



STAFF REPORT

TO: SAC Committee
FROM: John Erwin, Dir Natural Resources
DATE: November 21, 2014
SUBJECT: **Negotiated River Settlement and the Truckee River Operating Agreement (TROA)**

Negotiated River Settlement (TROA)

1. BACKGROUND

In order to fully understand the Truckee River Settlement it is important to take a look back at the history of uncertainty with respect to the uses and users of the water of the Truckee River. This uncertainty is more difficult to see today than it was in the early 1990s, because, since that time, much of the litigation has been put on hold and most parties with interests in the waters of the Truckee River have been successful in negotiating solutions to their issues. But, prior to the late 1980's, when negotiations had been largely unsuccessful, this community was in gridlock and was unable to rationally plan for its future.

Some of the uncertainties included: (1) whether the Truckee River reservoirs can be operated to accommodate the needs of the endangered and threatened species instead of providing water to water right holders; (2) the amount of water which California was entitled to use relative to the amount of water available for Nevada; (3) how would California agencies charged with managing wildlife issues implement their regulation programs such as increasing minimum releases or in-stream flows, and would those efforts cause our reservoirs to be depleted leaving more water unavailable in a drought; (4) how would a 60 year old court decree, dominated by agricultural uses, adapt to changing uses or conversion of water uses from irrigation to municipal; (5) how would pending litigation be resolved; (6) how would Tribal claims to water be resolved and whether their claim to higher priority water rights would affect Truckee Meadows water rights; and (7) what impacts would all these unsettled issues have on the utility's ability to maintain existing water supplies, grow its water supplies and provide for the communities' future demand for water.

Eventually, in 1989, Sierra and the Pyramid Lake Paiute Tribe ("PLPT") were able to sign an agreement known as the Preliminary Settlement Agreement ("PSA"). The intent of the agreement was to settle numerous issues (some mentioned above), claims and counter-claims between these two parties and lay the foundation for a larger settlement to Truckee River issues that would include the five Mandatory Signatory Parties (United States, California, Nevada, Sierra (now TMWA), and PLPT) and other parties willing to participate.

In 1990, Congress passed and the President signed into law Public Law 101-618, the *Truckee-Carson-Pyramid Lake Water Rights Settlement Act* ("Settlement Act"). The Settlement Act, which

incorporated and ratified the terms of the PSA; provided for the negotiation of a new operating agreement on the Truckee River; and preserved and protected the rights of all Orr Ditch water rights holders. The bill had provisions regarding other issues some of which were related to the settlement, such as economic development funds for PLPT; and some not related, such as the Fallon Tribe Settlement and the Newlands project reclamation reform provisions. Section 205(a) of PL101-618 directed the Secretary of the Interior to negotiate an agreement for the operation of Truckee River reservoirs. This agreement has become known as the Truckee River Operating Agreement (“TROA”).

Negotiations on TROA began in the 1990’s leading to the final agreement in September of 2008. When implemented, TROA will allow for a congressionally authorized interstate allocation of water and change the operations of the Truckee River system to accommodate multiple beneficial uses for drought supply, endangered and threatened fish species, water quality, California water use, and storage. In addition, operations will enhance riparian habitat, reestablish river canopy, enhance reservoir releases, improve recreational pools in the reservoirs, and improve the process for emergency drawdown procedures for Lake Tahoe.

2. COMPONENTS OF TROA (225+ pages)

Article 1

- Intent and Operating Principles
- Protection for historic water rights
 - including those belonging to non-signatories
 - protects local irrigators from cost of improvements to diversion facilities
 - provides the rules for makeup of return flows for effluent reuse
- Emergency Provisions

Article 2

- Defines Administrator role
- The Water Master will be the first Administrator
- Provides for Dispute Resolution Process
- Operations Coordinating Committee
- Financial Responsibilities for
 - Implementation/management
 - Storage Fees
 - Habitat Restoration

Article 3

- Data, information, and reports to be maintained
- Administrator responsible to get the data and monitoring he needs.
- Online data system

Article 4

- This article is only binding among the Tribe, US and TMWA
- Reiterates the PSA provisions regarding
 - Will-Serve Commitments
 - New supplies which are not included in the 119, 000 af of demand

Article 5

- Similar to the Truckee River Agreement
- Deals with the operation of the Reservoirs
 - storage of Floriston Rate water
 - Amends the Tahoe-Prosser Exchange Agreement by determining what water can be used for the fishery
 - Allows US to apply to increase storage at Stampede to store Fish Credit Water
- Rules for spill and losses

