

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. Box 2000, Sacramento, CA 95812-2000
Info: (916) 341-5300, FAX: (916) 341-5400, Web: http://www.waterrights.ca.gov

PROTEST – (Petitions)

BASED ON ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS
Protests based on Injury to Vested Rights should be completed on other side of this form

APPLICATION 5169 PERMIT _____ LICENSE 3723

I, (We,) Truckee-Carson Irrigation District (TCID), Churchill County, Individuals and the City of Fallon (see Attachment at paragraph A and Statement of Facts)
Name of protestant

of P.O. Box 1356, Fallon, Nevada, 89407-1356 have read carefully
Post Office address of protestant

a notice relative to a petition for change or extension of time.

under APPLICATION 5169 of Washoe County Water Conservation District
State name of petitioner

to appropriate water from See Attachment at paragraph B and Statement of Facts.
Name of source

It is desired to protest against the approval thereof because to the best of our information and belief:
my or our

the proposed change/extension will

- (1) not be within the State Water Resources Control Board's (SWRCB) jurisdiction
- (2) not best serve the public interest
- (3) be contrary to law
- (4) have an adverse environmental impact



State facts, which support the foregoing allegations See Statement of Facts.

Under what conditions may this protest be disregarded and dismissed? See paragraphs 86-89 of Statement of Facts.
State conditions that will relieve protest, or if none, so state

A true copy of this protest has been served upon the petitioner by mail.
Personally or by mail

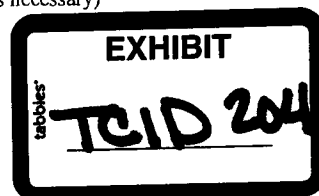
Date 4-2-07

[Signature]
Protestant(s) or Authorized Representative sign here

Protests MUST be filed within the time allowed by the SWRCB as stated in the notice relative to the change or such further time as may be allowed.

(NOTE: Attach supplemental sheets as necessary)

PRO-PET (1-00)



2007 APR - 03 11:03:51

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
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Info: (916) 341-5300, FAX: (916) 341-5400, Web: http://www.waterrights.ca.gov

PROTEST – (Petitions)

BASED ON INJURY TO VESTED RIGHTS

Protests based on Environmental or Public Interest Considerations should be completed on other side of this form

APPLICATION 5169 PERMIT LICENSE 3723

I, (We,) Truckee-Carson Irrigation District (TCID), Churchill County, Individuals and the City of Fallon (see Attachment at paragraph A and Statement of Facts)
Name of protestant

of P.O. Box 1356, Fallon, Nevada, 89407-1356 have read carefully
Post Office address of protestant

a notice relative to a petition for change or extension of time.

under APPLICATION 5169 of Washoe County Water Conservation District
State name of petitioner

to appropriate water from See Attachment at paragraph B and Statement of Facts.
Name of source

It is desired to protest against the approval thereof because to the best of our information and belief the
my or our
proposed change will result in injury to us as follows: See Attachment at paragraph C and Statement of Facts.
me or us State the injury which will result to you (see NOTE below)

Protestant claims a right to the use of water from the source from which petitioner is diverting, or proposes to divert, which right is based on: See Attachment at paragraph D and Statement of Facts.
Prior to application, notice posted, use begun prior to 12/19/14, riparian claim, or other right

Please provide application, permit or license numbers or statement of diversion and use numbers, which cover your use of water, or state 'none' see comments. The extent of present and past use of water by protestant or his predecessors in interest from this source is as follows: See Attachment at paragraph E and Statement of Facts.

State approximate date first use made, amount used, time of year when diversion made, the use to which water is put

Where is YOUR DIVERSION POINT located? Derby Dam 1/4 of SW 1/4 of Section 19
Describe location with sufficient accuracy that position thereof relative to that of petitioner may be determined.

T. 20N, R. 23E, MD B. & M. Is this point downstream from petitioner's point of diversion? YES NO
If Yes, explain: See Attachment at paragraph F and Statement of Facts.

Under what conditions may this protest be disregarded and dismissed? See Paragraphs 86-89 of Statement of Facts.
State conditions which will relieve protest, or if none, so state.

A true copy of this protest has been served upon the petitioner by mail personally or by mail
Date: 4-2-07
Protestant(s) or Authorized Representative sign here

Protests MUST be filed within the time allowed by the SWRCB as stated in the notice relative to the change or such further time as may be allowed.

(NOTE: Attach supplemental sheets as necessary)

Attachment

PROTEST - PETITION 5169

A:

Individual Newlands Project water right owners protesting Petition 9247 and whose address is the same as TCID are: Ernest C. Schank, Richard Harriman, Ray Peterson, Don Travis, Jerry Blodgett, Lester deBraga and Larry Miller (referred to as Individual Protestants).

Contact information for the Individual Newlands Project water right owners:

Post Office Box 1356
Fallon, Nevada 89407-1356

Churchill County Contact information:

Churchill County Administration Building
155 N. Taylor Street
Fallon, Nevada 89406
Phone: 775.423.5136

City of Fallon contact information:

Fallon City Hall
55 W. Williams Avenue
Fallon, Nevada 89406

B:

Water impounded by Independence Dam is diverted from Independence Lake in Nevada and Sierra Counties, California, which is tributary to Independence Creek thence Little Truckee River thence the Truckee River.

C:

TROA proposes to restructure the current TRA and Orr Ditch Decree Truckee River water management system, and systematically reallocate water away from the Newlands Project a reclamation project in western Nevada authorized under the Reclamation Act of 1902. See *U.S. v Orr Ditch Co.*, et al., Equity No. A-3 D. Nev. (1944). The Petition and TROA reallocate and store water that would otherwise be diverted at Derby Dam or stored in Lahontan Reservoir for use in the Newlands Project, Churchill County and the City of Fallon. In *United States v. Nevada*, the United States Supreme Court emphasized that the U.S. Government/Bureau of Reclamation may not reallocate water rights conferred by the Orr Ditch Decree to Newlands Project farmers to irrigate farmlands. 463 U.S. 125, 126 (1983).

D:

TCID has a responsibility under contract to operate and maintain the Newlands Reclamation Project and to deliver water to water right owners, including Individual Protestants, Churchill

County and the city of Fallon, who have contracted either with the United States or with TCID, and to comply with water rights decrees for water rights appropriated by the United States Under The Reclamation Act (43 U.S.C. 371, et seq.), and as a party to the water right decree of the Truckee River, known as the Orr Ditch Decree (U.S. v Orr Water Ditch Co., Equity A-3-LDG U.S. District Court, Nevada, September 8, 1944).

E:

TCID, the Individual Protestants, Churchill County and the City of Fallon have water rights which will be injured as a result of TROA and this petition. Stampede Reservoir's permit and Prosser Reservoir's license state that the Newlands Project is an intended place of use for Truckee River water discharged from Stampede and Prosser Reservoirs. Based on progress reports filed with the State Board for Boca Dam and Reservoir, Truckee River water has also been released from Boca Reservoir for use in the Newlands Project. The water rights of Protestants derive from Claims 3 and 4 of the Orr Ditch Decree. These water rights are used for irrigation, domestic, municipal and industrial, and recreational uses.

F:

Our diversion point is located at Derby Dam. Also the subject TROA project lists Stampede Dam NW 1/4 NW 1/4 of Section 28, T19N, R17E, Independence Dam, Lot 1, Section 35, T19N, R15E and Boca Dam, SE 1/4 SW 1/4 of Section 21, T18N, R17E as new diversion points. These diversion points are also TCID diversion points because Newlands Project farmers have water rights to water in Stampede, Independence and Boca Reservoirs. If, as TROA contemplates, water is diverted and released from these reservoirs, these reservoirs would be diversion points of Newlands users.

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

IN THE MATTER OF PETITIONS TO CHANGE AND APPLICATIONS TO APPROPRIATE WATER BY PERMIT FILED BY THE UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, TRUCKEE MEADOWS WATER AUTHORITY, AND WASHOE COUNTY WATER CONSERVATION DISTRICT TO IMPLEMENT THE TRUCKEE RIVER OPERATING AGREEMENT	STATEMENT OF FACTS SUPPORTING TRUCKEE-CARSON IRRIGATION DISTRICT'S, NEWLANDS PROJECT WATER RIGHT OWNERS', CHURCHILL COUNTY, NEVADA'S and THE CITY OF FALLON, NEVADA'S PROTEST AND REQUEST TO DENY PETITION FOR CHANGE APPLICATION 5169/LICENSE 3723 (BOCA DAM & RESERVOIR)
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THE TRUCKEE-CARSON IRRIGATION DISTRICT ("TCID"), by and through its attorneys, organized under Chapter 539 of the Nevada Revised Statutes, whose address is P.O. Box 1356, Fallon, Nevada, 89407-1356, with responsibilities under contract to operate and maintain the Newlands Reclamation Project ("Newlands Project") and to deliver water to landowners who have contracted either with the United States or with TCID, and to comply with water rights decrees for water rights appropriated by the United States under The Reclamation Act (43 U.S.C. 371, *et seq.*) and as a party to the water rights decree of the Truckee River, known as the Orr Ditch Decree (*U.S. v. Orr Water Ditch Co.*, Equity A-3-LDG U.S. District Court, Nevada, September 8, 1944), hereby protests the granting of Petitions for Change for Licenses 3723, 4196, 10180 and Permit 11605 and Applications to Appropriate Water by Permit 31487 and 31488, implementing the Truckee River Operating Agreement ("TROA").

