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STATE WATER RESOURCES
CONTROL BOARD
10 JUL 23 AM 10:49
DIV. OF WATER RIGHTS
SACRAMENTO

9 Attorneys for
10 Truckee-Carson Irrigation District

11 STATE WATER RESOURCES CONTROL BOARD OF THE STATE OF
12 CALIFORNIA

13 IN THE MATTER OF WATER RIGHT
14 APPLICATIONS 31487 LITTLE
15 TRUCKEE RIVER, and 31488
16 PROSSER CREEK AND PETITIONS
17 TO CHANGE APPLICATION NOS.
18 5169 BOCA RESERVOIR, 9247
19 INDEPENDENCE LAKE, 15673,
20 STAMPEDE RESERVOIR, 18006
21 PROSSER CREEK RESERVOIR,
22 FILED BY THE UNITED STATES
23 DEPARTMENT OF THE INTERIOR,
24 BUREAU OF RECLAMATION,
25 TRUCKEE MEADOWS WATER
26 AUTHORITY, AND WASHOE
27 COUNTY WATER CONSERVATION
28 DISTRICT TO IMPLEMENT THE
TRUCKEE RIVER OPERATING
AGREEMENT

OPPOSITION TO TRUCKEE MEADOWS
WATER AUTHORITY'S MOTION TO
EXCLUDE TESTIMONY, EXPERT REPORTS
AND EXHIBITS

Date: July 21, 2010
Time: 9:00 a.m.
Dept.: Coastal Hearing Room

I. INTRODUCTION

This late filed motion by the Truckee Meadows Water Authority ("TMWA ") is styled as a Motion to Exclude Testimony, Expert Reports and Exhibits, which it claims are unrelated to issues before the State Water Resources Control Board ("State Board") in this matter. Specifically, TMWA wishes to exclude evidence related to jurisdiction of the State Board over *Orr Ditch* Decree water rights that are implicated in this proceeding, and the consumptive use value of TMWA's *Orr Ditch* water rights that

1 are proposed to be converted for storage under the Truckee River Operating
2 Agreement ("TROA"). For the reason stated below, this motion is not only untimely, it
3 is complete without merit and must be denied.

4 The testimony which TMWA proposes to exclude provides the background of
5 the agreements and compromises that resolved conflicts which arose while many of
6 the subject California reservoirs were first being permitted. Applicants and Petitioners
7 in these proceedings have been permitted to testify extensively about the background
8 and underpinnings of the various reservoirs and operational and management history
9 that has driven them to negotiate the TROA. Now they seek to block the Protestants
10 from providing the same type of background information that led to the construct of the
11 Truckee River Agreement and the original approvals of permits for the reservoirs at
12 issue in this hearing. The motion if granted would cause a violation of the due process
13 rights of the Protestants.

14 Further, the *Orr Ditch* Decree Court has exclusive jurisdiction over the water
15 rights implicated in this proceeding, and the State Board cannot grant the change
16 petitions in this matter without violating the Truckee River Agreement ("TRA") and the
17 *Orr Ditch* Decree. Further, it is a better use of judicial and administrative economy for
18 the State Board to wait to act on the change petitions and applications until TROA is
19 approved by the *Orr Ditch* Decree Court and the Decree is modified. Finally, the
20 consumptive use analysis provided by TCID is directly related to the issue of injury to
21 existing water rights, which must be considered by the State Board and cannot be
22 deferred to another administrative and judicial proceeding. Therefore, TMWA's motion
23 should be denied.

24 II. BACKGROUND

25 The State Water Resources Control Board ("State Board") noticed Petitions for
26 Change for Licenses 3723, 4196, 10180 and Permit 11605 (collectively referred to as
27 "Petitions") and Applications to Appropriate Water by Permit 31487 and 31488
28 (collectively referred to as "Applications") on January 30, 2007. (TCID-198) The

1 Applications and Petitions were submitted to implement one project, the Truckee River
2 Operating Agreement ("TROA"). The negotiation and promulgation of the TROA was
3 provided for by the Truckee-Carson-Pyramid Lake Settlement Act, P.L. 101-618, 104
4 Stat. 3289, November 16, 1990 (the "Settlement Act").

