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22 TRUCKEE-CARSON IRRIGATION DISTRICT

23 UNITED STATES DISTRICT COURT
24 DISTRICT OF NEVADA

25 CHURCHILL COUNTY, CITY OF
26 FALLON AND THE TRUCKEE-
27 CARSON IRRIGATION DISTRICT,

28 Plaintiffs,

v.

29 UNITED STATES DEPARTMENT OF
30 THE INTERIOR; KEN SALAZAR,
31 Secretary of the United States
32 Department of Interior; UNITED
33 STATES BUREAU OF
34 RECLAMATION; J. WILLIAM
35 MCDONALD, Acting Commissioner of
36 the United States Bureau of
37 Reclamation,

38 Defendants.

Case No.

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

I. INTRODUCTION

1
2 1. Plaintiffs Churchill County, City of Fallon, and the Truckee-Carson Irrigation
3 District bring this action challenging the adequacy of a Final Environmental Impact
4 Statement/Environmental Impact Report ("FEIS/EIR") jointly-issued by the United States
5 Department of Interior and the California Department of Water Resources, approving the
6 Truckee River Operating Agreement ("TROA") as the preferred alternative among
7 alternatives considered. The final agency action authorized by the FEIS/EIR is the
8 adoption and implementation of TROA. The challenged FEIS/EIR concludes, without
9 adequate basis, that TROA would create no significant environmental impact, while
10 omitting adequate analyses of TROA and its alternatives, and omitting other required
11 analyses. In creating and approving the deficient FEIS/EIR, and approving and entering
12 into TROA, Defendants have violated the provisions of the National Environmental Policy
13 Act, 42 U.S.C. §§ 4321, *et seq.*, the Administrative Procedure Act, 5 U.S.C. §§ 551 *et*
14 *seq.*, and these statutes' implementing regulations.

15 2. Plaintiffs also challenge the promulgation of TROA as a Federal
16 Regulation. Public Law 101-618, which required the creation of TROA and its
17 promulgation as a federal regulation, provides at § 205(a)(5), that TROA will be subject
18 to judicial review under the standard set forth in 5 U.S.C. § 706(2)(A)-(D). Defendants
19 have violated the APA by enacting a regulation that is substantively unsupported, results
20 in the violation of existing, valid court decrees, violation of federal and state law,
21 assumes *ultra vires* abrogation of private property rights, and proceeds from a
22 negotiation and drafting process that contravenes the requirements of the Federal
23 Advisory Committee Act.

24 Plaintiffs seeks a declaration that Defendants' actions have violated the National
25 Environmental Policy Act, the Administrative Procedures Act, and the Federal Advisory
26 Committee Act. Plaintiffs seek an order (1) vacating approval of the FEIS/EIR and
27 Defendants' subsequent adoption of TROA as the planned agency action; and (2)
28 setting aside TROA as a federal regulation. Plaintiffs seek an injunction preventing

1 Defendants from taking action to implement TROA as a federal regulation and as the
2 operating agreement governing storage and release of waters from the Truckee River
3 until such time as (1) a supplemental Environmental Impact Statement/Environmental
4 Impact Report with adequate analysis of TROA's impacts and reasonable alternatives to
5 TROA is completed and approved; (2) a reasonable substantive and procedural basis is
6 established for a revised federal rule that is not violative of the APA; and (3) the
7 requirements of FACA are established and satisfied in connection with a revised and
8 reevaluated TROA.

9 **II. JURISDICTION AND VENUE**

10 3. This Court has jurisdiction over this action by virtue of 28 U.S.C. §1331,
11 which applies to actions arising under the laws of the United States; Public Law 101-618,
12 104 stat. 3289; at § 205(a)(5), which provides for jurisdiction of the Nevada District Court
13 in connection with judicial review of promulgation of the Truckee River Operating
14 Agreement; and *United States v. Alpine Land and Reservoir Co.*, 174 F.3d 1007, 1012-
15 1013 (9th Cir. 1999), which provides, *inter alia*, that the Orr Ditch Decree Court has
16 exclusive, continuing jurisdiction over matters implicating the Orr Ditch Decree.

17 4. Plaintiffs' claims arise under the National Environmental Policy Act, 42
18 U.S.C. §§ 4321, *et seq.* ("NEPA"), the Administrative Procedure Act, 5 U.S.C. §§ 551 *et*
19 *seq.* ("APA"), and the Federal Advisory Committee Act, 5 U.S.C. App. 2 §§ 1 *et seq.*
20 ("FACA"), and these statutes' implementing regulations.

21 5. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391.

22 6. An actual controversy exists between the parties within the meaning of 28
23 U.S.C. § 2201(a). This Court may grant declaratory relief and additional relief as
24 authorized by 28 U.S.C. §§ 2201 and 2202

25 **III. PARTIES**

26 7. Plaintiff Churchill County is a political subdivision of the state of Nevada.
27 Churchill County encompasses approximately 4,900 sq. miles of agricultural lands,
28 desert, mountains and valleys, and contains approximately 27,000 persons. Churchill

1 County is also the home of the Fallon Paiute-Shoshone Tribe, a number of lakes,
2 expansive wetlands and wildlife refuge areas, and the U. S. Naval Air Station at Fallon.
3 Churchill County's chief administrative offices are located at 155 N. Taylor Street, Fallon,
4 Nevada, 89406. Churchill County comprises a portion of the geographical area covered
5 by the federal Newlands Reclamation Project and is a Project water right holder. Many
6 of TCID's constituents are also citizens of Churchill County.

7 8. Plaintiff City of Fallon is a political subdivision of the State of Nevada.
8 Fallon is both the county seat of Churchill County and the largest city within Churchill
9 County with a population of approximately 9000. Fallon's address is City Hall, 55 W.
10 Williams Avenue, Fallon, Nevada, 89406. Fallon is within the geographical region
11 covered by the Newlands Reclamation Project and is a Project water right holder.

12 9. Plaintiff Truckee-Carson Irrigation District ("TCID") is a Nevada irrigation
13 district organized pursuant to and for the purposes provided for in Nevada Revised
14 Statutes Chapter 539. TCID is a political subdivision of the State of Nevada, organized
15 and chartered in 1918 for the purpose of representing the water right holders within the
16 boundaries of the federal government's Newlands Reclamation Project ("Newlands
17 Project"). Pursuant to its contract with the United States, TCID has solely managed,
18 maintained and operated the Newlands Project for more than 80 years. The Newlands
19 Project is located within Churchill and Lyon Counties in Nevada, and encompasses over
20 600 miles of canals, laterals and drains for the purpose of providing irrigation, wildlife,
21 and municipal and industrial water to over 3,000 water right owners. The sources of
22 water used to meet the delivery requirements include the Truckee River and the waters
23 of Donner Lake.

24 10. Plaintiffs have exhausted their administrative remedies. Plaintiffs and their
25 representatives have participated in the administrative proceedings leading to the final
26 promulgation of the TROA as a federal regulation, and the FEIS/EIR on which it is
27 based, including attendance at public hearings, meetings and discussions with
28 interested parties, and submission of statements, reports and other written comments to

1 Defendants, all of which have, or should have, placed Defendants on notice that the
2 regulation, FEIS/EIR, and its prior drafts, suffered from serious flaws and infirmities
3 rendering them legally insufficient under applicable federal and state law.

4 11. Defendant United States Department Of Interior ("DOI") is an agency of
5 the federal government. In conjunction with the California Department of Water
6 Resources, DOI, through its subdivision, the United States Bureau of Reclamation,
7 conducted and approved the environmental analysis set forth in the FEIS/EIR and its
8 earlier drafts. In September 2008, DOI issued a Record of Decision, signed by the
9 Secretary of DOI, Dirk Kempthorne, formally approving the FEIS/EIR and adopting the
10 TROA.

11 12. Defendant Ken Salazar is named in his official capacity as Secretary of the
12 United States Department of Interior.

13 13. Defendant United States Bureau of Reclamation ("BOR") is a bureau within
14 the DOI. BOR, in conjunction with the California Department of Water Resources
15 ("DWR"), conducted the environmental analysis set forth in the FEIS/EIR and its earlier
16 drafts.

17 14. Defendant J. William McDonald is named in his official capacity as Acting
18 Commissioner of the United States Bureau of Reclamation.

19 IV. FACTS

20 15. In 1902, the United States Congress passed the federal Reclamation Act to
21 reclaim arid lands of the west in order to establish farming communities. In 1903, the
22 Secretary of Interior designated the Truckee-Carson Reclamation Project (now called the
23 Newlands Reclamation Project), near Fallon, Nevada, as one of the first projects under
24 the new Reclamation Act. Also in 1903, the United States posted notices of its intent to
25 appropriate water rights from the Truckee River for the Newlands Project. In 1913, the
26 United States brought suit in the Federal District Court for the District of Nevada to quiet
27 title to a portion of the waters of the Truckee River in Nevada for the benefit of the
28 farmers in the Newlands Project and for the Pyramid Lake Paiute Tribe of Indians. The

1 quiet title suit is styled as *United States v. Orr Water Ditch Company*, Case No. Equity A-
2 3, LDG, U.S. District Court for Nevada ("Orr Ditch"). In 1926, the BOR contracted with
3 TCID to operate and maintain the Newlands Project.

4 16. In 1935, the parties to the Orr Ditch case entered into an agreement,
5 known as the Truckee River Agreement ("TRA"), to provide for the management of water
6 resources on the Truckee River. Each party, including the United States, agreed to
7 abide by the terms of the TRA and stipulated to entry of the Orr Ditch Decree in
8 accordance with the terms set forth in the TRA. In 1944, the Nevada Federal District
9 Court entered the final Orr Ditch Decree, which the court approved; adopted, and made
10 a part of the decree, and made the TRA binding as between the signatory parties to the
11 TRA. The TRA, as incorporated by the Orr Ditch Decree, has remained as the binding
12 document for the management of the Truckee River for the last 73 years.

