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VIA EMAIL ([kbarr@mp.usbr.gov](mailto:kbarr@mp.usbr.gov))

Mr. Kenneth Barr  
U.S. Department of the Interior  
Bureau of Reclamation  
Lahontan Basin Area Office  
705 North Plaza Street  
Carson City, Nevada 89701

Re: Truckee-Carson Irrigation District's Comments on Draft Truckee River  
Operating Agreement Environmental Impact Statement and Environmental  
Impact Report

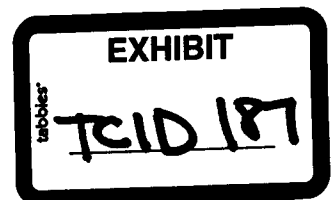
Dear Mr. Barr:

On behalf of the Truckee-Carson Irrigation District (TCID), I hereby submit comments on the Draft Environmental Impact Statement/Environmental Impact Report (Draft EIS/EIR) for the Truckee River Operating Agreement (TROA). TCID and this firm commented on the 1998 Draft EIS/EIR and those comments still apply. I incorporate those comments by reference and attach them for your convenience. I also adopt the comments of Churchill County and the City of Fallon. I have also attached comments from Mr. Charles Binder, President of Binder & Associates Consulting, Inc. (Binder), a water resources expert, and from Drs. Devraj Sharma and Willem Schreuder, President Emeritus and President of Principia Mathematica, Inc. (Principia), experts in water resources modeling. The comments of these experts are also submitted on behalf of Churchill County and the City of Fallon. I appreciate the opportunity to comment on this very important proposal, one that will affect not only the participants in the TROA negotiations but also all of the water users in the Truckee River Watershed.

These comments are organized as general comments on the Draft EIS/EIR in this letter, a separate attachment addressing page by page comments, a copy of the previous comments from this office on the 1998 Draft EIS/EIR, and the comments of Binder and Principia.

#### BACKGROUND

The Truckee River and its tributaries supply water to several hundred thousand individuals, to farms, ranches, businesses, and to flora and fauna over a vast area, stretching from



the Sierra Nevada Mountains to the Stillwater Range in Churchill County. There are several thousand individuals and entities that own water rights from water supplied by the Truckee River and its tributaries. These water rights were adjudicated in the *Orr Ditch Decree, U.S. v. Orr Water Ditch Company*, Case No. Equity A-3 (D.Nev. 1944). The *Orr Ditch Decree* was finalized after the parties agreed to stipulate to its entry after they had entered into the Truckee River Agreement (TRA) in 1935. The TRA was negotiated to settle all remaining disputes concerning the allocation of water from the Truckee River and to establish a scheme for the management of the reservoirs and resources associated with the Truckee River, including Lake Tahoe and what was to become Boca Reservoir.

The main participants in the negotiation of the TRA were the United States of America, TCID, the Washoe County Water Conservation District (Conservation District), and Sierra Pacific Power Company (Sierra). A portion of Sierra's water resource responsibilities have been taken over by the Truckee Meadows Water Authority (TMWA). Parties of the Fifth Part, or other individuals using water rights from the Truckee River also signed the agreement. TCID, the Conservation District and Sierra were assigned responsibilities for managing the river, since they were the major owners of water rights. The United States also was assigned a role since it had a major interest in facilities, including the dam at Lake Tahoe, Derby Dam, Lahontan Reservoir and the Newlands Project. The Federal Water Master, appointed by the *Orr Ditch* court also had a major role to play in the management of the River. There are many important components of the TRA, but the most important ones are the management of the reservoirs and Lake Tahoe in order to meet Floristan Rates in the Truckee River. Floristan Rates are designed to ensure that there is sufficient flow in the river to satisfy power generation requirements under the General Electric Decree of 1915, and to ensure sufficient flows in the river so that downstream irrigation, domestic and municipal and industrial (M&I) demands are met. These would include demands of the Newlands Project under Claims 3 and 4 of the *Orr Ditch Decree* to store water in Lake Tahoe and Lahontan Reservoir and to allow diversions at Derby Dam for irrigation, domestic and livestock and for carryover storage. Without the TRA, the *Orr Ditch Decree* could not have been entered as a final decree. The stipulation entered into by the parties prohibits withdrawal from the stipulation and makes the stipulation irrevocable. Any changes, therefore, to the TRA requires the consent of all the parties to the TRA.

After the *Orr Ditch Decree* was entered, disputes arose concerning the amount of water that the United States had allocated for the Pyramid Lake Paiute Tribe of Indians (PLIT). These disputes culminated in several significant events, including a suit by the PLIT to force the Secretary of Interior to regulate diversions from the Truckee River to the Newlands Project and an attempt by the United States to reallocate water in the Truckee River from the Newlands Project to the PLIT. This attempt was halted by the United States Supreme Court in the case of *Nevada v. U.S.*, 463 U.S. 110 (1983). The Court ruled that the *Orr Ditch Decree* barred the United States from reallocating the water of the Truckee River once the decree was final. The

Secretary of Interior has continued to regulate diversions from the Truckee River through the Newlands Project Operating Criteria and Procedures (OCAP), first promulgated in 1967, and amended in 1973, 1988 and modified in 1997. The OCAP is intended to ensure that the Newlands Project complies with all applicable decrees, including the *Orr Ditch Decree*.

For the last 69 years, the Truckee River has been managed by the parties to the TRA, along with the Federal Water Master. Several new reservoirs have been added to the Truckee River watershed that did not exist when the TRA was executed. These reservoirs are part of the Washoe Project and include Prosser Reservoir and Stampede Reservoir. These reservoirs are managed in conjunction with the other reservoirs serving the Truckee River basin; however, Stampede Reservoir is primarily managed as storage for water for endangered and threatened fish in Pyramid Lake and the Lower Truckee River.

In 1988, Sierra and PLIT negotiated the Preliminary Settlement Agreement (PSA), which purports to set forth a process to settle disputes between Sierra and PLIT over uses of waters in the Truckee River, but primarily allows for storage of water owned by Sierra in upstream reservoirs for drought protection for the Truckee Meadows. In return, the PLIT would be able to convert this drought protection water into Fish Credit Water if it is not needed by Sierra. The PSA was modified and then ratified by the United States. The PSA also became the foundation for the initiative to settle certain litigation the PLIT had initiated through federal legislation. Thus was born the Truckee-Carson-Pyramid Lake Settlement Act, P.L. 101-618, 104 Stat. 3289, November 16, 1990 (the Act).

The Act included provisions for congressional approval of the interstate allocations of water between Nevada and California and for the negotiation of the Truckee River Operating Agreement, which would use the PSA as its start point. The TROA provisions of the Act also required that water rights along the Truckee River be protected. Moreover, the Act also contained a reservation that it was not to be construed to alter or conflict with any existing rights to use the Truckee River water in accordance with the applicable decrees, including the right of the Newlands Project to divert water at Derby Dam.

## **WATER RIGHTS ISSUES**

The TROA purports to supercede all prior agreements regarding the management of the Truckee River. There is a significant question whether any parties to the TRA can unilaterally dispose of the TRA and replace it with a different management scheme without the consent of all parties to the TRA. Moreover, certain allocations of water in the TRA are not preserved in the TROA and the TROA purports to alter the manner in which Floristan Rates are set in the river. As noted above, the major management decisions on the Truckee River revolve around the

maintenance of Floristan Rates to meet the water right demands of the decree. TROA in many ways dismantles not only the management structure associated with Floristan Rates and storage in reservoirs to meet these rates but also alters the manner in which the rates are reduced and completely alters the characteristics of the water saved through such reductions. The long and short of this is that the water is no longer saved for the benefit of all water users on the river but is saved only for TMWA and/or the PLIT. The water right owners in the Newlands Project are completely cut out of this process and no longer have even a seat at the table to decide how the water in the river will be managed.