5 TROA is intended to replace the Truckee River Agreement of 1935, which is
6 currently used to operate the Truckee River, and which is incorporated by reference in
7 the *Orr Ditch Decree (U.S. v. Orr Water Ditch Co., Equity A-3-LDG U.S. District Court,*
8 *Nevada, September 8, 1944)*. The TRA, which will be superseded by TROA, requires
9 the Truckee River to be operated on the basis of Floriston rates. Under TROA, the
10 Change Petitions provide for redistribution of storage within Boca, Independence,
11 Stampede, and Prosser. The January 30, 2007 Notice of the Petitions and
12 Applications provides that the points of diversion and rediversion for the proposed
13 changes include numerous points of diversion identified in the *Orr Ditch Decree*,
14 including Derby Dam and Truckee Canal, which supplies Claim 3 water from the
15 Truckee River to the Newlands Project. (TCID-198 at pp. 9-11) Likewise, each
16 Change Petition includes the same *Orr Ditch* diversion points.

17 Among the issue raised in the Notice as a possible basis for protesting includes:

18 1) Interference with prior water rights, 2) Not in the public interest, 3) Contrary to law,
19 and 4) Not within the jurisdiction of the State Water Board. *Id.* at p. 16. Protests were
20 filed on behalf of the Truckee Carson Irrigation District ("TCID"), Churchill County, and
21 the City of Fallon (collectively "Protestants") related to the State Board's
22 implementation of each Application and Petition to change individually, as well as the
23 State Board's implementation of TROA as a whole. Numerous protest points were
24 raised related to the TRA and impacts to *Orr Ditch* decree water rights, including that
25 Applications 31487 and 31488 (§26) and the Petitions to Change (§31) under the
26 operation of TROA violate the *Orr Ditch* Decree, and attempt to re-allocate water
27 already adjudicated to other water right owners by the *Orr Ditch* Court and to store
28 water that would otherwise be diverted at Derby Dam or stored in Lahontan Reservoir

1 for irrigation in the Newlands Project.¹

2 The Protestants have claimed that, "the State Board does not have jurisdiction
3 to allocate Truckee River water belonging to Newlands Project water right owners,
4 Churchill County and the City of Fallon," which are governed exclusively by the *Orr*
5 *Ditch* Court. Protest ¶¶44. Historical return flows are addressed in Protest ¶¶36 and
6 ¶¶90.g, which requests that current return flows existing under the TRA and *Orr Ditch*
7 Decree are preserved. Finally, Protestants requested that the restrictions and
8 requirements of the TRA and the *Orr Ditch* Decree are imposed on TROA. ¶¶90.d. The
9 Notice of Public Hearing in this matter was issued on April 19, 2010, and called for an
10 exchange of testimony and exhibits on June 29, 2010. Key issues identified in the
11 Hearing Notice include injury to water users and impacts to public trust resources.

12 III. ARGUMENT

13 A. It Is Improper To Limit Evidence Before The State Board, Which 14 Must Make An Independent Determination Under California Law

15 There is no procedure in the California Water Code or the adjudicative
16 proceedings before the State Board (23 CCR § 648 *et seq*) which allow a petitioner to
17 limit the evidence presented by a protestant or to limit the scope of review by the State
18 Board. Tellingly, TMWA provides no authority for its request to exclude testimony in
19 this matter. There is simply no procedural mechanism that allows the petitioner to
20 attempt to influence these proceedings in this fashion. The Protestants must be
21 provided a chance to fully present their protest issues and the related testimony and
22 evidence must be fully considered by the State Board in making its determination.
23 Further, as discussed below, the information TMWA proposes to exclude is germane to
24 the issues required to be considered by the State Board and which were specifically
25 asked to be addressed.²

26 ¹ References to specific protest points relate to the paragraphs in which they appear in the Protest to
27 Petition to Change Stampede Reservoir (Application 15673).

28 ² In a March 12, 2010 letter on behalf of the Petitioners in this matter Mr. Richard Woodley of the Bureau
of Reclamation to Victoria Whitney, Chief, Division of Water Rights raises many of the same issue
TMWA raises in its Motion to Exclude. TCID responded in a letter to the State Board dated March 31,
2010.

