

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

In the Matter of:)
)
)
Public Hearing to Consider 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, and Permit)
11605 (Application 15673) and License)
10180 (Application 18006) of the United)
States Bureau of Reclamation Truckee)
River Watershed)
~~~~~ )

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SACRAMENTO, CALIFORNIA

VOLUME IV

WEDNESDAY, JULY 28, 2010

9:04 A.M.

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CERTIFIED SHORTHAND REPORTER  
LICENSE NUMBER 4375

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1 P R O C E E D I N G S

2 --o0o--

3 CO-HEARING OFFICER DODUC: Good morning,  
4 everyone. Welcome back. Hopefully everyone had a  
5 restful weekend in two days.

6 Yesterday a little before 1:00, I think, you  
7 should have received a letter from me issuing the ruling  
8 on Truckee Meadows Water Authority's motion to exclude  
9 testimony and exhibits.

10 In that ruling there were four issues I asked  
11 everyone to be prepared to address this morning, and I  
12 believe that at least issue number one has been  
13 addressed. Thank you, Mr. Van Zandt, for sending in the  
14 transcripts. So that leaves us a couple other items to  
15 address this morning.

16 Why don't we begin, Mr. Van Zandt, with you.  
17 I'll ask all the counsel to keep it concise, but please  
18 take five or ten minutes to address issues 2, 3 and 4.  
19 And we'll begin with Mr. Van Zandt.

20 MR. VAN ZANDT: Thank you, Board Member Doduc.  
21 Good morning, Chairman Hoppin, and members of the staff.

22 Obviously, we appreciate the ruling on the  
23 motion to exclude. We've already served the transcripts  
24 for Mr. Mahannah's testimony on the parties as well as  
25 served it with the Board. We do have hard copies as

1 well to file. We believe there is no reason why that  
2 cannot be admitted into evidence, and we would agree to  
3 limit Mr. Mahannah's testimony to merely introduce those  
4 exhibits, his report and the testimony. And the only  
5 thing he will say about it is just give the overall  
6 opinion and stop at that point and then go on to his  
7 next subject which is the unappropriated water.

8           On additional direct and cross-examination, I  
9 believe -- I think we would stand on the transcript and  
10 not provide any additional direct testimony other than  
11 the report and the transcript and let the Board review  
12 that and make its own determination based on its review  
13 of the reports and the transcripts, and hopefully the  
14 other side will agree to limit their cross as well.

15           On Janet Carson Phillips and John Erwin, at  
16 this point in time I don't think it would be useful to  
17 recall them. We'll just stand on the testimony that  
18 Mr. Mahannah and the cross that's in the transcripts. I  
19 don't think from my perspective that those two witnesses  
20 would necessarily add anything to that.

21           CO-HEARING OFFICER DODUC: Let me understand,  
22 Mr. Van Zandt. Are you withdrawing your request for  
23 additional cross-examination of those two witnesses?

24           MR. VAN ZANDT: Yes.

25           CO-HEARING OFFICER DODUC: Okay.

1 MR. VAN ZANDT: And I believe the parties from  
2 the other side, Mr. DePaoli and Mr. Palmer, are  
3 intending on perhaps adding some additional transcripts  
4 from the Nevada hearing. I'll let them address that.  
5 Thank you.

6 CO-HEARING OFFICER DODUC: Thank you,  
7 Mr. Van Zandt.

8 Mr. Mackedon, did you have anything to add?

9 MR. MACKEDON: I have nothing to add.

10 CO-HEARING OFFICER DODUC: Thank you very much.  
11 So Mr. Palmer?

12 MR. PALMER: I'd like to defer to Mr. DePaoli.

13 CO-HEARING OFFICER DODUC: Will Mr. DePaoli be  
14 speaking on behalf of all the joint parties? Thank you.

15 Good morning, Mr. DePaoli.

16 MR. DePAOLI: Good morning, members and staff.

17 I agree. Subject to the original objection  
18 that I made or without waiving the original objection I  
19 made, I see no reason not to admit the transcripts  
20 related to consumptive use from the Nevada hearing into  
21 evidence. I see no reason that there is any need to  
22 call a witness to identify that or to do anything more  
23 with it. I have no need for any additional cross  
24 relative to that.

25 With respect to question 4, Janet Carson did

1 not testify at all in the Nevada proceeding. John Erwin  
2 did testify but not as to consumptive use.

3           There is another witness who did testify in the  
4 Nevada proceeding on consumptive use, Mr. Lee Bergfeld  
5 from MBK Engineers. I would like to add the complete  
6 transcript of his direct, cross and recross from the  
7 Nevada proceeding. I have that. I have not had a  
8 chance to make additional copies of it or to submit it  
9 electronically, but I would do that as quickly as I can.

10           I would like to include with that two of his  
11 exhibits, Exhibit 120 having been his statement of  
12 qualifications from the Nevada proceeding, and  
13 Exhibit 121 from the Nevada proceeding which was his  
14 report there. He did have two additional exhibits, one  
15 that was submitted, one that was not. The one that was  
16 submitted, the same figures are in his report, so I  
17 don't think there is any need to add to the record with  
18 those exhibits.

19           But subject to being able to add that  
20 additional testimony and report and qualifications of  
21 Mr. Bergfeld, I'm satisfied with that solution for  
22 proceeding forward.

23           CO-HEARING OFFICER DODUC: Mr. Van Zandt, any  
24 objections to Mr. DePaoli's additional submissions?

25           MR. VAN ZANDT: No objection.

1 CO-HEARING OFFICER DODUC: Very well.  
2 Ms. Mahaney, any procedural questions from you?

3 SENIOR STAFF COUNSEL MAHANEY: Just a  
4 housekeeping matter for Mr. Van Zandt. The exhibits of  
5 Mr. Mahannah, of course, have an exhibit number for the  
6 prior proceeding. We'd like to know what the  
7 corresponding exhibit number is for the Nevada  
8 proceeding that might be cited in that transcript.

9 Does that make sense? Apparently not.

10 MR. VAN ZANDT: Well --

11 SENIOR STAFF COUNSEL MAHANEY: Those reports  
12 were filed in the Nevada proceeding, and we just need to  
13 make sure we know which exhibit number was used in the  
14 Nevada proceeding that corresponds to the reports in  
15 this proceeding. We just want to track the exhibit  
16 numbers.

17 MR. VAN ZANDT: Okay.

18 SENIOR STAFF COUNSEL MAHANEY: As Mr. DePaoli  
19 explained for his witness.

20 MR. VAN ZANDT: We were not intending on  
21 introducing Mr. Mahannah's report from the Nevada  
22 proceedings because the reports that are before the  
23 board here in this proceeding are essentially -- contain  
24 the same information. So we didn't want to duplicate  
25 that.

1 SENIOR STAFF COUNSEL MAHANEY: Okay.

2 MR. VAN ZANDT: So we would stand on the  
3 reports we've already submitted for consumptive use, for  
4 M&I and agriculture. Those are two separate reports. I  
5 can give you the numbers of those, but we won't submit  
6 any additional reports from the Nevada proceeding. Does  
7 that make sense?

8 CO-HEARING OFFICER DODUC: We were not asking  
9 for additional reports, thank you, we have plenty; we  
10 were asking for the correct references, because they may  
11 be numbered differently from what you submitted before  
12 and what you submitted to us for this proceeding, unless  
13 they're numbered exactly the same. I don't think so.

14 MR. VAN ZANDT: No. I'll get you those  
15 numbers.

16 CO-HEARING OFFICER DODUC: Okay. We don't need  
17 it right now.

18 Thank you, gentlemen, for addressing those  
19 issues so promptly and so efficiently. With that then  
20 we will go ahead and continue with Mr. Van Zandt, and  
21 your next witness:

22 MR. VAN ZANDT: I call Lyman McConnell to the  
23 stand, please.

24 CO-HEARING OFFICER DODUC: Mr. Van Zandt, as  
25 you bring up your witnesses today, please confirm that

1 they've taken the oath, and if they have not then I will  
2 be glad to administer it.

3 --o0o--

4 LYMAN F. McCONNELL

5 called by Truckee Carson Irrigation District and  
6 Churchill County

7 DIRECT EXAMINATION BY MR. VAN ZANDT

8 --o0o--

9 MR. VAN ZANDT: Good morning, Mr. McConnell.  
10 Would you state your name and spell your last name for  
11 the record, please.

12 THE WITNESS: My name is Lyman McConnell.  
13 L-y-m-a-n M-c-C-o-n-n-e-l-l.

14 MR. McCONNELL: Okay, Mr. McConnell. Were you  
15 present when the oath was administered on Wednesday of  
16 last week?

17 MR. McCONNELL: Yes, I was, and I said yes.

18 MR. VAN ZANDT: And, Mr. McConnell, give us  
19 just a brief overview of what your qualifications and  
20 your experience is.

21 MR. McCONNELL: I have a law degree from  
22 McGeorge School of Law, and I worked in Fallon for a few  
23 years as an attorney before I was approached to be the  
24 project manager for the District. And I worked as the  
25 project manager for the Truckee Carson Irrigation

1 District from November of 1984 until March of 2006. So  
2 I was project manager for 22 years.

3 MR. VAN ZANDT: And, Mr. McConnell, have you  
4 prepared direct testimony for these proceedings?

5 MR. McCONNELL: Yes, I have.

6 MR. VAN ZANDT: And are there any corrections  
7 to your direct testimony?

8 MR. McCONNELL: Yes, I have three.

9 MR. VAN ZANDT: Would you provide those for the  
10 Board, please.

11 MR. McCONNELL: On page 10, line 13, I would  
12 like to strike after the word reservoir. It indicates  
13 that the water is to be applied to, and replace that  
14 with "was modified by the Truckee River Agreement to  
15 benefit."

16 And then I would like to add two additional  
17 exhibit references to that statement. They are TCID-32  
18 and TCID-34 after the insert there that says TCID-3.

19 And then on page 11, line 18, I would like to  
20 change 5/1 to 4/1.

21 And then the third one is on page 13, line 19.  
22 I would like to change the exhibit number there from  
23 TCID-119 to TCID-117.

24 And that's all the corrections I have.

25 MR. VAN ZANDT: And, Mr. McConnell, with those

1 corrections is this a true and correct copy of your  
2 direct testimony?

3 MR. McCONNELL: Yes.

4 MR. VAN ZANDT: Thank you. Have you prepared a  
5 summary of your direct testimony?

6 MR. McCONNELL: I have.

7 MR. VAN ZANDT: And would you give that to the  
8 Board, please.

9 MR. McCONNELL: All right. Good morning, board  
10 members and staff.

11 I'm going to have a little bit of difficulty  
12 here because I need glasses for distance but I don't  
13 need them for reading, so I'm kind of in an in-between  
14 spot here.

15 CO-HEARING OFFICER HOPPIN: Why don't you just  
16 assume that we're up here and you can go ahead and read.

17 CO-HEARING OFFICER DODUC: We promise not to  
18 make faces at you that you'll miss.

19 MR. McCONNELL: All right. As I indicated  
20 previously, I have a law degree from McGeorge School of  
21 Law, and I reside in Fallon, Nevada, and have for the  
22 past 30 years, 33 years. It is my home, and I enjoy the  
23 rural nature and quiet of the area. There is lots of  
24 wildlife, plenty of stars and friendly people. It was a  
25 very safe place to raise my daughter.

1           As I mentioned before, I was the project  
2 manager for the Truckee Carson Irrigation District for  
3 22 years. My testimony today is based upon my  
4 experience in implementing the various agreements and  
5 decrees and my review of the upstream reservoirs.

6           As TCID project manager, I was responsible for  
7 the overall operation and maintenance of the Newlands  
8 Project. I was also responsible for the administration  
9 of the project and am familiar with the records of the  
10 District. I reported to the board of directors who set  
11 policy.

12           As project manager over the years I became  
13 familiar with the historical and legal records of the  
14 District. My duties included dealing with the Bureau of  
15 Reclamation in regard to the operations of the District  
16 and the water available to serve the project water right  
17 owners. I also worked with the Federal Water Master in  
18 the diversion of the water into the project.

19           There have been several negotiations over the  
20 years regarding water and its use as well as many  
21 lawsuits filed by the government in the Pyramid Lake  
22 tribe to reduce water use on the project. In that  
23 regard I became familiar with the Orr Ditch Decree which  
24 established the water rights for the water right owners  
25 on the Truckee River and incorporated into that decree

1 is the Truckee River Agreement. I also became familiar  
2 with the Alpine Decree which adjudicated the water  
3 rights on the Carson River.

4           The purpose of my testimony is to give you a  
5 historic background on the settlement of the Truckee  
6 River water rights and a perspective on the compromises  
7 that were made to resolve the conflicts on the river.  
8 It is important to understand those compromises as the  
9 various parties want to keep the benefits they received  
10 in those negotiations and do now want to recognize the  
11 benefits that the District received in exchange for its  
12 compromises.

13           You have heard some of this information before,  
14 but it's helpful to hear it again and in the context as  
15 I outlined it.

16           First, of course, the Congress of the U.S.  
17 passed the Reclamation Act in 1902 which authorized the  
18 Secretary of Interior to construct federal projects to  
19 irrigate land in the west. The Truckee-Carson Project  
20 now known as the Newlands Project was one of the first  
21 five authorized in 1903. Derby Dam on the Truckee River  
22 became the first project of the Reclamation Service, now  
23 the Bureau of Reclamation. It was completed in 1905.

24           At the same time the Federal Government posted  
25 notices throughout the area that it was appropriating

1 water rights for the project. In 1913 the government  
2 filed the Orr Ditch case to quiet title to the water  
3 rights on the Truckee River.

4 In 1915 the federal court entered an order  
5 known as the G.E. Decree giving the U.S. the rights to  
6 the dam and the easement at the outlet of Lake Tahoe.  
7 That decree established the flow regime that is known as  
8 Floriston Rates which you have heard is 500 cfs during  
9 the irrigation system and 400 cfs during the winter.

10 In 1926 the federal court in the Orr Ditch case  
11 entered a temporary restraining order setting forth the  
12 initial claims and rights to the water in the Truckee  
13 River.

14 Later that year the U.S. Department of the  
15 Interior entered into an agreement with the Truckee  
16 Carson Irrigation District to operate and maintain the  
17 Newlands Project and for the District to be responsible  
18 to collect and pay to the government the construction  
19 costs of the project.

20 That same year an application number 5169 was  
21 filed with the California Division of Water Right to  
22 store water from the Little Truckee River, a tributary  
23 to the Truckee River. That application was later  
24 amended and assigned to the Washoe County Water  
25 Conservation District. The Truckee Carson Irrigation

1 District protested that particular application.

2 In 1928 the District filed for storage in  
3 Donner Lake from Cold Creek, Application 6131, and the  
4 District was concerned about drought protection for the  
5 bench lands on the project.

6 As a result of these applications and the dry  
7 water years occurring in the late '20s and '30s, the  
8 parties began negotiations to resolve their conflicting  
9 claims. Those negotiations resulted in the 1935 Truckee  
10 River Agreement. The California Division of Water  
11 Resources delayed the hearings on these applications at  
12 the request of the parties so that negotiations of the  
13 Truckee River Agreement could be completed.

14 After the agreement was signed by the United  
15 States, the Truckee Carson Irrigation District, the  
16 Washoe County Water Conservancy District and Sierra  
17 Pacific Water Company, the California Division of Water  
18 Resources held a hearing on the application.

19 It was understood at that hearing that storage  
20 in Boca Reservoir under Application 5169 would be  
21 operated in accordance with the Truckee River Agreement.

22 The Truckee River Agreement provided benefits  
23 to the Newlands Project as well as others and the  
24 parties made concessions and were provided with benefits  
25 in exchange.

1           It was agreed in the Truckee River Agreement  
2 that Washoe County Water Conservancy District could  
3 store 25,000 acre feet of water in Boca Reservoir out of  
4 Truckee Canal water as well as additional storage up to  
5 a full reservoir of about 40,000 acre feet. TCID was  
6 given the right to 31 percent of the water that was  
7 diverted between the state line and Derby Dam.

8           As part of the compromises made, TCID allowed  
9 Sierra Pacific to divert up to 40 cfs out of that 31  
10 percent. TCID was also given priority over those  
11 upstream to ensure that it received 31 percent of the  
12 calculated diverted flow.

13           Also it was agreed to allow TCID to divert all  
14 of the water out of the other 69 percent of the  
15 calculated diverted flow that was not being fully  
16 exercised for irrigation, domestic or stock watering  
17 purposes.

18           As part of the compromises made by the parties  
19 to the Truckee River Agreement, the Truckee Carson  
20 Irrigation District agreed to withdraw its protest to  
21 Application 5169 and allow storage in Boca Reservoir in  
22 addition to resolving the other applications that were  
23 being heard at the time.

24           In addition the parties agreed that if it  
25 became necessary to reduce Floriston Rates to conserve

1 water they could temporarily agree to reduce rates and  
2 conserve the water for everyone, not just special  
3 interests. The parties also agreed to provide the first  
4 priority on the river to the Pyramid Lake Indian Tribe  
5 as Claims 1 and 2 under the Orr Ditch Decree.

6 The parties agreed to diligently and in good  
7 faith cooperate with each other for the purposes of  
8 carrying out the provisions of the Truckee River  
9 Agreement, and the parties signed a stipulation for  
10 entry of a final decree in the Orr Ditch case which  
11 would incorporate the Truckee River Agreement, and  
12 because the parties agreed to certain actions in the  
13 Truckee River Agreement they agreed that the stipulation  
14 was irrevocable.

15 The petitions for change in this case,  
16 especially Application 5169, for Boca Reservoir is  
17 proposed to be operated under TROA, superseding the  
18 Truckee River Agreement without the consent of the  
19 Truckee Carson Irrigation District. This is in direct  
20 conflict with the agreements and concessions made that  
21 allowed for the granting of these applications under the  
22 California Division of Water Resources' Decision D438,  
23 1938.

24 As mentioned, TCID withdraw its protest to  
25 Application 5169 before the operative date of the

1 Truckee River Agreement, and TCID further would not  
2 receive upstream storage under TROA that it negotiated  
3 under the Truckee River Agreement and believed it  
4 obtained when it agreed to drop this protest.

5 In 1943 TCID and Sierra Pacific acquired the  
6 rights to storage and use of Donner Lake water. It is  
7 considered a privately-owned source of water under the  
8 Truckee River Agreement and has the rights as  
9 privately-owned stored water under that agreement to  
10 have the transportation of the water released from  
11 Donner Lake to the points of diversion without  
12 transportation losses in the Truckee River.

13 In 1944, the federal court entered the final  
14 decree in the Orr Ditch case. The court incorporated  
15 the Truckee River Agreement as the parties had  
16 stipulated. The final decree set forth water rights for  
17 the project. Those were Claims 3 and 4.

18 Claim 3 provided to the Newlands Project a  
19 diversion right with the priority of 1902 of 1500 cfs  
20 for irrigation, for storage in Lahontan Reservoir with a  
21 capacity of 290,000 acre feet, for generating power, for  
22 supply and inhabitants of cities and towns on the  
23 project, and for domestic and other purposes.

24 As has been brought up in prior testimony, the  
25 decree also states that such diversion right is under

1 such control, disposal and regulation as the plaintiff  
2 -- that is, the United States -- may make or desire.

3           The last statement of the control of the United  
4 States has been the subject of prior litigation. The  
5 United States and the Pyramid Lake Indian Tribe brought  
6 an action in the early '70s, I believe it was 1972, to  
7 reopen the Orr Ditch Court, Orr Ditch Decree, to  
8 allocate the waters of the Truckee River for the Pyramid  
9 Lake Indian Tribe. They wanted to reopen the entire  
10 decree.

11           The District Court held that it was  
12 res judicata. The 17,000 or so water users in the  
13 decree had relied upon the decree in their water rights  
14 for many years, and the court was not going to reopen  
15 the decree. That was appealed to the Ninth Circuit  
16 Court of Appeals. The Ninth Circuit reversed the  
17 District Court in the respect of being able to  
18 reallocate the water between Pyramid Lake and the  
19 project, leaving the other water users in the decree out  
20 of that reallocation.

21           So fortunate for the District that the U.S.  
22 Supreme Court took the writ of certiorari and heard that  
23 case, and that case became known as Nevada vs. U.S. and  
24 it was decided by the U.S. Supreme Court in 1983. And  
25 in that case they reversed the Ninth Circuit Court of

1 Appeals and stated -- this is the quote I like: If the  
2 U.S. thinks it can move water around like so many  
3 bushels of wheat, they are wrong.

4           The U.S. may hold bear legal title to the water  
5 rights on the project, but they act in regard to those  
6 water rights and the ownership like a mortgage company  
7 would have legal title to your home. That is, they had  
8 a lien on the water rights to ensure that the  
9 construction charges and the O&M costs and expenditures  
10 were repaid, but the beneficial ownership of the water  
11 rights within the project are owned by the individual  
12 land owners. So that was a very important decision for  
13 the project and the water right owners.

14           Claim 4 in the Orr Ditch Decree is the right to  
15 store about 6 feet of water in Lake Tahoe with the  
16 priority of 1903 and releases that water for the  
17 Newlands Project. These rights were compromised in the  
18 Truckee River Agreement by providing other parties  
19 benefits in the Truckee River Agreement as mentioned  
20 earlier.

21           With regard to Prosser Reservoir, that  
22 reservoir was completed in the 1962-63 time frame, and  
23 it was constructed as part of the Washoe Project Act.  
24 And the parties, the United States, TCID, Prosser County  
25 Water District and Sierra Pacific had entered into an

1 agreement in 1959 which is referred to as the Prosser  
2 Exchange Agreement. And that exchange agreement was to  
3 allow releases from Lake Tahoe when otherwise under the  
4 decree and under the Truckee River Agreement, releases  
5 would not occur, so that there would be a minimum flow  
6 below the dam during the summertime of about 70 cfs and  
7 in the wintertime about 50 cfs.

8 In that exchange agreement it was stated that  
9 the agreement is binding upon the parties. As well,  
10 when that exchange agreement was presented to the  
11 General Electric court for modification of the  
12 GE Decree, the GE Decree also held that that agreement  
13 was binding on the parties. And what it did, basically,  
14 is when the water was released from Lake Tahoe which  
15 wasn't part of the releases for Floriston Rates, then  
16 Prosser would have water that either would store at the  
17 same time or it would have water that was stored  
18 previously that could be utilized in the future for  
19 maintaining the Floriston Rates to make up the water  
20 that was released to make those minimum flows. The TROA  
21 is superseding this agreement.

22 In addition, the license for Prosser, the  
23 current license for Prosser from the State of California  
24 has the Newlands Project as place of use.

25 Stampede Reservoir was also part of the Washoe

1 Project Act, and it was constructed -- I think the  
2 completion was somewhere around 1970. And its current  
3 permit from the California State Water Resources Control  
4 Board and Division of Water Resources, I believe is the  
5 correct term, has the Newlands Project as the place of  
6 use.

7 But since 1975, the water use reports that I've  
8 seen did not identify any use being as of benefit to the  
9 Newlands Project.

10 CO-HEARING OFFICER DODUC: Mr. McConnell, you  
11 need to wrap up your testimony.

12 MR. McCONNELL: All right, I will. Just a few  
13 more, couple more minutes? Would that be okay?

14 CO-HEARING OFFICER DODUC: Okay.

15 MR. McCONNELL: And the releases from the water  
16 from Stampede have been actually in violation of that  
17 permit.

18 I believe that this matter should have gone to  
19 the Orr Ditch Court prior to these hearings. The  
20 parties have asked that any approval by this Board be  
21 conditioned on approval of the TROA by the Orr Ditch  
22 Court. They have made objections to our claims saying  
23 that some of those cause a waste of time. I would make  
24 the same statement about the fact that if the Orr Ditch  
25 Court somehow modifies the TROA and the parties cannot

1 get things worked out, then we've wasted a lot of money  
2 and time with these hearings.

3           The Alpine Decree has a provision in it that if  
4 water changes are to be made in California or both in  
5 Nevada and California, that those changes go directly to  
6 the court, to the federal court. The Alpine Decree and  
7 the Orr Ditch Decree have the same Federal Water Master,  
8 and they have the same federal judge. So I believe that  
9 the court would probably interpret the Orr Ditch Court  
10 to indicate something similar, that they would have  
11 jurisdiction to decide some of these issues. Because  
12 these changes aren't maybe for reservoirs in California,  
13 but they affect waters both in California and Nevada.

14           CO-HEARING OFFICER DODUC: Please conclude now.

15           MR. McCONNELL: I just have a couple more  
16 statements then?

17           CO-HEARING OFFICER DODUC: Concluding  
18 statements.

19           MR. McCONNELL: Pardon me?

20           CO-HEARING OFFICER DODUC: Concluding  
21 statements.

22           MR. McCONNELL: Okay. Sorry about that. I  
23 didn't -- I see. Zero time. All right.

24           The Orr Ditch Decree has continuing and  
25 exclusive jurisdiction over this water and the Orr Ditch

1 Decree alone governs water rights belonging to the  
2 Newlands Project, water right owners.

3           The State Water Resources Control Board cannot  
4 take any action that deprives the Orr Ditch Court of  
5 exclusive jurisdiction or violates the existing decree,  
6 and you probably know that, including the incorporation  
7 of the Truckee River Agreement and Floriston Rate  
8 management.

9           It should be the Orr Ditch Court that sets  
10 first -- that acts first on the applications, attempting  
11 change to the management scheme of the Truckee River to  
12 implement TROA before the State Water Resources Board  
13 acts on the subject applications and petitions.

14           Thank you.

15           CO-HEARING OFFICER DODUC: Thank you. Does  
16 that conclude your direct?

17           MR. VAN ZANDT: Yes, it does. Thank you.

18           CO-HEARING OFFICER DODUC: Thank you,  
19 Mr. Van Zandt. I'll ask you to join your witness and  
20 ask joint party attorneys who are wishing to cross to  
21 please come up.

22           You guys changed seats on me so I assume that  
23 Mr. DePaoli will begin, or Mr. Palmer?

24           Mr. Palmer. I'm used to calling you first, so  
25 please.

1 MR. PALMER: All right. I won't break  
2 tradition yet.

3 --o0o--

4

5 CROSS-EXAMINATION BY MR. PALMER  
6 FOR THE UNITED STATES DEPARTMENT OF THE INTERIOR

7 --o0o--

8 MR. PALMER: Good morning, Mr. McConnell.

9 MR. McCONNELL: Good morning.

10 MR. PALMER: I have just a few questions to  
11 make sure I'm understanding some of your testimony.

12 I guess first, I just -- maybe this gets rid of  
13 a lot of my questions, but I'm assuming if one wanted to  
14 more fully understand what some of these documents  
15 contain such as the Truckee River Agreement and the Orr  
16 Ditch Decree, those that you reference in your  
17 testimony, that one could read those and more fully  
18 understand what's in there. Is that right?

19 MR. McCONNELL: Yes, they can. It's a very  
20 difficult document to read.

21 MR. PALMER: The Truckee River Agreement.

22 MR. McCONNELL: Yeah. It's not as difficult as  
23 the TROA, though.

24 MR. PALMER: You referenced the case of Nevada  
25 vs. United States, and isn't it true, though, that that

1 case did not involve the OCAP?

2 MR. McCONNELL: No, it was not an OCAP case.  
3 It was a reopening of the Orr Ditch Decree.

4 MR. PALMER: And when you reference in your  
5 testimony regarding a statement that -- if I paraphrase  
6 it correctly -- that the Orr Ditch Decree alone governs  
7 the water rights belonging to the Newlands Project  
8 farmers -- is that your statement?

9 MR. McCONNELL: Yes, I believe so. The Orr  
10 Ditch and the Alpine Decree both cover the water rights  
11 on the project.

12 MR. PALMER: But as far as deliveries into the  
13 project from the Truckee River, the OCAP governs those;  
14 is that correct?

15 MR. McCONNELL: There is an operating criteria  
16 that was started back in 1967, and there has been a  
17 series of them up through 1997.

18 MR. PALMER: And those were still in effect in  
19 1997?

20 MR. McCONNELL: The 1997 operating criteria and  
21 procedure is in effect, that is correct, but those  
22 operating criteria do not modify the water rights within  
23 the project.

24 MR. PALMER: And there is an express provision  
25 in those OCAP regulations that say something to that

1 effect, is there not?

2 MR. McCONNELL: I believe that's correct.

3 MR. PALMER: You made the statement that you  
4 don't believe that this Board can act on these change  
5 petitions or applications prior to them being heard by  
6 the Orr Ditch Court. Is that how I understand your  
7 statement?

8 MR. McCONNELL: I think that the proper  
9 procedure should be to have the court rule on the TROA  
10 first. Although we're here at the hearings, I doubt if  
11 that decision is going to be reversed unless the board  
12 decides that they will withhold the decision until after  
13 the court rules on the TROA.

14 MR. PALMER: So you weren't suggesting that  
15 this Board doesn't have jurisdiction to review these  
16 change petitions and applications at all, were you?

17 MR. McCONNELL: No, I was not.

18 MR. PALMER: Because, in fact, this Board did  
19 in fact issue the original permits, for example, for  
20 Stampede Reservoir; is that right?

21 MR. McCONNELL: That is correct, but there is  
22 some effect within the TROA that's going to have an  
23 impact on the water rights in Nevada.

24 MR. PALMER: Speaking of that, you referenced  
25 the Truckee River Agreement and your concerns about how

1 TROA treats the Truckee River Agreement. Can you tell  
2 us exactly how TROA treats the Truckee River agreement?  
3 What sections of the Truckee River Agreement are  
4 included or not included in TROA?

5 MR. McCONNELL: I can't tell you specifically.  
6 I've read through the TROA. I've tried to understand  
7 it, tried to make references back and forth. But I know  
8 that there is a section in the TROA that does say it  
9 supersedes the Truckee River Agreement and the Prosser  
10 Exchange Agreement.

11 MR. PALMER: But you can't tell me specifically  
12 what sections of the Truckee River Agreement are  
13 included and which are not included in TROA?

14 MR. McCONNELL: If you gave me time I could go  
15 through it, but I don't think that there is any section  
16 that I can recall that is identical to the Truckee River  
17 Agreement.

18 MR. PALMER: So you're saying that the -- does  
19 the Truckee River Operating Agreement, the TROA, still  
20 provide for the Floriston Rate flow structure?

21 MR. McCONNELL: The Truckee River Operating  
22 Agreement is TROA. It does have a structure in there  
23 for Floriston Rates, but it has a lot of modifications  
24 to it from the standpoint of the Truckee River  
25 Agreement. It's not the same. It supersedes the

1 Truckee River Agreement. The TROA becomes primarily the  
2 operating agreement on the river. The Truckee River  
3 Agreement is no longer in effect.

4 If you look at the TROA, there's provisions for  
5 establishing an administrator to operate the TROA. So  
6 once the TROA becomes effective and the Truckee River  
7 Agreement no longer is effective, then there isn't much  
8 for the Water Master to do, because at that point the  
9 administrator would be taking control of all operations  
10 on the river. And if there are any disputes as to  
11 what's going on, that has to be brought under the  
12 provisions of the TROA which require you to go to a  
13 special hearing officer.

14 MR. PALMER: Are you aware of TROA Section  
15 2.B.1 that states disputes rising under the Orr Ditch  
16 Decree shall remain subject to the jurisdiction of the  
17 Orr Ditch Court and the Federal Water Master?

18 MR. McCONNELL: It does say that, but if you  
19 look at the operations, you've got to go through the  
20 special hearing officer under TROA.

21 MR. PALMER: Isn't the District concerned about  
22 protection of their water rights?

23 MR. McCONNELL: Yes, we are, but the water  
24 rights are not separated from the water as I think some  
25 people think, that as long as they're not taking a

1 water -- excuse me, I don't know what's wrong with my  
2 voice.

3 But as long as -- as long as someone feels that  
4 they're not taking someone's water right, they feel like  
5 they're not interfering with their water right. But in  
6 effect, if they affect the water supply for that water  
7 right, the water right isn't much.

8 MR. PALMER: So whether the water right is  
9 actually affected or not, you still think there is an  
10 issue?

11 MR. McCONNELL: Yes, because there's going to  
12 be less water?

13 MR. PALMER: That's all the questions I have.  
14 Thank you.

15 CO-HEARING OFFICER DODUC: Thank you,  
16 Mr. Palmer.

17 Mr. DePaoli, cross?

18 MR. DePAOLI: Good morning, Mr. McConnell.

19 MR. McCONNELL: How are you?

20 MR. DePAOLI: Fine. Good to see you.

21 Just following up real quick on your statement  
22 about the administrator and the Federal Water Master,  
23 you are aware that TROA requires that the administrator  
24 and the Federal Water Master be the same person, are you  
25 not?

1           MR. McCONNELL: I think it says that. I think  
2 initially they're going to appoint the administrator  
3 with the current Water Master, but it's my understanding  
4 the current Water Master is going to retire soon, and so  
5 then the process of selecting a new Water Master will go  
6 under the TROA provisions, which puts the sovereign  
7 parties -- the U.S. and the Pyramid Tribe -- pretty much  
8 in control because they have to agree to it.

