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

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LICENSE NUMBER 4375
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CO-HEARING OFFICER DODUC: Good morning, everyone. Welcome back. Hopefully everyone had a restful weekend in two days.

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

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

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

MR. VAN ZANDT: Thank you, Board Member Doduc. Good morning, Chairman Hoppin, and members of the staff. Obviously, we appreciate the ruling on the motion to exclude. We've already served the transcripts for Mr. Mahannah's testimony on the parties as well as served it with the Board. We do have hard copies as
well to file. We believe there is no reason why that cannot be admitted into evidence, and we would agree to limit Mr. Mahannah's testimony to merely introduce those exhibits, his report and the testimony. And the only thing he will say about it is just give the overall opinion and stop at that point and then go on to his next subject which is the unappropriated water.

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

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

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

MR. VAN ZANDT: Yes.

CO-HEARING OFFICER DODUC: Okay.
MR. VAN ZANDT: And I believe the parties from the other side, Mr. DePaoli and Mr. Palmer, are intending on perhaps adding some additional transcripts from the Nevada hearing. I'll let them address that.

Thank you.

CO-HEARING OFFICER DODUC: Thank you,

Mr. Van Zandt.

Mr. Mackedon, did you have anything to add?

MR. MACKEDON: I have nothing to add.

CO-HEARING OFFICER DODUC: Thank you very much.

So Mr. Palmer?

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

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

Good morning, Mr. DePaoli.

MR. DePAOLI: Good morning, members and staff.

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

With respect to question 4, Janet Carson did
not testify at all in the Nevada proceeding. John Erwin did testify but not as to consumptive use.

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

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

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

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

MR. VAN ZANDT: No objection.
CO-HEARING OFFICER DODUC: Very well.

Ms. Mahaney, any procedural questions from you?

SENIOR STAFF COUNSEL MAHANEY: Just a housekeeping matter for Mr. Van Zandt. The exhibits of Mr. Mahannah, of course, have an exhibit number for the prior proceeding. We'd like to know what the corresponding exhibit number is for the Nevada proceeding that might be cited in that transcript. Does that make sense? Apparently not.

MR. VAN ZANDT: Well --

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

MR. VAN ZANDT: Okay.

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

MR. VAN ZANDT: We were not intending on introducing Mr. Mahannah's report from the Nevada proceedings because the reports that are before the board here in this proceeding are essentially -- contain the same information. So we didn't want to duplicate that.
SENIOR STAFF COUNSEL MAHANEY: Okay.

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

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

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

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

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

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

CO-HEARING OFFICER DODUC: Mr. Van Zandt, as you bring up your witnesses today, please confirm that
they've taken the oath, and if they have not then I will be glad to administer it.

--o0o--

LYMAN F. McCONNELL called by Truckee Carson Irrigation District and Churchill County

DIRECT EXAMINATION BY MR. VAN ZANDT

--o0o--

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

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

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

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

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

MR. McCONNELL: I have a law degree from McGeorge School of Law, and I worked in Fallon for a few years as an attorney before I was approached to be the project manager for the District. And I worked as the project manager for the Truckee Carson Irrigation
District from November of 1984 until March of 2006. So
I was project manager for 22 years.

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

MR. McCONNELL: Yes, I have.

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

MR. McCONNELL: Yes, I have three.

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

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

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

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

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

And that's all the corrections I have.

MR. VAN ZANDT: And, Mr. McConnell, with those
corrections is this a true and correct copy of your
direct testimony?

MR. McCONNELL: Yes.

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

MR. McCONNELL: I have.

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

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

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

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

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

MR. McCONNELL: All right. As I indicated
previously, I have a law degree from McGeorge School of
Law, and I reside in Fallon, Nevada, and have for the
past 30 years, 33 years. It is my home, and I enjoy the
rural nature and quiet of the area. There is lots of
wildlife, plenty of stars and friendly people. It was a
very safe place to raise my daughter.
As I mentioned before, I was the project manager for the Truckee Carson Irrigation District for 22 years. My testimony today is based upon my experience in implementing the various agreements and decrees and my review of the upstream reservoirs.

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

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

There have been several negotiations over the years regarding water and its use as well as many lawsuits filed by the government in the Pyramid Lake tribe to reduce water use on the project. In that regard I became familiar with the Orr Ditch Decree which established the water rights for the water right owners on the Truckee River and incorporated into that decree.
is the Truckee River Agreement. I also became familiar with the Alpine Decree which adjudicated the water rights on the Carson River.

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

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

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

At the same time the Federal Government posted notices throughout the area that it was appropriating
water rights for the project. In 1913 the government filed the Orr Ditch case to quiet title to the water rights on the Truckee River.

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

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

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

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

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

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

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

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

The Truckee River Agreement provided benefits to the Newlands Project as well as others and the parties made concessions and were provided with benefits in exchange.
It was agreed in the Truckee River Agreement that Washoe County Water Conservancy District could store 25,000 acre feet of water in Boca Reservoir out of Truckee Canal water as well as additional storage up to a full reservoir of about 40,000 acre feet. TCID was given the right to 31 percent of the water that was diverted between the state line and Derby Dam.

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

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

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

In addition the parties agreed that if it became necessary to reduce Floriston Rates to conserve
water they could temporarily agree to reduce rates and
conserve the water for everyone, not just special
interests. The parties also agreed to provide the first
priority on the river to the Pyramid Lake Indian Tribe
as Claims 1 and 2 under the Orr Ditch Decree.

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

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

As mentioned, TCID withdraw its protest to
Application 5169 before the operative date of the
Truckee River Agreement, and TCID further would not receive upstream storage under TROA that it negotiated under the Truckee River Agreement and believed it obtained when it agreed to drop this protest.

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

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

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

As has been brought up in prior testimony, the decree also states that such diversion right is under
such control, disposal and regulation as the plaintiff -- that is, the United States -- may make or desire.

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

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

So fortunate for the District that the U.S. Supreme Court took the writ of certiorari and heard that case, and that case became known as Nevada vs. U.S. and it was decided by the U.S. Supreme Court in 1983. And in that case they reversed the Ninth Circuit Court of
Appeals and stated -- this is the quote I like: If the U.S. thinks it can move water around like so many bushels of wheat, they are wrong.

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

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

With regard to Prosser Reservoir, that reservoir was completed in the 1962-63 time frame, and it was constructed as part of the Washoe Project Act. And the parties, the United States, TCID, Prosser County Water District and Sierra Pacific had entered into an
agreement in 1959 which is referred to as the Prosser Exchange Agreement. And that exchange agreement was to allow releases from Lake Tahoe when otherwise under the decree and under the Truckee River Agreement, releases would not occur, so that there would be a minimum flow below the dam during the summertime of about 70 cfs and in the wintertime about 50 cfs.

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

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

Stampede Reservoir was also part of the Washoe
Project Act, and it was constructed -- I think the completion was somewhere around 1970. And its current permit from the California State Water Resources Control Board and Division of Water Resources, I believe is the correct term, has the Newlands Project as the place of use.

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

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

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

CO-HEARING OFFICER DODUC: Okay.

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

I believe that this matter should have gone to the Orr Ditch Court prior to these hearings. The parties have asked that any approval by this Board be conditioned on approval of the TROA by the Orr Ditch Court. They have made objections to our claims saying that some of those cause a waste of time. I would make the same statement about the fact that if the Orr Ditch Court somehow modifies the TROA and the parties cannot
get things worked out, then we've wasted a lot of money
and time with these hearings.

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

CO-HEARING OFFICER DODUC: Please conclude now.

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

CO-HEARING OFFICER DODUC: Concluding
statements.

MR. McCONNELL: Pardon me?

CO-HEARING OFFICER DODUC: Concluding
statements.

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

The Orr Ditch Decree has continuing and
exclusive jurisdiction over this water and the Orr Ditch
Decree alone governs water rights belonging to the Newlands Project, water right owners.

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

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

Thank you.

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

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

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

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

Mr. Palmer. I'm used to calling you first, so please.
MR. PALMER: All right. I won't break tradition yet.

--o0o--

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

--o0o--

MR. PALMER: Good morning, Mr. McConnell.

MR. McCONNELL: Good morning.

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

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

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

MR. PALMER: The Truckee River Agreement.

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

MR. PALMER: You referenced the case of Nevada vs. United States, and isn't it true, though, that that
MR. McCONNELL: No, it was not an OCAP case. It was a reopening of the Orr Ditch Decree.

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

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

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

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

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

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

MR. PALMER: And there is an express provision in those OCAP regulations that say something to that
effect, is there not?

MR. McCONNELL: I believe that's correct.

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

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

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

MR. McCONNELL: No, I was not.

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

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

MR. PALMER: Speaking of that, you referenced
the Truckee River Agreement and your concerns about how
TROA treats the Truckee River Agreement. Can you tell us exactly how TROA treats the Truckee River agreement? What sections of the Truckee River Agreement are included or not included in TROA?

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

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

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

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

MR. McCONNELL: The Truckee River Operating Agreement is TROA. It does have a structure in there for Floriston Rates, but it has a lot of modifications to it from the standpoint of the Truckee River Agreement. It's not the same. It supersedes the
Truckee River Agreement. The TROA becomes primarily the operating agreement on the river. The Truckee River Agreement is no longer in effect.

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

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

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

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

MR. McCONNELL: Yes, we are, but the water rights are not separated from the water as I think some people think, that as long as they're not taking a
water -- excuse me, I don't know what's wrong with my voice.

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

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

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

MR. PALMER: That's all the questions I have.

Thank you.

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

Mr. DePaoli, cross?

MR. DePAOLI: Good morning, Mr. McConnell.

MR. McCONNELL: How are you?

MR. DePAOLI: Fine. Good to see you.

Just following up real quick on your statement about the administrator and the Federal Water Master, you are aware that TROA requires that the administrator and the Federal Water Master be the same person, are you not?
MR. McCONNELL: I think it says that. I think initially they're going to appoint the administrator with the current Water Master, but it's my understanding the current Water Master is going to retire soon, and so then the process of selecting a new Water Master will go under the TROA provisions, which puts the sovereign parties -- the U.S. and the Pyramid Tribe -- pretty much in control because they have to agree to it.

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

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

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

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

MR. DePAOLI: But to my point, the person who is -- regardless of who is the current Water Master, the person who will be the administrator will also be the Federal Water Master?
MR. McCONNELL: Yes, but as I said before, your procedure for getting relief is now under the TROA, and you have to follow the TROA process with the special hearing officer, and you have pay all the costs and the time frame for getting a resolution is going to take time. So in the meantime.

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

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

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

Do you recall that in your direct testimony?

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

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

MR. McCONNELL: Not to my knowledge.

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

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

MR. DePAOLI: So that statement in your
testimony relates solely to the fact that Lake Tahoe was involved in the adjudication?

MR. McCONNELL: Yes.

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

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

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

Right there, thank you.

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

MR. McCONNELL: Yes.

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

MR. McCONNELL: The parties made the agreements and compromises, and they agreed that it would be binding on them, and that when they stipulated to make
it part of the decree, they stipulated that it would be irrevocable.

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

MR. McCONNELL: It was.

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

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

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

MR. McCONNELL: It indicates that, yeah.

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

MR. McCONNELL: No.

MR. DePAOLI: Is it TCID's position that that
provision prevents a party from seeking to change a
water right in the manner provided by law?

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

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

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

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

MR. McCONNELL: I don't think so.

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

MR. McCONNELL: I am.

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

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

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

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

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

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

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

MR. DePAOLI: And that provision in the Truckee River Agreement is affected by OCAP, is it not?
MR. McCONNELL: Well, what you're saying is that if there is no diversions allowed under OCAP, that we may not have the ability to take the unused water. Is that when you're referring to?

MR. DePAOLI: Yeah.

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

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

MR. McCONNELL: Was that the contract case?

MR. DePAOLI: Yes.

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

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

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

CO-HEARING OFFICER DODUC: Please rephrase your question.

MR. DePAOLI: Did the Ninth Circuit in that case state that that provision of the Truckee River Agreement regarding unexercised portions of the 69 percent created no water right for TCID?
MR. McCONNELL: I don't know the specifics of that case, but -- so I can't really answer what you're referring to. If you're thinking that we don't have any right to the unexercised rights, then I would disagree. If you're trying to make a technicality on the fact that it created some different water right, then I don't know the answer to that.

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

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

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

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

MR. DePAOLI: No, the provision of the Truckee River Agreement referred to in your direct testimony at page 5, lines 14 to 19.
MR. McCONNELL: What line number.

MR. DePAOLI: Lines 14 to 19.

MR. McCONNELL: On page 5?

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

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

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

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

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

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

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

MR. McCONNELL: Yes.

MR. DePAOLI: Are there other provisions in the
Truckee River Agreement where parties are allowed to make changes to Floriston Rates and reduce Floriston Rates?

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

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

MR. McCONNELL: I don't recall any.

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

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

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

MR. McCONNELL: I don't know if I can say that,
but it certainly was a major portion of it.

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

MR. McCONNELL: No, I do not.

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

MR. McCONNELL: I don't know.

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

MR. McCONNELL: Not currently, no.

MR. DePAOLI: Did it ever?

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

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

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

MR. DePAOLI: Pardon?

MR. McCONNELL: Yes.

MR. DePAOLI: You think it says 1500?

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

MR. McCONNELL: I don't know.

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

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

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

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

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

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

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

MR. McCONNELL: I'm not sure.

MR. DePAOLI: Tell me how any action by this
Board on the Stampede change petition will deprive the Orr Ditch Court of any jurisdiction?

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

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

MR. McCONNELL: Did someone what?

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

MR. McCONNELL: I don't know.

MR. DePAOLI: Going back to 1938, at that time there wasn't this Board, but whatever the administrative agency in California that dealt with water rights was dealing with a situation where there were a number of things pending in California, a signed Truckee River
Agreement, and a proposal to not amend an Orr Ditch Decree but to actually enter one. Is that not correct?

MR. McCONNELL: Yes.

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

MR. McCONNELL: Yes, it did.

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

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

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

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

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

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

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

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

CO-HEARING OFFICER DODUC: Rephrase your question.

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

MR. McCONNELL: I don't think so.

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

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

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

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

MR. DePAOLI: That's your recollection?

MR. McCONNELL: Yeah.

MR. DePAOLI: In your written testimony you
talk about the United States was trying to reallocate project water between the Tribe and the Newlands Project. That bright idea came from the Ninth Circuit, did it not?

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

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

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

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

MR. McCONNELL: Yes.

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

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

MR. McCONNELL: There has been some litigation,
MR. DePAOLI: And are you aware of any instance where a court has ruled that a provision in OCAP violates the Orr Ditch Decree?

MR. McCONNELL: I cannot think of any.

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

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

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

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

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

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

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

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

MR. DePAOLI: No, I guess not. Page 4 of the
transcript. I'm sorry.

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

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

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

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

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

MR. McCONNELL: No.

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

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

CO-HEARING OFFICER DODUC: Rephrase, please.

MR. DePAOLI: Is there anything in the Truckee River Agreement that required TCID or anyone else to withdraw a protest as to the applications for Independence Lake?
MR. McCONNELL: No.

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

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

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

MR. McCONNELL: No I don't.

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

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

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

MR. McCONNELL: Yes.

MR. DePAOLI: Do you know what happened to Application 6534?
MR. McCONNELL: It might have been withdrawn. I guess it was to increase the storage there at Boca Reservoir, and I don't think Boca was constructed to store water.

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

MR. McCONNELL: Yes.

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

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

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

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

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

MR. DePAOLI: No. What I'm asking was: Was 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
permit 5286 which requires it to be operated in accordance with the Truckee River Agreement by the California state authority at the time?

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

MR. DePAoli: Yes.

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

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

MR. McCONNELL: No.

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

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

MR. DePAoli: But the moving around of water, I
think we covered this earlier, but what in the Truckee River Agreement precludes the moving around of water?

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

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

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

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

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

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

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

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

MR. DePAOLI: Let's back up on that one. There isn't anything -- strike that. The TROA doesn't in and of itself provide that Floriston Rates may be reduced, does it?

MR. McCONNELL: TROA?

MR. DePAOLI: Yes.

MR. McCONNELL: Provide for reduction of Floriston Rates?

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

MR. McCONNELL: I'm not sure what you're
getting at. It has provisions in there for reducing
Floriston Rates.

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

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

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

MR. McCONNELL: Yes.

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

MR. McCONNELL: Yes.

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

MR. McCONNELL: I did.

MR. DePAOLI: Isn't it true, Mr. McConnell,
that the Newlands Project was included as a place of use
for water for Stampede Reservoir for purposes of an
exchange between the Lahontan Reservoir and a reservoir to be constructed on the east fork of the Carson River called Watasheamu Reservoir?

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

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

MR. McCONNELL: Yes.

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

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

MR. DePAOLI: What were the other purposes?

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

MR. DePAOLI: You referenced TCID Exhibit 111 in your testimony. Did you look at the list of things that had to happen in connection with that proposal for an exchange and coordination between the Truckee River reservoirs and the new Watasheamu Reservoir?
MR. McCONNELL: I remember reading it, but I don't have a direct recollection right now. I know that -- you call it Watasheamu, I guess I call it Watasheamu. I don't know what the correct pronunciation is.

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

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

CO-HEARING OFFICER DODUC: Overruled.

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

MR. DePAOLI: Maybe we could put up TCID-111, please, at pages 16 and 17. Continue scrolling, please. You see that list there, it was going to require amendments to the Truckee River Agreement.

MR. McCONNELL: You're on page 16?

MR. DePAOLI: Probably on 17.

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

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

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

MR. DePAOLI: 1 through 4. Without taking a
lot of work that's a pretty good list of things that did
happen, is it not?

MR. McCONNELL: It as list of things.

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

MR. McCONNELL: No, it was deauthorized.

MR. DePAOLI: So it never will be built?

MR. McCONNELL: Not that one.

