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**STATE WATER RESOURCES CONTROL BOARD OF THE STATE OF
CALIFORNIA**

IN THE MATTER OF WATER RIGHT
APPLICATIONS 31487 LITTLE
TRUCKEE RIVER, and 31488
PROSSER CREEK AND PETITIONS
TO CHANGE APPLICATION NOS.
5169 BOCA RESERVOIR, 9247
INDEPENDENCE LAKE, 15673,
STAMPEDE RESERVOIR, 18006
PROSSER CREEK RESERVOIR,
FILED BY THE UNITED STATES
DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
TRUCKEE MEADOWS WATER
AUTHORITY, AND WASHOE
COUNTY WATER CONSERVATION
DISTRICT TO IMPLEMENT THE
TRUCKEE RIVER OPERATING
AGREEMENT

**JOINT CLOSING BRIEF FOR THE TRUCKEE
CARSON IRRIGATION DISTRICT,
CHURCHILL COUNTY, NV, AND CITY OF
FALLON, NV.**

Date: July 21, 2010
Time: 9:00 a.m.
Dept.: Coastal Hearing Room

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1 **I. INTRODUCTION**

2 The hearing related to the Truckee River Watershed and the above referenced
3 Applications and Change Petitions was held before the State Water Resources Control
4 Board ("State Board") on July 21 - July 23, July 28 and 29, 2010. The January 30,
5 2007 Notice of the Petitions and Applications and the April 19, 2010 Notice of Hearing
6 raised several issues that the State Board believed would be key in this proceeding,
7 including: 1) injure any legal user or water, 2) is water available to appropriate, 3) will
8 the proposed change in effect initiate a new right, 4) the jurisdiction of the State Water
9 Board, 5) what conditions, if any, should the State Board adopt? At the end of the
10 hearing, the State Board allowed for closing briefs. The Protestants to this matter, the
11 Truckee Carson Irrigation District ("TCID"), Churchill County, Nevada, and City of
12 Fallon, Nevada, hereby file their Joint Closing Brief.

13 **II. BACKGROUND**

14 The State Water Resources Control Board ("State Board") noticed Petitions for
15 Change for Licenses 3723, 4196, 10180 and Permit 11605 (collectively referred to as
16 "Petitions") and Applications to Appropriate Water by Permit 31487 and 31488
17 (collectively referred to as "Applications") on January 30, 2007. The "Applicants" and
18 "Petitioners" are the United States Department of the Interior, Bureau of Reclamation
19 ("BOR"), the Truckee Meadows Water Authority ("TMWA") and the Washoe County
20 Water Conservation District ("WCWCD"). The Applications and Petitions were
21 submitted to implement one project, the Truckee River Operating Agreement ("TROA").
22 The TROA project proponents are the Applicants and Petitioners, as well as the State
23 of California, the State of Nevada, the Pyramid Lake Paiute Indian Tribe ("Tribe") and
24 the City of Fernley, Nevada, all of whom appeared at the hearing in support of the
25 Applications and Petitions.

26 The factual and legal background related to the management of the Truckee
27 River Basin and associated water rights is long and complex. This background was
28 fully provided to the State Board in the Protests submitted related to these Applications

1 and Petitions. See SWRCB - 1 through 6. However, it is critical for the State Board to
2 understand the impact of the operation of the Applications and Petitions through TROA
3 on the present decrees and agreements which manage the operation of the Truckee
4 River.

5 In 1913, the United States filed an action to quiet title to the waters of the
6 Truckee River and its tributaries, including waters flowing in California that entered
7 Nevada. This action was brought primarily on behalf of the farmers in the Newlands
8 Project for irrigation of lands withdrawn under the Reclamation Act of 1902, and for the
9 benefit of the Tribe for irrigation on the Indian Reservation. *Nevada v. US.*, 463 U.S.
10 110, 114-117 (1983). This litigation resulted in the *Orr Ditch Decree, United States v.*
11 *Orr Water Ditch Co.*, CV-N-73-0003 LDG, (D. Nev. 1944) ("*Orr Ditch Decree*"), which
12 adjudicated water rights not only in Nevada but also in California, as those rights
13 related to the Newlands Project.

