

Ruling # 3739

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DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

STATE OF NEVADA

DIVISION OF WATER RESOURCES

In the Matter of Applications  
53092, 53093 and 53369.

RENO CITY COUNCIL CHAMBERS

490 South Center Street

Reno, Nevada

November 14, 1989.

9:00 o'clock a. m.

APPEARANCES:

PETER G. MORROS, HEARING OFFICER

Mike Turnipseed, Chief, surface  
water section

Garry Stone, federal water master.

For Westpac Utilities: Susan Oldham

For Truckee-Carson  
Irrigation District: Lyman McConnell

For Diversified  
Development: Ross deLipkau  
Attorney at Law  
Reno, Nevada

For Caughlin Ranch: Craig Howard  
Attorney at Law  
Reno, Nevada

For Real Party in  
interest on 53369: David Hoy  
Attorney at Law  
Reno, Nevada

EXHIBIT

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MR. MORROS: We will be on the record, if everybody is ready.

By way of introductions, my name is Pete Morros. I am the State Engineer for the State of Nevada. There is one other member of the staff of the State Engineer's Office here today, and that is Mike Turnipseed, who is the chief engineer of the surface-water and adjudication section of the Division of Water Resources. I have also asked the Federal Water Master to sit with the State Engineer at this hearing, and the record will reflect the presence of Mr. Garry Stone, the Federal Water Master.

The purpose of this hearing is to receive any evidence or testimony concerning three applications to change Truckee River decreed water rights, those applications being 53092, 53093 and 53369. All three applications stand in the name of Westpac Utilities.

The matter before this hearing today is more or less fully set out in the notice dated October 4th, 1989, setting the time and place for this hearing. Originally, this hearing was scheduled for November 9th, 1989, and due to scheduling problems, that date was continued until today, at this time and place.

A copy of the two hearing notices, one dated October 4th, 1989, and the second one dated October 10th,

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1989, will be combined and entered into the record as State's Exhibit No. 1, hearing no objections, of course.

(State's Exhibit 1 was marked for identification and admitted into evidence.)

MR. MORROS: The authority for this hearing is set out under NRS 533.365 and 533.375. I might also indicate that two of these applications, more specifically, 53092 and 53093, have been protested, on June 15th, 1989, by the Truckee Carson Irrigation District.

Application 53369 has not been protested. All three applications have completed the statutory publication and protest period.

With that, I think I will ask for a statement of appearances on behalf of the applicant Westpac Utilities.

MS. OLDHAM: Susan Oldham, counsel for Westpac Utilities.

MR. MORROS: Protestants?

MR. McCONNELL: Lyman McConnell, for Truckee Carson Irrigation District.

MR. MORROS: Is there anybody else that is going to want to testify today, or present any evidence

1 or testimony for the record, concerning these applications?

2 MR. deLIPKAU: Yes. My name is Ross deLipkau,  
3 Reno, Nevada. I am here on behalf of Diversified  
4 Development, one of the real parties in interest.

5 MR. MORROS: On which applications?

6 MR. deLIPKAU: Application 53093. And I  
7 would also like to make a statement at this point that  
8 the application on 53093 seeks 4.33 cfs. The correct  
9 amount should read 3.53 cfs.

10 MS. OLDHAM: That is correct from my perspective,  
11 too. We would like to reduce the 4.33 to 3.53.

12 MR. MORROS: What application are we talking  
13 about now?

14 MS. OLDHAM: 53093.

15 MR. McCONNELL: 93 or 92?

16 MS. OLDHAM: Okay. Now, you may be looking--  
17 The other thing we wanted to do is take a look at the  
18 notice, apparently, and maybe it's--maybe it's the  
19 number we have on our applications that is incorrect.

20 The notice appears to us to have switched  
21 53092 and 53093, relative to each claim number.

22 MR. MORROS: You mean there is a typographical  
23 error, and that 53092 should refer to claim number 638?

24 MS. OLDHAM: Right. And vice versa: 53093  
25 should refer to claim number 642.

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MR. MORROS: Well, the Application 53093, the original filed in the office of the State Engineer, refers to a portion of claim 638.

MS. OLDHAM: Does it? Then maybe our application numbers are incorrect at the top of our--

MR. MORROS: 53092 references claim number 642, with a diversion rate of 4.33 cfs.

MS. OLDHAM: Okay. Those two are switched, then, and our numbers that were at--that were put on our applications were incorrect, which may have been why--

MR. MORROS: Well, wait a minute, now.

MS. OLDHAM: 092 should be 4.33 cfs, not to exceed 377 acre feet, Fellnagle Ditch.

MR. McCONNELL: That's correct.

MS. OLDHAM: Okay. We were incorrect on that. That may change a couple of our exhibits, but we can--

MR. MORROS: Well, I want to make sure that there is no error on the part of the State Engineer's Office. You are not alleging that?

MR. deLIPKAU: Absolutely not.

MS. OLDHAM: Our mistake.

MR. McCONNELL: Well, is there a mistake? Because that is what the application says, what you just read.

1 MS. OLDHAM: Okay. Now, turning to 53092,  
2 which I had previously misreferenced, the 4.33 cfs  
3 should be 3.53.

4 MR. MORROS: All right. So the correction  
5 that you are indicating for the record is, you are  
6 indicating, for the record, that you want to reduce  
7 the amount of diversion rate you are seeking to change  
8 under Application 53092 from 4.33 cfs to 3.5 cfs; is  
9 that correct?

10 MR. deLIPKAU: 53.

11 MR. MORROS: 3.53.

12 MS. OLDHAM: 3.53.

13 MR. MORROS: What about the acre-feet?

14 MS. OLDHAM: That's all correct. Apparently  
15 that was one of the errata in the decree. It was not  
16 properly calculated. But the 3.77 is correct.

(Discussion off the record.)

17 MR. MORROS: Back on the record.

18 MR. HOWARD: I am Craig Howard, and I am making  
19 an appearance as attorney for Caughlin Ranch, another  
20 real party in interest. And that is on claim 642 and  
21 Application 53092.

22 Since the applicant is Westpac, Sue Oldham  
23 will be handling the testimony, so that we don't have  
24 duplications.  
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MR. MORROS: All right.

MS. OLDHAM: Before we proceed further, we do have a request. Mr. Hoy, who is the real party in interest on 53369, requests that since that application was not protested, that it be granted at the outset of this hearing, so that he can take his leave and--

MR. MORROS: All right.

MS. OLDHAM: --not remain the entire proceeding.

MR. MORROS: I have no problem with that.

MR. McCONNELL: We want to make a public comment, even though we haven't protested.

MR. MORROS: No, I understand that.

MR. HOY: I am David Hoy, real party in interest on Application No. 53369, along with my brother Richard, who is present.

MR. MORROS: Go ahead, David. Do you want to just go ahead and make a statement for the record? If you have got to leave--

MR. HOY: All that I would like to say is that it is my understanding that there is no protest as to that application. It is in the best interests to have the water rights transferred. They are not being used on the property at the present time, and we do defer to Mrs. Oldham with respect to the

1 technical data that may be needed or required by the  
2 State Engineer's Office to authorize the transfer.

3 MR. MORROS: If you would hold on for just  
4 a minute, David. Mr. McConnell, do you have any  
5 questions you wanted to ask of Mr. Hoy, before he  
6 leaves?

7 MR. McCONNELL: No, I don't think so.

8 MR. MORROS: Does anybody else have any  
9 questions of Mr. Hoy, before he leaves?

10 For the record, I want everybody to know that  
11 I am personally acquainted with David Hoy and Dick  
12 Hoy, also, his brother, who is also present. And at  
13 this time, if there is anybody who wants to make a  
14 motion that I recuse myself as far as this application  
15 goes, they can do so at this time.

16 I want the protestants to the other two  
17 applications, and any other parties to these proceedings,  
18 to be aware of that fact.

19 MR. McCONNELL: How personally related are  
20 you?

21 MR. MORROS: We are good friends, long-time  
22 good friends.

23 MR. McCONNELL: It's pretty hard not to be  
24 friends with people in Nevada.

25 MR. MORROS: I assume, then, that nobody has

1 any objections if I render a decision in the matter  
2 of this application, 53369, as far as the approval or  
3 denial, consistent with the statutory criteria, of  
4 course.

5 Mr. Stone, do you have any questions of Mr.  
6 Hoy?

7 MR. STONE: No.

8 MR. HOY: Thank you very much.

9 MR. MORROS: Thank you, David.

10 Mr. Arden?

11 MR. ARDEN: Yes. I don't believe I will be  
12 making--

13 MR. MORROS: State your full name, for the  
14 record:

15 MR. ARDEN: I'm Richard W. Arden. I am here  
16 today as a real party in interest on claim 6380,  
17 Application 53093, representing Bill Hanifin, Roberts  
18 Trust and myself. But I will not be making any statements.  
19 Westpac will be giving the testimony.

20 MR. MORROS: Boy, it is just not my day.  
21 Mr. McConnell, I will have to again give you the  
22 opportunity-- I'm personally acquainted with Mr. Arden  
23 and Mr. Hanifin. They are also long-time friends.  
24 So I will give you the opportunity to make a motion  
25 that I recuse myself, if you so desire.

1 MR. McCONNELL: No, we don't have any desire,  
2 unless it starts getting worse.

3 MR. MORROS: Let's go ahead and proceed.

4 MR. deLIPKAU: Could I make one statement?  
5 That is, Mr. Robert McDonald and his son, Tim, are  
6 basically Diversified Development, and you, of course,  
7 as well as everybody in this room knows the McDonalds.

8 MR. MORROS: Yes.

9 MR. deLIPKAU: The same comment should be made.

10 MS. OLDHAM: Can we make the same comment  
11 for--

12 MR. MORROS: Well, I am not--

13 MS. OLDHAM: We don't have a problem.

14 MR. MORROS: I am not that closely associated,  
15 relating to a friendship, not with Mr. McDonald, as  
16 Mr. Hoy, as the Hoy brothers and Rich Arden and Phil  
17 Hanifin.

18 I just don't want there to be any inference  
19 of impropriety on the part of the State Engineer. I  
20 want all parties to be of that relationship.

21 It is certainly not going to influence my  
22 decision, one way or the other, but anybody that wants  
23 the State Engineer to recuse himself from participating  
24 in the decision-making process, I will continue to  
25 conduct the hearing but designate someone else to make

1 the decision, if it is so desired by any of the parties.

2 (Discussion off the record.)

3 MR. MORROS: Regarding the transcript, and  
4 as provided in the notice setting the time and place  
5 for this hearing, the cost of transcribing this hearing  
6 will be borne on a pro rata basis by the applicants  
7 and the protestants. The State Engineer will require  
8 the original and one copy of the transcript. Anybody  
9 else that desires a copy of the transcript will make  
10 arrangements with the reporter to receive same.

11 The State Engineer has eight exhibits. We  
12 have provided a list of those exhibits and a description  
13 of those exhibits, which Exhibit No. 1, which is the  
14 copy of the notice setting the time and place for this  
15 hearing, has already been admitted for the record.

16 Exhibit No. 2 and 2A are copies of Applications  
17 53092 and the supporting map to 53092.

18 The exhibit list that I have handed out to  
19 everybody refers to Permit No. 53092. That should be  
20 corrected to reflect application.

21 Exhibit 3 and 3A are a copy of Application  
22 53093 and the supporting map to Application 53093.

23 Exhibit 4 and 4A are copies of the application  
24 and map respectively.

25 Exhibit 5 is a copy of the TCID protest to

1 Application No. 53092.

2 Exhibit 6 is a copy of the protest to Applica-  
3 tion No. 53093.

4 Exhibit 7 is a copy of a letter dated June  
5 15th, 1989, under the signature of Clare Mahannah.  
6 Exhibit No. 8 is a map which depicts the approximate  
7 location of the points of diversion and place of use  
8 of the Truckee River claims that are being sought to be  
9 changed under the subject applications.

10 Any objections to any of those exhibits  
11 being received into the record at this point?

12 MR. deLIPKAU: None, Mr. Morros. Could I  
13 please see a copy of No. 7?

14 MR. MORROS: Certainly.

15 Any objections to those exhibits?

16 MR. deLIPKAU: No.

17 MR. MORROS: All right. Exhibits 2 through 8,  
18 as I have described them, will be received into the  
19 record.

20 (State's Exhibits 2 through 8  
21 were received into evidence.)

22 MR. MORROS: Additionally, the State Engineer  
23 will take administrative notice of any other records  
24 or information in the records of the State Engineer's  
25 Office that might be helpful in making a decision in

1 this matter.

2 Is there any desire for any opening statements,  
3 or do you want to just go ahead and proceed with the  
4 testimony and evidence?

5 MS. OLDHAM: Just go ahead and proceed.

6 MR. MORROS: All right. The procedure is  
7 to allow the protestants to proceed with their case  
8 first.

9 MR. McCONNELL: How would you like to proceed  
10 on 53369?

11 MR. MORROS: Well, it has not been protested.  
12 If you want to make a statement concerning that applica-  
13 tion, you can go ahead and do so at this time.

14 MR. McCONNELL: All right. Basically, our  
15 concern, and the reason I raise the question, our concern  
16 is similar but not identical in all respects to the  
17 concerns with the other two applications, primarily  
18 53369 being an upstream diversion from our diversion at  
19 Derby Dam presents the question of return flows on a  
20 transfer, which is presented in our exhibit as concern  
21 number one, in the letter that was submitted as Exhibit--  
22 I guess Protestant's Exhibit No. 1.

23 MR. MORROS: Let the record reflect that we  
24 have marked for identification purposes, as Protestant's  
25 Exhibit No. 1, a copy of a letter dated November 10th,

1 1989, to Mr. Ross deLipkau, from Clare N. Mahannah,  
2 professional engineer, referencing Applications 53092,  
3 53093 and 53369.

4 MR. McCONNELL: I might mention for the record  
5 that, when we sent this letter to Mr. deLipkau, it was  
6 my impression he was representing the parties in this  
7 thing. So, if I misunderstood that, I apologize.

8 MR. deLIPKAU: That is most acceptable. It  
9 was delivered to the power company, the applicant, in  
10 very quick order.

11 MR. McCONNELL: Fine. And then the second  
12 concern is the insurance that the land of which the  
13 water rights were appurtenant at one time and are  
14 appurtenant at this time be no longer irrigated, and  
15 that there be some assurances that that does not occur.  
16 That is our main concern. The issue on return flows--  
17 I understand, and I don't know how it was handled by  
18 the State Engineer in the past, but it has been my  
19 understanding that transfers within the Reno-Sparks  
20 area have been on a one-acre-foot per one-acre-foot  
21 basis, with consideration of return flows being taken  
22 into account by the return flows from the Reno-Sparks  
23 joint-treatment facility.

24 Application 53369 is a diversion downstream  
25 from that treatment facility, and now has historically,

1 or would have had historic return flows to the system.

2 Our concern, primarily, in regard with  
3 return flows is that once the treatment plant issue  
4 has been resolved--that is, whether or not the  
5 water that is being currently returned to the river  
6 through the treatment plant and considered as return  
7 flows--is taken out of the river, as the State Engineer  
8 is aware, that issue is in the Ninth Circuit Court  
9 of Appeals, with the Cities of Reno and Sparks taking  
10 the position that they need not replace that water  
11 that has been removed from the river, our concern  
12 is that if that occurs, that there be some condition  
13 on the transfers of these water rights that historic  
14 return flows are allowed to remain in the river.

15 We have presented, in our letter, the request  
16 of 50 percent return flows. And that is just based  
17 on our understanding of how the Truckee River model  
18 is currently analyzing return flows in the Truckee  
19 Meadows on the model, approximately 50 percent.

20 So that is the request on condition--on  
21 number one, with regard to the return flows.

22 Condition number two, to ensure that there  
23 isn't a double diversion of the water and land upon  
24 which the water was originally applied is no longer  
25 irrigated, and assurances that that occurs.

1           That is pretty much what our concerns are  
2 and what our public comments would be in regard to  
3 Application 53369.

4           I might say one other thing: It is my  
5 understanding, from looking at the application, that  
6 prior--previously, 290 acre-feet was transferred off  
7 of a 424 total right. And this application is asking  
8 for 114 acre-feet to be transferred, which would mean  
9 that total transfer from the property would be 300--  
10 404, which would leave approximately 20 acre-feet, I  
11 presume on the property; is that correct?

12           MR. MORROS: Could you respond to that, Miss  
13 Oldham?

14           MS. OLDHAM: Our calculation had 108 left on  
15 that. Maybe we should take a minute to find out what  
16 the difference is.

17           MR. MORROS: Well, it is important.

18           MR. McCONNELL: If you look at the applica-  
19 tion, I think it mentioned that 290 acre-feet have  
20 been previously transferred, in the comment sections.

21           MR. MORROS: Well, what the remark section  
22 says, under the application, is that this application  
23 is supplemental to Permit 49918, filed June 12th, 1985,  
24 which transferred approximately 290 acre-feet, out  
25 of a total of 424 acre-feet, held by applicant's grantors,

1 Richard E. Hoy and David R. Hoy, under claim number 621.

2 As a result of the prior transfer of the land  
3 to which the water is appurtenant--is appurtenant--  
4 is no longer used for agricultural purposes.

5 And then, during 1988, Sierra had an average  
6 of 50,871 residential customers, and delivered approxi-  
7 mately 60,855 acre-feet of water. Maximum day of  
8 delivery was 102.004 million gallons, which is 313.04  
9 acre-feet.

10 Do you want to go off the record for just a  
11 moment while you discuss that?

12 (Discussion off the record.)

13 MR. MORROS: Let the record reflect that  
14 information provided from the State Engineer's Office  
15 indicates that Permit 49918 was issued in an amount  
16 not to exceed 290 acre-feet per year.

17 MR. McCONNELL: Shall I go on?

18 MR. MORROS: Continue, Mr. McConnell.

19 MR. McCONNELL: A question has come up in  
20 regard to the applicant's holding of title of water  
21 rights, or the actual diversion of water rights. As  
22 you are aware, in our procedure, we certify ownership  
23 of the applicant to the water rights that are being  
24 changed. And it is my understanding that the power  
25 company is not the current owner of that water right,

1 so we want to have something on the record as to how  
2 that procedure is handled, so when the permit is  
3 issued, to the power company, so that it is a full  
4 understanding from everyone as to how the water right  
5 is held.

6 MR. MORROS: Well, procedurally, I can  
7 indicate for the record, as far as the State Engineer's  
8 Office is concerned, that permit won't be issued until  
9 title is cleared to Westpac Utility, so that should  
10 satisfy your concerns there.