1 The thrust of TMWA's argument is that the State Board need not address issues
2 which they claim will be addressed in other administrative or adjudicative proceedings,
3 namely before the Nevada State Engineer and the *Orr Ditch* Court. However, the
4 Water Code provisions (§1200 et seq.) and regulations (23 CCR §650 et seq.) related
5 to the appropriation do not allow other administrative and judicial forums to make the
6 determinations required to be made by the State Board. The same applies to petitions
7 for change under Water Code §1700 et seq, or under 23 CCR § 791 et seq. TMWA's
8 suggestion that the State Board need not fully act on these Applications and Petitions
9 because other agencies and judicial proceedings in Nevada are acting is unavailing.
10 The State Board cannot ignore the detailed statutory and regulatory requirements in
11 making the relevant determinations. *Central Delta Water Agency v. State Water*
12 *Resources Control Bd.*, 124 Cal. App. 4th 245, 262 (Cal. App. 3d Dist. 2004). The
13 State Board has an independent obligation to address the protest points raised as a
14 result of the dramatic change to the Truckee River diversions, storage and releases
15 proposed in this matter.

16 **B. The *Orr Ditch* Decree Court's Exclusive Jurisdiction Should Prevent**
17 **The State Board From Acting Until TROA Is Approved And The**
18 **Decree Is Modified**

19 TMWA requests the exclusion of certain sections of the testimony of Lyman
20 McConnell (TCID-282), former TCID Project Manager. These sections relate to the
21 jurisdiction of the *Orr Ditch* Court (pg. 7, ln. 4 to ln. 17), and the historic underpinning's
22 of the TRA's resolution of Application 5169 and 9247, which are subject to the Change
23 Petitions presently before the Board (pg. 8, ln. 14 to pg. 10, ln 26.). The latter
24 testimony provides the background of the agreements and compromises that resolved
25 conflicts which arose while many of the subject California reservoirs were first being
26 permitted. Specifically, it addresses the Truckee River Agreement ("TRA"), which
27 allowed the stipulation signed by the parties to enter a final decree in the *Orr Ditch*
28 case. This testimony provides the historical context and lays the foundation for the
changes proposed by TROA and should be considered by the State Board.

1 The testimony of Mr. McConnell related to the *Orr Ditch* Court's jurisdiction
2 raises two similar and related arguments. First, because of the *Orr Ditch* Decree Court
3 has continuing and exclusive jurisdiction over adjudicated water right, the "[State
4 Board] cannot take any action that deprives the *Orr Ditch* Court of exclusive
5 jurisdiction, or that violates the existing decree, including, the incorporation of the TRA
6 and the Floriston Rate management structure." (TCID-282 at p. 7). The second issue
7 is one of administrative and judicial economy, and "[i]t should be the *Orr Ditch* Court
8 that acts first on the Applicant's attempted change in the management scheme of the
9 Truckee River to implement TROA before the SWRCB can act on the subject
10 Applications and Petitions." *Id.* The issue of jurisdiction also implicates the public
11 interest.

12 **1. The Operation of the Applications and Petitions under TROA**
13 **Directly Implicate *Orr Ditch* Decree Water Rights, Including**
14 **TMWA's *Orr Ditch* Rights.**

14 TMWA claims that the Petitions and Applications "which are subject to this
15 proceeding do not involve any issues concerning changes to *Orr Ditch* Decree
16 irrigation rights . . ." Motion to Exclude at p. 2. Further, TMWA claims that "[t]he water
17 rights which are the subject of the Change Petitions here were not adjudicated by the
18 *Orr Ditch* Decree." However, the very proposed reason for TROA is to improve
19 operational flexibility in the Truckee River, including the operation of *Orr Ditch* Decreed
20 rights on the Truckee River.

21 The January 30, 2007 Notice and related Change Petitions propose the
22 redistribution of storage of Truckee River water within Boca, Independence, Stampede,
23 and Prosser. The points of diversion for the proposed changes includes numerous
24 points of diversion identified in the *Orr Ditch* Decree, including Derby Dam and Truckee
25 Canal, which supplies Claim 3 water from the Truckee River to the Newlands Project.
26 (TCID-198 at pp. 9-11.) Changes to Boca Reservoir also directly implicates the TRA
27 and *Orr Ditch* Decree rights. Further, the written testimony of TMWA's witness Don
28 Mahin describes purchase of *Orr Ditch* Decree water rights from the Truckee Division

1 as part of the Water Quality Settlement Agreement and the supposed benefit of credit
2 storing this water under TROA. See TMWA 4-0.

