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CASE NO. 25219 / 25227

Dept. No.: Specially Assigned to Judge William A. Maddox

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DEPUTY

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CHURCHILL

IN THE MATTER OF APPLICATIONS 47047,)
47121, 47209, 47264, 48061 AND 48494)
FILED TO APPROPRIATE THE WATERS OF)
THE TRUCKEE RIVER AND ITS)
TRIBUTARIES WASHOE COUNTY,)
NEVADA.)

TRUCKEE-CARSON IRRIGATION)
DISTRICT,)

Petitioner,

and

CORKILL BROS., INC.,

Petitioner,

v.

TRACY TAYLOR, State Engineer, State of)
Nevada, Department of Conservation and)
Natural Resources, Division of Water)
Resources,)

Respondent.)

MOTION TO DISMISS AND
OPPOSITION OF PYRAMID LAKE
PAIUTE TRIBE AND TRUCKEE
MEADOWS WATER AUTHORITY
TO TRUCKEE-CARSON
IRRIGATION DISTRICT
MOTION/INDEPENDENT ACTION
FOR RELIEF FROM JUDGMENT

CV11 00796
Dept 8

Pursuant to Rule 12(b) of the Nevada Rules of Civil Procedure, the Pyramid Lake Paiute Tribe (the "Tribe") and the Truckee Meadows Water Authority ("TMWA") move the Court for an Order dismissing the Truckee-Carson Irrigation District Motion/Independent Action for Relief from Judgment. This Motion is made and based upon the provisions of Nev. R. Civ. P. 12(b)(3), insufficiency of process, 12(b)(4), insufficiency of service of process, 12(b)(5) failure

1 to state a claim upon which relief can be granted, and 12(b)(6), failure to join a party under Rule
2 19.

3 This Motion is made and based upon all of the pleadings and papers on file in this matter,
4 the Memorandum of Points and Authorities in Support of Motion to Dismiss and In Opposition
5 to Truckee-Carson Irrigation District's Motion/Independent Action for Relief From Judgment
6 and the attachments hereto.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**
8 **IN SUPPORT OF MOTION TO DISMISS INDEPENDENT ACTION**
9 **AND IN OPPOSITION TO TRUCKEE-CARSON IRRIGATION DISTRICT'S**
10 **MOTION FOR RELIEF OF JUDGMENT**

11 **I. INTRODUCTION.**

12 On or about January 21, 2011, the Truckee-Carson Irrigation District ("TCID") filed a
13 pleading entitled "Notice of Motion and Motion for Relief From Judgment" in this matter.
14 Because written notice of entry of judgment was served on July 31, 2008 (Ex. 1), approximately
15 two years and six months ago, and because Nev. R. Civ. P. 60(b) requires that a motion based
16 upon the grounds on which TCID relies is not available more than six months after notice of
17 entry of judgment, TCID hedges its bet by asking the Court to treat its motion as an independent
18 action to relieve it from judgment. See, TCID Memorandum of Points and Authorities ("TCID
19 Memorandum") at 14, Ins. 18-22.

20 The Nevada Supreme Court has made clear that TCID must choose its remedy and is not
21 permitted to pursue both possible remedies simultaneously by means of hedging or ambiguous
22 terminology. In *NC-DSH v. Garner*, 218 P.3d 853, at 857 (2009), the Court discussed the point
23 that both possible remedies may be available to a party, but that a party seeking relief from a
24 judgment under Rule 60(b) "may not pursue both remedies simultaneously." (citing, *Goodyear*
25 *Tire & Rubber Co. v. H.K. Porter Co.*, 521 F.2d 699, 700 (6th Cir. 1975). In short, TCID must
26 pick its horse and ride it, not throw everything up on the wall in the hopes that something sticks,
27 to mix a metaphor. No matter which remedy TCID must choose, both fail, as will be shown
28 below.

If this matter is to be considered an independent action, then it must be dismissed for

1 insufficiency of process, insufficiency of service of process, and for failure to join necessary
2 parties under Rule 19. TCID has not served the Tribe or TMWA with a summons as required
3 by Nev. R. Civ. P. 4(a), and the papers it has provided were sent by mail to their counsel, rather
4 than served personally on an appropriate official of the Tribe and TMWA as required by Nev.
5 R. Civ. P. 4(d). Moreover, TCID has not served the Nevada State Engineer, or his counsel, at
6 all. See, TCID Memorandum, Proof of Service following page 25. The State Engineer is a
7 necessary party to an independent action under Nev. R. Civ. P. Rule 19. Additionally, the
8 United States is a necessary party to proceedings attacking the property interests of Indian
9 tribes, as the United States is the owner of property rights in trust for tribes. TCID has not
10 attempted to join the United States to this proceeding, much less serve process on the United
11 States.