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

MR. McCONNELL: Yes.

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

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

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

MR. McCONNELL: Yeah, we found out after they
MR. DePAOLI: Is TCID a party to that case?
MR. McCONNELL: We're party to the Prosser Exchange Agreement.
MR. DePAOLI: Is TCID a party to the Truckee River General Electric case?
MR. McCONNELL: I don't believe so. Not in that regard. Not originally.
MR. DePAOLI: You mentioned something in your -- and I think it may be in your written testimony as well -- about the fact that the Alpine court requires changes to water rights involving both the Nevada and California to be filed with it. Do you recall that testimony?
MR. McCONNELL: Yes.
MR. DePAOLI: That's a specific provision in the Alpine decree, is it not?
MR. McCONNELL: It is.
MR. DePAOLI: And do you know why the court included that provision in the Alpine Decree?
MR. McCONNELL: I don't know why, no. I know that they adjudicated the water rights in California and the decree indicated that it was fully appropriated.
MR. DePAOLI: Do you know whether in the 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--
MR. PAGNI: Good morning, Mr. McConnell. I don't know if we met. My name is Michael Pagni, attorney the Washoe County Water Conservation District.

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

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

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

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

MR. McCONNELL: Yes.

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

MR. McCONNELL: They could.

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

MR. McCONNELL: You mean opposed by the applicant?

MR. PAGNI: Yes.
MR. McCONNELL: It probably was.

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

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

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

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

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

MR. McCONNELL: Not any more than the application.

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

MR. McCONNELL: If it's the same as the application, yeah, I would have to agree with that.
MR. PAGNI: And would you also agree that nowhere in license 3723 is the Newlands Project recognized as an authorized place of use?

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

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

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

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

Would you agree, based on the representation that the license does not currently provide any point of rediversion or place of use for the Newlands Project
users, would you agree that by adding those provisions, adding points of rediverison and places of use for Newlands Project, that the change petitions will provide a benefit to TCID?

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

MR. PAGNI: Mr. DePaoli asked a similar question for Independence, and I'll follow up for Boca. Would you agree that the action by the board on the Boca change petition will not deprive the Orr Ditch Court of jurisdiction?

MR. McCONNELL: No.

MR. PAGNI: No, don't agree?

MR. McCONNELL: It won't.

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

MR. McCONNELL: It's implied.

MR. PAGNI: It's implied?

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

MR. PAGNI: Could you explain for me how the change petition for Boca which seeks to add points of diversion, rediverison and places of use seeks to alter
the Floriston Rates?

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

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

MR. McCONNELL: I can only answer --

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

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

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

MR. McCONNELL: No, you can't say that. You can just say what I just said. That was my answer.

That the applicants themselves have asked the Board to put a condition on those permits. And that condition is if TROA is not approved, then the applications and
petitions don't have any effect. So it's not separate. The applications have that information in it.

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

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

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

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

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

MR. McCONNELL: Except for the fact that it's tied to the TROA. If the TROA doesn't go through, then you don't even want the petitions to be approved.
MR. PAGNI: So would I be characterizing your testimony correctly if I were to say that the bulk of your concerns relate to the TROA issues that will be heard by the Orr Ditch Court?

MR. McCONNELL: Yes.

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

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

CO-HEARING OFFICER DODUC: Finally got that right.

Mr. Taggart, your cross.

MR. TAGGART: Thank you.

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CROSS-EXAMINATION BY MR. TAGGART FOR CITY OF FERNLEY

--o0o--

MR. TAGGART: Good morning, Mr. McConnell.

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

MR. TAGGART: I just have a few questions.

During your direct exam you stated that the consideration of these California licenses and applications should not be considered until after the Orr Ditch Court considers TROA, correct?
MR. McCONNELL: That's what I said, yes.

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

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

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

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

MR. TAGGART: Well, if I could have TMWA Exhibit 1-5, please, up on the screen, and at page 6. I just want to point out the line that starts with "at the status conference," it states that -- and I want to read this to you so I can ask you a question:

At the status conference the State Engineer held that he was not going to address whether TROA changes the Orr Ditch Decree. Processing of the subject applications by the State Engineer in consideration of decree modifications necessitated by TROA by the Orr Ditch
Court are two separate and distinct actions by two separate and distinct authorities. The State Engineer has responsibility and authority to act on any application to appropriate or application to change considering criteria set in Nevada revised statutes.

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

MR. McCONNELL: It appears it did.

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

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

MR. TAGGART: Well, do you also agree that this Board does not need to consider the impacts of Nevada change applications on existing rights because the
review of those impacts is the subject of the Nevada State Engineer's jurisdiction?

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

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

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

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

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

Mr. Van Zandt, any redirect?

MR. VAN ZANDT: Yes, please.

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REDIRECT EXAMINATION BY MR. VAN ZANDT FOR TRUCKEE CARSON IRRIGATION DISTRICT and CHURCHILL COUNTY --o0o--

MR. VAN ZANDT: Mr. McConnell, Mr. DePaoli asked you about the Orr Ditch Court and its authority with regard to amending the decree to accommodate TROA.
I think his question was is it possible for the Orr Ditch Decree to essentially be amended by the Orr Ditch Court.

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

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

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

MR. McCONNELL: I'm not sure what you mean. MR. VAN ZANDT: I think in your direct testimony but also on cross you were asked about the ability of parties to the Truckee River Agreement and the effect of the stipulation that allowed the entry of
the Orr Ditch Decree.

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

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

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

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

MR. McCONNELL: Well, currently the Truckee
River Agreement provides for a water basin committee that works with the Federal Water Master in the regime of Floriston Rates and changes and modifications and whatever is in the agreement for the parties. And the Truckee Carson Irrigation District is a member of that water basin committee. We get notification of meetings and we participate and have to agree.

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

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

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

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

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

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

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

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

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

MR. McCONNELL: There's two things that I can see in that paragraph that are different from the TROA.
The first, the second word says "an agreement" for modification. And so what they're doing in the TROA is certainly not an agreement to modify the Truckee River Agreement. Agreement of some of the parties but not agreement of all of the parties.

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

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

MR. McCONNELL: I recall the questions, yes.

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

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

MR. McCONNELL: Yes. This was an action that was taken by the Pyramid Lake Tribe and filed in the Washington D.C. court, not in the Federal District Court in Nevada but in Washington D.C. And it was filed
against the United States Secretary of Interior to change the OCAP that the Secretary had provided for the project. The judge itself allowed the Pyramid Tribe to establish the OCAP which was kind of unusual rather than resubmitting it to the government for a different one.

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

MR. McCONNELL: All right.

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

Can you read that into the record, please.

MR. McCONNELL: (Reading:)

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

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

MR. McCONNELL: That is correct. The OCAP was not to affect the water rights under the decrees.
MR. VAN ZANDT: There was a question I believe by Mr. Taggart and Mr. Pagni was also questioning you a little bit about this on the interplay between the petitions for change and the applications in these proceedings and what may be happening with the TROA in the Orr Ditch Court.

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

MR. McCONNELL: Starting with since?

MR. VAN ZANDT: Yes.

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

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

A Yes, and it's dated June 29, 2010.
MR. VAN ZANDT: That's all I have.

CO-HEARING OFFICER DODUC: Thank you

Mr. Van Zandt.

Any recross, Mr. Palmer?

MR. PALMER: None. Thank you.

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

MR. DePAOLI: Just one second.

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RECROSS-EXAMINATION BY MR. DePAOLI FOR TRUCKEE MEADOWS WATER AUTHORITY

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

Do you recall those questions?

MR. McCONNELL: Yes.

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

MR. McCONNELL: I don't know what you mean by that, but I see a lot of wholesale changes in the TROA.
MR. DePAOLI: Well, what constitutes a wholesale change?

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

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

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

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

MR. McCONNELL: No. Go ahead.

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

MR. McCONNELL: I don't know.

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

MR. McCONNELL: No, that's not our position. We just feel that conditions that are set up are set up to exclude us from the process, that we're parties to
the Truckee River Agreement, we have some say in that. We are a large user of water on the river, and the TROA is trying to take us completely out. I mean, they superseded the Truckee River Agreement in the TROA and they supersede the Prosser Reservoir Exchange Agreement, and those are two agreements where the District is a signature. They do this without providing any notice to the District of what operations are going to take place. And as reflected in the EIS, there are shortages on the project that occur as a result of this operation, and there are some interesting things in there that you wonder how they come about.

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

MR. DePAOLI: Over what period of time?

MR. McCONNELL: That's a hundred years.

MR. DePAOLI: Okay, over a hundred years. Now, could some of that possibly be the result of the fact that the consumptive use portion of a senior water right
is going to be held in storage?

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

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

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

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

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

MR. DePAOLI: Depending on what OCAP says?

MR. McCONNELL: That's correct.

MR. DePAOLI: And if the Nevada State
Engineer's approval of allowing TMWA to hold back the
consumptive use portion of that water right, that water
right isn't going to get to Derby Dam under that
scenario, is it, at that point in time?

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

MR. DePAOLI: And that --

MR. McCONNELL: -- under certain circumstances.

MR. DePAOLI: Sorry.

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

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

MR. McCONNELL: Well, no, because --

MR. DePAOLI: But --

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

MR. DePAOLI: Can the witness --

CO-HEARING OFFICER DODUC: Gentlemen.

Mr. DePaoli asked you a question.
MR. McCONNELL: I'm sorry, I apologize.

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

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

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

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

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

Mr. DePaoli, where are you going with this?

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

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

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

CO-HEARING OFFICER DODUC: I'm not sure either.
MR. DePAOLI: So I'll move on.

CO-HEARING OFFICER DODUC: Move on, please.

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

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

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

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

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

MR. McCONNELL: Same answer as I gave before.

MR. DePAOLI: Which was no?
MR. McCONNELL: Yes.

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

CO-HEARING OFFICER DODUC: Mr. Pagni?

MR. PAGNI: I have no questions.

CO-HEARING OFFICER DODUC: Mr. Taggart?

MR. TAGGART: No questions.

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

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QUESTIONS FROM BOARD AND BOARD STAFF

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

MR. McCONNELL: Yes.

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

MR. McCONNELL: We weren't precluded. It just became very difficult to see if there was going to be any solutions when we separated out with the Pyramid Tribe to try to resolve differences. They took various groups and tried to get them to reach agreements on
various issues. And it was the Justice Department's
attorney that told us there was not going to be any
money available to facilitate any settlement between us
and the Tribe. Made it very difficult to come up with a
solution or an ability to negotiate at that time.

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

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

CO-HEARING OFFICER HOPPIN: I think there is a
picture of me like that over in the Senate.

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

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

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

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

MR. McCONNELL: That was part of it. The other part was that people got worn out. We started changing people to go there with a different perspective, maybe a new viewpoint or a new personality that might change the
dynamics, but that didn't work. And people just got worn out. They didn't want to go. They were tired of getting beat up at the hearings. And so that's partly what happened.

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

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

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

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

MR. McCONNELL: I think I can't answer the
original stipulations. There were provisions in the original contract that title to the works didn't transfer. But it's important for the United States to control the water rights or at least to have an impression that they control the water rights. I mean, the Justice Department attorneys stated several times that they own the water rights. I mean, they don't -- regardless of what the U.S. Supreme Court said, they take the position that they're their water rights and they can move it around however they want.

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

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

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

MR. McCONNELL: That's a good question. They did sell them, though. And I guess it's based on the
fact that people believe that they own them based on the U.S. Supreme Court's decision.

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

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

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

CO-HEARING OFFICER DODUC: Staff have any questions?

All right. Thank you, Mr. McConnell.
Mr. Van Zandt, if you would call your next witness and we'll do a seat change.

MR. VAN ZANDT: Chris Mahannah, please.

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

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

CHRIS C. MAHANNAH CALLED BY TRUCKEE CARSON IRRIGATION DISTRICT and CHURCHILL COUNTY

DIRECT EXAMINATION BY MR. VAN ZANDT

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

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

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

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

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

CO-HEARING OFFICER DODUC: Mr. Van Zandt, could
you confirm with your witness about the oath?

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

MR. MAHANNAH: I was.

MR. VAN ZANDT: And did you say yes?

MR. MAHANNAH: I did say yes.

CO-HEARING OFFICER DODUC: Thank you.

MR. VAN ZANDT: Thank you for reminding me.

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

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

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

MR. MAHANNAH: It appears so, yes.

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

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

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

MR. MAHANNAH: Yes, there is.

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

MR. MAHANNAH: At the very end of the document
there are two pages that were somehow appended to this report that are a technical memorandum from Binder & Associates. Those two pages should be removed.

MR. VAN ZANDT: Is that the only change?

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

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

MR. MAHANNAH: It is.

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

MR. MAHANNAH: Yes.

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

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

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

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

CO-HEARING OFFICER DODUC: Mr. DePaoli?

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

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

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

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

MR. MAHANNAH: It is.

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

MR. MAHANNAH: It is.

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

MR. MAHANNAH: Which one is 280?

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

MR. MAHANNAH: Yes.

MR. VAN ZANDT: Are there any changes to TCID
MR. MAHANNAH: I don't believe so, no.

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

MR. MAHANNAH: It is.

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

MR. MAHANNAH: Yes, I have those.

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

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

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

MR. MAHANNAH: It appears so, yes.

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

And, Mr. Mahannah, we're not going to do direct or cross on either your consumptive use for agriculture or M&I. But so the record contains what your ultimate
opinion was, that opinion was that there's 2.0 acre feet is the consumptive use that's appropriate for those change applications that were reviewed by the State Engineer, correct?

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

MR. VAN ZANDT: Thank you.

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

MR. MAHANNAH: Yes, I have.

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

MR. MAHANNAH: That's correct.

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

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

This summary is going to deal primarily with the applications to appropriate in Stampede Reservoir and Prosser. I won't reiterate what they're asking for;
I think we've talked that through to a great extent.

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

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

Okay. This is the watershed area for the Little Truckee River that shows the watershed area for Stampede Reservoir, Independence Lake, Prosser Creek watershed and then the Boca watershed.

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

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

As I mentioned, roughly 95 percent of the flow in the Little Truckee River or of the Truckee River is derived in California before it enters the state of
We heard testimony last week regarding some prior pending applications in Nevada, the first of which was Application 9330 filed by TCID in 1930. I was involved as well as Mr. Shahroody in testimony in 1996 regarding this application. It was denied, appealed, and now it's back, been remanded back to the State Engineer I believe in October of this year. So that's the most senior pending application that is still alive.

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

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

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

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

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

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

The State Engineer finds permits 48061 and 48494 only authorize the use of unappropriated water for instream/in situ use in the Truckee River. The applications did not seek authorization for storage in upstream reservoirs and are not permits for storage in upstream reservoirs and cannot be used for storage under the permit terms at issue here.
The State Engineer finds that he did not
and does not have before him applications
for storage of water in upstream
reservoirs. The issue of storage and
exchange contemplated under TROA is not
relevant to the State Engineer's
decisions on Applications 48061 and 94
since the applications were not filed for
storage in upstream reservoirs and cannot
be used in the manner under the current
permits.

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

Since Applications 48061 and 48494 do not
currently allow for storage as
anticipated by the draft TROA, it will be
necessary as a matter of state law for
the Tribe to file change applications to
obtain Nevada State Engineer approval in
order for the water to be stored as
anticipated by the draft TROA. This will
require the State Engineer to determine
whether the proposed storage use will
conflict with existing rights or threaten
to prove detrimental to public interest.
I think we heard testimony last week from Mr. Shahroody that they intend to file those but they have not been filed.

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

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

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

These flows are, underscore, required for the recreational purpose of natural spawning of Lahontan cutthroat trout and Cui-ui in the Truckee River below Derby Dam, to fulfill the purposes of establishment of Pyramid Lake Indian Reservation, to provide sustenance for the members of the Pyramid Lake Tribe, to prevent the loss of and to conserve the
endangered Cui-ui and the threatened Lahontan cutthroat trout, for the operation of Marble Bluff Dam and Pyramid Lake Fishway in support of that fishery and to maintain Pyramid Lake at a stable level to support the lake's use for recreation.

Item 2B of that attachment says:
The second component of the amount of water applied for is for the maintenance of the level of Pyramid Lake. For this purpose, an average annual inflow of the Truckee River to the lake of approximately 400,000 acre feet as required. Based on the historic flows of the Truckee River and the existing diversions from and depletions from those flows, the applicant's intent is to appropriate all of the water in the Truckee River and its tributaries that is not subject to valid existing rights.

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

So wrapping up, since 95 percent of the flow in the Truckee River originates in California and the State
Engineer and TROA's signatory parties agree that the
Truckee River is fully appropriated, I feel it's
reasonable to conclude that the entire Truckee River and
tributaries in both states are fully appropriated.

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

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

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

We heard testimony, I believe, from
Mr. Shahroody that they have been storing this water
without a permit from the Nevada State Engineer and
without an authorization from this Board. So that concludes my direct summary.

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

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

(Discussion off the record)

(Lunch Recess)

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

MR. DePAOLI: No cross.

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

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

MR. PAGNI: No.

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

MR. SODERLUND: No.

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

MR. MIXSON: No.
CO-HEARING OFFICER DODUC: Cross from Mr. Taggart?

MR. TAGGART: No.

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

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

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

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

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

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KEN KNOX
called by TRUCKEE CARSON IRRIGATION DISTRICT and CHURCHILL COUNTY

DIRECT EXAMINATION BY MR. VAN ZANDT

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

DR. KNOX: Good afternoon, sir.
MR. VAN ZANDT: Would you state your name for the record and spell your last name, please.

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

MR. VAN ZANDT: Thank you.

Dr. Knox, who is your current employer?

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

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

DR. KNOX: Yes, sir.

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

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

I am also an adjunct professor at the University of Denver. I teach one to two classes per term. These are graduate level classes, primarily focus
upon three disciplines. First, environmental protection law; the second is in water resources management and law; and the third is in natural resources economics.