14 An important component of the *Orr Ditch Decree* was the execution of the
15 Truckee River Agreement ("*TRA*") in 1935. For the last 75 years, the Truckee River
16 has been managed by the parties to the *TRA*, along with the Federal Water Master,
17 appointed to administer the *Orr Ditch Decree*. The *TRA* set forth the principles under
18 which the Truckee River would be operated and allowed for the stipulated entry of the
19 *Orr Ditch Decree*. The *TRA* requires the Truckee River to be operated on the basis of
20 Floriston Rates, as established in the 1915 General Electric Decree. *United States v.*
21 *The Truckee River General Electric Company*, Case No. 14861 (N.D. Cal. 1915) ("*GE*
22 *Decree*"). Floriston Rates measure the rate of flow in the Truckee River at the Iceland
23 Gage, and consist of an average flow of 500 cubic feet per second (cfs) each day
24 during the year, commencing March 1 and ending September 30 of any year, and an
25 average flow of 400 cfs each day from October 1 to the last day of February of the next
26 year.

27 The *TRA* was used as the basis for a stipulation that allowed the entry of the
28 final *Orr Ditch Decree*. The signatories to the *TRA* include most of the same parties to

1 this proceeding: The United States of America; TCID; WCWCD; Sierra Pacific Power
2 Company ("Sierra") who is the predecessor to TMWA, and such other users of the
3 waters of the Truckee River and/or its tributaries, known as Parties of Fifth Part. The
4 *Orr Ditch* Decree expressly incorporates the terms of the TRA, including the Floriston
5 rate structure.

6 The Newlands Project is a reclamation project in western Nevada authorized for
7 the reclamation and irrigation of land in the Carson and Truckee River watersheds. The
8 Newlands Project contains the Lake Tahoe Dam and Derby Diversion Dam on the
9 Truckee River, the Truckee Canal, Lahontan Dam and Reservoir, the Carson Diversion
10 Dam, four pumping plants, and over 900 miles of canals, laterals and drains. The
11 Newlands Project contains approximately 73,700 acres of water-righted lands of which
12 approximately 59,000 acres are currently being irrigated with a diversion requirement
13 of approximately 300,000 acre-feet. Water supplies for the Newlands Project are
14 derived from direct diversions on the Truckee and Carson Rivers as well as releases of
15 previously stored water in Donner Lake, Lake Tahoe, Prosser Creek Reservoir,
16 Stampede Reservoir, Boca Reservoir, and Lahontan Reservoir. The date of priority for
17 water rights in the Newlands Project in the Truckee River is 1902, as adjudicated in the
18 *Orr Ditch* Decree and provided by Claims 3 and 4 of the Decree.

19 The negotiation and promulgation of the TROA was provided for by the
20 Truckee-Carson-Pyramid Lake Settlement Act, P.L. 101-618, 104 Stat. 3289,
21 November 16, 1990 (the "Settlement Act"). TROA is intended to replace the Truckee
22 River Agreement of 1935, which is currently used to operate the Truckee River. The
23 Applications and Petitions are an effort by the TROA proponents to change the current
24 management scheme of the Truckee River and implement TROA. Under TROA, the
25 Change Petitions provide for redistribution of storage within Boca, Independence,
26 Stampede, and Prosser Reservoirs. TROA also allows for the exchange and trade of
27 water in all the upstream reservoirs in California.