11 MS. OLDHAM: And in this case, this may be  
12 one that is provided over to the cities, and under  
13 the agreement that we have on file with the State  
14 Engineer for water treatment and distribution, it  
15 would be certified over to Sierra Pacific. But it is  
16 not an actual title transfer.

17 MR. MORROS: But the title would be clear  
18 up to one of the parties in the agreement.

19 MS. OLDHAM: Right.

20 MR. MORROS: The lease agreements.

21 MS. OLDHAM: If you will recall, the IRS,  
22 the recent change in the IRS ruling will change that,  
23 and it is not going to be specifically leased over to  
24 Westpac, but it is provided to the cities, and then the  
25 water treatment distribution agreements, which presently

1 are on file with the State Engineer, but are being  
2 amended by the cities, and will be refiled with the  
3 State Engineer, will be the documents by which the  
4 use of the water is provided.

5 MR. MORROS: Well, in that case, then, if  
6 that goes into effect, then the applicant on these  
7 change applications--the change applications, are  
8 going to be the city or the county, rather than Westpac;  
9 is that correct?

10 MS. OLDHAM: In the future, that's correct.

11 MR. MORROS: Does that satisfy your concerns  
12 on that? It's a procedure that has been in effect for  
13 quite some time. And the lease cannot be terminated  
14 without the specific approval of the State Engineer.  
15 That's a condition of the lease.

16 MR. McCONNELL: That is a condition of the  
17 application, also, and the permit.

18 MR. MORROS: Well, the title will have to be  
19 cleared up, up to, for the sake of discussion, let's  
20 say the City of Reno, the title, as far as ownership  
21 of the water right, would be cleared to the City of  
22 Reno. Then the City of Reno and Westpac Utilities  
23 enter into a long-term lease, which is, as I recall,  
24 a 99-year lease, isn't it, Mrs. Oldham?

25 MS. OLDHAM: Yeah. The previous transactions

1 were 99-year leases. Presently, it's just forever,  
2 subject to that it can't be transferred away without  
3 the approval of the State Engineer.

4 MR. MORROS: Once that lease is entered into,  
5 that water is leased to Westpac, then they file a  
6 change application; then, if the permit is issued,  
7 it is issued subject to that lease. The title is  
8 clear; there is no cloud on the title. We won't issue  
9 the permit until the title is clear.

10 Again, using the City of Reno, just for  
11 discussion purposes, the title has to be cleared to  
12 the lessor; is that correct? Or the lessee--lessor.

13 MS. OLDHAM: We try not to use the terms  
14 lease or lessor anymore, because that is what the IRS  
15 found to be taxable, was the lease transaction. There  
16 is a right to use the water, that's--

17 MR. MORROS: All right. Well, whatever the  
18 case happens to be.

19 MR. McCONNELL: So that the permit, then, will  
20 be issued in the City of Reno, and then, by some kind  
21 of lease agreement that is filed with the State  
22 Engineer's Office, that the power--Westpac Utilities  
23 will serve that water?

24 MR. MORROS: I would assume, if they want to  
25 apply the new procedure in accordance with the IRS's

1 ruling, what they are going to have to do is transfer  
2 title of the change application over to the City of  
3 Reno.

4 But my point is, you can be assured that that  
5 is going to be cleared up to the satisfaction of the  
6 State Engineer before any permit is issued.

7 MR. McCONNELL: I am confident that will  
8 occur. I was just trying to set the record straight  
9 on the procedure, so that I fully understood it.

10 Do you want me to proceed now with 53092  
11 and 53093?

12 MR. MORROS: Certainly.

13 MR. McCONNELL: All right. In our Exhibit  
14 No. 1, our concern was not with return flows to the  
15 District, because 53092 and 53093 are points of use  
16 below Derby Dam, in the Wadsworth area.

17 Our concern was that those return flows make  
18 up a portion of downstream water users' rights. And  
19 in the future, if there isn't sufficient water in which  
20 to make up those rights, then additional water would  
21 have to be bypassed at Derby Dam, which would then  
22 interfere with our ability to divert water in Derby Dam.

23 So, indirectly, we see that there could be  
24 a possible problem with return flows. If these waters  
25 are going to be used within the system and the water

1 returned through the treatment facilities, those return  
2 flows will be made up. However, our concern is, as I  
3 expressed earlier, with 53369, the condition of the  
4 city in regard to its position with return of the  
5 water to the river, and the possibility that those  
6 waters could be removed without replacement.

7 And under those conditions, then, we are  
8 asking that the condition for return flows be placed  
9 on this transfer, assuming the water goes through the  
10 treatment facilities and is later removed without  
11 replacement.

12 Item No. 2, since it is my understanding that  
13 these two applications are being transferred from only  
14 a portion of the water rights and not the entire water  
15 rights--they are made up of the claims 642 and 638--  
16 that there is an assurance that the lands in which the  
17 waters are transferred from are no longer irrigated,  
18 inadvertently or advertently.

19 No. 3, we express concern that if water is  
20 continued to be transferred from the Wadsworth area,  
21 upstream, and water diminished in the use below Derby  
22 Dam, there comes a time when there is a public outcry  
23 for instream flows, and some ruling is made that requires  
24 instream flows below Derby Dam, which would affect our  
25 ability to divert water.

1 Under those circumstances, we are looking  
2 for consideration from the transfers. If that should  
3 occur, that a portion of that instream flow would be  
4 made up of the water right that is currently being  
5 irrigated in the area. Once it is transferred upstream,  
6 that water wouldn't be available for instream flows  
7 below Derby Dam.

8 Item No. 4 is our concern with the fact that  
9 waters that are currently diverted are allowed to flow  
10 below Derby is done so with the current state of the  
11 conditions of Derby Dam, being a structure that was  
12 constructed in 1903, that water is adequately passed,  
13 as water is transferred upstream, and, in this case,  
14 some 12 cfs or thereabouts.

15 The water that has to pass Derby will be  
16 reduced; otherwise, it would be an impact on our  
17 diversion right, if we had to pass the same amount of  
18 water that we are currently passing, although the water  
19 is being taken out upstream. It would be a double  
20 whammy on our diversion right, and we are concerned  
21 that the ability of the dam and the state of condition  
22 of the diversion structure is not such that we will be  
23 able to regulate the water to such a certain finite  
24 degree, so we are asking that the transfer of that  
25 water right be burdened with the pro rata share of cost

1 of ensuring that the water doesn't pass Derby Dam,  
2 because of the transfer upstream is shared by the  
3 water rights that are being moved upstream.

4 Our last item was just a concern with the  
5 cfs and the acre-footage. We understand that there is  
6 a limitation on the acre-footage, not to exceed, but  
7 we are not sure as to how the water would be utilized  
8 upstream in a cfs manner.

9 And if you took the cfs on a 365-day basis  
10 and used it, it would exceed the acre-foot limit of  
11 diversion.

12 We are not asking that the applications be  
13 denied; we are asking that if the applications are  
14 approved, that they be conditioned upon our concerns.

15 MR. MORROS: Does that conclude your position,  
16 Mr. McConnell?

17 MR. McCONNELL: I think that does.

18 MR. MORROS: Are you going to have any witnesses  
19 that you are going to want to testify on behalf of the  
20 protestant?

21 MR. McCONNELL: No.

22 MR. MORROS: Any questions? Do the applicants  
23 have any questions of Mr. McConnell, related directly  
24 to the exhibit?

25 MR. deLIPKAU: Yes, I think I would like to

1 ask some questions of Mr. McConnell.

2 MR. MORROS: All right.

3 LYMAN McCONNELL

4 called as a witness on behalf of the applicants,  
5 being first duly sworn on oath, was examined and  
6 testified as follows:

7 CROSS-EXAMINATION

8 BY MR. deLIPKAU:

9 Q Mr. McConnell, if it can be proven that there  
10 is no adverse effect upon the TCID water rights, would  
11 TCID withdraw its protest?

12 A Currently, or in the future?

13 Q At today's hearing.

14 A I think that, upon presentation of information,  
15 we would consider any information that is provided us.

16 Q Do you know whether or not the State Engineer  
17 is required, when deciding whether or not to grant a  
18 permit, he shall determine whether or not the contem-  
19 plated application will impair existing rights?

20 A Yes.

21 Q Who owns Derby Dam?

22 A United States.

23 Q Who has the duty to repair Derby Dam?

24 A Truckee Carson Irrigation District.

25 Q What is the condition of the repair or state

1 of the current dam?

2 A In what regard?

3 Q Is it in good condition? Bad condition?

4 A It's in fairly good condition.

5 Q Is it in need of repair?

6 A That is a qualitative answer, I guess--or  
7 question. It would depend upon what you are referring  
8 to.

9 Q Would the TCID have a protest if the granting  
10 of the permits do not impair the Truckee River decree?

11 A Well, I don't know if that question is  
12 relevant, from the standpoint of helping the State  
13 Engineer answer any questions.

14 Q Well, you are aware that the State Engineer,  
15 under the Truckee River decree, is given the authority  
16 to grant or deny applications to change, are you not?

17 A Well, that, together with state law, yes.

18 Q Now, if the State Engineer determines that  
19 there is no violation of the Truckee River decree,  
20 he is required to grant the application or applications,  
21 isn't he?

22 A Well, I think that would be an argument that  
23 could be made, but I don't necessarily agree with that.

24 Q Have you read the water law?

25 A Yes.

1 Q All right. You are familiar with it, then?

2 A Yes.

3 Q Isn't it true that the State Engineer, when  
4 deciding whether or not to grant the three subject  
5 applications, must also take into account the 1935  
6 Truckee River agreement?

7 A I would presume so.

8 Q All right. And that the State Engineer, in  
9 his decision, cannot grant an order which would violate  
10 that agreement; is that not true?

11 A I would say so.

12 Q All right. And is it also not true that the  
13 State Engineer, when deciding to act upon the three  
14 applications, must take into account other court  
15 decisions affecting storage and other similar matters  
16 on the Truckee River stream system? Can you answer that  
17 question?

18 Isn't it true that, when the State Engineer  
19 determines whether or not to grant the three subject  
20 applications, he must take into account the various  
21 other court decisions affecting storage and similar  
22 items on the Truckee River?

23 A I presume so, yes.

24 MR. deLIPKAU: I have no further questions,  
25 Mr. Morros.

1 MR. MORROS: Miss Oldham?

2 CROSS-EXAMINATION

3 BY MS. OLDHAM:

4 Q Now, Mr. McConnell, how might a public trust  
5 affect the water rights of TCID?

6 A Well, as I tried to explain, at one point  
7 in time, when the water rights that are below Derby  
8 Dam are transferred upstream, there won't be any  
9 flow below Derby Dam. And at that point, there may  
10 be a public outcry for instream flow. Currently, our  
11 releases are in the neighborhood of 30 to 35 cfs below  
12 Derby, and that is insufficient to satisfy any instream  
13 requirement.

14 Q From a legal standpoint, would you agree with  
15 such a ruling?

16 A Well, I don't know that I should give my  
17 comments on that.

18 Q Well, if--could it come about in other ways?  
19 For instance, could it come about as a result of outcry  
20 on the level of Pyramid Lake?

21 A What is that?

22 Q The public-trust doctrine. Instead of an  
23 instream requirement, it will be a lake-level require-  
24 ment at Pyramid Lake.

25 A I suppose that is possible.

1 Q How do you feel about that? Is that one  
2 easier?

3 A I still don't think that I have a comment on  
4 that.

5 Q What I am trying to--what I am trying to ask  
6 you is: If we are not sure how the public-trust doctrine  
7 might come about, can we be sure that that transfer  
8 of these water rights might be inconsistent with that?

9 A No, we can't. And that is why we are not  
10 saying that those transfers need be reduced as a result  
11 of that consideration at this time; it is only that they  
12 be conditioned upon a potential for that occurring,  
13 because we know that we have seen it on the horizon.

14 We have seen it in the State of California,  
15 and we know the State of Nevada has to consider the  
16 public interest that may just evolve into a similar  
17 requirement.

18 Q Does the public-trust doctrine apply in Nevada?

19 A Well, it just depends upon how you interpret it.  
20 Some people would say that the consideration of the  
21 public interest is a public trust.

22 Q How about the water-rights lawsuits with the  
23 City of Reno and Sparks? Are you a party to that lawsuit?

24 A Are you referring to the treatment plant?

25 Q Right.

1 A Yes, we are.

2 Q Are you a party to the proceedings that were  
3 previously before the Ninth Circuit?

4 A Yes.

5 MR. MORROS: I'm sorry. When you say "previously  
6 before the Ninth Circuit--"

7 MS. OLDHAM: Well, I believe-- Didn't the  
8 Ninth Circuit--

9 THE WITNESS: They hold on to it, partially.  
10 I don't think they dismissed it entirely.

11 BY MS. OLDHAM:

12 Q In attempting--

13 MR. MORROS: Wait a minute. Wait a minute.  
14 What lawsuit are we talking about?

15 MS. OLDHAM: There was an appeal, I believe,  
16 to the Ninth Circuit of the denial of the--denial of  
17 the water--the request by the Reno-Sparks treatment  
18 plant to be able to take a certain amount of water out  
19 of the river.

20 MR. MORROS: You are referring to the proceeding  
21 before Judge Foley?

22 MR. McCONNELL: Yes.

23 MR. MORROS: All right. My understanding--  
24 and I want to make sure I am not missing anything--there  
25 was a motion before the Ninth Circuit to dismiss that

1 appeal, and that was argued. And the court denied that  
2 motion, which then the briefing and oral-argument  
3 schedule was set up on the merits of the appeal. And  
4 that's now, we are in the process of completing the  
5 briefing and the oral arguments on the merits, which  
6 the Ninth Circuit will have to render an opinion on.

7 And the issue is directly related to--well,  
8 it's a jurisdictional issue, is what it is; isn't that  
9 correct?

10 MS. OLDHAM: Right.

11 MR. MORROS: I just want to make sure that  
12 I am not missing anything, since the State Engineer  
13 is a party to the lawsuit. I want to make sure I  
14 understand what I am being sued over.

15 MR. McCONNELL: Well, it is my understanding  
16 the issue is--and that is what our concern is--that  
17 Reno and Sparks takes the position that until they are  
18 completed with the treatment of the water through the  
19 treatment plant, they don't have to discharge it back  
20 into the river. And if they don't have to discharge it  
21 back to the river, there is no requirement to replace  
22 it, if they decide to pipe it into land application.

23 BY MS. OLDHAM:

24 Q If that comes about, do you anticipate that  
25 there would be a major disruption of all of the water

1 rights on the Truckee River downstream of Reno?

2 A Yes, I think so.

3 Q And do you think it might have a major  
4 disruption on Sierra Pacific and its water rights?

5 A I think so.

6 Q Are you asking that the State Engineer sort  
7 out what might happen as a result of that lawsuit in  
8 this case?

9 A No.

10 Q Are the gates and controls of the Derby Dam  
11 in need of repair?

12 A Currently, some of them are, yes.

13 Q Who is responsible for making those repairs?

14 A Well, between ourselves and the United States.  
15 We are the Truckee Carson Irrigation District.

16 Q You contracted with the United States that  
17 you would be responsible for making the repairs?

18 A That's correct.

19 Q Are you familiar with any provisions of the  
20 Truckee--of the Orr Ditch decree that relates to the  
21 maintenance and repair of the control structure?

22 A Not off the top of my head.

23 MS. OLDHAM: For the record, can we reference,  
24 on the general provisions, page 2 of the general  
25 provisions of the decree, the right-hand column, the

1 fourth paragraph down? Would you take a look at it?

2 MR. MORROS: On page 87?

3 MR. deLIPKAU: Yes.

4 MR. McCONNELL: This one is 89.

5 MS. OLDHAM: 87.

6 THE WITNESS: Are you talking about the  
7 paragraph that begins with "The owner--"?

8 MS. OLDHAM: Right.

9 MR. MORROS: I guess I'm a little confused  
10 on this, this issue related to Derby Dam. Are any of  
11 the other decreed water users, other than TCID, sharing  
12 in the maintenance of Derby Dam, or the control structures  
13 related thereto, at the present time, Mr. McConnell?

14 MR. McCONNELL: The only people that share  
15 in that are the people that own the water rights within  
16 Newlands Project.

17 MR. MORROS: And they are assessed on an  
18 annual basis? There is an assessment for maintenance,  
19 which includes maintenance on that diversion structure?

20 MR. McCONNELL: That's correct. There is an  
21 annual operation maintenance assessment that is made,  
22 which includes all of the structures that we have  
23 responsibility for maintaining.

24 MR. MORROS: But the decreed water right holders  
25 on that main channel of the Truckee and the upstream

1 tributaries don't share in the annual maintenance assess-  
2 ment for that structure, do they?

3 MR. McCONNELL: No.

4 BY MS. OLDHAM:

5 Q Did you assume that responsibility from the  
6 United States?

7 A Yes.

8 Q To maintain, pursuant to that paragraph of  
9 the Truckee--

10 A I don't know whether it was this paragraph  
11 specifically mentioned in our agreement.

12 Q Does the decree apply to TCID, or did the  
13 provisions of the decree apply specifically with  
14 respect to TCID, or was the United States the real  
15 party in interest?

16 A I can't answer that.

17 Q Do you know whether Sierra Pacific, Westpac  
18 Utilities, has offered to help to get your dam repaired  
19 within the structure of federal legislation?

20 A Yes.

21 Q Would our continuing to do that satisfy your  
22 concern here: continue to attempt to get your dam  
23 repaired through some sort of federal--

24 A I want to make it clear that, in our concerns  
25 with this water-rights transfer was the proposition that

1 we were looking for conditional approval on the basis  
2 of a pro rata sharing of the transfer of this water  
3 upstream, assuming we are unable to control the  
4 diversion.

5 We know that the diversion structure was  
6 built in 1903. It's a very old structure at the present  
7 time. It probably was constructed with the intent that  
8 there would be downstream water flows provided. And  
9 it has--you start getting into the area of less than  
10 30 cfs, and you take a major portion of that up to  
11 ten or 12 cfs, it starts becoming a little more difficult  
12 to regulate, as the flow of the river varies.

13 So we are looking only for contribution to  
14 the extent of a pro rata basis, if and when it becomes  
15 necessary that improvements to the structure, that we  
16 are obligated to maintain that structure, is not  
17 adequate to control the flows, so that it doesn't  
18 become a double-dipping, in a sense, from that stand-  
19 point.

