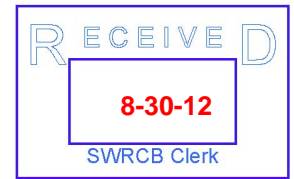




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VIA E-MAIL

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
Sacramento, CA 95812-0100
commentletters@water-boards.ca.gov

Re: COMMENT LETTER - 9/17/12 BOARD WORKSHOP: Truckee River Decision

Dear Ms. Townsend:

The Truckee River Irrigation District ("TCID") would like to thank the State Water Resources Control Board ("State Board") for the opportunity to comment on the Draft 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) ("Draft Decision").

TCID is responsible under contract with the United States Bureau of Reclamation ("BOR") to operate and maintain the Newlands Reclamation Project ("Newlands Project") in Nevada. TCID delivers water to landowners who have contracted either with the United States or with TCID for water rights appropriated by the United States under the Reclamation Act (43 U.S.C. §371, et seq.) and as a party to the water rights decree on the Truckee River, known as the *Orr Ditch Decree* (*US. v. Orr Water Ditch Co.*, Equity A-3-LDG U.S. District Court, Nevada, September 8, 1944). (App./Pet. Joint-7) The TCID Board of Directors is organized under Nevada Revised Statutes, section 539, and is elected by the water right owners. It has overall responsibility for the operation and maintenance of the Newlands Project. In 1926, the BOR contracted with TCID to operate and maintain the Newlands Project. (TCID-5) The most recent contract between TCID and the BOR is dated November 25, 1996. (TCID-161) The water rights in the Newlands Project are owned by the individuals.

The Newlands Project contains the Lake Tahoe Dam and Derby Diversion Dam on the Truckee River, the Truckee Canal, Lahontan Dam and Reservoir, the Carson Diversion Dam, three hydroelectric power facilities, and over 900 miles of canals, laterals and drains. Water supplies for the Newlands Project are derived from Carson River and direct diversions on the Truckee River and as well as releases of previously stored water in Donner lake, Lake Tahoe, Prosser Creek Reservoir, Boca Reservoir, and Lahontan Reservoir. Truckee River and its tributaries supply water to several hundred thousand individuals, to farms, ranches, businesses, and to flora and fauna over a vast area, stretching from the Sierra Nevada Mountains to the Stillwater Range in Churchill County.

Jurisdiction of the *Orr Ditch Decree* Court

Draft Decision at pages 13-14

1. The Draft Decision determines that the State Board can take action without deferral to the *Orr Ditch Decree* Court, and that it is not depriving the *Orr Ditch Decree* Court of exclusive jurisdiction or violating the Decree. To support this determination, the Draft Decision cites to Water Code §174, which provides the State Board for the "efficient administration of the water resources" to "exercise the adjudicatory and regulatory functions of the state in the field of water resources." It does not allow the State Board to implement decisions impacting decreed water rights.
2. Likewise, the issue raised by the protestants in this matter is not about the administrative authority of the State Board over the appropriation and use of water under Water Code §1225, or the prevention of waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water under Water Code §275. See Draft Decision at p. 14. Here, the issue related to the *Orr Ditch Decree* is not the administration of water rights, rather, it is an issue of the determinative rights under the *Orr Ditch Decree* and the Truckee River Agreement ("TRA") (App./Pet. Joint -6) as incorporated into the *Orr Ditch Decree*. (See App./Pet. Joint-7 at p. 86) The *Orr Ditch Decree* has exclusive jurisdiction over these water rights. *United States v. Alpine Land & Reservoir Co.* 174 F.3d 1007, 1012-1014 (1999). The Draft Decision does not adequately address the fact that the Conditionally Approved Applications and Petitions specifically violate the *Orr Ditch Decree* and TRA.
3. Although Water Code §2900 does not contemplate an interstate decree, it does show that jurisdiction related to an increase or decrease in the quantity of water generally remains with the court. See *In re Waters of Long Valley Creek Stream System* (1978) 84 Cal. App. 3d 140; *Superseded by In re Waters of Long Valley Creek Stream System* (1979) 25 Cal. 3d 339 (State Board is obligated to formulate orders in a manner not inconsistent with court adjudicated water rights.) The *Orr Ditch Decree* is binding on the parties to this proceeding, and the State Board determination must be consistent with the *Orr Ditch Decree*. *Id.*
4. The statement that the *Orr Ditch 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" is incorrect and internally inconstant. See Draft Decision at p. 22 (acknowledges that 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*."); pp. 25-26 (discusses operation of Boca Reservoir and release of Truckee Canal diversions under the *Orr Ditch Decree* and the TRA); pp. 27-28 (discusses the operation and storage of Truckee Meadows Water Authority's *Orr Ditch Decree* water rights under the Truckee River Operating Agreement ("TROA")). The subject Conditionally Approved Applications and Petitions specifically contemplate storage of water that is the subject of the *Orr Ditch Decree* Court, whose jurisdiction cannot be circumvented.