28

1 **III. ARGUMENT**

2 The burden is on Petitioners to show there will be no injury as a result of the
3 proposed change and on the Applicant to prove there is unappropriated water
4 available. Water Code §§1702 and 1375(d). In this proceeding there was a complete
5 failure of proof regarding either issue. The Petitioners put on no substantive evidence
6 regarding absence of injury and failed to meet their burden under California law. In
7 fact, the only substantive evidence of injury was presented by the Protestants, which
8 showed that through the operation of TROA that the proposed changes would cause
9 shortages to the Newlands Project. Further, the Protestants provided evidence that as
10 a result of approved and pending applications for unappropriated water in Nevada,
11 which was not considered by the Applicant, that there is in fact no unappropriated
12 water remaining in the Truckee River and its tributaries. Finally, in rebuttal, Protestants
13 provided evidence indicating critical flaws in the Water Availability Analysis conducted
14 by the Applicant, which should not be relied on by the State Board. As a result of this
15 failure of proof, and the resulting injury to Newlands Project water rights, the Petitions
16 and Applications should be denied.

17 The Petitioners proposed changes, allowing for exchanged diversions in
18 Stampede, Independence, and Boca Reservoirs, amounts to the initiation of a new
19 right under California law. Protestants provided clear evidence that the redistribution
20 of storage over a large geographic scale to the upstream reservoirs that have much
21 larger and independent contributing watershed has the potential to expand water
22 availability or yield and will initiate a new right. This issue is even more problematic
23 when considering the proposed storage under TROA in these reservoirs of *Orr Ditch*
24 Decree water, including Claim 3 water, effectively creating a "super water right."

25 The general approach of the Applicants and Petitioners in this case was to
26 direct the attention for the State Board to TROA and its associated Environmental
27 Impact Report/Environmental Impact Statement ("EIR/EIS") to support the claim of
28 benefits. However, when the discussion turned to injury or problems with the operation

1 of the proposed project, the proponents want the State Board to only look at the
2 subject Applications and Petitions and to disregard their operation under TROA. It
3 cannot be denied that the subject Applications and Petitions and the operation of
4 TROA are one an the same and must be considered together. However, what the
5 project proponents failed to address in this hearing is the operation of TROA. Once
6 the water is stored under the Change Petitions, TROA allows for this water to be
7 exchanged, traded, released, and credit stored under the operating rules of TROA.
8 The Petitioners admitted that this would occur without any further proceedings before
9 this Board. This is a clear violation of California's transfer and change requirements
10 and should not be allowed.

11 Before TROA or Applications and Petitions can go into effect, the *Orr Ditch*
12 Court must approve TROA and modify the Decree. Further, TROA specifically
13 "supersedes" the TRA, which is also required for the operation of the Change Petitions.
14 During this hearing there were a number of outstanding issues raised related to the
15 operation of these Petitions and Applications under TROA and the resulting injury to
16 existing rights that will not be finally resolved until the *Orr Ditch* Court acts. As a result,
17 it is the Protestants' position that the State Board can not fully act until the issues with
18 TROA are resolved, and that it is a better use of administrative and judicial resources
19 to allow the *Orr Ditch* court to proceed first.

20 The evidence of the supposed benefits from the Applications and Petitions
21 comes almost exclusively from TROA EIR/EIS and the associated Truckee River
22 Operating Model ("TROM") analysis. However, as the Protestants clearly showed,
23 TROM is fatally flawed and cannot be relied upon to make critical water resource
24 decisions. Finally, to the extent that the State Board grants the Applications and
25 Petitions, the Protestants herein provide a number of conditions for approval that will
26 help protect the water rights in the Newlands Project

27
28

1 **A. Petitioners Failed To Establish That The Proposed Changes Will Not**
2 **Injure Existing Water Users, And Newlands Project Water Rights**
3 **Will In Fact Be Injured**

4 California has long followed the “no injury” rule when changing the point of
5 diversion, purpose of use, or place of use. See *Scott v. Fruit Growers Supply Co.*,
6 (1927) 202 Cal. 47, 55 (“it is settled that even an appropriator of water may not change
7 the point of diversion to the injury of others.”). The no injury rule applies to protect
8 junior appropriators. SWRCB Order WR 85-4 at p. 14. A petition for change in a permit
9 or license must “[i]nclude sufficient information to demonstrate a reasonable likelihood
10 that the proposed change will not injure any other legal user of water.” Water Code
11 §1701.2 (d). Further,

12 [b]efore permission to make such a change is granted the petitioner shall
13 establish, to the satisfaction of the board, and it shall find, that the change
14 will not operate to the injury of any legal user of the water involved.