3 Because the State Board is considering all Applications and Petitions as a joint
4 project, it must also consider TROA's impacts on Lake Tahoe, including impacts on the
5 related *Orr Ditch* claim 3 and 4 water rights, even though those structures have pre-
6 1914 rights under California law. Or, more importantly, the *Orr Ditch* Court must
7 approve these changes before the State Board acts.³

8 Further, TMWA's *Orr Ditch* Decree water rights converted for use under TROA
9 in Nevada are specifically proposed to be stored in these reservoirs. TMWA claims it
10 has made no filing concerning changes with the State Board. This however does not
11 mean the State Board should not consider the impacts of the proposed storage in this
12 proceeding, including whether it has jurisdiction to approve the Change Petitions,
13 which when operated under the proposed TROA management scheme would violate
14 the *Orr Ditch* Decree.

15 In February through March of 2006 TMWA, along with the Cities of Reno and
16 Sparks, filed 59 change applications ("TMWA Applications") with the Nevada State
17 Engineer for storage in California of *Orr Ditch* Decree water rights with secondary
18 permits for beneficial uses allowed by TROA. (TCID-233)⁴ TMWA's applications in

19 ³ In general TROA and its operation under the Applications and Petitions has the potential to impact all
20 *Orr Ditch* Decree water rights stored in the California Reservoirs. Under TROA the parties to the
21 agreement are free to use any part of their water rights for any use under TROA. TROA provides for
22 changes in water rights and allows water to be "exchanged" or re-stored. TROA § 7.A. "Exchange"
23 means

24 the transfer of water from one category to another by **Trade, In-Lieu Release**, retaining
25 water in accordance with Section 8.K.2(a), diverting water and replacing the water with
26 a compensating **Release** pursuant to Section 6.C.1(c), or foregoing the right to divert
27 water from a stream and replacing that water by converting an equal amount of water in
28 a reservoir pursuant to Section 7..3(a)(3).

25 TROA specifically contemplates exchanging water by diverting it and replacing water with a
26 compensating release, including exchanges for Fish Water or Fish Credit Water. It is the impacts of
27 these TROA operations that was modeled in the TROA EIS/EIR, which indicates increased shortages to
28 the Newlands Project. See Knox Testimony (TCID-276B) These TROA operations, which require a
modification of the *Orr Ditch* Decree, should be addressed first by the Decree Court.

⁴ Exhibit TCID-233 is the first application filed by TMWA in Nevada and is essentially identical to the

1 Nevada indicate that the points of diversion for this water in California in Lake Tahoe,
2 Donner Lake, Prosser Reservoir, Boca Reservoir, Stampede Reservoir, and
3 Independence Lake. (See TCID-233, Ex. B) The last four are the subject of the
4 Change Petitions in this proceeding. The Remarks section states that the applications
5 “seek to add the [California Reservoirs] as additional points of diversion for the
6 consumptive use component of the water right . . .” *Id.* Finally, the secondary
7 applications that provides for use of water for wildlife purposes indicate that the
8 proposed place of use is in both California and Nevada extending from the California
9 reservoirs to Pyramid Lake. (TCID-235).

10 The TMWA Applications involve *Orr Ditch* irrigation water rights that have been
11 previously changed to municipal and industrial use (“M&I”) starting in 1955, and now
12 propose beneficial use under TROA. (See TCID-244B, Table 1) These *Orr Ditch* water
13 rights will be stored under TROA in the subject California reservoirs as provided in
14 TROA §4.B. (TCID-277) Further, TMWA is authorized to credit store this water in the
15 reservoirs that are subject to this hearing under TROA § 7.B. The testimony of
16 TMWA’s witness Marc Van Camp acknowledges that TMWA plans to store this *Orr*
17 *Ditch* water in Boca, Stampede, Independence, Prosser and other reservoirs. See
18 TMWA 3-0 at ¶35. The storage of TMWA’s water rights in California requires a change
19 in the TRA Floriston Rate Structure. See Nevada State Engineer Interim Order No 1. at
20 p. 4 (TCID-259)

21 The Nevada State Engineer recognized that it could not directly address the
22 storage in California of TMWA’s water to be used under TROA, and in Interim Order
23 No. 1 states:

24 Nevada Revised Statute § 533.055 provides for the storage of water,
25 whether stored in Nevada or in an adjoining state. Nevada Revised
26 Statute § 533.515 provides that a change application may not be denied
27 because the point of diversion or any portion of the works are situated in
another state, but if the intended place of use is in Nevada, the Applicant
needs a permit. TMWA does not need a permit from the Nevada State
Engineer to store any of this water in California.