Draft Decision at p. 16

5. Protestants are not suggesting that the TRA can deprive the State Water Board of its statutory responsibility for water rights administration or its independent duty to make required findings. However, the State Board should condition any administrative action or approval subject to the TRA. See Decision 435 and 1056 (acknowledging that water rights on the Truckee River are defined in part by the *Orr Ditch* Decree and the TRA).

Injury to Water Right Owners in the Newlands Project

Draft Decision at pp. 23-24

6. The injury analysis based simply on storage of priorities in relation to Claim 3 of the *Orr Ditch* Decree to demonstrate non-injury is an over simplification of the issues relating to redistribution of storage and exchanges between upstream reservoirs. See TCID 287, pages 10-16. The simple act of storing water in priority in itself may not cause injury, however moving that stored water to another larger reservoir to allow room for additional storage which would not have been there had the original stored right remained, potentially allows more water to be stored. For example, allowing Independence Lake stored water to be passed and stored in Stampede Reservoir has the same effect as enlarging Independence reservoir, thus expanding and initiating a new right.
7. The citation to *State Water Resources Control Bd. Cases* (2006) 136 Cal. App. 4th 674, 805 for the proposition that a downstream appropriator cannot require the owner of an upstream reservoir to release previously appropriated water has no application in this matter. In *State Water Resources Control Bd. Cases* the right at issue were contract water rights. The contract was interpreted as providing no right to water that Congress has directed must be used for other purposes (e.g. endangered species). Here, in addition to the contractual obligations in the TRA, the water rights owners in the Newlands Project own Claim 3 Water Rights under the *Orr Ditch* Decree. Junior appropriators can be injured by changes in diversion and beneficial use of senior water rights. See State Board Order WR 85-4 at p. 14. Further, Congress has specifically provided that these water rights must be protected through the operation of TROA. See Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Pub.L. No. 101-618 (Nov. 16, 1990), Tit. II, 104 Stat. 3289) (Settlement Act) at §210(b)(13). (App./Pet. Joint-16)
8. A junior water right owner is afforded protection when there is a long standing diversion pattern and flow that is changed by a senior water right owner.

It is generally recognized that one who makes substantial expenditures in reliance on long-continued diversion of water by another has the right to have the diversion continued if his investment would otherwise be destroyed.

Natural Soda Products Co. v. Los Angeles (1943) 23 Cal. 2d 193, 197.

When the owner maintains the dam but alters the flow to increase his profit at the expense of those below him, or merely to be arbitrary, it is reasonable to

require that the alterations shall not injure those who have relied on the customary operation of the dam in the past.

Id. at 198.

Here, testimony presented by Lyman McConnell, former TCID Project Manager, describes the agreements that the parties reached in the TRA, including agreement as to storage of water and required flow in the Truckee River. (TCID-282) Ernest C. Schank, President of the TCID discussed TCID's reliance on Floriston Rate water provided by the TRA and the negative impact to the Newlands Project that would result from the shortages anticipated by TROA, especially in critical dry years. (TCID-281).

Where the creator of the artificial condition intended it to be permanent, and a community of landowners or water users has been allowed to adjust itself to the presence and existence of the artificial watercourse or other artificial condition, acting upon the supposition of its continuance, and this has proceeded for a long time beyond the prescriptive period, the new condition will be regarded as though it were a natural one, its artificial origin being then disregarded by the law as it has been by the community. The creator of the artificial watercourse will be held to have dedicated it to the use of the community that has by long time become adjusted to it.