15 Water Code §1702 (emphasis added). Thus, the burden is on the Petitioners to show
16 there is no injury resulting from the above referenced Change Petitions.

17 In this proceeding there is a total lack of evidence to support any finding that the
18 proposed changes designed to implement TROA will not injure any legal water user.
19 Under Water Code §1702, the Petitioners failed to establish that the change will not
20 operate to the injury of any legal user, and the Petitions should be denied. The only
21 evidence of injury was presented by the Protestants, and it showed shortages to the
22 Newlands Project through the operation of TROA and the proposed changes.

23 **1. Petitioners Did Not Meet Their Burden Under Water Code**
24 **§1702**

25 The Petitioners offered three witnesses who were designated to address the
26 issue of “no injury.” However, none of these witnesses conducted an independent
27 analysis of injury, and appeared to rely mostly on the supposed protections of TROA
28 as preventing injury. Mr. Marc Van Camp, the Petitioners’ main witness on the issue of
injury, conducted no independent analysis of injury to other water users. Specifically,

1 he conducted no analysis related to the EIS/EIR or the modeling efforts. TR. Vol. I, p.
2 254:18-23.¹ Likewise, Mr. Shahroody conducted no actual analysis of potential injury
3 to existing water rights, apparently relying only on experience in determining there
4 would be no injury from the operation of the change petitions. *Id.* at p. 259:10-22.

5 Although Mr. Van Camp acknowledges that the purpose of the Change Petitions
6 are to implement TROA (TR. Vol. I, at p. 226: 5-16), he does not consider the
7 operation of TROA in his injury analysis. Mr. Van Camp claims that the Change
8 Petitions deal with previously stored water which is junior to other users, and restorage
9 of water is done under existing priorities, therefore there is no injury. *Id.* at pp. 227:19-
10 228:10; 238:15-239:4. However, as is evident on the face of the Change Petitions, as
11 well as testified to by several witnesses, these changes are designed for one reason,
12 to implement TROA. Water Code §1702 requires that the “petitioner shall establish . . .
13 that the change will not operate to the injury of any legal user of the water involved.”
14 Thus, the State Board must look at the operation of the changes, and that operation is
15 TROA. This includes not only the changes that appear on the face of the Petitions, but
16 also the water exchanges, trades, releases, and carryover storage anticipated by
17 TROA. Joint Ex.-19. As discussed below, the only evidence presented related to the
18 operation of TROA shows shortages to the Newlands Project.

19 In his injury analysis Mr. Van Camp also failed to consider the operation of
20 TMWA’s change applications filed in Nevada, which purport to store water in the
21 subject reservoirs. *Id.* at p. 229:11-230:2; See TCID-233 (indicating storage of TMWA’s
22 water in the California upstream reservoirs).² The operation of TROA includes the

23 ¹ “TR” refers to the transcripts of the Truckee River Hearing conducted on July 21 - July 23, July 28 and
24 29, 2010. Each day of the hearing is represented in an independent volume of the transcripts, which are
25 page numbered sequentially. Citation to the transcripts includes the volume number, page numbers and
26 line numbers. For example, TR. Vol. I at p. 254:18-23 represents transcripts volume I at page 254, lines
27 18 through 23.

