is binding  
8 on all parties, including TCID and the United States. TR. Vol. I at p. 149:5-151:3; TCID-  
9 118. Mr. McConnell testified that the Prosser Reservoir application has the Newlands  
10 Projects as a point of diversion (SWRCB-4), and how under Prosser Exchange  
11 Agreement it is operated to maintain Floriston rates. TCID-282 at pp. 13-14.<sup>15</sup>

12 TROA contemplates changes to the operation of Prosser Creek Reservoir, and  
13 expressly supersedes the Tahoe-Prosser Exchange Agreement. See TROA § 5.A.1(a),  
14 Joint Ex.-19. As with the TRA, this binding agreement cannot simply be unilaterally  
15 changed though the operation of the Change Petitions and TROA.

16 **F. The Applicant And Petitioners Benefits And Impacts Analysis Is**  
17 **Deficient As A Result Of Defective TROA Modeling Effort, And**  
18 **Cannot Support Sound Decision Making**

19 The alleged benefits derived from the Applications and Petitions are related  
20 exclusively with their operation under TROA. A sample of this evidence presented by  
21 the TROA proponents is presented below:

- 22 • Mr. Greg Evangelatos Testimony - Describes how he believes TROA will  
23 allow the maximum use of Fernley's water rights and testified that  
24 Fernley already has agreements to bank water under TROA for future  
25 credit storage, primarily in Stampede. TR. Vol. II at pp. 470:8-20 and pp.  
26 480:12-482:7.
- 27 • Ms. Janet Carson Phillips Testimony - Written and verbal testimony

28 protest to Applications 5169 and 6534 before the operative date of the TRA).

<sup>15</sup> As with Stampede Reservoir, Prosser Creek Reservoir is being operated for the benefit of Pyramid Lake in violation of its permit terms. TCID-282 at p. 11; TR. Vol. I at p. 132:14-21.



1 primarily consists of explaining why Sierra Pacific presumably agreed to  
2 TROA and the alleged benefits to TMWA from TROA. TMWA 2-0; TR.  
3 Vol. II at pp. 490-503.

- 4 • Mr. John Erwin Testimony - Provided TMWA's prospective of how TROA  
5 solves several long term challenges related to TMWA's water supply,  
6 claiming that TROA allows for expanded place of use and manner of use  
7 of Independence Lake water. TR. Vol. II at pp. 508-514.
- 8 • Mr. Don Mahin Testimony - Claims benefits to flow augmentation from  
9 storage under TROA of Water Quality Settlement Agreement water (TR.  
10 Vol. II at pp. 569:10-570:8), and that this water will be exchanged under  
11 TROA, including exchanges in the subject reservoirs (TR. Vol. III. at p.  
12 617:19-618:12).
- 13 • Mr. Ali Shahroody Testimony - Describes supposed benefit to Pyramid  
14 Lake fish from the operation of TROA. TR. Vol. II at pp. 557:25-559:5.
- 15 • Mr. John Sarna Testimony - States that approval of change petitions is  
16 necessary to implement TROA and describes the supposed resulting  
17 benefits. TR. Vol. II at pp. 574-583.

18 Further, as described below, these supposed benefits were determined  
19 primarily from the modeling effort conducted as part of the TROA EIR/EIS.

- 20 • Mr. Steve Caicco's testified that the benefits to fish species was derived  
21 from the Truckee River Operating Model. TR. Vol. II at p. 415:10-21.
- 22 • Mr. Tom Strekal testified that the analysis conducted as part of the  
23 EIR/EIS, including the Truckee River Operating Model, provided  
24 information used in his analysis. TR. Vol. II at pp. 396:20-397:6
- 25 • Mr. Chester Buchanan's statements about public trust and fisheries was  
26 based in part on Truckee River Operating Model analysis. TR. Vol. II at  
27 pp. 417:1-20.

28 Protestants' witness, Dr. Willem Schreuder, put on evidence that was extremely

1 critical of this modeling effort. Not only did Dr. Schreuder expose major flaws in the  
2 modeling methodology, but he demonstrated that the TROA parties were aware of  
3 these flaws and continued with the modeling effort anyway. Dr. Schreuder has  
4 personally run the model three or four dozen times under different scenarios. TR. Vol.  
5 III at p. 776:21-777:2. In his written report, Dr. Schreuder provided thirteen (13)  
6 opinions identifying critical flaws in TROM, including flaws in the model's validity and  
7 flaws in the model's application. TCID-275B.