TROA purports to create carryover storage rights in the upstream reservoirs and even removes water from storage in Lahontan Reservoir which is then stored in these upstream reservoirs, ostensibly for the purpose of preventing spills at Lahontan. The truth is that this initiative, which is part of TROA but neither analyzed or modeled in the Draft EIS/EIR, is designed to hold water that is part of the Newlands project water right owners carryover storage right in Lahontan, in the upstream reservoirs where it will be converted to fish water for the benefit of the PLIT. This is exactly the type of reallocation that was barred by the U.S. Supreme Court in 1983. In contrast to the carryover storage rights of the Newlands Project, Sierra, TMWA, PLIT and others are allowed to store water in upstream reservoirs and to carryover such storage from year to year by establishing a system of credits.

TROA also claims that the credit waters stored in these upstream reservoirs will attain the characteristics of Privately Owned Stored Water. This means that such waters can be stored in the reservoirs and when released, no transportation losses are applied until the water reaches its new point of diversion. This means that water stored for drought protection by TMWA that normally would be diverted in the Reno/Sparks area will now be stored with no losses and converted into Fish Credit Water. The Fish Credit Water, when it is released, will have no transportation losses applied until it reaches Pyramid Lake. Thus for the distance from Sparks to Pyramid Lake, some fifty miles, there are no transportation losses applied and the water needed to transport such credit waters comes out of the flow in the river that would otherwise be available to divert by others along the river without regard to priority of appropriation. To declare that water that is not even decreed water such as fish water or fish credit water is permitted to have carryover storage and no transportation losses elevates this water above other decreed water with a clearly higher priority and with decreed rights.

TROA also purports to be able to alter the way in which Floristan Rates are reduced without regard to the rights of Newlands Project water right owners, including rights to store water for drought protection. The negotiators of TROA have seen fit to remove TCID as a participant in any of the management decisions and have provided no protection for the rights of Newlands Project water rights owners, other than the State of Nevada. On average, 60,000 to 100,000 acre feet of water is diverted from the Truckee River for the benefit of the Newlands

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Project. This is compared to an average flow of about 600,000 acre feet. Thus water right owners with a significant interest in the waters of the Truckee river are being eliminated from its management. Moreover, in addition to control over Floristan Rates, the TROA purports to include credit storage in Lake Tahoe adverse to Claim 4 of Orr Ditch and to allow Donner Lake water, of which TCID owns and undivided one half, to be divided and credited by TMWA for drought protection and/or converted to fish credit water. This is a direct and substantial impact on the Newlands project. Finally, TMWA and Sierra are permitted to store hydroelectric power generation water, water that has a non consumptive use, and to eliminate that water from flowing in the river by converting it to Fish Credit Water, which requires it to bypass Derby Dam. Normally, this non consumptive use by TMWA or Sierra would continue to flow in the river and would be available for diversion by TCID. This is a direct and substantial impact on the Newlands Project.

#### **PURPOSE AND NEED FOR THE ACTION**

The Draft EIS/EIR states that there are two primary purposes for the proposed action, TROA. First, the action will provide drought protection for the Truckee Meadows. Second, the proposal will provide additional water for fish flows to Pyramid Lake for endangered and threatened species and will better time those flows. All other purposes for TROA appear to be secondary at best, even though the primary purposes of TROA, in addition to those favoring PLIT and TMWA, are to protect all water rights on the Truckee River, to provide for flood protection, and to minimize the costs to the Secretary of operating and maintaining Stampede Reservoir.

When all is said and done, TROA provides for enhanced protection for TMWA's water rights, and elevates water used for fish above all water rights on the Truckee River. As demonstrated in the Draft EIS/EIR, the benefits to Pyramid Lake from TROA are questionable if not negligible. Overall, the flow regimes 1, 2 and 3, favored by PLIT will actually occur less frequently under TROA as compared to No Action, and Most likely will occur less frequently as compared to Current Conditions. Further, TROA only provide an additional 5240 acre feet of water to Pyramid Lake on average, an amount that is within the gage error for the gage at Nixon. Thus, TROA, as compared Current Conditions provides questionable benefits.

In comparison, TROA, if adopted would have significant impacts on the water resources available to the Newlands Project. Although the water resources computer model used to support the analysis in the Draft EIS/EIR we believe is fatally flawed, even that model shows that under extreme drought conditions, an additional 8000 acre feet of shortages will occur in the Newlands Project. See Comments of Principia attached. This is a significant impact since P.L. 101-618 prohibits any alteration or conflict with decreed rights. The flawed Truckee River Operations Model (TROM) has been used to provide long term averages as the output that is

included in the Draft EIS/EIR. The use of long term averages tends to mask the true impacts on a yearly or even on a monthly basis, as the peaks and valleys tend to flatten out over a 100 year averaging period. A look at individual years reveals that there will be shortages on the river caused by the implementation of TROA.

Moreover, the TROM uses flawed assumptions in order to accomplish its analysis, especially in the No Action Alternative. For example, the No Action Alternative assumes that all irrigation rights in the Truckee Division of the Newlands Project will be eliminated. It also assumes that only a small number of acre feet of M&I water will remain in Fernley. The No Action Alternative also assumes the elimination of a significant demand from the Carson Division to the Newlands Project; it assumes the divided use of Donner Lake water; it assumes that Lahontan Reservoir has no carryover storage right; it assumes that water quality water will be used at 133 percent of its duty; it assumes that wetlands demand is 2.99 acre feet versus 3.5 acre feet; it assumes that efficiencies in the Newlands Project of 65.4 percent regardless of water supply conditions; it assumes that water quality water can be stored upstream; it assumes that PLIT will fully utilize its Claims 1 and 2 water; it assumes that PLIT has obtained rights to all unappropriated water on the Truckee River; it assumes that factors used to calculate monthly accretions are the same always; it does not calculate stream conveyance losses; it does not model Newlands Project incentive credit water; it assumes that inflows from the Carson River to Lahontan will not change. See Comments of Binder attached.

None of these assumptions or omissions are realistic for many reasons, and as explained in the detailed comments attached, many of the assumptions are simply erroneous or are too speculative at this point to assume that they will occur. Since the TROM is based on these faulty assumptions, the output from the model which is the basis for the impacts analysis in the Draft EIS/EIR is highly suspect.

## **ALTERNATIVES ANALYSIS**

### **1. The Draft EIS/EIR Fails to Explore and Objectively Evaluate an Adequate Range of Alternatives, and Specifically Failed to Examine Other Viable Alternatives.**

A draft EIS/EIR must consider all reasonable alternatives in depth. This requirement is equally applicable to both a draft and final EIS/EIR. See 40 C.F.R. §§ 1502.9(a) and 1502.14. The specific obligation to consider a range of alternatives is set forth in the regulations as follows:

[The Agency] should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis of choice among options by the decision maker and the public. In this

section agencies shall: (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits. © Include reasonable alternatives not within the jurisdiction of the lead agency. (d) Include the alternative of no action. (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits such preference.

