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1 The United States Department of the Interior, through the Bureau of Reclamation
2 ("Reclamation"), Washoe County Water Conservation District ("WCWCD"), the Truckee
3 Meadows Water Authority ("TMWA"), California Department of Water Resources
4 ("California DWR"), Pyramid Lake Paiute Tribe ("Tribe"), and the City of Fernley
5 ("Fernley") (collectively the "Petitioners") submit this joint closing brief in connection with
6 the Truckee River Hearings held in the above-captioned matter. This matter involves
7 the petitions for change ("Change Petitions") and applications to appropriate
8 ("Applications") filed by Petitioners and the protests thereto of the Truckee-Carson
9 Irrigation District ("TCID"), the Individual Newlands Project Water Right Owners, the City
10 of Fallon, Nevada and Churchill County, Nevada (collectively, "Protestants").
11

12 I. INTRODUCTION.

13 The Change Petitions and Applications, at their core, are relatively simple in
14 concept. The Change Petitions request common points of diversion and rediversion
15 among Independence Lake, Boca Reservoir and Stampede Reservoir, and common
16 points of downstream rediversion, places of use and purposes of use among those
17 three Reservoirs and also Prosser Creek Reservoir in order to facilitate more
18 coordinated and flexible reservoir operations. The Change Petitions will allow water to
19 be diverted to storage, rediverted, and exchanged such that the water from any one
20 reservoir may be used in the stead of water from any other reservoir, while at the same
21 time allowing existing water rights to be satisfied according to their current priorities.
22 The Applications seek to increase the amount of water diverted to storage in Stampede
23 Reservoir, and to expand the season of diversion for and the amount of water which
24 may be withdrawn from Prosser Creek Reservoir. The Applications, if approved, will
25 create opportunities to deliver water to the lower Truckee River and Pyramid Lake at
26
27
28

1 times when environmental benefits can be enhanced. If not allowed to be stored under
2 the Applications, the water would flow to the lower Truckee River and to Pyramid Lake.

3 Approval of the Change Petitions also facilitates implementation of the
4 Congressionally authorized Truckee River Operating Agreement ("TROA"), the
5 culmination of decades of litigation, negotiation and compromise over the administration
6 and interstate allocation of Truckee River waters. When Congress authorized the
7 negotiation of an operating agreement for the Truckee River Reservoirs,¹ it did so with
8 the intent of providing more flexible and coordinated operation of the federal reservoirs
9 and, with an owner's participation, of privately-owned reservoirs such as Independence
10 Lake. Title II of Pub. L. No. 101-618, 104 Stat. 3294 (referred to herein as "the
11 Settlement Act"), Section 205(a) and 205(a)(3)(H). Through this authorization,
12 Congress expressly recognized that such coordinated operation would require changes
13 to water rights under State law, such as the changes sought here. See, Settlement Act,
14 Section 205(a)(2)(D). To that end, the Settlement Act and the successful negotiation of
15 TROA have resulted in Petitioners filing the Change Petitions with the California State
16 Water Resources Control Board (the "Board") with respect to California water rights, as
17 well as the filing of separate change applications with the Nevada State Engineer
18 ("Nevada Change Applications") with respect to water rights governed by Nevada law.²

19 The requested changes and appropriations involved in this proceeding are
20 straightforward in concept. Protestants attempt to use the complexities of TROA, as
21 well as issues outside of the Board's purview that are being adjudicated in other
22 venues, to create confusion in an otherwise straightforward matter.

23
24
25
26
27 ¹ Lake Tahoe, Boca Reservoir, Prosser Creek Reservoir, Martis Reservoir and
28 Stampede Reservoir.

² The Nevada Change Applications are discussed in Section III.B at 20-24.

1 Protestants' attempts to blend issues pending before the Orr Ditch Court with the
2 matters before this Board should be rejected. The approval of TROA itself is not at
3 issue here. Similarly, Petitioners are not asking the Board to modify Floriston Rates, the
4 Truckee River Agreement, water rights priorities or the Orr Ditch Decree, nor are
5 Petitioners requesting the Board adjudicate changes to Nevada water rights. To the
6 extent any of these actions is necessary to implement TROA, Petitioners are requesting
7 those approvals from the court or administrative body with appropriate jurisdiction.
8

9 More importantly, when the focus is properly on the issues before this Board,
10 TROA's complexity actually supports the change Petitions and Applications, rather than
11 detracts from them. For example, TROA furthers the environmental, public trust and
12 water quality values of the Truckee River watershed, surpassing the "no significant
13 adverse impact" threshold to be considered by the Board.
14

15 Finally, Protestants' allegations of injury are based on a fundamentally flawed
16 premise that they have a legal right to require the senior water rights of others to be left
17 in the river for their benefit. The fact that Protestants may have benefitted from
18 unexercised senior water rights being left in the river in the past in no way grants
19 Protestants any legal right to prevent the owners of such water rights from exercising
20 them now. Protestants cannot demonstrate an unlawful injury simply because they
21 receive less water as a result of the exercise of senior water rights. Moreover, the
22 exercise of these senior water rights occur through the Nevada Change Applications,
23 and not the Change Petitions or the Applications here.
24

25 The issues before the Board are those set forth in the Notice of Hearing.
26 Petitioners' closing brief will address those issues as follows: (1) the Board has
27 jurisdiction to approve the Change Petitions and Applications, and no basis exists to
28 delay such approval; (2) the Change Petitions will not injure any legal user of water and

1 will not initiate a new water right; (3) water is available for appropriation in connection
2 with the Applications; (4) water under the Applications will be put to beneficial use and
3 the proposed appropriations are in the public interest; (5) as to both the Change
4 Petitions and Applications, the approval will not adversely impact water quality, the
5 environment, or public trust resources; and (6) the Board should impose the conditions
6 requested by Petitioners in order to meet the requirements of TROA (Section III.D).
7

8 **II. THE CHANGE PETITIONS AND APPLICATIONS ARE RIPE FOR DECISION**
9 **AND THE BOARD SHOULD NOT DEFER ACTION.**

10 Notwithstanding the efforts by Protestants to confuse the scope of this
11 proceeding, the Board unequivocally has jurisdiction to approve the Change Petitions
12 and Applications at this time. In an attempt to delay action by the Board, Protestants
13 mischaracterize the issues before the Board and the nature and consequences of
14 independent proceedings that are pending before separate autonomous bodies. It is
15 critical at the outset, therefore, to emphasize what issues are, and are not, before the
16 Board to confirm that the Change Petitions and Applications are currently ripe for
17 disposition.
18

19 **A. The Board's Approval Need Not Await Modification of the Orr Ditch**
20 **Decree or Action by the Nevada State Engineer on Pending and Yet**
21 **To Be Filed Applications.**

22 Protestants erroneously argue the Board should defer action on the Change
23 Petitions and Applications until: (1) a ruling by the Orr Ditch Court to modify or amend
24 its decree to the extent necessary to allow for the implementation of TROA and/or (2)
25 action by the Nevada State Engineer on yet to be filed change applications to store
26 water under the Tribe's Permit Nos. 48061 and 48494, and on applications pending in
27
28

1 Nevada, including TCID's 80 year old Application 9330.³ See, TCID-267 at 2-3; TCID-
2 276B at 6; 8; TCID-282 at 7, Ins. 14-17.⁴

3 Protestants' principal reason for contending the Board should not act until after
4 the Orr Ditch Court acts is that TROA might change as a result of that process. TCID-
5 276B at 8. However, that cannot happen. Joint-16, Settlement Act at § 205(a)(5).

7 Protestants' additional arguments are meritless because all actions, conditions
8 and procedures necessary for the Board to render a decision have already occurred.
9 See, California Water Code, §§ 1260-1266, 1700-1701 (application contents); §§ 1300-
10 1317, 1340-1342 (Notices); §§ 1350-1353, 1704-1707 (ripe for action after hearing). All
11 issues before the Board, therefore, are ripe for decision and fully within the Board's
12 power to decide.

13 Neither the Board's jurisdiction, questions of material fact or law, nor the Board's
14 ability to approve the Change Petitions and Applications are contingent upon the
15 independent exercise of jurisdiction by other sovereign bodies. California Water Code,
16 Sections 1250 through 1353; 1700-1707. Likewise, the jurisdiction of the Board to act
17 now is not compromised by the fact that independent proceedings are pending before
18 courts or other agencies on separate issues because the scope of this matter does not
19 encompass those independent proceedings. Regardless of the status or procedural
20 posture of those independent proceedings, the issues before the Board, the facts and
21 law that the Board must consider, and the analysis that the Board must conduct to
22 approve the Change Petitions and Applications remains exactly the same.
23
24

25 **B. The Board Is Not Required To Take Action Outside Its Jurisdiction.**

26
27 ³ For a detailed discussion of these Applications, see Section IV.C. at 45-47, *infra*.

28 ⁴ References to hearing exhibits are by exhibit number and page number. References
to the hearing transcript are to volume, page(s) and line(s).

1 Petitioners are not asking the Board to act on matters outside of its jurisdiction.
2 Approval of the Change Petitions and Applications does not require modification of the
3 Orr Ditch Decree or Truckee River Agreement, and Petitioners are not seeking such
4 relief from the Board. No matter what the Protestants may wish this Board to believe,
5 the decree modification is not at issue here.
6

7 The Orr Ditch Court has exclusive jurisdiction over the arguments made by
8 Protestants relating to modification of its decree. *See, Joint-7; see also, System Fed'n*
9 *No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright* , 364 U.S. 642, 647 (1961); *United*
10 *States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013 (9th Cir. 1999) (recognizing
11 exclusive *in rem* jurisdiction of decree courts). In fact, Protestants have made these
12 same allegations already in the Orr Decree Action, and the Orr Ditch Court's ultimate
13 decision regarding modification of the decree will consider Protestants' arguments.⁵
14 *See, United States v. Orr Water Ditch Co., Case No. 3:73-CV-00003, United States*
15 *District Court for State of Nevada ("Orr Decree Action"), Dkts. # 908, 914, 1012.* Neither
16 the existence nor outcome of that litigation precludes the Board's independent
17 determination on the Change Petitions and Applications. *See, California Water Code,*
18 *§§ 1350-1353, 1704-1707.*
19

20 Similarly, Petitioners are not asking the Board to modify Floriston Rates or alter
21 the priorities of water rights on the Truckee River. This is clear not only from the face of
22 the Change Petitions and Applications, but from the testimony of Marc Van Camp, Janet
23 Carson Phillips, and Chad Blanchard discussed below. Nor could the Board's approval
24 of the Change Petitions and Applications ever be construed as implicitly creating such
25

26
27 ⁵Since TROA cannot be implemented until the Orr Ditch Court adjudicates these issues.
28 Protestants' issues are resolved by conditioning the Board's approval as requested by
Petitioners. *See, Settlement Act, Section 205(a)(4). See, Section III.D. at 28-30, infra.*

1 an effect, as the power to make such modifications rests exclusively with the Orr Ditch
2 Court. See, Joint-7; see also, *System Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO*,
3 364 U.S. at 647; *Alpine Land & Reservoir Co.*, 174 F.3d at 1013.

4 Finally, Petitioners are not asking the Board to approve changes to Nevada water
5 rights or assume the duties of the Nevada State Engineer. The Nevada State Engineer
6 has exclusive jurisdiction over any change applications seeking to store the
7 consumptive use portion of Nevada water rights in the subject reservoirs, and in fact,
8 has already approved applications by TMWA to do so. *TMWA 1-5*. To the extent
9 additional approvals are necessary, they will be sought in accordance with Nevada law.
10 See, Vol. II Tr. at 339. Nothing in the Board's approval of the Change Petitions and
11 Applications abrogates that process, and the Board's approval of the Change Petitions
12 and Applications is not contingent upon any preliminary action by the Nevada State
13 Engineer.
14
15

16 In short, all Petitioners ask of the Board is to approve the Change Petitions and
17 Applications. Although TROA is the impetus for the Change Petitions and Applications,
18 the existence of TROA does not alter the basic threshold requirements that the Board
19 must review, as set forth in the Notice of Hearing. Likewise, the other TROA-related
20 matters pending before other courts and agencies do not abrogate the Board's
21 jurisdiction over this proceeding and do not warrant any delay in the Board's disposition
22 of the Change Petitions and Applications. For these reasons, Protestants' arguments
23 regarding jurisdiction and ripeness should be rejected.
24

25 **III. THE BOARD SHOULD APPROVE THE CHANGE PETITIONS.**

26 **A. Introduction.**

27 The Change Petitions before the Board are: (1) Reclamation Petition for Change
28 - Application 15673, Permit 11605 (Stampede Reservoir) (the "Stampede Change

1 Petition"); (2) Reclamation Petition for Change - Application 18006, License 10180
2 (Prosser Creek Reservoir) (the "Prosser Creek Change Petition"); (3) WCWCD Petition
3 for Change - Application 5169, License 3723 (Boca Reservoir) (the "Boca Change
4 Petition"); and (4) TMWA Petition for Change - Application 9247, License 4196
5 (Independence Lake) (the "Independence Change Petition").⁶ Prosser Creek Reservoir
6 is located on Prosser Creek, a tributary to the Truckee River. Stampede and Boca
7 Reservoirs are located on the Little Truckee River, a tributary to the Truckee River.
8 Independence Lake is located on Independence Creek, a tributary to the Little Truckee
9 River. USBR-3 at 2; Vol. I Tr. at 110, In. 24-111, In. 7; USBR-8; Vol. I Tr. at 123, In. 20-
10 124, In. 14; Joint-20 at 5, Ins. 6-26.

11 All four of the Change Petitions request common points of diversion which are
12 downstream of the confluences of Prosser Creek and the Little Truckee River with the
13 Truckee River. They also propose common purposes of use and common places of
14 use. USBR-1 at 3; Vol. I Tr. at 56, Ins. 3-9. For the three reservoirs on the Little
15 Truckee River system, Independence, Stampede and Boca, the Change Petitions
16 request additional changes to further the coordinated operation among those reservoirs.
17 The Stampede Change Petition requests additional points of diversion at Independence
18 and Boca, a point of diversion at Boca, and redistribution of storage at Boca and
19 Independence. The Independence Change Petition seeks additional points of diversion
20 at Stampede and Boca and additional points of diversion and redistribution of storage
21 at Stampede and Boca. The Boca Change Petition seeks additional points of diversion
22 at Stampede and Independence, an additional point of diversion and redistribution of
23 storage at Stampede, and redistribution of storage at Independence.

24 **B. The Proposed Changes Will Not Injure Any Legal User of Water.**

25 **1. Introduction.**

26 In order to grant the Change Petitions, the Board must find that the "change will
27 not operate to the injury of any legal user of the water involved." California Water Code
28

⁶ For additional details on the Change Petitions, see SWRCB 1 through 4 and USBR-1.

1 § 1702; see also, 23 Cal. Admin. Code § 791(a). In determining whether a requested
2 change will cause injury, the Board should focus on the effect of the change on the
3 water right of the Protestants. See, *State Water Resources Control Board Cases*, 136
4 Cal. App.4th 674, 743, 39 Cal. Rptr.3d 189, 244 (Cal. App. 2006). One who claims
5 injury from a change "must show the change will interfere with his or her right to use the
6 water, whatever the source of that right may be." *Id.*, 136 Cal. App.4th at 805; 39 Cal.
7 Rptr.3d at 243.

8 The water right which Protestants contend will be injured by the requested
9 changes is Claim No. 3 of the Orr Ditch Decree. See, e.g., TCID-276B at 4. Claim No.
10 3 of the Orr Ditch Decree grants the United States a direct diversion right from the
11 Truckee River at Derby Dam for the Newlands Project with a priority of July 2, 1902.
12 Joint-7 at 10-11. There are significant limitations on the diversion of water to the
13 Newlands Project under Orr Ditch Claim No. 3.⁷ See, e.g., USBR-3 at 6; 8-9; Joint-20 at
14 16, In. 9-19, In. 9. However, approval of the Change Petitions will not injure a legal
15 user of Claim No. 3 with or without those limitations. The issue of injury does not
16 change, regardless of the criteria which control diversion under Orr Ditch Claim No. 3.

