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20  
 21 IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF NEVADA

22	UNITED STATES OF AMERICA, <i>et al.</i> ,	) Case No. 3:73-cv-00003-LDG
		)
23	Plaintiff,	) <b>MEMORANDUM OF POINTS</b>
		) <b>AND AUTHORITIES IN SUPPORT OF</b>
24	v.	) <b>MOTION OF THE UNITED STATES,</b>
		) <b>STATE OF NEVADA, PYRAMID LAKE</b>
25	THE ORR WATER DITCH CO., <i>et al.</i> ,	) <b>PAIUTE TRIBE, TRUCKEE MEADOWS</b>
		) <b>WATER AUTHORITY, AND WASHOE</b>
26	Defendants.	) <b>COUNTY WATER CONSERVATION</b>
		) <b>DISTRICT TO MODIFY OR</b>
27		<b>AMEND THE FINAL DECREE ENTERED IN</b>
28		<b>THIS CASE IN 1944</b>

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**I. INTRODUCTION**

Pursuant to Section 205(a)(4) of the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, Title II, Public Law 101-618, 32 Stat. 3294, 3306 (“Settlement Act”), and Fed. R. Civ. P. 60(b)(5), the United States of America (“United States”), the State of Nevada (“Nevada”), the Pyramid Lake Paiute Tribe (“Tribe”), the Truckee Meadows Water Authority (“Water Authority”), and the Washoe County Water Conservation District (collectively, the “Moving Parties”) have jointly moved this Court for approval of necessary modifications to the Orr Ditch Decree so that the Truckee River Operating Agreement (“Operating Agreement”) may become effective.<sup>1/</sup> The Moving Parties, together with the State of California and municipalities and public agencies in California and Nevada, signed the Operating Agreement on September 6, 2008.<sup>2/</sup>

The Operating Agreement covers a wide range of important subjects. Some of those subjects are not presently addressed in the Final Decree entered in this case in 1944, and approval of the Operating Agreement will thus add new provisions to that Decree rather than amend existing provisions. The Moving Parties do not ask to re-open the Orr Ditch Decree with respect to any water rights adjudicated therein. Rather, this Motion primarily seeks to modify certain operational provisions of the 1935 Truckee River Agreement, which was incorporated into the Orr Ditch Decree, as to when water must be passed through or released from Lake Tahoe or Boca Reservoir to satisfy prescribed rates of flow known as "Floriston Rates." Implementation of the new Truckee River Operating Agreement depends upon the ability to modify such Floriston Rates, and thus the final Decree in this case must be modified to allow for that implementation.

Floriston Rates were originally negotiated in 1908 between the Truckee River General Electric Company and the Floriston Pulp and Paper Company. The purpose of Floriston Rates was to maintain instream flows for pulp mill and hydropower generation at Floriston, California. Floriston Rates as specified in the 1915 Truckee River General Electric Company decree are rates

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<sup>1/</sup> A copy of the signed Truckee River Operating Agreement is attached as Exhibit B to the Declaration of Stephen M. Macfarlane (“Macfarlane Decl.”), filed concurrently herewith.

<sup>2/</sup> The State of California will file a motion for intervention for limited purposes in the above-captioned case.

1 of flow at the California-Nevada state border of 400 to 500 cubic feet per second, depending on the  
2 month and elevation of water in Lake Tahoe.

3 Floriston Rates were included in the Orr Ditch Decree based upon the quantities of water  
4 needed in the 1940s to satisfy Orr Ditch Decree water rights as they were being exercised at that  
5 time, which was primarily for irrigation and the operation of five run-of-the-river hydroelectric  
6 plants then owned and operated by the Sierra Pacific Power Company (“Sierra Pacific”). Sierra  
7 Pacific is the successor to the Truckee River General Electric Company, and has now transferred  
8 its water business and water business assets to the Water Authority. The Orr Ditch Decree requires  
9 the Floriston Rate flows to be provided even when those quantities of water are not needed to satisfy  
10 Orr Ditch Decree water rights.

11 The Operating Agreement allows for adjustments to the Floriston Rates so that some or all  
12 of the water that must now be passed through or released to attain those flows may be retained in  
13 storage until it is needed by the holders of existing Orr Ditch Decree water rights. These  
14 adjustments are conditioned, however, on obtaining the approval of the Nevada State Engineer for  
15 changes to Orr Ditch Decree water rights. In addition, the Operating Agreement will allow for the  
16 coordinated operation of Lake Tahoe and Boca Reservoirs with Prosser Creek Reservoir and  
17 Stampede Reservoir, two additional federal reservoirs built after the Final Decree in this case was  
18 entered.

19 In the Settlement Act and its legislative history, Congress recognized that continuing to apply  
20 the rigid flow regime required by the Final Decree in this case was no longer equitable or in the  
21 public interest.<sup>3/</sup> Accordingly, Congress authorized and directed the Secretary of the Interior  
22 (“Secretary”) to negotiate a new operating agreement for Lake Tahoe, Boca Reservoir and other  
23 reservoirs in the Truckee River Basin with the States of Nevada and California, subject to certain  
24 criteria. *See* Macfarlane Decl., Exh. A, §§ 202, 205(a)(1), (2) and (3). The report of the Senate  
25 Committee on Indian Affairs on the Settlement Act states:

26 [T]he Operating Agreement will modify the existing method of river regulation . . . ., and will

27 \_\_\_\_\_  
28 <sup>3/</sup> For the Court’s convenience, a copy of the Settlement Act is attached as Exhibit A to the  
Macfarlane Declaration.

1 set forth criteria and procedures for satisfaction of other water rights on the river system.  
2 The Operating Agreement should also provide for improved coordination of reservoirs to  
3 satisfy instream beneficial uses of water in the Truckee River, such as fish and wildlife  
4 habitat, recreation, and water quality.... The Committee notes that this section 205(a)(1) is  
5 intended to facilitate and encourage the greatest possible coordination of reservoir  
6 operations, including privately owned reservoirs, if possible, *with the overall goal of moving  
7 beyond the present method of river regulation, tailored to meet the needs of the early part  
8 of this century, to a method which utilizes current technology to the fullest possible extent  
9 and serves contemporary needs.*

6 S.Rep. 101-555 (101<sup>st</sup> Cong. 2d Sess.) at 23 (emphasis added). The Operating Agreement satisfies  
7 this directive and the criteria established by the Congress.

8 In order to adequately explain the bases for this Motion and why it should be granted, it is  
9 necessary to provide the Court with background information on the evolution of Truckee River  
10 Basin water rights and management in the 20th Century, both before and after the entry of the Final  
11 Decree in this case in 1944; the circumstances of the 21st Century and how they differ from those  
12 that existed when the Orr Ditch Decree was entered; and on the Operating Agreement itself.

## 13 **II. BACKGROUND**

14 The Congress passed the Settlement Act in November 1990. This statute authorizes  
15 numerous measures in the Truckee and Carson River watersheds which will resolve longstanding  
16 disputes and litigation among multiple parties concerning the rights to use of the waters of those  
17 rivers and of Lake Tahoe.

18 The Settlement Act authorized and directed the Secretary to negotiate an operating  
19 agreement with Nevada and California to provide for a more flexible and coordinated operation of  
20 federal reservoirs in the Truckee River Basin, including Lake Tahoe, Boca Reservoir, Prosser Creek  
21 Reservoir, Martis Reservoir<sup>4/</sup> and Stampede Reservoir ("Truckee River Reservoirs"), while at the  
22 same time satisfying the exercise of water rights in conformance with the Orr Ditch Decree.  
23 Macfarlane Decl., Exh. A, § 205(a)(2)(D). The Congress also recognized that, in part, the more  
24 flexible and coordinated operation could require changes in water rights, and that any changes in  
25 water rights would have to be obtained under state law. *Id.*

26 The Operating Agreement provides other significant public interest benefits to the two States

27 \_\_\_\_\_  
28 <sup>4/</sup> Because it cannot hold water for extended periods of time, Martis Creek Reservoir is used  
exclusively for flood control, and that limited use will continue.