9           MR. DePAOLI: But the Orr Ditch Court has to  
10 agree to it, does it not?

11           MR. McCONNELL: Certainly, but if the parties  
12 submit somebody, I guess other people can object, but  
13 still the court will make a final determination. But it  
14 says -- my recollection is that if the court doesn't  
15 select that person they go back and give the court  
16 another option.

17           MR. DePAOLI: They keep trying until they make  
18 the court happy with the person, correct?

19           MR. McCONNELL: Yeah, that's what it says. But  
20 they keep control because it's the sovereign parties  
21 that get the final say.

22           MR. DePAOLI: But to my point, the person who  
23 is -- regardless of who is the current Water Master, the  
24 person who will be the administrator will also be the  
25 Federal Water Master?

1           MR. McCONNELL: Yes, but as I said before, your  
2 procedure for getting relief is now under the TROA, and  
3 you have to follow the TROA process with the special  
4 hearing officer, and you have pay all the costs and the  
5 time frame for getting a resolution is going to take  
6 time. So in the meantime.

7           MR. DePAOLI: That wasn't my question. You  
8 answered my question.

9           MR. McCONNELL: All right, I thought I was  
10 trying to explain.

11           MR. DePAOLI: In your written testimony you  
12 talk about the Orr Ditch litigation involving  
13 adjudicating the rights of the Newlands Project in  
14 California.

15           Do you recall that in your direct testimony?

16           MR. McCONNELL: I said something as it relates  
17 to Lake Tahoe.

18           MR. DePAOLI: Do you know whether water users  
19 in California were joined in the Orr Ditch litigation?

20           MR. McCONNELL: Not to my knowledge.

21           MR. DePAOLI: There weren't any water users at  
22 Lake Tahoe joined in that litigation were there?

23           MR. McCONNELL: I don't think so, not that I  
24 know of?

25           MR. DePAOLI: So that statement in your

1 testimony relates solely to the fact that Lake Tahoe was  
2 involved in the adjudication?

3 MR. McCONNELL: Yes.

4 MR. DePAOLI: You talked about Claim No. 4 in  
5 the Orr Ditch Decree. Claim No. 4 in the Orr Ditch  
6 Decree also confirms the rights of Sierra Pacific Power  
7 Company, does it not, to Lake Tahoe storage.

8 MR. McCONNELL: I don't know what you're  
9 referring to. I'd have to look at that.

10 MR. DePAOLI: Could we see joint Exhibit 7 at  
11 page 11, please, Claim 4.

12 Right there, thank you.

13 You see that very last sentence or the last two  
14 sentences? The last sentence: The rights of Sierra  
15 Pacific Power Company (formerly the Truckee River  
16 General Electric Company) under said judgment and decree  
17 are hereby recognized and confirm?

18 MR. McCONNELL: Yes.

19 MR. DePAOLI: Thank you. I was interested in  
20 your comments about nobody can withdraw from the Truckee  
21 River Agreement. Is that based upon -- well, what is  
22 that based upon?

23 MR. McCONNELL: The parties made the agreements  
24 and compromises, and they agreed that it would be  
25 binding on them, and that when they stipulated to make

1 it part of the decree, they stipulated that it would be  
2 irrevocable.

3 MR. DePAOLI: That part about the irrevocable  
4 language was in the stipulation for entry the decree,  
5 was it not?

6 MR. McCONNELL: It was.

7 MR. DePAOLI: And that was there because  
8 certain of the parties were building some reservoirs  
9 that needed to get built between the time the Truckee  
10 River Agreement was signed and the Orr Ditch Decree  
11 could be entered?

12 MR. McCONNELL: There were also -- it says  
13 actions were taken by the parties. So there were also  
14 compromises that were made by the parties in the Truckee  
15 River Agreement.

16 MR. DePAOLI: Wasn't that provision and the  
17 stipulation intended to prevent somebody from  
18 withdrawing from the stipulation before the court would  
19 have a chance to consider it?

20 MR. McCONNELL: It indicates that, yeah.

21 MR. DePAOLI: Is it TCID's position that the  
22 Orr Ditch Court is precluded from amending the Orr Ditch  
23 Decree as a result of that provision?

24 MR. McCONNELL: No.

25 MR. DePAOLI: Is it TCID's position that that

1 provision prevents a party from seeking to change a  
2 water right in the manner provided by law?

3 MR. McCONNELL: I don't think so. You have to  
4 remember that I'm not the representative of TCID. So as  
5 far as policy statements or litigation matters, I don't  
6 have final say on that or may not even be in the loop.

7 MR. DePAOLI: Well, I think you are their  
8 representative today.

9 MR. McCONNELL: I'm here providing testimony  
10 for when I was the project manager.

11 MR. DePAOLI: There isn't anything in the  
12 Truckee River Agreement which prohibits changes to water  
13 rights, is there?

14 MR. McCONNELL: I don't think so.

15 MR. DePAOLI: In your written testimony you  
16 talk about TMWA and TCID being cotenants in Donner Lake  
17 water rights. Were you aware of the petition judgment  
18 that has been entered in that case?

19 MR. McCONNELL: I am.

20 MR. DePAOLI: You talked about diverted flow  
21 both in your oral summary and in your written testimony,  
22 and I think today you said something along the lines  
23 that TCID allowed the power company to have 40 second  
24 feet of the 31 percent. Do you recall that testimony?

25 MR. McCONNELL: Yes.

1 MR. DePAOLI: Actually, the Truckee River  
2 Agreement specifically says that the 31 percent is to  
3 be -- the water that TCID is allowed to divert and the  
4 water that the power company is allowed to divert up to  
5 40 cfs, does it not?

6 MR. McCONNELL: Say that again. What do you  
7 mean?

8 MR. DePAOLI: Doesn't the Truckee River  
9 Agreement specifically indicate that the 31 percent  
10 includes water diverted about TCID and water diverted by  
11 the power company up to 40 second feet?

12 MR. McCONNELL: Yes, the 40 second feet comes  
13 out initially after the 31 percent up to the 40 cfs.  
14 They have to use the creek water first, and then if there  
15 is not sufficient water there then they can take it out  
16 of the 69 is the way I understand it.

17 MR. DePAOLI: In terms of the 69 percent that  
18 you say TCID has the right to take if it's not otherwise  
19 being exercised, in your written testimony you used the  
20 term "unused water." That term is not in the Truckee  
21 River Agreement, is it?

22 MR. McCONNELL: No, it should be unexercised.  
23 It says unexercised in the Truckee River Agreement.

24 MR. DePAOLI: And that provision in the Truckee  
25 River Agreement is affected by OCAP, is it not?

1           MR. McCONNELL: Well, what you're saying is  
2 that if there is no diversions allowed under OCAP, that  
3 we may not have the ability to take the unused water.  
4 Is that when you're referring to?

5           MR. DePAOLI: Yeah.

6           MR. McCONNELL: Yeah, the OCAP is a limitation  
7 on what the District can divert into the Truckee Canal.

8           MR. DePAOLI: Are you familiar with the case  
9 TCID vs. The Secretary?

10          MR. McCONNELL: Was that the contract case?

11          MR. DePAOLI: Yes.

12          MR. McCONNELL: I'm generally familiar with it.  
13 Yeah, that happened before I was project manager, but I  
14 was aware of the result.

15          MR. DePAOLI: And wasn't one of the results in  
16 that case that TCID had no right to water under that  
17 provision of the Truckee River Agreement?

18          MR. VAN ZANDT: Vague as to what right he's  
19 referring to.

20          CO-HEARING OFFICER DODUC: Please rephrase your  
21 question.

22          MR. DePAOLI: Did the Ninth Circuit in that  
23 case state that that provision of the Truckee River  
24 Agreement regarding unexercised portions of the 69  
25 percent created no water right for TCID?

1           MR. McCONNELL: I don't know the specifics of  
2 that case, but -- so I can't really answer what you're  
3 referring to. If you're thinking that we don't have any  
4 right to the unexercised rights, then I would disagree.  
5 If you're trying to make a technicality on the fact that  
6 it created some different water right, then I don't know  
7 the answer to that.

8           MR. DePAOLI: As you sit here today, you don't  
9 know exactly what that case held? We could look at it  
10 and see what it said.

11           MR. McCONNELL: The basic case of what I  
12 understood was that it was over the contract  
13 administration. So I'm not sure about the other details  
14 that you're referring to.

15           MR. DePAOLI: In your written testimony you  
16 talk about reductions in Floriston Rates in reducing or  
17 resulting in more storage in Lake Tahoe, and you give  
18 two examples. One example is what I would refer to as  
19 the current irrigation season reduction.

20           Are you familiar with that?

21           MR. McCONNELL: You mean the modeling results  
22 between the current conditions and the TROA?

23           MR. DePAOLI: No, the provision of the Truckee  
24 River Agreement referred to in your direct testimony at  
25 page 5, lines 14 to 19.

1 MR. McCONNELL: What line number.

2 MR. DePAOLI: Lines 14 to 19.

3 MR. McCONNELL: On page 5?

4 MR. DePAOLI: Well, I think it's on page 5.

5 MR. McCONNELL: All right. Now, I'm sorry, go  
6 ahead and ask your question.

7 MR. DePAOLI: The provision there where the  
8 three parties can agree to a reduction in Floriston  
9 Rates that you refer to in your testimony, that results  
10 in an actual reduction in Floriston Rates, does it not?

11 MR. McCONNELL: Yes, it can be agreed to by the  
12 parties on a temporary basis. They have done that in  
13 the past.

14 MR. DePAOLI: The other example that you give  
15 there regarding privately owned stored water being  
16 released in lieu of releases from Lake Tahoe, that does  
17 not result in any reduction in Floriston Rates, does it?

18 MR. McCONNELL: I don't think so, no. That  
19 would be like releases of water from Donner Lake and  
20 then holding the water back in Tahoe or -- I guess. The  
21 Truckee River Agreement says Tahoe.

22 MR. DePAOLI: But the Floriston Rates stays the  
23 same in that situation?

24 MR. McCONNELL: Yes.

25 MR. DePAOLI: Are there other provisions in the

1 Truckee River Agreement where parties are allowed to  
2 make changes to Floriston Rates and reduce Floriston  
3 Rates?

4 MR. McCONNELL: There are provisions for  
5 reducing Floriston Rates based on the elevation of Lake  
6 Tahoe.

7 MR. DePAOLI: That wasn't my question.  
8 Assuming, without regard to whether any elevations  
9 change, are there provisions in the Truckee River  
10 Agreement that say, for example, allow the power  
11 company, now TMWA, to make changes to Floriston Rates?

12 MR. McCONNELL: I don't recall any.

13 In your written testimony you indicate that  
14 Floriston Rates were intended to ensure that downstream  
15 irrigation and municipal rights are met. Floriston  
16 Rates, there are times when Floriston Rates will not  
17 meet fully what OCAP may be allowed to -- may allow to  
18 be diverted in the Truckee Canal; is that correct?

19 MR. McCONNELL: That's correct. There may be  
20 times, depending on the water supply and the storage  
21 levels.

22 MR. DePAOLI: Is it your testimony that without  
23 the Truckee River Agreement there never would have been  
24 an Orr Ditch Decree?

25 MR. McCONNELL: I don't know if I can say that,

1 but it certainly was a major portion of it.

2 MR. DePAOLI: Do you recollect whether there  
3 was opposition to entry of the Orr Ditch Decree when the  
4 stipulation was presented?

5 MR. McCONNELL: No, I do not.

6 MR. DePAOLI: TCID is not asking the State  
7 Board to determine whether or not the Truckee River --  
8 the Orr Ditch Decree can be amended, is it?

9 MR. McCONNELL: I don't know.

10 MR. DePAOLI: Does the Truckee Canal have a  
11 carrying capacity of 1500 cubic feet per second?

12 MR. McCONNELL: Not currently, no.

13 MR. DePAOLI: Did it ever?

14 MR. McCONNELL: Probably not, because there's  
15 provisions in the Truckee River Agreement that says that  
16 it allows it to expand it up to that. There wouldn't be  
17 any objections.

18 MR. DePAOLI: The provisions in the Truckee  
19 River Agreement don't say that it allows -- that it can  
20 be expanded to 1500 cubic feet per second, do they?

21 MR. McCONNELL: Doesn't it? I think it does.

22 MR. DePAOLI: Pardon?

23 MR. McCONNELL: Yes.

24 MR. DePAOLI: You think it says 1500?

25 MR. McCONNELL: Yeah.

1           MR. DePAOLI: Tell me how action by this Board  
2 on the Independence change petition will in any way  
3 deprive the Orr Ditch Court of jurisdiction under its  
4 decree.

5           MR. McCONNELL: I don't know.

6           MR. DePAOLI: Can you tell me how this Board's  
7 action on the Independence change petition will violate  
8 the Truckee River Agreement?

9           MR. McCONNELL: Only through the exchanging of  
10 water under the Truckee River Agreement by reducing  
11 Floriston Rates and moving water around and trading and  
12 exchanging water under TROA.

13          MR. DePAOLI: What in the Truckee River  
14 Agreement prevents exchanges of water?

15          MR. McCONNELL: I can't think of any particular  
16 provision.

17          MR. DePAOLI: Doesn't the Federal Water Master  
18 make, in effect, trades of water today between Boca and  
19 Stampede Reservoir?

20          MR. McCONNELL: He does. And I'm not sure what  
21 authority he's using, it just does some of those.

22          MR. DePAOLI: Has TCID ever been injured by any  
23 of those?

24          MR. McCONNELL: I'm not sure.

25          MR. DePAOLI: Tell me how any action by this

1 Board on the Stampede change petition will deprive the  
2 Orr Ditch Court of any jurisdiction?

3 MR. McCONNELL: I don't think the actions by  
4 this Board are going to deprive the Orr Ditch Court of  
5 any jurisdiction. I just think that the process and the  
6 priority of how the matter should have been handled  
7 should have been through the Orr Ditch Court first  
8 because of the approval of the TROA. Because the TROA  
9 is the basis for all the exchanges and modifications and  
10 trades and credits.

11 MR. DePAOLI: Are you aware of anyone  
12 presenting that issue to the State Board sometime  
13 between when these applications were -- petitions were  
14 filed and today?

15 MR. McCONNELL: Did someone what?

16 MR. DePAOLI: Present the issue of you  
17 shouldn't do anything until the Orr Ditch Court acts  
18 between the time the applications and the change  
19 petitions were filed and today?

20 MR. McCONNELL: I don't know.

21 MR. DePAOLI: Going back to 1938, at that time  
22 there wasn't this Board, but whatever the administrative  
23 agency in California that dealt with water rights was  
24 dealing with a situation where there were a number of  
25 things pending in California, a signed Truckee River

1 Agreement, and a proposal to not amend an Orr Ditch  
2 Decree but to actually enter one. Is that not correct?

3 MR. McCONNELL: Yes.

4 MR. DePAOLI: And at that point in time the  
5 California State Water Resources Control Board or  
6 predecessor agency went ahead and issued permits, did it  
7 not?

8 MR. McCONNELL: Yes, it did.

9 MR. DePAOLI: And the Orr Ditch Decree was not  
10 actually entered until September of 1944, some six years  
11 later?

12 MR. McCONNELL: Probably so, that's correct.

13 MR. DePAOLI: And there was always a chance  
14 that the Orr Ditch Decree as stipulated might not have  
15 been entered?

16 MR. McCONNELL: I suppose there is always a  
17 chance, but it looked like the parties had agreed that  
18 it was going to be.

19 MR. DePAOLI: I was interested in your comments  
20 about the litigation that led to Nevada vs. The United  
21 States. That action that resulted in Nevada vs. United  
22 States was a new and entirely separate action, was it  
23 not?

24 MR. VAN ZANDT: Objection; that's vague.

25 CO-HEARING OFFICER DODUC: I didn't hear your

1 objection.

2 MR. VAN ZANDT: It's vague and ambiguous, that  
3 question.

4 CO-HEARING OFFICER DODUC: Rephrase your  
5 question.

6 MR. DePAOLI: I will rephrase the question.  
7 What led to that was not some motion to modify  
8 the Orr Ditch Decree, was it?

9 MR. McCONNELL: I don't think so.

10 MR. DePAOLI: It was a brand new action filed  
11 by the United States and the Pyramid Lake Tribe?

12 MR. McCONNELL: It could have been, yeah. It  
13 was to reopen the decree, I remember that.

14 MR. DePAOLI: It was, was it not, an action to  
15 quiet title to another claim under the Federal Reserve  
16 Rights Doctrine for the Pyramid Lake Indian Reservation  
17 for the fishery at Pyramid Lake?

18 MR. McCONNELL: It could have included that. I  
19 know that later on after the Supreme Court ruled, the  
20 Pyramid Tribe went back to the court looking for an  
21 additional water right and they were told to go to the  
22 State Engineer. That's the way I recall.

23 MR. DePAOLI: That's your recollection?

24 MR. McCONNELL: Yeah.

25 MR. DePAOLI: In your written testimony you

1 talk about the United States was trying to reallocate  
2 project water between the Tribe and the Newlands  
3 Project. That bright idea came from the Ninth Circuit,  
4 did it not?

5 MR. McCONNELL: I don't know the details of all  
6 the case, but I know that's what happened at the Ninth  
7 Circuit.

8 MR. DePAOLI: The United States was trying to  
9 overlay this new Federal Reserve Right on everybody's  
10 water rights, was it not?

11 MR. McCONNELL: Yes, that's what I mentioned.  
12 There were 17,000 or so defendants in that case. They  
13 were trying to reallocate the water on the Truckee  
14 River.

15 MR. DePAOLI: There's been -- and including  
16 your testimony -- there's been a lot of testimony about  
17 the fact that OCAP is to comply with both the Alpine and  
18 Orr Ditch Decree. Do you recall that testimony?

19 MR. McCONNELL: Yes.

20 MR. DePAOLI: Are you aware of any -- let me  
21 back up.

22 Let me first ask: There's been quite a little  
23 bit of litigation over the validity of OCAP, has there  
24 not?

25 MR. McCONNELL: There has been some litigation,

1 yes.

2 MR. DePAOLI: And are you aware of any instance  
3 where a court has ruled that a provision in OCAP  
4 violates the Orr Ditch Decree?

5 MR. McCONNELL: I cannot think of any.

6 MR. DePAOLI: Are you aware of any case where a  
7 court has ruled that a provision of OCAP violates the  
8 Alpine Decree?

9 MR. McCONNELL: No, not that I'm aware of.

10 MR. DePAOLI: Going to the 1938 hearing in  
11 California, there were no protests filed in California  
12 in connection with Sierra Pacific Power Company's  
13 applications for water in Independence Lake, were there?

14 MR. McCONNELL: You know, it's not clear from  
15 reading that. There are places where it indicates that  
16 there might not have been protests, but then there's  
17 indications that some people thought there were  
18 protests.

19 MR. DePAOLI: Could we have TCID-32 at page 4,  
20 line 6 to 12 put up, please.

21 MR. VAN ZANDT: What page, Mr. DePaoli?

22 MR. DePAOLI: Page 4, line 6 to 12.

23 MR. LINDSAY: This is the PDF page 4. Is this  
24 the page you want?

25 MR. DePAOLI: No, I guess not. Page 4 of the

1 transcript. I'm sorry.

2 Do you see where it indicates there that those  
3 applications have not been protested?

4 MR. McCONNELL: That's what it says. But it  
5 seemed to me that -- it says that there, but it seems to  
6 me that somewhere in the reading of this transcript that  
7 there was some indication that there were parties that  
8 thought they had protested it.

9 MR. DePAOLI: You can't point us to where that  
10 is anywhere?

11 MR. McCONNELL: Not right now. I'll have to  
12 look it up.

13 MR. DePAOLI: And in the work that you've done,  
14 you didn't find an actual protest?

15 MR. McCONNELL: No.

16 MR. DePAOLI: There's nothing in the Truckee  
17 River Agreement, is there, that required any party to do  
18 anything with respect to those two applications?

19 MR. VAN ZANDT: Vague as to what applications  
20 you're talking about now.

21 CO-HEARING OFFICER DODUC: Rephrase, please.

22 MR. DePAOLI: Is there anything in the Truckee  
23 River Agreement that required TCID or anyone else to  
24 withdraw a protest as to the applications for  
25 Independence Lake?

1 MR. McCONNELL: No.

2 MR. DePAOLI: Another application that was  
3 heard that day is Application 5170. Do you know what  
4 happened to that application?

5 MR. McCONNELL: Just looking at the  
6 correspondence I saw, apparently it wasn't completed.  
7 It was for power production, if I recall, and there was  
8 some correspondence about needing permissions from the  
9 Power Commission. So I don't know that that got  
10 completed based on what I reviewed.

11 MR. DePAOLI: Do you know whether it was  
12 withdrawn, eventually?

13 MR. McCONNELL: No I don't.

14 MR. DePAOLI: But there isn't anything in the  
15 Truckee River Agreement which required TCID or any other  
16 parties to take any action as to that application, is  
17 there?

18 MR. McCONNELL: I don't recall seeing anything,  
19 no.

20 MR. DePAOLI: The only applications that the  
21 Truckee River Agreement references are Applications 5169  
22 and 6534; is that correct?

23 MR. McCONNELL: Yes.

24 MR. DePAOLI: Do you know what happened to  
25 Application 6534?

1           MR. McCONNELL: It might have been withdrawn.  
2 I guess it was to increase the storage there at Boca  
3 Reservoir, and I don't think Boca was constructed to  
4 store water.

5           MR. DePAOLI: Now, Application 6131 was an  
6 application that TCID had filed to divert water from  
7 Donner Creek and the Cold Creek into Donner Lake?

8           MR. McCONNELL: Yes.

9           MR. DePAOLI: At the time that was filed --  
10 strike that.

11           There isn't anything in the Truckee River  
12 Agreement that required any party to take any action  
13 with respect to Application 6131, is there?

14           MR. McCONNELL: No, I didn't see any.

15           MR. DePAOLI: So there is nothing that happened  
16 in 1938 which in any way affects the change petition for  
17 Independence Lake?

18           MR. McCONNELL: Well, I can't answer that  
19 completely. I suppose the Independence Lake petition is  
20 just based upon its storage permit for the 17,500. It  
21 has nothing to do with the 3,000 acre feet that is  
22 claimed as pre-14 water rights. Is that what you're  
23 saying?

24           MR. DePAOLI: No. What I'm asking was: Was  
25 there some compromise made about the Independence Lake

1 water right in 1938 that rises to the level of this  
2 Board or TMWA not being able to seek a change to it?

3 MR. McCONNELL: No.

4 MR. DePAOLI: And that would also be true as to  
5 the Stampede change petition, would it not?

6 MR. McCONNELL: The Stampede petition wasn't in  
7 effect then.

8 MR. DePAOLI: And the same would be true with  
9 respect to Prosser Creek Reservoir?

10 MR. McCONNELL: That's correct.

11 MR. DePAOLI: In your corrections to your  
12 testimony this morning you eliminated a reference on  
13 page 10, line 13, and you restated that to say that  
14 Application 5169 for Boca Reservoir was modified by the  
15 Truckee River Agreement to benefit.

16 Do you recall that correction?

17 MR. McCONNELL: Yes.

18 MR. DePAOLI: And that's because the reference  
19 to TCID-3 was not any indication that water from the  
20 Boca permit was to be used within the Newlands Project,  
21 correct?

22 MR. McCONNELL: That's correct. On the  
23 original petition and application it did not have that  
24 in there, that's correct.

25 MR. DePAOLI: Was any condition placed on

1 permit 5286 which requires it to be operated in  
2 accordance with the Truckee River Agreement by the  
3 California state authority at the time?

4 MR. McCONNELL: Is that the same as application  
5 5169?

6 MR. DePAOLI: Yes.

7 MR. McCONNELL: No. It was just in the  
8 decision that it was mentioned in there, and the water  
9 reports subsequent to that confirm that that's the way  
10 it was operated.

11 MR. DePAOLI: There is nothing in the license  
12 for Boca Reservoir that has such a condition, is there?

13 MR. McCONNELL: No.

14 MR. DePAOLI: Now, what is it about the change  
15 petition for Boca Reservoir which you contend is not  
16 consistent with what occurred in 1938?

17 MR. McCONNELL: Well, in 1938, as I mentioned,  
18 it was understood that the reservoir would be operated  
19 in accordance with the Truckee River Agreement. And so  
20 the change petitions here are going to allow that  
21 reservoir to be operated differently. You're going to  
22 have -- you're going to supercede the Truckee River  
23 Agreement and allow exchanges, trades and credits stored  
24 in Boca Reservoir and water is going to be moved around.

25 MR. DePAOLI: But the moving around of water, I

1 think we covered this earlier, but what in the Truckee  
2 River Agreement precludes the moving around of water?

3 MR. McCONNELL: Well, the Truckee River  
4 Agreement has specific provisions for release of water  
5 for meeting Floriston Rates out of the reservoir.

6 MR. DePAOLI: And what in these change  
7 petitions is going to result in water not being released  
8 from Boca Reservoir to satisfy Floriston Rates?

9 MR. McCONNELL: Well, you're probably going to  
10 see through the operations that there will probably be  
11 water coming from different places to make Floriston  
12 Rates. If you make Floriston Rates, if you're not  
13 reducing them to store credit water and you haven't  
14 moved it around from one reservoir to another. But the  
15 reservoir itself will not have strictly Floriston rate  
16 water in it, project water. It will have multiple other  
17 waters. And there might be times then when the  
18 Floriston Rates are not met, which is reflected in some  
19 of the EIS where it's showing shortages to the project.

20 MR. DePAOLI: Let's break that up. First of  
21 all, if the water that's available for diversion under  
22 Orr Ditch Decree water rights at Floriston is equal to  
23 what is required to satisfy Floriston Rates, does it  
24 matter what reservoir that water is released from?

25 MR. McCONNELL: It shouldn't.

1           MR. DePAOLI: The issue of whether or not  
2 Floriston Rates will be allowed to be reduced in order  
3 to allow, as you say, credit storage, that is an issue  
4 that is involved with the change applications that the  
5 Nevada State Engineer ruled on, is it not?

6           MR. McCONNELL: Well, the State Engineer did  
7 rule on change applications that were made by TMWA.

8           MR. DePAOLI: And whether or not there is going  
9 to be any adjustment in the rate of flow at Floriston as  
10 a result of that is going to be determined by the Orr  
11 Ditch Court, is it not?

12          MR. McCONNELL: TROA, yeah. The TROA has to be  
13 approved by the Orr Ditch Court, and TROA is the one  
14 that allows those change applications to occur.

15          MR. DePAOLI: Let's back up on that one. There  
16 isn't anything -- strike that.

17          The TROA doesn't in and of itself provide that  
18 Floriston Rates may be reduced, does it?

19          MR. McCONNELL: TROA?

20          MR. DePAOLI: Yes.

21          MR. McCONNELL: Provide for reduction of  
22 Floriston Rates?

23          MR. DePAOLI: Does TROA all by itself provide  
24 for reduction in Floriston Rates?

25          MR. McCONNELL: I'm not sure what you're

1 getting at. It has provisions in there for reducing  
2 Floriston Rates.

3 MR. DePAOLI: But only if two things happen.  
4 One, the Nevada State Engineer has to approve changes to  
5 Orr Ditch Decree water rights; is that correct?

6 MR. McCONNELL: I don't know. I'd have to look  
7 at the provisions in the TROA to know for sure.

8 MR. DePAOLI: Okay. But the benefits, the  
9 benefits of the Newlands Project from Boca Reservoir  
10 result from the fact of its storage and release of water  
11 to meet Floriston Rates, correct?

12 MR. McCONNELL: Yes.

13 MR. DePAOLI: Let's turn now to the Washoe  
14 Project and Stampede Reservoir. There has been a lot of  
15 testimony, including yours, that the Newlands Project is  
16 a place of use for water from Stampede Reservoir. Do  
17 you recall that testimony?

18 MR. McCONNELL: Yes.

19 MR. DePAOLI: And you looked at some of the  
20 documents related to the filings with California about  
21 Stampede and the Washoe Project?

22 MR. McCONNELL: I did.

23 MR. DePAOLI: Isn't it true, Mr. McConnell,  
24 that the Newlands Project was included as a place of use  
25 for water for Stampede Reservoir for purposes of an

1 exchange between the Lahontan Reservoir and a reservoir  
2 to be constructed on the east fork of the Carson River  
3 called Watasheamu Reservoir?

4 MR. McCONNELL: Yes. That's what the purpose  
5 of it was for.

6 MR. DePAOLI: That reservoir was, that  
7 Watasheamu Reservoir was intended to potentially store  
8 water on the east fork of the Carson River that would  
9 otherwise flow to Lahontan Reservoir, correct?

10 MR. McCONNELL: Yes.

11 MR. DePAOLI: And the water that the Newlands  
12 Project was to receive from Stampede Reservoir was to  
13 make up for that water that Watasheamu stored that would  
14 have gone to Lahontan?

15 MR. McCONNELL: That was one of the purposes,  
16 yeah.

17 MR. DePAOLI: What were the other purposes?

18 MR. McCONNELL: Well, the other purpose is just  
19 to help support the Floriston Rates and the water supply  
20 for the project.

21 MR. DePAOLI: You referenced TCID Exhibit 111  
22 in your testimony. Did you look at the list of things  
23 that had to happen in connection with that proposal for  
24 an exchange and coordination between the Truckee River  
25 reservoirs and the new Watasheamu Reservoir?

1           MR. McCONNELL: I remember reading it, but I  
2 don't have a direct recollection right now. I know  
3 that -- you call it Watasheamu, I guess I call it  
4 Watasheamu. I don't know what the correct pronunciation  
5 is.

6           MR. DePAOLI: Nor do I. That list is sort of a  
7 TROA-like list of things, is it not?

8           MR. VAN ZANDT: Objection. Calls for  
9 speculation on the part of the witness.

10          CO-HEARING OFFICER DODUC: Overruled.

11          MR. McCONNELL: I don't know. I'd have to look  
12 at the list and see what you're comparing it to. I  
13 can't remember.

14          MR. DePAOLI: Maybe we could put up TCID-111,  
15 please, at pages 16 and 17. Continue scrolling, please.

16          You see that list there, it was going to  
17 require amendments to the Truckee River Agreement.

18          MR. McCONNELL: You're on page 16?

19          MR. DePAOLI: Probably on 17.

20          MR. McCONNELL: You mean the paragraphs,  
21 indented paragraphs?

22          MR. DePAOLI: I'm sorry, I didn't hear you.

23          MR. McCONNELL: The paragraphs numbered 1, 2  
24 and 3?

25          MR. DePAOLI: 1 through 4. Without taking a

1 lot of work that's a pretty good list of things that did  
2 happen, is it not?

3 MR. McCONNELL: It as list of things.

4 MR. DePAOLI: And Watasheamu never has been  
5 built, has it?

6 MR. McCONNELL: No, it was deauthorized.

7 MR. DePAOLI: So it never will be built?

8 MR. McCONNELL: Not that one.

9 MR. DePAOLI: Let's talk about Prosser Creek  
10 Reservoir briefly. I think in your testimony, written  
11 and summary today you talk about the Tahoe-Prosser  
12 Exchange Agreement having no provision in it that allows  
13 it to terminate. Do you recall that testimony?

14 MR. McCONNELL: Yes.

15 MR. DePAOLI: And the Tahoe-Prosser Exchange  
16 Agreement was, in effect, incorporated into the Truckee  
17 River General Electric Decree in 1961, was it not?

18 MR. McCONNELL: '61 or '62. I can't remember  
19 exactly.

20 MR. DePAOLI: Are you aware of the fact that  
21 the Truckee River General Electric court has amended  
22 that decree to allow for Prosser Creek Reservoir to be  
23 operated in accordance with the Truckee River Operating  
24 Agreement?

25 MR. McCONNELL: Yeah, we found out after they

1 entered it. We weren't provided notice.

2 MR. DePAOLI: Is TCID a party to that case?

3 MR. McCONNELL: We're party to the Prosser  
4 Exchange Agreement.

5 MR. DePAOLI: Is TCID a party to the Truckee  
6 River General Electric case?

7 MR. McCONNELL: I don't believe so. Not in  
8 that regard. Not originally.

9 MR. DePAOLI: You mentioned something in  
10 your -- and I think it may be in your written testimony  
11 as well -- about the fact that the Alpine court requires  
12 changes to water rights involving both the Nevada and  
13 California to be filed with it.

14 Do you recall that testimony?

15 MR. McCONNELL: Yes.

16 MR. DePAOLI: That's a specific provision in  
17 the Alpine decree, is it not?

18 MR. McCONNELL: It is.

19 MR. DePAOLI: And do you know why the court  
20 included that provision in the Alpine Decree?

21 MR. McCONNELL: I don't know why, no. I know  
22 that they adjudicated the water rights in California and  
23 the decree indicated that it was fully appropriated.

24 MR. DePAOLI: Do you know whether in the  
25 California portion of the Alpine Decree whether any of

1 those water rights are post 1914 water rights?