See 40 C.F.R. § 1502.14. In the present case, only three alternatives were considered: no action, Local Water Supply Alternative ("LWSA") and TROA. The alternatives analyzed, however, are insufficient to satisfy the obligation to analyze a range of alternatives. The deficiencies in this analysis include the following:

- a. The Draft EIS/EIR failed to consider an adequate number or range of alternatives. Only three alternatives were considered, the No Action alternative, the LWSA, and the TROA. The No Action alternative and the LWSA are virtually identical. See e.g. Table 2.1 (Comparison of water management provisions among the alternatives); see also Draft EIS/EIR, p. 2-10 - 2-26. Under the LWSA alternative, all elements of Truckee River reservoir operations, river flow management, Truckee River hydroelectric plant operations, minimum reservoir releases, and reservoir spill and precautionary release criteria, and water exportation from Lake Tahoe and upper Truckee River basins are all presumed to be the same as under the No Action alternative. Further, the LWSA is speculative, representing water supply options that may be authorized by State and local governmental agencies if the TROA is not implemented. See Draft EIS/EIR p. 2-23. Accordingly, considering only a No Action alternative along with a virtually identical alternative (LWSA) is tantamount to considering no alternatives at all.
- b. The Draft EIS/EIR fails to rigorously explore and objectively evaluate all reasonable alternatives. Alternatives not explored or objectively evaluated include the construction of additional reservoir facilities, use of additional storage capacity in Lahontan reservoir, transbasin importation of surface water and groundwater supplies, conservation measures, increased use of conjunctive use and groundwater banking, and water leasing that would allow water users to temporarily forego the use of water for payment. The existence of these viable but unexamined alternatives renders the Draft EIS/EIR deficient. See *Westlands Water District v. United States*, 376 F.3d 853, 868 (9<sup>th</sup> Cir. 2004); see also

*Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 813 (9<sup>th</sup> Cir. 1999).

- c. The Draft EIS/EIR fails to identify a legitimate basis for dismissing the alternatives considered and rejected and TROA components considered and rejected. See Draft EIS/EIR Attachment G; see also Draft EIS/EIR, p. 2-3 (other alternatives to TROA rejected during the negotiating process). The public interest in the environment and in ensuring that all alternatives were considered cannot be limited or defeated by agreements between parties. See e.g. *Simmons v. United States Army Corps of Engineers*, 120 F.3d 664, 670 (7<sup>th</sup> Cir. 1997).
- d. The Draft EIS/EIR fails to explore and objectively evaluate all reasonable alternatives, and fails to fully explicate its course of inquiry, its analysis, and its reasoning with respect to these alternatives. In reference to the alternatives which were considered and rejected, all documents and data relating to the alternatives have not been produced. See Draft EIS/EIR, Attachment G. Material and underlying data cannot be incorporated by reference in the Draft EIS/EIR unless it is reasonably available for inspection by interested persons within the time allowed by comment. See 40 C.F.R. § 1502.21.
- e. The Draft EIS/EIR is biased toward the proposed action, TROA, and has prejudiced the outcome and the selection of alternatives examined. Moreover, action has been initiated, including but not limited to the filing of transfer applications, to give effect to the TROA, which limits through action the choice of other reasonable alternatives available. See Draft EIS/EIR, p. 3-396 - 3-402.

## **2. The Draft EIS/EIR Is Deficient Because It Failed To Include a Baseline Alternative.**

In the Binder Comments, Mr. Binder notes that the failure to analyze current conditions, (or a baseline alternative) masks the true impact of the TROA. When compared to the "No Action" alternative that was examined in the Draft EIS/EIR, the impact of TROA appears to be significantly less than when you compare to current conditions. See Binder Comments.

In *American Rivers v. Federal Energy Regulatory Commission*, 201 F.3d 1186 (9<sup>th</sup> Cir. 2000), the Court examined this issue, although the reverse problem was presented. In that case, opponents of a hydro power license objected to the use of existing environmental conditions as a baseline for comparing proposed alternatives. The Ninth Circuit, however, concluded that the use of baseline or existing conditions complied with provisions of NEPA. Moreover, the Court noted that such a comparison is necessary. The Court wrote:



A baseline is not an independent legal requirement, but rather, a practical requirement in environmental analysis often employed to identify the environmental consequences of a proposed agency action. See 54 Fed.Reg. 23756 (1989). Although this Court has had few occasions to address this issue, we have stated that "[w]ithout establishing ... baseline conditions ... there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA." ... "The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process."

*American Rivers*, 201 F.3d at 1195, ft.n. 15 (*internal citations omitted*).

### 3. CEQA Also Requires Analysis of a Reasonable Range of Alternatives.

The Environmental Impact Report ("EIR") is the heart of the California Environmental Quality Act ("CEQA"), Public Resources Code, § 21050, *et seq.*, as amended. *Planning and Conservation League v. Department of Water Resources*, (App. 3 Dist. 2000) 100 Cal.Rptr. 2d 173, 83 Cal.App.4th 892 (modified on denial of reh'g., rev. denied); *Mann v. Community Redevelopment Agency of the City of Hawthorne (Cloverleaf South Bay, Ltd.)*, (App.2 Dist. 1991) 285 Cal.Rptr 9, 233 Cal.App.3d 1143. The EIR seeks to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. *Marin Mun. Water Dist. v. KG Land California Corp.*, (App. 1 Dist. 1991) 1 Cal.Rptr.2d 767, 235 Cal.App.3d 1652 [main vol.] (reh'g denied). An error in failing to include relevant information in an EIR is prejudicial if the failure to include such information precludes informed decision making and an informed public participation, thereby thwarting the statutory goals of the EIR process. *Save our Peninsula Committee v. Monterey County Board of Supervisors*, (App. 6 Dist. 2000) 104 Cal.Rptr.2d 326, 87 Cal.App.4th 99.

A major function of the EIR is to preview and ensure that all reasonable alternatives are thoroughly assessed by the responsible official or board. *Inyo County v. City of Los Angeles*, (1977) 71 Cal.App.3d 185.<sup>1</sup> As the California State Legislature has declared:

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<sup>1</sup> Public Resources Code, § 21002.1 (a) states that "The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." Section 21061 states that "The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." Section 21081 states that "no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless . . . specific economic, legal, social, technological, or other considerations, . . . make

"The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects..."

Public Resources Code, § 21002. Thus, CEQA sets a much higher standard than NEPA for approval of projects. In order to assess thoroughly whether environmental effects can be alleviated and to fully inform the decision making and the public, the EIR must meaningfully discuss both mitigation and alternatives. *Laurel Heights Improvement Assn v. Regents of the University of California* (1988) 47 Cal.3d 376 at 401-402.

The CEQA guidelines at 14 California Code of Regulations ("CCR") § 15120 et seq, set out the required content of an EIR. Section 15126.4 states that an EIR shall describe feasible measures which could minimize significant adverse impacts. However, "[i]f the lead agency determines that a mitigation measure cannot be legally imposed, the measure need not be proposed or analyzed. Instead, the EIR may simply reference that fact and briefly explain the reasons underlying the lead agency's determination." (14 CCR §15126.4(a)(5)). An EIR must discuss alternatives to the proposed project and describe

a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation. An EIR is not required to consider alternatives which are infeasible. The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives. There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason.

14 CCR § 15126.6 (a). (See also *Laurel Heights Improvement Assn v. Regents of the University of California* (1988) 47 Cal.3d 376, and *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553). The EIR should briefly describe the rationale for selecting the alternatives to be discussed as well as briefly explain the agency's decision for any alternatives considered by the agency but rejected as infeasible. Factors for eliminating alternatives from detailed consideration

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infeasible the mitigation measures or alternatives identified in the environmental impact report."

in the EIR include; 1) failure to meet most of the basic project objectives, 2) infeasibility, or 3) inability to avoid significant environmental impacts. (14 CCR §15126.6 ©). The alternatives analysis should contain sufficient information about each alternative to allow meaningful evaluation and comparison with the proposed project. A matrix displaying the major characteristics and significant environmental effects of each alternative may be used for this purpose. (14 CCR §15126.6 (d)). The range of alternatives that must be evaluated is governed by the "rule of reason" that requires only those alternatives necessary to permit a reasoned choice. Additionally, alternatives shall be selected and discussed in a manner to foster meaningful public participation and informed decision making. (14 CCR §15126.6 (f)).