28 other 59 applications.

1 TCID-259 at pp 12-13. What TMWA needs to store this *Orr Ditch* water in California is
2 the operation of TROA and the approval by the State Board of the subject Change
3 Petitions.⁵

4 **2. The State Board Cannot Grant The Change Petitions Without**
5 **Violating the *Orr Ditch* Decree.**

6 The Applications and Petitions were submitted to implement one project, and
7 are predicated on the approval of TROA. See Notice (TCID-198 at p. 2) In order for
8 these changes to go into effect there must be modifications to the *Orr Ditch* Decree
9 and the TRA. Specifically, TROA must be submitted to the *Orr Ditch* Decree Court for
10 approval and possible modifications of the decree. (See TROA §§12.A.4(b) and (c)).
11 Further, TROA "supersedes all requirements of any agreements concerning the
12 operation of the Truckee River Reservoirs including those of the Truckee River
13 Agreement." TROA §5.A.1(a). The *Orr Ditch* Decree, on page 86, approved and
14 adopted the TRA and made it a part of the Decree and stated it shall be binding as
15 between the signatories. (TCID-49) Therefore, the State Board cannot grant these
16 Applications without violating the existing *Orr Ditch* Decree and the TRA.

17 ⁵ TMWA relies heavily on the determination made by the Nevada State Engineer to support its
18 argument that the State Board should not defer action until the *Orr Ditch* Court acts to approve TROA.
19 However, the Nevada State Engineer has not been consistent in his position related to TROA. He
20 refused to consider TROA and the required modification to the TRA and the *Orr Ditch* Decree in
21 approving TMWA's change applications in Ruling 6035. See Interim order No 1. at p. 9 (TCID-259).
22 Ruling 6035 has been appealed and TCID believes that the State Engineer over stepped his authority in
23 approving change applications that violate the *Orr Ditch* decree as is presently exists.

24 Taking an apparent conflicting position, the State Engineer is allowing TROA to run its course in
25 regards to applications 15664, 24310, 24311, and 24312 filed by the Bureau of Reclamation ("BOR")
26 (TCID-82, 121-123) These applications were filed in 1954 (Application No. 15664) and 1968
27 (Applications Nos. 24310, 24311, and 24312) by the BOR to appropriate waters of Little Truckee River
28 for storage in Stampede Reservoir. In 2005 the State Engineer, in an attempt to take action on these
applications, inquired as to the BOR's intention. (See May 11, 2005 letter from Susan Joseph-Taylor to
Kirk Rodgers, BOR Regional Director; TCID-198) Because these applications are "potentially important
to the TROA process and future implementation," the BOR requested the State Engineer to "continue to
hold the Stampede related Water Right Applications 15664, 24310, 24311, and 24312 in abeyance
until TROA is approved and implemented." (See letter to Susan Joseph-Taylor from Donna E.
Tegelman, BOR Regional Resource Manger, dated August 2, 2005 at p. 2; TCID-191) The BOR takes
the position that "it would appear prudent for the State Engineer to defer any formal action on the
Applications in question until the TROA process and the related California water right actions have been
completed." *Id.* These applications are still pending before the State Engineer, who apparently accepted
the position presented by the BOR.

1 The Applications are inconsistent with the *Orr Ditch* Decree as it is currently
2 written and it would certainly be detrimental to the public interest and counter to
3 existing law to approve the Applications and Petitions. Further, it is not sufficient to
4 condition the approval of the Applications and Petitions on the *Orr Ditch* Decree
5 Court's approval of TROA, especially when we have no idea what the final TROA will
6 look like. "The Water Board cannot ignore the detailed statutory and regulatory
7 requirements it must meet in issuing a permit to appropriate water and cannot satisfy a
8 duty imposed on it by the state Constitution and the Water Code in issuing a permit by
9 placing it in a condition to a permit." *Central Delta Water Agency v. State Water*
10 *Resources Control Bd.*, 124 Cal. App. 4th 245, 262 (Cal. App. 3d Dist. 2004).

