

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

DECISION XXXX

In the Matter of Applications 31487 and 31488 filed by the
United States Bureau of Reclamation,
and
Petitions to Change
License 3723 (Application 5169) of Washoe County Water Conservation District,
License 4196 (Application 9247) of Truckee Meadows Water Authority, and
Permit 11605 (Application 15673) and License 10180 (Application 18006)
of the United States Bureau of Reclamation
Truckee River Watershed

SOURCES: Little Truckee River, Independence Creek, Prosser Creek

COUNTIES: Nevada and Sierra

DECISION CONDITIONALLY APPROVING APPLICATIONS 31487 AND 31488
AND
CONDITIONALLY APPROVING PETITIONS TO CHANGE
LICENSE 3723 (APPLICATION 5169),
LICENSE 4196 (APPLICATION 9247), PERMIT 11605 (APPLICATION 15673),
AND LICENSE 10180 (APPLICATION 18006)

TABLE OF CONTENTS

1.0 INTRODUCTION.....3

2.0 BACKGROUND4

 2.1 Truckee River Stream System.....4

 2.2 Legal Framework.....6

 2.3 Truckee River Operating Agreement.....8

 2.4 Truckee River Reservoirs9

 2.5 Water Right Proceeding12

 2.5.1 Change Petitions and Water Right Applications.....12

 2.5.2 Protests Filed12

 2.5.3 Hearing.....12

3.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.....14

4.0 STATE WATER BOARD ACTION IN THIS PROCEEDING15

5.0 PETITIONS TO CHANGE PERMIT 11605 AND LICENSES 3723, 4196, AND 10180 ... 19

 5.1 State Water Board Authority Regarding Petitions for Change.....19

 5.2 Proposed Changes to Permits and Licenses20

 5.3 Issues Raised in Opposition to the Proposed Changes23

 5.3.1 Rights of Downstream Water Users Claiming Injury23

 5.3.2 Injury to Other Legal Users of Water25

 5.3.3 Initiation of a New Right35

 5.4 No Potential Injury to Water Right Holders between Independence and Boca37

 5.5 Approval of the Change Petitions39

 5.5.1 Flood Control.....39

 5.5.2 Coordinated Reservoir Operations and Exchanges40

 5.5.3 Operating Term for License 10180 (Prosser Creek Reservoir).....41

 5.5.4 Other Special Terms and Conditions Related to Approval of the Change Petitions
 42

6.0 WATER RIGHT APPLICATIONS 31487 AND 3148842

 6.1 State Water Board Authority Regarding Water Right Applications44

 6.2 Water Availability44

 6.2.1 Overview of Methodology Used45

 6.2.2 Water Availability Analysis for Application 31487 (Stampede Reservoir).....48

 6.2.3 Water Availability Analysis for Application 31488 (Prosser Creek Reservoir).....49

 6.2.4 State Filed Applications.....50

 6.2.5 Protestants' Arguments51

 6.2.6 Conclusions Regarding Water Availability.....61

 6.3 Beneficial Use and Public Interest.....61

 6.4 Redistribution of Storage63

 6.5 Terms and Conditions Relating to Approval of the Applications.....63

7.0 Environmental Effects of the Change Petitions and Water65

Right Applications65

8.0 Evidentiary Motions.....68

9.0 OTHER Terms and Conditions69

10.0 CONCLUSION73

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BY THE BOARD:

1.0 INTRODUCTION

In this decision, the State Water Resources Control Board (State Water Board or Board) conditionally approves water right Applications 31487 and 31488 of the United States Bureau of Reclamation (Reclamation or Applicant) to appropriate water from Independence Creek, the Little Truckee River, and Prosser Creek for beneficial use. The State Water Board also conditionally approves petitions to change License 3723 (Application 5169) of Washoe County Water Conservation District (Conservation District), License 4196 (Application 9247) of Truckee Meadows Water Authority (TMWA), and Permit 11605 (Application 15673) and License 10180 (Application 18006) of Reclamation. The entities filing the change petitions, Conservation District, TMWA, and Reclamation, are collectively referred to herein as Petitioners. Reclamation

and the Petitioners filed the two applications and four petitions for change to implement the Truckee River Operating Agreement (TROA).

2.0 BACKGROUND

2.1 Truckee River Stream System

This section provides a general overview of the Truckee River stream system. Specific facilities, tributary watersheds, and projects relevant to this decision are discussed in later sections.

The Truckee River flows approximately 120 miles from the outlet of Lake Tahoe in the Sierra Nevada in California to its terminus at Pyramid Lake, located on the Pyramid Lake Indian Reservation in the desert plains of Nevada. (Figure 1; USBR-3, pp. 1, 3.)¹ The Truckee River Basin~~basin~~ is a hydrographically closed basin that encompasses approximately 3,060 square miles. Precipitation amounts in the basin vary widely from the mountainous areas to the desert, with much of the precipitation in the form of snow. (USBR-3, p. 2.)

Below Lake Tahoe, the Truckee River generally flows north and east, passing through the town of Truckee, California, until its confluence with the Little Truckee River. The Truckee River continues to flow in a generally northerly and easterly direction across the California-Nevada state line, through Truckee Meadows in Nevada, which includes the cities of Reno and Sparks. Below Truckee Meadows, the Truckee River reaches Derby Diversion Dam (Derby Dam), where water is diverted into the Truckee Canal to provide irrigation water for the Newlands Reclamation Project (Newlands Project). After passing Derby Dam, the Truckee River flows into Pyramid Lake. (*Id.*, pp. 2-3.)

¹ Citations to the evidentiary record identify primary support for a particular fact or proposition, but are not intended to identify every piece of supporting evidence in the record. Exhibits are identified by the name or abbreviation for the party submitting the exhibit, the exhibit number, and the page number or other location of the referenced material within the exhibit. The following abbreviations are used when citing to the parties' exhibits: "USBR" is used for Reclamation; "TMWA" is used for TMWA; "App./Pet. Joint" for Reclamation's and the other Petitioners' joint exhibits (filed by Reclamation, TMWA, and the Conservation District); "TCID" is used for TCID and the other protestants; "DWR" is used for the California Department of Water Resources; and "SWRCB" is used for the State Water Board.

Citations to the Certified Shorthand Reporter's Transcript are indicated by "R.T." followed by a Roman numeral for the volume of the transcript, followed by the beginning page and line number and the ending line number or page and line number.

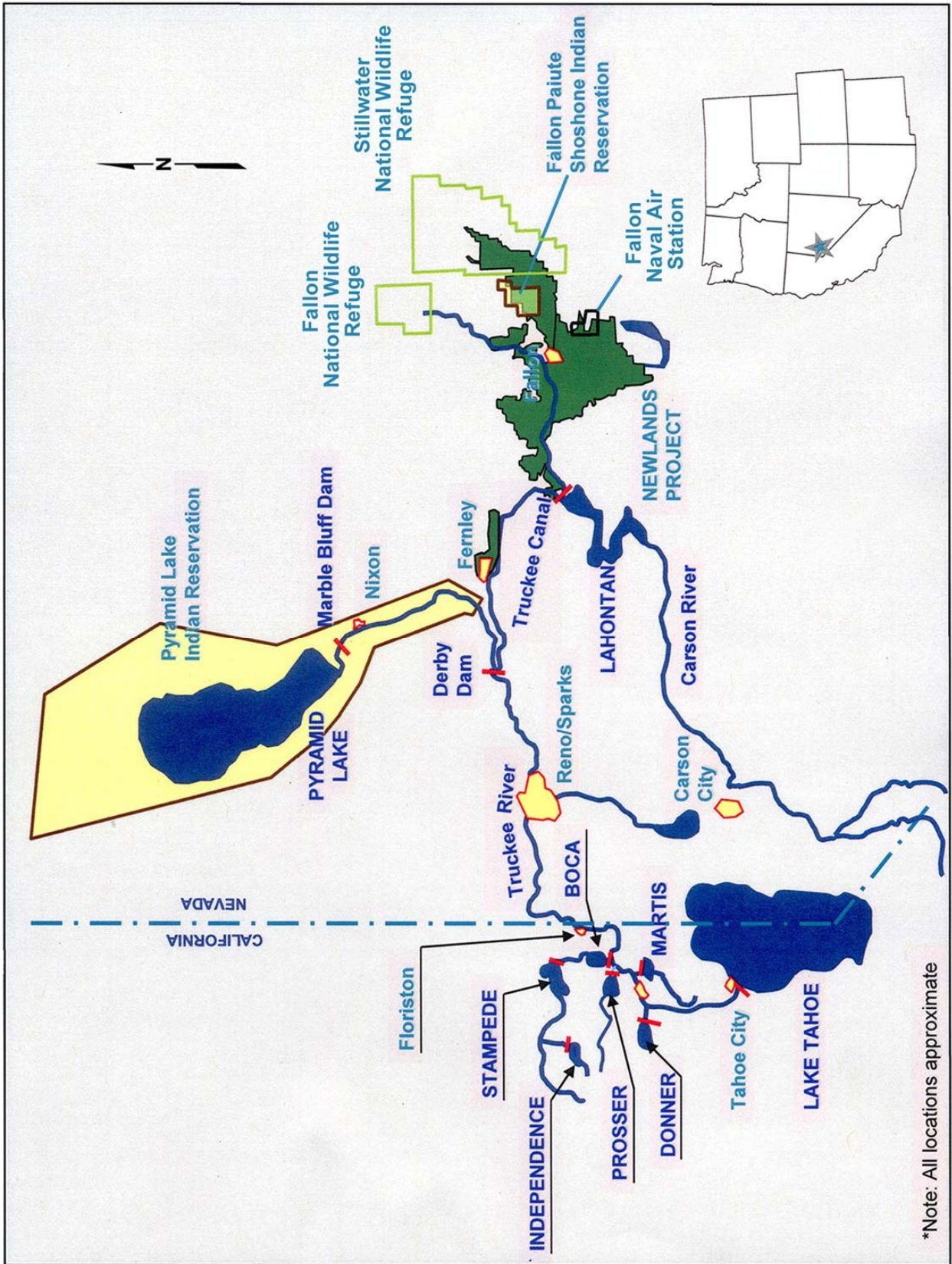


FIGURE 1 (ADAPTED FROM EXHIBIT USBR-15)

Most of the runoff in the Truckee River basin occurs in California in the Sierra Nevada. (USBR-7, pp. 1-2.) In California, the Truckee River gains tributary flow from Donner Creek, Martis Creek, Prosser Creek, and the Little Truckee River, as well as other smaller watersheds. The Little Truckee River is the largest tributary to the Truckee River in California, providing flow from approximately 173 square miles within the northwest quadrant of the Truckee River Basin~~basin~~. Within the Little Truckee River watershed lies Independence Creek, a major tributary to the Little Truckee River. In summer months, a transbasin diversion carries water from the Little Truckee River, upstream of its confluence with Independence Creek, through the Little Truckee Ditch to the Sierra Valley in the Feather River basin. (USBR-3, p. 2; USBR-20, p. 4.)

The Truckee River terminates in Pyramid Lake, where water generally only leaves the lake by evaporation. (USBR-3, p. 3.) “Due to increased consumptive use of the river’s water supply over the last one hundred years, as well as the transbasin diversion of water away from the Truckee River through the Truckee Canal to the Newlands Project, Pyramid Lake’s water surface elevation has declined greatly at times. The lowest recorded lake elevation occurred in 1967, when the lake was almost 95 feet lower than its highest recorded elevation in 1891.” (*Ibid.*)

The Truckee River and its tributaries provide habitat to a variety of native and non-native fish species. (SWRCB-7, p. 3-181.) Pyramid Lake is home to two fish species, the cui-ui fish and the Lahontan cutthroat trout, which are listed under the federal Endangered Species Act as endangered and threatened species, respectively. (USBR-3, p. 3.)

2.2 Legal Framework

The interstate waters of Lake Tahoe and the Truckee River have been the subject of dispute, controversy, and litigation for well over a century. Water diversion and use on the Truckee River and its tributaries historically have been governed or influenced by a number of court decrees, court decisions, agreements, laws, and regulations that we will not attempt to summarize here. (See USBR-3, pp. 6-9 [summarizing documents governing Truckee River water storage and flow]; see also State Water Board Decision D-1056 (1962), pp. 5-7 [describing administration of water rights on the Truckee River].) Nonetheless, it is useful to identify certain decrees and agreements that help form the current governing operational framework for the Truckee River.

The Truckee River General Electric Decree, issued in *United States of America vs. The Truckee River General Electric Company* in 1915, granted the United States an easement to control the dam at Lake Tahoe and defined rights to store Truckee River water in, and release it from, Lake Tahoe. The decree requires certain rates of flow, now known as the “Floriston Rates,” to be maintained in the Truckee River.² The Floriston Rates are currently measured at the USGS streamgauge at Farad, California, which is near the California-Nevada state line. (USBR-3, p. 6; App./Pet. Joint-2.)

The Orr Ditch Decree was entered in *United States of America vs. Orr Ditch Water Company, et al.* in 1944, after the United States sought to adjudicate Truckee River water rights in the State of Nevada. (App./Pet. Joint-7; USBR-3, p. 6.) In addition to adjudicating water rights, the decree incorporated the 1935 Truckee River Agreement as binding among the parties to that agreement (including the United States, Truckee Carson Irrigation District (TCID), the Conservation District, and TMWA’s predecessor, the Sierra Pacific Power Company (SPPC)). (App./Pet. Joint-6.) The Truckee River Agreement is an operations agreement that provides for storage of Truckee River waters, among other things. (*Id.*; USBR-3, p. 6.) In addition, the Orr Ditch Decree, through the incorporation of the Truckee River Agreement, allows lower rates of flow, known as “Reduced Floriston Rates,” to be met to conserve water during the period of November 1 through March 31 of each year.³ (App./Pet. Joint-20, pp. 6-7.)

In 1959 the United States, TCID, the Conservation District, and entered into the Tahoe-Prosser Exchange Agreement. The agreement provided for the construction of Prosser Creek Dam and Reservoir and describes the operating procedures for the facility. (App./Pet. Joint-3; USBR-3, p. 7.) It also provides for minimum releases from Lake Tahoe for fishery purposes (streamflow maintenance) downstream from Tahoe Dam when releases are not necessary to meet Floriston Rates.⁴ (App./Pet. Joint-3; USBR-21, p. 5.)

² The Truckee River General Electric Decree required that the flow in the Truckee River be maintained at a rate of 500 cubic feet per second (cfs) from March 1 through September 30 of each year. From October 1 through the last day in February, the flow requirement was reduced to 400 cfs. (App./Pet. Joint-2; USBR-3, p. 6.)

³ The Reduced Floriston Rates are 350 cfs whenever the surface water elevation of Lake Tahoe is below 6,226.0 feet and not below 6,225.25 feet, and 300 cfs whenever the elevation is below 6,225.25 feet. (App./Pet. Joint-20, pp. 6-7; USBR-7, p. 6, fig. 2; R.T. I, 129:5-8.)

⁴ “Minimum releases of 70 cfs from April through September and 50 cfs the remainder of the year are maintained at the lake outlet when an equivalent amount of water is available for exchange in Prosser Creek Reservoir. If there is no available storage and inflow to Prosser Creek Reservoir is less than these releases, minimum release from Lake Tahoe is reduced to that of Prosser Creek inflow.” (USBR-21, p. 5.)

2.3 Truckee River Operating Agreement

In 1990 Congress enacted the Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Pub.L. No. 101-618 (Nov. 16, 1990), Tit. II, 104 Stat. 3289) (Settlement Act) to provide a mechanism for resolving the ongoing disputes to the interstate waters. (App./Pet. Joint-16.) The Settlement Act provides, in part, for Truckee River water supply management, enhancement and recovery of the Pyramid Lake fishery, protection of wetlands habitat, and an interstate allocation between California and Nevada of the interstate waters of the Truckee River, Carson River, and Lake Tahoe.⁵ (See, e.g., App./Pet. Joint-16, § 202.)

Section 205 of the Settlement Act directs the Secretary of the Interior to negotiate an operating agreement (known as TROA) for the Truckee River reservoirs with the States of California and Nevada, after consultation with other designated parties. The interstate allocations under the Settlement Act and other provisions of the act will not take effect until a number of other contingencies have been met, including TROA taking effect and settlement of outstanding litigation and proceedings. (App./Pet. Joint-16, § 210(a).) TROA must provide for the operation of the Truckee River reservoirs to: (1) satisfy dam safety and flood control requirements; (2) provide for the enhancement of spawning flows available in the lower Truckee River for the Pyramid Lake fishery in a manner consistent with the federal Endangered Species Act; (3) carry out the terms of the Preliminary Settlement Agreement; and (4) ensure that water is stored and released from Truckee River reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch Decree and Truckee River General Electric Decree, except where those rights have been voluntarily relinquished or have been transferred pursuant to state law. (App./Pet. Joint-16, § 205(a)(2); see also DWR-01, p. 1 [describing purposes of TROA].)

TROA was signed on September 6, 2008. (App./Pet. Joint-19.) The five mandatory signatory parties include the States of California and Nevada, the Pyramid Lake Paiute Tribe (Tribe), the United States (Departments of Justice and Interior) and TMWA. Other agencies and entities signed TROA as well, including the Conservation District. On December 5, 2008, TROA was promulgated as the exclusive federal regulation governing the agreement. (App./Pet. Joint-16,

⁵ Under the interstate allocation, overall water use in the California portion of the Truckee River Basin~~basin~~ would be limited to the gross amount of 32,000 acre-feet per year, of which 10,000 acre-feet per year may be from surface water. (App./Pet. Joint-16, § 204(c)(1).) According to the California Department of Water Resources' witness, Mr. John Sarna, current use in the California portion of the Truckee Basin~~basin~~ is well below these limits. (DWR-01, p. 4.)

§ 205(a)(5); 43 C.F.R. Pt. 419.) TROA requires that certain remaining conditions be met before it (and the interstate allocations under the Settlement Act) will take effect, including modification of the Orr Ditch Decree, approval of the water right changes pending before the State Water Board, and resolution of litigation. (App./Pet. Joint-19, § 12.A.4, pp. 12-3 to 12-5; see also App./Pet. Joint-16, §§ 205(a)(4), 210(a) [identifying conditions to be met before TROA takes effect]; R.T. I, 193:18-22.)

2.4 Truckee River Reservoirs

There are seven storage reservoirs tributary to the Truckee River in California: Lake Tahoe, Donner Lake, Martis Creek Reservoir (flood control only), Prosser Creek Reservoir, Independence Lake, Stampede Reservoir, and Boca Reservoir.⁶ (USBR-7, p. 5, Table 1.) These seven storage reservoirs control approximately 70 percent of the flow in the Truckee River. (USBR-3, p. 5.) In general, the reservoirs store surface water from the Truckee River in the spring and release it in the summer and early fall, primarily to meet demands in Nevada. (SWRCB-7, pp. 3-41 & 3-42.) The change petitions and applications at issue in this hearing concern Prosser Creek Reservoir, Independence Lake, Stampede Reservoir, and Boca Reservoir, described below.

Prosser Creek Reservoir (License 10180 (Application 18006))

Water is diverted from Prosser Creek, which is tributary to the Truckee River, to Prosser Creek Reservoir in Nevada County, California. (USBR-1, p. 3.) Prosser Creek Dam is owned and operated by Reclamation. (USBR-7, p. 5, Table 1.) The dam is a 163-foot high zoned earthfill dam with a usable storage capacity of 29,800 acre-feet (af) at the spillway crest. (USBR-7, p. 5, Table 1; p. 24.) The primary function of Prosser Creek Reservoir is to provide flood control protection and to store Tahoe-Prosser Exchange Water. (App./Pet. Joint-20, p. 5.)

License 10180 is held by Reclamation. The license allows for storage of 30,000 af per annum (afa), to be collected from April 10 to August 10 of each year. The maximum withdrawal in any one year shall not exceed 20,162 af. The place of use includes 82,000 net acres within 143,480 gross acres all within the Truckee Meadows and Newlands Project areas and Prosser Creek Reservoir. The purposes of use include irrigation, domestic, municipal, industrial, fish culture, and recreation. (SWRCB-4.) Between November 1 of each year and April 10 of the following

⁶ In addition, a privately owned reservoir, Webber Lake, is located upstream of Stampede Dam on the Little Truckee River. (USBR-7, p. 4; TCID-287, p. 12.)

year, reservoir storage is lowered to 9,800 af to provide 20,000 af for flood control. (SWRCB-7, p. 3-43.) With a priority date of 1958, License 10180 has the most junior storage priority in the Truckee River ~~Basin~~basin. (USBR-21, pp. 2, 5.)

Independence Lake (License 4196 (Application 9247))

Water is diverted to Independence Lake in Nevada and Sierra Counties, California, from Independence Creek, which is tributary to the Little Truckee River thence the Truckee River. (USBR-1, p. 2.) Independence Lake, which is owned and operated by TMWA, has a 31-foot high earthfill dam, providing a usable storage capacity of 17,500 af. (USBR-3, p. 5; USBR-7, p. 5, Table 1.) Independence Lake was a reservoir when the Orr Ditch Decree was entered, but the decree did not adjudicate the water right for the reservoir. (App./Pet. Joint-20, p. 4.)

License 4196, which is held by TMWA, allows for storage of 17,500 afa to be collected from about December 1 of each year to about July 1 of the following year for municipal purposes. The license has a 1938 priority. The place of use includes portions of the City of Reno and the City of Sparks, Nevada. (USBR-1, p. 2.) Between November 1 and April 1, reservoir storage usually ranges from 13,000 to 15,000 af for dam safety reasons. (SWRCB-7, p. 3-43.)

Stampede Reservoir (Permit 11605 (Application 15673))

Water is diverted from the Little Truckee River, which is tributary to the Truckee River, to Stampede Reservoir in Sierra County, California. (USBR-1, p. 3.) Stampede Dam, which is owned and operated by Reclamation, is a 239-foot high zoned earthfill dam with a usable storage capacity of 226,500 af. (USBR-7, p. 4, and Table 1, p. 5.) There is a small hydropower generation plant at Stampede Dam with a generation capacity of 3.6 megawatts. (USBR-3, p. 6.) Permit 18320, which is not at issue in this proceeding, provides for power generation.

Permit 11605, which has a priority date of 1954, is held by Reclamation. The permit allows for the direct diversion of 350 cubic feet per second (cfs) from about April 1 to about November 1 of each year and for 126,000 af to storage from January 1 to December 31 of each year. The existing purposes of use are irrigation, domestic, municipal, industrial, flood control, fish culture, and recreation. The place of use includes 26,800 net acres within 36,340 gross acres within Truckee Meadows and 70,000 net acres within 107,140 gross acres within the Newlands Project. (USBR-1, p. 3; SWRCB-3.) The primary use of Stampede Reservoir is for flood control and storage of water dedicated to the threatened and endangered Pyramid Lake fish species.

(App./Pet. Joint-20, p. 6; USBR-3, p. 7; App./Pet. Joint-13⁷.) Approximately 22,000 af is reserved for storage between November 1 and April 10 for flood control. (SWRCB-7, p. 3-43.)

In 1994 the United States, Tribe, Conservation District and Sierra Pacific Power Company (TMWA's predecessor) entered into an Interim Storage Agreement to store privately owned water in Stampede and Boca Reservoirs. (USBR-3, p. 7; TMWA 1-4.) The agreement "sets forth rules for the establishment, storage, and exchange of privately owned (non-project) water within the reservoirs." (USBR-3, p. 7.)

Boca Reservoir (License 3723 (Application 5169))

Water is diverted to Boca Reservoir in Nevada County, California, from the Little Truckee River, which is tributary to the Truckee River. Boca Dam is a 116-foot earthfill dam with a usable storage capacity of 41,100 af, which is owned by Reclamation and operated under contract by the Conservation District. (USBR-1, p. 2; USBR-7, p. 5, Table 1.)

License 3723, which has a priority date of 1926, is held by the Conservation District.⁸ The license allows for storage of 40,850 afa collected from about October 1 of each year to about July 1 of the succeeding year. The purposes of use are irrigation of a net area of 30,000 acres and domestic use all within the boundaries of the Conservation District in Nevada. The maximum area irrigated in any one year shall not exceed 29,000 acres. The primary function of Boca Reservoir is to provide flood control protection and storage of Floriston Rate Water. (App./Pet. Joint-20, p. 5.) Flood control storage of 8,000 af is reserved in the reservoir from November 1 to April 10 of the following year. (SWRCB-7, p. 3-43.)

⁷ In *Carson-Truckee Water Conservancy District v. Watt*, 549 F.Supp. 704 (D. Nev. 1983), affirmed in relevant part in (9th Cir. 1984) 741 F.2d 257, the federal district court concluded that the federal Endangered Species Act requires the Secretary of the Interior to give the Pyramid Lake fishery priority over all other purposes of Stampede Reservoir until the cui-ui and Lahontan cutthroat trout are no longer classified as endangered or threatened. (App./Pet. Joint-13; App./Pet. Joint-14.)

⁸ Under the Truckee River Agreement, to which TCID also is a party, the Conservation District may store 25,000 af of Truckee Canal Water—the 1500 cfs decreed to the United States for diversion into the Truckee Canal—in Boca Reservoir subject to certain conditions. In practical effect, this allows the first 25,000 af of storage in Boca Reservoir to be stored ahead of Newlands Project water rights that are established under Claim No. 3 of the Orr Ditch Decree (described below), with the rest of the water in Boca Reservoir (up to the reservoir's capacity of 40,870 af) stored junior to Claim No. 3. (App./Pet. Joint-6; App./Pet. Joint-20, p. 8.)

2.5 Water Right Proceeding

2.5.1 *Change Petitions and Water Right Applications*

In December 2003, Reclamation, the Conservation District, and TMWA filed four separate petitions to change their respective permit and licenses for Independence Lake, Stampede Reservoir, Boca Reservoir, and Prosser Creek Reservoir. In general, the change petitions seek to include common points of diversion, points of rediversion, places of use, and purposes of use so that water can be exchanged, stored, and diverted, to implement TROA. The change petitions were revised in 2005. (USBR-1, pp. 1-4; USBR-13.)

On January 8, 2004, Reclamation filed two water right applications. Under Application 31487, Reclamation seeks to divert water and store water from Independence Creek and the Little Truckee River in the existing Independence Lake, and Stampede and Boca Reservoirs. It filed Application 31488 to divert and store water from Prosser Creek in the existing Prosser Creek Reservoir. All sources are tributary to the Truckee River. (SWRCB-5, -6; USBR-1, pp. 4-5.) The change petitions and applications are described in detail below.

2.5.2 *Protests Filed*

The State Water Board provided notice of the four change petitions and two applications on January 30, 2007. On April 2, 2007, protests to each of the four change petitions and two applications were filed jointly by TCID; Churchill County, Nevada; Newlands Project individual water right owners (Ernest C. Schank, Richard Harriman, Ray Peterson, Don Travis, Jerry Blodgett, Lester deBraga, and Larry Miller); and the City of Fallon, Nevada (collectively, "Protestants"). TCID claims a contractual responsibility to operate and maintain the Newlands Project and to deliver water to the water right owners, including the other co-protestants. The protests were based on injury to prior rights, injury to the public interest, injury to the public trust, and environmental grounds.

2.5.3 *Hearing*

On April 19, 2010, the State Water Board issued a Notice of Public Hearing on the change petitions and applications that identified the following key hearing issues:

- “1. Petitions to Change Permit 11605 and Licenses 3723, 4196, and 10180

- a. Should the State Water Board approve the petitions to change Permit 11605, and Licenses 3723, 4196, and 10180?
 - i. Will the proposed changes injure any legal user of water? If the State Water Board approves the changes, what conditions, if any, should the board adopt to avoid any injury?
 - ii. Will the proposed changes in effect initiate a new water right?
 - iii. Will the proposed changes result in any significant adverse impacts to water quality, the environment, or public trust resources? If so, what conditions, if any, should the State Water Board adopt to avoid or mitigate any such potential adverse impacts?
 - iv. If the State Water Board approves the changes, what conditions, if any, should the board adopt to meet the requirements of the Truckee River Operating Agreement?"