INDIVIDUAL NEWLANDS PROJECT WATER RIGHT OWNERS, Ernest C. Schank,

Richard Harriman, Ray Peterson, Don Travis, Jerry Blodgett, Lester deBraga and Larry Miller, whose address is also P.O. Box 1356, Fallon, Nevada, 89407-1356 also protest the granting of Petitions for Change for Licenses 3723, 4196, 10180 and Permit 11605 and Applications to Appropriate Water by Permit 31487 and 31488, implementing TROA. Mr. Schank, Mr. Harriman, Mr. Peterson, Mr. Travis, Mr. deBraga and Mr. Miller own parcels of land and water rights in the Carson Division of the Newlands Project. Mr. Blodgett owns land and water rights in the Truckee Division of the Newlands Project.

CHURCHILL COUNTY, NEVADA, whose address is 155 N. Taylor Street, Fallon, Nevada, 89406, also protests the granting of Petitions for Change for Licenses 3723, 4196, 10180 and Permit 11605 and Applications to Appropriate Water by Permit 31487 and 31488, implementing TROA.

THE CITY OF FALLON, NEVADA, whose address is City Hall, 55 W. Williams Avenue, Fallon, Nevada, 89406 also protests the granting of Petitions for Change for Licenses 3723, 4196, 10180 and Permit 11605 and Applications to Appropriate Water by Permit 31487 and 31488, implementing TROA.

TCID, INDIVIDUAL NEWLANDS PROJECT WATER RIGHT OWNERS, CHURCHILL COUNTY, NEVADA and THE CITY OF FALLON, NEVADA (collectively referred to as "Protestants") hereby protest the granting of Petitions for Change for Licenses 3723, 4196, 10180 and Permit 11605 and Applications to Appropriate Water by Permit 31487 and 31488, implementing TROA as follows:

1. The State Water Resources Control Board ("State Board") noticed Petitions for Change for Licenses 3723, 4196, 10180 and Permit 11605 (collectively referred to as

“Petitions”) and Applications to Appropriate Water by Permit 31487 and 31488 (collectively referred to as “Applications”) on January 30, 2007. The applicants for these Petitions and Applications are the United States Department of the Interior, Bureau of Reclamation (“BOR”), the Truckee Meadows Water Authority (“TMWA”) and the Washoe County Water Conservation District (“WCWCD”) (collectively referred to as the “Applicants”). The deadline period for filing protests to these Petitions and Applications is April 2, 2007.

2. The Applicants submitted two applications and four petitions to change as one project to implement TROA. Protestants protest the State Board’s implementation of each application and petition to change individually, as well as the State Board’s implementation of TROA as a whole. Accordingly, Protestants will file six protests, one protest for each application and petition to change. Each protest will contain specific protest points for the application or petition to change the protest applies to, as well as general protest points applying to the entire TROA project as a whole.

3. Protestants served duplicate copies of this protest upon The Applicants by U.S. Mail.

4. The agent for Protestants is Michael Van Zandt, Esq., McQuaid, Bedford & Van Zandt, LLP, 221 Main Street, Sixteenth Floor, San Francisco, CA 94105.

5. Protestants have reviewed the information in the State Board’s Public Notice for the TROA Project, Petitions for Change for Licenses 3723, 4196, 10180 and Permit 11605 and Applications to Appropriate Water by Permit 31487 and 31488, and references said Notice, Petition and Application information herein.

6. This protest is based on the grounds that: TROA and Petition to Change

Application 5169/License 3723 (Boca Dam & Reservoir) injure the prior water rights of the Newlands Project, the State Board does not have jurisdiction to allocate Truckee River water already belonging to Newlands Project landowners, and TROA and Petition to Change Application 5169/License 3723 injure the environment and the public interest, violate the Public Trust Doctrine and are contrary to existing law. Moreover, the State Board does not have jurisdiction over the waters at issue here because they have been adjudicated under the Orr Ditch Decree in the State of Nevada. The Applicants submitted their two applications and four petitions as one project, to implement TROA.

7. TMWA, the City of Reno and the City of Sparks filed similar applications to change the manner and place of use of water to be stored in the Truckee River reservoirs in Nevada. These applications are currently pending review before the Nevada State Engineer. Protestants hereby incorporates by reference each and every protest point in the protests it filed to TMWA's Truckee River applications in Nevada in this protest. (See Exhibit A to this Statement of Facts for one of the protests TCID filed to TMWA's Truckee River applications in Nevada.)

TRUCKEE RIVER MANAGEMENT GENERAL BACKGROUND

8. The factual and legal background related to the management of the Truckee River basin and associated water rights is long and complex. However, an understanding of the background of events leading up to the current management scheme of the Truckee River along with how TROA has evolved is required for the State Board to fully understand the injury Protestants will suffer if TROA is implemented. Currently, the Truckee River Agreement and the Orr Ditch Decree control the distribution and storage of water in the Truckee River basin.

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

10. An important component of the Orr Ditch Decree was the execution of the Truckee River Agreement (“TRA”) in 1935. For the last 72 years, the Truckee River has been managed by the parties to the TRA, along with the Federal Water Master, appointed to administer the Orr Ditch Decree. The TRA set forth the principles under which the Truckee River would be operated and allowed for the stipulated entry of the Orr Ditch Decree. The TRA required the Truckee River to be operated on the basis of Floriston Rates, as established in the 1915 General Electric Decree. *United States v. The Truckee River General Electric Company*, Case No. 14861 (N.D. Cal. 1915). The GE Decree provided for the condemnation of the Lake Tahoe Dam and the assumption of rights to store and release water from Lake Tahoe by the United States. These rights required the United States to release water from Lake Tahoe in order to maintain Floriston Rates. Floriston Rates measure the rate of flow in the Truckee River at the Iceland Gage, and consist of an average flow of 500 cubic feet per second (cfs) each day during the year, commencing March 1 and ending September 30 of any year, and an average flow of 400 cfs each day from October 1 to the last day of February of the next year. Three types of

water are used to achieve Floriston Rates: (1) project water stored in Lake Tahoe and Boca Reservoir pursuant to the Orr Ditch Decree, (2) water exchanged under the Tahoe-Prosser Exchange Agreement, and (3) unregulated flow in the Truckee River. If the General Electric Company requested that Floriston Rates be reduced, then the difference was considered saved water and was stored for the benefit of the Newlands Project.

11. Further, the TRA also allocates rights to the Truckee River, recognizes specific claims to be included in the final decree, sets rates of flow in the river, allows for construction of supplemental reservoirs, recognizes privately owned stored water, sets diversions by Sierra Pacific for municipal and domestic uses, allows use of water for power generation, allocates Diverted Flow to TCID and the Conservation District, and creates the framework for managing the Truckee River. The TRA was used as the basis for a stipulation that allowed the entry of the final Orr Ditch Decree. Once a party signed the stipulation, the signing party could not rescind its signature. The signatories to the TRA include: The United States of America; Truckee-Carson Irrigation District; Washoe County Water Conservation District (Conservation District); Sierra Pacific Power Company (Sierra), and such other users of the waters of the Truckee River and/or its tributaries, known as Parties of Fifth Part.

12. The TRA explicitly provides that the original intent of supplemental stored water in Boca Reservoir was for irrigation purposes. After the TRA was executed, The Washoe Project added additional reservoirs to the Truckee River system that also existed to supply water for downstream irrigation – Prosser Reservoir and Stampede Reservoir. These reservoirs are currently 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 contravention of its existing Application and Permit.

13. The TRA also provides for an allocation of any unused decreed water between the Conservation District and TCID. Specifically, the Conservation District has a right to use 69% of any unused decreed diverted flows, and TCID has a right to use 31% of any unused decreed diverted flows in the Truckee River.

14. The Orr Ditch Decree expressly incorporates the terms of the TRA, and also provides extensive requirements in its "General Provisions" that the State Board is legally bound to comply with and consider in its review of the TROA Petitions and Applications. *See generally United States v. Orr Water Ditch Co.*, CV-N-73-0003 LDG, (D. Nev. 1944). The portions of the Orr Ditch Decree that directly pertain to the Newlands Project are discussed in following paragraphs in the section of this protest entitled "Newlands Project General Background."