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

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

I served as the hearing officer for this Division of Water Resources. I developed most of the rules and regulations that are currently in effect since 1998 that are employed within the state of Colorado for
water resources management and allocation.

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

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

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

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

But also we made periodic visits, consortiums, conferences as colleagues on how we would go and manage and allocate water resources. And one of the lessons that I learned in an arid environment in the western
United States, it's quite striking how similar the controversies/challenges can be throughout this land.

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

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

DR. KNOX: Yes, sir, it is.

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

DR. KNOX: Yes, sir, I did.

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

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

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

DR. KNOX: Yes, sir, you provided the correct
MR. VAN ZANDT: So we just want to interlineate after it says Case No. 25219 and 25227 at TCID-208, right?

DR. KNOX: Yes, please.

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

DR. KNOX: Yes, it is.

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

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

CO-HEARING OFFICER DODUC: Thank you.

MR. VAN ZANDT: Thank you. Please proceed.

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

In regard to the water resources and supply for Stampede Reservoir and Prosser Creek Reservoir, Stampede Reservoir and Prosser Creek Reservoir are on-channel
impoundment structures located on the Little Truckee River and Prosser Creek respectively. The water stored and subsequently released from these structures is used to supplement streamflows in the Truckee River and assist toward meeting the demands of downstream water rights and the Floristion Rate targets specified in the Truckee River Agreement.

The Truckee River Agreement, including designation of the Floristion Rate targets, was approved and adopted by the Federal District Court and made part of the final decree in the United States of America v. Orr Water Ditch Company that is binding upon the parties to the agreement including the United States of America, the Truckee Irrigation Water Conservation District — excuse me -- the Truckee Carson Irrigation District, the Washoe County Water Conservation District and Sierra Pacific Power Company which is the predecessor in interest to Truckee Meadows.

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

It is my opinion that the application sought for Stampede Reservoir and Prosser Creek Reservoir seek
an expansion of the original water right adjudications granted to these structures in terms of the source of supply, the quantity, the season or timing and the location.

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

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

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

The impetus for the final decree was a lawsuit
filed by the United States in 1913 that sought to
adjudicate water rights to the Truckee River for the
benefit of the Pyramid Lake Indian Reservation and the
planned Newlands Project.

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

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

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

The diversion and storage water rights retained
by the water right owners within the Newlands Project
that receive water by diversion at Derby Dam, conveyance
in the Truckee Canal and its lateral delivery system,
and from Lahontan Reservoir are senior in priority to
the subject water rights in this proceeding and warrant protection from injury.

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

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

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

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

The Nevada State Engineer issued permit number 48494 that granted 477,851 acre feet of water from the
Truckee River and its tributaries for recreational purpose.

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

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

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

A significant component of the Act is the requirement that the operation of the Truckee River Reservoirs shall be operated to "ensure that water is stored in and released from Truckee River reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch Decree and Truckee River General Electric Decree. And that citation is found in section 205(a)(2)(D). Section 1.C of TROA also attempts to reiterate the protection of water rights as required by
The TROA upon which these applications and change petitions rest and rely upon in its present state does not contain adequate information or specificity to protect the owners of vested water rights from injury. Agency actions cannot interfere -- pardon me.

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

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

Petitions to change water rights. The process to change or transfer water rights is often complicated. However, the basic concept in a change in water right proceeding may include a change in the type of use the
water resources that may be applied toward, a change in the point of diversion or storage, a change in the place of use, or a combination of all these elements. They may occur as long as other water rights in the tributary system are not adversely impacted.

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

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

And it is an expansion beyond the original
permits and licenses. If granted it would require a new
priority to reflect the time when the applicants formed
a manifest intent to appropriate the waters to
beneficial use.

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

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

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

The requested application is an expansion of
use and amount to the water right claimed and permitted
in the original adjudication for this structure. The justification cites several beneficial uses and a general characterization that the intent of the applicant is to optimize the use of the water storage vessel, independently and in conjunction with other upstream reservoirs in the Truckee River system, to accommodate beneficial uses of water.

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

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

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

DR. KNOX: Thank you, ma'am. I will also opine that in review of the EIS and EIR it is apparent that shortages to water rights in the Newlands Project will periodically occur by implementation of the TROA, and these shortages were
determined through application of the Truckee River model.

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

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

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

Thank you, ma'am.

CO-HEARING OFFICER DODUC: Thank you.

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

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

CO-HEARING OFFICER DODUC: Thank you. Cross?

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

MR. PALMER: Thank you.

CROSS-EXAMINATION BY MR. PALMER

FOR U.S. BUREAU OF RECLAMATION

MR. PALMER: Good afternoon. Is it Dr. Knox? Is that how you prefer to be addressed?

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

MR. PALMER: I'd like to just ask you a couple questions about your qualifications. I was listening and trying to catch what you were saying about that and looking at what you have written down here. And it does appear that you're not a hydrologist; is that correct?

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

And as a side note, I wish Mr. Rieker every
success and God speed in the pursuit of his Ph.D.

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

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

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

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

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

DR. KNOX: I would assume -- I would characterize the assumption of management to include
supervision of people, and that began in my career after approximately six years where I started to supervise people with escalating type of responsibilities in terms of number, disciplines and complexity of staff.

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

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

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

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

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

MR. PALMER: So would I be incorrect if I read the title of your dissertation as: The Allocation of
Interstate Groundwater Evaluation of the Republican River Compact as a Case Study?

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

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

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

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

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

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


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

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

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

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

MR. PALMER: That's adjunct professor position?

DR. KNOX: Yes, sir.
MR. PALMER: And isn't it correct that URS has a current contract with the United States Bureau of Reclamation for consulting services?

MR. VAN ZANDT: Relevancy.

CO-HEARING OFFICER DODUC: Mr. Palmer?

MR. PALMER: I'm just trying to find out his qualifications, what information he's had available to him to review this information.

CO-HEARING OFFICER DODUC: I'll allow the question.

DR. KNOX: Sir, would you please repeat the question.

MR. PALMER: Isn't it true that URS has a current contract with the United States Bureau of Reclamation for consultation services? Do you know that?

DR. KNOX: I do not know that.

MR. PALMER: So you don't know that URS worked on the 1988 OCAP as a consultant on the NEPA documents? You're not aware of that?

DR. KNOX: No, sir, I was not aware of that.

MR. PALMER: I'd like to turn to your direct testimony.

I'll start on page one. In your second paragraph you have a statement regarding what you're
testifying about, and you say that there are certain
terms and conditions that are appropriate to prevent
injury to existing water rights in the Truckee River
system.

And what rights are you talking about where you
say necessary to prevent injury to existing water
rights? What are those?

DR. KNOX: I'm focusing upon those water rights
that are owned by those 3,000 individuals within the
Newlands Project under the Orr Water Ditch Decree.

MR. PALMER: So those are the only rights that
need protecting in the Truckee River system?

DR. KNOX: No, sir, I did not say that. I
believe all water rights within the Truckee River system
warrant protection.

MR. PALMER: Do you know what the source of
those rights are that you're urging protection of, what
the legal source of those rights are? What are they
based on, the Newlands Project water rights.

DR. KNOX: Sir, it's my understanding that they
were adjudicated as part of the 1944 Orr Water Ditch
Decree.

MR. PALMER: And does the Orr Ditch Decree
include water rights from the Newlands Project? How
does it include those?
DR. KNOX: It includes those under Claim 3.

MR. PALMER: So as part of Claim 3, that's the only place they show up in the Orr Ditch Decree, right?

DR. KNOX: That's the dominant source, sir. I don't know that it's the exclusive source within that decree.

MR. PALMER: And isn't it your understanding that TROA in fact expressly protects those water rights that are part of the Orr Ditch Decree?

DR. KNOX: I would give you that that's the stated intent of TROA. Whether it actually protects those or not, it is my opinion in its present state it does not, sir.

MR. PALMER: But you don't disagree that those provisions in TROA, we could refer to them, but they do state that it's intended to protect existing rights?

DR. KNOX: There are provisions in TROA that provide the intent to protect existing water rights.

MR. PALMER: Does the word "intent" show up in TROA?

DR. KNOX: I do not know that.

MR. PALMER: I would suggest it doesn't.

MR. VAN ZANDT: Object to that and move to strike.

CO-HEARING OFFICER DODUC: Sustained. Please
ask questions only, Mr. Palmer.

MR. PALMER: Looking at page 3 of your testimony, you start talking about Stampede and Prosser. And in regard to the Truckee River Agreement, does the Truckee River Agreement include reference to Stampede and Prosser?

DR. KNOX: Yes, I believe it does.

MR. PALMER: You reference the term "depletion from surface water diversions," and I was curious as to what's the source of those depletions. What are you referring to there?

DR. KNOX: Sir, would you please help me. Where are you referring to in this exhibit, please.

MR. PALMER: It's on page 1. You've got a very long paragraph about halfway down. It says: Depletion of surface water diversions.

When you're talking about completion from surface water diversions, I just want to understand what you mean by that phrase.

DR. KNOX: Ladies and gentlemen, I was responsible for the development, defense and implementation of the Rio Grande Decision Support System and the Rio Grande Compact Groundwater Model used to quantify the time, amount and location of depletions from surface water diversions and groundwater.
withdrawals.

The depletions in this context were twofold. One, surface water diversions themselves have a consumptive use, whether it be for domestic use, irrigation, other applications. That has an impact to the stream system.

These two bodies also enveloped the depletions to the stream system that were calculated from the diversion of high capacity wells, and the high capacity was defined as greater than 50 gallons per minute.

MR. PALMER: Let me move along to look at your opinion number 1.

DR. KNOX: Thank you, sir.

MR. PALMER: And help me understand the structure of your testimony so maybe I can be asking questions correctly.

Do the facts that support your opinion in your testimony, are they before the stated opinion or do they come after the stated opinion in how you've written this. I'm confused.

DR. KNOX: Well, let me see if I can help with that, sir.

The general context is to lay the foundation or the factual basis for my opinions that are summarized by the opinions at the end.
For instance, you will see on page 3 text at
the bottom of that page that provides that factual
foundation followed by opinion that's marked.

MR. PALMER: That helps me understand how you
structured this.

DR. KNOX: Very good, sir.

MR. PALMER: And so when you make the statement
in opinion number 1: Applications for Stampede and
Prosser seek an expansion of the original water right
adjudications, what are the facts you're relying on to
make that statement in your text above that?

DR. KNOX: The factual information is based
upon -- in part. We need to read the entire context of
the exhibit.

It includes those background information
references that are cited under background on page 2
and 3.

MR. PALMER: I'd like you to be specific. What
specific facts? Because you told me that the text
preceding the opinion are the factual background for the
opinion, so I'm trying to make sure I understand.

What is the specific facts in this text that
you're relying on for opinion number 1.

DR. KNOX: Very good. Well, in part, we start
then with that the water stored is part of that
necessary to meet the downstream demands under the Floriston and reduced Floriston Rates.

The foundation for that is the Truckee River Agreement, in part. Subsequent to that we talk about the Orr Water Ditch company that's -- pardon me -- the Orr Water Ditch Decree that is binding upon the four parties, including the United States and Truckee Carson Irrigation District.

And it also relies upon my interpretation of those decrees and review of the documents in the background section that forms that composite opinion on page 4.

MR. PALMER: So the decrees and the Truckee River Agreement?

DR. KNOX: Those are parts, sir. I would not want to mislead you and say that they are limited to only those, because I reviewed -- had the opportunity to review many documents as part of this proceeding.

MR. PALMER: I'll just take that for now. I haven't really got a clear answer.

But let me just make sure, just in terminology, when you say the applications, you understand that there are two applications before the Board here, one for Stampede and one for Prosser Creek Reservoir; is that right?
DR. KNOX: And Ms. Mahaney provided a clarification on the first day, and it's my understanding there are two applications and four change petitions, I believe that's the correct vernacular.

MR. PALMER: So when you refer to applications in opinion number 1, you're referring to the change petitions and applications?

DR. KNOX: I'm referring to the applications, sir. If it would help, I believe they're 31487 and 31488 as applications.

MR. PALMER: Right. And don't you understand that the purpose of the application is to in fact expand the appropriation? The applications ask for an additional appropriation of water, isn't that true?

DR. KNOX: In both Stampede and Prosser Creek, yes, it is an expansion. Sounds like we agree.

MR. PALMER: If I understand what you're saying here, we do agree on that fundamental position.

Okay. So opinion number 1.

Then for your term on page 4, term 1-1, you talk about that expansion needs to be prevented. And so if we're applying for additional water to appropriate, why should that additional appropriation be prevented if there is water available to appropriate?

DR. KNOX: Because it is injurious. The
expansion itself in terms of a physical storage of water
in a reservoir is one component. But you may not
divorce that from the fact that there are other
priorities assigned to those multiple pools within a
reservoir. This is a common practice in the western
United States.

MR. PALMER: Excuse me. The question was that
if there is additional water available to be
appropriated, why should that be prevented, this
additional -- water application for additional
appropriation if there is in fact water available to
appropriate?

DR. KNOX: I'm trying to answer the question.
The reason why it should be prevented is if
it's an expansion of the original priority beyond that
that was contemplated and adjudicated or permitted,
whether there is water available for appropriation or
not is a distinct and separate issue. That may under
this condition if water is available -- and please, we
need to be careful here, it's not just that test. There
are other bodies of law that need to take into effect
such as whether there is water available for
appropriation, whether it could be administered,
et cetera.

Then and only then would the term and condition
be allowed that the new appropriation or storage would have a junior or a subsequent water right to that original action. That's why.

MR. PALMER: In that same term 1-1 you use the phrase that you want these applications to be held in abeyance until the out-of-priority depletions are identified, quantified, et cetera.

What evidence do you have, what facts do you have that there will be such out-of-priority depletions?

DR. KNOX: Well, in review of the evidence that was tendered by the applicants, I was unable to see any support from a technical perspective. And from my perspective, I was able to look at the decreed amounts in addition to rulings by the Nevada State Engineer and others that found that this would be fully appropriated. The Truckee River and all its tributaries is the explicit language.

So that's water in my mind that has been fully encumbered that this application seeks to somehow dedicate to an earlier priority.

MR. PALMER: And where specifically did you find that language about fully appropriated?

DR. KNOX: I believe it's permit number 48494 by the Nevada State Engineer, and that was upheld in TCID Exhibit 208 by Judge William A. Maddox.
MR. PALMER: And isn't it true that that holding was that the Truckee River is fully appropriated in Nevada?

DR. KNOX: If I may, may I refer to the exhibit? I do not think it says that.

MR. PALMER: We can look, to save time. Everyone can look. If that's the source of your information, everyone can check that.

DR. KNOX: Yes, and we apparently disagree. I don't believe there is a qualification that says fully appropriated within Nevada. It says the Truckee River and all its tributaries.

MR. PALMER: You have a statement on the top of page 5 referring to the Orr Ditch Decree, and the very last line says.

...and other purposes under control, disposal and regulation by the Truckee Carson Irrigation District.

And were you present for other testimony that actually read that portion of the Orr Ditch Decree that in fact it's under the control of the plaintiff, the United States? Do you agree with that?

DR. KNOX: I agree that I was present.

MR. PALMER: So where in the Orr Ditch Decree does it say that the Truckee Carson Irrigation District
has control of this regulation of Claim 3? I assume you took that from the decree itself; is that right?

DR. KNOX: No, that would be a false assumption, sir.

MR. PALMER: Where did you get that information?

DR. KNOX: That's in context of reviewing other matters such as OCAP itself. It's also review of the Orr Ditch Water Decree, and it's also my understanding from professional experience of how reclamation projects and the water rights are owned, distributed, managed in conjunction with the water right owners and professionals with the Bureau of Reclamation.

MR. PALMER: But do you know that for a fact as opposed to what happens on the Newlands Project, Newlands Project in specific. There may be some generalization you stated, but specifically on the Newlands Project do you know how that water is managed between the United States and the Irrigation District and the farmers?

DR. KNOX: It is my understanding that the water rights are owned by individuals within the Newlands Project, and the Bureau of Reclamation has promulgated a federal regulation to help achieve the management of that water supply to the Newlands Project.
MR. PALMER: So we look at the OCAP for that relationship; is that right?

DR. KNOX: Yes, sir, in part.

MR. PALMER: Then I'll do that. Thank you.

Your opinion number 2. You have the phrase in the middle of that paragraph, "senior in priority to subject water rights in this proceeding."

I think you said this, but just to make sure I'm clear on the water rights in this proceeding, what water rights are you referring to specifically there?

DR. KNOX: I'm referring to those that are the applications and Stampede and Prosser Creek Reservoir as well as the change petitions.

MR. PALMER: All right. Those specific rights. Okay.

So when you say "junior or later priority must be curtailed" then you're just talking about the priority system. I mean, if there is a water right that's senior, it would have to be served first before a junior water right. Or are you saying something more than that here in opinion 2?

DR. KNOX: My intent is to honor the priority system.

MR. PALMER: I think you acknowledged this in your direct, but the water right for the Newlands
Project in Claim 3 held by the United States is in fact a junior water right as far as the Orr Ditch Decreed water rights go; isn't that correct?

DR. KNOX: No, I did not say that, sir, because I didn't say that the water right was held by the United States. My testimony was that these water rights in Claim 3 are held by individuals, the 3,000 individuals in the Newlands Project.

MR. PALMER: All right. Well, wouldn't you agree that the decree states the plaintiff holds the Claim 3 water right in the Orr Ditch Decree? That's what the decree says; isn't that correct?

DR. KNOX: It does.

MR. PALMER: So when we talk about that right, Claim 3, isn't it a junior water right as far as the other Orr Ditch Decree water rights go?

DR. KNOX: No. That's a bit -- Mr. Palmer, my recollection is it's Claim 3 which is junior to claim 1 and 2 but senior to multiple other claims within that decree. There's -- I don't recall. I can look, but there's claims, 4, 5, 6, 7, et cetera.