“2. Water Right Applications 31487 and 31488

- a. Should the State Water Board approve either water right Application 31487 or Application 31488, or both?
 - i. Is water available for appropriation under each of the applications? If so, when is water available and under what circumstances, taking into consideration prior rights? What conditions, if any, should the State Water Board adopt to protect prior rights?
 - ii. Will the water be put to beneficial use and are each of the proposed appropriations in the public interest? If the State Water Board approves the applications, what conditions, if any, should the board adopt to ensure that the diversions are in accordance with applicable law and best serve the public interest?
 - iii. Will approval of the applications result in any significant adverse impacts to water quality, the environment, or public trust resources? What conditions, if any, should the State Water Board adopt to avoid or mitigate any such potential adverse impacts?
 - iv. If the State Water Board approves the applications, what conditions, if any, should the board adopt to meet the requirements of the Truckee River Operating Agreement?"

A pre-hearing status conference to discuss the scope of the hearing, the status of the protests, and other procedural issues was held on May 27, 2010. Reclamation, the California Department of Water Resources (DWR), TMWA, the Conservation District, TCID, Churchill County, the City of Fallon, the City of Fernley, and the Tribe filed Notices of Intent to Appear as participants in the hearing. The State Water Board held the water right hearing on July 21, 22, 23, 28, and 29, 2010. Reclamation, TMWA, and the Conservation District presented a joint case-in-chief as Applicant and Petitioners, and also their own individual cases-in-chief. DWR, TCID, the City of Fernley, and Churchill County also presented cases-in-chief. The Tribe, the State of Nevada, the California Department of Fish and Game, and DWR presented policy statements. The United States Department of Interior, through Reclamation, the Conservation District, TMWA, DWR, the Tribe, and the City of Fernley submitted a joint closing brief (hereinafter "Joint Closing Brief"). TCID, Churchill County, and the City of Fallon also filed a joint closing brief (hereinafter "TCID Closing Brief").

3.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

In January 2008, pursuant to the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA), the U.S. Department of the Interior and DWR jointly issued a final Environmental Impact Statement/Environmental Impact Report (EIS/EIR) evaluating the proposed TROA. The proposed action included the implementation of TROA, the water right applications filed by Reclamation, and Petitioners' proposed changes to the California water right permit and licenses to allow the water storage, transfers, and exchanges provided for in the proposed TROA. On September 5, 2008, the Secretary of the Interior signed the Record of Decision for the proposed TROA and the California Resources Agency certified the final EIS/EIR. (App./Pet. Joint-17; DWR - 05.) The final EIS/EIR does not identify any significant adverse effects that require mitigation. (SWRCB-7, pp. ES-13, 3-457 to 3-469; R.T. II, 388:2-5.)

The State Water Board is a responsible agency under CEQA for purposes of considering whether to approve the change petitions and applications. As a responsible agency, the State Water Board must review and consider the environmental effects of the project identified in the EIS/EIR, and any other relevant evidence in the hearing record, and reach its own conclusions on whether and how to approve the project involved. (Cal. Code Regs., tit. 14, § 15096, subd. (a).) The State Water Board is responsible for mitigating or avoiding only the significant environmental effects of those parts of the project that it decides to approve. (Cal. Code Regs., tit. 14, § 15096, subd. (g).)

TCID argues that flaws in the Truckee River Operations Model used to support the draft and final EIS/EIRs call into “serious question the fundamental underpinning of the EIS/EIR,” and urges the State Water Board to reject the model, in its present form, for use as the foundation for the EIS/EIR. (TCID-275B, at p. 3.)⁹ In general, however, a responsible agency must presume that the EIR complies with CEQA. CEQA Guidelines section 15231 requires a responsible agency that was consulted by the lead agency in preparing the EIR to conclusively presume that an EIR is adequate unless (1) the EIR is finally adjudicated in a legal proceeding to be inadequate, or (2) a subsequent EIR is necessary pursuant to section 15162. (Cal. Code Regs., tit. 14, § 15231; see Pub. Resources Code, § 21167.2.) The EIR has not been adjudged to be inadequate and no circumstances exist to require a subsequent EIR. (R.T. II, 583:2-14; DWR-01, p. 10.) Therefore, the State Water Board is required to presume that the EIR is adequate.

The State Water Board has considered the environmental effects of the project as shown in the EIS/EIR. Based on a review of the EIS/EIR and the information in the hearing record, no findings or mitigation are required under CEQA. Nonetheless, regardless of any obligation the State Water Board may have under CEQA, the State Water Board has an independent obligation to consider the effect of the proposed project for purposes of meeting the State Water Board’s public trust and public interest responsibilities. (See generally Wat. Code, § 1253; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.)

4.0 STATE WATER BOARD ACTION IN THIS PROCEEDING

Protestants assert that it is in the interest of judicial and administrative economy for the State Water Board to defer action on the pending applications and petitions until TROA is approved by the Orr Ditch Court and the Orr Ditch Decree is modified. They state that the State Water Board cannot take any action that deprives the decree court of its exclusive and continuing jurisdiction over the decreed rights or violates the decree, including incorporation of the Truckee River Agreement and the Floriston Rate management structure into the decree. Because the Orr Ditch Decree must be modified before TROA takes effect, Protestants allege that the State Water Board cannot properly evaluate the effect of the proposed changes on existing water rights until the decree court renders a decision.

⁹ TCID-275B does not have page numbers; the pages cited here refer to the .PDF format page numbering.

The State Water Board will not defer action on the pending applications and petitions for the following reasons. The State Water Board's exercise of its adjudicatory functions under state law does not deprive the Orr Ditch Decree Court of its exclusive jurisdiction or violate the Orr Ditch Decree. The State Water Board exercises the adjudicatory and regulatory functions of the State of California in the field of water resources. (Wat. Code, § 174.) Under the California Water Code, the State Water Board has exclusive primary jurisdiction over the pending applications and petitions in this proceeding. (See *id.*, § 1225.)

Protestants cite Water Code section 2900 and California case law for the proposition that, under California's system for the adjudication of water rights, the court reserves jurisdiction to modify a decree. A court's reservation of jurisdiction in an adjudication decree, however, does not divest the State Water Board of its administrative authority over water rights subject to the decree. (See, e.g., Wat. Code, §§ 2819 [authority to act on change petitions for water rights subject to a statutory stream system adjudication], 2820 [revocations].)¹⁰ In addition to its authority to administer water right permits and licenses, the State Water Board has continuing authority under the public trust and reasonableness doctrine over water rights in an adjudicated stream system. (See, *id.*, § 275 [proceedings to prevent waste and unreasonable use]; *Imperial Irrigation Dist. v. State Water Resources Control Bd.* (1986) 186 Cal.App.3d 1160 [upholding State Water Board authority in administrative proceeding concerning waste and unreasonable use of waters subject to a federal court adjudication]. See also *In re Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448, 472 & fn. 16 [recognizing State Water Board authority to apply public trust and reasonable use requirements to riparian rights].) Moreover, the Orr Ditch Decree did not seek to comprehensively determine the rights of all water right holders in the California portion of the Truckee River watershed; the decree does not include a determination of any of the water rights perfected or being developed under authority of a water right permit or license issued by the State Water Board.

The purpose of the requested changes and applications is to implement TROA, which in turn would result in an altered operational regime on the Truckee River and its tributaries. Citing to Decisions 1131 (1963) and 1132 (1963) of the State Water Board's predecessor, Protestants

¹⁰ Like section 2900 of the Water Code, on which Protestants rely, sections 2819 and 2820 apply to statutory stream system adjudications conducted under chapter 3 (commencing with section 2500) of part 3 of division 2 of the Water Code. The Orr Ditch Decree was not issued pursuant to these provisions. But these provisions serve to illustrate the point that an adjudication does not deprive the State Water Board of its adjudicatory authority over the water rights subject to the adjudication decree.

contend that when there is a private agreement between parties to a proceeding before the State Water Board, such as the Truckee River Agreement or the Tahoe-Prosser Exchange Agreement, the “respective rights and obligations” of the parties are not within the board’s jurisdiction, and that the board should conform any approval subject to the private agreement. (TCID Closing Brief, pp. 31, 35-36.) Protestants note that the Truckee River Agreement led to the resolution of competing applications to certain Truckee River reservoirs, including Boca Reservoir, which were addressed by the State Water Board’s predecessor in Decision 435 (1938) and Decision 1056. (See, e.g., TCID-282, pp. 8-10 [discussing proceedings leading to Decision 435].) Thus, Protestants want the Orr Ditch Court to address the issue of TROA superseding these agreements before the State Water Board acts.

We conclude that it is appropriate for the State Water Board to act on the pending applications and petitions filed under state law, focusing on the issues raised under our state law obligations. The Orr Ditch Court has continuing jurisdiction over the Orr Ditch Decree, including the Truckee River Agreement. To enter into effect, TROA must be submitted to the Orr Ditch Court and the Truckee River General Electric Court for approval of any necessary modifications to the respective decrees.¹¹ (App./Pet. Joint-16, § 205(a)(4).) The State Water Board is not being asked to amend any decree or agreement; instead our purview is limited to the requested changes pending before us, generally relating to changes in points of diversion, places of use, and purposes of use. Thus, contrary to Protestants’ suggestion, it is unnecessary to defer our action pending the outcome of proceedings before the Orr Ditch Court. Instead, the better approach is to consider the applications and petitions pursuant to California law, but to condition any approval upon TROA taking effect (as the Applicant and Petitioners request), which will not occur before Orr Ditch Court approves any necessary modifications to the decree. Further, the State Water Board’s consideration of the pending requests will serve to inform the Orr Ditch Court’s determination, at least with respect to the issues raised under California law.

Moreover, Protestants misconstrue the water right decisions they cite. We agree that as a general proposition the State Water Board does not oversee private agreements between private parties and that it will not adjudicate the “respective rights and obligations” as between the parties to such agreements. (But see Decision 1131 at p. 4 [interpreting a private agreement in a manner different from its literal language, so as to conform the agreement to

¹¹ The Truckee River General Electric Court has amended the decree to allow Prosser Creek Reservoir to be operated in accordance with TROA. (R.T. IV, 884:20-885:8.)

applicable water right constraints].) But a private agreement cannot deprive the State Water Board of its statutory responsibility for water right administration, including the authority to act on water right applications and petitions. (See, e.g., Wat. Code, § 1250 [State Water Board “shall do all things required or proper” relating to applications].) Nor can the State Water Board rely on third party agreements to fulfill its independent obligations. (*Central Delta Water Agency v. State Water Resources Control Board (Central Delta)* (2004) 124 Cal.App.4th 245, 265; see, e.g, State Water Board Order WR 2008-0014, p. 19 [declining to rely on a third party agreement for the enforcement of conditions “when the State Water Board has clear authority and an obligation to ensure that those conditions are met”].) Thus, while the State Water Board recognizes the potential value of negotiated agreements related to water right proceedings, and may incorporate terms of such agreements as part of its approvals, it must satisfy its independent duty to make any required findings and place appropriate conditions in the water rights pending before it.

Protestants also suggest that the State Water Board cannot condition approval of the applications and petitions on the Orr Ditch Court’s approval of TROA because the board does not know how the decree will be modified or TROA will be affected. They cite *Central Delta Water Agency v. State Water Resources Control Bd.*, *supra*, to support their position that the State Water Board cannot conditionally approve the applications and permits. In *Central Delta*, the appellate court held that the State Water Board, after a hearing, could not defer making findings that were prerequisite to issuing water right permits by delegating the remaining findings to its staff for subsequent determinations by the staff. *Central Delta* is inapposite. In this decision, the State Water Board makes the legally required findings that are necessary to approve the applications and petitions. It does not impermissibly delegate any necessary findings to staff or another entity. The State Water Board merely makes its approval subject to a condition subsequent. (See, e.g., Order WR 2000-13 at pp. 40-41.)

In addition, Protestants assert, it is premature for the State Water Board to act until Petitioners have obtained the necessary approvals under Nevada law to store water in the upstream Truckee River reservoirs or other issues related to Nevada water right applications have been resolved. As discussed herein, the Applicant and Petitioners have satisfied the procedural and substantive requirements under California law for obtaining approval of the applications and change petitions. Nothing in California law prohibits the State Water Board from acting until all other necessary approvals are obtained.

We recognize that the interstate nature of the Truckee River stream system and the complex legal framework governing the diversion and use of water from that stream system present unique considerations in this proceeding. We wish to emphasize that our action in this proceeding exclusively concerns the exercise of the State Water Board's functions under California law—namely, whether to approve the pending applications and petitions.

5.0 PETITIONS TO CHANGE PERMIT 11605 AND LICENSES 3723, 4196, AND 10180

5.1 State Water Board Authority Regarding Petitions for Change

Water Code sections 1700 through 1705 govern changes in the place of use, purpose of use, or point of diversion, of an appropriative water right acquired under division 2 of the Water Code. A change cannot be made without the approval of the State Water Board. Before the State Water Board may approve a change, “the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved.” (Wat. Code, § 1702.) The petitioner also must establish that the proposed change will not effectively initiate a new right. (Cal. Code Regs., tit. 23, § 791, subd. (a).)

Any interested person may file a protest against the petition on the basis that the proposed change would injure a legal user of water, interfere with a prior right, is not within the State Water Board's jurisdiction, would not best conserve the public interest or public trust, would have an adverse environmental impact or would be contrary to law. (Wat. Code, §§ 1703.2, 1703.6, subds. (c) & (d); Cal. Code Regs., tit. 23, §§ 745, subds. (b) & (c), 796.) The State Water Board may approve the petition if the board finds that the change will not injure any legal user of water or unreasonably affect fish, wildlife, or other instream beneficial uses.¹²

¹² “Water Code section 1702 does not expressly require a finding that the change will not unreasonably affect fish, wildlife, or other instream beneficial uses, but the statutory provisions governing change petitions support the conclusion that the [State Water] Board must consider the potential impacts to fish, wildlife, or other instream beneficial uses in determining whether and under what conditions to approve such a change petition.” (Order WR 2009-0033, p. 6, fn. 4; see, e.g., Wat. Code, §§ 1701.2, subd. (c), 1703; see also, Cal. Code Reg., tit. 23, §§ 794, subd. (a)(8), (b)-(d), 795, subd. (a) [establishing notice requirements relating to the potential effects of the proposed change on water quality, fish, wildlife, and other instream beneficial uses].)

“Moreover, consideration of potential impacts to fish and wildlife is consistent with the State Water Board's continuing duty to consider the impacts of water diversions on public trust resources, including fish and wildlife habitat.” (Order WR 2009-0033, p. 6, fn. 4, citing *National Audubon Society v. Superior Court* (1983), *supra*, 33 Cal.3d at 434-435, 445-447.) Similarly, the fact that Water Code section 1702 does not expressly require a finding that a change will be in the public interest does not preclude the Board from taking public interest considerations into account. (See State Water Board Order WR 95-9, p. 29; State Water Board Revised Decision 1641 (2000) pp. 117, 129 [reasoning that when reviewing a proposed change to a permit or license, the Board should consider the same factors that were considered when reviewing the underlying water right application, and therefore the Board should consider the public interest and effects on fish and wildlife].) (Order WR 2009-0033, p. 6, fn. 4.)

5.2 Proposed Changes to Permits and Licenses

The petitions for change request the addition of points of diversion and rediversion and changes to the place and purposes of use, to facilitate coordinated operations under TROA. These changes include: (1) the addition of common points of diversion among Independence Lake, Stampede Reservoir, and Boca Reservoir; (2) the redistribution¹³ of storage among the same three reservoirs;¹⁴ (3) the addition of common points of rediversion;¹⁵ (4) enlargement of the place of use to provide for a common place of use under the licenses and permit; and (5) the addition of purposes of use so that the licenses and permit have the same purposes of use. (USBR-1, pp. 1-2; R.T. I, 55:21-56:23.)

In addition, Petitioners request that the following term be eliminated in License 10180 (Prosser Creek Reservoir):

The Licensee shall operate Prosser Creek Reservoir in coordination with releases of water from Lake Tahoe in the Truckee River in accordance with the operation schedule contained in the U.S. Bureau of Reclamation, Prosser Creek Reservoir Operation Study, January 14, 1958, and amended July 1, 1958, on file with the [State Water] Board, or in accordance with any modified operation schedule that may be submitted by the Licensee, and approved by the [State Water Board] after notice and opportunity to be heard has been given to all parties and other interested persons in this proceeding.

(USBR-1, p. 4.)

¹³ According to Reclamation, “[r]edistribution as used in the change petitions means that a quantity of water, which would have been or is physically stored in a reservoir under this license (permit) may be stored in another reservoir under this license (permit).” (USBR-1, p. 1, fn. 1.)

¹⁴ For example, under the proposed changes to License 4196, water initially stored in Independence Lake may be withdrawn and restored in Stampede or Boca Reservoirs for potential later municipal use by TMWA. (TMWA 3-0, p. 11.) Changes to Permit 11605 (Stampede Reservoir) will allow the storage of water in Independence Lake and the storage and restorage of water in Boca Reservoir. (TMWA 3-0, p. 12.) Changes to License 3723 (Boca Reservoir) will allow the storage of water and redistribution of storage to Independence Lake and to Stampede Reservoir. (TMWA 3-0, p. 13.)

¹⁵ Unlike the other change petitions, the change petition for License 10180 (Prosser Creek Reservoir) does not seek to add points of diversion and redistribution of storage. (TMWA 3-0, p. 13.) In addition, Independence Lake is not a point of rediversion in any permit or license.

Petitioners request that the following term be included instead:

The Licensee shall operate Prosser Creek Reservoir in accordance with the Truckee River Operating Agreement, which is on file with the State Water Resources Control Board.

(USBR-1, pp. 3-4.)

In addition, because implementation of the proposed changes is predicated on the approval and implementation of TROA, Petitioners have requested that any State Water Board order approving the change petitions include the following conditions:

These changes are not effective until the conditions required for the Truckee River Operating Agreement to enter into effect have been satisfied. All diversions, storage, use of water and operations under this [License/Permit] shall be in accordance with the provisions contained in this [License/Permit] and the Truckee River Operating Agreement.

Water stored in this [Name of Reservoir] pursuant to permits issued by the Nevada State Engineer under Nevada Law, and recognized pursuant to the provisions of California Water Code Sections 1231 and 1232 shall not be considered as water stored pursuant to the provisions of this [License/Permit].

(USBR-1, p. 4.)

The proposed changes in the points of diversion and points of rediversion, places of use, and purposes of use are described in more detail below. All of the existing points of diversion and points of rediversion, places of use, and purposes of use under the permit and licenses will be retained. (USBR-1, p. 2.)

Proposed Common Points of Rediversion

The proposed common points of rediversion under License 3723, License 4196, License 10180, and Permit 11605 are described in Table A of this decision.

Proposed Common Expanded Place of Use

The proposed expanded place of use is shown on Map No. 320-208-189A-~~4~~,¹⁶, which is on file at the State Water Board in Sacramento, California. The following list provides the proposed expanded place of use in all four change petitions, including the existing place of use of License 3723 (Boca), License 4196 (Independence), License 10180 (Prosser), and Permit 11605 (Stampede).

Township*	Range*
13N	17 & 18E
14N	16 – 18E
15N	16 – 18E
16N	16 – 18E
17N	15 – 20E, 24 – 31E
18N	14 – 21E, 24 – 31E
19N	14 – 31E
20N	18 – 32E
21N	18 – 26E, 29 – 32E
22N	20 – 24E
23N	20 – 24E
24N	20 – 24E
25N	20 – 24E
26N	20 – 24E
27N	20 – 24E
28N	23 & 24E

* All references to township and range are to Mount Diablo Base and Meridian (MDB&M)

¹⁶ [This map was originally dated July 24, 2006, and has been revised several times since then. This decision refers to the version most recently revised on 8/27/12.](#)

Proposed Common Purposes of Use

Reclamation requests that the purposes of use be expanded to include the following to facilitate possible changes and exchanges permitted under TROA:

Common Purposes of Use for Licenses, Permit, and Applications
Municipal
Domestic
Industrial
Irrigation
Stockwatering
Fish Culture
Fish & Wildlife Protection/Enhancement (including wetlands)
Power (incidental)
Instream Water Quality Enhancement
Recreation
Conservation of Pyramid Lake fishery (as provided in P.L. 101-618)
Flood Control (except for Independence Reservoir, L4196)

Power Use

Incidental Power use will be at the power plants described in Table C of this decision.

5.3 Issues Raised in Opposition to the Proposed Changes

In general, Protestants contend that the proposed changes will injure the rights of the Newlands Project and existing water users and effectively initiate a new right. They assert that Petitioners have failed to demonstrate that no injury will result from approval of the proposed changes and that the impacts analysis is deficient.

5.3.1 *Rights of Downstream Water Users Claiming Injury*

At the hearing, Protestants alleged that Petitioners have failed to establish that the proposed changes will not operate to the injury of any legal user of water. Specifically, Protestants allege that the proposed changes will cause injury to their water rights, which derive from Claim Nos. 3 and 4 of the Orr Ditch Decree. Claim No. 3 grants the United States the right to divert 1,500 cfs of water flowing in the Truckee River through the Truckee Canal “for the irrigation of 232,800 acres of land on the Newlands Project, for storage in the Lahontan Reservoir, for generating

power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes” (App./Pet. Joint-7, p 10.) With a priority date of July 2, 1902, Claim No. 3 is junior to approximately 95 percent of the other claims under the Orr Ditch Decree.^{461Z} (USBR-3, p. 8; R.T. I, 115:8-11.)

Under Water Code section 1702, before the State Water Board can grant permission to make a change in an appropriative water right, it must find that the change will not operate to the injury of any legal user of the water involved. A “legal user of the water involved” is not limited to a person who holds an appropriative water right, but encompasses any person who legally uses the water involved. (See, e.g., *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 804 [finding that a legal user of water includes a person who uses the water under a contract with the appropriator who seeks the change].) Thus, the controlling consideration in the State Water Board’s inquiry is the effect of the change on the rights of others. (*Id.*, at pp. 743, 805.) A person who claims that a proposed change will cause injury “must show the change will interfere with his or her *right* to use the water, whatever the source of that right may be.” (*Id.* at p. 805.) It is not enough for a person to show that he or she will receive less water as a result of the change. A person claiming injury must demonstrate that he or she has a right to the greater amount of water claimed and that the proposed change will interfere with that right. (*Ibid.*)

The water right owners represented by TCID have a legal interest in the waters of the Truckee River pursuant to Claim No. 3 of the Orr Ditch Decree. TCID is responsible for the operation and management of the Newlands Project, including the management of the Claim No. 3 water for the benefit of the project in accordance with the Operating Criteria and Procedures (OCAP) (discussed below). (TCID-281, p. 2; R.T. II, 482:13-22; see *Truckee-Carson Irrigation District v. Secretary of Interior* (1984) 742 F.2d 527, 531 [noting that TCID’s rights to the flow of the Truckee River were strictly managerial].) Nearly all of the water rights in the Newlands Project

^{461Z} Under Claim No. 4 of the Orr Ditch Decree, the United States also has the right to store water in Lake Tahoe and to discharge sufficient water to deliver 1,500 cfs, after transportation loss, to the head of the Truckee Canal at Derby Dam to be subsequently diverted for irrigation, storage in Lahontan Reservoir, and other purposes. (App./Pet. Joint-7, p. 11.) The testimony in the hearing, however, primarily focused on Claim No. 3, and for ease of reference, we refer herein to Claim No. 3.

Additionally, in written testimony, TCID’s witness described rights granted under the final decree in *United States of America v. Alpine Land & Reservoir Co., et al.* (D.Nev. 1980), Civ. No. D-183, (Alpine Decree), entered on October 28, 1980, which also serves the Newlands Project. The Alpine Decree adjudicates water rights on the Carson River and its tributaries. (TCID-134.) The Carson River and rights arising under the Alpine Decree are not at issue in this proceeding.

are owned by the individual land owners. (R.T. III, 733:1-17.) The United States Supreme Court has determined that the Newlands Project landowners have a beneficial interest in the water rights held by Reclamation for the benefit of the Project. “The beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.” (*Nevada v. United States* (1983) 463 U.S. 110, 126.) It is not enough, however, for Protestants to show that they have a right to the water involved, but they must also show that the proposed changes will interfere with that right. As explained below, Protestants have not met that burden.

5.3.2 Injury to Other Legal Users of Water

Protestants argue that the Petitioners failed to meet their burden under Water Code section 1702 because they did not conduct an independent analysis of injury to other water users. Protestants note that the purpose of the proposed changes is to implement TROA and, thus, the State Water Board must look at the operation of the proposed changes, which includes the changes proposed on the face of the petitions, and also the water exchanges, trades, releases, and carryover storage anticipated by TROA. (TCID [briefClosing Brief](#), p. 8.) Protestants also contend that the Petitioners’ injury analysis failed to consider operation of TMWA’s change applications filed in Nevada, which purport to store water in the California upstream reservoirs. In sum, Protestants allege that the Petitioners did not conduct an adequate injury analysis because they did not consider the operation of TROA and TMWA’s water rights.

5.3.2.1 ADEQUACY OF INJURY ANALYSIS

Petitioners must provide sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water. (Wat. Code, § 1701.2, subd. (d).) As explained by the federal Chief Deputy Water Master, Mr. Chad Blanchard, the storage of new water in Truckee River [Basinbasin](#) reservoirs is on a priority schedule. (App./Pet. Joint-20, p. 8; R.T. I, 125:11-126:22.) The priorities of storage under the permit and licenses for Independence Lake, Stampede Reservoir, Boca Reservoir (with the exception of the first 25,000 af of storage in the reservoir), and Prosser Creek Reservoir are all junior to Claim No. 3. (See App./Pet. Joint-20, p. 8 [explaining that Truckee Canal demands and other conditions must be met before new storage may occur in the reservoirs].) Thus, according to Petitioners, the proposed changes will not result in injury because the water involved in the changes is water previously stored under those junior rights. Previously stored water is only available for use by the water right holder and is not available for other users downstream. Downstream users have

no legal interest in the water and therefore cannot be injured by the proposed changes. (R.T. I, 227:22-228:10.) Moreover, the water subject to the proposed changes will remain with the quantities and seasons of the existing licenses and permit. (TMWA 3-0, p. 14.)

As explained above, in evaluating whether a proposed change will cause injury, the State Water Board must focus on the rights of others. In general, any legal injury will depend on the “relative seniority of the water rights involved and the presence of natural flow.” (State Water Board Revised Decision 1641 (D-1641), p. 34.) An appropriative water right holder “can divert and use any unappropriated water that is flowing in the stream, including abandoned water.” (*Id.*, p. 33.) A downstream appropriator, however, cannot require the owner of an upstream reservoir to release previously appropriated water. (*State Water Resources Control Bd. Cases, supra*, at p. 743.) Put another way, an upstream appropriator is not required to continue to abandon stored water it has abandoned in the past, causing an artificial flow of water. (*Stevens v. Oakdale Irrigation District* (1939) 13 Cal.2d 343.) Thus, if previously stored water is not available to a water right holder, the water right holder cannot be injured if the water does not arrive at the water right holder’s point of diversion due to a change in the use of the stored water. (See, e.g., D-1641, pp. 33-34 [framing issue as whether “petitioned changes would reduce flows when natural flows would occur under unimpaired circumstances”].)

Independence Lake (License 4196)

License 4196 is junior in priority to the Orr Ditch Decree rights, including Claim No. 3. (TMWA 3-0, pp. 11-12.) Water users under Claim No. 3 do not have any right, either direct or indirect, to any water stored in Independence Lake (License 4196) or Stampede Reservoir (Permit 11605). (R.T. IV, 996:12-21.) As explained above, water stored under License 4196 is stored in conformity with the water right priority system administered by the Federal Water Master. Thus, “[n]o water can be stored under License 4196, unless the water right for the Newlands Reclamation Project is fully satisfied.” (TMWA 3-0, p. 12.)