15. In anticipation of construction of the Prosser Creek Reservoir, certain parties entered an Agreement for Water Exchange Operation of Lake Tahoe and Prosser Creek Reservoir (Prosser Agreement) on June 15, 1959. The Prosser Agreement was signed by the United States, TCID, the Washoe County Water Conservation District and Sierra Pacific. The Prosser Agreement is binding on all signatories as well as their successors and assigns, and there is no termination clause in the agreement. It is designed to coordinate storage and releases of waters in Prosser Creek Reservoir and Lake Tahoe and incorporates the Prosser Creek Reservoir into the current management scheme of the Truckee River by reference to the GE Decree, Truckee River Agreement, and the Orr Ditch Decree. The Prosser Agreement provides for

storage in Prosser Creek Reservoir of “Tahoe Exchange Water,” which is credited to and classified as Lake Tahoe Storage. “Tahoe Exchange Water” receives priority and must be released in amounts necessary to maintain Floriston Rates or Reduced Floriston Rates for the benefit of water users in the Truckee River Basin as contemplated by the GE Decree, Truckee River Agreement, and the Orr Ditch decree.

16. 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. Under the PSA, the PLIT would be able to convert Sierra Pacific’s drought protection water into Fishery Credit Water if it is not needed by Sierra. The PSA was modified and then ratified by the United States in 1990. The PSA also became the foundation for the initiative to settle certain litigation the PLIT had initiated through the federal courts. Thus was born the Truckee-Carson-Pyramid Lake Settlement Act, P.L. 101-618, 104 Stat. 3289, November 16, 1990 (the “Settlement Act”).

17. The Settlement 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 starting point. The TROA provisions of the Settlement 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. Section 205 of P.L. 101-618 requires the Secretary of the Interior to negotiate an operating

agreement with the State of Nevada and the State of California, after consulting with other parties. The PLIT, Sierra Pacific and Washoe County will be additional signatories to the TROA. The main purpose of the TROA is to implement the PSA and to resolve the claims of PLIT to waters of the Truckee River. The TROA is intended to replace the Truckee River Agreement of 1935, which is currently used to operate the Truckee River. The Applications and Petitions currently before the State Board are an effort by the Applicants to change the current management scheme of the Truckee River and implement TROA, without the participation of major water right holders in the Truckee River.

18. Related to the Truckee River reservoirs, section 205 of the Settlement Act provides that the reservoirs will be operated to:

- (A) satisfy all applicable dam safety and flood control requirements;
- (B) provide for the enhancement of spawning flows available in the Lower Truckee River for the Pyramid Lake fishery;
- (C) carry out the terms, conditions, and contingencies of the Preliminary Settlement Agreement as modified by the Ratification Agreement.
- (D) ensure that water is stored in and released from Truckee River reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch decree and Truckee River General Electric decree, except for those rights that are voluntarily relinquished by the parties to the Preliminary Settlement Agreement as modified by the Ratification Agreement, or by any other persons or entities, or which are transferred pursuant to State law; and
- (E) minimize the Secretary's costs associated with operation and maintenance of Stampede Reservoir.

See P.L. 101-618 § 205(A)-(D).

19. Further, TROA may under section 205 of the Settlement Act include provisions concerning:

- (A) administration of the Operating Agreement, including but not limited to establishing or designating an agency or court to oversee operation of the Truckee River and Truckee River reservoirs;

- (B) means of assuring compliance with the provisions of the Preliminary Settlement Agreement as modified by the Ratification Agreement and the Operating Agreement;
- (C) operations of the Truckee River system which will not be changed;
- (D) operations and procedures for use of Federal facilities for the purpose of meeting the Secretary's responsibilities under the Endangered Species Act, as amended;
- (E) methods to diminish the likelihood of Lake Tahoe dropping below its natural rim and to improve the efficient use of Lake Tahoe water under extreme drought conditions;
- (F) procedures for management and operations at the Truckee River reservoirs;
- (G) procedures for operation of the Truckee River reservoirs for instream beneficial uses of water within the Truckee River basin;
- (H) operation of other reservoirs in the Truckee River basin to the extent that owners of affected storage rights become parties to the Operating Agreement; and
- (I) procedures and criteria for implementing California's allocation of Truckee River water.

See P.L. 101-618 § 205(A)-(D).

NEWLANDS PROJECT GENERAL BACKGROUND

20. The Newlands Project is a reclamation project in western Nevada authorized for the reclamation and irrigation of land in the Carson and Truckee River watersheds. The Newlands Project contains the Lake Tahoe Dam and Derby Diversion Dam on the Truckee River, the Truckee Canal, Lahontan Dam and Reservoir, the Carson Diversion Dam, four pumping plants, and over 900 miles of canals, laterals and drains. The Newlands Project contains approximately 73,700 acres of water-righted lands of which approximately 59,000 acres are currently being irrigated with a diversion requirement of approximately 300,000 acre-feet. Water supplies for the Newlands Project are derived from direct diversions on the Truckee and Carson Rivers as well as releases of previously stored water in Donner Lake, Lake Tahoe, Prosser Creek Reservoir, Stampede Reservoir, Boca Reservoir, and Lahontan Reservoir. The date of priority for water rights in the Newlands Project in the Truckee River is 1902, as

adjudicated and decreed in *United States v. Orr Water Ditch Co.*

21. The Orr Ditch Decree confirmed and decreed the Newlands Project landowners' Reclamation Act water rights. The Orr Ditch Court affirmed these rights in 1944. *See U.S. v. Orr Water Ditch Co., et al., Equity No. A-3. D. Nev. (1944).* Claim 3 of the Orr Ditch Decree secured irrigation, domestic and power generation rights for the farmers in the Newlands Project, including diversion rights of water for up to 1500 cfs of Truckee River water at Derby Dam and a right to store 290,000 acre feet of water in Lahontan Reservoir for the benefit of the Newlands Project. Claim 4 of the Orr Ditch Decree secured the right of the United States to store water in Lake Tahoe for the benefit of the Newlands Project and other lands under the federal Reclamation Act. Claim 4 of the Orr Ditch Decree also secured the Newlands Project's rights to release water from Lake Tahoe Dam, as set forth in the General Electric Decree. Thus, the Orr Ditch Decree adjudicated water rights not only in Nevada, but also in California, as those rights related to the Newlands Project.

22. Truckee River water is a critical component to the water supply of the Newlands Project. The Truckee River supplies 100% of the Truckee Division of the Newlands Project, and also supplies a substantial amount of water to the Carson Division of the Newlands Project.

GENERAL BACKGROUND OF TROA PROJECT AND OVERVIEW OF PROPOSED PETITIONS AND APPLICATIONS

23. TROA proposes to unravel the management scheme used for the Truckee River and the Truckee River reservoirs for the last 72 years. TROA would establish new rules for the accounting of water that is stored, released, exchanged displaced or spilled at Independence, Stampede, Boca and Prosser Creek Reservoirs. As part of these new rules, TROA proposes to

allow for the credit storage of waters in the Truckee River upstream rivers and lakes. TROA also proposes to replace the 1935 Truckee River Agreement (“TRA”) the management agreement for the Truckee River which has been used to make decisions on the operation of the Truckee River for the last 72 years. TROA proposes a new management, credit storage, change and exchange system allegedly for instream flows, water quality and spawning flows for Pyramid Lake fishes, and increased storage for municipal and industrial water supply for the Reno-Sparks area (often referred to as the Truckee Meadows), the City of Fernley, Nevada and the Truckee River Basin in California. However, TROA makes no promises for drought protection or storage rights for other Nevada localities and projects that rely upon Truckee River water, namely Lyon County, Storey County, Churchill County, and the City of Fallon. TROA also fails to propose any substantial protections for the Newlands Project’s vested rights in Truckee River water.

24. TROA also includes planned changes in operations for Donner Lake and Lake Tahoe which would directly impact Protestants. Because the State Board is considering all applications and petitions as a joint project, the State Board should also review TROA’s impacts on Donner Lake and Lake Tahoe, even though these structures have pre-1914 water rights under California law.

25. To facilitate and authorize TROA’s changes and exchanges of water in the Truckee River, the Petitions in the TROA Project collectively propose new diversion, redistribution and rediversion points and add new places of use and purposes of use (municipal, domestic, industrial, irrigation, stockwatering, fish culture, fish & wildlife protection/enhancement (including wetlands), power, instream water quality enhancement, recreation, and conservation of the Pyramid Lake fishery) to the licenses and permit currently in

place on the Little Truckee River and Prosser Creek. These licenses and permit are for Boca Reservoir (License 3723), Independence Lake (License 4196), Stampede Reservoir (Permit 11605), and Prosser Creek Reservoir (License 10180). The Petitioners request that these licenses and permit have a common place of use and common purposes of use, with the exception that Independence Dam and Reservoir (License 4196) does not have flood control as a purpose of use. In addition, the BOR requests that a permit term be eliminated in License 10180 and replaced by TROA operating criteria. Finally, the BOR filed two time extensions for Permit 11605, and ultimately seeks to extend time to complete beneficial use of water to the year 2012.