17 As a result of *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252
18 (D.C. Cir. 1973), which is further described in *Truckee-Carson Irrigation District v.*
19 *Secretary*, 742 F.2d 527 (9th Cir. 1984), diversions from the Truckee River to the
20 Carson Division of the Newlands Project are now closely regulated pursuant to federal
21 regulations referred to as "Operating Criteria and Procedures for the Newlands
22 Reclamation Project" ("OCAP"). Joint-9, 43 C.F.R., §§ 418.1, et seq. A key element of
23 OCAP is the portion of the regulation dealing with diversions of Truckee River water to
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28 ⁷ It should be noted that Claim No. 3 of the Orr Ditch Decree states that water diverted
under it is subject to "such control, disposal, and regulation as the [United States] may
make or desire." See, Joint-7, Claim No. 3 at 10.

1 the Project's Carson Division. See, Joint-9, 43 C.F.R., §§ 418.16-418.22. The purpose
2 of that regulation is summarized in 43 C.F.R., § 418.17 as follows:

3 Project water must be managed to make maximum use of Carson River
4 water and to minimize diversions of Truckee River water through the
5 Truckee Canal. This will make available as much of Truckee River water
as possible for use in the Lower Truckee River and Pyramid Lake.

6 In 1980, when the District Court entered a final judgment and decree in the
7 Alpine Litigation, it accompanied that judgment and decree with a reported decision.
8 That decision made it clear that the Truckee River is a supplemental water supply for
9 the Carson Division of the Newlands Reclamation Project. The Court said:
10

11 Lake Lahontan is serviced by the Carson River and by diversions from the
12 Truckee River through the Truckee Canal. Obviously, all Carson River
13 water which reaches the Lahontan Reservoir is captured and stored there.
14 Under section 8 of the Reclamation Act of 1902 (43 U.S.C. § 372), the
15 Nevada statute (N.R.S. 533.035), and all applicable judicial precedent,
16 beneficial use is the basis, the measure and the limit of a water right.
17 Hence, additional water diverted through the Truckee Canal is limited to
18 the amount required for beneficial use. While Claim No. 3 on page 10 of
19 the Truckee River Final Decree grants to the United States the right to
divert 1,500 cubic feet per second of water flowing in the Truckee River for
use on the Newlands Project, the Truckee River Decree itself, on page 87,
expresses the beneficial use limitation as follows: "Except as herein
specially provided no diversion of water into any ditch or canal in this
decree mentioned shall be permitted except in such amount as shall be
actually, reasonably necessary for the economical and beneficial use for
which the right of diversion is determined and established by this decree."

20 *United States v. Alpine Land and Reservoir Company*, 503 F.Supp. 877, 881 (D.Nev.
21 1980). Joint-10.⁸

22 Subject to the foregoing limitations, legal users of Orr Ditch Claim No. 3 benefit
23 from water released to support the Floriston Rate flow from Boca Reservoir under
24

25
26
27 ⁸ As for TCID itself, the Ninth Circuit has already held that TCID's rights under the Orr
28 Ditch Decree and the Truckee River Agreement are "strictly managerial," and do not
include any right to Truckee River water or to the flow of the Truckee River. *TCID v.*
Secretary, 742 F.2d at 531.

1 License 3723, and from Prosser Creek Reservoir under License 10180, which is Tahoe
2 Exchange Water under the Tahoe-Prosser Exchange Agreement (Joint-3). Joint-20 at
3 6, In. 14-7, In. 16; Vol. I Tr. at 128, In. 3-129, In. 2; 131, Ins. 12-132, In. 11. Orr Ditch
4 Claim No. 3 does not include a right, direct or indirect, to any water stored in
5 Independence Reservoir under License 4196. It also does not include a right, direct or
6 indirect, to water stored in Stampede Reservoir under Permit No. 11605. It has no right,
7 direct or indirect, to water stored in Prosser Creek Reservoir under License No. 10180
8 which is not needed for the Tahoe-Prosser Exchange. Joint-20 at 10, Ins. 19-11, In. 2;
9 14, Ins. 19-26.

10 **2. Uncontradicted Evidence Establishes That the Change**
11 **Petitions Will Not Result in Injury to Any Other Legal User of**
12 **Water.**

13 For purposes of considering the issues of injury to any other legal user of water,
14 it is useful to group the requested changes into three specific categories. One category
15 is the requested changes in points of diversion for the three reservoirs on the Little
16 Truckee River system, Independence, Stampede and Boca. A second category is the
17 requested points of rediversion and redistribution of storage among those same three
18 reservoirs. The third category is the common downstream points of rediversion and the
19 common places and purposes of use for all four reservoirs.

20 **(a) Changes in Point of Diversion - Independence,**
21 **Stampede and Boca.**

22 With respect to the change to allow water under the Independence License to be
23 diverted at Stampede or Boca, there is no injury to legal users of water under Orr Ditch
24 Claim No. 3 because, as Van Camp testified, regardless of where water is diverted to
25 storage under Independence License 4196, it can only be diverted to storage to the
26 extent allowed by that existing water right and in accordance with its existing priority.
27 The same is true with respect to the changes in points of diversion for both Boca and
28 Stampede Reservoirs. TMWA 3-0 at 11, In. 25-13 In. 7; Vol. I Tr. at 227, In. 24-228, In.

1 10. The diversion to storage of new water under the relevant licenses and permit is on
2 a priority schedule, and can only begin after specific conditions are met. That schedule
3 and those conditions for storage are not changed by these Change Petitions in any
4 fashion. Joint-20 at 8, Ins. 2-23; Vol. I Tr. at 125, In. 9-126, In. 20.

5 Existing water rights, including Orr Ditch Claim No. 3, will be in the same position
6 after these changes in points of diversion are granted, as they are today without these
7 changes. As indicated in the testimony of Chief Deputy Water Master Blanchard, to a
8 certain extent, water under the Boca Reservoir License is already being diverted to
9 storage in Stampede Reservoir. Joint-20 at 20, In. 25-21, In. 16; Vol. I Tr. at 130, In. 21-
10 131, In. 11. This has been happening for some time without any injury to legal users of
11 water under Orr Ditch Claim No. 3. Vol. I Tr. at 868, Ins. 17-24. Moreover, with the
12 exception of the first 25,000 acre feet of storage in Boca Reservoir, the storage priorities
13 for Independence, Boca and Stampede are all junior in priority to all Orr Ditch Decree
14 water rights, including Orr Ditch Claim No. 3.⁹ TMWA 3-0 at 11, In. 28-13 In. 7; Vol. I Tr.
15 at 227, In. 24-228, In. 10; Joint-20 at 8, Ins. 2-23. Vol. I Tr. at 125, In. 9-126, In. 20.

16 **(b) Points of Rediversion and Redistribution of Storage**
17 **Among Independence, Stampede and Boca.**

18 The changes requesting permission to redivert and/or redistribute water
19 which has been previously stored in priority between or among Independence,
20 Stampede and Boca are important elements of the more coordinated and flexible
21 operation intended by Congress in the Settlement Act, and in meeting the
22 environmental goals provided for in TROA. For example, by adding a downstream point
23 of rediversion, an owner of the previously stored water right can allow a release larger
24 than required existing minimums without a loss of control of the water. TMWA 3-0 at
25 11, Ins. 8-18; TMWA 2-0 at 12, In. 18-13 In. 25. These changes also are important in
26

27
28 ⁹ The Truckee River Agreement, in effect, provides that the first 25,000 acre feet of
storage in Boca Reservoir may be stored ahead of Claim No. 3. See, Joint-6, Article
IV.(A); Article I.(N).

1 facilitating trades and exchanges provided for in TROA. *Id.* See also, USBR-5 at 1-2;
2 5-6.

3 As noted above, Orr Ditch Claim No. 3 does not include any right, direct or
4 indirect, to previously stored water under the Independence License and the Stampede
5 Permit. See, pgs. 10-11 above. As a matter of law, legal users of water under Orr Ditch
6 Claim No. 3 cannot be injured by the movement of that water between or among these
7 three reservoirs. *State Water Resources Control Board Cases*, 136 Cal. App.4th at 743;
8 39 Cal. Rptr.3d at 244. The benefits which legal users of water under Orr Ditch Claim
9 No. 3 may receive from water stored under the Boca License are not injured if some of
10 that Boca water is in and released from Stampede Reservoir or Independence Lake
11 instead. Regardless of in which reservoir it is stored and from which reservoir it is
12 released, the water is still available to provide those benefits. TCID's long-time former
13 Manager, Lyman McConnell, acknowledged this on cross examination. Vol. IV Tr. at
14 878, In. 14-879, In. 25. Like the change in point of diversion described above,
15 rediversion to and redistribution of storage between Boca and Stampede Reservoirs
16 has been happening for many years without injury to those benefits to legal users of Orr
17 Ditch Claim No. 3. See, pg. 12 above.

18 In addition, any space made available in one of these reservoirs by
19 movement of its water to another reservoir can only be filled in accordance with existing
20 priorities, again, all of which are junior to Orr Ditch Claim No. 3, with the exception of the
21 first 25,000 acre feet in Boca Reservoir. TMWA 3-0 at 11, In. 28-13 In. 7; Vol. I Tr. at
22 227, In. 24-228, In. 10; see also, Joint-20 at 8, Ins. 2-23; Vol. I Tr. at 125, In. 9-126, In.
23 20.

24 **(c) Common Downstream Points of Rediversion and**
25 **Common Places and Purpose of Use.**

26 The Change Petitions, by the addition of downstream common points of
27 rediversion, common places of use and common purposes of use, further facilitate the
28 flexible and coordinated operation of these reservoirs intended by Congress in the
Settlement Act and as provided in TROA. This flexible and coordinated operation will

1 take place through trades and exchanges. By establishing common downstream points
2 of rediversion, common places of use and common purposes of use for Independence,
3 Stampede, Boca and Prosser, the Change Petitions facilitate exchanges of water
4 between or among reservoirs. With the approval of these changes, water from any one
5 reservoir may be used in the stead of water from any of the other reservoirs. TMWA 3-0
6 at 13, In. 16-14 In. 7; TMWA 2-0 at 12, Ins. 3-10. The environmental benefits provided
7 for in TROA are dependent on these changes. USBR-5 at 4-6.

8 Orr Ditch Claim No. 3 does not include any right, direct or indirect, to water
9 stored by TMWA under the Independence License, or to water stored by the United
10 States under the Stampede Permit. A legal user of water under Orr Ditch Claim No. 3
11 and Protestants cannot be injured by changes to add common downstream points of
12 rediversion, places of use and purposes of use for the Independence License and
13 Stampede Permit. Orr Ditch Claim No. 3 and Protestants have no right, direct or
14 indirect, to water stored by the United States under the Prosser License which is not
15 needed for the Tahoe Prosser Exchange. Indeed, Congress has expressly directed
16 how that water from Stampede and Prosser is to be used, and it is not to the benefit of
17 Orr Ditch Claim No. 3. See, Settlement Act § 207(d)(1) and (2), and § 209(b). *C.f.*,
18 *State Water Resources Control Board Cases*, 136 Cal. App.4th at 806; 39 Cal. Rptr.3d
19 at 294. As the evidence in this case demonstrated, the original connection between the
20 Newlands Project as a place of use for water from Stampede Reservoir was for the
21 purposes of an exchange between Lahontan Reservoir and a dam to be constructed on
22 the East Fork of the Carson River to be known as "Watasheamu." That dam was never
23 built, and by reason of the revocation of the authority to build it in the Settlement Act,
24 never will be built. See, Settlement Act § 205(c). See *also*, TCID-80; TCID-111 at pgs.
25 7-8; Vol. IV Tr. at 881, In. 23-884, In. 8.

26 Protestants, through Orr Ditch Claim No. 3, have no traditional water right
27 interest in water stored under the Boca Reservoir and Prosser Creek Reservoir
28 Licenses. They are not the holders of those Licenses. Assuming for the sake of

1 argument, that the benefits Orr Ditch Claim No. 3 receives under the Floriston Rate
2 regime, make the water right holders in the Newlands Project a "legal user" of some
3 water previously stored under the Boca License and Tahoe Exchange Water previously
4 stored under the Prosser License within the meaning of *State Water Resources Control*
5 *Board Cases*, 136 Cal. App. 674, 805, 29 Cal. Rptr.3d 189 at 293, they are not injured
6 by the changes requested with respect to common downstream points of diversion
7 and common places and purposes of use as they relate to the Boca License and to
8 Tahoe Exchange Water under the Prosser License for several reasons.

9 First, the changes will not affect or injure any right to use water from those
10 reservoirs for purposes of the Floriston Rates flow. TROA, Joint-19, continues to make
11 the maintenance of Floriston Rates or Reduced Floriston Rates the foundation for
12 operations. Joint-19, Section 5.A.1. Section 5.A.1(d) of TROA requires that water from
13 Boca Reservoir and water from the Tahoe-Prosser Exchange continue to be available
14 for maintaining Floriston Rates or Reduced Floriston Rates. See *also*, Joint-19 at
15 Definition 47; Definition 86. These Change Petitions do not and cannot alter the use of
16 water available for Floriston Rates. Second, they do not seek to alter the Floriston Rate
17 flow. Any change to the Floriston Rate flow can only happen through the Orr Ditch
18 Court and modifications of the Orr Ditch Decree. McConnell acknowledged this on
19 cross-examination. Vol. IV Tr. at 880, Ins. 1-14.

20 Third, like the similar changes for the Stampede Permit and Independence
21 License, these changes to the Boca and Prosser Creek Licenses are to facilitate trades
22 and exchanges between and among the reservoirs. Water stored under those Licenses
23 will still be available to support the Floriston Rate flow. As McConnell testified, Orr Ditch
24 Claim No. 3 is not injured if water to satisfy it comes from a different reservoir than it
25 may come from today. Vol. IV Tr. at 879, Ins. 20-25. Moreover, the Change Petition for
26 Boca Reservoir adds the Newlands Project as a place of use for water released from
27 that reservoir. See, Vol. IV Tr. at 889, In. 1-890, In. 6.

1 As several witnesses also noted, TROA in Sections 1.C.1 and 1.C.2 provides
2 additional safeguards to protect and correct against any injuries to water rights. See,
3 TMWA 3-0 at 13, Ins. 12-15; USBR-5 at 3-4; USBR-7 at 42-43.

4 **3. Protestants Did Not Present Any Evidence That the Changes**
5 **Requested Will Result in Injury to Any Legal User of Water.**

6 The Protestants did not produce any evidence that the changes requested by the
7 Change Petitions, collectively or individually, result in injury to any right of the
8 Protestants to the use of water or of any other person to the use of water, including
9 legal users of water under Orr Ditch Claim No. 3. Protestants attempted to support their
10 allegations of injury with the testimony of Kenneth Knox and the hearsay testimony of
11 Goetsch and Schank. None of that testimony was directed at any specific aspect of the
12 Change Petitions, but instead was directed to TROA in general.

13 The written and oral testimony of Kenneth Knox contained many errors, and
14 demonstrates that Knox did not have sufficient knowledge of the present operation of
15 these reservoirs, of the operations under the Orr Ditch Decree, and of the proposed
16 operations under TROA, to render a reliable opinion. For example, in both his written
17 and oral testimony, Knox stated that all of the reservoirs involved in the Change
18 Petitions "have been operated to supplement streamflows in the Truckee River and
19 assist toward meeting the Floriston Rate targets." TCID-276B at 4; Vol. IV Tr. at 989, In.
20 14-990, In. 14. None of that is accurate. See, Joint-20 at 10, In. 19-11, In. 2; 14, Ins.
21 19-26. Knox had no idea whether water stored under the Independence License was
22 used to assist in meeting Floriston Rates, and incorrectly testified that uncommitted
23 water from Prosser Creek Reservoir and water from Stampede Reservoir was also used
24 for Floriston Rates. Vol. IV Tr. at 989, In. 24-990, In. 19. In addition, in both his written
25 and oral testimony, Knox stated that all of the Change Petitions sought to alter the
26 amount of water stored under the relevant permit or license. TCID-276B at 4; Vol. IV Tr.
27 at 992, Ins. 2-25. None of the Change Petitions request that, nor could they. TMWA
28 3.0 at 9, Ins. 16-19; Vol. I Tr. at 227, Ins. 2-3. In his written testimony, Knox also
suggested that somehow the Change Petitions involved "out-of-priority" storage. TCID-

1 276B at 4. However, in his oral testimony, he acknowledged that was not the case.
2 Vol. IV Tr. at 997, Ins. 11-14. In short, his "opinions" on injury are based upon a
3 fundamental misunderstanding of existing facts. Vol. IV Tr. at 955, In. 14-957, In. 12.

