

1 Case No. 25219/25227

2 Dept. No. Specially Assigned to Judge William A. Maddox

3
4 **IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
5 **IN AND FOR THE COUNTY OF CHURCHILL**

6 In the Matter of Applications 47047, 47121,
7 47209, 47264, 48061 and 48494 filed to
8 Appropriate the Waters of the Truckee River
and its Tributaries Washoe County, Nevada,

NOTICE OF ENTRY OF ORDER

9 TRUCKEE-CARSON IRRIGATION
10 DISTRICT,

11 Petitioner,

12 and

13 CORKILL BROS., INC.

14 Petitioner,

vs.

16 R. MICHAEL TURNIPSEED, State
17 Engineer, State of Nevada, Department of
Conservation and Natural Resources,
18 Division of Water Resources,

19 Respondent.



20
21 PLEASE TAKE NOTICE that the Joint Proposed Decision and Order in the above-
entitled action was entered and filed on the June 18, 2008, a copy of which is attached hereto.

22 DATED this 30th day of July, 2008.

24 ROBERT C. MADDOX & ASSOCIATES

25
26 By

27 Don Springmeyer, Esq., NV Bar No. 1021
Christopher W. Mixson, Esq., NV Bar No. 10685
3811 West Charleston Blvd., Suite 110
Las Vegas, Nevada 89102
Attorneys for Pyramid Lake Paiute Tribe of Indians

1 **CERTIFICATE OF SERVICE**

2 Case Nos. 25219/25227

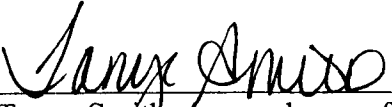
3 I, Tanya Smith, declare:

4 I am a resident and employed in Clark County, Nevada. I am over the age of eighteen years
5 and not a party to the within action. My business address is 3811 West Charleston Blvd., Suite 110,
6 Las Vegas, Nevada 89102.

7 On July 31, 2008, I served a true and correct copy of the document described as **NOTICE**
8 **OF ENTRY OF ORDER**, on the parties listed on the attached service list as follows:

- 9 **VIA U.S. MAIL:** I caused such envelope, with first-class postage thereon fully prepaid, to
10 be deposited in a recognized place of deposit of the U.S. mail in Las Vegas, Nevada, for
11 collection and mailing to the office of the addressee on the date shown herein following
ordinary business practices..
- 12 **VIA FACSIMILE:** I caused such document to be served via facsimile on the parties in this
13 action by transmitting a true copy to the fax numbers listed on the attached service list.
- 14 **VIA ELECTRONIC MEANS:** I caused such document to be served via e-mail on the
15 parties in this action by transmitting a true copy to the e-mail addressees listed on the
attached service list.

16 I declare under penalty of perjury that the foregoing is true and correct.

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20 Tanya Smith, An employee of
21 Robert C. Maddox & Associates
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Case Nos. 25219/25227

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Dept. No. Specially Assigned to Judge William A. Maddox

FILED

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William A. Maddox

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE
OF NEVADA IN AND FOR THE COUNTY OF CHURCHILL

In the Matter of Applications 47047,)
47121, 47209, 47264, 48061 and 48494)
Filed to Appropriate the Waters of the)
Truckee River and Its Tributaries Washoe)
County, Nevada.)

**JOINT PROPOSED DECISION AND
ORDER**

TRUCKEE-CARSON IRRIGATION)
DISTRICT, and Corkill Brothers, Inc.)

Petitioner,)

v.)

R. MICHAEL TURNIPSEED, State)
Engineer, State of Nevada, Department)
of Conservation and Natural Resources,)
Division of Water Resources.)

Respondent.)

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IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE
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DECISION AND ORDER

In the Matter of Applications 47047,)
47121, 47209, 47264, 48061 and 48494)
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TRUCKEE-CARSON IRRIGATION)
DISTRICT, and Corkill Brothers, Inc.)