1 and to those who rely upon the Truckee River. Implementation of the Operating Agreement is a  
2 prerequisite to the Congressional allocation of the waters of the Truckee and Carson Rivers and of  
3 Lake Tahoe between California and Nevada. *Id.* § 210(a)(2)(A); § 204. The Operating Agreement  
4 is also a settlement of long-standing but unresolved litigation over Truckee River water rights in  
5 California and dormant federal reserved water right claims for National Forests and public lands.  
6 *See id.* § 210(a)(1). The Operating Agreement enables the creation of an emergency drought water  
7 supply for the Truckee Meadows, and enhances spawning flows for the benefit of Pyramid Lake  
8 fish. The Operating Agreement incorporates guidelines and agreements over the management of  
9 Truckee River water to improve instream flows below dams, while protecting Orr Ditch Decree  
10 water right holders.

11 The Operating Agreement also implements the terms, conditions and contingencies of a prior  
12 agreement known as the Preliminary Settlement Agreement ("PSA"), which was entered into  
13 between the Tribe and Sierra Pacific (the predecessor to the Water Authority). The Congress ratified  
14 the PSA on behalf of the United States and required that the Operating Agreement implement its  
15 provisions. *See id.* § 205(a)(2)(C).<sup>5/</sup> The PSA provides for actions by the Tribe and the Water  
16 Authority to cooperate in the use of their water rights, to take specific measures to prevent waste of  
17 water, and to take steps to acquire additional Truckee River water rights to meet their needs for  
18 Truckee River water. The PSA, as implemented through the Operating Agreement, provides a  
19 means of enhancing the reliability of the water supply for the Reno-Sparks metropolitan area in  
20 northern Nevada, and improves the timing of Truckee River flows of water to Pyramid Lake for the  
21 benefit of the Pyramid Lake fishery (which includes species listed as endangered or threatened under  
22 the federal Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq.*).

23 The Operating Agreement also incorporates public interest values, including the protection  
24 of aquatic resources and habitat on the Truckee River and its tributaries, as well as recreation, and  
25 water quality.

26 In conjunction with the relief requested from this Court, certain changes to water rights are  
27 needed to allow for the more flexible and coordinated operation of Truckee River Reservoirs. These

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28 <sup>5/</sup> A copy of the PSA is attached as Exhibit C to the Macfarlane Declaration.

1 changes involve Change Petitions filed in California ("California Change Petitions") and Change  
2 Applications filed with the Nevada State Engineer ("Nevada Change Applications") which seek  
3 changes to water rights recognized under the Orr Ditch Decree.

4 The California Change Petitions will, if granted, do nothing more than modify the points of  
5 diversion and redirection and places and purposes of use of existing water rights for Stampede  
6 Reservoir, Boca Reservoir, Independence Lake and Prosser Creek Reservoir. These changes will  
7 facilitate more flexible and coordinated operation of those reservoirs.

8 The Nevada Change Applications provide for the consumptive use component of existing  
9 Orr Ditch Decree water rights to be held in storage until needed for a beneficial use. The non-  
10 consumptive portion of those Orr Ditch Decree water rights will remain in the stream to help satisfy  
11 other water rights, just as if the consumptive portion had been used for its original beneficial use.

12 The Floriston Rates mentioned above, which are described in more detail below, will remain  
13 the foundation on which the approval of the California Change Petitions and the Nevada Change  
14 Applications through the Operating Agreement will build the more coordinated and flexible  
15 management of the Truckee River and its reservoirs under the circumstances which exist in the 21st  
16 Century.

17  
18 **III. THE EVOLUTION OF TRUCKEE RIVER BASIN WATER RIGHTS  
19 AND TRUCKEE RIVER MANAGEMENT IN THE 20th CENTURY**

20 **A. History of the Litigation to Establish Water Rights.**

21 **1. The Advent of Floriston Rates**

22 In November of 1908, the Truckee River General Electric Company acquired the dam at the  
23 outlet of and the water stored in Lake Tahoe.<sup>6/</sup> At the same time, it entered into an agreement with  
24 the Floriston Land and Power Company and the Floriston Pulp and Paper Company (the "Floriston  
25 Companies") to control and regulate the flow of water out of Lake Tahoe into the Truckee River so  
26 that water would be available for the operation of mills and works of the Floriston Companies.

27 \_\_\_\_\_  
28 <sup>6/</sup> The Truckee River General Electric Company is the predecessor to Sierra Pacific and to the  
Water Authority.

1 Specifically, the agreement provided that the outflow from Lake Tahoe would be regulated so that  
2 the flow in the Truckee River measured at a gage at or near Floriston, California would be not less  
3 than 500 cubic feet per second from the first day of March through the thirtieth day of September  
4 in each year, and not less than 400 cubic feet per second from the first day of October through the  
5 last day of February of each year. These rates of flow became known as the "Floriston Rates."

## 6 **2. The Newlands Reclamation Project**

7 Shortly after passage of the 1902 Reclamation Act, the Secretary withdrew from the public  
8 domain land for what became known as the Newlands Reclamation Project in western Nevada (the  
9 "Newlands Project"). Ultimately, the Newlands Project embraced approximately 73,000 acres of  
10 land with water rights in two divisions, the Truckee Division and the Carson Division. The Truckee  
11 Division in the vicinity of the City of Fernley receives water directly from the Truckee River by  
12 diversion at Derby Dam into the Truckee Canal. The Carson Division is located in the area of  
13 Fallon, Nevada, and is supplied with water from both the Truckee and Carson Rivers. The water  
14 from the Truckee River is delivered to Lahontan Reservoir in the Carson River Basin by diversion  
15 at Derby Dam and conveyance through the Truckee Canal. *See Nevada v. United States*, 463 U.S.  
16 110, 115-16 (1983). The water from the two rivers in Lahontan Reservoir is then released to irrigate  
17 lands in the Carson Division of the Newlands Project.

18 To provide water for the Newlands Project, the United States also initiated three legal  
19 actions: the above-captioned case, the Truckee River General Electric ("TRGE") case, and the  
20 Alpine case. The TRGE case was initiated for the purpose of gaining control of the dam and outlet  
21 works at Lake Tahoe. The other two actions involved adjudication proceedings to determine the  
22 relative rights of users of water on the Truckee and Carson Rivers.

## 23 **3. The Truckee River General Electric Decree**

24 In February 1909, to gain control of the dam and outlet works provided by the Lake Tahoe  
25 Dam, the United States commenced an action in a United States District Court in California in order  
26 to condemn the existing dam at the outlet of Lake Tahoe. The defendant was the Truckee River  
27 General Electric Company. That action, with its current case number, is *United States v. Truckee*  
28 *River General Electric Co.*, Case No. 2:68-cv-643 (E.D. Cal.).

1 In 1915, a judgment and decree was entered in the TRGE case (the "1915 TRGE Decree").  
2 The 1915 TRGE Decree awarded the United States an easement for, and the right to operate, the  
3 Lake Tahoe Dam and its controlling works. However, the 1915 TRGE Decree contained injunctive  
4 provisions requiring the United States to operate the dam and the controlling works so that the  
5 Floriston Rates, as described in the Agreement between the Truckee River General Electric  
6 Company and the Floriston Companies, would be satisfied.

#### 7 4. The Orr Ditch Decree

8 The above-captioned case, involving waters of the Truckee River in Nevada, was  
9 commenced by the United States in 1913. *Nevada*, 463 U.S. at 116. Following several years of  
10 hearings, a Special Master appointed in this case issued a report and proposed decree in July of  
11 1924. In February of 1926, this Court entered a temporary restraining order declaring the water  
12 rights as proposed by the Special Master. *Id.* at 117.