20 Q So, I am not sure if you answered my question  
21 or not, which was: Would you be satisfied with Westpac  
22 working with you and agreeing to assist TCID in getting  
23 needed federal funding for those repairs; or are you  
24 specifically asking for Westpac to come up with the  
25 money?

1           A     No, we are not specifically asking for anyone  
2 to come up with the money. We are asking that the  
3 State Engineer consider the fact that, as the water  
4 rights are transferred downstream, that it becomes more  
5 difficult to regulate flows; and in that consideration,  
6 that there be pro rata sharing of the cost of trying  
7 to control those structures.

8                     It is similar to any other control structure:  
9 that it is designed to do certain things. When you  
10 change the applications, the design might not be  
11 adequate to provide for changed circumstances.

12           MR. MORROS: Let me make sure I understand,  
13 Mr. McConnell, what you are asking, and that is that  
14 the permit be conditioned to the extent that, should  
15 any modification of that diversion structure become  
16 necessary at Derby, as a result of downstream water  
17 rights being moved to points of diversion upstream,  
18 then those applicants under those--or those permittees  
19 under those permits, if and when they were approved,  
20 be required to share in the cost of any modification  
21 that might be required to that diversion structure  
22 at some time in the future. Is that a fair statement?

23                     MR. McCONNELL: That is a fair statement.

24           MR. MORROS: So you are anticipating that,  
25 should all downstream decreed rights be eliminated--

1 again, just for the sake of discussion--below Derby  
2 Dam, all of those rights are moved upstream, and Mr.  
3 Stone, the Water Master, indicates that there is a  
4 diversion requirement below Derby of about-- How much  
5 was that?

6 MR. STONE: Around 30 to 35 cubic feet per  
7 second, at the present time.

8 MS. OLDHAM: There is rights in excess of  
9 that.

10 MR. STONE: Yes, there are rights in excess  
11 of that, that are not being--that are not presently  
12 being irrigated.

13 MR. MORROS: But not all of those rights  
14 have historically called for water.

15 MR. STONE: That's correct.

16 MR. MORROS: I don't know whether Derby Dam  
17 was designed originally with that in mind, but I doubt  
18 it, since the dam itself was built at the turn of the  
19 century, and the decree didn't become final until 1944,  
20 or the Truckee River agreement.

21 I just want to make clear--I just want to be  
22 able to clearly understand, you know, what is the  
23 basis for your request or your concerns.

24 I am just anticipating that some time in the  
25 future there may be a modification of that diversion

1 structure at Derby Dam required, because of the  
2 elimination of or the movement of downstream water  
3 rights to points of diversion upstream from Derby;  
4 is that correct?

5 MR. McCONNELL: That's correct.

6 MR. MORROS: I guess I don't understand why  
7 that should occur. But I am sure you have your reasons.

8 MR. McCONNELL: Why what should occur?

9 MR. MORROS: Any modification of Derby Dam  
10 would be required under those conditions.

11 MR. McCONNELL: Well, currently, I suppose  
12 what you are referring to is the fact that maybe,  
13 perhaps the dam ought to be able to stop all flows,  
14 and currently, we are not able to stop all flows.

15 MR. MORROS: Why would you be required to  
16 stop anything other than what you are entitled to under  
17 the decree?

18 MR. McCONNELL: Well, right now we are  
19 required, under the decree, we are allowed to take up  
20 to the 1500 cubic feet per second, but we are required,  
21 for prior rights, to allow certain quantities of water  
22 to bypass Derby Dam. And it is those certain quantities  
23 that are in the neighborhood of 30 to 35 cfs that  
24 we can meet at the present time.

25 However, as the water rights are transferred

1 upstream--this one being approximately 12 cfs out of  
2 maybe 30 to 35 cfs--are transferred upstream, then  
3 what happens is, then we would no longer be required  
4 to allow 30 to 35 to bypass; we are only allowed--we  
5 are only required to allow 20 to 25 to bypass.

6 Then it becomes a point in time when the  
7 structure itself is not capable of maybe perhaps  
8 monitoring or controlling flows to such a small amount.  
9 And when you are talking about 500 cfs, or thereabouts,  
10 in the river, and in fluctuating amounts, so, as it  
11 becomes less and less water downstream, then it becomes  
12 more and more difficult to regulate.

13 And if you don't regulate it, then the  
14 water goes downstream, as it has in the past. And if  
15 a permit is not-- The water is also taken out upstream,  
16 so there is a double-dipping into the water source at  
17 that time, which, in fact, is going to impair our  
18 water-diversion right.

19 MR. STONE: Mr. Morros, as I may, as an  
20 operational matter, part of the rights downstream are  
21 now made up by leakage through Derby Dam.

22 MR. MORROS: I understand that. I was aware  
23 of that. It's not a tight dam.

24 MS. OLDHAM: But there is a distinction, also,  
25 between repair kinds of requirements and requirements,

1 I think, that might be the result of some sort of needed  
2 design modification that we are talking about here.

3 It's leaking through the gates and control  
4 structures, I understand, which could be made tight.

5 MR. MORROS: I'm just trying to determine  
6 whether Mr. McConnell's request has merit or not. Under  
7 the law, the State Engineer is required to evaluate  
8 the economic impacts on a water district associated  
9 with any proposed change. Obviously, if there would be  
10 need for expenditures of funds to modify Derby Dam,  
11 in any way, shape or form, at some time in the future,  
12 as the result of these rights that are being proposed  
13 to be moved from points of diversion below the Derby  
14 Dam to upstream locations, then his concerns have  
15 merit, under that provision of the statute.

16 MR. McCONNELL: I also raise it under a  
17 general concern that, as water flows change in the  
18 system, diversion structures have to change. If, say,  
19 for example, there is a change in the flow in the river,  
20 some diversion structures along the river may not be  
21 adequate to divert the water that they were adequate  
22 to divert previously. So you have a consideration or  
23 concern that what is current and what is maintained is  
24 current, and what operates under current conditions  
25 may not operate adequately under changed conditions.

1 And that is what our concern is.

2 MS. OLDHAM: I think from our standpoint there  
3 is a distinction between a repair condition and a  
4 needed modification of the entire structure in order  
5 to--

6 MR. MORROS: Well, I think that goes without  
7 saying.

8 MS. OLDHAM: And the repair situation is a  
9 requirement of the decree, and would not--the rights  
10 we are talking about here are five cfs. The dam,  
11 which--we don't believe that the dam is incapable of  
12 controlling it to the degree of the five cfs we are  
13 talking about, in its present design situation.

14 If there is a concern at this point, it is  
15 the result of the gates being in need of repair, which  
16 we have supported TCID and attempted to get monies  
17 to help them out that way, and will continue to do so.  
18 And I will state that for the record.

19 And I was just trying to find out if that was  
20 adequate for the purpose of this application, with  
21 respect to Mr. McConnell, or whether he was really  
22 trying to determine some precedent for the future  
23 that--

24 MR. McCONNELL: Well, we are not talking about  
25 repair, because, if we can repair it, and we can

1 prevent the flow, then we don't have a problem.

2 We are talking about the circumstance that  
3 we are not able to repair it, to modify it, so that  
4 we can control five, ten, 15 cfs, when we are talking  
5 about several hundred in the river. So it is not a  
6 situation where we are asking for folks to contribute  
7 toward our repair.

8 We are just looking toward the potential  
9 problems in the future, which may involve some considera-  
10 tion that you can't utilize the design structure that  
11 was put in by the United States in 1903, but that  
12 requires some modifications. And those modifications  
13 have to be done. And that is what we are talking  
14 about.

15 MR. MORROS: Well, under the decree, you  
16 can divert up to 1500 cubic feet per second from the  
17 Truckee River, but I think the Truckee canal pretty  
18 well limits you to what, about 900, isn't it?

19 MR. McCONNELL: Well, this year we had up  
20 to close to 950 at one time.

21 MR. MORROS: But that is just about the  
22 capacity of the canal, isn't it?

23 MR. McCONNELL: That is getting very close,  
24 yes.

25 MR. MORROS: Do you have any additional

1 questions?

2 BY MS. OLDHAM:

3 Q I just have one other, I guess. To the  
4 extent that you have 500 cfs coming into the canal  
5 at some point in time, in a normal year, when you have  
6 got plenty of water, is that going to affect your  
7 getting your entire right, or is it just going to affect  
8 the timing of it?

9 A It just depends upon the timing and the  
10 criteria for diversion.

11 Q In a normal water year, is what I am talking  
12 about.

13 A Yeah. There may be times when we are not  
14 able to take all of the diversion, but then there will  
15 be times later on, in the irrigation season, when we  
16 could. And that is what we are concerned about.

17 The circumstance that we are concerned about  
18 is the timing, when we are required to pass certain  
19 minimum flows past Derby as the result of downstream  
20 irrigation. And that is going to be in the later part  
21 of the summertime, primarily.

22 Q But you are not concerned about the time  
23 when there are no requirements for bypassing flows?

24 A No.

25 MS. OLDHAM: No further questions.

1           MR. MORROS: Well, your protest is basically  
2 the statement that if the applications are granted,  
3 they may tend to adversely affect existing downstream  
4 water rights. You know we have been through the  
5 process of what the State Engineer can consider, as  
6 far as a protest goes. And it has to be pretty much  
7 limited to those issues brought up in the statement  
8 on the protest. And that has pretty well been confirmed  
9 by the Ninth Circuit also.

10           But, on the other hand, the law requires  
11 the State Engineer to consider any potential economic  
12 effects on an irrigation district that may be involved  
13 in any of these changes.

14           So I want to get this clear in my mind as  
15 to--I don't know whether you are speculating on future  
16 modifications to Derby or whether your concerns have  
17 merit, have foundation.

18           Let's just say, again, for discussion purposes,  
19 suppose that all downstream decreed water rights were  
20 approved and were moved upstream, and there was no flow  
21 requirement to service priorities below Derby Dam. In  
22 your mind, is there a possibility that Derby Dam would  
23 have to be modified under those conditions?

24           MR. McCONNELL: Yes.

25           MR. MORROS: For what purpose?

1 MR. McCONNELL: Well, to ensure that the  
2 water rights of the district are met, so that we could  
3 divert the entire flow.

4 MR. MORROS: But the dam presently should be  
5 accomplishing that.

6 MR. McCONNELL: The dam currently allows  
7 certain waters to flow downstream, which are a require-  
8 ment of downstream water rights, to meet downstream  
9 water rights.

10 MR. MORROS: Well, what you are saying is  
11 there would have to be modifications to the extent that  
12 leakage to the dam and any other methods that is being  
13 utilized now to service those downstream rights would  
14 be limited so that TCID could more efficiently divert  
15 whatever flows were available in the channel, with no  
16 consideration for any downstream rights?

17 MR. McCONNELL: That's right. Because  
18 currently, right now, the water flows downstream to  
19 meet those rights. If the permits are approved, the  
20 water will be taken out of the upstream. So, if the  
21 water continues to flow downstream, now you have had--  
22 you have taken and impaired the diversion rights of the  
23 district. You see what I mean?

24 MR. STONE: Are you saying that you could not  
25 shut Derby Dam off tight without some modification to

1 the existing structure?

2 MR. McCONNELL: That's probably correct.

3 MR. STONE: As opposed to a repair of the  
4 present structure?

5 MR. McCONNELL: Yes, yes, because the gates  
6 on them are cast-iron type gates. They are sliding  
7 gates. They have the steps on the upstream side,  
8 instead of the downstream side.

9 The bottom half moves up, and it catches  
10 the top half. And that moves up. And the actual  
11 structure itself maybe wasn't designed or constructed  
12 in such a fashion to prevent entire flows from being  
13 cut off.

14 We have attempted, on various occasions, to  
15 try to stop leakage and stop the flows with replacement  
16 of gates and those things, and have been completely  
17 unsuccessful.

18 MR. MORROS: Basically you are saying that  
19 when the river gets down to a flow of, say, 900 to  
20 950 cfs at Derby Dam, then you are in a position to  
21 divert the entire flow?

22 MR. McCONNELL: That's correct.

23 MR. MORROS: You are under no further  
24 obligation to allow water to go on by to meet those  
25 downstream priorities?

1 MR. McCONNELL: If those downstream priorities  
2 are transferred upstream, that would be correct.

3 MR. MORROS: Any additional questions? Mr.  
4 Stone?

5 MR. STONE: No, I have no questions.

6 MR. MORROS: Why don't we take about a ten-  
7 minute break and then get started on the applicants.

(Recess.)

8  
9 MR. MORROS: One thing I neglected to take  
10 care of, when Mr. McConnell finished up, was the  
11 exhibit that we marked as Protestant's No. 1, which  
12 was the memo to Ross deLipkau from Clare Mahannah,  
13 dated November the 10th, 1989, that I previously  
14 described.

15 Any objections to this exhibit being received  
16 into the record?

17 MR. deLIPKAU: No.

18 MR. MORROS: Then Protestant's Exhibit No. 1  
19 will be admitted.

(Protestant's Exhibit No. 1  
20 was admitted into evidence.)

21  
22 MR. MORROS: I guess it is the applicant's  
23 turn at this point.

24 Let's go off the record for just a minute.

(Discussion off the record.)  
25

1 MR. MORROS: We have marked, for identification  
2 purposes, seven exhibits for the applicant.

3 MS. OLDHAM: Eight, I believe.

4 MR. MORROS: Let's go off the record again.

5 (Discussion off the record.)

6 MR. MORROS: Eight; is that correct?

7 MS. OLDHAM: Yes. There is a pencilled-in  
8 change to Exhibit 1, which is on the official copy and  
9 mine, and I think it needs to be made so on yours, and  
10 several of the others, as Applicant's No.--the first  
11 block that has 53093, that should be 53092, claim 642.

12 MR. MORROS: Wait a minute. Okay. I'm sorry.

13 MS. OLDHAM: Is that right?

14 MR. MORROS: Okay.

15 MS. OLDHAM: Where it says 092, then it needs  
16 to be three.

17 MR. MORROS: Let the record reflect that the  
18 State Engineer has made those corrections to Exhibit No.  
19 1, Applicant's Exhibit No. 1, that has been marked for  
20 identification purposes.

21 Is Mr. Burns going to be providing some extra  
22 testimony?

23 MS. OLDHAM: Yes.

24 MR. MORROS: All right. Mr. Burns, I will ask  
25 you to state your full name for the record, and then

1 raise your right hand to be sworn.

2 MR. BURNS: Joseph I. Burns.

3 (Whereupon the witness was duly  
4 sworn.)

5 JOSEPH I. BURNS

6 called as a witness on behalf of the applicant,  
7 being first duly sworn on oath, was examined  
8 and testified as follows:

9 DIRECT EXAMINATION

10 BY MS. OLDHAM:

11 Q Mr. Burns does Exhibit 2 accurately reflect  
12 your background, education and experience?

13 A Yes, it does.

14 MR. MORROS: Any objections to Exhibit No. 2  
15 being received into the record? Applicant's Exhibit No.  
16 2, that exhibit is entitled Professional Background and  
17 Experience of Joseph I. Burns, consulting civil engineer.  
18 Mr. McConnell?

19 MR. McCONNELL: None.

20 MR. MORROS: All right.

21 (Applicant's Exhibit No. 2 was  
22 admitted into evidence.)

23 MS. OLDHAM: Can we ask that he be qualified  
24 as an expert, that you will stipulate that he be  
25 qualified as an expert witness in engineering, civil

1 engineering, hydrology and hydraulics?

2 MR. McCONNELL: Certainly.

3 MR. MORROS: Hearing no objections, then,  
4 Applicant's Exhibit No. 2 will be received into the  
5 record.

6 BY MS. OLDHAM:

7 Q Mr. Burns, was Exhibit 1 prepared by you,  
8 or under your direct supervision?

9 A Yes, it was.

10 Q Can you generally describe that exhibit, please.

11 A This shows the Truckee River system, starting  
12 up at Lake Tahoe, and indicates the reservoirs in the  
13 California area that feeds water to the Truckee system,  
14 and carries the Truckee system out to Pyramid Lake.

15 It also shows the portion of the Carson River,  
16 Lahontan Reservoir and the Carson River, going out to the  
17 Fallon area. So it generally covers the Carson-Truckee  
18 River systems.

19 MS. OLDHAM: This exhibit was intended to be  
20 informational and to help us, if we needed to distinguish  
21 the various locations.

22 We would offer it for that purpose.

23 MR. MORROS: Any objection?

24 MR. McCONNELL: No.

25 MR. MORROS: All right. Applicant's Exhibit

1 No. 1 will be received into the record.

2 (Applicant's Exhibit No. 1 was  
3 received into evidence.)

4 BY MS. OLDHAM:

5 Q Mr. Burns, pursuant to your testimony in this  
6 case, what were your duties and responsibilities requested  
7 of you by Sierra Pacific?

8 A I was requested to take a look at the applica-  
9 tions before the State Engineer and determine what  
10 impact, if any, it would have on the downstream water  
11 users, particularly TCID.

12 Q And what was the conclusion of your analysis?

13 A The conclusion is that there would be no  
14 adverse effect on TCID, as to their water rights;  
15 whereby the transfer of these applications into the  
16 Truckee Meadows area.

17 Q Will you please generally describe the  
18 analysis you performed.

19 A What we did, we took a look. We said that  
20 we should take a look at the most adverse condition;  
21 that is, what would be most likely to impact TCID.

22 So we took a look at a future condition and--  
23 in which we would be utilizing--or the water rights  
24 in the Truckee Meadows would be fully utilized. Also,  
25 we assumed that the water rights downstream of Derby

1 Dam would be fully utilized, and water would be released  
2 for that purpose.

3 And in the analysis that we made, we took a  
4 look in the future at a condition which we were attempt-  
5 ing to deliver 119,000 acre-feet of water M & I water  
6 to the Truckee Meadows area.

7 And in that analysis, we had additional water-  
8 supply sources that would support acquired irrigation  
9 rights. And the analysis indicates that we could  
10 support approximately 72,000 acre-feet of irrigation  
11 rights that would be exercised in the Truckee Meadows  
12 for M & I purposes.

13 And we assumed that the remaining irrigation  
14 rights that were in the Truckee Meadows were being  
15 exercised, water was being delivered for irrigation  
16 purposes. And we operated this system with the Truckee  
17 River model. And I think Mr. Morros is familiar with  
18 the model.

19 It is a model that has been developed by  
20 working with many, many people and agencies, to give  
21 us a technique in how we can address what will happen  
22 to the river system if we make certain assumptions.

