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Arnold Schwarzenegger
Governor

August 11, 2010

ELECTRONIC MAIL

To: Truckee River Hearing Service List

TRUCKEE RIVER HEARING: RULING ON JOINT OBJECTIONS TO TRUCKEE-CARSON IRRIGATION DISTRICT'S EXHIBITS

This letter responds to the joint objections of the United States Bureau of Reclamation, Washoe County Water Conservation District, Truckee Meadows Water Authority (TMWA), Pyramid Lake Paiute Tribe, City of Fernley, and California Department of Water Resources (for ease of reference these parties collectively are referred to herein as the "joint parties" although not all of these parties presented a joint case-in-chief) to exhibits submitted by the Truckee-Carson Irrigation District (TCID) in the Truckee River hearing. To ensure that the State Water Resources Control Board (State Water Board or SWRCB) has a complete record of the exhibits to which the joint parties objected and the grounds for their objections, I requested the joint parties to submit their objections in writing by July 30, 2010, and TCID to submit its written response by August 3, 2010. The written objections and response were timely received.

The joint parties have objected to approximately 123 exhibits, often identifying multiple grounds for objection. As discussed below, I am overruling the objections based on relevance grounds. At this point in the proceeding, however, it is premature to determine what evidence the State Water Board will rely upon in formulating its decision and what weight it will give contested evidence. Thus, I will not rule on each objection today; instead, this letter explains my ruling on the objections based on duplication of exhibits and also describes how the State Water Board will address other general categories of evidentiary objections such as hearsay and authentication. In general, if the State Water Board wishes to rely on contested evidence in making its decision, it will consider the joint parties' objections and TCID's response in determining what weight, if any, to afford the contested evidence. The State Water Board's determination will be explained in its decision.

Relevance

The joint parties objected to many of TCID's exhibits on the grounds that the exhibits are not relevant to the proceeding. The State Water Board's hearing officers generally prefer to admit evidence that would be admissible under the State Water Board's regulations, using the more liberal standards applicable to administrative proceedings. (Gov. Code, § 11513, subd. (c); see Cal. Code Regs., tit. 23, § 648, subd. (b) [identifying statutes governing State Water Board's adjudicative proceedings].) TCID's exhibits appear to be relevant to certain key issues in this proceeding. Accordingly, the objections based on relevance grounds are overruled. If, however, in the course of the State Water Board's review of the record in this proceeding, the

California Environmental Protection Agency

board subsequently determines that a particular exhibit is not relevant to any of the key hearing issues, the board will not afford that exhibit any weight.

Authentication

The joint parties objected to many of TCID's exhibits on the grounds that the exhibits have not been authenticated. With respect to "all authentication issues" raised by the joint parties, TCID responded that formal authentication under the Evidence Code is not required in State Water Board hearings. In certain instances, TCID also identified independent grounds for authentication of particular exhibits.

While the State Water Board's hearings need not be conducted according to technical rules of evidence, for relevant evidence to be admissible, it must be "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs" (Gov. Code, § 11513, subd. (c).) "[T]he objection that a document has not been authenticated does not go to the truth of the contents of the document, but rather to the introduction of evidence sufficient to sustain a finding that is the writing that the proponent claims it to be." (*Interinsurance Exchange v. Velji* (1975) 44 Cal.App.3d 310, 318, citing Evid. Code, § 1400.) Accordingly, the exhibits will be accepted into evidence, but any uncertainty regarding a document's origin, chain of custody, how the document was found and excerpted, or other issues relating to the genuineness or authenticity of the document, will be taken into account in evaluating the weight of the evidence.

Hearsay

The joint parties objected to a number of exhibits on hearsay grounds. In response, TCID asserted that hearsay evidence is admissible in State Water Board hearings to supplement or explain other evidence. For certain exhibits, TCID also identified a hearsay exception or an independent ground for considering hearsay evidence.

The State Water Board may accept and consider hearsay evidence, but is limited in using such evidence. Hearsay evidence may be used to supplement or explain other evidence in the proceeding, "but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Gov. Code, § 11513, subd. (d); Cal. Code Regs., tit. 23, § 648.5.1.) I decline to exclude the contested evidence on hearsay grounds, but will consider it subject to the limitations in Government Code section 11513, subdivision (d). In addition, the circumstances that led to the hearsay objections may limit or undermine the trustworthiness of that information, and such limits will be taken into account in determining the weight to give any hearsay evidence in this proceeding.