Petitioner,)

v.)

R. MICHAEL TURNIPSEED, State)
Engineer, State of Nevada, Department)
of Conservation and Natural Resources,)
Division of Water Resources,)

Respondent.)

1 This case presents an appeal of a decision of the Nevada State Engineer (State Engineer)
2 by the Petitioners, Truckee Carson Irrigation District (TCID), and Corkill Bros., Inc. (Corkill
3 Bros.), pursuant to NRS 533.450. TCID and Corkill Bros. have appealed State Engineer's
4 Ruling 4683 (Ruling 4683), in which the State Engineer granted Applications 48061 and 48494,
5 and State Engineer's Ruling on Remand 4683A (Ruling 4683A) in which the State Engineer
6 determined that the draft Truckee River Operating Agreement (TROA) is not relevant to the
7 consideration of those Applications.

8 **I. Course of Proceedings**

9 The Nevada State Engineer entered State Engineer's Ruling No. 4683 (Ruling 4683) on
10 November 24, 1998. On December 17, 1998, Petitioner TCID filed a Petition for Judicial
11 Review and Request for Stay of Ruling #4683 by the State Engineer in this Court. TCID's
12 Petition for Judicial Review was assigned case number 25219 by the Court Clerk. On December
13 18, 1998, Petitioner Corkill Bros. filed its Petition for Judicial Review and Request for Stay of
14 Ruling #4683 by the State Engineer, and was assigned case number 25227.

15 On December 21, 1998, the Pyramid Lake Paiute Tribe (Tribe) filed peremptory
16 challenges in both cases. On that same day the Nevada State Engineer filed Motions for Change
17 of Venue in both proceedings. Following briefing the peremptory challenges were denied by
18 Judge Huff by order entered February 3, 1999, and the Tribe filed a Petition for Writ of
19 Mandamus with the Nevada Supreme Court. Case Nos. 25219 and 25227 were then
20 consolidated by order entered February 16, 1999. The State Engineer's Motions for Change of
21 Venue were denied in open court on March 16, 1999. The State Engineer appealed that decision
22 to the Nevada Supreme Court on that same day.

23 After briefing, the Nevada Supreme Court issued a Writ of Mandamus on November 30,
24 2000, ordering that the order striking the peremptory challenge be vacated and that these matters
25 be reassigned to a different judge. *Turnipseed v. Truckee-Carson Irrigation District*, 116, Nev.
26 1024, 13 P.3d 395 (2000). The Supreme Court also ordered that all orders entered in this matter
27 after the date on which the peremptory challenge had been filed be vacated. *Id.* The Supreme
28 Court entered the Remittitur and Notice in Lieu of Remittitur on December 27, 2000.

1 On December 13, 2000, the Nevada Supreme Court assigned Judge William A. Maddox
2 of the First Judicial District to sit as a judge of the Third Judicial District Court to hear all
3 matters related to this case. That Order was filed with the Third Judicial District Court on
4 December 18, 2000. On June 2, 2004, the State Engineer filed a Motion to Dismiss asserting
5 that the Petition for Judicial Review should be dismissed on the grounds that the matter had not
6 been brought to trial within five years as required by NRCP 41(e). On October 12, 2005, this
7 Court entered its Order Denying Motion to Dismiss, Granting Motion to Stay, and Denying
8 Motion for Change of Venue. In that Order this Court held that "the Plaintiffs have until
9 December 19, 2005 in which to bring their case before the Court." Petitioner filed and served its
10 Memorandum of Points and Authorities in Support of Petition for Review of State Engineer
11 Ruling 4683 on November 21, 2005. By stipulation the parties agreed to extensions of time in
12 which to file briefs in this matter, and TCID filed its Amended Memorandum of Points and
13 Authorities in Support of Petition for Review of State Engineer Ruling 4683 on or about January
14 18, 2006, with answering briefs filed thereafter by the State Engineer, the Tribe and the Truckee
15 Meadows Water Authority (TMWA) as successor in interest to Sierra Pacific Power Company.