26. To further facilitate TROA's implementation, the Applicants request that the State Board grant two new Applications to Appropriate Water from the Truckee River for the TROA Project. The Applicants request that the State Board grant the Applicants' application to appropriate water from the Little Truckee River (Application 31487) and Prosser Creek (Application 31488). Because TROA proposes such a massive storage scheme in upstream Truckee River reservoirs, TROA cannot succeed without the State Board's approval of Applications 31487 and 31488. However, Applications 31487 and 31488 directly violate the Orr Ditch Decree, and attempt to re-allocate water already adjudicated and allocated to other water right owners by the Orr Ditch Court.

27. Petition for Change of Application 5169/License 3723 for Boca Dam and Reservoir (the "Boca Reservoir Petition to Change") seeks to add points of diversion, redistribution and rediversion to authorize and facilitate changes and exchanges of water in the Truckee River under TROA. The Boca Reservoir Petition to Change requests the addition of Stampede Dam as an additional point of diversion, redistribution and rediversion, and the

addition of Independence Dam as an addition point of diversion and redistribution. The Boca Reservoir Petition to Change also expands the existing place of use within the WCWCD to include additional townships detailed in the application papers. Finally, The Boca Reservoir Petition to Change expands the existing purposes of use from irrigation and domestic uses, which will continue, to municipal, industrial, stockwatering, fish culture, conservation of the Pyramid Lake fishery, fish & wildlife protection/enhancement, power, instream water quality enhancement, recreation and flood control purposes. All of the changes petitioned in The Boca Reservoir Petition to Change allegedly implement TROA. Accordingly, the changes The Boca Reservoir Petition to Change will supposedly not take effect unless and until TROA is in effect.

**TROA & THE BOCA RESERVOIR PETITION TO CHANGE INJURE THE PRIOR
WATER RIGHTS OF THE NEULANDS PROJECT, CHURCHILL COUNTY AND THE
CITY OF FALLON**

28. The California Water Code requires each Petition for Change to “[i]nclude sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water.” Cal. Water Code § 1701.2(d). *See also* 23 C.C.R. § 791. Moreover, before the State Board grants a Petition to Change, the petitioner must prove, and the State Board must find, that “the change will not operate to the injury of any legal user of the water involved.” Cal. Water Code § 1702. The Protestants first protest the Boca Reservoir Petition to Change, and TROA itself, on the grounds that The Boca Reservoir Petition to Change and TROA injure the water rights of the individual landowners in the Newlands Project, Churchill County and the City of Fallon.

29. In 1956, Congress authorized Stampede Reservoir and Prosser Creek Reservoirs, as part of The Washoe Reclamation Project. The Boca Reservoir Petition to Change proposes to add Stampede Reservoir as an additional point of rediversion, redistribution and rediversion. Congress intended The Washoe Reclamation Project to operate the purpose of, *inter alia*, furnishing water for the irrigation of approximately 50,000 acres of land in the Truckee and Carson River Basins in Nevada and California, and firming the existing water supplies of lands under the Truckee River Storage Project and the Newlands Project. See Public Law 858, 84th Congress, Chapter 809, 2nd Session. The original permit terms of Stampede Reservoir and original license terms of Prosser Creek Reservoir also provided that, in addition to other uses, water from Stampede and Prosser Creek Reservoirs should be used within the Newlands Project for irrigation purposes. Currently, Stampede Reservoir and Prosser Creek Reservoir are managed in conjunction with the other reservoirs serving the Truckee River Basin.

30. The Boca Reservoir Petition to Change and TROA injure the water rights of the landowners in the Newlands Project because the Boca Reservoir Petition to Change and TROA propose to restructure the current TRA and Orr Ditch Decree Truckee River water management system, and systematically reallocate water away from irrigation in the Newlands Project, guaranteed under the Orr Ditch Decree, provided for in the terms of Stampede and Prosser Creek Reservoir permits and licenses, and acknowledged in progress reports for Boca Reservoir from 1949 through 1985. Until 1985, water was released from Boca Reservoir for the sole purpose of maintaining required flows as prescribed by the TRA. See Progress Reports for Boca Reservoir submitted by the Applicants. The Boca Reservoir Petition to Change and TROA reallocate and store water that would otherwise be diverted at Derby Dam or stored in Lahontan Reservoir for

irrigation in the Newlands Project. In *United States v. Nevada*, the United States Supreme Court held that the U.S. Government/Bureau of Reclamation may not reallocate water rights conferred by the Orr Ditch Decree to Newlands Project farmers to irrigate farmlands. 463 U.S. 110, 126 (1983). Rather, the ownership interest in the water rights to irrigate farmland in the Newlands Project lies with the owners of the land within the Newlands Project to which the water rights are appurtenant. *Id.*

31. The Boca Reservoir Petition to Change and TROA propose to store additional water upstream in Boca Reservoir, Stampede Reservoir, Prosser Creek Reservoir and Independence Lake that has already been adjudicated as part of the Newlands Project water right owners' carryover storage rights in Lahontan Reservoir. Once the water is stored in upstream reservoirs, signatories to TROA, the Applicants here, may carryover such storage from year to year by establishing a system of credits. Because TCID is not a signatory to TROA, the Newlands Project has no recognized right to carryover storage in these upstream reservoirs. Moreover, the water that is sought by the Applicants to be stored in these upstream reservoirs is water, at least in substantial part, with water rights that have been adjudicated under Claims 3 and 4 of the Orr Ditch Decree and allocated in the TRA to the water right owners in the Newlands Project, Churchill County and the City of Fallon.

32. TROA also dedicates portions of carryover water to fish conservation uses for the benefit of the Pyramid Lake Indian Tribe. TROA harms the Newlands Project, Churchill County and the City of Fallon in this regard as well, because once water has been stored as fish water or fish culture water under TROA, then that water is unavailable to the water right owners in the Newlands Project, Churchill County and the City of Fallon even though the PLIT has no right to

this water under the Orr Ditch Decree, and the Newlands Project has an adjudicated senior water right.

33. TROA also harms the Protestants' water rights because it increases water shortages in the Carson Division of the Newlands Project. Increased shortages are caused by the changed timing and reduction in magnitude of Truckee River supplies as a result of the proposed credit storage, reduction in Floriston Rates, and alteration of return flow amounts and patterns. Increased shortages reduce the amount of water in the Carson Division of the Newlands Project, and, in turn, reduce the amount of water Newlands Project water right holders, farmers, have to irrigate their crops. Indeed, review of the BOR's surface water modeling information for TROA, provided by the BOR in the Draft Environmental Impact Statement/Environmental Impact Report ("EIR/EIS") documents for the project, shows that the BOR actually projects TROA operations will increase water shortages in the Carson Division of the Newlands Project, compared to maintaining the current Truckee River management structure governed by the TRA and Orr Ditch Decree.

34. TROA also harms the water rights of the water right owners in the Newlands Project, Churchill County and the City of Fallon, and frustrates the irrigation purpose of the Stampede Reservoir application and permit, because Pyramid Lake fish water, water not provided for in the Orr Ditch Decree, has carryover storage and no transportation losses attached. Pyramid Lake fish credit water is elevated above other water rights in the Orr Ditch Decree, such as the Newlands Project water rights, and given a higher priority in the Truckee River water management scheme. When Pyramid Lake fish credit water is released from storage, no transportation losses are applied until the water reaches its new point of diversion at Pyramid

Lake. Thus for the distance from Sparks to Pyramid Lake, some fifty miles, the water needed to transport such credit waters comes out of the flow in the river that would otherwise be available to others downstream along the river for diversion, without regard to priority of appropriation.

35. TROA's potential new uses for Truckee River water – fish culture, fish & wildlife protection/enhancement and conservation of the Pyramid Lake fishery – will also injure Newlands Project, Churchill County and the City of Fallon water users. As provided in the text of the Washoe Project authorization by Congress, and the initial application and permit/license terms for Stampede and Prosser Reservoirs, water in Stampede and Prosser Reservoirs' main historic use was for irrigation purposes. Water used for irrigation upstream in the Truckee River provides return flows that when they return to the Truckee River flow downstream can be beneficially used by Newlands Project farmers. Likewise, the municipal and domestic uses of Truckee River water also provide substantial return flows that are available to be diverted at Derby Dam. However, water for fish uses under TROA does not provide return flows to the Newlands Project farmers, injures the farmers in times of water shortage and drought, and runs contrary to the intended purpose of the Stampede Reservoir application and permit, and the intent of the Washoe Project.

36. TROA's proposed water storage and additional uses of Truckee River water will additionally interfere with the implementation of Floriston Rates on the Truckee River. The terms of the TRA limit when Floriston Rates can be changed, and require the permission of the Conservation District, TCID and Sierra Pacific Power Company before such changes can occur. Under TROA, an Administrator will oversee the management of the Truckee River at the direction of the TROA signatories (which do not include TCID). The TROA signatories

purportedly may agree to a reduction in flow rates in exchange for storage credit in the upstream reservoirs. As a result, less water may be available for diversion by the Newlands Project Newlands Project, Churchill County and the City of Fallon at Derby Dam. In turn, the Newlands Project, Churchill County and the City of Fallon may not have access to adequate amounts of water to meet its irrigation municipal and industrial and/or storage rights.