2 MR. McCONNELL: No, I don't know.

3 MR. DePAOLI: Are you familiar with the  
4 situation that developed with respect to Mud Lake on the  
5 Carson River -- and I can't tell you exactly when, but  
6 in the last century but towards the end?

7 MR. McCONNELL: I'm familiar with it, but I  
8 don't know if I could recall the details of it. I know  
9 that there was some transfers involved with it.

10 MR. DePAOLI: Do you know how the Alpine court  
11 handled those changes?

12 MR. McCONNELL: No, I don't. I don't recall.

13 MR. DePAOLI: That concludes my  
14 cross-examination.

15 CO-HEARING OFFICER DODUC: Thank you,  
16 Mr. DePaoli. I'm going to ask Mr. Pagni to hold on to  
17 your questions while we take a ten-minute break.

18 (Recess)

19 CO-HEARING OFFICER DODUC: Mr. Pagni, you may  
20 begin your cross.

21 MR. PAGNI: Thank you.

22 --o0o--

23 CROSS-EXAMINATION BY MR. PAGNI

24 FOR WASHOE COUNTY WATER CONSERVATION DISTRICT

25 --o0o--

1           MR. PAGNI: Good morning, Mr. McConnell. I  
2 don't know if we met. My name is Michael Pagni,  
3 attorney the Washoe County Water Conservation District.

4           MR. McCONNELL: I've heard your name before but  
5 I don't think I've had a chance to meet you.

6           MR. PAGNI: Nice to meet you. Mr. DePaoli  
7 touched on a lot of the questions I had for you, but I  
8 had a few follow-ups.

9           You indicated in your direct testimony, you  
10 mentioned a lot of the events that happened back in the  
11 1930s on the original Application 5169 that the Washoe  
12 County Water Conservation District holds.

13           Just so I understand, is your knowledge based  
14 on your reading of the documents that were in the State  
15 Board's records?

16           MR. McCONNELL: Yes.

17           MR. PAGNI: And you would agree that anybody  
18 could read those documents themselves to gain their own  
19 understanding of what they say?

20           MR. McCONNELL: They could.

21           MR. PAGNI: Would you agree that TCID's protest  
22 of Application 5169 was opposed at that time?

23           MR. McCONNELL: You mean opposed by the  
24 applicant?

25           MR. PAGNI: Yes.

1 MR. McCONNELL: It probably was.

2 MR. PAGNI: Were you aware that it was opposed  
3 on the ground that the applicant believed there was  
4 sufficient water available in the Truckee River to  
5 satisfy the storage sought in the application while  
6 still satisfying senior rights on the Truckee?

7 MR. McCONNELL: I'm not sure of exactly the  
8 reasoning. I know that the District later on filed its  
9 own application to try to improve the flows. So I know  
10 that during the drought period, the late '20s and then  
11 in the '30s, there was insufficient water to meet the  
12 demands.

13 MR. PAGNI: My question was whether you were  
14 aware of the grounds for the applicant to oppose TCID's  
15 protest.

16 MR. McCONNELL: No, I don't recall knowing.

17 MR. PAGNI: Are you familiar with license 3723  
18 which is the license for Boca Reservoir?

19 MR. McCONNELL: Not any more than the  
20 application.

21 MR. PAGNI: Would you agree that nowhere in  
22 license 3723 is the Truckee Canal identified as an  
23 authorized point of rediversion?

24 MR. McCONNELL: If it's the same as the  
25 application, yeah, I would have to agree with that.

1           MR. PAGNI:  And would you also agree that  
2  nowhere in license 3723 is the Newlands Project  
3  recognized as an authorized place of use?

4           MR. McCONNELL:  If it's the same as the  
5  application, yes, I would agree with that.

6           MR. PAGNI:  Would you agree that by adding the  
7  Newlands Project as a place of use and adding the  
8  Truckee Canal as a point of rediversion the change  
9  petitions provide a benefit to TCID?

10          MR. McCONNELL:  I don't know that that's true,  
11  because the applicants and the protestants at the time  
12  of the hearing back in the '30s understood that they  
13  would be operated in accordance with the Truckee River  
14  Agreement.  So there was an understanding at that time  
15  that that water would be utilized in accordance with the  
16  Truckee River Agreement which would provide benefits to  
17  the TCID.

18          MR. PAGNI:  Well, the applicants are not asking  
19  the board to approve the Truckee River Agreement; we're  
20  asking the board to approve changes to the license.  So  
21  if we could, let's limit our answer to the license  
22  itself.

23                        Would you agree, based on the representation  
24  that the license does not currently provide any point of  
25  rediversion or place of use for the Newlands Project

1 users, would you agree that by adding those provisions,  
2 adding points of rediversion and places of use for  
3 Newlands Project, that the change petitions will provide  
4 a benefit to TCID?

5 MR. McCONNELL: Well, they could correct that,  
6 yes.

7 MR. PAGNI: Mr. DePaoli asked a similar  
8 question for Independence, and I'll follow up for Boca.

9 Would you agree that the action by the board on  
10 the Boca change petition will not deprive the Orr Ditch  
11 Court of jurisdiction?

12 MR. McCONNELL: No.

13 MR. PAGNI: No, don't agree?

14 MR. McCONNELL: It won't.

15 MR. PAGNI: Thank you. And would you also  
16 agree that the petitioners and applicants today are not  
17 asking California Board to alter the Floriston Rate  
18 regime?

19 MR. McCONNELL: It's implied.

20 MR. PAGNI: It's implied?

21 MR. McCONNELL: Yeah, because the whole scheme  
22 of the operation is based on the TROA.

23 MR. PAGNI: Could you explain for me how the  
24 change petition for Boca which seeks to add points of  
25 diversion, rediversion and places of use seeks to alter

1 the Floriston Rates?

2 MR. McCONNELL: It's based on the TROA, and we  
3 wouldn't be here if it wasn't for the TROA.

4 MR. PAGNI: Again, sir, we're not asking this  
5 Board to approve TROA; we're asking the Board to approve  
6 a change to the license. So can you explain for me how  
7 the change petition itself, which seeks to add points of  
8 rediversion and places of use to the license --

9 MR. McCONNELL: I can only answer --

10 MR. PAGNI: -- alters the Floriston Rates  
11 scheme?

12 MR. McCONNELL: I can only answer it the same  
13 way. The whole purpose of us being here is the TROA.  
14 And the license applicants say that if the TROA is  
15 modified, they want a condition on the permits. So if  
16 the TROA is not modified by the court then these  
17 application permits do not have any effect.

18 MR. PAGNI: So do I understand your answer to  
19 be that you cannot state how the change petitions in and  
20 of themselves alter the Floriston Rates?

21 MR. McCONNELL: No, you can't say that. You  
22 can just say what I just said. That was my answer.  
23 That the applicants themselves have asked the Board to  
24 put a condition on those permits. And that condition is  
25 if TROA is not approved, then the applications and

1 petitions don't have any effect. So it's not separate.  
2 The applications have that information in it.

3 MR. PAGNI: Now you've confused me, sir,  
4 because your answer before was that it is implied by the  
5 applications because of a TROA reference that this Board  
6 is being asked to change the Floriston Rates, and yet  
7 now you are saying that what this Board is being asked  
8 to do would only become effective if some other entity,  
9 the Orr Ditch Court, approves a modification to  
10 incorporate the TROA provisions.

11 MR. McCONNELL: So maybe I used the wrong term.  
12 Maybe I should have said explicit instead of implied.  
13 That's all.

14 MR. PAGNI: Would you agree that nothing in the  
15 change petitions or applications request or would  
16 require this Board to alter the priority water rights as  
17 adjudicated by the Orr Ditch Court?

18 MR. McCONNELL: You're not asking that in the  
19 petitions. It's just -- it's all tied with TROA,  
20 though. It's the same.

21 MR. PAGNI: You agree we're not asking for it  
22 in the petitions that are the subject before this Board?

23 MR. McCONNELL: Except for the fact that it's  
24 tied to the TROA. If the TROA doesn't go through, then  
25 you don't even want the petitions to be approved.

1 MR. PAGNI: So would I be characterizing your  
2 testimony correctly if I were to say that the bulk of  
3 your concerns relate to the TROA issues that will be  
4 heard by the Orr Ditch Court?

5 MR. McCONNELL: Yes.

6 MR. PAGNI: Thank you. I have no further  
7 questions.

8 CO-HEARING OFFICER DODUC: Thank you,  
9 Mr. Pagni.

10 MR. PAGNI: Yes.

11 CO-HEARING OFFICER DODUC: Finally got that  
12 right.

13 Mr. Taggart, your cross.

14 MR. TAGGART: Thank you.

15 --o0o--

16 CROSS-EXAMINATION BY MR. TAGGART

17 FOR CITY OF FERNLEY

18 --o0o--

19 MR. TAGGART: Good morning, Mr. McConnell.

20 MR. McCONNELL: Hi. How are you doing, Paul.

21 MR. TAGGART: I just have a few questions.

22 During your direct exam you stated that the  
23 consideration of these California licenses and  
24 applications should not be considered until after the  
25 Orr Ditch Court considers TROA, correct?

1 MR. McCONNELL: That's what I said, yes.

2 MR. TAGGART: And isn't it true that TCID also  
3 argued to the Nevada State Engineer that he should not  
4 consider the Nevada change applications regarding  
5 storage until after the Orr Ditch Court had considered  
6 TROA?

7 MR. McCONNELL: They might have. I wasn't  
8 involved in that hearing.

9 MR. TAGGART: Well, are you familiar with  
10 Ruling 6035 from the Nevada State Engineer?

11 MR. McCONNELL: Not completely. Just  
12 generally, I was told that they were approved. That's  
13 about it.

14 MR. TAGGART: Well, if I could have TMWA  
15 Exhibit 1-5, please, up on the screen, and at page 6.

16 I just want to point out the line that starts  
17 with "at the status conference," it states that -- and I  
18 want to read this to you so I can ask you a question:

19 At the status conference the State  
20 Engineer held that he was not going to  
21 address whether TROA changes the Orr  
22 Ditch Decree. Processing of the subject  
23 applications by the State Engineer in  
24 consideration of decree modifications  
25 necessitated by TROA by the Orr Ditch

1           Court are two separate and distinct  
2           actions by two separate and distinct  
3           authorities. The State Engineer has  
4           responsibility and authority to act on  
5           any application to appropriate or  
6           application to change considering  
7           criteria set in Nevada revised statutes.

8           Now, on that basis, didn't the State Engineer  
9           reject the exact same argument you're making here today  
10          that the Orr Ditch Court approval of TROA should occur  
11          first?

12           MR. McCONNELL: It appears it did.

13           MR. TAGGART: So wouldn't you agree that this  
14          Board's sole decision requirement in this proceeding is  
15          on the applications and licenses before it and not on  
16          whether TROA modifications are consistent with the Orr  
17          Ditch Decree?

18           MR. McCONNELL: Well, with the exception that  
19          the applicants know that it's all conditioned on TROA,  
20          and so therefore the TROA should have been determined  
21          first under the Orr Ditch Decree. That was our  
22          position. That's my position.

23           MR. TAGGART: Well, do you also agree that this  
24          Board does not need to consider the impacts of Nevada  
25          change applications on existing rights because the

1 review of those impacts is the subject of the Nevada  
2 State Engineer's jurisdiction?

3 MR. VAN ZANDT: I'm going to object to that  
4 because the board has already ruled on that in the  
5 motion to exclude that they are going to consider that.

6 CO-HEARING OFFICER DODUC: Sustained. Please  
7 move on to your next line of questioning.

8 MR. TAGGART: I have no further questions.  
9 Thank you.

10 CO-HEARING OFFICER DODUC: Thank you,  
11 Mr. Taggart.

12 Mr. Soderlund, no cross? And Mr. Mixson, no  
13 cross?

14 Mr. Van Zandt, any redirect?

15 MR. VAN ZANDT: Yes, please.

16

17 --o0o--

18 REDIRECT EXAMINATION BY MR. VAN ZANDT

19 FOR TRUCKEE CARSON IRRIGATION DISTRICT

20 and CHURCHILL COUNTY

21 --o0o--

22

23 MR. VAN ZANDT: Mr. McConnell, Mr. DePaoli  
24 asked you about the Orr Ditch Court and its authority  
25 with regard to amending the decree to accommodate TROA.

1 I think his question was is it possible for the Orr  
2 Ditch Decree to essentially be amended by the Orr Ditch  
3 Court.

4 And my question to you is if we're talking  
5 about wholesale changes to the Truckee River Agreement,  
6 what is your view with regard to what the parties must  
7 do in order to allow the Truckee River Agreement to be  
8 changed in the context of the Orr Ditch Decree?

9 MR. McCONNELL: Well, it's my opinion that it  
10 would require the District to agree to those  
11 modifications, because the agreement was made with all  
12 the parties and there were compromises and there were  
13 exchanges of benefits within that agreement. So the  
14 District should be a party to any changes.

15 MR. VAN ZANDT: And again, going back to the  
16 Orr Ditch Decree, if there are wholesale changes to the  
17 Truckee River Agreement as a result of TROA, what is  
18 your position with regard to the ability of the parties  
19 to the Truckee River Agreement to withdraw from that  
20 agreement?

21 MR. McCONNELL: I'm not sure what you mean.

22 MR. VAN ZANDT: I think in your direct  
23 testimony but also on cross you were asked about the  
24 ability of parties to the Truckee River Agreement and  
25 the effect of the stipulation that allowed the entry of

1 the Orr Ditch Decree.

2 So my question is: What is your view as  
3 regards to the ability of a party to the Truckee River  
4 Agreement to now withdraw from that agreement in the  
5 context of the TROA.

6 MR. McCONNELL: Well, my view is that the  
7 parties made their agreements and their compromises in  
8 the Truckee River Agreement, and they agreed to operate  
9 in good faith, and it was a binding on them, and they  
10 stipulated to the final decree. And so for the parties  
11 to consider the Truckee River Agreement to be superseded  
12 by the TROA by not including the District in that  
13 agreement I think violates the intent of the parties and  
14 the agreement itself.

15 MR. VAN ZANDT: I think you were also asked by  
16 Mr. DePaoli about the difference between the Truckee  
17 River Agreement and the Truckee River Operating  
18 Agreement -- actually it was Mr. Palmer asked you this  
19 question. In other words, how TROA treats the Truckee  
20 River Agreement.

21 And I wanted to ask you: Is there a difference  
22 between the way the Truckee Carson Irrigation District  
23 is treated under TROA and how it's treated under the  
24 Truckee River Agreement?

25 MR. McCONNELL: Well, currently the Truckee

1 River Agreement provides for a water basin committee  
2 that works with the Federal Water Master in the regime  
3 of Floriston Rates and changes and modifications and  
4 whatever is in the agreement for the parties. And the  
5 Truckee Carson Irrigation District is a member of that  
6 water basin committee. We get notification of meetings  
7 and we participate and have to agree.

8 Under the TROA they are going to supercede the  
9 Truckee River Agreement, and they provide no basis for  
10 notification to the District or no participation by the  
11 District in TROA operations whatsoever.

12 And it's kind of strange that the District,  
13 being a large user on the river, probably 25 percent on  
14 average of the total supply, that we are completely  
15 excluded out of any participation in the TROA, for  
16 whatever reason.

17 I have my ideas as to why, but I don't know if  
18 you're interested in hearing those or not.

19 MR. VAN ZANDT: I think it was Mr. DePaoli  
20 asked you a question about the 1938 decision by the  
21 California Department of Water Rights with regard to  
22 Boca. Had all the parties to the various protests and  
23 applications when the ruling came out in 1938 consented  
24 to how Boca Reservoir was going to be made?

25 MR. McCONNELL: Yes, they had consented in the

1 Truckee River Agreement. That would be the Washoe  
2 County Water Conservation District, Sierra Pacific Power  
3 Company and TCID at that time. So they had negotiated  
4 and agreed how water would be stored in -- they called  
5 it a supplemental reservoir, but they knew they were  
6 talking about Boca, and how the water would be released  
7 from the reservoir or what parties could do with the  
8 water out of the reservoir, who got what share of the  
9 waters.

10 So it was a complete settlement, basically, of  
11 the protests and the applicant's process. And so that  
12 was understood at the time that California held a  
13 hearing and discussed it and then rendered its decision.

14 MR. VAN ZANDT: There was a question about TCID  
15 Exhibit 111 which was referenced in your direct  
16 testimony on page 17, if we could bring it up,  
17 Mr. Lindsay. Thank you.

18 And in particular that paragraph 1 that's on  
19 page 17 of TCID-111. I believe it was Mr. DePaoli was  
20 asking you about this particular provision and  
21 characterizing it as TROA-like.

22 After reading this paragraph 1, do you have a  
23 view as to whether or not this is TROA-like?

24 MR. McCONNELL: There's two things that I can  
25 see in that paragraph that are different from the TROA.

1           The first, the second word says "an agreement"  
2 for modification. And so what they're doing in the TROA  
3 is certainly not an agreement to modify the Truckee  
4 River Agreement. Agreement of some of the parties but  
5 not agreement of all of the parties.

6           And then finally in the last sentence it says  
7 that they are -- it says they're not going to reduce  
8 Floriston Rates. So that's different from the TROA  
9 where the whole premise is to reduce Floriston Rates.

10           MR. VAN ZANDT: There was some questions about  
11 the OCAP and whether or not there had ever been an  
12 action challenging whether the OCAP had violated either  
13 the Alpine and Orr Ditch Decree; do you recall that?

14           MR. McCONNELL: I recall the questions, yes.

15           MR. VAN ZANDT: I'm going to show you -- I  
16 believe this is joint Exhibit 8, which for the record is  
17 a copy of the Pyramid Lake Tribe vs. Morton decision,  
18 1973.

19           And it was this decision, Mr. McConnell, that  
20 first modified the original 1967 OCAP that was issued by  
21 the Secretary for the Newlands Project?

22           MR. McCONNELL: Yes. This was an action that  
23 was taken by the Pyramid Lake Tribe and filed in the  
24 Washington D.C. court, not in the Federal District Court  
25 in Nevada but in Washington D.C. And it was filed

1 against the United States Secretary of Interior to  
2 change the OCAP that the Secretary had provided for the  
3 project. The judge itself allowed the Pyramid Tribe to  
4 establish the OCAP which was kind of unusual rather than  
5 resubmitting it to the government for a different one.

6 MR. VAN ZANDT: I want to direct your attention  
7 to page 262 of Joint Exhibit 8, and there is a paragraph  
8 4 on that page. We'll wait for it to come up on the  
9 screen here.

10 MR. McCONNELL: All right.

11 MR. VAN ZANDT: Subparagraph 4 on the left  
12 column, Mr. Lindsay. Thank you.

13 Can you read that into the record, please.

14 MR. McCONNELL: (Reading:)

15 Nothing in this judgment and order shall  
16 constitute an interpretation or  
17 modification of either the Alpine or Orr  
18 Water Ditch Decrees, nor shall it be  
19 deemed to affect the rights of any person  
20 under either of such decrees so long as  
21 they remain in effect.

22 MR. VAN ZANDT: And the court is talking about  
23 the OCAP there, correct?

24 MR. McCONNELL: That is correct. The OCAP was  
25 not to affect the water rights under the decrees.

1           MR. VAN ZANDT: There was a question I believe  
2 by Mr. Taggart and Mr. Pagni was also questioning you a  
3 little bit about this on the interplay between the  
4 petitions for change and the applications in these  
5 proceedings and what may be happening with the TROA in  
6 the Orr Ditch Court.

7           And I just wanted to have you look at USBR  
8 Exhibit 2. And it's under the introduction paragraph II  
9 there. Starting with the -- I believe it's the last  
10 sentence, last two sentences. Would you read that into  
11 the record, please.

12           MR. McCONNELL: Starting with since?

13           MR. VAN ZANDT: Yes.

14           MR. McCONNELL: Since the provisions  
15 of the change petitions and the  
16 appropriation applications are integral  
17 components of TROA, they could not be  
18 evaluated separate from TROA in the  
19 EIS/EIR. Therefore, the effects of TROA,  
20 including those of the petitions and  
21 applications, are one and the same.

22           MR. VAN ZANDT: And that's testimony from  
23 Mr. Kenneth Parr who is the Lahontan Basin Area Manager,  
24 correct?

25           A Yes, and it's dated June 29, 2010.

1 MR. VAN ZANDT: That's all I have.

2 CO-HEARING OFFICER DODUC: Thank you  
3 Mr. Van Zandt.

4 Any recross, Mr. Palmer?

5 MR. PALMER: None. Thank you.

6 CO-HEARING OFFICER DODUC: Any recross,  
7 Mr. DePaoli?

8 MR. DePAOLI: Just one second.

9

10 --o0o--

11 RE-CROSS-EXAMINATION BY MR. DePAOLI

12 FOR TRUCKEE MEADOWS WATER AUTHORITY

13 --o0o--

14

15 MR. DePAOLI: Mr. Van Zandt asked you some  
16 questions on redirect about what must be done if there  
17 are wholesale changes to the Truckee River Agreement in  
18 TROA.

19 Do you recall those questions?

20 MR. McCONNELL: Yes.

21 MR. DePAOLI: So if in fact there aren't  
22 wholesale changes to the Truckee River Agreement in  
23 TROA, not everyone's consent is required?

24 MR. McCONNELL: I don't know what you mean by  
25 that, but I see a lot of wholesale changes in the TROA.

1           MR. DePAOLI: Well, what constitutes a  
2 wholesale change?

3           MR. McCONNELL: Well, one, of course, is the  
4 fact that the District is not a participant completely,  
5 in a sense frozen out of the project, no notifications,  
6 no agreements, water will be exchanged and moved around  
7 without notifications to anybody including the District.

8           MR. DePAOLI: Does the District get notice from  
9 the Water Master when the Water Master is moving water  
10 from Stampede and Boca and vice versa?

11          MR. VAN ZANDT: I'm not sure the witness was  
12 finished with his answer.

13          MR. DePAOLI: I'm sorry. Were you finished?

14          MR. McCONNELL: No. Go ahead.

15          MR. DePAOLI: Does the District get notice from  
16 the Federal Water Master every time the Federal Water  
17 Master moves water between Stampede and Boca and vice  
18 versa?

19          MR. McCONNELL: I don't know.

20          MR. DePAOLI: It's basically TCID's position  
21 that it has a veto over whether or not TROA can happen  
22 or not happen; is that correct?

23          MR. McCONNELL: No, that's not our position.  
24 We just feel that conditions that are set up are set up  
25 to exclude us from the process, that we're parties to

1 the Truckee River Agreement, we have some say in that.  
2 We are a large user of water on the river, and the TROA  
3 is trying to take us completely out.

4 I mean, they superseded the Truckee River  
5 Agreement in the TROA and they supersede the Prosser  
6 Reservoir Exchange Agreement, and those are two  
7 agreements where the District is a signature. They do  
8 this without providing any notice to the District of  
9 what operations are going to take place. And as  
10 reflected in the EIS, there are shortages on the project  
11 that occur as a result of this operation, and there are  
12 some interesting things in there that you wonder how  
13 they come about.

14 For example, how does the Pyramid Lake rise two  
15 and a half feet? Where is that water coming from? When  
16 you model all the actions with the same water supply and  
17 you model it with the same OCAP restrictions for  
18 diversions to the project and all of a sudden you come  
19 up with two and a half extra feet in Pyramid Lake,  
20 that's 300,000 acre feet. That's a lot of water.

21 MR. DePAOLI: Over what period of time?

22 MR. McCONNELL: That's a hundred years.

23 MR. DePAOLI: Okay, over a hundred years. Now,  
24 could some of that possibly be the result of the fact  
25 that the consumptive use portion of a senior water right

1 is going to be held in storage?

2 MR. McCONNELL: Well, I don't know, because the  
3 TROA was --

4 MR. DePAOLI: I'll accept "I don't know."

5 MR. McCONNELL: The TROA was supposed to be  
6 modeled based on the Truckee Meadows using a full water  
7 supply. That's the no action rule under TROA the way I  
8 understand it. So if you're using all your water, and  
9 California is getting more water under the interstate  
10 allocations, and we're still restricted to our similar  
11 OCAP flows, where is the water coming from?

12 MR. DePAOLI: Well, I was just asking about  
13 that. Right now if the Truckee Meadows Water Authority  
14 has no particular use for a water right under the  
15 Floriston Rate regime because it's going down the river  
16 at a time when it can't use it, when that water gets to  
17 Derby Dam it can go one of two places, can it not?

18 MR. McCONNELL: It will go into the project or  
19 it will go to Pyramid Lake.

20 MR. DePAOLI: Depending on what OCAP says?

21 MR. McCONNELL: That's correct.

22 MR. DePAOLI: And if the Nevada State  
23 Engineer's approval of allowing TMWA to hold back the  
24 consumptive use portion of that water right, that water  
25 right isn't going to get to Derby Dam under that

1 scenario, is it, at that point in time?

2 MR. McCONNELL: Not the consumptive use  
3 portion. It's going to be traded off into water credits  
4 for the fish, or you might get it for some drought  
5 protection in the future --

6 MR. DePAOLI: And that --

7 MR. McCONNELL: -- under certain circumstances.

8 MR. DePAOLI: Sorry.

9 MR. McCONNELL: But, see, the problem with  
10 that, Gordon, is you're assuming that you can store that  
11 water now and not use it. But it's my understanding  
12 that the TROA is modeled and the no action alternative  
13 was modeled with the Truckee Meadows utilizing 119,000  
14 acre feet. That's 40,000 acre feet more than they  
15 currently are using. So we're talking about modeling  
16 future conditions, not modeling something that's going  
17 to occur at the present time.

18 MR. DePAOLI: Let's not talk about the model.  
19 Let's just talk about common sense.

20 MR. McCONNELL: Well, no, because --

21 MR. DePAOLI: But --

22 MR. McCONNELL: -- my answer was in --

23 MR. DePAOLI: Can the witness --

24 CO-HEARING OFFICER DODUC: Gentlemen.

25 Mr. DePaoli asked you a question.

1 MR. McCONNELL: I'm sorry, I apologize.

2 MR. DePAOLI: What's your understanding of the  
3 consumptive use portion of a water?

4 MR. McCONNELL: Well, in irrigation and in crop  
5 it would be what it would take for the crop, to grow a  
6 crop, and so it's the consumptive use portion of the  
7 water that goes to growing the crop.

8 MR. DePAOLI: And that portion is no longer  
9 available for anyone after that's been used, correct?

10 MR. VAN ZANDT: I'm going to have to object to  
11 this line of questioning. I think this is outside of  
12 the direct, cross, redirect. It's far afield from where  
13 we were.

14 CO-HEARING OFFICER DODUC: Stop reading my  
15 mind, Mr. Van Zandt.

16 Mr. DePaoli, where are you going with this?

17 MR. DePAOLI: I'm trying to ask some questions  
18 related to the lengthy nonresponsive answer to my  
19 earlier question.

20 CO-HEARING OFFICER DODUC: I'll allow you to  
21 ask the question again. Rephrase it, make it clear, and  
22 tie it back to the scope of Mr. Van Zandt's redirect.

23 MR. DePAOLI: At this point I'm not sure I can  
24 do that.

25 CO-HEARING OFFICER DODUC: I'm not sure either.

1 MR. DePAOLI: So I'll move on.

2 CO-HEARING OFFICER DODUC: Move on, please.

3 MR. DePAOLI: Can you tell the Board where in  
4 the Truckee River Agreement there is the provision which  
5 creates the Truckee Basin Committee that you referred  
6 to?

7 MR. McCONNELL: I don't know, unless it's the  
8 result of creating an administrator and it came out of a  
9 result of that because of the agreements that the  
10 parties have to reach if they're going to temporarily  
11 reduce Floriston Rates and how they're going to  
12 administer the river under the agreement.

13 MR. DePAOLI: So your answer is you can't tell  
14 the Board where there is a provision that requires the  
15 Truckee Basin Committee in the Truckee River Agreement?

16 MR. McCONNELL: I can't think of one right now,  
17 no.

18 MR. DePAOLI: Mr. Van Zandt had you read a  
19 quote from Tribe v. Morton and my earlier question. And  
20 my question now is: Are you aware of any case which has  
21 actually determined that a provision of OCAP did affect  
22 a water right under the Orr Ditch Decree or the Alpine  
23 Decree?

24 MR. McCONNELL: Same answer as I gave before.

25 MR. DePAOLI: Which was no?

1 MR. McCONNELL: Yes.

2 MR. DePAOLI: No further redirect -- or  
3 recross.

4 CO-HEARING OFFICER DODUC: Mr. Pagni?

5 MR. PAGNI: I have no questions.

6 CO-HEARING OFFICER DODUC: Mr. Taggart?

7 MR. TAGGART: No questions.

8 CO-HEARING OFFICER DODUC: I believe,  
9 Mr. Hoppin, you had some questions?

10 --o0o--

11 QUESTIONS FROM BOARD AND BOARD STAFF

12 --o0o--

13 CO-HEARING OFFICER HOPPIN: Mr. McConnell, you  
14 mentioned several times that the District wasn't a party  
15 to TROA. At any time was the District involved in the  
16 negotiations that led up to TROA?

17 MR. McCONNELL: Yes.

18 CO-HEARING OFFICER HOPPIN: And were you  
19 precluded from being a party in TROA, or did you decide  
20 to withdraw?

21 MR. McCONNELL: We weren't precluded. It just  
22 became very difficult to see if there was going to be  
23 any solutions when we separated out with the Pyramid  
24 Tribe to try to resolve differences. They took various  
25 groups and tried to get them to reach agreements on

1 various issues. And it was the Justice Department's  
2 attorney that told us there was not going to be any  
3 money available to facilitate any settlement between us  
4 and the Tribe. Made it very difficult to come up with a  
5 solution or an ability to negotiate at that time.

6 And then all of our requests for storage  
7 credits for the Newlands Project were rejected. And so  
8 it got to the point where it appeared at least to me  
9 that they weren't willing to negotiate with us. They  
10 didn't have to, for one thing. We weren't what was  
11 considered a mandatory party, so they didn't have to  
12 have us in there. They started out indicating that they  
13 wanted to have everybody a party to it, but it became  
14 clear through the negotiations that they weren't going  
15 to agree to anything that the District would want to try  
16 to get the matter solved.

17 And it goes back to a long history of  
18 litigation by the Pyramid Tribe and the United States  
19 against the District. It goes back 40 years. And that  
20 position hasn't changed. And we had -- the Tribe's goal  
21 is to take Derby Dam out of the river. They've stated  
22 that goal. They have a picture at the reservation where  
23 you have the picture of Derby Dam and they have a red  
24 circle around it with a red slash through it.

25 CO-HEARING OFFICER HOPPIN: I think there is a

1 picture of me like that over in the Senate.

2 MR. McCONNELL: Well, so you know what I mean,  
3 then.

4 And the Justice Department attorney said he  
5 wants to financially bankrupt the District. So you have  
6 attitudes of the parties that it becomes very difficult  
7 to find a solution. I mean, we would have been very  
8 willing to come up with a solution where they could have  
9 stored some of the project water that would help us in  
10 some of these circumstances where there is less water.

11 CO-HEARING OFFICER HOPPIN: I would assume, and  
12 correct me if I'm wrong, that like most districts you  
13 have limited financial resources and it came down to a  
14 business decision as to whether it was more to your  
15 advantage to try and participate in what appeared to  
16 be -- I'm searching for the right adjective. I'll just  
17 exclude that portion of it.

18 You decided it was better to use your limited  
19 resources to litigate against the TROA rather than to  
20 continue to use your limited resources to continue to  
21 participate; is that correct?

22 MR. McCONNELL: That was part of it. The other  
23 part was that people got worn out. We started changing  
24 people to go there with a different perspective, maybe a  
25 new viewpoint or a new personality that might change the

1 dynamics, but that didn't work. And people just got  
2 worn out. They didn't want to go. They were tired of  
3 getting beat up at the hearings. And so that's partly  
4 what happened.

5 CO-HEARING OFFICER HOPPIN: Thank you. I have  
6 one more question.

7 Last week I believe it was Mr. Schank mentioned  
8 that on your project after the construction portion was  
9 paid the Bureau retained the water right, there was no  
10 release of the water right after construction, there was  
11 an ongoing O&M, which would not be unusual, but after  
12 the construction was paid there was no release of the  
13 water rights to the individual land owners in the  
14 Newlands Project; is that correct?

15 MR. McCONNELL: That's correct. They haven't  
16 signed off on that.

17 CO-HEARING OFFICER HOPPIN: Was that  
18 arrangement stipulated, to your knowledge? And I know  
19 it preceded your tenure at the District, certainly -- or  
20 certainly I hope it did; if it didn't, you're  
21 well-preserved -- but was that stipulation made in the  
22 original agreement, or was it something that people were  
23 surprised by, the fact that the water rights would be  
24 retained?

25 MR. McCONNELL: I think I can't answer the

1 original stipulations. There were provisions in the  
2 original contract that title to the works didn't  
3 transfer. But it's important for the United States to  
4 control the water rights or at least to have an  
5 impression that they control the water rights.