13 17. TROA was mandated by Public Law 101-618 passed by the 101st
14 Congress at the end of its 1990 session. Public Law 101-618, 104 stat. 3289, November
15 16, 1990, was intended to settle a number of outstanding disputes concerning the
16 allocation and uses of Truckee and Carson River waters. Indeed, these waters have
17 been the subject of multitudinous litigation stretching from the earliest years of the last
18 century to the present. Public Law 101-618 purported to establish a framework,
19 contingent in part on other parties reaching accord in their respective disputes, for a final
20 settlement of all claims. Section 204 of Public Law 101-618 establishes the respective
21 water allocations for the states of Nevada and California from the Truckee and Carson
22 Rivers and Lake Tahoe. Section 205 orders the Secretary of the United States
23 Department of Interior to negotiate an operating agreement with the states of Nevada
24 and California and other "interested parties" to be designated by the Secretary to govern
25 the operation of certain dams and reservoirs in the Lake Tahoe and Truckee River
26 Basins. TROA is the result of these negotiations.

27 18. The chief elements of a first-draft TROA were established by May 1996. In
28 February 1998, the DOI and DWR jointly issued a draft environmental impact

1 statement/environmental impact report evaluating the draft TROA and a No Action
2 Alternative. As TROA negotiations continued, and the TROA draft changed, DOI/DWR
3 prepared a revised draft environmental impact statement/environmental impact report
4 ("REIS/EIR"), which was released for public comment in August 2004 along with the draft
5 TROA.

6 19. The original public comment period was scheduled to terminate on October
7 24, 2004. However, because of the complexity and breadth of the issues addressed,
8 numerous commenting parties requested extension of the comment period, including
9 TCID, which requested a four-month extension. DOI refused to grant more than a two-
10 month extension and the period of public comment closed on December 30, 2004.

11 20. TCID provided extensive comments to the REIS/EIR, setting forth its
12 position that the REIS/EIR failed to satisfy the requirements of both NEPA and its
13 California-state corollary the California Environmental Quality Act ("CEQA"). Among
14 other things, TCID pointed out that the REIS/EIR failed to assess a sufficient range of
15 alternatives and failed to identify a legitimate basis for dismissing the alternatives
16 considered and rejected. The REIS/EIR failed to explicate and support the drafters'
17 course of inquiry and failed to provide necessary back-up data regarding the proposals
18 considered and rejected. The REIS/EIR failed to adequately describe the current
19 environmental setting and its baseline conditions. The REIS/EIR was overlong,
20 convoluted, and needlessly abstruse. The REIS/EIR defined the project so narrowly that
21 other alternatives besides TROA were necessarily rejected. The REIS/EIR incorporated
22 other documents into its analysis without properly summarizing them. The computer
23 modeling program upon which the findings of the REIS/EIR depended lacked scientific
24 integrity and soundness. The BOR did not provide any documents for the computer
25 model used in the analysis, and when a request was made by TCID, the BOR responded
26 that the documentation was protected by the attorney work product doctrine and would
27 not be released to the public. The REIS/EIR omitted key environmental impact analyses,
28 and the analysis done was faulty. The REIS/EIR's failed to adequately analyze overall

1 water use, supply, and consumption vis-à-vis TROA. The REIS/EIR did not account for
2 population growth and extended drought condition. The REIS/EIR inadequately
3 assessed cumulative impacts. And the REIS/EIR impermissibly analyzed only segments
4 of the project rather than the project in toto.

5 21. Churchill County also provided extensive comments to the REIS/EIR. As
6 with many other commenters, Churchill County asked for an extension of time to review
7 the thousand-plus page REIS/EIR, noting that the future of "the entire Lahontan Valley is
8 inextricably linked to the Newlands Project and diversion criteria that are to be governed,
9 ostensibly, by TROA" while notifying Defendants that "[o]ur citizens, our farmers, need
10 much more time to view the shape their collective futures will take." In a later comment
11 letter, Churchill County also took issue with the computer modeling on which the
12 REIS/EIR was based. Churchill County observed that the Truckee River Operating
13 Model was substantially unchanged from the model that was successfully challenged
14 during development of an earlier draft EIS/EIR report in 1998. Churchill County also
15 asked to be supplied with a copy of the operating model "along with details and
16 assumptions associated with the model and water flow analysis, as well as any and all
17 sub functions or ancillary routines written to integrate data which did not fit the original
18 model" as well as the "operating and running instructions required for the model to
19 function." The response to Churchill County's request was wholly inadequate. In its final
20 comments letter, Churchill County identified numerous areas of deficiency in the
21 REIS/EIR. These included: 1) deficiencies, omissions, invalid assumptions, and lack of
22 validation of the Truckee River Operating Model; 2) The REIS/EIR's lack of established
23 and validated baseline conditions for use in comparative analysis; 3) The REIS/EIR's
24 lack of analysis of the occurrence and impact of multiple drought years in succession, an
25 event common in the history of the Truckee River; 4) The REIS/EIR's lack of sufficient
26 differentiation between alternatives offered for analysis and all reasonable alternatives;
27 5) The existence of an analytical imbalance in the REIS/EIR between the level of
28 research devoted to the upper Truckee River compared to the lower Truckee River; and,

1 6) The REIS/EIR's lack of a written commitment or stated requirement to follow
2 implementation of TROA with multi-year impact monitoring and verification of REIS/EIR
3 conclusions.

4 22. The City of Fallon also provided comments to the REIS/EIR. As with other
5 commenters, the city requested an extension of the comments period in order to more
6 sufficiently address the many issues raise in the long and complicated REIS/EIR. The
7 city also disputed the validity of the Truckee River Operation Model, voicing the same
8 concerns over its lack of verification, validation or calibration as other commenters. The
9 city also demanded that the REIS/EIR include "an honest presentation of the current
10 operating conditions of the Truckee River" and noted that the REIS/EIR "is constructed
11 on a fictitious baseline" using input data which erroneously depicts downstream water
12 rights owners, like the city, yielding to upstream claims without any basis for assuming
13 so.

14 23. Other commenters took exception to the REIS/EIR. In its comments, the
15 Sierra Club expressed concern that the REIS/EIR failed to adequately address the issue
16 of climate change and questioned the reliability of the computer-generated water
17 modeling on which the entire REIS/EIR depended, stating: "Although we understand
18 that the Truckee River water model is based on the last 100 years of precipitation/flow
19 data, we are concerned that the next 100 years may not follow the historic precedents, in
20 view of global warming. ... [W]e would prefer to have model runs in the EIS on potential
21 reductions in water supplies - due to extended droughts exacerbated by global warming
22 - and their environmental impacts, as well as a process set up for dealing with less than
23 modeled future water supplies."

24 24. The Lahontan Valley Environmental Alliance ("Environmental Alliance")
25 also expressed concern regarding the adequacy and ramifications of the Truckee River
26 Operations Model on which the REIS/EIR was based, commenting that no modeling was
27 done to assess the impact of the probable absence of Newlands Project Credit Water
28 and that the model assumed acquisition of private water rights that might not be

1 obtained. The Environmental Alliance also expressed concern that the REIS/EIR did not
2 assess the health implications of rising dust levels in agricultural lands de-watered by
3 TROA, and observed that the "No Action" and "Proposed Action" alternatives were
4 essentially the same, leaving future events unmodeled and calling into doubt the
5 REIS/EIR's statement of "no significant impact."

6 25. Defendants and the DWR took the public comments under submission as
7 of December 30, 2004.

8 26. In 2006 the California legislature passed the "Global Warming Solutions
9 Act." The act's legislative findings state that "Global warming poses a serious threat to
10 the economic well-being, public health, natural resources, and the environment of
11 California. The potential adverse impacts of global warming include ... a reduction in the
12 quality and supply of water to the state from the Sierra snow pack ..."

13 27. In 2007 the California legislature amended CEQA to clearly establish that
14 green house gas emissions ("GHGs") and the effects of GHGs are appropriate subjects
15 for CEQA analysis. A 2008 Technical Advisory from the Governor's Office of Planning
16 and Research relating to "CEQA And Climate Change" states that "[e]ach public agency
17 that is a lead agency for complying with CEQA needs to develop its own approach to
18 performing a climate change analysis... ." This same document references land use
19 plans and policies that encourage or discourage production of GHGs.

20 28. On January 25, 2008, DOI/BOR and DWR jointly issued the Final EIS/EIR
21 ("FEIS/EIR"). While the FEIS/EIR included numerous changes, the extensive violations
22 of NEPA and CEQA set forth in the comment letters submitted to the agencies in
23 response to the REIS/EIR remained substantially intact, being either ignored or
24 insufficiently addressed. Significantly, despite commenters' concerns regarding the
25 failure to run computer modeled analyses taking into account potential environmental
26 impacts caused by reductions in water supplies due to droughts exacerbated by global
27 warming, the FEIS/EIR essentially ignored the issue of global warming impacts.

28 29. On September 5, 2008, Dirk Kempthorne, in his capacity as then-Secretary

1 of the DOI, signed the Record of Decision pertaining to TROA. The Record of Decision
2 identifies the agency's action as adoption of TROA and sets forth TROA as the preferred
3 alternative under the FEIS/EIR.

4 30. On September 6, 2008, TROA was signed by seventeen parties, including
5 the DOI, by Dirk Kempthorne in his capacity as Secretary of the DOI, the State of
6 Nevada, by Allen Biaggi, Director of the Department of Conservation and Natural
7 Resources, the State of California, by Mike Chrisman, Secretary of California's
8 Resources Agency (said to be in consultation with and on behalf of the California
9 agencies identified in TROA and as designee of the Governor for all purposes required
10 by the Settlement Act), the Truckee Meadows Water Authority, and the Pyramid Lake
11 Paiute Tribe of Indians, among others.

12 31. On September 10, 2008, the DWR submitted to the California State
13 Clearing House DWR's Notice of Determination regarding TROA. The Notice describes
14 the agency action as "the signing, adoption, and implementation of the Truckee River
15 Operating Agreement by the State of California ... including the changing of California
16 water rights permits and licenses to allow water storage, transfers, and exchanges
17 provided for in the Negotiated Agreement." The Notice references the FEIS/EIR and
18 states that no significant adverse impacts were identified therein and consequently no
19 mitigation efforts were identified or required.

20 32. Even as DWR issued its NOD in September 2008, predicated on a
21 FEIS/EIR that basically ignored the issue of global warming impacts, the DWR's web site
22 warned: "Climate change is already impacting California's water resources. In the future,
23 warmer temperatures, different patterns of precipitation and runoff, and rising sea levels
24 will profoundly affect the ability to manage water supplies and other natural resources.
25 Adapting California's water management systems to climate change presents one of the
26 most significant challenges for the 21st century." See
27 www.water.ca.gov/climatechange/.

