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FILE NUMBER 18068-008

DIRECT DIAL

June 29, 1998

BY FAX 702-882-7592

Ms. Betsy Rieke
Bureau of Reclamation
Lahontan Basin Office
705 North Plaza Street
Carson City, NV 89702-0640

Re: Truckee River Operating Agreement Draft EIS/EIR

Dear Ms. Rieke:

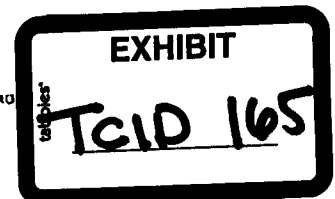
These comments are made on behalf of the Truckee-Carson Irrigation District ("TCID") and are in addition to the comments submitted separately by TCID. These comments relate to the process and substance of the Truckee River Operating Agreement ("TROA") Environmental Impact Statement/Environmental Impact Report ("EIS/EIR").

BACKGROUND

TCID was established in 1918 to address design defects in the drainage system for the Newlands Project. The U.S. Reclamation Service (now Bureau of Reclamation ("BOR")) desired that TCID operate and maintain the Newlands Project on behalf of the United States under a federal contract. In 1926, TCID and the United States entered into an O&M contract which authorized TCID to operate and maintain the project and to act as the fiscal agent of the United States for purposes of repayment of the capital construction charges for the project.

In the early days of the project, the project manager found it increasingly difficult to assure an adequate water supply was available for the entrymen. Significant problems were faced by the project due to the overdiversion of water from the Truckee River by persons in the Truckee Meadows. So much water was diverted that at times there was no water flowing in the Truckee River at Derby Dam, and certainly no water flowing to Pyramid Lake. At the insistence of the Department of Interior, the Department of Justice filed a quiet title suit to determine the relative rights of the water users of the Truckee River. The

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case is known as United States v. Orr Water Ditch Company or the Orr Ditch decree. In the 1920s and 1930s, the region experienced a severe drought. The drought made it imperative to secure upstream storage on the Truckee River in order to ensure an adequate supply of water for irrigation during times of shortage.

TCID in order to secure additional sources of water began leasing water from Donner Lake. This culminated with the purchase of a common interest with Sierra Pacific Power Company ("SPPCo") in 9500 acre feet of storage and water rights in Donner Lake. This water is referred to as "Privately-owned stored water" in the Truckee River Agreement. In 1930, TCID filed with the Nevada State Engineer two applications to appropriate water on the Truckee and Carson Rivers for 100,000 acre feet each. Applications 9330 and 9331 were intended to allow the District to have available water to meet the needs of the water right owners in the Newlands Project.

As a prelude to and a condition of the entering of the final decree in the Orr Ditch case, the parties entered into an agreement for the operation of the Truckee River. The Truckee River Agreement ("TRA") contains specific language which makes it binding on all of the signatories, including the United States, the SPPCo, TCID, the Washoe County Water Conservation District and the individual water right owners on the Truckee River. There is no provision for modifying the TRA. Instead the parties had stipulated to the entry of the final decree with the Orr Ditch Court incorporating by reference the provisions of the TRA into the decree. Therefore, the operation of the Truckee River under the decree became integral to the adjudication of the rights of the parties to the water in the Truckee River itself. One cannot be divorced from the other.

The Orr Ditch Decree in Claim 3 recognized diversion rights in the water right owners in the Newlands Project for up to 1500 cfs of Truckee River water at Derby Dam. It also recognized the right of the water right owners to store water in Lahontan Reservoir for the benefit of the Newlands Project. Moreover, the decree recognized the right of the United States to store water in Lake Tahoe for the benefit of the Newlands Project. One of the important compromises in the TRA was the recognition of Claim 2 for the addition of certain irrigation water rights for the Pyramid Lake Paiute Indian Tribe ("PLIT"). Without the consent of the parties to the TRA, there would be no Claim 2 in the Orr Ditch Decree because the United States did not ask for this right in the original complaint.

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The PLIT and others have filed claims with the Nevada State Engineer for unappropriated water in the Truckee River. The finalization of the TROA requires that the PLIT's application be resolved favorably to the PLIT. However, the TROA EIS/EIR fails to recognize that TCID's application predates PLIT's by some fifty years. The parties are awaiting the outcome of the hearings conducted by the State Engineer with regard to the unappropriated water application. Until the State Engineer rules, it is premature to assume that only the PLIT will be awarded this water. Given the priority of the district's application and the clearly stated need for water to correct shortfalls created by the OCAP, TCID has made a compelling case for this water.

ALTERNATIVES

Every decisionmaker must have before him or her the range of reasonable alternatives in order to make an informed decision. This is especially important when the government is proposing to alter the operations of a vital resource such as the Truckee River. Altering the relationships among so many water right owners can have a devastating effect, especially in times of drought. This in turn can have an impact on the wetlands, wildlife, soil, groundwater, and on the social and economic well-being of the community.

