

Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

Dated: September 5, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

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DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

43 CFR Part 419

RIN 1006–AA48

Operation of the Truckee River and Other Reservoirs

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Bureau of Reclamation is proposing this rule to comply with the requirements of the Truckee-Carson-Pyramid Lake Water Rights Settlement Act. The Settlement Act requires that the operating agreement negotiated with the States of California and Nevada for the operation of Truckee River Reservoirs (the five Federal reservoirs in the Truckee River basin) be promulgated as a Federal Regulation.

DATES: Comments must be received by Reclamation no later than November 14, 2008.

ADDRESSES: You may submit comments, identified by 1006–AA48, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Search on docket identification number BOR–2008–0006 when submitting comments on this rule.

- *Mail:* Kenneth Parr, Bureau of Reclamation, 705 N. Plaza St., Carson City, NV 89701.

FOR FURTHER INFORMATION CONTACT: Kenneth Parr, Bureau of Reclamation, 705 N. Plaza St., Carson City, NV 89701; telephone (775) 882–3436; or for a copy of the TROA, visit the TROA Web site at <http://www.usbr.gov/mp/troa/>.

SUPPLEMENTARY INFORMATION: Section 205(a)(2) of the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, title II of Public Law 101–618, November 16, 1990 (Settlement Act or Act), directs the Secretary of the Interior (Secretary) to negotiate an operating agreement that must:

- Satisfy all applicable dam safety and flood control requirements;
- Provide for the enhancement of spawning flows available in the Lower Truckee River for the Pyramid Lake fishery (endangered cui-ui, and threatened Lahontan cutthroat trout) in a manner consistent with the Secretary's responsibilities under the Endangered Species Act, as amended (ESA);
- Carry out the terms, conditions, and contingencies of the Preliminary Settlement Agreement between the Pyramid Lake Paiute Tribe (Pyramid Tribe) and Sierra Pacific Power Company (Power Company), as modified by the Ratification Agreement of the United States (PSA);
- Ensure that water is stored in and released from Truckee River Reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch and Truckee River General Electric decrees, except for any rights voluntarily relinquished by the parties to the operating agreement; and
- Minimize the Secretary's costs associated with operation and maintenance of Stampede Reservoir.

The Act further provides that the following may be addressed in the operating agreement:

- Administration of the operating agreement;
- Means of assuring compliance with PSA;
- Operations of Truckee River system that will not change;
- Operations and procedures for using Federal facilities to meet the Secretary's responsibilities under ESA;
- Methods of reducing likelihood that Lake Tahoe will drop below its natural rim and improving the efficient use of Lake Tahoe during extreme drought situations;
- Procedures for managing and operating Federal reservoirs;
- Procedures for operating Federal reservoirs for instream beneficial uses;
- Operation of non-Federal reservoirs in the Truckee River basin to the extent owners of affected storage rights become parties to the operating agreement; and
- Procedures and criteria for implementing California's allocation of Truckee River water.

The Truckee River Operating Agreement (TROA) will, among other things: (1) Enhance conditions for threatened and endangered fishes in the Truckee River and its tributaries; (2) increase municipal and industrial (M&I) water supplies to provide drought protection for the Truckee Meadows (the Cities of Reno and Sparks, Nevada, metropolitan area); (3) improve river water quality downstream from the City of Sparks and below Derby Dam; (4)

enhance stream flows and recreational opportunities in the Truckee River basin; and (5) provide procedures for implementing the interstate allocation of Lake Tahoe basin and Truckee River basin waters between Nevada and California. While the Settlement Act also confirms the allocation of the waters of the Carson River and its tributaries between California and Nevada represented by the Alpine Decree, TROA by its terms does not affect the Carson River.

Section 205(a)(9) of the Settlement Act requires the Secretary to satisfy the requirements of the National Environmental Policy Act. Because the State of California is a mandatory signatory party, it is also necessary to comply with the California Environmental Quality Act. Consequently, the Department of the Interior and the California Department of Water Resources jointly prepared an Environmental Impact Statement/ Environmental Impact Report (EIS/EIR). The Final EIS/EIR concludes that TROA will:

- Provide better conditions for threatened Lahontan cutthroat trout and endangered cui-ui in many reaches of the Truckee River and its tributaries;
- Provide greater potential for enhancing riparian vegetation along some reaches of the Truckee River in median hydrologic conditions and along all mainstem and tributary reaches under dry and extremely dry hydrologic conditions; and
- Enhance riparian habitat along some mainstem and tributary reaches under wet and median hydrologic conditions and along most mainstem reaches in dry and extremely dry hydrologic conditions.

Section 205(a)(9) also provides that the Secretary may not become a party to TROA if the Secretary determines that the effects of TROA, together with cumulative effects, are likely to jeopardize any threatened or endangered species or be adverse to designated critical habitat of such species. The Final EIS/EIR concludes that implementation of TROA will not adversely affect LCT or cui-ui, but in fact is likely to benefit both species. The U.S. Fish and Wildlife Service has concurred in that determination through the consultation process required by Section 7 of the Endangered Species Act of the 1973, as amended, 16 U.S.C. Sec. 1531 at *et seq.*

Since TROA is the result of negotiations and agreement among at least the five mandatory signatory parties and must be promulgated as a Federal regulation, the regulation we are proposing today would incorporate by

reference the agreement exactly as negotiated. After extensive discussions with the Office of the Federal Register, we have determined that incorporating TROA by reference is the best method to preserve the integrity of the Code of Federal Regulations while accommodating the negotiating parties and the requirements of the Act. Incorporation by reference is a workable solution because the agreement is readily available to all of the concerned parties and will be easy for other interested parties to consult on various websites or at Reclamation's offices.