Accordingly, the proposed change in the points of diversion will not cause injury because water cannot be initially diverted to storage under License 4196 unless allowed under the existing right and in accordance with the priority system (i.e., rights arising under Claim No. 3 are first met). Similarly, changes in the points of rediversion and redistribution of storage among Independence Lake, Stampede Reservoir, and Boca Reservoir will not result in any legal injury. Protestants do not have a right to water previously stored under License 4196 that is then rediverted or redistributed, and thus, Protestants cannot be injured by a change in the

previously stored water. To the extent Protestants suggest that reservoir refill may cause injury, water diverted to fill any space made available in Independence Lake by moving water to another reservoir must be diverted in accordance with the terms of License 4196 and the priority system. (TMWA 3-0, pp. 11-12.) Once the water is diverted to storage in a manner consistent with water right priorities, water stored in Independence Lake is previously stored water to which Protestants have no right. For the same reasons, other changes to License 4196 involving downstream points of rediversion and places and purposes of use will not result in injury. Water stored under License 4196 is not available to the Newlands Project and thus, changes to that right cannot cause injury to water users in the Project. (TMWA 3-0, p. 12.)

Stampede Reservoir (Permit 11605)

As with License 4196 for Independence Lake, the priority of storage under the Stampede Reservoir permit is junior to Claim No. 3. (TMWA 3-0, pp. 12-13.) TCID's witness admits that water users under Claim No. 3 do not have any right, either direct or indirect, to any water stored in Stampede Reservoir (Permit 11605). (R.T. IV, 996:12-21.) Thus, for similar reasons discussed above regarding the change petition for the Independence Lake license, the proposed changes to the Stampede Reservoir permit will not injure any legal user of water.

Boca Reservoir (License 3723)

License 3723 has a water right priority of 1926, which normally would be junior to Claim No. 3 as a matter of strict water right application priority. Pursuant to the Truckee River Agreement, however, the federal watermaster administers the storage priority of the first 25,000 af in Boca Reservoir ahead of Truckee Canal diversions. (App./Pet. Joint-20, p. 8.) The priority of storage above the initial storage of 25,000 af under the Boca Reservoir license remains junior to Claim No. 3. (App./Pet. Joint-20, pp. 8, 10; TMWA 3-0, p. 6.) The proposed changes will not cause injury because water cannot be initially diverted to storage under License 3723 unless allowed under the existing right and in accordance with the priority system. The fact that the Truckee River Agreement—to which both TCID and the Conservation District are parties—allows the Conservation District to store the initial 25,000 af of water in Boca Reservoir ahead of Truckee Canal diversions does not change this conclusion with respect to that portion of water stored in the reservoir. Absent any evidence that the Conservation District is precluded under the Truckee River Agreement from making changes to the diversion and use of that stored water, the proposed changes will not injure TCID's right to the use of water. Thus, for similar reasons discussed above regarding the change petition for the Independence Lake license, the proposed changes to those water rights will not cause injury to any legal user of water.

To the extent Protestants arguably have a legal interest in water stored under the licenses for Boca or Prosser Reservoirs, which is used to meet Floriston Rates, the proposed changes will not result in injury. Water users under Claim No. 3 benefit from water released to meet Floriston Rates. Floriston Rates are met from natural flow, Lake Tahoe storage releases, storage releases from Boca Reservoir under License 3723, and releases of Tahoe Exchange Water from Prosser Creek Reservoir under License 10180 pursuant to the Tahoe-Prosser Exchange Agreement. (App./Pet. Joint-20, pp. 5, 7; App./Pet. Joint-21, pp. 3-4; R.T. I, 128:5-129:20, 131:14-132:13.) The change petitions do not propose to alter the Floriston Rate regime. Protestants are not injured if water normally released from one reservoir is instead released from another reservoir such as Independence Lake or Stampede Reservoir.

Prosser Creek Reservoir (License 10180)

The priority of storage under the Prosser Creek Reservoir license, 1958, is junior to Claim No. 3. According to Petitioners, the Claim No. 3 water users have no right, either direct or indirect, to any water stored in Prosser Creek Reservoir (License 10180) that is not needed for the Tahoe-Prosser Exchange. (Joint Closing Brief, p. 11; App./Pet. Joint-20, p. 10.) For the same reasons discussed above regarding the change petitions for the Independence Lake and Boca Reservoir licenses, the proposed changes to those water rights will not cause injury to any legal user of water.

For the reasons discussed above, Protestants do not have a right to water previously stored under License 10180, and thus, Protestants cannot be injured by a change in the operations schedule governing the previously stored water.

In sum, Petitioners have provided sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water. (Wat. Code, § 1701.2, subd. (d).) The proposed changes will not result in injury to Protestants because the water involved in the changes is water previously stored under those junior rights.

5.3.2.2 OPERATIONS OF TROA

In evaluating injury, Protestants contend that the State Water Board must not only examine the changes proposed on the face of the petitions, but also the effects of the water exchanges, trades, releases, and carryover storage anticipated by TROA. (TCID [briefClosing Brief](#), p. 8.)

The State Water Board has appropriately focused the scope of its review in this proceeding on the changes proposed to the California permit and licenses in the petitions pending before us. Contrary to Protestants' suggestion, the State Water Board is not required to evaluate the effects of other changes that have no connection, besides being changes authorized under TROA, with the changes pending before us.⁴⁷¹⁸

Protestants contend that subsequent operations of the reservoirs under TROA should be publicly noticed and that the State Water Board and interested persons should have an opportunity to review and evaluate the potential effects of those operations on existing water rights. (TCID-276B, p. 9; TCID Closing Brief, pp. 29-30.) Protestants' witness, Mr. Kenneth Knox, asserts that allowing the water right holders to "circumvent" the change petition process for water stored in the reservoirs "as some form of cart blanche management authority, is not in the public interest." (TCID-276B, p. 9.) This decision, however, neither expressly nor impliedly authorizes any such circumvention of future change petition procedures. California law establishes a specific framework for processing and approving various changes to water rights and transfers. (See, e.g, Wat. Code, §§ 1435 et seq. [temporary urgency changes], 1700 et seq. [changes in point of diversion, place of use, purpose of use], 1725 et seq. [temporary transfers], 1735 et seq. [long-term transfers].) Any proposed changes to water rights must comply with any applicable procedures and substantive requirements. Additional notice or procedures are not generally required, however, when operations are conducted in accordance with the terms of a permit or license.

With respect to the operation of TROA, Protestants contend that the injury analysis failed to consider the operation of TMWA's change applications filed in Nevada to store water in the California upstream reservoirs. (TCID ~~brief~~[Closing Brief](#), pp. 8-9.) TROA would be implemented, in part, by allowing water under Nevada water rights to be stored in California reservoirs until the water is needed in Nevada, thereby preserving the storing parties' ownership of the water rights and priority dates. On March 19, 2010, the Nevada State Engineer issued Ruling No. 6035, which approved the changes to the Nevada water rights and authorized the storage of the consumptive use portion of those rights in the upstream reservoirs. (TMWA 1-5; R.T. I, 228:19-229:10; see N.R.S. § 533.515 [Nevada statute authorizing appropriative permit

⁴⁷¹⁸ Further, the final EIS/EIR evaluated the impacts associated with changes authorized by TROA, including cumulative impacts, and it did not identify any significant environmental effects requiring mitigation.

with point of diversion in another state when the place of use is situated in the State of Nevada].)

Petitioners contend that the Nevada change applications do not have to be considered in the State Water Board's evaluation of the California change petitions, citing to Water Code sections 1230-1232. (R.T. I, 229:11-230:2.) They explain that a consumptive use proportion of a Nevada direct diversion water right should not be considered to be water stored as the result of any California permits or licenses. Instead, without the Nevada State Engineer's approval, the water must be passed through the California reservoirs. (TMWA 3-0, pp. 14-15.) As noted above, Petitioners have requested that any approval of the change petitions include a term providing that water stored in the California upstream reservoirs under Nevada-issued permits, and recognized pursuant to the provisions of California Water Code sections 1231 and 1232, shall not be considered as water stored pursuant to the provisions of the California permits and licenses. (USBR-1, p. 4.)

Water Code sections 1230-1232, which address appropriations from interstate streams, recognize interstate water right reciprocity and give the same force and effect to water rights of other states as if the rights were acquired under California law, if the other states provide the same recognition of California rights. Section 1231 provides, in part:

Upon any stream flowing across the state boundary a right of appropriation having the point of diversion and the place of use in another state and recognized by the laws of that state shall have the same force and effect as if the point of diversion and the place of use were in this State if the laws of that state give like force and effect to similar rights acquired in this State

Although section 1232, subdivision (a) contains a general exemption from reciprocity for interstate lakes and streams flowing out of interstate lakes, subdivision (b) expressly provides that the reciprocity provision applies to "any appropriation or change in point of diversion, place of use, or purpose of use under a right to the use of waters from the Truckee River if the appropriation or change is made pursuant to the operating agreement described in Section 205(a) of Public Law 101-618." Thus, section 1231 applies to appropriations or changes made pursuant to TROA.

TMWA's change applications filed in Nevada to store water in the California upstream reservoirs involve changes in appropriative water rights with points of diversion and

places of use in Nevada. Under Water Code section 1231, those rights are treated the same as if the point of diversion and place of use were in California. The need for State Water Board approval of changes in point of diversion, place of use, or purposes of use in California depends on the priority date of the appropriation. For appropriations after the December 19, 1914, effective date of the Water Commission Act, the change requires the approval of the State Water Board. For changes involving [rights initiated before December 19, 1914, commonly referred to in California as “pre-1914 rights,”](#) the change must comply with requirements to protect legal users of water, but does not require approval by the State Water Board. (Wat. Code, § 1706.) TMWA’s Nevada change applications involve pre-1914 rights.

For the reasons described in this decision, Petitioners have shown that the proposed changes to California water rights will not injure any legal user of water and are consistent with provisions of California law governing such changes. To the extent Protestants suggest that operation of the Nevada change applications in conjunction with the proposed California change petitions may result in injury, they have failed to rebut the evidence regarding lack of harm or adequately explain why the evidence is unpersuasive. Moreover, we note that the Nevada State Engineer has determined that approval of the Nevada change applications will not injure existing rights.⁴⁸¹⁹ While the State Water Board will make its own determination as to whether a change sought under California law will result in injury, we will afford the Nevada State Engineer’s determination a high degree of deference to the extent it is relevant to our inquiry.

In accordance with Water Code section 1231, water stored in California under pre-1914 Nevada water rights will not be considered water stored under rights requiring approval by the State Water Board. We will include the requested condition in our approval.

5.3.2.3 ADMINISTRATIVE PROVISIONS OF TROA

Protestants allege that instead of adequately analyzing the no injury issue, Petitioners point to the administrative procedures of TROA as providing a remedy if there is injury to an existing water right. (TCID [briefClosing Brief](#), pp. 9-10.) Protestants note that Water Code section 1702 requires Petitioners to establish the change will not operate to the injury of any legal user of

⁴⁸¹⁹ Although the Nevada State Engineer did not expressly consider California water rights in acting on the change petitions, in Ruling No. 6035 he concludes that the change does not conflict with existing rights and it does not threaten to prove detrimental to the public interest. (TMWA 1-5, pp. 17-18.)

water, not to show that there is an available remedy for an existing injury. (TCID ~~brief~~[Closing Brief](#), p. 10.) As explained herein, the State Water Board independently finds that the change will not injure a legal user of water and does not rely on the administrative provisions of TROA as the basis for this finding.

5.3.2.4 SHORTAGES TO NEWLANDS PROJECT

Protestants contend that the only evidence presented related to the operation of TROA shows shortages to the Newlands Project. As evaluated in the EIS/EIR, the Newlands Project water supply consists of the total of the Carson River discharge and supplemental Truckee River water available for diversion via the Truckee Canal to Lahontan Reservoir. (USBR-4, p. 8, fn. 1.) The EIS/EIR evaluated the potential effects of TROA on the Newlands Project by “comparing the quantity of Truckee River water available for diversion at Derby Diversion Dam and resulting Truckee Canal inflow to Lahontan Reservoir and Lahontan Reservoir storage and releases to the lower Carson River under the various alternatives.” (USBR-4, p. 8.) At particular issue in the hearing, Figure 3.23 of the EIS/EIR depicts modeling results that compares agricultural shortages to the Carson Division under four scenarios: “TROA,” “Current Conditions,” “No Action,” and “Local Water Supply Alternative.” (SWRCB-7, p. 3-107, fig. 3.23.) Under TROA and the No Action alternatives, shortages occur in 9 of the 100 years of analysis. (*Id.*, pp. 3-108, 3-110.) Protestants cite to this information as showing a qualitative trend of increased shortages to the Newlands Project, especially in critical dry years.

The modeling of shortages in the EIS/EIR, however, does not necessarily equate to evidence of legal injury under Water Code section 1702. As explained above, it is not enough for a person claiming that a proposed change will cause injury to show that he or she will receive less water as a result of the change. (*State Water Resources Control Bd. Cases, supra*, 136 Cal.App.4th at 805.) A person claiming injury must demonstrate that he or she has a right to the greater amount of water claimed and that the proposed change will interfere with that right. (*Ibid.*)

According to Petitioners’ witness, Mr. Thomas Strekal, the term “shortage” in the EIS/EIR means “an amount of water less than a full supply during an irrigation season for the Newlands Project.” (USBR-4, p. 8, fn. 1.) The term “does not and is not intended to indicate that any irrigation entitlement for any water right owner served by TCID for that season has not been satisfied.” (*Ibid.*) Mr. Strekal explained that there was little difference in effect on the Newlands Project between TROA and the other alternatives, but that slightly less water was available for

diversion at Derby Dam under TROA “because the holders of upstream senior Truckee River water rights would be able to exercise their water rights more effectively by diverting the consumptive use portion of their previously-unused water to storage as credit water.” (USBR-4, p. 8.)

In contrast, Protestants’ witness, Mr. Ernest Schank, defined “shortage” as “anything less than a full duty.” (R.T. III, 745:18-20.) Mr. Schank stated that TROA will cause shortages because water that once flowed downstream to Derby Dam could be impounded by senior water right holders in upstream reservoirs. (R.T. III, 738:13-21.) He acknowledged that shortages could be caused by the fact that his water rights are simply junior to other water rights on the system. (R.T. III, 746:23-747:1.)

The fact that Protestants may receive less water than they have received historically does not mean that the proposed change will injure Protestants’ legal rights. The references to shortages in the EIS/EIR, by themselves, do not provide evidence of legal injury. To the contrary, Mr. Strekal has explained that shortages will occur due to the exercise of senior water rights. As explained above, an upstream appropriator is not required to continue to abandon stored water it has abandoned in the past, causing an artificial flow of water. (*Stevens v. Oakdale Irrigation District, supra*, 13 Cal.2d 343.) Thus, injury will not result from the lawful exercise of senior rights. Protestants have not correlated the shortages described in the EIS/EIR with injury to their legal rights.

5.3.2.5 THE ORR DITCH DECREE AND OTHER APPROVALS

Protestants argue that the “25 percent rule” in the Orr Ditch Decree, which generally limits water use during any month to no more than 25 percent of the seasonal allowance, applies only to direct diversion for irrigation use and cannot be applied to storage of any consumptive use rights or the proposed purposes of TROA.⁴⁹²⁰ (TCID-287, p. 17.) The Protestants, however, raise this issue with respect to Nevada water right changes that either have been approved by the

⁴⁹²⁰ The “General Provisions” of the Orr Ditch Decree state: “No owner or person or party entitled to the use of water under this decree shall be allowed to use for irrigation during any calendar month more than twenty-five per cent of the quantity of direct water in acre fee hereby allowed for the land for the season.” (App./Pet. Joint-7, p. 87.) Another provision allows all water users who are allowed a flow of less than one inch per acre to use a larger flow than that specifically allowed by the Orr Ditch Decree, not to exceed one inch per acre, “provided that the amount of water used during any calendar year shall not exceed the seasonal acre feet allowance for the land, and that the flow allowed would not, if continuous, deliver in any one month in excess of twenty-five (25) per cent for the seasonal allowance in acre feet heretofore in this decree specifically allowed for said lands.” (*Id.*, p. 88.)

Nevada State Engineer or are pending before him.²⁰²¹ (TCID-287, pp. 17-18.) Thus, the matter is one of Nevada law as applied to Nevada water rights adjudicated by the Orr Ditch Decree and over which the Orr Ditch Court has exclusive jurisdiction. (*United States v. Alpine Land & Reservoir Co.* (9th Cir. 1999) 174 F.3d 1012-1014.)

Protestants also object to lack of need for additional approvals regarding changes to the California water rights, particularly with respect to operations under TROA. (TCID 276B, p. 8, opinion 6.) Our consideration and approval of the pending change petitions is in accordance with applicable state law. To the extent Petitioners may seek additional changes to their California water rights, applicable state law and procedures will apply to those changes as well.

5.3.2.6 CREDIBILITY OF WITNESS

In sum, Petitioners adequately demonstrated that the proposed changes would not injure any legal users of water, and Protestants' evidence and argument to the contrary is not convincing. The hearing officers observed the witnesses presenting testimony at the hearing. The State Water Board has carefully reviewed and considered that oral testimony and the written testimony and other evidence in this proceeding. We find unpersuasive the testimony of Protestant's witness, Mr. Kenneth Knox, who testified as an expert witness on various issues, including the effects of the change petitions and the water right applications.²⁴²² According to Mr. Knox's curriculum vitae, a good portion of his professional experience was with the Colorado Division of Water Resources. (TCID-276A; see also R.T. IV, 1014:9-1015:10 [admitting limited exposure to the subject of his testimony relative to other witnesses].) While the western states adhere to certain common principles of appropriative water law, each state has its own unique interpretation of water law concepts and procedural requirements. It is not a prerequisite for an expert witness testifying about the administration of water rights in California

²⁰²¹ Protestants made a similar argument to the Nevada State Engineer in the Nevada proceeding on TMWA's request to add the California reservoirs as points of diversion for the consumptive use portion of TMWA's Nevada water rights. In Ruling 6035, the Nevada State Engineer noted that he already found that TMWA had not requested to change the Orr Ditch Decree provision and overruled Protestants' claim. (TMWA 1-5, p. 7.) The Nevada State Engineer further noted that there was no indication in the decree that when "water rights are changed to another manner of use that basic general principles established in the decree are superseded" and he found that no more than 25 percent of the water right could be diverted to storage in any one month. (*Ibid.*) To avoid potential harm to existing water right holders, however, the ruling requires the diversion rate to be adjusted "to account for the consumptive and non-consumptive portion of the water right." (*Ibid.*)

²⁴²² To the extent Mr. Knox opined about the water right applications, the State Water Board does not agree with his conclusions for the same reasons discussed herein.

to have lived or worked in California, but absent specific knowledge or experience with water right administration in this state the testimony may be less persuasive.

With respect to this proceeding, Mr. Knox had extremely limited experience with the Truckee River ~~Basin~~basin. (R.T. IV, 949:13-950:13.) Consequently, Mr. Knox did not appear to have sufficient knowledge of the reservoir operations and water rights about which he was testifying. (See, e.g., R.T. IV, 958:5-960:3 [explaining that applications should not be granted to avoid expansion of the water right even if water is available for appropriation], 990:4-19 [did not know whether Independence Lake was used to meet Floriston Rates], 992:23-995.1 [opining that carryover storage would alter the amount of water stored under the water rights and that such storage must be expressly allowed as a term of water rights], 995:10-996:1 [did not know whether change petitions sought to limit water released from storage], 1006:10-1007:6 [did not know amount of storage under water right license and did not know amount of storage sought under change petition but still opined that there would be injury].) In light of the foregoing, the State Water Board does not agree with Mr. Knox's conclusions. (Gov. Code, § 11425.50, subd. (b).)

5.3.3 Initiation of a New Right

A proposed change in the exercise of an appropriative right cannot initiate a new right. (Cal. Code Regs., tit. 23, § 791, subd. (a).) A change may result in the creation of a new right if it increases the quantity of water diverted under the existing right, for example, by appropriating a greater amount of water, increasing the season of diversion, or using a different source of water. (State Water Board Order No. WR 2009-0061, pp. 5-6, citing Cal. Code Regs., tit. 23, § 699 & *Johnson Rancho County Water District v. State Water Rights Board* (1965) 235 Cal.App.2d 863, 879.)

The change petitions for Boca Reservoir, Stampede Reservoir, and Independence Lake seek to add common points of diversion among the three reservoirs, raising an issue among the parties as to whether the proposed changes involve the addition of a new source of water supply that would result in the creation of a new right. (E.g., compare TMWA 3-0 at p. 10 with TCID-287 at pp. 15-16.) The source of water is a fundamental attribute of a water right that cannot be changed; thus, the diversion of water from a different source of supply results in an entirely new appropriation. (State Water Board Order No. WR 2009-0061, pp. 5-6, 16; see also Wat. Code, §§ 1260, 1301 [requiring water right application and notice to identify source of supply].) What constitutes a new or different source of water requires a factual analysis by the State Water

Board that may need to address various factors, including whether the existing and proposed points of diversion are hydrologically connected, and thus involve a common source of supply, and the geographic scale of the proposed change.

In this case, however, the analysis is relatively simple. We find that the proposed changes in the points of diversion do not involve a potential change in source of supply that warrants further analysis.²²²³ Independence Lake is located on Independence Creek, which is tributary to the Little Truckee River, on which Boca and Stampede Reservoirs are located. Thus, the proposed changes involve adding diversion points along the same stream system and the same source of supply as the original diversion points. (See *Kidd v. Laird* (1860) 15 Cal. 161, 179-181 [person entitled to divert a quantity of water of the stream may take the same at any point on the stream].) The proposed changes do not involve a different source of supply.

The proposed changes do not seek to appropriate a greater amount of water or to increase the season of diversion. Petitioners assert that the proposed changes do not initiate a new water right because the amount of water to be diverted to storage and withdrawn from storage, as well as the season of diversion, will not change under the existing permits or licenses. On rebuttal, Protestants contend that the proposed changes will enlarge the existing right because the redistribution of storage from Boca or Stampede Reservoirs upstream to Independence Lake has the potential to expand project yields and storage due to the larger contributing watershed areas for the downstream reservoirs compared to Independence Lake. (TCID-287 at p. 15.) Additionally, Protestants argue that the proposed changes have the potential to expand TMWA's ability to store additional water in Independence Lake by making additional storage available in Independence Lake in the fall and storing water in the much larger capacity downstream reservoirs. (TCID-287 at pp. 15-16.)

Testimony in the record, however, indicates that approval of the changes will not result in an increase in the quantity of water diverted to storage or withdrawn from storage. (TMWA 3-0, pp. 9-10; R.T. I, pp. 233.) TMWA does not propose to divert water at either of the new points of diversion when water is not available in Independence Creek at Independence Dam. (TMWA 3-0, p. 10.) In fact, to eliminate any concern that the proposed change in point of diversion would initiate a new right, TMWA has no objection

²²²³ For example, a proposed change in point of diversion from one tributary to another tributary above the confluence of the two tributaries may raise a potential issue regarding a change in the source of supply.

to including the following condition with respect to the change petition for Independence Lake (License 4196):

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

(Joint Closing Brief, p. 32.)

Additionally, proposed changes to add points of rediversion or redistribution of storage are changes in what happens to water after it is initially diverted from the natural streamflow; these changes do not necessarily affect the rate of diversion, and therefore do not per se result in an expansion of a water right. (State Water Board Order No. WR 2009-0061, p. 6.) Nonetheless, we will condition our approval to ensure that water may not be diverted at Boca Reservoir or Stampede Reservoir that is not available for diversion at Independence Dam. Thus, we find that the proposed changes will not initiate a new right.

5.4 No Potential Injury to Water Right Holders between Independence and Boca

No water right holder on Independence Creek or the Little Truckee River protested or submitted evidence to support an objection to the change petitions based on injury to their right to use water. Nonetheless, because the State Water Board's records indicate that water right holders exist in the stream reach between Independence Lake and Boca Reservoir, we must evaluate whether the proposed changes will result in injury to those legal users. In particular, we will focus on the addition of points of diversion or points of rediversion for License 3723 (Boca Reservoir), License 4196 (Independence Lake), and Permit 11605 (Stampede Reservoir).

In general, adding a downstream point of diversion to an existing permit or license will not cause injury to any intermediate downstream water user. Because an upstream water user can take water before it reaches a downstream applicant, a protest based upon interference with the prior right of such upstream user normally will not be accepted by the State Water Board. (Cal. Code Regs., tit. 23, § 749; see *id.*, §.796 [protest procedures on applications shall govern the procedures on change petitions to the extent applicable].) Adding Stampede Dam and Boca Dam as points of diversion for License 4196 at Independence Lake (and adding Boca Dam as a point of diversion for Permit 11605 at Stampede Reservoir), therefore, will not cause injury to downstream water users. In addition, adding points of rediversion either upstream or

downstream for Permit 11605 and Licenses 3723 and 4196 will not cause injury because, as stated above, once water is stored in priority under a valid right, other water right holders cannot later claim that water when it is released and rediverted at a point downstream.

Adding Independence Dam as a point of diversion for Permit 11605 (Stampede Reservoir), on the other hand, may reduce flows between Independence Dam and Stampede Dam. Similarly, adding points of diversion at Stampede Dam and Independence Dam for License 3723 (Boca Reservoir) may reduce flows between Independence Dam and Boca Dam. Those reduced flows have the potential to injure water right holders who divert water from those river reaches.

A review of the State Water Board's Electronic Water Rights Information Management System (eWRIMS) database shows that in addition to Licenses 3723 and 4196, Permit 11605, and Application 31487, there is one license, one permit, two state-filed applications, and four Statements of Water Diversion and Use (statements)²³²⁴ on file for the stream reach between Independence Lake and Boca Reservoir.²⁴²⁵ License 2607 (Application 9267) at Independence Lake and Permit 18320 (Application 26273) at Stampede Reservoir, are held by TMWA and Reclamation ~~and TMWA~~, respectively, who are signatory parties to TROA and who are also petitioners in this proceeding. They have had ample opportunity to participate in this proceeding and have not claimed any injury so we will not consider this issue further with respect to those water rights.

There are two state-filed applications on the Little Truckee River at Stampede Reservoir, Applications 21069 and 21070. These filings have not been assigned to anyone. Therefore there is no injury.

Of the four statements filed with the State Water Board, one is a pre-1914 water right claim on the Little Truckee River, S000387, by Mr. James H. Bickford, downstream of Independence Lake and upstream of Stampede Reservoir. The United States Forest Service, Tahoe National

²³²⁴ Water Code section 5100 et seq. generally requires statements to be filed for the diversion and use of water under certain claimed rights, primarily riparian or pre-1914 appropriative rights.

²⁴²⁵ We take official notice of the information in the eWRIMS database pursuant to California Code of Regulations, title 23, section 648.2 (authorizing the State Water Board to take official notice of matters that may be judicially noticed), and pursuant to Evidence Code section 452, subdivision (c) (authorizing judicial notice of the official acts of administrative agencies). We do not, however, take official notice of the truth of the matters asserted in the database, namely, whether the rights claimed in the statements are valid water rights. The State Water Board does not express any opinion on the validity of water rights claimed in Statements of Water Diversion and Use.

Forest, also filed two statements, S010367 and S010369, for diversions from Stampede Reservoir. Although they did not specify the claim of right, it appears that they may be claiming a riparian right to the use of water at Stampede Reservoir. Upstream, there is one other statement, S010327, on Independence Creek by Independence Creek Properties. A basis of right is not specified, but it appears to be a riparian claim. To avoid any potential injury resulting from the changes in points of diversion, the State Water Board's approval of the change petitions will be subject to the rights of persons diverting water for reasonable beneficial use under valid and properly exercised riparian and pre- and post-1914 appropriative claims of right, and other claims of right, that have a priority superior to the priority of Permit 11605 or License 3723.