23 And in part of the assumptions that we had  
24 in the model is that the present OPAC would be in place  
25 for the Truckee Carson Irrigation District, and a total

1 demand for the Newlands Project of 320,000 acre-feet.

2           What we did, we operated the model with the  
3 condition that the water rights were being fully  
4 exercised downstream of Derby Dam. And from that  
5 analysis, then we could develop what the shortages  
6 would be of both in the Truckee division and the  
7 Carson division of the Truckee Carson Irrigation District.

8           Then we moved, and what we did, initially,  
9 when we started to take a look at this question, we  
10 understood that all three applications were downstream  
11 of Derby Dam. So the analysis we made, which is a  
12 more severe case than if we have one of these applica-  
13 tions upstream of Derby Dam--but we assumed that the  
14 three applications were downstream of Derby Dam, and  
15 that a diversion of approximately 670 acre-feet would  
16 be required for those applications.

17           Then we made the assumption that that water  
18 was not going to be diverted at those points, and  
19 that we moved the 3581 acre-feet of the right, the  
20 right for applying water to the land, moved that up  
21 into the Truckee Meadows, and that right would then  
22 be exercised in the Truckee Meadows as part of the  
23 72,000 acre-feet of irrigation rights used for M & I  
24 purposes.

25           We operated the model, and then we came up

1 again with the impact on TCID, which shortages would  
2 they experience in the Truckee division and the  
3 Truckee--and the Truckee division.

4 And the period that we used, we used the  
5 hydrologic period of 1901 through 1980, which has been  
6 sort of a standard period we have been using in many  
7 of the negotiations or litigation. And what we came  
8 up with--

9 Q Well, looking now at Exhibit--Applicant's  
10 Exhibit 3, entitled Truckee River Model Development  
11 and Description, was this prepared by you, or under  
12 your direct supervision?

13 A Yes, it was.

14 Q Would you just generally describe what is in  
15 that exhibit.

16 A Well, what this exhibit does, it gives a  
17 little background on the Truckee River model, and how  
18 it was started, and the various elements that went  
19 into the model. So it is really to give a little  
20 background on the model that we are using here, to  
21 determine a study of the impact on the Carson and  
22 Truckee River systems, when we make changes to the  
23 system.

24 MS. OLDHAM: We were aware that the State  
25 Engineer has become familiar with the Truckee River

1 model, but we thought, for the record, if we just put  
2 together a description, that it might save time on the  
3 record to provide the description of the model in this  
4 format, rather than trying to do it all on the record,  
5 especially recognizing that the protestant is also  
6 fairly familiar with the model.

7 MR. MORROS: That is acceptable to the  
8 State Engineer, as long as it is acceptable to the  
9 protestant. I will take administrative notice of  
10 all of the stated information associated with that  
11 model, which the State Engineer's Office is familiar  
12 with.

13 Is that satisfactory to you, Mr. McConnell?

14 MR. McCONNELL: Yes.

15 MS. OLDHAM: Then is Exhibit 3 admitted?

16 MR. MORROS: I certainly have no objection.  
17 Mr. McConnell, do you have any objections to Applicant's  
18 Exhibit No. 3 being admitted?

19 MR. McCONNELL: For what purpose?

20 MS. OLDHAM: Well, I think that is informa-  
21 tional, as well as this is attempting to--this is  
22 intended to be the background on the development of the  
23 model. It doesn't have any information with respect  
24 to the particular runs done for the analysis here, but  
25 just how the model itself was developed, and the process

1 Mr. Burns went to.

2 MR. McCONNELL: For historical information,  
3 I don't have any objection.

4 MR. MORROS: All right. Applicant's Exhibit  
5 No. 3 will be received into the record.

6 (Applicant's Exhibit No. 3  
7 was received into evidence.)

8 BY MS. OLDHAM:

9 Q Mr. Burns, was Exhibit, Applicant's Exhibit  
10 4 prepared by you and under your supervision?

11 A Exhibit 4 is the water-supply impacts on  
12 TCID. That is Exhibit 4.

13 Q Does this exhibit essentially summarize the  
14 conclusions of your analysis?

15 A Yes, it does.

16 Q Could you describe that exhibit and the  
17 conclusions that it contains.

18 A This summarizes the results of the analyses,  
19 using the Truckee River model, under the conditions which  
20 I previously stated; and that is, under the condition  
21 of first operating the system with the 670 acre-feet,  
22 which is the total quantity of diversion water under  
23 these three applications, that that water was diverted  
24 downstream from Derby.

25 Then the system was run by moving the 581

1 acre-feet of right, which we don't bring up the losses  
2 associated with that diversion; bring 581 acre-feet  
3 of water into the Truckee Meadows.

4 That is exercised as part of the 72,000 acre-  
5 feet of irrigation rights used for M & I purposes.

6 Then the model was run, and we ended up then  
7 with what the impact is. And in this case, we have  
8 summarized the comparison or impact on TCID. And we  
9 are taking a look at the shortages that would be--  
10 that would result in both the Truckee division and  
11 Carson division.

12 On page 2, of Exhibit 4, we have a table  
13 title comparison of TCID shortages, values, 1,000  
14 acre-feet.

15 We have the calendar year in which a shortage  
16 would have occurred. Again, the period that we are  
17 analyzing is the hydrologic period 1901 to 1980.

18 Then the next two columns are headed 670  
19 acre-feet diverted downstream of Derby Dam. And under  
20 that heading, we have two columns: 1, Truckee division,  
21 which shows the shortage that would occur. For  
22 example, in 1931, there would have been a shortage of  
23 14,490 acre-feet in the Truckee division. And then,  
24 similarly, the Carson division, in the year '31,  
25 Carson division of the Newlands Project would have had

1 a shortage in the supply of 144,190 acre-feet.

2 Then the next two columns that are headed 581  
3 acre-feet transferred to Westpac, that's moving 581  
4 acre-feet of right from below Derby Dam up to the  
5 Truckee Meadows.

6 And the result is--for example, in the  
7 Truckee division, in 1931, note that the shortage in  
8 the Truckee division is 4,230 acre-feet, which is less  
9 than the shortage that would occur in the Truckee  
10 division, if those rights have been exercised downstream  
11 of Derby Dam.

12 Also Carson division, in the same manner,  
13 it shows that we have a 143,830 acre-feet shortage  
14 in 1931 in the Carson division, when we exercised the  
15 right upstream of Derby. And that, again, is less  
16 than the shortage that would have occurred if those  
17 rights had been exercised downstream of Derby Dam.

18 Then take a look at the totals down at the  
19 bottom. Notice that in the Truckee division it has  
20 an accumulative shortage of 33,170 acre-feet for those  
21 years. If the right had been exercised upstream, the  
22 shortage would have been 32,410.

23 Similarly, the Carson division shortages  
24 were greater if the rights were exercised downstream  
25 of Derby. So the conclusion is, by operating the whole

1 system with all of the constraints, it comes out that  
2 there is no adverse impact on TCID by moving these  
3 rights upstream.

4 Q The years you have listed are the years of  
5 shortages. Were there any shortages in other years  
6 to TCID?

7 A No. These were the shortages in the period  
8 of analysis.

9 Q So in the other 80 years not listed here,  
10 was there any impact on TCID?

11 A No.

12 MR. MORROS: What you are saying, basically,  
13 Mr. Burns, is that approval of these applications is  
14 going to result in more water being available to TCID  
15 in those--for the lack of a better term--drought years?

16 THE WITNESS: Yes.

17 MR. MORROS: Or at least that is what your  
18 model is telling you.

19 THE WITNESS: Yes. Then, if you follow it  
20 through, you can see why. It has to do with consumptive  
21 use downstream, or taking it upstream and using it in  
22 a way that there is a greater return to the river. And  
23 these factors all come in to play.

24 For example, at Derby Dam, what we are talking  
25 about here is that we must pass 670 acre-feet to divert

1 that water; you must divert the right plus the loss.

2 But if we move the water upstream into the  
3 Truckee Meadows, then all that Westpac will exercise  
4 is the face value of the right: 581 acre-feet.

5 MR. MORROS: Doesn't that basically support  
6 Mr. McConnell's concerns related to depletion of those  
7 flows below Derby Dam, that might result in triggering  
8 something, such as the Public-Trust Doctrine, or some  
9 type of requirement for instream flows?

10 THE WITNESS: Well, what we have in this  
11 analysis is, as I said, a future condition. And we are  
12 assuming--and in this analysis we are making sure that  
13 all of the rights downstream of Derby Dam, the Indian  
14 rights, that all of those rights are being met and  
15 exercised.

16 And actually, that if all of those rights are  
17 being exercised, the water supply from the river, it  
18 is going to be more than the leakage coming past the  
19 dam; that actually water will have to be released.

20 And those rights, I think, are first rights  
21 on the river. And they will be exercised; and those  
22 rights, I don't believe, can be moved. They will be  
23 there. And with a, we assume, an 1859 right, we, in  
24 all of our studies, indicate that that water will be  
25 there, those rights will be met. And it will take more

1 than just the leakage from the dam to do that.

2 MR. MORROS: Well, what if things change?  
3 What if conditions change? The dam is modified, and  
4 there is no longer any leakage.

5 THE WITNESS: Well, I think it would be of  
6 benefit to TCID and to Westpac. For example, just  
7 last spring, when the Water Master was operating the  
8 river, he was passing much more than Floriston rates  
9 at Farad, because Independence had stored 3,000--they  
10 have a first right, 3,000 acre-feet. OPAC had been  
11 filled up to 25,000 acre-feet. No additional water  
12 could be stored upstream in those reservoirs, or Prosser,  
13 or Stampede, until TCID rights are met.

14 So the Water Master passes all of the water  
15 down to Derby Dam. And I think TCID diverted about  
16 an average of almost 900 second-feet per month. But  
17 there was probably, I think, about 60 or 60-plus second-  
18 feet passing the dam. They couldn't control it.

19 Now, that 60 second-feet could, if it had  
20 not been passing the dam, have been stored upstream  
21 by Westpac, because the right of TCID was being measured  
22 by how much they could put in the canal.

23 So here is a case where having a facility that  
24 will--you can't control water. It is not only important  
25 at low flow, it's important at high flow. So I think

1 it's a benefit to both the TCID and of the other water-  
2 right holders upstream.

3 MR. MORROS: Mr. Turnipseed, do you have any  
4 questions?

5 MR. TURNIPSEED: Do you want to wait until  
6 he is done? Okay.

7 EXAMINATION

8 BY MR. TURNIPSEED:

9 Q In your conclusion here, does this assume,  
10 then, that 58 percent of the 58-percent rule, does  
11 that--

12 THE WITNESS: You are referring to the critical-  
13 year yield?

14 MR. TURNIPSEED: Critical-year yield; does  
15 that assume, then, the 58 percent of water transfer is  
16 going to M & I, and the other 42 percent is going on down-  
17 stream?

18 THE WITNESS: This is being transferred up  
19 with that 1.72 factor; that's correct.

20 BY MR. TURNIPSEED:

21 Q And also, then, with what comes back through  
22 the sewage-treatment plant?

23 A That's correct.

24 Q But if those two--if either of those two  
25 assumptions were to change, then the results would be

1 different?

2 A Yes, if you changed some of those assumptions.  
3 But we are operating--this is falling within the  
4 present operating rules, if you will, of PSC on how  
5 the Sierra Pacific will handle the water rights and  
6 transfer them up.

7 MR. TURNIPSEED: I see.

8 MS. OLDHAM: Maybe just as a legal aside,  
9 we did get a copy of the statute, 533.370, which  
10 talks about proposed changes of use: if, within an  
11 irrigation district, must not adversely affect the cost  
12 of water for other holders of water rights in the  
13 district, then the efficiency of delivery.

14 For the record, we wanted to clarify that  
15 the obligations with respect to the water rights being  
16 transferred within the district--

17 MR. MORROS: But, if as a result of these  
18 transfers, modifications have to be made to Derby,  
19 and that cost has to be passed on to those water users  
20 within that irrigation district, I think it falls  
21 within the authority of this statute.

22 MS. OLDHAM: Well, I guess two premises of  
23 that is the statute really talks about--it's conditioned  
24 upon the fact that the transfer is within an irrigation  
25 district, which it is not. This district--or this right

1 is not within an irrigation district.

2 But, secondly, I think we disagree with the  
3 fact that the modifications are being required by the  
4 transfer; that specifically, we think the modifications  
5 are required now, and that our water rights are being  
6 impaired as a result of those repairs not having been  
7 done and the modifications not having been made.

8 You know, I don't know whether you call them  
9 modifications--it's semantics--or repairs.

10 When we replaced the gates at Independence  
11 Lake, we replaced the gate with a tight structure,  
12 you know. We didn't go back in and fix the old cast-  
13 iron gate. That wouldn't be the way you would go about  
14 doing it on a reasonable basis. You put in a decent  
15 control structure.

16 MR. MORROS: What you are saying is that there  
17 is a distinction as to whether this statute is applicable  
18 or not, and that distinction is whether it is directly  
19 related to whether the change is proposed internally  
20 within the district, or proposed to remove a water  
21 right from within the district and take it to outside  
22 use. In the absence of that, your position is that  
23 533.370, 1-B, does not apply; is that correct?

24 MS. OLDHAM: Right. And further, that even--  
25 you know, assuming arguendo that you apply it, that

1 TCID has an obligation under the Orr Ditch decree,  
2 which was that section that we pointed out earlier, to  
3 see that they have an efficient and effective control  
4 structure, and that that obligation goes to Westpac  
5 right now, that our water supplies are being affected  
6 by that leaking at times when there are no rights,  
7 that have a call on that water.

8 And for that reason, we have proceeded to  
9 try and get those repairs done; through trying to get  
10 federal assistance, knowing that TCID does have some  
11 financial problems.

12 MR. MORROS: Okay.

13 MR. deLIPKAU: Mr. Morros, I would concur with  
14 Westpac's position.

15 MR. MORROS: For some reason, I knew you would.

16 REDIRECT EXAMINATION

17 BY MS. OLDHAM:

18 Q Mr. Burns, turning now to Exhibit 5, Applicant's  
19 Exhibit 5--let's take 5 and 6 together--were these  
20 exhibits prepared by you, or under your direct supervision?

21 A Yes, they were.

22 Q Could you describe those two exhibits, please.

23 A Well, we start with Exhibit 5, which is  
24 designated Case A, and thought we would take some kind  
25 of a schematic, an application of some rates of flow,

1 and take a look at what happens if we move certain  
2 rights around in the system.

3 And we started up at the top, and made an  
4 assumption, say, there is 500 second-feet at--and  
5 these, incidentally, are second-feet--500 second-feet  
6 would stay essentially at Farad. That's on the upper  
7 left-hand corner, just as before transfer.

8 Then we assume that there is a hundred second-  
9 feet diverted in the Reno-Sparks area for M & I purpose.  
10 And assuming a 50 percent return flow from that diversion,  
11 so we have 400 second-feet, after the hundred-second-  
12 foot diversion; 50 second-feet of return flow. Now  
13 there is 450 second-feet in the river.

14 Then we have assumed that we have had a diversion,  
15 an irrigation diversion, say, downstream of Vista,  
16 upstream of Derby Dam, making the assumption that that  
17 is ten second-feet.

18 And then, consumptive use is about 70 percent;  
19 we have about 30 percent return flow, so three second-  
20 feet of the ten diverted would return to the river.

21 So we end up with a flow of 443 second-feet  
22 upstream, or at Derby Dam.

23 Then we make an assumption that there is a  
24 requirement that 50 second-feet be passed below Derby  
25 Dam for the water right holders downstream of Derby Dam.

1 Then we are taking a--identifying a diversion of ten  
2 second-feet, and, again, a return flow of three second-  
3 feet results in a total flow of 43 second-feet in the  
4 river below that diversion and use.

5 And we end up that, Derby Dam, we have 443  
6 second-feet; we have a 50-second-foot requirement of  
7 flow below Derby Dam. And that results in a flow to  
8 TCID of 393 second-feet.

9 And we are assuming here that that is a  
10 right they are exercising under their OPAC, and they  
11 are attempting to take the water that is available  
12 to them over to Lahontan, or to the Truckee division.

13 Now, we assume, after transfer--let's  
14 transfer the ten-second-foot diversion below Derby  
15 Dam. Let's transfer that up into the Truckee Meadows  
16 or the Reno-Sparks area. And let's exercise that  
17 right for an M & I purpose. So now we have our 500  
18 second-feet coming into Farad, now we divert 110 second-  
19 feet from M & I purposes. And that 50 percent return-  
20 flow, we have 55 second-feet coming back in the river.  
21 So we have now 445 second-feet, say, at Vista. We have  
22 our--still have our irrigation diversion between Vista  
23 and Derby Dam. And we follow that through, and we end  
24 up with 438 cubic feet per second at Derby Dam.

25 But since we have removed a diversion require-

1 ment or right downstream of Derby Dam, we no longer  
2 have to put the 50 second-feet, but we have to leave  
3 the 43 second-feet. We have taken out the effect of  
4 that diversion.

5 So now we have 438 second-feet above Derby,  
6 and we have the requirement to release 43. And that  
7 leaves 395 second-feet to TCID.

8 And this, in a rather simple schematic way,  
9 demonstrates what the impact is. We have a consumptive  
10 use downstream; we move it up, change it to M & I use,  
11 and it does have an impact, and it's a favorable impact  
12 on TCID.

13 Q Is it favorable in all years?

14 A Yes. ASSUMES AG C.O. > 50% IN A  
YEAR

15 Q In other words, if TCID had a right to a  
16 certain amount of water in a normal year, are they  
17 going to get more water, or are they going to get the  
18 same amount of water quicker?

19 A They would get--well, they would get the same  
20 amount of water. You are assuming, in a normal year,  
21 they would get up to their right, and they would get up  
22 to their right.

23 Q So it really only--it has a favorable aspect  
24 to it during drought years?

25 A Yes.

1 Q Case B, could you--

2 MR. MORROS: You are referring to Exhibit 6  
3 now?

4 THE WITNESS: Exhibit 6, Case B, is this--  
5 we simply took the irrigation that we are making,  
6 essentially, between Vista and Derby, moved that into  
7 the Truckee Meadows, and exercised that as an M & I  
8 right. And in that case, we come back, we have now  
9 110 second-feet.

10 Of that, we are taking from the river, for  
11 M & I, we have a 55 second-foot return; we have  
12 limited the irrigation use between Vista and Derby,  
13 and we end up with 445 second-feet above Derby Dam.