I. Background

The United States has been extensively involved in litigation over Federal and Indian rights to the use of the waters of the Truckee River in California and Nevada since the early 1900's. In 1913 the United States filed a suit claiming rights to the use of such waters for multiple purposes, including supply for the first Reclamation Project in the nation and for use on the Pyramid Lake Paiute Indian reservation. The subject matter of Truckee River litigation over the years has involved Indian trust and reserved rights, domestic and municipal uses of water stored in Federal projects, a proposed California/Nevada compact for an interstate allocation of the River's water, Endangered Species Act claims, and rights for use in irrigation projects. Multiple lawsuits concerning those subjects became very active in the early 1970s and continued significantly until the early 1990s. By that time, it had become clear that the only hope for resolution of the many conflicts over the use of Truckee River water was through a regional settlement which would provide for cooperative uses of the water stored in Federal reservoirs on the Truckee River to meet the demands and right of all users. Efforts to effect changes in those rights through litigation had proven completely unavailing.

In November of 1990, Congress enacted the Settlement Act to provide authorization for measures which if carried out would serve to resolve many of the longstanding disputes and Federal litigation among multiple parties concerning the rights to use of the waters of the Truckee and Carson Rivers in Nevada and California. Those parties include the States of Nevada and California and other parties to the negotiated agreement which constitutes this rule.

The Truckee River originates at the outlet of Lake Tahoe in California and flows to Pyramid Lake, a terminal desert lake in northwestern Nevada. The flow

of the Truckee River was first regulated in 1870 by construction of a private timber crib dam at the outlet of Lake Tahoe. A number of dams, Federal and private, have since been constructed on tributaries to the Truckee River in California to create water storage and flood control reservoirs and regulate river flow. Flows of the river have historically been utilized for diverse purposes, including generation of hydropower, irrigation of agricultural lands, and municipal and industrial water supplies.

Newlands Project

The Newlands Federal Reclamation Project was authorized in 1902 and constructed under the Federal Reclamation Act, 32 Stat. 388. Derby Diversion Dam diverts water from the Truckee River through the Truckee Canal for use on the Newlands Project's Truckee Division. Truckee River water diverted at Derby Dam is also stored in Lahontan Reservoir in the Carson River basin as a supplemental source of water for the Carson Division of the Newlands Project.

In 1967, the Secretary of the Interior issued regulations called Operating Criteria and Procedures (OCAP), referred to in the rule as Truckee Canal Diversion Criteria, to limit diversions of Truckee River water to the Newlands Project, 32 FR 3098, February 21, 1967. Revised versions of OCAP have been in effect since that time.

Court Decrees

Three Federal court actions, *United States v. Truckee River General Electric Co.*, No. 14861 (N. D. Calif. 1915), now designated Case No. 68-cv-643 (E. D. Calif.) (TRGE), *United States v. Orr Water Ditch Company, et al.*, In Equity No. A3, Case No. 73-cv-00003 (D. Nev. 1944) (Orr Ditch), and *United States v. Alpine Land and Reservoir Co., et al.*, Civ. No. D-183, Case No. 73-cv-183 (D. Nev. 1980) (Alpine) were brought to confirm a water supply for the Newlands Project and (in Orr Ditch) for use on the Pyramid Lake Paiute Indian Reservation. Each case resulted in a decree setting forth the relative water rights in the Truckee River and Carson River basins, respectively.

The TRGE Decree in 1915 granted the United States an easement for, and the right to operate, Lake Tahoe Dam. It also required that releases of water be maintained to satisfy, but not exceed, certain flows in the Truckee River at Floriston, California (Floriston Rates). Floriston Rates are rates of flow in the Truckee River at the California-Nevada State border of 300 to 500 cubic feet per

second (cfs) depending on month and elevation of water in Lake Tahoe.

The 1944 Orr Ditch Decree determined the relative rights to use Truckee River water in Nevada and for Power Company's run-of-the-river hydroelectric power plants. Floriston Rates, when maintained, satisfy water rights confirmed by the Orr Ditch Decree. The Orr Ditch Decree also confirmed water rights to the United States for use on the Pyramid Lake Paiute Indian Reservation (claims 1 and 2), to the United States for use on the Newlands Project subject to water duties and regulations of the Secretary of the Interior (claim 3), and to the United States for the use of the top six feet of Lake Tahoe as a reservoir (claim 4). The Orr Ditch Decree further recognized the 1935 Truckee River Agreement (TRA), an operating agreement for the Truckee River among Power Company, Truckee-Carson Irrigation District (TCID), Washoe County Water Conservation District (WCWCD or Conservation District), the United States Department of the Interior, and individual Truckee River water users (parties of the fifth part) as binding among those parties.