6 I mean, the Justice Department attorneys stated  
7 several times that they own the water rights. I mean,  
8 they don't -- regardless of what the U.S. Supreme Court  
9 said, they take the position that they're their water  
10 rights and they can move it around however they want.

11 CO-HEARING OFFICER HOPPIN: So if you can  
12 explain this to me, when Mr. Goetsch testified last week  
13 he testified that individuals in Newlands from time to  
14 time had sold their water rights to upstream water  
15 users; is that correct?

16 MR. McCONNELL: There have been some on the  
17 Truckee division that have sold to the water quality --  
18 I believe it's the water quality program.

19 CO-HEARING OFFICER HOPPIN: Do they have to  
20 have the blessings of the Bureau of Reclamation before  
21 they did that? I'm having a hard time understanding how  
22 an individual can sell a water right if in fact the  
23 Bureau has retained them?

24 MR. McCONNELL: That's a good question. They  
25 did sell them, though. And I guess it's based on the

1 fact that people believe that they own them based on the  
2 U.S. Supreme Court's decision.

3 Now, of course, the purchase of those water  
4 rights are by either the Pyramid Tribe or the  
5 Reno/Sparks and Washoe County group for water quality  
6 purposes, and those are all agreements that are  
7 supported by the United States. So the United States  
8 probably wouldn't have objected to those if they had the  
9 opportunity.

10 I know one thing that they're doing on the  
11 project, which is kind of unusual to me, is that they're  
12 precluding the City of Fernley from diverting their  
13 water that they've acquired out of the canal. They're  
14 giving them a lot of trouble on that, and they want them  
15 to build a diversion structure down in the river which  
16 is several hundred feet -- or a hundred feet or two  
17 hundred feet lower in elevation, so they would have to  
18 pump the water up out of the river. And to me it's just  
19 another move in the direction to try to take the Derby  
20 Dam out of the system.

21 CO-HEARING OFFICER HOPPIN: Thank you for your  
22 answers, Mr. McConnell.

23 CO-HEARING OFFICER DODUC: Staff have any  
24 questions?

25 All right. Thank you, Mr. McConnell.

1           Mr. Van Zandt, if you would call your next  
2 witness and we'll do a seat change.

3           MR. VAN ZANDT: Chris Mahannah, please.

4           CO-HEARING OFFICER DODUC: You may begin when  
5 ready, Mr. Van Zandt.

6           MR. VAN ZANDT: Thank you. I may need some  
7 binoculars to see my witness.

8                                           --o0o--

9                                           CHRIS C. MAHANNAH

10                                          CALLED BY TRUCKEE CARSON IRRIGATION DISTRICT

11                                                  and CHURCHILL COUNTY

12                                                  DIRECT EXAMINATION BY MR. VAN ZANDT

13                                           --o0o--

14           MR. VAN ZANDT: Mr. Mahannah, will you state  
15 your name for the record, please, and spell your last  
16 name.

17           MR. MAHANNAH: Chris C. Mahannah. Last name is  
18 spelled M-a-h-a-n-n-a-h.

19           MR. VAN ZANDT: And where are you employed,  
20 Mr. Mahannah?

21           MR. MAHANNAH: I have my own firm, Mahannah &  
22 Associates, located in Reno, Nevada.

23           MR. VAN ZANDT: And let me direct your  
24 attention to TCID Exhibit 244A.

25           CO-HEARING OFFICER DODUC: Mr. Van Zandt, could

1 you confirm with your witness about the oath?

2 MR. VAN ZANDT: Mr. Mahannah, you were here on  
3 last Wednesday when the oath was administered?

4 MR. MAHANNAH: I was.

5 MR. VAN ZANDT: And did you say yes?

6 MR. MAHANNAH: I did say yes.

7 CO-HEARING OFFICER DODUC: Thank you.

8 MR. VAN ZANDT: Thank you for reminding me.

9 Turning your attention to TCID Exhibit 244A,  
10 identify that for the record, please.

11 MR. MAHANNAH: This would be the statement of  
12 qualifications for my firm and my resume is attached at  
13 the end of the document.

14 MR. VAN ZANDT: And this is a true and correct  
15 copy of your statement of qualifications?

16 MR. MAHANNAH: It appears so, yes.

17 MR. VAN ZANDT: And would you look at TCID  
18 Exhibit 244D, please, identify that for the record?

19 MR. MAHANNAH: 244D is my consumptive use  
20 report.

21 MR. VAN ZANDT: Are there any changes to  
22 Exhibit 244B?

23 MR. MAHANNAH: Yes, there is.

24 MR. VAN ZANDT: Would you detail those, please.

25 MR. MAHANNAH: At the very end of the document

1 there are two pages that were somehow appended to this  
2 report that are a technical memorandum from Binder &  
3 Associates. Those two pages should be removed.

4 MR. VAN ZANDT: Is that the only change?

5 MR. MAHANNAH: That's the only change to 244B.

6 MR. VAN ZANDT: With that change, is that a  
7 true and correct copy of your Exhibit 244B?

8 MR. MAHANNAH: It is.

9 MR. VAN ZANDT: The next Exhibit, I believe, is  
10 TCID 267?

11 MR. MAHANNAH: Yes.

12 MR. VAN ZANDT: Are there any changes to --  
13 first will you identify what that is for the record,  
14 please.

15 MR. MAHANNAH: That's my unappropriated water  
16 report on the agricultural consumptive use.

17 MR. VAN ZANDT: And are there any changes to  
18 TCID Exhibit 267?

19 MR. MAHANNAH: Yes. On page 10 there is a  
20 reference, second exhibit from the bottom, it says 231.  
21 It should be 232. Also in that exhibit TCID, in the  
22 references under TCID-228, the exhibit cited in the  
23 report, is missing a map under Application 9330. That  
24 map needs to be added. Also, TCID-82 is Application  
25 15664 cited in the report, that's missing a supporting

1 map. So that needs to be added.

2 CO-HEARING OFFICER DODUC: Mr. DePaoli?

3 MR. DePAOLI: Maybe I misheard. I thought the  
4 witness said that Exhibit 267 was his report on  
5 agricultural consumptive use, and the one I have is 280.  
6 But I do think he is talking about 267, but that's what  
7 confused me.

8 MR. MAHANNAH: You're correct, Mr. DePaoli. I  
9 did misspeak. 267 is my unappropriated water report.

10 CO-HEARING OFFICER DODUC: Thank you,  
11 Mr. DePaoli.

12 MR. VAN ZANDT: So with those changes -- is  
13 that the last change, Mr. Mahannah?

14 MR. MAHANNAH: It is.

15 MR. VAN ZANDT: Thank you. With those changes  
16 is TCID Exhibit 267 a true and correct copy of your  
17 direct testimony on unappropriated water analysis?

18 MR. MAHANNAH: It is.

19 MR. VAN ZANDT: And then direct your attention  
20 to TCID Exhibit 280.

21 MR. MAHANNAH: Which one is 280?

22 MR. VAN ZANDT: 280, the agricultural  
23 consumptive use report.

24 MR. MAHANNAH: Yes.

25 MR. VAN ZANDT: Are there any changes to TCID

1 Exhibit 280?

2 MR. MAHANNAH: I don't believe so, no.

3 MR. VAN ZANDT: And is this a true and correct  
4 copy of your direct testimony with regard to  
5 agricultural consumptive use?

6 MR. MAHANNAH: It is.

7 MR. VAN ZANDT: I want to show the witness, if  
8 he doesn't have it in front of him, new exhibits TCID  
9 302 and 303.

10 MR. MAHANNAH: Yes, I have those.

11 MR. VAN ZANDT: And could you identify those  
12 for the record?

13 MR. MAHANNAH: This was my testimony -- direct,  
14 cross, recross -- at the hearing held before the Nevada  
15 State Engineer on December 14 and 15, 2009 where I  
16 presented the M&I and ag CU reports.

17 MR. VAN ZANDT: And to your knowledge that is a  
18 true and correct copy of those transcripts?

19 MR. MAHANNAH: It appears so, yes.

20 MR. VAN ZANDT: And of the certification pages  
21 TCID Exhibit 302, it's at page 183. And at TCID  
22 Exhibit 303 it's at page 346.

23 And, Mr. Mahannah, we're not going to do direct  
24 or cross on either your consumptive use for agriculture  
25 or M&I. But so the record contains what your ultimate

1 opinion was, that opinion was that there's 2.0 acre feet  
2 is the consumptive use that's appropriate for those  
3 change applications that were reviewed by the State  
4 Engineer, correct?

5 MR. MAHANNAH: That was part of it, that the  
6 State Engineer should base his decision on a municipal  
7 consumptive use amount of 2.0, and to store that in the  
8 same manner in which it was historically consumed to  
9 protect return flows in time, location and amount.

10 MR. VAN ZANDT: Thank you.

11 Now I want to turn your attention to TCID  
12 Exhibit 267. Have you prepared a summary of your  
13 testimony with regard to that report?

14 MR. MAHANNAH: Yes, I have.

15 MR. VAN ZANDT: And that's dealing with the  
16 unappropriated water analysis, correct?

17 MR. MAHANNAH: That's correct.

18 MR. VAN ZANDT: Would you give that  
19 presentation, please.

20 MR. MAHANNAH: Yes. Is the clock the remaining  
21 time I have for the summary? Okay, I'll get right to  
22 it.

23 This summary is going to deal primarily with  
24 the applications to appropriate in Stampede Reservoir  
25 and Prosser. I won't reiterate what they're asking for;

1 I think we've talked that through to a great extent.

2 Little Truckee River is the largest tributary  
3 to the Truckee River, and approximately 95 percent of  
4 the Truckee River flow in Nevada is generated in the  
5 California watersheds.

6 If I could get the hearing office to bring up  
7 TCID 265, it's a map I've prepared, detailed map of the  
8 little Truckee River watershed. 265. I thought I gave  
9 you a higher resolution color one of this.

10 Okay. This is the watershed area for the  
11 little Truckee River that shows the watershed area for  
12 Stampede Reservoir, Independence Lake, Prosser Creek  
13 watershed and then the Boca watershed.

14 So as I mentioned earlier, that is the largest.  
15 The little Truckee River headwaters up here at Webber  
16 Lake, flows down through the little Truckee.  
17 Independence joins the Little Truckee roughly in this  
18 vicinity. This is Stampede Reservoir, the dam, and then  
19 down to Boca Reservoir. This is Prosser Creek Reservoir  
20 here.

21 If I could switch back to my Power Point,  
22 please.

23 As I mentioned, roughly 95 percent of the flow  
24 in the Little Truckee River or of the Truckee River is  
25 derived in California before it enters the state of

1 Nevada.

2           We heard testimony last week regarding some  
3 prior pending applications in Nevada, the first of which  
4 was Application 9330 filed by TCID in 1930. I was  
5 involved as well as Mr. Shahroody in testimony in 1996  
6 regarding this application. It was denied, appealed,  
7 and now it's back, been remanded back to the State  
8 Engineer I believe in October of this year. So that's  
9 the most senior pending application that is still alive.

10           There is also four applications filed by the  
11 Bureau, 15664 and then 24310 through 12, seeking new  
12 appropriations in Stampede Reservoir, 225,000 acre feet.  
13 There is correspondence in the supporting exhibits where  
14 the Nevada State Engineer, Mike Turnipseed at the time,  
15 inquired or sent a memo to the director of the  
16 Conservation and said we've had unappropriated water  
17 hearings, these applications were not considered, what  
18 should we do about them. And he suggested that they be  
19 withdrawn or denied.

20           In 2005 the State Engineer sent the Bureau a  
21 letter asking what do we want to do with these old  
22 pending applications. The Bureau replied, basically,  
23 that the applications are important to the TROA process  
24 implementation and they've asked the State Engineer to  
25 hold these in abeyance. So we have senior pending

1 applications in Nevada.

2 This was discussed to some degree last week,  
3 State Engineer rulings on unappropriated water. They  
4 granted the Tribe's Applications 48061 and 94 for 477  
5 some thousand acre feet.

6 TCID-211 and 212 are the actual permits. Yes,  
7 those are the permits. And in the permits they declared  
8 that the Truckee River was fully appropriated.

9 State Engineer and TROA signatory parties in  
10 Section 1.E.1, TCID-227, have agreed that the Truckee  
11 River is fully appropriated.

12 TROA Section 12 A.4.F, the Orr Ditch Court must  
13 modify the decree to recognize the Tribe's  
14 unappropriated water and the Truckee River is fully  
15 appropriated. In 4683 A -- and I'd like to just read a  
16 portion of this at TCID-231.

17 The State Engineer finds permits 48061  
18 and 48494 only authorize the use of  
19 unappropriated water for instream/in situ  
20 use in the Truckee River. The  
21 applications did not seek authorization  
22 for storage in upstream reservoirs and  
23 are not permits for storage in upstream  
24 reservoirs and cannot be used for storage  
25 under the permit terms at issue here.

1           The State Engineer finds that he did not  
2           and does not have before him applications  
3           for storage of water in upstream  
4           reservoirs. The issue of storage and  
5           exchange contemplated under TROA is not  
6           relevant to the State Engineer's  
7           decisions on Applications 48061 and 94  
8           since the applications were not filed for  
9           storage in upstream reservoirs and cannot  
10          be used in the manner under the current  
11          permits.

12                 That was appealed to District Court, and I'll  
13          read from TCID-208.

14                 Since Applications 48061 and 48494 do not  
15                 currently allow for storage as  
16                 anticipated by the draft TROA, it will be  
17                 necessary as a matter of state law for  
18                 the Tribe to file change applications to  
19                 obtain Nevada State Engineer approval in  
20                 order for the water to be stored as  
21                 anticipated by the draft TROA. This will  
22                 require the State Engineer to determine  
23                 whether the proposed storage use will  
24                 conflict with existing rights or threaten  
25                 to prove detrimental to public interest.

1 I think we heard testimony last week from  
2 Mr. Shahroody that they intend to file those but they  
3 have not been filed.

4 This next slide is a bit hard to read, but this  
5 is the amount, the 477,000 acre feet and the monthly  
6 amounts that the Tribe requested in their applications  
7 to appropriate was the subject of several days of  
8 testimony in 9330. And I'm going to read from the  
9 Tribe's own applications as supporting attachments to  
10 those applications that became part of the permit terms.

11 MR. VAN ZANDT: Mr. Mahannah, I just want to  
12 note for the record that this same chart is contained in  
13 TCID-267 at page 5, correct?

14 MR. MAHANNAH: Okay. So out of TCID-211 and  
15 212, under Attachment A, item 2A, this is the Tribe's  
16 own words:

17 These flows are, underscore, required for  
18 the recreational purpose of natural  
19 spawning of Lahontan cutthroat trout and  
20 Cui-ui in the Truckee River below Derby  
21 Dam, to fulfill the purposes of  
22 establishment of Pyramid Lake Indian  
23 Reservation, to provide sustenance for  
24 the members of the Pyramid Lake Tribe, to  
25 prevent the loss of and to conserve the

1           endangered Cui-ui and the threatened  
2           Lahontan cutthroat trout, for the  
3           operation of Marble Bluff Dam and Pyramid  
4           Lake Fishway in support of that fishery  
5           and to maintain Pyramid Lake at a stable  
6           level to support the lake's use for  
7           recreation.

8           Item 2B of that attachment says:

9           The second component of the amount of  
10          water applied for is for the maintenance  
11          of the level of Pyramid Lake. For this  
12          purpose, an average annual inflow of the  
13          Truckee River to the lake of  
14          approximately 400,000 acre feet as  
15          required. Based on the historic flows of  
16          the Truckee River and the existing  
17          diversions from and depletions from those  
18          flows, the applicant's intent is to  
19          appropriate all of the water in the  
20          Truckee River and its tributaries that is  
21          not subject to valid existing rights.

22          So the Tribe was asking for all the water, and  
23          the State Engineer granted that.

24          So wrapping up, since 95 percent of the flow in  
25          the Truckee River originates in California and the State

1 Engineer and TROA's signatory parties agree that the  
2 Truckee River is fully appropriated, I feel it's  
3 reasonable to conclude that the entire Truckee River and  
4 tributaries in both states are fully appropriated.

5 I feel both applications should be denied on  
6 the grounds that the system is fully appropriated. Or  
7 at a minimum, the senior pending applications in Nevada  
8 from the same source should be dealt with before acting  
9 on these pending applications to appropriate; i.e., the  
10 old Bureau pending application should either be  
11 withdrawn or denied, and TCID's application which has  
12 been remanded should be dealt with.

13 And then obviously the Tribe needs to file  
14 change applications on the Nevada unappropriated water.  
15 I mean, they admitted last week that's what they're  
16 seeking to store. It's more of a change, not a new  
17 appropriation, in my opinion.

18 Then in conclusion, in the transcript -- this  
19 is from Michael Wolz, Senior Deputy Attorney General,  
20 that there have been implications that this water is  
21 already being stored. And if that's the case, then  
22 enforcement action needs to be placed.

23 We heard testimony, I believe, from  
24 Mr. Shahroody that they have been storing this water  
25 without a permit from the Nevada State Engineer and

1 without an authorization from this Board. So that  
2 concludes my direct summary.

3 MR. VAN ZANDT: Thank you, that's all I have.

4 CO-HEARING OFFICER DODUC: Thank you,  
5 Mr. Van Zandt. I think I'll prefer to take a lunch  
6 break before we get into cross-examination, but let's go  
7 off record.

8 (Discussion off the record)

9 (Lunch Recess)

10 CO-HEARING OFFICER DODUC: Welcome back,  
11 everyone. We're now ready for our cross-examination of  
12 Mr. Mahannah, so attorneys that will be conducting the  
13 cross-examination, please come up.

14 MR. DePAOLI: No cross.

15 CO-HEARING OFFICER DODUC: Let me run through  
16 the list.

17 No cross from Mr. Palmer. No cross from  
18 Mr. DePaoli. Any cross from Mr. Pagni?

19 MR. PAGNI: No.

20 CO-HEARING OFFICER DODUC: Cross from  
21 Mr. Soderlund?

22 MR. SODERLUND: No.

23 CO-HEARING OFFICER DODUC: Cross from  
24 Mr. Mixson?

25 MR. MIXSON: No.

1 CO-HEARING OFFICER DODUC: Cross from  
2 Mr. Taggart?

3 MR. TAGGART: No.

4 CO-HEARING OFFICER DODUC: Okay. That's easy  
5 enough. Thank you, gentlemen.

6 CO-HEARING OFFICER DODUC: Mr. Van Zandt, do  
7 you have any additional witnesses?

8 MR. VAN ZANDT: I do. I'd like to call Dr. Ken  
9 Knox. Direct examination by Mr. Van Zandt of  
10 Mr. Kenneth Knox.

11 CO-HEARING OFFICER DODUC: Good afternoon. You  
12 may begin when ready, Mr. Van Zandt.

13 CO-HEARING OFFICER HOPPIN: Mr. Van Zandt, if  
14 the previous witness strained your eyesight, I don't  
15 think there is any prerequisite of where you put them.  
16 You can move them wherever you want.

17

18 --o0o--

19 KEN KNOX

20 called by TRUCKEE CARSON IRRIGATION DISTRICT

21 and CHURCHILL COUNTY

22 DIRECT EXAMINATION BY MR. VAN ZANDT

23 --o0o--

24 MR. VAN ZANDT: Good afternoon, Dr. Knox.

25 DR. KNOX: Good afternoon, sir.

1 MR. VAN ZANDT: Would you state your name for  
2 the record and spell your last name, please.

3 DR. KNOX: My name is Ken Knox, K-n-o-x, and I  
4 do recognize and I was here Wednesday and answered  
5 affirmatively to the oath.

6 MR. VAN ZANDT: Thank you.

7 Dr. Knox, who is your current employer?

8 DR. KNOX: I'm employed by URS Corporation.

9 MR. VAN ZANDT: And I'm going to refer you to  
10 TCID Exhibit 276A?

11 DR. KNOX: Yes, sir.

12 MR. VAN ZANDT: And for the record, would you  
13 give the Board members some idea of your calculations,  
14 please?

15 DR. KNOX: 276A is a copy of my curriculum  
16 vitae. And in terms of my background, as a member of  
17 URS Corporation part of my responsibilities include  
18 providing professional consultation to a variety of  
19 governmental, private, corporate, industrial and  
20 citizens and entities in water resources engineering,  
21 planning, development and management within the United  
22 States and also within the international community.

23 I am also an adjunct professor at the  
24 University of Denver. I teach one to two classes per  
25 term. These are graduate level classes, primarily focus

1 upon three disciplines. First, environmental protection  
2 law; the second is in water resources management and  
3 law; and the third is in natural resources economics.

4           Prior to working at URS, as Mr. Van Zandt  
5 explained in my introduction, I was employed as the  
6 Chief Deputy State Engineer for the Colorado Division of  
7 Water Resources. As part of my responsibilities in that  
8 former position, I was responsible for the daily  
9 administration and allocation of water resources in  
10 seven river basins within that state. I was also  
11 responsible for the water resources engineering, and  
12 that included both surface and groundwater functions. I  
13 oversaw the modeling and the development of decision  
14 support systems for the State of Colorado.

15           I also enjoyed working with Interstate River  
16 Compacts. I served as the engineer adviser. The State  
17 of Colorado is party to nine interstate compacts. The  
18 State also administered her waters pursuant to two  
19 United States Supreme Court decrees and several  
20 memorandums of agreement and memorandums of  
21 understanding with other adjoining states.

22           I served as the hearing officer for this  
23 Division of Water Resources. I developed most of the  
24 rules and regulations that are currently in effect since  
25 1998 that are employed within the state of Colorado for

1 water resources management and allocation.

2 I was asked to provide periodic briefings and  
3 recommendations to the Colorado Governor and the  
4 Attorney General and testified before the general  
5 assembly regarding water resources management issues.

6 Mostly what I want to convey to you is I was  
7 blessed with the opportunity to serve the water using  
8 community and the citizens for over 24 years as a public  
9 servant.

10 MR. VAN ZANDT: Thank you. And Dr. Knox, do  
11 you have any experience with water rights in the state  
12 of Nevada.

13 DR. KNOX: Yes, sir, I do. My experience with  
14 the state of Nevada started approximately 1998 when I  
15 was asked to assume that leadership position with the  
16 Colorado Division of Water Resources. Part of those  
17 functions required, again, working with my colleagues in  
18 17 western United States -- excuse me, 17 states, 17  
19 western states in the United States. I think that's  
20 more appropriately stated on interstate compact  
21 allocation.

22 But also we made periodic visits, consortiums,  
23 conferences as colleagues on how we would go and manage  
24 and allocate water resources. And one of the lessons  
25 that I learned in an arid environment in the western

1 United States, it's quite striking how similar the  
2 controversies/challenges can be throughout this land.

3 I also served -- excuse me. I also have a  
4 familiarity with this basin in particular. As part of  
5 my PhD's dissertation I was looking at all interstate  
6 river compacts and found this one quite intriguing.

7 MR. VAN ZANDT: Thank you. Exhibit 276A is a  
8 true and correct of your curriculum vitae?

9 DR. KNOX: Yes, sir, it is.

10 MR. VAN ZANDT: Did you also provide direct  
11 written testimony for today's proceedings?

12 DR. KNOX: Yes, sir, I did.

13 MR. VAN ZANDT: And direct your attention to  
14 TCID Exhibit 276D. Are there any corrections to that  
15 testimony?

16 DR. KNOX: Yes, I'm afraid I have one, please.  
17 On page 3, in terms of listed references, I would  
18 request to add TCID-208, Case 25219/25227 entitled  
19 Decision and Order of the Third Judicial Court in the  
20 State of Nevada by Judge William A. Maddox dated  
21 June 13, 2008.

22 MR. VAN ZANDT: And on page 6 that decision is  
23 mentioned. Would you like to interlineate the exhibit  
24 number there in the first full paragraph.

25 DR. KNOX: Yes, sir, you provided the correct

1 reference on page 6.

2 MR. VAN ZANDT: So we just want to interlineate  
3 after it says Case No. 25219 and 25227 at TCID-208,  
4 right?

5 DR. KNOX: Yes, please.

6 MR. VAN ZANDT: With those changes, is this a  
7 true and correct of your direct written testimony?

8 DR. KNOX: Yes, it is.

9 MR. VAN ZANDT: And have you prepared a summary  
10 of your testimony for today?

11 DR. KNOX: Yes. Pursuant to Madam Board  
12 Member's direction, I will hit the highlights.

13 CO-HEARING OFFICER DODUC: Thank you.

14 MR. VAN ZANDT: Thank you. Please proceed.

15 DR. KNOX: I have been asked to provide  
16 testimony in this proceeding concerning water right  
17 Applications 31487 and 31488 filed by the United States  
18 Bureau of Reclamation, petitions to change license 3723  
19 by Washoe County Water Conservation District, license  
20 4196 by Truckee Meadows Water Authority, permit 11605  
21 and license 10180 by the United States Bureau of  
22 Reclamation in the Truckee River system.

23 In regard to the water resources and supply for  
24 Stampede Reservoir and Prosser Creek Reservoir, Stampede  
25 Reservoir and Prosser Creek Reservoir are on-channel

1 impoundment structures located on the Little Truckee  
2 River and Prosser Creek respectively. The water stored  
3 and subsequently released from these structures is used  
4 to supplement streamflows in the Truckee River and  
5 assist toward meeting the demands of downstream water  
6 rights and the Floriston Rate targets specified in the  
7 Truckee River Agreement.

8           The Truckee River Agreement, including  
9 designation of the Floriston Rate targets, was approved  
10 and adopted by the Federal District Court and made part  
11 of the final decree in the United States of America v.  
12 Orr Water Ditch Company that is binding upon the parties  
13 to the agreement including the United States of America,  
14 the Truckee Irrigation Water Conservation District --  
15 excuse me -- the Truckee Carson Irrigation District, the  
16 Washoe County Water Conservation District and Sierra  
17 Pacific Power Company which is the predecessor in  
18 interest to Truckee Meadows.

19           The water supplies that are passed through  
20 Stampede and Prosser Creek Reservoirs, or waters that  
21 are temporarily captured and released, is part of a  
22 conjunctive water supply system used to meet existing  
23 downstream demands.

24           It is my opinion that the application sought  
25 for Stampede Reservoir and Prosser Creek Reservoir seek

1 an expansion of the original water right adjudications  
2 granted to these structures in terms of the source of  
3 supply, the quantity, the season or timing and the  
4 location.

5 In terms of the existing water rights within  
6 the Newlands Project, there are approximately 3,000  
7 individuals with water rights in the Newlands Project  
8 that retain senior water rights in the Truckee River  
9 system. The owners of these senior water rights  
10 continue to divert water that is physically available  
11 and in priority in the Truckee River to beneficial uses.  
12 They are explicitly protected by existing decrees such  
13 as the Orr Water Ditch Decree and the Alpine Land and  
14 Reservoir Decree.

15 Pursuant to Claim 3, in the final decree in the  
16 United States of America vs. Orr Water Ditch Company,  
17 the Truckee Canal was granted a senior water right with  
18 a July 2, 1902 priority.

19 And I recognize that the term "senior" is a  
20 relative term. Of course there are pre water rights in  
21 the Truckee Meadows with 1870 priorities, by the water  
22 right that we're talking about here for the Truckee  
23 Canal is senior to those pending in these instant  
24 applications and petitions before the Board.

25 The impetus for the final decree was a lawsuit

1 filed by the United States in 1913 that sought to  
2 adjudicate water rights to the Truckee River for the  
3 benefit of the Pyramid Lake Indian Reservation and the  
4 planned Newlands Project.

5           The Orr Ditch Decree explicitly specifies that  
6 the water right awarded to the Truckee Carson Irrigation  
7 District may be used for irrigation of lands on the  
8 Newlands Project, for storage in Lahontan Reservoir, for  
9 generating power, for domestic purposes and supplying  
10 water for inhabitants in the cities and towns on the  
11 project, and other purposes under control, disposal and  
12 regulation by the Truckee Carson Irrigation District.

13           In a parallel manner to the Orr Ditch Decree,  
14 the final decree in the United States of America vs. The  
15 Alpine Land and Reservoir Company was a general  
16 adjudication of water rights on the Carson River and its  
17 tributaries.

18           In this action the Federal District Court  
19 declared that the Carson River and its tributaries are  
20 fully appropriated as a factual finding.

21           The diversion and storage water rights retained  
22 by the water right owners within the Newlands Project  
23 that receive water by diversion at Derby Dam, conveyance  
24 in the Truckee Canal and its lateral delivery system,  
25 and from Lahontan Reservoir are senior in priority to

1 the subject water rights in this proceeding and warrant  
2 protection from injury.

3 In terms of completing permits and  
4 applications, the Truckee Carson Irrigation District  
5 filed application 9330 on September 9, 1930 and an  
6 amended application on March 9, 1931. This application  
7 seeks to appropriate 1,500 cubic feet per second with an  
8 annual volumetric limit up to 100,000 acre feet of  
9 waters in the Truckee River and its tributaries for  
10 storage in Lahontan Reservoir for domestic purposes and  
11 irrigation of lands within the Newlands Project.

12 It is proposed that the water will be conveyed  
13 to Lahontan Reservoir through diversion at Derby Dam and  
14 use the same infrastructure and distribution currently  
15 in place.

16 Application 9330 was denied by the Nevada State  
17 Engineer on August 14, 1998, and is currently under  
18 appeal.

19 The Pyramid Lake Paiute Tribe filed an  
20 application to appropriate water from the Truckee River  
21 and its tributaries with the Nevada State Engineer's  
22 office on October 17, 1984, approximately 54 years after  
23 filing by the Truckee Carson Irrigation District.

24 The Nevada State Engineer issued permit number  
25 48494 that granted 477,851 acre feet of water from the

1 Truckee River and its tributaries for recreational  
2 purpose.

3 The Nevada State Engineer found, and this  
4 decision was upheld by the Third District Court, that  
5 the Truckee River and its tributaries are fully  
6 appropriated. The Truckee River Operating Agreement may  
7 not interfere with decreed water rights.

8 For foundation, the requirement for creating  
9 the Truckee River Operating Agreement may be attributed  
10 to the Water Rights Settlement Act of 1990, also known  
11 as Public Law 101-618.

12 Under Section 205 of the Act which is entitled  
13 Truckee River Water Supply Management, several  
14 requirements are provided that describe the potential  
15 control and operations of the reservoirs in the Truckee  
16 River system.

17 A significant component of the Act is the  
18 requirement that the operation of the Truckee River  
19 Reservoirs shall be operated to "ensure that water is  
20 stored in and released from Truckee River reservoirs to  
21 satisfy the exercise of water rights in conformance with  
22 the Orr Ditch Decree and Truckee River General Electric  
23 Decree. And that citation is found in section  
24 205(a)(2)(D). Section 1.C of TROA also attempts to  
25 reiterate the protection of water rights as required by

1 said 1990 Act.

2           The TROA upon which these applications and  
3 change petitions rest and rely upon in its present state  
4 does not contain adequate information or specificity to  
5 protect the owners of vested water rights from injury.

6           Agency actions cannot interfere -- pardon me.

7           Agency regulations cannot interfere with  
8 decreed water rights. The creation and implementation  
9 of rules and policies by a government agency such as the  
10 adjustments to the 1997 operating criteria procedures  
11 here in this proceeding referred to many times as OCAP  
12 for the Newlands Irrigation Project in Nevada are often  
13 helpful to document and describe the procedures taken by  
14 said agency personnel in water resources management  
15 activities.

16           Agency regulations and policies, including  
17 those issued by federal, state and local agencies should  
18 properly be constructed and interpreted to complement  
19 existing decrees. However, these federal regulations  
20 may not circumvent, replace or diminish a decreed water  
21 right issued by an adjudicated body or court of law.

22           Petitions to change water rights. The process  
23 to change or transfer water rights is often complicated.  
24 However, the basic concept in a change in water right  
25 proceeding may include a change in the type of use the

1 water resources that may be applied toward, a change in  
2 the point of diversion or storage, a change in the place  
3 of use, or a combination of all these elements. They  
4 may occur as long as other water rights in the tributary  
5 system are not adversely impacted.

6 By its nature, a change in water right involves  
7 a deviance from historic conditions or a change in the  
8 status quo within a river system. In highly developed  
9 river systems such as the Truckee River, the impacts of  
10 a change in water right may be significant. However, a  
11 fundamental test or a bar in a change of water right  
12 proceeding is the requirement for the applicant to  
13 demonstrate that the change will not adversely impact  
14 the water supply in the time, amount or location to  
15 other existing water rights in a tributary stream system  
16 if said change petition is approved.

17 In succinct terms, the stated purpose of the  
18 four change petitions is to accommodate the  
19 implementation of TROA. The applicants seek additional  
20 points of diversion, redistribution and rediversion be  
21 added to the existing licenses. Implementation of TROA  
22 will cause a change in the amount, time and location of  
23 the water stored in reservoirs subject to these change  
24 positions.

25 And it is an expansion beyond the original

1 permits and licenses. If granted it would require a new  
2 priority to reflect the time when the applicants formed  
3 a manifest intent to appropriate the waters to  
4 beneficial use.