11 Because the Applications and Petitions can only be analyzed in the context of
12 TROA, and TROA can only take effect after the *Orr Ditch* Decree is modified to
13 accommodate the significant changes that TROA proposes, the State Board cannot
14 properly and adequately evaluate the effect of proposed changes on existing water
15 rights and whether they are detrimental to the public interest until the *Orr Ditch* Court
16 has reviewed TROA and has accepted modifications to the *Orr Ditch* Decree, including
17 the wholesale substitution of TROA for the TRA, which now governs the management
18 of the Truckee River. It would be clear error to approve the Applications and Petitions,
19 which cannot currently be accomplished under the *Orr Ditch* Decree. No one, not the
20 State Board, not TCID, not even TMWA knows how, if, or to what extent TROA will
21 allow reductions to Floriston Rates. The reason being that until TROA is approved with
22 potential modification by the *Orr Ditch* Court, it has no effect.

23 The issue of the State Board's jurisdiction and whether the proposed changes
24 are contrary to law were specifically presented as a potential protest factor in the
25 January 30, 2007 Notice. (TCID-198) These issues deserve full development at the
26 hearing scheduled before the State Board. Therefore, the related McConnell
27 testimony should not be excluded and TMWA's motion should be denied.
28

1 3. **The Interstate Nature Of These Applications Require That The**
2 ***Orr Ditch* Court Act First.**

3 TMWA, apparently recognizing the interstate nature of the changes under
4 TROA and the related Applications and Petitions, suggests that the State Board has no
5 jurisdiction over these water rights unless appointed to act by the *Orr Ditch* Court.
6 Although, TCID agrees that the State Board is without jurisdiction, it does not believe
7 the solution, as used on the Walker River system, is to have the Court appoint the
8 State Board as a special master. Rather, the solution is to have the *Orr Ditch* Court act
9 first to approve TROA and modify the decree. This is consistent with the directly
10 related *Alpine* Decree and the Settlement Act (TCID-135).

11 The Federal District Court maintains exclusive and continuous jurisdiction over
12 water rights under the *Orr Ditch* and *Alpine* decrees. See *United States v. Alpine Land*
13 *& Reservoir Co.*, 174 F.3d 1007, 1011(9th Cir. 1999) (“We conclude that the district
14 court’s jurisdiction over disputes arising under the *Alpine* and *Orr Ditch* Decrees is both
15 continuing and exclusive.”) This includes “jurisdiction to determine the proper forum for
16 decision of disputes regarding *Orr Ditch* decreed water rights under its continuing
17 jurisdiction of the *Orr Ditch* decree.” *United States v. Orr Water Ditch Co.*, 914 F.2d
18 1302, 1306 (9th Cir. Nev. 1990). Further, it is the Decree Court, not the State Board
19 that “expressly reserves jurisdiction to modify, amend, eliminate, add to or change any
20 provision of this Decree.” *Alpine* Decree Administrative Provision XIII.

21 As TMWA points out, changes to *Orr Ditch* Decree water rights are filed first
22 with the Nevada State Engineer. This is because the *Orr Ditch* Decree adjudicated
23 water rights almost exclusively in Nevada. It was not contemplated, and there is no
24 specific provision for interstate changes to water rights in the *Orr Ditch* Decree. In fact,
25 it is TROA that allows for interstate changes of *Orr Ditch* rights, which have never
26 previously been proposed. For this to occur, TROA must first be approved by the *Orr*
27 *Ditch* Court. See P.L. 101-616 §205(a)(4) (TCID-135).

28 However, the *Alpine* Decree adjudicated water rights in both California and

1 Nevada. (TCID-134) The Alpine Court recognized that “the state law procedures for
2 change applications are markedly different in California and Nevada,” including riparian
3 rights in California. *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877,
4 892 (D. Nev. 1980) Because of the inherent jurisdictional problems from one state
5 acting unilaterally on an applications for change directed at both states, the *Alpine*
6 Decree states that:

7 Applications for changes in the place of diversion, place of use or manner
8 of use as to California or as to both California and Nevada shall be made
9 directly to this Court in accordance with the regular rules and procedure
10 and notice must be served on all affected interests.