4 In both his written and oral testimony, Knox did not and apparently could not
5 explain how the changes requested by the Change Petitions will result in injury to a
6 legal user of water. His only responses to that question were vague references to
7 TROA. See, e.g., Vol. IV Tr. at 1000, In. 15-1004, In. 4. Thus, Knox's testimony was
8 neither credible nor reliable, and any opinion of his on injury was based upon the same
9 hearsay referenced by Protestant witnesses, Goetsch and Schank, that "TROA
10 produces additional shortages." See, e.g., Churchill County-1 at 3, Ins. 14-17; TCID-
11 281 at 4, Ins. 21-24; see also, Vol. III Tr. at 696, In. 16-698, In. 7, 736, In. 15-739, In. 5.

12 Protestants' "evidence" on additional shortages relates to the Carson Division of
13 the Newlands Project and is taken from page 3-107 in the Final EIS/EIR for TROA.
14 SWRCB-7. Figure 3.23 on that page shows Carson Division Shortages in 9 Years, with
15 a comparison among "Current Conditions," "No Action," "Local Water Supply Alternative
16 (LWSA)," and "TROA." It is important to place that information in its proper context.
17 Current Conditions was the year 2002. No Action, Local Water Supply Alternative and
18 TROA were all projected to the year 2033. Vol. II Tr. at 404, Ins. 11-13. See also,
19 SWRCB-7 at 2-11, 2-24, and 2-27.

20 Erwin and Phillips explained what is happening under "Current Conditions." As a
21 result of the urbanization of farms in the Truckee Meadows, TMWA has acquired over
22 64,000 acre feet of Orr Ditch Decree irrigation water rights and changed them to
23 municipal use under Nevada law. TMWA 1.0 at 6, In. 15-7, In. 8. Irrigation and
24 municipal demand patterns do not match precisely. See, TMWA 1-5 at 9. Thus, under
25 "Current Conditions," often TMWA is not able to exercise a portion of its senior Orr Ditch
26 Decree water rights because the municipal demand pattern does not match that of the
27
28

1 irrigator who first appropriated the water.¹⁰ Under "Current Conditions," it must either
2 watch that water flow by its treatment plants, or build a reservoir in Nevada to store the
3 consumptive use portion of some of these former irrigation water rights.¹¹ TMWA 2-0 at
4 5, In. 20-6, In. 11. Thus, under "Current Conditions," water right holders downstream of
5 TMWA's treatment plants, including legal users of Orr Ditch Claim No. 3, receive a
6 benefit when TMWA does not exercise a portion of its senior water rights. For that
7 reason, under "Current Conditions," at times, the Carson Division receives the benefit of
8 water from TMWA's unexercised water rights. However, that is a benefit that
9 Protestants cannot require be continued. TMWA is entitled to exercise its senior Orr
10 Ditch Decree water rights, and that exercise does not result in an "unlawful" injury to any
11 legal user of Orr Ditch Claim No. 3. As Schank acknowledged, shortages can be
12 caused to a junior water right holder by the exercise of a prior senior water right, and
13 such an exercise does not cause an "artificial" shortage. Vol. III Tr. at 746, In. 23-747,
14 In. 10.

15 "No Action" is essentially a continuation of "Current Conditions" and trends to the
16 year 2033 without implementation of any other water supply alternatives for the area.

17
18 ¹⁰ Under Nevada law, TMWA's failure to exercise portions of its direct diversion water
19 rights does not expose those rights to loss by forfeiture or abandonment. In Nevada,
20 surface water rights cannot be lost under forfeiture. N.R.S. § 533.060(2). In addition, a
21 surface water right appurtenant to land formerly used primarily for irrigation is not
subject to abandonment when it is appurtenant to land converted to an urban use and
acquired by an entity like TMWA for municipal use. N.R.S. § 533.060(3).

22 ¹¹ Much of the appearance of complexity resulting from TMWA's changes to its Orr Ditch
23 Decree water rights under Nevada State Engineer Ruling 6035 (TMWA 1-5) is driven by
24 the fact that the reservoirs are upstream of Farad in California. The fact that the
25 reservoirs are upstream of Farad requires a change in the rate of flow in the Truckee
26 River at Farad, an adjustment to the Floriston Rate flow, in order to store the
27 consumptive use portion in those reservoirs. However, if the reservoir were
28 downstream of Farad, there would be no change to that rate of flow at Farad. The
consumptive use portion would be placed in storage in the reservoir, and the non-
consumptive use portion would remain in the Truckee River. The fact that the storage
happens in available space in upstream reservoirs in California and results in a change
in rate of flow at Farad does not change the impact on Orr Ditch Claim No. 3, from that
which would happen if the reservoir was downstream. Legal users of Orr Ditch Claim
No. 3 are in the exact same position.

1 SWRCB-7 at 2-11. Thus, downstream water right holders, including legal users of Orr
2 Ditch Claim No. 3, continue to receive the benefit of TMWA's not exercising a portion of
3 its senior water rights; a benefit which they cannot require be continued under Nevada
4 or California law. On the other hand, the "Local Water Supply" alternative is an action
5 alternative similar to No Action, but with the implementation of water supply options that
6 may be authorized by State and local governments. It describes a probable water
7 management approach in the Truckee River Basin in 2033 if TROA were not
8 implemented. *Id.*, at 2-24. It would involve ground water recharge using water from
9 some, but not all, of TMWA's unexercised senior Orr Ditch Decree surface water rights,
10 among other things. *Id.*, at 2-26.

11 Therefore, if the issue of injury from the Change Petitions depended on a
12 comparison of alternatives, **which it does not**, the appropriate comparison for
13 additional Carson Division shortages is not one between "Current Conditions," which is
14 the year 2002, and TROA, nor is it a comparison between No Action and TROA, or
15 between Local Water Supply Alternative and TROA. These comparisons involve
16 benefits to users of downstream water rights, including Orr Ditch Claim No. 3, which
17 they cannot require be continued. If there was a comparison to be made with respect to
18 Carson Division shortages with and without TROA, the appropriate comparison would
19 be one which included the exercise of senior water rights. TMWA has an obligation to
20 provide a water supply to its customers as both John Erwin and Janet Phillips testified.
21 TMWA 1.0; TMWA 2.0. If there were no TROA, TMWA would be obligated to find, and
22 would find, other ways to exercise and receive the full benefit of its valuable and senior
23 water rights. Indeed, Janet Phillips testified that TMWA's predecessor, Sierra Pacific,
24 considered 18 reservoir options, and all but one were in Nevada. TMWA 2.0 at 8, Ins.
25 4-16. That appropriate comparison would show no additional shortages between TROA
26 and the lawful exercise of TMWA's senior water rights. See, note 11 at 18 above.

27 As Mr. Strekal testified, the difference between TROA and No Action is the result
28 of the holders of upstream senior Truckee River water rights exercising those water

1 rights more effectively under the Nevada Change Applications by diverting the
2 consumptive use portion of previously unexercised water rights to storage under the
3 Nevada Change Permits. Vol. II Tr. at 362, Ins. 7-13. See also, USBR-4 at 8. The
4 proper exercise of senior water rights in Nevada under a Nevada State Engineer ruling
5 is not an unlawful injury. It is also not a consequence of the changes requested in these
6 Change Petitions.

7 Moreover, even if these Change Petitions were in any way essential to the
8 approval of the Nevada State Engineer under the Nevada Change Applications, which
9 they are not, there is no unlawful injury resulting from the exercise of senior Nevada
10 water rights. See, TMWA 1-5. The State Engineer in Nevada addressed the issue this
11 way:

12 Waters of the Truckee River were originally primarily used under rights for
13 irrigation and power generation purposes. As conditions changed over
14 time, less water was used for irrigation in the Truckee Meadows and
15 irrigation water rights were converted to municipal use. Because
16 municipal use is variable and more water rights have been acquired to be
17 available for use during times of drought, there are times when there is
18 water in the river that has flowed downstream for use by downstream
19 water users. Under Protestants' theory, this constituted establishment of
20 "historical practices."

21 The State Engineer finds the subject applications under
22 consideration in this ruling are simply a request to enable the Applicant to
23 divert and use the consumptive use portion of its senior priority existing
24 water rights. Thus, the State Engineer finds the proposed changes will not
25 conflict with prior rights of the Protestants.

26 [Emphasis in original]. TMWA 1-5 at pg. 9.

27 In sum, the only "evidence" of injury offered by Protestants is unrelated to the
28 changes requested in the Change Petitions. Moreover, the alleged "injury" is not an
unlawful injury because it results from the exercise of senior water rights.

4. **The Consumptive Use of a Nevada Direct Diversion Orr Ditch
Decree Water Right Is Not Relevant to Whether the Change
Petitions Will Result in Injury to Any Legal User of Water and,
In Any Event, the Board Is Required by Law to Defer to the
Nevada State Engineer and the Orr Ditch Court on the
Consumptive Use Issue.**

1 Over the objection of TMWA, the Board admitted testimony in this proceeding
2 concerning the appropriate consumptive use portion of Nevada direct diversion Orr
3 Ditch Decree water rights for purposes of storage when not needed to meet the demand
4 of TMWA's customers. The ruling on TMWA's Motion to Exclude Testimony and
5 Exhibits, states that "testimony on consumptive use appears to be relevant to . . .
6 whether the proposed changes have the potential to injure any legal user of water."
7 July 27, 2010 Ruling at 3. The ruling was without prejudice to whether the rulings of the
8 Nevada State Engineer should be conclusive in this proceeding, or to whether the
9 Board should defer to the expertise of the State Engineer. *Id.* It also did not prejudice
10 how to take into account the pendency of proceedings before the Orr Ditch Court
11 concerning the State Engineer's Ruling. *Id.*

12 The appropriate consumptive use portion of a Nevada direct diversion Orr Ditch
13 Decree water right is not relevant to the injury issue here. The only connection between
14 the Nevada Change Applications and the Change Petitions here is that neither can be
15 implemented if TROA is not implemented. Except for that connection, the Nevada
16 Change Applications can be implemented independent of the Change Petitions, and
17 vice-versa. An understanding of what was filed in Nevada is essential here.

18 In 2006, TMWA filed 59 Change Applications with the Nevada State Engineer
19 (the "Nevada Change Applications") to change the point of diversion, place and manner
20 of use of various Orr Ditch Decree water rights. The Nevada Change Applications
21 sought to obtain approval from the Nevada State Engineer to store the consumptive use
22 portion of those water rights when they are not needed to meet the demands of
23 TMWA's customers. The non-consumptive portion of those water rights remains in the
24 river to serve other water rights. TMWA 1-0 at 9, In. 27-10, In. 18. The Nevada Change
25 Applications add Lake Tahoe Dam, Donner Lake Dam, Prosser Creek Dam, Boca Dam,
26 Stampede Dam and Independence Lake Dam as points of diversion for the
27 consumptive use portion of TMWA's Nevada direct diversion Orr Ditch Decree water
28

1 rights. After the water is stored, "secondary permits" will provide for beneficial uses
2 allowed by TROA. TCID-233 at Exh. B and Exh. D; see also, TMWA 1-5 at 1-2.

3 Under Nevada law, the storage of water is allowed under a "primary permit." The
4 beneficial use of stored water is then permitted under one or more "secondary" permits.
5 See, N.R.S. § 533.440; see also, TCID-234-237. The Nevada primary permits will allow
6 the consumptive use portion to be stored in any of the referenced reservoirs. The
7 Nevada secondary permits will allow for multiple uses of the stored water. Neither the
8 initial storage of that water, nor its subsequent beneficial use is in any way dependent
9 on the approval of the Change Petitions here. The primary permit allows the water to
10 be in any of the reservoirs referenced, and the secondary permits allow the water to be
11 released from any of those reservoirs for beneficial uses allowed by TROA and at
12 places allowed by TROA. None of that is dependent on these Change Petitions.

13 Certainly, the consumptive use issue is important to ensuring that the Nevada
14 Change Applications do not conflict with existing rights (cause an unlawful injury) to
15 legal users of Orr Ditch Claim No. 3 and any other water rights. However, it is not this
16 Board's responsibility to make that determination in connection with the Change
17 Petitions here. It is the responsibility of the Nevada State Engineer and the Orr Ditch
18 Court in connection with the Nevada Change Applications. Moreover, the Board is
19 required as a matter of law to defer to the Nevada State Engineer and ultimately the Orr
20 Ditch Court on the consumptive use issue and on the issue of whether the Nevada
21 Change Applications injure the rights of Protestants. This deference is required as a
22 matter of California law and as a matter of federal law under relevant federal court
23 decisions.

24 The Board has no jurisdiction to become involved in changes to Nevada irrigation
25 water rights adjudicated by the Orr Ditch Decree, and must defer to the Nevada State
26 Engineer and the Orr Ditch Court on the consumptive use issue for four reasons. First,
27 they are Nevada water rights, and the Orr Ditch Court and relevant case law require
28 such changes to be filed with the Nevada State Engineer. *United States v. Orr Water*

1 *Ditch Company*, 914 F.2d 1302-1309; 1311 (9th Cir. 1990). Second, the rights involved
2 are all pre-1914 water rights, and the Board would have no jurisdiction, even if the water
3 rights were California water rights. See, Cal. Water Code, § 1706; *People v. Murrison*,
4 101 Cal. App. 4th 349, 359, n. 6 (2002); *Nicoll v. Rudnick*, 160 Cal. App. 4th 550, 557
5 (2008). Third, the Orr Ditch Court has exclusive jurisdiction over water rights
6 adjudicated by the Orr Ditch Decree, and the Board's acting independently on a key
7 issue related to changes to Nevada Orr Ditch Decree water rights would be an unlawful
8 interference with that exclusive jurisdiction. See, *United States v. Alpine Land &*
9 *Reservoir Company*, 174 F.3d 1007, 1012-1014 (9th Cir. 1999).

10 Also, the Board must defer to the State Engineer and the Orr Ditch Court as a
11 matter of California law. In a decision involving an application to store water in a
12 California reservoir from Smoke Creek, an interstate stream on the California-Nevada
13 border in Lassen County, this Board said:

14 The applicant also claims to hold direct diversion rights under Nevada law
15 and recently submitted documentation filed with the Nevada Division of
16 Water Resources in 1999 in support of that claim. The SWRCB has no
17 authority to resolve issues regarding the validity of the applicant's alleged
18 direct diversion rights in Nevada, nor can the SWRCB resolve issues
19 regarding the impact of applicant's direct diversion of water in Nevada
upon the availability of water for use by BLM under Nevada Certificate
14970. Any dispute over those matters must be resolved in Nevada
pursuant to Nevada law.

20 *In Re Application 30300*, Decision 1640 at 8 (1999).