28 33. On September 15, 2008, the BOR announced in the Federal Register the

1 opening of a 60-day comment period for TROA's planned adoption as a federal rule. On
2 November 14, 2008, TCID submitted written comments to the BOR. These comments
3 noted, *inter alia*, that the regulation as it is currently drafted violates numerous provisions
4 of the Orr Ditch Decree, the Truckee River Agreement, Public Law 101-618, and Nevada
5 state law; that it violates the separation of powers doctrine; that it assumes *ultra vires*
6 authority to abrogate private property rights; and is based on a computer model found by
7 the government's own experts to be wholly unreliable.

8 34. TCID also commented that the very process by which TROA was
9 negotiated constituted a violation of the Federal Advisory Committee Act ("FACA")
10 because defendants relied on extra-governmental TROA negotiation participants to
11 advise them on key factual matters while at the same time failing to adhere to procedural
12 and informational transparency requirements set forth in FACA.

13 35. On December 5, 2008, the BOR promulgated TROA as a final rule in the
14 Federal Register, to be codified at 43 C.F.R. part 419. In its promulgation text, the BOR
15 either ignored or provided inadequate responses to the comments contained in TCID's
16 November 14, 2008 letter.

17 36. TROA became effective as a federal regulation on January 5, 2009.

18 37. Implementation of TROA will result in significant negative impacts on the
19 environmental and economic health of TCID and those receiving water through TCID's
20 activities. Among other things, TROA modifies procedures and requirements for the
21 storage, use, and distribution of water to the Newlands Project. Changes in reservoir
22 storage activities as well as conversion of agricultural land and water to industrial and
23 municipal uses entailed by TROA would directly result in shortages of water available to
24 TCID and the Newlands Project with potentially disastrous consequences. Among other
25 uses, the Newlands Project supplies water to wetlands at the Stillwater Wildlife Refuge
26 and Carson Lake and Pasture. The Stillwater Wildlife Refuge Wetlands have been
27 designated a site of international importance by the Western Hemispheric Shorebird
28 Reserve Network because of the hundreds of thousands of shorebirds, such as Long-

1 billed dowitcher, Black-necked stilt, and American avocet passing through during
2 migration. Similarly, the Carson Lake and Pasture, comprising approximately 22,000
3 acres of wetlands in the south-eastern portion of the Lahontan Valley, is also recognized
4 as a significant wetland area providing habitat for thousands of migratory birds. Loss of
5 water to wetlands dependent on water from the Newlands Project could have harmful
6 effects on the wetlands environment and the wildlife dependent on an adequate supply
7 of water to them.

8 38. Loss of water to the Newlands Project would also have adverse effects on
9 groundwater supplies within the Newlands Project's geographic confines. Irrigation
10 water not only supplies water for agricultural crop growth, it recharges the underground
11 aquifer on which TCID members, Churchill County, the City of Fallon and citizens of the
12 community, depend for well water and the community water supply. As aquifer recharge
13 slows due to declining irrigation, the water table drops, often below the current level of
14 existing wells, leaving families without water for drinking and other purposes. Loss of
15 agricultural irrigation water also threatens degradation of the environment within areas
16 de-watered by TROA, including within geographic confines of the Newlands Project.
17 The soil of previously productive high-desert farmlands, when deprived of water, is
18 known to become dry and unstable, leading to a "dust bowl" effect as particulate matter
19 becomes airborne. Such air pollution threatens both human and animal health. TROA's
20 de-watering of farmland within the Newlands Project also threatens the economic
21 destruction of TCID members whose livelihood depend on crops irrigated by the
22 Newlands Project.

23 39. TROA also represents an unexamined decision to supply municipal and
24 industrial purposes at the expense of agricultural uses encompassed by the Newlands
25 Project. The historical back drop to TROA reaches to the mid-80s when the Public
26 Services Commission in Nevada threatened to stop issuing "will serve" letters necessary
27 for permitted construction of new industrial and residential buildings, particularly in the
28 areas serviced by the Truckee Meadows Water Authority, which supplies water to the

1 fast-growing Reno-Sparks area. Much of the impetus for TROA was to find ways to
2 service growth in the form of water supply to new residential and industrial construction.
3 The FEIS/EIR failed to analyze the growth inducing impacts of providing additional water
4 resources to the cities of Reno and Sparks and Washoe County, Nevada, as a result of
5 the implementation of TROA. Such construction threatens the environment of TCID
6 members with degradation of air and water quality, including a dramatic, and as yet
7 unexamined increase in Green House Gas Emissions entailed by such development.

8 40. These same risks are borne by plaintiffs Churchill County and City of
9 Fallon. Both of these entities are within the Newlands Project, both are Project water
10 rights holders, and citizens of both will be subject to the potential negative impacts
11 insufficiently addressed in the FEIS/EIR. Indeed, the City of Fallon owns and operates a
12 municipal water system that provides drinking water to its 9000 residents. As the city
13 noted in one of its comment letters to Defendants, "[b]ecause the proposed ...
14 government actions described in the [REIS/EIR] of the TROA affect the human
15 environment by potentially reducing the drinking water supply for 9,000 residents, the
16 City of Fallon has a direct and substantial interest in ensuring that the [REIS/EIR]
17 comports with NEPA." Similarly, Churchill County is a largely agricultural county with
18 many family farms that are threatened with de-watering by the implementation of TROA.
19 Moreover, Churchill County citizens are threatened with decreases in their community
20 water supply as a result of additional shortages of supply to the Newlands Project.

21 41. The potential adverse consequences of TROA encompass not only
22 Plaintiffs, but all of the organizations and businesses, from non-profits and non
23 governmental organizations, trade unions and corporations, farmers and shopkeepers,
24 to individuals and their families, as well as wildlife, pets and livestock, whose water
25 supply is governed by TROA. Because the FEIS/EIR is at bottom a lax and unreliable
26 document, the far-reaching and potentially devastating consequences of TROA, and the
27 salutary consequences of potential alternatives, have never been adequately assessed.
28 As a California appeals court observed in *Santa Clarita Organization For Planning The*

1 *Environment v. County of Los Angeles*, (2003) 106 Cal.App.4th 715, 723, when faced
2 with an impact report's inadequate analysis of where a development's water would come
3 from, particularly in drought years, "[w]ater is too important to receive such cursory
4 treatment." Here the import is a thousand-fold greater, as the number of lives touched
5 by TROA is vastly greater. The FEIS/EIR's failure to account for extreme drought likely
6 as a result of global climate change, and the far-reaching ramifications of water supply
7 decisions in such a case, again threatens harm not only to Plaintiffs, their members and
8 citizens, but to everyone within the constellation of water users dependent on TROA
9 being the best choice.

10 **V. FIRST CLAIM FOR RELIEF**

11 **(Failure To Prepare An Adequate Environmental Impact Statement In Violation Of**
12 **The National Environmental Policy Act and the Administrative Procedures Act)**

13 42. Plaintiffs hereby reallege and reincorporate each and every paragraph
14 above.

15 43. NEPA requires the preparation of an environmental impact statement for
16 every major federal action which may affect the quality of the human environment. 42
17 U.S.C. 4332(2)(C). Agency action must be based on an adequate environmental impact
18 statement that satisfies the requirements of NEPA. *Sierra Club v. United States Dept. of*
19 *Trans.*, 310 F.Supp.2d 1168, 1185 (D.Nev. 2004). An EIS that does not contain a
20 reasonable, thorough discussion of significant aspects of the probable environmental
21 consequences, or whose form, content, and preparation fail to foster both informed
22 decision-making and informed public participation, must be set aside. *Id.* at 1186.

23 44. The APA, 5 U.S.C. §§ 551 et seq., requires that agency actions and
24 decisions follow all statutorily prescribed procedures and comply with all applicable laws.
25 The APA also requires that a reviewing court hold unlawful and set aside any agency
26 action if it fails to meet statutory, procedural or constitutional requirements or if it was
27 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.
28 5 U.S.C. § 706. Defendant here failed to proceed in a manner in accordance with the

1 law and engaged in arbitrary and capricious decision making.

2 45. The APA authorizes federal courts to enjoin agency activity if it fails to
3 meet statutory, procedural, or constitutional requirements or if it was arbitrary,
4 capricious, an abuse of discretion, or otherwise not in accordance with law.

5 46. The intended agency action, the implementation of TROA, proceeds from
6 an inadequate environmental impact statement that does not meet the requirements of
7 NEPA. The jointly issued FEIS/EIR does not satisfy NEPA, *inter alia*, in the following
8 ways.

9 47. An Environmental Impact Statement ("EIS") must "rigorously explore and
10 objectively evaluate all reasonable alternatives," devoting "substantial treatment to each
11 alternative considered in detail, including the proposed action so that reviewers may
12 evaluate their comparative merits." 40 C.F.R. § 1502.14(a)-(b).

13 48. The FEIS/EIR failed to assess a reasonable range of alternatives as
14 required. The FEIS/EIR purported to provide just three alternatives, "No Action," "Local
15 Water Supply," and TROA. But even this scant collection was illusory, as the No Action
16 alternative was in essence identical to the Local Water Supply alternative. Under the
17 Local Water Supply alternative all elements of Truckee River reservoir operations, river
18 flow management, Truckee River hydroelectric plant operations, minimum reservoir
19 releases, reservoir spill and precautionary release criteria, and water exportation from
20 Lake Tahoe and upper Truckee River basins were presumed to be the same as under
21 the No Action alternative. To the extent the Local Water Supply alternative purported to
22 vary the No Action alternative, it was based on speculation as to water supply options
23 that may, or may not, be authorized by state and local agencies if TROA is not
24 implemented. All of this had the effect of making the preferred alternative--TROA--in
25 effect the *only* agency action considered against the status quo. This amounts to no
26 discussion of alternatives at all.