16 On or about November 21, 2005, TCID filed a Motion to Supplement the Record, asking
17 the Court consider the provisions of the draft TROA in addressing its Petition for Judicial
18 Review. The State Engineer opposed that motion on February 15, 2006. In its Reply to the
19 Opposition to the Motion to Supplement the Record TCID filed on February 28, 2006, TCID
20 asked this Court that this matter be remanded to the State Engineer so that his decision could be
21 reconsidered in light of the draft TROA. On March 24, 2006, the State Engineer objected to
22 TCID's request to remand this matter to the State Engineer.

23 On May 23, 2006, this Court ordered, "that this case, along with the newly available
24 evidence presented in these motions, shall be remanded to the State Engineer to be heard to
25 determine if new or modified findings and/or decisions are appropriate."

26 On October 26, 2006, the State Engineer entered Ruling on Remand 4683A, and found
27 that, "Permits 48061 and 48494 only authorize the use of the unappropriated water for
28 *instream/in situ* use in the Truckee River. Application 48061 and 48494 did not seek
authorization for storage in upstream reservoirs, are not permits for the storage of water in

1 upstream reservoirs, and cannot be used for storage under the permits at issue here.” Ruling
2 4683A at 1-2. He concluded: “at this time to answer the question as to what the State Engineer
3 would do if the applications were before him requesting authorization of the use of this water in
4 storage would be in the form of an advisory opinion and improper,” *id.*, and that the: “issue of
5 storage and exchange under the Truckee River Operating Agreement is not relevant to the State
6 Engineer’s decision on Application 48061 and 48494. . . .” *Id.*

7 II. Standards on Review

8 The standards for review of a decision of the Nevada State Engineer are well established.
9 Pursuant to NRS 533.450(9), “[t]he decision of the state engineer shall be prima facie correct,
10 and the burden of proof shall be upon the party attacking the same.” On appeal the function of
11 this court is to review the evidence on which the State Engineer based his decision to ascertain
12 whether the evidence supports the decision. If so, the Court is bound to sustain the State
13 Engineer’s decision. *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).
14 This court may not substitute its judgment for that of the State Engineer. It may not pass upon
15 the credibility of the witnesses nor reweigh the evidence, but is limited “to a determination of
16 whether substantial evidence in the record supports the State Engineer’s decision.” *State*
17 *Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991). Substantial evidence is that
18 which a “reasonable mind might accept as adequate to support a conclusion.” *State Employment*
19 *Security Dept. v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

20 Questions of law are reviewed de novo. *Bacher v. State Engineer*, 122 Nev. ___, 146
21 P.3d 793, 798 (2007), *Andersen Family Associates v. Ricci*, 123 Nev. ___, 179 P.3d 1201, 1203
22 (2008). However, the State Engineer’s view or interpretation of his legal authority is persuasive,
23 even if not controlling, *id.*, see also, *State Engineer v. Morris*, 107 Nev. at 701, 819 P.2d at 205
24 (quoting *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)), since “[a]n
25 agency charged with the duty of administering an act is impliedly clothed with power to construe
26 it as a necessary precedent to administrative action.” *Pyramid Lake Paiute Tribe of Indians v.*
27 *Washoe County*, 112 Nev. 743, 747, 918 P.2d 697, 700 (1996).
28

1 **III. Discussion of the Merits**

2 At issue in this case is whether the Nevada State Engineer properly granted Applications
3 48061 and 48494, which were filed by the Tribe on May 25 and October 17, 1984, respectively. ¹
4 Those applications each sought to appropriate 3,000 cubic feet per second on water from the
5 Truckee River for the recreational purpose of natural spawning of the Lahontan Cutthroat Trout
6 and Cui-ui in the Truckee River, to fulfill the purposes of the establishment of the Pyramid Lake
7 Indian Reservation, to provide sustenance and income for the members of the Tribe and to
8 preserve the endangered Cui-ui and threatened Lahontan Cutthroat Trout.

