



Linda S. Adams  
Secretary for  
Environmental Protection

# State Water Resources Control Board

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## Executive Office

Charles R. Hoppin, Chairman  
1001 I Street • Sacramento, California 95814 • (916) 341-5615  
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100  
Fax (916) 341-5621 • <http://www.waterboards.ca.gov>



Arnold Schwarzenegger  
Governor

July 27, 2010

## ELECTRONIC MAIL

Truckee River Hearing Service List

### TRUCKEE RIVER HEARING: RULING ON TRUCKEE MEADOWS WATER AUTHORITY'S MOTION TO EXCLUDE TESTIMONY AND EXHIBITS

This letter responds to the Truckee Meadows Water Authority's (TMWA) motion seeking an order by the State Water Resources Control Board (State Water Board) excluding certain expert reports and exhibits submitted by the Truckee-Carson Irrigation District (TCID). (TMWA "Motion to Exclude Testimony, Expert Reports and Exhibits Related to Issues Not Before the California State Water Resources Control Board (July 15, 2010) (TMWA Motion).") By letter dated July 19, 2010, the State Water Board gave the parties an opportunity to file an opposition to TMWA's motion. On July 23, 2010, TCID timely filed its "Opposition to [TMWA's] Motion to Exclude Testimony, Expert Reports and Exhibits." As explained herein, TMWA's motion is denied. Because the State Water Board's consideration of live testimony and cross-examination related to the consumptive use portion of water rights has the potential for the undue consumption of time, however, the parties are requested to consider a proposal set forth below to expedite this hearing by admitting testimony that was presented before the Nevada State Engineer.

TMWA seeks to exclude TCID's testimony, expert reports and exhibits relating to:

"(1) the consumptive use portion of water rights adjudicated for irrigation by the Orr Ditch Decree; and (2) whether the [State Water Board] should stay its action on these Applications and Change Petitions until after the court in *United States of America v. Orr Water Ditch Company, et al.*, in the United States District Court for the District of Nevada, in Equity No. A-3 (the "Orr Ditch Court") determines whether the Orr Ditch Decree may be modified or amended as necessary to allow the Truckee River Operating Agreement [(TROA)] to supersede the Truckee River Agreement."

(TMWA Motion, pp. 1-2.) The specific elements of TMWA's motion are addressed below.

As a threshold matter, TCID responds by contending that there is no statutory or regulatory procedure that allows a petitioner to limit evidence presented by a protestant or to limit the scope of review by the State Water Board. While the State Water Board does not require a particular form of petition, pleading, request, or motion, it has ample authority to receive and act

on evidentiary objections, or to act on its own accord, to ensure that the evidence presented is relevant to the issues in the proceeding before it and is otherwise appropriate for consideration in the proceeding. (See Gov. Code, § 11513, subd. (c) ["is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs"]; see generally Cal. Code Regs., tit. 23, § 648.5.1.) A hearing officer also has the "discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." (Gov. Code, § 11513, subd. (f); see also Cal. Code Regs., tit. 23, § 648.5, subd. (a) [conduct of proceeding].) Thus, the State Water Board is not required to receive all evidence submitted in an adjudicative proceeding; it has discretion to limit the presentation of evidence to non-repetitive evidence that is relevant to the board's determination of issues in the proceeding.

#### Testimony and Exhibits Relating to Consumptive Use

TCID's exhibits include TCID-244B, the Expert Report of Chris C. Mahannah regarding "M&I Consumptive Use Analysis (In the Matter of Protested Nevada Applications 73783, et al. and Related Secondary Applications)" and related exhibits, and TCID-280, the Expert Report of Chris Mahannah regarding "Agricultural Consumptive Use." These expert reports were presented at a hearing, held on December 14-17, 2009, before the Office of the Nevada State Engineer on TMWA's change applications to store the consumptive use portion of various Orr Ditch Decree rights in upstream Truckee River reservoirs in California.<sup>1</sup> On March 19, 2010, the Nevada State Engineer issued Ruling 6035, which approved the change applications and determined the consumptive use portion of the Orr Ditch Decree rights that would be allowed to be changed for storage. Judicial review of that ruling is now pending before the Orr Ditch Court.