Alternatives analysis in an environmental document is at the heart of the analysis and decision making. Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985). The alternatives analysis ensures the decision maker has before him or her the necessary range of reasonable alternatives in order to make an intelligent and informed decision. Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971). The rule of reason controls the range of reasonable alternatives that must be analyzed and in this case, the BOR must include alternatives that would only modify the TRA in such a way as to add the additional reservoirs and other potential changes in operation but would not alter the basic relationships among the parties to the original Truckee River Agreement. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). California Environmental Quality Act (CEQA) Guidelines Section 15126(d) provides that alternatives analysis must be accomplished in order to provide the decision maker with choices that will avoid or lessen environmental impacts. Therefore, under California law, the decision maker must have a range of alternatives from which to choose.

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Unfortunately, in this case the EIS/EIR contains only one alternative, the no action alternative. The proposed action is termed the preferred alternative; however, there are no other alternatives analyzed or presented. This is a clear violation of the National Environmental Policy Act (NEPA). The document admits that other alternatives were considered and rejected by the negotiators. The basis for the rejection of the alternatives was the rejection of the idea by the negotiators. Thus if a negotiator, for whatever reason, rejected an alternative, then that alternative was deemed not feasible by the team and was rejected. All of this was accomplished without any input from the public as is required under NEPA. Moreover, the idea that an alternative can be rejected merely because one of the negotiators refuses to agree, denies the decision makers in this case an opportunity to explore fully all of the reasonable alternatives. In fact, what may be unacceptable to one agency may be reasonable to another and must at least be considered. In this case, the Draft TROA states that it is subject to being changed; therefore, if an agency considers an alternative to be reasonable from an environmental perspective then it could renegotiate that provision, insisting that it be given consideration. To do otherwise, turns the alternative analysis of NEPA on its head.

The EIS/EIR states at page 2-7 that goals of the alternatives could not be achieved unless parties to the negotiation voluntarily agreed on management measures, including giving up water rights or relinquishing control of water rights as to timing of releases. Since TCID was not involved in the decisions to relinquish water rights or its rights to the timing of releases, the question arises as to how the parties to these negotiations are able to change Floristan rates and to change the priorities of storage in the reservoirs without gaining TCID's permission and the parties of the Fifth Part to the TRA.

The Draft EIS/EIR also states at page 2-8 that changes will continue to be made to the TROA by the parties but that the additional changes are expected to fall within the range of possible actions evaluated in the draft EIR/EIR. It seems obvious that if there are changes to the TROA, then they can be analyzed in this document if there is a range of reasonable alternatives analyzed in the EIS/EIR. However, if there is only one proposed action and one alternative (no action), then how can any changes to the TROA fall within a range of alternatives, when there are none. If changes are made to the TROA after the EIS/EIR is completed then only a supplemental EIS/EIR can satisfy the requirements of NEPA and CEQA.

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Within the discussion of the no action alternative, there are numerous errors. The most glaring of which are the omissions of TCID as a full participant in the management of the Truckee River. In fact when speaking about Lake Tahoe Dam, the document never mentions the fact that TCID is in control of and operates the dam. Moreover, when mentioning Donner Lake water, the document does not acknowledge that SPPCo only owns an undivided one-half interest in the water and that the Donner Lake water even after it is used by SPPCo is to be returned to the Truckee River so that it can flow downstream to Derby Dam to be diverted for the Newlands Project. There is no proposal by SPPCo to acquire all of Donner Lake water and TCID has no present intention of relinquishing such a right. The proposal by SPPCo to trade Donner Lake water as Fish Credit water would be a breach of the agreement SPPCo has with TCID for the use of that water.

The EIS/EIR treats the remaining waters in the Truckee River, those not committed under Orr Ditch, as being under the control of the United States. That is not true and is inconsistent with the position of the United States in hearings before the Nevada State Engineer on TCID's Application 9330 to appropriate waters of the Truckee River. That issue has not as yet been decided and the United States should not assume that unappropriated waters in the Truckee River will inure to the benefit of the PLIT.

On page 2-19 of the EIS/EIR, the document discusses the basis for TROA. It is difficult to glean the real reason for having to amend the operations of the river from this discussion. Several things are clear. The document does not address the potential for additional water shortages for the Newlands project due to changes in the operations of the river. Further, the basis of the TROA seems to be drought protection for the Truckee Meadows while enhancing fish spawning. There is no mention of drought protection for the Newlands Project as the basis for TROA, something that was at the heart of the TRA. Why is this, except for blatant discrimination against the Newlands Project. In fact, the TROA through its water storage credit and accounting mechanisms allows for priorities of water rights to be shifted in the upstream reservoirs and for carryover storage for SPPCo and PLIT while denying these same benefits to the Newlands Project. In fact at the same time that storage rights are being enhanced for other parties to the TROA, they are being diminished for the Newlands project under the Adjusted OCAP.

The reduction in Floristan rates proposed by TROA is particularly disturbing since it could have the effect of

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diminishing the amount of water available to divert at Derby Dam. By allowing TROA signatories to agree to reduction in flow rates in exchange for storage credit in the upstream reservoirs, the TROA creates a situation where less water is available for diversion at Derby Dam and favoritism is being shown to signatories whether or not they have the priority of right to store water. In fact, the storage rights the Newlands Project has in Lahontan Reservoir as granted by the Orr Ditch Court is being undermined by the storage credit scheme of TROA.