21 In that decision, the Board also relied on California Water Code § 1231 to protect
22 a BLM water right recognized under Nevada law. *Id.* That section and the section
23 which follows, Cal. Water Code § 1232, are also relevant to the issue here. California
24 Water Code § 1231 recognizes that on any stream flowing across the state boundary, a
25 right of appropriation having the point of diversion and the place of use in Nevada and
26 recognized by the laws of Nevada, shall have the same force and effect as if the point of
27 diversion and the place of use were in the state of California, if the laws of Nevada give
28 like force and effect to similar rights acquired in California. However, until 2002,

1 California Water Code § 1232 did not apply to streams flowing in or out of any interstate
2 lakes, like Lake Tahoe. It was amended in 2002 to provide an exception for "any
3 appropriation or change in point of diversion, place of use or purpose of use under a
4 right to the use of waters from the Truckee River if the appropriation or change is made
5 pursuant to the Operating Agreement described in Section 205(a) of Public Law
6 101.618." [Emphasis added]. The reference in that 2002 amendment to change in
7 point of diversion is a reference to changes in points of diversion approved by the
8 Nevada State Engineer under the Nevada Change Applications. That, coupled with the
9 provision of California Water Code § 1231, requires that the Board defer to the Nevada
10 State Engineer and the Orr Ditch Court on all issues related to the Nevada Change
11 Applications, including the issue of the consumptive use of a Nevada Orr Ditch Decree
12 direct diversion water right.
13
14

15 **C. The Proposed Changes Will Not Initiate a New Water Right.**

16 Under California law, a change petition cannot initiate a new water right. See, 23
17 Cal. Code Regulations § 791(a); see also, 23 Cal. Code Regulations § 699. A change
18 that does not increase the quantity of water applied for does not initiate a new right.
19 *Johnson Rancho County Water District v. State Water Rights Board*, 235 Cal. App.2d
20 863, 879, 45 Cal. Rptr. 589, (Cal. App. 1965). A change that does not involve taking
21 water during a different season of diversion also does not involve the initiation of a new
22 right. See, *In Re: Petition for Reconsideration Regarding Petitions for Change Under*
23 *License 9847*, Order WR 2009-0061, at 5-6 (2009). A change that does not involve
24 taking water from a different river system also does not initiate a new water right. *C.f.*,
25 *Johnson Rancho County Water District*, 235 Cal. App.2d at 879. A change in point of
26 diversion from a river to an upstream tributary where less water is available does not
27 initiate a new right. *C.f.*, *In Re Application 5644A*, Decision D 1013 at 2-3 (1961).
28

1 In a memorandum, which is TCID-162, Senior Staff Counsel for the Board,
2 opined that, in certain circumstances, a change in a point of diversion to a "new source"
3 can result in the initiation of a new water right. The memorandum states that the Board
4 should determine on a case by case basis whether the change involves a change in
5 source. The memorandum sets forth several factors to be considered and evaluated in
6 determining whether a change in point of diversion involves the same or a different
7 source. Those factors include: hydrologic connectivity, geographic scale of the
8 proposed change, and no injury, among others. TCID-162 at 9-10.

10 None of the Change Petitions seeks any change in season of diversion or in the
11 amount of water which can be diverted to storage in a season. Therefore, they do not
12 initiate a new water right under those criteria. TMWA 3-0 at 9, In. 16-10 In. 2; Vol. I Tr.
13 at 226, In. 17-227, In. 3. Boca Change Petition and the Stampede Change Petition seek
14 to add a point of diversion at Independence Dam which is upstream from their existing
15 points of diversion on a tributary to the Little Truckee River. The Boca Change Petition
16 also seeks to add Stampede Dam as a point of diversion on the Little Truckee River,
17 which is also upstream from its existing point of diversion. The Independence Change
18 Petition requests the addition of Stampede Dam and Boca Dam as downstream points
19 of diversion. Independence Creek is a tributary to the Little Truckee River on which
20 Boca Dam and Stampede Dam are located.

23 As Van Camp testified, Independence Creek and the Little Truckee River and the
24 proposed additional points of diversion are hydrologically connected. It was his opinion
25 that there is no large geographic change here, particularly in light of the fact that the
26 points of diversion are high in the watershed of the Truckee River system. Van Camp
27 Testimony, TMWA 3-0 at 10, In. 13-20; 7/21/10 Tr. at 226, In. 17-227 In. 18. Although
28 Van Camp acknowledged that there was a difference in size between the Independence

1 watershed and the Boca and Stampede watershed, he also pointed out that the relative
2 size of all of those watersheds is much smaller than the watershed available at the point
3 of diversion for Orr Ditch Claim No. 3 at Derby Dam. 7/21/10 Tr. at 242, In. 13-243 In. 3
4

5 On the injury issue, Van Camp testified that TMWA did not propose to divert
6 water at either of the new points of diversion when there would not be a like quantity
7 available at Independence Dam. He also noted that there was no injury and no need to
8 subordinate the Independence priority to the priorities on the Little Truckee River. The
9 priorities for the Sierra Valley water right and Boca Reservoir are senior to the water
10 right for Independence Lake. In addition, he noted that the owner of Stampede
11 Reservoir and the Stampede Reservoir water right, the United States, had agreed to
12 those new points of diversion by becoming a party to TROA. Van Camp Testimony,
13 TMWA 3-0 at 10, In. 20-28.
14

15 The only evidence offered by Protestants on this issue came in the Mahannah
16 Rebuttal Report, TCID-287. Mahannah focused primarily on the request to add points
17 of diversion for Boca and Stampede upstream to Independence, arguing some theory
18 that such new diversion points increased the potential for storage. TCID-287 at 15.
19 That does not comport with reality, or to California law that a new upstream point of
20 diversion on a tributary where there is less water than the downstream diversion point is
21 not a new source. To the extent that Mahannah argued that a new source was involved
22 by moving the point of diversion for Independence downstream to Stampede or Boca,
23 the testimony of Van Camp rebutted that assertion. Moreover, TMWA's willingness to
24 agree that water would not be diverted at either of the new points of diversion, when a
25 like quantity was not available at Independence Dam, completely eliminates the new
26 source issue.
27
28

1 The initial diversion to storage of water under the Independence water right at
2 Stampede or Boca is likely to be rare. More often than not, that operation would result
3 in the Independence water in Stampede or Boca being more susceptible to spilling from
4 those reservoirs than it would be if it was stored in Independence Lake. See, Joint-19,
5 Section 5(C)(1)(c) and Section 5(C)(1)(m). The one circumstance when Independence
6 water in Stampede would have that risk reduced, but not eliminated, is when it is
7 passed through and stored downstream for purposes of maintaining minimum releases
8 or preferred instream flows encouraged by the Administrator pursuant to Section
9 9.F.2(b) or (c) of TROA. See, Joint-19 at Section 8.N.3.

11 In TCID-287, Mahannah also contends that a new right is initiated because when
12 water stored under the Independence License is in a downstream reservoir, there is
13 more space for storage in Independence Reservoir. Van Camp testified that a new
14 water right is not initiated in that situation when, as here, there is no request to expand
15 the water right in terms of storage in any one season or to expand the season itself.
16 See, Vol. I Tr. at 247, Ins. 3-14; 248, In. 20-249 In. 14. Van Camp's testimony is
17 consistent with this Board's order in the Camp Pendleton Petition for Reconsideration.

18
19 There, the Board said:

20
21 The requirements in a permit that limit the amount of a diversion can, and
22 must, remain in place when change petitions are approved, regardless of
23 whether the water is diverted for storage or immediate use. The situation
24 presented is no different than when a water right holder requests a change
25 to a new point of diversion that has a larger capacity either due to the
26 physical limitations of the diversion facilities or due to the amount of water
27 physically available at the diversion point. While the capacity of the old
28 point of diversion is no longer a limit on the diversion amount, it is possible
to change to a new point of diversion and still maintain the prior limit on
diversions as a result of conditions imposed on the approval of the
change.

1 *In Re: Petition for Reconsideration*, Order WR 2009-0061 at 7. In effect, in Camp
2 Pendleton the Board said that a change initiates a new right if it increases the amount of
3 water taken from a water source at a given time. *Id.*, at 6. That is not the case here.

4 In any event, legal users of Orr Ditch Claim No. 3 will not be injured by this
5 change. A downstream water right is not entitled to benefit from water previously
6 lawfully stored under another's water right. The only rights that such a downstream
7 appropriator has are those which he would have had under the natural conditions
8 existing before the dam was erected. See, *State Water Resources Control Board*
9 *Cases*, 146 Cal. App.4th at 738, 39 Cal. Rptr.3d at 240. See also, *In the Matter of Water*
10 *Right Application 3300*, Decision 1640 (1999) (the release of previously stored water
11 could not be required to provide water needed for satisfaction of downstream right).

12 TMWA has the right to use, and could use, any water stored under the Independence
13 License which under the Independence Change Petition is requested to be rediverted to
14 storage in Boca or Stampede. This is water which is stored after Orr Ditch Claim No. 3
15 is satisfied, and is water which, before the Independence permit was issued, would
16 have gone to Pyramid Lake because it is only available for storage when Orr Ditch
17 Claim No. 3 has been satisfied.

18
19
20 **D. Conditions the Board Should Adopt to Meet the Requirements of the**
21 **Truckee River Operating Agreement, to Avoid Injury, and to Meet the**
22 **Board's Public Trust Obligations.**

23 For a number of reasons, TROA is not a garden variety settlement agreement
24 among numerous parties. It is an agreement authorized by Congress. It involves
25 federal reservoirs and an interstate lake and river system. The parties to it are four
26 sovereigns, the United States, California, Nevada, the Tribe, and numerous political
27 subdivisions of both states. TROA was required to be and has been promulgated as
28 the exclusive federal regulation relating to the operation of the federal reservoirs. See,

1 Joint-16, Settlement Act, Section 205(a)(5); 43 C.F.R. Part 419; 73 Fed. Reg. 74031-
2 74039 (Dec. 5, 2008). It cannot be substantially modified without following the same
3 process and procedure used in the first instance. Joint-16, Settlement Act, Section
4 205(a)(5). The decrees of two federal courts must be amended as necessary for it to
5 enter into effect. *Id.*, at Section 205(a)(4). One such amendment has already occurred.
6 See, Joint-5. In short, in more than one respect, TROA has the force of law and
7 includes detailed provisions for its enforcement. See, Joint-19, Section 2.B. Finally, it is
8 intended to implement California's public trust responsibilities. Joint-19, Section 1.A.3.

10 TROA is a complex document which includes numerous interrelated provisions.
11 Those interrelated provisions, among other things, relate to protection of the interests
12 and water rights of the parties to TROA and of third parties and to operational rules
13 intended to provide the environmental benefits described in Section V.B, *infra*. See
14 *also*, USBR-5 at 5-6. Because of the interrelationship of all of these provisions, it is not
15 possible to simply extract some, but not all, of TROA's provisions as permit conditions,
16 as the Board may have done in other situations. See, *e.g.*, SWRCB Order No. WR
17 2008-14 (Mar. 18, 2008).

19 For those reasons and the reasons set forth below, Petitioners request that the
20 Board's order include three conditions which relate directly to the requirements of
21 TROA, avoidance of injury and satisfaction of the Board's public trust obligations. First,
22 any order should include the following condition:

24 These changes are not effective until the conditions required for the
25 Truckee River Operating Agreement to enter into effect have been
satisfied.

26 That condition is important to the Board because it ensures that these Change
27 Petitions (and the Applications) cannot be implemented unless and until the protections
28 and environmental benefits provided by TROA are also implemented. It is important to

1 the TROA parties because they agreed to seek the necessary changes to the existing
2 water rights to implement TROA as a complete package. They did not agree to allow
3 for any exceptions to the package, or to allow for changes or appropriations to be
4 approved if TROA itself did not enter into effect. Without an implemented TROA, the
5 alignment of the parties and the changes requested might be different.
6

7 Second, the order should also include this additional condition:

8 All diversions, storage, use of water and operations under this
9 [LICENSE/PERMIT] shall be in accordance with the provisions contained
10 in this [LICENSE/PERMIT] and the Truckee River Operating Agreement.

11 There was an exchange between Senior Staff Counsel Mahaney and Kenneth
12 Parr about that sentence. See, Vol. I Tr. at 103, In. 23-105, In. 8. So that there is no
13 confusion over what is intended with that condition, the Board is advised that the
14 condition intends to require that operations, including diversion, storage and use of
15 water, under the approved Change Petitions be in accordance with all related and
16 relevant provisions of TROA.

17 The incorporation of this condition as proposed is important for several reasons.
18 First, it avoids the risks associated with attempting to extract some, but not all, of the
19 provisions of TROA as permit conditions. Second, as noted above, TROA has within it
20 the operational rules to which the parties have agreed, and which protect their water
21 rights and the water rights of others. For example, Section 8.C of TROA provides the
22 general rule that water which the Change Petitions may allow to be in another reservoir
23 through a point of redirection cannot interfere with any of the operations related to the
24 water which is the "Project Water" of that reservoir. In other words, water from
25 Independence Lake stored under the Independence License, which may be redirected
26 to storage in Stampede Reservoir, cannot, as a general rule, interfere with the water
27 allowed to be stored in Stampede Reservoir under the Stampede Reservoir Permit.
28

1 As another example, Section 5.C of TROA provides that Project Water in its own
2 reservoir spills last. Using the same hypothetical, water from Independence Lake under
3 the Independence License and in Stampede Reservoir would, as a general rule, spill
4 before any water in Stampede Reservoir under the Stampede Permit. To the extent
5 that there are exceptions to those general rules, the parties owning the respective water
6 rights have agreed to those exceptions in TROA. Similarly, Section 5.D of TROA
7 requires water in a reservoir other than its original reservoir share in reservoir losses.
8 Water released from reservoirs must share in conveyance losses. See, Joint-19, TROA
9 Section 5.E. TROA Section 5.B essentially incorporates the Federal Water Master's
10 priorities for adding water to the reservoirs. Finally, as noted above, Section 5.A.1(d) of
11 TROA continues to require that Boca Storage Water, Additional Boca Storage Water
12 and Tahoe Exchange Water be available for meeting the exercise of Orr Ditch Decree
13 water rights in Nevada. Similarly, Sections 5.A.4(c) and 5.A.4(d) and Section 5.A.4(e)
14 continue the operations of the Truckee River Agreement with respect to releases of
15 Boca Storage Water and Additional Boca Storage Water, and continue the coordination
16 of releases from Boca Reservoir and Lake Tahoe as testified to by Chief Deputy
17 Federal Water Master Chad Blanchard. See, Joint-20 at 7, Ins. 17-28. In addition,
18 TROA has within it the operational rules which result in the environmental benefits
19 described below in section V.B., *infra*. See also, USBR-5 at pgs. 5-6.
20
21
22

23 The order should also include the following condition:

24 Water stored in this [NAME OF RESERVOIR] pursuant to permits issued
25 by the Nevada State Engineer under Nevada law and recognized pursuant
26 to the provisions of California Water Code §§ 1231 and 1232 shall not be
27 considered as water stored pursuant to the provisions of this
28 [LICENSE/PERMIT].

As explained above, and as Van Camp explained in his testimony, the Nevada
State Engineer has approved change applications to allow TMWA to store the

1 consumptive use portion of former Nevada direct diversion irrigation water rights in
2 these reservoirs and in other reservoirs when it is not needed to meet TMWA's water
3 demands. The storage of that water is critical to TMWA's drought supply objectives,
4 and is also an important element of environmental benefits in Nevada and California. In
5 the future, there may be similar changes allowed for storage of other Nevada direct
6 diversion irrigation water rights. See, e.g., TMWA 4-0; see also, Joint-19, Article Seven.
7 Such storage will not involve any water which could have been stored under permits or
8 licenses for the reservoirs here. It involves a direct diversion water right, the
9 consumptive use portion of which can only be stored as a result of the Nevada State
10 Engineer permit. Without that permit, it must be passed through the reservoir.
11 Therefore, it should not be considered as water stored as a result of any of these
12 reservoirs' licenses or permits. Van Camp Testimony, TMWA 3-0 at 14, In. 19-15 In. 2.

13
14 Although TMWA does not believe it is necessary, TMWA has no objection to
15 inclusion of the following condition with respect to the Independence Change Petition:
16

17 Water can be initially diverted to storage under License 4196 at Stampede
18 Dam and Boca Dam only at times when flow to an equivalent volume is
19 available at Independence Dam as verified by the TROA Administrator.