TMWA asserts that the State Water Board does not have jurisdiction over changes to Orr Ditch Decree irrigation water rights, that TMWA has made no filing concerning such changes with the board, and that the notice for this proceeding did not involve any issue regarding changes to Orr Ditch Decree irrigation rights. TMWA further asserts that the Nevada State Engineer has heard and decided the issue of the appropriate consumptive use portion of water rights adjudicated for irrigation by the Orr Ditch Decree and that judicial review of the State Engineer's ruling is now pending before the Orr Ditch Court.

TCID responds that TWMA's motion should be denied because the State Water Board's statutes and regulations do not allow other administrative and judicial forums to make the determinations that the board is required to make, and that the board cannot grant the change petitions without violating the Truckee River Agreement and the Orr Ditch Decree. TCID further asserts that it is in the interest of judicial and administrative economy for the board to wait to act on the change petitions and applications until TROA is approved by the Orr Ditch Decree Court and the decree is modified.

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<sup>1</sup> "In the Matter of Protested Applications 73783, 73791, 73792, 73794 through 73800, 73849 through 73855, 73863, 73865, 73868 through 73872, 73908 through 73915, 73917, 73986, 73987, 74076 through 74085, 74193 through 74202 and related Secondary Applications S1, S2, S3, and S4" in the Office of the State Engineer of the State of Nevada.

I find that Mr. Mahannah's testimony on consumptive use appears to be relevant to at least one of the key hearing issues in this proceeding: whether the proposed changes have the potential to injure any legal user of water. Accordingly, I will allow his testimony on those matters to proceed. TMWA's motion to exclude TCID-244B through TCID-257 and TCID-280 and all attachments thereto (including TCID-144) is denied. This procedural ruling is without prejudice to any arguments the parties may have as to whether any rulings of the Nevada State Engineer should be considered conclusive in this proceeding and, if not, to what extent the State Water Board should defer to the expertise of the Nevada State Engineer. Nor does this ruling prejudice any issue concerning how to take into account the pendency of proceedings before the Orr Ditch Decree Court, including whether and how any approvals might be conditioned to allow modification as appropriate in light of the court's action.

I also recognize that hearing testimony and cross-examination on an issue that has already been the subject of testimony and cross-examination before the Nevada State Engineer has the potential to be unduly time consuming and a burden on some of the witnesses. In the interest of efficiency and economy, I am considering allowing direct examination and cross examination on these exhibits through the procedures set forth below.

It appears that Mr. Mahannah's testimony in his expert reports (TCID-244B and TCID-280) was presented in the December 2009 hearing before the Nevada State Engineer that led to the Ruling 6035. Because this testimony has been the subject of direct examination and cross examination under oath, and to ensure that the current hearing continues expeditiously, I will consider allowing TCID to submit portions of the transcript, if one exists, from the Nevada State Engineer's hearing in lieu of conducting direct examination and cross examination in this proceeding. Accordingly, on Wednesday morning, July 28, 2010, the parties should be prepared to briefly address the following questions:

1. Is there a transcript available of the direct examination and cross-examination relating to TCID-244B and TCID-280 from the Nevada State Engineer's December 2009 hearing on TMWA's change applications?
2. If so, is there any reason it cannot be admitted into evidence in this proceeding?
3. Will allowing additional direct examination or cross examination on TCID-244B, TCID-280, and related exhibits – direct testimony and cross examination in addition to that which has already been transcribed in connection with the December 2009 hearing – add probative value that outweighs the consumption of time that admitting that additional evidence would take?
4. Did Janet Carson Phillips or John Erwin testify on consumptive use matters at the December 2009 hearing before the Nevada State Engineer and did TCID have an opportunity to cross examine those witnesses on matters? If so, I will consider allowing TMWA to submit portions of the transcript containing the direct examination and cross examination in lieu of having their witnesses cross-examined further in this hearing. If not, I would like to hear whether there is other relevant testimony or cross-examination of other witness at the December 2009 hearing before the Nevada State Engineer that could substitute for testimony by Ms. Phillips or Mr. Erwin on consumptive use matters.