MR. PALMER: So you don't have really any idea about the total number of water rights in the Orr Ditch Decree and where the 1902 priority stacks up as far as relatively junior or relatively senior? You don't know
that?

DR. KNOX: I appreciate your terminology. As I said earlier, the term civil senior and junior is a relative position.

MR. PALMER: Referring to application 9330 -- and forgive me if I didn't catch what you said on direct. I was trying to make sure I understood.

Regarding the ability of TCID to divert that water from the Truckee River, do you know if the District has current authority to use, for example, the Truckee Canal to divert any water they may receive under application 9330?

DR. KNOX: To help refresh your memory, my testimony was that 9330 was denied by the State Engineer but it's currently under appeal.

MR. PALMER: Right, but I thought I heard you say something about that the TCID had the ability to divert that water if they were granted that permit, and I just want to know what you base that statement on.

Or maybe I misheard you. If I did, I'm sorry.

DR. KNOX: I believe you misheard me, sir.

MR. PALMER: All right. So you don't know one way or the other whether the Irrigation District has any current means of diverting that water from the Truckee River under application 9330?
DR. KNOX: Thank you for the qualification, because under current means that implies infrastructure and ability to divert it. That's a physical aspect. But I'm not aware of a legal ability to do so at this time until the application is resolved.

MR. PALMER: So physical ability is the mere fact that the canal exists and it's open to the river; is that right?

DR. KNOX: Yes.

MR. PALMER: You qualified the Tribe's unappropriated water permits here on page 6 of your testimony as temporary. Do you understand that those permits are temporary in some way?

DR. KNOX: That was my understanding of what the State Engineer's ruling said.

MR. PALMER: I assume that that's just like any other permit that might be granted, that in your view, I believe, it's temporary until such time as beneficial use is proved up and a license or certificate is issued? Is that what you really meant?

DR. KNOX: In other states they'll use the terminology "conditional water right." But that is correct, Mr. Palmer, it's generally a term to show the application of use.

MR. PALMER: Have you reviewed the water
availability analysis presented by the applicants in this proceeding?

CO-HEARING OFFICER DODUC: Mr. Van Zandt?

MR. VAN ZANDT: This is outside the scope of the direct testimony, but Dr. Knox will come back and talk about that. So if you held that question, we will get to that.

CO-HEARING OFFICER DODUC: And Mr. Palmer, your reason for asking this witness that question?

MR. PALMER: He's talking about that he says it's premature because there is no water available to appropriate, so I'm asking him if he reviewed those. He has a statement in here also that there is no engineering data or information at all that supports the water availability that's being asked for by the applicants, so I wanted to probe where did you get that information? Did he do his own analysis? Did he review the analysis by the applicant? He just has this blanket statement that there is no support whatsoever.

CO-HEARING OFFICER DODUC: The objection is overruled. Please answer the question.

DR. KNOX: Sir, I believe you used the term analysis. I reviewed two analyses, one for Prosser Creek and one for Stampede.

MR. PALMER: And your conclusion was that those
were not correct in their determination that water was available for appropriation?

DR. KNOX: Yes, that is my assertion.

MR. PALMER: So you're going to come back on rebuttal and tell us all about that, so I should hold all those questions; is that what you're telling me?

MR. VAN ZANDT: Yeah, I think it will be more fully informed once he does his direct on rebuttal.

MR. PALMER: With that opportunity reserved, I'd like to refer to your opinion number 4 now.

And again, maybe this can go rather quickly. The facts upon which you're basing your opinion 4, that would be in the text immediately preceding that under the heading Truckee River Operating Agreement May Not Interfere with Decreed Water Rights. Is that right?

DR. KNOX: That's the foundation, yes.

MR. PALMER: And do you understand that the court has already approved the changes to the Truckee River General Electric decree for TROA? Are you aware of that?

DR. KNOX: I am not aware of that.

MR. PALMER: Next in your opinion number 5 location you have the title Agency Regulations Cannot Interfere with Decreed Water Rights, and you discuss the McCarran Amendment.
I guess, do you consider this proceeding before this Board on these change petitions and applications a McCarran Amendment proceeding?

MR. VAN ZANDT: Calls for a legal conclusion.

MR. PALMER: Well, he's the one that is saying that's what we're doing here. So I can ask him what's his basis, but I thought I would maybe cut to the point here. If he doesn't believe that then I can not ask him what he's talking about.

CO-HEARING OFFICER DODUC: The witness will answer the question.

DR. KNOX: I will attest that this is not a McCarran Amendment hearing. But my statements as to the applicability of the McCarran Amendment in the administration and delegation of authorities, I stand by.

MR. PALMER: Do you understand that before a state can administer water rights under the McCarran Amendments, federal water rights, that there has to be an adjudication in accordance with the McCarran Amendment first? Do you understand that?

DR. KNOX: I would rephrase that differently. It is my understanding of the McCarran Amendment in terms of state adjudicatory administration laws for the United States has ceded that authority to
the states.

MR. PALMER: Well, this could go on for a long time. But in a general stream adjudication, correct?
The McCarran Amendment applies to a general stream adjudication?

DR. KNOX: Not necessarily, because I'm aware of many subsequent adjudications in other western states that -- when I use the term general adjudication, that's a composite adjudication at one time for a group of water rights. I know that the United States seeks individual water rights in compliance with applicable state law on a case-specific basis.

MR. PALMER: And you're speaking from Colorado experience; is that right?

DR. KNOX: Yes.

MR. PALMER: The Colorado system is much different, but again, we could spend a lot of time on that. The McCarran Amendment, I think, would speak for itself, so I'll move on.

You reference OCAP in your opinion number 5. Let me back up real quick.

In opinion number 5 you have this statement that the United States Federal Government as an applicant has similar responsibilities as other public or private water right owners, but are you not aware of
California vs. United States, U.S. Supreme Court decision that makes congressional directives trump any state water right proceeding? Are you aware of that?

MR. VAN ZANDT: I'm going to object to that. He does not talk about California vs. United States in his direct testimony.

MR. PALMER: But he says that the United States is subject to the same rights and responsibilities of any other public/private entity, and that's not the case. I'm asking if he's aware of that Supreme Court decision.

CO-HEARING OFFICER DODUC: The witness will answer the question. And if you're not aware, say you're not aware.

DR. KNOX: Thank you, ma'am. I'm not aware.

MR. PALMER: And you do understand as far as OCAP goes that it does limit diversions from the Truckee River to the Truckee Canal for the Newlands Project; is that right?

DR. KNOX: I believe it speaks for itself. It's operating criteria that dictates those diversions in part in compliance with the decrees.

MR. PALMER: And are you aware that the Truckee River Operating Agreement has in fact been submitted to the Orr Ditch Court for its review? Are you aware of
that?

DR. KNOX: No, I'm not aware of that. I don't know.

MR. PALMER: In your opinion number 6 you have the phrase several lines down, "silent assumption."

What is that?

MR. VAN ZANDT: Say that again, please.

MR. PALMER: Silent assumption. What is that?

About seven lines down in opinion number 6. You do not see what I'm talking about?

DR. KNOX: Yes, sir, but I have this nasty habit of trying to read the sentences before for context.

And this is in regards to my understanding of the United States is seeking a term and condition to hold these in abeyance. And it's a silent assumption in context that it's a bit of the sleeve's out of the vest. That would assume that there would be no injury.

My opinion is there is injury at this point, so it's silent in the context that it does not address that point head-on.

MR. PALMER: So you just said that there is injury at this point. What injury is there today, I guess you mean?

DR. KNOX: At the time of this application and
the present state of the applications and the change petitions, should they be implemented by this Board -- pardon me -- approved by this Board and implemented, would be injurious.

I'm not trying to dance around your question. If your question is in the sense is TROA in an operable sense at this point? I'm not aware of that it is.

MR. PALMER: So you're basing that statement on how you understand TROA; is that right?

DR. KNOX: In part.

MR. PALMER: And in part what else?

DR. KNOX: The priorities, OCAP, the permits issued by the Nevada State Engineer and the other body of evidence that supports this proceeding, sir.

MR. PALMER: Is it your opinion that the 1997 OCAP is somehow contrary to the water rights in the Orr Ditch Decree?

DR. KNOX: I would not characterize it as being contradictory to the water rights, but it is again a federal regulation that by its intent and purpose should not interfere with those.

MR. PALMER: On page 10 just before -- I guess this is in your opinion number 8 on the top of page 10, the middle of that continuing paragraph, you cite to the California Water Code Section 1206 for the assertion
that the Truckee River is fully appropriated in California. Does that statute say that?

DR. KNOX: That's my understanding, yes.

MR. PALMER: Specifically says the Truckee River in that statute?

DR. KNOX: Not in specificity to a single river system, no.

MR. PALMER: Now I'd like to turn to page 11 of your direct. At the bottom of that page you reference two statements out of the Environment Impact Report which is State Board Exhibit 7 from the executive summary. Do you see that?

DR. KNOX: Yes. Thank you, Mr. Palmer.

MR. PALMER: There are other purposes for TROA listed on those pages other than what you have listed here; isn't that right?

DR. KNOX: I do not know what they are at this time, but I'm not going to disagree with you.

MR. PALMER: On the top of the next page, page 12, your opinion 10, you say in review of the EIS/EIR it is apparent that shortages to water rights in the Newlands Project, et cetera. Do you see that statement?

So I want to make sure I understand. So what water rights are going to be shorted that you're referring to specifically?
DR. KNOX: Water rights within the Newlands Project.

MR. PALMER: So the ones that belong to the 3,000 farmers?

DR. KNOX: That's my understanding, yes.

MR. PALMER: And you got that out of the EIS?


MR. PALMER: And what specifically were you referring to in that document for the State?

DR. KNOX: I was referring -- I don't recall. If you'd like, I could try to find the page numbers, but it's approximately page 3120 and so forth. In prior testimony there was much discussion about some of the graphics.

MR. PALMER: The Carson Division Shortage Graph, does that ring a bell?

DR. KNOX: Yes, sir. Thank you very much.

MR. PALMER: So is it your understanding that if there were no TROA that these water rights we've just been talking about would never be shorted?

DR. KNOX: No, that is not correct. As a water resource engineer with hydrology training, it does show shortages. But my attention in the formation of this opinion was the increase, the additional shortage that
would have been caused by implementation of TROA.

MR. PALMER: As displayed on those graphs?

DR. KNOX: Yes.

MR. PALMER: You reference in that same provision, you say: Is not apparent what, if any, alternatives were developed.

Do you see that statement in your opinion number 10? Do you see that, what I'm referring to?

DR. KNOX: Thank you, sir. Yes, I do.

MR. PALMER: I just want to be sure we're talking about the same thing.

So you're talking about alternatives. Do you know what purpose alternatives serve in NEPA.

DR. KNOX: I have a fundamental understanding of what NEPA is and the development and evaluation of reasonable and prudent alternatives, yes, sir.

MR. PALMER: And what are those alternatives? What's the purpose of developing alternatives?

DR. KNOX: Well, my understanding in a general layman's context is when you have a proposed federal action and something that would deviate from that, you have alternatives that start with a no action, but then you also based upon what should be receipt of information from the public and other interested parties, part of the rigorous process employed by the
implementing agency, that you seek to identify what the impacts of that proposed change would be.

Oftentimes there are detrimental effects. The evaluation of the alternatives should also clearly identify those and seek mitigative terms and conditions to try to address those. And that is what I was unable to find in that document, sir.

MR. PALMER: I think we just ranged all over the place. We started talking about alternatives and you began talking about impacts.

Is it true that when you analyze alternatives, maybe you compare them one against the other, you are looking at impacts related to those alternatives; isn't that right?

DR. KNOX: No.

MR. PALMER: Are alternatives at all controlled by the purpose and needs statement in a NEPA document?

DR. KNOX: Yes, they are. The alternatives are not only to address the comparative analysis between subsequent alternatives themselves but also the impact between existing conditions and that alternative discreetly.

MR. PALMER: And that's found where? What's the authority for that statement?

DR. KNOX: Sir, that's my understanding of
working with and reading NEPA, or the National Environmental Policy Act. I apologize.

MR. PALMER: We get use to the short versions.

DR. KNOX: Fair enough, sir.

MR. PALMER: In your next section just before opinion number 11, you have the statement, "the impacts of declining water supplies within the Carson River Basin. And it's three lines from the bottom, just above opinion eleven. I just again want to understand what you're referring to there.

DR. KNOX: I apologize, Mr. Palmer. Would you please refer me, you're in opinion 11?

MR. PALMER: Right above opinion 11, three lines above that, the sentence that starts the fourth line above that: However, the impacts of declining water supplies in the Carlson River basin...

Do you see where I am now?

DR. KNOX: Yes, sir.

MR. PALMER: So what declining water supplies are you referring to there?

DR. KNOX: I'm referring to the shortages as identified by TROA in the EIS/EIR.

MR. PALMER: The ones we were just talking about, the Carson Division shortage graph?

DR. KNOX: Yes.
MR. PALMER: In your review of the EIS/EIR, did you happen to review the responses to comment letters?

DR. KNOX: No.

MR. PALMER: You have a statement in your opinion 11, if I can paraphrase, and certainly correct me if I do that incorrectly, that you don't believe that the EIS/EIR includes analysis of the necessary resources or interests of the protestants here?

DR. KNOX: Sir, I do need some help. I mean, what protestants? What resources?

MR. PALMER: Well, you make a statement that the EIS/EIR is lacking, and I'm trying to understand what was not analyzed, in your view? What resource was not analyzed, what interest was not discussed in the EIS/EIR that you're finding lacking?

MR. VAN ZANDT: Excuse me, you're talking about opinion 11?

CO-HEARING OFFICER DODUC: Yes, which statement?

MR. VAN ZANDT: I don't see anything about the EIS/EIR in number 11.

CO-HEARING OFFICER DODUC: I don't see it either.

MR. PALMER: It says the interests of the 3,000 owners of water rights in the Newlands Project were not
The EIS/EIR is an analysis of TROA. So that's analyzed the interest of these folks you say were not included and their rights weren't included in TROA, but the EIS/EIR did an analysis of those; isn't that right, those rights and interests of those folks you list here?

DR. KNOX: Sir, what I would refer to as the EIS and EIR, it described a shortage. What it did not include was an analysis of what the impacts are to these 3,000 water rights. In context, this is under the impact of public interest and public trust opinion.

What I'm really trying to refer to in this issue is the fact that, again, seeking some form of measured balance in public interest, it was perplexing to me to see that a major water diversion and use within the Truckee River system with a limited supply, those interests of those entities, the farmers, the communities, of Fallon and Churchill County were not included.

MR. PALMER: So you mean they were not a signatory to TROA, is that what you're saying?

DR. KNOX: Sir, we're talking about two different things. I thought we were talking about the EIS/EIR.

MR. PALMER: Well, I was, but isn't it true
that the interests of those parties that you just
mentioned are analyzed in the EIS/EIR?

DR. KNOX: I would disagree with that in
totality. They were in part, but not in totality.

MR. PALMER: So if I would refer you to page
3-442 of the EIS/EIR State Board EXHIBIT 7 titled
Newlands Project Operations, did you read that section?
Want me to show it to you?

DR. KNOX: Thank you so much.

MR. VAN ZANDT: Let him --

CO-HEARING OFFICER DODUC: Mr. Van Zandt, what
was that?

MR. VAN ZANDT: I would like the witness be
able to see it before he answers.

DR. KNOX: Thank you, Mr. Palmer.

Mr. Palmer has handed me -- what is the exhibit
number?

MR. PALMER: 7.

DR. KNOX: Exhibit 7, Truckee River Operating
Agreement, and he's pointed out the Newlands Project
Operations on page 3442.

And in response to your inquiry, sir, no, I
don't believe that, even though this is addressed on
this page, that it does provide a complete address or
analysis of those water rights in the Newlands Project.
MR. PALMER: So in that regard then, what specific analysis is missing?

DR. KNOX: In part, because under the preliminary, or at least my understanding of the TROA runs that show a shortage, I did not see any form of mitigative measures or relief to try to address that in that document.

MR. PALMER: Well, there is a difference between analyzing something and providing mitigation. Do you understand that?

DR. KNOX: Yes, I do.

MR. PALMER: So the water rights were analyzed. Your concern seems to be that you believe that those shortages that were shown on that table should have been mitigated. Is that what you're testifying to?

DR. KNOX: I believe the analysis should define what the shortages are, then that analysis should be extended to see if there are other reasonable terms and conditions that may address, provide relief to those shortages.

MR. PALMER: So you reference in your opinion 11 the Public Trust Doctrine. Are you aware of the California Public Trust Doctrine that this Board relies on in, for example, deciding what conditions it may place on applications before it?
DR. KNOX: My understanding of it starts with the Audubon -- what I refer to as the Audubon case and a few other principles and discussion with Division of Water Resource personnel in California. But I have a fundamental understanding of it, sir.

MR. PALMER: And do you understand that that Public Trust Doctrine goes to water and related resources that are over the purview of the State?

DR. KNOX: Hence the Mono Lake and the Audubon decision. Yes.

MR. PALMER: So -- excuse me.

DR. KNOX: Yes, it includes water resources.

MR. PALMER: So we're concerned here with, for example, the effects of TROA on fishery in the Truckee River.

DR. KNOX: In terms of one of the parameters within the public trust? Yes.

MR. PALMER: And what are the other parameters in the public trust that you're referring to here that relate to that California Public Trust Doctrine?

DR. KNOX: I also believe it incorporates -- Mr. Palmer, I apologize, I'm drawing a blank on the other parameters that I read in the Public Trust Doctrine, so I can't answer that at this point.

MR. PALMER: Fair enough. And do you
understand that the TROA, the Truckee River Operating
Agreement, is a negotiated agreement, the negotiation of
which was directed by Congress to the Secretary of the
Interior. Do you understand that?

