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STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

In the Matter of:

Water Right 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, Permit 11605
(Application 15673) and License 10180
(Application 18006) of the United States
Bureau of Reclamation

) Hearing Officers: Tam Doduc and
) Charles Hoppin

) **JOINT CLOSING BRIEF OF**
) **UNITED STATES DEPARTMENT**
) **OF THE INTERIOR, BUREAU OF**
) **RECLAMATION; TRUCKEE**
) **MEADOWS WATER**
) **AUTHORITY; WASHOE COUNTY**
) **WATER CONSERVATION**
) **DISTRICT; CALIFORNIA**
) **DEPARTMENT OF WATER**
) **RESOURCES; PYRAMID LAKE**
) **PAIUTE TRIBE; AND CITY OF**
) **FERNLEY**

) Date: July 21-23; 28-29, 2010

) Time: 9:00 a.m.

) Dept: 1001 I Street, Second Floor
) Coastal Hearing Room
) Sacramento, California

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

12 I. INTRODUCTION.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 **A. Introduction.**

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

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

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

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

25 **1. Introduction.**

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

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

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

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

17 As a result of *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252
18 (D.C. Cir. 1973), which is further described in *Truckee-Carson Irrigation District v.*
19 *Secretary*, 742 F.2d 527 (9th Cir. 1984), diversions from the Truckee River to the
20 Carson Division of the Newlands Project are now closely regulated pursuant to federal
21 regulations referred to as "Operating Criteria and Procedures for the Newlands
22 Reclamation Project" ("OCAP"). Joint-9, 43 C.F.R., §§ 418.1, et seq. A key element of
23 OCAP is the portion of the regulation dealing with diversions of Truckee River water to
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26
27

28 ⁷ It should be noted that Claim No. 3 of the Orr Ditch Decree states that water diverted
under it is subject to "such control, disposal, and regulation as the [United States] may
make or desire." See, Joint-7, Claim No. 3 at 10.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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