20 This condition is suggested to completely eliminate any concern that the change in point
21 of diversion under the Independence License involves a different source and initiates a
22 new right.

23 **IV. THE BOARD SHOULD APPROVE THE WATER RIGHT APPLICATIONS.**

24 **A. Introduction.**

25 The Bureau of Reclamation (Reclamation) holds Permit No. 11605 (Application
26 15673) for Stampede Reservoir and License 10180 (Application 18006) for Prosser
27 Creek Reservoir. USBR-1 at 5. Application 31487 for Stampede Reservoir was filed to
28 appropriate 350 cubic feet per second (cfs) by direct diversion from January 1 to

1 December 31, and up to 226,500 acre feet per annum by storage from January 1 to
2 December 31, for a maximum annual quantity to be appropriated by direct diversion or
3 by storage of 226,500 acre-feet in combination with Permit 11605. *Id.* Application
4 31488 for Prosser Creek Reservoir was filed to increase the existing maximum
5 withdrawal in any one year above the 20,162 acre-feet in License 10180 and for a
6 storage season from October 1 to August 10, for a maximum annual quantity of storage
7 under this application and License 10180 of 30,000 acre-feet. *Id.* Both applications
8 were also filed to accommodate the implementation of the provisions of TROA. *Id.*;
9 USBR-2 at 4; USBR-7 at 1; and SWRCB-5 and 6 (water right files for applications
10 31487 and 31488, respectively).¹²

12
13 To approve an application for appropriation, the Board must make findings
14 regarding water availability, beneficial use, public trust, and public interest. SWRCB
15 Decision No. 1649 at 11 (October 20, 2009).¹³ In determining whether there is water
16 available for appropriation, the Board must consider whether there is unappropriated
17 water in the Little Truckee River and Prosser Creek, and whether Reclamation could
18 divert that water for reasonable and beneficial use in a manner that is consistent with
19 existing water rights. (Wat. Code §§ 1253, 1375(d).) As summarized in section IV.B.
20 below, the evidence presented during the hearing established that Reclamation can
21 divert and store up to 226,500 acre feet in Stampede Reservoir and up to 30,000 acre
22 feet in Prosser Reservoir of unappropriated water during wet years and place that water
23

24
25 ¹² For additional details on the applications, see SWRCB-5 and 6 and USBR-1.

26
27 ¹³ Because these are applications to appropriate water and not a change petition, the
28 measure of whether the application can be approved is whether there is water available
for the appropriation under Water Code, § 1202, not whether there will be injury to
another legal user of water as would be the case when addressing a petition for change
under § 1702. SWRCB Order No. WR 2006 – 0007 (March 8, 2006) at 10, fn 5.

1 to reasonable and beneficial use without interfering with valid senior rights or causing
2 injury to legal users of water.

3 The Board must also consider whether issuing permits for the Applications would
4 serve the public interest and are sufficiently protective of the public trust. (Wat. Code §§
5 1253-1259.) As summarized in section VI.D below, the only credible and competent
6 evidence presented during the hearing demonstrated that granting the Applications
7 would serve the public interest in a variety of ways:
8

- 9 • More water could be stored and released for cui-ui and Lahontan cutthroat trout
10 spawning in the lower Truckee River.
- 11 • More water would be available for enhancing reservoir releases for stream flow
12 benefits.
- 13 • Reservoir levels would be better maintained for recreational uses.
- 14 • Increased storage would also enhance habitat for fish, waterfowl, and shore
15 birds.

16 These same interests demonstrate that approving the applications is protective of the
17 public trust.

18 Water availability is considered in section IV.B and C, while the other criteria to
19 be considered in determining whether to approve an application for appropriation are
20 discussed in sections IV.D and V below. In determining whether water is available to
21 support an application to appropriate water, the Board must determine whether
22 unappropriated water is available to supply the project described in the application.

23 Wat. Code, § 1375, subd. (d). Unappropriated water includes water that has not been
24 either previously appropriated or diverted for riparian use. Wat. Code, §§ 1201, 1202.

25 According to the Board's regulations, a permit can be issued only for unappropriated
26 water. Unappropriated water does not include water being used pursuant to an existing
27 right, whether the right is owned by the applicant, or by another person. (Cal. Code
28

Regs., tit. 23, § 695.) *Id.*; see also, *Eaton v. State Water Rights Board*, 171 Cal. App. 2d

1 409, 413; 340 P.2d 722 (1959). The evidence presented in this proceeding, as
2 discussed below, demonstrates that there is water available for appropriation, the
3 applications are in the public interest and would not result in any significant adverse
4 impact to water quality, the environment or public trust resources. Thus, the Board
5 should approve the applications.
6

7 **B. Unappropriated Water Is Available to Support the Applications.**

8 The Applicant prepared a Water Availability Analysis ("WAA") for each
9 application. USBR-20 (Stampede) and 21 (Prosser). The purpose of the analysis was
10 to show the amount of water available in the Truckee River system, Vol. II Tr. at 328,
11 Ins. 12-13, taking into account existing water rights. Vol. II Tr. at 321, Ins. 6-13. The
12 analysis was based on the Board's requirements, Vol. II Tr. at 318, Ins. 11-16, and the
13 methodology used for each analysis, which included the use of historic hydrology, Vol. II
14 Tr. at 325, Ins. 19-23; 326, Ins. 12-15, was agreed to by the Board staff. USBR-19 at 2.
15 At the hearing, the applicant's witness, Engineer Ali Shahroody, President of Stetson
16 Engineers, Inc., testified on behalf of the Applicants and Petitioners regarding the
17 availability of unappropriated water for storage in Stampede and Prosser Creek
18 Reservoirs as contemplated by Applications 31487 (Stampede) and 31488 (Prosser).
19 USBR-7 at 1-35.
20

21
22 At the request of the Board after receiving Reclamation's Applications, Mr.
23 Shahroody prepared Water Availability Analyses ("WAAs") for both Stampede and
24 Prosser Creek Reservoirs. USBR-20 and 21. Mr. Shahroody determined that
25 unappropriated water remains available for storage in both of these reservoirs. USBR-7
26 at 16 (Table 4) (showing available water for storage at Stampede Reservoir for water
27 years 1970-2006); and 32 (Table 9) (showing available water for storage at Prosser
28 Creek Reservoir for water years 1970-2006). Specifically, Mr. Shahroody determined

1 that the Stampede Reservoir had been filled to its capacity of 226,500 acre-feet in ten of
2 the thirty-seven years for which Mr. Shahroody compiled data. Vol. II Tr. at 286 (citing
3 USBR-20, Fig. 3).

4 Mr. Shahroody presented the WAA for each application and concluded that water
5 is available for appropriation during high flow or wet years and that the ability to capture
6 such flows in the future is dependent on a number of factors that cannot be predicted
7 with certainty at this time. USBR-7. That water may be available for appropriation only
8 in high flow years does not defeat the application. See, SWRCB Decision 1649 at 28
9 (2009) (approving application where Board found that water was available for
10 appropriation during the high flow periods and there was no guarantee that water would
11 be available in a particular amount in any given year; the actual quantity of water
12 subject to the application would be determined at the license stage; not at the
13 application approval stage.)

14 The analysis of water available for appropriation for Stampede Reservoir is
15 presented in USBR-7 beginning at page 11.¹⁴ The analysis is based on the historical
16 operation of Stampede Reservoir for a 37 year period from 1969 to 2006 and the
17 amount of water available is calculated for periods (1) of higher flow in the Truckee
18 River, (2) when storage would not interfere with any downstream water rights in
19 California or Nevada, USBR-7 at 11; Vol. II Tr. at 289, Ins. 7-11; and (3) when such
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26
27 ¹⁴ Background information on water rights priorities and use of water in the Truckee
28 River system relevant to the Stampede application is presented in pages 1 to 10 of
USBR-7. See also, Joint-20.

1 water would otherwise flow to Pyramid Lake.¹⁵ USBR-7 at 11; Vol. II Tr. at 288, Ins. 13-
2 25 and 289, In. 1. Table 3 presents the analysis in detail. USBR-7 at 12-13. The
3 results of the WAA are summarized in Table 4. *Id.*, at 16; Vol. II Tr. at 285, Ins. 9-15.
4 Additional information on water availability for different water year types shows that
5 water is available in wet and above average years. *Id.*, at 19-22 (Tables 6 and 7).
6

7 Mr. Shahroody's WAAs for the Stampede and Prosser Creek Reservoirs were
8 limited to so-called "wet" and "above average" water years, as opposed to dry water
9 years. Vol. II Tr. at 288, Ins.13-21. For "dry" or "below average" years, there would be
10 no water available for storage because Stampede and Prosser Creek Reservoirs are
11 among the lowest priority on the Truckee River System, and are therefore precluded
12 from storing water unless all downstream water users have satisfied their water rights.
13 *See, e.g.*, Vol. II Tr. at 288, Ins. 20-21. In other words, Mr. Shahroody only calculated
14 water as available for storage for periods when it *would not interfere with any*
15 *downstream rights*, and therefore the water proposed to be stored pursuant to these
16

17 Applications is water that would otherwise flow to Pyramid Lake on the Pyramid Lake
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24 ¹⁵ The Tribe currently holds permit nos. 48061 and 48494 in Nevada for the remaining
25 unappropriated water in the Truckee River in Nevada. The issuance of these permits is
26 in conformance with Pub. L. 101-618, section 210(A)(2)(b) and TROA. USBR-7 at 9.
27 To the extent that the water requested in this application (and for application 31488 for
28 Prosser Creek Reservoir) is part of the water appropriated to the Tribe in Nevada, the
Tribe has given its consent for this water to be stored in Stampede and Prosser Creek
Reservoirs in accordance with TROA. Vol. II Tr. at 287, Ins. 6-17; 288, Ins. 1-5; and
301, Ins. 12-15.

1 Indian Reservation. Vol. II Tr. at 288–89;¹⁶ see also, Vol. II Tr. at 289, Ins. 7–9 (“The
2 storage of water sought herein would not interfere with Nevada water rights because *it*
3 *will only be stored after all of Nevada rights are satisfied.*”) (emphasis added); *Id.*, at 321
4 (during cross examination of Mr. Shahroody, he explained that he only used the “wet”
5 years for his analysis, which assumes that all rights downstream of the proposed
6 storage were satisfied for those years).
7

8 In addition to protecting all other senior water rights by storing only water that
9 would otherwise flow to Pyramid Lake, the proposed storage of available water as
10 calculated in Mr. Shahroody’s WAA would also provide for fish flows under Flow
11 Regime 1 (the highest flow rate) for the threatened and endangered fishes of the lower
12 Truckee River and Pyramid Lake. Vol. II Tr. at 290, Ins. 7–22. Mr. Shahroody testified
13 that he used only conservative assumptions when calculating the available water for
14 storage. The analysis was conservative because it assumed senior diversions to Derby
15 Dam that may be higher than allowed under the current OCAP and also assumed
16 satisfaction of the maximum flows for fish needs. Vol. II Tr. at 290, Ins. 1-6 (analysis
17 looked only at historical diversions of Truckee River water at Derby Dam for the
18 Newlands Project using the conservative 1970s era Operating Criteria and Procedures
19 (OCAP) as opposed to the stricter 1997 OCAP); and *id.*, at 290, Ins. 7–22 (analysis
20 takes conservative approach regarding joint U.S. Fish and Wildlife Service and Pyramid
21 Lake Paiute Tribe developed fish flow regimes for the Lower Truckee River by
22 calculating water available for storage only after ensuring Flow Regime No. 1, which
23
24
25

26 ¹⁶ As stated in footnote 15 above, because the water proposed to be stored is water that
27 would otherwise flow to Pyramid Lake on the Pyramid Lake Indian Reservation, the
28 Pyramid Lake Paiute Tribe—a party to these proceedings who supports the granting of
the Applications—has given its consent to Reclamation to store water in Stampede and
Prosser Creek Reservoirs that would otherwise flow to Pyramid Lake. Vol. II Tr. at 288,
Ins. 2–5; 301, Ins. 8–15.

1 requires the most volume of water, is satisfied); USBR-20 at 7; USBR-21 at 7; Vol. II Tr.
2 at 308; and USBR-7 at 16 and 32.

3 The WAA concluded that water is available in certain year types to support the
4 requested additional appropriation for Stampede Reservoir. A similar analysis was
5 performed for Prosser Creek, concluding that water is available for appropriation as
6 identified in the application. USBR-7 at 24-35; Vol. II Tr. at 292-294. Thus, the
7 evidence amply supports the availability of water to support each of these applications
8 and the Board should approve each of them on that basis.

10 **C. Evidence Presented By and Response to Evidence of Protestants Re**
11 **Water Availability and Unappropriated Water.**

12 **1. Availability of Water for Storage.**

13 Although the Applicant provided the Board with a separate WAA for the proposed
14 storage of Truckee River water in both the Stampede Reservoir and Prosser Creek
15 Reservoir, the Protestants did not provide any such evidence regarding the *lack* of
16 available water for said storage. Instead, the Protestants merely provided reports and
17 testimony that criticized Mr. Shahroody's studies and findings. However, the
18 Protestants' witness, Mr. Chris Mahannah, provided rebuttal written testimony intended
19 to rebut Mr. Shahroody's WAAs and Mr. Shahroody's testimony. See, TCID-287
20 (hereinafter "Mahannah Rebuttal Report").

21 Mr. Mahannah argues that Mr. Shahroody's WAAs suffer from four critical flaws.
22 First, Mahannah argues that the WAAs incorrectly assume a flow regime for the Lower
23 Truckee River below Derby Dam that is inconsistent with the Tribe's Nevada Permits
24 48061 (TCID-211) and 48494 (TCID-212). TCID-287 at 2. Mahannah also claims that
25 the WAAs neglect to consider the physical or flood capacities of the respective
26 reservoirs when determining whether water would be available for storage in those
27 reservoirs. *Id.* Third, Mahannah claims that the WAAs are flawed because they are
28 based on "historical static analysis" that does not account for future conditions under the
TROA. *Id.*, at 3. Finally, Mahannah alleges the WAA is flawed because it includes

1 "water that is already within their permitted allotment in their analysis as available water
2 in addition to the amount stored in the reservoir." *Id.* For the reasons set forth below,
3 Mr. Mahannah's critiques of the WAAs should not be given any weight by the Board.

4 **(a) Alleged TCID Flaw #1 – Inconsistent Flow Regimes.**

5 Mahannah opines that the WAA is flawed because it assumes a target flow
6 regime for fish flows below Derby Dam that is less than the amount of water awarded to
7 the Tribe in the unappropriated water ruling, which granted the Tribe's Permit Nos.
8 48061 and 48494. TCID-287 at 3–5. Mahannah's report states, "The WAA's assume a
9 Pyramid Lake Inflow target Flow Regime 1 . . . which totals approximately 251,000 afa
10 [acre-feet annually] which is roughly half the 477,851 afa granted to the Tribe under
11 permits 48061 and 48494." *Id.*, at 3. Mahannah appears to argue that the Tribe's WAA
12 should assume the entire unappropriated water right granted to the Tribe as water that
13 is unavailable for storage in the upstream reservoirs, and that by assuming the 251,000
14 afa flow regime, the WAA inflates the amount of water available for appropriation by the
15 difference between Flow Regime 1 and the Tribe's combined unappropriated water right
16 - an inflation of approximately 226,851 afa. TCID-287 at 5 ("Obviously reducing
17 demand below Derby will inflate any WAA result at an upstream location such as
18 Stampede and Prosser.").