11 Administrative Provision VII at p. 162. *Id.* The *Orr Ditch* and *Alpine* Decrees have
12 always been interpreted consistently and in parallel, and this provision also should
13 apply in the present matter. See *U.S. v. Orr Water Ditch Co.*, 914 F.2d 1302, 1308 (9th
14 Cir. 1990) (“The *Alpine Land* litigation on Carson River water rights parallels the *Orr*
15 *Ditch* litigation . . . The Carson River decree is more specific than the *Orr Ditch* decree
16 about who handles change applications.”); See Also *U.S. v. Alpine Land & Reservoir*
17 *Co.*, 510 F.3d 1035, 1037 (9th Cir. 2007) (“The *Orr Ditch* Decree was involved in
18 certain of the cases and the *Alpine* Decree was involved in others, but the basic
19 principles we will apply do not differ from decree to decree.”)

20 The reason that changes in the place of diversion, place of use or manner of
21 use as to California must go directly to the decree court is an issue of jurisdiction.
22 “[T]he *Alpine* and *Orr Ditch* Decrees were complex and comprehensive water
23 adjudications for which conflicting federal and state constructions would be entirely
24 unworkable, the district court’s retention of jurisdiction was intended to be exclusive.”
25 *United States v. Alpine Land & Reservoir Company*, 174 F.3d 1007, 1013 (9th Cir.
26 1999). Here, the Change Petitions propose to change the place of diversion (re-
27 diversion), place of use, and manner of use of *Orr Ditch* rights in both California and
28 Nevada for uses under TROA. Because the decrees are interpreted consistently, the
State Board should allow the *Orr Ditch* court to first address the interstate changes of

1 decreed rights proposed by TROA. This would also be consistent with the Settlement
2 Act which requires that TROA be submitted to the *Orr Ditch* Court “ for approval and
3 any necessary modifications in the provisions of the Orr Ditch Decree.” See P.L. 101-
4 616 §205(a)(4) (TCID-135).

5 Cases dealing with the potential for contradicting determinations related to
6 decreed water rights have avoided any inconsistencies by deferring to the decree
7 court. The case of *Mineral County v. State, Dep’t of Conservation and Natural*
8 *Resources*, 20 P.3d 800 (Nev. 2001) involved a petition for writ of prohibition to
9 prevent the Department of Conservation and Natural Resources from granting
10 additional rights to withdraw surface water or groundwater from Walker River System,
11 adjudicated under the Walker River Decree. The Petitioners claimed that future
12 actions by the Nevada State Engineer will threaten to decrease water flows to Walker
13 Lake. The court found that the decree court, which had continuing involvement in the
14 monitoring of the Walker River, was the proper forum for the redress that Petitioners
15 sought. The *Mineral County* court reasoned “because the Decree involves the
16 allocation of interstate waters between California and Nevada, we believe that a
17 consistent and controlling interpretation by a federal court of competent jurisdiction is
18 more appropriate.” *Id.* at 807. Likewise here, the consistent and controlling
19 interpretation by the *Orr Ditch* Decree Court related to TROA is necessary, and the
20 State Board should not act until TROA is finalized and the Decree is appropriately
21 modified.

22 **4. It Is A Waste Of Judicial Economy And the State Board’s**
23 **Resources To Proceed On The Applications Until TROA Is**
24 **Approved And The *Orr Ditch* Decree Modified.**

25 TMWA claims that it is “a waste of the resources of the State Board and of the
26 parties to this proceeding for the State Board to hold hearing and then defer action
27 until after the Orr Ditch Court acts to modify or amend the Orr Ditch Decree.” Motion to
28 Exclude at p. 3. TCID agrees with this position. However, TMWA’s solution of
ignoring the *Orr Ditch* Court’s jurisdiction over these water right only makes the

1 situation worst.

2 As a practical matter it makes more sense to allow for the approval of TROA
3 and modification of the *Orr Ditch* Decree before the State Board takes action on these
4 Applications and Petitions. Why go through an administrative proceeding before the
5 State Board that will never go into effect if TROA is not approved or if it is extensively
6 modified? If the final approval and implementation of TROA ultimately must go before
7 the *Orr Ditch* Court, then it would appear to be prudent to start there rather than to
8 conduct proceedings in California before TROA is finalized, potentially modified, and
9 approved by the Court that ultimately has jurisdiction over these water rights. Further,
10 it would be a waste of administrative economy to approve the change Applications
11 contingent on the proposed TROA regulation that may well change before it is finally
12 implemented. The *Orr Ditch* Court may not agree with the way TROA is written and
13 not allow the modifications to the Decree as envisioned by the TROA signatories. This
14 could well result in changes to TROA which were not anticipated by the State Board in
15 approving these Applications and Petitions. Moreover, the modifications to the Decree
16 could entirely contradict any determination made by the State Board, resulting in
17 additional hearings. It is a much better use of resources to wait until TROA is
18 approved and the *Orr Ditch* Decree modified so that there are consistent
19 determinations made related to the changes anticipated by TROA.