The 1980 Alpine Decree determined the rights, relative priorities, and water duties for all Carson River water users in California and Nevada.

Reservoirs

There are five Federal reservoirs in the Truckee River basin, collectively referred to as Truckee River Reservoirs. They are: The reservoir formed by the dam at the outlet of Lake Tahoe, which regulates the top six feet of the lake; Boca Reservoir on the Little Truckee River, constructed in 1937 and operated under contract by WCWCD; Prosser Creek Reservoir, constructed on Prosser Creek in 1967, as part of the Washoe Project; Stampede Reservoir, constructed on the Little Truckee River in 1970, also as part of the Washoe Project; and Martis Creek Reservoir, a United States Army Corps of Engineers flood control facility, constructed on Martis Creek in 1971.

The 1959 Tahoe-Prosser Exchange Agreement (TPEA), executed by parties to TRA, provides for an exchange of water between Lake Tahoe and Prosser Creek Reservoir to maintain a minimum flow in the Truckee River immediately downstream from Lake Tahoe when releases from Lake Tahoe would not otherwise be required. This exchange protects water for Floriston Rates while providing flows downstream from Lake Tahoe for fish purposes.

The water in Stampede Reservoir is dedicated for the benefit of Pyramid Lake fishes (endangered cui-ui and

threatened Lahontan cutthroat trout) by determination of the Secretary. The Secretary's determination was upheld by the Federal courts in *Carson-Truckee Water Conservancy District v. Watt*, 537 F. Supp. 106 (D. Nev. 1982), aff'd 741 F.2d 257 (9th Cir. 1984).

Martis Creek Reservoir is operated by the U.S. Army Corps of Engineers exclusively for flood control purposes.

In addition to the Federal reservoirs, there are two private reservoirs in the Truckee River basin: Donner Lake, formed by a dam on Donner Creek, and Independence Lake, formed by a dam on Independence Creek. Both Donner and Independence creeks are tributary to the Truckee River. The water right for Donner Lake is owned by TCID and the Truckee Meadows Water Authority (Water Authority) as tenants in common. The water rights for Independence Lake are owned by Water Authority.

Settlement Act

The Settlement Act was enacted and signed into law in 1990, in part to facilitate the resolution of disputes and settlement of litigation over use of Truckee River water among multiple parties, including the States of Nevada and California. Section 204 of the Act provides for an interstate allocation of waters of the Lake Tahoe and Truckee River basins between California and Nevada similar to the interstate allocation negotiated by the two states in the 1960s and confirms the allocation of waters of the Carson River and its tributaries between the states represented by the Alpine Decree. Section 205(a) of the Act directs the Secretary to negotiate an agreement for operation of Truckee River Reservoirs with California and Nevada, and other parties as determined appropriate, to among other things, implement the provisions of the PSA. Because the Act directs that the negotiated agreement (TROA) implement the PSA, the Pyramid Tribe and Water Authority are mandatory signatories of the negotiated agreement along with the United States, California, and Nevada. Subsequent to the Settlement Act, Power Company on June 11, 2001, sold its water utility business to Water Authority and assigned to Water Authority all of its rights and responsibilities under the PSA and TROA. Accordingly, Water Authority is now the mandatory signatory party to TROA.

Water Quality Settlement Agreement

Also subsequent to the Settlement Act, the 1996 Truckee River Water Quality Settlement Agreement (WQSA) was entered into by the cities of Reno

and Sparks, Nevada, Washoe County, Nevada, the United States Department of the Interior, the United States Department of Justice, the United States Environmental Protection Agency, the Nevada Division of Environmental Protection, and the Pyramid Tribe. In settlement of certain litigation over the proposed expansion of the Truckee Meadows Water Reclamation Facility, WQSA established a program to purchase and dedicate Truckee River water rights for stream flow purposes by the United States and the Truckee Meadows communities (Reno-Sparks metropolitan area) in Nevada. The purpose of the water rights purchase program is to improve water quality in the Truckee River, particularly below Derby Dam. A final Environmental Impact Statement on the Federal water rights acquisition portion of WQSA was published in October 2002, and a Record of Decision was issued in December 2002. Water made available to serve the dedicated water rights may, to the extent possible, be stored in Truckee River Reservoirs and will be managed for water quality purposes by the dedicating parties and by the Pyramid Tribe. TROA accommodates implementation of the WQSA and provides for the storage of Water Quality Credit Water in Truckee Reservoirs.

II. Overview of Rule

Main Provisions of the Negotiated Agreement

The negotiated agreement (TROA), which constitutes the rule, will be incorporated by reference. It provides the framework, rules, and procedures for the operation of Truckee River Reservoirs, Independence Lake, and Donner Lake, to the extent Donner Lake is made available, and for management of flows in the Truckee River, with more flexibility than is available under current operations. It also provides for implementation of the interstate allocation of waters of the Lake Tahoe and Truckee River basins between California and Nevada, as provided in sections 204 and 210(a)(2) of the Act. The maintenance of Floriston Rates and Reduced Floriston Rates is the basic foundation of TROA.