Here, the TROA failed to look at alternatives and potential mitigating actions in the Draft EIS/EIR. Although the document does give some detail on the alternatives selected for analysis, it fails to meet the CEQA requirements in regards to the alternatives considered and rejected. Section 2.V of TROA refers to a Report to Negotiators which is apparently a detailed report given to a select group of stake holders who were given mandatory signature authority, and an opportunity to reject additional alternatives that were not detailed in the Draft EIS/EIR. Numerous alternatives were evaluated to assist the negotiators in developing an operating agreement. The Report to Negotiators was intended to serve as the draft EIS/EIR for TROA, but due to indeterminate issues, it was modified and distribution was restricted to the negotiating parties. It contained a "NEPA-style analysis of five potential project alternatives." It is unclear the fate of the other alternatives that are not discussed in the Draft EIS/EIR. According to the Draft EIS/EIR Section 2.V, "the projected adverse effects on water resources of each preliminary alternative were unacceptable to one or more of the negotiating parties with mandatory signature authority . . . . Accordingly, the alternatives evaluated in the Report to the Negotiators were rejected, and negotiations continue", apparently leading to the Draft EIS/EIR. If rejection by interested parties were a criteria for disqualification of alternatives under CEQA, then the analysis of alternatives proscribed by CEQA could not inform the decision maker and would be nothing more than a *post hoc* rationalization to support decisions already made.

The procedure for alternatives analysis described in the Draft EIS/EIR does not follow the procedure provided in CEQA. There is no provision in CEQA to have a selected group of stake holders make a preliminary determination of alternatives and thus circumvent the requirements of a thorough assessment of all alternatives. Additionally, the purpose of a thorough, detailed analysis of alternatives is to inform the decision maker and the public. The pre-Draft EIS/EIR exclusion of alternatives and cursory discussion in the Draft EIS/EIR does not meet the intent of the CEQA alternatives analysis. In addition, the claim that the alternatives were not fully analyzed because they affected water rights appears disingenuous. All of the options, including TROA will interfere with water rights. It just happens that the rejected alternatives interfere with only the negotiator's water rights. The TROA will interfere with water rights in the Newlands Project (see Binder Comments). If interference with a water right is reason for removal from

analysis, then the TROA itself is on no better footing than any of the rejected alternatives.

The California Supreme Court has determined that an EIR must contain a meaningful discussion of both mitigation and alternatives. *Laurel Heights Improvement Assn v. Regents of the University of California* (1988) 47 Cal.3d 376, at 401-402. In *Laurel Heights*, alternatives for a university biomedical research facility in a draft EIR were determined to be inadequate. The draft EIR identified three types of alternatives: no project anywhere, alternative sites on campus, and alternative sites off-campus; but gave cursory treatment to these alternatives which received only a small amount of text in the large EIR. The court determined that these brief reviews offered nothing more than inappropriate conclusory statements and provides no information to the public to enable it to understand, evaluate, and respond. The court states that "the key issue is whether the selection and discussion of alternatives fosters informed decision making and *informed public participation*." *Id.* at 404. The Regents argue that alternatives had already been considered and found to be infeasible during the internal planning processes and that EIR need not discuss a clearly infeasible project alternative. The court rejects a result that would require blind trust by the public, especially in light of CEQA's fundamental goal that the public be fully informed as to the environmental consequences of action by their public officials. "To facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions." *Id.* at 404 (quoting *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935).

As in *Laurel Heights*, the TROA Draft EIS/EIR should not call for blind faith in the negotiating parties to determine the feasibility of alternatives. If the negotiators feel that the alternatives have significant impacts not apparent in TROA, then the Draft EIS/EIR is the place to fully explain the alternatives and the reasons for selecting TROA. The scant 2 paragraph description and conclusory statements regarding impacted water rights in section 2.A. of the Draft EIS/EIR can hardly be said to fully inform the public. The information provided in Attachment G regarding the alternatives basically reiterates the same information in section 2.A., and the computer model used to extrapolate the data in Table 1 is suspect.

Finally, the alternatives considered but rejected do not include a reasonable range of alternatives as required by CEQA. Some alternatives not considered are: 1) construction of additional reservoirs; 2) use of water banking or underground storage for drought protection; 3) use of interbasin transfers that allow pumping of underground aquifers and transmission of the water to the Truckee River or as a substitute for water diverted from the Truckee River; 4) conservation measures financed by the parties seeking to increase their water supply, such as piping of diverted water, additional water metering, installation of low flow devices, channeling of the River to minimize evaporation, planting of shade trees to reduce temperature, etc.; 5) providing a leasing mechanism for times of drought, when water right owners may lease their water to increase the supply needed for M&I or fish flows. The only mention of any of these

suggested alternatives in the Draft EIS/EIR is a conclusory statement in section 2.V. that "Constructing a new reservoir was not considered as an alternative because it would have exacerbated degradation of riverine fish and riparian habitat as well as created additional cumulative environmental impact throughout the Truckee River basin." This is not a sufficient discussion designed to inform; it is merely an admission that this alternative was not considered.

Both the California and the federal courts have declared that the consideration of alternatives must be judged by "the rule of reason". *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553 At 565. CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR and each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553 at 566 Reasonable or feasible alternatives must be analyzed. The guidelines at Title 14 CCR §15364 define feasible as "means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors."

Here, the alternatives accepted require water to be stored and released without permission of the owner, preclude certain storage and release for decreed water rights and users, and provide benefits to non-water-righted uses at the expense of water-righted uses. These actions are in conflict with § 205(a)(2) of P.L. 101-618, which states that water is to be stored and released from Truckee River Reservoirs to satisfy exercise of water rights in conformance with both the *Orr Ditch* and *Truckee River General Electric Decree*. If the alternatives are counter to existing law they need not be analyzed (CCR § 15126.4(a)(5)). In addition, § 205(a)(1) of P.L. 101-618 requires TROA to carry out the terms of the Preliminary Settlement Agreement between Pyramid Tribe and Sierra Pacific. The stated justification for rejection of alternatives is that any alternative rejected by a party with mandatory signature authority is not feasible because the TROA requires the approval of these parties. However, P.L. 101-618 requires full compliance with NEPA and state law, including CEQA.

Here, TROA is the sole proposed document to determine the operation of the Truckee River reservoirs. Potential conflicts with the *Orr Ditch* and *Truckee River General Electric Decrees* are fatal to an alternative to TROA. Section 210 (b)(13) of P.L. 101-618 states that the Act shall not be construed to conflict with or alter the *Orr Ditch* or *Alpine Decrees*. Failure to comply with CEQA's requirements for alternative analysis makes the document inadequate.