9 TCID and Corkill Bros. assert that the State Engineer erred in granting Applications
10 48061 and 48494 for the following reasons:

11 1. The State Engineer prejudged the issue of beneficial use and was bias to such a
12 degree that TCID and Corkill Bros. were denied due process of law.

13 2. The State Engineer incorrectly determined that the Applications were not
14 detrimental to the public interest, and improperly addressed the issue of whether the Tribe's
15 applications were in the public interest.

16 3. The Tribe's applications were defective because they sought multiple uses of
17 water in violation of NRS 533.330, and those uses were vague and ambiguous.

18 4. The Tribe's applications were ambiguous as to the amount of water sought and
19 would conflict with existing rights.

20 5. The Tribe failed to show that sufficient water was available.

21 6. The State Engineer relied on an unreliable computer model to calculate the
22 amount of water needed, the actual amount of water needed for the recovery of the Cui-ui is
23 disputed, the evidence did not show that stabilization of the level of Pyramid Lake is necessary
24 for fish recovery, and the requested water would not be used beneficially.

25
26 ¹ In Ruling 4683 the State Engineer also addressed and denied Application 47047 filed by Sierra
27 Pacific Power Company and Applications 47121, 47209 and 47264 filed by the Washoe County
28 Department of Public Works, Sanitation Division. Neither of those applicants appealed State
Engineer's Ruling 4683, and the State Engineer's findings and conclusions related to those
applications are not at issue here as a result.

1 7. The Tribe's applications were defective since they proposed to divert water from
2 a point of diversion downstream of the place of use.

3 8. The State Engineer erred in determining that the Truckee River Operating
4 Agreement was irrelevant to his consideration of the Tribe's Applications as filed.

5 This court hereby affirms the State Engineer's determinations in Rulings 4683 and 4683A
6 for the reasons that are discussed below.

7 **A. The Allegations of Bias Do Not Rise To the Level of a Constitutional**
8 **Violation.**

9 TCID's and Corkill Bros.' allegations of bias are based primarily on a Memorandum of
10 Understanding (MOU) that was entered into by the Tribe, the Secretary of the Interior, the
11 Governor of the State of Nevada, and the Director of the Nevada Department of Conservation
12 and Natural Resources. That document states in part:

13 It is agreed that the Tribe's Claim . . . will proceed under the Nevada State
14 water law procedures through the State Engineer. It is expressly understood
15 and agreed that the proposed uses set forth and described in the Tribe's
16 Applications Nos. 48061 and 48494 are beneficial uses recognized under
17 Nevada Water Law [NRS 533.023 and 533.030(2), see also Nevada vs.
18 Morros, 104 Nev. 709, 766 P.2d 263 (1988)]. Upon State Engineer action,
19 and expressly provided that the Tribe is granted the right to the waters of the
20 Truckee River which are not presently subject to vested or perfected rights,
21 the State of Nevada and the Tribe will join in an action in the Orr Ditch Court
22 seeking confirmation of that right.

23 (ROA) Vol I at 111. TCID and Corkill Bros. also assert that certain legislative
24 enactments indicate bias on the part of the State Engineer rising to the level of a violation of its
25 constitutional right to due process.

26 TCID's and Corkill Bros.' allegations must be considered in light of the principles
27 that: "[m]ost matters relating to judicial disqualification do not rise to a constitutional level,"
28 *Aetna v. LaVoie*, 475 U.S. 813, 820 (1986) (quoting *Federal Trade Commission v. Cement*
Institute, 333 U.S. 683, 702 (1948)), and that only the most extreme cases of judicial bias require
disqualification on the basis of constitutional standards. *Id.* at 821. Here, there has been no
showing of actual bias on the part of the State Engineer or in his decision making. Likewise, no
authority supports that contention that bias may be imputed to the State Engineer. In addition,
the MOU did not bind or commit the State Engineer to approve the Tribe's Applications, but

1 rather specifically anticipated that the State Engineer maintained his discretion in addressing the
2 Applications.