5.5 Approval of the Change Petitions

For the reasons discussed above, we find that the proposed changes, as conditioned herein, will not injure any legal user of water, unreasonably affect fish, wildlife, or other instream beneficial uses, or initiate a new right.²⁵²⁶ With several exceptions, discussed below, the requested changes are conditionally approved.

5.5.1 *Flood Control*

In their change petitions, Petitioners seek to amend the licenses and permit for Boca Reservoir, Stampede Reservoir, and Prosser Creek Reservoir so that the licenses and permit have the same purposes of use, including flood control purposes. The permit for Stampede Reservoir already includes flood control as a purpose of use, but the licenses for Prosser Creek and Boca Reservoirs do not. Thus, Petitioners request the addition of flood control as a purpose of use to the licenses for Prosser Creek and Boca Reservoirs.

We have concluded, however, that flood control is not a beneficial use of water. "The concept that use of public water must be made for beneficial purposes is fundamental in western water jurisprudence." (Hutchins, 1 Water Rights Laws in the 19 Western States (1971), p. 438.)

Under California law, an appropriation must be for a useful or beneficial purpose or the right will cease. (Wat. Code, § 1240.) Previous State Water Board decisions have concluded that flood

²⁵²⁶ On issuance of the amended permit and licenses, and in the permits issued on the applications discussed below, the characterization of the purposes of use will be modified to conform to the terminology contained in our regulations. "Conservation of Pyramid Lake Fishery" and "Wetlands" are included in "Fish and Wildlife Preservation and Enhancement," and "Instream Water Quality Enhancement" is included in "Water Quality." (Cal. Code Regs., tit. 23, §§ 666, 670.)

control is not a beneficial use as a matter of state law and disallowed applications for this purpose for lack of jurisdiction. (Decision 130 (1926) at p. 6 [storage of water for flood control purposes is not application of water to beneficial use “but rather the placing of restraint upon floods in order to prevent damage”]; Decision 100 (1926) at p. 61); Decision 858 (1956) at p. 49.) With respect to flood control, we believe that these previous decisions were correctly decided and are controlling precedent today.²⁶²⁷ Thus, the requests in this proceeding to add flood control as a purpose of use to the permits and licenses are denied.

It is unclear why the State Water Board previously approved flood control as a purpose of use for Stampede Reservoir. (Decision 913 (1958).) To the extent Decision 913 establishes a precedent for including flood control as a purpose of use, it is overruled.²⁷²⁸ Because flood control is not a beneficial use, we remove flood control as a purpose of use from Permit 11605. This correction will not affect operation of Stampede Reservoir for flood control purposes. Although the flood control project operations may be subject to the State Water Board’s public trust and reasonable use authority, the diversion of water for flood control purposes, absent application of the diverted water to beneficial use, is not subject to the requirement for a water right permit or license. (See Decision 1460 (1976).)

~~5.5.2—Place of Use~~

~~Another exception to our approval of the change petitions concerns the place of use described on the maps filed with the change petitions and applications. We note that the common place of use map, map No. 320-208-189A-1, dated July 24, 2006, is inconsistent with the study area described on page 1-9 of the EIS/EIR and shown on the location map within the EIS/EIR. According to the EIS/EIR, the study area includes the Truckee River basin in northeastern California and northwestern Nevada, Lahontan Reservoir, and the lower Carson River basin in northwestern Nevada. The two basins are hydraulically linked by the Truckee Canal, which~~

²⁶²⁷ The State Water Board’s decisions are precedential unless otherwise specified. (State Water Board Order WR 96-1, p. 17, fn. 11.) A prior decision or order, however, can be overturned. (*Ibid.*)

²⁷²⁸ The approval of flood control as a purpose of use in Decision 913 is inconsistent with three other decisions which approve applications filed by Reclamation, but conclude that the State Water Board has no authority to approve flood control as a purpose of use. (Decision 935 (1959) at pp. 64, 101; Decision 990 (1961) at p. 41; Decision 1365 (1970) at p. 5.) To the extent that the reasoning in those decisions suggests that it would be unconstitutional for the State Water Board to include flood control as a permitted use, the decisions cannot be considered precedential because following that reasoning would be inconsistent with a later-enacted constitutional amendment. (See Cal. Const., art. III, § 3.5 [a state agency cannot refuse to follow state law on grounds of unconstitutionality unless an appellate court has held the statute to be unconstitutional].) But the result reached in those decisions – that the purposes of use for which a water right permit may be issued do not include flood control – is sound and the decisions may be considered precedential for that result even if the analyses in the decisions do not expressly reference the principle that flood control is not a beneficial use.

~~extends from Derby Diversion Dam on the Truckee River to Lahontan Reservoir on the Carson River. According to the location map, the study area also includes the Fernley Wildlife Management Area. The common place of use shown on map No. 320-208-189A-1 generally falls within the study area boundary, except around the edges where the place of use does not follow the basin boundaries. The study area weaves in and out of the proposed place of use boundary, leaving some areas of the place of use outside of the study area. The study area also does not appear to include the area within T17N, R24E and T18N, R24E. These areas, however, are within the existing place of use of Permit 11605 and License 10180.~~

~~Because the impacts of the proposed changes to the portions of the place of use falling outside the EIS/EIR study area have not been analyzed under CEQA, we cannot approve those changes. Moreover, the Settlement Act prohibits water from being “diverted within the Truckee River basin in California for use in California outside the Truckee River basin.” [App./Pet. Joint-16, § 204(c)(1)(F).] Accordingly, the authorized place of use will include only lands within T13N, R17&18E; T14N, R16-18E; T15N, R16-18E; T16N, R16-18E; T17N, R15-20E, 24-31E; T18N, R14-21E, 24-31E; T19N, R14-31E; T20N, R18-32E; T21N, R18-26E, 29-32E; T22N, R20-24E; T23N, R20-24E; T24N, R20-24E; T25N, R20-24E; T26N, R20-24E; T27N, R20-24E; T28N, R23&24E, MDB&M, which are also within the study area boundary or existing places of use. A revised place of use map will be required prior to the issuance of any amended permit or amended licenses.~~

5.5.2 5.5.3 *Coordinated Reservoir Operations and Exchanges*

“TROA allows for the coordinated operations of the reservoirs rather than as individual facilities. To accomplish this, TROA allows credits to be exchanged among water owners and water to be used from the reservoir that would be most efficient at that point in time.” (USBR-1, p. 4.)

Some of these exchanges may involve a purely paper transaction, where there is no actual movement of water. (R.T. II, 500:11-502:24.) To the extent that Petitioners request the State Water Board to approve a petition for re-diversion that does not purport to physically result in a re-diversion of the water, it is questionable whether the board would want to consider such a request. There are practical and policy implications of allowing “re-diversion” under circumstances where water is not in fact being re-diverted. Nonetheless, we need not decide this issue here. While TROA may allow the exchange of credit water, the State Water Board must ensure that water will actually be put to beneficial use. Thus, in order to ensure accurate accounting of water diversion and use under Licenses 3723, 4196, and 10180, Permit 11605, and the permits issued pursuant to Applications 31487 and 31488, the State Water Board will

include a term requiring that, due to the permittee's or licensee's ability to exchange water among water right holders under TROA, beneficial uses for water shall only be credited to the permit or license under which the water was originally diverted.

5.5.3 ~~5.5.4~~ *Operating Term for License 10180 (Prosser Creek Reservoir)*

As noted above, Petitioners request that a term in License 10180 that currently requires operation of the reservoir in coordination with a specified operation schedule be replaced with the following term:

The Licensee shall operate Prosser Creek Reservoir in accordance with the Truckee River Operating Agreement, which is on file with the State Water Resources Control Board.

(USBR-1, pp. 3-4.)

The proposed term, which requires the reservoir to be operated in accordance with TROA, is similar to the following term, which Petitioners have requested for all of the change petitions, that requires all diversion, storage, use of water and operations to be in accordance with TROA:

These changes are not effective until the conditions required for the Truckee River Operating Agreement to enter into effect have been satisfied. All diversions, storage, use of water and operations under this [License/Permit] shall be in accordance with the provisions contained in this [License/Permit] and the Truckee River Operating Agreement.

Because the two proposed terms have similar effect, to avoid duplication, we will approve replacement of the existing operations term only with this latter term.

5.5.4 ~~5.5.5~~ *Other Special Terms and Conditions Related to Approval of the Change Petitions*

Terms and conditions in the existing permit and licenses will be updated or added in order to be consistent with current standard permit and license terms, including amount descriptions. This also includes the addition of a maximum withdrawal limitation in existing Licenses 3723 and 4196. The maximum withdrawal limitations are contained in the license inspection reports, which are in the application files for each license. In both cases, the maximum withdrawal limitation is equal to the full diversion amount.

Amended Licenses 3723, 4196, and 10180 are subject to mandatory licensing terms shown in Table D and standard license terms 5i, 30, 69, and M1. Licenses 3723 and 4196 are also subject to standard license term 22. Amended Permit 11605 is subject to mandatory permit terms 6, 10, 11, 12, 13, 14, 15, and 63 (A through H) and standard permit terms 22, 30, and 69, and M.

Existing permit terms in Permit 11605 for Stampede Reservoir will be updated to include references to Application 31487 and the addition of points of diversion, points of rediversion, and places of storage. Existing references to Application 15672 (Permit 11604), which was revoked on February 23, 1971, at the permittee's request, will be deleted.

In order to prevent injury, and in addition to the specific term discussed above, the amended permit and licenses will be subject to prior rights. Additional terms and conditions applicable to approval of the petitions and applications are discussed below in section 9.0.

6.0 WATER RIGHT APPLICATIONS 31487 AND 31488

Together with the change petitions, Reclamation filed two water right applications on existing reservoirs, Stampede Reservoir (Application 31487) and Prosser Creek Reservoir (Application 31488), located on the Little Truckee River and Prosser Creek, respectively. As with the change petitions, the applications were filed to accommodate implementation of TROA. (USBR-1, p. 1.) Similar to the change petitions, Reclamation requests that any approval of the water right applications include a condition that the approval will not take effect until TROA takes effect.

Under Application 31487, Reclamation seeks to appropriate 350 cfs by direct diversion from January 1 to December 31, and up to 226,500 afa by diversion to storage from January 1 to December 31. The maximum annual quantity requested to be appropriated by direct diversion or storage under Application 31487 in combination with Permit 11605 is 226,500 af, which is the capacity of Stampede Reservoir.²⁸²⁹ (USBR-1, p. 5; SWRCB-5.) Reclamation further proposes

²⁸²⁹ Permit 11605 (Application 15673) allows for the direct diversion of 350 cfs from April 1 to November 1 of each year and for 126,000 af diversion to storage from January 1 to December 31 of each year from the Little Truckee River. Reclamation also holds a water right for power generation at Stampede Reservoir, Permit 18320 (Application 26273), which was not part of this hearing. Permit 18320 contains a term that limits the total amount appropriated under Permits 11605 and 18320 to 350 cfs by direct diversion and 126,000 afa by storage. According to testimony,

to limit the maximum annual quantity of storage under Application 31487 and Permit 11605 to 226,500 af of water.²⁹³⁰ (USBR-1, p. 5; USBR-7, p. 7.) In addition to a point of diversion at Stampede Dam, Reclamation requests a point of diversion, rediversion, and redistribution of storage at Boca Dam, and a point of diversion and redistribution of storage at Independence Dam. (USBR-1, p. 5.)

Application 31488 is for storage of 30,000 af in Prosser Creek Reservoir, located on Prosser Creek, tributary to the Truckee River. Reclamation also holds License 10180 (Application 18006) for Prosser Creek Reservoir, which authorizes 30,000 afa to be collected to storage in the reservoir from April 10 to August 10 of each year, with a maximum withdrawal not to exceed 20,162 afa. (USBR-1, pp. 3, 5.) Under Application 31488, Reclamation seeks to divert water to storage in Prosser Creek Reservoir from October 1 to August 10, which will authorize collection to storage beyond the April 10 to August 10 season authorized under License 10180. (*Id.*, p. 5.) In addition, under Application 31488, Reclamation seeks to increase the maximum withdrawal in any one year above the 20,162 af identified in License 10180 for Prosser Reservoir, thus allowing Reclamation to store and withdraw up to 30,000 af in any one year. This would allow Reclamation to lower the reservoir below 9,838 afa more often, although TROA would require maintenance of a minimum fish pool of 5,000 af, “or such lesser amount as may be determined by California Department of Fish and Game to better serve the fishery throughout the Truckee River Basin.” (App./Pet. Joint-19, § 5.B.6(c)(4), p. 5-15; USBR-21, p. 8.) Reclamation proposes to limit the maximum annual quantity of storage under Application 31488 and License 10180 to a combined total of 30,000 af. (USBR-1, p. 5.)

6.1 State Water Board Authority Regarding Water Right Applications

When approving an application to appropriate water, the State Water Board must make findings regarding water availability, beneficial use, public trust, and public interest. In addition to making a determination of water availability, which is discussed in more detail below, the State Water Board must consider the relative benefit to be derived from all beneficial uses of water

power production at Stampede Reservoir is incidental to the operation of the reservoir for other purposes. (USBR-7, p. 7.)

²⁹³⁰ The testimony refers to a combined limitation on the maximum annual quantity of storage under Application 31487 and Permit 11605, but does not discuss a combined limitation on direct diversion under the two water rights. We have construed the application to include such a limitation, so that the maximum annual quantity of direct diversion under Application 31487 and Permit 11605 is limited to 350 cfs. There is no evidence in the record supporting a contrary interpretation.

concerned, including the preservation and enhancement of fish and wildlife, and uses protected in a relevant water quality control plan. (Wat. Code, § 1257.) The State Water Board may impose terms and conditions that will best develop, conserve, and utilize in the public interest the water sought to be appropriated, protect fish and wildlife, and carry out water quality control plans. (*Id.*, §§ 1253, 1257, 1257.5, 1258.) In evaluating a water right application, the State Water Board also must ensure the protection of public trust uses, including fish and wildlife habitat, whenever feasible. (*National Audubon Society v. Superior Court, supra*, 33 Cal.3d 419.)

6.2 Water Availability

When considering whether to approve an application to appropriate water, the State Water Board must determine whether unappropriated water is available to supply the applicant. (Wat. Code, § 1375, subd. (d); Cal. Code Regs., tit. 23, § 695.) Unappropriated water includes water that is not being applied to beneficial use, that is not needed for riparian use, or that is not otherwise appropriated. (*Id.*, §§ 1201, 1202.) Simply put, “[u]nappropriated water does not include water being used pursuant to an existing right” (Cal. Code Regs., tit. 23, § 695.)

In determining the amount of water available for appropriation, the State Water Board shall take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses. Beneficial uses include, but are not limited to, instream uses, recreation and the preservation of fish and wildlife habitat. (Wat. Code, §§ 1243, 1243.5.)

Pursuant to Water Code sections 1205-1207, the State Water Board has adopted a declaration that certain stream systems in California are fully appropriated either year-round or during specified months, thereby precluding acceptance of applications to appropriate unappropriated water from sources subject to the declaration. (State Water Board Order 98-08.) With one exception not relevant here, the Truckee River and its tributaries are not listed on the Declaration of Fully Appropriated Stream Systems. The absence of a fully appropriated declaration regarding a particular stream system, however, does not create a presumption that water is available for appropriation from that source. (*Id.*, p. 27.)

6.2.1 *Overview of Methodology Used*

Reclamation’s water availability analyses for Stampede and Prosser Creek Reservoirs evaluate the amount of water that could be stored in the reservoirs once prior rights and other obligations have been met. Reclamation primarily focused its water availability analyses on high flow

years, acknowledging that the amount of water it seeks to appropriate in its applications may not be available in every year type. (R.T. II, 288:13-21.) In general, Reclamation's analyses focused on periods when the storage of water would not interfere with any downstream water rights and the stored water would otherwise flow to Pyramid Lake. (R.T. II, 288:22-289:1; USBR-20, p. 8; USBR-21, pp. 8-9.) Reclamation's methodology is described in more detail below.

Water Not Always Available in all Water Year Types

Reclamation provided testimony that the amount of water it seeks to appropriate will not necessarily be available in every year type. (USBR-7, p. 17.) As explained above, water is stored in the Truckee River reservoirs under a system of water right priorities. (USBR-7, p. 2; App./Pet. Joint-20, p. 8.) Because Stampede and Prosser Creek Reservoirs are the lowest in priority to store water in the Truckee River basin, water generally would not be available in average, below average, or dry water years. (R.T. II, 288:13-18, 291:4-12, 294:8-14.) Consequently, Reclamation focused its analyses on water availability in wet and above average water years.³⁰³¹ (*Ibid.*, USBR-20, p. 15; USBR-21, p. 12.)

Lack of Interference with Downstream Water Rights

Reclamation calculated the available amounts of water for the periods when the storage of such water would not interfere with any downstream water rights and, if not stored, the water that would have otherwise flowed to Pyramid Lake. (R.T. II, 288:22-289:1.) Reclamation assumed that during wetter years, storage of water under the two applications would not interfere with any downstream water rights and the water reaching Nixon, the last gage before entering Pyramid Lake, is water left over after all other entitlements have been satisfied. (R.T. II, 321:6-13.) Thus, according to Reclamation, during wet periods, generally all downstream water rights in the Truckee River basin can be served by unregulated runoff into the mainstem of the Truckee River, leaving sufficient additional runoff in Prosser Creek and the Little Truckee River to fill Prosser Creek Reservoir, and Stampede and Boca Reservoirs, respectively. (USBR-7, p. 11; USBR-20, p. 9; USBR-21, p. 10; R.T. II, 294:3-23, 321:6-322:1.)

³⁰³¹ Reclamation's witness, Mr. Ali Shahroody, testified that while water was available primarily in wet and above average years, there may be circumstances where water would be available in average or below-average years. These circumstances appear to be quite limited. There was only one average year in Reclamation's analysis for Stampede Reservoir that showed water available above the currently authorized 126,000 af and no below-average water years that showed water available above 126,000 af. (R.T. II, 318:23-319:15; USBR-20, p. 15.) Similarly, there was an average and below average water year that showed water available for storage in Prosser Creek Reservoir above 30,000 af. (USBR-7, p. 34.)

According to Reclamation's witness, Mr. Ali Shahroody, storing water under the applications

. . . will not interfere with any California water rights, including any new water that may be appropriated in California, because the [Settlement Act's] Interstate Allocation between California and Nevada specifies that water for use in Nevada is junior in priority. The storage of water sought herein will not interfere with Nevada water rights because it will only be stored after all other Nevada water rights have been satisfied.

(USBR-7, p. 11; see also p. 27 [containing similar statement regarding the analysis for Prosser Creek Reservoir].)

Under Nevada Applications 48061 and 48494, the Tribe is authorized to appropriate the remaining waters of the Truckee River. (USBR-7, p. 9.) Applications 48061 and 48494 each contain a term that reads:

This permit is issued for all the unappropriated water of the Truckee River and its tributaries, and as such is issued junior in priority to all existing rights on the Truckee River and its tributaries, and can only be exercised in those years where there are high flows in the river in excess of the senior rights. In addition, this permit is issued subject to any interstate allocation of the Truckee River.

(TCID-211; TCID-212.) The Tribe gives its consent to store water in Stampede and Prosser Creek Reservoirs that would otherwise flow to Pyramid Lake. (USBR-7, p. 9, fn. 2; USBR-21, p. 6, fn. 2.)

Flow Regimes

Water is stored in Stampede and Prosser Creek Reservoirs for the benefit of the Pyramid Lake fishes. The water is currently managed using flow regime criteria developed by the United States Fish and Wildlife Service based on six hydrologic year types and the amount of Stampede Project Water (and Fish Credit Water under TROA) in storage on March 1 of each year.³⁴³² (USBR-7, p. 10; SWRCB-7, p. 3-53.) The purpose of the flow regime criteria is to

³⁴³² According to the EIS/EIR, "Project Water" is "[w]ater stored in Lake Tahoe, Prosser Creek Reservoir, Stampede Reservoir, and Boca Reservoir pursuant to existing storage licenses or permits (e.g., Stampede Project Water)." (SWRCB-7, p. G-12.) "Fish Credit Water" is defined in the EIS/EIR as "a water category under TROA, used to benefit cui-ui in lower Truckee River/Pyramid Lake and [Lahontan cutthroat trout (LCT)] in the Truckee River basin." (*Id.*, p. G-6.) "Fish Water" is a "water category under TROA, comprised of Stampede Project Water and Prosser Project Water." (*Ibid.*)

maintain instream flows for cui-ui and Lahontan cutthroat trout in the lower Truckee River and to restore habitat in the lower Truckee River ecosystem. (USBR-7, p. 10.) Each of the six flow regimes has a set of monthly inflow targets to Pyramid Lake, with Flow Regime No. 1 having the highest target flow rates. (*Ibid.*) Thus, for purposes of the water availability analyses, Reclamation used Flow Regime No. 1 as the target flow for the lower Truckee River and assumed water would not be diverted to storage in the reservoirs until the target flow was met. (*Ibid.*; USBR-20, p. 9; USBR-21, p. 9.)

Analyses Intended to be Conservative

Reclamation notes that its water availability analyses are conservative. For instance, Reclamation assumed that diversion requirements at Derby Dam to the Truckee Canal were the same as historic diversions even though there were times when the historical diversions substantially exceeded the currently allowable OCAP diversions. (USBR-20, p. 9, fn. 4; USBR-21, p. 9, fn. 3.) By including the higher historical diversions at Derby Dam in its analyses than would have been allowed under the more restrictive 1997 final adjusted OCAP, Reclamation's calculations show less water available in the Truckee River below Derby Dam and the analyses are thus conservative. (R.T. II, 289:20-290:6.)

In addition, the Truckee Canal diversion is currently limited to 350 cfs due to a breach in the canal in January 2008. If not for the physical limitation of the canal, more water could be diverted at Derby Dam, making less water available in Stampede Reservoir. Because the limitation due to the breach occurred after the period of record used in the analysis for Stampede Reservoir (August 1969 through September 2006), the 350 cfs limitation is not part of the analysis. (R.T. II, 307:18-308:9; USBR-20, p. 8.) According to Reclamation's witness, Mr. Shahroody, if the limitation continues, there would be more water available than the analysis shows. (R.T. II, 308:10-18.) Similarly, the January 2008 breach occurred after the period of record used in the analysis for Prosser Creek Reservoir (August 1969 through September 2006). (USBR-21, p. 8.)

6.2.2 Water Availability Analysis for Application 31487 (Stampede Reservoir)

Reclamation's water availability analysis for Application 31487 at Stampede Reservoir is based on the historical operation of Stampede Reservoir from August 1969 through September 2006. (USBR-7, p. 11.) Reclamation performed a spreadsheet analysis for periods when the priority of Stampede Reservoir would allow it to store water, which occurs when storage in Boca Reservoir is full or nearly full. In addition, these are periods when flows at Farad exceed the

applicable Floriston Rates and flows in the lower Truckee River exceed the target flows under Flow Regime No. 1. (*Id.*, p. 16.)

The water available for diversion to storage under Application 31487 is water in the Little Truckee River basin, upstream of Stampede Reservoir, which, if not diverted, would eventually flow to Pyramid Lake. (SWRCB-7, p. 3-467.) The watershed above Stampede Reservoir drains approximately 136 square miles. (USBR-7, p. 5, Table 1.) The Little Truckee River is regulated upstream of Stampede Reservoir by a dam on the privately owned Webber Lake. (USBR-7, p. 4.) In addition, the dam at Independence Lake, which is located upstream of Stampede Reservoir on Independence Creek, regulates runoff into Stampede Reservoir. (*Ibid.*) Mr. Shahroody testified that the USGS gage record from water years 1970 through 2006 shows that Stampede Reservoir filled close to its full capacity of 226,500 af in ten of the 37 years of record. (R.T. II, 285:5-18; USBR-20, p. 5, and Figure 3.) According to Reclamation, this demonstrates that up to 226,500 af of water is available for storage statistically in at least one year out of four wet years. (R.T. II, 285:12-15.)

According to Reclamation's analysis, the total amount of water available for diversion to storage in Stampede Reservoir ranged from 2,350 to 279,040 af per year during the period of record from water years 1970 through 2006 (37 years). (USBR-20, p. 10.) There were 11 years out of the 37 years of record when water would have been available for diversion to storage in Stampede Reservoir in excess of the 126,000 af currently authorized for diversion to storage. (*Ibid.*) Only two years in the 37-year record analyzed by Reclamation exceeded 226,500 af available for storage. (*Ibid.*) Based on its analysis, Reclamation concludes that water is available for appropriation in the Little Truckee River to increase the maximum diversion to storage in Stampede Reservoir from 126,000 afa to 226,000 afa. (USBR-20, p. 16.)

6.2.3 Water Availability Analysis for Application 31488 (Prosser Creek Reservoir)

In assessing water availability for Application 31488 at Prosser Creek Reservoir, Reclamation used a similar methodology as the analysis for the Stampede Reservoir application. (USBR-21, pp. 8-9.) Reclamation considered water in the Prosser Creek basin, upstream of Prosser Creek Reservoir, that would otherwise flow to Pyramid Lake or be stored under the Tahoe-Prosser Exchange Agreement to be available for diversion to storage under Application 31488. (USBR-21, pp. 8-9.)

The watershed above Prosser Creek Reservoir drains approximately 50 square miles. (USBR-21, p. 4.) There is no other dam or reservoir regulating Prosser Creek upstream of Prosser Creek Reservoir. (*Ibid.*) Prosser Creek Reservoir has the most junior priority for storage in the Truckee River basin, storing water when it is not needed to meet senior downstream water rights and when storage in the reservoir will not interfere with storage in other reservoirs in the basin. (USBR-21, p. 2.)

Reclamation presented a storage hydrograph, which showed that in water years 1964 through 2006 Prosser Creek Reservoir nearly filled to its full capacity of about 30,000 af in 17 years during that period. For its water availability analysis, Reclamation analyzed the historical operation of Prosser Creek Reservoir for the period August 1969 through September 2006. The analysis looked at the availability of water to fill an empty reservoir in any one year, as well as the availability of water to be diverted to storage during the additional fill period October-March in any one year. (USBR-21, p. 8.) For the period of analysis from water year 1970 through 2006, Reclamation estimated the amount of water available for diversion to storage in Prosser Creek Reservoir ranged from 27,870 to 135,350 afa, and that water in excess of 30,000 af was available in 17 out of 37 years. (USBR-21, p. 11.) For the same 37-year period of record, Reclamation estimated that the amount of water available for diversion to storage in October through March ranged from 1,420 to 63,030 afa. (*Ibid.*) According to this analysis, there were 13 out of 37 years of record when there was water available for diversion to storage in October through March, and six of those years showed water available for storage above 30,000 af.³²³³ (USBR-21, pp. 11-12.) In sum, Reclamation asserts that water is available in Prosser Creek to “extend the fill season from the current April 10-August 10 to October 1-August 10 and increase the existing maximum withdrawal in any one year above 20,162 [af] for Prosser Creek Reservoir as requested in Application 31488.” (USBR-21, p. 14.)

6.2.4 State Filed Applications

Reclamation’s water availability analyses do not take into account state-filed applications pending on Stampede and Prosser Creek Reservoirs. As defined in the Water Code, unappropriated water includes water for which no appropriative right has been approved or perfected. (See Wat. Code, § 1202.) Hence, the State Water Board may find that there is

³²³³ The amount that can be stored in Prosser Creek Reservoir from November 1 through April 10, however, is limited by flood control limitations. (USBR-21, p. 11.) During this period, storage in Prosser Creek Reservoir is limited to 9,800 af. (*Ibid.*)

unappropriated water available even if there are other applications on file, with earlier priority dates, that ~~would~~might make use of all of the unappropriated water if those applications are approved at some point in the future. (See generally Wat. Code, § 1375, subd. (d) [requiring a finding that unappropriated water is available to supply the applicant before the State Water Board may issue a permit].) Nevertheless, it may be useful to evaluate the amounts needed to serve appropriations proposed by other applications in order to determine whether approval of the application would be in the public interest.