14 In this case, we still have the right being  
15 exercised downstream, so we must release 60 second-feet.  
16 Again, in this case, it indicates that we end up with  
17 395 second-feet to TCID, which is greater or more water  
18 under the before-transferred condition.

19 BY MS. OLDHAM:

20 Q What is the basis for saying it is greater  
21 in both Exhibits 5 and 6?

22 A Notice indicated flows to TCID, in the before-  
23 transfer, we have a line coming down that says "to TCID,  
24 and there's 393 second-feet," Case A.

25 Then go down, after transfer, and note there

1 is 393 second-feet indicated there. And that also  
2 appears on Case B as well.

3 Q But is that a result of operating criteria?

4 A It is the result of applying, yes, applying  
5 the operating criteria and the nature of use of the  
6 water, and where you use the water.

7 Q And is the greater amount that occurs in the  
8 after-transfer related to the return flow of irrigation  
9 versus M & I?

10 A Yes. And also, in the--when you are between  
11 Vista and Derby Dam, but also it comes into play here,  
12 the consumptive portion. But also, when you apply the  
13 69-31 percent criteria in that irrigation diversion,  
14 it's upstream, and that's counted in the 69-31. So it  
15 ends up that the major difference is the consumptive  
16 use versus the return flow from M & I.

17 Q Were Exhibits 7 and 8 prepared by you, or  
18 under your direct supervision?

19 A Yes.

20 Q Can you describe what is in Exhibits 7 and 8.

21 A May I check? Is this 7?

22 Q Yes.

23 A Exhibit 7 is a listing of the water rights  
24 that have been previously transferred from downstream;  
25 that is, downstream of Vista, upstream, by--through the

1 State Engineer's Office, by Westpac.

2 Q That's 7, did you say?

3 How about 8? Could you describe that exhibit?

4 A Eight indicates that the subdivision approved  
5 by the State Engineer's Office using these portions of  
6 these downstream rights that were transferred up to the  
7 Truckee Meadows.

8 Q Do you know, did any of these transfer have  
9 an adverse impact on TCID?

10 A No.

11 Q Based on your total analysis and all of the  
12 exhibits, do you have a conclusion whether the transfers  
13 of the water rights under Applications 53369, 53092  
14 and 53093 would adversely impact the rights of TCID?

15 A They do not adversely impact the rights of  
16 TCID.

17 MS. OLDHAM: Thank you.

18 MR. MORROS: Mr. McConnell?

19 MR. deLIPKAU: Could I ask a few more questions?

20 MR. MORROS: Go ahead.

21 (Discussion off the record.)

22 DIRECT EXAMINATION

23 BY MR. deLIPKAU:

24 Q Mr. Burns, you earlier stated that you had  
25 prepared what is called the Truckee River model; is

1 that correct?

2 A That's correct.

3 Q In two sentences, could you please describe  
4 the Truckee River model.

5 A It's a model to permit as to operate the Truckee  
6 and Carson River systems so that we can measure what  
7 happened through the system by applying all constraints  
8 on the system.

9 Q All right. Where else, besides today's  
10 hearing, has the model been used?

11 A It has been used in Federal Court; it has  
12 been used in negotiations; it has been used--well, it  
13 is being now used by all the parties that are involved  
14 on the Truckee River system. We have technical committees,  
15 and that includes the tribe.

16 Q In answer to Mrs. Oldham's question, you  
17 stated that if the three applications were, in fact,  
18 granted, there would, in fact, be no adverse effect  
19 upon TCID; is that correct?

20 A No adverse impact on the water rights; that  
21 is correct.

22 Q Thank you. Would you please describe what  
23 effect the granting of the three permits would have  
24 upon the Truckee River decree?

25 A None.

1 Q All right. Would you please--

2 A You are applying the Truckee River decree  
3 when you make the analysis.

4 Q I see. Would you please describe whether  
5 or not the granting of the three applications would  
6 impair or violate the Truckee River agreement of 1935.

7 A Not as far as I know.

8 Q All right. Do you know whether or not the  
9 Truckee River agreement, in particular page 9, the 31-  
10 69 percent ratio, could be maintained should the three  
11 applications be granted?

12 A I don't know about what is on page 9, but  
13 applying the 69-31, certainly could be and would be  
14 applied.

15 Q All right. Let us assume that some superior  
16 court or some superior governmental authority states  
17 that the effluent could not be returned to the Truckee  
18 River. Do you have that assumption in mind?

19 A Yes.

20 Q What would be the effect upon Westpac and  
21 TCID, should that event occur?

22 A I assume the 69-31 percent would still apply,  
23 and there would be adverse impact on both.

24 Q And how would that adverse impact occur?

25 A Because it's set up that 69 percent of the

1 diversions, instantaneous diversions between Farad and  
2 Derby, you can add them all--the diversions cannot be  
3 more than 69 percent of that total flow, and the 31  
4 percent out of Derby Dam has to be met, so you have to  
5 meet the 31 percent downstream.

6 If you are not putting the return flow in,  
7 then you are going to back off on the water uses up-  
8 stream.

9 Q So, basically, there would be a large curtail-  
10 ment in water consumption and use within the Westpac  
11 service area; is that not correct?

12 A It depends upon how much you take out.

13 Q All right. And it would be devastating?

14 A Well, again, it depends upon what the conditions  
15 are.

16 Q Is it again your testimony that, should the  
17 three applications be granted, there will be no adverse  
18 effect or impact upon TCID?

19 A That's correct.

20 MR. deLIPKAU: No further questions, Mr. Morros.

21 MR. HOWARD: No questions.

22 MR. MORROS: Mr. McConnell?

23 CROSS-EXAMINATION

24 BY MR. McCONNELL:

25 Q Mr. Burns, on Exhibits 7 and 8, what was the

1 purpose of Exhibits 7 and 8? What was the purpose to  
2 illustrate?

3 A I believe it was to illustrate what actions  
4 had been taken on downstream water rights by moving  
5 them upstream.

6 Q Is there any indication, as a result of the  
7 fact that only 265 acre-feet have been used for  
8 subdivision, whereas 4,289 acre-feet have been trans-  
9 ferred downstream to upstream? Is there anything  
10 intended to be shown by that?

11 A No.

12 Q You weren't implying that 4,000 acre-feet  
13 was transferred upstream, and only using 265, and the  
14 rest of it was to our benefit, then?

15 A No. But notice that some of this is upstream,  
16 to Tracy Power Plant. No, this was just simply a matter  
17 of actually what has happened.

18 Q Just for the record, to show what transfers  
19 have occurred in the past, and where they have gone;  
20 is that correct?

21 A Where part of them has gone; that's correct.

22 Q So it appears that a major portion of those  
23 transfers went upstream, but they didn't go into the  
24 Reno-Sparks area; is that correct?

25 A The Tracy Power Plant were retained at that

1 location.

2 Q And most of those transfers occurred when?

3 A I would have to check.

4 Q The fifties, sixties, or before?

5 A Whenever the Tracy Power Plant-- Mr. Furth  
6 may be able to help us out.

7 Q With regard to your Exhibits 5 and 6, when  
8 you made those illustrations, you were showing that the  
9 amount of water that reaches Derby Dam during the year  
10 of 443 or 438 cfs; is that correct?

11 A Yes.

12 Q And then the district then would divert 393  
13 or 395, depending upon the circumstances?

14 A That is what would be available for the  
15 district to divert.

16 Q So that assumes, then, that Derby Dam has  
17 the ability to accurately divert quantities of water in  
18 that amount?

19 A No. I think it has--Derby Dam has the ability  
20 to release 50 second-feet to meet the downstream require-  
21 ment.

22 Q And the transfer, if it occurred at Derby Dam,  
23 then, Derby Dam, you assume that you could change that  
24 release so it only required 43 cfs to be released below  
25 Derby Dam?

1 Derby Dam?

2 A In this indication, that's correct.

3 Q All right. So you are assuming Derby Dam  
4 has the ability, then?

5 A Well, I think we are assuming that, for the  
6 entire system, that the, when you make the analysis--  
7 we are assuming that this whole system--there are other  
8 diverters, too--that they would be able to divert and  
9 use this right. I think that is the basic assumption.

10 Q All right. On Case A, after transfer, you  
11 show 43 cfs is going to Pyramid Lake; is that correct?

12 A No, it's being released at Derby Dam for  
13 downstream users, because you know, Mr. McConnell,  
14 you have to take into account the accretion. There is  
15 more water than that that goes into Pyramid Lake.

16 Q All right. I wasn't trying to get to that  
17 point. The point I am trying to make is that the  
18 diversion below Derby was changed from to 43; is that  
19 correct?

20 A That is correct.

21 Q In your illustration.

22 A That's correct.

23 Q Now, that is assuming, then, that ten cfs was  
24 transferred upstream, and three had been historically  
25 returned to the system, under your example?

1 A That's correct.

2 Q Now, if the ten was diverted after transfer,  
3 in the Reno-Sparks area, and the Reno-Sparks sewer  
4 effluent was not returned to the river, would there  
5 still be then a requirement to divert 43 cfs past  
6 Derby Dam?

7 A I don't know. I assume that those are down-  
8 stream rights, and those rights would have to be met.

9 Q Okay. So what you are assuming, then, is  
10 that the releases below Derby Dam would be reduced,  
11 or taking into consideration return flows, historical  
12 return flows from the prior irrigation, and, in this  
13 case, instead of reducing the diversion below Derby  
14 Dam cfs, the diversion was only reduced by seven cfs?

15 A That's correct; the consumptive-use portion.

16 Q And this was just for illustration purposes  
17 only? You are not saying that three cfs is what the  
18 return flows would have been?

19 A Well, I think that is probably a pretty good  
20 estimate of about what is happening today. But it is  
21 for illustrative purposes here.

22 Q But in these illustrations, that assumes that  
23 the sewer effluent from Reno and Sparks should be  
24 returned to the river?

25 A That's correct.

1 Q To reach a conclusion that there wouldn't be  
2 any adverse impact on TCID water rights, you base that  
3 on the Truckee River model runs; is that correct?

4 A Not only on the Truckee River model runs, but  
5 also on how the system operates. For example, the Vista  
6 to Derby, I think any movement of water from irrigation--  
7 say Vista to Derby; I am only using that as an example--  
8 up to Truckee Meadows, would be to the benefit of TCID.

9 There would be more water at Derby Dam for  
10 diversion by TCID. That is because currently the  
11 utility company returns approximately 50 percent through  
12 the treatment plant; but also because of the 69-31  
13 percent comes in to play. And that diversion between  
14 Vista and Derby is part of the 69-31 percent computation.

15 Q But wouldn't that utility company be diverting  
16 an additional ten cfs from the flows in the river?

17 A In this illustration, yes.

18 Q And wouldn't the flows of the river remain  
19 constant at 500 cfs, theoretically, if you were releasing  
20 water to meet the Floristan rights?

21 A In this example, we assume there is 500 second-  
22 feet at Pyramid.

23 Q So the diversion, then, to the utility for the  
24 transfer upstream, would increase; is that not true?

25 A That's correct; removing the ten second-feet

1 up and assuming it is diverted for M & I purpose.

2 Q From the standpoint of the model, does it  
3 look at daily flows?

4 A No, it's monthly.

5 Q And I believe it's utilized in thousands of  
6 acre-feet, is it not?

7 A That is correct.

8 Q So that--

9 A Excuse me. No, we don't round 2,000s of  
10 acre-feet. Actually, the computer carries it down to  
11 the acre-foot, and the print-out I think we have to the  
12 nearest ten acre-feet.

13 Q If the model is basically a computer-generated  
14 system, based on yours and Ron Hall's--or Mr. Hall's  
15 understanding of it, the Truckee River agreement and the  
16 Orr Ditch decree?

17 A No. I think it is more than that, because  
18 what we have attempted to do is, as you know, work with  
19 the Bureau of Reclamation, the Federal Water Master,  
20 the Conservation District, your office, and trying to  
21 make sure that in the model, the model will--the model  
22 is nothing more than what you tell it to do.

23 But we have gone to treat lengths to try to  
24 get input from everybody: Does this model, as it is  
25 operating, fairly reflect and accurately reflect the

1 constraints on the system?

2 So I know it is not just our operation. I  
3 think it has been, well, almost ten, 15 years attempting  
4 at everybody's input of that model.

5 And we still have a technical committee that  
6 meets once a month, and that is made up of all the  
7 parties, the tribe, the Bureau, the State of California  
8 is involved. So I think it's a model that is accepted  
9 by all the parties operating on the river.

10 Q I think, generally, as a computer model, it  
11 is good and useful for making comparisons. You can take  
12 an 80-year history that has occurred, and you can attempt  
13 to make modifications in the computer programming and  
14 come up with assumptions for what might occur in the  
15 future, and to make comparisons between those conditions;  
16 is that correct?

17 A That is correct. And I think the--what is  
18 significant are the differences. When you run the model  
19 with all of these criteria, you change one, and it is  
20 the difference that is significant.

21 Q Has the model ever been checked or verified  
22 against actual conditions, to say whether or not the  
23 accuracy of the model is within five percent, ten percent,  
24 15 percent, 200 percent, one percent?

25 A No, in that sense, no. But what we have done,

1 of course, is to check all the data on the input, and  
2 we have attempted to verify, in that sense. But in the  
3 way you are talking about, no, that we can't produce  
4 those historic events. With the model, we get said  
5 assumptions and operate the model.

6 Q So if the model was off by five percent, there  
7 could be a five percent error, either way?

8 A In this--from what?

9 Q From the numbers that were generated from your  
10 comparisons.

11 A But then, if you--then you are comparing from  
12 the model with this change in assumption, and then you  
13 get a difference. That five percent wouldn't come in to  
14 play. You would get a difference, and that difference  
15 would be significant.

16 Q Now, does the model--I think you answered this  
17 before--the model works on a monthly basis?

18 A Yes.

19 Q Rather than a daily basis?

20 A That's correct.

21 Q In regard to Exhibit No. 4, the values in  
22 comparison of TCID shortages were done with TCID  
23 receiving 320,000 acre-feet allocation, maximum?

24 A That's correct.

25 Q Then you are aware that that issue is currently

1 under review by the Federal District Court?

2 A Yes.

3 Q And has the TCID, in the past, been able to  
4 achieve that 320,000 limitation?

5 A I am not sure.

6 Q Under normal operating conditions, have we  
7 been restricted, or have we been limited to 320?

8 A No, you have not. You have been set a quota  
9 each year.

10 Q If the usage on the project increased, what  
11 effect would that have on the numbers that you have?

12 A I think basically it would reduce the flows  
13 into Pyramid Lake. I do not believe it would change  
14 the impact on your rights, because you would be operating  
15 before and after the transfer with that--whatever demand  
16 you want to put in. And again, you would be looking at  
17 a difference.

18 Q Didn't you also say this was 119,000?

19 A That's correct.

20 Q So it is presuming that the Truckee Meadows  
21 is operating at 119,000, and there is about 60-some  
22 thousand return flows from the sewage-treatment plant?

23 A That's correct. And you're operating at the  
24 119,000. So we would be exercising the upstream rights,  
25 and in that way, today, all of the rights are not being

1 exercised. So there is water coming down, available to  
2 you.

3 Q And the model's conclusion, after running  
4 those comparisons, if 581 acre-feet is transferred  
5 downstream to upstream, that TCID would average 430 acre-  
6 feet per year of that 581; is that correct?

7 A That is correct. Now, we are assuming that we  
8 are moving 581 from downstream of Derby, upstream to  
9 Truckee Meadows, and says, like over the eight years,  
10 there is an average of 438 acre-feet per year.

11 Q Is it correct, as we stated in our letter,  
12 that the model utilizes approximately 50 percent return  
13 flow?

14 A That's close. I think it's a little bit  
15 different, but that's close.

16 Q I believe part of your testimony also involved  
17 the Public Service Commission rule with regard to  
18 1.72 factor; is that correct?

19 A That's correct.

20 Q Would you explain for me what that means.

21 A Well, it means that an applicant for service  
22 from Sierra Pacific, through Reno and Sparks, would  
23 require that 1.72 acre-feet of water be brought in in  
24 order for the company to deliver one acre-feet of water.

25 Q And what is the purpose for that?

1           A     The purpose is that Sierra Pacific, with their  
2 water supply today, and their stored water, can and  
3 are agreeing to support the irrigation rights up to that  
4 yield of 58 percent. The 58 percent is the maximum  
5 amount of water you can get from an irrigation right  
6 in the Truckee Meadows. That's an annual basis.

7                     And Westpac is agreeing to make up the  
8 difference in that water, with their stored water.

9           Q     I am not sure I understood that. Would you  
10 try that again?

11           A     That if you bring in a water right to Westpac,  
12 that the most that you can generate water from that  
13 right, for M & I purposes, is 58 percent. And Westpac  
14 commits itself, when you bring that right to Westpac,  
15 to support that right with stored water from Donner  
16 and Independence.

17           Q     What was the purpose of that?

18           A     I think that rule was to permit additional  
19 development of the Truckee Meadows, to bring in--the  
20 developer must bring in the full water supply for his  
21 development.

22           Q     Well, if the developer brought in one acre-  
23 foot, why couldn't Westpac use one acre-foot?

24           A     Well, if he brings in one acre-feet, what he  
25 is bringing, the 1.72 and the 58 percent of that, he is

1 bringing in a full supply. And with that full supply  
2 that Westpac is agreeing to then use their storage to  
3 support that right.

4 Fifty-eight percent is the maximum. Actually,  
5 today, it is considerably less than that.

6 Q I guess I am having trouble understanding  
7 this. Why was it developed, do you know? Do you know  
8 why the 58 percent rule was developed?

9 A I think it was developed so that the procedure,  
10 the water--the developer would bring in a full water  
11 supply for his development.

12 Q If he needs one acre-foot, why wouldn't one  
13 acre-foot be a full water supply?

14 A Well, because you only get, at the maximum,  
15 58 percent of that out of the river. But if he brings  
16 in 1.72, he is bringing those extra rights in, then he  
17 would exercise the 1.72 in the river, and you will get  
18 an acre-foot of supply.

19 Q In other words, just because Sierra--

20 MR. MORROS: Let me interrupt. I just want  
21 to interject one question.

22 Fifty-eight percent under what conditions?

23 THE WITNESS: Under a future condition, and  
24 that with an increase in the demand, if we increase  
25 the demand in the Truckee Meadows for MI purposes, we

1 would use more water in January and February, and it's  
2 under this future condition, future development, that  
3 the maximum you get would be 58 percent.

4 Today, because you have not developed a  
5 demand, you are not using as much water in the winter-  
6 time. We are down around 35, 40 percent.