37. TROA's proposed upstream storage scheme also proposes to store waters historically diverted to the Truckee Meadows, the City of Fernley and the Lahontan Valley. Upstream storage of Truckee Meadows, Fernley and Lahontan Valley water will negatively impact groundwater conditions and the stream/aquifer hydrologic connection in the Truckee River in both California and Nevada. It appears that the TROA Petitions and Applications no longer include "Groundwater Recharge" as a purpose of use. However, the TROA operations will negatively impact the groundwater recharge of Hydrographic Basins in Nevada by storing water in upstream reservoirs that normally flows in the river. The diversion of a portion of surface water that has historically recharged Hydrographic Basins in Nevada will also unreasonably lower the water table resulting in injury to well owners in these regions. These wells must then draw water that is hydrologically connected to the Truckee River, thus adversely affecting downstream water right owners.

38. TROA, in conjunction with Petitions and Applications currently before the State Board, also proposes to impound, allocate, and schedule discharges of Privately Owned and Stored Water in Donner Lake. TCID and TMWA are the sole co-tenant owners of water rights in Donner Lake. Operation of Donner Lake is governed by an agreement related to "Donner Lake Operation and Maintenance Cost Sharing and Use of Donner Lake Water," ("Agreement")

entered into by TCID and Sierra Pacific, the predecessor in interest to TMWA. The Agreement specifies all permissible uses of Donner Lake water and mandates that releases shall be for the sole use and benefit of the parties to the Agreement. The proposed management of Donner Lake water within the management scheme of TROA violates the Agreement and will deprive TCID of the benefit of its interest in Donner Lake. TROA also contemplates the sale of Donner Lake water rights by TCID for use in implementing the provisions of TROA. TCID has no intention of selling its water rights in Donner Lake. In fact, the water rights in Donner Lake are currently the subject of litigation before the Superior Court of California in and for the County of Nevada (Case No. T06/2239C). The use of Donner Lake water in conjunction with these Petitions and Applications is speculative and will injure TCID's water rights in Donner Lake.

39. TROA must comply with the TRA, unless and until consent of all parties is received. TCID does not consent. TROA and its associated petitions and applications are accordingly defective because they attempt to effect a unilateral modification to the Orr Ditch Decree by changing the TRA, without consent, approval or notice of TCID. By modifying the Orr Ditch Decree and changing the TRA, TROA changes the distribution and storage of water in the Truckee River Basin. Changing the distribution and storage of water in the Truckee River Basin harms the prior water rights of the farmers of the Newlands Project, Churchill County and the City of Fallon, guaranteed under the Orr Ditch Decree, affirmed by the Orr Ditch Court, and provided for in the Stampede Reservoir original application and permit.

40. For the reasons above, the State Board should not approve the Boca Reservoir Petition to Change because TROA and the Boca Reservoir Petition to Change attempt to reallocate water that the Orr Ditch Decree already committed to supply the Carson Division of

the Newlands Project, Churchill County and the City of Fallon.

**THE STATE BOARD DOES NOT HAVE JURISDICTION TO CHANGE THE USE OF
TRUCKEE RIVER WATER ALREADY ALLOCATED TO THE NEWLANDS
PROJECT WATER RIGHT OWNERS, CHURCHILL COUNTY AND THE CITY OF
FALLON**

41. Protestants also protest TROA and the Boca Reservoir Petition to Change on the grounds that the State Board does not have jurisdiction to allocate Truckee River water already belonging to Newlands Project water right owners, Churchill County and the City of Fallon. The Boca Reservoir Petition to Change proposes to store, divert and re-divert water that was historically diverted and continues to be diverted to Lahontan Reservoir for the benefit of the Newlands Project water right owners. The State Board has no jurisdiction over this water because the Orr Ditch Decree governs water rights belonging to the Newlands Project water right owners, Churchill County and the City of Fallon in Truckee River water. *See U.S. v. Orr Water Ditch Co., et al., Equity No. A-3. D. Nev. (1944)*. Moreover, water stored in Lake Tahoe is subject to Claim 4 of the Orr Ditch Decree but also has been adjudicated in the Truckee River General Electric Decree.

**TROA & THE BOCA RESERVOIR PETITION TO CHANGE INJURE THE
ENVIRONMENT**

42. The Protestants also protest the Boca Reservoir Petition to Change, and TROA itself, on the grounds that TROA will adversely impact the environment. The California Water Code requires that a petition for change “[i]nclude all information reasonably available to the petitioner . . . concerning the extent, if any, to which fish and wildlife would be affected by the

change, and a statement of any measures proposed to be taken for the protection of fish and wildlife in connection with the change.” Cal. Water Code § 1701.2(c).

43. In order to address TROA’s impacts on fish and wildlife and other aspects of the environment, The Applicants refer to and attempt to incorporate by reference the Revised TROA EIR/EIS the Department of Interior, U.S. Fish & Wildlife Service, Bureau of Indian Affairs and the California Department of Water Resources are currently preparing to evaluate TROA’s environmental impacts. However, the Revised TROA EIR/EIS exists only as a draft. Informal conversations with the agencies preparing the Final TROA Revised EIR/EIS indicate that the document may be complete and published for public comment and review sometime in late 2007. Without revised CEQA/NEPA environmental review documents, it is impossible to evaluate the environmental implications of the Boca Reservoir Petition to Change, and TROA itself. And without revised CEQA/NEPA environmental review documents, the TROA Petitions and Applications are also premature and incomplete. *See e.g. ONRC Action v. Bureau of Land Management*, 150 F.3d 1132, 1137-38 (9th Cir. 1998); *Laurel Heights Improvement Ass’n v. Regents of University of California*, 6 Cal. 4th 1112, 1123-24 (1993) (both providing that CEQA/NEPA environmental review process must be concluded before a state or federal agency implements a project).

44. The Applicants failed to comply with the Water Code and the State Board’s forms for petitions and applications because they have provided no analysis of the potential environmental impacts of TROA. Indeed, State Board forms request that petitioners and applicants attach the most recent environmental review document that exists. While a 2004 Draft EIS/EIR does exist for TROA, The Applicants fail to attach that document with their

Petitions and Applications. Without any information regarding the environmental impacts of TROA, it is utterly impossible to evaluate, and, in turn, implement TROA, on to grant The Applicants' Petitions and Applications.

45. Additionally, the Draft EIS/EIR (the last published TROA CEQA/NEPA document, dated 2004) omits analysis of many potential adverse environmental impacts of TROA, including adverse impacts on fish and wildlife and plant communities, as required by the Water Code and the State Board's petition for change form. Under the California Environmental Quality Act ("CEQA"), The Applicants are also required to adequately analyze all water supply issues associated with the TROA 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). Indeed, recent California Supreme Court case law emphasizes that an EIR for a water supply project is required to explain how all long-term water demands will be met or affected by the proposed project, and clearly identify the environmental effects of a water project, and how those effects will be mitigated. See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 441 (2007). Because the Draft EIS/EIR fails to address substantial water supply issues and associated environmental issues, The Applicants fail to fully comply with section 1701.2(c) of the Water Code and the State Board's form for petition to change applications, as well as California case law requiring a detailed analysis of potential environmental effects of a water project.

46. The Draft EIR/EIS fails to address significant potential environmental effects of the TROA project. First, a complex of interconnected Truckee water-dependant downstream

wetlands, Stillwater Wildlife Management Area, Stillwater National Wildlife Refuge, and Carson Lake Pasture, will be injured by the upstream storage scheme the TROA Project proposes. These wetlands areas consist mainly of fresh and alkaline marshes varying from several centimeters to a meter in depth, and are dependent on primary water deliveries and return flows from irrigation projects, including the Newlands Project. The reduced return flows in the Truckee River and reduced storage in Lahontan Reservoir that TROA proposes would reduce return flows to the Newlands Project, and, in turn, to these wetland areas, and cause wildlife, habitat, native flora and fauna and water quality to deteriorate. Both the United States and Nevada have purchased water rights for the recovery of the wetlands. These wetlands recovery water rights will also be injured and negatively impacted by TROA.

47. The Draft EIS/EIR also fails to address the potential impacts of the TROA Project on the Fallon National Wildlife Refuge. The Fallon National Wildlife Refuge is dependent on downstream diversions of Truckee River water and water stored and released from the Lahontan Reservoir, and comprises over 15,000 acres of playa and wetland habitat in the Carson Sink. The refuge is important habitat for migratory shorebirds and waterfowl in all years, and particularly in dry years when water supplies and water rights purchased by federal and state agencies will be impacted by increased shortages under TROA. Pursuant to the upstream storage scheme and diversions into Pyramid Lake TROA proposes, there will likely be insufficient water flow in the Carson and Truckee Rivers and Lahontan Reservoir for the water to enter the refuge. If water does not enter the refuge, wetland habitat deteriorates and declines, causing, in turn, the native migratory shorebirds and waterfowl and other animal species and plant communities supported by the refuge's wetlands to suffer.