DR. KNOX: Yes, it's a negotiated agreement by
the signatory parties, but not all parties.

MR. PALMER: Right, but it was directed by
Congress. You refer to Public Law 101-618 in section
205, and that directed the Secretary to negotiate the
TROA; isn't that right?

DR. KNOX: That is my understanding, yes.

MR. PALMER: What do you mean by "hard look"?

DR. KNOX: Hard look?

MR. PALMER: Yes.

CO-HEARING OFFICER HOPPIN: She can do it
better than anybody.

CO-HEARING OFFICER DODUC: Mr. Palmer, please
put that in context for me. To where are you referring
in the witness' testimony?

DR. KNOX: Opinion 12, fourth line from the
bottom, in quotes he has "hard look."

CO-HEARING OFFICER DODUC: Thank you.

DR. KNOX: I admit to borrowing that phrase
from several United States and appellate court briefs
that I use when I teach my students in the review and
application of NEPA that the courts have used that term, hard look, which I've interpreted and explained to my students to mean a rigorous, complete objective analysis of all positions.

MR. PALMER: I'd like to refer you to, since you didn't get a chance to read them, to a response to a comment -- this is on State Board 7, page 436, response PW 1030, and see if you would agree with this statement as far as what's contained in the EIS/EIR.

DR. KNOX: Excuse me, did you want me to read it or read it aloud?

MR. PALMER: Yes, read it into the record.

DR. KNOX: On page 436 of the aforementioned Exhibit, PW 1030, which appears to be one of many. The document presents an extensive analysis of a number of Newlands Project resources based on assumed future water demand. Lahontan Reservoir, which supplies water to the Carson Division, is analyzed in detail relative to storage and releases to satisfy the exercise of water rights served by the Newlands Project. Impacts to wetlands are considered similar to irrigated lands for convenience because of numerous options.
for obtaining benefits from available supply. The effects of the recoupment cannot be analyzed because that matter remains in litigation.

MR. PALMER: So my question is regarding --

CO-HEARING OFFICER DODUC: Mr. Palmer, into the microphone, please.

MR. PALMER: Sorry.

So you still disagree with that statement regarding the extensive analysis of the EIS as far as Newlands Project interests go?

DR. KNOX: I stand by my answer, yes, sir.

CO-HEARING OFFICER DODUC: Mr. Palmer, please wrap up your cross.

MR. PALMER: I will indeed. Thank you.

In your conclusion you state that -- if I'm paraphrasing wrong you'll correct me -- it says that these change petitions and applications will impose additional shortages in time, amount or location that will injure vested water rights in the Truckee River system.

So again you're just referring to the 3,000, as you called it, water right owners in the Newlands Project; is that right?

DR. KNOX: That was the context of my analysis,
MR. PALMER: That's all I have. Thank you.

CO-HEARING OFFICER DODUC: Thank you, Mr. Palmer. Let's give the witness a chance to take a breather. We'll take a short 5, 6 minute break at will and resume at 2:35.

(Recess)

CO-HEARING OFFICER DODUC: Since it looks like we're all back, Mr. DePaoli, you may begin your cross.

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CROSS-EXAMINATION BY MR. DePAOLI FOR TRUCKEE MEADOWS WATER AUTHORITY

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MR. DePAOLI: Good afternoon, Dr. Knox.

DR. KNOX: Good afternoon, sir.

MR. DePAOLI: Dr. Knox, in your testimony when you use the word application or the word applications, are you intending in all places to refer only to the applications to appropriate?

DR. KNOX: My intent is to -- my intent is to turn this on. Excuse me.

"Applications" refers to the increase in storage levels for Stampede and Prosser Creek, and petitions in change are a different matter.

MR. DePAOLI: So in your written testimony...
those words are separately used and intended to be
separately used?

DR. KNOX: That is my intent, yes.

MR. DePAOLI: At the beginning of your
testimony you listed some material that you reviewed in
preparation for this testimony, and then on direct you
added one item to that list. Is that everything that
you reviewed?

DR. KNOX: No. It is everything I used in the
formation and basis of my opinions that were provided in
expert witness testimony.

MR. DePAOLI: So your opinions then do not
involve anything related to the Tahoe-Prosser Exchange
Agreement, for example?

DR. KNOX: I do not recall offering opinion in
regard to that, no, sir.

MR. DePAOLI: And you did not look at that
document?

DR. KNOX: No, I did look at that document.

MR. DePAOLI: Did you review the Truckee River
General Electric Decree?

DR. KNOX: Yes.

MR. DePAOLI: But it wasn't involved in your
opinions either?

DR. KNOX: It was not included within those
cited in my testimony, no.

MR. DePAOLI: And as I understood your responses to some of Mr. Palmer's questions, essentially the material that precedes your opinions is the material on which your opinions that follow are based; is that correct?

DR. KNOX: That information served as the basis for my written testimony.

CO-HEARING OFFICER DODUC: Mr. DePaoli, let me interject here and caution you. I was extremely patient with Mr. Palmer, please do not revisit the grounds that he has already plowed through.

MR. DePAOLI: I will do that.

Is it your understanding that water stored under the existing California water right permit for Stampede Reservoir is used to assist in meeting Floriston Rates or reduce Floriston Rates?

DR. KNOX: In part, yes.

MR. DePAOLI: Can you tell me what downstream water rights water stored in the California water right for Stampede Reservoir is used to assist in meeting?

DR. KNOX: Explicitly by water right name, no, I cannot.

MR. DePAOLI: Is it your understanding that uncommitted water from Prosser Creek Reservoir is used
to assist in meeting Floriston Rates or reduce Floriston Rates?

DR. KNOX: Yes, it is.

MR. DePAOLI: What do you mean by: The reservoir cited in the change petitions have been operated to supplement stream flows in the Truckee River?

DR. KNOX: I mean that they, as functional storage vessels, capture excess water available during spring runoff in part that is used in part to help in the delivery of the Floriston Rates and is subsequently used for application of beneficial use by downstream interests including those in the Newlands Project through diversion through the Truckee Canal.

MR. DePAOLI: Is it your understanding that water stored under the water right license for Independence Lake is used to assist in meeting Floriston Rates?

DR. KNOX: I don't know the answer to that.

MR. DePAOLI: In theory, at least, is a new water right application for storage -- strike that. A new water right application for storage is for available, unappropriated water, is it not?

DR. KNOX: That's my general understanding, yes.
MR. DePAOLI: And that storage would have to take place in priority, would it not?

DR. KNOX: For it to be what I would term as legal, yes.

MR. DePAOLI: And if it is accomplished in what you term as legal, it will not adversely impact a senior water right holder, will it?

DR. KNOX: That new storage water right has the presumption that the adjudicatory body found that there would be no injury, issued that permit or license. And then subsequent, if it was stored within that priority, it would be the presumption that it would be legal.

MR. DePAOLI: Sort of the flip side of that is that the exercise of a senior water right is not unlawful even if that exercise makes less water available for a junior water right?

DR. KNOX: Mr. DePaoli, that was a bit circuitous. I'll rephrase that in my terms.

The lawful diversion of a senior water right is allowed.

MR. DePAOLI: Are you familiar with the water right priorities that the Federal Water Master follows in allowing new water to be stored in the reservoirs that are the subject of the change petition?

DR. KNOX: My familiarity is limited to what
was published in Mr. Blanchard's report.

MR. DePAOLI: Dr. Knox, in opinion number 1 you say something about the alteration and amount of water stored and released in the reservoirs cited in the change petitions will further extend the material injury to existing and senior water rights in the Newlands Projects.

Are you saying that one or more of the change petitions seeks to alter the amount of water stored?

MR. VAN ZANDT: I'm going to object because the opinion 1 refers to applications, not the change petition.

MR. DePAOLI: If you look at the last sentence in opinion number 1, it says: In a similar manner, the alteration and the amount of water stored and released in the reservoir cited in the change of water right petitions will further extend.

That's the part I'm looking at.

MR. VAN ZANDT: That's what you're referring to? Okay, I withdraw the objection.

DR. KNOX: Thank you. Mr. DePaoli, would you please repeat the question.

MR. DePAOLI: Which of the change petitions seeks to alter the amount of water stored?

DR. KNOX: I believe they all do.
MR. DePAOLI: Well, let's take the Stampede change petition, and tell me how it seeks to alter the amount of water stored?

DR. KNOX: In part, through the use of carryover storage. That would impact -- that amount of water that would be stored under the original priority, it's my understanding through testimony of Ms. Phillips and others, is that water in part for drought protection or other intended purposes would be carried over. That would have an incremental change in the amount of storage held in that vessel.

MR. DePAOLI: I want to focus on the change for the Stampede water right is a change to that particular water right, not any other water right. Am I missing something there?

DR. KNOX: Mr. DePaoli, my understanding is that all of these change applications are founded upon TROA which seeks to form some form of integrated storage, including Stampede, as points of -- alternate points of storage and rediversion and et cetera.

MR. DePAOLI: But the current water right for Stampede Reservoir allows for the storage of, I think, 126,000, and there may be a 500 in that or not, per year. Does the Stampede change petition seek to increase that amount?
DR. KNOX: My understanding is it seeks to change not the 126 per se, but it allows that storage to be changed in other vessels, other upper Truckee River system storage vessels.

MR. DePAOLI: But it doesn't increase the amount that can be stored in any one year?

DR. KNOX: I believe it would have a cascading effect in the subsequent year with that amount held in carryover storage.

MR. DePAOLI: Is there something presently in the Stampede permit that prohibits carryover storage?

DR. KNOX: I do not know something that prohibits it, nor do I see anything explicitly that's -- it's my familiarity as a water administrator that carryover storage must be specifically allowed as a term and condition.

MR. DePAOLI: So is that in part what you base your conclusion on that unless carryover storage is specifically allowed, it is disallowed?

DR. KNOX: That's part of a common, in part, professional experience, that carryover storage has an impact upon the availability of water supplies. It also has a term of notice to other downstream interests. So yes, it should be something that is explicitly included and then, and only then, if it's not injurious,
MR. DePAOLI: Are you aware of anything in the Independence license that prohibits carryover storage?

DR. KNOX: No, or that specifically allows it, either.

MR. DePAOLI: And how about the Boca license?

DR. KNOX: Same response, sir.

MR. DePAOLI: Same response? Well, strike that on Prosser.

Did the change petitions in any way seek to alter the amount of water that is released from these reservoirs in a year?

DR. KNOX: Yes.

MR. DePAOLI: How?

DR. KNOX: Through the explicit intent to create -- my understanding is up to eleven different types of credit storage accounts, focusing primarily on fish credit water that would be released in time and amount deemed appropriate by other interests.

So yes, it would affect the timing of the releases.

MR. DePAOLI: But do the change petitions seek in any way to limit the amount of water that can be released which is stored under these water rights that are here today?
DR. KNOX: I don't know the answer to that.

MR. DePAOLI: Do the Claim 3 water rights have some entitlement under law to receive water from Independence Lake?

DR. KNOX: By their physical proximity, the Claim 3 water rights, I believe, are entitled to all upstream tributary flows, not stored converted in priority. And so if there is water that is out of priority from Independence Lake that would be used to satisfy those, yes, they have the ability to call that water through.

MR. DePAOLI: Do they have the ability to call water that has been properly stored under the Independence license and then released by TMWA for its purposes, do they have a right to call on that?

DR. KNOX: Not that I'm aware of, no.

MR. DePAOLI: And would that be the same with respect to water release from Stampede Reservoir?

DR. KNOX: Yes, as long as the test is made that that water that is so released is applied to beneficial use without waste.

MR. DePAOLI: And would that be the same with respect to uncommitted water from Prosser Creek Reservoir?

DR. KNOX: I'm unfamiliar with uncommitted
water from Prosser Creek Reservoir.

MR. DePAOLI: And I may be treading in a spot here I shouldn't go, but I didn't really -- I think Mr. Palmer asked you about the reference to out-of-priority storage that's in term and condition 1-1, and I really didn't understand your answer.

What are you referring to there?

DR. KNOX: I refer in term and condition number 1-1 on page 4 of Exhibit 276B to be water that is not stored in priority in a storage vessel.

MR. DePAOLI: And do any of the change petitions seek to store water out of priority?

DR. KNOX: No. My understanding is that is not the case.

MR. DePAOLI: You understand that the Alpine Decree adjudicated water rights on the Carson River, do you not?

DR. KNOX: That's my general understanding, yes.

MR. DePAOLI: It didn't adjudicate any water rights from the Truckee River?

DR. KNOX: That's my understanding.

MR. DePAOLI: In the opinion number 2 -- and just for my clarification, when you refer to water rights senior in priority to water rights in this
proceeding, you're not referring to any water rights adjudicated under the Alpine Decree?

DR. KNOX: I want to try to be careful here, Mr. DePaoli, because my recollection is in the Alpine Decree it includes Lahontan Reservoir. Part of the storage vessel -- excuse me. Part of the water supply for that storage vessel can be diversions under the Orr Ditch Decree.

MR. DePAOLI: But those diversions happen because of the Orr Ditch Decree not the Alpine Decree?

DR. KNOX: That is my understanding, but it is an integrated system.

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

DR. KNOX: But it is an integrated system.

MR. DePAOLI: But there is nothing in the Alpine Decree that can require diversions from the Truckee River to the Lahontan Reservoir is there?

DR. KNOX: Not that I'm aware of.

MR. DePAOLI: In the portion of your testimony dealing with competing permits and applications, you mention the decision of Judge Maddox. That decision doesn't have anything to do with the change petitions, does it?

MR. VAN ZANDT: Change petitions in these
MR. DePAOLI: In these proceedings.

DR. KNOX: Not directly, no.

MR. DePAOLI: Indirectly?

DR. KNOX: Yes.

MR. DePAOLI: How?

DR. KNOX: Because it's my understanding listening to other testimony proffered, particularly by the Tribe, that there is an intent to use that water that was the subject of Judge Maddox's opinion for upstream storage that would also be incorporated with some of these change petitions.

MR. DePAOLI: I didn't hear that. So how is it going to be incorporated into these change petitions?

DR. KNOX: My understanding was there was a claim that there was going to be an intent to move some of that water for storage in upstream reservoirs. This TROA that is the foundation for the change petitions seeks to have an operational scheme to use that unappropriated water in capture and release.

MR. DePAOLI: But there is no change petition either before this Board or anywhere else that seeks to do that at this time, is there?

DR. KNOX: No, I think it would have been good to have that done.
CO-HEARING OFFICER DODUC: Mr. DePaoli?

MR. DEPAOLI: I'm moving along.

Were any of the water rights that are involved in these change petitions adjudicated by federal court?

DR. KNOX: Not that I'm aware of.

MR. DEPAOLI: Can you tell me how each or any of the change petitions will result in water not being released from a Truckee River reservoir to satisfy the exercise of water rights in conformance with the Orr Ditch Decree?

MR. VAN ZANDT: The question seems to be a little vague. Can you restate it?

CO-HEARING OFFICER DODUC: Please rephrase, Mr. DePaoli.

MR. DEPAOLI: Can you explain how one of these change petitions will result in water not being released from a Truckee River reservoir to satisfy an existing Orr Ditch Water Decree right?

DR. KNOX: One example is it's my understanding that water that would have been stored in amount in, say, Stampede Reservoir, based upon the source of supply, the time and the location, may be carried over or used as an alternate point of storage in Boca Reservoir, retained, released at a different time that is different than under the historic operations would
have been bypassed through the reservoir used to serve
downstream water rights.

MR. DePAOLI: And that's going to result in not
releasing water to satisfy Floriston Rates?

DR. KNOX: It could.

MR. DePAOLI: Well, I'm having a hard time
understanding how.

DR. KNOX: In part, it's my understanding based
upon TROA and testimony that it would have a reduced
Floriston Rates.

MR. DePAOLI: Are you talking about what is
happening in Nevada with the changes to Orr Ditch Decree
water rights?

DR. KNOX: Sir, I don't know what you're
talking about there.

MR. DePAOLI: Where do you gain the
understanding that you just gave in your answer?

DR. KNOX: By review of the applications -- the
petitions for change, pardon me for my Freudian slip --
the petitions for change and listening to the testimony
of previous witnesses, including those from TMWA.

MR. DePAOLI: So is there something specific in
these change petitions which requests this Board to
authorize water not to be released to maintain Floriston
Rates?
DR. KNOX: Not in those explicit terms, but the change petitions are founded upon TROA, which does provide that potential.

MR. DePAOLI: And do you know how TROA provides that potential?

DR. KNOX: In part by allowing it to have an expansion of the use of the existing storage vessels and their source of supply to all other -- excuse me, that's too blunt -- to other reservoirs in the upper Truckee River system.

MR. DePAOLI: Does TROA in and of itself authorize the reduction in Floriston Rates, if you know?

CO-HEARING OFFICER DODUC: This area has been covered. Asked and answered. Please move on, Mr. DePaoli.

MR. DePAOLI: Dr. Knox, in opinion number 6 you indicate it's premature to act on these change petitions because TROA may be altered. Do you know whether or not TROA can be altered at this point in time?

DR. KNOX: I don't know.

MR. DePAOLI: In that same opinion you talk about these change petitions will remove these reservoirs from the change process for all time. Are you suggesting that there should be a change petition every time someone wants to, say, release water from
Independence Lake for an instream purpose to recapture it in Stampede Reservoir?

DR. KNOX: No, but I am asserting that when you have an expansion to an existing reservoir in terms of their season of storage and release, their amount, et cetera, that it is proper that they come before this Board for change petitions.

MR. DePAOLI: Do any of the change petitions seek to change the season of storage?

DR. KNOX: Not on their face, but they certainly do through implementation of TROA.

CO-HEARING OFFICER DODUC: Mr. DePaoli?

MR. DePAOLI: I'm moving on.

In term and condition 8.2 on page 10.

DR. KNOX: Yes, sir.