7 MR. MORROS: Wasn't the 58 percent rule  
8 developed based upon a critical-year yield? In other  
9 words, under the worst scenario, you could only expect  
10 58 percent of the face value of the water right to be  
11 available in a drought year?

12 THE WITNESS: That's correct. I apologize.

13 MR. MORROS: That is what I wanted the record  
14 to be clear on. I think the record was getting a little  
15 confused. That is my understanding. If I am wrong,  
16 somebody tell me differently.

17 THE WITNESS: That is exactly correct.

18 BY MR. McCONNELL:

19 Q So the purpose of that, then, the Public  
20 Service Commission issued a rule that said in order for  
21 the power company or Westpac to supply one acre-foot  
22 of water in critical drought, they were going to have  
23 to have 1.72 acre-feet to supply that; and critical  
24 drought, I presume, is 1930-31 period?

25 A '31 and '34, and the period 1928-35.

1 Q Now, what would happen if that rule was changed,  
2 and it went to 1-to-1?

3 A Well, the way the rule is set up now is that  
4 Westpac can support up to 46,000 acre-feet of irrigation  
5 rights, and up to 1.72. And beyond that, then you must  
6 develop additional supply to support any additional  
7 irrigation rights that you want to operate.

8 Q But then, if this model was operated on a  
9 1-for-1 basis, with the rule changed, would that change  
10 the rule?

11 A No, because the way the model is run here,  
12 it was run with Rule 17; that up to 46,100 acre-feet  
13 of irrigation rights, that were at the 1.72 ratio to  
14 get up to that point.

15 Beyond that, then we are at a 1.0-to-1 ratio.  
16 And that's the way this model was run.

17 And at that point, then, developers not only  
18 have to bring in one acre-feet; they have to pay for  
19 additional storage or additional support for that water  
20 right.

21 Q Are these water-right transfers within the  
22 46,000 or above the 46,000?

23 A These are within the 46,000.

24 Q So regardless of any proposed change with the  
25 Public Service Commission, it is my understanding that

1 the power company has requested a change. The model  
2 run wouldn't differ; is that correct?

3 A That's correct.

4 Q So if the Public Service Commission said you  
5 no longer have to comply with Rule 17, would the power  
6 company then be able to issue a will-serve letter for  
7 additional water, because they now have 72 percent more?

8 MS. OLDHAM: I am going to object, because  
9 we are starting to call for speculation that is beyond  
10 the application. Maybe it's a misunderstanding of  
11 what the discussion was.

12 MR. MORROS: Well, I don't know that it is  
13 necessarily speculation. I think it's a scenario that  
14 has a possibility of occurring. I, on many occasions,  
15 have thought of it myself. And when this 58 percent  
16 critical-year yield rule was being developed, the State  
17 Engineer was supportive of that, because we felt it was  
18 technically sound.

19 So if the Public Service Commission was to  
20 change their mind and relax the rule, I am not so sure  
21 the State Engineer would be willing to go along with  
22 that, from a standpoint of signing off on subdivisions.

23 MS. OLDHAM: We aren't talking about relaxing  
24 the rule. And that is why I objected, because I think  
25 it was a mischaracterization of what was actually in

1 the hearing before the Public Service Commission.

2 MR. MORROS: Well, I am not so sure that that  
3 was--and Mr. McConnell is probably in a better position  
4 to define his own question than I am. But I think what  
5 you are attempting to express, Mr. McConnell--and tell  
6 me if I am wrong--is that there is the possibility that  
7 the 58 percent critical-year yield rule could be  
8 relaxed at some time in the future. And that is where  
9 the question was coming from, wasn't it?

10 MR. McCONNELL: That's correct. I am concerned  
11 that the information that has been provided to show  
12 TCID benefits from these transfers could possibly  
13 change.

14 MR. MORROS: I will overrule your objection  
15 on that base. Go ahead.

16 THE WITNESS: We just finished a hearing before  
17 the Public Service Commission, and going over with the  
18 Commission, on the basis of the water supply for Westpac,  
19 and that 1.72 was in there, and there was at least no  
20 indication to me that that being changed. That is part  
21 and parcel of the water-supply scenario here for Westpac.

22 There was no indication that that was being  
23 relaxed or changed. I believe that the Public Service  
24 Commission is still going with that concept, that we  
25 can support up to 80,000 acre-feet delivery and using

1 the Rule 17 process of 1.72.

2 MR. MORROS: The simple, hard fact is--and  
3 it's demonstrated by the record--is that, in a critical  
4 year, the worst drought on record, the water supply  
5 dwindles to 58 percent of the normal or--

6 THE WITNESS: For the annual amount.

7 MR. MORROS: The average yield.

8 THE WITNESS: That's correct.

9 MR. MORROS: And that's well-established.

10 THE WITNESS: That's correct.

11 MR. MORROS: So unless you have got some way  
12 to supplement that water supply on those dry years,  
13 from sources that are independent of the Truckee River  
14 system, you are stuck with that as a water supply.

15 THE WITNESS: That's correct.

16 MR. MORROS: You can't perceive that unless  
17 some other supply could be developed that would supplement  
18 that during your dry years, there would be any reason  
19 to change that.

20 We have to deal with reality, and the reality  
21 is that the water ain't there in the dry years. It's  
22 as simple as that.

23 MS. OLDHAM: It doesn't change the yield or  
24 the right. And I don't think we ever said that to the  
25 Commission.

1 THE WITNESS: No. I think that all of this  
2 was presented to the Commission. It did not indicate  
3 there would be any change to that.

4 MR. MORROS: I worry about that changing,  
5 without the addition of another supply of water to  
6 offset that.

7 MS. OLDHAM: We would not propose it.

8 MR. MORROS: I think the 58 percent was  
9 adopted and embraced by the Public Service Commission  
10 as a result of the power company's presentations to  
11 the Commission during those series of hearings that  
12 they conducted when this Rule 17 was being considered,  
13 wasn't it?

14 THE WITNESS: As a matter of fact, those same  
15 studies that were used at that hearing were used today,  
16 and still have not changed.

17 MS. OLDHAM: I think that at the Commission  
18 hearing, the point was that there is a limit to when  
19 just bringing in 1.72 times the amount of acre-feet  
20 actually provides us a water supply. When you get out  
21 to that future condition, there is a point where we can  
22 only do that so far. Then, at that point, we have got  
23 to have some other storage option. And that is when  
24 you go to the 1-for-1. You have one acre-foot, but  
25 then you have got to have some other water right filling

1 it in, either a storage reservoir or, you know, ground-  
2 water options or something else that supports it.

3 MR. MORROS: Well, I probably should qualify  
4 my statement, too, when I say sources of water independent  
5 of Truckee River, either that or additional storage.

6 MR. McCONNELL: I have no further questions.

7 MR. MORROS: Any redirect of Mr. Burns?

8 MS. OLDHAM: I do.

9 REDIRECT EXAMINATION

10 BY MS. OLDHAM:

11 Q Mr. Burns, during the period of shortages  
12 that are reflected on your Exhibit No. 4, were the  
13 water rights which are concerned with these applications  
14 fully exercised?

15 A Yes.

16 Q Would there be any difference in your analysis  
17 of impact, negative impact to TCID's rights if TCID  
18 were to win their OPAC proceedings and have a greater  
19 right of diversion?

20 A No, I don't think so.

21 Q Would there be any difference if we were  
22 operating under the present conditions, as opposed to  
23 operating under future conditions?

24 A No.

25 Q The conclusion would remain the same?

1           A     That's correct. In fact, there is more water ,  
2 available today, to them. The rights aren't fully  
3 exercised upstream.

4           Q     Was it more conservative, for the purposes  
5 of this analysis, to assume a future condition?

6           A     Yes.

7           Q     Than a present condition?

8           A     That's correct.

9           Q     How so?

10          A     Well, for example, today all of the rights  
11 in the Truckee Meadows are not being exercised. There-  
12 fore, that water goes on down the river.

13                     In this analysis, we assumed and put in here  
14 the exercising of all the rights in the Truckee Meadows.  
15 We also have in this analysis that all of the rights  
16 downstream of Derby Dam will be met, in this analysis.

17                     So that was, I think, the most severe condition  
18 that we could get. And then, the remaining water of  
19 TCID, we wanted to be sure that the water would be there  
20 for TCID.

21          Q     Did you assume the future conditions so that  
22 there would not be additional water going to TCID from  
23 the 42 percent, as exists today, the excess water rights?

24          A     Well, to the extent that all of our rights are  
25 being exercised now. How much still remains, you would

1 have to go through the analysis. But we did want to  
2 exercise all of the rights.

3 Q And with respect to the questions and answers  
4 you gave on Exhibit 5, Mr. McConnell discussed what  
5 would happen if Reno and Sparks failed to return their  
6 effluent to the river. You indicated that there would  
7 still be a requirement to have 31 percent show up at  
8 Vista; is that correct?

9 A I assumed the Orr Ditch decree, still, in the  
10 assumption that the Orr Ditch decree would still be  
11 applicable.

12 Q Okay. As between the water that is going to  
13 Pyramid Lake, or the water that is specified to make  
14 up the water rights below Derby Dam, I should say, and  
15 the water that's going to TCID, what would determine  
16 whether the water went to the water rights below Derby  
17 versus over to TCID?

18 A I think the right--the priority of the right--  
19 and here we are saying the rights downstream of Derby  
20 have a prior right.

21 Q So if there was an impact on TCID, it would  
22 be as a result of this priority?

23 A I believe so.

24 MR. deLIPKAU: Is it also possible that, if  
25 the effluent were not returned to the river, Sierra

1 Pacific would simply be required to deliver less water,  
2 thereby leaving more water in the stream to make up  
3 the TCID shortfall?

4 A I don't know. That may be a case. I don't  
5 know how it would be handled to make up the shortfall.

6 Q That event hasn't yet occurred?

7 A It has not occurred; right.

8 MR. deLIPKAU: Thank you. No further questions,  
9 Mr. Morros.

10 MR. McCONNEL: Just to follow-up on that last  
11 question, I think that was the intent of our original  
12 number one concern; and that is, if water is not returned  
13 to the river, which the treatment plant is utilizing,  
14 making up return flow, then there wouldn't be any  
15 return flows, so that the water rights would have to be  
16 reduced, then, to make up those return flows.

17 MR. MORROS: Wouldn't that concern extend to  
18 any rights on the river system, regardless of whether  
19 it was below Derby or not, as far as water availability  
20 at Derby?

21 MR. McCONNELL: Certainly. But we are only  
22 dealing with these transfers.

23 MR. MORROS: Well, the only reason I make that  
24 remark is that, from the standpoint of that concern, I  
25 don't think there is any distinction, any substantial

1 distinction between these transfers and any other  
2 transfer, whether it was upstream or downstream.

3 MR. McCONNELL: That probably is correct.

4 MS. OLDHAM: And I think even--this has been  
5 raised in other protests, I guess, by TCID, at this  
6 point, to our water-right applications, and I don't  
7 know to what degree it can or should be settled in this  
8 case. But from Sierra Pacific's standpoint, we are not  
9 agreeing that the whole brunt of what Reno and Sparks  
10 might do from winning what would be a devastating blow  
11 in this lawsuit falls upon Sierra Pacific.

12 The way we see it is that the decrees will  
13 sort that out, and that the 6931 criteria will apply,  
14 and that we will have an obligation to meet that.

15 And to the extent that that is less than what  
16 we presently return today, that TCID will--being the  
17 lower priority on the bottom of the river, will probably  
18 take the remainder of the brunt. So it would be a shared  
19 burden in that situation.

20 TCID would like to admit or agree that the  
21 6931 criteria has to be met.

22 MR. MORROS: Well, I would think that, if  
23 the end result of the lawsuit is that the effluent  
24 doesn't have to be returned to the river in the form of  
25 historic return flows, then I think all users on the

1 river, where there has been a conversion over to uses  
2 other than irrigation, are going to be faced with  
3 regulation by the Federal Water Master to account for  
4 those return flows, because, under those circumstances,  
5 approving those change applications would have an adverse  
6 effect, in my mind, anyway.

7 (Recess.)

8 MR. MORROS: Does the Water Master have any  
9 questions of the witness?

10 MR. STONE: No.

11 MR. MORROS: Mr. Turnipseed?

12 EXAMINATION

13 BY MR. TURNIPSEED:

14 Q I think you might have answered mine, but let  
15 me just ask it again. We took a certain set of circum-  
16 stances here, with a certain set of applications, and  
17 you analyzed what the effect of TCID would be. But I  
18 am not sure we got to a point in the future where, if  
19 more and more changes go from the lower Truckee River  
20 system up to the Truckee Meadows, if someday there may  
21 be an effect.

22 A You are going to have to evaluate--

23 Q Each one, separately?

24 A Yes.

25 Q And then I guess we will, if all the water--if

1 all of the non-Indian irrigation rights in the lower  
2 Truckee Meadows, in the lower Truckee River were  
3 transferred to Truckee Meadows, and only the Indian  
4 1859 priorities had to be passed at Derby, then you  
5 are saying there probably would be an effect?

6 A Well, then it depends on: Are you going to--  
7 how are you going to support those rights bringing it up?  
8 How much supply are you going to have? You would have  
9 to analyze it, and take a look--

10 Q That goes back to the 69-31?

11 A Yes.

12 MR. TURNIPSEED: That's all I have.

13 EXAMINATION

14 BY MR. MORROS:

15 Q I guess the thing that I wonder about is,  
16 if we approve these changes and permits are issued  
17 so the amount of water that can be committed to new  
18 development under the decree of reliance is now down  
19 to 58 percent of the face value of the right, assuming  
20 that the right in the past has been exercised to a  
21 hundred percent of its face value, when water supplies  
22 were available, so under those conditions, there is 42  
23 percent of that flow that will stay in the river, under  
24 the 58-percent critical year criteria, plus whatever  
25 return flows would be generated as a result of that

1 water being diverted and put to beneficial use for  
2 municipal purposes, and then the effluent treated, and  
3 effluent continuing to be discharged to the river,  
4 but assuming that something happens in the future,  
5 and the effluent is not discharged to the river, and  
6 the State Engineer and the Federal Water Master are  
7 unsuccessful in asserting the position of the historic  
8 return flows, and there is a loss of those return flows,  
9 isn't that more than compensated by the 58-percent  
10 critical year yield rule?

11 A I don't think so, because when we get down  
12 to where it is right now, we are saying that the water  
13 is returned, we are analyzing that condition. But if  
14 we divert that water away, and it doesn't return, I  
15 think you are going to have to operate the whole system,  
16 and it becomes a driving question and--

17 MR. MORROS: But you are not diverting a  
18 hundred percent, you are only diverting 58 percent of  
19 that water.

20 THE WITNESS: That's all we're getting in the  
21 dry period, but we are exercising more than 58 percent  
22 in other years.

23 BY MR. MORROS:

24 Q But you have not committed development to  
25 anything beyond 58 percent.

1           A     For up until that 80,000 acre-feet, that's  
2     correct.

3           Q     What reason would you have to divert more  
4     than that in the wet years? I don't see how you can  
5     divert more than 58 percent in a wet year and cut back  
6     to 58 percent in the dry years, when you haven't committed  
7     that demand to more than 58 percent. I don't understand  
8     your reasoning there.

9           MS. OLDHAM: I guess it's--

10          MR. MORROS: No, he's the expert now. He's  
11     the witness.

12          MS. OLDHAM: Well, there is a legal matter,  
13     too, that has to do with--

14          MR. MORROS: It is not a legal matter; it is  
15     a matter of available water supplies and diverting.  
16     And counsel is not going to answer the question.

17          THE WITNESS: Well, in this example, I think  
18     we are exercising--

19     BY MR. MORROW:

20          Q     Let me try to simplify my question. If the  
21     transfers are approved right now, you have to allow  
22     a hundred percent of that water to go by Derby to serve  
23     those rights downstream, in their present irrigation  
24     status. If they are in priority, and they are entitled  
25     to that water, TCID is not in a position to interfere

1 with that, because they have a junior priority. You  
2 allow this right to be moved upstream and diverted,  
3 and the use is being changed over to municipal use.  
4 The 58-percent critical year yield rule applies now,  
5 so you have reduced the demand on that right down to  
6 58 percent of its critical value.

7 You are not going to commit new development  
8 or new demand, based upon that right, the availability  
9 of that water under that right, more than 58 percent  
10 of that face value. So 42 percent of that right stays  
11 in the river. Isn't that an advantage for TCID?

12 A Yes, definitely.

13 Q Well, that was my question.

14 A Okay.

15 MR. McCONNELL: Then my response is, what if  
16 that changes?

17 MS. OLDHAM: How come he gets to talk?

18 MR. McCONNELL: Well, like I stated when we  
19 started out with this whole proceeding, I don't have  
20 any problem as long as everything stays the way it is.

21 MR. MORROS: Well, I don't have any problems  
22 as long as everything stays the way it is, too. But we  
23 can speculate on changes occurring, and they may occur.  
24 And there is a possibility that we are not going to  
25 prevail in the lawsuit. There is no question about that.

1 MR. McCONNELL: Okay. But so--

2 MR. MORROS: But that is not going to affect  
3 the 58 percent, is my point. That has nothing to do  
4 with the effluent or return flows.

5 MR. McCONNELL: The 58 percent is based on the  
6 Public Service Commission ruling. It is not based on  
7 the State Engineer's ruling.

8 MR. MORROS: Fifty-eight percent is based upon  
9 Sierra Power's perception as to what they will have as  
10 a reliable water supply in a drought year, in a drought  
11 condition. And based upon the historic record of flows  
12 in that area, their perception is that under the worst-  
13 case scenario, which is the drought of the thirties,  
14 only 58 percent of the face value of those water rights  
15 is going to be available in the system.

16 It has nothing to do with the return flows  
17 or anything else. It is simply that once the change  
18 is approved, and it's changed over to municipal water,  
19 then you are not going to commit more than 58 percent  
20 of the face value of that water right.

21 MR. McCONNELL: Within the permit.

22 MR. MORROS: Well, Rule 17 applies. What you  
23 are saying is, put it into permits, so even if conditions  
24 change where that rule may be modified or lifted, you  
25 want it to stay the same, as far as anything related--

1 related to anything where the original diversion or the  
2 original right was below Derby.

3 MS. OLDHAM: These rights have already been,  
4 I guess, offered to the local governments, who have a  
5 similar rule that applies to the 58 percent and are  
6 going under these kind of rights. They are being  
7 provided under the 58 percent rule, these particular  
8 rights are.