TROA retains most current procedures and management authorities for operating Truckee River Reservoirs, including maintaining the storage priorities for project water (water associated with the license or permit for a particular reservoir) and water dedicated to maintenance of Floriston Rates. Applicable flood control and safety of dams requirements will continue to be in effect. Perhaps most

importantly, Truckee River Reservoirs will continue to be operated to satisfy the exercise of water rights in conformance with the Orr Ditch and TRGE decrees, except for any water rights that are voluntarily relinquished by the signatory parties. The Federal Water Master will continue to assure that Truckee River operations satisfy the exercise of water rights recognized by the Orr Ditch Decree.

How TROA Would Be Different From Current Operations

TROA Provides for the Establishment of Credit Water

Article Seven of TROA prescribes rules and procedures that provide opportunities for signatory parties, as authorized by changes to water rights under applicable State law, to retain in storage as credit water in Truckee River Reservoirs, Independence Lake, and Donner Lake, to the extent Donner Lake is made available, all or a portion of the water that the party would otherwise be entitled to divert for use downstream under the party's water rights. A person initially not a signatory to TROA could also have an opportunity to store credit water, to the extent storage space is available, by agreeing to be bound by the same rules as a signatory party. Any party storing credit water will be required to have a storage contract with the owner of the reservoir in which the credit water will be stored unless otherwise provided in TROA.

Two of the various categories of credit water, M&I Credit Water and Fish Credit Water, will be created as provided for in the PSA. M&I Credit Water will be established by Water Authority for use as a drought supply. Fish Credit Water will be established by the United States and Pyramid Tribe for the benefit of Pyramid Lake fishes. A portion of Fish Credit Water can also be designated as Joint Program Fish Credit Water, a category of credit water which will be managed by California for purposes of stream flow and reservoir levels in California.

TROA establishes priorities for each category of credit water and accounting procedures relative to its storage, release, spill, evaporation, and exchange. Relative priorities for various types of credit water and credit water operations are important for administration of TROA when concurrent uses or potentially conflicting operations are scheduled or requested.

TROA Provides for Exchanges of Credit Water

Article Eight of TROA provides for water, particularly credit water, to be exchanged among Truckee River Reservoirs, Independence Lake, and Donner Lake, to the extent Donner Lake is made available, in accordance with prescribed rules and limitations. An exchange of water between reservoirs can be accomplished in several ways. The provisions for exchanging water greatly enhance and increase the flexibility of system operations. The increased flexibility provided by TROA through the various categories of credit water and opportunities for exchanges facilitates more efficient use of the existing available water supply to more effectively serve the many, and often competing, beneficial uses.

Other Provisions of TROA

Article Two of TROA establishes an Administrator to administer its provisions and a Special Hearing Officer to resolve disputes which may arise under TROA. The Administrator is responsible, among other things, for: Implementing the provisions of TROA and operating the designated reservoirs consistent with stated general operational principles set out in Article One; integrating the operational schedules submitted by the parties under Article Eleven; and accounting for the various categories of water under procedures developed by the Administrator under Article Three. The Federal Water Master under the Orr Ditch Decree will retain full authority to ensure that Orr Ditch Decree water rights are fully enforced, and the Administrator will have authority and responsibility to provide an acceptable remedy if the Orr Ditch water rights of a person not signatory to TROA are adversely affected by a TROA operation. TROA provides that the Federal Water Master for the Orr Ditch Decree in office when TROA enters into effect will be the first TROA Administrator, and the names of any subsequent nominees for the position of Administrator must be submitted to the Orr Ditch Court for approval. TROA recognizes that disputes arising under the Orr Ditch Decree remain subject to the jurisdiction of the Orr Ditch Court and the Federal Water Master.

TROA also:

- Incorporates in Article Four the miscellaneous provisions of the PSA not included elsewhere in TROA;
- Provides in Article Five for operation of water to maintain Floriston Rates and of project water used for the

benefit of threatened and endangered Pyramid Lake fishes;

- Sets forth in Article Six the procedures for implementing and accounting for the Truckee River basin and Lake Tahoe basin allocations;
- Establishes under Article Nine criteria for beneficial uses of water in California for stream flows and reservoir levels for fish and wildlife, and for recreation;
- Establishes in Article Ten criteria for the design and location of water wells in the Truckee River basin in California;
- Sets forth in Article Twelve conditions which must be satisfied for TROA to enter into effect, identifies other provisions of the Act which become effective when TROA enters into effect, and establishes a date by which TROA, and the other provisions of the Act contingent upon TROA, must enter into effect;
- Makes clear in Article Thirteen that TROA is the basis of reservoir operations, provides for a periodic review of such operations, and that any future change to TROA will require the same process used for its original negotiation; and
- Includes in Article Fourteen standard statements required in any contract or agreement signed by the United States or the State of California, identification of responsible parties to receive notices, and criteria for future assignments of interests.

III. Procedural Requirements

1. Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this rule is not a significant rule and has not reviewed it under the requirements of Executive Order 12866. We have evaluated the impacts of the rule as required by E.O. 12866 and have determined that it is not a significant regulatory action. The results of our evaluation are given below.

(1) This rule will not have an annual effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities.