12 In addition, if this matter is an independent action to relieve TCID from the June 18, 2008
13 Judgment, the Tribe and TMWA have an absolute right to have venue changed to the Second
14 Judicial District Court of the State of Nevada In and For the County of Washoe under N.R.S.
15 13.040. The Tribe and TMWA have therefore separately filed a Demand for Change of Venue
16 and a Motion for Change of Venue as provided in N.R.S. 13.050.

17 Furthermore, TCID has failed to either establish the requisite "grave miscarriage of
18 justice," which is the "demanding standard" required by the Nevada Supreme Court and the
19 United States Supreme Court to bring an independent action; or to meet the "heavy burden" of
20 vacating a final judgment based upon alleged fraud, which must be established by clear and
21 convincing evidence. *NC-DSH v. Garner*, at 858 (quoting, *U.S. v. Beggerly*, 524 U.S. 38, 47
22 (1998)); *Id.* at 860-61 (citing, *Universal Oil Co. v. Root Mfg. Co.*, 328 U.S. 575, 580 (1946);
23 *Occhiuto v. Occhiuto*, 97 Nev. 143, 146 n.2 (1981)).

24 If, on the other hand, this matter is a motion under Rule 60(b), it is without question
25 untimely, as TCID openly acknowledges.

26 In either event, as is established by these points and authorities, TCID is not entitled to
27 relief by motion or independent action.
28

1 **II. STATEMENT OF FACTS.**

2 **A. Procedural Background.**

3 In 1984, the Tribe filed two Applications with the Nevada State Engineer, Nos. 48061
4 and 48494, to appropriate the remaining unappropriated waters of the Truckee River in Nevada.
5 On November 24, 1998, the Nevada State Engineer issued Ruling 4683, which granted the
6 Tribe rights pursuant to Application Nos. 48061 and 48494 to appropriate the remaining
7 unappropriated water of the Truckee River. Ex. 2. Ruling 4683 granted up to 477,851 acre feet
8 per year of Truckee River water, if and when available, to the Tribe with a 1984 priority.

9 Ruling 4683 was appealed to this Court, and a remand to the State Engineer resulted,
10 with the subsequent issuance by the State Engineer of an Amended or Supplemental Ruling,
11 Ruling 4683A. Ruling 4683A was again appealed to this Court. Judge William Maddox¹,
12 sitting by assignment from the Supreme Court of Nevada, upheld both Rulings in a written
13 Order filed on June 18, 2008. TCID did not appeal that Ruling. However, Corkill Brothers did
14 appeal to the Nevada Supreme Court. On March 30, 2009, the Supreme Court dismissed that
15 appeal (Ex. 3), and this Court's Order upholding Rulings 4683/4683A became final as to all
16 parties.

17 Now, nearly three years after the judgment became final as to TCID, and nearly two
18 years after it became final as to all parties, TCID has filed this "matter", which has no merit and
19 is a gross misrepresentation of the facts. The foundation for TCID's Motion/Independent
20 Action is that there is "newly discovered evidence that the [Tribe] is illegally storing water in
21 violation of the State Engineer's ruling and the permits allowed to be issued by this Court and in
22 contradiction to the representations made to the Court by the Tribe and its Counsel." TCID
23 Memorandum at 1, Ins. 7-10. As is established by TCID's own filing, and further substantiated
24 below, the evidence on which TCID relies is not new, does not show illegal storage of water by
25 the Tribe under its Nevada permits, and there were no misrepresentations made to the Court.

26 **B. Storage of Water From the Little Truckee River By the Bureau of**
27 **Reclamation In Stampede Reservoir In California.**
28

¹ Judge Maddox is no longer a sitting judge.

1 In an effort to make it appear that there were misrepresentations made to the Court at a
2 May 2, 2008 oral argument, TCID has omitted important information as to what occurred at that
3 time. In addition, the so-called "admission" by the Tribe, which is the lynchpin for this
4 Motion/Independent Action, is nothing more, and nothing less, than an acknowledgement that
5 water from the Little Truckee River in **California** is presently being stored in **California** in
6 Stampede Reservoir by the **Bureau of Reclamation** ("Reclamation") pursuant to a **California**
7 **water right** for such storage issued by the California State Water Resources Control Board
8 ("State Board"), and that but for that lawful storage in California, the water would otherwise
9 flow to Pyramid Lake. That is clear from the testimony which TCID has included in its
10 Memorandum. *See*, TCID Memorandum at 12-13.