5 Water storage and operations in Stampede  
6 Reservoir. Application 31487 was filed for the purpose  
7 of accommodating the implementation of the provisions of  
8 the Truckee River Agreement. For Stampede Reservoir the  
9 application seeks to appropriate 350 cubic feet per  
10 second by direct diversion, January 1st through December  
11 31st, and increase the permitted storage from 126,000 to  
12 226,500 acre feet annually.

13 The application includes a justification  
14 section that reflects applicants' intent to use TROA as  
15 the mechanism to make more efficient use of the Truckee  
16 River systems and to provide multiple beneficial uses.

17 No additional information, engineering or  
18 technical analysis was provided that describes the water  
19 available, physical and legal water availability, in  
20 priority for these requests, the proposed schedule of  
21 storage/releases, and/or the change in water deliveries  
22 and return flow patterns that may impact downstream  
23 rights.

24 The requested application is an expansion of  
25 use and amount to the water right claimed and permitted

1 in the original adjudication for this structure. The  
2 justification cites several beneficial uses and a  
3 general characterization that the intent of the  
4 applicant is to optimize the use of the water storage  
5 vessel, independently and in conjunction with other  
6 upstream reservoirs in the Truckee River system, to  
7 accommodate beneficial uses of water.

8 The engineering and technical analysis to  
9 support this application is incomplete and inadequate to  
10 support its adjudication at this time. The Truckee  
11 River system, similar to other river basins, has a  
12 finite supply of water available for appropriation and  
13 application to multiple and competitive beneficial uses  
14 of water.

15 Extension of the storage and release schedule  
16 to accommodate the additional uses contemplated herein,  
17 is an expansion of use. That same logic, in the matter  
18 of brevity applies also to Prosser Creek Reservoir.

19 CO-HEARING OFFICER DODUC: Please conclude your  
20 testimony, Dr. Knox.

21 DR. KNOX: Thank you, ma'am.

22 I will also opine that in review of the EIS and  
23 EIR it is apparent that shortages to water rights in the  
24 Newlands Project will periodically occur by  
25 implementation of the TROA, and these shortages were

1 determined through application of the Truckee River  
2 model.

3 In conclusion, it is my opinion that this  
4 contradicts the spirit of seeking a measured and  
5 balanced approach to public interest and trust. And  
6 based upon my review of the aforementioned documents and  
7 my professional experience in administration of water  
8 rights and management of water resources, the  
9 applications and change petitions are not supported with  
10 adequate engineering or technical evidence.

11 In their present state the applications and  
12 petitions for change will impose additional shortages in  
13 time, amount and location that will injure vested water  
14 rights in the Truckee River system and should be denied.

15 In the alternative, imposition of the  
16 recommended terms and conditions are reasonable,  
17 necessary and appropriate to assist government officials  
18 in the administration of these water rights and to  
19 prevent material injury to other water rights that are  
20 dependent upon the Truckee River system.

21 Thank you, ma'am.

22 CO-HEARING OFFICER DODUC: Thank you.

23 MR. VAN ZANDT: And Dr. Knox, just to complete  
24 your testimony, the references in your direct testimony  
25 276B are listed at pages 2 and 3 of your report; is that

1 correct?

2 DR. KNOX: Yes, please.

3 MR. VAN ZANDT: That's all I have.

4 CO-HEARING OFFICER DODUC: Thank you. Cross?

5 Mr. Palmer, please begin when you're ready with  
6 your cross.

7 MR. PALMER: Thank you.

8 --o0o--

9 CROSS-EXAMINATION BY MR. PALMER

10 FOR U.S. BUREAU OF RECLAMATION

11 --o0o--

12 MR. PALMER: Good afternoon. Is it Dr. Knox?

13 Is that how you prefer to be addressed?

14 DR. KNOX: Whatever is convenient for you,  
15 Mr. Palmer.

16 MR. PALMER: I'd like to just ask you a couple  
17 questions about your qualifications. I was listening  
18 and trying to catch what you were saying about that and  
19 looking at what you have written down here.

20 And it does appear that you're not a  
21 hydrologist; is that correct?

22 DR. KNOX: Sir, my undergraduate degree is in  
23 chemical engineering. My masters and Ph.D. are in civil  
24 engineering from Colorado State University.

25 And as a side note, I wish Mr. Rieker every

1 success and God speed in the pursuit of his Ph.D.

2 But my degree is in civil engineering with an  
3 emphasis in water resources management and planning that  
4 had a significant amount of coursework. And I retain  
5 extensive professional experience in the application and  
6 use of hydrologic studies, but it is not specifically in  
7 hydrology; it is in civil engineering.

8 MR. PALMER: So when you were discussing the  
9 work you did with the Colorado State Engineer's office,  
10 it appears you're more in a management role? You didn't  
11 do the hands-on engineering yourself?

12 DR. KNOX: No, sir, that's quite incorrect.  
13 Folks, I enjoy the benefit -- my first job was as a  
14 hydrographer where I was actually paid to measure  
15 streamflows and put on waders. And that escalated to  
16 many other technical analysis from watershed yields,  
17 reservoir operations, canal optimization.

18 But yes, it did eventually turn into a  
19 management position overseeing those engineering  
20 functions.

21 MR. PALMER: And when did that begin, the  
22 managerial position? When did you first take on that  
23 role?

24 DR. KNOX: I would assume -- I would  
25 characterize the assumption of management to include

1 supervision of people, and that began in my career after  
2 approximately six years where I started to supervise  
3 people with escalating type of responsibilities in terms  
4 of number, disciplines and complexity of staff.

5 But at all times, I retained and am proud of  
6 the fact that I enjoyed working on the technical aspects  
7 as well. I had to.

8 MR. PALMER: And moving to your doctorate, if I  
9 understood your testimony, you were saying that you had  
10 some experience in the Truckee River Basin related to  
11 your dissertation; is that what I understood?

12 DR. KNOX: Yes, sir, that's correct.

13 MR. PALMER: But that wasn't -- your  
14 dissertation wasn't on the Truckee River Basin, though,  
15 was it?

16 DR. KNOX: No. My dissertation was on the role  
17 of integrating groundwater with interstate river  
18 compacts. For context, there are 45 interstate river  
19 compacts in the United States. 29 are focused upon the  
20 water supply and allocation of water resources. Only  
21 six -- only six -- factor in groundwater, and the  
22 California-Nevada interstate compact was one of those  
23 six.

24 MR. PALMER: So would I be incorrect if I read  
25 the title of your dissertation as: The Allocation of

1 Interstate Groundwater Evaluation of the Republican  
2 River Compact as a Case Study?

3 DR. KNOX: No, sir. That's the title.

4 MR. PALMER: So you haven't performed any work  
5 as a hydrologist in the Truckee River basin?

6 DR. KNOX: That is correct, I have not.

7 MR. PALMER: You haven't performed any work as  
8 a civil engineer in the Truckee River Basin; is that  
9 correct?

10 DR. KNOX: My work in the Truckee River has  
11 been limited to this project as well as just discussions  
12 with the Nevada State Engineer's office about  
13 administration within this basin.

14 MR. PALMER: You're talking about recent  
15 discussions with the Nevada State Engineer's office?

16 DR. KNOX: Sir, starting in 1998.

17 MR. PALMER: The period of time you mentioned  
18 that you were working on these interstate compact  
19 issues?

20 DR. KNOX: That's correct, Mr. Palmer.

21 MR. PALMER: And so you're currently employed  
22 by URS; is that correct?

23 DR. KNOX: Yes, sir, and University of Denver.

24 MR. PALMER: That's adjunct professor position?

25 DR. KNOX: Yes, sir.

1 MR. PALMER: And isn't it correct that URS has  
2 a current contract with the United States Bureau of  
3 Reclamation for consulting services?

4 MR. VAN ZANDT: Relevancy.

5 CO-HEARING OFFICER DODUC: Mr. Palmer?

6 MR. PALMER: I'm just trying to find out his  
7 qualifications, what information he's had available to  
8 him to review this information.

9 CO-HEARING OFFICER DODUC: I'll allow the  
10 question.

11 DR. KNOX: Sir, would you please repeat the  
12 question.

13 MR. PALMER: Isn't it true that URS has a  
14 current contract with the United States Bureau of  
15 Reclamation for consultation services? Do you know  
16 that?

17 DR. KNOX: I do not know that.

18 MR. PALMER: So you don't know that URS worked  
19 on the 1988 OCAP as a consultant on the NEPA documents?  
20 You're not aware of that?

21 DR. KNOX: No, sir, I was not aware of that.

22 MR. PALMER: I'd like to turn to your direct  
23 testimony.

24 I'll start on page one. In your second  
25 paragraph you have a statement regarding what you're

1     testifying about, and you say that there are certain  
2     terms and conditions that are appropriate to prevent  
3     injury to existing water rights in the Truckee River  
4     system.

5             And what rights are you talking about where you  
6     say necessary to prevent injury to existing water  
7     rights? What are those?

8             DR. KNOX: I'm focusing upon those water rights  
9     that are owned by those 3,000 individuals within the  
10    Newlands Project under the Orr Water Ditch Decree.

11            MR. PALMER: So those are the only rights that  
12    need protecting in the Truckee River system?

13            DR. KNOX: No, sir, I did not say that. I  
14    believe all water rights within the Truckee River system  
15    warrant protection.

16            MR. PALMER: Do you know what the source of  
17    those rights are that you're urging protection of, what  
18    the legal source of those rights are? What are they  
19    based on, the Newlands Project water rights.

20            DR. KNOX: Sir, it's my understanding that they  
21    were adjudicated as part of the 1944 Orr Water Ditch  
22    Decree.

23            MR. PALMER: And does the Orr Ditch Decree  
24    include water rights from the Newlands Project? How  
25    does it include those?

1 DR. KNOX: It includes those under Claim 3.

2 MR. PALMER: So as part of Claim 3, that's the  
3 only place they show up in the Orr Ditch Decree, right?

4 DR. KNOX: That's the dominant source, sir. I  
5 don't know that it's the exclusive source within that  
6 decree.

7 MR. PALMER: And isn't it your understanding  
8 that TROA in fact expressly protects those water rights  
9 that are part of the Orr Ditch Decree?

10 DR. KNOX: I would give you that that's the  
11 stated intent of TROA. Whether it actually protects  
12 those or not, it is my opinion in its present state it  
13 does not, sir.

14 MR. PALMER: But you don't disagree that those  
15 provisions in TROA, we could refer to them, but they do  
16 state that it's intended to protect existing rights?

17 DR. KNOX: There are provisions in TROA that  
18 provide the intent to protect existing water rights.

19 MR. PALMER: Does the word "intent" show up in  
20 TROA?

21 DR. KNOX: I do not know that.

22 MR. PALMER: I would suggest it doesn't.

23 MR. VAN ZANDT: Object to that and move to  
24 strike.

25 CO-HEARING OFFICER DODUC: Sustained. Please

1 ask questions only, Mr. Palmer.

2 MR. PALMER: Looking at page 3 of your  
3 testimony, you start talking about Stampede and Prosser.  
4 And in regard to the Truckee River Agreement, does the  
5 Truckee River Agreement include reference to Stampede  
6 and Prosser?

7 DR. KNOX: Yes, I believe it does.

8 MR. PALMER: You reference the term "depletion  
9 from surface water diversions," and I was curious as to  
10 what's the source of those depletions. What are you  
11 referring to there?

12 DR. KNOX: Sir, would you please help me.  
13 Where are you referring to in this exhibit, please.

14 MR. PALMER: It's on page 1. You've got a very  
15 long paragraph about halfway down. It says: Depletion  
16 of surface water diversions.

17 When you're talking about completion from  
18 surface water diversions, I just want to understand what  
19 you mean by that phrase.

20 DR. KNOX: Ladies and gentlemen, I was  
21 responsible for the development, defense and  
22 implementation of the Rio Grande Decision Support System  
23 and the Rio Grande Compact Groundwater Model used to  
24 quantify the time, amount and location of depletions  
25 from surface water diversions and groundwater

1 withdrawals.

2           The depletions in this context were twofold.  
3 One, surface water diversions themselves have a  
4 consumptive use, whether it be for domestic use,  
5 irrigation, other applications. That has an impact to  
6 the stream system.

7           These two bodies also enveloped the depletions  
8 to the stream system that were calculated from the  
9 diversion of high capacity wells, and the high capacity  
10 was defined as greater than 50 gallons per minute.

11           MR. PALMER: Let me move along to look at your  
12 opinion number 1.

13           DR. KNOX: Thank you, sir.

14           MR. PALMER: And help me understand the  
15 structure of your testimony so maybe I can be asking  
16 questions correctly.

17           Do the facts that support your opinion in your  
18 testimony, are they before the stated opinion or do they  
19 come after the stated opinion in how you've written  
20 this. I'm confused.

21           DR. KNOX: Well, let me see if I can help with  
22 that, sir.

23           The general context is to lay the foundation or  
24 the factual basis for my opinions that are summarized by  
25 the opinions at the end.

1           For instance, you will see on page 3 text at  
2 the bottom of that page that provides that factual  
3 foundation followed by opinion that's marked.

4           MR. PALMER: That helps me understand how you  
5 structured this.

6           DR. KNOX: Very good, sir.

7           MR. PALMER: And so when you make the statement  
8 in opinion number 1: Applications for Stampede and  
9 Prosser seek an expansion of the original water right  
10 adjudications, what are the facts you're relying on to  
11 make that statement in your text above that?

12          DR. KNOX: The factual information is based  
13 upon -- in part. We need to read the entire context of  
14 the exhibit.

15          It includes those background information  
16 references that are cited under background on page 2  
17 and 3.

18          MR. PALMER: I'd like you to be specific. What  
19 specific facts? Because you told me that the text  
20 preceding the opinion are the factual background for the  
21 opinion, so I'm trying to make sure I understand.

22          What is the specific facts in this text that  
23 you're relying on for opinion number 1.

24          DR. KNOX: Very good. Well, in part, we start  
25 then with that the water stored is part of that

1 necessary to meet the downstream demands under the  
2 Floriston and reduced Floriston Rates.

3           The foundation for that is the Truckee River  
4 Agreement, in part. Subsequent to that we talk about  
5 the Orr Water Ditch company that's -- pardon me -- the  
6 Orr Water Ditch Decree that is binding upon the four  
7 parties, including the United States and Truckee Carson  
8 Irrigation District.

9           And it also relies upon my interpretation of  
10 those decrees and review of the documents in the  
11 background section that forms that composite opinion on  
12 page 4.

13           MR. PALMER: So the decrees and the Truckee  
14 River Agreement?

15           DR. KNOX: Those are parts, sir. I would not  
16 want to mislead you and say that they are limited to  
17 only those, because I reviewed -- had the opportunity to  
18 review many documents as part of this proceeding.

19           MR. PALMER: I'll just take that for now. I  
20 haven't really got a clear answer.

21           But let me just make sure, just in terminology,  
22 when you say the applications, you understand that there  
23 are two applications before the Board here, one for  
24 Stampede and one for Prosser Creek Reservoir; is that  
25 right?

1 DR. KNOX: And Ms. Mahaney provided a  
2 clarification on the first day, and it's my  
3 understanding there are two applications and four change  
4 petitions, I believe that's the correct vernacular.

5 MR. PALMER: So when you refer to applications  
6 in opinion number 1, you're referring to the change  
7 petitions and applications?

8 DR. KNOX: I'm referring to the applications,  
9 sir. If it would help, I believe they're 31487 and  
10 31488 as applications.

11 MR. PALMER: Right. And don't you understand  
12 that the purpose of the application is to in fact expand  
13 the appropriation? The applications ask for an  
14 additional appropriation of water, isn't that true?

15 DR. KNOX: In both Stampede and Prosser Creek,  
16 yes, it is an expansion. Sounds like we agree.

17 MR. PALMER: If I understand what you're saying  
18 here, we do agree on that fundamental position.

19 Okay. So opinion number 1.

20 Then for your term on page 4, term 1-1, you  
21 talk about that expansion needs to be prevented. And so  
22 if we're applying for additional water to appropriate,  
23 why should that additional appropriation be prevented if  
24 there is water available to appropriate?

25 DR. KNOX: Because it is injurious. The

1 expansion itself in terms of a physical storage of water  
2 in a reservoir is one component. But you may not  
3 divorce that from the fact that there are other  
4 priorities assigned to those multiple pools within a  
5 reservoir. This is a common practice in the western  
6 United States.

7 MR. PALMER: Excuse me. The question was that  
8 if there is additional water available to be  
9 appropriated, why should that be prevented, this  
10 additional -- water application for additional  
11 appropriation if there is in fact water available to  
12 appropriate?

13 DR. KNOX: I'm trying to answer the question.  
14 The reason why it should be prevented is if  
15 it's an expansion of the original priority beyond that  
16 that was contemplated and adjudicated or permitted,  
17 whether there is water available for appropriation or  
18 not is a distinct and separate issue. That may under  
19 this condition if water is available -- and please, we  
20 need to be careful here, it's not just that test. There  
21 are other bodies of law that need to take into effect  
22 such as whether there is water available for  
23 appropriation, whether it could be administered,  
24 et cetera.

25 Then and only then would the term and condition

1 be allowed that the new appropriation or storage would  
2 have a junior or a subsequent water right to that  
3 original action. That's why.

4 MR. PALMER: In that same term 1-1 you use the  
5 phrase that you want these applications to be held in  
6 abeyance until the out-of-priority depletions are  
7 identified, quantified, et cetera.

8 What evidence do you have, what facts do you  
9 have that there will be such out-of-priority depletions?

10 DR. KNOX: Well, in review of the evidence that  
11 was tendered by the applicants, I was unable to see any  
12 support from a technical perspective. And from my  
13 perspective, I was able to look at the decreed amounts  
14 in addition to rulings by the Nevada State Engineer and  
15 others that found that this would be fully appropriated.  
16 The Truckee River and all its tributaries is the  
17 explicit language.

18 So that's water in my mind that has been fully  
19 encumbered that this application seeks to somehow  
20 dedicate to an earlier priority.

21 MR. PALMER: And where specifically did you  
22 find that language about fully appropriated?

23 DR. KNOX: I believe it's permit number 48494  
24 by the Nevada State Engineer, and that was upheld in  
25 TCID Exhibit 208 by Judge William A. Maddox.

1           MR. PALMER:  And isn't it true that that  
2 holding was that the Truckee River is fully appropriated  
3 in Nevada?

4           DR. KNOX:  If I may, may I refer to the  
5 exhibit?  I do not think it says that.

6           MR. PALMER:  We can look, to save time.  
7 Everyone can look.  If that's the source of your  
8 information, everyone can check that.

9           DR. KNOX:  Yes, and we apparently disagree.  I  
10 don't believe there is a qualification that says fully  
11 appropriated within Nevada.  It says the Truckee River  
12 and all its tributaries.

13           MR. PALMER:  You have a statement on the top of  
14 page 5 referring to the Orr Ditch Decree, and the very  
15 last line says.

16                     ...and other purposes under control,  
17                     disposal and regulation by the Truckee  
18                     Carson Irrigation District.

19           And were you present for other testimony that  
20 actually read that portion of the Orr Ditch Decree that  
21 in fact it's under the control of the plaintiff, the  
22 United States?  Do you agree with that?

23           DR. KNOX:  I agree that I was present.

24           MR. PALMER:  So where in the Orr Ditch Decree  
25 does it say that the Truckee Carson Irrigation District

1 has control of this regulation of Claim 3? I assume you  
2 took that from the decree itself; is that right?

3 DR. KNOX: No, that would be a false  
4 assumption, sir.

5 MR. PALMER: Where did you get that  
6 information?

7 DR. KNOX: That's in context of reviewing other  
8 matters such as OCAP itself. It's also review of the  
9 Orr Ditch Water Decree, and it's also my understanding  
10 from professional experience of how reclamation projects  
11 and the water rights are owned, distributed, managed in  
12 conjunction with the water right owners and  
13 professionals with the Bureau of Reclamation.

14 MR. PALMER: But do you know that for a fact as  
15 opposed to what happens on the Newlands Project,  
16 Newlands Project in specific. There may be some  
17 generalization you stated, but specifically on the  
18 Newlands Project do you know how that water is managed  
19 between the United States and the Irrigation District  
20 and the farmers?

21 DR. KNOX: It is my understanding that the  
22 water rights are owned by individuals within the  
23 Newlands Project, and the Bureau of Reclamation has  
24 promulgated a federal regulation to help achieve the  
25 management of that water supply to the Newlands Project.

1           MR. PALMER: So we look at the OCAP for that  
2 relationship; is that right?

3           DR. KNOX: Yes, sir, in part.

4           MR. PALMER: Then I'll do that. Thank you.

5           Your opinion number 2. You have the phrase in  
6 the middle of that paragraph, "senior in priority to  
7 subject water rights in this proceeding."

8           I think you said this, but just to make sure  
9 I'm clear on the water rights in this proceeding, what  
10 water rights are you referring to specifically there?

11          DR. KNOX: I'm referring to those that are the  
12 applications and Stampede and Prosser Creek Reservoir as  
13 well as the change petitions.

14          MR. PALMER: All right. Those specific rights.  
15 Okay.

16          So when you say "junior or later priority must  
17 be curtailed" then you're just talking about the  
18 priority system. I mean, if there is a water right  
19 that's senior, it would have to be served first before a  
20 junior water right. Or are you saying something more  
21 than that here in opinion 2?

22          DR. KNOX: My intent is to honor the priority  
23 system.

24          MR. PALMER: I think you acknowledged this in  
25 your direct, but the water right for the Newlands

1 Project in Claim 3 held by the United States is in fact  
2 a junior water right as far as the Orr Ditch Decreed  
3 water rights go; isn't that correct?

4 DR. KNOX: No, I did not say that, sir, because  
5 I didn't say that the water right was held by the United  
6 States. My testimony was that these water rights in  
7 Claim 3 are held by individuals, the 3,000 individuals  
8 in the Newlands Project.

9 MR. PALMER: All right. Well, wouldn't you  
10 agree that the decree states the plaintiff holds the  
11 Claim 3 water right in the Orr Ditch Decree? That's  
12 what the decree says; isn't that correct?

13 DR. KNOX: It does.

14 MR. PALMER: So when we talk about that right,  
15 Claim 3, isn't it a junior water right as far as the  
16 other Orr Ditch Decree water rights go?

17 DR. KNOX: No. That's a bit -- Mr. Palmer, my  
18 recollection is it's Claim 3 which is junior to claim 1  
19 and 2 but senior to multiple other claims within that  
20 decree. There's -- I don't recall. I can look, but  
21 there's claims, 4, 5, 6, 7, et cetera.

22 MR. PALMER: So you don't have really any idea  
23 about the total number of water rights in the Orr Ditch  
24 Decree and where the 1902 priority stacks up as far as  
25 relatively junior or relatively senior? You don't know

1 that?

2 DR. KNOX: I appreciate your terminology. As I  
3 said earlier, the term civil senior and junior is a  
4 relative position.

5 MR. PALMER: Referring to application 9330 --  
6 and forgive me if I didn't catch what you said on  
7 direct. I was trying to make sure I understood.

8 Regarding the ability of TCID to divert that  
9 water from the Truckee River, do you know if the  
10 District has current authority to use, for example, the  
11 Truckee Canal to divert any water they may receive under  
12 application 9330?

13 DR. KNOX: To help refresh your memory, my  
14 testimony was that 9330 was denied by the State Engineer  
15 but it's currently under appeal.

16 MR. PALMER: Right, but I thought I heard you  
17 say something about that the TCID had the ability to  
18 divert that water if they were granted that permit, and  
19 I just want to know what you base that statement on.

20 Or maybe I misheard you. If I did, I'm sorry.

21 DR. KNOX: I believe you misheard me, sir.

22 MR. PALMER: All right. So you don't know one  
23 way or the other whether the Irrigation District has any  
24 current means of diverting that water from the Truckee  
25 River under application 9330?

1 DR. KNOX: Thank you for the qualification,  
2 because under current means that implies infrastructure  
3 and ability to divert it. That's a physical aspect.  
4 But I'm not aware of a legal ability to do so at this  
5 time until the application is resolved.

6 MR. PALMER: So physical ability is the mere  
7 fact that the canal exists and it's open to the river;  
8 is that right?

9 DR. KNOX: Yes.

10 MR. PALMER: You qualified the Tribe's  
11 unappropriated water permits here on page 6 of your  
12 testimony as temporary. Do you understand that those  
13 permits are temporary in some way?

14 DR. KNOX: That was my understanding of what  
15 the State Engineer's ruling said.

16 MR. PALMER: I assume that that's just like any  
17 other permit that might be granted, that in your view, I  
18 believe, it's temporary until such time as beneficial  
19 use is proved up and a license or certificate is issued?  
20 Is that what you really meant?

21 DR. KNOX: In other states they'll use the  
22 terminology "conditional water right." But that is  
23 correct, Mr. Palmer, it's generally a term to show the  
24 application of use.

25 MR. PALMER: Have you reviewed the water

1 availability analysis presented by the applicants in  
2 this proceeding?

3 CO-HEARING OFFICER DODUC: Mr. Van Zandt?

4 MR. VAN ZANDT: This is outside the scope of  
5 the direct testimony, but Dr. Knox will come back and  
6 talk about that. So if you held that question, we will  
7 get to that.

8 CO-HEARING OFFICER DODUC: And Mr. Palmer, your  
9 reason for asking this witness that question?

10 MR. PALMER: He's talking about that he says  
11 it's premature because there is no water available to  
12 appropriate, so I'm asking him if he reviewed those.

13 He has a statement in here also that there is  
14 no engineering data or information at all that supports  
15 the water availability that's being asked for by the  
16 applicants, so I wanted to probe where did you get that  
17 information? Did he do his own analysis? Did he review  
18 the analysis by the applicant? He just has this blanket  
19 statement that there is no support whatsoever.

20 CO-HEARING OFFICER DODUC: The objection is  
21 overruled. Please answer the question.

22 DR. KNOX: Sir, I believe you used the term  
23 analysis. I reviewed two analyses, one for Prosser  
24 Creek and one for Stampede.

25 MR. PALMER: And your conclusion was that those

1 were not correct in their determination that water was  
2 available for appropriation?

3 DR. KNOX: Yes, that is my assertion.

4 MR. PALMER: So you're going to come back on  
5 rebuttal and tell us all about that, so I should hold  
6 all those questions; is that what you're telling me?

7 MR. VAN ZANDT: Yeah, I think it will be more  
8 fully informed once he does his direct on rebuttal.

9 MR. PALMER: With that opportunity reserved,  
10 I'd like to refer to your opinion number 4 now.

11 And again, maybe this can go rather quickly.  
12 The facts upon which you're basing your opinion 4, that  
13 would be in the text immediately preceding that under  
14 the heading Truckee River Operating Agreement May Not  
15 Interfere with Decreed Water Rights. Is that right?

16 DR. KNOX: That's the foundation, yes.

17 MR. PALMER: And do you understand that the  
18 court has already approved the changes to the Truckee  
19 River General Electric decree for TROA? Are you aware  
20 of that?

21 DR. KNOX: I am not aware of that.

22 MR. PALMER: Next in your opinion number 5  
23 location you have the title Agency Regulations Cannot  
24 Interfere with Decreed Water Rights, and you discuss the  
25 McCarran Amendment.

1 I guess, do you consider this proceeding before  
2 this Board on these change petitions and applications a  
3 McCarran Amendment proceeding?

4 MR. VAN ZANDT: Calls for a legal conclusion.

5 MR. PALMER: Well, he's the one that is saying  
6 that's what we're doing here. So I can ask him what's  
7 his basis, but I thought I would maybe cut to the point  
8 here. If he doesn't believe that then I can not ask him  
9 what he's talking about.

10 CO-HEARING OFFICER DODUC: The witness will  
11 answer the question.

12 DR. KNOX: I will attest that this is not a  
13 McCarran Amendment hearing. But my statements as to the  
14 applicability of the McCarran Amendment in the  
15 administration and delegation of authorities, I stand  
16 by.

17 MR. PALMER: Do you understand that before a  
18 state can administer water rights under the McCarran  
19 Amendments, federal water rights, that there has to be  
20 an adjudication in accordance with the McCarran  
21 Amendment first? Do you understand that?

22 DR. KNOX: I would rephrase that differently.

23 It is my understanding of the McCarran  
24 Amendment in terms of state adjudicatory administration  
25 laws for the United States has ceded that authority to

1 the states.

2 MR. PALMER: Well, this could go on for a long  
3 time. But in a general stream adjudication, correct?  
4 The McCarran Amendment applies to a general stream  
5 adjudication?

6 DR. KNOX: Not necessarily, because I'm aware  
7 of many subsequent adjudications in other western states  
8 that -- when I use the term general adjudication, that's  
9 a composite adjudication at one time for a group of  
10 water rights. I know that the United States seeks  
11 individual water rights in compliance with applicable  
12 state law on a case-specific basis.

13 MR. PALMER: And you're speaking from Colorado  
14 experience; is that right?

15 DR. KNOX: Yes.

16 MR. PALMER: The Colorado system is much  
17 different, but again, we could spend a lot of time on  
18 that. The McCarran Amendment, I think, would speak for  
19 itself, so I'll move on.

20 You reference OCAP in your opinion number 5.  
21 Let me back up real quick.

22 In opinion number 5 you have this statement  
23 that the United States Federal Government as an  
24 applicant has similar responsibilities as other public  
25 or private water right owners, but are you not aware of

1 California vs. United States, U.S. Supreme Court  
2 decision that makes congressional directives trump any  
3 state water right proceeding? Are you aware of that?

4 MR. VAN ZANDT: I'm going to object to that.  
5 He does not talk about California vs. United States in  
6 his direct testimony.

7 MR. PALMER: But he says that the United States  
8 is subject to the same rights and responsibilities of  
9 any other public/private entity, and that's not the  
10 case. I'm asking if he's aware of that Supreme Court  
11 decision.

12 CO-HEARING OFFICER DODUC: The witness will  
13 answer the question. And if you're not aware, say  
14 you're not aware.

15 DR. KNOX: Thank you, ma'am. I'm not aware.

16 MR. PALMER: And you do understand as far as  
17 OCAP goes that it does limit diversions from the Truckee  
18 River to the Truckee Canal for the Newlands Project; is  
19 that right?

20 DR. KNOX: I believe it speaks for itself.  
21 It's operating criteria that dictates those diversions  
22 in part in compliance with the decrees.

23 MR. PALMER: And are you aware that the Truckee  
24 River Operating Agreement has in fact been submitted to  
25 the Orr Ditch Court for its review? Are you aware of

1 that?

2 DR. KNOX: No, I'm not aware of that. I don't  
3 know.

4 MR. PALMER: In your opinion number 6 you have  
5 the phrase several lines down, "silent assumption."  
6 What is that?

7 MR. VAN ZANDT: Say that again, please.

8 MR. PALMER: Silent assumption. What is that?  
9 About seven lines down in opinion number 6.  
10 You do not see what I'm talking about?

11 DR. KNOX: Yes, sir, but I have this nasty  
12 habit of trying to read the sentences before for  
13 context.

14 And this is in regards to my understanding of  
15 the United States is seeking a term and condition to  
16 hold these in abeyance. And it's a silent assumption in  
17 context that it's a bit of the sleeve's out of the vest.  
18 That would assume that there would be no injury.

19 My opinion is there is injury at this point, so  
20 it's silent in the context that it does not address that  
21 point head-on.

22 MR. PALMER: So you just said that there is  
23 injury at this point. What injury is there today, I  
24 guess you mean?

25 DR. KNOX: At the time of this application and

1 the present state of the applications and the change  
2 petitions, should they be implemented by this Board --  
3 pardon me -- approved by this Board and implemented,  
4 would be injurious.

5 I'm not trying to dance around your question.  
6 If your question is in the sense is TROA in an operable  
7 sense at this point? I'm not aware of that it is.

8 MR. PALMER: So you're basing that statement on  
9 how you understand TROA; is that right?

10 DR. KNOX: In part.

11 MR. PALMER: And in part what else?

12 DR. KNOX: The priorities, OCAP, the permits  
13 issued by the Nevada State Engineer and the other body  
14 of evidence that supports this proceeding, sir.

15 MR. PALMER: Is it your opinion that the 1997  
16 OCAP is somehow contrary to the water rights in the Orr  
17 Ditch Decree?

18 DR. KNOX: I would not characterize it as being  
19 contradictory to the water rights, but it is again a  
20 federal regulation that by its intent and purpose should  
21 not interfere with those.

22 MR. PALMER: On page 10 just before -- I guess  
23 this is in your opinion number 8 on the top of page 10,  
24 the middle of that continuing paragraph, you cite to the  
25 California Water Code Section 1206 for the assertion

1 that the Truckee River is fully appropriated in  
2 California. Does that statute say that?

3 DR. KNOX: That's my understanding, yes.

4 MR. PALMER: Specifically says the Truckee  
5 River in that statute?

6 DR. KNOX: Not in specificity to a single river  
7 system, no.