## ENVIRONMENTAL SETTING

The Draft EIS/EIR fails to adequately describe the current environmental setting and its baseline conditions. NEPA requires that an environmental impact study adequately consider and disclose the environmental impact of its actions. The only way to fulfill this mandate is to

examine current baseline conditions against which the various proposed alternatives can be evaluated. As recognized by the Ninth Circuit, without establishing baseline conditions, there is simply no way to determine what effect an action will have on the environment and, consequently, no way to comply with NEPA. See *American Rivers v. Federal Energy Regulatory Commission*, 201 F.3d 1186, 1195 (9<sup>th</sup> Cir. 2000), quoting *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9<sup>th</sup> Cir. 1988). It is, therefore, critical to the NEPA process that the current environmental conditions be fully and accurately defined. *Id.*

Notwithstanding the above, the Draft EIS/EIR fails to properly describe the current environmental setting, fails to consider or take into effect important aspects of Truckee River management, and fails to fully analyze current conditions as an alternative to the three analyzed alternatives (No Action, LWSA, and TROA). Deficiencies in this regard include but are not limited to the following:

- a. The Draft EIS/EIR does not analyze current conditions as a separate alternative to the No Action, LWSA and TROA alternatives. While comparisons to current conditions are referred to occasionally in the Draft EIS/EIR, use of baseline comparisons is incomplete. By way of example, Table 2.10 describes a Summary of Effects of Alternatives on Resources. The Table compares current conditions to the No Action, LWSA and TROA alternatives in the categories of effects to the economic environment, social environment, and cultural resources. However, a comparison of current conditions to the three alternatives is omitted in the important categories of the effects on water resources, Truckee River flow, exercise of water rights to meet demand, groundwater, water quality, sedimentation and erosion, biological resources, and recreation. See Draft EIS/EIR, p. 2-53 - 2-62; see also Draft EIS/EIR, Table 3.96, p. 3-389. Analysis should be conducted, and resultant tables and discussion provided, to compare the proposed action to current conditions with consistency throughout the Draft EIS/EIR. In particular, this needs to be provided in reference to the potential impacts, and changes from current conditions and operations, of the Newlands Project. See Draft EIS/EIR, p. 3-388 - 3-391.
- b. The Draft EIS/EIR does not adequately describe historic and current management of the Truckee River. It fails to adequately disclose and analyze the TRA and the Orr Ditch Decree nor does it fully analyze the impact the proposed action on the management of the river.

## GENERAL INADEQUACIES IN THE DRAFT EIS/EIR

### 1. The Draft EIS/EIR Is Neither Readable Nor Understandable.

The requirements that an environmental impact statement must be both readable and understandable derive from the goal of ensuring that the statement serve as an effective tool for decision makers and the general public alike. To that end, the applicable regulations require that environmental impact statements be written in plain language so that decision makers and the public can readily understand them. See 40 C.F.R. § 1502.8. The statements are to be "concise, clear, and to the point and shall be supported by evidence that the agency has made the necessary environmental analyses." See 40 C.F.R. § 1502.1. The text of the environmental impact statements should be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages. See 40 C.F.R. § 1502.7. At the same time, additional materials, in the form of an appendix, should be circulated with the statement and must include material prepared in connection with the statement that substantiates any analysis, that is analytic in nature, or that is relevant to the decision to be made. See 40 C.F.R. § 1502.18; see also *Oregon Environmental Counsel v. Kunzman*, 817 F.2d 484, 494 (9<sup>th</sup> Cir. 1987) ("an EIS must be 'organized and written in language understandable to the general public and at the same time contain sufficient technical and scientific data to alert specialists to particular problems within their expertise'") (*internal citations omitted*). If not disclosed in the form of an appendix, the technical and scientific data must be readily available on request. See 40 C.F.R. § 1502.18(d).

A clear understanding of the Draft EIS/EIR first requires that the public understand TROA and what it is attempting to accomplish. A reading of the appendix containing TROA leaves one with the same feeling that a federal judge had when first encountering the federal Clean Water Act.

The Clean Water Act ("CWA") is an enigmatical piece of legislation. Filled with more sesquipedalian jargon than a year's subscription to any trade journal and a byzantine system of cross references; its intricacies are virtually indecipherable.

*Citizens' Coal Counsel v. Environmental Protection Agency*, \_\_\_ F.3d \_\_\_ (6th Cir. 2004). No. 02-3628.

The TROA is a complex document, full of cross references and unique definitions, that test the reaches of the human brain. It also leaves one with the feeling that something is happening with the water, you just can never tell what or when. The Draft EIS/EIR does not improve upon the TROA much. It also contains a byzantine collection of definitions and jargon and cross references to other provisions of TROA that leaves one in a whirlwind of concepts.

Never once in the Draft EIS/EIR does the document attempt to set forth any factual scenarios that would mimic real world conditions that the public can relate to and then attempt to describe how TROA works. This is not too much to ask for so important a proposal.

In the present case, the Draft EIS/EIR far exceeds the page limitations recommended by the regulations. It is unwieldy, particularly for members of the general public. At the same time, the appendices fail to provide all necessary data required to permit specialists to fully analyze the scientific basis for the conclusions reached in the Draft EIS/EIR. Materials which were prepared in connection with the Draft EIS/EIR that could be used to substantiate or discredit the analysis and that are relevant to the decisions at issue were not fully disclosed in either the body of the Draft EIS/EIR or the appendices thereto, and were not made readily available on request. To the contrary, in an effort to receive the data and information, TCID was required to submit formal requests pursuant to the Freedom of Information Act ("FOIA"). For these reasons, the Draft EIS/EIR fails to satisfy the readability and understandability requirements.

## 2. Bias in the Selection of Alternatives and in the Analysis.

The Draft EIS/EIR evidences impermissible agency bias and an attempt to justify decisions already made. This comment has two components. The first is that you cannot so narrowly define a project so as to dismiss out of hand all other reasonable alternatives. The second is that the DEIS cannot contrive a purpose of a project to be so slender so as to define "reasonable alternatives" out of consideration or out of existence. The second is that agency bias cannot interfere with the obligation to consider and weigh the pros and cons of all alternatives.

Sometimes, agency bias is evidenced by picking a program or desired outcome, thus forgoing all other reasonable alternatives. See *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 813 (9<sup>th</sup> Cir. 1999). Or, as in the present case, by stating without further explanation that all other alternatives either would not be agreed to by the parties or would conflict with P.L. 101-618. See e.g. *Simmons v. United States Army Corps of Engineers*, 120 F.3d 664, 666 (7<sup>th</sup> Cir. 1997). In our case, if you boil it down, what the Draft EIS/EIR tells us is that the drafters believe that there is only one way, TROA, to comply with or satisfy the requirements of P.L. 101-618. I think a closer look will reveal that this is not the case, and there are viable alternatives that either individually or in combination will satisfy the objectives of P.L. 101-618. If that is the case, then by only considering TROA as an option, the parties involved have effectively engaged in the following tactic:

One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and



thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act.

*Id.*

Administrative bias also was addressed in *Sierra Club v. Forehlke*, 345 F. Supp. 440 (W.D. Wisc. 1972). In that case, plaintiffs sought injunctive relief to restrain defendants from commencement of construction of a flood control dam and reservoir project. Although the court did not find enough evidence of administrative bias to warrant injunctive relief at this stage, the court did go through alleged tactics by which agencies have manipulated the contents of a report to justify a desired end and addressed the manner in which other courts have addressed the problem of administrative bias. In *Sierra Club* it was alleged that the agency used misleading statements, double standards, distortion of benefits, understatement of disadvantages, and partial disclosures evidenced a "total lack of open-minded willingness to consider fairly all alternatives." The Draft EIS/EIR contains distortions, unsupported assumptions, and a flawed computer model analysis that is evidence of bias.