28 ² Mr. Van Camp relies on Water Code §§1230 - 1231 for his apparent position that the TMWA change
applications do not have to be accounted for under the subject change petitions. TR. Vol. I, p. 229:23-
230:2; TMWA 3-0 at ¶ 35, p. 14. However, the cited Water Code provisions do not allow for the State
Board to ignore the impact of the TMWA change applications in considering the operation of the
proposed changes. As indicated by its legislative history, this statutory provision was designed to
protect the priority of existing water rights used to implement TROA, an issue not contested in these

1 storage and redistribution of TMWA's water under the Nevada change applications in
2 these reservoirs. See Erwin testimony, TR. Vol. II at pp. 512:11-513:5; Phillips
3 testimony, *Id.* at p. 528:24-529:22. In fact, as discussed below, it is the exercise of
4 TMWA's rights that the TROA proponents claim are causing the shortages to the
5 Newlands Project. Mr. Van Camp cannot adequately analyze the issue of injury when
6 he does not consider the operation of TROA and the TMWA water rights.

7 Dr. Kenneth W. Knox, expert for the Protestants, was critical of the lack of injury
8 analysis related to the Change Petitions. He states that:

9 The change petitions appear to be wholly reliant upon TROA. No
10 additional or independent water resource engineering or analyses are
11 evident that describe in detail the change in storage/release patterns, the
12 amount of water physically and legally available at each of the discrete
13 points of diversion, storage, and rediversion that are requested, the
14 change in return flow amounts, timing, and location, and other critical
factors that must be identified and quantified to demonstrate the requested
change does not expand or enlarge the existing licenses/permit beyond
their original adjudication to the detriment and injury of existing water
rights in the Truckee River system.

15 Knox Opinion No 7, TCID-276B at p. 9. By failing to conduct an adequate analysis
16 related to injury, the Petitioners have failed to meet their burden under Water Code
17 §1702 and the Change Petitions should be denied.

18 **2. The Self Serving TROA Administrative Procures Do Not**
19 **Establish That The Proposed Changes Will Not Operate To**
20 **The Injury Of Any Legal User**

21 The standard answer by the Petitioners when addressing the issue of injury is
22 to point to the administrative procedures of TROA as providing a remedy if there is an
23 injury to an existing water right. See Van Camp testimony at TR. Vol. I, p. 228:11-18;
24 Buchanan testimony *Id.* at p. 236:11-237:15. Mr. Shahroody claims that not only
25 TROA, but also the Settlement Act (Joint Ex. 16), protects vested rights. *Id.* at pp.
26 232:7-234:3.³ The circular argument is that the Change Petitions designed to

27 proceedings. See AB 1327, Assembly Committee On Water, Parks And Wildlife, April 3, 2001 (TCID-
28 284).

³ The Settlement Act § 210(b)(13) states that nothing in the Act is intended to affect *Orr Ditch* rights or
alter or conflict with existing rights. Joint Ex. 16. This does not mean that existing rights are not injured

1 implement TROA cannot injure existing rights because TROA is supposed to protect
2 such rights. This self serving non-answer does not establish that the proposed
3 changes will not operate to the injury of any legal user as required under Water Code
4 §1702.

5 Further, the provisions of TROA most relied on by the proponents, §§1.C and
6 2.B, only apply if there has already been an injury and the injured party seeks a
7 remedy. TMWA 3-0 at ¶ 32, p. 13; USBR-7 at p.43; USBR-5 at p. 3; see also TROA
8 §1.C.2, Joint Ex. 19 (providing a remedy once an owner of a water right does not
9 receive amount of water they are entitled to). The process of appointing the TROA
10 Administrator is at best biased, and does not ensure that Newlands Project water right
11 owners will receive a fair remedy even after an injury has occurred. The person who
12 hears a complaint is the Administrator, who is nominated by the TROA signatories with
13 control by the Sovereign Parties. TROA §2.A.2, Joint Ex. 19; Buchanan testimony at
14 TR. Vol. I, pp. 268:9-269:1; 278:8-279:8 (indicating that the TROA Administrator is
15 nominated by nominating committee composed of one representative of the signatory
16 parties, who may also petition for the Administrator's removal); McConnell testimony at
17 TR. Vol. IV at pp. 856:21-858:10. Water Code §1702 requires the Petitioner to
18 establish that the change will not operate to the injury of any legal user, not to show
19 that there is an available remedy for an existing injury. Here, there is a failure of proof
20 under Water Code §1702 and the Petitions should be denied.