13 In 1934, a severe drought stimulated interest in finalizing this litigation and ending the 1926  
14 temporary restraining order. In 1935, the principal organizational defendants in this case, the  
15 Washoe County Water Conservation District, Sierra Pacific, the Truckee-Carson Irrigation District  
16 ("TCID"), and the United States, along with certain individual parties, entered into the Truckee  
17 River Agreement. In that Agreement, the parties proposed to stipulate to a final decree in this case  
18 contingent on construction of additional upstream storage. Ultimately, that additional upstream  
19 storage was provided by a reservoir on the Little Truckee River in California, Boca Reservoir.<sup>2/</sup> In  
20 1944, after Boca Reservoir had been completed in 1937, the stipulation for entry of the final Orr  
21 Ditch Decree was submitted to this Court, and over the objections of some of the parties, the final  
22 Orr Ditch Decree was entered specifically incorporating the Truckee River Agreement as a portion  
23 of its judgment.

24 Although the Orr Ditch Decree, through the Truckee River Agreement, largely continued the

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25  
26 <sup>2/</sup> Boca Reservoir was approved for construction by the President in 1935 under section 4 of  
27 the Act of June 25, 1910 (36 Stat. 835) and under subsection B of section 4 of the Act of December  
28 5, 1924 (43 Stat. 701). The Washoe County Water Conservation District was established for  
purposes of paying for the construction and operation of Boca Reservoir.

1 Floriston Rates set out in the 1915 TRGE Decree, it also provided for "Reduced Floriston Rates"  
2 under certain circumstances from November 1 through March 31. Reduced Floriston Rates are 350  
3 cubic feet per second from November 1 to March 31 whenever the elevation of Lake Tahoe is  
4 6,226.0 feet and not below 6,225.25 feet, and 300 cubic feet per second whenever the water surface  
5 elevation of Lake Tahoe is below 6,225.25 feet. The Final Decree in this case, through the Truckee  
6 River Agreement, also contained provisions for seeking court approval of releases of water from  
7 Lake Tahoe in excess of amounts needed to maintain Floriston Rates when the elevation of Lake  
8 Tahoe approached its maximum elevation of 6,229.1 feet.<sup>8/</sup> In general, however, the final Decree,  
9 through its incorporation of the Truckee River Agreement, provides for the operation of Lake Tahoe  
10 and Boca Reservoir for purposes of meeting Floriston Rates.

11 On September 8, 1944, this Court entered the final Orr Ditch Decree and set in place a  
12 management scheme which allowed for water rights recognized in the Decree to be satisfied from  
13 the natural flow of the Truckee River and from water released from Lake Tahoe and Boca Reservoir  
14 pursuant to the established Floriston Rates. At that time, the reservoir formed by the Lake Tahoe  
15 Dam and Boca Reservoir were the only two federal reservoirs on the system. In addition, at that  
16 time, water that reached Derby Dam and was not needed to meet senior water rights downstream  
17 was diverted to the Newlands Project, subject to the carrying capacity of the Truckee Canal.

## 18 5. The Alpine Decree

19 In 1925, the United States commenced an action involving the waters of the Carson River.  
20 That action became known as the Alpine Litigation. *See United States v. Alpine Land & Reservoir*  
21 *Co.*, 431 F.2d 763, 765 (9th Cir. 1970), *cert. denied*, 401 U.S. 909 (1971). That action was also filed  
22 in the United States District Court for the District of Nevada. In addition to including all users of  
23 Carson River water in Nevada, it included most, if not all, of the users of water on the Carson River  
24 and its tributaries in California. Temporary restraining orders were entered in 1949, 1950 and 1951,  
25 and a final decree was entered in 1980. *See United States v. Alpine Land & Reservoir Co.*, 503 F.

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26  
27 <sup>8/</sup> Because such emergency releases involve temporary relief from the injunctive provisions  
28 of the 1915 TRGE Decree, approval for those releases is sought from United States District Court  
for the Eastern District of California, which retains jurisdiction over that Decree.

1 Supp. 877 (D. Nev. 1980), *aff'd as modified*, 697 F.2d 851 (9<sup>th</sup> Cir.), *cert. denied*, 464 U.S. 863  
2 (1983).

3 **B. Limitations on Diversions to the Newlands Project From the Truckee River.**

4 In 1967, the Secretary issued regulations governing diversions of water from the Truckee  
5 River to the Newlands Project. In 1970, the Tribe filed an action in the United States District Court  
6 for the District of Columbia, contending that regulations issued by the Secretary for the operation  
7 of the Newlands Project allowed for the diversion of too much Truckee River water to the Project,  
8 and improperly allowed the diversion of water that would otherwise flow into Pyramid Lake.  
9 *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 254 (D.C. Cir. 1973); *see also*,  
10 *Truckee-Carson Irrigation District v. Secretary*, 742 F.2d 527, 529-30 (9th Cir. 1984).

11 As a result of that litigation and subsequent decisions of the federal government, diversions  
12 from the Truckee River to the Carson Division of the Newlands Project are now closely regulated  
13 pursuant to federal regulations referred to as "Operating Criteria and Procedures for the Newlands  
14 Reclamation Project," 43 C.F.R., §§ 418.1, *et seq.* ("OCAP"). A key element of the OCAP is the  
15 portion of the regulation dealing with diversions of Truckee River water to the Project's Carson  
16 Division.<sup>2/</sup> *See* 43 C.F.R., §§ 418.16-418.22. The purpose of that regulation is summarized in 43  
17 C.F.R., § 418.17:

18 Project water must be managed to make maximum use of Carson River water and to  
19 minimize diversions of Truckee River water through the Truckee Canal. This will  
20 make available as much of Truckee River water as possible for use in the Lower  
21 Truckee River and Pyramid Lake.

22 In 1980, when the District Court entered a final judgment and decree in the Alpine litigation,  
23 it accompanied that judgment and decree with a reported decision. That decision reaffirmed that the  
24 Truckee River is a supplemental water supply for the Carson Division of the Newlands Project:

25 Lake Lahontan is serviced by the Carson River and by diversions from the Truckee  
26 River through the Truckee Canal. Obviously, all Carson River water which reaches  
27 the Lahontan Reservoir is captured and stored there. Under section 8 of the  
28 Reclamation Act of 1902 (43 U.S.C. § 372), the Nevada statute (N.R.S. § 533.035),  
and all applicable judicial precedent, beneficial use is the basis, the measure and the

<sup>2/</sup> It should be noted that diversions to the Newlands Project under Claim No. 3 of the Orr  
Ditch Decree were always subject to "such control, disposal, and regulation as the [United States]  
may make or desire." *See* Orr Ditch Decree, Claim No. 3 at pg. 10.

1 limit of a water right. Hence, additional water diverted through the Truckee Canal  
2 is limited to the amount required for beneficial use. While Claim No. 3 on page 10  
3 of the Truckee River Final Decree grants to the United States the right to divert 1,500  
4 cubic feet per second of water flowing in the Truckee River for use on the Newlands  
5 Project, the Truckee River Decree itself, on page 87, expresses the beneficial use  
6 limitation as follows: "Except as herein specially provided no diversion of water into  
7 any ditch or canal in this decree mentioned shall be permitted except in such amount  
8 as shall be actually, reasonably necessary for the economical and beneficial use for  
9 which the right of diversion is determined and established by this decree."

6 *Alpine Land*, 503 F. Supp. at 881.

7 Today, much of the Truckee River water, both natural flow and water released from Lake  
8 Tahoe and Boca to meet Floriston Rates, may not be lawfully diverted at Derby Dam and thus flows  
9 to Pyramid Lake.