Objections set forth in TMWA's July 15, 2010 Motion to Exclude

The joint parties reiterate objections to certain exhibits that TMWA previously raised in its July 15, 2010 Motion to Exclude. I addressed those issues in my July 27, 2010, ruling, and the joint parties' continued objections are noted. To the extent that the joint parties raise other objections (e.g., relevance or hearsay) to the exhibits that are the subject of TMWA's Motion to Exclude, this ruling applies to those objections as well.

Duplication and Completeness of Exhibits

The joint parties objected to certain TCID exhibits on the grounds that the exhibits duplicated either State Water Board staff exhibits, exhibits submitted by the joint parties, or other TCID exhibits. At the hearing, the parties agreed that where a TCID exhibit was the same as one of the joint exhibits, that the latter would be admitted in place of the former. While duplication is not generally the sole grounds for ruling that a document is inadmissible in State Water Board proceedings, I will consider the issue, in part, as a means to reduce the size of an already voluminous administrative record. This portion of the ruling only addresses duplication and completeness of exhibits; the other objections to these exhibits are addressed above.

In its August 3 response, TCID withdrew the following exhibits: TCID-147, TCID-169, TCID-170, TCID-178, TCID-179, TCID-188, TCID-206, TCID-215, TCID-217, TCID-221, TCID-223, TCID-225, TCID-227, TCID-243, TCID-261, TCID-262, TCID-270, TCID-271, TCID-272, TCID-273, and TCID-294. TCID did not submit exhibits for exhibit numbers TCID-33, TCID-152, and TCID-283 through TCID-286.

The joint parties claim that TCID-164 is the duplicate of TCID-222 and Pet/App. Joint-9, which contain various versions of the Operating Criteria and Procedures (OCAP) for the Newlands Reclamation Project. TCID responds that TCID-164 is the "actual published version of OCAP." I will sustain the joint parties' objection and exclude TCID-164, noting that if there is any question about which version to reference, the State Water Board may take official notice of the OCAP published in the federal Code of Federal Regulations. (Cal. Code Regs., tit. 23, § 649.2.)

The joint parties objected to certain exhibits on the grounds that the exhibits duplicate State Water Board staff exhibits. TCID agreed to withdraw the following exhibits if they are duplicates: TCID-199 through TCID-204. The hearing team has confirmed that these documents are contained in the State Water Board's staff exhibits, and therefore the exhibits will not be admitted into evidence. For the following exhibits, TCID responded that it would stipulate that the documents are duplicates "if contained verbatim" in SWRCB-7 ("Truckee River Operating Agreement Final Environmental Impact Statement/Environmental Report and Appendices. January 2008."): TCID-183, TCID-184, TCID-185, TCID-186, TCID-187. The hearing team reviewed SWRCB-7 and it appears that same documents are contained in SWRCB-7, but with some formatting differences or with notations for responses to comments that are commonly found in environmental documents. Because those differences do not affect the substance of the document, I will treat TCID-183, TCID-184, TCID-185, TCID-186, TCID-187 as duplicate exhibits and not admit them. I will, however, admit TCID-198 for ease of reference. I also will admit TCID-226, which contains portions of SWRCB-7 with highlighted portions for reference.

TCID also responds that TCID-277, TCID-278, and TCID-279 are not duplicates of State Water Board staff exhibits. I will allow these exhibits to be admitted into evidence.

The joint parties also objected to TCID-134 ("Alpine Decree Excerpts, December 20, 1980") and TCID-289 ("Table: Flow Regime for Cui-ui Spawning in the Lower Truckee River"), stating that the entire decree or document, respectively, should be included. TCID responded that it would provide the entire decree or document, but it has not done so. Nonetheless, I will not sustain the objections that are based solely on the ground that only a portion of a document was submitted; thus the joint parties' objections to TCID-134 and TCID-289 are overruled.

If you have any questions about this letter, please contact Erin K.L. Mahaney, Senior Staff Counsel, at (916) 341-5187.

Sincerely,



Tam M. Doduc
Hearing Officer

cc: Mr. Charles Hoppin, Chairman
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**SERVICE LIST OF PARTIES TO EXCHANGE INFORMATION: TRUCKEE RIVER HEARING -
SCHEDULED TO COMMENCE ON JULY 21, 2010**

**SERVICE LIST
(May 18, 2010)**

PARTIES TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS, AND OTHER DOCUMENTS. (Note: The parties listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

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Continued on next page.

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Service List of Parties

-2-

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**LIST OF INTERESTED PERSONS MAKING POLICY STATEMENTS ONLY
(PARTIES ARE NOT REQUIRED TO SERVE THE FOLLOWING PERSONS WITH WRITTEN
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