9 I think, just to clarify the record a little  
10 bit, the State Engineer, long before the Public Service  
11 Commission ever ruled on Rule 17, had us providing  
12 water rights on this basis, and that the going to the  
13 Public Service Commission was an effort to have all  
14 permits treated the same. Because the State Engineer  
15 only had jurisdiction of subdivisions at that time, and  
16 not over the commercial development.

17 So we then went to develop the rule at that  
18 level, and subsequently to that, the cities all put  
19 into effect the same. So we actually have three layers  
20 of government that apply that rule at this point.

21 MR. McCONNELL: All we have asked is that  
22 those conditions be placed on the permit. We haven't  
23 asked that the water-right transfer be reduced; we  
24 have asked that the conditions that are currently in  
25 existence be placed on the permit. Because the problem

1 arises, for example--

2 MR. MORROS: Well, if the application is  
3 approved, it is subject to existing rights, regardless  
4 of whether they are junior or senior in priority.

5 The application cannot be approved if there  
6 is any substantial evidence that it is going to adversely  
7 affect existing rights.

8 MR. McCONNELL: And under current conditions,  
9 as you understand it, it doesn't--you were to say it  
10 doesn't. Now, if that is the case, then, I think all  
11 we are asking is that you place into the permit the  
12 conditions upon which you are making that determination.

13 MR. MORROS: Well, some time in the future,  
14 if it is demonstrated that because of the change in  
15 operating criteria on the river, or a change in the 58  
16 percent rule, or whatever the case happens to be, that  
17 there is some adverse effect occurring on existing  
18 rights, which would not be there had not the changes  
19 been approved, and I think the Federal Water Master  
20 is in a position where he will have to exercise regula-  
21 tion.

22 MR. McCONNELL: But say, for example, you  
23 have somebody that has developed a subdivision on the  
24 basis of current rules, and then, all of a sudden, those  
25 permits were granted on current rules, and all of a

1 sudden, then the water is not available because the  
2 return flows have to be taken out of that water.

3 Where is the water going to come from to make  
4 up to the homes that are relying upon the water that  
5 was there to build the homes with in the first place?

6 MR. MORROS: It's going to come from the  
7 42 percent, the rights being penalized right now under  
8 Rule 17.

9 MR. McCONNELL: Then you start changing the  
10 circumstances under which you are analyzing this permit.  
11 Now you are not limiting it to what you are saying is  
12 current conditions, because now you are freeing up that  
13 water availability. Then, at that point, maybe there  
14 is an impact on us, because we haven't analyzed it  
15 under that aspect.

16 MR. STONE: I guess I am the one that would  
17 have to administer it. And my question to you would be--  
18 just so I understand--are you saying that just on this  
19 transfer--whatever the numbers are, I'm sorry--53092  
20 and 53093, that if, in the future, some other thing  
21 occurred, that I would administratively go in and  
22 reduce these two applications, or these two transfers  
23 to whatever subdivision they are appurtenant, made  
24 appurtenant by the power company, or whatever happened?

25 I mean, wouldn't I have to--as we have already

1 discussed in the hearing, wouldn't it have to be done  
2 on a carte blanc basis to every application that has  
3 been done?

4 MR. McCONNELL: What I am saying is that  
5 if you go back and look at some of these prior  
6 applications, somebody is going to argue that there  
7 wasn't any condition on those, and we have relied  
8 upon them to build homes, and people are relying  
9 upon that water supply, and we are not going to reduce  
10 them.

11 MR. MORROS: But I don't see where there is  
12 any difference between these applications and any  
13 other change on the river.

14 MR. McCONNELL: Well, the difference is that  
15 the issues weren't formed as well as they are today,  
16 and they weren't brought to the forefront. And I think  
17 this is just the pressues of what is occurring on the  
18 river system, now that these issues are being brought  
19 up.

20 But I am not saying that they didn't apply  
21 in the past; just that nobody ever discussed them.

22 MR. STONE: Are you suggesting, again, for  
23 clarification, that in the future any transfer appli-  
24 cations that are presented to the State Engineer  
25 have to be granted on the basis that somebody may file

1 or win an existing lawsuit?

2 I mean, I don't know how I could administer  
3 that.

4 MR. McCONNELL: No. I'm asking them to be  
5 conditioned upon the current conditions. You say they  
6 are conditioned upon 58 percent yield or use, so if  
7 that is the condition upon which they are granted, then  
8 put that condition in the permit, and then we don't  
9 have to worry about the fact of what you are saying  
10 about the return flows, if, in fact, there is 42 percent  
11 of the rights still in the river.

12 MS. OLDHAM: Can we look at it a little  
13 different way? If you took this Exhibit 5 and said,  
14 if the condition changed, that Reno and Sparks won  
15 their lawsuit, then, if you diverted ten acre-feet,  
16 you would have 3.1 coming back; you would have 3.1  
17 percent of that right coming back.

18 You would be in absolutely no different  
19 position than you are today. There wouldn't be any  
20 advantage to TCID, but there would be no detriment to  
21 TCID from the 31 percent.

22 In fact, because the transportation losses  
23 on these ditches are all less than 31 percent-- Lagomarsino  
24 was 30.

25 MR. STONE: Oh, on these ditches.

1 MS. OLDHAM: These ditches that we are talking  
2 about here. Then you could have no impact. The worst  
3 that could happen is, you would be at the same--that  
4 you would have the same amount going to TCID under  
5 the before-transferred and after-transferred conditions.

6 MR. MORROS: Well, my concern is that we are  
7 generally talking about any future change applications  
8 on the river, regardless of whether they are above or  
9 below Derby. And your concerns related to these  
10 applications are basically applicable to any future  
11 change application on the Truckee system.

12 MR. McCONNELL: That's correct.

13 MR. MORROS: Do you have any evidence that  
14 any of the changes up to this point, that have occurred,  
15 where decreed rights have been changed over to municipal  
16 use, has had any adverse effect on water availability  
17 of the TCID's diversion at Derby?

18 MR. McCONNELL: No.

19 MR. MORROS: But, again, we go back to, as  
20 long as the effluent continues to be discharged to the  
21 river, we probably won't have a problem, as long as the  
22 58 percent rule is in full force and effect. Actually,  
23 this is going to result in more of a benefit to TCID  
24 than a depletion.

25 MR. McCONNELL: Assuming we don't start upstream.

1           MR. MORROS: I mean, I am talking from the  
2 standpoint of water being available at Derby for  
3 diversion.

4           MR. STONE: Mr. McConnell, maybe I didn't  
5 make myself clear. But if you attach a condition  
6 of the 58 percent to this application or to the  
7 permit, if, in fact, it is granted, my question was:  
8 Does that mean that, in the future, if that is changed,  
9 these applications are the ones that are affected by  
10 that caveat in the--

11           MR. McCONNELL: Yes.

12           MR. STONE: Then my question is still: How  
13 would you administer that, if it were only to affect  
14 these applications?

15           MR. McCONNELL: Oh, I am not certain as to  
16 what would happen with the other applications. I can  
17 conceive of an attorney arguing that most applications  
18 have been issued, and they are not conditioned, and  
19 there is no change to them.

20           MR. MORROS: Those applications were issued  
21 subject to existing rights, and I feel that the Federal  
22 Water Master has continuing jurisdiction over that  
23 river, and he has the authority to regulate those  
24 diversions.

25           If conditions change, and he has to exercise

1 that authority, as an officer of the court, I think he  
2 can proceed to do so.

3 MR. McCONNELL: I perceive a reluctance to  
4 condition the permits upon current conditions.

5 MR. MORROS: Well, at this point there is a  
6 reluctance. If we had dealt with this issue the first  
7 time the change application came before the State  
8 Engineer-- I don't know that it's necessary. I think  
9 what you are asking for is already there, is what I am  
10 saying, Mr. McConnell.

11 Perhaps Mr. Stone feels differently about it.

12 MR. McCONNELL: Well, we have dealt with quite  
13 a bit of litigation, with an innovative attorney, and  
14 all I am trying to do is foreclose as many problems as  
15 possible in the future. And I understand what you are  
16 saying. But, on the other hand, that shouldn't foreclose  
17 the issue of permits based on current conditions.

18 MR. MORROS: All right.

19 MR. McCONNELL: If there is a particular  
20 problem with that, go back and say that all your previous  
21 ones were under the same conditions.

22 MS. OLDHAM: I don't think we could accept  
23 these permits as far as accepting them for will-serve  
24 letter, if they were--if they were conditioned on current  
25 conditions, and, if anything changed, all of a sudden

1 we don't have a water supply for the customers that we  
2 are relying on.

3 We are relying upon our entire water supply  
4 the same way, and I agree there are several very  
5 imaginative attorneys out there who could come up with  
6 an argument that could throw the whole world topsy-  
7 turvy, as far as water rights go.

8 But we can't protect against them, and, in  
9 fact, you know, being the last right on the river,  
10 being the--you know, in terms of priority, and being  
11 at the bottom of the river, I think--you know, I under-  
12 stand TCID's concerns. But, at the same time, we can't  
13 protect and take the brunt of the Truckee Meadows of  
14 everything that might come up from an imaginative  
15 standpoint in the future.

16 We are looking to go on and to fight those  
17 types of deals, as they come down, and those types of  
18 lawsuits, as they are filed. And we--but we can't  
19 rely on a water supply on that basis.

20 MR. MORROS: I think there are enough safe-  
21 guards in place, through the water-quantity review  
22 process, the statute water-quantity review process,  
23 where, if there was an attempt to commit the water  
24 supply under these rights to new development in the form  
25 of new subdivisions, new condominium developments, or

1 planned-unit developments, whatever the case happens to  
2 be, above and beyond the 58 percent--in other words,  
3 some condition changed and the power company came to  
4 us with--or developer came to us with the subdivision  
5 that had been signed off by the power company, on the  
6 basis that now they were dealing with 70 percent  
7 critical-year yield instead of 58 percent critical-  
8 year yield, then they would be put in a position before  
9 the State Engineer would consider approval of that  
10 subdivision, or signing off on that subdivision, of  
11 demonstrating to the State Engineer that there is not  
12 going to be an impact, again, on those downstream  
13 rights.

14 MR. STONE: Is it your contention--is it  
15 just because it is below Derby, or is this your conten-  
16 tion on any future transfers in the Truckee River  
17 system, excluding TCID?

18 MR. McCONNELL: Well, right now, we are just  
19 dealing with these transfers.

20 MR. STONE: Yes, but I am trying to understand,  
21 because I have to administer it. So I am wondering--

22 MR. McCONNELL: Well, our position, basically,  
23 is that the irrigation rights previously had return  
24 flows. Those return flows are made up of returns  
25 through the treatment plant. If that is gone, then our

1 position would be that the return flows have to be  
2 made up.

3 MR. MORROS: And I am in full accordance.

4 MR. STONE: I agree.

5 MR. MORROS: Those return flows have to be  
6 accounted for. That has been my position all along.  
7 It hasn't changed. And I see no reason to even consider  
8 changing it.

9 MR. STONE: Furthermore, you are entitled to--  
10 what is it--69-31? There is that breakdown that is  
11 in the Truckee River agreement, which is part of the  
12 decree, that is ongoing. So, as the diversions--if  
13 the diversions increase up here, I guess the entitlement  
14 would increase. That's why I feel the protection is  
15 built into the decree, is what I am trying to suggest,  
16 Lyman.

5  
17 MR. McCONNELL: Well, I just respectfully  
18 disagree with that. I want to make sure that it is  
19 fully understood what our position is, and our position  
20 is, if current conditions remain, fine. But if they  
21 don't remain, then we have got problems.

22 MR. MORROS: But you are putting me in a  
23 position of having to rule on the merits of these  
24 applications based upon--

25 MR. McCONNELL: Current conditions.

1 MR. MORROS: No, based upon a speculation  
2 that the current conditions are going to change at  
3 some time.

4 MR. McCONNELL: No, I am asking you to rule  
5 on them under current conditions.

6 MR. MORROS: Under current conditions, then,  
7 there doesn't appear to be any evidence of adverse  
8 effect.

9 MR. McCONNELL: As long as the current  
10 conditions are conditioned in the permit.

11 MR. STONE: Current conditions meaning the  
12 reverse flow through the 58 percent relationship,  
13 et cetera?

14 MR. McCONNELL: Yeah.

15 MR. MORROS: How about if a condition was  
16 included in the terms of the permit that approval of  
17 this permit does not in any way negate or waive the  
18 right of the Federal Water Master to regulate diversions  
19 under this permit?

20 MS. OLDHAM: Under the Orr Ditch decree and  
21 the Truckee River agreement?

22 MR. MORROS: Yes.

23 MS. OLDHAM: We would agree with that. And  
24 we would agree that the conditions of the Orr Ditch  
25 decree and Truckee River agreement must be met.

1 MR. MORROS: And if you want to take it one  
2 step further, and with the full understanding that  
3 historic return flows have to continue to be accounted  
4 for.

5 MR. deLIPKAU: No, we couldn't say that,  
6 because we don't know--

7 MR. MORROS: You couldn't say that, but I can  
8 say it, if I want to.

9 MR. deLIPKAU: Well, okay, you could say it,  
10 if you want to. But if a superior governmental authority,  
11 in whatever form, Congress, U.S. Supreme Court, State  
12 Supreme Court, says you can't put the water in--the  
13 effluent in the river, then what Westpac is faced with  
14 is meeting the criteria under the decree and under the  
15 agreement. And that might have a catastrophic effect  
16 on Reno, which legally is fine. If Westpac serves  
17 40 percent of the volume of water next year, as it did  
18 this year, then that's too bad. But everybody will be  
19 in the same position.

20 All we want these three applications to be  
21 is approved in the same condition as all of the other  
22 Truckee River applications to change are. The other  
23 applications, now permits, do not have conditions that  
24 the Water Master expressly reserves the right to  
25 administer.

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MR. STONE: But I do.

MR. deLIPKAU: I realize that is implied in all of the permits, so I think we would go along with that condition, at least my client could, and Westpac also. But these three applications certainly cannot take the brunt of this superior governmental authority saying you can't put the effluent back in the river.

We don't know what will happen. We don't know how that decree or statute will be formed.

MS. OLDHAM: There would be a whole process of interpreting the decrees and how they apply after that. But that would have to--

MR. MORROS: I am just seeking a solution to this dilemma, you know. I think Mr. McConnell's objections and his concerns have some merit. And how are we going to deal with it? .

MR. deLIPKAU: Well, I would like to kind of summarize where we are and--

MS. OLDHAM: We can't even agree that, in the future, 50 percent will always return. You know, you don't know that. Appliances will become more efficient in the future. There may be efficiencies relative to the system that are going to occur over time. With respect to conservation, one thing we know we have to

1 meet is the 69-31 criteria and the decrees. And we  
2 would always agree to meet those decrees; and to be  
3 subject to the authority of the Federal Water Master  
4 and his--in his rights and authority to--

5 MR. MORROS: The only other alternative is  
6 just to totally disqualify the Truckee River as a  
7 source of municipal water for development in the  
8 Truckee Meadows area.

9 MS. OLDHAM: Because of some imaginative  
10 lawsuits which we don't agree with, with the positions  
11 that are being taken.

12 MR. MORROS: I don't know. Maybe we are at  
13 that point.

14 MS. OLDHAM: I don't believe we are. I think  
15 water rights are property rights, under Nevada law. They  
16 are controlled by the decree. We have already been  
17 through U.S. versus Nevada, which says that the decree  
18 is--stands, and it is controlling, and that that is--  
19 and we firmly believe that that will be the case.

20 And if these other lawsuits-- It doesn't take  
21 much to file a lawsuit. All it takes is a piece of  
22 paper and I don't know how many dollars, at this  
23 point.

24 MR. MORROS: And an attorney, I guess.

25 MS. OLDHAM: Yeah.

1 MR. deLIPKAU: That's easier than money.

2 MS. OLDHAM: We can't protect against claims  
3 that people are going to make; that someone ought to  
4 tear down Tahoe Dam, for instance. Those things are  
5 going to happen. But they are not right.

6 MR. McCONNELL: But, on the other hand, as  
7 we have discussed, we are not talking about future  
8 contingencies, we are talking about today's contingencies.  
9 But I hear reluctance on their side to even agree to  
10 the conditions of today's conditions, so that leaves  
11 me a little concerned about what the intent is in the  
12 future, from the standpoint of changing those conditions.

13 And if we are making a ruling under today's  
14 conditions, I don't see any problem with conditioning  
15 the permit on today's conditions.

16 MR. MORROS: Well, I don't know exactly the  
17 wording that you are striving for. Do you have something  
18 that you wanted to add, Mr. Arden?

19 MR. ARDEN: If I may, I would like to make  
20 a statement. I think it has been fully--

21 MR. MORROS: State your full name for the  
22 record.

23 MR. ARDEN: Richard W. Arden.

24 MR. MORROS: Do you want to raise your right  
25 hand-- If you are going to make a statement-- Are you

1 going to testify on your own behalf?

2 MR. ARDEN: I am just going to make a comment,  
3 and then, if you feel that--

4 MR. MORROS: Is it in the form of--

5 MR. ARDEN: No. I am just going to take the  
6 data that was presented, and kind of make a point, if  
7 I can.

8 (Whereupon Richard W. Arden was  
9 duly sworn.)

10 MR. MORROS: Mr. Arden, go ahead.

11 MR. ARDEN: I think that it has been pointed  
12 out that if we continue to use the rights under claim  
13 638 for irrigation, which is below Derby Dam, TCID  
14 would not have been getting any benefit of that water  
15 that has to pass by Derby Dam, to give us the right to  
16 use it on that property.

17 I think, in this particular case, we can show  
18 that it is--if you want to speculate, that you have to  
19 remove the effluent from the Truckee River and pipe it  
20 to some other point, that this water right will have  
21 less effect on TCID than any transfer above Derby Dam.

22 I could theoretically go ahead and divert the  
23 water up above Derby Dam, and take no return flow from  
24 it, and I would still have the same status that I  
25 would under the present irrigation right, because there

1 is no return flow that is benefitting TCID right now.

2 So if you really want to get into the issue  
3 of speculation on return flow and what is going to  
4 happen to it, it is going to have greater impact when  
5 you change then existing water rights within the  
6 Truckee Meadows, than if you change it below Derby Dam  
7 on TCID.

8 Do you follow what I am saying?

9 MR. McCONNELL: I follow what he's saying,  
10 but our position is that it is going to have an impact  
11 on the rights below Derby Dam, which are prior and  
12 senior to ours. And if those return flows aren't  
13 there to make up their rights, then it is going to come  
14 out of our junior rights. So it has an impact on us.