### 3. The Draft EIS/EIR Impermissibly Incorporates Other Documents.

The Draft EIS/EIR incorporates other documents into the analysis without properly summarizing those documents. Particularly in Attachment G addressing the range of alternatives that were "considered" but rejected, justification for the decision is based on reference to a document and series of underlying studies not produced as part of the Draft EIS/EIR. While under some circumstances, such incorporation by reference is permitted, there are restrictions. See 40 C.F.R. § 1502.20<sup>2</sup>; see also 40 C.F.R. § 1502.21.<sup>3</sup>

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<sup>2</sup> "Tiering: Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review. . . . Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available Tiering may also be appropriate for different stages of actions."

<sup>3</sup> "Incorporation by reference: Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding

Virtually the entire justification for rejecting the alternatives identified in Attachment G is contained not in the document itself, but through reference to the Report to Negotiators and to other "studies" and "extensive computer simulation effort." See Draft EIS/EIR, p. G1-1. To my knowledge, the Report to Negotiators has not been produced pursuant to our FOIA request, nor has information and data relating to the underlying studies. Such nondisclosure alone, and specifically the failure to make it available for inspection within the time allowed for comment is objectionable. See 40 C.F.R. § 1502.21. Improper tiering and incorporation by reference is a close cousin to another challenge, which is a challenge to the scientific integrity of the EIS and a failure to provide complete information serving as the basis of the decision.

#### 4. The Preparers Failed to Insure the Scientific Integrity of the Analyses (1502.24)

NEPA requires scientific integrity in the preparation of a detailed statement. See 40 C.F.R. § 1502.24 ("Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analysis in environmental impact statements. They shall identify any methodologies used and shall make explicitly reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.") NEPA also requires that the public have access to all pertinent information in order to understand the environmental impacts.

A good discussion of a challenge to the scientific methodology is found in *Public Lands Council v. Powell*, 379 F.3d 738, 749-50 (9<sup>th</sup> Cir. 2004). Of particular import is the Court's conclusions that the withholding of information relating to the model's variables as well as the model's shortcomings violated NEPA. See *Public Lands Council, supra*, p. 750 ("The Forest Service's heavy reliance on the WATSED model in this case does not meet the regulatory requirements because there was inadequate disclosure that the model's consideration of relevant variables is incomplete ... We hold that this withholding of information violated NEPA which requires up-front disclosures of relevant shortcomings in the data or models"). Conclusory statements are insufficient, and impact statements should be rejected that "suffer from a serious lack of detail and rely on conclusions that are based on assumptions without supporting objective data. See *Rankin v. Coleman*, 394 F. Supp. 647, 656 (E.D. North Carolina 1975), quoting *Brooks v. Volpe*, 350 F. Supp. 269, 276-277 (W.D. Wash. 1972), *aff'd per curiam*, 487 F.2d 1344 (9<sup>th</sup> Cir. 1973).

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agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested person within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference."

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In the present case, the shortcomings of both the model and data inputted into the model are discussed at length in comments prepared and submitted by Dr. Willem A. Schreuder and Charles W. Binder on behalf of TCID. In sum, the deficiencies include but are not limited to the following:

- a. The Draft Draft EIS/EIR incorporates many assumptions into its analysis and fails to provide sufficient supporting data to back up the assumptions. By way of example, the assumptions included in the No Action alternative and inadequately defined and insufficient data in support of these assumptions is provided.
- b. The Draft Draft EIS/EIR is based on an outdated and flawed model that cannot be relied up to ensure the scientific integrity of the Draft Draft EIS/EIR. It is premised on theoretical approaches and research methods that are not generally accepted in the scientific community. Accordingly, the true impacts of the alternatives cannot be accurately predicted or analyzed under the current model.
- c. The data used in the model analysis is flawed and relies upon the use of long-term averages to analyze impacts when annual and monthly analysis would be both more accurate and further reveal additional impacts. *See e.g.* Water Resources Appendix, Exhibit 5.
- d. The Draft EIR/EIS fails to include analysis of all TROA provisions and, therefore fails to analyze the entire proposed action. Of concern is that in evaluating only segments of the proposed action, masks its true impacts.
- e. The model uses river flows for points on the Truckee River that are different than the USGS gaging stations for historical streamflows, and model output was processed using a program to estimate streamflows at the other locations. An adequate explanation for the use of estimates as opposed to historic data at the USGS gaging stations was not offered, and the result is that it impedes the ability to accurately analyze model results in comparison to historical conditions. *See e.g.* Water Resources Appendix, Exhibit 2. The use of these estimates, and others, without adequate data and rationale to support the use of the estimates, render the analysis flawed.

Under NEPA, all federal agencies have a duty to "insure the professional integrity, including scientific integrity, of the discussions and analyses in the environmental impact statements." 40 C.F.R. § 1502.24; *Utahns for Better Transp. v. United States Dept. of Transp.*, 305 F.3d 1152, 1181-82 (10th Cir. 2002). Similarly, the CEQA requires agencies to rely on precise data when that data is available and the EIR must include facts and analyses sufficient to

allow for informed decision making. 14 Cal. Code Regs. § 15151; *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 568 (1990); see also *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm'rs*, 91 Cal. App. 4th 1344, 1370 (lead agency must use every effort to disclose all information about significant impacts).<sup>4</sup>

Agencies can rely on computer models to help make these analyses, but the models must be relevant to the inquiry and updated to reflect current conditions. *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1130 (8th Cir. 1999) (upholding use of model that "was fully updated" and relevant); *National Wildlife Federation v. E.P.A.*, 286 F.3d 554, 565 (D.C. Cir. 2002) (upholding use of old model because it was "quite accurate over these last 25 years and remains an objective, established tool").

Equally important, the model must incorporate all available scientific information, or risk running afoul of NEPA. See 40 C.F.R. § 1502.22; cf. *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1005 (D.C. Cir. 1997) (acceptable to proceed with imperfect information but not if information is readily available); *Environmental Defense Fund, Inc. v. Coastside County Water Dist.*, 27 Cal.App.3d 695, 706 (1972) ("It should be understood that whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report."). If the agency's decisions regarding the model were arbitrary or capricious, then the decisions can be overturned. *Public Lands Council*, 379 F.3d 743, n.5; *Lee v. United States Air Force*, 354 F.3d 1229, 1243 (10th Cir. 2004).

Here, BOR and DWR arbitrarily failed to include crucial data in the analysis, data that is readily available. Also, the model used to prepare the Draft EIS had been replaced by an updated version that BOR and DWR chose not to use. Because both of these actions are impermissible under the NEPA, the draft EIS is invalid.

The Draft's analysis was generated using an outdated version of the model's software. While it may have been acceptable to use old software if it was still accurate and relevant, the fact that a new version exists obviates this possibility. See *National Wildlife Federation*, 286 F.3d at 565. And, since the software was outdated, it could not qualify as "fully updated," and thus appropriate for the agency to use. *Friends of Boundary Waters*, 164 F.3d at 1130. Also

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<sup>4</sup>In general, these cases analyzing NEPA play an important role in applying and understanding CEQA. "Recognizing that the California act was modeled on the federal statute, we have consistently treated judicial and administrative interpretation of the latter enactment as persuasive authority in interpreting CEQA." *Wildlife Alive v. Chickering*, 18 Cal.3d 190, 201 (1976).

critical was the agencies' failure to include the available scientific information that would allow for the model to make reasonable predictions. *See Commonwealth of Mass. v. Andrus*, 594 F.2d 872, 886-87 (1st Cir. 1979) (upholding use of model that was flawed but could not be updated because "not enough scientific data was available to make the kind of [elaborate] model envisioned by EPA worthwhile").