MR. DePAOLI: You indicate that the action is not reasonable and is inappropriate until such time as a detailed water resources engineering analysis is provided and evaluated that describes the amount of water physically and legally available to each reservoir in this conjunctive water supply system.

Wasn't the amount of water legally available to Stampede Reservoir under its existing permit determined when that permit was issued?

DR. KNOX: For 126,000 acre feet, yes.
MR. DePAOLI: And that's all the change petition is dealing with, correct, that existing permit?

DR. KNOX: Again, sir, on its face, but implementation of TROA I believe does seek to extend it.

MR. DePAOLI: Is it your understanding that the Prosser Creek application seeks to increase permitted storage from 20,162 acre feet to 30,000?

DR. KNOX: In part, yes. It also seeks to extend the storage season from four months to ten and a half months.

MR. DePAOLI: Do you have any firsthand knowledge that folks from the Newlands Project were excluded from the TROA process?

DR. KNOX: Sir, I was not part of those negotiations. I do not have firsthand knowledge.

MR. DePAOLI: That concludes my direct -- or cross, excuse me.

CO-HEARING OFFICER DODUC: Thank you.

Mr. Pagni?

MR. PAGNI: Thank you.

--o0o--

CROSS-EXAMINATION BY MR. PAGNI FOR WASHOE COUNTY WATER CONSERVATION DISTRICT

--o0o--

MR. PAGNI: Dr. Knox, Mr. McConnell confirmed
that -- sorry.

DR. KNOX: I understand.

MR. PAGNI: I get to sit here for two hours and then have to try to talk.

-- confirmed that TCID does not have any rights under license 3723 for diversion or place of use.

Would you agree that Claim 3 does not have any authorized rights of diversion or places of use under the Boca license 3723.

DR. KNOX: Good afternoon, sir.

No, I do not know.

MR. PAGNI: Would you agree that -- I will represent to you that TCID is not identified or the Newlands Project is not identified as a point of rediversion or place of use under that license.

Would you agree that by adding the Newlands Project as a point of rediversion and a place of use under the Boca license that provides a benefit to the Newlands Project users.

DR. KNOX: Sir, you added it, but I term benefit -- excuse me. You referred to the terms it provides a benefit. I couch benefit as actual receipt of water. Naming it in principal alone, that's nice, but should there be water that would be provided and delivered without any diminution of their existing
supplies, yes that would be a benefit.

MR. PAGNI: And you would also agree it
certainly doesn't injure them?

DR. KNOX: Unfortunately, I've been in water
matters for a long time, and there's also mischief if
someone tries to flood someone. But I don't take that
your intent would be to flood anyone out, then that
would be injurious, but as long as it's water that could
be applied to beneficial use, that would be helpful.

MR. PAGNI: Is it your opinion that the Boca
change petition will increase the amount of water stored
in the Boca Reservoir.

DR. KNOX: It's my position that it would have
the effect of enlarging the water right not in the
reservoir itself, but water that could be stored on an
incremental basis in those other Truckee reservoirs
under the Boca water right.

MR. PAGNI: Do you know how many acre feet are
currently permitted under license 3723 for storage in
Boca Reservoir?

DR. KNOX: No, sir. Not exactly, no.

MR. PAGNI: Do you know how many acre feet are
being sought under the change petition for Boca
Reservoir for storage in that reservoir?

DR. KNOX: No, sir, I do not.
MR. PAGNI: So if I understand it, you don't know the amount of storage currently licensed, and you don't know the amount of storage being sought in the change petition, but you have an opinion as to whether there's an increase in storage?

DR. KNOX: Yes, I do.

MR. PAGNI: Thank you.

You testified earlier that it's your intention to honor the priority system. Would any of the opinions that you've issued today and in your direct testimony change if you had the benefit of understanding that the change petitions and applications don't seek to alter the priority of water rights as adjudicated by the Orr Ditch Court?

DR. KNOX: That goes partially there, but for me to -- the entirety of honoring the priority system means honoring all decrees, and not having an expansion of use of any of them, not just specifically the Orr Ditch Decree.

MR. PAGNI: Was that a yes or a no?

CO-HEARING OFFICER DODUC: He answered your question, Mr. Pagni.

MR. PAGNI: I asked whether his opinion would change, and I didn't understand his answer, whether he was saying yes it would change or no it would not.
DR. KNOX: Thank you, Madam Board Member.
I cannot give you a yes or no answer because it's an incomplete question.

MR. PAGNI: Would any of your opinions change if you had the benefit of understanding that the water would not be stored out of priority in any of the reservoirs as sought in these change petitions and applications?

CO-HEARING OFFICER DODUC: Mr. Van Zandt?

MR. VAN ZANDT: I think this has been covered by Mr. Palmer in his cross.

MR. PAGNI: I would disagree. Mr. Palmer never asked whether his opinions would change if he understood these facts. It seemed to me in some of the cross-examination it wasn't clear whether Mr. Knox had a full understanding of the facts as they exist on the river system. So I'm just asking him whether now that he has the benefit of that information his opinions would change today.

CO-HEARING OFFICER DODUC: And his answer, I'm sure, would be no, so the objection is sustained.

Please move on, Mr. Pagni.

MR. PAGNI: In rendering your opinions were you aware of that neither the change petitions nor the applications seek to alter the Floriston Rate regime?
DR. KNOX: Sir, again, not on their face they don't, but through implementation of TROA it would have that effect.

MR. PAGNI: There has been testimony that these change petitions and applications will not change the Floriston Rate regime. My question to you is if that testimony is accurate, does that alter your opinion?

MR. VAN ZANDT: I'm going to object because this was covered by Mr. Palmer in particular.

MR. PAGNI: The purpose of the question, this is an expert who has been brought in. I'm trying to determine how objective his expert opinion is.

CO-HEARING OFFICER DODUC: The objection is sustained. Move on, Mr. Pagni.

DR. KNOX: Pagni. That's okay.

In rendering your opinions were you aware that portions of the Truckee River Agreement are in fact incorporated into TROA?

DR. KNOX: Yes, Mr. Pagni, it's my understanding there are portions of the Truckee River Agreement incorporated into TROA.

MR. PAGNI: I have no further questions.

CO-HEARING OFFICER DODUC: Thank you.

Mr. Taggart?

MR. TAGGART: Thank you.
CROSS-EXAMINATION BY MR. TAGGART
FOR CITY OF FERNLEY

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
movement of a senior right or the movement of a water right, let's say, to keep it simple, into the reservoir, and it's the act of moving that water right and altering historic practice that's causing the injury?

DR. KNOX: Perhaps it would help if I gave you my definition of what injury is?

MR. TAGGART: I don't think it would. I'm trying to be as clear as I can.

I'm confused about whether it's the movement of water rights from Truckee Meadows into these reservoirs through the alteration of the flow of the river, in your opinion, if that's the genesis of your opinion on injury, or whether it's simply the decision to increase capacity for storage in an upstream reservoir. Those are two separate decisions that have to be made.

So is it both or is it only one?

DR. KNOX: Mr. Taggart, I'll try to address those in the sequence that was posed.

In terms of the water that is moved from one reservoir to the next, I would need to look and see at what was the source of supply of that water in that original reservoir. Was water being stored under priority and was water available for storage in the original point.

Then you wish to move it to the second one.
The first test on that is if there was water that would have been moved, if it was physically and legally available for storage, it may be moved as an alternate point of storage if said change does not diminish — that's the test for injury — the water that would have, absent that action, flowed down to meet a downstream water right demand.

In regards to the second aspect, the actual physical storage of reservoir, in and of itself that does not constitute injury, again, if that water that is being stored would not be necessary to meet a downstream demand.

MR. TAGGART: When did you leave the Colorado State Engineer's office?

DR. KNOX: Approximately, July 14th, 2008.

MR. TAGGART: And how many times have you testified as an expert about water management outside the state of Colorado?

DR. KNOX: In terms of days or cases?

MR. TAGGART: I'm asking since you left the Colorado Attorney General's office -- I mean State Engineer's office?

DR. KNOX: Thank you for the clarification.

MR. TAGGART: How many times have you testified as an expert of water management outside of the state of
Colorado?

DR. KNOX: None that I can recall.

MR. TAGGART: And you mentioned before that you had had conversations with the Nevada State Engineer or someone in the State Engineer's office about TROA. When was the last time you had conversations like that?

DR. KNOX: I'm sorry, Mr. Taggart, I would ask you to repeat that question. I incorrectly stated testimony since I left the employment of the state of Colorado. I did testify on behalf of the state of Colorado in regards to some Republican River Interstate Compact litigation upon their request.

I apologize. Would you repeat the last question.

MR. TAGGART: I wanted you to answer when was the last time you had conversations with people in the Nevada State Engineer's office about TROA?

DR. KNOX: Sir, prior to July 14th of 2008. I do not recall the exact date.

MR. TAGGART: Do recognize, having reviewed the documents that you listed in your expert report, that the Truckee River is in essence a document driven river, it's driven by -- the flows in the river are controlled by legal agreements and decrees?

DR. KNOX: I never heard of it in that
terminology, but most of the river systems that I've administered and worked in you could say that. For the Colorado they call it the law of the river. There is an entire body of law.

MR. TAGGART: So would you agree with me or not?

DR. KNOX: I think that's a fair characterization.

MR. TAGGART: And when you've testified before as an expert wouldn't you agree that you had far more experience in the subject matter you're testifying about than you have here today? And I'll specify that you had 20 years of experience in Colorado when you were testifying on behalf of the state of Colorado?

DR. KNOX: Sir, certainly I have more understanding of Colorado river issues, but my opinions here are based upon the composite of my ability to read decrees and testimony over now 26 years.

MR. TAGGART: And how many hours did you spend in preparation for making the opinions that are included in TCID-276B?

DR. KNOX: That's a bit of a loaded question, because they were billable hours, but I do not know at this point.

MR. TAGGART: Was it more than a hundred?
DR. KNOX: I don't know.

MR. TAGGART: Was it more than 50?

DR. KNOX: Yes.

MR. TAGGART: So wouldn't you agree that your exposure to the issues that you're testifying about is rather limited in comparison to the other experts that have testified here today or during this hearing, I should say?

DR. KNOX: I will admit that I do not have the tenure of Mr. Shahroody and others, yes.

MR. TAGGART: And how did you determine what documents to review? What steps did you go through to complete that review? Were the documents provided to you by counsel?

DR. KNOX: Some were.

MR. TAGGART: Did you find documents on your own investigation?

DR. KNOX: Yes.

MR. TAGGART: Did you visit the Nevada State Engineer's office and search his files?

DR. KNOX: No.

MR. TAGGART: Did you search the files of the California Water Resources Control Board in Sacramento?

DR. KNOX: No, I was provided those documents.

MR. TAGGART: And those were provided to you by
counsel?

DR. KNOX: Yes, in addition to those from Nevada.

MR. TAGGART: Don't you think in order to develop an independent opinion about a subject you have to collect the documents independently as an expert and find as much information about the subject before you're willing to offer an opinion?

DR. KNOX: Oh, no.

MR. TAGGART: Okay. Now, you indicated that --

DR. KNOX: Because the documents I received were --

CO-HEARING OFFICER DODUC: One at a time.

DR. KNOX: I apologize.

MR. TAGGART: You indicated that you are familiar with the Newlands Project, correct?

DR. KNOX: I have an understanding of it, yes, Mr. Taggart.

MR. TAGGART: Are you familiar with the Carson Division and the Truckee Division of the Newlands Project?

DR. KNOX: Yes.

MR. TAGGART: And do you know which division Fernley is in?

DR. KNOX: I've been to Fernley. I don't know
with absolute specificity.

MR. TAGGART: Do you know if Fernley owns water rights in the Newlands Project?

DR. KNOX: That is my understanding, yes.

MR. TAGGART: Did you review any documents to create that understanding, or are you relying on statements of others?

DR. KNOX: Yes, including your witness.

MR. TAGGART: Yes, you did rely on documents?

I'm a little confused about your answer. Let me restate the question so it's very clear.

Did you do an independent review of documents in order to determine whether Fernley owns water rights in the Newlands Project?

DR. KNOX: No, sir.

MR. TAGGART: Now, you indicate that you reviewed the EIS and the EIR, correct?

DR. KNOX: The 2008 version, yes.

MR. TAGGART: In opinion number 11 you state that the interests of approximately 3,000 owners of water rights within the Newlands Project were not included in TROA, right?

DR. KNOX: Yes, sir, I state that.

MR. TAGGART: Well, based upon your review of the EIS/EIR, how does that document address impacts to
the Truckee Division?

DR. KNOX: It doesn't.

MR. TAGGART: Are you aware of a section of the EIS/EIR that analyzes the impacts to groundwater in the Truckee Division from TROA?

DR. KNOX: I did read that, but it does not address it in the rigorous analysis that I consider to be sufficient.

MR. TAGGART: So it does -- earlier you said it doesn't address impacts in the Truckee Division, and are you saying that it does address impacts in the Truckee Division, it just doesn't do it rigorously enough?

DR. KNOX: Mr. Taggart, "address impacts" can have two different connotations.

Does it cite or have narrative within the EIS?

Yes. Does it address it in terms of remedying those impacts? No.

MR. TAGGART: But you will concede that the EIS considered impacts to the Truckee Division of the Newlands Project, will you not?

DR. KNOX: I will concede it states that, yes.

MR. TAGGART: Now, you also have reviewed TROA, correct?

DR. KNOX: Yes, sir.

MR. TAGGART: And again you make this statement
that TROA does not include the interests of the 3,000 
owners of water rights.

 Doesn't TROA include Fernley as a party that 
can store water?

 DR. KNOX: That is my understanding. It 
includes that.

 MR. TAGGART: Did you review that provision of 
TROA?

 MR. TAGGART: I read the entire document.

 MR. VAN ZANDT: I'm going to interject here. 
Though this is very interesting about the City of 
Fernley, there is nothing in the change petitions or the 
applications before the Board that implicates the City 
of Fernley. So inquiring into how the EIS/EIR and/or 
TROA treats the City of Fernley I don't think is 
assisting the Board.

 CO-HEARING OFFICER DODUC: Relevance, 
Mr. Taggart?

 MR. TAGGART: The opinion is specifically 
stating that TROA does not include the interests of 
Newlands Project water right owners. TROA in fact does, 
and I'm asking -- I think the witness is being 
inconsistent, his opinion is inconsistent with the 
document, and I want to ask him a few questions about 
that.
CO-HEARING OFFICER DODUC: I'll allow, but please be very direct and get to the point.

MR. TAGGART: So wouldn't you agree that the fact that TROA includes a storage mechanism for Fernley is one way that TROA addresses the interests of Newlands Project water right owners?

DR. KNOX: Sir, I don't know that.

MR. TAGGART: Now, are you aware that TROA includes a right for Newlands Project storage?

DR. KNOX: Newlands Project storage or Newlands Project credit storage?

MR. TAGGART: Newlands Project credit storage.

DR. KNOX: Yes.

MR. TAGGART: And wouldn't you agree that in that regard TROA includes a mechanism for the interests of water right owners in the Newlands Project to store water?

DR. KNOX: It speaks for itself.

MR. TAGGART: I have a question about opinion number 1, and it's a simple one. You have an opinion and then you have a term and a condition. My understanding from this is from the first sentence in your term and condition, that if that term and condition were applied to the applications and licenses that you would not object to their being
issued. Is that a true statement?

DR. KNOX: My intent was to follow what I thought was the directions from the Board and to render an opinion, and in subsequent order, also to offer terms and conditions.

So my opinion would be that these petitions and applications be denied. But absent that, the terms and conditions are offered for your consideration as a form of relief that I consider to be appropriate and reasonable.

MR. TAGGART: So do you agree with my statement? Was it a true statement or not, that if this condition were applied then would you not object to the granting of the applications and the licenses?

MR. VAN ZANDT: That's asked and answered.

MR. TAGGART: I don't think he did.

DR. KNOX: I'm sorry, madame, would you like me to answer?

CO-HEARING OFFICER DODUC: Would you like to expand on your answer?

MR. TAGGART: I try pose my questions for yes or no to make this fairly quick.

But is that a true statement, that if this condition is applied you do not object to the granting of the applications and the licenses?
DR. KNOX: It would help.

MR. TAGGART: Okay, that's fair.

And with respect to opinion number 2, based on your -- and do you consider yourself now to be an expert on the Truckee River water management?

DR. KNOX: Yes.

MR. TAGGART: Under the Orr Ditch Decree, what priorities are junior to Claim 3?

CO-HEARING OFFICER DODUC: Mr. Van Zandt?

MR. VAN ZANDT: You're testing his memory on the 17,000 water rights that are in --

CO-HEARING OFFICER DODUC: Is that an objection?

MR. VAN ZANDT: That's an objection.

CO-HEARING OFFICER DODUC: The objection is overruled.

DR. KNOX: May I ask just a point of clarification? Did you say which ones are junior to the Orr Ditch Decree?

MR. TAGGART: To Claim 3.

DR. KNOX: Within the Truckee River system?

MR. TAGGART: In the Orr Ditch Decree. The Orr Ditch Decree has a series of claims. One of them is Claim 3. You've testified about Claim 3. You've said that Claim 3 cannot be harmed.
So what rights are junior to Claim 3?

DR. KNOX: What I usually do in terms of administration is rather than misspeak, I turn to the decree. May I do that?

CO-HEARING OFFICER DODUC: You may do that.

MR. TAGGART: You would agree, would you not, as you're doing that, you would agree that understanding the relative priority is important to the foundation of the opinion that you provided here today, wouldn't you?

DR. KNOX: Yes.

MR. TAGGART: And do you know what the priority date is of Claim 3?

DR. KNOX: July 2nd of 1902.

MR. TAGGART: Okay.


Starting with Claim No. 4, it appears that Lake Tahoe storage -- and I'm trying to expedite this, ma'am -- was the 21st day of May, 1903.