21 **3. The Only Evidence Presented At The Hearing Indicated Injury**
22 **To The Newlands Project As A Result Of Shortages Caused**
23 **By TROA**

24 There was extensive testimony at the hearing related to evidence of increased
25 shortages in the Newlands Project. This centered mostly on the TROA EIR/EIS

26 as a result of the operation of the Change Petitions through TROA. The State Board has an
27 independent obligation to ensure there is no injury. Further, TROA must be approved by the *Orr Ditch*
28 Court and the Decree modified to allow for the operation of TROA and the proposed changes. See
Settlement Act §205(a)(4), Joint Ex. 16. Thus, as discussed below, it would appear a more prudent
approach to allow the *Orr Ditch* Court to act first to ensure the Settlement Act requirements to protect
existing decreed rights are accomplished through TROA and to allow for the modification of the Decree, if
appropriate.

1 modeling results that indicates there will be additional shortages to the Newlands
2 Project as a result of the operation of TROA. It is figure 3.23 of the EIR/EIS that
3 represents these shortages, indicating nine years of additional shortages to the
4 Newlands Project over a 100 year period resulting from the operation of TROA.
5 SWRCB-7. These shortages occur in the dry years and approach as much as
6 approximately 30,000 acre feet. Figure 3.23 was the only evidence before the State
7 Board regarding shortages. TR. Vol. II at p. 446:14-17. Although the Protestants are
8 critical of the modeling effort related to the TROA environmental review and would not
9 quantitatively rely on the results derived, the shortages analysis conducted by the
10 TROA parties at a minimum shows a disturbing qualitative trend of increased
11 shortages resulting from TROA, especially in critical dry years.

12 Although it is Petitioners' burden to establish the change will not cause injury,
13 witnesses for Protestants not only provided evidence of how increased shortages
14 directly implicates Newlands Project water rights, they showed how these increased
15 shortages will negatively impact farming operations and the agriculturally dependent
16 economy of Lahontan Valley. *TCID-281; Churchill County-1*. Dr. Kenneth Knox
17 provided expert testimony that, based on his review of the EIR/EIS, shortages to water
18 rights in the Newlands Project will periodically occur by implementation of TROA, as
19 determined through application of TROM. TR. Vol. IV, pp. 945:22-946:2; *see also* Knox
20 Opinion No 10, *TCID-276B* at p. 12. Mr. Chris Mahannah also testified that the
21 Petitioner's own evidence, i.e., the results of the model show increased shortages. TR.
22 Vol. V, p. 1093: 4-5. Dr. Knox is of the opinion that "TROA does adversely impact the
23 senior water rights owned/operated in the Newlands Project." Knox Opinion No 6,
24 *TCID-276B* at p. 8. Further, he stated that "[i]n their present state the applications and
25 petitions for change will impose additional shortages in time, amount and location that
26 will injure vested water rights in the Truckee River system and should be denied." TR.
27 Vol. IV, pp. 946:11-14; *see also* Knox Opinion No 4, *TCID-276B* at p. 7. Dr. Knox was
28 particularly troubled by the increased shortages that will be caused by implementation

1 of TROA as described in figure 3.23 of the EIR/EIS. *Id.* at 974:19-976:1.