### 10 **C. Rights to Water From the Washoe Project Reservoirs.**

11 In 1956, Congress authorized another project in the Truckee and Carson River Basins, the  
12 Washoe Project. Pub. L. No. 84-858, 70 Stat. 775. The initial purposes of the Washoe Project were  
13 for irrigation, flood control, hydroelectric power, development of fish and wildlife resources, and  
14 "other beneficial purposes." In 1958, Congress amended the Washoe Project Act to authorize  
15 increased construction costs and to add another dam to the Project. Pub. L. No. 85-706, 72 Stat. 705.

16 In 1962, the Bureau of Reclamation ("Reclamation") completed construction of Prosser  
17 Creek Reservoir in the Truckee River Basin as part of the Washoe Project. Prior to its construction,  
18 the United States, Sierra Pacific, TCID and the Washoe County Water Conservation District entered  
19 into the "Tahoe-Prosser Exchange Agreement." The 1915 TRGE Decree was amended in 1961 to  
20 allow for operations called for in this Agreement. The Tahoe-Prosser Exchange Agreement  
21 provided some flexibility in the operation of Lake Tahoe under the Orr Ditch Decree through an  
22 exchange of water in Lake Tahoe to meet instream flows in the Truckee River downstream of Lake  
23 Tahoe, with water stored in Prosser Creek Reservoir to meet Floriston Rates. The Operating  
24 Agreement leaves this exchange in place with minor modifications. Water stored in Prosser Creek  
25 Reservoir not needed for this exchange is "uncommitted water" and is used for fish and wildlife  
26 purposes. Prosser Creek Reservoir is also used for flood control purposes.

27 Also as part of the Washoe Project, the United States completed construction of Stampede  
28 Dam on the Little Truckee River in 1970, in part to provide flood control protection for Boca Dam

1 and the Reno-Sparks area. A special district, the Carson-Truckee Water Conservancy District, had  
2 been formed in 1958 to act as the agency to purchase water stored by Stampede Dam. However,  
3 because of the rapid growth of Reno and Sparks since the mid-1950s, and a need for additional water  
4 for municipal and industrial uses, the Carson-Truckee Water Conservancy District and Sierra Pacific  
5 sought to enter into a contract with the Secretary to distribute water for the reimbursable purpose  
6 of municipal and industrial use. They were the only entities who sought to distribute water for a  
7 reimbursable purpose.

8 While these activities were taking place in 1967, the *cui-ui* fish population of Pyramid Lake  
9 (“*cui-ui*”) was declared to be an endangered species under a predecessor statute to the ESA. *See* 32  
10 Fed. Reg. 4.001 (March 11, 1967). In addition, in 1975, the Lahontan cutthroat trout was declared  
11 a threatened species under the ESA. *See* 40 Fed. Reg. 29,864. As a result, the Secretary decided  
12 to operate Stampede Dam so as to conserve the *cui-ui* and Lahontan cutthroat trout pursuant to the  
13 ESA.

14 In the early 1980s, the Carson-Truckee Water Conservancy District, Sierra Pacific and the  
15 State of Nevada filed an action in the United States District Court for the District of Nevada to  
16 require the Secretary to enter into a contract to supply water from Stampede Reservoir for municipal  
17 and industrial (“M&I”) purposes. *See Carson-Truckee Water Conservancy District v. Watt*, 537 F.  
18 Supp. 106 (D. Nev. 1982); *Carson-Truckee Water Conservancy District v. Watt*, 549 F. Supp. 704  
19 (D. Nev. 1982); *aff’d sub nom., Carson-Truckee Water Conservancy District v. Clark*, 741 F.2d 257  
20 (9th Cir. 1984). The decisions arising out of that action rejected the claim that the Secretary was  
21 required to operate Stampede Reservoir for M&I purposes and upheld the Secretary's operation of  
22 Stampede for the benefit of *cui-ui* and the Lahontan cutthroat trout. That operation continues to the  
23 present time. In addition, Stampede Reservoir continues to be operated for flood control purposes.

#### 24 **IV. MEETING THE CIRCUMSTANCES OF THE 21st CENTURY: 25 THE OPERATING AGREEMENT AND THE SETTLEMENT ACT**

26 As is clear from the foregoing background, the operations established for the Truckee River  
27 at the beginning of the 20th Century evolved as circumstances and conditions changed throughout  
28 that century. The Settlement Act and the Operating Agreement are other critically important steps



1 in that evolution to meet the circumstances and conditions of the 21st Century, and to provide for  
2 more flexible operations as those circumstances and conditions continue to change in the future.

3 The Operating Agreement itself best describes and summarizes how those circumstances and  
4 conditions have changed since the Orr Ditch Decree was entered in 1944. Recitals 6, 7 and 8 of the  
5 Operating Agreement provide:

6 6. Pursuant to the Truckee River General Electric Decree, and the Orr  
7 Ditch Decree, including the Truckee River Agreement, Releases from Lake Tahoe  
8 and Boca Reservoir have been managed to maintain Floriston Rates and reduced  
9 Floriston Rates, as applicable. In addition, water has been Passed-Through Truckee  
River Reservoirs to contribute to the maintenance of Floriston Rates and Reduced  
Floriston Rates, and to conserve Floriston Rate Water in Lake Tahoe and Boca  
Reservoir.

10 7. There have been material changes to many of the conditions extant  
11 at the time the Orr Ditch Decree was entered, including, but not limited to, the  
following;

12 (a) irrigation of farmlands within the Truckee Meadows has been reduced  
13 from approximately 28,500 acres in 1944 to approximately 3,900 acres in 2007, and  
14 Orr Ditch Decree Water Rights formerly used to irrigate farmlands in the Truckee  
Meadows have been changed in accordance with the provisions of the Orr Ditch  
Decree to allow for their diversion for Municipal and Industrial Uses.

15 (b) The combined population of Reno and Sparks and surrounding areas  
16 of Washoe County has increased from approximately 39,600 in 1944 to  
approximately 409,000 in 2006.

17 (c) Reliance on hydroelectric facilities dependent on water from Lake  
18 Tahoe and the Truckee River has decreased substantially.

19 (d) Use of water stored in Lake Tahoe and from the Truckee River and  
20 its tributaries for Municipal and Industrial Uses within Reno and Sparks and  
surrounding areas of Washoe County has increased from approximately 20,000 acre-  
feet in 1944 to approximately 70,100 acre-feet in 2006.

21 (e) United States has constructed additional conservation and flood  
22 control storage facilities on tributaries of the Truckee River, including Martis Creek  
Reservoir, Prosser Creek Reservoir, and Stampede Reservoir.

23 (f) United States, by regulations known as Operating Criteria and  
24 Procedures (referred to in this Agreement as Truckee Canal Diversion Criteria), has  
limited diversions from the Truckee River to the Newlands Project.

25 (g) Congress has enacted the Endangered Species Act, Pyramid Lake  
26 Fishes have been listed pursuant to that Act, and the Settlement Act conditionally  
27 authorizes the use of Stampede and Prosser Creek Reservoirs for the primary benefit  
of Pyramid Lake Fishes.

28 (h) Prosser Creek Reservoir has been operated under the Tahoe-Prosser  
Exchange Agreement in part to coordinate its storage and release of water to allow

1 for minimum releases of water from Lake Tahoe, when releases from Lake Tahoe  
2 would not otherwise be required.

3 (I) The Preliminary Settlement Agreement, which provides for changes  
4 in water rights to benefit threatened and endangered species of fish in Pyramid Lake  
and for an adequate supply of water in Reno and Sparks and surrounding areas  
during periods of drought, has been entered into.

