

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

tabbles

TCD 247

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LYMAN McCONNELL

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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