3 Similarly, the MOU's statement that the use proposed by the Tribe's Applications is a
4 beneficial use did not violate TCID's or Corkill Bros. due process rights. The use proposed by
5 the Tribe is beneficial as a matter of law. NRS 533.023, 533.030(2), 534.080, *State v. Morros*,
6 104 Nev. 709, 716-17, 766 P.2d 263, 268 (1988). Any recognition of this in the MOU could not
7 have prejudiced or biased the State Engineer since he would have been compelled to follow state
8 law on this issue.

9 The various legislative enactments cited by TCID likewise do not show bias on the part
10 of the State Engineer, since such enactments, to the extent that they can be considered biased in
11 nature, may not be imputed to the State Engineer, and the State Engineer cannot be deemed to be
12 biased in following the law.

13 **B. The State Engineer correctly determined that the Applications were not**
14 **detrimental to the public interest, and properly addressed the issue of**
15 **whether the Tribe's applications were in the public interest.**

16 TCID and Corkill Bros. contend that the State Engineer erred in concluding that the
17 Tribe's applications did not threaten to prove detrimental to the public interest. They also
18 contend that the State Engineer ignored controlling law and certain of his past decisions by
19 improperly determining that the Tribe's Applications were in the public interest.

20 NRS 533.370(5) provides in relevant part: "where there is no unappropriated water in the
21 proposed source of supply, or where its proposed use or change conflicts with existing rights . . .
22 or threatens to prove detrimental to the public interest, the State Engineer shall reject the
23 application and refuse to issue the requested permit." Here, TCID did not show that the use of
24 water proposed by the Tribe's Applications threatens to prove detrimental to the public interest.
25 To the contrary, Nevada law clearly establishes that the use of water for recreation and the
26 included use for the propagation of fish is a beneficial use. NRS 533.023, 533.030(2), *State v.*
27 *Morros*, 104 Nev. 709, 715, 716, 766 P.2d 263, 267, 268 (1988).

28 Much of TCID's argument on this issue appears to be that the State Engineer erred in
denying TCID's competing application for Truckee River water, Application 9330. The State

1 Engineer's resolution of Application 9330 as set forth in State Engineer's Ruling 4659 is
2 currently before Department II of the Third Judicial District Court in the matters of TCID, the
3 *City of Fallon, and Corkill Bros. v. Turnipseed*, case numbers 24980, 25004, and 25006,
4 respectively and is therefore not at issue in this appeal. The proper analysis is to look at each
5 individual application and make a public interest determination, not to balance the relative merits
6 of competing applications. *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev.
7 743, 748 n. 4, 749, 918 P.2d 697, 700 n. 4, 700-701 (1996).

8 **C. The State Engineer correctly rejected Petitioners' contention that the Tribe's**
9 **Applications were defective because they sought multiple uses of water in**
10 **violation of NRS 533.330, or were vague and ambiguous as to the proposed**
11 **uses of the water.**

12 TCID and Corkill Bros. allege that Applications 48061 and 48484 are defective on their
13 face since they seek to appropriate water for more than one use in violation of NRS 533.330, and
14 that they are also as a result vague and ambiguous. The State Engineer properly determined that
15 wildlife watering and the propagation of fish are encompassed within the single use of
16 recreation. NRS 533.010(2), *State v. Morros*, 104 Nev. 709, 716-17, 766 P.2d 262, 268 (1988).
17 There is, therefore, no ambiguity in the applications.