MR. TAGGART: And let me ask you a more specific question so we can expedite this.

The water rights in the Truckee Meadows, do you have a general understanding of whether they are senior or junior to Claim 3?
DR. KNOX: I have a general understanding that they are senior.

MR. TAGGART: Okay. And Lahontan Reservoir, does that have a storage right under the Orr Ditch Decree?

DR. KNOX: Yes.

MR. TAGGART: And is that a carryover storage right?

DR. KNOX: I do not recall that it has the term carryover. It has the term storage.

MR. TAGGART: And you indicated earlier that it's customary for carryover to be included in a term in order to establish carryover storage, correct?

DR. KNOX: It is customary under more current adjudicatory processes to have that term, yes.

MR. TAGGART: In opinion number 3, my question is this: If an application was applied before the Nevada State Engineer for storage of the Tribe's unappropriated water in Stampede Reservoir -- do you understand my question so far?

DR. KNOX: Yes, sir.

MR. TAGGART: And if that application were granted prior to TROA becoming effective -- do you understand my question?

DR. KNOX: Yes.
MR. TAGGART: Then would your concern raised in this opinion be addressed?

DR. KNOX: Mr. Taggart, if I understand this, you use the word, I think, "if" three times. But to make sure I understand, if the Tribe does seek a petition before the Nevada State Engineer to include upstream storage, to short-circuit this, if you will, and if it was allowed by the Nevada State Engineer.

What I didn't hear you say is how that would parlay before storage before this Board. So I'm missing something here. Are you inferring that it receives full administrative and what I'm terming adjudicatory approval? Would it change my opinion?

MR. TAGGART: Well, your opinion here is specifically addressing the procedure before the Nevada State Engineer. It says at the end that nothing has been filed to the Nevada State Engineer as required by law. So I'm specifying a question with the Nevada State Engineer. It seems like your hang-up here is if there is not a Nevada right to store the unappropriated water that's a problem.

And what I'm asking you is if there was a right under Nevada law to store, wouldn't that take care of the concern you have in this opinion?

DR. KNOX: As to the first part, yes, it is a
problem. And if it was approved, it would go a long way
to alleviating my concern.

MR. TAGGART: In opinion number 4 -- and you've
spent a lot of years in Colorado managing water systems,
right?

DR. KNOX: Twenty-six.

MR. TAGGART: And during that time you're
aware, are you not, that often -- or I won't often --
sometimes a person will not use their entire water
right?

DR. KNOX: Certainly.

MR. TAGGART: And if they don't use their
entire water right, it may become available to someone
else even though that person might not be in priority,
right?

DR. KNOX: Yes. If they're downstream in
particular.

MR. TAGGART: Now, wouldn't you agree as a
concept that the senior water right holder has the right
to fully utilize their water right regardless of whether
they have not fully utilized it for a period of years?

DR. KNOX: That's a general precept. But,
Mr. Taggart, most states have rules of abandonment and
forfeiture that can get quite naughty and intricate.

MR. TAGGART: And I understand that. And
without considering abandonment and forfeiture, I'm asking a very simple question here.

The argument is being made that upstream water right users have not fully utilized their water right and are now intending to fully utilize their water right. And if that's true, what's wrong -- isn't that allowable under the basic principles of western water law as you understand them?

DR. KNOX: I'm a little bit hung-up because I'm not sure that I would agree that the characterization is correct that we're alleging that they haven't used their existing water right. It's the expansion that's of concern.

MR. TAGGART: So you would agree then as a general precept, though, that a senior water right user can capture their water right and use it even if someone else has been benefitting from that nonuse, assuming they haven't eclipsed the abandonment and forfeiture provisions?

DR. KNOX: I have to always insert the claim as long as they're not using the water and wasting it.

MR. TAGGART: In opinion number 6 you state that -- and at the beginning of your opinion you talk about how TROA is not in effect. And it seems like you're saying that this ought to be handled by the Orr
Ditch Court first and then come back to the State Board here in Sacramento.

Is that a fair characterization of part of your opinion?

DR. KNOX: Yes.

MR. TAGGART: Now, wouldn't it be just as plausible to argue if the parties went to the Orr Ditch Court first that you have to come to the state boards before you can go to the Orr Ditch Court?

DR. KNOX: No.

MR. TAGGART: Okay. And in opinion number 7 you make the statement that exchanges would cause injury. Exchanges under TROA would cause injury, and I wanted to ask you, what specific exchanges are you talking about?

DR. KNOX: Sir, did you say opinion 7?

MR. TAGGART: Yes.

DR. KNOX: Because I do not see the word exchange in that.

MR. TAGGART: Well, you make the point, I think, that no additional review -- well, there would be a circumvention of State procedure if these applications were granted.

Is that a fair characterization of your opinion?
DR. KNOX: I apologize. You lost me.

MR. TAGGART: It says: Moreover, the ability of the applicant to circumvent the change of water right process in California in the future.

I'm asking you about that particular opinion that you have.

DR. KNOX: I do see those words, yes.

MR. TAGGART: So explain to me how that will occur under TROA?

DR. KNOX: My understanding of TROA is it would allow this type of storage rediversion at multiple points. But beyond that, I'm not sure I can answer your question.

MR. TAGGART: Okay. So I'm clear about your opinion number 8, I want to ask you a little bit about what you've done in Colorado.

In Colorado it's customary to grant storage water rights, is it not?

DR. KNOX: Certainly it occurs, yes.

MR. TAGGART: And there is nothing inconsistent with the priority system under prior appropriation to allow for the storage of water as long as there is no injury, right?

DR. KNOX: That's the intent.

MR. TAGGART: And that can even happen on a
fully-appropriated system, can't it?

DR. KNOX: In Colorado?

MR. TAGGART: Yes.

DR. KNOX: Yes.

MR. TAGGART: Okay. And in getting back to the first couple questions I asked you, it sounds to me like it's not the approval of additional storage, basically saying 126 can now be 226, that's not what you're concerned about causing the injury; it's the actual moving of water rights from a historic use and historic practice to actually putting them into that reservoir to create that difference between 126 and 226.

Is that a fair statement?

DR. KNOX: There again, there are two components to this. One is the actual exchange and substitution of water in Stampede, to borrow your example. That water that would have been released to downstream rights is now being claimed for storage in Stampede, and I don't know that that water has been proven to be physically or legally available.

The other part of it in terms of storage from 126 up to the 226-5, difference in Colorado, my understanding is there a precept against allowing that application if a stream is fully appropriated in California.
MR. TAGGART: Well, it's true, is it not, that in Colorado you presided over the changes to historic operations of water systems in order to accommodate more modern needs on those water systems?

DR. KNOX: Absolutely, always in terms and conditions that I'm advocating herein.

MR. TAGGART: And in opinion number 10 you're talking again about this chart from the EIS and the EIR that we've all seen many times, and you're citing to that for the opinion regarding shortages.

What other evidence did you rely upon for creating your opinion about shortages other than the EIS?

DR. KNOX: Review of TROA itself, the decrees that specify the priorities of relative water rights in this system. Looking at the maps and the general hydrology and physical characteristics of the system -- in other words, how the plumbing works -- was part of it as well.

MR. TAGGART: And opinion number 11, you have inserted the term Public Trust Doctrine into an opinion, so I have to ask you about that.

You understand that the Public Trust Doctrine is often considered one that is state based, like it may differ from state to state how the Public Trust Doctrine
DR. KNOX: That is my understanding, yes, Mr. Taggart.

MR. TAGGART: Well, are you asking the California Water Resources Control Board to apply the California Public Trust Doctrine to the administration of Nevada water rights that are under the administrative jurisdiction of the state of Nevada?

DR. KNOX: With due respect, I'm not sure what your role and jurisdiction is as it extends across state boundaries. My opinion is based on the fact that you have petitions and applications before you. The Public Trust Doctrine, as you choose to interpret it, is a matter for you to consider and weigh in this proceeding as you deem appropriate.

MR. TAGGART: When you were involved in bistate agreements in Colorado, you developed an opinion, I'm sure, that it's important for one state to respect the neighboring state's jurisdiction over water resources, didn't you?

DR. KNOX: I haven't made that opinion formal, but if you're asking me should one state honor another, absolutely. Sincere -- well, significant issues occur, violations of compacts --

MR. TAGGART: That would be a lot better than
original jurisdiction actions in front of the United States Supreme Court like Colorado is unfortunately involved in quite a few of.

DR. KNOX: I've only been involved in two actions, and that's enough.

MR. TAGGART: Do you know if there is a compact between Nevada and California on the Truckee River?

DR. KNOX: It's my understanding that there has been formulation of those, but it's not in current effect as ratified in its current state by either legislative body, Congress or signed into law by the President, which is necessary. No.

MR. TAGGART: Thank you. Don't you think it's a good idea to have the compact ratified or have it consummated through TROA?

DR. KNOX: Not necessarily. And my opinion for that is based on the fact that as I read Public Law 101-618, it's my understanding in Subsection 204(d) there are compliance issues there. So you have some form of congressional action describing that the states should adhere to that.

It's my understanding from previous testimony from Mr. Sarna and others that the State of California has agreed to adopt that, which is common sense.

I know that there's other informal memorandums
of agreement and understanding for the distribution and administration of water resources that do not rise to the compact level. I personally was informed of the negotiation for one between the State of Colorado and Utah on Paw Creek. So you craft the need to meet the circumstances.

MR. TAGGART: Did you review State Engineer Ruling 6035 as part of your preparation for testimony here?

DR. KNOX: Mr. Taggart, that does not seem familiar to me.

MR. TAGGART: Okay. This is the ruling that addresses the change applications filed by Truckee Meadows Water Authority to store Nevada water rights in the reservoirs that we are addressing here today.

DR. KNOX: No, sir, I did not review that.

MR. TAGGART: So would it surprise you to learn that the State Engineer of Nevada has already ruled on whether the movement of these water rights would cause an impact to a downstream water right owner?

DR. KNOX: I don't know the answer to that.

MR. TAGGART: So you haven't reviewed the testimony that was submitted to the Nevada State Engineer regarding the impact of the TROA change applications in preparation of your testimony?
DR. KNOX: No.

MR. TAGGART: Well, if the State Engineer has already made a determination, don't you think it's important for you to know that if he's made a determination specifically on an issue that you're providing an opinion on?

DR. KNOX: Sir, I might find that interesting. It doesn't sway my opinion, and I don't know where I would stop reviewing documents that I would find interesting.

MR. TAGGART: Well, would it cause you concern if your opinion was directing California to make a decision that was inconsistent with the state that has administrative authority over those water rights?

DR. KNOX: Is that what happened, Mr. Taggart?

MR. TAGGART: I asked you a hypothetical, sir.

DR. KNOX: If I understand, your hypothetical is would it concern me if the Nevada State Engineer issued a decision that he or she knowingly was in conflict with Public Law 101-618?

MR. TAGGART: Well, that wasn't my question, sir.

DR. KNOX: Or the compact?

MR. TAGGART: You don't know about Ruling 6035, right? You already answered that.
DR. KNOX: I'll stay with my answer. The answer is no.

MR. TAGGART: So you don't know that the State Engineer already reviewed a component of the TROA change applications. You don't know that, right?

DR. KNOX: That's correct.

MR. TAGGART: And so you don't know whether your opinion is inconsistent with the Nevada State Engineer's opinion, do you?

DR. KNOX: You're giving me a hypothetical.

MR. TAGGART: That's not a hypothetical. You do not know whether your opinion is inconsistent with the State Engineer on whether the change applications in Nevada will impact TCID?

DR. KNOX: You're right, I don't know.

MR. TAGGART: And you're offering an opinion here today that moving water in these upstream reservoirs will impact TCID, right?

DR. KNOX: Yes, I am.

MR. TAGGART: Okay. I have no further questions.

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

Redirect, Mr. Van Zandt?

I'm sorry, let me check real quickly.
Mr. Soderlund, I assume you have no cross?

MR. SODERLUND: No.

CO-HEARING OFFICER DODUC: And Mr. Mixson, I assume you have no cross?

MR. MIXSON: No cross.

CO-HEARING OFFICER DODUC: Thank you.

Mr. Van Zandt.

MR. VAN ZANDT: Thank you. I just have a few, I think.

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REDIRECT EXAMINATION BY MR. VAN ZANDT

FOR TRUCKEE CARSON IRRIGATION DISTRICT and CHURCHILL COUNTY

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MR. VAN ZANDT: Dr. Knox, I think you were asked by Mr. Palmer about Stampede and Prosser Reservoir and whether they were mentioned in the Truckee River Agreement, and I think you answered yes.

Did you misunderstand what Mr. Palmer had said?

DR. KNOX: Mr. Van Zandt, that’s my -- if I said that, that’s incorrect, because I thought you said Stampede and Prosser in relationship with the Truckee River Agreement, which was 1935, and these occurred in 1962 or 1970, respectively.

So no, it would have been the Truckee River
Operating Agreement. I apologize for that error on my part.

MR. VAN ZANDT: And I also think Mr. Palmer asked you about the McCarran Amendment and associating that with general stream adjudications and the authority of the State to act on some federal water rights.

Were you aware of another authority that might allow for a state to administer federal water rights that are held in title by a federal agency?

DR. KNOX: A couple, and I need to share this is testing my memory.

But one is United States vs. The City and County of Denver. There may be others that I'm not familiar with. But basically as a practicing water administration official in collaboration with at that time the Colorado Attorney General's office, it was my understanding that the McCarran Amendment extended towards the administration of the water resources, of federal water rights to be on equal plane, if you will, with other water rights.

They do not retain a superiority, nor do they release their authorities. They're operated within -- integrated in a seamless manner within the priority system.

MR. VAN ZANDT: And do you have an
understanding of whether or not the Reclamation Act of 1902 addresses whether or not a federal agency must comply with state water law?

DR. KNOX: Again, I don't remember the exact paragraph, but it's my understanding that that was part of the 1902 Reclamation Act as well.

MR. VAN ZANDT: You were asked by Mr. Pagni if the Boca change petitions increase the amount of water stored, and you answered his question but then you wanted to give a reason for why you gave that answer. Can you remember the question and why it is you believe that it enlarges or increases the amount of water stored?

DR. KNOX: As I recall the question, we have the existing storage water rights that are vested to Boca Reservoir, but under TROA there would be additional waters sought to be stored in that vessel that would be in excess of their existing water right.

MR. VAN ZANDT: I believe Mr. Taggart asked you about how many times you've testified since you left the employment at the State Engineer's office in Colorado. Can you just give the Board an idea of how many times you've testified as an expert in your entire career?

DR. KNOX: Ms. Van Zandt, in courts of law and adjudicatory proceedings? I would prefer to not include
testimony before general assembly and those others, because I just don't know. But in the range of 55 to 60 different trials. I don't know how many hundreds of days.

MR. VAN ZANDT: We had mention of the case of Nevada vs. U.S. and we would like to add that as an exhibit for the convenience of the Board. TCID Exhibit 305. I believe we have copies here. So I believe the Board could take administrative notice of that. It was mentioned in the testimony. It was mentioned in Dr. Knox's direct testimony as well.

That's all the questions I have.

CO-HEARING OFFICER DODUC: Thank you, Mr. Van Zandt. Recross, Mr. Palmer?

MR. PALMER: No questions. Thank you.

CO-HEARING OFFICER DODUC: Recross, Mr. DePaoli?

MR. DEPAOLI: No questions.

CO-HEARING OFFICER DODUC: Recross, Mr. Pagni?

MR. PAGNI: No questions.

CO-HEARING OFFICER DODUC: Recross, Mr. Taggart?

MR. TAGGART: No questions.

CO-HEARING OFFICER DODUC: Thank you.

Ms. Mahaney?
QUESTIONS BY THE BOARD AND STAFF

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?
MR. VAN ZANDT: I would. And I don't know what your pleasure is, if you'd like to go through each one of the exhibits that have been mentioned or included in the direct testimony, just enumerate those one by one?

CO-HEARING OFFICER DODUC: I think you can refer to them by reference rather than go through every single one of them. Let me put it this way. Is there any exhibits that you submitted that you do not wish to move into evidence?

MR. VAN ZANDT: No. We can move the entire body of the exhibits that we have. I just want to make sure that the exhibits that we referred to in cross that were in either the joint exhibits, the USBR exhibits, that those get included ultimately in the ones that are admitted. But TCID's exhibits, I'd move that they be admitted at this point in time.

CO-HEARING OFFICER DODUC: Objections? Any objections?

MR. PALMER: Yes.

CO-HEARING OFFICER DODUC: Mr. Palmer.

MR. PALMER: Sort of jointly we have gone through this, so I would ask any of the others to correct me or add if I'm missing something.

CO-HEARING OFFICER DODUC: Okay.

MR. PALMER: I'll just start off.
The first one that I have on our list for TCID exhibit -- I guess one thing before that. We were going to request -- I don't know if Mr. Van Zandt has a preference, but as he mentioned there are a number of the TCID exhibits that are the same as the Applicant/Petitioner's joint exhibits. And we would prefer to refer to our exhibit. I don't know if he has a preference for that as opposed to having duplicates.

CO-HEARING OFFICER DODUC: I don't have a preference. Go ahead and do that.

MR. PALMER: Then TCID Exhibit 143 is the first one I have that we have an objection to. There is no indication of its authenticity. It wasn't sponsored by any other witnesses. We can't tell exactly what it is or what it's intended to report.

CO-HEARING OFFICER DODUC: All right. Next objection?

MR. TAGGART: TCID-145, similar basis.

CO-HEARING OFFICER DODUC: Just go ahead and continue to list your objections.

MR. PALMER: I'll just make a list then.

TCID-146, 147 --

CO-HEARING OFFICER DODUC: Mr. Palmer, do me a favor, and also as you're listing the exhibits, also provide your reasons for the objection.
MR. PALMER: So --

CO-HEARING OFFICER DODUC: We heard your reasons for 143 and 145.