Chowchilla Farms, Inc. v. Martin (1933) 219 Cal. 1, 17; citing *Wiel on Water Rights*, volume 1, section 60.

A change in the flow of a stream that appears to be permanent usually leads to costly adjustments by those interested, as they come to regard the artificial condition as permanent. It is therefore reasonable that they should receive as much protection as if the condition were natural.

Natural Soda Products Co. at p. 197. The Draft Decision does not protect the historic flows in the Truckee River as part of the agreements reached in the TRA, which results in shortages that will negatively impact water users in the Newlands Project.

9. The Draft Decision 's conclusion that no shortages or injury have been proven is inconsistent with the evidence shown in the TROA EIS/EIR. Applicants analyzed the water resource impact in the Newlands Project and concluded that there will be shortages. This admission by Applicants cannot be ignored and provides a bases either to deny the Applications or to condition them to require that no shortages will occur due to TROA.
10. The statement that previously stored water is only available for use by the water right holder and that the downstream users have no legal interest in the water and therefore cannot be injured by the proposed changes is incorrect. The water users in the Newlands Project have an interest in the water that is released under the TRA to make Floriston Rates. These same water right owners have an interest in the waters in Stampede Reservoir as well, in accord with the existing permit. However, unlike *State*

Water Resources Control Bd. Cases, there is no contractual limitation to access the previously stored water.

11. Likewise, the statement that a downstream appropriator cannot require the owner of an upstream reservoir to release previously appropriated water is not correct in this situation. There is a contractual obligation to release this water to meet Floriston Rates, which is the very basis of the TRA.
12. The case *Stevens v. Oakdale Irrigation District* (1939) 13 Cal 343 is not applicable in this situation. *Stevens* deals with the reduction in the flow of previously abandoned "foreign" or "imported water." Here, the water at issue is not from a imported source and there is no "artificial flow." At issue here is the timing of released flow in the Truckee River and its tributaries.

Draft Decision at p. 29

13. The statement that all of Truckee Meadows Water Authority's Nevada change applications involve pre-1914 rights is not correct. See Nevada Permit 73798 (a change of Permit 63785 which changed a portion of Orr Ditch Claim 88a having a 4/1/1914 priority).

Stampede Reservoir

Draft Decision p. 25

14. The statement 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) is incorrect. Newlands Project water right owners have a right to call on water stored in Stampede Reservoir pursuant to the existing permit, and have a right to use water stored in Stampede Reservoir, which specifically has the Newlands Project as a place of use.

Boca Reservoir

Draft Decision pp. 25-26

15. It is improper and inconstant to rely on the TRA to establish priority in Boca to the first 25,000 af of storage, but to disregard the remainder of the TRA and the compromises and agreements made related to Floriston Rates.
16. The statement that the change petitions do not propose to alter the Floriston Rate regime is incorrect. The change petitions are specifically conditioned on TROA, which not only alters the Floriston Rate structure, it entirely supersedes the TRA Floriston Rate regime. TROA § 5.A.1(a) and § 5.A.3(a) (App./Pet. Joint-19).

Operation of TROA

Draft Decision pp. 27 and 32

17. Does the statement in the Draft Decision that proposed changes to water rights must comply with applicable procedures indicate that the SWRCB will require that for each change in purpose of use under TROA that the Applicants will be required to comply with the provisions of Water Code §1700 et seq?
18. Can you please provide authority for the statement that "[a]dditional notice or procedures are not generally required, however, when operations are conducted in accordance with the terms of a permit or license." Draft Decision at p. 27. How does this statement relate to the requirement under Water Code §1700 that water is appropriated for "one specific purpose?" To allow the multiple changes contemplated by TROA without any notice or administrative procedure circumvents the provisions in the Water Code required for each change in place or purpose of use.

Water Availability Analysis

Draft Decision pp. 48-49

19. There is nothing in Water Code §1202 that provides that that the "State Water Board may find that there is unappropriated water available even if there are other applications on file, with an earlier priority dates, that would make use of all of the unappropriated water."