5 (j) Pursuant to the settlement of the case brought by Pyramid Tribe  
6 against Reno and Sparks, Nevada and United States Environmental Protection  
7 Agency, the Truckee River Water Quality Settlement Agreement was executed  
8 providing for the purchase of substantial quantities of Truckee River water rights  
to enhance water quality and to help achieve water quality standards in the Truckee  
River and Pyramid Lake.

9 8. The changed conditions enumerated in Recital 7, and the recognition  
10 that conditions will continue to change in the future, make it desirable to operate the  
11 reservoirs in the Lake Tahoe Basin and Truckee River Basin in the more flexible  
12 and coordinated manner contemplated in this Agreement, that will, to the maximum  
13 extent practicable and without interfering with Orr Ditch Decree Water Rights, meet  
14 the multiple water use objectives contemplated in the Settlement Act, including  
reliable water supply and drought protection for Municipal and Industrial Uses,  
15 instream flows for fish and wildlife including threatened and endangered species,  
16 water quality, and recreation. This Agreement has been negotiated and executed by  
17 the Signatory Parties with the intent to accomplish the objectives and meet the  
18 requirements of Section 205 of the Settlement Act.

19 Macfarlane Decl., Exh. B, at R-2-R-3.

20 Through the Settlement Act, Congress recognized that the prospective, rigid operation of  
21 Lake Tahoe, Boca Reservoir and other Truckee River Reservoirs to satisfy Floriston Rates was no  
22 longer equitable, and that modifying those operations would benefit fish and wildlife, municipal,  
23 industrial, and irrigation users and recreation. *See* Macfarlane Decl., Exh. A, § 202(b); S.Rep. 101-  
24 555, quoted *supra* at 2-3. Congress recognized that these benefits could be achieved through an  
agreement providing for the operation of Truckee River Reservoirs that would nevertheless  
continue to "ensure that water [was] stored and released from Truckee River reservoirs to satisfy  
the exercise of water rights in conformance with the Orr Ditch Decree and Truckee River General  
Electric Decree." Macfarlane Decl., Exh. A, § 205(a)(2)(D). As stated in S.Rep. 101-555, at 23:

25 Subparagraph 205(a)(2)(D) expressly provides that the Operating Agreement must be  
26 structured to permit water right holders under the *Orr Ditch* and *Truckee River General*  
*Electric* decrees to continue to exercise their rights under those decrees, except where rights  
27 have been voluntarily relinquished or in the case of rights which are transferred under State  
28 Law. Paragraph 205(a)(4) requires that, before entering into effect, the Operating  
Agreement be submitted to the *Orr Ditch* and *Truckee River General Electric* courts. These  
provisions are intended to protect the rights of Newlands Project irrigators and other users  
of Truckee River water. They should be read in conjunction with paragraph 210(b)(13)

1 which disclaims any intent to alter or conflict with any vested or perfected Truckee River  
2 water rights or affect the power of the *Orr Ditch* court to ensure that the owners of vested  
3 and perfected Truckee River water rights receive the amount of water to which they are  
4 entitled under the *Orr Ditch* decree.

5 Congress required that the operating agreement ensure that Truckee River Reservoirs be  
6 operated to:

7 (A) satisfy all applicable dam safety and flood control requirements;

8 (B) provide for the enhancement of spawning flows available in the  
9 Lower Truckee River for the Pyramid Lake fishery in a manner consistent with the  
10 Secretary's responsibilities under the Endangered Species Act, as amended;

11 (C) carry out the terms, conditions, and contingencies of the Ratification  
12 Agreement. Mitigation necessary to reduce or avoid significant adverse  
13 environmental effects, if any, of the implementation of the Preliminary Settlement  
14 Agreement, as modified by the Ratification Agreement, including instream  
15 beneficial uses of water within the Truckee River basin, shall be provided through  
16 one or more mitigation agreements which shall be negotiated and executed by the  
17 parties to the Preliminary Settlement Agreement as modified by the Ratification  
18 agreement and the appropriate agencies of the States of Nevada and California;

19 (D) ensure that water is stored in and released from Truckee River  
20 reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch  
21 decree and Truckee River General Electric decree, except for those rights that are  
22 voluntarily relinquished by the parties to the Preliminary Settlement Agreement as  
23 modified by the Ratification Agreement, or by any other persons or entities, or  
24 which are transferred pursuant to State law; and

25 (E) minimize the Secretary's costs associated with operation and  
26 maintenance of Stampede Reservoir.

27 Macfarlane Decl., Exh. A, § 205(a)(2).

28 Congress allowed, but did not require, the operating agreement to address the following  
subjects:

(A) administration of the Operating Agreement, including but not limited  
to establishing or designating an agency or court to oversee operations of the  
Truckee River and Truckee River reservoirs;

(B) means of assuring compliance with the provisions of the Preliminary  
Settlement Agreement as modified by the Ratification Agreement and the Operating  
Agreement;

(C) operations of the Truckee River system which will not be changed;

(D) operations and procedures for use of Federal facilities for the purpose  
of meeting the Secretary's responsibilities under the Endangered Species Act, as  
amended;

(E) methods to diminish the likelihood of Lake Tahoe dropping below

1 its natural rim and to improve the efficient use of Lake Tahoe water under extreme  
2 drought conditions;

3 (F) procedures for management and operations at the Truckee River  
4 reservoirs;

5 (G) procedures for operation of the Truckee River reservoirs for instream  
6 beneficial uses of water within the Truckee River basin;

7 (H) operation of other reservoirs in the Truckee River basin to the extent  
8 that owners of affected storage rights become parties to the Operating Agreement;  
9 and

10 (I) procedures and criteria for implementing California's allocation of  
11 Truckee River water.

12 *Id.* § 205(a)(3).

## 13 ARGUMENT

### 14 V. THE COURT SHOULD EXERCISE ITS AUTHORITY TO MODIFY OR 15 AMEND THE FINAL 1944 DECREE TO INCORPORATE THE 16 OPERATING AGREEMENT

17 The foregoing sections show that Truckee River operations are now vastly different than  
18 were the operations when the Decree was entered in 1944. Because of these changes, and because  
19 of the direction from Congress in the Settlement Act, the Moving Parties respectfully seek the  
20 amendment or modification of the Decree. As described in more detail below, this Court has the  
21 authority to amend the Decree, and it should exercise that authority to modify or amend the Decree  
22 so that Truckee River reservoir operations in the 21<sup>st</sup> Century may be conducted as provided in the  
23 Operating Agreement.

#### 24 A. The Court Has Authority To Modify or Amend the Orr Ditch Decree.

25 This Court has continuing supervision over, and thus authority to modify or amend, the  
26 Final Decree entered in this case in 1944. *System Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO*  
27 *v. Wright*, 364 U.S. 642, 647 (1961). Rule 60(b)(5) of the Federal Rules of Civil Procedure, allows  
28 a Court to grant relief “if it is no longer equitable that the judgment should have prospective  
application.” District courts have broad and flexible authority to apply this rule to ensure that their  
continuing injunctions are consistent with existing circumstances and the public interest. *See Rufo*  
*v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378-80 (1990); accord *Pyramid Lake Tribe of*  
*Indians v. Hodel*, 878 F.2d 1215, 1216 (9th Cir. 1989) (“A court charged with administering a

1 decree entered by it or its predecessor has broad authority to alter or modify the decree in light of  
2 changed circumstances, and consistent with principles of equity.”). The Supreme Court has  
3 explained that “the source of power to modify is of course the fact that an injunction often requires  
4 continuing supervision by the issuing court and always a continuing willingness to apply its powers  
5 and process” for enforcement. *System Fed'n No. 91*, 364 U.S. at 647; *see also, Frew v. Hawkins*,  
6 540 U.S. 431, 444 (2004) (noting that “district courts should apply a ‘flexible standard’ to the  
7 modification of consent decrees when a significant change in facts or law warrants their  
8 amendment”).