TROA is a mechanism negotiated by its signatories to facilitate more flexibility in water use and storage and more effective coordination of reservoir operations on the Truckee River. The increased flexibility and more effective coordination of operations will provide a more stable water supply for Reno,

Sparks, and Washoe County, Nevada, will enhance stream flow in the Truckee River below Derby Dam for threatened and endangered fishes, and will improve water quality.

The credit water and exchange provisions of TROA allow parties to more efficiently use the water resource and, more particularly, realize more efficient and effective utilization of their own water rights. Historically, senior water right holders could not always fully divert the water to which they were entitled under their water right because of their inability to use or store the water when available. At times some junior water right holders, including those on the Newlands Project, have been able to benefit from this water, although most has ultimately flowed to Pyramid Lake. The additional storage options made available under TROA will permit senior water right holders to more fully exercise their water rights. To the extent the exercise of senior Orr Ditch Decree water rights under TROA makes less water available to junior water right holders than has in the past been available because the senior rights could not be fully exercised, there is no unlawful injury to junior water right holders, including those on the Newlands Project.

The total cost of implementing TROA is estimated to be approximately \$15.8 million annually (\$2.1 million for storage fees, O&M, and administration; \$1.4 million in lost income from water transfers; and approximately \$12.3 million annually for the purchase of water rights until 10,000 acre feet of water rights have been acquired to meet future water demand). Operation of the Federal reservoirs under TROA will result in new storage contracts which will reflect average storage and operation costs of approximately \$1.5 million annually. The administration costs associated with implementing TROA by the Administrator is estimated to be \$600,000 annually to be shared by the Federal government and the States of California and Nevada. Under TROA irrigation water rights acquired by Water Authority and others are to be transferred in accordance with applicable State law to meet water conservation and water quality objectives. This reduction of irrigation water rights results in a loss of approximately 100 jobs and the loss of \$1.4 million in personal income. Water rights will also be purchased from willing sellers to meet future water demand. The cost of such purchases is approximately \$12.3 million annually based on current market value of water rights. Because TROA implementation actions rely on market mechanisms, any

reductions in economic activity or productivity, including employment or income reductions occasioned by the sale of irrigation water rights and reduced agricultural activity, will be fully compensated by the monetary or other compensation derived from the sale of the water rights.

One of the benefits of TROA would be the avoided costs to the water users in the area of developing additional water storage facilities to meet increasing water demands in the region. The construction costs and O&M for new water storage facilities to meet that demand would be approximately \$5 million annually. In addition to the avoided costs from implementing TROA, there is the additional benefit of supporting the Reno-Sparks economy by providing the storage capacity for M&I water demand in the future. It is estimated that in 2033, through the operation of TROA, the stored M&I water will support approximately 74,000 jobs and approximately \$2.6 billion in associated personal income annually. There are also the annual nonmonetary benefits of improving water quality, improving fish and wildlife habitat, and meeting Indian trust responsibilities. Accordingly, TROA is not an economically significant rule under E.O. 12866.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency. Bureaus within the U.S. Department of the Interior are the only Federal agencies directly affected by the agreement. For instance, all TROA actions are specifically subordinated to Army Corps of Engineers (Corps) flood control criteria so that the Corps is free to adjust them as necessary apart from this regulation. In addition, TROA specifically provides that any use of the Corps' Martis Creek Reservoir for a TROA purpose, e.g., for conservation or credit water storage, would require a written agreement with the Corps. Upon TROA taking effect, Section 206(c) of the Settlement Act, which pertains to water use on the U.S. Naval Air Station, Fallon, Nevada, shall also become effective. This is a consequence of the Settlement Act, and not a direct effect of the provisions of TROA.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. The rule is a negotiated agreement, and it directly affects only the signatories of that agreement.

(4) OMB has determined that this rule does not raise novel legal or policy issues. TROA explicitly incorporates or

accommodates all relevant laws and judicial decisions. By law TROA cannot have an adverse effect on any other person's water rights under the Orr Ditch or Truckee River General Electric decrees, and any modifications to those decrees necessary to implement TROA must be approved by the two courts with jurisdiction over the two decrees before TROA can become effective. TROA is required to be consistent with the decision in *Pyramid Lake Paiute Tribe v. Morton*, 354 Fed. Supp. 252 (D.D.C. 1973) and cannot be inconsistent with the Secretary's responsibilities under the Endangered Species Act.

2. Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The rule will not affect a substantial number of small entities. TROA directly affects only its signatories. While TCID may be considered a small entity, TROA neither directly affects TCID or the water rights of the individual water right holders on the Newlands Project. Specifically, the parties likely to be directly affected by TROA are:

- U.S. Department of the Interior;
- State of California;
- State of Nevada;
- Pyramid Lake Paiute Tribe;
- Truckee Meadows Water Authority;
- Washoe County Water Conservation District;
- City of Reno, Nevada;
- City of Sparks, Nevada;
- City of Fernley, Nevada;
- Washoe County, Nevada;
- Sierra Valley Water Company;
- Carson-Truckee Water Conservancy District;
- North Tahoe Public Utilities District; and
- Truckee Donner Public Utilities District.

Sierra Pacific Power Company will join in the execution of TROA for a limited purpose through a Special Joinder.