Water Code section 10500 authorizes DWR to file applications, commonly referred to as state-filed applications, to appropriate water that may be required to carry out a general or coordinated plan for the development, use, or conservation of the water resources of the state. After state-filed applications are filed, they are transferred to and held by the State Water Board which may release from priority or assign any portion of an application when “the release or assignment is for the purpose of development not in conflict with such general plan or coordinated plan or with water quality objectives established pursuant to law.” (Wat. Code, § 10504.) State-filed applications have a priority as of the date of filing, and until assigned, are not subject to the due diligence requirement that normally applies to water right applications. (Wat. Code, §§ 10500, 10504.)

There are two state-filed applications with points of diversion at Stampede Dam (Applications 21069 and 21070) and two state-filed applications with points of diversion at Prosser Creek Dam (Applications 21071 and 21072). All four state-filed applications were filed on December 6, 1962. Application 21069 is for 50,000 afa, to be collected to storage between January 1 and December 31 of each year. The purposes of use are domestic, irrigation, municipal, industrial, and incidental recreational, and fish and wildlife enhancement. Application 21070 is for 50,000 afa, to be collected to storage between January 1 and December 31 of each year. The purposes of use are power, recreational, and fish and wildlife enhancement. Application 21071 is for 30,000 afa, to be collected to storage between January 1 and December 31 of each year. The purposes of use are domestic, irrigation, municipal, industrial, and incidental recreational, and fish and wildlife enhancement. Application 21072 is for 30,000 afa, to be collected to storage between January 1 and December 31 of each year. The purposes of use are power, recreational, and fish and wildlife enhancement.

Reclamation’s water availability analyses do not include an evaluation of these senior pending state-filed applications relative to the diversions proposed under Reclamation’s applications.

Considering the state-filed applications would reduce the water shown available in Reclamation's analyses. (USBR-20 and 21.) For example, looking at the consumptive use applications only (Applications 21069 and 21071), subtracting the state-filed application amounts from the results of Reclamation's analyses would have shown one year, 1982, where the requested amount of water, 226,500 af, in combination with Permit 11605, would have been available for storage at Stampede Reservoir and multiple years where the requested amount of water, 30,000 af, in combination with License 10180, would have been available for appropriation at Prosser Creek Reservoir. If all four state-filed applications, including the non-consumptive use filings, were considered in the analyses, 226,500 af would not have been available for storage at Stampede Reservoir in any year, and 30,000 af of water would still be available for diversion at Prosser Creek Reservoir in multiple years.

These state-filed applications have not been assigned to any applicant, nor is there any pending request for assignment or release from priority. Accordingly, the existence of the state-filed applications do not affect our evaluation of water availability in this proceeding. We note, however, that if any of the state-filed applications are partially or wholly assigned in the future, permits issued pursuant to Reclamation's applications would be junior in priority to the state-filed applications.

6.2.5 Protestants' Arguments

Protestants assert that the State Water Board cannot grant Applications 31487 and 31488 for three reasons: 1) all water of the Truckee River and its tributaries has been fully appropriated; 2) Reclamation's water availability analyses are severely flawed; and 3) "it is illegal to store the Tribe's Nevada permitted unappropriated water, which cannot be considered unappropriated water under the proposed California Applications." (TCID Closing Brief, pp. 17-18.)

6.2.5.1 CONTENTION THAT THE TRUCKEE RIVER AND ITS TRIBUTARIES ARE FULLY APPROPRIATED

Protestants contend that the Truckee River and its tributaries in both California and Nevada are fully appropriated. (R.T. IV, 929:5-12; TCID-267, p. 6.) Protestants initially note that the parties to TROA "have historically expressed the opinion that the Truckee River system is fully appropriated." (TCID Closing Brief, p. 18.) As one example, they cite to positions taken by TMWA's predecessor (Sierra Pacific Power Company), the Conservation District, and TCID in State Water Rights Board (the State Water Board's predecessor) proceedings involving Lake Tahoe and its tributaries in the 1960's. (Decision 1056 (1962); Decision 1173 (1964).) With

respect to each of the California proceedings cited, the State Water Rights Board determined that unappropriated water was available for appropriation. We note that the positions that parties have taken in prior proceedings do not constitute substantial evidence in this proceeding as to whether or not water is available for appropriation.

Protestants explain that because the Nevada State Engineer has granted rights to all of the unappropriated waters of the Truckee River and its tributaries, and approximately 95 percent of the flow originates in California before it enters Nevada, “it is reasonable to conclude the entire Truckee River and tributary system in both states are fully appropriated, subject to any interstate allocation.” (TCID-267 (corrected), p. 6; R.T. IV, 928:24-929:4.) According to Protestants, the main issue relating to the availability of water concerns the Tribe’s permits, Nevada Permits 48061 and 48494. The Nevada State Engineer issued these permits to the Tribe for instream uses in Nevada for a maximum total combined duty under both permits not to exceed 477,851 afa.³³³⁴ (TCID-211, p. 1; TCID-212, p. 1.) The approval for each permit states: “This permit is issued for all the unappropriated water of the Truckee River and its tributaries” (*Ibid.*) Moreover, Protestants point out, TROA states that “[t]he Signatory Parties agree that water under [Nevada] Permits Number 48061 and 48494 shall flow to Pyramid Lake for the purposes described therein and that the Truckee River and its tributaries, in Nevada, is fully appropriated and therefore closed to any new appropriations.”³⁴³⁵ (App./Pet. Joint-19, pp. 1-4 to 1-5.) Additionally, Protestants contend, there are a number of pending applications in Nevada that predate Reclamation’s California water right applications (including TCID’s Nevada Application 9330, which was filed in 1930, and has been denied twice by the Nevada State Engineer) and that should be decided before the State Water Board acts on the pending California applications. (R.T. IV, 929:6-12; TCID-267, pp. 2-4.)

³³³⁴ More specifically, the permits were issued for instream/*in situ* recreational use in the Truckee River and Pyramid Lake. The place of use is the Truckee River downstream of Derby Dam, the Marble Bluff Dam and Pyramid Lake Fishway and within Pyramid Lake. (TCID-211; TCID-212.) Recreational use includes helping maintain Pyramid Lake at a stable level to support use for recreation, to prevent the loss of and to conserve cui-ui and Lahontan cutthroat trout, to improve and maintain water quality and quantity in Pyramid Lake and the Truckee River downstream of Derby Dam, to provide flows for the operation of Marble Bluff Dam and Pyramid Lake Fishway, and to provide suitable flows at proper temperatures for the natural spawning of Lahontan cutthroat trout and cui-ui in the Truckee River downstream of Derby Dam. (TCID-211, TCID-212.)

³⁴³⁵ Protestants, however, fail to acknowledge that TROA also provides for the filing of new applications at Stampede and Prosser Creek Reservoirs. (App./Pet. Joint-19 at 7-7.)

Reclamation argues that its analyses show that water is available for appropriation in California. The parties supporting approval of the applications respond to Protestants' arguments by contending that, despite the Nevada State Engineer's determination that the Truckee River stream system is fully appropriated, the State Water Board has not declared the Little Truckee River or Prosser Creek to be fully appropriated. (Joint Closing Brief, p. 45.) They further note that the Nevada State Engineer has not, would not, nor could not, ever suggest that any portion of the stream system in California is fully appropriated.³⁵³⁶ According to Reclamation, water from the Little Truckee River and Prosser Creek would eventually flow to Pyramid Lake and would be appropriated by the Tribe under its existing permits from the State of Nevada (Permits 48061 and 48494). Moreover, to the extent that water sought in Reclamation's applications is water appropriated to the Tribe in Nevada, the Tribe gives its consent to store that water upstream in Stampede and Prosser Creek Reservoirs.³⁶³⁷ (R.T. II, 288:1-5, 301:8-15.)

In a stream system that would otherwise be considered fully appropriated, an application may be processed and a permit issued based on water made available through water exchanges. (Order WR 98-08 at pp. 21-22.) Thus, to the extent that use under the applications is charged against Nevada's allocation of the waters of the Truckee River,³⁷³⁸ the Tribe's consent means that water may be considered available for appropriation to the extent that water would otherwise have been appropriated under Permits 48061 and 48494. To the extent that use is charged against California's allocation, the availability of unappropriated water depends on whether sufficient water is available under California's allocation to support the proposed appropriation.

Interstate water allocations are not necessarily determined by strict adherence to priority among individual users in different states. Rather, the share of users in each state is determined by voluntary agreement between the states, apportionment by Congress, or apportionment by the

³⁵³⁶ While we agree that it is unlikely the Nevada State Engineer would issue a ruling on matters within another state's jurisdiction, for purposes of clarification, we note that it is not unprecedented for the Nevada State Engineer to appear in an administrative proceeding before the State Water Board. The Nevada State Engineer previously has appeared before the State Water Board on his own behalf and on behalf of the Director of the Nevada Department of Conservation and Natural Resources, in the board's hearing on the declaration of fully appropriated stream systems, to make a presentation in support of a finding that no water is available for appropriation from a stream within the interstate Carson River system. (State Water Board Order WR 89-25, p. 5.)

³⁶³⁷ The Tribe's Permits 48061 and 48494 currently do not have a storage component. (TCID-211; TCID-212; R.T. I, 272; R.T. II, 339:5-14.)

³⁷³⁸ The places of use under the applications include areas in both states. Under section 204(i) of the Settlement Act, water diverted in one state for use in another is charged to the allocation of the state where the water is used.

courts. (See generally 3 Beck, *Water and Water Rights* (3d ed. 2010) §§ 43.01, 43.02, pp. 43-3–43-5.) A water right permitted or adjudicated by a state on an interstate stream provides a right to divert and use water only to the extent the water can be diverted or used within that state's share. (*Hinderlider v. La Plata River & Cherry Creek Ditch Co.* (1938) 304 U.S. 92, 102.) Moreover, while priority and reliance are substantial considerations in determining the share of each state, there is no rule that once a state has permitted or adjudicated rights sufficient to fully appropriate the entire stream, another state's share is limited to the appropriations it has already approved. (See *id.* at pp. 102-03; see also *Montana v. Wyoming* (2011) 131 S.Ct. 1765 [where interstate compact made allocation allowing continuation of pre-compact appropriators in both states, the Court did not impose curtailments by priority date of the individual appropriators, but instead treated the provision as a separate allocation to each state, allowing full use of the upstream state's allocation even though that left insufficient water to fully satisfy the allocation for appropriators in the downstream state].) Indeed, both the Settlement Act and the previous attempt at establishing an interstate allocation of the waters of the Truckee River, the California-Nevada Interstate Compact (Wat. Code, § 5975 et seq.) would set California's share at an amount that would appear to allow some newly initiated appropriations. So long as California does not exceed its share, there may be additional water available for appropriation in California, even if Nevada has already issued permits sufficient to use any and all water that flows downstream into Nevada.

Although the Nevada State Engineer has declared the Truckee River and its tributaries to be fully appropriated and the signatory parties to TROA have declared the Truckee River and its tributaries, *in Nevada*, to be fully appropriated, the State Water Board has not declared the pertinent reaches of the Truckee River and its tributaries *in California* to be fully appropriated.³⁸³⁹ This is consistent with the principle that each state has authority to allocate water within its share of the waters of an interstate stream. While Nevada unquestionably has authority to fully allocate all water available to it, including any water that flows downstream into Nevada because California does not fully use its share, Nevada's actions do not have the effect of allocating water within California's share.

As we have noted before, the State Water Board's power "to authorize appropriation of unappropriated water is limited to California's equitable share of these interstate waters."

³⁸³⁹ In Order WR 98-08, the State Water Board declared the Perazzo Canyon, tributary to the Little Truckee River, to be fully appropriated from the confluence of the canyon and the Little Truckee River upstream.

(Decision 1056, p. 8.) This poses a challenge until and unless the Settlement Act allocation takes effect or some other binding determination is made of the interstate apportionment. But determinations of the availability of unappropriated water are always subject to uncertainty. (See *United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at pp. 102-03 [the State Water Board's determination, as a prerequisite to issuance of a permit, that there is unappropriated water available for the applicant, is an "estimate"].)

Although there is insufficient basis in this proceeding to determine that the Truckee River ~~Basin~~basin is fully appropriated in California, the understanding that California is limited to its share of the waters of the Truckee River and uncertainty concerning amount of that share must be taken into account as part of water right administration in California. Accordingly, it is appropriate to set forth a few general principles that should guide the State Water Board in its administration of water rights in the Lake Tahoe and Truckee River ~~Basins~~basins:

- Although the allocations in the Settlement Act have not yet taken effect, the Settlement Act provides the best available framework for determining the amount of water available for use in the Lake Tahoe and Truckee River ~~Basins~~basins. For purposes of both obtaining the best estimate of available supplies and promoting cooperation to effectively administer rights to waters in an interstate system, the State Water Board should administer water rights in California with a view towards assuring that water use in California is consistent with the Settlement Act.
- Pending the completion of the process necessary for the Settlement Act allocations to take effect, the State Water Board should avoid approvals that amount to new commitments of water that may not be available under California's share. There is a significant risk that if the Settlement Act allocations do not take effect then the amount ultimately determined to be California's share will be substantially less than is allocated under the Settlement Act. The State Water Board should avoid issuing approvals that have the long-term effect of increasing water use in California until there has been definitive determination of California's share.
- Absent compelling reasons to process a water right application without waiting for the Settlement Act allocation to take effect, the Division should hold applications for appropriation, including state-filed applications, in the Lake Tahoe and Truckee River

~~Basins~~basins in abeyance. This has been the Division's practice in recent years, and it should continue, with appropriate exceptions. Obviously, applications for approvals that are necessary for the Settlement Act to take effect should be processed. Likewise, approvals that are urgently needed for environmental or public health reasons should be allowed to proceed, subject to appropriate conditions to avoid unnecessary increases in water use. Finally, applications that help further efforts to manage water use in California within its share by consolidating surface and groundwater use, and assuring that total use does not increase, may be considered. In general, however, the uncertainty concerning the availability of water supplies in the Lake Tahoe and Truckee River ~~Basins~~basins, and the State Water Board's limited resources for processing applications, make it undesirable to devote substantial effort to processing applications until a definitive interstate allocation takes effect.

In this case, there is a compelling reason to process the applications without waiting for the Settlement Act allocations to take effect: approval of the applications will aid in accomplishing the purposes of TROA, and the effectiveness TROA is a contingency that must be met before the Settlement Act allocations can take effect. Additionally, the applications have been structured to avoid injury to any legal uses of water, in California or Nevada. We will condition the permits subject to prior rights and to the interstate allocation of water under the Settlement Act, once effective.

6.2.5.2 CONTENTION THAT THE WATER AVAILABILITY ANALYSIS IS SEVERELY FLAWED

Protestants claim that the Reclamation's water availability analyses are severely flawed for four primary reasons. First, Protestants assert that the Reclamation's analyses are flawed because they assume a Pyramid Lake inflow target under Flow Regime No. 1 of approximately 251,000 afa, instead of the full 477,851 afa of water authorized under the Tribe's Nevada Permits 48061 and 48494.³⁹⁴⁰ (TCID-287, pp. 2-5.) As explained above, Reclamation used Flow Regime No. 1 as the target flow for the lower Truckee River and assumed water would not be diverted to storage in Stampede and Prosser Creek Reservoirs until the target flow was met. Protestants' witness, Mr. Chris Mahannah, testified that using the 251,000 afa flow regime in the water availability analyses reduces the demand below Derby Dam, thereby inflating the amount of water available for appropriation at upstream locations. (TCID-287, p. 5.)

³⁹⁴⁰ Protestants cite to hearings before the Nevada State Engineer in 1996 on TCID's Nevada Application 9330, in which the same witnesses in this proceeding testified that TCID's proposed fish flow regime below Derby Dam of 204,000 afa was inadequate to protect fish and habitat. (TCID-287, pp. 4-5.)

Second, Protestants contend that the analyses neglect to consider the physical or flood limit capacities of the reservoirs, which limit the ability to store water. (TCID-287, pp. 2, 5.) Mr. Mahannah testified that without the physical capacity to store the water, the water availability analysis is a meaningless exercise unless additional storage is contemplated. (TCID-287, pp. 6-7.)

Mr. Mahannah presented rebuttal testimony that addressed both of these purported flaws. He performed a modified water availability analysis for Stampede Reservoir that included the Tribe's maximum annual permitted appropriation below Derby Dam, 477,851 af, and considered reservoir storage limits due to flood control or reservoir capacity. Using these constraints, he asserts the amount of additional available water at Stampede Reservoir ranges from 0 – 29,167 afa and averages 11,369 afa, which is considerably below the additional 100,500 af storage volume Application 31487 is seeking. (TCID-287, pp. 7-8; R.T. V, 1079:22-1086:6.) Although Mr. Mahannah did not perform such an analysis for Prosser Creek Reservoir, he testified that the results would have been similar or would have shown an even more dramatic reduction in water availability due to Prosser Creek Reservoir's flood storage limit and much smaller capacity as compared to Stampede Reservoir. (TCID-287, pp. 8-9.)

Reclamation's witness, Mr. Shahroody, testified that he disagreed that he should have used the entire amount of water authorized under the Tribe's Nevada permits in his analyses. (R.T. II, 316:3-317:3.) The Tribe's permits were granted for two general purposes: (1) to conserve the cui-ui and Lahontan cutthroat trout populations; and (2) to maintain the level of Pyramid Lake. (TCID-211, Attachment A, p. 2; TCID-212, Attachment A, p. 2.) The second component, inflow to maintain Pyramid Lake elevation requires an average annual amount of approximately 400,000 af. (See, e.g., TCID-211, Attachment A, p. 2.) Thus, Mr. Shahroody testified, it was not necessary to include the Tribe's full permitted amount—above Flow Regime No. 1—in his calculations because the water required to maintain the level of Pyramid Lake will get to the lake eventually. It is simply a matter of timing. (R.T. II, 330:14-331:17.)

Mr. Shahroody also testified that his analysis was a watershed yield analysis. He was only looking at the water available in the Little Truckee and Prosser Creek watersheds, independent of reservoir capacity. (R.T. II, 345:12-18.) The ability to store that water depends on a variety of factors. Mr. Shahroody provided testimony that water may be carried over in Stampede Reservoir depending on hydrologic conditions and releases made for the Pyramid Lake fishes in

the lower Truckee River in prior years. During dry periods, a significant portion of the water stored in Stampede Reservoir is released to benefit listed fishes in the lower Truckee River. Stampede Reservoir, for example, was “practically emptied” in water years 1976 and 1977. (USBR-20, p. 11.) If the period 1976-1977 were followed by water years similar to 1982 or 1983, Stampede Reservoir could be filled to its capacity (226,500 af) in one year. (*Ibid.*) Mr. Shahroody provided similar testimony regarding the hydrologic analysis for Prosser Creek Reservoir. Water is carried over in Prosser Creek Reservoir depending on hydrologic conditions, the Tahoe-Prosser exchange, and releases made for the benefit of Pyramid Lake fishes in prior years. Mr. Shahroody also noted that Prosser Creek Reservoir was emptied in the drought years of 1976 and 1977. (USBR-21, p. 11.)

With respect to these two alleged flaws, we find that it was appropriate to analyze the watershed yield in the Little Truckee River and Prosser Creek Reservoirs and the satisfaction of senior rights, including the flow regime necessary for fish and wildlife purposes, in determining the availability of water for storage. The purpose of a water availability analysis is simply that—to determine whether unappropriated water is available to supply the applicant. (Wat. Code, § 1375, subd. (d).) The issues that Protestants raise about storage capacity and flood control limitations are issues related to project yield and the applicant’s ability to put water to beneficial use, which are not germane to the threshold issue of water availability.

Moreover, Protestants’ argument that Reclamation should have considered the full 477,851 afa of water under the Tribe’s Nevada Permits, instead of Flow Regime No. 1 target of approximately 251,000 afa, is without merit. It was appropriate to consider the flow regime target in the water availability analysis because in determining the amount of water available for appropriation, the State Water Board must consider, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses, such as instream uses, recreation and the preservation of fish and wildlife habitat. (Wat. Code, §§ 1243, 1243.5.) Including the flow regime target in the water availability analysis helps to inform the State Water Board’s determination.

The real issue, however, is not whether Reclamation should have evaluated Flow Regime No. 1 instead of the Tribe’s permitted amount of 477,851 afa, but whether the 477,851 afa should have been included in the water availability analysis in the first instance. We have already addressed this issue above. The Tribe’s consent means that water that might otherwise be considered unavailable, because it would be needed to assure adequate flows to satisfy the

Tribe's permitted amount, is available for diversion to storage under the applications. Moreover, to the extent the Tribe's water is used to support the level of Pyramid Lake, the Tribe is not harmed if reductions in inflows below the permitted amounts are compensated for by releases from storage at other times. Changing the timing of inflows into Pyramid Lake, without affecting the total amount, amounts to a physical solution because it allows for more efficient use of available supplies while protecting the water rights held by the Tribe. (See generally Order WRO 2004-0004 at pp. 15-16 [summarizing the physical solution doctrine].)

Third, Protestants argue that Reclamation's water availability analyses are static analyses that consider only selected years and historic data, and not future conditions under TROA. (TCID-287, pp. 9-10.) Protestants' witness testified that under future TROA conditions, end-of-month reservoir storage values will be higher than the historical values used in the water availability analyses. (TCID-287, p. 9.) Protestants suggest that a more robust model should have been used to account for such future conditions. (*Id.*, p. 10.) For the same reasons we have explained above, however, a water availability analysis need not address future operating conditions of a proposed project as long as the analysis demonstrates that unappropriated water is available to meet the maximum potential diversion and use sought by the water right application.

Fourth, Protestants object that the water availability analyses include "water that is already within their permitted allotment in their analysis as available water in addition to the amount stored in the reservoir." (TCID-287, p. 10.) For example, they contend it is incorrect to include the 126,000 af already permitted for Stampede Reservoir as water available for appropriation. (*Id.*) Reclamation and the parties supporting the applications respond that this permitted amount is included within the analysis "because the maximum annual quantity to be appropriated by direct diversion or by storage under Application 31487 is 226,500 afa, *in combination with* Permit 11605." (Joint Closing Brief, p. 44, italics in original.)

The State Water Board finds that because any permit authorized under either Application 31487 (Stampede Reservoir) or Application 31488 (Prosser Creek Reservoir) will contain an annual maximum limitation applicable to the combination of rights for the respective reservoirs, it was not erroneous to include the existing permitted amount within the water availability analysis. For example, approval of Application 31487 will require a term limiting the overall diversion (direct

diversion plus storage) to 226,500 afa, in combination with existing Permits 11605 and 18320.⁴⁰⁴¹ Thus, the maximum storage allowed at Stampede Reservoir will be 226,500 afa regardless of whether water is stored under Application 31487, Permit 11605, or Permit 18320.⁴⁴⁴² Application 31488 will include a similar combined storage limitation with existing License 10180. The water availability analyses demonstrate that during certain flow periods, water is available to fill Stampede and Prosser Creek Reservoirs to their maximum capacities in any one year.

6.2.5.3 CONTENTION THAT THE CURRENT STORAGE OF WATER IN STAMPEDE RESERVOIR VIOLATES NEVADA AND CALIFORNIA LAW

Protestants argue that unappropriated water is currently being stored in Stampede Reservoir, which violates both Nevada and California law. (TCID Closing Brief, pp. 24-25.) In sum, Protestants contend that the Tribe is storing water in Stampede Reservoir under its Nevada water right permits without first seeking permission from the Nevada State Engineer. They also argue that the current use of Stampede Reservoir violates California law because certain reservoir operations, including the amount of water stored and purpose of use, are not conducted in accordance with the terms of Permit 11605.

Protestants' argument invokes the State Water Board's enforcement discretion more than it addresses water availability, and we need not address it in detail here.⁴²⁴³ We note, however, that the State Water Board is directed to take vigorous action to enforce the terms and conditions of permits and licenses, and to prevent unauthorized diversion of water. (See Wat. Code, § 1825.) Of course, the State Water Board has broad authority to set enforcement policies and priorities. Thus, the State Water Board's decision whether to take enforcement action is discretionary and the board may elect not to take enforcement in certain circumstances, such as when a permittee or licensee is diligently pursuing necessary changes

⁴⁰⁴¹ We find the amount of water authorized under Reclamation's power generation permit at Stampede Reservoir, Permit 18320, is accounted for in the water availability analysis because: 1) the water availability analysis considered senior rights; 2) the combination of all three permits will be limited to 226,500 afa for both direct diversion and storage; and 3) Permit 18320 contains a term limiting the total amount appropriated under Permits 11605 and 18320 to 350 cfs by direct diversion and 126,000 afa by storage, which is equal to the existing diversion limitation on Permit 11605 alone.

⁴⁴⁴² "To prevent the establishment of water rights in excess of available water and in excess of the reasonable needs of the user, diverted water is credited to the senior right to the limit of that right." (SWRCB Order WR 85-4, p. 5.) Only diversions that exceed the senior right or that are made under conditions not authorized by the senior right can be credited to the junior right. (*Ibid.*)

⁴²⁴³ To the extent Protestants raise issues regarding the Tribe's compliance with Nevada law, those issues are not properly before us.

in their water rights. Moreover, any enforcement action must be properly noticed. (See, e.g., Wat. Code, §§ 1055 [administrative civil liability complaints], 1831 [cease and desist orders].) The notice for this hearing focused on the petitioned changes and water right applications, and thus, this proceeding is not the appropriate forum for the enforcement of water rights.

6.2.6 *Conclusions Regarding Water Availability*

Having considered the foregoing, the State Water Board finds that unappropriated water is available for appropriation under Applications 31487 and 31488. The amount of water Reclamation seeks to appropriate will not always be available for diversion and may vary from month to month and year to year. Reclamation has demonstrated, however, that water will be available for appropriation during high flow periods when senior rights have been satisfied. The water availability analysis shows that water is available in the Little Truckee River for diversion to storage in Stampede Reservoir⁴³⁴⁴ above the current diversion quantity of 126,000 afa. During certain flow periods, up to 226,500 af of water is available for appropriation by direct diversion and to surface storage for beneficial use under Application 31487 in combination with Permit 11605. The State Water Board further concludes that during certain flow periods up to 30,000 af of water is available for appropriation to surface storage for beneficial use under Application 31488 in combination with License 10180 (Application 18006).

6.3 Beneficial Use and Public Interest

An appropriation of water must be for a useful or beneficial purpose. (Wat. Code, § 1240.) The State Water Board will allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated. (Wat. Code, §§ 1253, 1257; see also Wat. Code, § 1255 [requiring Board to reject application that would not best conserve the public interest].)

Reclamation seeks to appropriate water under Applications 31487 and 31488 for the following purposes of use: Domestic, Municipal, Industrial, Irrigation, Fish Culture, Recreational Uses, Conservation of Pyramid Lake Fishery, Stockwatering, Fish and Wildlife Protection and Enhancement (including Wetlands), Power (Incidental), Instream Water Quality Enhancement, and Flood Control. (SWRCB-5; SWRCB-6.) With the exception of flood control, discussed

⁴³⁴⁴ With additional points of diversion at Independence Lake and Boca Reservoir.

above, these purposes are beneficial ones recognized by the State Water Board. (Wat. Code, §§ 1243, 1254; Cal. Code Regs., tit. 23, § 659 et seq.)

The evidence in the record indicates that the water appropriated under Applications 31487 and 31488 will be put to beneficial use. Fish and wildlife preservation and enhancement is a primary beneficial use under the applications, with recreation as an incidental beneficial use resulting from the additional water stored in the reservoirs. (USBR-5, pp. 6-7; R.T. II, 302-303.) Because TROA allows for the coordinated operations of Boca, Stampede, Prosser Creek, and Independence Reservoirs, discussed above with respect to the change petitions, the water diverted under the two applications may be used for any of the common purposes of use requested in the applications and petitions.⁴⁴⁴⁵ (SWRCB-5 & -6; USBR-1, p. 5.) Our approval is limited to the quantity of water that can be beneficially used.