9 In *Rufo*, the Supreme Court adopted a flexible standard for modifying consent decrees that  
10 turns on “a significant change in facts or law [that] warrants revision of the decree” and  
11 modifications that are “suitably tailored to the changed circumstance.” 502 U.S. at 393. A court  
12 may recognize changes in either statutory or decisional law. *Agostini v. Felton*, 521 U.S. 203, 215  
13 (1997). This flexible standard under Rule 60(b)(5) applies to all modifications of consent decrees:  
14 “*Rufo* sets forth a general, flexible standard for all petitions brought under the equity provision of  
15 Rule 60 (b)(5).” *Bellevue Manor Associates v. United States*, 165 F.3d 1249, 1255 (9th Cir. 1999).

16 The Supreme Court in *Rufo* recognized that decrees often remain intact for long periods of  
17 time. As a result, there is a high probability that there will be significant legal and factual changes  
18 during the life of a decree. *Rufo* concluded that modification of a consent decree “may be  
19 warranted when changed factual conditions make compliance with the decree substantially more  
20 onerous.” *Rufo*, 502 U.S. at 384. “A court errs when it refuses to modify an injunction or consent  
21 decree in light of such changes.” *Felton*, 521 U.S. at 215. As we explain below, the final Orr Ditch  
22 Decree is such a long-term judgment and decree with operational provisions that now should be  
23 amended and modified in order to carry out the Congressional directive in the Settlement Act. Such  
24 an amendment is clearly justified under the flexible standard in *Rufo*. Moreover, the Supreme  
25 Court cited the public interest as a “particularly significant reason” for adopting a flexible  
26 modification standard where the litigation affects the public at large, and not just the parties. *Rufo*,  
27 502 U.S. at 381. Here, the public at large is benefitted, and the public interest would be furthered  
28 by allowing for the Decree to be modified to carry out the Congressional intent to, among other

1 things, provide a greatly enhanced drought water supply for the residents of the Truckee Meadows,  
2 fulfill the purposes of the ESA by enhancing spawning flows in the lower Truckee River,  
3 significantly improve the quality of the waters of the Truckee River, and provide for the allocation  
4 of the waters of Lake Tahoe and the Truckee River and Carson River between California and  
5 Nevada.

6 To meet the standard under Rule 60(b)(5) and *Rufo*, “[t]he moving party must satisfy the  
7 initial burden of showing a significant change either in factual conditions or in the law warranting  
8 modification of the decree.” *United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005) (citing  
9 *Rufo*, 502 U.S. at 384). “The district court must then determine whether the proposed modification  
10 is suitably tailored to resolve the problems created by the changed factual or legal conditions.” *Id.*  
11 (citing *Rufo*, 502 U.S. at 391). Applied here, there have been significant changes in both the  
12 applicable law and the factual circumstances that clearly necessitate modification of the Orr Ditch  
13 Decree. It is likewise clear that the requested changes to the Decree are suitably tailored to respond  
14 to changes in federal law as well as significant changes in factual circumstances.

15 **B. The Substantially Changed Factual and Legal Circumstances and the Public**  
16 **Interest, Justify Modification or Amendment of the Final Decree in this Case.**

17 Modification of the Orr Ditch Decree to provide for changes in the operation of the Truckee  
18 River Reservoirs is clearly warranted. It is important to consider that the impetus for the Operating  
19 Agreement is an Act of Congress which not only recognized the need for changes to the operation  
20 of federally-owned reservoirs to meet the needs and circumstances of the 21st Century, but also  
21 established the parameters for the changes in operation. That Congressional action, and the  
22 changes in the factual and the legal circumstances over the years since 1944, more than adequately  
23 support this request for modification of the final Decree.

24 **1. Significant changes since 1944 in the law affecting the Truckee River**

25 Turning first to the changed legal circumstances, the Settlement Act is itself a new law that  
26 contemplates and requires approval of the modifications to the Orr Ditch Decree that are necessary  
27 to implement the Operating Agreement. Macfarlane Decl., Exh. A, § 205(a)(4). The Settlement Act  
28 further provides Congressional consent for the interstate allocation of the waters of Lake Tahoe and

1 the Truckee and Carson Rivers, an interstate allocation that was negotiated by the two states *after*  
2 the Orr Ditch Decree was entered in 1944, once the Operating Agreement becomes effective. *Id.*  
3 § 210(a)(2)(A); *see also id.* § 204 (interstate allocation provisions of the Settlement Act). The  
4 Settlement Act also authorizes significant changes in operation of federally-owned reservoirs, and  
5 changed uses for federal Reclamation facilities, including those of the Washoe and Newlands  
6 Projects. *Id.* §§ 205(b), 205(c), 209(a). Similarly, the enactment of the Endangered Species Act and  
7 the listing of Pyramid Lake fishes are further substantial legal changes since 1944. Also, post-1944  
8 federal regulations (the Newlands Project OCAP) and the decision in *Pyramid Lake Paiute Tribe*  
9 *v. Morton* have changed Truckee River operations by significantly limiting diversions to the  
10 Newlands Project. These changes in law since 1944 more than justify the relief sought in the  
11 instant Motion.

12 The Operating Agreement addresses these significantly changed legal circumstances  
13 because it provides greater flexibility in the operation of federal Truckee River reservoirs to provide  
14 greater public benefits while simultaneously allowing the exercise of Orr Ditch Decree water rights.  
15 The credit storage provisions contained in Article 7 of the Operating Agreement, and the exchange  
16 provisions in Article 8, not only enhance operational flexibility of these reservoirs, they also enable  
17 Orr Ditch Decree water right holders with storage contracts to store water under those rights to  
18 meet the need for drought protection, water quality enhancement in the lower Truckee River, and  
19 the enhancement of spawning flows for Pyramid Lake fishes. *See Macfarlane Decl., Exh. B., Art.*  
20 *7 & 8.* In addition, Articles 4 and 7 of the Operating Agreement implement the provisions of the  
21 Preliminary Settlement Agreement, which allow some of the water stored by the Water Authority  
22 for drought protection to be used for the benefit of Pyramid Lake fishes when drought conditions  
23 do not materialize. *See id.*, Art. 4 & 7. The Operating Agreement also incorporates provisions that  
24 are intended to enhance instream flow protections below dams on Truckee River tributaries. *See*  
25 *id.*, Art. 7.C; 9.F. These provisions of the Operating Agreement are fully consistent with the  
26 purposes and directives of Congress in the Settlement Act. *See Settlement Act §§ 202, 205(a)(2).*

## 27 2. Significant factual changes since 1944

28 The next inquiry involves changed factual circumstances. For factual changes to warrant

1 modification, cited changes must “‘make compliance with the consent decree ‘more onerous,’  
2 ‘unworkable,’ or ‘detrimental to the public interest.’” *Asarco*, 430 F.3d at 979 (quoting *Small v.*  
3 *Hunt*, 98 F.3d 789, 795 (4th Cir. 1996), and citing *Rufo*, 502 U.S. at 384). Applied here, the  
4 changed facts make compliance with the Truckee River Agreement and this Final Decree more  
5 onerous and detrimental to the public interest.

6 As noted above in the Background section, the Truckee Meadows has changed from an area  
7 of hundreds of farms to a metropolitan area with hundreds of thousands of residents.  
8 Approximately 87% of the farmland in the Truckee Meadows has been converted to urban uses.  
9 The population of the Truckee Meadows has increased more than tenfold. Similar changes have  
10 also taken place in the City of Fernley. The Water Authority's small hydroelectric plants on the  
11 Truckee River no longer provide a significant portion of the electricity for the area. Additional  
12 storage facilities have been constructed in the Truckee River Basin, including Prosser Creek  
13 Reservoir and Stampede Reservoir, presenting opportunities for operations which did not exist in  
14 1944. Reclamation assumed operation and maintenance of Lake Tahoe Dam from TCID in 2000,  
15 and TCID no longer operates that dam. Water rights have been acquired and transferred for the  
16 purpose of improving water quality in the Truckee River. The legally protected status of the *cui-ui*  
17 and the Lahontan cutthroat trout has placed new demands on reservoir operations, and led to the  
18 construction of new facilities intended to assist in the recovery those species.