27 49. The FEIS/EIR failed to identify a legitimate basis for dismissing the
28 alternatives considered and rejected and TROA terms considered and rejected. Section

1 2.V of the FEIS/EIR refers to a "Report to Negotiators" that was intended to be a draft
2 EIS/EIR for TROA which contained "NEPA-style analysis of five potential project
3 alternatives" that was distributed only to TROA negotiating parties. The FEIS/EIR goes
4 on to say that each of these alternatives was rejected because "[o]ne or more of the
5 negotiators with mandatory signature authority rejected these alternatives because of
6 their potential adverse impacts to water rights." There is no provision in NEPA to have a
7 selected group of stake holders make a preliminary determination of alternatives and
8 thus circumvent thorough assessment of all alternatives. Indeed, the public interest in
9 the environment and in ensuring that all reasonable alternatives are rigorously explored
10 cannot be ignored or defeated by agreement of the parties. See, e.g., *Simmons v.*
11 *United States Army Corp. of Engineers*, 120 F.3d 664, 670 (7th Cir. 1997). And the
12 stated rationale for exclusion—interference with an interested party's water rights—puts
13 TROA on no better footing than the five summarily rejected alternatives since TROA will
14 adversely affect Newlands Project water rights. As drafted, the FEIS/EIR calls for blind
15 faith in the negotiating parties to determine feasibility of alternatives. If the negotiators
16 felt that the alternatives would create significant impacts not apparent in TROA, then the
17 FEIS/EIR was the place to fully explain the alternatives and the reasons for selecting
18 TROA. But the FEIS/EIR's cursory discussion of alternatives and their bases for
19 exclusion does not meet the intent of NEPA to adequately inform the public. Nor does
20 the FEIS/EIR sufficiently explain its course of inquiry, its analysis, and its reasoning with
21 respect to alternatives considered, and it fails to provide necessary back-up data
22 regarding the proposals considered and rejected, contrary to the requirements of 40
23 C.F.R. § 1502.21.

24 50. The FEIS/EIR also failed to explore existing reasonable alternatives.
25 These reasonable alternatives include construction of additional reservoirs; use of water
26 banking or underground storage for drought protection; use of additional capacity in
27 Lahontan Reservoir; use of interbasin transfers that allow pumping of underground
28 aquifers and transmission of the water to the Truckee River or as a substitute for water

1 diverted from the Truckee River; conservation measures financed by the parties seeking
2 to increase their water supply, such as piping of diverted water, additional water
3 metering, installation of low flow devices, channeling of the Truckee River to minimize
4 evaporation, planting of shade trees to reduce temperatures, etc.; and providing a
5 leasing mechanism for times of drought, when water owners may lease their water to
6 increase the supply needed for M&I or fish flows. The FEIS/EIR's one sentence devoted
7 to just one of these alternatives, that "[c]onstructing a new reservoir was not considered
8 ... because it would have exacerbated degradation of riverine fish and riparian habitat as
9 well as created additional cumulative environmental impact throughout the Truckee River
10 basin" is hardly informative. It is merely an admission that the alternative was not
11 considered.

12 51. NEPA requires that analyzed alternatives be feasible. Nevertheless, the
13 alternatives assessed by the FEIS/EIR do not satisfy this feasibility requirement. The
14 alternatives addressed require water to be stored and released without permission of the
15 owner, preclude certain storage and release for decreed water rights and users, and
16 provide benefits to non-water-righted uses at the expense of water-righted uses. These
17 actions are in conflict with § 205(a)(2) of Public Law 101-618 requiring that water is to be
18 stored and released from Truckee River reservoirs to satisfy exercise of water rights in
19 conformance with both the Orr Ditch and Truckee River General Electric decrees. In
20 addition, § 205(a)(1)(c) of Public Law 101-618 requires TROA to carry out the terms of
21 the Preliminary Settlement Agreement between the Pyramid Lake Indian tribe and Sierra
22 Pacific. The stated justification for rejection of alternatives is that any alternative rejected
23 by a party with TROA signature authority is not feasible because TROA requires
24 approval of these parties. But TROA is the sole proposed document to determine the
25 operation of the Truckee River reservoirs. Potential conflicts with the Orr Ditch and
26 Truckee River General Electric Decrees are fatal to TROA. And § 210(b)(13) of Public
27 Law 101-618 states that the Act shall not be construed to conflict with or alter the Orr
28 Ditch or Alpine Decrees. And Public Law 101-618 requires full compliance with NEPA,

1 which has not been met.

2 52. NEPA requires that environmental impact statements be written in plain
3 language so that decision makers and the public can readily understand them. See 40
4 C.F.R. § 1502.8. Statements are to be "concise, clear, and to the point and shall be
5 supported by evidence that the agency has made the necessary environmental
6 analyses." 40 C.F.R. § 1502.1. Ordinarily an EIS should be less than 150 pages and no
7 more than 300 pages even if pertaining to an unusually complex project. See 40 C.F.R.
8 § 1502.7. Appendices must include materials prepared in connection with the EIS that
9 substantiates analysis or is relevant to the decision to be made. See 40 C.F.R. §
10 1502.18. If not disclosed in an appendix, technical and scientific data must be readily
11 available upon request. See 40 C.F.R. § 1502.18(d).

12 53. A clear understanding of the FEIS/EIR requires that the public first
13 understand TROA and what it is attempting to accomplish. But the appendix containing
14 TROA is of little help. TROA is overly complex, riddled with confusing cross-references
15 and unique definitions, and generally presents a wall of obfuscation. It leaves the reader
16 feeling that something is happening with Truckee River water, but exactly what is
17 unclear. The FEIS/EIR continues the theme. It is the opposite of clear and concise. It
18 contains a convoluted collection of definitions, jargon, and cross-references to TROA
19 provisions that leave plain sense and meaning behind. It omits any factual scenarios
20 that might anchor the reader's understanding to an actual state of affairs in the world. It
21 is overlong, unwieldy, and obtuse, vastly exceeding the page limitations outlined in
22 NEPA regulations. At the same time, its appendices fail to provide necessary data
23 required to permit specialists to fully analyze the scientific basis for the conclusions
24 reached. Materials that were prepared in connection with the FEIS/EIR that could be
25 used to substantiate or discredit the analysis and that are relevant to the decisions at
26 issue were not fully disclosed in either the body of the FEIS/EIR or the appendices
27 thereto, and were not made readily available on request. To the contrary, in an effort to
28 receive the supporting data and information, plaintiff TCID was forced to submit to

1 Defendants formal requests pursuant to the Freedom of Information Act ("FOIA"). And
2 even after having to resort to FOIA requests to obtain analytical back-up materials,
3 Defendants refused to supply key information.

4 54. An agency engages in impermissible bias where it defines the project itself
5 so narrowly so as to omit reasonable alternatives. See, e.g., *Muckleshoot Indian Tribe v.*
6 *United States Forest Service*, 177 F.3d 800, 813 (9th Cir. 1999). Bias is also shown
7 where the agency frames the project's purpose so narrowly that "reasonable
8 alternatives" are defined out of existence. See, e.g., *Simmons v. United States Army*
9 *Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997). And bias is shown where the
10 agency uses misleading statements, double standards, overstatement of benefits,
11 understatement of disadvantages, and partial disclosures revealing a "lack of open-
12 minded willingness to consider fairly all alternatives." See, e.g., *Sierra Club v. Forehlke*,
13 345 F.Supp. 440 (W.D. Wisc. 1972). The FEIS/EIR shows that Defendants were
14 impermissibly biased in favor of TROA. It contains distortions, unsupported
15 assumptions, and is propped up by a flawed and tendentious computer modeling
16 program. And because the FEIS/EIR has narrowly framed the project and its purpose,
17 while omitting adequate explanation for its conclusions, the FEIS/EIR amounts to
18 Defendants' *ipse dixit* assertion that there is only one way to satisfy P.L. 101-618,
19 namely, TROA. But there are other ways to satisfy P.L. 101-618, unconsidered by
20 Defendants, including those referenced in paragraph 50 *supra*.

21 55. NEPA limits incorporation by reference of documents into an EIS and
22 requires incorporated documents to be reasonably described and available for
23 inspection. 40 C.F.R. § 1502.21. The FEIS/EIR attaches an exhibit entitled "Selected
24 Elements of the Report to Negotiators," which purports to summarize parts of a primary
25 document, the Report to Negotiators, and references other studies relied on. The actual
26 Report to Negotiators contained a NEPA-style five-alternatives analysis that was
27 presented to TROA negotiating parties, but not the public. The summary at Exhibit E is
28 partial and insufficient, justifying rejected alternatives by reference to the unproduced

1 report and other unproduced studies and computer modeling efforts. The full report and
2 related studies should have been made adequately summarized and made available for
3 review, but were not. Moreover, the Report to Negotiators was arguably Defendants'
4 first-tier analysis of TROA and alternatives. See C.F.R. § 1502.20 (re tiered analysis).
5 As such, the report should have been produced in full and submitted to the public for
6 comment.

7 56. NEPA also requires that an EIS adequately describe the current
8 environmental setting and establish a sufficient baseline alternative. The baseline--
9 drawn from existing, current conditions--is the back drop against which various
10 alternatives may be evaluated. See, e.g., *American Rivers v. Federal Energy Regulatory*
11 *Commissions*, 201 F.3d 1186, 1195 n. 15 (9th Cir. 2000) (internal citations omitted)
12 ("without establishing . . . baseline conditions . . . there is simply no way to determine
13 what effect [an action] will have on the environment and, consequently, no way to
14 comply with NEPA"). The FEIS/EIR fails to properly describe the current environmental
15 setting and fails to consider or take into account important aspects of Truckee River
16 management. The FEIS/EIR does not analyze current conditions as a separate
17 alternative to the No Action, Local Water Supply, and TROA alternatives, resulting in the
18 masking of TROA's true impact. When compared to the "No Action" alternative that was
19 examined in the FEIS/EIR, the impact of TROA appears to be significantly less than
20 when compared to current conditions. And while comparisons to current conditions are
21 referred to occasionally in the FEIS/EIR, use of baseline conditions is woefully
22 incomplete, including omission of comparisons in the vital categories of effects on water
23 resources, Truckee River flow, exercise of water rights to meet demand, groundwater,
24 water quality, sedimentation and erosion, biological resources and recreation. Analysis
25 should have been presented comparing TROA to current conditions with consistency,
26 and in particular with respect to potential impacts and changes to the Newlands Project.
27 Similarly, the FEIS/EIR does not adequately describe historic and current management
28 of the Truckee River, and impacts on such management, and further omits analysis of

1 requirements flowing from the still-valid Truckee River Agreement and Orr Ditch Decree.
2 As a result of the failure to adequately analyze baseline conditions, the preferred agency
3 action, TROA, is deceptively portrayed as having a lesser environmental impact than the
4 No Action alternative. The FEIS/EIR makes this finding despite the fact that TROA will
5 cause increased shortages of the water supply to the Newlands Project, Churchill
6 County, and the City of Fallon, with all of the attendant significant environmental impacts
7 such shortages will cause to the environment. More fundamentally, because the
8 FEIS/EIR omits these, and other, baseline issues, its analysis does not satisfy NEPA
9 requirements.