Article 6

- New California water rights with higher priority than Nevada water rights but cannot diminish TMWA's 40 cfs right or the Tribe's right to Claims 1 and 2
- Limits the California diversions to 32,000 af and depletions to 17,600 af
- Rules to help diminish the impact on our drought supplies when California stores water
- Creation of Credit Water for California instream and recreation purposes

Article 7

- Rules on how each category of credit water is stored
- Identifies change applications necessary to the Agreement
- Sets forth water quality flow requirements

Article 8

- Sets priorities for use of water by the parties
 - M&I Credit water is high in priority, Water Quality Credit Water is lower
- Rules for all manner of exchanges and movement between reservoirs
- Rules for credit water accounting when Tahoe drops below the rim
- Sets limitations on whether water can be retained adverse to fish releases

Article 9

- Rules for maintaining minimum and enhances minimum releases from reservoirs
- Sets minimum bypass flow requirements at the hydros
- Provides for California Guidelines

Article 10

- A complicated article that ensures California that downstream users will not claim California groundwater pumping should be prohibited because it may cause reductions of downstream flow

Article 11

- Rules to notify Administrator of water release schedules
- Administrator creates integrated schedules consistent with the priorities in Article 8.

Article 12

- Contingencies precedent to effectiveness

Article 13

- Amendments and Review of Operations
- A process to review operations every 10 years to determine if unmet needs can be achieved
- The process for amending TROA

Article 14

- Boilerplate

3. FINAL STEPS TO IMPLEMENT TROA

TROA was signed by the Mandatory Signatory Parties (TMWA, Pyramid Lake Paiute Tribe, California, Nevada, and the United States) and seven other parties on September 6, 2008. TROA binds PLPT, the United States, California and Nevada to move forward together to implement and make TROA effective. There are and always will be regulatory uncertainties surrounding the use the Truckee River. When TROA becomes effective there will be a new, more flexible framework for river operations which will provide parties additional opportunity to accommodate issues as they emerge.

The following actions outlined below are required to implement the Truckee River Operating Agreement and for it to enter into effect. Many of the required actions have taken place, but are subject to a court challenge. Those court challenges do not in any way alter the fact that the required action has taken place. However, any one of the five Mandatory Signatory Parties to the Truckee River Operating Agreement may delay its entry into effect until such challenge is final and not subject to further appeal. The Mandatory Signatory Parties have discussed the pros and cons of delay while court challenges to required actions are pending, but have not reached any decision on the question.

A. Promulgation of Truckee River Operating Agreement as a Federal Regulation.

The Operating Agreement must become a federal regulation. It was first published in the Federal Register on December 5, 2008, and its promulgation as a regulation became final on January 5, 2009. Thus, this required action has taken place.

Truckee-Carson Irrigation District, Churchill County and the City of Fallon have initiated litigation in the United States District Court challenging the regulation under the Administrative Procedure Act, 5 U.S.C. §§ 551, et seq., and under the Federal Advisory Committee Act, 5 U.S.C. App. 2 §§ 1, et seq. That same litigation also challenges the adequacy of the Final Environmental Impact Statement for the Truckee River Operating Agreement. The United States has filed an answer in this matter, and the Pyramid Lake Paiute Tribe, Truckee Meadows Water Authority, City of Fernley, and the Washoe County Water Conservation District, have been allowed to intervene.

The United States has filed, and all of the interveners have joined in, a motion for summary judgment. Oppositions to the motions for summary judgment will not be filed until thirty days after the Court rules on a long pending Motion to Supplement the Record in this matter. It is difficult to estimate when there will be a decision on its merits. It is likely that there will be an appeal from any decision by the District Court.

B. Modifications to Orr Ditch Decree.

The Orr Ditch Decree must be modified to accommodate changes required by the Operating Agreement. A motion was submitted to the Court in *United States v. Orr Water Ditch Company, et*

al. for approval of modifications to the Orr Ditch Decree on November 17, 2008. The motion has been opposed by Truckee-Carson Irrigation District, Churchill County, City of Fallon, and numerous owners of water rights.

After determining how pleadings, motions and other papers will be served in this matter on represented parties and on approximately 900 unrepresented parties, the Court gave the TROA Signatory Parties until February 1, 2011 to file a definitive Amended Motion to Modify the Orr Ditch Decree, with all necessary supporting information. That Amended Motion was filed and fully briefed by all parties. On September 30, 2014, the Court entered an Order granting the Amended Motion to Modify, and an Order which amends the Orr Ditch Decree as requested in the Amended Motion.