15 MR. MORROS: Well, I am not so sure I follow  
16 that. What you are saying, if the right ceases to be  
17 exercised below Derby, and is exercised upstream at a  
18 58 percent level, then there is going to be some impact  
19 on those other downstream users below Derby, because  
20 the return flows are not going to be available.

21 But if you are not diverting--if you are not  
22 exercising your right in the form of an irrigation right  
23 down there, you are not diverting water from the river,  
24 isn't that going to be of some benefit to those down-  
25 stream users, especially a downstream user that might

1 be junior in priority to these rights?

2 MR. McCONNELL: You are talking, again, under  
3 current conditions; right? The 58 percent limitation  
4 on the use and return flows in the treatment plant?  
5 And all I am saying is that that is all we have asked  
6 for.

7 MR. MORROS: Well, go ahead, Mr. deLipkau.  
8 You said that you had the closing statement you wanted  
9 to make.

10 MR. deLIPKAU: I think where we are and what  
11 we have to look to is NRS 533.370, Subsection 3, which  
12 states, in essence, that the State Engineer shall approve  
13 an application, if filed in proper form, if there is,  
14 one, unappropriated water in the proposed source; or,  
15 number two, that the proposed use of the water does not  
16 tend to impair the value of existing rights; or, three,  
17 otherwise would be detrimental to the public interest.

18 That law applies also to applications for  
19 change, as well as applications to appropriate.

20 The Truckee River decree, on page 88, under  
21 which we are all guided, states that applications to  
22 change are authorized in accordance with law. The  
23 law referred to in the decree is NRS 533.370.

24 What we have clearly proved, through the  
25 testimony of Mr. Burns, is that the contemplated three

1 applications, if changed, would not cause a detrimental  
2 effect to others on the stream system. These obviously  
3 are not applications to appropriate; they are to change.  
4 The change does not tend to impair the value of existing  
5 rights.

6 That is the sole grounds upon which the  
7 TCID protested. The sole ground has been met. And,  
8 in fact, the amount of water to TCID will, in fact,  
9 be improved.

10 The applications, if approved, will not violate  
11 the Truckee River decree; it will not violate the  
12 1935 agreement. Rather, both of those instruments  
13 can be fully met by the implementation of the three  
14 applications.

15 It should also be pointed out--and I request  
16 the State Engineer take judicial notice of the prior  
17 applications approved by him, as depicted on Westpac's  
18 Exhibits 7 and 8.

19 I would like to put to rest once and for all  
20 the 58 percent rule and how it works.

21 Briefly stated, if a developer comes to  
22 either Reno or Sparks with a project--and I am going to  
23 use round numbers--his contemplated project needs 5.8  
24 acre-feet per annum, under current rules, he is required  
25 to deliver to the government ten acre-feet.

1           That means that 4.2 acre-feet are allowed to  
2 flow in the river. That's 4.2. If the same ten acre-  
3 feet were utilized for irrigation purposes, there would  
4 be some consumption, there would be some seepage,  
5 and there would be some return flow.

6           I believe the testimony of Mr. Burns stated  
7 that 30 percent would return to the river. Therefore,  
8 just at that use, we have excess water in the river  
9 by that conversion.

10           Now, the 5.8 acre-feet that is returned into  
11 this development, approximately 50 percent or 2.9 acre-  
12 feet is returned to the treatment plant. Adding those  
13 two situations up, the hypothetical development would  
14 return 7.1 acre-feet to the river.

15           Therefore, that hypothetical would create more  
16 water for the benefit of TCID and downstream water  
17 users.

18           Mr. State Engineer, it is my request that the  
19 three applications be granted with the routine and  
20 usual conditions imposed thereupon. Obviously, under  
21 the decree, and under the State Engineer's authority,  
22 he and the Water Master have continuing jurisdiction  
23 over these three applications, if granted, as well as  
24 the other many hundreds of applications that are, in  
25 fact, now permits. Thank you.

1 MR. MORROS: Mr. McConnell, did you have  
2 anything in the form of a closing statement?

3 MR. McCONNELL: Just briefly. Once again,  
4 a hypothetical is under current conditions. And as we  
5 stated earlier, we don't have any problems with these  
6 transfers, if they are conditioned upon current  
7 conditions.

8 And just to respond a little bit to the  
9 hypothetical that Mr. deLipkau gave, that would  
10 indicate that we should be rolling in water, I just  
11 cite one example: the difference between the drought  
12 in 1977 and the drought of 1988, in the sense that  
13 the use in Reno and Sparks went up from 40-some thousand  
14 acre-feet to 60,000-some acre-feet.

15 And under his circumstances, we ought to  
16 receive more water in 1988 than 1977, but failed to  
17 do so.

18 So although the model and the arguments are  
19 there, the water use doesn't always pan out the way  
20 that models and people might put them down on paper.

21 Our concerns are that our water rights can  
22 be impaired if current conditions change. And we  
23 are asking that the application be continued upon  
24 current conditions.

25 In addition, we feel that it is equitable and

1 fair that any additional expense for modernization of  
2 structures, in order to prevent the loss of water  
3 to the district, should be borne by those that stand  
4 to benefit.

5 The example was given by Miss Oldham that  
6 they repair the dam at Independence for their sole  
7 benefit. If we were to repair the dam at Derby, we  
8 would expect it to be for our benefit. But in this  
9 case, the benefit is to just maintain water, if it is  
10 necessary in the future, that would have been there  
11 anyhow, except for the transfer upstream.

12 We are not asking for anything that isn't  
13 equitable and proportional; and that the State Engineer  
14 or Water Master, or some other third party, could do  
15 the independent determination as to whether there is  
16 a repair or a modification necessary. I am not asking  
17 that it be part of the repairs.

18 We are asking the State Engineer to consider  
19 the public interest and potential public trust in the  
20 future for transferring all downstream water rights  
21 upstream, and the need for instream flows, and the  
22 potential that that puts on us at Derby Dam, since we  
23 are the last diverters along the river at that point.

24 And we feel that, if that is going to occur  
25 in the future, and all indications seem to be that

1 downstream water rights are being moved upstream, then  
2 the future is, in that regard, and then we ask the  
3 State Engineer to consider that, in these transfers,  
4 we further ask the State Engineer to ensure that the  
5 water--or the land where the water is currently used,  
6 will not be irrigated in the future, to ensure there  
7 would be an adverse impact.

8           And with regard to our first point, which was  
9 the speculation or the treatment-plant water not being  
10 returned to the river, that speculation can be removed  
11 by conditioning the transfers on current conditions,  
12 at 58 percent utilization, and 50 percent return flow,  
13 to the river system, through the treatment plant. That  
14 is the current conditions; no impact on the district.

15           MR. MORROS: Does anybody else have anything  
16 that they would like--any statements that they would  
17 like to make for the record?

18           MS. OLDHAM: I don't want to repeat anything  
19 that Ross has said, but I did want to make a couple of  
20 comments.

21           MR. MORROS: All right.

22           MS. OLDHAM: The current conditions are  
23 terribly undefined in this hearing. We haven't made  
24 an attempt to establish what the current conditions are,  
25 under any set of circumstances.

1           If, in the future, there is a change in the  
2 amount of sewage that a household puts out, if there  
3 is a change in the amount of the usage, if there is--  
4 there is other things that could occur that could be  
5 considered changed conditions, we can't lose the water  
6 supply to the particular person that it's gone to,  
7 and we are relying on having a particular water supply  
8 that is available to the applicant.

9           For that reason, we, if these water rights  
10 were conditioned on current conditions, we would  
11 consider that to be an insecure water supply, as such,  
12 and one that would not be acceptable as in reliance  
13 on will-serve letter, something we couldn't issue a  
14 will-serve letter based upon.

15           The company is perfectly willing to accept  
16 a condition that would recognize and accept the juris-  
17 diction of the Water Master, as it exists, to regulate  
18 to use his jurisdiction under the decrees, and to  
19 provide solutions in the future as issues do come up,  
20 and water rights are affected in major ways by varying  
21 circumstances.

22           We don't agree that it would be proper for  
23 the State Engineer to condition any permit. I think  
24 we are concerned with respect to these permits and  
25 these hearings, but we also know TCID has asked that

1 all future applications have similar conditions in  
2 other protests that they have filed. And we would  
3 like to get that resolved, once and for all.

4 We are sorry that it hasn't been resolved,  
5 and we haven't been able to have a discussion prior  
6 to these hearings, in order to try and work it out.

7 It does seem like these particular permits,  
8 as Mr. Arden has pointed out, are permits that are  
9 less subject to problems as a result of future conditions  
10 than other applications may be in the future.

11 We would continue to attempt to discuss the  
12 matter with TCID, but we really aren't in a position,  
13 during these hearings, to try and get this issue resolved.  
14 I guess what I am trying to say is that, in the future,  
15 I think we are going to face this issue again. These  
16 particular permits are not subject to any kind of  
17 negative impact as a result of the future conditions  
18 mentioned, due to the fact, as Mr. Arden explained,  
19 but also to the fact that the return flows from the  
20 transportation losses on these particular permits are  
21 less than the 31 percent criteria.

22 Therefore, even under the decree, they would  
23 never be impacted by--they would not be impacted by a  
24 transfer, even under a future condition.

25 With respect to point number two in Mr. )

1 McConnell's--or Mr. Mahannah's memo, certainly we will  
2 notify and would notify the Water Master, to see that  
3 a double diversion did not occur. We do that in the  
4 regular course of things and matters, and we would  
5 continue to do that.

6 I think we have stated our position with  
7 respect to the gates sufficiently, in the earlier  
8 record, and we don't feel responsible for paying for  
9 those gates. We do think there is a benefit, contrary  
10 to what Mr. McConnell said, there is a direct benefit  
11 to TCID in fixing those gates, because that is water  
12 that could otherwise be stored, when no one else has a  
13 right to it below Derby. And we think that they have  
14 an obligation to fix it, not only for themselves, but  
15 for other water-right holders, including ourselves,  
16 to properly operate and to allow us to be storing it  
17 in upstream storage, rather than allowing that water  
18 to dribble down to Pyramid Lake, when it's not necessary.

19 The diversion rate point I think we corrected  
20 in our earlier discussions.

21 MR. McCONNELL: Just one final thing.

22 MR. MORROS: We are going to have to come to  
23 an end here.

24 MR. McCONNELL: Just one sentence. I just  
25 wanted to remind you that the evidence presented here,

1 showing there was no impact on the district, was based  
2 on current conditions.

3 MS. OLDHAM: We don't--well, it is based on  
4 some current conditions; it is also based on a future  
5 water-supply condition of 119,000 acre-feet of water  
6 being supplied to the Truckee Meadows. So, in a lot  
7 of respects, it dealt with future conditions.

8 MR. McCONNELL: I understand that, but, I mean,  
9 what I am referring to is, to current conditions is  
10 58 percent limitation, as well as the 50 percent return  
11 flow.

12 MS. OLDHAM: But with respect to a future  
13 condition which exercised all of those water rights;  
14 did not exercise just 58 percent. It exercises the  
15 whole right.

16 MR. MORROS: Any other comments, or does  
17 anybody else wish to make a statement for the record?

18 Hearing none, we are going to take about a  
19 ten-minute recess, and then I think that I am going to  
20 rule on the matter of these applications. I see no  
21 reason to delay it.

22 " (Recess.)

23 MR. MORROS: There is a little housekeeping  
24 chore we will have to deal with first, and that is the  
25 matter of the Applicant's exhibit. I apologize for

1 not taking care of this. We have received into the  
2 record Applicant's Exhibits 1, 2 and 3. Is there any  
3 objection to Exhibits 4, 5, 6, 7 and 8 being received  
4 into the record?

5 MR. McCONNELL: No.

6 MR. MORROS: All right. Applicant's Exhibits  
7 4, 5, 6, 7 and 8 will be received into the record.

8 (Applicant's Exhibits 4, 5, 6,  
9 7 and 8 were received into  
10 evidence.)

11 MR. MORROS: First, I will take up the matter  
12 of Application 533369, which was filed by Westpac  
13 Utilities, to change the point of diversion, place and  
14 manner of use of a portion of the Truckee River decreed  
15 water right under claim number 621.

16 There were no protests filed to that appli-  
17 cation, and, therefore, it is not necessary for the  
18 State Engineer to rule, as is required in the case of  
19 a protested application. That application to change  
20 will be approved, and it will be subject to the same  
21 terms and conditions that will be imposed in the matter  
22 of Applications 53092 and 53093.

23 Additionally, before approval can occur under  
24 53369, the question of title will have to be cleared up.  
25 It is my understanding that, with the IRS ruling, that

1 title under these rights will pass to either Washoe  
2 County or the City of Reno, or the City of Sparks, and  
3 that there then will be an agreement entered into  
4 between those entities and Westpac Utilities, for  
5 delivery of the water to the developments proposed to  
6 be served by these water rights; is that correct?

7 MS. OLDHAM: I believe all of these water  
8 rights are Reno and Sparks, are they not?

9 MR. MORROS: Well, whatever the case may be.

10 MS. OLDHAM: Washoe County is a little bit  
11 different issue.

12 MR. MORROS: All right. But before approval  
13 of 53369 can occur, that title matter will have to be  
14 cleared up. I want there to be a full understanding of  
15 that.

16 Going now to Applications 53092 and 53093,  
17 those applications were protested by the Truckee Carson  
18 Irrigation District on the grounds that, if the  
19 applications were granted, it may tend to adversely  
20 affect existing downstream water rights.

21 We have taken evidence and testimony into  
22 the record today in this proceeding, and it is my  
23 finding that there does not appear to be substantial  
24 evidence to support a finding that approval of those  
25 applications would adversely affect downstream rights

1 or any other rights on the stream system.

2 The decree specifically provides, on page  
3 88--I am referring now to the Truckee River decree--  
4 No. A-3, U.S. District Court, District of Nevada, that  
5 persons whose rights are adjudicated hereby, their  
6 successors or assigns, shall be entitled to change,  
7 in the manner provided by law, the point of diversion  
8 and the place of use, means, manner or purpose of  
9 using of the waters to which they are so entitled, or,  
10 of any part thereof, so far as they may do so without  
11 injury to the right of other persons whose rights are  
12 fixed by this decree.

13 There doesn't appear to be any evidence that  
14 approval of these applications to change would result  
15 in any injury to the rights of any other persons whose  
16 rights are fixed by this decree. And that is specifically  
17 my finding.

18 The diversion rate under 53092, it has been  
19 requested by the applicant that diversion rate be  
20 reduced to 3.53 cfs; is that correct?

21 MR. deLIPKAU: That's correct.

22 MR. MORROS: And it is my finding that that is  
23 appropriate and consistent with the representation  
24 that has been made to the State Engineer as to the  
25 amount of water desired to be changed under Application

1 53092.

2 Relating to the request by the protestant,  
3 Truckee Carson Irrigation District, regarding the  
4 modifications at Derby Dam, it appears that there is  
5 some basis for the concern expressed by the protestant  
6 that there may, at some time in the future, have to be  
7 some modifications made to Derby Dam in order to ensure  
8 that the protestant will be able to divert the amounts  
9 of water that they are entitled to under the decree,  
10 but at this point, I think the record demonstrates that  
11 that is somewhat speculative. And until such time as  
12 it can be demonstrated that those modifications are  
13 necessary, I don't feel that the State Engineer has  
14 the authority to require that the applicant be responsibl  
15 for any of the costs that might occur at sometime in the  
16 future.

17 The protestant also requested that assurances  
18 be given that the existing place of use that these  
19 rights are attached to in the form of decreed irrigation  
20 rights, that the water deliveries to those lands be  
21 ceased completely, and that no further irrigation be  
22 allowed on those lands, and certainly, if the permits  
23 are issued, it would be the responsibility of the  
24 Federal Water Master to assure that there are no  
25 deliveries of water made to those lands for the purposes

1 of irrigation, or, for that fact, any other purpose.  
2 And I think the Federal Water Master would be able to  
3 accomplish that without any substantial hurdles to clear.

4 Mr. Stone has assured me he doesn't think  
5 that there is any problem.

6 I am going to issue the permits under  
7 Applications 53092 and 53093, when the title problem  
8 is cleared up and clarified on the records of the  
9 State Engineer, subject to existing rights, and also  
10 subject to the continuing jurisdiction and regulation  
11 by the Federal Water Master, as provided in the Truckee  
12 River decree.

13 I don't think that that condition is any  
14 different than the implied conditions that have been  
15 attached to any other change applications that have been  
16 approved on the Truckee River system. I think that if,  
17 at any time in the future, it can be demonstrated to  
18 the Federal Water Master that there is a need for  
19 additional regulation of the diversions under these  
20 rights, or any other rights that may exist on the  
21 Truckee River, that the Federal Water Master does have  
22 the authority and the jurisdiction to accomplish that  
23 additional regulation, as an officer of the court.  
24 And should anybody object to any regulation, additional  
25 regulation, by the Federal Water Master, or any additional

1 administration under the decree by the Federal Water  
2 Master, then certainly they have an appeal procedure  
3 that is available to them, to the Federal District  
4 Court. And that is basically outside the jurisdiction  
5 of the State Engineer. But these permits will be  
6 issued, subject to existing rights, and subject to the  
7 continuing jurisdiction of the Federal Water Master.  
8 And that, I think, goes right to the heart of the  
9 provision and the decree, that the rights cannot be  
10 exercised if they in any way injure the rights of any  
11 other persons whose rights are fixed by the Truckee  
12 River decree.

13 Additionally, the permits under these appli-  
14 cations will not be issued until, of course, the  
15 statutory permit fees are submitted to the State  
16 Engineer's Office.

17 With that, I will declare this hearing closed.

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STATE OF NEVADA )  
                  ) ss.  
COUNTY OF WASHOE )

I, Richard A. Williams, a notary public in and for the County of Washoe, State of Nevada, do hereby certify:

That on Tuesday, November 14, 1989, at the hour of 9 o'clock a. m., at the Reno City Council Chambers, Reno, Nevada, I was present and reported the proceedings had and the testimony given in said hearing in verbatim stenotype notes, which were thereafter caused to be transcribed by me;

That the foregoing transcript, consisting of pages 1 through 136, inclusive, constitutes a full, true and accurate transcript of my said stenotype notes, to the best of my knowledge, skill and ability.

Dated at Reno, Nevada, this 6th day of December, 1989.

\_\_\_\_\_  
Richard A. Williams, CSR