8 During oral testimony, Dr. Schreuder summarized his opinions in two points.  
9 First, because the model at 72,000 lines of code is very convoluted and complex, he  
10 does not believe that anybody truly understands what it does. TR. Vol. III at p. 766:2-  
11 18. The output that the model produces is very selective and there is no adequate  
12 documentation to inform a reviewer how to track water exchanges and variables were  
13 used. *Id.* at p. 797:11-20. Second, when actually operating the model, there are erratic  
14 and very counter-intuitive results to the outputs that occur as a result of running that  
15 model in different ways. *Id.* at p. 766:2-18. This uncertainty in the model is not  
16 acceptable because there was no effort to calibrate the model in order to understand  
17 the counterintuitive results and there was no sensitivity analysis. *Id.* at pp. 776:1-  
18 777:20, p. 814:2-12. Further, just by running the model on different computers with the  
19 same input, Dr. Schreuder got results that differed by as much 3000 acre feet of water.  
20 *Id.* at pp. 779:10-780:1.

21 Dr. Schreuder also put on evidence demonstrating that his negative opinions  
22 regarding the model were shared by BOR and U.S. Geological Survey (USGS)  
23 employees who were working on the model at least as far back as 1994; including  
24 opinions by Bill Sikonia (USGS), Ken Cartier (USGS), Bill Greer (BOR) and Robertson  
25 Software, Inc. *Id.* at pp. 770:16-772:18; TCID-138; TCID-275B References. These  
26 opinions support those of Dr. Schreuder, indicating: 1) That the model is not  
27 understandable, overly complex, and convoluted (TCID-154 and 159); 2) That minute  
28 changes to the model completely changes the results (TCID-159); 3) That the model

1 does not adhere to good coding practices (TCID 151); 4) That it is difficult to determine  
2 if the output results represent a realistic representation of the water system (TCID-  
3 158); 5) That the lack of documentation and the lack of calibration creates uncertainty  
4 and makes it impossible to assess the accuracy of the model (TCID-137 and 151); 6)  
5 That no sensitivity analysis was performed (TCID-159); 7) That the model should have  
6 been re-written or a different model used (TCID-151 and 159); and 8) That the model's  
7 predictions are driven by the expectations of the TROA parties (TCID-160).

8           John Sarna, who worked on the model during the negotiations and as part of  
9 the EIR/EIS acknowledged that he knows Mr. Sikonia and Mr. Cartier and that they  
10 were critical of the model. TR. Vol. III at p 623:6-12; pp. 627:15-628:20. Importantly,  
11 Mr. Sarna admitted that the above described memos that are critical of the model were  
12 not presented to the TROA decision makers as part of the EIR/EIS process. *Id.* at pp.  
13 667:21-668:9. Based on Dr. Schreuder's analysis, the model continues to show the  
14 exact same behavior of which these individuals were critical. *Id.* at p. 819:1-13. He  
15 concludes that "a number of individuals that spent an awful lot of time studying this  
16 code for the TROA parties came to the conclusion that this model is not defensible."  
17 TR. Vol. III at p. 772:15-18.

18           Dr. Schreuder recommends, as did the BOR and USGS employees who  
19 reviewed the model, that there should have been a re-write of the model so that it is  
20 understandable. TR. Vol. III at p. 781:1-782:24; see also TCID-158. Further, Dr.  
21 Schreuder recommends the use of a different model, such as Riverware, which is  
22 much easier to understand, has been peer reviewed, and has been adopted as a  
23 replacement for TROM. *Id.*, TCID-275B Opinion 3.

24           The Truckee River Operating Model is also the source of the shortages analysis  
25 discussed above. Dr. Schreuder does not believe that the results of this analysis can  
26 be relied on quantitatively, but states that "[t]o the extent that a party has a burden of  
27 proof, I think that there is a certainly significant concerns raised that I would encourage  
28 the decision-makers to take into consideration." TR. Vol. III at pp. 821:6-822:18. He

1 has no confidence in its model results (*Id.* at p. 774), and does not believe that this  
2 model forms a sound scientific basis for any decision-making (*Id.* at p. 766).  
3 Ultimately, it is Dr. Schreuder's opinion that the model "provides little, if any,  
4 confidence in the data it is evaluating and no confidence that the output created by this  
5 TROA is either reliable or usable for purposes of decision making." TCID-275B.