10 57. An EIS must be based on sound and accurate scientific information and
11 methodology. "Agencies shall insure the professional integrity, including scientific
12 integrity, of the discussions and analyses in environmental impact statements. They
13 shall identify any methodologies used and shall make explicit reference by footnote to
14 the scientific and other sources relied upon for conclusions in the statement." 40 C.F.R.
15 § 1502.24. An EIS that is issued without adequate information relating to a computer
16 model's variables or discussion and disclosure of the model's shortcomings violates
17 NEPA. See *Public Lands Council v. Powell*, 379 F.3d 738, 749-50 (9th Cir. 2004).
18 Conclusory statements are insufficient, and impact statements should be rejected that
19 "suffer from a serious lack of detail and rely on conclusions that are based on
20 assumptions without supporting objective data." See *Rankin v. Coleman*, 394 F.Supp.
21 647, 656 (E.D. N.Car. 1975), quoting *Brooks v. Volpe*, 350 F.Supp. 269, 276-277 (W.D.
22 Wash. 1972), *aff'd per curiam*, 487 F.2d 1344 (9th Cir. 1973).

23 58. The underlying scientific analysis and data on which the entire FEIS/EIR
24 depended was fatally flawed. The FEIS/EIR's alternatives analysis relied heavily on
25 computer modeling performed on the Truckee River Operations Model ("TROM"). But
26 the TROM suffered from many weaknesses rendering it scientifically unsound and of
27 dubious accuracy. Discussion of the TROM failed to provide sufficient supporting data to
28 back up the numerous assumptions built into its analysis. The TROM itself was outdated.

1 and flawed, premised on theoretical approaches and research methods that are not
2 generally accepted in the scientific community. The data used in the TROM was flawed
3 and relied on long term averages to analyze impacts when annual and monthly analysis
4 would be both more accurate and further reveal additional impacts. The TROM omitted
5 key TROA provisions and so necessarily did not analyze the whole project, masking its
6 true impacts. The TROM used river flows for points on the Truckee River that are
7 different than the United States Geological Survey's gauging stations for historical
8 streamflows, and model output was processed using a program to estimate streamflows
9 at other locations. The TROM failed to include crucial data that is readily available. The
10 TROM itself was an outdated software platform that Defendants had replaced with an
11 updated version, but impermissibly chose not to use in connection with the FEIS/EIR.
12 See, e.g., *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1130
13 (8th Cir. 1999) (disputed computer model was "fully updated"). The TROM's use of
14 estimates was insufficiently explained or supported. And it lacked available scientific
15 information that might have allowed it to make reasonable predictions. The TROM was
16 never calibrated, verified, or validated, nor were any sensitivity runs performed on it.
17 The TROM assumes that the next 100 years will be just like the last 100 years, and
18 omits stochastic analysis. And the TROM did not model extreme drought conditions
19 made much more likely as a result of climate change and global warming. In addition,
20 the FEIS/EIR makes many assumptions that are flawed, particularly with respect to
21 water supply issues, and when incorporated into the TROM create error in the impact
22 analysis. Examples of flawed assumptions include failing to account for occurrences
23 during extreme low-flow years. The failure to include severe or long-term drought
24 analysis where five to seven year droughts are ordinary is arbitrary on its face. Based
25 on these omissions, and others, the TROM, and hence the conclusions drawn from it
26 and put forth in the FEIS/EIR, do not satisfy NEPA requirements for scientific integrity
27 and soundness.

28 59. An EIS must include a detailed statement regarding the environmental

1 impact of the proposed agency action together with the identification of all adverse
2 impacts. 42 U.S.C. § 4332(C). It must assess the impacts of both the proposed action
3 and the reasonable alternatives in comparative form. 40 C.F.R. § 1502.14. NEPA also
4 requires that an EIS examine the relationship between short-term uses of man's
5 environment and the maintenance and enhancement of long-term productivity, and an
6 examination of irreversible or irretrievable commitments of resources which would be
7 involved in the proposal should it be implemented. Examination of both direct and
8 indirect effects is required. 40 C.F.R. § 1508.8. To complete the analysis, once impacts
9 of the proposed action and alternatives have been identified, identification and analysis
10 of measures to mitigate the impacts must also be presented. See 40 C.F.R. §§
11 1502.14(f) and 1502.16. Perfunctory discussion of mitigation measures will not suffice.
12 They must be discussed in detail, including their likely effectiveness. See *Northwest*
13 *Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986).
14 Overall an EIS must demonstrate that the reviewing agency or agencies took a "hard
15 look" at the potential consequences of the proposed action and reasonable alternatives.
16 See, e.g., *Price Road Neighborhood Ass'n v. United States Dept. of Transportation*, 113
17 F.3d 1505 (9th Cir. 1997). The FEIS/EIR does not satisfy these requirements.

18 60. The manner in which the FEIS/EIR analyzed the proposed action as well
19 as the No Action and Local Water Supply alternatives, tended to mask impacts. The
20 FEIS/EIR failed to adequately analyze impacts from not allowing return flows to the
21 Truckee River, from storing Newlands Project Credit Water in Stampede Reservoir on
22 carryover storage, from looking at long term averages instead of focusing on month to
23 month or year to year impacts, among others. The FEIS/EIR also segmented various
24 proposals, again masking environmental impacts. And because the FEIS/EIR did not
25 adequately identify environmental impacts, it also failed to identify feasible mitigation
26 measures that could reduce or eliminate impacts. The FEIS/EIR failed to sufficiently
27 identify TROA's impacts, or those of the other alternatives, and is deficient in its failure to
28 identify and analyze specific mitigation measures. These deficiencies are particularly

1 acute in relation to assessment of TROA's impact on the Newlands Project. These
2 deficiencies include use of assumptions with parameters that have not, and may never,
3 occur, as well as long term averages, that tended to hide the impacts of the proposed
4 action; failure to compare current conditions to the proposed action that obscures
5 TROA's impacts; use of a scientifically flawed and unreliable computer modeling
6 resulting in unreliable findings and analysis concerning impacts; inadequate assessment
7 of impacts on Churchill County, the City of Fallon, and the Newlands Project; and failure
8 to analyze and fully develop plans for mitigation of adverse effects that will result if
9 TROA is implemented. The FEIS/EIR's analysis of water use and consumption is also
10 flawed. Its projected water sources are speculative, depending on conditions or
11 agreements that may not come to pass, and the information is derived from a fatally
12 flawed model, the TROM. The FEIS/EIR also does not account for population growth
13 and extended drought conditions, both clearly likely, if not certain, outcomes. The
14 FEIS/EIR study assumptions include one that population growth will occur with or without
15 TROA. However, TROA is what is allegedly providing drought protection for the Truckee
16 Meadows area that would allow the Truckee Meadows Water Authority ("TMWA")—a
17 TROA signatory—to increase the population served to a projected 119,000 households.
18 If TROA did not provide drought protection to allow this growth, then TMWA could not
19 issue will-serve letters to an increased number of households. Because the net effect of
20 TROA is to encourage population growth and development in Reno, Sparks, Fernley,
21 and the Pyramid Lake Reservation, the effects of this growth on highways, schools,
22 hospital, and air quality, including its effect on and contribution to global warming and
23 climate change within the region, should have been assessed in the FEIS/EIR.

24 61. An EIS must contain an adequate cumulative impact analysis. A project
25 must be analyzed in light of the project's interaction with the effects of past, current, and
26 reasonably foreseeable future projects. See *Lands Council v. Powell*, 379 F.3d 738, 744
27 (9th Cir. 2004), citing 40 C.F.R. § 1508.7. "Cumulative impact is the impact on the
28 environment which results from the incremental impact of the action when added to other

1 past, present, and reasonably foreseeable future actions regardless of what agency
2 (Federal or non-Federal) or person undertakes such actions. Cumulative impacts can
3 result from individually minor but collectively significant actions taking place over time.”
4 40 C.F.R. § 1508.7. NEPA requires adequate cataloguing of the related projects,
5 including data of time, type, place, and scale of other projects. *Lands Council*, 379 F.3d
6 at 744. Moreover, the significance of the proposed action and likely impacts cannot be
7 avoided by breaking an action into smaller parts if it is part of a comprehensive strategy.
8 See *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998).

9 62. The FEIS/EIR inadequately assessed cumulative impacts, omitting
10 necessary analysis of impacts on other projects, including the Lahontan Reservoir,
11 groundwater in Churchill County, the Stillwater Wildlife Refuge, Carson Lake and
12 Pasture, the Fernley Wildlife Management Area, the Naval Air Station at Fallon, as well
13 as modification of the governing Operating Criteria and Procedures to accommodate
14 Newlands Project Credit Water, the Recoupment Judgment entered on February 15,
15 2005, in the case *United States v. Board of Directors, Truckee-Carson Irrigation District*,
16 Nevada District Court case number 3:95-cv-00757-HDM, and the impacts of water rights
17 acquisition programs. The FEIS/EIR also failed to take the necessary “hard look” at
18 increased water shortages in the Newlands Project likely to result from TROA;
19 environmental and economic impacts of shifting water from agricultural uses to municipal
20 and industrial uses, including lower crop yields, reduced hydroelectric power generation,
21 and reduction of water delivery fees collected by TCID; and the effect on TCID’s ability to
22 maintain properly the canals and ditches in the Newlands Project; environmental
23 impacts, including adverse impacts on air quality, resulting from a shift from agricultural
24 to non-agricultural uses; impacts on groundwater and other water resources, including
25 water storage and carryover storage; impacts resulting from growth inducement and
26 increased urban development; impacts on Pyramid Lake restoration efforts; and impacts
27 resulting from increased recreational uses, including impacts of such use on Lahontan
28 Reservoir. For the impacts not analyzed in detail, the FEIS/EIR fails to provide an

1 adequate factual basis for the conclusion that there were no significant impacts or that
2 impact analysis was not required. The failure to analyze the foregoing impacts renders
3 the FEIS/EIR inadequate under NEPA.