Moreover, the evidence supports a determination that the proposed appropriation of water in Stampede and Prosser Creek Reservoirs will serve the public interest by providing operational flexibility in implementing TROA. For example, additional storage in the reservoirs for later release will provide water for the threatened and endangered Pyramid Lake fishes, as well as other fishes, enhance habitat for fish, waterfowl and shore birds, and provide increased recreational opportunities. (USBR-5, pp. 6-7; USBR-7, p. 39.) Approval of the applications also will help to improve water quality in the lower Truckee River by increasing instream flows through storage releases and provide flexibility for maintaining a municipal drought supply. (USBR-7, pp. 41-42.) Such benefits are in the public interest.

Protestants, however, assert that the Truckee River and its tributaries are fully appropriated and that approving new appropriations is detrimental to the public interest. (TCID-287, p. 1.) They also suggest that the shortages to the Newlands Project resulting from TROA operations that are identified in the EIS/EIR controvert the public interest. (R.T. IV, 945:22-946:5.) We have already determined that water is available for appropriation and that, in our discussion of the change petitions, the shortages identified in the EIS/EIR do not equate to legal injury. While the public interest encompasses broader concerns than water availability and legal injury,

⁴⁴⁴⁵ We note, however, that any license that may be issued on either Application 31487 or Application 31488 will be limited to the amount of water that is determined to have been applied to beneficial use, and the purposes for which the water is beneficially used. (Wat. Code, § 1610.)

Protestants have not submitted credible evidence that the applications will not conserve the public interest.

6.4 Redistribution of Storage

Application 31487 requests “redistribution of storage”⁴⁵⁴⁶ at Boca and Independence Reservoirs. (USBR-1, p. 5.) The State Water Board, however, generally uses the term “redistribution” when reallocating authorized quantities of water in an existing permit or license among multiple reservoirs, and not in connection with an application for a new appropriation. Nonetheless, by including points of diversion, points of rediversion, and the associated places of storage in the new permit for Application 31487 in the Little Truckee River watershed, we believe Applicant’s request to physically store water in the specific reservoirs is satisfied.

6.5 Terms and Conditions Relating to Approval of the Applications

Permits authorized under Applications 31487 and 31488 are subject to mandatory permit terms 6, 10, 11, 12, 13, 14, 15, and 63 (A through H) and standard permit terms 30, 69, 203, and M. The permit authorized under Application 31487 is also subject to standard permit term 22. The permit authorized under Application 31488 is also subject to standard permit term 5i.

This decision will require a limitation on the amount of water directly diverted under Application 31487 in combination with the other water rights for Stampede Reservoir. Permit 11605 for Stampede Reservoir has a direct diversion limit of 350 cfs in combination with the now-revoked permit issued pursuant to Application 15672. The reference to the revoked permit will be removed from amended Permit 11605. The existing permit for power use at Stampede Reservoir, Permit 18320 (Application 26273), has a direct diversion limit of 225 cfs and a combined direct diversion limit with Permit 11605 of 350 cfs. On the application form for Application 15673, the applicant estimated the “capacity of the diversion conduit or pumping plant proposed” to be 350 cfs. The applicant did not request a combined rate of 700 cfs for Application 31487 and Permit 11605 or propose construction. The State Water Board, therefore, construes the maximum combined rate requested to be 350 cfs. Therefore, the permit issued pursuant to Application 31487 shall include a maximum simultaneous rate of direct diversion of 350 cfs for water rights at Stampede Reservoir to ensure that the diversion of

⁴⁵⁴⁶ Attachment No. 1 to Application 31487 includes the following footnote: “Redistribution as used in this petition means that a quantity of water which would have been or is physically stored in a reservoir under this license (permit) may be stored in another reservoir under this license (permit).” (SWRCB-5.) Presumably Reclamation meant to say “application” in place of “petition.”

water under the combination of water rights for the reservoir does not result in adverse effects that were not considered in this proceeding.

Moreover, in order to protect other water rights and instream beneficial uses, the permit for Application 31487 will also contain a term stating that the equivalent of the authorized continuous flow allowance for any 30-day period may be directly diverted at Stampede Reservoir in a shorter time, provided there is no interference with other rights and instream beneficial uses, and provided further that all terms and conditions protecting instream beneficial uses are observed.

The water appropriated under Application 31487 will be limited to the quantity that can be beneficially used and shall not exceed 350 cubic feet per second by direct diversion at Stampede Reservoir and 226,500 afa by storage at Independence Lake, Stampede Reservoir, and Boca Reservoir from January 1 to December 31 of each year. The total amount of water to be taken from the source (direct diversion plus collection to storage) shall not exceed 226,500 af per water year of October 1 to September 30. The total quantity of water collected to storage under the permit issued pursuant to Application 31487, Permit 11605 (Application 15673), and Permit 18320 (Application 26273) shall not exceed 226,500 af.

With respect to Prosser Creek Reservoir, the water appropriated under the permit issued by this decision will be limited to the quantity that can be beneficially used and shall not exceed 30,000 afa to be collected from October 1 of each year to August 10 of the succeeding year. The total quantity of water collected to storage at Prosser Creek Reservoir under the permit issued pursuant to Application 31488 and License 10180 (Application 18006) shall not exceed 30,000 afa.

The permits issued pursuant to Applications 31487 and 31488 will contain standard permit term 9, which states that construction work and complete application of the water to the authorized use shall be prosecuted with reasonable diligence and be completed by December 31, 2022.

Before issuing a license that confirms the right to appropriate 226,500 af of water under Application 31487 in combination with Permits 11605 and 18320 or a license that confirms the right to appropriate 30,000 af of water under Application 31488 in combination with License 10180, the State Water Board will determine whether such an amount has been applied to beneficial use by the permittee. (Wat. Code, § 1610.) In each case, if the permittee does not

capture and put the full amount to beneficial use, the State Water Board may, when the project is licensed, reduce the right to appropriation to the maximum amount of water put to beneficial use in any one year over the life of the permit. (Wat. Code, §1610.5.)

For the reasons discussed above in the change petitions section, we will not include in our approval (i) use of the term “redistribution of storage,” or (ii) ~~places of use not evaluated in the EIS/EIR, or (iii)~~ flood control as a purpose of use. Special terms imposed in our approval of the change petitions will also be imposed in the approval of the applications.

~~As discussed in section 5.5.2, because the impacts of the proposed applications on the portions of the place of use falling outside the EIS/EIR study area have not been analyzed under CEQA, we cannot approve those areas in the place of use. Moreover, the Settlement Act prohibits water from being “diverted within the Truckee River basin in California for use in California outside the Truckee River basin.” (App./Pet. Joint-16, § 204(c)(1)(F).) Accordingly, the authorized place of use will include only lands within T13N, R17&18E; T14N, R16-18E; T15N, R16-18E; T16N, R16-18E; T17N, R15-20E, 24-31E; T18N, R14-21E, 24-31E; T19N, R14-31E; T20N, R18-32E; T21N, R18-26E, 29-32E; T22N, R20-24E; T23N, R20-24E; T24N, R20-24E; T25N, R20-24E; T26N, R20-24E; T27N, R20-24E; T28N, R23&24E, MDB&M, which are also within the study area boundary or existing places of use. A revised place of use map will be required prior to the issuance of any permits.~~

Additional terms and conditions related to the approval of the application and petitions are discussed in section 9.0.

7.0 ENVIRONMENTAL EFFECTS OF THE CHANGE PETITIONS AND WATER RIGHT APPLICATIONS

As discussed above, in considering the change petitions and water right applications, the State Water Board must evaluate the environmental effects of the proposed changes, including any effects on water quality, fish, wildlife, and other instream beneficial uses, and other public trust resources. We note that the purposes of the Settlement Act authorizing TROA include providing benefits to fish and wildlife and recreation, promoting the enhancement and recovery of the Pyramid Lake fishery, and protecting and enhancing significant wetlands and the wildlife that depend on those wetlands. (App./Pet. Joint-16, § 202; see also App./Pet. Joint-19 (TROA), p. 1-1, § 1.A.1 [identifying provisions of the Settlement Act that TROA is intended to satisfy].)

TROA itself states that it is “intended to implement California’s responsibilities under the public

trust doctrine” through coordinating operation of the various reservoirs, by supporting recreation and instream flows, and by providing for consultation with California. (App./Pet. Joint-19, p. 1-2, § 1.A.3.) By themselves, these statements of purpose do not suffice to fulfill the State Water Board’s obligations under the public trust doctrine and other state law. The evidence in the record, however, supports the conclusion that approving the four change petitions and two water right applications that were filed to implement TROA will not adversely affect water quality, fish, wildlife, and other instream beneficial uses, and other public trust resources, and in fact, may benefit those resources through operation of TROA.

As discussed previously, the EIS/EIR evaluated the effects of implementing TROA and the associated change petitions and water right applications. (SWRCB 7, pp. 3-457 to 3-469.) The analysis addressed various resource areas within the State Water Board’s purview, including water quality, biological resources (fisheries, wildlife, and riparian and wetland habitat) and recreation. (USBR-4, pp. 4-7; SWRCB-7.) The final EIS/EIR did not identify any significant adverse environmental effects under TROA requiring mitigation.⁴⁶⁴⁷

As noted above, TCID’s witness criticized the Truckee River Operations Model used in the preparation of the EIS/EIR. While the State Water Board, as a responsible agency under CEQA, is subject to a conclusive presumption that an EIR complies with CEQA (Cal. Code Regs., tit. 14, § 15231), no such conclusive presumption applies to the State Water Board’s responsibilities under other provisions of state law, such as the public trust doctrine.

Nonetheless, the State Water Board will consider an environmental document prepared under CEQA to inform its review pursuant to the public trust doctrine and other laws, and may afford the document substantial weight in light of the evidence in the entire hearing record.

In this case, Protestants did not submit any evidence demonstrating that the approval of the change petitions and water right applications would have a significant adverse affect on water quality, fish, wildlife, and other instream beneficial uses, and other public trust resources.

⁴⁶⁴⁷ The State Water Board’s consideration of an appropriation of water in California from an interstate river system raises issues regarding the geographic scope of the board’s purview under CEQA, the public trust doctrine, and other state law, and its responsibility to minimize any environmental effects across state lines. (See, e.g., Pub. Resources Code, § 21080, subd. (b)(14) & Cal. Code of Regulations, tit. 14, § 15277 [creating a limited exemption from CEQA for projects or portions of projects located within another state]; *National Audubon Society v. Superior Court*, *supra*, 33 Cal.3d at 425 [“the core of the public trust doctrine is the state’s authority as sovereign to a continuous supervision and control over the navigable waters of the state” (italics added)].) We need not consider such issues further, however, given that the EIS/EIR analyzed the project’s effects on the entire interstate riverine environment and found

Instead, the primary focus of TCID's testimony was on the adequacy of the modeling and the project's effects on water users represented by TCID. The Truckee River Operations Model was used in the preparation of the EIS/EIR to simulate water management and demands in the Lake Tahoe, Truckee River, and lower Carson River basins. (SWRCB-7, p. 3-30) The operations model generated "a 100-year data set of simulated riverflows, diversions, and return flows as well as reservoir storage, releases, and spills for current conditions and each alternative." (*Id.*, at p. 3-35.) The results generated by the model were used to identify potential hydrologic differences among current conditions and the alternatives and then to compare the potential effects of the alternatives on water and water-related resources in the study area. (*Id.* at p. 3-30.)

The State Water Board recognizes that there is a degree of uncertainty inherent in computer modeling, but also recognizes that computer models may provide the best available tool for evaluating particular conditions or effects. (See, e.g., State Water Board Decision 1631 (1994, pp. 15-16 [describing use of computer models in evaluating water diversion alternatives]; see also *State Water Resources Control Bd. Cases, supra*, 136 Cal.App.4th at p. 795, quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 409 [in a challenge to studies on which an EIR is based, "the issue is not whether the studies are irrefutable or whether they could have been better," but whether the studies are sufficiently credible as part of the total evidence].) In this case, the project proponents acknowledged the limitations of the operations model, but concluded that it was appropriate for a comparative analysis of the various alternatives. (SWRCB-7, pp. 3-35 to 3-36.) While Protestants may prefer that the operations model be rewritten or that a different model be used,⁴⁷⁴⁸ they have not met their burden to demonstrate that that the modeling used to support the EIR is "clearly inadequate or unsupported." (*State Water Resources Control Bd. Cases, supra*, at p. 795, quoting *Laurel Heights, supra*, at p. 409, fn. 12.) Nor do Protestants proffer any modeling or analysis of their own, or any credible evidence of any significant adverse effects associated with the approval of the change petitions and water right applications.

no significant adverse effects, and in light of our conclusion herein that the project will not significantly affect water quality, fish, wildlife, and other instream beneficial uses, and other public trust resources.

⁴⁷⁴⁸ TCID suggested RiverWare as an alternative model in its comments on the EIS/EIR. (TCID-275B, p. 5; R.T. III, 781:13-15.) According to the responses to comments in the EIS/EIR, however, RiverWare had not been developed for the system at the time of the TROA negotiations and preparation of the EIS/EIR. (SWRCB-7, p. 421, Response PW 06-03.)

In contrast, the EIS/EIR, the expert testimony, and other evidence in the hearing record provide substantial evidence supporting a finding that the proposed actions generally will have no effect on, or will benefit, environmental resources along the Truckee River, and that any adverse effects are minimal in light of the benefits that will accrue from the project. (SWRCB -7; USBR-4, at pp. 4-9; USBR-5, at pp. 5-7; USBR-6, USBR-7, at pp. 39-42; TMWA 4-0; DWR-1, at pp. 5-10.) The project proponent's conclusions were not solely based on the operations model results, but also on the professional judgment of the experts involved. (R.T. II, 442:18-444:1; R.T. III, 629:19-23.) Moreover, TROA was negotiated to satisfy provisions of the Settlement Act requiring enhancement of fish, wildlife and recreational beneficial uses, as well as TROA's own objectives of implementing California public trust, and to avoid significant adverse effects to biological resources; given these objectives, it is unsurprising that no need for mitigation has been identified by the project proponents. (USBR-6, p. 1; App./Pet. Joint-19, p. 1-2, § 1.A.3.) According to the testimony, approval of the change petitions and water right applications would provide opportunities under TROA for water managers to protect and enhance fish habitat, water quality, and recreational opportunities in the Truckee River system. (USBR-5, pp. 5-7.) In sum, we conclude that approval of the change petitions and water right applications will not significantly adversely effect water quality, fish, wildlife, and other instream beneficial uses, and other public trust resources.

In light of the proposed exchanges and changes in reservoir operations, however, we must ensure that existing [instream](#) flow requirements imposed by the State Water Board under its public trust, water right and water quality authorities are maintained. When a point of diversion or redirection is added to a permit or license, and that point has an existing [instream](#) flow requirement imposed on another claim of right using the same point of diversion or redirection, it is reasonable to ~~require the permittee or licensee to meet the same~~ [ensure that the instream](#) flow requirement [continues to be met](#). Otherwise, allowing a permittee or licensee to use the new point of diversion or redirection without observing the existing flow requirement may adversely affect public trust or other resources. Thus, we will ~~impose~~ [condition the permits and licenses to which the points of diversion and redirection are added to ensure that](#) the existing [instream](#) flow requirements for Stampede Reservoir and the Farad Diversion Dam Replacement Project⁴⁸⁴⁹ ~~on all permits and licenses to which the points of diversion and redirection already subject to the flow requirements are added~~ [are met](#).

⁴⁸⁴⁹ We take official notice of Condition 12 of the water quality certification issued for the Farad Diversion Dam Replacement Project, the bypass term, pursuant to California Code of Regulations, title 23, section 648.2 (authorizing

8.0 EVIDENTIARY MOTIONS

During the course of this proceeding, TMWA and other parties objected to numerous exhibits submitted by TCID. On July 15, 2011, TMWA moved to exclude TCID's testimony, expert reports, and exhibits primarily relating to the consumptive portion of Orr Ditch Decree water rights and whether the State Water Board should stay its action in this proceeding until the Orr Ditch Court determines whether to amend the decree to allow TROA to supersede the Truckee River Agreement. (TMWA "Motion to Exclude Testimony, Expert Reports and Exhibits Related to Issues Not Before the California State Water Resources Control Board" (July 15, 2010).) The State Water Board gave TCID an opportunity to respond to the motions and TCID timely responded. In a ruling dated July 27, 2010, the State Water Board denied TMWA's motion.

At the conclusion of TCID's case in chief, the parties supporting approval of the applications and petitions objected to approximately 123 of TCID's exhibits, often identifying multiple grounds for objection. The Hearing Officer requested those joint parties to submit their objections in writing and gave TCID an opportunity to respond in writing. On August 11, 2010, the Hearing Officer issued a ruling that addressed general categories of objections raised, such as relevance, hearsay, and authentication, and explained that if the State Water Board wished to rely on contested evidence in making its decision, it would consider the joint parties' objections and TCID's response in determining what weight, if any, to give the contested evidence.

To the extent that the State Water Board has identified any contested exhibits in this decision, it has done so for the sole purpose of explaining TCID's testimony and arguments, or for other explication. We have not relied on the disputed exhibits as the sole or primary support for the findings in this decision.

9.0 OTHER TERMS AND CONDITIONS

This section describes additional terms and conditions, not described elsewhere in this decision, that are applicable to the State Water Board's approval of the change petitions and water right applications.

the State Water Board to take official notice of matters that may be judicially noticed), and pursuant to Evidence Code section 452, subdivision (c) (authorizing judicial notice of the official acts of administrative agencies). (See also, SWRCB-7, p. 2-22, fn. 17 & p. 2-45, fn. 38 [describing Condition 12].)

Accurate water accounting is important in order to prevent the unauthorized diversion of water, to prevent injury, and to enable the State Water Board to determine the amount of water that has been applied to beneficial use pursuant to Water Code section 1605. The State Water Board will impose terms and conditions to ensure proper measurement and record keeping of water diversion and use.

Applicant and Petitioners do not propose any reservoir construction. To ensure that adverse effects that were not considered in this proceeding do not occur and to prevent the unauthorized diversion of water, reservoir capacities will be limited in each permit, amended permit or amended license to the existing capacities of the reservoirs discussed above in section 2.4. In order to release flows that are not authorized for appropriation and to ensure the beneficial use of water, each permit, amended permit, or amended license will contain a term requiring the permittee or licensee to maintain existing outlet pipes in each reservoir owned or operated by the permittee or licensee where water is authorized for diversion under that permit or license. In addition, no water shall be diverted or rediverted by the permittee or licensee in any reservoir where water is authorized for diversion under that permit or license, which is not owned or operated by the permittee or licensee, if the reservoir's outlet pipe is not in working order.

Applicant and Petitioners have requested that the permits and licenses include a term requiring the diversion and use of water and reservoir operations be conducted in accordance with TROA. We have included this term, but have modified it to also refer to the Settlement Act. In addition, we have removed terms from Permit 11605 and License 10180 that were intended to address the appropriation and use of water in the Truckee River basin pending the implementation of a Congressionally-approved interstate compact. The California-Nevada Interstate Compact, however, was not ratified by Congress. Instead, the Settlement Act will establish an interstate allocation between California and Nevada once particular conditions are met, including TROA taking effect. Certain permit terms and conditions adopted during the interstate compact negotiations will become superfluous or obsolete once TROA and the Settlement Act are effective and, thus, they have been removed.

In the State Water Board's exercise of its continuing authority over public trust resources and water right administration, Applicant and Petitioners will be required to notify the Deputy Director for Water Rights of adjustments to operations or changes to TROA made in accordance with Article Thirteen of TROA that will affect the diversion and use of water under the permits and licenses. In addition, a term has been added providing that the diversion of water under each

permit or license is subject to regulation by the TROA Administrator appointed to enforce the terms of TROA to the extent such regulation is consistent with the terms and conditions of the permit or license.

Applicant and Petitioners requested a common place of use for the applications, permit, and licenses that were the subject of this hearing. The authorized place of use will include lands within T13N, R17&18E; T14N, R16-18E; T15N, R16-18E; T16N, R16-18E; T17N, R15-20E, 24-31E; T18N, R14-21E, 24-31E; T19N, R14-31E; T20N, R18-32E; T21N, R18-26E, 29-32E; T22N, R20-24E; T23N, R20-24E; T24N, R20-24E; T25N, R20-24E; T26N, R20-24E; T27N, R20-24E; T28N, R23&24E, MDB&M, as shown on map No. 320-208-189A-1. A revised place of use map (or maps) will be required prior to the issuance of any permits, amended permits, or amended licenses and will include the authorized irrigated acreage as described below:

In each of the petitions and applications, Applicant and Petitioners requested that irrigation use continue in the existing place of use as shown on Map No. 320-419-156, dated December 17, 1953. The referenced map is a general map for Stampede Reservoir (Application 15673), which shows a net irrigated acreage for the Truckee Meadows area of 26,800 acres and a gross acreage of 36,340 acres. Consistent with the EIS/EIR, the maximum existing irrigated acreage will not be expanded. ~~The~~ Thus, we have construed the applications and petitions as seeking the existing net irrigated acreage amount of 26,800 acres in the Truckee Meadows area and we approve that quantity in Permit 11605, License 4196, License 10180, and permits issued pursuant to Application 31487 and Application 31488. License 3723, however, currently authorizes 29,000 acres of net irrigated acreage in the Truckee Meadows area and this amount will remain unchanged.

Therefore, the maximum area irrigated in any one year under Permit 11605, ~~License 3723,~~ License 4196, License 10180, and permits issued pursuant to Application 31487 and Application 31488, shall not exceed a total of 96,800 net acres within a total gross area of 143,480 acres as follows:

- Truckee Meadows - 26,800 net acres within a gross area of 36,340 acres in the vicinity of Reno, Nevada, within lands described as follows:
T18N, R18E-R21E; T19N, R18E-R21E; T20N, R18E-R21E, and
- Newlands Project - 70,000 net acres within a gross area of 107,140 acres in the vicinity of Fallon, Nevada, within lands described as follows:

D R A F T

September 25, 2012

T17N, R24E-R31E; T18N, R24E-R31E; T19N, R24E-R31E;
T20N, R24E-R31E, all within MDB&M.

The maximum area irrigated in any one year under License 3723 (Application 5169), License 4196 (Application 9247), Permit 11605 (Application 15673), License 10180 (Application 18006), and permits issued pursuant to Application 31487 and Application 31488, shall not exceed a total of 99,000 net acres within a total gross area of 143,480 acres.

The maximum area irrigated in any one year under License 3723 (Application 5169) shall not exceed the following:

Truckee Meadows - 29,000 acres in the vicinity of Reno, Nevada , within lands described as follows:

T18N, R18E-R21E; T19N, R18E-R21E; T20N, R18E-R21E; all within MDB&M.

~~This will reduce the Truckee Meadows irrigated acreage in License 3723 from 29,000 acres to 26,800 acres.~~

Newlands Project - 70,000 net acres within a gross area of 107,140 acres in the vicinity of Fallon, Nevada, within lands described as follows:

T17N, R24E-R31E; T18N, R24E-R31E; T19N, R24E-R31E; T20N, R24E-R31E; all within MDB&M.

The State Water Board will require a total combined storage limit for the three reservoirs in the Little Truckee River watershed in which water may be collected to storage to ensure that adverse effects do not occur that were not considered in this proceeding and to prevent the unauthorized diversion of water. The total quantity of water collected to storage at Independence Lake, Stampede Reservoir, and Boca Reservoir under Application 31487, License 2607 (Application 9267),⁴⁹⁵⁰ License 3723 (Application 5169), License 4196 (Application 9247), Permit 11605 (Application 15673), and Permit 18320 (Application 26273) shall not exceed a total of 284,850 afa.⁵⁰⁵¹

⁴⁹⁵⁰ License 2607 is for power use at Independence Lake.

⁵⁰⁵¹ This amount is less than the total combined capacities of Independence Lake, Stampede Reservoir, and Boca Reservoir because existing License 3723 (Application 5169) allows 40,850 acre-feet of water per annum to be

Application 31487 and Permit 11605 include direct diversion at Stampede Reservoir. Independence Lake and Boca Reservoir are also included as points of diversion. Because direct diversion is not currently authorized under existing licenses at Independence Lake and Boca Reservoir and the Applicant and Petitioners do not propose any construction, such as pipelines to deliver the water for direct diversion from the reservoirs, we do not construe the applications and petitions as requesting direct diversion at Independence Lake or Boca Reservoir. Direct diversion, therefore, is limited to Stampede Reservoir.

For the reasons discussed in section 6.4 for the permit issued pursuant to Application 31487, amended Permit 11605 will include a maximum simultaneous rate of direct diversion of 350 cfs for water rights at Stampede Reservoir and will also contain a term which states that the equivalent of the authorized continuous flow allowance for any 30-day period may be directly diverted at Stampede Reservoir in a shorter time, provided there is no interference with other rights and instream beneficial uses, and provided further that all terms and conditions protecting instream beneficial uses are observed.

The change petitions and applications request Incidental Power use at points of rediversion listed in Table C of this decision. Incidental Power is a non-consumptive use and the water shall be returned to the source. The permits, amended permit, and amended licenses issued by this decision will include a modified term 111, which includes locations where water is returned to the river. The Applicant and Petitioners describe these locations in App./Pet. Joint-23 through 28 as follows:

- *Stampede Powerhouse Return: Little Truckee River: By California Coordinate System of 1983, Zone 2, North 2,303,127 feet and East 7,096,674 feet.
- Farad Powerhouse Return: Truckee River: By California Coordinate System of 1983, Zone 2, North 2,284,919 feet and East 7,117,723 feet.
- Fleish Powerhouse Return: Truckee River: By Nevada Coordinate System of 1983, West Zone, North 14,848,874 feet and East 2,226,837 feet.

collected to storage in Boca Reservoir. (USBR-1, p. 2.) The capacity of Boca Reservoir, however, is cited as 41,100 acre-feet. (USBR-7, Table 1.)

Verdi Powerhouse Return: Truckee River: Nevada Coordinate System of 1983, West Zone, North 14,864,373 feet and East 2,230,562 feet.

Washoe Powerhouse Return: Truckee River: Nevada Coordinate System of 1983, West Zone, North 14,857,794 feet and East 2,243,430 feet.

*Not included in the permit issued pursuant to Application 31488 or License 10180, which do not include Incidental Power at the Stampede powerhouse.

~~The change petitions and applications request Municipal use as a common purpose of use. The Legislature has found and declared the conservation and efficient use of urban water supplies are of statewide concern. (Wat. Code, § 10610.2, subd. (a).) Thus, we find it is in the public interest, as a condition of our approval, to impose a modified version of Term 29A, requiring an urban water supplier to prepare an Urban Water Management Plan or a plan authorized under Nevada law that contains similar information.~~

10.0 CONCLUSION

For the reasons discussed herein, the change petitions and applications are conditionally approved.

ORDER

IT IS HEREBY ORDERED THAT Applications 31487 and 31488 be approved and permits issued subject to prior rights and subject to the following terms and conditions; and petitions to amend Permit 11605 (Application 15673), and Licenses 3723 (Application 5169), 4196 (Application 9247), and 10180 (Application 18006) be approved subject to the following terms and conditions. Permit 11605 and Licenses 3723, 4196, and 10180 shall be replaced with amended permit and licenses that will contain the terms, conditions, and changes specified herein and all current terms and conditions set forth in the original permit and licenses and applicable subsequent decisions and orders.

The following changes are not effective, and the permits, amended permit, and amended licenses will not be issued, until the conditions required for the Truckee River Operating Agreement (TROA) to enter into effect have been satisfied and the Applicant and Petitioners notify the Deputy Director for Water Rights, in writing, that those conditions have been satisfied.

Prior to issuance of any permits, amended permit, or amended licenses, permittee/licensees shall submit a final project map that meets the requirements of California Code of Regulations, title 23, chapter 2, article 7. The points of diversion and points of rediversion and their coordinates must be shown on the map. The numbering scheme for the points of diversion and points of rediversion are shown in Tables A and B of this decision. The map must also show the sections within the township and range where the place of use boundary is irregular and does not follow township and range lines.