Recall of TMWA's Witnesses for Cross-Examination

TCID's cross-examination of TMWA's witnesses, Ms. Phillips and Mr. Erwin, on consumptive use matters, was deferred pending resolution of TMWA's Motion. I will decide whether to recall those witnesses after our discussion on Wednesday morning, July 28, 2010. Specifically, I will consider whether having these witnesses testify on cross examination on consumptive use matters has the potential for consumption of time that substantially outweighs the probative value of that testimony, taking into account the extent to which there is evidence from the December 2009 hearing before the Nevada State Engineer that could be used in lieu of their being recalled for further testimony in this proceeding. If Ms. Phillips and Mr. Erwin are recalled to the hearing, TMWA may choose to have them appear on Thursday, July 29, instead of Wednesday, July 28, to avoid having the witnesses travel on a day when they may not need to appear.

Testimony and Exhibits Relating to the Request for Deferral of Action

In TCID-282, "Direct Testimony of Lyman F. McConnell in support of Protest of [TCID]," Mr. McConnell testifies that the Orr Ditch Court should act first on the proposed changes in the management scheme of the Truckee River to implement TROA before the SWRCB should act on the pending applications and petitions. TMWA seeks to exclude this portion of Mr. McConnell's testimony, in part, asserting that the State Water Board can and should decide hearing issues related to the applications and change petitions without any need to know whether the Orr Ditch Court will allow the Orr Ditch Decree to be modified or amended to accommodate the TROA. TCID responds that the State Water Board cannot take any action that deprives the Orr Ditch Court of its exclusive jurisdiction or that violates the Orr Ditch Decree and, in the interest of administrative and judicial economy, the Orr Ditch Court should act first on the proposed changes in the management scheme of the Truckee River to implement TROA.

TMWA's motion to exclude TCID-282, p. 7, ln. 4 to ln. 17 is denied. Mr. McConnell's testimony includes legal opinion and argument as to the scope and effect of the Orr Ditch Court's jurisdiction. The parties will be given an opportunity to address legal issues in their closing briefs and the State Water Board will decide those legal issues itself. The State Water Board will allow Mr. McConnell's testimony for the opinion testimony it otherwise provides, and will weigh it accordingly.

Testimony and Exhibits Relating to the Truckee River Agreement and Decision 435

TMWA also moves to exclude portions of Mr. McConnell's testimony (TCID-282) related to Decision 435 (TCID-34), in which the State Water Board's predecessor, the Division of Water Resources, acted on applications to appropriate water in various upstream Truckee River reservoirs in California after the Truckee River Agreement was negotiated among the parties. Mr. McConnell's testimony provides a historical overview of the role of the Truckee River Agreement in resolving the protest issues relating to the applications. This historical context is arguably relevant to this proceeding; accordingly, TMWA's motion to exclude TCID-282, p. 8, ln.14 to p. 10, ln. 26 is denied.

To the extent, however, Mr. McConnell's testimony cites to TCID exhibits that include documents produced by and records of executive branch agencies, including the Truckee River Agreement (TCID-19) and official records of the State Water Board, the Board will not accept Mr. McConnell's testimony for the truth of the matters asserted within those documents. TMWA's objection bears on the weight of his testimony and accordingly, the State Water Board will take the objection into account when weighing Mr. McConnell's evidence.

If you have any questions about this letter, please contact Erin K.L. Mahaney, Senior Staff Counsel, at (916) 341-5187.