19 The Protestants raised this same "flaw" during the cross examination of Mr.
20 Shahroody on the subject of water availability for storage in these two reservoirs. Vol. II
21 Tr. at 315–317. There, Mr. Shahroody explained that there are up to six different flow
22 regimes that are employed by the Fish and Wildlife Service and the Tribe, depending
23 upon the actual conditions of the river in any given year. *Id.*, at 316, Ins. 7–10. The flow
24 regimes were developed to ensure adequate monthly flows in the Lower Truckee River
25 for the threatened and endangered fishes of the Pyramid Lake and their habitat. *Id.*, at
26 316–317. On the other hand, the 477,851 afa of unappropriated water granted to the
27 Tribe pursuant to Permits 48061 and 48494 is an upper limit that is a junior right on the
28 river and is completely dependent on the precise on-the-ground conditions at any one

1 time. The Tribe's right to the unappropriated Truckee River water is not a right to a
2 concrete and definable volume of water but rather is a right to any *remaining* water in
3 the river, up to a maximum of 477,851 afa. TCID-211; TCID-212; TCID-230 at 28.

4 Further, the Flow Regime 1 referenced in the proceedings involving the Tribe's
5 permits is intended to address required flow for cui-ui spawning during a seven month
6 period. See, TCID-289. The purpose of Flow Regime 1 is to maximize cui-ui spawning
7 and minimize larvae mortality for available water resources, and therefore a *minimum*
8 flow was established as a baseline for that purpose, but greater flows were also sought
9 to enhance spawning conditions such as water temperature for cui-ui egg incubation.
10 See, Table 1 of Mahannah Rebuttal Report (TCID-287) (showing reduced flow regime
11 *only for January through July*), *c.f.* WAAs (USBR-20 at 8; USBR-21 at 8), which uses a
12 twelve month period. The Nevada permits were granted to the Tribe as an instream
13 right to support cui-ui and Lahontan cutthroat trout, and also to maintain the elevation
14 level of Pyramid Lake. Maintenance of the level of Pyramid Lake accounts for the
15 greater amount of volume requested and granted in Ruling 4683 (TCID-230) above the
16 *minimum* requirements of river flow of the Tribe/FWS Flow Regimes. The Flow Regime
17 1 target and the elevation target are used to meet two separate objectives.

18 Finally, the Tribe has given its consent to the storage of water in the upstream
19 reservoirs pursuant to the Applications that are the subject of these proceedings. The
20 FWS and Tribe Flow Regimes are intended to ensure adequate surface water flow in
21 the river for the protected fishes and their habitat, and any water above those monthly
22 flow regime targets that is not subject to any other vested or perfected water right in the
23 Truckee River system, and with the Tribe's consent as to Permits 48061 and 48494, is
24 therefore appropriately considered available for storage under these Applications.

25 **(b) Alleged TCID Flaw #2 – Failure to Consider Physical or**
26 **Flood Control Limits on Reservoir Capacity.**

27 The second flaw Mr. Mahannah alleges is that the WAA fails to consider the
28 physical and/or flood control storage limits of the Stampede and Prosser Reservoirs.
TCID-287 at 5–7. The flood control limits of the reservoirs are rendered as theoretical

1 end-of-month (EOM) storage capacities, and Mr. Mahannah's claim is that the WAA is
2 flawed because for the vast majority of years analyzed, the theoretical WAA EOM
3 storage values exceeded the flood control or physical limits of the reservoirs. *Id.*, at 6.
4 In other words, the Protestants argue that the WAA incorrectly calculates water
5 availability because it includes as water available for storage *all* the water that was not
6 necessary to meet vested or perfected rights, and does not limit its calculations to only
7 the amounts of water that could physically have "fit" in the reservoirs or that could
8 legally have been stored because of flood control limitations at any given time. *Id.*, at
9 6-7 ("Simply put, one can't store water beyond the physical capacity of the reservoir.
10 By not constraining the WAA analysis to the flood and/or physical capacity renders the
11 analysis to merely a theoretical exercise to compute available water which serves no
12 purpose unless additional storage is contemplated.").

13 The Protestants' claim in this regard betrays their complete misunderstanding of
14 the purpose of the Applicant's WAA. The WAA is meant to calculate the *potential*
15 amount of water available for storage by looking at historical water data. It is *not* meant
16 to calculate the *actual* amount of that available water that could have been stored
17 according to physical or legal limits in place at those times. This concept was
18 thoroughly explored during the cross examination of Mr. Shahroody by the Protestants,
19 and he explained more than once why the WAA did not determine whether any water
20 found to have been available for storage *could have been stored* at the time it was
21 available. The amount of available room for storing, and the time at which it could be
22 stored in terms of monthly flood control requirements for Stampede and Prosser Creek
23 Reservoirs, is not a factor in determining whether there is water available for storage in
24 those reservoirs. Such physical limitations on storage will have to be made on a case
25 by case basis, and do not represent a flaw in the WAA. Vol. II Tr. at 324-329.

26 **(c) Alleged Flaw #3 – The WAAs Do Not Consider Future**
27 **TROA Conditions.**

28 The third alleged flaw in the WAAs as identified by Mr. Mahannah is that the
WAAs do not consider "future actions proposed under TROA." Without pointing to any

1 specific "future action" proposed by TROA, Mr. Mahannah argues that "[end-of-month]
2 reservoir storage values will be higher than the historical EOM values used in the
3 WAAs." TCID-287 at 9. Essentially, Mr. Mahannah appears to be arguing that under
4 TROA there will be additional water stored in Stampede and Prosser Creek Reservoirs,
5 which was not part of the historical data used in Mr. Shahroody's WAAs. Therefore, Mr.
6 Mahannah argues, because there will be additional water in the reservoirs in the future
7 pursuant to TROA, there will be less available storage volume for any water to be stored
8 in the future. *Id.*, at 10.

9 This alleged flaw suffers from the same conceptual deficiency as does Mr.
10 Mahannah's "flaw #2," namely, that the WAAs purposefully did not consider the amount
11 of available *storage capacity* in Stampede or Prosser Creek Reservoirs for any water
12 deemed otherwise available for storage. But the WAAs, as stated above, were only
13 concerned with whether there was water available for storage after all other
14 downstream water rights had been satisfied. It was not relevant for that consideration
15 whether the reservoirs could physically store such water at any given point in time – the
16 only relevant consideration is whether there was any such available water. Whether
17 such water can physically be stored can only be determined at the time the water is
18 available to be stored.

19 In addition to misapprehending the nature of the WAAs, Mr. Mahannah's "flaw
20 #3" also fails to consider that under the TROA, any such additional water could
21 potentially be required to be Displaced (released or spilled) from the reservoirs to allow
22 additional available water to be stored. Under section 5.B.8(a) of TROA (Joint-19 at 5-
23 21) all water accumulated in Stampede Reservoir as a result of the Stampede
24 Application in excess of 126,000 acre feet is classified as Fish Credit Water and is
25 Established as such under Section 7.C.3 (Joint-19 at 7-19). Under Section 8.E.4 of
26 TROA (Joint-19 at 8-3), an accumulation of such credit water may result in
27 displacement of a lower priority credit water in a reservoir in the same sequence as
28 provided for spill under the rules in TROA Section 5.C (Joint-19 at 5-24 to 5-26). In

1 terms of those spill provisions, Fish Credit Water that would be stored pursuant to the
2 Stampede Application has a high priority. See, TROA Sec. 5.C.1(h) (Joint-19 at 5-24 to
3 5-25).

4 Thus, if there ever was any other credit water in Stampede or Prosser Creek
5 Reservoirs according to the "future TROA conditions" as theorized in Mahannah Flaw
6 #3 when water under this new appropriation was available for storage, in the majority of
7 cases such credit water would have to be Displaced (released or spilled) to allow space
8 for such storage to happen. So there would, in fact, be available space made for such
9 an appropriation pursuant to the terms of TROA. Moreover, there would only be water
10 to store under this appropriation in relatively "wet" years, and under such circumstances
11 the other categories of water in Stampede would likely have already been Displaced.

12 **(d) Alleged Flaw #4 – The WAAs Include Water That Is**
13 **Already Within the Permitted Allotment.**

14 Finally, Mr. Mahannah alleges that the WAA is flawed because it "include[s]
15 water that is already within their permitted allotment . . . as available water in addition to
16 amount stored in the reservoir." TCID-287 at 10. Mr. Mahannah claims that the WAA
17 includes water as available for storage even if, for example, such water would already
18 be within the 126,000 acre feet capacity of the Stampede Reservoir. This, it is claimed,
19 is not correctly included as additional water available for appropriation. *Id.* However,
20 the amount of water available to be stored within the 126,000 acre feet capacity of the
21 reservoir is included in the WAA because the maximum annual quantity to be
22 appropriated by direct diversion or by storage under Application 31487 is 226,500 afa,
23 *in combination* with Permit 11605.

24 **2. Unappropriated Water.**

25 The Protestants claim that there is no "unappropriated water" in the Truckee
26 River system for storage in upstream reservoirs as requested in the Applications. TCID-
27 267; TCID-276B. As a result of that assertion, they contend either that the Applications
28 should be denied, or that the Board should defer action on them. Protestants rely on
statements of the Nevada State Engineer that the Truckee River is considered fully

1 appropriated in Nevada. See, e.g., TCID-211; TCID-212. They also rely upon the
2 Protestant TCID's Application No. 9330 for 100,000 acre feet of Truckee River water,
3 and point to Reclamation Application Nos. 15664, 24310, 24311 and 24312. Finally, the
4 Protestants refer to the Tribe's Permits 48061 and 48494, which granted the Tribe the
5 remaining unappropriated water of the Truckee River in Nevada. TCID-267; TCID-276B
6 at 5-6. The issue raised by the Tribe's Permits has been addressed at pages 40-41
7 above. The Protestants also argue that TROA Section 1.E.1 and Nevada State
8 Engineer Ruling 5792 (TCID-232) stand for the proposition that the Truckee River is
9 considered fully appropriated in the context of these Applications. TCID-267 at 7-9.
10 Finally, the Protestants argue that these Applications attempt to circumvent a decision
11 of Nevada Judge Maddox (TCID-208). See, TCID-267 at 7-8; TCID 276B at 6.
12 Protestants are wrong on all of these assertions.

13 First, despite what the Nevada State Engineer may have said about the lower
14 Truckee River in Nevada, for the purposes of these Applications, the Little Truckee
15 River and Prosser Creek, which provide the water proposed for storage, have not been
16 declared fully appropriated in California pursuant to Cal. Water Code §§ 1205, et seq.
17 Water Code § 1205 provides that the Board, after notice and hearing, may declare a
18 stream system fully appropriated. No such declaration has been made for either the
19 Little Truckee River or Prosser Creek. See, SWRCB Order 98-08 (Nov. 19, 1998)
20 (These streams and the Truckee River itself are not included), *c.f.*, Vol. IV Tr. at 1041,
21 Ins. 4-17. Moreover, the Nevada State Engineer has not stated or even suggested that
22 any portion of the Truckee River or its tributaries in California is fully appropriated. He
23 did not do that in Permit Nos. 48061 (TCID-211) and 48494 (TCID-212), in Ruling 4683
24 (TCID-229) or in Ruling 5972 (TCID-232), nor would he, or could he ever make such a
25 ruling as to California.

26 TCID's 80 year old Application 9330 for 100,000 acre feet of Truckee River water
27 in Nevada does not require the Board to defer action here, or suggest that there is no
28 available water for storage pursuant to these Applications. First, TCID has only made

1 an *application* for such water. It has not been granted a permit for such an
2 appropriation, and cannot proceed to appropriate that water from the Truckee River.
3 See, N.R.S. 533.325. Second, and related, is the fact that TCID's application is at best
4 speculative at this point in time. There is no evidence that it will ever be granted, and
5 even if granted, it is not known what amount of appropriation might be permitted, and
6 ultimately certificated as a result of proof of actual beneficial use. TCID's application
7 has been denied *twice* by the Nevada State Engineer. See, TCID-229 at 4; 21.

8 Application 9330 was filed by TCID in 1930. TCID-228; TCID-229 at 1. In the
9 "remarks" section of that Application, TCID stated that it intended to increase the
10 storage capacity of Lahontan Reservoir by 100,000 acre feet, to 394,000 acre feet.
11 TCID-228. It also stated that the right applied for was to be "supplemental" to the
12 present rights held or acquired by the United States, *i.e.*, Orr Ditch Claim No. 3. TCID-
13 228.

14 Therefore, even if the State Engineer were to drastically reverse course and
15 grant TCID's Application, water would only be available for diversion when TCID's Orr
16 Ditch Claim No. 3 right was inadequate to supplement the supply available to the
17 Carson Division from the Carson River and Lahontan Reservoir. That is likely to occur
18 in very dry years, and when there is insufficient water to meet Orr Ditch Claim No. 3 and
19 its 1902 priority, there will be no water to satisfy a 1930 priority under Application 9330,
20 and no water available for the Applications here. Water for the storage applied for by
21 the Applications is *only available when all other downstream Truckee River water rights*
22 *are satisfied*, and when that situation exists, Orr Ditch Claim No. 3 must be fully satisfied
23 and will not need to be supplemented by water from Application 9330.¹⁷ In short, TCID
24 presented no evidence whatsoever that Application 9330 requires the Board to either
25

26
27 ¹⁷ It is also important to note that during these wet periods when water is available
28 under these Applications in the Truckee River Basin, the Carson River may and likely
will fill Lahontan Reservoir even if it has an expanded capacity. See, TCID-134 (Alpine
Decree) at 151 (United States entitled to store entire flow of Carson River as it reaches
Lahontan Reservoir).

1 deny or defer action on the Applications here.

2 The Protestants also argue that Reclamation's Application Nos. 15664, 24310,
3 24311 and 24312 require the Board to defer action on these Applications. TCID-267 at
4 8-9. Reclamation has made it clear that these Nevada Applications are not intended to
5 do anything more than ensure that water stored and released under the existing
6 Stampede Permit and the Stampede Application here, if granted by this Board, will be
7 protected under Nevada law as to its purpose and place of use once the water enters
8 Nevada. TCID-191 at 2. Nevada law, in N.R.S. 533.055, will likely ensure that happens
9 in any event. Indeed, it has been happening since the early 1970s with respect to
10 Permit No. 11605. These Nevada Applications also provide no basis for deferring
11 action on or denying the Applications here.

12 The Protestants also claim that TROA itself, in Section 1.E.1 (Joint-19 at 1-4 to 1-
13 5), precludes the granting of these Applications because the TROA parties agree the
14 Truckee River is fully appropriated in Nevada based upon the Tribe's Permits 48061
15 and 48494. TCID-267 at 6. The parties to TROA recognized the Tribe's Permits and
16 the Applications at issue herein, and expressly made clear that nothing was intended to
17 imply that there was no unappropriated water *in California* for the storage of the
18 available water for the present Applications. See, e.g., TROA Sec. 7.A.4(a)(5) and (7)
19 (Joint-19 at 7-7) (regarding applications for new appropriation at Stampede and Prosser
20 Creek Reservoirs, TROA states "an application may be filed by United States with
21 California Water Resources Control Board to increase Stampede Reservoir's *California*
22 *Water Right* to a maximum diversion to storage of 226,500 acre-feet annually. . ."
23 (emphasis added); and same in sub-section (7) as to Prosser Creek Reservoir).

24 Finally, the Protestants claim that the decision of the Third Judicial District Court
25 for Churchill County Nevada (Case Nos. 25219/25277) (TCID-208) (the "Maddox
26 Ruling") requires the Board to defer action on these Applications. That decision related
27 to an appeal of the State Engineer's decision to grant Applications 48061 and 48494.
28

1 Explained in its proper context, the Maddox Ruling does not require the Board to
2 defer action here. The question there was whether the Nevada State Engineer correctly
3 ruled that issues which might be raised if the Tribe at some future time applied for
4 permission to store some or all of the water to be appropriated under Applications
5 48061 and 48494, as contemplated in the then draft TROA, were relevant to the
6 decision of the State Engineer to approve those applications in the first instance, and
7 whether until such permission was sought, were ripe for decision. Maddox Ruling at 3-
8 4, 5 (TCID-208). The Maddox Ruling determined:

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

21 The State Engineer correctly concluded that the draft TROA was not
22 relevant to the consideration of Applications 48061 and 48494.
23 Applications 48061 and 48494 were not filed nor approved for storage of
24 water as is anticipated in the draft TROA. Here on review, the question is
25 whether the Applications as granted comply with State law, not whether an
26 anticipated but currently unauthorized use of the water would comply with
27 State law. Since Applications 48061 and 48494 do not currently allow for
28 the storage of water as anticipated by the draft TROA, it will be necessary
as a matter of State law for the Tribe to file change applications and to
obtain the Nevada State Engineer's approval in order for the water to be
stored and used as anticipated by the draft TROA.