MR. PALMER: 146, same reason. 147, I believe, is a duplicate of 146. So I'd just object that it's a duplicate. We've entered our objection already. I just wanted to restate that to 148, 149 through 160, the memoranda from Bill Sikonia and others, that they were not here to testify. They were not authenticated and we've made that objection.

CO-HEARING OFFICER DODUC: I recall that.

MR. PALMER: Exhibit 163 falls in that category as well. That's farther down, another Bill Sikonia. Exhibit 164 is a duplicate. It comes up later. I'm sorry. It's the OCAP. We have that in our joint exhibits. It's also twice in the TCID exhibits.

Again, Exhibit 165 is contained in State Board Exhibit 7. That's the comment letters on the EIS. There's several of those, and so they're duplicates.

CO-HEARING OFFICER DODUC: Okay.

MR. PALMER: I'd object to 166, relevance and authentication. Same for 168, 169, 170, 171, 172, 173.

CO-HEARING OFFICER DODUC: And all that is relevance and authentication?

MR. PALMER: Yes.
MR. PALMER: Same with 174.

And this next set is a similar objection, 175 through 180. Next, similar on the model, same objection as before, 182. And then these next exhibits are again already in Exhibit 7, the comment letters on the EIS.

Exhibit 184, 185, 186, 187, I object to 188 on relevance. Same with 192, relevance.

215 -- I'm sorry, 213, I object to that. That's a Complaint filed in a recent action by TCID. I don't know the relevance for that. It's a pleading. It's legal opinion.

MR. PALMER: 214 is the same as 145, we mentioned that before. I'm sorry, 214. 214 is the same as 145. Object to 215, the same as before, relevance, authentication. 216, the same.

CO-HEARING OFFICER DODUC: Okay.

MR. PALMER: Same, relevance and -- yes. 217, same objection. 218, authentication as well as relevance. Same for 219.

221 and 222 are covered by the joint exhibits filed by the applicants. Exhibit 223, same thing, relevance, authentication. Same with 224, 225,
relevance.

226, they're excerpts from Exhibit 7 which is already in evidence.

227 is a Truckee River Operating Agreement that's already an exhibit by applicants/petitioners.

Object to 237 and 238 on relevance. 242, relevance and authentication. 243 is a duplicate of 159. Exhibit 262 is the same as Exhibit 140.

Object on relevance grounds and authentication to 270 and 271. And 272 and 273, those were retracted by Mr. Mahannah. Those are referenced in the two pages he deleted from his report that reference these exhibits. And we object to those on relevance, authentication. There has been no sponsor of those. But I think he withdrew them anyway. I'm not sure about that, but that's how I understood his testimony.

For whatever it's worth, the 277, 278 and 279 are in the Board exhibits. They're part of the applications, the original applications for these reservoirs we're talking about today.

And we've already entered our objection to 280. I believe that's all of what we've seen so far to 282.

CO-HEARING OFFICER DODUC: Okay. Mr. DePaoli, anything to add?
MR. DePAOLI: Yes. I would like to add an objection to -- I think it's 43. Excuse me. 44 and 45 on relevance.

CO-HEARING OFFICER DODUC: That's 43, 44 and 45?

MR. DePAOLI: Not 43, just 44 and 45 on relevance.

CO-HEARING OFFICER DODUC: Okay.

MR. DePAOLI: And I would also like to add a hearsay objection to all of the exhibits that Mr. Palmer was referring to as well as authenticity and relevance. There was one other one or a couple other ones that I wanted to add.

210. And he may have covered 210; I could not hear everything he said. But would I like to object to 210 on relevance. It's comments to an administrative rule.

And I would renew my objection to all of the exhibits that were the subject of the Motion to Exclude. And I may have missed this, but did Mr. Palmer object to 272 and 273?

CO-HEARING OFFICER DODUC: Yes, he did.

MR. DePAOLI: I think that was all that I had in addition to what he had.

CO-HEARING OFFICER DODUC: Thank you.
Mr. Pagni?

MR. PAGNI: I would join in those, and the one other comment I would make is Exhibits 198 through 204, these are the applications and the protests. I don't know that those are necessarily evidence; they're more the pleadings that are in front of the Board. I don't consider those evidence. That would be all that I would add.

CO-HEARING OFFICER DODUC: Okay. Mr. Taggart?

MR. TAGGART: Just join in all those objections.

CO-HEARING OFFICER DODUC: Okay. Mr. Soderlund, any additional objections? Hearing none, Mr. Mixson?

MR. MIXSON: No. The Tribe joins in all the objections.

CO-HEARING OFFICER DODUC: Thank you. Gentlemen, I took notes as quickly as I could, but since it is an extensive list, I'm going to request that you submit in writing those objections to me, the exhibits as well as the grounds for your objection.

And let me ask Mr. Van Zandt. Mr. Van Zandt, providing that these are indeed duplicates, your reason for including them in the record?

MR. VAN ZANDT: Well, of course we didn't know
what exhibits were being proffered by the applicants and
petitioners, so they're there to make sure that those
documents are placed before the Board. If there is a
duplicate that's a joint exhibit or USBR or TMWA exhibit
that gets admitted, then we would withdraw those as our
proffered exhibits by TCID.

I also wanted to add Churchill County has one
exhibit, I believe, that I didn't mention, Churchill
County 1.

CO-HEARING OFFICER DODUC: You're moving
Churchill County as well.

MR. VAN ZANDT: We move that as well into
evidence.

CO-HEARING OFFICER DODUC: Actually, we already
accepted Churchill into evidence. That got by before
they objected.

MR. VAN ZANDT: And I wanted to ask a question.
They submit it in writing. Should I then provide a
response to that? Because otherwise I'll have to go
through these one by one and provide a response on the
record to them. That may take some time.

CO-HEARING OFFICER DODUC: Yes, we will want
you to respond in writing.

And Ms. Mahaney will outline sometime tomorrow,
I think, at the conclusion of our hearing -- we will
conclude tomorrow -- some procedural matters, and we'll
include some timelines associated with these submittals
as well, unless you want them today.

    SENIOR STAFF COUNSEL MAHANEY: No.
    MR. VAN ZANDT: That would be fine.
    CO-HEARING OFFICER DODUC: Mr. Van Zandt, what
about the exhibits we received from you this afternoon?
    SENIOR STAFF COUNSEL MAHANEY: What we want to
do is clarify whether the exhibits that you have
submitted this afternoon are part of your entry right
now aside from rebuttal.
    MR. VAN ZANDT: I think the ones that were
submitted this afternoon for the most part are
associated with the rebuttal reports. There were two
rebuttal reports, one by Dr. Knox and one by
Mr. Mahannah. I think most of the exhibits were
associated with Mr. Mahannah's rebuttal report, except
for 305 which is the Nevada vs. U.S., so we move that
into admission right now. But the other ones, I
believe, are just rebuttal.
    SENIOR STAFF COUNSEL MAHANEY: Well, actually,
there are the transcripts. I just wanted to make sure
that's included within.
    MR. Van Zandt: Oh, yes.
    CO-HEARING OFFICER DODUC: So the two
transcripts are included?

MR. VAN ZANDT: Yes, because those will be included, yes, in the direct testimony of Mr. Mahannah.

CO-HEARING OFFICER DODUC: And so for the rebuttal testimony received is TCID-287, so we'll hold off on that for now, and 288.

MR. VAN ZANDT: Yes.

CO-HEARING OFFICER DODUC: And 289.

SENIOR STAFF COUNSEL MAHANEY: And just to clarify, the transcripts are TCID-202 and TCID-303.

MR. VAN ZANDT: That's correct.

CO-HEARING OFFICER DODUC: All right. I think that does it for your exhibits, Mr. Van Zandt. Okay. At this time, Mr. Palmer, do you want to move USBR's exhibits as well as the joint exhibits into the record?

MR. PALMER: Yes, if it's appropriate to do so now we would, in fact like to move all of the joint exhibits and the USBR exhibits into evidence.

CO-HEARING OFFICER DODUC: Okay. Any objections to that from either Mr. Van Zandt or Mr. Mackedon?

MR. MACKEDON: I have none.

CO-HEARING OFFICER DODUC: None from Mr. Mackedon.
SENIOR STAFF COUNSEL MAHANEY: I do have a clarifying question. We had asked you for some coordinates. Have those been provided yet?

MR. PALMER: No. I can get it. Well, I guess Mr. Parr appears we have copies. I was told we were furiously working on them at lunchtime.

SENIOR STAFF COUNSEL MAHANEY: Right.

MR. PALMER: Do you want to take a minute to figure this out?

CO-HEARING OFFICER DODUC: If you have it, then yes, please, let's take a minute and do that.

MR. PALMER: I just need to find out if we in fact have exactly what you want in the format you want it.

CO-HEARING OFFICER DODUC: Would you prefer to do that tomorrow?

MR. PALMER: If we're going to be here tomorrow, that would be more convenient. Then we can be sure we're getting you exactly what you need in the format you need.

CO-HEARING OFFICER DODUC: Let's do that tomorrow then.

MR. PALMER: Thank you.

CO-HEARING OFFICER DODUC: So we're back to whether Mr. Van Zandt has any objections to USBR and
MR. VAN ZANDT: No, we don't have any objection to those being entered into evidence.

CO-HEARING OFFICER DODUC: Thank you.

So those are moved.

And Mr. DePaoli, I believe you have some additional exhibits?

MR. DePAOLI: Yes. I would like to move all of the TMWA exhibits into evidence along with the new ones which I think have been provided to everyone which have been identified TMWA 5-0, TMWA 5-1 and TMWA 5-2.

MR. VAN ZANDT: These are new exhibits?

MR. DePAOLI: They are the portion of the Lee Bergfeld direct and cross from the Nevada hearing, his qualifications and his report.

MR. VAN ZANDT: We don't have any objection.

CO-HEARING OFFICER DODUC: No objections to that? Seeing none, all right.

Thank you, Mr. DePaoli.

Mr. Pagni, do you have any exhibits to move into the record?

MR. PAGNI: No, I have nothing to add.

CO-HEARING OFFICER DODUC: Mr. Taggart?

MR. TAGGART: We move to admit Fernley Exhibit 1 which was Greg Evangelatos' testimony and with
the attachments to that exhibit all as one exhibit.

CO-HEARING OFFICER DODUC: Any objections to that?

MR. VAN ZANDT: No objection.

CO-HEARING OFFICER DODUC: No objections? Mr. Soderlund?

MR. SODERLUND: Yes, the Department of Water Resources would like to move Exhibits DWR 1 through 5 into evidence.

CO-HEARING OFFICER DODUC: Any objections to that?

MR. VAN ZANDT: No.

CO-HEARING OFFICER DODUC: Seeing none, those are moved.

Mr. Mixson? No objections.

MR. MIXON: The Tribe has no objections.

CO-HEARING OFFICER DODUC: And Mr. Mackedon, did you have any -- no? And Mr. Jardine? Actually, Mr. Jardine -- you represent Churchill County.

MR. VAN ZANDT: Churchill County just had the one that's all been admitted.

CO-HEARING OFFICER DODUC: All right. Anything else?

SENIOR STAFF COUNSEL MAHANEY: As Ms. Doduc said, we will cover some of the procedures for entering
the objections and responses tomorrow, because that was an extensive list and we would like to see it in writing.

CO-HEARING OFFICER DODUC: Okay. And I think we need to take a little break, but after -- before we do, let me confirm with respect to rebuttals, we'll start with Mr. Palmer. Do you anticipate calling rebuttal witnesses?

MR. PALMER: No.

CO-HEARING OFFICER DODUC: Mr. DePaoli?

MR. DePAOLI: I would like to have an opportunity to confer with the other folks that have presented the joint case-in-chief on that question, if we could, since we've just heard --

CO-HEARING OFFICER DODUC: All right. Then why don't we go ahead and take our 10-minute break and when we resume we'll reask the question regarding rebuttal.

MR. DePAOLI: I would appreciate that.

CO-HEARING OFFICER DODUC: Thank you. Let's take a ten-minute break.

(Recess).

CO-HEARING OFFICER DODUC: Mr. Murphey, I believe you have a request. Would you please make that request now.

ENGINEERING GEOLOGIST PAUL MURPHEY: Yes. For
TCID what I'd like is a revised exhibit index in Word version that lists all the exhibits that you recently entered with a description of each. If we get that by tomorrow, that would be great.

MR. VAN ZANDT: Let me understand. You want it in Word, and you said you want a revised description of the exhibits? I'm not sure I understand what that means.

ENGINEERING GEOLOGIST PAUL MURPHEY: Right. Just a description of all the exhibits you recently entered, 287 through 305.

MR. VAN ZANDT: Oh, to add those.

ENGINEERING GEOLOGIST PAUL MURPHEY: Correct. MR. VAN ZANDT: That's not a problem. Thank you.

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

I was going through the joint parties asking if you had rebuttal witnesses. So Mr. Palmer?

MR. PALMER: No.

CO-HEARING OFFICER DODUC: Mr. DePaoli?

MR. DEPAOLI: No.

CO-HEARING OFFICER DODUC: Mr. -- I will get this right once during this hearing. Mr. Pawnee?

Pagnee? Pawnye? Pawnya?
MR. PAGNI: No, I have no rebuttal.

CO-HEARING OFFICER DODUC: I deeply apologize, because my last name is mispronounced all the time, so I should be especially sensitive, and I know I've totally mangled your last name over the days of the hearing, and for that I sincerely apologize.

Mr. Soderlund?

MR. SODERLUND: No.

CO-HEARING OFFICER DODUC: Mr. Mixson?

MR. MIXSON: No.

CO-HEARING OFFICER DODUC: Mr. Taggart?

MR. TAGGART: No.

CO-HEARING OFFICER DODUC: Okay. And that moves us to Mr. Van Zandt.

Ms. Mahaney? I'm allowed to finish, apparently.

Mr. Van Zandt, you mentioned having two rebuttal witnesses. Would this be on behalf of Churchill County and City of Fallon as well?

MR. VAN ZANDT: It will be, yes.

CO-HEARING OFFICER DODUC: Let me check with my counsel.

And before we get to Mr. Van Zandt's rebuttal witnesses, Mr. Palmer, I believe you have some coordinates to enter into the record.
MR. PALMER: Yes. In response to your question, we do have what we think is the final product to offer for you to look at. And what we've done is we have the five hard copies and we have it on a disk. And for each separate change petition and application, each reservoir, we have numbered it a separate joint exhibit starting with joint Exhibit 23 would be Boca, 24 is Independence, 25 is Stampede change petition, 26 is Prosser Creek, 27 is Stampede application and 28 is the Prosser Creek application.

CO-HEARING OFFICER DODUC: And these would be the coordinates requested by Board staff?

MR. PALMER: They are the coordinates requested by staff.

CO-HEARING OFFICER DODUC: Thank you. Any objections? Hearing none -- oh. I tried get it by you, Mr. Van Zandt.

MR. VAN ZANDT: I don't believe we've seen these. I don't have a copy of them.

MR. PALMER: We have copies.

MR. VAN ZANDT: Thank you.

CO-HEARING OFFICER DODUC: How about if you give Mr. Van Zandt a copy first.

MR. PALMER: Okay.

CO-HEARING OFFICER DODUC: Mr. Palmer, if I
understand correctly, these are being submitted as joint parties exhibits, joint exhibits?

MR. PALMER: Yes.

CO-HEARING OFFICER DODUC: Would you also provide Mr. Murphey with an updated Word list of exhibits?

ENGINEERING GEOLOGIST PAUL MURPHEY: Yes, just an updated index in Word version.

MR. PALMER: Yes.

CO-HEARING OFFICER DODUC: And Mr. Van Zandt, any objections to these new exhibits?

MR. VAN ZANDT: Actually, we haven't had a chance to check their accuracy, but we don't really have an objection to them. We trust the government in this case.

CO-HEARING OFFICER DODUC: Your objection is premised that these are correct coordinates. So noted. Thank you.

And so those have now been accepted into evidence.

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

And now I will ask Mr. Van Zandt to call up his first rebuttal witness.

Is there any objection from the parties to
staying a little bit later today? Mr. DePaoli?

MR. DEPAOLI: Yes. I was wondering if --

CO-HEARING OFFICER DODUC: Mr. DePaoli, please come up to the microphone.

MR. DEPAOLI: I was wondering if we might have the evening to look over this material and come back tomorrow morning for the rebuttal.

CO-HEARING OFFICER DODUC: Any thoughts on that, Mr. Van Zandt?

MR. VAN ZANDT: I was just about to suggest the same thing. We provided two reports for the convenience of the Board as well as the parties. They're not unusually extensive, but they're extensive enough where they really need to maybe have some time to look at.

CO-HEARING OFFICER DODUC: You guys are really pushing it -- a long lunch and leaving ten minutes early? You're taking advantage of my good nature.

MR. VAN ZANDT: But we may finish up before noon tomorrow.

CO-HEARING OFFICER DODUC: Well, on that basis, that is a reasonable request, and since the parties are in favor of that, I'm also in favor of that.

Any objections from staff or Mr. Hoppin, upon penalty of death and pain?

With that, then, I believe that is a very good
suggestion, and we adjourn for the day. Please
reconvene at 9:00 tomorrow.

* * *

(Thereupon the STATE WATER RESOURCES
CONTROL BOARD hearing was continued at
4:51 p.m.)
CERTIFICATE OF REPORTER

I, DIXIE L. COOKSEY, a Certified Shorthand Reporter of the State of California, do hereby certify:

That I am a disinterested person herein; that the foregoing STATE WATER RESOURCES CONTROL BOARD hearing was reported in shorthand by me, Linda Kay Rigel, a Certified Shorthand Reporter of the State of California, and thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said meeting nor in any way interested in the outcome of said meeting.

IN WITNESS WHEREOF, I have hereunto set my hand this August 13, 2010.

DIXIE L. COOKSEY, CSR
Certified Shorthand Reporter
License No. 4375