18 **D. The State Engineer correctly concluded that the Tribe's applications were**
19 **not ambiguous as to the amount of water sought and that they would not**
20 **conflict with existing rights.**

21 TCID and Corkill Bros. argue that the Tribe's Applications are defective since the
22 amount of water sought is vague and ambiguous. To the extent that it can be said that the
23 amount of water sought is ambiguous it has been clarified by the State Engineer's specific
24 finding in Ruling 4683 that the combined duty of those applications is 477,851 acre-feet
25 annually. Ruling 4683 at 21, BOR at 42. The Tribe has not appealed Ruling 4683 and therefore
26 accepts the State Engineer's findings. There is no ambiguity as to the amount of water allowed
27 under Ruling 4683.

28 The State Engineer was similarly correct in concluding that Applications 48061 and
48494 would not conflict with existing rights on the Truckee River. The rights granted under
Applications 48061 and 48494 are junior in priority date to all other rights on the river, and may

1 only be exercised in those years where there are high flows in the river in excess of senior rights.
2 As a consequence, all other users of the Truckee River may make a call for their water before the
3 Tribe may exercise its Application 48061 and Application 48494 water rights. NRS 533.030(1),
4 *Cappaert v. United States*, 426 U.S. 128, 142 (1976), ROA Vol. V at 899, l. 7 through 900, l. 1.
5 Further, TCID failed to prove its allegation the proposed appropriation would conflict with
6 existing rights.

7 **E. Substantial evidence supports the State Engineer's conclusion that there is**
8 **sufficient water available to satisfy Applications 48061 and 48494.**

9 The State Engineer recognized in Ruling 4683 that the amount of water available to
10 satisfy Applications 48061 and 48494 would vary significantly from year to year, but that there
11 was unappropriated water in the Truckee River. TCID's expert testified that there was 100,000
12 acre feet of water available for appropriation above the amount necessary to meet the
13 downstream rights and the fish flow requirements. ROA Vol. VI at 1281. The Tribe's expert
14 testified that there is, on average 403,000 to 370,950 acre-feet of unused and/or unappropriated
15 water in the Truckee River. ROA Vol. V at 894 - 895, Vol. VII at 1523-1524. Supplemental
16 Record on Appeal at 2001. Thus, substantial evidence in the record supports the State
17 Engineer's determination that there is unappropriated water available to satisfy Applications
18 48061 and 48494 in those years where there are high flows in the Truckee River.

19 TCID argues that the State Engineer erred in granting Applications 48061 and 48494 for
20 477,851 acre-feet annually since that amount of water will not be available in all years.
21 However, the State Engineer specifically recognized that the, "entire quantity of unappropriated
22 water is not available in most years." Ruling 4683 at 18. Because the Application 48061 and
23 Application 48494 water rights have the most junior priority on the Truckee River, in those years
24 in which the unappropriated flows are insufficient to satisfy all earlier priority users, the Tribe
25 will not be allowed to exercise its Applications 48061 and 48494 water rights. NRS 533.030(1);
26 *Cappaert v. United States*, 426 U.S. 128, 142 (1976). Even in those years where there is some
27 unappropriated water available, the Tribe will only be able to exercise its Applications 48061
28 and 48494 water rights after all senior priority water right holders have been allowed to take their

1 water, which may result in an amount less than 477,851 acre-feet. As a result, Ruling 4683 in no
2 way infringes upon vested or perfected water rights in the Truckee River.

3 **F. Substantial Evidence Supports the State Engineer's Conclusions That the**
4 **Use of Water Proposed Under Applications 48061 and 48494 Is Necessary**
5 **and Constitutes a Beneficial Use.**

6 TCID raises a number of challenges to the State Engineer's conclusion that the water
7 applied for under the Tribe's applications is necessary for the proposed purposes, including
8 assertions that the computer model relied on by the Tribe was unreliable, that the amount of
9 water needed for recovery of the cui-ui is in dispute, that the Tribe failed to demonstrate that
10 stabilization of the level of Pyramid Lake is necessary for fish recovery, and that the water
11 sought under Applications 48061 and 48494 will not be used beneficially. In large part, TCID's
12 position is that the evidence relied upon by the State Engineer is unreliable or disputed. The
13 question on review is not, however, whether any of the evidence is disputed, but whether the
14 State Engineer's conclusions are supported by substantial evidence. *State Engineer v. Morris*,
15 107 Nev. 699, 701, 819 P.2d 203, 205 (1991).