TCID-208 at 12. As was made clear at the hearing in this proceeding, the Tribe has not
yet applied to the Nevada State Engineer for permission to store water appropriated
under Permit Nos. 48061 and 48494 in the upstream reservoirs in California. However,
in the meantime, Reclamation has applied to increase its storage amount for Stampede
Reservoir and to alter its storage regime for Prosser Creek Reservoir, and the Tribe has

1 given its consent to those Applications. That water will be released to Pyramid Lake,
2 and the only change is in regard to the timing of those flows. That change in timing will
3 not result in any legal harm to any senior downstream water rights, and the Protestants
4 did not show otherwise.

5
6 **D. The Record Demonstrates That the Water Sought Under Applications**
7 **31487 and 31488 Will Be Put to Beneficial Use and That the**
8 **Applications Are in the Public Interest.**

9 The Board is to allow the appropriation for beneficial purposes of unappropriated
10 water under such terms and conditions as in its judgment will best develop, conserve,
11 and utilize in the public interest the water sought to be appropriated. Water Code §
12 1253. In determining whether an appropriation is in the public interest, the Board shall
13 give consideration to all beneficial uses of the water concerned and shall consider the
14 relative benefit to be derived from each. Water Code § 1257.

15 Here, the evidence thoroughly demonstrates that the use of water proposed by
16 these Applications is in the public interest. The water that will be appropriated under
17 these Applications will be used for beneficial uses recognized by California law,
18 including domestic, municipal, industrial, irrigation, fish culture, and recreation purposes
19 consistent with Water Code § 1243. Importantly, a primary purpose for the Applications
20 is to provide for fish and wildlife preservation and enhancement. In addition, a
21 significant incidental use that benefits from the additional stored water is recreation.
22 These two beneficial uses are recognized beneficial uses in California. See, Water
23 Code § 1243; 23 Cal. Code Regs. §§ 666; 668.

24 **1. The Applications Are in the Public Interest.**

25 The planned beneficial uses for these Applications will serve the public interest.
26 Applicants' witnesses provided evidence that appropriating additional water for storage
27 in Stampede and Prosser Creek Reservoirs will provide for and increase multiple
28 beneficial uses, including fish and wildlife preservation and enhancement (23 Cal. Code
29 Regs. § 666), as well as recreation (23 Cal. Code Regs. § 668), and water quality.

1 Consequently, these witnesses provided substantial evidence that the Applications are
2 in the public interest as a matter of law.

3 For example, Mr. Shahroody described in his testimony how the water would be
4 put to beneficial use. Mr. Shahroody indicated that one of the primary uses for water
5 stored in Stampede Reservoir and Prosser Reservoirs is for the threatened and
6 endangered fishes of Pyramid Lake. USBR-7 at 7 and 24. In general, water from
7 Stampede and Prosser Creek reservoirs is released to support the passage flows for
8 cui-ui to migrate and overcome the delta in the mouth of the Truckee River at Pyramid
9 Lake, which acts as a barrier to spawning runs. *Id.*, at 39. In addition to releases for
10 spawning, water is also released to maintain the habitat in the lower Truckee River year
11 round. *Id.* The flows are also targeted for the recruitment and maintenance of natural
12 riparian vegetation, such as willows and cottonwood, in the lower Truckee River. *Id.*
13 However, there is insufficient water in most years to overcome the passage barrier at
14 the delta and provide the higher flows for habitat maintenance. *Id.* Mr. Shahroody
15 testified that the additional stored water is needed and will be used to provide the
16 hydraulic depth necessary for the cui-ui to migrate through the delta in the spring. *Id.*;
17 Vol. II Tr. at 558, 559.

18 Similarly, Mr. Buchanan testified that in addition to providing more water for cui-ui
19 and Lahontan cutthroat trout spawning in the lower Truckee River, the increased stored
20 water would also provide more fish credit water to maintain spawning access for
21 Lahontan cutthroat trout from Independence Lake into Independence Creek and would
22 enhance minimum bypass flows at hydroelectric diversions on the Truckee River.
23 USBR-5 at 7. Mr. Buchanan concluded that such management of the additional stored
24 water would also benefit fish species other than cui-ui and Lahontan cutthroat trout. *Id.*
25 In addition, Mr. Buchanan testified that additional storage in both reservoirs would
26 provide enhanced reservoir habitat for fish, water fowl and shore birds. *Id.*

27 Mr. Caicco, lead biologist for the TROA for U.S. Fish and Wildlife Service, also
28 testified to the various ways the additional stored water would preserve and enhance

1 fish and wildlife. See, USBR-6. Like Mr. Buchanan, Mr. Caicco testified that increased
2 stored water in California reservoirs would provide multiple benefits. For example, the
3 frequency that storage would fall below the California Department of Fish and Game's
4 recommended minimum threshold ranges is between 9 and 35 percent less under
5 TROA, which includes the additional water. *Id.*, at 3. By staying within the
6 recommended threshold ranges, the reservoirs are better able to maintain fishery, water
7 quality and aquatic productivity, and minimize algal blooms. *Id.*

8 Since more water will be able to be stored in Stampede Reservoir, the expected
9 result will be 60-80 percent more shallow water habitat under dry hydrologic conditions.
10 *Id.*, at 4. This increased habitat will benefit waterfowl and shorebirds. *Id.*, at 3.

11 Finally, Mr. Caicco testified that the benefits of the Applications, along with the
12 Change Petitions, are most pronounced under dry and extremely dry hydrologic
13 conditions. *Id.*, at 5. The reason for this is because water that was stored under the
14 Applications is available to be released when it is needed the most. By allowing more
15 water to be stored in Stampede, the water's use can be maximized by releasing it when
16 the water would be particularly beneficial.

17 Mr. Sarna, chief of the California-Nevada and Watershed Assessment Section of
18 the California Department of Water Resources, provided testimony regarding the
19 benefits of implementing TROA. DWR-01. While Mr. Sarna's testimony did not focus
20 on the Applications specifically, it did provide evidence demonstrating how the
21 Applications, along with the Change Petitions, will result in significant benefits to in-
22 stream flows and recreation in California. Mr. Sarna testified that under TROA section
23 7.C.6, California will have control over the establishment and release of Joint Program
24 Fish Credit Water, which may be concurrently established with Fish Credit Water. *Id.*, at
25 8. Fish Credit Water will, in turn, be much more likely to be established if the
26 Applications are approved. Under California's control, Joint Program Fish Credit Water
27 will be used to maintain and improve instream flows in California. *Id.*

1 Mr. Sarna also testified that TROA will allow substantially more water to be
2 stored in upstream reservoirs overall. *Id.*, at 6. Language was included in TROA to use
3 its flexibility to move water from low-priority reservoirs (for recreation) to high-priority
4 reservoirs to meet water-based recreation objectives to the extent possible. *Id.* The
5 Applications account for a significant portion of the increase in stored water expected
6 and, as such, are critical to realizing the benefits to recreation that will result from
7 TROA's implementation.

8 **2. No Evidence Was Presented That Demonstrates Water Would**
9 **Not be Beneficially Used.**

10 The Protestants did not produce any evidence that the water sought would not be
11 put to beneficial use(s). Therefore, it is undisputed the uses sought will be beneficial.

12 **3. Protestants Failed to Offer Evidence That the Applications Are**
13 **Not in the Public Interest.**

14 Protestants assert two irrelevant arguments in an effort to establish these
15 Applications are not in the public's interest. First, through the testimony of Mr. Knox,
16 Protestants attempt to argue that there are competing permits and Applications for the
17 subject water already being considered in Nevada and these competing permits should
18 impact the decision sought here. See, TCID-276B at 5. TCID filed application 9330 in
19 1930, seeking to appropriate 1,500 cfs, with an annual limit up to 100,000 acre-feet, of
20 Truckee River water and its tributaries for storage in Lahontan Reservoir. *Id.*, at 5, 6.
21 Application 9330 was denied by the Nevada State Engineer in 1998, and is currently
22 under appeal. *Id.*, at 6. Given that application 9330 is still active, Mr. Knox suggests
23 that it is premature to grant the Applications. *Id.* Ironically, Protestants have already
24 made this argument unsuccessfully in a different venue. See, TCID-208 (Decision of
25 William A. Maddox in the Matter of Applications 47047, 4712, 47209, 47264, 48061 and
26 48494, dated 6/13/2008).

27 In the decision, Judge Maddox addressed whether the Tribe's Applications
28 48061 and 48094 were not detrimental to the public interest. In finding that the Nevada
State Engineer properly determined that the Applications were indeed in the public

1 interest, Judge Maddox noted that “[m]uch of TCID’s argument on this issue appears to
2 be that the State Engineer erred in denying TCID’s competing application for Truckee
3 River water, Application 9330.” TCID-208 at 7; 8. Judge Maddox noted that the State
4 Engineer’s resolution of Application 9330 was not before him in this appeal. As such,
5 “[t]he proper analysis is to look at each individual application and make a public interest
6 determination, not to balance the relative merits of competing applications. [Citation
7 omitted.]” *Id.*

9 Judge Maddox’s rationale is sound and should be applied here. Application 9330
10 is not before the Board and, as such, the Board should not balance the relative merits of
11 the allegedly competing applications when making a public interest determination.

12 In addition to demanding an unnecessary weighing of allegedly competing
13 applications, Protestants argue they personally will not realize any benefit from the
14 Applications, and thus the Applications cannot be in the public’s interest. See, TCID-
15 276B at 12. This argument is absurd.

17 First, Protestants’ argument blends the potential (and unproven) factual injury it
18 might experience as a result of receiving less of other users’ water with the larger
19 inquiry this Board must make concerning the public interest. The fact that Protestants
20 may be getting less water it has no legal right to is not against the public interest as that
21 term is defined by California law. Moreover, the argument assumes that without the
22 Applications, this unappropriated water would be available for diversion at Derby Dam.
23 As explained above, the water that would be appropriated under these Applications is
24 unappropriated water – water that is available after senior downstream water rights
25 have been satisfied. Moreover, Permits 48061 and 48494 provide the Tribe with the
26 right to use the remaining water in the river in Nevada. The water being sought in this
27 proceeding would be the water that the Tribe already has a right to use under the above
28

1 permits. The Applications will simply allow that water to be stored, with the Tribe's
2 consent, until a time when the water can be more effectively used. Simply, the
3 Applications will only change the timing of when water reaches Pyramid Lake; they will
4 not change the amount or the fact that the water is indeed diverted to that lake as is the
5 case under present conditions. Thus, the Protestant's argument is without merit
6 because the Applications will not limit or in any way affect their ability to put water to
7 beneficial use. Without these Applications, the same amount of water would still flow to
8 Pyramid Lake, albeit with less benefit to cui-ui and Lahontan cutthroat trout, and their
9 habitat.
10

11 **E. The Conditions That the Board Should Impose Are the Same**
12 **Conditions Concerning TROA as for the Change Petitions.**

13 The only conditions that should be imposed by the Board on the Applications are
14 those regarding TROA as discussed above in section III.D.

15 **V. CHANGE PETITIONS AND APPLICATIONS CREATE NO SIGNIFICANT**
16 **ADVERSE IMPACTS TO, AND INSTEAD BENEFIT, WATER QUALITY, THE**
17 **ENVIRONMENT AND PUBLIC TRUST RESOURCES.**

18 **A. The Impacts Analysis in the EIR is Conclusive.**

19 As a responsible agency, the Board is legally required to conclude that TROA's
20 Environmental Impact Report ("EIR") complies with the California Environmental Quality
21 Act ("CEQA"). Specifically, the Board should find as a matter of law that the analyses of
22 potential impacts associated with the subject petitions and applications being sought
23 here were supported by substantial evidence and the modeling used to address these
24 potential impacts was adequate and clearly supported as required by law. (Pub. Res.
25 Code section 21000 *et seq.* ["CEQA"]; *see, State Water Resources Control Board*
26 *Cases* (2006) 136 Cal.App. 4th 674, 784. According to Public Resources Code
27 21167.2:
28

1 If no action or proceeding alleging that an environmental impact report
2 does not comply with the provisions of this division is commenced during
3 the period prescribed in subdivision (c) of Section 21167, the
4 environmental impact report shall be conclusively presumed to comply
5 with the provisions of this division for purposes of its use by responsible
6 agencies, unless the provisions of Section 21166 are applicable.
7 (Emphasis added.)

8 The presumption in section 21167.2 "acts to preclude reopening of the CEQA process
9 even if the initial EIR is discovered to have been fundamentally inaccurate and
10 misleading in the description of a significant effect or the severity of its consequences.
11 After certification, the interests of finality are favored over the policy of encouraging
12 public comment." *Laurel Heights Improvement Assn. v. Regents of University of*
13 *California* (1993) 6 Cal.4th 1112,1130. Accordingly, Protestants cannot use these
14 proceedings to collaterally attack the EIR or contend the Board fails to meet its
15 independent obligation as responsible agency if it relies on the EIR's findings and
16 conclusions with respect to potential adverse impacts.

17 While it is true the Board has an independent duty to consider significant adverse
18 impacts on public trust resources that may result from its discretionary approval, in this
19 instance it must as a matter of law presume the EIR is adequate to satisfy that duty.
20 Thus, the Board should find that the California Natural Resources Agency ("Resources
21 Agency"), acting as lead agency pursuant to CEQA, relied upon substantial evidence to
22 support use of the TROA modeling, and that the Resources Agency complied with its
23 obligations to analyze and address any and all potentially significant adverse impacts
24 associated with the execution of TROA, including those potential significant adverse
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1 impacts associated with the Change Petitions and Applications presently before the
2 Board.¹⁸

3 Importantly, the EIR for TROA determined that if implemented TROA will provide
4 benefit to the environment and to public trust values in California. It also concluded that
5 there will not be any potentially significant adverse impacts to the environment as a
6 result of TROA's execution by the Resources Agency and various other state entities
7 and departments. See, SWRCB-7. This analysis necessarily included the Change
8 Petitions and Applications before this Board. The time for challenging these
9 conclusions has long passed, the EIR having been certified by the Resources Agency
10 on September 5, 2008. Pub. Res. Code § 21167 [providing 30 days to challenge the
11 EIR]; DWR -01 at 9; Vol. II Tr. at 583, Ins. 2-14.

12
13
14 Additionally, there are no changed circumstances that permit the Board to re-
15 evaluate impacts already addressed by the EIR nor were any alleged by Protestants.

16 According to Public Resources Code section 21166:

17 When an environmental impact report has been prepared for a project
18 pursuant to this division, no subsequent or supplemental environmental
19 impact report shall be required by the lead agency or by any responsible
20 agency, unless one or more of the following events occurs:

21 (a) Substantial changes are proposed in the project which will require
22 major revisions of the environmental impact report.

23 (b) Substantial changes occur with respect to the circumstances under
24 which the project is being undertaken which will require major revisions in
25 the environmental impact report.

26 (c) New information, which was not known and could not have been
27 known at the time the environmental impact report was certified as
28 complete, becomes available.

26 ¹⁸ The EIR was prepared as a joint EIS/EIR under both the National Environmental
27 Policy Act ("NEPA") and CEQA by the Bureau of Reclamation and the California
28 Department of Water Resources, respectively. SWRCB-7; USBR-4 at 3. The Secretary
of the Interior issued the federal Record of Decision for TROA on September 3, 2008.
Id. Reclamation published TROA as a final rule in the Federal Register on December 5,
2008. *Id.*, at 4.