8 MR. PALMER: Now I'd like to turn to page 11 of  
9 your direct. At the bottom of that page you reference  
10 two statements out of the Environment Impact Report  
11 which is State Board Exhibit 7 from the executive  
12 summary. Do you see that?

13 DR. KNOX: Yes. Thank you, Mr. Palmer.

14 MR. PALMER: There are other purposes for TROA  
15 listed on those pages other than what you have listed  
16 here; isn't that right?

17 DR. KNOX: I do not know what they are at this  
18 time, but I'm not going to disagree with you.

19 MR. PALMER: On the top of the next page, page  
20 12, your opinion 10, you say in review of the EIS/EIR it  
21 is apparent that shortages to water rights in the  
22 Newlands Project, et cetera. Do you see that statement?

23 So I want to make sure I understand. So what  
24 water rights are going to be shorted that you're  
25 referring to specifically?

1 DR. KNOX: Water rights within the Newlands  
2 Project.

3 MR. PALMER: So the ones that belong to the  
4 3,000 farmers?

5 DR. KNOX: That's my understanding, yes.

6 MR. PALMER: And you got that out of the EIS?

7 DR. KNOX: EIS/EIR, January 2008 final. Yes,  
8 sir.

9 MR. PALMER: And what specifically were you  
10 referring to in that document for the State?

11 DR. KNOX: I was referring -- I don't recall.  
12 If you'd like, I could try to find the page numbers, but  
13 it's approximately page 3120 and so forth. In prior  
14 testimony there was much discussion about some of the  
15 graphics.

16 MR. PALMER: The Carson Division Shortage  
17 Graph, does that ring a bell?

18 DR. KNOX: Yes, sir. Thank you very much.

19 MR. PALMER: So is it your understanding that  
20 if there were no TROA that these water rights we've just  
21 been talking about would never be shorted?

22 DR. KNOX: No, that is not correct. As a water  
23 resource engineer with hydrology training, it does show  
24 shortages. But my attention in the formation of this  
25 opinion was the increase, the additional shortage that

1 would have been caused by implementation of TROA.

2 MR. PALMER: As displayed on those graphs?

3 DR. KNOX: Yes.

4 MR. PALMER: You reference in that same  
5 provision, you say: Is not apparent what, if any,  
6 alternatives were developed.

7 Do you see that statement in your opinion  
8 number 10? Do you see that, what I'm referring to?

9 DR. KNOX: Thank you, sir. Yes, I do.

10 MR. PALMER: I just want to be sure we're  
11 talking about the same thing.

12 So you're talking about alternatives. Do you  
13 know what purpose alternatives serve in NEPA.

14 DR. KNOX: I have a fundamental understanding  
15 of what NEPA is and the development and evaluation of  
16 reasonable and prudent alternatives, yes, sir.

17 MR. PALMER: And what are those alternatives?  
18 What's the purpose of developing alternatives?

19 DR. KNOX: Well, my understanding in a general  
20 layman's context is when you have a proposed federal  
21 action and something that would deviate from that, you  
22 have alternatives that start with a no action, but then  
23 you also based upon what should be receipt of  
24 information from the public and other interested  
25 parties, part of the rigorous process employed by the

1 implementing agency, that you seek to identify what the  
2 impacts of that proposed change would be.

3           Oftentimes there are detrimental effects. The  
4 evaluation of the alternatives should also clearly  
5 identify those and seek mitigative terms and conditions  
6 to try to address those. And that is what I was unable  
7 to find in that document, sir.

8           MR. PALMER: I think we just ranged all over  
9 the place. We started talking about alternatives and  
10 you began talking about impacts.

11           Is it true that when you analyze alternatives,  
12 maybe you compare them one against the other, you are  
13 looking at impacts related to those alternatives; isn't  
14 that right?

15           DR. KNOX: No.

16           MR. PALMER: Are alternatives at all controlled  
17 by the purpose and needs statement in a NEPA document?

18           DR. KNOX: Yes, they are. The alternatives are  
19 not only to address the comparative analysis between  
20 subsequent alternatives themselves but also the impact  
21 between existing conditions and that alternative  
22 discreetly.

23           MR. PALMER: And that's found where? What's  
24 the authority for that statement?

25           DR. KNOX: Sir, that's my understanding of

1 working with and reading NEPA, or the National  
2 Environmental Policy Act. I apologize.

3 MR. PALMER: We get use to the short versions.

4 DR. KNOX: Fair enough, sir.

5 MR. PALMER: In your next section just before  
6 opinion number 11, you have the statement, "the impacts  
7 of declining water supplies within the Carson River  
8 Basin. And it's three lines from the bottom, just above  
9 opinion eleven. I just again want to understand what  
10 you're referring to there.

11 DR. KNOX: I apologize, Mr. Palmer. Would you  
12 please refer me, you're in opinion 11?

13 MR. PALMER: Right above opinion 11, three  
14 lines above that, the sentence that starts the fourth  
15 line above that: However, the impacts of declining  
16 water supplies in the Carlson River basin...

17 Do you see where I am now?

18 DR. KNOX: Yes, sir.

19 MR. PALMER: So what declining water supplies  
20 are you referring to there?

21 DR. KNOX: I'm referring to the shortages as  
22 identified by TROA in the EIS/EIR.

23 MR. PALMER: The ones we were just talking  
24 about, the Carson Division shortage graph?

25 DR. KNOX: Yes.

1           MR. PALMER: In your review of the EIS/EIR, did  
2 you happen to review the responses to comment letters?

3           DR. KNOX: No.

4           MR. PALMER: You have a statement in your  
5 opinion 11, if I can paraphrase, and certainly correct  
6 me if I do that incorrectly, that you don't believe that  
7 the EIS/EIR includes analysis of the necessary resources  
8 or interests of the protestants here?

9           DR. KNOX: Sir, I do need some help. I mean,  
10 what protestants? What resources?

11           MR. PALMER: Well, you make a statement that  
12 the EIS/EIR is lacking, and I'm trying to understand  
13 what was not analyzed, in your view? What resource was  
14 not analyzed, what interest was not discussed in the  
15 EIS/EIR that you're finding lacking?

16           MR. VAN ZANDT: Excuse me, you're talking about  
17 opinion 11?

18           CO-HEARING OFFICER DODUC: Yes, which  
19 statement?

20           MR. VAN ZANDT: I don't see anything about the  
21 EIS/EIR in number 11.

22           CO-HEARING OFFICER DODUC: I don't see it  
23 either.

24           MR. PALMER: It says the interests of the 3,000  
25 owners of water rights in the Newlands Project were not

1 included in TROA.

2 The EIS/EIR is an analysis of TROA. So that's  
3 analyzed the interest of these folks you say were not  
4 included and their rights weren't included in TROA, but  
5 the EIS/EIR did an analysis of those; isn't that right,  
6 those rights and interests of those folks you list here?

7 DR. KNOX: Sir, what I would refer to as the  
8 EIS and EIR, it described a shortage. What it did not  
9 include was an analysis of what the impacts are to these  
10 3,000 water rights. In context, this is under the  
11 impact of public interest and public trust opinion.

12 What I'm really trying to refer to in this  
13 issue is the fact that, again, seeking some form of  
14 measured balance in public interest, it was perplexing  
15 to me to see that a major water diversion and use within  
16 the Truckee River system with a limited supply, those  
17 interests of those entities, the farmers, the  
18 communities, of Fallon and Churchill County were not  
19 included.

20 MR. PALMER: So you mean they were not a  
21 signatory to TROA, is that what you're saying?

22 DR. KNOX: Sir, we're talking about two  
23 different things. I thought we were talking about the  
24 EIS/EIR.

25 MR. PALMER: Well, I was, but isn't it true

1 that the interests of those parties that you just  
2 mentioned are analyzed in the EIS/EIR?

3 DR. KNOX: I would disagree with that in  
4 totality. They were in part, but not in totality.

5 MR. PALMER: So if I would refer you to page  
6 3-442 of the EIS/EIR State Board EXHIBIT 7 titled  
7 Newlands Project Operations, did you read that section?  
8 Want me to show it to you?

9 DR. KNOX: Thank you so much.

10 MR. VAN ZANDT: Let him --

11 CO-HEARING OFFICER DODUC: Mr. Van Zandt, what  
12 was that?

13 MR. VAN ZANDT: I would like the witness be  
14 able to see it before he answers.

15 DR. KNOX: Thank you, Mr. Palmer.

16 Mr. Palmer has handed me -- what is the exhibit  
17 number?

18 MR. PALMER: 7.

19 DR. KNOX: Exhibit 7, Truckee River Operating  
20 Agreement, and he's pointed out the Newlands Project  
21 Operations on page 3442.

22 And in response to your inquiry, sir, no, I  
23 don't believe that, even though this is addressed on  
24 this page, that it does provide a complete address or  
25 analysis of those water rights in the Newlands Project.

1 MR. PALMER: So in that regard then, what  
2 specific analysis is missing?

3 DR. KNOX: In part, because under the  
4 preliminary, or at least my understanding of the TROA  
5 runs that show a shortage, I did not see any form of  
6 mitigative measures or relief to try to address that in  
7 that document.

8 MR. PALMER: Well, there is a difference  
9 between analyzing something and providing mitigation.  
10 Do you understand that?

11 DR. KNOX: Yes, I do.

12 MR. PALMER: So the water rights were analyzed.  
13 Your concern seems to be that you believe that those  
14 shortages that were shown on that table should have been  
15 mitigated. Is that what you're testifying to?

16 DR. KNOX: I believe the analysis should define  
17 what the shortages are, then that analysis should be  
18 extended to see if there are other reasonable terms and  
19 conditions that may address, provide relief to those  
20 shortages.

21 MR. PALMER: So you reference in your opinion  
22 the Public Trust Doctrine. Are you aware of the  
23 California Public Trust Doctrine that this Board relies  
24 on in, for example, deciding what conditions it may  
25 place on applications before it?

1 DR. KNOX: My understanding of it starts with  
2 the Audubon -- what I refer to as the Audubon case and a  
3 few other principles and discussion with Division of  
4 Water Resource personnel in California. But I have a  
5 fundamental understanding of it, sir.

6 MR. PALMER: And do you understand that that  
7 Public Trust Doctrine goes to water and related  
8 resources that are over the purview of the State?

9 DR. KNOX: Hence the Mono Lake and the Audubon  
10 decision. Yes.

11 MR. PALMER: So -- excuse me.

12 DR. KNOX: Yes, it includes water resources.

13 MR. PALMER: So we're concerned here with, for  
14 example, the effects of TROA on fishery in the Truckee  
15 River.

16 DR. KNOX: In terms of one of the parameters  
17 within the public trust? Yes.

18 MR. PALMER: And what are the other parameters  
19 in the public trust that you're referring to here that  
20 relate to that California Public Trust Doctrine?

21 DR. KNOX: I also believe it incorporates --  
22 Mr. Palmer, I apologize, I'm drawing a blank on the  
23 other parameters that I read in the Public Trust  
24 Doctrine, so I can't answer that at this point.

25 MR. PALMER: Fair enough. And do you

1 understand that the TROA, the Truckee River Operating  
2 Agreement, is a negotiated agreement, the negotiation of  
3 which was directed by Congress to the Secretary of the  
4 Interior. Do you understand that?

5 DR. KNOX: Yes, it's a negotiated agreement by  
6 the signatory parties, but not all parties.

7 MR. PALMER: Right, but it was directed by  
8 Congress. You refer to Public Law 101-618 in section  
9 205, and that directed the Secretary to negotiate the  
10 TROA; isn't that right?

11 DR. KNOX: That is my understanding, yes.

12 MR. PALMER: What do you mean by "hard look"?

13 DR. KNOX: Hard look?

14 MR. PALMER: Yes.

15 CO-HEARING OFFICER HOPPIN: She can do it  
16 better than anybody.

17 CO-HEARING OFFICER DODUC: Mr. Palmer, please  
18 put that in context for me. To where are you referring  
19 in the witness' testimony?

20 DR. KNOX: Opinion 12, fourth line from the  
21 bottom, in quotes he has "hard look."

22 CO-HEARING OFFICER DODUC: Thank you.

23 DR. KNOX: I admit to borrowing that phrase  
24 from several United States and appellate court briefs  
25 that I use when I teach my students in the review and

1 application of NEPA that the courts have used that term,  
2 hard look, which I've interpreted and explained to my  
3 students to mean a rigorous, complete objective analysis  
4 of all positions.

5 MR. PALMER: I'd like to refer you to, since  
6 you didn't get a chance to read them, to a response to a  
7 comment -- this is on State Board 7, page 436, response  
8 PW 1030, and see if you would agree with this statement  
9 as far as what's contained in the EIS/EIR.

10 DR. KNOX: Excuse me, did you want me to read  
11 it or read it aloud?

12 MR. PALMER: Yes, read it into the record.

13 DR. KNOX: On page 436 of the aforementioned  
14 Exhibit, PW 1030, which appears to be one of many.

15 The document presents an extensive  
16 analysis of a number of Newlands Project  
17 resources based on assumed future water  
18 demand. Lahontan Reservoir, which  
19 supplies water to the Carson Division, is  
20 analyzed in detail relative to storage  
21 and releases to satisfy the exercise of  
22 water rights served by the Newlands  
23 Project. Impacts to wetlands are  
24 considered similar to irrigated lands for  
25 convenience because of numerous options

1           for obtaining benefits from available  
2           supply. The effects of the recoupment  
3           cannot be analyzed because that matter  
4           remains in litigation.

5           MR. PALMER: So my question is regarding --

6           CO-HEARING OFFICER DODUC: Mr. Palmer, into the  
7 microphone, please.

8           MR. PALMER: Sorry.

9           So you still disagree with that statement  
10 regarding the extensive analysis of the EIS as far as  
11 Newlands Project interests go?

12          DR. KNOX: I stand by my answer, yes, sir.

13          CO-HEARING OFFICER DODUC: Mr. Palmer, please  
14 wrap up your cross.

15          MR. PALMER: I will indeed. Thank you.

16          In your conclusion you state that -- if I'm  
17 paraphrasing wrong you'll correct me -- it says that  
18 these change petitions and applications will impose  
19 additional shortages in time, amount or location that  
20 will injure vested water rights in the Truckee River  
21 system.

22          So again you're just referring to the 3,000, as  
23 you called it, water right owners in the Newlands  
24 Project; is that right?

25          DR. KNOX: That was the context of my analysis,

1 yes.

2 MR. PALMER: That's all I have. Thank you.

3 CO-HEARING OFFICER DODUC: Thank you,  
4 Mr. Palmer. Let's give the witness a chance to take a  
5 breather. We'll take a short 5, 6 minute break at will  
6 resume at 2:35.

7 (Recess)

8 CO-HEARING OFFICER DODUC: Since it looks like  
9 we're all back, Mr. DePaoli, you may begin your cross.

10 --o0o--

11 CROSS-EXAMINATION BY MR. DePAOLI  
12 FOR TRUCKEE MEADOWS WATER AUTHORITY

13 --o0o--

14 MR. DePAOLI: Good afternoon, Dr. Knox.

15 DR. KNOX: Good afternoon, sir.

16 MR. DePAOLI: Dr. Knox, in your testimony when  
17 you use the word application or the word applications,  
18 are you intending in all places to refer only to the  
19 applications to appropriate?

20 DR. KNOX: My intent is to -- my intent is to  
21 turn this on. Excuse me.

22 "Applications" refers to the increase in  
23 storage levels for Stampede and Prosser Creek, and  
24 petitions in change are a different matter.

25 MR. DePAOLI: So in your written testimony

1 those words are separately used and intended to be  
2 separately used?

3 DR. KNOX: That is my intent, yes.

4 MR. DePAOLI: At the beginning of your  
5 testimony you listed some material that you reviewed in  
6 preparation for this testimony, and then on direct you  
7 added one item to that list. Is that everything that  
8 you reviewed?

9 DR. KNOX: No. It is everything I used in the  
10 formation and basis of my opinions that were provided in  
11 expert witness testimony.

12 MR. DePAOLI: So your opinions then do not  
13 involve anything related to the Tahoe-Prosser Exchange  
14 Agreement, for example?

15 DR. KNOX: I do not recall offering opinion in  
16 regard to that, no, sir.

17 MR. DePAOLI: And you did not look at that  
18 document?

19 DR. KNOX: No, I did look at that document.

20 MR. DePAOLI: Did you review the Truckee River  
21 General Electric Decree?

22 DR. KNOX: Yes.

23 MR. DePAOLI: But it wasn't involved in your  
24 opinions either?

25 DR. KNOX: It was not included within those

1 cited in my testimony, no.

2 MR. DePAOLI: And as I understood your  
3 responses to some of Mr. Palmer's questions, essentially  
4 the material that precedes your opinions is the material  
5 on which your opinions that follow are based; is that  
6 correct?

7 DR. KNOX: That information served as the basis  
8 for my written testimony.

9 CO-HEARING OFFICER DODUC: Mr. DePaoli, let me  
10 interject here and caution you. I was extremely patient  
11 with Mr. Palmer, please do not revisit the grounds that  
12 he has already plowed through.

13 MR. DePAOLI: I will do that.

14 Is it your understanding that water stored  
15 under the existing California water right permit for  
16 Stampede Reservoir is used to assist in meeting  
17 Floriston Rates or reduce Floriston Rates?

18 DR. KNOX: In part, yes.

19 MR. DePAOLI: Can you tell me what downstream  
20 water rights water stored in the California water right  
21 for Stampede Reservoir is used to assist in meeting?

22 DR. KNOX: Explicitly by water right name, no,  
23 I cannot.

24 MR. DePAOLI: Is it your understanding that  
25 uncommitted water from Prosser Creek Reservoir is used

1 to assist in meeting Floriston Rates or reduce Floriston  
2 Rates?

3 DR. KNOX: Yes, it is.

4 MR. DePAOLI: What do you mean by: The  
5 reservoir cited in the change petitions have been  
6 operated to supplement stream flows in the Truckee  
7 River?

8 DR. KNOX: I mean that they, as functional  
9 storage vessels, capture excess water available during  
10 spring runoff in part that is used in part to help in  
11 the delivery of the Floriston Rates and is subsequently  
12 used for application of beneficial use by downstream  
13 interests including those in the Newlands Project  
14 through diversion through the Truckee Canal.

15 MR. DePAOLI: Is it your understanding that  
16 water stored under the water right license for  
17 Independence Lake is used to assist in meeting Floriston  
18 Rates?

19 DR. KNOX: I don't know the answer to that.

20 MR. DePAOLI: In theory, at least, is a new  
21 water right application for storage -- strike that.

22 A new water right application for storage is  
23 for available, unappropriated water, is it not?

24 DR. KNOX: That's my general understanding,  
25 yes.

1           MR. DePAOLI:   And that storage would have to  
2 take place in priority, would it not?

3           DR. KNOX:   For it to be what I would term as  
4 legal, yes.

5           MR. DePAOLI:   And if it is accomplished in what  
6 you term as legal, it will not adversely impact a senior  
7 water right holder, will it?

8           DR. KNOX:   That new storage water right has the  
9 presumption that the adjudicatory body found that there  
10 would be no injury, issued that permit or license.  And  
11 then subsequent, if it was stored within that priority,  
12 it would be the presumption that it would be legal.

13          MR. DePAOLI:   Sort of the flip side of that is  
14 that the exercise of a senior water right is not  
15 unlawful even if that exercise makes less water  
16 available for a junior water right?

17          DR. KNOX:   Mr. DePaoli, that was a bit  
18 circuitous.  I'll rephrase that in my terms.

19                 The lawful diversion of a senior water right is  
20 allowed.

21          MR. DePAOLI:   Are you familiar with the water  
22 right priorities that the Federal Water Master follows  
23 in allowing new water to be stored in the reservoirs  
24 that are the subject of the change petition?

25          DR. KNOX:   My familiarity is limited to what

1 was published in Mr. Blanchard's report.

2 MR. DePAOLI: Dr. Knox, in opinion number 1 you  
3 say something about the alteration and amount of water  
4 stored and released in the reservoirs cited in the  
5 change petitions will further extend the material injury  
6 to existing and senior water rights in the Newlands  
7 Projects.

8 Are you saying that one or more of the change  
9 petitions seeks to alter the amount of water stored?

10 MR. VAN ZANDT: I'm going to object because the  
11 opinion 1 refers to applications, not the change  
12 petition.

13 MR. DePAOLI: If you look at the last sentence  
14 in opinion number 1, it says: In a similar manner, the  
15 alteration and the amount of water stored and released  
16 in the reservoir cited in the change of water right  
17 petitions will further extend.

18 That's the part I'm looking at.

19 MR. VAN ZANDT: That's what you're referring  
20 to? Okay, I withdraw the objection.

21 DR. KNOX: Thank you. Mr. DePaoli, would you  
22 please repeat the question.

23 MR. DePAOLI: Which of the change petitions  
24 seeks to alter the amount of water stored?

25 DR. KNOX: I believe they all do.

1           MR. DePAOLI: Well, let's take the Stampede  
2 change petition, and tell me how it seeks to alter the  
3 amount of water stored?

4           DR. KNOX: In part, through the use of  
5 carryover storage. That would impact -- that amount of  
6 water that would be stored under the original priority,  
7 it's my understanding through testimony of Ms. Phillips  
8 and others, is that water in part for drought protection  
9 or other intended purposes would be carried over. That  
10 would have an incremental change in the amount of  
11 storage held in that vessel.

12           MR. DePAOLI: I want to focus on the change for  
13 the Stampede water right is a change to that particular  
14 water right, not any other water right. Am I missing  
15 something there?

16           DR. KNOX: Mr. DePaoli, my understanding is  
17 that all of these change applications are founded upon  
18 TROA which seeks to form some form of integrated  
19 storage, including Stampede, as points of -- alternate  
20 points of storage and rediversion and et cetera.

21           MR. DePAOLI: But the current water right for  
22 Stampede Reservoir allows for the storage of, I think,  
23 126,000, and there may be a 500 in that or not, per  
24 year. Does the Stampede change petition seek to  
25 increase that amount?

1 DR. KNOX: My understanding is it seeks to  
2 change not the 126 per se, but it allows that storage to  
3 be changed in other vessels, other upper Truckee River  
4 system storage vessels.

5 MR. DePAOLI: But it doesn't increase the  
6 amount that can be stored in any one year?

7 DR. KNOX: I believe it would have a cascading  
8 effect in the subsequent year with that amount held in  
9 carryover storage.

10 MR. DePAOLI: Is there something presently in  
11 the Stampede permit that prohibits carryover storage?

12 DR. KNOX: I do not know something that  
13 prohibits it, nor do I see anything explicitly that's --  
14 it's my familiarity as a water administrator that  
15 carryover storage must be specifically allowed as a term  
16 and condition.

17 MR. DePAOLI: So is that in part what you base  
18 your conclusion on that unless carryover storage is  
19 specifically allowed, it is disallowed?

20 DR. KNOX: That's part of a common, in part,  
21 professional experience, that carryover storage has an  
22 impact upon the availability of water supplies. It also  
23 has a term of notice to other downstream interests. So  
24 yes, it should be something that is explicitly included  
25 and then, and only then, if it's not injurious,

1 approved.

2 MR. DePAOLI: Are you aware of anything in the  
3 Independence license that prohibits carryover storage?

4 DR. KNOX: No, or that specifically allows it,  
5 either.

6 MR. DePAOLI: And how about the Boca license?

7 DR. KNOX: Same response, sir.

8 MR. DePAOLI: Same response? Well, strike that  
9 on Prosser.

10 Did the change petitions in any way seek to  
11 alter the amount of water that is released from these  
12 reservoirs in a year?

13 DR. KNOX: Yes.

14 MR. DePAOLI: How?

15 DR. KNOX: Through the explicit intent to  
16 create -- my understanding is up to eleven different  
17 types of credit storage accounts, focusing primarily on  
18 fish credit water that would be released in time and  
19 amount deemed appropriate by other interests.

20 So yes, it would affect the timing of the  
21 releases.

22 MR. DePAOLI: But do the change petitions seek  
23 in any way to limit the amount of water that can be  
24 released which is stored under these water rights that  
25 are here today?

1 DR. KNOX: I don't know the answer to that.

2 MR. DePAOLI: Do the Claim 3 water rights have  
3 some entitlement under law to receive water from  
4 Independence Lake?

5 DR. KNOX: By their physical proximity, the  
6 Claim 3 water rights, I believe, are entitled to all  
7 upstream tributary flows, not stored converted in  
8 priority. And so if there is water that is out of  
9 priority from Independence Lake that would be used to  
10 satisfy those, yes, they have the ability to call that  
11 water through.

12 MR. DePAOLI: Do they have the ability to call  
13 water that has been properly stored under the  
14 Independence license and then released by TMWA for its  
15 purposes, do they have a right to call on that?

16 DR. KNOX: Not that I'm aware of, no.

17 MR. DePAOLI: And would that be the same with  
18 respect to water release from Stampede Reservoir?

19 DR. KNOX: Yes, as long as the test is made  
20 that that water that is so released is applied to  
21 beneficial use without waste.

22 MR. DePAOLI: And would that be the same with  
23 respect to uncommitted water from Prosser Creek  
24 Reservoir?

25 DR. KNOX: I'm unfamiliar with uncommitted

1 water from Prosser Creek Reservoir.

2 MR. DePAOLI: And I may be treading in a spot  
3 here I shouldn't go, but I didn't really -- I think  
4 Mr. Palmer asked you about the reference to  
5 out-of-priority storage that's in term and condition  
6 1-1, and I really didn't understand your answer.

7 What are you referring to there?

8 DR. KNOX: I refer in term and condition number  
9 1-1 on page 4 of Exhibit 276B to be water that is not  
10 stored in priority in a storage vessel.

11 MR. DePAOLI: And do any of the change  
12 petitions seek to store water out of priority?

13 DR. KNOX: No. My understanding is that is not  
14 the case.

15 MR. DePAOLI: You understand that the Alpine  
16 Decree adjudicated water rights on the Carson River, do  
17 you not?

18 DR. KNOX: That's my general understanding,  
19 yes.

20 MR. DePAOLI: It didn't adjudicate any water  
21 rights from the Truckee River?

22 DR. KNOX: That's my understanding.

23 MR. DePAOLI: In the opinion number 2 -- and  
24 just for my clarification, when you refer to water  
25 rights senior in priority to water rights in this

1 proceeding, you're not referring to any water rights  
2 adjudicated under the Alpine Decree?

3 DR. KNOX: I want to try to be careful here,  
4 Mr. DePaoli, because my recollection is in the Alpine  
5 Decree it includes Lahontan Reservoir. Part of the  
6 storage vessel -- excuse me. Part of the water supply  
7 for that storage vessel can be diversions under the Orr  
8 Ditch Decree.

9 MR. DePAOLI: But those diversions happen  
10 because of the Orr Ditch Decree not the Alpine Decree?

11 DR. KNOX: That is my understanding, but it is  
12 an integrated system.

13 MR. DePAOLI: I'm sorry, I didn't hear what you  
14 said.

15 DR. KNOX: But it is an integrated system.

16 MR. DePAOLI: But there is nothing in the  
17 Alpine Decree that can require diversions from the  
18 Truckee River to the Lahontan Reservoir is there?

19 DR. KNOX: Not that I'm aware of.

20 MR. DePAOLI: In the portion of your testimony  
21 dealing with competing permits and applications, you  
22 mention the decision of Judge Maddox. That decision  
23 doesn't have anything to do with the change petitions,  
24 does it?

25 MR. VAN ZANDT: Change petitions in these

1 proceedings?

2 MR. DePAOLI: In these proceedings.

3 DR. KNOX: Not directly, no.

4 MR. DePAOLI: Indirectly?

5 DR. KNOX: Yes.

6 MR. DePAOLI: How?

7 DR. KNOX: Because it's my understanding  
8 listening to other testimony proffered, particularly by  
9 the Tribe, that there is an intent to use that water  
10 that was the subject of Judge Maddox's opinion for  
11 upstream storage that would also be incorporated with  
12 some of these change petitions.

13 MR. DePAOLI: I didn't hear that. So how is it  
14 going to be incorporated into these change petitions?

15 DR. KNOX: My understanding was there was a  
16 claim that there was going to be an intent to move some  
17 of that water for storage in upstream reservoirs. This  
18 TROA that is the foundation for the change petitions  
19 seeks to have an operational scheme to use that  
20 unappropriated water in capture and release.

21 MR. DePAOLI: But there is no change petition  
22 either before this Board or anywhere else that seeks to  
23 do that at this time, is there?

24 DR. KNOX: No, I think it would have been good  
25 to have that done.

1 CO-HEARING OFFICER DODUC: Mr. DePaoli?

2 MR. DePAOLI: I'm moving along.

3 Were any of the water rights that are involved  
4 in these change petitions adjudicated by federal court?

5 DR. KNOX: Not that I'm aware of.

6 MR. DePAOLI: Can you tell me how each or any  
7 of the change petitions will result in water not being  
8 released from a Truckee River reservoir to satisfy the  
9 exercise of water rights in conformance with the Orr  
10 Ditch Decree?

11 MR. VAN ZANDT: The question seems to be a  
12 little vague. Can you restate it?

13 CO-HEARING OFFICER DODUC: Please rephrase,  
14 Mr. DePaoli.

15 MR. DePAOLI: Can you explain how one of these  
16 change petitions will result in water not being released  
17 from a Truckee River reservoir to satisfy an existing  
18 Orr Ditch Water Decree right?

19 DR. KNOX: One example is it's my understanding  
20 that water that would have been stored in amount in,  
21 say, Stampede Reservoir, based upon the source of  
22 supply, the time and the location, may be carried over  
23 or used as an alternate point of storage in Boca  
24 Reservoir, retained, released at a different time that  
25 is different than under the historic operations would

1 have been bypassed through the reservoir used to serve  
2 downstream water rights.

3 MR. DePAOLI: And that's going to result in not  
4 releasing water to satisfy Floriston Rates?

5 DR. KNOX: It could.

6 MR. DePAOLI: Well, I'm having a hard time  
7 understanding how.

8 DR. KNOX: In part, it's my understanding based  
9 upon TROA and testimony that it would have a reduced  
10 Floriston Rates.

11 MR. DePAOLI: Are you talking about what is  
12 happening in Nevada with the changes to Orr Ditch Decree  
13 water rights?

14 DR. KNOX: Sir, I don't know what you're  
15 talking about there.

16 MR. DePAOLI: Where do you gain the  
17 understanding that you just gave in your answer?

18 DR. KNOX: By review of the applications -- the  
19 petitions for change, pardon me for my Freudian slip --  
20 the petitions for change and listening to the testimony  
21 of previous witnesses, including those from TMWA.

22 MR. DePAOLI: So is there something specific in  
23 these change petitions which requests this Board to  
24 authorize water not to be released to maintain Floriston  
25 Rates?

1 DR. KNOX: Not in those explicit terms, but the  
2 change petitions are founded upon TROA, which does  
3 provide that potential.

4 MR. DePAOLI: And do you know how TROA provides  
5 that potential?

6 DR. KNOX: In part by allowing it to have an  
7 expansion of the use of the existing storage vessels and  
8 their source of supply to all other -- excuse me, that's  
9 too blunt -- to other reservoirs in the upper Truckee  
10 River system.

11 MR. DePAOLI: Does TROA in and of itself  
12 authorize the reduction in Floriston Rates, if you know?

13 CO-HEARING OFFICER DODUC: This area has been  
14 covered. Asked and answered. Please move on,  
15 Mr. DePaoli.

16 MR. DePAOLI: Dr. Knox, in opinion number 6 you  
17 indicate it's premature to act on these change petitions  
18 because TROA may be altered. Do you know whether or not  
19 TROA can be altered at this point in time?

20 DR. KNOX: I don't know.

21 MR. DePAOLI: In that same opinion you talk  
22 about these change petitions will remove these  
23 reservoirs from the change process for all time. Are  
24 you suggesting that there should be a change petition  
25 every time someone wants to, say, release water from

1 Independence Lake for an instream purpose to recapture  
2 it in Stampede Reservoir?

3 DR. KNOX: No, but I am asserting that when you  
4 have an expansion to an existing reservoir in terms of  
5 their season of storage and release, their amount,  
6 et cetera, that it is proper that they come before this  
7 Board for change petitions.

8 MR. DePAOLI: Do any of the change petitions  
9 seek to change the season of storage?

10 DR. KNOX: Not on their face, but they  
11 certainly do through implementation of TROA.

12 CO-HEARING OFFICER DODUC: Mr. DePaoli?

13 MR. DePAOLI: I'm moving on.

14 In term and condition 8.2 on page 10.

15 DR. KNOX: Yes, sir.

16 MR. DePAOLI: You indicate that the action is  
17 not reasonable and is inappropriate until such time as a  
18 detailed water resources engineering analysis is  
19 provided and evaluated that describes the amount of  
20 water physically and legally available to each reservoir  
21 in this conjunctive water supply system.

22 Wasn't the amount of water legally available to  
23 Stampede Reservoir under its existing permit determined  
24 when that permit was issued?