Applications 31487, 31488, Permit 11605, Licenses 3723, 4196, 10180:

1. The authorized purposes of use are Municipal, Domestic, Industrial, Irrigation, Stockwatering, Fish Culture, Water Quality, Recreational, Fish and Wildlife Preservation and Enhancement, and Incidental Power.
2. Municipal, Domestic, Industrial, Stockwatering, Fish Culture, Water Quality, Recreational, and Fish and Wildlife Preservation and Enhancement uses are authorized within lands described as follows:

D R A F T

September 25, 2012

T13N, R17E-R18E; T14N, R16E-R18E; T15N, R16E-R18E;
T16N, R16E-R18E; T17N, R15E-R20E; T17N, R24E-R31E;
T18N, R14E-R21E; T18N, R24E-R31E; T19N, R14E-R31E;
T20N, R18E-R32E; T21N, R18E-R26E; T21N, R29E-R32E;
T22N-T27N, R20E-R24E and T28N, R23E-R24E, all within MDB&M,

Irrigation use is authorized as follows:

The maximum area irrigated in any one year under License 3723 (Application 5169), License 4196 (Application 9247), Permit 11605 (Application 15673), License 10180 (Application 18006), and permits issued pursuant to Application 31487 and Application 31488, shall not exceed a total of ~~96,800~~99,000 net acres within a total gross area of 143,480 acres as follows:

The maximum area irrigated in any one year under License 3723 (Application 5169) shall not exceed the following:

Truckee Meadows - 29,000 net acres in the vicinity of Reno, Nevada, within lands described as follows:

T18N, R18E-R21E; T19N, R18E-R21E; T20N, R18E-R21E, and

Newlands Project - 70,000 net acres within a gross area of 107,140 acres in the vicinity of Fallon, Nevada, within lands described as follows:

T17N, R24E-R31E; T18N, R24E-R31E; T19N, R24E-R31E;
T20N, R24E-R31E, all within MDB&M.

The maximum area irrigated in any one year under License 4196 (Application 9247), Permit 11605 (Application 15673), License 10180 (Application 18006), and permits issued pursuant to Application 31487 and Application 31488, shall not exceed a total of 96,800 net acres within a total gross area of 143,480 acres as follows:

Truckee Meadows - 26,800 net acres within a gross area of 36,340 acres in the vicinity of Reno, Nevada, within lands described as follows:
T18N, R18E-R21E; T19N, R18E-R21E; T20N, R18E-R21E, and

Newlands Project - 70,000 net acres within a gross area of 107,140 acres in the vicinity of Fallon, Nevada, within lands described as follows:
T17N, R24E-R31E; T18N, R24E-R31E; T19N, R24E-R31E;
T20N, R24E-R31E, all within MDB&M.

Incidental Power use is authorized at power plants shown in Table C; except that Incidental Power at the Stampede powerhouse is not included in the permit issued pursuant to Application 31488 and License 10180 (Application 18006).

The place of use approved by this decision shall be shown on a map(s) submitted to, and subject to approval by, the Deputy Director of Water Rights.

3. Water diverted for Incidental Power use under this permit/license is for nonconsumptive use and is to be released at the following locations:

*Stampede Powerhouse Return: Little Truckee River: By California Coordinate System of 1983, Zone 2, North 2,303,127 feet and East 7,096,674 feet.

Farad Powerhouse Return: Truckee River: By California Coordinate System of 1983, Zone 2, North 2,284,919 feet and East 7,117,723 feet.

Fleish Powerhouse Return: Truckee River: By Nevada Coordinate System of 1983, West Zone, North 14,848,874 feet and East 2,226,837 feet.

Verdi Powerhouse Return: Truckee River: Nevada Coordinate System of 1983, West Zone, North 14,864,373 feet and East 2,230,562 feet.

Washoe Powerhouse Return: Truckee River: Nevada Coordinate System of 1983, West Zone, North 14,857,794 feet and East 2,243,430 feet.

*Not included in the permit issued pursuant to Application 31488 or License 10180, which do not include Incidental Power at Stampede powerhouse.

4. The numbering for the points of diversion, points of rediversion, and places of storage for License 3723 (Application 5169), License 4196 (Application 9247), Permit 11605 (Application 15673), License 10180 (Application 18006), and permits issued pursuant to Application 31487 and Application 31488, are shown on map [MAP NUMBER], dated [DATE], filed with the State Water Board.

~~5. Permittee/licensee shall consult with the Division of Water Rights as to whether permittee/licensee is an "urban water supplier" as defined in California Water Code section~~

~~10617. If permittee/licensee is an urban water supplier, then within one year from issuance of the permit, amended permit, or amended license, permittee/licensee shall submit to the State Water Board its Urban Water Management Plan as prepared and adopted in conformance with California Water Code section 10610, et seq., or a comparable urban water management plan, as may be authorized under Nevada law that contains similar information. The plan may be supplemented by any additional information that may be required by the State Water Board.~~

~~—All cost-effective measures identified in the Urban Water Management Plan or comparable plan and any supplements thereto shall be implemented in accordance with the schedule for implementation found therein.~~

~~6. To ensure that the bypass flow requirement imposed as a condition of water quality certification for the Farad Diversion Dam Replacement Project is met, permittee/licensee shall bypass a minimum flow of 150 cfs in the bypass reach below the Farad diversion dam, or total Truckee River flow immediately upstream of the diversion dam, whichever is less, in the operation area, or applicable bypass flow as it may be revised in the water quality certification for the project.~~

~~—No diversion shall be allowed at the points of diversion or rediversion authorized by this permit/license unless the applicable bypass flows are met.~~

5. ~~7.~~ Due to the permittee's/licensee's ability to exchange water among water right holders under TROA, beneficial uses for water shall only be credited to the permit or license under which the water was originally diverted.

6. ~~8.~~ Diversions under this permit/license shall be subject to the interstate allocation authorized under the Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Pub.L. No. 101-618 (Nov. 16, 1990), Tit. II, 104 Stat. 3289) when the allocation becomes effective.

7. ~~9.~~ All diversions, storage, use of water and operations under this permit/license shall be in accordance with the provisions contained in this permit/license, [the Truckee-Carson-Pyramid Lake Water Rights Settlement Act \(Pub.L. No. 101-618 \(Nov. 16, 1990\), Tit. II, 104 Stat. 3289\) \(Settlement Act\)](#), and TROA, which is on file with the State Water Board. [The](#)

[Board retains jurisdiction for the purpose of amending the terms of this permit/license to conform to the terms of TROA and the Settlement Act.](#)

8. ~~10.~~ Diversion of water under this permit/license is subject to regulation by the TROA Administrator appointed to enforce the terms and conditions of ~~the~~ TROA to the extent such regulation is not inconsistent with the terms and conditions of this permit/license.
9. ~~11.~~ Permittee/licensee shall notify the Deputy Director for Water Rights, in writing, of any adjustments to operations or changes to TROA made in accordance with Article Thirteen of TROA that will affect the diversion and use of water under this permit/license.

IT IS FURTHER ORDERED that the permit issued pursuant to Application 31487 include the following additional terms and conditions:

10. ~~12.~~ Mandatory permit terms 6, 10, 11, 12, 13, 14, 15, and 63 (A through H) and standard permit terms 22, 30, 69, 203, and M.

11. ~~13.~~ The points of diversion, places of storage, sources of water, and points of rediversion are as follows:

- a. Points of diversion and places of storage: Permittee is authorized to divert and store water from Independence Creek and Little Truckee River at the points of diversion and places of storage identified within Table B of this Decision;
- b. Points of Rediversion: Permittee is authorized to re-divert water at the points of rediversion identified within Tables A and B of this Decision.

c. Sources:

(1) Independence Creek tributary to Little Truckee River thence Truckee River within the County of Nevada.

(2) Little Truckee River tributary to Truckee River thence Pyramid Lake within the Counties of Sierra and Nevada.

~~12. 14.~~ The amounts of water authorized to be appropriated under Application 31487 are as follows:

- a. The water appropriated shall be limited to the quantity that can be beneficially used and shall not exceed 350 cubic feet per second by direct diversion at Stampede Reservoir and 226,500 acre-feet per annum by storage at Independence Lake, Stampede Reservoir, and Boca Reservoir from January 1 to December 31 of each year.

The total amount of water to be taken from the source (direct diversion plus collection to storage) shall not exceed 226,500 acre-feet per year.

- b. The total quantity of water collected to storage under this permit, Permit 11605 (Application 15673), and Permit 18320 (Application 26273) shall not exceed 226,500 acre-feet per year.
- c. The total quantity of water collected to storage at Independence Lake, Stampede Reservoir, and Boca Reservoir under this permit, License 3723 (Application 5169), License 4196 (Application 9247), License 2607 (Application 9267), Permit 11605 (Application 15673), and Permit 18320 (Application 26273) shall not exceed a total of 284,850 acre-feet per year.
- d. The capacities of Independence Lake, Stampede Reservoir, and Boca Reservoir covered by this permit, License 3723 (Application 5169), License 4196 (Application 9247), License 2607 (Application 9267) Permit 11605 (Application 15673), and Permit 18320 (Application 26273) shall not exceed 17,500 acre-feet in Independence Lake, 226,500 acre-feet in Stampede Reservoir, and 41,100 acre-feet in Boca Reservoir.
- e. The maximum simultaneous rate of direct diversion at Stampede Reservoir under this permit, Permit 11605 (Application 15673), and Permit 18320 (Application 26273) shall not exceed 350 cfs.
- f. The equivalent of the authorized continuous flow allowance for any 30-day period may be directly diverted at Stampede Reservoir in a shorter time, provided there is no

interference with other rights and instream beneficial uses, and provided further that all terms and conditions protecting instream beneficial uses are observed.

13. ~~15.~~ Construction work and complete application of the water to the authorized use shall be prosecuted with reasonable diligence and be completed by December 31, 2022.

14. ~~16.~~ Permittee shall measure and monitor amounts diverted, collected to storage, withdrawn from storage and rediverted for beneficial use under this permit. The permittee shall submit a plan for approval by the State Water Board that includes a description and location of the measuring devices, frequency of data collection, the methods for recording and reporting data to the State Water Board, and any calculations required to develop the records. The plan shall identify how the permittee will ensure that the total cumulative amount of water collected, stored and used at the reservoirs authorized under this permit will not exceed the authorized amount under the permit. The plan shall also identify how the amounts collected and beneficially used under all of the permits and licenses for coordinated reservoir storage under TROA will be accounted for under the individual permits and licenses and any other bases of right. The plan shall be submitted and approved by the Deputy Director for Water Rights prior to diversion under this permit. Permittee shall implement the plan upon approval. A record of such measurements shall be maintained by the permittee, and made available to interested persons upon reasonable request. A copy of the records shall be submitted to the State Water Board with the annual "Progress Report by Permittee."

15. ~~17.~~ To assure sufficient water flows in the Little Truckee River below Stampede Reservoir to protect public fishery resources, bypasses or releases shall be made from Stampede Reservoir into the Little Truckee River to maintain minimum flows therein as follows:

During Years of 60 and up to 130 percent normal predicted runoff, based on the official federal-state cooperative April snow surveys and water supply forecasts for the Truckee River watershed, (a) six cubic feet per second measured at a point one-quarter mile downstream from Stampede Dam, and (b) twelve cubic feet per second measured at a point near the confluence of the Little Truckee River with Boca Reservoir.

During years when the official predicted runoff for the Truckee River watershed is less than 60 percent of normal, (a) six cubic feet per second measured at a point one-quarter

mile downstream from Stampede Dam, and (b) six cubic feet per second measured at a point near the confluence of the Little Truckee River with Boca Reservoir.

During years when the official predicted runoff for the Truckee River watershed is more than 130 percent of normal, (a) eight cubic feet per second measured at a point one-quarter mile downstream from Stampede Dam, and (b) sixteen cubic feet per second measured at a point near the confluence of the Little Truckee River with Boca Reservoir.

The flows to be maintained in the foregoing schedule shall become effective on May 1 of each year and continue to April 30 of the following year.

No diversion shall be allowed at the [Stampede Reservoir](#) points of diversion or rediversion authorized by this permit unless the applicable [minimum instream flows](#) ~~are met~~ in this term are met for water collected to storage in Stampede Reservoir. This condition does not require a bypass or release of water collected to storage in other reservoirs and subsequently transferred to Stampede Reservoir. Reclamation shall maintain an account of all water stored in Stampede Reservoir, and shall separately account for water transferred to the reservoir from other reservoirs. The account shall document when the transfer water is released from Stampede Reservoir storage for beneficial use. Failure to document the transfer of water into and out of Stampede Reservoir shall result in all water in the reservoir being subject to the bypass or release criteria for Stampede Reservoir.

16. No water shall be diverted at the Farad Diversion Dam, except in compliance with the bypass flow requirement imposed as a condition of water quality certification for the Farad Diversion Dam Replacement Project. Further, no water shall be diverted at the Farad Diversion Dam unless (1) permittee has submitted information to the Deputy Director for Water Rights demonstrating that the permittee has acquired access to divert water or made arrangements with TMWA to divert water on permittee's behalf, and (2) the Deputy Director for Water Rights advises the permittee that it has made a satisfactory demonstration.

17. ~~18.~~ Permittee shall maintain the existing outlet ~~pipes~~ pipe for ~~Independence Lake~~, Stampede Reservoir, ~~and Boca Reservoir~~ in proper working order. No water shall be diverted in

Independence Lake, or diverted or rediverted in Boca Reservoir, under this permit if the outlet pipe for the particular reservoir in which water is sought to be diverted or rediverted is not in working order.

18. ~~19.~~ Water stored in Independence Lake, Stampede Reservoir, and Boca Reservoir pursuant to ~~pre-1914~~ permits issued by the Nevada State Engineer under Nevada Law, with priority dates before December 19, 1914. and recognized pursuant to the provisions of California Water Code sections 1231 and 1232 shall not be considered as water stored pursuant to the provisions of this Permit.

IT IS FURTHER ORDERED that the permit issued pursuant to Application 31488 include the following additional terms and conditions:

19. ~~20.~~ Mandatory permit terms 6, 10, 11, 12, 13, 14, 15, and 63 (A through H) and standard permit terms 5i, 30, 69, 203, and M.

20. ~~21.~~ The point of diversion, place of storage, source of water, and points of rediversion are as follows:

- a. Point of diversion and place of storage: Permittee is authorized to divert and store water from Prosser Creek at a point of diversion and place of storage at Prosser Creek Dam, within NW ¼ of SW ¼, of Section 30, T18N, R17E, MDBM; California Coordinate System of 1983, Zone 2, North 2,269,206 feet and East 7,088,234 feet, POD(4).
- b. Points of Rediversion: Permittee is authorized to re-divert water at the points of rediversion identified within Table A of this Decision.
- c. Source: Prosser Creek tributary to Truckee River thence Pyramid Lake within the County of Nevada.

21. ~~22.~~ The amounts of water authorized to be appropriated under Application 31488:

- a. The water appropriated shall be limited to the quantity that can be beneficially used and shall not exceed 30,000 acre-feet per annum to be collected from October 1 of each year to August 10 of the succeeding year.

- b. The total quantity of water collected to storage at Prosser Creek Reservoir under this permit and License 10180 (Application 18006) shall not exceed 30,000 acre-feet per year.
- c. The capacity of the reservoir covered by this permit and License 10180 (Application 18006) shall not exceed 29,800 acre-feet.

~~22. 23.~~ Construction work and complete application of the water to the authorized use shall be prosecuted with reasonable diligence and be completed by December 31, 2022.

~~23. 24.~~ Permittee shall measure and monitor amounts diverted, collected to storage, withdrawn from storage and rediverted for beneficial use under this permit. The permittee shall submit a plan for approval by the State Water Board that includes a description and location of the measuring devices, frequency of data collection, the methods for recording and reporting data to the State Water Board, and any calculations required to develop the records. The plan shall identify how the permittee will ensure that the total cumulative amount of water collected, stored and used at Prosser Creek Reservoir will not exceed the authorized amount under the permit. The plan shall also identify how the amounts collected and beneficially used under all of the permits and licenses for coordinated reservoir storage under TROA will be accounted for under the individual permits and licenses and any other bases of right. The plan shall be submitted and approved by the Deputy Director for Water Rights prior to diversion under this permit. Permittee shall implement the plan upon approval. A record of such measurements shall be maintained by the permittee, and made available to interested persons upon reasonable request. A copy of the records shall be submitted to the State Water Board with the annual "Progress Report by Permittee."

24. No water shall be rediverted at the Farad Diversion Dam, except in compliance with the bypass flow requirement imposed as a condition of water quality certification for the Farad Diversion Dam Replacement Project. Further, no water shall be rediverted at the Farad Diversion Dam unless (1) permittee has submitted information to the Deputy Director for Water Rights demonstrating that the permittee has acquired access to redivert water or made arrangements with TMWA to divert water on permittee's behalf, and (2) the Deputy Director for Water Rights advises the permittee that it has made a satisfactory demonstration.

25. Permittee shall maintain the existing outlet pipe for Prosser Creek Reservoir in proper working order.

26. Water stored in Prosser Creek Reservoir pursuant to pre-1914 permits issued by the Nevada State Engineer under Nevada Law, and recognized pursuant to the provisions of California Water Code sections 1231 and 1232 shall not be considered as water stored pursuant to the provisions of this permit.

IT IS FURTHER ORDERED that Permit 11605 (Application 15673) shall be amended by adding the following additional terms and conditions:

27. Permit 11605 (Application 15673) is subject to mandatory permit terms 6, 10, 11, 12, 13, 14, 15, and 63 (A through H) and standard permit terms 22, 30, 69, and M.

28. The purposes of use authorized by the State Water Board's March 22, 1971 Order amending Permit 11605 shall be modified as follows:

Domestic, Municipal, Industrial, Irrigation, Stockwatering, ~~Flood Control~~, Fish Culture, Water Quality, Recreational, Fish and Wildlife Preservation and Enhancement, and Incidental Power

29. The points of diversion, places of storage, sources of water, and points of rediversion are as follows:

a. Points of diversion and places of storage: Permittee is authorized to divert and store water from Independence Creek and Little Truckee River at the points of diversion and places of storage identified within Table B of this Decision;

b. Points of Rediversion: Permittee is authorized to re-divert water at the points of rediversion identified in Tables A and B of this Decision.

c. Sources:

(1) Independence Creek tributary to Little Truckee River thence Truckee River within the County of Nevada.

(2) Little Truckee River tributary to Truckee River thence Pyramid Lake within the Counties of Sierra and Nevada.

30. Terms 1 and 2 of Permit 11605 (Application 15673) shall be deleted and replaced with the following terms:

- a. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 350 cubic feet per second (cfs) by direct diversion at Stampede Reservoir to be diverted from April 1 to November 1 of each year and 126,000 acre-feet per annum by storage to be collected from January 1 to December 31 of each year.

The total amount of water to be taken from the source (direct diversion plus collection to storage) shall not exceed 126,000 acre-feet per year.

- b. The total quantity of water collected to storage under this permit, Permit 18320 (Application 26273) and the permit issued pursuant to Application 31487 shall not exceed 226,500 acre-feet per annum.
- c. The total quantity of water collected to storage at Independence Lake, Stampede Reservoir, and Boca Reservoir under this permit, License 3723 (Application 5169), License 4196 (Application 9247), License 2607 (Application 9267), Permit 18320 (Application 26273), and permit issued pursuant to Application 31487 shall not exceed a total of 284,850 acre-feet per year.
- d. The capacities of Independence Lake, Stampede Reservoir, and Boca Reservoir covered by this permit, License 3723 (Application 5169), License 4196 (Application 9247), License 2607 (Application 9267), Permit 18320 (Application 26273), and permit issued pursuant to Application 31487 shall not exceed 17,500 acre-feet in Independence Lake, 226,500 acre-feet in Stampede Reservoir, and 41,100 acre-feet in Boca Reservoir.
- e. The maximum simultaneous rate of direct diversion at Stampede Reservoir under this permit, Permit 18320 (Application 26273), and the permit issued pursuant to Application 31487 shall not exceed 350 cfs.

- f. The equivalent of the authorized continuous flow allowance for any 30-day period may be directly diverted at Stampede Reservoir in a shorter time, provided there is no interference with other rights and instream beneficial uses, and provided further that all terms and conditions protecting instream beneficial uses are observed.
31. Permittee shall measure and monitor amounts diverted, collected to storage, withdrawn from storage and rediverted for beneficial use under this permit. The permittee shall submit a plan for approval by the State Water Board that includes a description and location of the measuring devices, frequency of data collection, the methods for recording and reporting data to the State Water Board, and any calculations required to develop the records. The plan shall identify how the permittee will ensure that the total cumulative amount of water collected, stored and used at the reservoirs authorized under this permit will not exceed the authorized amount under the permit. The plan shall also identify how the amounts collected and beneficially used under all of the permits and licenses for coordinated reservoir storage under TROA will be accounted for under the individual permits and licenses and any other bases of right. The plan shall be submitted and approved by the Deputy Director for Water Rights prior to diversion under this permit. Permittee shall implement the plan upon approval. A record of such measurements shall be maintained by the permittee, and made available to interested persons upon reasonable request. A copy of the records shall be submitted to the State Water Board with the annual "Progress Report by Permittee."
32. ~~The third sentence in Term 4 of Permit 11605 (Application 15673) shall be modified as follows:...~~~~The appropriative rights hereby reserved for use in California shall be deemed to have the same date of priority as any rights which may be consummated pursuant to Applications 15672 and 15673.~~~~Appropriative rights acquired to water of the Truckee River system in addition to the appropriative rights described above shall be junior in priority thereto.~~Terms 3, 4, and 8 of Permit 11605 (Application 15673) shall be deleted.
33. Term 5 of Permit 11605 (Application 15673) shall be modified as follows:
- Permittee shall keep adequate records of (1) the amounts of water beneficially used for the various purposes for which the water has been appropriated, (2) the amount of water stored in each reservoir (Independence Lake, Stampede Reservoir and Boca Reservoir) in lieu of storage at other existing reservoirs, and (3) the amount of water stored in each reservoir

(Independence Lake, Stampede Reservoir and Boca Reservoir) in addition to the amount described in (2) of this condition. Copies of such records shall be furnished annually to the State Water Board together with the annual progress reports.

34. Term 6 of Permit 11605 (Application 15673) shall be modified as follows:

To assure sufficient water flows in the Little Truckee River below Stampede Reservoir to protect public fishery resources, bypasses or releases shall be made from Stampede Reservoir ~~said reservoir~~ into the Little Truckee River to maintain minimum flows therein as follows:

During Years of 60 and up to 130 percent normal predicted runoff, based on the official federal-state cooperative April snow surveys and water supply forecasts for the Truckee River watershed, (a) six cubic feet per second measured at a point one-quarter mile downstream from Stampede Dam, and (b) twelve cubic feet per second measured at a point near the confluence of the Little Truckee River with Boca Reservoir.

During years when the official predicted runoff for the Truckee River watershed is less than 60 percent of normal, (a) six cubic feet per second measured at a point one-quarter mile downstream from Stampede Dam, and (b) six cubic feet per second measured at a point near the confluence of the Little Truckee River with Boca Reservoir.

During years when the official predicted runoff for the Truckee River watershed is more than 130 percent of normal, (a) eight cubic feet per second measured at a point one-quarter mile downstream from Stampede Dam, and (b) sixteen cubic feet per second measured at a point near the confluence of the Little Truckee River with Boca Reservoir.

The flows to be maintained in the foregoing schedule shall become effective on May 1 of each year and continue to April 30 of the following year.

No diversion shall be allowed at the [Stampede Reservoir](#) points of diversion or rediversion authorized by this permit unless the applicable [minimum instream](#) flows ~~are met~~ [in this term are met for water collected to storage in Stampede Reservoir. This condition does not require a bypass or release of water collected to storage in other reservoirs and](#)

subsequently transferred to Stampede Reservoir. Reclamation shall maintain an account of all water stored in Stampede Reservoir, and shall separately account for water transferred to the reservoir from other reservoirs. The account shall document when the transfer water is released from Stampede Reservoir storage for beneficial use. Failure to document the transfer of water into and out of Stampede Reservoir shall result in all water in the reservoir being subject to the bypass or release criteria for Stampede Reservoir.

35. No water shall be rediverted at the Farad Diversion Dam, except in compliance with the bypass flow requirement imposed as a condition of water quality certification for the Farad Diversion Dam Replacement Project. Further, no water shall be rediverted at the Farad Diversion Dam unless (1) permittee has submitted information to the Deputy Director for Water Rights demonstrating that the permittee has acquired access to redivert water or made arrangements with TMWA to divert water on permittee's behalf, and (2) the Deputy Director for Water Rights advises the permittee that it has made a satisfactory demonstration.

36. ~~35.~~ Terms 9, 13, 14, 15, and 16 of Permit 11605 shall be deleted as they are duplicative of mandatory permit terms 6, 10, 12, and 13 (A, B, D, and E).

37. ~~36.~~ Water stored in Independence Lake, Stampede Reservoir, and Boca Reservoir pursuant to ~~pre-1914~~ permits issued by the Nevada State Engineer under Nevada Law, with priority dates before December 19, 1914, and recognized pursuant to the provisions of California Water Code sections 1231 and 1232 shall not be considered as water stored pursuant to the provisions of this permit.

38. ~~37.~~ Permittee shall maintain the existing outlet ~~pipes~~pipe for ~~Independence Lake,~~ Stampede Reservoir, ~~and Boca Reservoir~~ in proper working order. No water shall be diverted in Independence Lake, or diverted or rediverted in Boca Reservoir, under this permit if the outlet pipe for the particular reservoir in which water is sought to be diverted or rediverted is not in working order.

39. ~~38.~~ This permit is subject to the rights of persons diverting water for reasonable beneficial use under valid and properly exercised riparian and pre- and post-1914 appropriative claims

of right, and other claims of right, that have a priority superior to the priority of Application 15673.

IT IS FURTHER ORDERED that License 3723 (Application 5169) and License 4196 (Application 9247) shall be amended subject to the following additional terms and conditions:

License 3723 (Application 5169)

~~40. 39.~~ The amount of water to which this right is entitled and hereby confirmed is limited to the amount actually beneficially used for the stated purposes and shall not exceed forty thousand eight hundred fifty (40,850) acre-feet per annum to be collected in Independence Lake, Stampede Reservoir, and Boca Reservoir from October 1 of each year to July 1 of the succeeding year. The maximum withdrawal in any one year shall not exceed 40,850 acre-feet.

~~41. 40.~~ This license is subject to the rights of persons diverting water for reasonable beneficial use under valid and properly exercised riparian and pre- and post-1914 appropriative claims of right, and other claims of right, that have a priority superior to the priority of Application 5169.

42. No water shall be rediverted at the Farad Diversion Dam, except in compliance with the bypass flow requirement imposed as a condition of water quality certification for the Farad Diversion Dam Replacement Project. Further, no water shall be rediverted at the Farad Diversion Dam unless (1) licensee has submitted information to the Deputy Director for Water Rights demonstrating that the licensee has acquired access to divert water or made arrangements with TMWA to divert water on licensee's behalf, and (2) the Deputy Director for Water Rights advises the licensee that it has made a satisfactory demonstration.

43. Licensee shall maintain the existing outlet pipe for Boca Reservoir in proper working order. No water shall be diverted in Independence Lake, or diverted or rediverted in Stampede Reservoir, under this license if the outlet pipe for the particular reservoir in which water is sought to be diverted or rediverted is not in working order.

License 4196 (Application 9247)

~~44. 41.~~ The amount of water to which this right is entitled and hereby confirmed is limited to the amount actually beneficially used for the stated purposes and shall not exceed seventeen thousand five hundred (17,500) acre-feet per annum to be collected in Independence Lake, Stampede Reservoir, and Boca Reservoir from December 1 of each year to July 1 of the succeeding year. The maximum withdrawal in any one year shall not exceed 17,500 acre-feet.