Draft Decision pp. 52-54

20. The Draft Decision incorrectly considers the Pyramid Lake Piute Tribe's ("Tribe") appropriation under Nevada applications 48061 and 48494 as water available for appropriation and storage in California. Water Code §§1231 and 1232 provides an appropriation in Nevada made pursuant to TROA, as described in §205 of the Settlement Act (Joint Ex.-16), shall have full force and effect in California. Section 210(a)(2)(B) of the Settlement Act provides that TROA "shall not take effect until the Pyramid Lake Tribe's claim to the remaining water of the Truckee River which are not subject to vested and perfected rights has been fully resolved in a manner satisfactory to the State of Nevada and the Pyramid Lake Tribe." TROA §1.E.1. Further, TROA also explicitly states that the Tribe's unappropriated water rights shall be confirmed by the *Orr Ditch* Court for TROA to go into effect. The Tribe's Nevada Permits 48061 and 48494 should have full force and effect in California and thus drastically limit the amount of unappropriated water available.
21. The Tribe cannot give its consent to store water under Nevada Permits 48061 and 48494. As acknowledged in footnote 36 of the Draft Decision, there is no storage component to these rights. According to the logic of the Draft Decision, anyone having an *Orr Ditch* Decree right could "consent" to storage in an upstream reservoir including the Newlands Project Claim 3 rights. Consent to store and the right to store are two

completely different concepts. The Tribe has no rights to store this water and it should not be considered water available for appropriation.

22. The Draft Decision is inconsistent in its treatment of the Tribe's Nevada Permits 48061 and 48494. It claims that the State Board does not have to consider that the Truckee River is fully appropriated as a result of Nevada Permits 48061 and 48494 because the State Board only must consider the California share of the Interstate Allocation. p. 52. It then makes the determination that water is available because the Tribe's permitted amount of 477,851 afa is available for diversion and storage under the applications. p. 57. The storage or potential storage of the Tribe's water rights is simply not an issue in this proceeding and should not be considered by the State Board.
23. The Draft Decision fails to address the applications filed by the BOR in Nevada for 225,000 acre feet of new water. RT Vol. IV pp. 924:10 – 925:1.
24. Given that the runoff generated in California produces ~95% of the Truckee River water in Nevada and nearly all water rights are within Nevada, it is incorrect not to adopt the same position as the Nevada State Engineer and TROA signatory parties, that the Truckee River and its tributaries are fully appropriated.

Draft Decision pp. 59-60

25. The Draft Decision states: "The water availability analysis demonstrate that water is available to fill Stampede and Prosser Creek Reservoirs to their maximum capacities." Draft decision at p. 59. This is a completely different concept than that presented in Sec. 6.2.6 on page 60 which states there is sufficient water to fill Prosser and Stampede Reservoir from empty to full capacity within the year. There is a huge difference between filling Stampede Reservoir to its capacity of 226,500 af and storing 226,500 afa in any one year. Historically, from 1969 – 2005, Stampede Reservoir only stored more than 100,000 af in any given year three years (1980, 1993 & 1995) over this period of record (See TCID 301). The Draft Decision is confusing maximum reservoir capacities with annual volumes which could be potentially stored.

Beneficial Use or Water

Draft Decision pp. 60-61

26. The Draft Decision recognizes that the Application 31487 and 31488 seek multiple beneficial uses; including: domestic, municipal, industrial, irrigation, fish culture, recreational uses, conservation of Pyramid Lake Fishery, fish and wildlife protection and enhancement (including wetlands), power, and instream water quality enhancement. It then provides that under the operation of TROA the water may be used "for any of these common purposes of use requested in the applications and petitions." This appears to be a violation of Water Code § 1700, which requires that "[w]ater appropriated under the Water Commission Act or this code for one specific purpose shall not be deemed to be appropriated for any other or different purpose."

Terms and Conditions

Draft Decision p. 69

27. The Draft Decision states Applicant and Petitioners do not propose any reservoir construction is not completely correct. Currently the BOR is undertaking feasibility studies for the proposed raising of Stampede dam to increase reservoir capacity for the alleged sole purpose of flood protection.
28. The permits and licenses at issue should be conditions to provide that their operation under TROA may not cause shortages to the Newlands Project.
29. Draft Order items number 19, 26, and 36 should be correct to reflect that not all rights stored under the permits are pre-1914 rights. See item 13 above.

Respectfully submitted,

On behalf of 

Michael J. Van Zandt