Water operations of Water Authority, Conservation District, City of Reno, City of Sparks, and Washoe County, Nevada, are all intertwined within one geographic area in western Nevada. The criterion for a small entity is less than 50,000 population. All of these entities are located within Washoe County, Nevada. The population of Washoe County is approximately 346,000 people (2000 Census). The Reno-Sparks division of Washoe County has a population of approximately 256,000.

Only if Conservation District, a taxing authority water purveyor of M&I and irrigation water supplies, were considered a separate entity would it be considered small as it has 33,000 people within its taxing jurisdiction; Water Authority serves 77,000 customers. The City of Fernley, in Lyon County, with a population of approximately 8,600 (2000 Census), would be considered small.

Carson-Truckee Water Conservancy District's office is located in Reno, Nevada, and the District has no service population. It is authorized under Nevada State statutes to collect fees and taxes to do conservation work.

North Tahoe Public Utility District, Tahoe Vista, Placer County, California, has a service population of 5,300 and, therefore, is considered a small entity. It consists of the Sewer and Water Department, Recreation and Parks Department, North Tahoe Beach Center, and the North Tahoe Community Conference Center.

Truckee Donner Public Utilities District, Truckee, California, is a non-profit utility providing electric and water service in the Truckee area. The District serves 12,000 electric customers and 12,000 water service connections. It is considered a small entity.

Sierra Valley Water Company is a small water purveyor in Sierra and Plumas Counties, California. It provides domestic and irrigation water to 29 customers. It is, therefore, considered small.

Pyramid Lake Paiute Indian Reservation is located in Washoe County, with approximately 1,734 tribal members residing on the reservation. Indian tribes are not covered by the Regulatory Flexibility Act.

Power Company's service territory covers approximately 50,000 square miles in northern Nevada including the cities of Reno, Sparks, and the Lake Tahoe area of northeastern California. It is a wholly-owned subsidiary of Sierra Pacific Resources. It employs in excess of 1,100 people and services approximately 500,000 electric and gas customers. It has assets in excess of \$2.5 billion and revenue in excess of \$1 billion. It is not, therefore, considered a small entity.

Of the most likely signatories, only five are considered to be small entities, and all who enter into TROA will be willing signatories. There is, therefore, not a significant effect on a substantial number of small entities.

3. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business

Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of \$100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The availability of additional water management options is expected in the long term to lower overall operation costs.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. TROA has only regional effects and will not have national or international implications.

4. *Unfunded Mandates Reform Act*

This rule does not impose an unfunded mandate on State, local, or tribal governments in the aggregate, or on the private sector, of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. The costs of the new water management opportunities made available by the agreement will only accrue to the signatories, and the costs will be small relative to the benefits and will apply only if a signatory avails itself of the options under the agreement. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. *Takings (E.O. 12630)*

Under the criteria in Executive Order 12630, the rule does not have significant takings implications. The provisions of the agreement are accepted voluntarily by the signatories and the exercise of water rights under existing decrees is expressly provided for. Therefore, this rule will not result in a taking of private property, and a takings implication assessment is not required.

6. *Federalism (E.O. 13132)*

Under the criteria in Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The States of California and Nevada are signatories to TROA and participated fully in negotiations that culminated in the agreement. TROA would have two principal effects on the governments of the States of California and Nevada.

First, when TROA enters into effect, an allocation of the waters of the Lake Tahoe and Truckee River basins, and confirmation of the allocation of the Carson River and its tributaries

represented by the Alpine Decree, automatically enters into effect in a manner similar to an interstate compact. Generally, these allocations limit the amount of water that can be used or diverted from Lake Tahoe basin for use within the basin under procedures of the two States, and the amount of water that can be used or diverted from the California portions of the Truckee River basin and the Carson River and its tributaries under relevant decrees and procedures of the State of California. The balance of the water of these two rivers that flows into Nevada can be allocated pursuant to the water allocation procedures of the State of Nevada and various court decrees. Generally, these allocations were negotiated by and agreed to by the two States and, though not required by law to do so, both States have voluntarily abided by their provisions pending passage of Public Law 101-618, initially, and pending implementation of TROA, subsequently. TROA merely aids in the implementation of the allocation of the waters of the Lake Tahoe and Truckee River basins provided for in the Settlement Act. By signing TROA, the two States will, effectively, be binding themselves to this interstate allocation.

Secondly, there are modest (i.e., expected to be approximately \$600,000 in total) financial requirements for funding the annual administration of TROA. Subject to the limits on the authority in the constitutions of the two States to commit future appropriations, it is reasonable to expect the two States to pay their allocated shares of the funding. By signing TROA, the two States would be signaling their intention to secure funding for their shares of the administration of TROA. Neither of these effects is considered to rise to the level of significance requiring a Federalism Assessment. The rule, which governs only the responsibilities of the signatories, does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The rule provides for the application of State law in its implementation in the same manner as does the Settlement Act. Therefore, a Federalism Assessment is not required.

7. *Civil Justice Reform (E.O. 12988)*

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

a. Does not unduly burden the judicial system.

b. Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

c. Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

8. *Consultation With Indian Tribes (E.O. 13175)*

Under the criteria in Executive Order 13175, we have evaluated this rule and determined that it has no potential effects, within the requirements of the Executive Order, on Federally recognized Indian tribes.