1 Tellingly, Protestants' own expert admitted during these proceedings that their present
2 attempts to attack the EIR are based on the same arguments and comments they
3 raised on previous occasions over the years. See, Vol. III Tr. at 786, In. 7-787, In. 7;
4 760, In. 21-761, In. 5; 814, Ins. 13-18; p. 825. Protestants' witness, Dr. Schreuder,
5 provided no new facts or new information that would trigger an obligation on the part of
6 the Board to supplement or reject the impacts analysis contained in the Resources
7 Agency's EIR. *Id.* Rather, he merely repeated, nearly verbatim, the same arguments
8 attacking the sufficiency of the modeling for TROA made years before —the same
9 arguments he forwarded during the statutorily required public comment and review
10 period, and which were answered at that time in the mandatory responses to public
11 comments. *Id.* See, SWRCB-7, Comments and Responses Appendix, pgs. 141-147
12 and 421-424. Therefore, it is immaterial whether the Protestants assert in these
13 proceedings that the modeling was somehow inadequate or unsupported since, as a
14 matter of law, the Board must deem the opposite to be true. See, *State Water*
15 *Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 794-796 [upholding the
16 Board's decision to rely on modeling that was not clearly inadequate or unsupported].
17
18

19 Further, the State's expert, John Sarna, Senior Engineer for the Department of
20 Water Resources, testified that there have not been any changed conditions since
21 TROA was analyzed and that there is no new information that would require additional
22 analysis. See, Vol. II Tr. at 583, Ins. 2-14. Accordingly, any attempts by Protestants to
23 suggest there are impacts which remain unknown or unanalyzed amount to an
24 inappropriate collateral attack on CEQA, and should be rejected by the Board. The
25 Board is on solid legal ground to adopt the findings in the EIR to satisfy its obligations
26 under CEQA to make a determination whether to approve the Change Petitions and
27 Applications.
28

1 **B. The Applicants Adequately Demonstrated That There Are No**
2 **Significant Adverse Impacts From the Change Petitions and the**
3 **Applications, and There Will Be Many Benefits.**

4 The Board in its hearing notice identified as a key issue for both the Change
5 Petitions and Applications whether such changes and/or applications would result in any
6 significant adverse impacts to water quality, the environment or public trust resources
7 and if any such impacts were identified, what conditions, if any, should the Board adopt
8 to avoid or mitigate any such potential adverse impacts. Notice of Public Hearing and
9 Pre-Hearing Conference at 4-5 (April 19, 2010).

10 The public trust doctrine applies to all of the state's navigable waterways and the
11 lands lying beneath them. *National Audubon Society v. Superior Court*, 33 Cal.3d 419,
12 434, 658 P.2d 709 (1983). The State is the trustee of this public trust for the benefit of
13 the people. *Id.* Ecological values are among those values protected by the public trust.
14 *Id.*, at p. 435. "The state has an affirmative duty to take the public trust into account in
15 the planning and allocation of water resources, and to protect public trust uses
16 whenever feasible." *Id.*, at 446. Indeed, this duty "prevents any party from acquiring a
17 vested right to appropriate water in a manner harmful to the interests protected by the
18 public trust." *El Dorado Irrigation District v. State Water Resources Control Board*, 142
19 Cal. App. 4th 937, 966 (2006). The public trust doctrine requires the Board to consider
20 fish and wildlife resources, recreation and water quality in all navigable waters to which
21 the State has an interest. *State Water Resources Control Board Cases*, 136 Cal. App.
22 4th 674, 777-778 (2006). In this case, the waters are those of the Truckee River and its
23 tributaries in California.

24 In addition, as to the environment in general, when approving a project, a
25 responsible agency must either: (1) adopt conditions to avoid or mitigate significant
26 adverse environmental effects within the scope of its responsibility; (2) find that another
27 adverse environmental effects within the scope of its responsibility; (2) find that another
28

1 agency has the responsibility and jurisdiction and that such agency can or should avoid
2 or mitigate the adverse effect; or (3) find that specific economic, legal, social,
3 technological or other considerations make infeasible the mitigation measures or project
4 alternatives identified in the EIR, and adopt a statement of overriding considerations.
5 Pub. Res. Code, §§ 21002.1, 21081; CEQA Guidelines, §§ 15091, 15093. The State
6 Water Board is responsible for mitigating or avoiding only the significant environmental
7 effects of those parts of the project that it decides to approve. (CEQA Guidelines, §
8 15096, subd. (g).) This responsibility includes addressing any significant adverse direct
9 or indirect effects on water resources. SWRCB Decision 1649 at 74-75.
10

11 Here, the evidence presented demonstrates that, as to both the Change Petitions
12 and the Applications, there was no significant adverse impact to water quality, the
13 environment or public trust resources and that the implementation of the changes and
14 appropriation under the applications will provide benefits to water quality, the
15 environment and public trust resources. The Petitioners and Applicant presented
16 testimony of Kenneth Parr, Thomas Strekal, Chester Buchanan, Steven Caicco, Ali
17 Shahroody, Don Mahin and John Sarna in support of these findings. USBR-2 at 3;
18 USBR-4 at 4-9; USBR-5 at 5-7; USBR-6; USBR-7 at 36-42; TMWA 4-0 at 8-10; DWR-1
19 at 3-10; respectively, and SWRCB-7. Thus, the Board does not need to adopt any
20 conditions to avoid or mitigate any potential adverse impacts as no such impacts were
21 identified. The conditions that should be adopted are those identified above in sections
22 III.D and IV. E.
23
24

25 For surface water in the Truckee River system, the total amount of water stored
26 under TROA, in particular in Stampede, Boca and Prosser Reservoirs and the flow in
27 the lower Truckee River and discharge to Pyramid Lake are greater than under No
28 Action, the Local Water Supply Alternative or Current Conditions as evaluated in the

1 Final EIS/EIR. USBR-4 at 4; Vol. II Tr. at 357-358. Additionally, flows in Independence
2 Creek, Little Truckee River and Prosser Creek downstream from the reservoirs were
3 appreciably greater in dry hydrologic conditions. *Id.*; Vol. II Tr. at 358, Ins. 7-10. No
4 adverse effects were identified for groundwater in the Truckee Meadows area or to
5 groundwater resources in California, *id.*; Vol. II Tr. at 358, Ins. 18-25, and no
6 measurable effect was identified on groundwater resources of the Newlands Project.
7 SWRCB-7 at 3-443.

9 Water quality in the Truckee River was better under TROA than the other
10 alternatives evaluated in the EIS/EIR, including current conditions and no effects from
11 erosion or sedimentation were identified. *Id.*, at 5; Vol. II Tr. at 359, Ins. 2-22. Truckee
12 River water quality was better under TROA than under the No Action or Current
13 Conditions because releases of water stored pursuant to TROA would, to the extent
14 possible, be timed to enhance stream flows during periods of low flow. USBR-4 at 5.
15 Additionally, storage under the Change Petitions, as implemented through TROA, will
16 facilitate the use of the water quality water acquired through the Water Quality
17 Settlement Agreement and implemented through TROA to increase flows and therefore
18 water quality for fish and related habitat in the lower Truckee River. TMWA 4-0 at 9-10;
19 Vol. II Tr. at 567, Ins. 5-14, 568, Ins. 21-25 and 569, Ins. 1-16. The additional storage
20 will also provide additional water in the reservoirs for recreation in California and
21 augmentation of stream flow in dry periods to benefit fish and wildlife habitat and
22 instream recreation. *Id.*, at 10; Vol. II Tr. at 569, Ins. 17-25; 570, Ins. 1-4.

25 Conditions for fish in the Truckee River and its tributaries and Prosser Creek,
26 Stampede and Boca Reservoirs would be more beneficial under TROA, and the
27 Change Petitions and Applications than under the other alternatives and Current
28 Conditions, because of the ability to store credit waters and release them at times to

1 provide the greatest benefit for the resident fish. Vol. II Tr. at 359, Ins. 23-25; 360, Ins.
2 1-3; USBR-4 at 5-6. No significant adverse impact was identified to biological resources
3 of the Truckee River and its tributaries and the affected lakes and reservoirs. Vol. II Tr.
4 at 368-369; USBR-6 at 8-9. These resources include fish in the Truckee River and its
5 tributaries, as well as fish in the lakes and reservoirs, birds including birds that nest on
6 islands in Stampede and Lahontan Reservoirs, and threatened and endangered species
7 and other special status species. Vol. II Tr. at 368, Ins. 10-16. A number of benefits
8 were identified due to the flexibility in storage operations provided by TROA. Vol. II Tr.
9 at 369-370; USBR-6 at 2-8. In particular, the provisions of TROA, as reflected in the
10 Change Petitions and Applications, that provide for integrated reservoir operations,
11 including exchanges of water and establishing credit waters, allow for stored water to be
12 released in dry and extremely dry periods when it is needed. Vol. II tr. at 370, Ins. 20-
13 25; USBR-6 at 4-5. A number of provisions of TROA provide for the realization of
14 benefits to the environment, including water quality, in relation to the Change Petitions
15 and Applications. USBR-5 at 5-7; Vol. II Tr. at 379-380.

18 Recreation would generally benefit under TROA because of the ability under
19 TROA, and the Change Petitions and Applications, to store credit waters, which in turn
20 would affect reservoir levels as noted below. Vol. II Tr. at 360, Ins. 4-8; USBR-4 at 6.
21 Effects on flows for fly fishing, rafting and kayaking would be minimal under No Action,
22 Local Water Supply Alternative and TROA, and none of the effects on flows for anglers
23 under any of the alternatives is considered significant. USBR-4 at 6.

25 Other resources were also evaluated, including economics, social, cultural,
26 Indian Trust and aesthetic, as well as growth-inducing impacts. *Id.*, at 6-7; Vol. II Tr. at
27 360-361. No significant adverse impact was identified, and in some cases benefits
28

1 were identified through the implementation of TROA and the Change Petitions and
2 Applications. *Id.*

3 Additional benefits to biological resources and recreation under TROA specific to
4 California were also identified. These included the California Guidelines that (1) assist
5 in meeting the California Department of Fish and Game minimum and preferred flows,
6 ramping flows, and avoid exceeding maximum flows, and (2) provide California control
7 over establishment and release of a substantial amount of fish credit and California
8 environmental credit water for instream flows, water quality and maintaining reservoir
9 levels. Vol. II Tr. at 578-582; DWR-1 at 3-10. In addition, the movement of water as
10 provided in the change petitions will result in benefits (1) to recreation by allowing more
11 water to be stored in upstream reservoirs during the recreation season and (2) to the
12 environment by improved instream flows in the Truckee River and its tributaries. *Id.*

13
14
15 **C. The Protestants Did Not Provide Any Evidence That the Change**
16 **Petitions and Applications Would Cause a Significant Adverse**
17 **Impact to the Relevant Resources and They Did Not Show That the**
18 **Truckee River Model Was Not an Appropriate Tool to Support the**
19 **Evaluations Made.**

20 The Protestants did not provide any evidence regarding significant adverse
21 impacts to water quality, the environment or public trust resources from the Change
22 Petitions or Applications. The Protestants provided testimony through Dr. Schreuder,
23 related to the model used in the evaluations included in the EIS/EIR in an attempt to
24 cast doubt on the conclusions reached in the EIS/EIR (although the protestants purport
25 to rely on the EIS/EIR in alleging that TROA will harm the Newlands Project). TCID-
26 275B; TCID-281 at 4-6; Vol. III Tr. at 697-698 and 751-752. As noted above in section
27 V.A, the assertions about the model by Dr. Schreuder were essentially the same
28 assertions made in his comments on the DEIR/EIS, adding only uncorroborated
statements by others as to concerns expressed in 1996, well before the final version of

1 the model was completed for use in the evaluations for the DEIS/EIR and the Final
2 EIS/EIR. *Id.*; Vol. III Tr. at 786-787, 660, 819; SWRCB-7, Comments and Responses
3 Appendix at 141-147.

4 The issue for the Board is whether the model and its use "are sufficiently credible
5 to be considered as part of the total evidence that supports the agency's decision."
6 *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674, 795 (2006). The
7 party challenging the EIR bears the burden of demonstrating that the studies on which
8 the EIR is based are clearly inadequate or unsupported. *Id.* The weight of the evidence
9 in this case supports the use of the model in the evaluation of the resources in the
10 EIS/EIR and the Protestants have not met their burden.

11 The Final EIS/EIR contained an expanded description of the Truckee River
12 Model and its use in the evaluation of resources contained in the
13 Final EIS/EIR. SWRCB-7 at 3, Ins. 31-36. The Final EIS/EIR contained extensive
14 responses to comments, including responses to the comments from TCID and the letter
15 co-authored by Dr. Schreuder. SWRCB-7, Comments and Responses Appendix at
16 421-424. These responses to comments adequately explained the use of the model
17 and responded to the criticisms of the model by Dr. Schreuder, which are the same
18 criticisms contained in his testimony before the Board. *Id.* The final version of the
19 model contained changes from the version in 1996. Vol. III Tr. at 625, Ins. 4-20. The
20 evaluation of the benefits from TROA was based in part on the model results, but mainly
21 based on professional judgment of the subject matter experts and their knowledge of
22 the Truckee River system. Vol. II Tr. at 442-444; 629, Ins. 19-23.

23 The Protestants have not met their burden to demonstrate that the evaluations
24 made by the Petitioners and Applicant "are clearly inadequate and unsupported." The
25 overwhelming weight of the evidence supports a finding by the Board that there is no
26
27
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1 significant adverse impact to water quality, the environment or public trust from the
2 proposed changes or applications and that substantial benefits will accrue to these
3 resources from implementation of the proposed changes and applications through
4 TROA. Further, as explained above in Section V.A, the Board, as a matter of law,
5 should find the analysis in the EIR, which adequately supports the Change Petitions and
6 Applications, is conclusive as to the issues discussed therein.
7

8 **VI. CONCLUSION.**

9 The evidence before the Board on the key issues related to the Change Petitions
10 and the Applications overwhelmingly supports a decision and order by the Board
11 approving all of the Change Petitions and the Applications. For the most part,
12 Protestants did not present any evidence on those key issues. Instead, their evidence
13 was directed at issues which have been or will be decided by the Nevada State
14 Engineer, or the Orr Ditch Court, or both. Protestants have been, or will be, heard on
15 those issues before that agency and court. They are simply not issues for the Board.
16

17 Petitioners respectfully request that the Board issue a decision and order
18 approving the Change Petitions and the Applications, conditioned as requested above.
19 Such decision and order will be one more important step toward implementing an
20 operating agreement which satisfies the exercise of existing water rights, and at the
21 same time provides for a more flexible and coordinated operation of Truckee River
22 Reservoirs to meet the conditions and circumstances of the 21st Century. Those
23 conditions and circumstances include a reliable water supply and drought protection for
24 municipal use, and instream flows for fish and wildlife, including threatened and
25 endangered species, as well as water quality and recreation. That decision and order
26 will be one more important step to making effective a binding allocation between
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28

1 California and Nevada of the waters of the Truckee and Carson Rivers and of Lake
2 Tahoe.

3 Respectfully submitted on behalf of the parties referenced above.

4 Dated: September 7, 2010.

5
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1 **CERTIFICATE OF ELECTRONIC SERVICE**

2 I hereby certify that on September 7, 2010, I served a copy of the attached the
3 *Joint Closing Brief of United States Department of the Interior, Bureau of Reclamation;*
4 *Truckee Meadows Water Authority; Washoe County Water Conservation District;*
5 *California Department of Water Resources; Pyramid Lake Paiute Tribe; and City of*
6 *Fernley* via electronic mail to the parties listed below:

7
8 Division of Water Rights
9 State Water Resources Control Board
10 Attn: Paul Murphey
11 P.O. Box 2000
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13 wrhearing@waterboards.ca.gov

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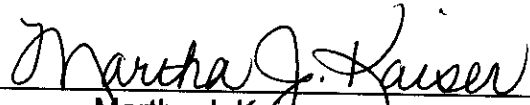
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10 Dated: September 7, 2010

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Martha J. Kaiser