20 **C. The Consumptive Use Analysis Is Directly Related To The Issue Of**
21 **Injury To Existing Water Rights**

22 TMWA claims that the State Board should not become involved with the
23 consumptive use issue because it is not an issue raised in the Change Petitions or
24 Applications. However, injury to existing water rights, including injury from diminished
25 return flows, is not only an issue raised by the Petitions and Application, but it is an
26 issue that must be addressed by the State Board. Further, TMWA had advanced
27 notice that both the issue of injury, as well as the issue of return flows would be
28 addressed based on TCID's Protests.

1 As discussed above the Petitions and Applications propose to change the
2 management of the reservoirs and the Truckee River to allow for the operation of
3 TROA. The California Applications and Petitions subsume within their sources of
4 water to credit store and exchange the TMWA water which is the subject of the Nevada
5 State Engineer rulings. The TROA EIS/EIR acknowledges that the storage of TMWA
6 change applications under TROA cause shortages to the Newlands Project when
7 stored upstream at 2.5 acre feet consumptive use rate as modeled. The State Board
8 should not approve the Change Petitions and the Applications because part of the
9 water the BOR seeks to store is based on an inflated amount of water that has been
10 determined by the applicants to cause shortages to the Newlands Project. Thus, the
11 Applications and Petitions will injure existing downstream water rights, an act that both
12 violates California requirement for a transfer and also violates P.L. 101-618, section
13 210(b)(13).

14 Counter to TMWA's suggestion, the State Board cannot defer this injury
15 analysis to the Nevada State Engineer. The California Water Code requires the State
16 Board to make an independent determination that a proposed change will not injure
17 any other legal user of water." Cal. Water Code §1701.2(d). "The Water Board cannot
18 ignore the detailed statutory and regulatory requirements it must meet in issuing a
19 permit to appropriate water . . ." *Central Delta Water Agency v. State Water*
20 *Resources Control Bd.*, 124 Cal. App. 4th 245, 262 (Cal. App. 3d Dist. 2004) Further,
21 the transfers and exchanges proposed under TROA are in essence a temporary
22 change which requires a

23
24 change the point of diversion, place of use, or purpose of use due to a
25 transfer or exchange of water or water rights if the transfer would only
26 involve the amount of water that would have been consumptively used or
stored by the permittee or licensee in the absence of the proposed
temporary change, would not injure any legal user of the water . . .

27 Cal. Wat. Code § 1725. Nothing allows the State Board to defer to other agencies or
28

1 judicial proceedings in making this determination.

2 The proceedings before the Nevada State Engineer dealt strictly with change
3 applications filed by TMWA in Nevada, and was based solely on the statutory
4 requirements of Title 48, Chapter 533 of the Nevada Revised Statutes. Here, the claim
5 of injury to existing rights deals with the subject Applications and Petitions and the
6 proposed operation under TROA allowing for rediversion, redistribution of storage,
7 changes in places of use and purpose of use, exchanges, and credit storage. The
8 Nevada State Engineer did not address the issues required to be determined by the
9 State Board under the Water Code, or take evidence or make any determinations
10 related to the operation of the subject Applications and Petitions in California to
11 implement TROA. The State Board has an independent obligation to make the
12 relevant determinations and cannot rely on the Nevada State Engineer.

13 **IV. CONCLUSION**

14 For the reasons stated above, the State Board should deny TMWA's Motion to
15 Exclude Testimony, Expert Reports and Exhibits and allow TCID to properly present its
16 protest to the Petitions and Applications designed to implement TROA. The
17 Protestants must be provided a chance to fully present their protest issues and the
18 related testimony and evidence must be fully considered by the State Board in making
19 its determination.
20

21
22 Dated: July 23, 2010

HANSON BRIDGETT LLP

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25 By: 

26 Michael J. Van Zandt (SB # 96777)
27 Attorneys for Protestant Truckee-Carson
28 Irrigation District

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