48. The Carson River Basin is also home to threatened Bald Eagles. Healthy habitat for Bald Eagles depends on downstream/Carson River Basin diversions of Truckee River water and water stored and released from the Lahontan Reservoir, as well as return flows from irrigation projects such as the Newlands Project.

49. The TROA Project's upstream storage management scheme would additionally negatively impact air quality in desert regions surrounding the Truckee River. As the availability of Truckee River water for agricultural uses is reduced, a shift in water use to non-agricultural purposes will result in less plant growth, increased particulate matter in the air and, in turn, worse air quality in high desert regions bordering the river.

50. The TROA Project will negatively affect groundwater and groundwater recharge from irrigation and agriculture across the aquifer underlying the Carson Sink and Newlands Project, resulting in a drop in the water table and corresponding drop in the domestic water supply for the areas surrounding the river.

51. The TROA Project will increase urban development and induce growth, resulting in reduced water quality from urban runoff in newly developed urban areas.

52. The TROA Project will increase upstream storage of Truckee River water and decrease downstream storage and water levels in the Lahontan Reservoir, and adversely impact Lahontan Reservoir aesthetically as well as recreationally, for public use.

53. The TROA Project's upstream storage management scheme is to the detriment of Lake Tahoe, and the ecosystem of the Lake Tahoe Basin. The water that is the subject of the TROA Project and will be stored in upstream reservoirs according to TROA would, under the current Truckee River management scheme, be credited into storage in Lake Tahoe. Storing this

water in upstream reservoirs would result in an artificial decrease in Lake Tahoe levels, causing the lake to drop below its natural rim. In turn, flora and fauna, wildlife and fish habitat, water quality and other aspects of the Lake Tahoe Basin will suffer.

54. Therefore, the Protestants protest the Boca Reservoir Petition to Change and TROA Project on the grounds that substantial injury to the environment potentially exists as a result of TROA. The Applicants fail to comply with the Water Code, section 1701.2(c), the State Board's petition for change form and CEQA/NEPA and do not discuss all reasonable potential effects on the environment as a result of TROA.

TROA & THE BOCA RESERVOIR PETITION TO CHANGE INJURE THE PUBLIC INTEREST

55. Protestants additionally protest the Boca Reservoir Petition to Change, and TROA itself, on the grounds that the TROA Project will injure the public interest. The State Board has broad discretion to grant a permit to appropriate water subject to "terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated." Cal. Water Code §§ 1253 - 1256. The State Board is to consider a variety of beneficial uses which particular water may serve, and may subject appropriation to conditions that will best develop and conserve water in public interest. Cal. Water Code § 1257.

56. The Boca Reservoir Petition to Change and TROA injure the public interest because they will increase water shortages in the Newlands Project, and in turn reduce water that is available for irrigation purposes in the Newlands Project. In California, the second highest beneficial use for water is for irrigation purposes. Cal. Water Code § 1254. The Boca Reservoir Petition to Change and TROA's upstream storage scheme for Truckee River water will increase

water shortages in the Newlands Project by changing the timing and reduction in magnitude of Truckee River supplies as a result of the proposed credit storage scheme, reducing Floriston Rates, and altering return flow amounts and patterns. Water shortages in the Newlands Project directly affect the public, i.e. the farmers, who individually hold water rights in the Truckee River.

57. Water shortages in downstream portions of the Truckee River mean adverse impacts on the operation of the Newlands Project, particularly the economic effects of water shortages on the agricultural revenue of individual farmers in the public, due to a reduction in crop yields. TCID and the Newlands Project as a whole will also experience a drop in hydropower generation and revenues, and a reduction of water delivery fees received by TCID. The Draft EIR/EIS fails to acknowledge these public interest considerations and does not include a section on impacts to TCID hydropower generation and revenues.

58. The Boca Reservoir Petition to Change and TROA will also injure the public interest because they will reduce Truckee River flows for domestic purposes in downstream portions of the Truckee River in Lyon County, Storey County, Churchill County, the City of Fernley, the City of Fallon and the Newlands Project. In California, the highest beneficial use for water is for domestic purposes. Cal. Water Code § 1254. The Boca Reservoir Petition to Change and TROA will limit water delivered to these downstream areas particularly in times of drought. By diverting water to Pyramid Lake for fish conservation purposes, these counties, cities and the Newlands Project may lose their drought protection and suffer severe water shortages.

59. The Boca Reservoir Petition to Change and TROA will also affect the public by keeping Truckee River water upstream, and, in turn, reducing the amount of water stored downstream in Lahontan Reservoir, and, limiting the public recreational opportunities in Lahontan Reservoir that are associated with higher water levels.

60. Holding water upstream in the Truckee River storage reservoirs will also deplete groundwater storage for communities downstream of Reno and Sparks that depend on surface water to recharge their groundwater aquifers.

61. Finally, the Boca Reservoir Petition to Change and TROA also have the potential to harm the public interest by depleting the storage levels of Prosser, Independence, Boca and Stampede Reservoirs to increase the flow of water into Pyramid Lake even though Pyramid Lake has no water rights in Truckee River water. If the storage levels of Prosser, Independence, Boca and Stampede Reservoirs are depleted, public recreational opportunities will be limited in these Reservoirs as well.

62. Therefore, Protestants protest the Boca Reservoir Petition to Change and TROA on the grounds that substantial injury to the public interest to upstream reservoirs and to downstream reservoirs and downstream water users potentially exist as a result of the TROA.

TROA & THE BOCA RESERVOIR PETITION TO CHANGE INJURE PUBLIC TRUST

VALUES

63. Protestants additionally protest the Boca Reservoir Petition to Change, and TROA itself, on the grounds that the Application and TROA Project will injure public trust values. Under the public trust doctrine, the state has title as trustee to all tidelands and navigable lakes and streams and is charged with preserving these waterways for navigation, commerce, and

fishing, as well as for scientific study, recreation, and as open space and habitat for birds and marine life. *National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419, 434-35 (1983). See also *Marks v. Whitney*, 6 Cal. 3d 251, 257-58 (1971) (recreation); *Baker v. Mack*, 19 Cal. App. 3d 1040, 1045-46 (1971) (recreation). The trust also extends to the tributaries of navigable streams; ecological preservation uses and wild creatures. See *National Audubon Society v. Superior Court*, 33 Cal. 3d at 435-36 (tributaries); *Marks v. Whitney*, 6 Cal. 3d at 259-60 (ecological preservation); *Geer v. Connecticut*, 161 U.S. 519, 528-30 (1896) (overruled on other grounds) (wild creatures). The State Board has a duty to protect these public trust values and resources when administering water rights. See generally *National Audubon Society*, 33 Cal.3d at 434-36.

64. The Boca Reservoir Petition to Change, and TROA itself, injure public trust values in numerous respects. First, implementing TROA and its associated permits and applications, including the Boca Reservoir Petition to Change, would cause more Truckee River water to be stored upstream, and less river water to flow downstream to Truckee River diversions and tributaries. TROA would ultimately limit water supply to key areas of ecological study and preservation, Carson Lake, the Fallon National Wildlife Refuge and the Stillwater National Wildlife Refuge. See *National Audubon Society v. Superior Court*, 33 Cal. 3d at 435-36 (tributaries); *Marks v. Whitney*, 6 Cal. 3d at 259-60 (ecological preservation); and *Geer v. Connecticut*, 161 U.S. 519, 528-30 (1896) (overruled on other grounds) (wild creatures). The threatened bald eagle populates these wildlife areas. The bald eagle is also protected under the Bald and Golden Eagle Protection Act. 16 U.S.C. §§ 668-668(d). TROA would injure public trust values in these national wildlife refuges by limiting water to these areas, reducing water-

based habitat in those areas, and, in turn injuring ecological study and wildlife preservation. Indeed, Public Law 101-618 (the federal legislation conceptualizing TROA) was enacted in part to promote Fallon National Wildlife Refuge and the Stillwater National Wildlife Refuge wetlands protection. *See* P.L. 101-618 section 205, entitled “Wetlands Protection.” However, actually putting TROA into practice would harm the wetlands P.L. 101-618 strives to protect.

65. TROA and its implementing permits and applications also injure public trust values by potentially reducing (or draining) water levels in California and Nevada reservoirs, reservoirs used for recreational purposes, with wildlife habitats of their own. Because of TROA’s complex management proposal in Truckee River reservoirs, the actual impacts of TROA are largely unknown. However, TROA’s emphasis on fishery conservation in Pyramid Lake may allow The Applicants to drain Truckee River reservoirs, such as Prosser Reservoir, in low water years to provide sufficient water supply for fish conservation in Pyramid Lake. Likewise, storing and stockpiling Truckee River water in the upstream California reservoirs may also reduce water storage and water levels in Lahontan Reservoir, downstream from TROA’s upstream storage reservoirs. Lower water levels in the California reservoirs and Lahontan Reservoir frustrate public trust values by limiting water-dependent recreational opportunities, wildlife habitat, and wildlife. *See Marks v. Whitney*, 6 Cal. 3d at 257-58 (recreation); *Baker v. Mack*, 19 Cal. App. 3d at 1045-46 (recreation & ecological preservation); and *Geer v. Connecticut*, 161 U.S. 519, 528-30 (1896) (overruled on other grounds) (wild creatures).