4 63. NEPA also requires that an agency acknowledge when there is incomplete
5 or unavailable information from which to evaluate reasonably foreseeable significant
6 adverse effects on the human environment. 40 C.F.R. § 1508.22. Where such
7 information is known to be lacking, an FEIS/EIR must provide a statement that it is
8 incomplete or unavailable, a statement of the relevance of the incomplete or unavailable
9 information to impacts evaluation, a summary of existing credible scientific evidence, and
10 an assessment of impacts based on theoretical approaches or generally accepted
11 research methods. "Reasonably foreseeable includes impacts which have catastrophic
12 consequences, even if their probability of occurrence is low" *Id.* Given the large
13 amount of missing or unreliable information in relation to TROA computer modeling, the
14 FEIS/EIR should have acknowledged the lack of information about the effects of TROA,
15 assessed the relevance of the missing information, and proceeded to address all
16 reasonably foreseeable consequences, including catastrophic consequences. This was
17 not done. Instead the FEIS/EIR proceeds as if the TROM were reliable and omits
18 assessment of key potential negative outcomes.

19 64. An EIS must address the entire project, not just portions of it. Analyzing
20 only portions of a project is impermissible because it tends to mask potential
21 environmental impacts. 40 C.F.R. § 1508.25(a); *Cady v. Morton*, 527 F.2d 786, 795
22 (9th Cir. 1975) (EIS covering only a portion of proposed strip mining operation
23 impermissibly segmented project).

24 65. The FEIS/EIR does not address the entire project, but rather segments it
25 and fails to adequately address future actions necessitated by TROA. Reference is
26 made to Newlands Project Credit Water but use of the credit water is not modeled in the
27 TROM or addressed in the FEIS/EIR. Reference is made to storage of credit water in
28 Donner Lake, but Donner Lake storage rights are owned as an undivided interest

1 between TCID and Sierra Pacific. No use of Donner Lake for credit storage under TROA
2 can be made without permission from TCID. The TROA discussion states that certain
3 provisions of the Truckee River Agreement would be changed, but does not adequately
4 describe the changes, or explain why such changes are necessary or how the TRA has
5 been used to manage the Truckee River for the last 69 years. The section on Reservoir
6 Operations purports to allow TMWA to exchange water in Donner Lake for Fish Credit
7 Water. Again, since the water in Donner Lake owned by TMWA is an undivided one-half
8 interest in common with TCID, any use of such water as Fish Credit Water can only be
9 done with the express consent of TCID. The reference to Newlands Project Credit
10 Water being removed for Lahontan Reservoir is unsupportable since this is being
11 segmented from the TROA proposal and it cannot be accomplished without the
12 permission of Newlands Project water rights owners. In addition, Fernley Credit Water
13 has been segmented in the FEIS/EIR analysis.

14 66. By the foregoing actions and omissions, Defendants impermissibly created
15 and approved a legally inadequate EIS which procedurally and substantively failed to
16 satisfy the requirements of NEPA, 42 U.S.C. §§ 4321 *et seq.* In so doing, Defendants
17 violated the APA, 5 U.S.C. § 706(2), by acting arbitrarily, capriciously, in an abuse of
18 discretion, not in accordance with the law and/or without observance of procedures
19 required by law.

20 **VI. SECOND CLAIM FOR RELIEF**
21 **(Violation Of The Administrative Procedure Act)**

22 67. Plaintiffs hereby reallege and reincorporate each and every paragraph
23 above.

24 68. Agency rule making is subject to judicial review under the Administrative
25 Procedure Act, 5 U.S.C. § 702. Public Law 101-618, § 205(a)(5), provides that
26 promulgation of TROA as a federal regulation is subject to judicial review under the
27 standard set forth in 5 U.S.C. § 706(2)(A)-(D).

28 69. Because the substance of TROA as a regulation is identical with TROA as

1 an adopted agency action under NEPA, the infirmities relating to TROA set forth in
2 Plaintiffs' First Claim For Relief are applicable to the TROA as a federal rule. Additional
3 infirmities with TROA as an instance of agency action and rule making include:

4 70. TROA violates the Orr Ditch decree. That decree prohibits anyone "from
5 ever taking, diverting, using or claiming any of the water so decreed, in any manner or at
6 any time so as to in any way interfere with prior rights of any other persons or parties
7 under this decree." (Orr Ditch Decree at p. 87.) Defendants' own biased computer
8 modeling shows TROA resulting in decreased water supply to the Carson Division of the
9 Newlands Project, in violation of decreed rights.

10 71. TROA also allows the use of historical return flows in a fashion that injures
11 existing rights in violation of the Orr Ditch Decree. For example, under TROA, the
12 consumptive use portion of unused and excess agricultural rights converted to M&I
13 purposes by TMWA will be stored in Truckee River reservoirs as M&I Credit Water for
14 subsequent release to meet M&I demands, or if unused, converted to Fish Credit Water
15 and released at times contrary to historical flow patterns. Later releases of stored credit
16 waters will likely occur during times when Truckee River streamflows are significantly
17 less than the streamflows occurring at the time the water is stored. Thus, TROA results
18 in a greater likelihood for increases in stream conveyance losses to decreed right
19 holders. In addition, if historical flows are converted to Fish Credit Water and released
20 when TCID is not allowed to divert, they will flow past Derby Dam to Pyramid Lake, thus
21 causing additional shortages to the Newlands Project and to the communities of Fernley,
22 Fallon and Churchill County.

23 72. TROA violates the Orr Ditch Decree by establishing water categories
24 unrecognized by the decree, such as fish credit water, then improperly elevating the
25 priority of such water, in violation of the decree, by treating it in the fashion of privately
26 owned storage water to which no transportation losses are applied until released water
27 reaches its new point of diversion.

28 73. TROA further violates the Orr Ditch Decree by allowing storage and re-

1 categorization of water previously intended for hydroelectric power generation, a non-
2 consumptive use. Under the Orr Ditch Decree water used by Sierra Pacific Power
3 Company ("SPPC") and the Truckee Meadows Water Authority ("TMWA") for
4 hydroelectric generation is returned to the river and available for diversion by TCID.
5 Under TROA, TMWA and SPPC are now permitted to store hydroelectric power
6 generation water and then convert it to Fish Credit Water, a consumptive use, that
7 bypasses Derby Dam and is unavailable for diversion by TCID.

8 74. Storage in upstream reservoirs authorized by TROA is to the detriment of
9 Lake Tahoe, again in violation of the Orr Ditch Decree. Under TROA, water that would
10 otherwise be credited into storage in Lake Tahoe will be stored elsewhere, resulting in
11 artificial decrease of Lake Tahoe's water level, adversely affecting rights under Claims
12 No. 3 and 4 of the Orr Ditch Decree. This decrease also is contrary to the requirements
13 of the Settlement Act which states that TROA should include "methods to diminish the
14 likelihood of Lake Tahoe dropping below its natural rim."

15 75. TROA also will result in negative impacts to groundwater that is
16 hydrologically connected to the Truckee River. The Truckee River provides recharge of
17 the groundwater aquifer in Hydrographic Basin 87, which TMWA uses as a substantial
18 source of water. Because water that would otherwise flow in the river will be stored in
19 upstream reservoirs, recharge of the groundwater aquifer in Hydrographic Basin 87 will
20 be decreased and greater amounts of remaining Truckee River flow will be required to
21 recharge the aquifer, thus impairing Orr Ditch decreed water rights.

22 76. TROA violates the "58 Percent Rule" reached in connection with prior
23 applications relating to Orr Ditch decreed water rights. TCID protested a prior change in
24 Orr Ditch Decree water rights to M&I use in 1989. In its ruling, the Nevada State
25 Engineer determined that there would be no injury to the Newlands Project as a result of
26 the change to M&I, in part, due to the operation of the "58 percent rule." Under this rule,
27 an applicant for service in Truckee Meadows had to acquire 1.72 acre-feet of water in
28 order to deliver one-acre foot, and thus, 58 percent was the maximum amount of water

1 that could be obtained from an irrigation right, leaving 42 percent continuing downstream
2 and available for diversion to the Newlands Project. The changes in water storage rules
3 encompassed by TROA result in a reduction of Truckee River flow guaranteed under the
4 previously adjudicated 58 percent rule, further injuring Newland Project water rights in
5 violation of the Orr Ditch Decree.

6 77. TROA also violates the Truckee River Agreement ("TRA"). The TRA was a
7 negotiated settlement of disputes among the parties to the Orr Ditch Decree. The TRA
8 addressed issues on several levels, including allocating rights to the Truckee River,
9 recognizing specific claims to be included in the final decree, setting rates of flow in the
10 river, allowing for construction of supplemental reservoirs, recognition of privately owned
11 stored water, setting of diversions by SPPC for Municipal and Domestic uses, allowing
12 use of water for power generation, allocating of Diverted Flow to TCID and the Washoe
13 County Water Conservation District ("Conservation District"), and creating the framework
14 for managing the Truckee River. The TRA was used as the basis for a stipulation that
15 allowed the entry of the final Orr Ditch Decree and once a party signed the stipulation,
16 the signing party could not rescind its signature and the execution of the stipulation is
17 irrevocable. The TRA is incorporated into the Orr Ditch Decree as a part of the decree
18 itself. See Orr Ditch Decree at p. 86.

19 78. The TRA contains specific language which makes it binding on all of the
20 signatories, including the United States, SPPC/TMWA, TCID, the Water Conservation
21 District and the individual water right owners on the Truckee River. There is no provision
22 for modifying the TRA. Under the TRA the Truckee River has been jointly managed by
23 the United States, TCID, SPPC/TMWA, the Conservation District, and the Federal Water
24 Master for more than 70 years. TROA purports to "supersede" the TRA, vesting
25 management of the Truckee River in a sub-set of the signatories, the United States and
26 TMWA, and granting rights to a non-signatory to the TRA, the Pyramid Lake Paiute
27 Indian Tribe ("PLIT"). TROA further abrogates the TRA by subsuming the Federal Water
28 Master's role into that of an "Administrator" controlled by the United States, TMWA and

1 PLIT. But TROA cannot "supersede" the TRA as articulated in TROA §5.A.1(a) without
2 the agreement of all the TRA signatories, including TCID. Nor can a subset of TRA
3 signatories unilaterally dispose of and replace it with a different management scheme
4 without the consent of all parties to the TRA.