Specifically, the Draft fails to discuss many different, and readily obtainable, reasons for possible impacts. These primarily concern water supply issues. Under CEQA, the agencies are required to adequately analyze all water supply issues associated with the project. Cal. Water Code §§ 10910-10915; *Stanislaus Natural Heritage Project v. County of Stanislaus*, 48 Cal. App. 4th 182, 196-97 (1996); *Santiago County Water Dist. v. County of Orange*, 118 Cal. App. 3d 818, 829-30 (1981).

The Draft EIS/EIR makes many assumptions that are flawed and that when incorporated into the model have the effect of introducing error into the impact analysis.

An example of flawed assumptions and their effect on impact analysis occurs when the Draft fails to account for what would happen during extreme low flow years, nor does the model look at a serious drought or long-term drought. Even if this information is not specifically available, the Draft must contain an acknowledgment that the information is missing, that it would not be economically feasible or practical to obtain the information, and an analysis of the possible impacts flowing from the possible drought scenario. *See* 43 C.F.R. § 1502.22. There is none of this in the Draft. To fail to include any analysis of a drought, when five to seven year droughts are simply part of life in the high desert, is arbitrary on its face.

Because the Draft fails to properly account for necessary scientific information, it must be revised. The agencies must use a current, accurate version of the model and include the data necessary to make accurate forecasts. Since the Draft fails to do either of these things, it is facially invalid.

## ENVIRONMENTAL IMPACT ANALYSIS

### 1. The Draft EIS/EIR Fails to Identify Environmental Impacts and Mitigations

As demonstrated, the manner in which the Draft EIS/EIR analyzes the proposed action and even the No Action Alternative and the LWSA tends to mask any impacts. The document fails to adequately analyze the impacts from not allowing return flows to the river, from storing Newlands Project Credit Water in Stampede on carryover storage, from looking at long term averages instead of focusing on month to month or year to year impacts, among others. The document has also segmented various proposals, again masking environmental impacts. Because

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the Draft EIS/EIR does not adequately identify the environmental impacts, it also fails to identify feasible mitigations that could reduce or eliminate impacts. This is a requirement of both NEPA and CEQA.

A required component of any environmental impact statement is that it include a detailed statement regarding the environmental impact of the proposed action together with the identification of any and all adverse impacts. *See* 42 U.S.C. § 4332(C). Accordingly, in determining whether an agency complied with NEPA, the courts will consider whether the agency took the requisite "hard look" at the consequences of its proposed action. *See Price Road Neighborhood Association v. U.S. Dept. of Transportation*, 113 F.3d 1505 (9<sup>th</sup> Cir. 1997); *see also* 40 C.F.R. § 1502.16 (requiring the statement to address the various impacts or environmental consequences of both the proposed action and alternatives). NEPA requires that the statements present the environmental impacts of both the proposed action as well as the alternatives, in comparative form. *See* 40 C.F.R. § 1502.14. It also requires an examination of the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and an examination of irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. Examination of both direct and indirect effects are also required. *See* 40 C.F.R. § 1508.8.

To complete the analysis, once impacts of the proposed action and alternatives have been identified, identification and analysis of measures to mitigate the impacts are also required. *See* 40 C.F.R. § 1502.14(f) (the statement must "include appropriate mitigation measures not already included in the proposed action or alternatives"); *see also* 40 C.F.R. § 1502.16 (requiring analysis of means to mitigate adverse environmental impacts). The mere listing of mitigation measures is insufficient. The environmental impact statement must analyze the mitigation measures in detail and explain the effectiveness of the measures considered. *See Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 (9<sup>th</sup> Cir. 1986).

In the present case, the Draft EIS/EIR is deficient in its failure to disclose the impacts of its proposed action or the "alternatives" presented, and is deficient in its failure to identify and analyze specific mitigation measures. These deficiencies are particularly acute when considering the impacts of the TROA on the Newlands Project. The problems with the required analysis include each of the following.

- a. The assumptions used in the No Action alternative, as well as the other alternatives, mask the magnitude of the impacts of the proposed action. These assumptions include parameters that have not occurred and may never occur, and the use of long-term averages that mask the impacts of the proposed action.

- b. Failure to compare current conditions to the proposed action mask the impacts of the proposed action.
- c. The EIS process is continuing to evaluate the impacts of the proposed action, with the findings to be revealed in the Final EIS. Procedurally, this is insufficient.
- d. The models used to evaluate the impacts of the alternatives presented are flawed and are scientifically unreliable, and therefore render unreliable the findings and analysis concerning impacts.
- e. The Draft EIS/EIR inadequately addresses the impacts of the proposed action on the Newlands Project.
- f. The Draft EIS/EIR fails to define and analyze fully developed and finalized plans for the mitigation of the adverse effects that will result if the proposed action is implemented.

Thus, the Draft EIS/EIR fails to adequately analyze impacts under NEPA.

The failure of the Draft EIS/EIR to adequately analyze water use and consumption is fatal under CEQA, as well. In *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal. App.4th 715 the court finds a EIR inadequate for failure to state accurately the amount of water available for the project. Here, a draft EIR for a housing development stated that the project would have sufficient water for present and future demands based on entitlements to water from the State Water Project (SWP). Despite comments that entitlements do not represent actual delivered water the draft EIR was finalized. In the final EIR dry year entitlements were assumed to be 50%, and each proposed project would be required to demonstrate available water as part of the sub-division approval process. The court was critical of the response given in the final EIR and states that "water is too important to receive such cursory treatment", and the problems raised by the public and responsible experts require a good faith reasoned analysis in response. *Id.* at 723. (Quoting *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 357, 173 Cal.Rptr. 390.). The court determined that the EIR made no attempt to calculate the differences between entitlements and actual supply and "fails to undertake an adequate analysis of how much water the SWP can actually deliver in wet, average and dry years." *Id.* at 724

TROA Draft EIS/EIR like the EIR in *Santa Clarita Organization for Planning the Environment* fails to adequately analyze water use and supply and is thus fatally flawed. The projected water sources in TROA are equally speculative for numerous reasons (See Comments from Binder and Associates Consulting, Inc. And Principia Mathematica, Inc.). Most of the

information regarding water consumption and sources of water is derived from a fatally flawed model, making the analysis of TROA as well as the alternative suspect. For example, the model has never been calibrated, verified or validated. Moreover, there are limitations in the FORTRAN model that cause unintended consequences in the output. The model does not address many of the components of TROA. There have never been sensitivity runs on the output of the model and the model assumes that the last 100 years of water resources conditions will repeat without doing any stochastic runs. Additionally, the fact that the Draft EIS/EIR only looks at long term averages (over 100 years) and not at impacts during individual months or years also makes the analysis suspect.

Additionally, like the situation in *Santa Clarita Organization for Planning the Environment*, the TROA Draft EIS/EIR fails to account for population growth and extended drought conditions. The Draft EIS/EIR study assumptions include one that population growth will occur with or without TROA. However, TROA is what is allegedly providing drought protection for the Truckee Meadows that would allow TMWA to increase the population served. Whether TROA facilitates the population growth or not, it is being used as a mechanism to serve an expanded population so that the growth inducing impacts of TROA on other infrastructure in Reno, Sparks, Fernley, Pyramid Lake Reservation, Fallon and Churchill County should be assessed. Local and state agencies have already planned to grow their populations by the numbers used in the Draft EIS/EIR. Presumably, the main reason that TMWA is involved in TROA is to ensure that its population, if it does grow to 119,000 will have water to serve it in times of drought. If TROA did not provide drought protection to allow this growth to 119,000, then TMWA could not be issued will serve letters for that many households. Consequently, TROA is providing incentives for developers to come to the Truckee Meadows and to build more houses. This is the growth-inducing effect of TROA. Moreover, TROA will allow the Pyramid Lake Reservation population to grow. This Draft EIS/EIR does not address the growth impacts of TROA on highways, schools, hospitals, air and water quality, etc. This is a serious flaw in the document and makes it invalid.