C. Modifications to Truckee River General Electric Decree.

The Truckee River General Electric Decree must be modified to accommodate changes required by the Operating Agreement. The United States and the Truckee Meadows Water Authority submitted a joint motion to the court in *United States v. Truckee River General Electric Company* to modify the Truckee River General Electric Decree on November 20, 2008. The Court entered an order modifying the Decree on December 22, 2008. Truckee-Carson Irrigation District has stated that it intends to move to have this order vacated, but has not yet done so. Therefore, at this time, this required action has taken place.

D. Changes to Water Rights.

1. California Change Petitions

Approval by the California State Water Resources Control Board (the “State Board”) of petitions to change the water rights for Boca Reservoir, Prosser Creek Reservoir and Stampede Reservoir, and for Independence Lake, must be obtained. These change petitions were filed with the State Board. A five-day evidentiary hearing before the State Board ended on July 29, 2010. Simultaneous joint closing briefs were filed with the State Board on September 7, 2010. On October 29, 2012, the State Board issued Decision 1651 approving the petitions to change. Therefore, the required action has taken place.

On March 7, 2013, Truckee-Carson Irrigation District, Churchill County, Nevada and City of Fallon, Nevada filed a Petition for Writ of Administrative Mandamus in state court in California challenging Decision 1651. On April 18, 2014, the Petition was dismissed without leave to amend for failure to join indispensable parties. On May 21, 2014, the Truckee-Carson Irrigation District, Churchill County and the City of Fallon appealed that dismissal to the Third District Court of Appeal in Sacramento, California. That appeal is pending.

2. Nevada Change Applications

Approval of changes to water rights in Nevada to allow the Truckee Meadows Water Authority to hold the consumptive use component of certain of its water rights in storage must be approved by the Nevada State Engineer. These Change Applications were filed. A hearing on these Change Applications was held before the Nevada State Engineer from December 14 to December 19, 2009. On March 19, 2010, the Nevada State Engineer issued Ruling No. 6035 approving the Truckee Meadows Water Authority’s Change Applications. Therefore, the required action has taken place.

The Truckee-Carson Irrigation District, City of Fallon and Churchill County appealed the State Engineer's decision to the Orr Ditch Court. On March 31, 2014, the Orr Ditch Court denied the Petition, and affirmed the State Engineer's decision. The Truckee-Carson Irrigation District, City of Fallon and Churchill County appealed the Orr Ditch Court's decision to the Ninth Circuit Court of Appeals on May 21, 2014. Their opening brief was due in that appeal on October 28, 2014.

E. Unappropriated Water

The Nevada State Engineer's ruling on unappropriated Truckee River water, State Engineer Ruling No. 4683, must be final, and the Orr Ditch Court must have made a determination that the Truckee River in Nevada is fully appropriated and closed to new appropriations. The Nevada State Engineer Ruling granted the unappropriated Truckee River water to the Pyramid Tribe. The Ruling was appealed to the Third Judicial District Court of the State of Nevada, and the State Engineer's Ruling was affirmed. That District Court decision was appealed to the Nevada Supreme Court by the City of Fallon. On March 30, 2009, the City of Fallon dismissed that appeal, and Ruling No. 4683 is now final.

In addition, the State Engineer's denial of an earlier Truckee-Carson Irrigation District application for unappropriated Truckee River water was remanded by the Third Judicial District Court in and for the County of Churchill to the Nevada State Engineer on October 15, 2008. The Nevada State Engineer held a hearing on the remand, and on June 8, 2011 issued Ruling on Remand 6122 denying the Application. That decision was not appealed.

The "fully appropriated determination" by the Orr Ditch Court is included in the Amended Motion to Modify the Orr Ditch Decree.

F. Resolution of Litigation

Pyramid Lake Paiute Tribe v. California, Civil S-181-378-RAR-RCB, and *United States v. Truckee-Carson Irrigation District*, Civil No. 4-2987-RCB, cases pending in federal courts in California and Nevada, respectively, must be finally resolved. The *United States v. Truckee-Carson Irrigation District* case may have been dismissed with prejudice on August 10, 2009. Work is underway to finally resolve the remaining action, and to determine if anything more needs to be done with *United States v. Truckee-Carson Irrigation District*.

G. Change to Allow Storage of Unappropriated Water

Approval of a change to the unappropriated water right of the Pyramid Tribe to allow water under that right to be stored in Truckee River reservoirs must be approved by the Nevada State Engineer. The Pyramid Tribe filed the applications needed to make that change on September 16, 2014. Notice of those applications was sent for publication on September 29, 2014. Interested persons will have thirty (30) days from the last publication in which to protest those applications.