16 In regard to the computer model used by experts for the Tribe, the State Engineer
17 specifically stated that he had not relied on that model in reaching his conclusions. Ruling 4683
18 at 22, ROA Vol. I at 43. Since the computer model was not a basis for the State Engineer's
19 decision, concerns expressed about its validity alone are not justification for a finding of error.
20 In addition, the issues raised as to the reliability of the model ask this court to reweigh the
21 evidence, which it may not do. *State Engineer v. Morris*, 107 Nev. at 701, 819 P.2d at 205.

22 In regard to the need for the amounts of water granted by the State Engineer, experts
23 testified that the cui-ui recovery plan called for the acquisition of 110,000 acre-feet of water
24 above the amount of unappropriated water that was already flowing to Pyramid Lake, and that
25 that amount of water is necessary for the recovery of the Cui-ui. ROA Vol. V at 931, ll. 1-18;
26 933, ll. 13-25; 936, l. 17 through 937, l. 11; 953, ll. 7-21; 960, l. 3 through 961, l. 3; 965, ll. 10
27 through 966, l. 14; 981, ll. 5-15; 995, l. 6 through 997, l. 24; 1000, ll. 4-22; 1004, l. 5 through
28 1005, l. 19; ROA Vol. VII at 1596, ll. 1-11; 1620, l. 16 through 1621, l. 24. Experts likewise
testified that the elevation of Pyramid Lake is important in the recovery of the Cui-ui and

1 Lahontan Cutthroat trout, both because it aids in their ability to spawn in the Truckee River and
2 provides improved water quality in the lake itself. ROA Vol. V at 937, l. 12 through 939, l. 25;
3 941, l. 20 through 942, l. 8; 974, l. 5 through 978, l. 25; 986, l. 13 through 987, l. 8; 998, ll. 2-12;
4 1000, l. 23 through 1003, l. 14; 1008, l. 3 through 1009, l. 21; 1031, l. 8 through 1032, l. 12;
5 ROA Vol. VII at 1562, l. 2 through 1566, l. 4; 1618, l. 4 through 1619, l. 6; 1622, ll. 3-25; 1642,
6 ll. 4-17; 1648, l. 6 through 1649, l. 21. Finally, experts also were of the opinion that the
7 unappropriated water flowing to Pyramid Lake is being used for a beneficial purpose. ROA Vol.
8 V at 935, l. 2 through 936, l. 19; 1009, ll. 9-21; ROA Vol. VII at 1566, l. 11 through 1567, l. 11.
9 The State Engineer noted in addition that even though the unappropriated water of the Truckee
10 River had been reaching Pyramid Lake in the last decades, "species of fish have become
11 endangered and threatened, therefore, less unappropriated water reaching the lake would only
12 exacerbate the problem." Ruling 4683 at 22, ROA Vol. I at 43. This court finds that the State
13 Engineer's conclusions as to these points are supported by substantial evidence and must be
14 affirmed.