5 79. Under the TRA Floriston Rates in the Truckee River must be maintained at
6 established levels and any change to such rates requires agreement of TRA signatories.
7 But under TROA the TROA signatories may agree to a reduction in flow rates in
8 exchange for storage credit in the upstream reservoirs. As a result, it is likely that less
9 water will be available for diversion by the Newlands Project, Churchill County and the
10 City of Fallon at Derby Dam. In turn, the Newlands Project may not have access to
11 adequate amounts of water to meet their rights. TROA changes the rules for distribution
12 and storage of water in the Truckee River Basin in contradiction to the terms of the TRA,
13 while TROA lacks external authority for "superseding" the TRA and Orr Ditch Decree.
14 This change in the distribution and storage of water harms the prior existing water rights
15 of the farmers of the Newlands Project, which were guaranteed under the *Orr Ditch*
16 Decree.

17 80. Water in Boca Reservoir or Lake Tahoe water may not be used as
18 proposed under TROA. These water bodies are subject to the terms of the TRA, to
19 which the TROA parties are bound. Changes in the flow from Boca Reservoir require
20 the consent of TCID. Several new reservoirs have been added to the Truckee River
21 watershed that did not exist when the TRA was executed. These reservoirs are part of
22 the Washoe Project and include Prosser Reservoir and Stampede Reservoir. All
23 Washoe Project Reservoirs, including Prosser Reservoir and Stampede Reservoir, must
24 also be operated based on Floriston Rates. These reservoirs are managed in
25 conjunction with the other reservoirs serving the Truckee River basin. TROA fails to
26 show that the proposed diversion and use of water is consistent with the management
27 regime of the Truckee River as set forth in the TRA and the *Orr Ditch* Decree.

28 81. TROA also impermissibly supersedes the allocation of "Diverted Flow"

1 under the TRA. The TRA provides that Diverted Flow (essentially all water rights that
2 are diverted along the Truckee River) is allocated thirty-one percent to TCID for use in
3 the Newlands Project and sixty-nine percent to the Conservation District, subject to the
4 rights of SPPC in Article V of the TRA. The TRA further gives TCID the right to divert
5 and use any unused part of the sixty-nine percent. TROA makes no provision for this
6 term in the TRA, and under TROA the right to the thirty-one percent Diverted Flow, and
7 use of the sixty-nine percent remainder, is lost to TCID as it is recategorized as fish
8 water which will in turn flow past Derby Dam and be made unavailable for diversion to
9 TCID. If water is being declared as excess and allowed to be converted to Credit Water,
10 such water is part of the Diverted Flow and is subject to the TRA. This provision has the
11 effect of elevating Fish Credit Water to a higher priority than decreed water under the Orr
12 Ditch Decree.

13 82. TCID relies on the historic flow pattern of the Truckee River, established by
14 Floriston Rates, to provide water rights to the Newlands Project. But TROA creates a
15 new category of water—Credit Water—that is not recognized by the TRA or the Orr Ditch
16 Decree and allows water that would otherwise be used to maintain Floriston Rates to be
17 converted to Fish Credit Water unavailable for diversion by TCID and other downstream
18 users. TROA thus impermissibly strips rights valid under the TRA and Orr Ditch Decree
19 in favor of a scheme that reapportions those rights without process or agreement of the
20 derogated right holder.

21 83. TROA also impermissibly violates Public Law 101-618 (the "Settlement
22 Act"), the very law which called for its creation. The Settlement Act contains a
23 reservation that it is not to be construed to alter or conflict with any existing rights to use
24 Truckee River water in accordance with the Orr Ditch and Truckee River General Electric
25 Decrees. See § 205(a)(2) of P.L. 101-618. Thus, the foregoing violations of provisions of
26 the Orr Ditch Decree and TRA entailed by TROA are themselves violations of the
27 Settlement Act.

28 84. TROA also directly undercuts a stated requirement of TROA set forth in the

1 Settlement Act, namely, fulfilling the goals of the Endangered Species Act by promoting
2 the enhancement and recovery of the Pyramid Lake fishery. See Settlement Act §§
3 202(f) and 205(a)(2)(B). There is substantive evidence suggesting that TROA will lead to
4 a substantial *decline* in the population of the endangered cu-cui fish population in
5 Pyramid Lake. As such, TROA violates the Settlement Act.

6 85. Section 210(a)(2)(B) of the Settlement Act does not allow TROA or the
7 Interstate Allocation of waters under the Settlement Act to occur until the PLIT's claims
8 to unappropriated water are resolved in a manner satisfactory to the PLIT and the State
9 of Nevada. Such claims are still pending. Both TCID and PLIT have competing
10 applications (TCID's filed in 1930, PLIT's in 1994 and 1996) for unappropriated water on
11 the Truckee river which are subject to as-yet unresolved court challenges. Similarly, in
12 2003 the BOR applied for approval to capture additional Truckee River waters to be
13 stored in Stampede Reservoir. This application appears also to compete with PLIT's
14 application for purportedly unappropriated Truckee River waters. Until these
15 applications are finally determined, it is premature to assume that PLIT will be "satisfied"
16 with the final outcome of the competing claims to unappropriated water.

17 86. TROA violates the Supreme Court's decision in *Nevada v. U.S.* (1983) 463
18 U.S. 110 (1983) wherein it determined that the United States was prohibited, based on
19 entry of the TRA and the Orr Ditch Decree, from reallocating the water of the Truckee
20 River. TROA purports to create carryover storage rights in the upstream reservoirs and
21 even removes water from storage in Lahontan Reservoir which is then stored in these
22 upstream reservoirs, ostensibly for the purpose of preventing spills at Lahontan. These
23 provisions are designed to hold water that is part of the Newlands Project water right
24 owners carryover storage right in Lahontan, in the upstream reservoirs where it will be
25 converted to fish water for the benefit of the PLIT. This is exactly the type of reallocation
26 that was barred by the U.S. Supreme Court in 1983.

27 87. Provisions for the handling of credit water under TROA conflict with OCAP.
28 Under TROA, control of Newlands Project Credit Water ("NPCW") shifts from TCID to

1 the United States and the provisions for NPCW result in a diminution of actual credit
2 water currently available to TCID via OCAP.

3 88. TROA results in violation of California law. The use of water stored in
4 Stampede Reservoir is subject to a California State Water Resources Control Board
5 permit. Stampede Reservoir's original application and resulting permit require that
6 Stampede Reservoir water be released for use within the Newlands Project for irrigation
7 purposes. Nevertheless, under TROA Stampede Reservoir water will instead be moved
8 between Truckee River Reservoirs to facilitate releases of Fish Water to Pyramid Lake,
9 providing no beneficial use to the Newlands Project and directly violating the terms of the
10 Stampede Reservoir permit and California Water Code §§ 1825 and 1831.

11 89. TROA also provides that NPCW not required for diversion to the Newlands
12 Project (pursuant to Truckee Canal Diversion Criteria) will be reclassified as Additional
13 Boca Storage Water, Independence Lake Privately Owned Stored Water and Fish Water
14 or Fish Credit Water depending on a set of characteristics and qualifications. As with
15 many other TROA components this TROA provision impermissibly converts the
16 Newlands Project's *Orr Ditch* decreed water rights to types of water that do not have a
17 decreed water right – Additional Boca Storage Water, Independence Lake Privately
18 Owned Stored Water (which supplies the Truckee Meadows) and Fish Water or Fish
19 Credit Water, for the benefit of Pyramid Lake. Bureau of Reclamation OCAP policies on
20 the implementation of Newlands Project Credit Water also convert Newlands Project
21 Credit Water to water for cui-ui recovery where Newlands Project Credit Water remains
22 in storage in Truckee River reservoirs at the end of the irrigation season. These
23 provisions impermissibly abrogate valid, existing Newlands Project water rights.

24 90. TROA also assumes that privately owned water can be used without
25 permission and for purposes barred by private agreements. TCID and TMWA are the
26 sole tenant-in-common owners of water rights in Donner Lake. Operation of Donner
27 Lake is governed by an agreement related to "Donner Lake Operation and Maintenance
28 Cost Sharing and Use of Donner Lake Water," ("Agreement") entered into by TCID and

1 Sierra Pacific, the predecessor in interest to TMWA in May 1943. The Agreement
2 specifies all permissible uses of Donner Lake water and mandates that releases shall be
3 for the sole use and benefit of the parties to the Agreement.

4 91. TROA ignores the fact that TMWA only owns an undivided one-half interest
5 in the water, and that the Donner Lake water even after it is used by TMWA is to be
6 returned to the Truckee River after September 15 of each year so that it can flow
7 downstream to Derby Dam to be diverted for the Newlands Project. Instead, TROA
8 falsely assumes that Donner Lake water can be partitioned, contrary to the Agreement,
9 and used by TMWA in whatever fashion it cares to. The issues of whether Donner Lake
10 water may be partitioned and whether it may be used for purposes other than those
11 specified in the parties' private Agreement is currently the subject of litigation in
12 California Superior Court (Truckee-Carson Irrigation District v. Sierra Pacific Power Co.,
13 et al., Nevada County Case No. T06-2239C). Until such time as that action is
14 concluded, it is premature for TROA to assume that Donner Lake water may be
15 partitioned and used by TMWA without limitation.

16 92. TROA also calls for Credit Water and Project Water to be used to meet
17 increased minimum releases for Donner Lake. Included in the definition for Project
18 Water contained in TROA is Privately Owned Stored Water (POSW) in Donner Lake,
19 apparently, and without any authority, including the water in Donner Lake owned by
20 TCID.

21 93. TROA also purports to allow TMWA to exchange water in Donner Lake for
22 Fish Credit Water. Since the water in Donner Lake owned by TMWA is an undivided
23 one half interest in common with the TCID, any use of such water as Fish Credit Water
24 can only be done with the express consent of TCID and would otherwise be a breach of
25 the Agreement. Reference is also made in TROA to storage of credit water in Donner
26 Lake. Likewise, no use of Donner Lake for credit storage under TROA can be made
27 without permission from TCID, and would otherwise be a breach of the Agreement.
28 TCID has not given such permission and does not plan to allow such use of Donner

1 Lake water.

2 94. As noted in Plaintiffs' First Claim for Relief, comments to the TROA
3 FEIS/EIR include numerous comments critical of the computer model used to negotiate
4 and develop TROA. The responses to these comments did not address the fundamental
5 flaws in the TROA model. These flaws were known to the TROA negotiators and
6 signatories as far back as 1996, yet it appears nothing was done to correct the errors
7 and uncertainty in the model.