Indian trust resources are legal interests in property or natural resources held in trust by the United States for Indian Tribes or individuals. The Secretary of the Interior is the trustee for the United States on behalf of Indian Tribes. Examples of trust resources are lands, minerals, hunting and fishing rights, and water rights. Indian trust resources have been assessed in consultation with the following tribes during the development of TROA: Pyramid Lake Paiute Tribe—Pyramid Lake Indian Reservation in Nevada; Reno-Sparks Indian Colony—Reno and Hungry Valley, in Nevada; Fallon Paiute-Shoshone Tribe—Fallon Paiute-Shoshone Reservation and Fallon Colony in Nevada; and Washoe Tribe of Nevada and California—colonies in Nevada and in California with cultural interests at and near Lake Tahoe.

For the Pyramid Tribe, flow in the Truckee River below Derby Dam and discharge to Pyramid Lake will increase slightly under TROA. With increased flow and the increased capacity to manage Truckee River water, TROA will: Assist in improving lower river water quality; enhance slightly the elevation of Pyramid Lake; enhance the riparian canopy; assist in stabilizing the lower river; enhance recreational opportunities at Pyramid Lake; enhance spawning opportunities for cui-ui and LCT; and enhance river habitat for Pyramid Lake fishes. In addition, the exercise of Truckee River agricultural and M&I water rights below Derby Dam, including those of the Pyramid Tribe, will continue to be satisfied. For Reno-Sparks Indian Colony, TROA will have no effect on the exercise of Truckee River water rights. The Fallon Paiute Shoshone Tribe will receive a full water supply with the same frequency as at present. TROA will have no effect on flows of the Carson River or on resources of the Washoe Tribe.

The Federal Government negotiated TROA on a government-to-government

basis with the Pyramid Tribe, as well as with the States of California and Nevada. As a result, TROA incorporates the principles of sovereignty for each sovereign signatory.

9. Paperwork Reduction Act

This rule does not contain any requirement for information collection by a Federal entity or Federal employee, and a submission under the Paperwork Reduction Act (PRA) is not required.

There are several provisions of TROA which require information to be submitted by the signatory parties to the TROA Administrator. With respect to the Paperwork Reduction Act, it is important to note that the TROA Administrator is not a Federal employee and the Office of the TROA Administrator is not a Federal entity. The signatory parties have agreed to provide to the Administrator the information requested and necessary for proper implementation and administration of TROA. Thus, even though there are requirements to provide information contained in the negotiated TROA and, as required by Congress, are provisions of the rule, the information is not sought or requested by a Federal employee or a Federal agency. Accordingly, the subject provisions are not information collection requirements for purposes of the Paperwork Reduction Act.

10. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. The Final EIS/EIR has concluded that implementation of TROA would not significantly affect the quality of the human environment and that no unavoidable adverse impacts are expected as a result of implementing TROA. No mitigation measures are identified or required. Because of exchanges and storage agreements that are components of TROA, a more assured long-term drought water supply for Truckee Meadows would be obtainable, and improved flow conditions would be possible for Pyramid Lake fishes and aquatic species in general. California's allocation of water for M&I purposes in the long run would be assured and could be utilized in the short run to improve environmental conditions in the Truckee River. Compliance with NEPA will be completed before the final rule is issued.

11. Data Quality Act

In developing this rule we did not conduct or use a study, experiment, or

survey requiring peer review under the Data Quality Act (Pub. L. 106–554).

12. Effects on Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

Analysis contained in the Final EIS/EIR shows that under TROA, hydropower generation and gross revenues are about 3.5 percent less under wet hydrologic conditions than under current conditions due to the increased conservation and improved water quality applications of TROA; about 6.0 percent less in median hydrologic conditions, and about 55.0 percent greater in dry hydrologic conditions. Net reduced hydroelectric power generation, if any, resulting from implementation of TROA would be compensated consistent with the provisions of the Agreement.

13. Clarity of This Regulation

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- a. Be logically organized;
- b. Use the active voice to address readers directly;
- c. Use clear language rather than jargon;
- d. Be divided into short sections and sentences; and
- e. Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the “ADDRESSES” section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 43 CFR Part 419

Agriculture, Irrigation, Natural resources, Endangered and threatened species, Reclamation, Reservoirs, Water resources, Water supply, Incorporation by reference.

Dated: August 28, 2008.

Kameron L. Onley,

Acting Assistant Secretary—Water and Science.

For the reasons given in the preamble, the Bureau of Reclamation proposes to add to title 43 of the Code of Federal Regulations a new part 419 to read as follows:

PART 419—OPERATION OF THE TRUCKEE RIVER AND OTHER RESERVOIRS

Sec.

- 419.1 What is the purpose of this part?
- 419.2 What are the definitions used in this part?
- 419.3 What general principles govern implementation of the TROA?
- 419.4 What are the specific provisions governing operations of the reservoirs?

Authority: Pub. L. 101–618 (104 Stat. 3289, 3294).

§ 419.1 What is the purpose of this part?