2 Potential reasons for the shortages were provided based on the ability under
3 TROA to provide carry over and integrated storage, including alternate points of
4 storage and rediversion. *Id.* at 992:2-994:9. Further, TROA allows for the storage and
5 carry over of Claim 3 Water Quality Settlement Agreement water rights with a 1902
6 priority in upstream reservoirs, providing a firmer yield than the similarly situated
7 remaining Claim 3 rights in the Truckee Division of the Newlands Project. TR. Vol. V,
8 pp. 1090:12-1091:5. Additionally, as discussed in detail below, the storage of the
9 Tribe's unappropriated water, and the application of the 25 percent rule and the
10 consumptive use component proposed under TROA, will result in injury to Newlands
11 Project water rights. See generally Mahannah Rebuttal Report, TCID-287 at pp. 16-17.

12 The Petitioner's witnesses also testified that TROA showed shortages to the
13 Newlands Project. Tellingly, Kenneth Parr, BOR Area Manger, admitted that even
14 though he has a duty to protect the water right owners in the Newlands Project, the
15 EIR/EIS concludes that TROA will cause shortages based on the methodology that
16 was used. TR. Vol. I, pp. 74:5-75:1. Likewise Mr. Strekal, a fish and wildlife biologist
17 for the Bureau of Indian Affairs, acknowledged that the model results showed
18 shortages to the Newlands Project (TR. Vol. II at pp. 398:9--399:16.) and that in fact
19 these model results are the only information related to shortages in the record (*Id.* at p.
20 446:14-17).

21 Petitioners attempted to distance themselves from their own model results. For
22 example, Mr. Strekel claimed effects of shortages on Newlands Project would not be
23 discernible on a long-term average, identifying a difference on average of 40 acre feet
24 per year. *Id.* at p. 362:15-23. However, on cross examination he admits that averaging
25 the shortages diminishes the impact, and that increased shortages in the nine dry
26 years is much more then 40 af. *Id.* at p. 399:8-25. Further, he admits that if shortages
27 reduce a farmers ability to irrigate the impact can be severe. *Id.* at p. 400:1-8.

28 The Petitioners also attempt to demonstrate that the shortages to the Newlands

1 Project are strictly from the exercise of senior water rights. However, there is nothing
2 in the analysis associated with figure 3.23 in the EIR/EIS that indicates this is strictly
3 the source of the shortages. At best, the testimony related to this issue was non-
4 committal. Mr. Strekal states initially that less water is available as a result of
5 upstream senior water right holders (*Id.* at p 362: 7-13), but later testifies that there are
6 a lot of factors that need to be considered when looking at figure 3:23 (*Id.* at 400:9-
7 401:7), and that it is not a function of just senior water rights, but also hydrology (*Id.* at
8 p. 409:9-13). Mr. Parr could only testify that “there's a relationship” between the full
9 utilization of senior water rights and shortages demonstrated in the EIS/EIR. TR. Vol I
10 at p. 97:12-17.

11 Here, not only have the Petitioners failed to meet their burden under Water
12 Code §1702, but the only substantive relevant evidence presented to the State Board
13 shows that the operation of these proposed changes will result in injury from shortages
14 caused by the operation of TROA. Therefore, the State Board should deny the
15 Change Petitions.

16 **4. Application of the 25 Percent Rule and Consumptive Use Rate**
17 **Under TROA Use Will Cause Injury To Existing Rights**

18 The *Orr Ditch* Decree under the so called “25 percent rule” allows a water right
19 owner to take up to 25 percent of their water in any given month for irrigation use. *Orr*
20 *Ditch* Decree pp. 87 and 88, Joint Ex.-7. However, the Petitioners’ plan under TROA
21 to convert water to storage at up to 25 percent in any month, not based on an irrigation
22 schedule. The 25 percent rule was not intended to apply to storage or for the
23 proposed uses under TROA. Further, this operation will result in injury to the
24 Newlands Project as a result of the changes in the historic return flow pattern.

25 The written testimony of TMWA’s witness Don Mahin describes purchase of *Orr*
26 *Ditch* Decree water rights from the Truckee Division as part of the Water Quality
27 Settlement Agreement (“WQSA”) and the supposed benefit of credit storing this water
28 under TROA. TMWA 4-0. Mr. Mahin testified that the plan is to store this water within