25 DR. KNOX: For 126,000 acre feet, yes.

1 MR. DePAOLI: And that's all the change  
2 petition is dealing with, correct, that existing permit?

3 DR. KNOX: Again, sir, on its face, but  
4 implementation of TROA I believe does seek to extend it.

5 MR. DePAOLI: Is it your understanding that the  
6 Prosser Creek application seeks to increase permitted  
7 storage from 20,162 acre feet to 30,000?

8 DR. KNOX: In part, yes. It also seeks to  
9 extend the storage season from four months to ten and a  
10 half months.

11 MR. DePAOLI: Do you have any firsthand  
12 knowledge that folks from the Newlands Project were  
13 excluded from the TROA process?

14 DR. KNOX: Sir, I was not part of those  
15 negotiations. I do not have firsthand knowledge.

16 MR. DePAOLI: That concludes my direct -- or  
17 cross, excuse me.

18 CO-HEARING OFFICER DODUC: Thank you.

19 Mr. Pagni?

20 MR. PAGNI: Thank you.

21 --o0o--

22 CROSS-EXAMINATION BY MR. PAGNI

23 FOR WASHOE COUNTY WATER CONSERVATION DISTRICT

24 --o0o--

25 MR. PAGNI: Dr. Knox, Mr. McConnell confirmed

1 that -- sorry.

2 DR. KNOX: I understand.

3 MR. PAGNI: I get to sit here for two hours and  
4 then have to try to talk.

5 -- confirmed that TCID does not have any rights  
6 under license 3723 for diversion or place of use.

7 Would you agree that Claim 3 does not have any  
8 authorized rights of diversion or places of use under  
9 the Boca license 3723.

10 DR. KNOX: Good afternoon, sir.

11 No, I do not know.

12 MR. PAGNI: Would you agree that -- I will  
13 represent to you that TCID is not identified or the  
14 Newlands Project is not identified as a point of  
15 rediversion or place of use under that license.

16 Would you agree that by adding the Newlands  
17 Project as a point of rediversion and a place of use  
18 under the Boca license that provides a benefit to the  
19 Newlands Project users.

20 DR. KNOX: Sir, you added it, but I term  
21 benefit -- excuse me. You referred to the terms it  
22 provides a benefit. I couch benefit as actual receipt  
23 of water. Naming it in principal alone, that's nice,  
24 but should there be water that would be provided and  
25 delivered without any diminution of their existing

1 supplies, yes that would be a benefit.

2 MR. PAGNI: And you would also agree it  
3 certainly doesn't injure them?

4 DR. KNOX: Unfortunately, I've been in water  
5 matters for a long time, and there's also mischief if  
6 someone tries to flood someone. But I don't take that  
7 your intent would be to flood anyone out, then that  
8 would be injurious, but as long as it's water that could  
9 be applied to beneficial use, that would be helpful.

10 MR. PAGNI: Is it your opinion that the Boca  
11 change petition will increase the amount of water stored  
12 in the Boca Reservoir.

13 DR. KNOX: It's my position that it would have  
14 the effect of enlarging the water right not in the  
15 reservoir itself, but water that could be stored on an  
16 incremental basis in those other Truckee reservoirs  
17 under the Boca water right.

18 MR. PAGNI: Do you know how many acre feet are  
19 currently permitted under license 3723 for storage in  
20 Boca Reservoir?

21 DR. KNOX: No, sir. Not exactly, no.

22 MR. PAGNI: Do you know how many acre feet are  
23 being sought under the change petition for Boca  
24 Reservoir for storage in that reservoir?

25 DR. KNOX: No, sir, I do not.

1           MR. PAGNI:  So if I understand it, you don't  
2 know the amount of storage currently licensed, and you  
3 don't know the amount of storage being sought in the  
4 change petition, but you have an opinion as to whether  
5 there's an increase in storage?

6           DR. KNOX:  Yes, I do.

7           MR. PAGNI:  Thank you.

8           You testified earlier that it's your intention  
9 to honor the priority system.  Would any of the opinions  
10 that you've issued today and in your direct testimony  
11 change if you had the benefit of understanding that the  
12 change petitions and applications don't seek to alter  
13 the priority of water rights as adjudicated by the Orr  
14 Ditch Court?

15          DR. KNOX:  That goes partially there, but for  
16 me to -- the entirety of honoring the priority system  
17 means honoring all decrees, and not having an expansion  
18 of use of any of them, not just specifically the Orr  
19 Ditch Decree.

20          MR. PAGNI:  Was that a yes or a no?

21          CO-HEARING OFFICER DODUC:  He answered your  
22 question, Mr. Pagni.

23          MR. PAGNI:  I asked whether his opinion would  
24 change, and I didn't understand his answer, whether he  
25 was saying yes it would change or no it would not.

1 DR. KNOX: Thank you, Madam Board Member.

2 I cannot give you a yes or no answer because  
3 it's an incomplete question.

4 MR. PAGNI: Would any of your opinions change  
5 if you had the benefit of understanding that the water  
6 would not be stored out of priority in any of the  
7 reservoirs as sought in these change petitions and  
8 applications?

9 CO-HEARING OFFICER DODUC: Mr. Van Zandt?

10 MR. VAN ZANDT: I think this has been covered  
11 by Mr. Palmer in his cross.

12 MR. PAGNI: I would disagree. Mr. Palmer never  
13 asked whether his opinions would change if he understood  
14 these facts. It seemed to me in some of the  
15 cross-examination it wasn't clear whether Mr. Knox had a  
16 full understanding of the facts as they exist on the  
17 river system. So I'm just asking him whether now that  
18 he has the benefit of that information his opinions  
19 would change today.

20 CO-HEARING OFFICER DODUC: And his answer, I'm  
21 sure, would be no, so the objection is sustained.  
22 Please move on, Mr. Pagni.

23 MR. PAGNI: In rendering your opinions were you  
24 aware of that neither the change petitions nor the  
25 applications seek to alter the Floriston Rate regime?

1 DR. KNOX: Sir, again, not on their face they  
2 don't, but through implementation of TROA it would have  
3 that effect.

4 MR. PAGNI: There has been testimony that these  
5 change petitions and applications will not change the  
6 Floriston Rate regime. My question to you is if that  
7 testimony is accurate, does that alter your opinion?

8 MR. VAN ZANDT: I'm going to object because  
9 this was covered by Mr. Palmer in particular.

10 MR. PAGNI: The purpose of the question, this  
11 is an expert who has been brought in. I'm trying to  
12 determine how objective his expert opinion is.

13 CO-HEARING OFFICER DODUC: The objection is  
14 sustained. Move on, Mr. Pagni.

15 DR. KNOX: Pagni. That's okay.

16 In rendering your opinions were you aware that  
17 portions of the Truckee River Agreement are in fact  
18 incorporated into TROA?

19 DR. KNOX: Yes, Mr. Pagni, it's my  
20 understanding there are portions of the Truckee River  
21 Agreement incorporated into TROA.

22 MR. PAGNI: I have no further questions.

23 CO-HEARING OFFICER DODUC: Thank you.

24 Mr. Taggart?

25 MR. TAGGART: Thank you.

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CROSS-EXAMINATION BY MR. TAGGART  
FOR CITY OF FERNLEY

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MR. TAGGART: Good afternoon, Dr. Knox.

DR. KNOX: Good afternoon, Mr. Taggart.

MR. TAGGART: First I want to ask you a question about exactly what the focus of your opinion about injury is, and I want you to, if you will, divide up in your mind what's happening, what's contemplated under TROA. And I'll say that -- I'll articulate three different acts that are happening. One might be increasing the amount of storage that can be in a reservoir, actually storing more water in the reservoir and then moving senior rights into that reservoir.

So those are kind of three distinct actions, don't you think, that are happening if these applications were approved?

DR. KNOX: If I understood you correct, two are hypotheticals and the last one was an action.

MR. TAGGART: Okay. Well, what I'm trying to find out is: Is your opinion about injury, is it based upon the simple decision that's being requested to increase the capacity for storage, or is that solely the act that would cause the injury, or is it also the

1 movement of a senior right or the movement of a water  
2 right, let's say, to keep it simple, into the reservoir,  
3 and it's the act of moving that water right and altering  
4 historic practice that's causing the injury?

5 DR. KNOX: Perhaps it would help if I gave you  
6 my definition of what injury is?

7 MR. TAGGART: I don't think it would. I'm  
8 trying to be as clear as I can.

9 I'm confused about whether it's the movement of  
10 water rights from Truckee Meadows into these reservoirs  
11 through the alteration of the flow of the river, in your  
12 opinion, if that's the genesis of your opinion on  
13 injury, or whether it's simply the decision to increase  
14 capacity for storage in an upstream reservoir. Those  
15 are two separate decisions that have to be made.

16 So is it both or is it only one?

17 DR. KNOX: Mr. Taggart, I'll try to address  
18 those in the sequence that was posed.

19 In terms of the water that is moved from one  
20 reservoir to the next, I would need to look and see at  
21 what was the source of supply of that water in that  
22 original reservoir. Was water being stored under  
23 priority and was water available for storage in the  
24 original point.

25 Then you wish to move it to the second one.

1 The first test on that is if there was water that would  
2 have been moved, if it was physically and legally  
3 available for storage, it may be moved as an alternate  
4 point of storage if said change does not diminish --  
5 that's the test for injury -- the water that would have,  
6 absent that action, flowed down to meet a downstream  
7 water right demand.

8 In regards to the second aspect, the actual  
9 physical storage of reservoir, in and of itself that  
10 does not constitute injury, again, if that water that is  
11 being stored would not be necessary to meet a downstream  
12 demand.

13 MR. TAGGART: When did you leave the Colorado  
14 State Engineer's office?

15 DR. KNOX: Approximately, July 14th, 2008.

16 MR. TAGGART: And how many times have you  
17 testified as an expert about water management outside  
18 the state of Colorado?

19 DR. KNOX: In terms of days or cases?

20 MR. TAGGART: I'm asking since you left the  
21 Colorado Attorney General's office -- I mean State  
22 Engineer's office?

23 DR. KNOX: Thank you for the clarification.

24 MR. TAGGART: How many times have you testified  
25 as an expert of water management outside of the state of

1 Colorado?

2 DR. KNOX: None that I can recall.

3 MR. TAGGART: And you mentioned before that you  
4 had had conversations with the Nevada State Engineer or  
5 someone in the State Engineer's office about TROA. When  
6 was the last time you had conversations like that?

7 DR. KNOX: I'm sorry, Mr. Taggart, I would ask  
8 you to repeat that question. I incorrectly stated  
9 testimony since I left the employment of the state of  
10 Colorado. I did testify on behalf of the state of  
11 Colorado in regards to some Republican River Interstate  
12 Compact litigation upon their request.

13 I apologize. Would you repeat the last  
14 question.

15 MR. TAGGART: I wanted you to answer when was  
16 the last time you had conversations with people in the  
17 Nevada State Engineer's office about TROA?

18 DR. KNOX: Sir, prior to July 14th of 2008. I  
19 do not recall the exact date.

20 MR. TAGGART: Do recognize, having reviewed the  
21 documents that you listed in your expert report, that  
22 the Truckee River is in essence a document driven river,  
23 it's driven by -- the flows in the river are controlled  
24 by legal agreements and decrees?

25 DR. KNOX: I never heard of it in that

1 terminology, but most of the river systems that I've  
2 administered and worked in you could say that. For the  
3 Colorado they call it the law of the river. There is an  
4 entire body of law.

5 MR. TAGGART: So would you agree with me or  
6 not?

7 DR. KNOX: I think that's a fair  
8 characterization.

9 MR. TAGGART: And when you've testified before  
10 as an expert wouldn't you agree that you had far more  
11 experience in the subject matter you're testifying about  
12 than you have here today? And I'll specify that you had  
13 20 years of experience in Colorado when you were  
14 testifying on behalf of the state of Colorado?

15 DR. KNOX: Sir, certainly I have more  
16 understanding of Colorado river issues, but my opinions  
17 here are based upon the composite of my ability to read  
18 decrees and testimony over now 26 years.

19 MR. TAGGART: And how many hours did you spend  
20 in preparation for making the opinions that are included  
21 in TCID-276B?

22 DR. KNOX: That's a bit of a loaded question,  
23 because they were billable hours, but I do not know at  
24 this point.

25 MR. TAGGART: Was it more than a hundred?

1 DR. KNOX: I don't know.

2 MR. TAGGART: Was it more than 50?

3 DR. KNOX: Yes.

4 MR. TAGGART: So wouldn't you agree that your  
5 exposure to the issues that you're testifying about is  
6 rather limited in comparison to the other experts that  
7 have testified here today or during this hearing, I  
8 should say?

9 DR. KNOX: I will admit that I do not have the  
10 tenure of Mr. Shahroody and others, yes.

11 MR. TAGGART: And how did you determine what  
12 documents to review? What steps did you go through to  
13 complete that review? Were the documents provided to  
14 you by counsel?

15 DR. KNOX: Some were.

16 MR. TAGGART: Did you find documents on your  
17 own investigation?

18 DR. KNOX: Yes.

19 MR. TAGGART: Did you visit the Nevada State  
20 Engineer's office and search his files?

21 DR. KNOX: No.

22 MR. TAGGART: Did you search the files of the  
23 California Water Resources Control Board in Sacramento?

24 DR. KNOX: No, I was provided those documents.

25 MR. TAGGART: And those were provided to you by

1 counsel?

2 DR. KNOX: Yes, in addition to those from  
3 Nevada.

4 MR. TAGGART: Don't you think in order to  
5 develop an independent opinion about a subject you have  
6 to collect the documents independently as an expert and  
7 find as much information about the subject before you're  
8 willing to offer an opinion?

9 DR. KNOX: Oh, no.

10 MR. TAGGART: Okay. Now, you indicated that --

11 DR. KNOX: Because the documents I received  
12 were --

13 CO-HEARING OFFICER DODUC: One at a time.

14 DR. KNOX: I apologize.

15 MR. TAGGART: You indicated that you are  
16 familiar with the Newlands Project, correct?

17 DR. KNOX: I have an understanding of it, yes,  
18 Mr. Taggart.

19 MR. TAGGART: Are you familiar with the Carson  
20 Division and the Truckee Division of the Newlands  
21 Project?

22 DR. KNOX: Yes.

23 MR. TAGGART: And do you know which division  
24 Fernley is in?

25 DR. KNOX: I've been to Fernley. I don't know

1 with absolute specificity.

2 MR. TAGGART: Do you know if Fernley owns water  
3 rights in the Newlands Project?

4 DR. KNOX: That is my understanding, yes.

5 MR. TAGGART: Did you review any documents to  
6 create that understanding, or are you relying on  
7 statements of others?

8 DR. KNOX: Yes, including your witness.

9 MR. TAGGART: Yes, you did rely on documents?  
10 I'm a little confused about your answer. Let me restate  
11 the question so it's very clear.

12 Did you do an independent review of documents  
13 in order to determine whether Fernley owns water rights  
14 in the Newlands Project?

15 DR. KNOX: No, sir.

16 MR. TAGGART: Now, you indicate that you  
17 reviewed the EIS and the EIR, correct?

18 DR. KNOX: The 2008 version, yes.

19 MR. TAGGART: In opinion number 11 you state  
20 that the interests of approximately 3,000 owners of  
21 water rights within the Newlands Project were not  
22 included in TROA, right?

23 DR. KNOX: Yes, sir, I state that.

24 MR. TAGGART: Well, based upon your review of  
25 the EIS/EIR, how does that document address impacts to

1 the Truckee Division?

2 DR. KNOX: It doesn't.

3 MR. TAGGART: Are you aware of a section of the  
4 EIS/EIR that analyzes the impacts to groundwater in the  
5 Truckee Division from TROA?

6 DR. KNOX: I did read that, but it does not  
7 address it in the rigorous analysis that I consider to  
8 be sufficient.

9 MR. TAGGART: So it does -- earlier you said it  
10 doesn't address impacts in the Truckee Division, and are  
11 you saying that it does address impacts in the Truckee  
12 Division, it just doesn't do it rigorously enough?

13 DR. KNOX: Mr. Taggart, "address impacts" can  
14 have two different connotations.

15 Does it cite or have narrative within the EIS?  
16 Yes. Does it address it in terms of remedying those  
17 impacts? No.

18 MR. TAGGART: But you will concede that the EIS  
19 considered impacts to the Truckee Division of the  
20 Newlands Project, will you not?

21 DR. KNOX: I will concede it states that, yes.

22 MR. TAGGART: Now, you also have reviewed TROA,  
23 correct?

24 DR. KNOX: Yes, sir.

25 MR. TAGGART: And again you make this statement

1 that TROA does not include the interests of the 3,000  
2 owners of water rights.

3 Doesn't TROA include Fernley as a party that  
4 can store water?

5 DR. KNOX: That is my understanding. It  
6 includes that.

7 MR. TAGGART: Did you review that provision of  
8 TROA?

9 MR. TAGGART: I read the entire document.

10 MR. VAN ZANDT: I'm going to interject here.  
11 Though this is very interesting about the City of  
12 Fernley, there is nothing in the change petitions or the  
13 applications before the Board that implicates the City  
14 of Fernley. So inquiring into how the EIS/EIR and/or  
15 TROA treats the City of Fernley I don't think is  
16 assisting the Board.

17 CO-HEARING OFFICER DODUC: Relevance,  
18 Mr. Taggart?

19 MR. TAGGART: The opinion is specifically  
20 stating that TROA does not include the interests of  
21 Newlands Project water right owners. TROA in fact does,  
22 and I'm asking -- I think the witness is being  
23 inconsistent, his opinion is inconsistent with the  
24 document, and I want to ask him a few questions about  
25 that.

1 CO-HEARING OFFICER DODUC: I'll allow, but  
2 please be very direct and get to the point.

3 MR. TAGGART: So wouldn't you agree that the  
4 fact that TROA includes a storage mechanism for Fernley  
5 is one way that TROA addresses the interests of Newlands  
6 Project water right owners?

7 DR. KNOX: Sir, I don't know that.

8 MR. TAGGART: Now, are you aware that TROA  
9 includes a right for Newlands Project storage?

10 DR. KNOX: Newlands Project storage or Newlands  
11 Project credit storage?

12 MR. TAGGART: Newlands Project credit storage.

13 DR. KNOX: Yes.

14 MR. TAGGART: And wouldn't you agree that in  
15 that regard TROA includes a mechanism for the interests  
16 of water right owners in the Newlands Project to store  
17 water?

18 DR. KNOX: It speaks for itself.

19 MR. TAGGART: I have a question about opinion  
20 number 1, and it's a simple one.

21 You have an opinion and then you have a term  
22 and a condition. My understanding from this is from the  
23 first sentence in your term and condition, that if that  
24 term and condition were applied to the applications and  
25 licenses that you would not object to their being

1 issued. Is that a true statement?

2 DR. KNOX: My intent was to follow what I  
3 thought was the directions from the Board and to render  
4 an opinion, and in subsequent order, also to offer terms  
5 and conditions.

6 So my opinion would be that these petitions and  
7 applications be denied. But absent that, the terms and  
8 conditions are offered for your consideration as a form  
9 of relief that I consider to be appropriate and  
10 reasonable.

11 MR. TAGGART: So do you agree with my  
12 statement? Was it a true statement or not, that if this  
13 condition were applied then would you not object to the  
14 granting of the applications and the licenses?

15 MR. VAN ZANDT: That's asked and answered.

16 MR. TAGGART: I don't think he did.

17 DR. KNOX: I'm sorry, madame, would you like me  
18 to answer?

19 CO-HEARING OFFICER DODUC: Would you like to  
20 expand on your answer?

21 MR. TAGGART: I try pose my questions for yes  
22 or no to make this fairly quick.

23 But is that a true statement, that if this  
24 condition is applied you do not object to the granting  
25 of the applications and the licenses?

1 DR. KNOX: It would help.

2 MR. TAGGART: Okay, that's fair.

3 And with respect to opinion number 2, based on  
4 your -- and do you consider yourself now to be an expert  
5 on the Truckee River water management?

6 DR. KNOX: Yes.

7 MR. TAGGART: Under the Orr Ditch Decree, what  
8 priorities are junior to Claim 3?

9 CO-HEARING OFFICER DODUC: Mr. Van Zandt?

10 MR. VAN ZANDT: You're testing his memory on  
11 the 17,000 water rights that are in --

12 CO-HEARING OFFICER DODUC: Is that an  
13 objection?

14 MR. VAN ZANDT: That's an objection.

15 CO-HEARING OFFICER DODUC: The objection is  
16 overruled.

17 DR. KNOX: May I ask just a point of  
18 clarification? Did you say which ones are junior to the  
19 Orr Ditch Decree?

20 MR. TAGGART: To Claim 3.

21 DR. KNOX: Within the Truckee River system?

22 MR. TAGGART: In the Orr Ditch Decree. The Orr  
23 Ditch Decree has a series of claims. One of them is  
24 Claim 3. You've testified about Claim 3. You've said  
25 that Claim 3 cannot be harmed.

1           So what rights are junior to Claim 3?

2           DR. KNOX:   What I usually do in terms of  
3 administration is rather than misspeak, I turn to the  
4 decree.   May I do that?

5           CO-HEARING OFFICER DODUC:   You may do that.

6           MR. TAGGART:   You would agree, would you not,  
7 as you're doing that, you would agree that understanding  
8 the relative priority is important to the foundation of  
9 the opinion that you provided here today, wouldn't you?

10          DR. KNOX:   Yes.

11          MR. TAGGART:   And do you know what the priority  
12 date is of Claim 3?

13          DR. KNOX:   July 2nd of 1902.

14          MR. TAGGART:   Okay.

15          DR. KNOX:   Interesting, not long after June  
16 17th, 2000 -- I'm sorry, 1902.   Did I say 2002?   1902.  
17 Not long after passage of the Reclamation Act.

18                 Starting with Claim No. 4, it appears that Lake  
19 Tahoe storage -- and I'm trying to expedite this,  
20 ma'am -- was the 21st day of May, 1903.

21          MR. TAGGART:   And let me ask you a more  
22 specific question so we can expedite this.

23                 The water rights in the Truckee Meadows, do you  
24 have a general understanding of whether they are senior  
25 or junior to Claim 3?

1 DR. KNOX: I have a general understanding that  
2 they are senior.

3 MR. TAGGART: Okay. And Lahontan Reservoir,  
4 does that have a storage right under the Orr Ditch  
5 Decree?

6 DR. KNOX: Yes.

7 MR. TAGGART: And is that a carryover storage  
8 right?

9 DR. KNOX: I do not recall that it has the term  
10 carryover. It has the term storage.

11 MR. TAGGART: And you indicated earlier that  
12 it's customary for carryover to be included in a term in  
13 order to establish carryover storage, correct?

14 DR. KNOX: It is customary under more current  
15 adjudicatory processes to have that term, yes.

16 MR. TAGGART: In opinion number 3, my question  
17 is this: If an application was applied before the  
18 Nevada State Engineer for storage of the Tribe's  
19 unappropriated water in Stampede Reservoir -- do you  
20 understand my question so far?

21 DR. KNOX: Yes, sir.

22 MR. TAGGART: And if that application were  
23 granted prior to TROA becoming effective -- do you  
24 understand my question?

25 DR. KNOX: Yes.

1           MR. TAGGART:  Then would your concern raised in  
2 this opinion be addressed?

3           DR. KNOX:  Mr. Taggart, if I understand this,  
4 you use the word, I think, "if" three times.  But to  
5 make sure I understand, if the Tribe does seek a  
6 petition before the Nevada State Engineer to include  
7 upstream storage, to short-circuit this, if you will,  
8 and if it was allowed by the Nevada State Engineer.

9           What I didn't hear you say is how that would  
10 parlay before storage before this Board.  So I'm missing  
11 something here.  Are you inferring that it receives full  
12 administrative and what I'm terming adjudicatory  
13 approval?  Would it change my opinion?

14          MR. TAGGART:  Well, your opinion here is  
15 specifically addressing the procedure before the Nevada  
16 State Engineer.  It says at the end that nothing has  
17 been filed to the Nevada State Engineer as required by  
18 law.  So I'm specifying a question with the Nevada State  
19 Engineer.  It seems like your hang-up here is if there  
20 is not a Nevada right to store the unappropriated water  
21 that's a problem.

22          And what I'm asking you is if there was a right  
23 under Nevada law to store, wouldn't that take care of  
24 the concern you have in this opinion?

25          DR. KNOX:  As to the first part, yes, it is a

1 problem. And if it was approved, it would go a long way  
2 to alleviating my concern.

3 MR. TAGGART: In opinion number 4 -- and you've  
4 spent a lot of years in Colorado managing water systems,  
5 right?

6 DR. KNOX: Twenty-six.

7 MR. TAGGART: And during that time you're  
8 aware, are you not, that often -- or I won't often --  
9 sometimes a person will not use their entire water  
10 right?

11 DR. KNOX: Certainly.

12 MR. TAGGART: And if they don't use their  
13 entire water right, it may become available to someone  
14 else even though that person might not be in priority,  
15 right?

16 DR. KNOX: Yes. If they're downstream in  
17 particular.

18 MR. TAGGART: Now, wouldn't you agree as a  
19 concept that the senior water right holder has the right  
20 to fully utilize their water right regardless of whether  
21 they have not fully utilized it for a period of years?

22 DR. KNOX: That's a general precept. But,  
23 Mr. Taggart, most states have rules of abandonment and  
24 forfeiture that can get quite naughty and intricate.

25 MR. TAGGART: And I understand that. And

1 without considering abandonment and forfeiture, I'm  
2 asking a very simple question here.

3           The argument is being made that upstream water  
4 right users have not fully utilized their water right  
5 and are now intending to fully utilize their water  
6 right. And if that's true, what's wrong -- isn't that  
7 allowable under the basic principles of western water  
8 law as you understand them?

9           DR. KNOX: I'm a little bit hung-up because I'm  
10 not sure that I would agree that the characterization is  
11 correct that we're alleging that they haven't used their  
12 existing water right. It's the expansion that's of  
13 concern.

14           MR. TAGGART: So you would agree then as a  
15 general precept, though, that a senior water right user  
16 can capture their water right and use it even if someone  
17 else has been benefitting from that nonuse, assuming  
18 they haven't eclipsed the abandonment and forfeiture  
19 provisions?

20           DR. KNOX: I have to always insert the claim as  
21 long as they're not using the water and wasting it.

22           MR. TAGGART: In opinion number 6 you state  
23 that -- and at the beginning of your opinion you talk  
24 about how TROA is not in effect. And it seems like  
25 you're saying that this ought to be handled by the Orr

1 Ditch Court first and then come back to the State Board  
2 here in Sacramento.

3 Is that a fair characterization of part of your  
4 opinion?

5 DR. KNOX: Yes.

6 MR. TAGGART: Now, wouldn't it be just as  
7 plausible to argue if the parties went to the Orr Ditch  
8 Court first that you have to come to the state boards  
9 before you can go to the Orr Ditch Court?

10 DR. KNOX: No.

11 MR. TAGGART: Okay. And in opinion number 7  
12 you make the statement that exchanges would cause  
13 injury. Exchanges under TROA would cause injury, and I  
14 wanted to ask you, what specific exchanges are you  
15 talking about?

16 DR. KNOX: Sir, did you say opinion 7?

17 MR. TAGGART: Yes.

18 DR. KNOX: Because I do not see the word  
19 exchange in that.

20 MR. TAGGART: Well, you make the point, I  
21 think, that no additional review -- well, there would be  
22 a circumvention of State procedure if these applications  
23 were granted.

24 Is that a fair characterization of your  
25 opinion?

1 DR. KNOX: I apologize. You lost me.

2 MR. TAGGART: It says: Moreover, the ability  
3 of the applicant to circumvent the change of water right  
4 process in California in the future.

5 I'm asking you about that particular opinion  
6 that you have.

7 DR. KNOX: I do see those words, yes.

8 MR. TAGGART: So explain to me how that will  
9 occur under TROA?

10 DR. KNOX: My understanding of TROA is it would  
11 allow this type of storage rediversion at multiple  
12 points. But beyond that, I'm not sure I can answer your  
13 question.

14 MR. TAGGART: Okay. So I'm clear about your  
15 opinion number 8, I want to ask you a little bit about  
16 what you've done in Colorado.

17 In Colorado it's customary to grant storage  
18 water rights, is it not?

19 DR. KNOX: Certainly it occurs, yes.

20 MR. TAGGART: And there is nothing inconsistent  
21 with the priority system under prior appropriation to  
22 allow for the storage of water as long as there is no  
23 injury, right?

24 DR. KNOX: That's the intent.

25 MR. TAGGART: And that can even happen on a

1 fully-appropriated system, can't it?

2 DR. KNOX: In Colorado?

3 MR. TAGGART: Yes.

4 DR. KNOX: Yes.

5 MR. TAGGART: Okay. And in getting back to the  
6 first couple questions I asked you, it sounds to me like  
7 it's not the approval of additional storage, basically  
8 saying 126 can now be 226, that's not what you're  
9 concerned about causing the injury; it's the actual  
10 moving of water rights from a historic use and historic  
11 practice to actually putting them into that reservoir to  
12 create that difference between 126 and 226.

13 Is that a fair statement?

14 DR. KNOX: There again, there are two  
15 components to this. One is the actual exchange and  
16 substitution of water in Stampede, to borrow your  
17 example. That water that would have been released to  
18 downstream rights is now being claimed for storage in  
19 Stampede, and I don't know that that water has been  
20 proven to be physically or legally available.

21 The other part of it in terms of storage from  
22 126 up to the 226-5, difference in Colorado, my  
23 understanding is there a precept against allowing that  
24 application if a stream is fully appropriated in  
25 California.

1           MR. TAGGART: Well, it's true, is it not, that  
2 in Colorado you presided over the changes to historic  
3 operations of water systems in order to accommodate more  
4 modern needs on those water systems?

5           DR. KNOX: Absolutely, always in terms and  
6 conditions that I'm advocating herein.

7           MR. TAGGART: And in opinion number 10 you're  
8 talking again about this chart from the EIS and the EIR  
9 that we've all seen many times, and you're citing to  
10 that for the opinion regarding shortages.

11           What other evidence did you rely upon for  
12 creating your opinion about shortages other than the  
13 EIS?

14           DR. KNOX: Review of TROA itself, the decrees  
15 that specify the priorities of relative water rights in  
16 this system. Looking at the maps and the general  
17 hydrology and physical characteristics of the system --  
18 in other words, how the plumbing works -- was part of it  
19 as well.

20           MR. TAGGART: And opinion number 11, you have  
21 inserted the term Public Trust Doctrine into an opinion,  
22 so I have to ask you about that.

23           You understand that the Public Trust Doctrine  
24 is often considered one that is state based, like it may  
25 differ from state to state how the Public Trust Doctrine

1 is applied?

2 DR. KNOX: That is my understanding, yes,  
3 Mr. Taggart.

4 MR. TAGGART: Well, are you asking the  
5 California Water Resources Control Board to apply the  
6 California Public Trust Doctrine to the administration  
7 of Nevada water rights that are under the administrative  
8 jurisdiction of the state of Nevada?

9 DR. KNOX: With due respect, I'm not sure what  
10 your role and jurisdiction is as it extends across state  
11 boundaries. My opinion is based on the fact that you  
12 have petitions and applications before you. The Public  
13 Trust Doctrine, as you choose to interpret it, is a  
14 matter for you to consider and weigh in this proceeding  
15 as you deem appropriate.

16 MR. TAGGART: When you were involved in bistate  
17 agreements in Colorado, you developed an opinion, I'm  
18 sure, that it's important for one state to respect the  
19 neighboring state's jurisdiction over water resources,  
20 didn't you?

21 DR. KNOX: I haven't made that opinion formal,  
22 but if you're asking me should one state honor another,  
23 absolutely. Sincere -- well, significant issues occur,  
24 violations of compacts --

25 MR. TAGGART: That would be a lot better than

1 original jurisdiction actions in front of the United  
2 States Supreme Court like Colorado is unfortunately  
3 involved in quite a few of.

4 DR. KNOX: I've only been involved in two  
5 actions, and that's enough.

6 MR. TAGGART: Do you know if there is a compact  
7 between Nevada and California on the Truckee River?

8 DR. KNOX: It's my understanding that there has  
9 been formulation of those, but it's not in current  
10 effect as ratified in its current state by either  
11 legislative body, Congress or signed into law by the  
12 President, which is necessary. No.

13 MR. TAGGART: Thank you. Don't you think it's  
14 a good idea to have the compact ratified or have it  
15 consummated through TROA?

16 DR. KNOX: Not necessarily. And my opinion for  
17 that is based on the fact that as I read Public Law  
18 101-618, it's my understanding in Subsection 204(d)  
19 there are compliance issues there. So you have some  
20 form of congressional action describing that the states  
21 should adhere to that.

22 It's my understanding from previous testimony  
23 from Mr. Sarna and others that the State of California  
24 has agreed to adopt that, which is common sense.