66. Finally, TROA and its implementing petitions and applications also have the potential to injure the public trust rights of the citizens of Lyon County, Storey County, Churchill County, the City of Fallon and the Newlands Project to clean drinking water. While the State of

California has yet to extend the public trust doctrine this far, the public certainly is entitled to clean drinking water as a fundamental basic tenet of public property rights, human rights and common decency. The priority TROA places on designating large amounts of Truckee River as water for Pyramid Lake fish conservation has the potential to limit available water in the Truckee River for downstream communities to use as drinking water and for drought protection purposes.

67. Lastly, TROA and its implementing petitions and applications also raise public trust issues by choosing which communities are entitled to drought protection and clean drinking water. TROA gives upstream communities the best chance at a fresh water supply in times of drought, despite the fact that TROA's applications claim broad drought protection as a TROA purpose of use.

68. Therefore, Protestants protest TROA on the grounds that TROA injures public trust values.

TROA & THE BOCA RESERVOIR PETITION TO CHANGE ARE CONTRARY TO EXISTING LAW

69. Protestants also protest TROA and the Boca Reservoir Petition to Change because they are contrary to existing law. The Applicants circumvent California law requirements for transfers of water and fail to comply with the requirements of CEQA and the National Environmental Policy Act ("NEPA").

70. First, the Applicants circumvent the scrutiny of California's transfer statutes and misapply California law by defining TROA's proposed storage and transfer scheme instead as "changes and exchanges" of water. Tellingly, the Applicants have stricken the term "transfer"

from their petitions and applications in order to mask the true intent of the TROA project. In reality, the Applicants propose broad water transfers outside of the change petitions on file with the State Board. Because the Applicants have not properly defined the scope of the TROA project, the Applicants neglect to discuss the true impacts and injury to other water users, such as the Newlands Project water right owners, Churchill County and the City of Fallon that will most likely occur as a result of TROA's water transfers. Likewise, because the Applicants have not properly defined TROA as a transfer project, many water right owners on the Truckee River that will potentially be harmed by the TROA transfers have not had opportunity to intervene and protest injuries to their water rights.

71. The Applicants also failed to comply with CEQA and the National Environmental Policy Act ("NEPA"), which they incorporate by reference into their Petitions and Applications. CEQA, Cal. Pub. Resources Code §§ 21000-21177, and NEPA, 42 U.S.C. 4321, *et seq.*, require state and federal agencies, respectively, to identify and analyze agency actions with the potential to impact the environment, evaluate alternatives to those actions, document the environmental analysis and findings, and make the environmental analysis and information available to the public before final agency action is made. The State Board should deny the TROA Petitions and Applications because The Applicants have failed to comply with CEQA and NEPA before attempting to implement TROA at the State Board level. The Protestants hereby incorporate by reference each and every CEQA and NEPA comment letter they have submitted for TROA EIR/EIS documents (attached as Exhibit B to this Statement of Facts).

72. Both CEQA and NEPA require that the lead agency conducting the environmental review fully complete the entire CEQA/NEPA environmental review process,

including the Revised EIR/EIS, before approving and implementing a project. *See e.g. ONRC Action v. Bureau of Land Management*, 150 F.3d 1132, 1137-38 (9th Cir. 1998); *Laurel Heights Improvement Ass'n v. Regents of University of California*, 6 Cal. 4th 1112, 1123-24 (1993). An agency may not take any action that would significantly impact the environment before the CEQA/NEPA process has fully concluded. *Id.* The TROA Petitions and Applications are contrary to law because they violate this basic tenant of CEQA/NEPA case law, and request implementation of TROA before formal TROA environmental review has officially concluded, and before the State Board (and Protestants) have had an opportunity to review the Final EIR/EIS discussing the environmental effects of TROA. The Applicants may not implement TROA, and the State Board may not grant The Applicants' Petitions and Applications to implement TROA, before reviewing the Final EIR/EIS for the project.

73. Likewise, the Applicants have recently published a revised draft of TROA itself, with significant substantive changes to TROA that directly affect the Newlands Project. Yet, Protestants have not had an opportunity to review and comment on these changes prior to submitting their protests to the State Board. Accordingly, The Applicants may not implement TROA and the State Board may not grant The Applicants' Petitions and Applications to implement TROA before reviewing the recently published updated version of TROA.

74. Moreover, the most recent publicly available TROA environmental document, the TROA Draft EIS/EIR, published in 2004, is contrary to CEQA and NEPA in numerous respects, many of which may plague the Final EIS/EIR, to be published in late 2007.

75. As the State Board emphasized in its letter of December 28, 2004 evaluating the TROA Draft EIS/EIR (attached to this Statement of Facts as Exhibit C), the Draft EIS/EIR does

not adequately address the project level water right actions under consideration by the State Board – the Petitions for Change and Applications to Appropriate and their specific descriptions and sources of water. The Draft EIS/EIR also does not discuss the impacts associated with the State Board’s potential approval of the Petitions or Applications and their potential impacts on beneficial uses of water, public trust resources, and other legal water right owners. Additionally, the Draft EIS/EIR fails to discuss the potential groundwater recharge component of the Petitions and Applications, and the impact to the environment and other legal users of water with regards to groundwater recharge.

76. The Draft EIS/EIR also fails to adequately analyze water use and water consumption. California case law interpreting CEQA consistently emphasizes that an EIR analyzing a proposed water project must “clearly and coherently explain . . . how long-term water demand is to be met with the [proposed] water sources,” as well as the environmental impacts associated with exploiting the water resources. *See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 441 (2007). *See also Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, 106 Cal. App. 4th 715 (2003). Analysis of water use or water supply in an EIR may not be speculative or only cursorily mentioned in passing. *Id.* However, most of the information regarding water consumption and sources of water in the TROA Draft EIR/EIS is derived from a fatally flawed water model. The model The Applicants use to analyze TROA and its effects has never been calibrated, verified or validated. Significant limitations in the model exist that cause unintended consequences in the output the model predicts. *See* Comment Letter from Principia Mathematica, attached in Exhibit B. The model does not address many of TROA’s components.

The Draft EIS/EIR does not include model output for Prosser Reservoir water levels as contained in Exhibit 6 of the Water Resources Appendix for Boca, Donner, Stampede, Independence, Lahontan, Stampede and Tahoe. Finally, the model assumes that the last 100 years of water resources conditions will repeat, and does not conduct stochastic runs to verify that this is truly a likely possibility. Thus, TROA environmental analysis is based upon a faulty model, which in turn results in faulty analysis of water use and water consumption in the TROA Draft EIR/EIS.

77. The Draft EIR/EIS also gives an inadequate alternatives analysis, failing to consider all reasonable alternatives in depth. *See* 40 C.F.R. §§ 1502.9(a) and 1502.14. The TROA EIR/EIS only evaluates three alternatives: no action, Local Water Supply Alternative (“LWSA”) and TROA. These alternatives, however, do not analyze the range of alternatives CEQA and NEPA require. *See e.g. Westlands Water District v. United States*, 376 F.3d 853, 868 (9th Cir. 2004). The Draft EIR/EIS neglects to discuss obvious, common sense alternatives to TROA. For instance, the Draft EIR/EIS does not analyze water conservation, building more reservoirs or allowing water to be stored in Lahontan Reservoir.

78. The Draft EIR/EIS draws a distinction between the importance of the State Board’s implementation of the Petitions to Change and the Applications to Appropriate, and states that the State Board’s approval of the Applications to Appropriate is not essential for the TROA project to move forward. However, the Draft EIS/EIR did not evaluate a scenario where the State Board approved the Petitions to Change but did not approve the Applications to Appropriate. It is thus impossible to ascertain how The Applicants would implement TROA without the State Board’s approval of the Applications, and the Draft EIS/EIR appears incomplete.

79. The Draft EIS/EIR fails to include or adequately examine baseline alternatives. NEPA requires that an environmental impact study adequately consider and disclose the environmental impact of its actions by examining current baseline conditions to evaluate proposed alternatives against. Without establishing baseline conditions, there is simply no way to analyze the effect an action will have on the environment. *See American Rivers v. Federal Energy Regulatory Commission*, 201 F.3d 1186, 1195 (9th Cir. 2000). The TROA configuration is flawed when comparing to current conditions because the TROA alternative includes all of the embedded assumptions associated with year 2033. To determine the potential impacts of TROA on the current operations of the Newlands Project, only TROA provisions should be imposed on current conditions. Instead, the document compares TROA to a set of artificial, contrived conditions that do not exist in the Truckee River basin, and the overall impact of TROA appears significantly less significant than if the TROA alternative were simply added to conditions that actually exist in the Truckee River basin. The Draft EIS/EIR does not compare TROA to the current Truckee River management scheme, governed by the TRA and determined under the Orr Ditch Decree.