~~45. 42.~~ Water can be initially diverted to storage under this license at Stampede Dam and Boca Dam only at times when flow to an equivalent volume is available at Independence Dam as verified by the TROA Administrator.

~~46. To ensure that the bypass flow requirement imposed as a condition of water quality certification for the Farad Diversion Dam Replacement Project is met, no water shall be rediverted at the Farad Diversion Dam unless licensee bypasses a minimum flow of 150 cfs in the bypass reach below the Farad diversion dam, or total Truckee River flow immediately upstream of the diversion dam, whichever is less, in the operation area, or applicable bypass flow as it may be revised in the water quality certification for the project.~~

~~47. Licensee shall maintain the existing outlet pipe for Independence Lake in proper working order. No water shall be diverted or rediverted in Stampede Reservoir or in Boca Reservoir under this license if the outlet pipe for the particular reservoir in which water is sought to be diverted or rediverted is not in working order.~~

License 3723 (Application 5169) and License 4196 (Application 9247)

~~48. 43.~~ Licenses 3723 (Application 5169) and 4196 (Application 9247) are subject to mandatory licensing terms shown in Table D and standard license terms 5i, 22, 30, 69 and M1.

~~49. 44.~~ The maximum amount of water collected to storage in Independence Lake, Stampede Reservoir, and Boca Reservoir under License 3723 (Application 5169), License 4196 (Application 9247), License 2607 (Application 9267), Permit 11605 (Application 15673), Permit 18320 (Application 26273), and permit issued pursuant to Application 31487 shall not exceed a total of 284,850 acre-feet per year.

50. ~~45.~~ The capacities of Independence Lake, Stampede Reservoir, and Boca Reservoir covered by License 3723 (Application 5169), License 4196 (Application 9247), License 2607 (Application 9267), Permit 11605 (Application 15673), Permit 18320 (Application 26273), and permit issued pursuant to Application 31487 shall not exceed 226,500 acre-feet in Stampede Reservoir, 17,500 acre-feet in Independence Lake, and 41,100 acre-feet in Boca Reservoir

51. ~~46.~~ The points of diversion, places of storage, sources of water, and points of rediversion are as follows:

a. Points of diversion and places of storage: Licensee is authorized to divert and store water from Independence Creek and Little Truckee River at the points of diversion and places of storage identified within Table B of this Decision;

b. Points of Rediversion: Licensee is authorized to re-divert water at the points of rediversion identified in Tables A and B of this Decision.

c. Sources:

(1) Independence Creek tributary to Little Truckee River thence Truckee River within the County of Nevada.

(2) Little Truckee River tributary to Truckee River thence Pyramid Lake within the Counties of Sierra and Nevada.

52. ~~47.~~ Licensee shall measure and monitor amounts diverted, collected to storage, withdrawn from storage and rediverted for beneficial use under this ~~permit~~/license. The licensee shall submit a plan for approval by the State Water Board that includes a description and location of the measuring devices, frequency of data collection, the methods for recording and reporting data to the State Water Board, and any calculations required to develop the records. The plan shall identify how the licensee will ensure that the total cumulative amount of water collected, stored and used at the reservoirs authorized under this license will not exceed the authorized amount under the license. The plan shall also identify how the amounts collected and beneficially used under all of the permits and licenses for coordinated reservoir storage under TROA will be accounted for under the individual permits

and licenses and any other bases of right. The plan shall be submitted and approved by the Deputy Director for Water Rights prior to diversion under this license. Licensee shall implement the plan upon approval. A record of such measurements shall be maintained by the licensee, and made available to interested persons upon reasonable request. A copy of the records shall be submitted to the State Water Board with the annual "Report of Licensee."

~~53. 48.~~ To assure sufficient water flows in the Little Truckee River below Stampede Reservoir to protect public fishery resources, bypasses or releases shall be made from Stampede Reservoir into the Little Truckee River to maintain minimum flows therein as follows:

During Years of 60 and up to 130 percent normal predicted runoff, based on the official federal-state cooperative April snow surveys and water supply forecasts for the Truckee River watershed, (a) six cubic feet per second measured at a point one-quarter mile downstream from Stampede Dam, and (b) twelve cubic feet per second measured at a point near the confluence of the Little Truckee River with Boca Reservoir.

During years when the official predicted runoff for the Truckee River watershed is less than 60 percent of normal, (a) six cubic feet per second measured at a point one-quarter mile downstream from Stampede Dam, and (b) six cubic feet per second measured at a point near the confluence of the Little Truckee River with Boca Reservoir.

During years when the official predicted runoff for the Truckee River watershed is more than 130 percent of normal, (a) eight cubic feet per second measured at a point one-quarter mile downstream from Stampede Dam, and (b) sixteen cubic feet per second measured at a point near the confluence of the Little Truckee River with Boca Reservoir.

The flows to be maintained in the foregoing schedule shall become effective on May 1 of each year and continue to April 30 of the following year.

No diversion shall be allowed at the Stampede Reservoir points of diversion or rediversion authorized by this license unless the applicable minimum instream flows ~~are~~ met in this term are met for water collected to storage in Stampede Reservoir. This

condition does not require a bypass or release of water collected to storage in other reservoirs and subsequently transferred to Stampede Reservoir.

~~54. 49.~~ Water stored in Independence Lake, Stampede Reservoir, and Boca Reservoir pursuant to ~~pre-1914~~ permits issued by the Nevada State Engineer under Nevada Law; with priority dates before December 19, 1914. and recognized pursuant to the provisions of California Water Code sections 1231 and 1232 shall not be considered as water stored pursuant to the provisions of this license.

~~50. Licensee shall maintain the existing outlet pipes in Independence Lake, Stampede Reservoir, and Boca Reservoir in proper working order.~~

IT IS FURTHER ORDERED that License 10180 (Application 18006) shall be amended subject to the following additional terms and conditions:

~~55. 51.~~ License 10180 (Application 18006) is subject to mandatory licensing terms shown in Table D and standard license terms 5i, 30, 69 and M1.

~~56. 52.~~ The points of diversion, places of storage, sources of water, and points of rediversion are as follows:

- a. Point of diversion and place of storage: Licensee is authorized to divert and store water from Prosser Creek at a point of diversion and place of storage at Prosser Creek Dam, within NW $\frac{1}{4}$ of SW $\frac{1}{4}$, of Section 30, T18N, R17E, MDBM; California Coordinate System of 1983, Zone 2, North 2,269,206 feet and East 7,088,234 feet, POD(4).
- b. Points of Rediversion: Licensee is authorized to re-divert water at the points of rediversion identified within Table A of this Decision.
- c. Source: Prosser Creek tributary to Truckee River thence Pyramid Lake within the County of Nevada.

~~57. 53.~~ The amount of water to which this right is entitled and hereby confirmed is limited to the amount actually beneficially used for the stated purposes and shall not exceed thirty

thousand (30,000) acre-feet per annum, to be collected from April 10 to August 10 of each year. The maximum withdrawal in any one year shall not exceed 20,162 acre-feet.

58. ~~54.~~ The maximum amount of water collected to storage in Prosser Creek Reservoir under this license and the permit issued pursuant to Application 31488 shall not exceed 30,000 acre-feet per year.

59. ~~55.~~ The capacity of Prosser Creek Reservoir covered by this license and the permit issued pursuant to Application 31488 shall not exceed 29,800 acre-feet.

60. ~~56.~~ Existing License term on page 1 of the License will be modified as follows: ~~The appropriate rights consummated pursuant to Application 18006~~ This license shall have an effective priority junior and subject to those rights reserved to California water users to appropriate unappropriated waters of the Little Truckee River as set forth in section 5976 of part 8, division 2 of the Water Code, the allocations of water of the Truckee River and its tributaries.

61. ~~57.~~ Licensee shall measure and monitor amounts diverted, collected to storage, withdrawn from storage and rediverted for beneficial use under this license. The licensee shall submit a plan for approval by the State Water Board that includes a description and location of the measuring devices, frequency of data collection, the methods for recording and reporting data to the State Water Board, and any calculations required to develop the records. The plan shall identify how the licensee will ensure that the total cumulative amount of water collected, stored and used at Prosser Creek Reservoir will not exceed the authorized amount under the license. The plan shall also identify how the amounts collected and beneficially used under all of the permits and licenses for coordinated reservoir storage under TROA will be accounted for under the individual permits and licenses and any other bases of right. The plan shall be submitted and approved by the Deputy Director for Water Rights prior to diversion under this license. Licensee shall implement the plan upon approval. A record of such measurements shall be maintained by the licensee, and made available to interested persons upon reasonable request. A copy of the records shall be submitted to the State Water Board with the annual "Report of Licensee."

62. ~~58.~~ Water stored in Prosser Creek Reservoir pursuant to pre-1914 permits issued by the Nevada State Engineer under Nevada Law, and recognized pursuant to the provisions of California Water Code sections 1231 and 1232 shall not be considered as water stored pursuant to the provisions of this license.

63. No water shall be diverted at the Farad Diversion Dam, except in compliance with the bypass flow requirement imposed as a condition of water quality certification for the Farad Diversion Dam Replacement Project. Further, no water shall be diverted at the Farad Diversion Dam unless (1) licensee has submitted information to the Deputy Director for Water Rights demonstrating that the licensee has acquired access to divert water or made arrangements with Truckee Meadows Water Authority to divert water on licensee's behalf, and (2) the Deputy Director for Water Rights advises the licensee that it has made a satisfactory demonstration.

64. ~~59.~~ Licensee shall maintain the existing outlet pipe in Prosser Creek Reservoir in proper working order.

65. The following terms shall be eliminated from License 10180 (Application 18006):

~~60. The following term shall be eliminated from License 10180 (Application 18006):~~ The licensee shall operate Prosser Creek Reservoir in coordination with releases of water from Lake Tahoe in the Truckee River in accordance with the operation schedule contained in the U.S. Bureau of Reclamation, Prosser Creek Reservoir Operation Study, January 14, 1958, and amended July 1, 1958, on file with the Board, or in accordance with any modified operation schedule that may be submitted by the licensee, and approved by the State Water Resources Control Board after notice and opportunity to be heard has been given to all parties and other interested persons in this proceeding.

If and when the interstate compact covering the distribution and use of waters of the Truckee and Carson Rivers is consented to by congress, the operation of Prosser Reservoir shall be in conformity with such compact and the terms and conditions set forth in this license which are in conflict therewith shall not apply.

Insofar as the appropriation of water under this license is concerned, Prosser Creek Reservoir shall not be operated by the licensee separately or in conjunction with other reservoirs of the Truckee River Basin so as to prevent in the future such consumptive beneficial uses of water as are presently being made in the California portion of said basin and such consumptive beneficial uses as are presently being made of water diverted from Little Truckee River to Sierra Valley, Echo Lake to the American River Basin, and Marlette Lake to Virginia City, Nevada; provided that the foregoing is a condition imposed upon the operation of said reservoir under this license and is not to be construed as a definition of the legality of any water right.

Permittee shall keep adequate records of:

- A. The respective amounts of water impounded in and released from Prosser Creek Reservoir solely for the purpose of exchanging water released from storage at Lake Tahoe for the maintenance of fish life.
- B. The respective amount of waters impounded in and released from Prosser Creek Reservoir in addition to the foregoing.
- C. Releases of stored waters from Lake Tahoe in fulfillment of the approved operation schedule in condition 1 above.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a decision duly and regularly adopted at a meeting of the State Water Board held on XXXXXXXX 2012.

AYE:

NO:

ABSENT:

D R A F T

September 25, 2012

ABSTAIN:

DRAFT

Jeanine Townsend
Clerk to the Board

D R A F T

September 25, 2012

**Table A – Location of common Points of Rediversion (POR) for
Amended License 3723 (Application 5169), Amended License 4196 (Application 9247),
Amended License 10180 (Application 18006), Amended Permit 11605 (Application 15673),
and Permits Issued Pursuant to Applications 31487 and 31488**

By California Coordinate System of 1983 in Zone 2	40-acre subdivision of public land survey or projection thereof	Section	Township	Range	Base and Meridian
(5) Farad Power Plant Ditch & Flume North 2,276,726 feet and East 7,119,940 feet	SW ¼ of NW ¼	30	18N	18E	MD
(6) Fleish Power Plant Ditch & Flume North 2,297,211 feet and East 7,124,864 feet	NE ¼ of SE ¼	6	18N	18E	MD
By Nevada Coordinate System of 1983, West Zone	40-acre subdivision of public land survey or projection thereof	Section	Township	Range	Base and Meridian
(7) Steamboat Canal North 14,843,385 feet and East 2,223,994 feet	NE ¼ of SW ¼	31	19N	18E	MD
(8) Coldron Ditch North 14,850,973 feet and East 2,226,583 feet	SE ¼ of NE ¼	30	19N	18E	MD
(9) Katz Ditch North 14,853,083 feet and East 2,226,202 feet	SE ¼ of SE ¼	19	19N	18E	MD
(10) Verdi Power Plant, Ditch & Flume North 14,853,117 feet and East 2,226,229 feet	SE ¼ of SE ¼	19	19N	18E	MD
(11) Washoe Power Plant Ditch North 14,862,548 <u>14,862,766</u> feet and East 2,235,859 <u>2,235,824</u> feet	NW ¼ of NE ¼	16	19N	18E	MD
(12) Hogan Ditch North 14,860,793 feet and East 2,236,229 feet	SW ¼ of NE ¼	16	19N	18E	MD
(13) Highland Ditch North 14,863,059 <u>14,862,766</u> feet and East 2,236,256 <u>2,235,824</u> feet	SW<u>NW</u> ¼ of SE<u>NE</u> ¼	9<u>16</u>	19N	18E	MD
(14) Mastin Ditch North 14,858,104 feet and East 2,244,534 feet	SE ¼ of SW ¼	14	19N	18E	MD

D R A F T

September 25, 2012

(15) Last Chance Ditch North 14,860,796 feet and East 2,247,614 feet	SE ¼ of NE ¼	14	19N	18E	MD
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Location of points of redirection (continued)

By Nevada Coordinate System of 1983, West Zone	40-acre subdivision of public land survey or projection thereof	Section	Township	Range	Base and Meridian
(16) Sparks-Capurro Ditch North 14,859,813 feet and East 2,250,976 feet	NW ¼ of SE ¼	13	19N	18E	MD
(17) Irwin-Mayberry Ditch North 14,856,488 feet and East 2,254,953 feet	NE ¼ of NW ¼	19	19N	19E	MD
(18) Lake Ditch (Lake Southside) North 14,856,917 feet and East 2,255,686 feet	NE ¼ of NW ¼	19	19N	19E	MD
(19) South Side Canal North 14,858,528 feet and East 2,259,680 feet	NE ¼ of SW ¼	17	19N	19E	MD
(20) Orr Ditch, Orr Extension & Spanish Spring Valley Ditch North 14,859,198 feet and East 2,260,521 feet	NE ¼ of SW ¼	17	19N	19E	MD
(21) Indian Flat Ditch North 14,858,946 feet and East 2,262,112 feet	NE ¼ of SE ¼	17	19N	19E	MD
(22) Orr Ditch Pump Station North 14,859,008 feet and East 2,262,704 feet	NE ¼ of SE ¼	17	19N	19E	MD
(23) Reno Power Ditch & Flume North 14,859,867 feet and East 2,267,642 feet	SE ¼ of NE ¼	16	19N	19E	MD
(24) Countryman Ditch North 14,862,075 feet and East 2,268,033 feet	NE ¼ of NE ¼	16	19N	19E	MD
(25) Chism Ditch North 14,862,003 feet and East 2,268,150 feet	NE ¼ of NE ¼	16	19N	19E	MD
(26) English Mill Ditch & English Mill Tailrace Ditch North 14,863,566 feet and East 2,271,673 feet	NW ¼ of SE ¼	10	19N	19E	MD

Location of points of redirection (continued)

By Nevada Coordinate System of 1983, West Zone	40-acre subdivision of public land survey or projection thereof	Section	Township	Range	Base and Meridian
(27) Hayden Ditch or Court Ditch North 14,862,824 feet and East 2,272,659 feet	SE ¼ of SE ¼	10	19N	19E	MD
(28) Idlewild Pump Station North 14,862,625 feet and East 2,273,168 feet	SE ¼ of SE ¼	10	19N	19E	MD
(29) Sullivan & Kelly Ditch North 14,863,999 feet and East 2,276,707 feet	NW ¼ of SE ¼	11	19N	19E	MD
(30) Cochran Ditch North 14,863,699 feet and East 2,277,344 feet	NW ¼ of SE ¼	11	19N	19E	MD
(31) Riverside Mill Ditch & Flume (Claim #10) North 14,864,144 feet and East 2,277,365 feet	NW ¼ of SE ¼	11	19N	19E	MD
(32) Scott Ranch Ditch North 14,865,010 feet and East 2,279,290 feet	SW ¼ of NW ¼	12	19N	19E	MD
(33) Abbee Ditch North 14,866,265 feet and East 2,283,562 feet	SE ¼ of NE ¼	12	19N	19E	MD
(34) Perry Ditch North 14,866,298 feet and East 2,284,219 feet	SE ¼ of NE ¼	12	19N	19E	MD
(35) Eastman Ditch North 14,865,286 feet and East 2,287,441 feet	SW ¼ of NE ¼	7	19N	20E	MD
(36) No. Truckee Ditch (Glendale Plant) North 14,865,173 feet and East 2,287,712 feet	SW ¼ of NE ¼	7	19N	20E	MD
(37) Sessions Ditch North 14,865,057 feet and East 2,287,842 feet	SW ¼ of NE ¼	7	19N	20E	MD
(38) Pioneer Ditch North 14,862,744 feet and East 2,289,385 feet	SE ¼ of SE ¼	7	19N	20E	MD

D R A F T

September 25, 2012

Location of points of rediversion (continued)

By Nevada Coordinate System of 1983, West Zone	40-acre subdivision of public land survey or projection thereof	Section	Township	Range	Base and Meridian
(39) Stephens Ditch (Stevens) North 14,862,524 feet and East 2,291,611 feet	SE ¼ of SW ¼	8	19N	20E	MD
(40) Glendale Ditch North 14,862,252 feet and East 2,291,882 feet	SE ¼ of SW ¼	8	19N	20E	MD
(41) Hidden Valley Induction Well #4 North 14,861,057 feet and East 2,295,828 feet	SW ¼ of NW ¼	16	19N	20E	MD
(42) Largomarsino - Murphy Ditch (S. Largomarsino) North 14,858,576 feet and East 2,316,686 feet	NW ¼ of SE ¼	18	19N	21E	MD
(43) Largomarsino – Noce Ditch (N. Largomarsino) North 14,858,813 feet and East 2,318,003 feet	NE ¼ of SE ¼	18	19N	21E	MD
(44) Groton Ditch North 14,858,234 feet and East 2,324,482 feet	NE ¼ of SE ¼	17	19N	21E	MD
(45) Sheep Ranch Ditch North 14,859,130 feet and East 2,325,476 feet	NW ¼ of SW ¼	16	19N	21E	MD
(46) McCarran North Side Ditch North 14,866,397 feet and East 2,338,153 feet	NE ¼ of NW ¼	11	19N	21E	MD
(47) McCarran South Side Ditch North 14,870,317 <u>14,870,713</u> feet and East 2,342,460 <u>2,342,338</u> feet	SW ¼ of NW ¼	1	19N	21E	MD
(48) Old Ditch North 14,871,849 feet and East 2,349,880 feet	NW ¼ of NE ¼	6	19N	22E	MD
(49) Hill Ditch North 14,876,905 feet and East 2,354,774 feet	NW ¼ of NE ¼	32	20N	22E	MD

D R A F T

September 25, 2012

Location of points of rediversion (continued)

By Nevada Coordinate System of 1983, West Zone	40-acre subdivision of public land survey or projection thereof	Section (Projected)*	Township	Range	Base and Meridian
(50) Tracy Power Plant North 14,877,698 feet and East 2,359,590 feet	SE ¼ of SW ¼	28	20N	23 22E	MD
(51) Derby Dam & Truckee Canal North 14,884,92814,885,141 feet and East 2,380,5162,380,928 feet	NE ¼ of SW ¼	19	20N	23E	MD
(52) Preston Ditch North 14,885,468 feet and East 2,386,178 feet	SE ¼ of NW ¼	20	20N	23E	MD
(53) Washburn Ditch North 14,885,521 feet and East 2,396,933 feet	SE ¼ of NW ¼	22	20N	23E	MD
(54) Gregory Ditch North 14,888,853 feet and East 2,405,578 feet	SE ¼ of SE ¼	14	20N	23E	MD
(55) Wadsworth Power Ditch North 14,889,268 feet and East 2,406,873 feet	NW ¼ of SW ¼	13	20N	23E	MD
(56) Herman Ditch North 14,891,95714,892,654 feet and East 2,417,7752,417,832 feet	NW ¼ of NW ¼	17	20N	24E	MD
(57) Pierson Ditch North 14,894,902 feet and East 2,422,828 feet	NW ¼ of SW ¼	9	20N	24E	MD
(58) Olinghouse No. 1 Ditch North 14,897,868 feet and East 2,425,862 feet	NW ¼ of NE ¼	9	20N	24E	MD
(59) Fernley North 14,899,217 feet and East 2,427,535 feet	SW ¼ of NW SW ¼	9 3	20N	24E	MD
(60) Proctor Ditch North 14,901,29014,900,772 feet and East 2,428,1992,427,717 feet	SW ¼ of NW ¼	3	20N	24E	MD
(61) Fellnagle Ditch North 14,905,654 feet and East 2,425,317 feet	NW ¼ of SE ¼	33	21N	24E	MD
(62) Olinghouse No. 2					

D R A F T

September 25, 2012

Ditch North 14,914,468 feet and East 2,431,328 feet	SW ¼ of SE ¼	22	21N	24E	MD
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Location of points of redirection (continued)

By Nevada Coordinate System of 1983, West Zone	40-acre subdivision of public land survey or projection thereof	Section (Projected)*	Township	Range	Base and Meridian
(63) Gardella Ditch North 14,922,553 feet and East 2,428,236 feet	SW ¼ of NW ¼	15	21N	24E	MD
(64) Olinghouse No. 3 Ditch North 14,923,152 feet and East 2,428,587 feet	SW ¼ of NW ¼	15	21N	24E	MD
(65) Indian Ditch (Nixon Ditch) North 14,959,013 <u>14,959,047</u> feet and East 2,408,112 <u>2,409,488</u> feet	SW ¼ of SW <u>NE</u> ¼	18 <u>12</u>	22N	23E	MD
<i>The following points of redirection apply only to Amended Permit 11605 and Amended License 10180</i>					
(8a) Truckee Meadows: Numerous points of redirection between points (8) and (40)	SE ¼ of NE ¼	30	19N	18E	MD
	SE ¼ of SW ¼	8	19N	20E	MD
(66) Newlands Project: Lahontan Dam North 14,839,256 feet and <u>East</u> 2,488,123 feet	Bearing N. 82°45'E. 3850 feet from SW corner	33	19N	26E	MD
(67) Newlands Project: Numerous points of redirection between Carson Diversion Dam North 14,849,892 feet and East 2,509,034 feet and Sagouspe Diversion Dam: North 14,867,558 feet and East 2,581,744 feet	Bearing N. 56°30'W. 1,885 feet from SW <u>SE</u> corner	19	19N	27E	MD
	Bearing N. 43°00'E. 3,620 feet from SW corner	4	19N	29E	MD

Table B – Location of Points of Diversion (POD), Places of Storage, and Points of Rediversion (POR) – Permit issued Pursuant to Application 31487, Amended Permit 11605 (Application 15673), Amended License 3723 (Application 5169), and Amended License 4196 (Application 9247)

By California Coordinate System of 1983, Zone 2	Source	40-acre subdivision of public land survey or projection thereof	Section	Township	Range	Base and Meridian
POD (1): Independence Dam (Independence Lake) North 2,295,098 feet and East 7,044,314 feet	Independence Creek	NW ¼ of SW ¼	35	19N	15E	MD
POD & POR (2): Stampede Dam (Stampede Reservoir) North 2,304,477 feet and East 7,096,882 feet	Little Truckee River	NW ¼ of NW ¼	28	19N	17E	MD
POD & POR (3): Boca Dam (Boca Reservoir) North 2,273,334 feet and East 7,099,243 feet	Little Truckee River	SE ¼ of SW ¼	21	18N	17E	MD
<i>See additional points of rediversion in Table A of this Decision.</i>						

Table C – Authorized Incidental Power Use at the following locations:

Powerhouse	Subdivision	Section	Township	Range	Base and Meridian
Stampede**	SW ¼ of NW ¼	28	19N	17E	MD
Farad	SE ¼ of SE ¼	12	18N	17E	MD
Fleish	NE ¼ of SE ¼	30	19N	18E	MD
Verdi	NW ¼ of SE ¼	8	19N	18E	MD
Washoe	SW ¼ of SW ¼	14	19N	18E	MD

** Not included in Permit issued pursuant to Application 31488 or License 10180, which do not include Incidental Power at the Stampede powerhouse.

Table D – Mandatory License Terms

The right hereby confirmed to the diversion and use of water is restricted to the point or points of diversion herein specified and to the lands or place of use herein described.

Reports shall be filed promptly by the licensee on the appropriate forms which will be provided for the purpose from time to time by the State Water Board.

Licensee shall allow representatives of the State Water Board and other parties, as may be authorized from time to time by the State Water Board, reasonable access to project works to determine compliance with the terms of this license.

Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this license, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the State Water Board may be exercised by imposing specific requirements over and above those contained in this license with a view to eliminating waste of water and to meeting the reasonable water requirements of licensee without unreasonable draft on the source. Licensee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this license and to determine accurately water use as against reasonable water requirement for the authorized project. No action will be taken pursuant to this paragraph unless the State Water Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the State Water Board also may be exercised by imposing further limitations on the diversion and use of water by the licensee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the State Water Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution article X, section 2; is consistent with the public interest and is necessary to preserve or restore the uses protected by the public trust.

The quantity of water diverted under this license is subject to modification by the State Water Board if, after notice to the licensee and an opportunity for hearing, the State Water Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the State Water Board finds that: (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

This license does not authorize any act which results in the taking of a threatened or endangered species or candidate species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code §§ 2050 to 2089) or the federal Endangered Species Act (16 U.S.C.A. §§ 1531 to 1544). If a “take” will result from any act authorized under this water right, the licensee shall obtain authorization for an incidental take prior to construction or operation of the project. Licensee shall be responsible for meeting all requirements of the state or federal Endangered Species Acts for the project authorized under this license.

If construction or rehabilitation work is required for the diversion works covered by this license within the bed, channel, or bank of the affected water body, the licensee shall enter into a streambed or lake alteration agreement with the State Department of Fish and Game. Licensee shall submit a copy of the agreement, or waiver thereof, to the Division of Water Rights prior to commencement of work. Compliance with the terms and conditions of the agreement is the responsibility of the licensee.

This license is granted and the licensee accepts all rights herein confirmed subject to the following provisions of the Water Code:

Section 1625. Each license shall be in such form and contain such terms as may be prescribed by the State Water Board.

Section 1626. All licenses shall be under the terms and conditions of this division (of the Water Code).

Section 1627. A license shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code) but no longer.

Section 1628. Every license shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article (of the Water Code) and the statement that any appropriator of water to whom a license is issued takes the license subject to the conditions therein expressed.

Section 1629. Every licensee, if he accepts a license, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefore shall at any time be assigned to or claimed for any license granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any licensee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any licensee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

Section 1630. At any time after the expiration of twenty years after the granting of a license, the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State shall have the right to purchase the works and property occupied and used under the license and the works built or constructed for the enjoyment of the rights granted under the license.

Section 1631. In the event that the State, or any city, city and county, municipal water district, irrigation district, lighting district, or political subdivision of the State so desiring to purchase and the owner of the works and property cannot agree upon the purchase price, the price shall be determined in such manner as is now or may hereafter be provided by law for determining the value of property taken in eminent domain proceedings.