25 I know that there's other informal memorandums

1 of agreement and understanding for the distribution and  
2 administration of water resources that do not rise to  
3 the compact level. I personally was informed of the  
4 negotiation for one between the State of Colorado and  
5 Utah on Paw Creek. So you craft the need to meet the  
6 circumstances.

7 MR. TAGGART: Did you review State Engineer  
8 Ruling 6035 as part of your preparation for testimony  
9 here?

10 DR. KNOX: Mr. Taggart, that does not seem  
11 familiar to me.

12 MR. TAGGART: Okay. This is the ruling that  
13 addresses the change applications filed by Truckee  
14 Meadows Water Authority to store Nevada water rights in  
15 the reservoirs that we are addressing here today.

16 DR. KNOX: No, sir, I did not review that.

17 MR. TAGGART: So would it surprise you to learn  
18 that the State Engineer of Nevada has already ruled on  
19 whether the movement of these water rights would cause  
20 an impact to a downstream water right owner?

21 DR. KNOX: I don't know the answer to that.

22 MR. TAGGART: So you haven't reviewed the  
23 testimony that was submitted to the Nevada State  
24 Engineer regarding the impact of the TROA change  
25 applications in preparation of your testimony?

1 DR. KNOX: No.

2 MR. TAGGART: Well, if the State Engineer has  
3 already made a determination, don't you think it's  
4 important for you to know that if he's made a  
5 determination specifically on an issue that you're  
6 providing an opinion on?

7 DR. KNOX: Sir, I might find that interesting.  
8 It doesn't sway my opinion, and I don't know where I  
9 would stop reviewing documents that I would find  
10 interesting.

11 MR. TAGGART: Well, would it cause you concern  
12 if your opinion was directing California to make a  
13 decision that was inconsistent with the state that has  
14 administrative authority over those water rights?

15 DR. KNOX: Is that what happened, Mr. Taggart?

16 MR. TAGGART: I asked you a hypothetical, sir.

17 DR. KNOX: If I understand, your hypothetical  
18 is would it concern me if the Nevada State Engineer  
19 issued a decision that he or she knowingly was in  
20 conflict with Public Law 101-618?

21 MR. TAGGART: Well, that wasn't my question,  
22 sir.

23 DR. KNOX: Or the compact?

24 MR. TAGGART: You don't know about Ruling 6035,  
25 right? You already answered that.

1 DR. KNOX: I'll stay with my answer. The  
2 answer is no.

3 MR. TAGGART: So you don't know that the State  
4 Engineer already reviewed a component of the TROA change  
5 applications. You don't know that, right?

6 DR. KNOX: That's correct.

7 MR. TAGGART: And so you don't know whether  
8 your opinion is inconsistent with the Nevada State  
9 Engineer's opinion, do you?

10 DR. KNOX: You're giving me a hypothetical.

11 MR. TAGGART: That's not a hypothetical.

12 You do not know whether your opinion is  
13 inconsistent with the State Engineer on whether the  
14 change applications in Nevada will impact TCID?

15 DR. KNOX: You're right, I don't know.

16 MR. TAGGART: And you're offering an opinion  
17 here today that moving water in these upstream  
18 reservoirs will impact TCID, right?

19 DR. KNOX: Yes, I am.

20 MR. TAGGART: Okay. I have no further  
21 questions.

22 CO-HEARING OFFICER DODUC: Thank you,  
23 Mr. Taggart.

24 Redirect, Mr. Van Zandt?

25 I'm sorry, let me check real quickly.

1 Mr. Soderlund, I assume you have no cross?

2 MR. SODERLUND: No.

3 CO-HEARING OFFICER DODUC: And Mr. Mixson, I  
4 assume you have no cross?

5 MR. MIXSON: No cross.

6 CO-HEARING OFFICER DODUC: Thank you.

7 Mr. Van Zandt.

8 MR. VAN ZANDT: Thank you. I just have a few,  
9 I think.

10 --o0o--

11 REDIRECT EXAMINATION BY MR. VAN ZANDT

12 FOR TRUCKEE CARSON IRRIGATION DISTRICT

13 and CHURCHILL COUNTY

14 --o0o--

15 MR. VAN ZANDT: Dr. Knox, I think you were  
16 asked by Mr. Palmer about Stampede and Prosser Reservoir  
17 and whether they were mentioned in the Truckee River  
18 Agreement, and I think you answered yes.

19 Did you misunderstand what Mr. Palmer had said?

20 DR. KNOX: Mr. Van Zandt, that's my -- if I  
21 said that, that's incorrect, because I thought you said  
22 Stampede and Prosser in relationship with the Truckee  
23 River Agreement, which was 1935, and these occurred in  
24 1962 or 1970, respectively.

25 So no, it would have been the Truckee River

1 Operating Agreement. I apologize for that error on my  
2 part.

3 MR. VAN ZANDT: And I also think Mr. Palmer  
4 asked you about the McCarran Amendment and associating  
5 that with general stream adjudications and the authority  
6 of the State to act on some federal water rights.

7 Were you aware of another authority that might  
8 allow for a state to administer federal water rights  
9 that are held in title by a federal agency?

10 DR. KNOX: A couple, and I need to share this  
11 is testing my memory.

12 But one is United States vs. The City and  
13 County of Denver. There may be others that I'm not  
14 familiar with. But basically as a practicing water  
15 administration official in collaboration with at that  
16 time the Colorado Attorney General's office, it was my  
17 understanding that the McCarran Amendment extended  
18 towards the administration of the water resources, of  
19 federal water rights to be on equal plane, if you will,  
20 with other water rights.

21 They do not retain a superiority, nor do they  
22 release their authorities. They're operated within --  
23 integrated in a seamless manner within the priority  
24 system.

25 MR. VAN ZANDT: And do you have an

1 understanding of whether or not the Reclamation Act of  
2 1902 addresses whether or not a federal agency must  
3 comply with state water law?

4 DR. KNOX: Again, I don't remember the exact  
5 paragraph, but it's my understanding that that was part  
6 of the 1902 Reclamation Act as well.

7 MR. VAN ZANDT: You were asked by Mr. Pagni if  
8 the Boca change petitions increase the amount of water  
9 stored, and you answered his question but then you  
10 wanted to give a reason for why you gave that answer.

11 Can you remember the question and why it is you  
12 believe that it enlarges or increases the amount of  
13 water stored?

14 DR. KNOX: As I recall the question, we have  
15 the existing storage water rights that are vested to  
16 Boca Reservoir, but under TROA there would be additional  
17 waters sought to be stored in that vessel that would be  
18 in excess of their existing water right.

19 MR. VAN ZANDT: I believe Mr. Taggart asked you  
20 about how many times you've testified since you left the  
21 employment at the State Engineer's office in Colorado.  
22 Can you just give the Board an idea of how many times  
23 you've testified as an expert in your entire career?

24 DR. KNOX: Ms. Van Zandt, in courts of law and  
25 adjudicatory proceedings? I would prefer to not include

1 testimony before general assembly and those others,  
2 because I just don't know. But in the range of 55 to 60  
3 different trials. I don't know how many hundreds of  
4 days.

5 MR. VAN ZANDT: We had mention of the case of  
6 Nevada vs. U.S. and we would like to add that as an  
7 exhibit for the convenience of the Board. TCID  
8 Exhibit 305. I believe we have copies here. So I  
9 believe the Board could take administrative notice of  
10 that. It was mentioned in the testimony. It was  
11 mentioned in Dr. Knox's direct testimony as well.

12 That's all the questions I have.

13 CO-HEARING OFFICER DODUC: Thank you,  
14 Mr. Van Zandt. Recross, Mr. Palmer?

15 MR. PALMER: No questions. Thank you.

16 CO-HEARING OFFICER DODUC: Recross,  
17 Mr. DePaoli?

18 MR. DePAOLI: No questions.

19 CO-HEARING OFFICER DODUC: Recross, Mr. Pagni?

20 MR. PAGNI: No questions.

21 CO-HEARING OFFICER DODUC: Recross,  
22 Mr. Taggart?

23 MR. TAGGART: No questions.

24 CO-HEARING OFFICER DODUC: Thank you.

25 Ms. Mahaney?

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QUESTIONS BY THE BOARD AND STAFF

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SENIOR STAFF COUNSEL MAHANEY: Dr. Knox, I have one question for you about your testimony on page 10 which states that since the Truckee River is fully appropriated under California Water Code Section 1206, no application for a permit to appropriate water may be accepted for filing on these waters.

That's in the first paragraph at the top of the page.

You made the same statement or a similar statement also in your testimony. In formulating your opinion to make this statement, did you review the State Water Board's Declaration of Fully Appropriated Stream Systems?

DR. KNOX: No, ma'am, I did not.

SENIOR STAFF COUNSEL MAHANEY: All right. Thank you.

CO-HEARING OFFICER DODUC: Mr. Van Zandt, does that conclude your case-in-chief?

MR. VAN ZANDT: That is our last witness in our case-in-chief, yes.

CO-HEARING OFFICER DODUC: At this time could you like to move your exhibits into evidence?

1           MR. VAN ZANDT: I would. And I don't know what  
2 your pleasure is, if you'd like to go through each one  
3 of the exhibits that have been mentioned or included in  
4 the direct testimony, just enumerate those one by one?

5           CO-HEARING OFFICER DODUC: I think you can  
6 refer to them by reference rather than go through every  
7 single one of them. Let me put it this way. Is there  
8 any exhibits that you submitted that you do not wish to  
9 move into evidence?

10          MR. VAN ZANDT: No. We can move the entire  
11 body of the exhibits that we have. I just want to make  
12 sure that the exhibits that we referred to in cross that  
13 were in either the joint exhibits, the USBR exhibits,  
14 that those get included ultimately in the ones that are  
15 admitted. But TCID's exhibits, I'd move that they be  
16 admitted at this point in time.

17          CO-HEARING OFFICER DODUC: Objections? Any  
18 objections?

19          MR. PALMER: Yes.

20          CO-HEARING OFFICER DODUC: Mr. Palmer.

21          MR. PALMER: Sort of jointly we have gone  
22 through this, so I would ask any of the others to  
23 correct me or add if I'm missing something.

24          CO-HEARING OFFICER DODUC: Okay.

25          MR. PALMER: I'll just start off.

1           The first one that I have on our list for TCID  
2 exhibit -- I guess one thing before that. We were going  
3 to request -- I don't know if Mr. Van Zandt has a  
4 preference, but as he mentioned there are a number of  
5 the TCID exhibits that are the same as the  
6 Applicant/Petitioner's joint exhibits. And we would  
7 prefer to refer to our exhibit. I don't know if he has  
8 a preference for that as opposed to having duplicates.

9           CO-HEARING OFFICER DODUC: I don't have a  
10 preference. Go ahead and do that.

11           MR. PALMER: Then TCID Exhibit 143 is the first  
12 one I have that we have an objection to. There is no  
13 indication of its authenticity. It wasn't sponsored by  
14 any other witnesses. We can't tell exactly what it is  
15 or what it's intended to report.

16           CO-HEARING OFFICER DODUC: All right. Next  
17 objection?

18           MR. TAGGART: TCID-145, similar basis.

19           CO-HEARING OFFICER DODUC: Just go ahead and  
20 continue to list your objections.

21           MR. PALMER: I'll just make a list then.  
22 TCID-146, 147 --

23           CO-HEARING OFFICER DODUC: Mr. Palmer, do me a  
24 favor, and also as you're listing the exhibits, also  
25 provide your reasons for the objection.

1 MR. PALMER: So --

2 CO-HEARING OFFICER DODUC: We heard your  
3 reasons for 143 and 145.

4 MR. PALMER: 146, same reason. 147, I believe,  
5 is a duplicate of 146. So I'd just object that it's a  
6 duplicate. We've entered our objection already. I just  
7 wanted to restate that to 148, 149 through 160, the  
8 memoranda from Bill Sikonia and others, that they were  
9 not here to testify. They were not authenticated and  
10 we've made that objection.

11 CO-HEARING OFFICER DODUC: I recall that.

12 MR. PALMER: Exhibit 163 falls in that category  
13 as well. That's farther down, another Bill Sikonia.

14 Exhibit 164 is a duplicate. It comes up later.  
15 I'm sorry. It's the OCAP. We have that in our joint  
16 exhibits. It's also twice in the TCID exhibits.

17 Again, Exhibit 165 is contained in State Board  
18 Exhibit 7. That's the comment letters on the EIS.  
19 There's several of those, and so they're duplicates.

20 CO-HEARING OFFICER DODUC: Okay.

21 MR. PALMER: I'd object to 166, relevance and  
22 authentication. Same for 168, 169, 170, 171, 172, 173.

23 CO-HEARING OFFICER DODUC: And all that is  
24 relevance and authentication?

25 MR. PALMER: Yes.

1 CO-HEARING OFFICER DODUC: Okay.

2 MR. PALMER: Same with 174.

3 And this next set is a similar objection, 175  
4 through 180. Next, similar on the model, same objection  
5 as before, 182. And then these next exhibits are again  
6 already in Exhibit 7, the comment letters on the EIS.

7 Exhibit 184, 185, 186, 187, I object to 188 on  
8 relevance. Same with 192, relevance.

9 215 -- I'm sorry, 213, I object to that.  
10 That's a Complaint filed in a recent action by TCID. I  
11 don't know the relevance for that. It's a pleading.  
12 It's legal opinion.

13 CO-HEARING OFFICER DODUC: Okay.

14 MR. PALMER: 214 is the same as 145, we  
15 mentioned that before. I'm sorry, 214. 214 is the same  
16 as 145. Object to 215, the same as before, relevance,  
17 authentication. 216, the same.

18 CO-HEARING OFFICER DODUC: Same meaning  
19 relevance?

20 MR. PALMER: Same, relevance and -- yes.

21 217, same objection. 218, authentication as  
22 well as relevance. Same for 219.

23 221 and 222 are covered by the joint exhibits  
24 filed by the applicants. Exhibit 223, same thing,  
25 relevance, authentication. Same with 224, 225,

1 relevance.

2 226, they're excerpts from Exhibit 7 which is  
3 already in evidence.

4 227 is a Truckee River Operating Agreement  
5 that's already an exhibit by applicants/petitioners.

6 Object to 237 and 238 on relevance. 242,  
7 relevance and authentication. 243 is a duplicate of  
8 159. Exhibit 262 is the same as Exhibit 140.

9 Object on relevance grounds and authentication  
10 to 270 and 271. And 272 and 273, those were retracted  
11 by Mr. Mahannah. Those are referenced in the two pages  
12 he deleted from his report that reference these  
13 exhibits. And we object to those on relevance,  
14 authentication. There has been no sponsor of those.  
15 But I think he withdrew them anyway. I'm not sure about  
16 that, but that's how I understood his testimony.

17 For whatever it's worth, the 277, 278 and 279  
18 are in the Board exhibits. They're part of the  
19 applications, the original applications for these  
20 reservoirs we're talking about today.

21 And we've already entered our objection to 280.

22 I believe that's all of what we've seen so far  
23 to 282.

24 CO-HEARING OFFICER DODUC: Okay. Mr. DePaoli,  
25 anything to add?

1           MR. DePAOLI: Yes. I would like to add an  
2 objection to -- I think it's 43. Excuse me. 44 and 45  
3 on relevance.

4           CO-HEARING OFFICER DODUC: That's 43, 44 and  
5 45?

6           MR. DePAOLI: Not 43, just 44 and 45 on  
7 relevance.

8           CO-HEARING OFFICER DODUC: Okay.

9           MR. DePAOLI: And I would also like to add a  
10 hearsay objection to all of the exhibits that Mr. Palmer  
11 was referring to as well as authenticity and relevance.

12           There was one other one or a couple other ones  
13 that I wanted to add.

14           210. And he may have covered 210; I could not  
15 hear everything he said. But would I like to object to  
16 210 on relevance. It's comments to an administrative  
17 rule.

18           And I would renew my objection to all of the  
19 exhibits that were the subject of the Motion to Exclude.

20           And I may have missed this, but did Mr. Palmer  
21 object to 272 and 273?

22           CO-HEARING OFFICER DODUC: Yes, he did.

23           MR. DePAOLI: I think that was all that I had  
24 in addition to what he had.

25           CO-HEARING OFFICER DODUC: Thank you.

1 Mr. Pagni?

2 MR. PAGNI: I would join in those, and the one  
3 other comment I would make is Exhibits 198 through 204,  
4 these are the applications and the protests. I don't  
5 know that those are necessarily evidence; they're more  
6 the pleadings that are in front of the Board. I don't  
7 consider those evidence. That would be all that I would  
8 add.

9 CO-HEARING OFFICER DODUC: Okay. Mr. Taggart?

10 MR. TAGGART: Just join in all those  
11 objections.

12 CO-HEARING OFFICER DODUC: Okay. Mr.  
13 Soderlund, any additional objections? Hearing none,  
14 Mr. Mixson?

15 MR. MIXSON: No. The Tribe joins in all the  
16 objections.

17 CO-HEARING OFFICER DODUC: Thank you.

18 Gentlemen, I took notes as quickly as I could,  
19 but since it is an extensive list, I'm going to request  
20 that you submit in writing those objections to me, the  
21 exhibits as well as the grounds for your objection.

22 And let me ask Mr. Van Zandt. Mr. Van Zandt,  
23 providing that these are indeed duplicates, your reason  
24 for including them in the record?

25 MR. VAN ZANDT: Well, of course we didn't know

1 what exhibits were being proffered by the applicants and  
2 petitioners, so they're there to make sure that those  
3 documents are placed before the Board. If there is a  
4 duplicate that's a joint exhibit or USBR or TMWA exhibit  
5 that gets admitted, then we would withdraw those as our  
6 proffered exhibits by TCID.

7 I also wanted to add Churchill County has one  
8 exhibit, I believe, that I didn't mention, Churchill  
9 County 1.

10 CO-HEARING OFFICER DODUC: You're moving  
11 Churchill County as well.

12 MR. VAN ZANDT: We move that as well into  
13 evidence.

14 CO-HEARING OFFICER DODUC: Actually, we already  
15 accepted Churchill into evidence. That got by before  
16 they objected.

17 MR. VAN ZANDT: And I wanted to ask a question.  
18 They submit it in writing. Should I then provide a  
19 response to that? Because otherwise I'll have to go  
20 through these one by one and provide a response on the  
21 record to them. That may take some time.

22 CO-HEARING OFFICER DODUC: Yes, we will want  
23 you to respond in writing.

24 And Ms. Mahaney will outline sometime tomorrow,  
25 I think, at the conclusion of our hearing -- we will

1 conclude tomorrow -- some procedural matters, and we'll  
2 include some timelines associated with these submittals  
3 as well, unless you want them today.

4 SENIOR STAFF COUNSEL MAHANEY: No.

5 MR. VAN ZANDT: That would be fine.

6 CO-HEARING OFFICER DODUC: Mr. Van Zandt, what  
7 about the exhibits we received from you this afternoon?

8 SENIOR STAFF COUNSEL MAHANEY: What we want to  
9 do is clarify whether the exhibits that you have  
10 submitted this afternoon are part of your entry right  
11 now aside from rebuttal.

12 MR. VAN ZANDT: I think the ones that were  
13 submitted this afternoon for the most part are  
14 associated with the rebuttal reports. There were two  
15 rebuttal reports, one by Dr. Knox and one by  
16 Mr. Mahannah. I think most of the exhibits were  
17 associated with Mr. Mahannah's rebuttal report, except  
18 for 305 which is the Nevada vs. U.S., so we move that  
19 into admission right now. But the other ones, I  
20 believe, are just rebuttal.

21 SENIOR STAFF COUNSEL MAHANEY: Well, actually,  
22 there are the transcripts. I just wanted to make sure  
23 that's included within.

24 MR. Van Zandt: Oh, yes.

25 CO-HEARING OFFICER DODUC: So the two

1 transcripts are included?

2 MR. VAN ZANDT: Yes, because those will be  
3 included, yes, in the direct testimony of Mr. Mahannah.

4 CO-HEARING OFFICER DODUC: And so for the  
5 rebuttal testimony received is TCID-287, so we'll hold  
6 off on that for now, and 288.

7 MR. VAN ZANDT: Yes.

8 CO-HEARING OFFICER DODUC: And 289.

9 SENIOR STAFF COUNSEL MAHANEY: And just to  
10 clarify, the transcripts are TCID-202 and TCID-303.

11 MR. VAN ZANDT: That's correct.

12 CO-HEARING OFFICER DODUC: All right. I think  
13 that does it for your exhibits, Mr. Van Zandt. Okay.

14 At this time, Mr. Palmer, do you want to move  
15 USBR's exhibits as well as the joint exhibits into the  
16 record?

17 MR. PALMER: Yes, if it's appropriate to do so  
18 now we would, in fact like to move all of the joint  
19 exhibits and the USBR exhibits into evidence.

20 CO-HEARING OFFICER DODUC: Okay. Any  
21 objections to that from either Mr. Van Zandt or  
22 Mr. Mackedon?

23 MR. MACKEDON: I have none.

24 CO-HEARING OFFICER DODUC: None from  
25 Mr. Mackedon.

1 SENIOR STAFF COUNSEL MAHANEY: I do have a  
2 clarifying question. We had asked you for some  
3 coordinates. Have those been provided yet?

4 MR. PALMER: No. I can get it. Well, I guess  
5 Mr. Parr appears we have copies. I was told we were  
6 furiously working on them at lunchtime.

7 SENIOR STAFF COUNSEL MAHANEY: Right.

8 MR. PALMER: Do you want to take a minute to  
9 figure this out?

10 CO-HEARING OFFICER DODUC: If you have it, then  
11 yes, please, let's take a minute and do that.

12 MR. PALMER: I just need to find out if we in  
13 fact have exactly what you want in the format you want  
14 it.

15 CO-HEARING OFFICER DODUC: Would you prefer to  
16 do that tomorrow?

17 MR. PALMER: If we're going to be here  
18 tomorrow, that would be more convenient. Then we can be  
19 sure we're getting you exactly what you need in the  
20 format you need.

21 CO-HEARING OFFICER DODUC: Let's do that  
22 tomorrow then.

23 MR. PALMER: Thank you.

24 CO-HEARING OFFICER DODUC: So we're back to  
25 whether Mr. Van Zandt has any objections to USBR and

1 joint exhibits being moved into the record.

2 MR. VAN ZANDT: No, we don't have any objection  
3 to those being entered into evidence.

4 CO-HEARING OFFICER DODUC: Thank you.

5 So those are moved.

6 And Mr. DePaoli, I believe you have some  
7 additional exhibits?

8 MR. DePAOLI: Yes. I would like to move all of  
9 the TMWA exhibits into evidence along with the new ones  
10 which I think have been provided to everyone which have  
11 been identified TMWA 5-0, TMWA 5-1 and TMWA 5-2.

12 MR. VAN ZANDT: These are new exhibits?

13 MR. DePAOLI: They are the portion of the Lee  
14 Bergfeld direct and cross from the Nevada hearing, his  
15 qualifications and his report.

16 MR. VAN ZANDT: We don't have any objection.

17 CO-HEARING OFFICER DODUC: No objections to  
18 that? Seeing none, all right.

19 Thank you, Mr. DePaoli.

20 Mr. Pagni, do you have any exhibits to move  
21 into the record?

22 MR. PAGNI: No, I have nothing to add.

23 CO-HEARING OFFICER DODUC: Mr. Taggart?

24 MR. TAGGART: We move to admit Fernley

25 Exhibit 1 which was Greg Evangelatos' testimony and with

1 the attachments to that exhibit all as one exhibit.

2 CO-HEARING OFFICER DODUC: Any objections to  
3 that?

4 MR. VAN ZANDT: No objection.

5 CO-HEARING OFFICER DODUC: No objections?

6 Mr. Soderlund?

7 MR. SODERLUND: Yes, the Department of Water  
8 Resources would like to move Exhibits DWR 1 through 5  
9 into evidence.

10 CO-HEARING OFFICER DODUC: Any objections to  
11 that?

12 MR. VAN ZANDT: No.

13 CO-HEARING OFFICER DODUC: Seeing none, those  
14 are moved.

15 Mr. Mixson? No objections.

16 MR. MIXON: The Tribe has no objections.

17 CO-HEARING OFFICER DODUC: And Mr. Mackedon,  
18 did you have any -- no? And Mr. Jardine? Actually,  
19 Mr. Jardine -- you represent Churchill County.

20 MR. VAN ZANDT: Churchill County just had the  
21 one that's all been admitted.

22 CO-HEARING OFFICER DODUC: All right. Anything  
23 else?

24 SENIOR STAFF COUNSEL MAHANEY: As Ms. Doduc  
25 said, we will cover some of the procedures for entering

1 the objections and responses tomorrow, because that was  
2 an extensive list and we would like to see it in  
3 writing.

4 CO-HEARING OFFICER DODUC: Okay. And I think  
5 we need to take a little break, but after -- before we  
6 do, let me confirm with respect to rebuttals, we'll  
7 start with Mr. Palmer. Do you anticipate calling  
8 rebuttal witnesses?

9 MR. PALMER: No.

10 CO-HEARING OFFICER DODUC: Mr. DePaoli?

11 MR. DePAOLI: I would like to have an  
12 opportunity to confer with the other folks that have  
13 presented the joint case-in-chief on that question, if  
14 we could, since we've just heard --

15 CO-HEARING OFFICER DODUC: All right. Then why  
16 don't we go ahead and take our 10-minute break and when  
17 we resume we'll reask the question regarding rebuttal.

18 MR. DePAOLI: I would appreciate that.

19 CO-HEARING OFFICER DODUC: Thank you. Let's  
20 take a ten-minute break.

21 (Recess).

22 CO-HEARING OFFICER DODUC: Mr. Murphey, I  
23 believe you have a request. Would you please make that  
24 request now.

25 ENGINEERING GEOLOGIST PAUL MURPHEY: Yes. For

1 TCID what I'd like is a revised exhibit index in Word  
2 version that lists all the exhibits that you recently  
3 entered with a description of each. If we get that by  
4 tomorrow, that would be great.

5 MR. VAN ZANDT: Let me understand. You want it  
6 in Word, and you said you want a revised description of  
7 the exhibits? I'm not sure I understand what that  
8 means.

9 ENGINEERING GEOLOGIST PAUL MURPHEY: Right.  
10 Just a description of all the exhibits you recently  
11 entered, 287 through 305.

12 MR. VAN ZANDT: Oh, to add those.

13 ENGINEERING GEOLOGIST PAUL MURPHEY: Correct.

14 MR. VAN ZANDT: That's not a problem. Thank  
15 you.

16 CO-HEARING OFFICER DODUC: Thank you,  
17 Mr. Van Zandt.

18 I was going through the joint parties asking if  
19 you had rebuttal witnesses. So Mr. Palmer?

20 MR. PALMER: No.

21 CO-HEARING OFFICER DODUC: Mr. DePaoli?

22 MR. DePAOLI: No.

23 CO-HEARING OFFICER DODUC: Mr. -- I will get  
24 this right once during this hearing. Mr. Pawnee?  
25 Pagnee? Pawnye? Pawnya?

1 MR. PAGNI: No, I have no rebuttal.

2 CO-HEARING OFFICER DODUC: I deeply apologize,  
3 because my last name is mispronounced all the time, so I  
4 should be especially sensitive, and I know I've totally  
5 mangled your last name over the days of the hearing, and  
6 for that I sincerely apologize.

7 Mr. Soderlund?

8 MR. SODERLUND: No.

9 CO-HEARING OFFICER DODUC: Mr. Mixson?

10 MR. MIXSON: No.

11 CO-HEARING OFFICER DODUC: Mr. Taggart?

12 MR. TAGGART: No.

13 CO-HEARING OFFICER DODUC: Okay. And that  
14 moves us to Mr. Van Zandt.

15 Ms. Mahaney? I'm allowed to finish,  
16 apparently.

17 Mr. Van Zandt, you mentioned having two  
18 rebuttal witnesses. Would this be on behalf of  
19 Churchill County and City of Fallon as well?

20 MR. VAN ZANDT: It will be, yes.

21 CO-HEARING OFFICER DODUC: Let me check with my  
22 counsel.

23 And before we get to Mr. Van Zandt's rebuttal  
24 witnesses, Mr. Palmer, I believe you have some  
25 coordinates to enter into the record.

1           MR. PALMER:  Yes.  In response to your  
2 question, we do have what we think is the final product  
3 to offer for you to look at.  And what we've done is we  
4 have the five hard copies and we have it on a disk.  And  
5 for each separate change petition and application, each  
6 reservoir, we have numbered it a separate joint exhibit  
7 starting with joint Exhibit 23 would be Boca, 24 is  
8 Independence, 25 is Stampede change petition, 26 is  
9 Prosser Creek, 27 is Stampede application and 28 is the  
10 Prosser Creek application.

11           CO-HEARING OFFICER DODUC:  And these would be  
12 the coordinates requested by Board staff?

13           MR. PALMER:  They are the coordinates requested  
14 by staff.

15           CO-HEARING OFFICER DODUC:  Thank you.  Any  
16 objections?  Hearing none -- oh.  I tried get it by you,  
17 Mr. Van Zandt.

18           MR. VAN ZANDT:  I don't believe we've seen  
19 these.  I don't have a copy of them.

20           MR. PALMER:  We have copies.

21           MR. VAN ZANDT:  Thank you.

22           CO-HEARING OFFICER DODUC:  How about if you  
23 give Mr. Van Zandt a copy first.

24           MR. PALMER:  Okay.

25           CO-HEARING OFFICER DODUC:  Mr. Palmer, if I

1 understand correctly, these are being submitted as joint  
2 parties exhibits, joint exhibits?

3 MR. PALMER: Yes.

4 CO-HEARING OFFICER DODUC: Would you also  
5 provide Mr. Murphey with an updated Word list of  
6 exhibits?

7 ENGINEERING GEOLOGIST PAUL MURPHEY: Yes, just  
8 an updated index in Word version.

9 MR. PALMER: Yes.

10 CO-HEARING OFFICER DODUC: And Mr. Van Zandt,  
11 any objections to these new exhibits?

12 MR. VAN ZANDT: Actually, we haven't had a  
13 chance to check their accuracy, but we don't really have  
14 an objection to them. We trust the government in this  
15 case.

16 CO-HEARING OFFICER DODUC: Your objection is  
17 premised that these are correct coordinates. So noted.  
18 Thank you.

19 And so those have now been accepted into  
20 evidence.

21 CO-HEARING OFFICER DODUC: Thank you,  
22 Mr. Palmer.

23 And now I will ask Mr. Van Zandt to call up his  
24 first rebuttal witness.

25 Is there any objection from the parties to

1 staying a little bit later today? Mr. DePaoli?

2 MR. DePAOLI: Yes. I was wondering if --

3 CO-HEARING OFFICER DODUC: Mr. DePaoli, please  
4 come up to the microphone.

5 MR. DePAOLI: I was wondering if we might have  
6 the evening to look over this material and come back  
7 tomorrow morning for the rebuttal.

8 CO-HEARING OFFICER DODUC: Any thoughts on  
9 that, Mr. Van Zandt?

10 MR. VAN ZANDT: I was just about to suggest the  
11 same thing. We provided two reports for the convenience  
12 of the Board as well as the parties. They're not  
13 unusually extensive, but they're extensive enough where  
14 they really need to maybe have some time to look at.

15 CO-HEARING OFFICER DODUC: You guys are really  
16 pushing it -- a long lunch and leaving ten minutes  
17 early? You're taking advantage of my good nature.

18 MR. VAN ZANDT: But we may finish up before  
19 noon tomorrow.

20 CO-HEARING OFFICER DODUC: Well, on that basis,  
21 that is a reasonable request, and since the parties are  
22 in favor of that, I'm also in favor of that.

23 Any objections from staff or Mr. Hoppin, upon  
24 penalty of death and pain?

25 With that, then, I believe that is a very good

1 suggestion, and we adjourn for the day. Please  
2 reconvene at 9:00 tomorrow.

3 \* \* \*

4 (Thereupon the STATE WATER RESOURCES  
5 CONTROL BOARD hearing was continued at  
6 4:51 p.m.)

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1 CERTIFICATE OF REPORTER

2 I, DIXIE L. COOKSEY, a Certified Shorthand  
3 Reporter of the State of California, do hereby certify:

4 That I am a disinterested person herein; that  
5 the foregoing STATE WATER RESOURCES CONTROL BOARD  
6 hearing was reported in shorthand by me, Linda Kay  
7 Rigel, a Certified Shorthand Reporter of the State of  
8 California, and thereafter transcribed into typewriting.

9 I further certify that I am not of counsel or  
10 attorney for any of the parties to said meeting nor in  
11 any way interested in the outcome of said meeting.

12 IN WITNESS WHEREOF, I have hereunto set my hand  
13 this August 13, 2010.

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DIXIE L. COOKSEY, CSR  
Certified Shorthand Reporter  
License No. 4375

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