80. The Draft EIS/EIR also fails to adequately evaluate alternatives and potential mitigating actions. *See* 14 CCR § 15126.6; *Laurel Heights Improvement Assn v. Regents of the University of California*, 47 Cal.3d 376 (1988). An alternatives analysis should contain sufficient information about each alternative to allow meaningful evaluation and comparison with the proposed project. CEQA and NEPA do not provide for rejection of proposed alternatives by interested parties. However, the Draft EIR/EIS emphasizes that this is exactly the type of review of alternatives TROA went through, and that were eventually adopted by the

environmental review document. Section 2.V of TROA refers to a Report to Negotiators, a report given to a select group of TROA stakeholders with mandatory signature authority. The Report gave the stakeholders an opportunity to reject alternatives that were not detailed in the Draft EIS/EIR. The Draft EIS/EIR only contains alternatives the stakeholders did not veto. If rejection by interested parties were a criteria for disqualification of alternatives under CEQA, then the analysis of alternatives proscribed by CEQA would be nothing more than a *post hoc* rationalization to support decisions already made.

81. The alternatives accepted in the Draft EIR/EIS are counter to existing law, the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990. TROA, the accepted alternative in the Draft EIR/EIS, requires water to be stored and released without permission of the owners of water rights in the Truckee River, precludes certain storage and release for decreed water rights and users, and provides benefits to non-water-righted uses at the expense of water-righted uses. These actions are in conflict with the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990. Section 205(a)(2) of the Settlement Act 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* Decrees. In addition, the Settlement Act requires full compliance with NEPA and state law, including CEQA. And CEQA provides that alternatives counter to existing law need not be analyzed. CCR § 15126.4(a)(5). Potential conflicts with the *Orr Ditch* and *Truckee River General Electric* Decrees are fatal to any TROA alternative.

82. In addition to the faulty alternatives analysis of the Draft EIS/EIR, the document is also biased toward the proposed action, TROA, and has prejudiced the outcome and the

selection of alternatives examined in the environmental review. The Draft EIS/EIR is biased in several respects: the document defines TROA so narrowly as to rule out other reasonable alternatives, and bias in drafting the document appears to interfere with agency obligations to consider and weigh the pros and cons of each environmental alternative presented. *See Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 813 (9th Cir. 1999) (agency bias in picking a program or desired outcome at early stages of review process and forgoing all other reasonable alternatives); *Simmons v. United States Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997) (agency bias in “contriv[ing] a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence)”).

83. The Applicants’ Petitions and Applications are also contrary to CEQA and NEPA because the Draft EIS/EIR, the only published and available document discussing The Applicants’ environmental review of TROA, lacks scientific integrity. *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.”) Similarly, CEQA also requires agencies to rely on precise data when available, and include in an EIR 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). 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”).

Withholding information related to a model’s variables, as well as a model’s shortcomings, violates NEPA. *The Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005).

84. Here, the agencies relied upon an outdated version of modeling software to analyze the TROA model and its effects, when new, up-to-date modeling software existed. The agencies also failed to account in the model for the effects of low flow years, or serious drought. At the least, the Draft EIS/EIR must contain an acknowledgement that low flow years and serious drought are possibilities. *See* 43 C.F.R. § 1502.22. However, the document mentions neither of these possibilities, and the model fails to account for these possibilities. Finally, the model also uses river flows for points on the Truckee River that are different than the USGS gaging stations for historical streamflows. Model output was processed using a program to estimate streamflows at the other locations. The use of these estimates, and others, without adequate data and rationale to support the use of the estimates, render the analysis flawed.

85. Last, but certainly not least, TROA and its last published CEQA/NEPA document are contrary to law because they are incomprehensible. An environmental impact statement must be written in plain, clear and concise language for public understanding and review. *See* 40 C.F.R. §§ 1502.8, 40 C.F.R. § 1502.1, 14 C.C.R. §§ 15121(a); 15140. Materials that support the environmental analysis must be attached in an appendix to the document. 40 C.F.R. § 1502.18. In order to understand the TROA Draft EIR/EIS, the reader must, in turn, understand TROA. However, TROA is full of cross-references and unique definitions, and long rules with multiple

exceptions. Likewise, the Draft EIS/EIR is also complex and difficult to read. It contains a collection of definitions, jargon and cross-references to other provisions of TROA that embroil the reader in a whirlwind of concepts. And never once in the Draft EIS/EIR does the document attempt to set forth any factual scenarios or realistic conditions that the reader or the public could understand. The Draft EIS/EIR far exceeds the page limitations recommended by the regulations, and 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. For these reasons, the Draft EIS/EIR fails to satisfy the readability and understandability requirements of CEQA and NEPA, and is contrary to law.

STEPS THAT COULD BE TAKEN TO RESOLVE THIS PROTEST

86. Protestants request that the State Board not rule on the TROA Petitions and Applications until the Revised EIR/EIS document for the project is complete, and the public (including Protestants) have had an opportunity to review and comment on the Final EIR/EIS. The State Board should allow Protestants to supplement their Protest, if necessary, a reasonable time after review of the Revised TROA EIR/EIS takes place to respond to The Applicants' Revised EIR/EIS and incorporate discussion of this document into Protestants' Protests.

87. The State Board should not approve the Petitions and Applications that implement TROA until and unless the following terms and conditions are enacted:

- a. Terms and conditions are imposed to ensure that existing water rights are not injured;
- b. Newlands Project storage rights under the Orr Ditch Decree are permitted

- before any water is stored under TROA;
- c. The TROA diversions and storage shall be according to a new priority based on the date of the underlying change applications and applications to appropriate;
 - d. All restrictions and requirements of the TRA, Orr Ditch Decree and Prosser-Tahoe Exchange Agreement are imposed on TROA and the Petitions and Applications;
 - e. Any subsequent releases of the stored water shall be subject to reservoir evaporation and seepage losses as well as river conveyance losses to the new point of diversion in order to prevent such losses being incurred by downstream users;
 - f. Drought protection is ensured for all downstream users;
 - g. Current return flow amounts existing under the TRA and Orr Ditch Decree are preserved;
 - h. Current groundwater recharge in downstream portions of the Truckee River existing under the TRA and Orr Ditch Decree is preserved;
 - i. Measures are taken to protect downstream wetlands and wildlife refuges;
 - j. Measures are taken to protect and preserve water levels in Lahontan Reservoir for recreation purposes.
 - k. Each and every transfer of water between and among upstream reservoirs must be in accordance with California Water Code transfer statutes to consider injury to the public interest and existing water rights.

88. Since the full scope of TROA is unknown, and environmental review of TROA is not complete, Protestants reserve the right to add to or amend or supplement this Protest as more information becomes available.

89. Therefore, Protestants respectfully request that the State Board require The Applicants to submit Revised EIR/EIS documents pursuant to CEQA and NEPA, before the State Board rules on the TROA Petitions and Applications. The State Board should review the Revised EIR/EIS documents before ruling on the TROA Petitions and Applications, and should hold a hearing on the TROA Petitions and Applications after the Revised EIR/EIS becomes available. Finally, the State Board should deny the TROA Petitions and Applications, and enter an order denying the TROA Petitions and Applications, because the Petitions and Applications injure prior water rights on the Truckee River, the State Board does not have jurisdiction to re-allocate water already belonging to Newlands Project water right owners, Churchill County and the City of Fallon, and the TROA Petitions and Applications injure the environment, the public interest, public trust values, and are contrary to law.

Dated this 2nd day of April, 2007.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that on April 2, 2007, I served a copy of the attached **STATEMENT OF FACTS SUPPORTING TRUCKEE-CARSON IRRIGATION DISTRICT'S, NEWLANDS PROJECT LANDOWNERS AND WATER RIGHT OWNERS' AND CHURCHILL COUNTY, NEVADA'S PROTEST AND REQUEST TO DENY PETITION FOR CHANGE APPLICATION 5169/LICENSE 3723 (BOCA DAM & RESERVOIR)** via United States first class mail, postage pre-paid, on the parties listed below:

Martha Kaiser
Mid-Pacific Region
US Bureau of Reclamation, (MP-440)
2800 Cottage Way
Sacramento, CA 95825

Brad T. Goetsch
County Manager
Churchill County
155 No. Taylor Street, Suite 153
Fallon, NV 89406

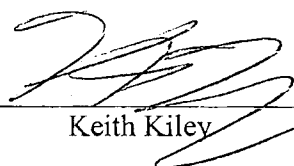
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Reno, NV 89502

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Dated this 2nd day of April, 2007 in San Francisco, California.



Keith Kiley