## **2. The DRAFT EIS/EIR Fails to Analyze Cumulative Impacts**

Cumulative effects analysis is required in an EIS. It includes a requirement that the proposed project be analyzed in light of the project's interaction with the effects of past, current, and reasonably foreseeable future projects. See *Lands Council v. Powell*, 379 F.3d 738, 744 (9<sup>th</sup> Cir. 2004), citing 40 C.F.R. § 1508.7. NEPA requires adequate cataloging of the related projects, including data of time, type, place, and scale of the other projects. *Id.* Further, the significance of the proposed action and likely impacts cannot be avoided by breaking an action into small component parts if it is part of a comprehensive strategy. See *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9<sup>th</sup> Cir. 1998).



Under CEQA, the agencies are required to adequately analyze all water supply issues associated with the project. Cal. Water Code §§ 10910-10915; Stanislaus Natural Heritage Project v. County of Stanislaus, 48 Cal. App. 4th 182, 196-97 (1996); Santiago County Water Dist. v. County of Orange, 118 Cal. App. 3d 818, 829-30 (1981).

In the present case, not all projects which stand to be impacted by the proposed action have been sufficiently analyzed. These include the Lahontan Reservoir, Stillwater Wildlife Refuge, Carson Lake and Pasture, Fernley Wildlife Management Area, the Naval Air Station at Fallon, modification to the OCAP to accommodate Newlands Project Credit Water, and recoupment. In addition, the drafters of the Draft EIS/EIR failed to take the required "hard look" at the following impacts:

- a. Impacts on Newlands Project Operations and, in particular, increased water shortages. See Draft EIS/EIR, p. 3-388 - 3-391;
- b. Economic impacts, in particular stemming from the shifting of water use from agricultural uses to M&I and other uses as well as the economic effects of water shortages on agricultural revenue due to a reduction in crop yields, drop in hydro power generation and revenues, and reduction of water delivery fees received by TCID;
- c. Environmental impacts including adverse impacts on air quality due to a shift in water use from agricultural to non-agricultural uses;
- d. Impacts relating to groundwater and other water resources;
- e. Impacts on water storage and carryover storage;
- f. Impacts relating to increased urban development and growth inducement;
- g. Impacts on Pyramid Lake restoration efforts;
- h. Recreational impacts including impacts on the use of Lahontan Reservoir for recreational purposes.

For those impacts not analyzed in detail, the Draft Draft EIS/EIR fails to provide an adequate factual basis for the conclusion that there were no significant impacts or that impact analysis was not required.

Failure to identify these significant environmental impacts means that the Draft EIS/EIR

has also failed to identify mitigations and to determine if impacts can be overridden under CEQA.

### 3. The Draft EIS/EIR Segments the Project and Hides Impacts

Both NEPA and CEQA require that the whole project be analyzed in the EIS/EIR and not just portions. Failure to analyze the whole project tends to mask the potential environmental impacts. *Natural Resources Defense Council v. Callaway*, 524 F.2d 79 (2d Cir. 1975); *Cady v. Morton*, 527 F.2d 786 (9<sup>th</sup> Cir. 1975).

CEQA defines a "project" as the "whole of an action" that has the potential to result in a physical change to the environment "directly or ultimately." Guidelines § 15378(a). Thus, the term "project" refers to the entire set of activities for which government approval is sought and not just to each separate and distinct government approval necessary for the project activity to occur. Guidelines § 15378(c). Lead agencies may not improperly reach the decision to forego preparation of an EIR by segmenting a project into various stages of approval, focusing on pieces in isolation, and failing to consider the project as a whole. This prevents lead agencies from fragmenting environmental analysis into discrete parts of projects, and thereby avoiding full environmental disclosure. See *Bozung v. Local Agency Formation Commission*, (1975) 13 Cal.3d 263, 283. Piecemeal environmental review that ignores the end result of the entire project is unlawful. See *Christward Ministry v. Superior Court*, (1986) 184 Cal.App.3d 180, 193.

In *Christward Ministry*, the court held that an EIR should have been required for a general plan amendment designating an existing landfill site to permit various waste disposal activities, although an EIR would be required later for the specific use permits for such disposal activities. *Id.* Likewise, in *Citizens Assn. for Sensible Development v. County of Inyo*, *supra*, 172 Cal.App.3d at 167, the court held that a county improperly prepared a negative declaration for a general plan amendment and rezoning for a shopping center followed by another negative declaration for a subdivision map and road abandonment because the county failed to analyze the impacts of the entire development.

In the Draft EIS/EIR does not address the entire "project," but rather segments the project and fails to adequately address future actions necessitated by TROA. Reference is made to the Newlands Project Credit Water but use of this credit water is not modeled or analyzed in the Draft EIS or the Draft TROM. Additionally, reference is made to storage of credit water in Donner Lake. Donner Lake storage rights are owned as an undivided interest between TCID and Sierra Pacific. No use of Donner Lake for credit storage under TROA can be made without permission from TCID. The TROA discussion states that certain provisions of the Truckee River Agreement (TRA) would be changed but nowhere are these provisions identified or described. In fact, nowhere in the Draft EIS/EIR is there a description of the TRA and how it has been used

in the past to manage the Truckee River for the last 69 years. The section on Reservoir Operations purports to allow TMWA to exchange water in Donner Lake for Fish Credit Water. Since the water in Donner Lake owned by TMWA is an undivided one half interest in common with the TCID, any use of such water as Fish Credit Water can only be done with the express consent of TCID. The reference to Newlands Project Credit Water being removed from Lahontan is unsupported since this is being segmented from the TROA proposal and it cannot be accomplished without permission of the Newlands Project water right owners. Moreover, the Fernley Credit water has also been segmented in the analysis.

An EIS must include analysis of environmental effects of future activities if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. *Laurel Heights Improvement Assn v. Regents of the University of California* (1988) 47 Cal.3d 376, at 396. The contents of the EIR must discuss future and commutative environmental effects and an agency must consider the commutative effects of its action before a project gains irreversible momentum, *City of Antioch v. City Council* (1986) 187 Cal. App. 3d 1325 at 1333. Environmental considerations cannot be masked or minimized by chopping a large project into smaller segments cumulatively may have disastrous consequences. *Plan for Arcadia, Inc. v. City Council of Arcadia* (1974, 2<sup>nd</sup> Dist) 117 Cal Rptr 96 at 105. Further, not only must reasonable anticipated future projects be considered in the EIR, but they must be discussed in the cumulative analysis. *Terminal Plaza Corp. v. City and County of San Francisco* (1986, 1<sup>st</sup> Dist) 223 Cal Rptr 379 at 385-386.

The cumulative impacts of the TROA should be analyzed for Lahontan Reservoir, groundwater in Churchill County, impacts on Stillwater Wildlife Refuge, impacts on Carson lake and Pasture, impacts on Fernley Wildlife Management Area, impacts on the Naval Air Station at Fallon, impacts from modification to the OCAP to accommodate Newlands Project Credit Water, impacts from recoupment (since there is a judgment in the case) and impacts from water rights acquisition programs. All of these other actions have the potential to impact TROA and their cumulative impacts should have been analyzed.

Mr. Kenneth Parr  
December 30, 2004  
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## CONCLUSION

For the foregoing reasons, the Draft EIS/EIR should be withdrawn, substantially revised and recirculated for public comment.

Sincerely,

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