The TROA creates categories of water rights which do not exist under Nevada law or the Orr Ditch decree. The TROA purports to create fish credit, M&I credit, Joint Program Fish Credit and other categories of water not recognized elsewhere. The water appropriated by the United States on behalf of the Newlands Project and the PLIT was for irrigation and domestic purposes. The TROA is attempting to create new purposes for the use of the water without going through an approval process for the change of use of the water. This is a violation of the Reclamation Act and Nevada law.

PROCESS FOR DEVELOPMENT OF TROA

The TROA as drafted is a complex document with a myriad of relationships between parties, a complex river system and interrelated reservoirs. The draft TROA does not make very clear how all of these complex mechanisms do interrelate. Moreover, if there is an opportunity to cause an environmental impact it is from the manner in which the TROA is implemented that will give rise to these effects. The manner in which the TROA was negotiated has exacerbated the difficulty of understanding how the TROA will operate because apparently there are no minutes of the negotiation sessions and the meetings were not conducted under the auspices of the Federal Advisory Committee Act (FACA).

Under FACA, the Federal agency seeking advice on the management of the river and in setting U.S. policy must charter the advisory committee so that potential conflicts of interest are revealed and the public may evaluate the source of the various inputs to the decision making process. For example, in this case most of the computer modelling for the TROA was accomplished by the SPPCo. Moreover, most of the drafting of the document was done by the attorney for SPPCo. Without these facts being revealed, it is difficult to evaluate the TROA in a truly impartial light. Also it is difficult for the public to participate in the process when there were no Federal Register notices for the meetings, no formal minutes were kept and no

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registering of financial interests were filed by the major participants. Most particularly, the party which had the most to gain from the "negotiations," the SPPCo was in complete control of the modelling and drafting. SPPCo had already struck a deal with the PLIT as to how the water would be split in the Preliminary Settlement Agreement (PSA). The United States had already ratified the PSA. Therefore, conflicts abounded and none of the actions of the government were conducted in the sunshine.

CUMULATIVE EFFECTS

The Draft EIS/EIR purports to analyze the cumulative effects of a series of proposals all related to the water resources in the Lahontan Valley and the Truckee Division of the Newlands Project. These include wetlands water right purchases, retirement of Truckee Division rights, water quality agreement, recoupment, fish spawning enhancements, modifications to Pyramid Lake fisheries, groundwater resource protection, unappropriated water claims, transfer protests, etc. All of these actions are either proposed by or being participated in by the United States. There is a need for a comprehensive or programmatic EIS to evaluate the effects of all these actions, especially as they affect the Newlands Project. Without this comprehensive review, the government is merely piecemealing its analysis of environmental impacts which will have the effect of underestimating such impacts.

UNCERTAINTIES

There are many areas of uncertainty in the document which require further analysis once the uncertainty is resolved. For example, the resolution of the storage of TCID's Donner lake water may have an impact on SPPCo's storage rights and may alleviate some of the impacts from drought if TCID is allowed to store the Donner Lake water upstream or in Lahontan. Moreover, there are many provisions of the TROA itself which have not been finalized and therefore, the potential impacts analyzed in the Draft EIS/EIR will change. Therefore, the document will not assist the decision makers nor inform the public of the potential impacts if there are changes to the TROA.

TRUCKEE RIVER AGREEMENT

As discussed above, the TRA has served the people and the users of Truckee River water for many years. It is easy to demonstrate that the entity that controls the flow of the river controls who will benefit and who will not benefit from the

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waters of the Truckee River. For many years, the Truckee River has been jointly managed by the United States, TCID, SPPCo, Washoe Conservation District, and the Federal Water Master. Now the TROA proposes to supplant this group with a new triumvirate of the United States, SPPCo and PLIT. The Federal Water Master's role will be subsumed into an administrator who is controlled by the triumvirate. The purpose of this power shift can only be for two purposes. First, the parties now wish the Federal Water Master and the courts to take less of a role in the administering of the decrees. Second, the parties now want to relegate TCID to a non role in deciding how the river will be administered. Since TCID is the government's contractor the real victim here are the persons owning the majority of the water rights in the Truckee River, i.e. the Newlands Project water right owners. The question must be asked: Is it fair to exclude TCID from making management decisions concerning the Truckee River when it has been directed by vote of the Newlands Project water rights owners to play such a role under the TRA?

LIST OF PREPARERS

Since the TROA was drafted by many non governmental entities and a significant amount of the computer modelling was accomplished by SPPCo, it is important to reveal this to the public. The names and affiliations of these other entities must be revealed along with their credentials.

CONCLUSION

The Draft EIS/EIR contains numerous erroneous statements and fails to analyze reasonable alternatives. The participation by entities whose motives may not coincide with the government's requires the controls of the Federal Advisory Committee Act to protect the integrity of the process.

Sincerely,
McQuaid, Metzler, McCormick
& Van Zandt, LLP

By: 

Michael J. Van Zandt
Attorneys for

Truckee-Carson Irrigation District

cc: Lyman F. McConnell, Esq.