15 **G. The State Engineer correctly concluded that Applications 48061 and 48494**
16 **were not defective merely because they proposed to divert water from a point**
17 **downstream of the place of use.**

18 The point of diversion under Application 48061 was identified as the point where the
19 Truckee River enters Pyramid Lake, and its place of use was identified as the Truckee River
20 downstream of Derby Dam. Ruling 4683 at 24, ROA Vol. I at 45. TCID asserts that the State
21 Engineer erred in granting that application since the point of diversion is below the place of use,
22 and no works were identified to move the water upstream to the proposed place of use. The
23 State Engineer found, however, that since the rights applied for are *instream/in situ* rights
24 intended to support the threatened or endangered fish and that no actual diversion of water will
25 be made, identifying the confluence of the Truckee River and Pyramid Lake as the point of
26 diversion serves only to guarantee that the water actually gets to the lake and does not render the
27 Tribe's Applications invalid. Ruling 4683 at 24, ROA Vol. I at 45. The State Engineer's
28 findings are consistent with Nevada law and the realities of an *in situ* use of water. See *State v.*

1 *Morros*, 104 Nev. 709, 713, 766 P.2d 263, 267 (1988). Applications 48061 and 48494 are not
2 defective because the identified point of diversion is downstream of the place of use.

3 **H. The State Engineer did not err in determining that the Truckee River**
4 **Operating Agreement was irrelevant to his considerations of the Tribe's**
5 **Applications as filed.**

6 On remand this Court posed a specific question to the Nevada State Engineer: "IT IS
7 **HEREBY ORDERED** that this case, along with the newly available evidence presented in these
8 motions, shall be remanded to the State Engineer to be heard to determine if any new or modified
9 findings and/or decisions are appropriate." *Id.*, at 5. The State Engineer determined on remand
10 that the consequences of storage of the Tribe's Permit 48061 and Permit 48494 water rights is
11 not yet ripe for adjudication since any proposed storage of those rights will be addressed in the
12 course of consideration of future change applications that must be filed before storage of the
13 water will be allowed. Ruling on Remand 4683A at 2. He similarly determined that addressing
14 the validity or impact of future storage applications would constitute an advisory opinion.

15 The State Engineer correctly concluded that the draft TROA was not relevant to the
16 consideration of Applications 48061 and 48494. Applications 48061 and 48494 were not filed
17 nor approved for storage of water as is anticipated in the draft TROA. Here on review, the
18 question is whether the Applications as granted comply with State law, not whether an
19 anticipated but currently unauthorized use of the water would comply with State law. Since
20 Applications 48061 and 48494 do not currently allow for the storage of water as anticipated by
21 the draft TROA, it will be necessary as a matter of State law for the Tribe to file change
22 applications and to obtain the Nevada State Engineer's approval in order for the water to be
23 stored and used as anticipated by the draft TROA. NRS 533.325, 533.440. This will require the
24 State Engineer to determine whether the proposed storage and use will conflict with existing
25 rights or threaten to prove detrimental to the public interest at that time. NRS 533.440,
26 533.370(5). TROA anticipates that change applications will be necessary to store water as
27 anticipated. Second Supplemental Record on Appeal at 134. However, it is not certain, in fact,
28 that TROA will become effective or that the change applications will ever be filed. The State

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Engineer did not err in refusing to consider the possible impacts of storage of the Applications 48061 and Application 48494 water rights anticipated under the draft TROA.

IV. Conclusion

WHEREFORE, this matter having come before the Court on May 2, 2008, for hearing on Truckee Carson Irrigation District's and Corkill Bros., Inc.'s Petitions for Judicial Review and the court having considered the pleadings, papers, and argument submitted in connection with the Petition, and finding the findings of fact in State Engineer's Ruling 4683 are supported by substantial evidence and that the State Engineer committed no error as to any conclusion of law in State Engineer's Ruling 4683, and further finding that the State Engineer committed no error in Ruling 4683A in determining that the provisions of the draft Truckee River Operating Agreement are not relevant to the proceedings at hand.

IT IS THEREFORE ORDERED that TCID's and the Corkill Bros.'s Petitions for Judicial Review are hereby denied in their entirety, and State Engineer's Rulings 4683 and 4683A are affirmed.

DATED this 13th day of June, 2008

William G. Maddy
DISTRICT COURT JUDGE

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