19 Compliance with rigid Floriston Rate flows has become onerous in light of these factual  
20 developments, all of which occurred after the entry of the Decree in 1944. The fact that it is no  
21 longer equitable to operate Truckee River reservoirs rigidly to meet Floriston Rates – even when  
22 the Floriston Rate flow is not needed to satisfy the exercise of Orr Ditch Decree water rights – is  
23 conclusively established by the determinations made by Congress in the Settlement Act itself. *See*  
24 S.Rep. 101-555, quoted *supra* at 2-3. Two key requirements of the Settlement Act itself support  
25 this conclusion: the requirement that the Operating Agreement carry out the terms, conditions and  
26 contingencies of the PSA, and the requirement that the Operating Agreement provide for the  
27 *enhancement* of spawning flows in the lower Truckee River in a manner consistent with the  
28 Secretary’s responsibilities under the Endangered Species Act. Macfarlane Decl., Exh. A, §§



1 205(a)(2)(B), (C). The PSA requires the establishment of credit water in Truckee River reservoirs  
2 that cannot be accomplished if that water must be released to maintain Floriston Rates. The  
3 enhancement of spawning flows for Pyramid Lake fishes also requires changes in water rights that  
4 may affect the timing of releases of water from storage in Truckee River reservoirs that, again,  
5 cannot be accomplished if that water must instead be released to maintain Floriston Rates.

### 6 **3. The public interest supports modification of the Decree**

7 Finally, the Supreme Court in *Rufo* cited the public interest as a "particularly significant  
8 reason" for adopting a flexible modification standard where the litigation affects the public at large,  
9 not just the parties involved. 502 U.S. at 381. Here, the public at large is benefitted and the public  
10 interest would be furthered by allowing for the Decree to be modified to carry out the  
11 Congressional intent to, among other things, provide a greatly improved drought water supply for  
12 the residents of the Truckee Meadows, fulfill the purposes of the ESA by enhancing spawning  
13 flows in the lower Truckee River, significantly improve the quality of the waters of the Truckee  
14 River and provide for the allocation of the waters of Lake Tahoe and the Truckee and Carson  
15 Rivers between Nevada and California.

### 16 **C. The Proposed Modification or Amendment of the Final Decree in this Case Is** 17 **Suitably Tailored to Changed Circumstances and the Requirements of the** **Settlement Act.**

18 *Rufo* requires that the proposed modifications be "suitably tailored" to resolve the problems  
19 created by the changed circumstances. *Rufo*, 502 U.S. at 391. The requested changes meet this  
20 standard because the Operating Agreement is built on the authorizations provided by the Settlement  
21 Act and on the water rights and management provided by the Orr Ditch Decree, including the  
22 Truckee River Agreement. These requested changes are narrow and targeted; they do not unravel  
23 the Orr Ditch Decree and do not reallocate water away from any water right holder or user. At the  
24 same time, the Operating Agreement meets the requirements of Section 205(a) of the Settlement  
25 Act, including implementation of the PSA and the provision of enhanced spawning flows for  
26 Pyramid Lake fishes.

27 The foundation for operations under the Operating Agreement is maintenance of Floriston  
28 Rates or Reduced Floriston Rates to the extent necessary to satisfy existing and exercised water

1 rights. *See* Macfarlane Decl., Exh. B, § 5.A.1. The Operating Agreement authorizes the  
2 modification of these currently rigid rates so that the consumptive use portion of certain water  
3 rights can be stored in upstream reservoirs. *Id.*, § 5.A.3. This treatment of the Floriston Rates  
4 ensures that the Orr Ditch decreed rights will continue to be satisfied while implementing carefully  
5 tailored modifications that are necessary to address changed circumstances.

6 Many of the existing provisions for adjustments to Floriston Rates in the Truckee River  
7 Agreement remain in the Operating Agreement. *See, e.g., id.*, § 5.A.3. The urbanization of areas  
8 which formerly relied upon Floriston Rate flows to meet the exercise of Orr Ditch Decree water  
9 rights for irrigation, like Reno and Sparks, has resulted in times when some of those rights were not  
10 exercised. Because of the operation of Lake Tahoe and Boca to meet Floriston Rates, water that  
11 was previously diverted to serve those unexercised and senior Orr Ditch Decree water rights, at  
12 times when allowed by Operating Criteria and Procedures, has been diverted to the Newlands  
13 Project under the 1902 water right decreed to the United States.

14 When the Nevada Change Applications are approved, the consumptive use component of  
15 Orr Ditch Decree water rights<sup>10/</sup> not needed to meet current municipal and industrial demand in the  
16 Water Authority's service area will be held in storage, and Floriston Rate flows will be adjusted  
17 accordingly. The non-consumptive portion of those Orr Ditch Decree water rights will remain in  
18 the River so that other water right holders, including those in the Newlands Project, will be in the  
19 same position they would have been had the Orr Ditch Decree water rights been exercised for their  
20 original use. The Operating Agreement only authorizes adjustments to Floriston Rate flows if and  
21 to the extent that the Nevada State Engineer approves change applications under the requirements  
22 of Nevada law. Nevada law requires a determination that the change does not conflict with existing  
23 rights and does not threaten to prove detrimental to the public interest. *See* N.R.S. § 533.370(5).  
24 The State Engineer's decision on those issues is reviewable by this Court. *See United States v. Orr*  
25 *Water Ditch Co.*, 914 F.2d 1302 (9th Cir. 1990).

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26 <sup>10/</sup> The "consumptive use component" sought in the Nevada change applications is the amount  
27 of applied water which was consumed each year by the principal historic crop, alfalfa, when these  
28 water rights were used for irrigation.

1 Article 5 of the Operating Agreement concerns Floriston Rates created by the 1915 TRGE  
2 Decree and the provisions added by the Truckee River Agreement. The Operating Agreement  
3 provides for important modifications to those flows, but also declares that Floriston Rates remain  
4 the foundation for operations under the Operating Agreement. It is Article 5 of the Operating  
5 Agreement that addresses the ways in which the Operating Agreement supersedes and replaces  
6 some provisions of the Truckee River Agreement while carrying forward other provisions of the  
7 Truckee River Agreement. Articles III, IV, V, VI and VII of the Truckee River Agreement are  
8 comparable to this Article. The key features of Article 5 of the Operating Agreement are as  
9 follows:

10 **Section 5.A.** Section 5.A sets forth a fundamental principle upon which the Operating  
11 Agreement rests: that portions of Floriston Rate water may be retained in storage and used to  
12 accumulate credit water as provided elsewhere in the Agreement. *See* Macfarlane Decl., Exh. B.,  
13 § 5.A.3(a). This principle is absolutely essential to the working of the Operating Agreement:  
14 subject to approval of changes to water rights under applicable law, the Operating Agreement  
15 allows the owners of water rights to store water under their rights in Truckee River reservoirs until  
16 they actually need that water, instead of compelling the pass-through or release of that water in  
17 order to meet Floriston Rates as is the case under the existing decrees. This principle is also  
18 necessary to carry out the provisions of the PSA that are carried forward into the Operating  
19 Agreement. *See id.*, Art. 4, *passim.*; § 5.A.3; § 7.A.3; *id.*, Exh. C (PSA) §§ 4, 11, 27, 28.