8 95. The United States government's own experts had no faith in the operating
9 model. Internal memoranda from the U.S. Geological Survey include comments such as
10 "It is extremely difficult to separate whether operations are simply personal estimates
11 (usually with little justification) on processes and constants, or whether the choices are
12 actually based on rational analysis or dictated by court cases;" "Because of the lack of a
13 clear understanding of the model's operation, I do not think one can assure the model
14 results are valid;" "[T]he TROA model is such a patchwork of assumptions, physical and
15 political simplifications, and convoluted code that it is difficult to say what the output
16 results might represent or whether they approach a realistic representation of the water
17 system." These admissions indicate Defendants were well aware of the unreliable basis
18 for TROA itself, but proceeded to promulgate it as a federal rule nevertheless.

19 96. TROA additionally violates the separation of powers doctrine under which
20 the executive, legislative and judicial branches of government must be kept distinct to
21 prevent abuse of power. Under TROA the Water Master appointed by the Orr Ditch
22 Court to carry out and enforce the provisions of the Decree is replaced by an
23 Administrator nominated by a committee of TROA signatories, whose nomination must
24 be approved by the "sovereign" TROA signatories (United States, Nevada, California,
25 and PLIT), and who can only be removed by these same parties. Replacing the Water
26 Master with the Administrator who is appointed based on the preference of TROA
27 signatories interferes with the *Orr Ditch* Court's authority and violates the separation of
28 powers doctrine.

1 97. Similarly, TROA requires that administrative remedies be exhausted before
2 a Special Hearing Officer appointed by a four-member committee of the sovereign TROA
3 signatories. These provisions grant entirely too much decision making power for
4 managing the Truckee River to the TROA Signatories. Even if the *Orr Ditch* Court may
5 ultimately hear a dispute involving decreed water rights, the initial administrative
6 determination will be tainted with bias and the burden will likely be placed on those
7 parties who are not signatories to TROA.

8 98. TROA violates a number of Nevada Water code provisions. Under TROA,
9 water rights owners will store water in the upstream reservoirs in California and will
10 purportedly place the water to beneficial uses in California and Nevada as set forth in
11 applications for secondary permits. The secondary permit applications already filed
12 under TROA by TMWA identify at least three separate and distinct uses for the same
13 water, including municipal, wildlife and power generation. The use of the same water for
14 multiple purposes at multiple places of use violates NRS §533.330, which only permits a
15 water right to be used for a single purpose at a single place of use. By the use of
16 multiple secondary applications, TROA improperly circumvents the jurisdiction of the
17 State Engineer and the *Orr Ditch* Court, depriving them of their authority to review
18 changes in manner and place of use and to determine for each change whether it is
19 detrimental to the public interest or if it will injure existing water rights.

20 99. The storage, accumulation, trade, exchange, and multiple uses of water
21 under the TROA management scheme also violates NRS §533.040, which requires that
22 water used for beneficial purposes to remain appurtenant to a single place of use.
23 Under TROA, there is no way for the State Engineer or other water users to determine
24 when water is traded or exchanged and whether it remains appurtenant to the place of
25 use. TROA allows changes without any notice so that it is impossible to determine if the
26 water is being used at the single place of appurtenancy.

27 100. Under NRS §533.045, the right to divert water ceases when necessity for
28 its use does not exist, and water may not be diverted or used except at such times as

1 the water is required for a beneficial purpose. And the right to use water is limited to the
2 amount necessary, and when water is not necessary it must be allowed to flow in the
3 river and cannot be considered to have been appropriated. NRS §533.060. TROA's
4 provisions, allowing carry over storage and conversion to fish credit water, violates these
5 statutory provisions. If the water is not necessary, then there is no right to divert and
6 store it under TROA, and the water should remain in the river and not be credit stored.
7 Requiring water that is not necessary for use to remain in the river is also in line with the
8 TRA saved water and diverted flow requirements.

9 101. Appropriate losses for storage and conveyance of water must be
10 determined by the State Engineer. NRS §533.055. TROA provides that conveyance
11 losses shall be calculated by the Administrator using procedures developed by the
12 Administrator. This is a clear violation of NRS §533.055 and directly interferes with the
13 authority of the State Engineer.

14 102. TROA specifically contemplates exchanging water by diverting it and
15 replacing water with a compensating release, including exchanges for Fish Water or Fish
16 Credit Water specifically designed to flow to Pyramid Lake. Once water is credit stored,
17 TROA provides that it may be traded by Scheduling Parties with approval of the TROA
18 Administrator. The State Engineer will have no opportunity to approve these "trades."
19 Thus, under TROA, the water user is permitted to decide when, how much and where
20 the water can be transferred to during any given year without any further scrutiny by the
21 State of Nevada, and as established by the Orr Ditch Court.

22 103. TROA also violates Nevada law and the Reclamation Act by creating new
23 purposes for water subject to already-existing, binding category determinations and
24 allowing such changes to occur without the required formal approval process.

25 104. By the foregoing actions and omissions in evaluating, drafting, and
26 promulgating TROA as a federal regulation, Defendants violated the APA, 5 U.S.C. §
27 706(2), by acting arbitrarily, capriciously, in an abuse of discretion, not in accordance
28 with the law and/or without observance of procedures required by law.

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3 VII. THIRD CLAIM FOR RELIEF

4 (Violation Of The Federal Advisory Committee Act and the Administrative
5 Procedure Act)

6 105. Plaintiffs hereby reallege and reincorporate each and every paragraph
7 above.

8 106. The Federal Advisory Committee Act ("FACA"), 5 U.S.C. Appendix II, §§ 1
9 *et seq.*, imposes requirements on agencies when they establish or utilize any advisory
10 committee, which is defined as a group of individuals, including at least one non-federal
11 employee, that provides collective advice or recommendations to the agency. 5 U.S.C.
12 App. II, § 3(2). When an agency seeks to obtain such advice or recommendations, it
13 must ensure the advisory committee is "in the public interest," *id.* App. II, § 9 (a)(2), is
14 "fairly balanced in terms of points of view represented and the function to be performed,"
15 *id.* § 5(b)(2), and does not contain members with inappropriate special interests. *id.* §
16 5(b)(3). If these criteria are satisfied, the agency must file a charter for the committee.
17 *id.* § 9(c).

18 107. Once an advisory committee is operating, the agency also must comply
19 with requirements designed to ensure public access and participation. Among other
20 requirements, an advisory committee must provide adequate public notice of, and
21 conduct, open meetings, *id.* § 10(a), and must make transcripts of meetings available to
22 the public. *id.* §§ 10(b), 11(a). In addition, all documents made available to, or prepared
23 by, an advisory committee must be publicly accessible. *id.* § 10(b). A federal employee
24 must also chair, or attend, each advisory committee meeting. *id.* § 10(e).

25 108. The TROA negotiation process was subject to the requirements of the
26 FACA. TROA negotiation meetings were comprised of a fixed roster of attendees who
27 were used as a source of advice and recommendations to the DOI/BOR. Indeed, the
28 FEIS/EIR indicates that the DOI/BOR relied on advice and recommendations of

1 particular TROA negotiating parties, each with its own interest to promote, to reject water
2 allocation models other than TROA. And it is known that most of the computer modeling
3 for TROA was accomplished by a private party, SPPC, and most of the drafting of the
4 document, which was intended to be and in fact became a *federal rule*, was done by the
5 attorney for SPPC.

6 109. Defendants were required to ensure that TROA negotiating participants'
7 advice to the agency would be "in the public interest," "fairly balanced in terms of points
8 of view represented and the function to be performed," and would not contain members
9 with inappropriate special interests. This was not done. Furthermore, the agency did not
10 file a charter for the committee as required. Nor were financial disclosure filings made
11 by committee members.

12 110. In addition, the DOI/BOR did not provide adequate public notice of TROA
13 negotiation sessions and did not conduct them as open meetings. DOI/BOR has not
14 made transcripts of meetings available to the public nor made publicly accessible all
15 documents made available or prepared by the TROA advisory committee.

16 111. By the foregoing actions and omissions Defendants violated the FACA, 5
17 U.S.C. Appendix II, §§ 1 *et seq.*, and the APA, 5 U.S.C. § 706(2), by acting arbitrarily,
18 capriciously, in an abuse of discretion, not in accordance with the law and/or without
19 observance of procedures required by law.

20 VIII. FOURTH CLAIM FOR RELIEF

21 (Injunctive Relief)

22 112. Plaintiffs hereby reallege and reincorporate each and every paragraph
23 above.

24 113. Unless preliminary and permanent injunctions are issued enjoining
25 Defendants from implementing TROA, Plaintiffs, their members and residents living
26 within the Newlands Project and subject to TROA, will suffer irreparable harm.

27 114. Plaintiffs do not have a speedy or adequate remedy at law because
28 Defendants actions pose an immediate danger to the health and safety of Plaintiffs, their

1 members and residents living within the Newlands Project and subject to TROA.

2 WHEREFORE, Plaintiff prays for relief as follows:

3 A. An order declaring that the FEIS/EIR did not comply with NEPA and the
4 APA.

5 B. An order declaring that TROA as a federal regulation does not comply with
6 the APA.

7 C. An order setting aside the FEIS/EIR and the subsequent Notice of Decision
8 and requiring the Defendants to prepare a supplemental and adequate Environmental
9 Impact Statement conforming to the requirements of NEPA.

10 D. An order setting aside TROA as a federal regulation.

11 E. An injunction preventing Defendants from taking action to implement TROA
12 as a federal regulation and as the operating agreement governing storage and release of
13 waters from the Truckee River until such time as (1) a supplemental Environmental
14 Impact Statement/Environmental Impact Report with adequate analysis of TROA's
15 impacts and reasonable alternatives to TROA is completed and approved; (2) a
16 reasonable substantive and procedural basis is established for a revised federal rule that
17 is not violative of the APA; (3) the requirements of FACA are established and satisfied in
18 connection with a revised and reevaluated TROA.

19 F. That the Court grant Plaintiffs their costs of suit including reasonable expert
20 witness and attorney fees.

21 G. That the Court grant such further and other relief as the Court deems just
22 and proper.

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DATED: April 2, 2009

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