6 **G. The Ratification Of The Interstate Allocation Under TROA Does Not**  
7 **Support Approval Of The Applications And Petitions**

8 A number of parties to this proceeding, including the States of California (TR.  
9 Vol. I at p. 198:21-24) and Nevada (TR. Vol. I at pp. 16:23-18:14), stressed the alleged  
10 importance of the interstate allocation though the operation of TROA. However, TROA  
11 has no real impact on the current or future operation of the interstate compact, which is  
12 in place and is currently operating. See Water Code §5976 *et seq.* and Nevada  
13 Revised Statues §538.270 *et seq.* Mr. John Hoffman, representing the State of  
14 Nevada, described how in 1970 and 1971 the States of Nevada and California  
15 approved the compact, but Congress did not ratify it as a result of objections from the  
16 Pyramid Lake Tribe, local interests, and some federal agencies. TR. Vol. I at pp. 16:23-  
17 18:14. However, it is Nevada's policy to support the allocation. *Id.* Further, Mr. Sarna  
18 testified that it is the policy of this Board to abide by the terms of the compact. *Id.* at p.  
19 209:7-22; *see also* SWRCB Decision D-1200 at p. 3 (State Board in 1964 recognized  
20 the allotments as specified in the interstate compact.)

21 While the Compact was never consented to by Congress, it stands as the  
22 latest and highest expression of the intent of the California Legislature. As  
23 such, this Board must follow its strictures as a statement of the public  
24 policy of California. Both California and Nevada have followed the  
25 provisions set forth in the Compact, and this Board must continue to do so  
26 until there is a restatement of legislative policy.

27 SWRCB Order WQ 83-9 at pp. 13-14.

28 Further, Serra Pacific (TMWA's predecessor), TCID, and WCWCD have  
historically taken the position they will abide by any agreement entered into between

1 the States of California and Nevada for allocation of the waters of Lake Tahoe Basin.  
2 Decision D-1056 at p. 16 (1962). Thus, whether TROA and the subject Applications  
3 and Petitions are approved has no real impact to the interstate allocation between  
4 California and Nevada.

#### 5 **IV. CONDITIONS**

6 If the State Board elects not to reject the Applications and Petitions, then the  
7 Protestants suggest the following conditions are placed in their approval or as  
8 additional requirements to help reduce the impact to Newlands Project water right:

- 9 1. Defer action until the *Orr Ditch* Court has had an opportunity to deal with  
10 the modification of the Decree, including the Truckee River Agreement.
- 11 2. Defer action on the Applications to appropriate until the Nevada State  
12 Engineer rules on the outstanding applications for unappropriated water  
13 on the Truckee River.
- 14 3. Require the use of an appropriate model, such as *Rivenware*®, to  
15 conduct the shortage analysis and to perform the Water Availability  
16 Analysis before approval.
- 17 4. If acting before the *Orr Ditch* Court, limit storage of *Orr Ditch* water rights  
18 that have been converted to municipal use from agriculture to a  
19 consumptive use of 2.0.
- 20 5. If acting before the *Orr Ditch* Court, prohibit the application of the 25  
21 percent rule to non-irrigation water rights.
- 22 6. The timing of storage of *Orr Ditch* Decree rights under the proposed  
23 changes and operation of TROA should mimic the historical return flows  
24 in time, location and amount so as to protect the existing rights of the  
25 Newlands Project.
- 26 7. If the Board should decide to approve the Applications or Petitions, then  
27 water stored in these upstream reservoirs should be made available for  
28 use in the Newlands Project so as to prevent shortages.

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- 8. Provide upstream storage with carry over ability to all *Orr Ditch* Claim 3 rights, including rights in the Newlands Project.
- 9. Require that any future changes under the operation of TROA, including exchanges, trades, and releases are subject to a change or transfer proceeding under California law to provide the opportunity for review and evaluation by the State Board and other interested parties to understand the potential impact on existing water rights, and to protest the changes.

**V. CONCLUSION**

For the reasons stated above, the State Board should deny the Applications and Petitions designed to implement TROA which were the subject of this proceeding. In the alternative, the State Board should require the Applicants and Petitioners to meet the additional requirements described above or should place the suggested conditions on any approval.

Dated: September 7, 2010

HANSON BRIDGETT LLP



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Nathan Metcalf (SB # 10404)  
Attorneys for Protestant Truckee-Carson  
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 7, 2010, I served a copy of the attached

3 **JOINT CLOSING BRIEF FOR THE TRUCKEE-CARSON IRRIGATION DISTRICT,**  
4 **CHURCHILL COUNTY, NV, AND CITY OF FALLON, NV**

5 Electronic Transmission based on the Notice of Public Hearing from the State Water  
6 Resources Control Board of the parties to accept service by email or electronic transmission. I  
7 am readily familiar with Hanson Bridgett's practices for transmitting documents by electronic  
8 mail via internet service provider. I caused the documents to be sent to the persons at the  
9 email addresses listed for each addressee on the attached service list. In addition, 5 copies  
10 were delivered to the State Water Control Resources Board.

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I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Dated this 7th day of September, 2010 in San Francisco, California.

  

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Keith Kiley