(a) This part satisfies the requirement of section 205(a)(5) of the Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Settlement Act) that the negotiated agreement for operation of Truckee River Reservoirs be promulgated as a Federal regulation. The Truckee River Operating Agreement (TROA), which is incorporated by reference into this part, is the agreement negotiated pursuant to section 205(a). The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of TROA from the Area Manager, Bureau of Reclamation, 705 N. Plaza St., Carson City, NV 89701. You may inspect a copy at Bureau of Reclamation, 705 N. Plaza St., Carson City, NV 89701, or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

(b) This part implements the Settlement Act by providing for operation of the Truckee River Reservoirs and other reservoirs in a manner that:

- (1) Implements California's allocation of Truckee River basin water and the Nevada and California allocations of Lake Tahoe basin water;
- (2) Enhances fish, wildlife, and recreational beneficial uses of water in the Truckee River basin;
- (3) Carries out the terms, conditions, and contingencies of the Preliminary

Settlement Agreement, as modified by the Ratification Agreement;

(4) Ensures that water is stored in, released from, and passed through Truckee River Reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch Decree and Truckee River General Electric Decree, except for rights voluntarily relinquished by any persons, or transferred under State law;

(5) Provides for the enhancement of spawning flows available in the Lower Truckee River for Pyramid Lake Fishes in a manner consistent with the Secretary's responsibilities under the Endangered Species Act, as amended;

(6) Satisfies all applicable dam safety and flood control requirements; and

(7) Minimizes the Secretary's costs associated with operation and maintenance of Stampede Reservoir.

§ 419.2 What are the definitions used in this part?

Act means the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, title II, Pub. L. 101-618 (104 Stat. 3289, 3294).

Administrator means the individual appointed in accordance with sections 2.A.2 through 2.A.3 of the Truckee River Operating Agreement, incorporated by reference into this part.

Preliminary Settlement Agreement means that Agreement between the Pyramid Lake Paiute Tribe and Sierra Pacific Power Company of May 23, 1989, as subsequently modified and ratified by the United States.

TROA means the Truckee River Operating Agreement, which is incorporated by reference into this part.

Truckee River basin means the area which naturally drains into the Truckee River and its tributaries and into Pyramid Lake, including Pyramid Lake, but excluding the Lake Tahoe basin.

§ 419.3 What general principles govern implementation of the TROA?

The following are general operational principles which provide a framework for the Administrator in implementing the TROA. These general principles are intended to be consistent with the specific provisions of TROA, but if they conflict with those specific provisions, the specific TROA provisions control. Operations should meet all of the following criteria:

(a) Be conducted, consistent with the TROA and applicable legal requirements, so that the available water supply in the Truckee River basin satisfies, to the maximum extent possible, multiple beneficial purposes, including municipal and industrial, irrigation, fish, wildlife, water quality, and recreation purposes.

(b) Satisfy vested and perfected rights to use the water of the Truckee River and its tributaries, to the extent that water rights are scheduled to be exercised, and to the extent that water is lawfully available. This includes, but is not limited to, the exercise of water rights under the provisions of the Orr

Ditch Decree, except as expressly provided in the Settlement Act and the TROA.

(c) Maintain minimum releases and, to the extent practicable consistent with existing water rights and the TROA, maintain enhanced minimum releases, preferred stream flows, and reservoir recreation levels as described in Article Nine of the TROA.

(d) Comply with applicable flood control requirements for Prosser Creek, Stampede, Boca, and Martis Creek Reservoirs.

(e) Comply with all applicable dam safety requirements.

(f) Use the integrated schedules developed by the Administrator through coordination with the scheduling parties.

(g) Respond to declared Federal, State, or local water-related emergencies presenting a clear and immediate danger to public health, life, property, or essential public services involving an upset or other unexpected occurrence to facilities and resources addressed in the TROA.

§ 419.4 What specific provisions govern operations of the reservoirs?

The specific provisions governing operations of the Truckee River Reservoirs and other reservoirs are contained in the TROA. The following table shows the location of the provisions in the TROA.

Provisions governing . . .	Are in the following sections of the TROA . . .
Recitals, Definitions	Recitals 1 through 9, Definitions (1) through (106).
Satisfaction of provisions of law, general operational principles, protection of water rights, imported water, remaining water of the Truckee River, and emergencies.	Sections 1.A through 1.F
Administration	Sections 2.A through 2.C.
Accounting, reporting, forecasting, and monitoring	Sections 3.A through 3.E.
Incorporation of certain provisions of the preliminary settlement agreement	Sections 4.A through 4.G.
Operation of Floriston Rate and Project Water	Sections 5.A through 5.E.
Truckee River and Lake Tahoe Basin Allocation and Accounting	Sections 6.A through 6.E.
Credit Water Establishment, Storage, and Conversion	Sections 7.A through 7.H.
Priorities and Rules for Operations Following Impoundment or Accumulation of Water in Reservoirs.	Sections 8.A through 8.V.
Beneficial Uses of Water for Instream Flows and Recreation in California	Sections 9.A through 9.F.
Design of Water Wells in the Truckee River Basin in California	Sections 10.A through 10.H.
Scheduling	Sections 11.A through 11.H.
Effectiveness of the TROA	Sections 12.A and 12.B.
Relation of TROA to Settlement Act, Adjustments to Operations and Changes to Agreement	Sections 13.A through 13.E.
Miscellaneous areas	Sections 14.A through 14.Q.