20 Section 5.A. incorporates and modifies provisions of the Truckee River Agreement and  
21 Tahoe-Prosser Exchange Agreement pertaining to releases of water from Lake Tahoe. The parties  
22 to the Truckee River Agreement agreed that the maximum elevation of Lake Tahoe should be  
23 6,229.1 feet above sea level in order to avoid shoreline erosion and damage to lakefront property  
24 from high water. Under the current regime, when the elevation of Lake Tahoe approaches this  
25 limit, the United States and other parties to the Truckee River Agreement must seek an order from  
26 the 1915 TRGE Court approving the emergency release of water from the Lake Tahoe Dam in  
27 excess of Floriston Rates. Under Section 5.A.3(d) of the Operating Agreement, the determination  
28 to make releases from Lake Tahoe to avoid exceeding this elevation would be made by the

1 Administrator, thereby avoiding the need to return to court. The criteria for making emergency  
2 releases, however, are carried forward from the Truckee River Agreement. *See* Macfarlane Decl.,  
3 Exh. B, § 5.A.3.(d)(2), (3). The Operating Agreement will streamline the process of making  
4 emergency releases, thereby enhancing the protection of property and public safety.

5 Article 5 also contains provisions addressing the maintenance of Floriston Rates when the  
6 elevation of Lake Tahoe falls below the Lake's natural rim. *Id.*, § 5.A.4. The coordination of  
7 operations of Lake Tahoe Dam and the dams at Prosser Creek and Boca Reservoirs is addressed  
8 here, again with respect to the maintenance of Floriston Rates. It should be emphasized that most  
9 of the provisions of Section 5.A carry forward into the Operating Agreement provisions of the  
10 Truckee River Agreement that continue to be implemented today.

11 **Section 5.B.** Section 5.B summarizes the rules for impounding and releasing water for each  
12 of the Truckee River Reservoirs. These rules encompass both existing requirements for  
13 impounding and releasing water and new opportunities to store and release water created by the  
14 Operating Agreement itself. They are intended to dovetail with petitions for amendments to water  
15 rights permits and applications for new permits to appropriate water for individual Truckee River  
16 reservoirs that have been filed with the California State Water Resources Control Board. The goal  
17 of these provisions is to conform to existing water rights, providing for the impoundment and  
18 release of project water, while coordinating the release of water from each federal Truckee River  
19 Reservoir in order to enhance additional storage opportunities and the use of exchanges and  
20 transfers of water between reservoirs.

21 **Sections 5.C – 5.E.** Section 5.C allocates spill from each Truckee River reservoir to each  
22 category of water stored in each reservoir. This section specifies the order in which each category  
23 of water stored in Truckee River reservoirs spills when the reservoirs become too full. As a result,  
24 some categories of water are more vulnerable to spill (*i.e.*, they spill first) than other categories.  
25 Section 5.D allocates reservoir losses and evaporation from each reservoir. Section 5.E performs  
26 a similar function with respect to stream channel conveyance loss. An important negotiated  
27 principle in Section 5.E is that each category of water released from a Truckee River reservoir bears  
28 its own stream channel conveyance loss *except* Newlands Project Credit Water released for

1 diversion to Lahontan Reservoir. Section 5.E.2 provides that stream channel conveyance losses  
2 of released Newlands Project Credit Water will be borne by Fish Water or Fish Credit Water. This  
3 provision helps ensure that operations will not be adverse to the Newlands Project.

4 **Other provisions of the Operating Agreement.** Portions of Article 1 of the Operating  
5 Agreement are also very important in the context of this request to modify the Orr Ditch Decree.  
6 Article One contains a specific provision, Section 1.C, which addresses the protection of water  
7 rights. That Section ensures that the Operating Agreement will be implemented in a manner that  
8 fully protects vested and protected water rights as required under Sections 205(a)(2)(D) and  
9 210(b)(13) of the Settlement Act. Section 1.C.1 states in pertinent part that:

10 nothing in this Agreement shall be construed to (a) affect the power of the Orr Ditch  
11 Court to ensure that the owners of vested and perfected Truckee River water rights  
12 receive the amount of water to which they are entitled under the Orr Ditch Decree;  
13 or (b) alter or conflict with any vested or perfected rights of any Person to use the  
14 water of the Truckee River or its tributaries, including, but not limited to, the rights  
15 of landowners within the Newlands Project for the delivery of Truckee River water  
16 to Derby Dam and for the diversion of such water at Derby Dam pursuant to the Orr  
17 Ditch Decree or any applicable law.

18 Section 1.C.2 authorizes the Administrator (who under the Operating Agreement will be the same  
19 person as the Federal Water Master under the Orr Ditch Decree) to take appropriate remedial action  
20 in the event that an operation results in the holder of an Orr Ditch Decree water right not receiving  
21 the water to which that holder is legally entitled.

22 Thus, the Operating Agreement retains much of the current operational regime, while  
23 modifying the provisions related to the issues recognized by the Congress: the rigid operation of  
24 federal reservoirs to meet Floriston Rate flows when those flows were not needed to meet the  
25 exercise of Orr Ditch Decree water rights and could be managed and stored to better meet fish and  
26 wildlife, municipal and industrial, recreation and water quality needs. The remainder of the Decree,  
27 including significant elements of the Truckee River Agreement, remain unchanged.

28 Other portions of the Operating Agreement modify the Decree by adding mostly procedural  
provisions, authorized by the Congress. For example, in Settlement Act § 205(a)(3)(A), the  
Congress authorized the inclusion of provisions for establishing an agency and designating a court  
to oversee operation of the Truckee River Reservoirs, and these provisions are included in Article

1 2 of the Operating Agreement. *Compare also*, Macfarlane Decl., Exh. A, § 205(a)(3)(B), *and* Exh.  
2 B, Art. 4; *id.*, Exh. A., § 205(a)(3)(F), *and* Exh. B., Arts. 3, 7, 8, and 11; *id.*, Exh. A., §  
3 205(a)(3)(G), *and* Exh. B., Art. 9; *id.*, Exh. A., § 205(a)(3)(I), *and* Exh. B., Arts. 6 and 10.

4 **VI. CONCLUSION**

5 In the Settlement Act, the Congress recognized that changed circumstances had occurred  
6 in the Lake Tahoe and Truckee River basins in California and Nevada. Congress laid the  
7 foundation for the United States, California, Nevada, and other parties to negotiate, execute and  
8 implement an operating agreement which satisfies the exercise of existing water rights, and at the  
9 same time provides for a more flexible and coordinated operation of Truckee River Reservoirs to  
10 meet the conditions and circumstances of the 21<sup>st</sup> Century. This foundation includes reliable water  
11 supply and drought protection for municipal use, and instream flows for fish and wildlife, including  
12 threatened and endangered species, as well as water quality and recreation. The Operating  
13 Agreement now presented to the Court does all of those things pursuant to the Settlement Act.  
14 Congress clearly recognized that it is no longer in the public interest for the operation of Truckee  
15 River Reservoirs to be governed by rigid provisions for the pass-through or release of water when  
16 such pass-through or release is not needed to satisfy water rights then being exercised. Those old  
17 rules have prevented the Federal Truckee River Reservoirs from being operated in ways that  
18 advance the public interest and values of the 21<sup>st</sup> Century.

19 These current needs and values include recovery of endangered species, improved water  
20 quality and providing a drought water supply for the residents of the Truckee Meadows and an  
21 interstate allocation of the waters of Lake Tahoe, and the Truckee and Carson Rivers. Congress  
22 intended that the Settlement Act lead to the adoption of new rules while at the same time protecting  
23 existing decreed water rights. This Court should now take the action necessary to implement the  
24 TROA by exercising its authority to modify or amend the Orr Ditch Decree and thereby allow the  
25 Operating Agreement directed by Congress and signed by the parties to take effect. The Court  
26 should grant the Motion.

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Respectfully submitted this 17<sup>th</sup> day of November, 2008, by:

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