Sincerely,



Tam M. Doduc  
Hearing Officer

cc: Mr. Charles R. Hoppin, Chairman  
Executive Office  
State Water Resources Control Board  
1001 I Street, 26<sup>th</sup> Floor [95814]  
P.O. Box 100  
Sacramento, CA 95812-0100

**SERVICE LIST  
(July 27, 2010)**

**PARTIES TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS, AND OTHER DOCUMENTS.** (Note: The parties listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

Truckee Carson Irrigation District  
Michael J. Van Zandt  
Hanson Bridgett LLP  
425 Market Street, 26<sup>th</sup> Floor  
San Francisco, CA 94015  
(415) 777-3200  
[mvanzandt@hansonbridgett.com](mailto:mvanzandt@hansonbridgett.com)

U.S. Bureau of Reclamation  
Stephen R. Palmer  
Office of the Solicitor,  
Department of Interior  
2800 Cottage Way, Room E-1712  
Sacramento, CA 95825  
(916) 978-5683  
[stephen.palmer@sol.doi.gov](mailto:stephen.palmer@sol.doi.gov)

City of Fernley  
Paul G. Taggart  
Taggart & Taggart, Ltd.  
108 North Minnesota Street  
Carson City, NV 89703  
(775) 882-9900  
[paul@legaltnt.com](mailto:paul@legaltnt.com)

California Department of Water Resources  
Erick D. Soderlund  
1416 Ninth Street, Room 1118  
Sacramento, CA 95814  
(916) 653-8826  
[esoderlu@water.ca.gov](mailto:esoderlu@water.ca.gov)

Pyramid Lake Paiute Tribe  
Don Springmeyer  
Christopher W. Mixson  
Wolf, Rifkin, Shapiro,  
Schulman & Rabkin LLP  
3556 E. Russell Road, 2<sup>nd</sup> Floor  
Las Vegas, NV 89120  
(702) 341-5200  
[dspringmeyer@wrslawyers.com](mailto:dspringmeyer@wrslawyers.com)  
[cmixson@wrslawyers.com](mailto:cmixson@wrslawyers.com)

Churchill County  
Rusty D. Jardine  
Churchill County District Attorney's Office  
155 North Taylor Street, Suite 156B  
Fallon, NV 89406  
(775) 428-0346  
[rjardine@churchillda.org](mailto:rjardine@churchillda.org)

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Truckee Meadows Water Authority  
Gordon H. DePaoli  
Woodburn and Wedge  
6100 Neil Road, #500  
Reno, NV 89511  
(775) 688-3000  
[gdepaoli@woodburnandwedge.com](mailto:gdepaoli@woodburnandwedge.com)  
[dferguson@woodburnandwedge.com](mailto:dferguson@woodburnandwedge.com)  
[jill.willis@bbklaw.com](mailto:jill.willis@bbklaw.com)  
[stefanie.hedlund@bbklaw.com](mailto:stefanie.hedlund@bbklaw.com)

Washoe County Water Conservation  
District  
Michael A.T. Pagni  
P.O. Box 2670  
Reno, NV 89505  
(775) 788-2020  
[mpagni@mcdonaldcarano.com](mailto:mpagni@mcdonaldcarano.com)

City of Fallon  
Michael F. Mackedon  
P.O. Box 1203  
Fallon, NV 89407  
(775) 423-2106  
[fallonlaw@phonewave.net](mailto:fallonlaw@phonewave.net)

**LIST OF INTERESTED PERSONS MAKING POLICY STATEMENTS ONLY  
(PARTIES ARE NOT REQUIRED TO SERVE THE FOLLOWING PERSONS WITH  
WRITTEN TESTIMONY, EXHIBITS, AND OTHER DOCUMENTS)**

California Department of Fish and Game  
Chandra Ferrari  
1416 Ninth Street, 12<sup>th</sup> Floor  
Sacramento, CA 95814  
(916) 654-3819  
[Cferrari@dfg.ca.gov](mailto:Cferrari@dfg.ca.gov)

State of Nevada  
John W. Hoffman  
429 West Plumb Lane  
Reno, NV 89509  
(775) 322-4081  
[office@htag.reno.nv.us](mailto:office@htag.reno.nv.us)