11 That storage which has been taking place for over 40 years is storage by Reclamation. It
12 is not storage by the Tribe. It is not illegal, and it is not part of the water for which the State
13 Engineer granted Permit Nos. 48061 and 48494. TCID knew those facts long before 2008, and
14 those facts were presented to the Court both in argument and in briefs at that time. In short,
15 there is no basis for equitable relief from a judgment here.

16 Stampede Reservoir is a product of the Washoe Project, authorized in 1956 by Congress
17 in the Truckee and Carson River basins. Pub. L. No. 84-858, 70 Stat. 775. The initial purposes
18 of the Washoe Project were for irrigation, flood control, hydroelectric power, development of
19 fish and wildlife resources, and "other beneficial purposes." The two principal reservoirs to be
20 constructed in the Washoe Project were Stampede on the Little Truckee River, and Watasheamu
21 on the East Fork of the Carson River. *Id.* In 1958, Congress amended the Washoe Project Act
22 to authorize increased construction costs and to add another dam, on Prosser Creek. Pub. L. No.
23 85-706, 72 Stat. 705.

24 In 1954, Reclamation filed Application 15673 in California to appropriate water from the
25 Little Truckee River for storage in Stampede Reservoir. In 1958, California issued Permit
26 11605 authorizing that storage. *See*, TCID Memorandum, Attachment G.

27 In 1970, Reclamation completed construction of Stampede Dam on the Little Truckee
28 River, in part to provide flood control protection for Boca Dam and the Reno-Sparks area.

1 Stampede Reservoir and the proposed, but never constructed, Watasheamu Reservoir on the East
2 Fork of the Carson River were intended to provide an additional water supply for lands upstream
3 of Lahontan Reservoir on the Carson River through an exchange. Water which otherwise would
4 have been stored in Lahontan Reservoir was to be stored in Watasheamu, and the water lost to
5 Lahontan Reservoir was to be made up by water from Stampede Reservoir. Ex. 4 at 7-8; 16-18.
6 However, Watasheamu Dam on the East Fork of the Carson River was never built, and Congress
7 has revoked the authority to build it. Truckee-Carson-Pyramid Lake Settlement Act ("Settlement
8 Act"), Pub. L. 101-618, § 205(c).

9 A special district, the Carson-Truckee Water Conservancy District, had been formed in
10 1958 to act as the agency to purchase water stored by Stampede Dam. *Carson-Truckee Water*
11 *Conservancy District v. Watt*, 537 F. Supp. 106, 108 (D. Nev. 1982). Because of the rapid
12 growth of Reno and Sparks since the mid-1950's, and the need for additional water for municipal
13 and industrial uses, the Carson-Truckee Water Conservancy District and Sierra Pacific Power
14 Company sought to enter into a contract with the Secretary of Interior ("Secretary") to distribute
15 water for the reimbursable purpose of municipal and industrial use. They were the only entities
16 who sought to distribute water for a reimbursable purpose. *Id.* at 110.

17 In 1967, the cui-ui population of Pyramid Lake was declared to be an endangered species
18 under a predecessor statute to the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.* ("ESA").
19 *See*, 32 Fed. Reg. 4,001 (Mar. 11, 1967). In addition, in 1975, a surviving strain of the
20 Lahontan cutthroat trout was declared a threatened species under the ESA. *See*, 40 Fed. Reg.
21 29,864 (July 16, 1975); *Carson-Truckee Water Conservancy District v. Watt*, 549 F. Supp. 704,
22 707 (D. Nev. 1982). As a result of these listings, the Secretary decided to operate Stampede
23 Dam so as to conserve the cui-ui and Lahontan cutthroat trout (pursuant to the ESA), and
24 declined to enter into a contract with the Carson-Truckee Water Conservancy District and Sierra
25 Pacific for water for municipal and industrial use from Stampede Reservoir. *Carson-Truckee*
26 *Water Conservancy District v. Clark*, 741 F.2d 257, 259 (9th Cir. 1984).

27 Those entities then filed an action in the United States District Court for the District of
28 Nevada to compel the Secretary to enter into such a contract. *See*, *Carson-Truckee Water*
Conservancy District v. Watt, 537 F. Supp. 106 (D. Nev. 1982); *Carson-Truckee Water*

1 *Conservancy District v. Watt*, 549 F. Supp. 704 (D. Nev. 1982); *aff'd sub nom., Carson-Truckee*
2 *Water Conservancy District v. Clark*, 741 F.2d 257 (9th Cir. 1984). The decisions arising out of
3 that action rejected the claim that the Secretary was required to operate Stampede Reservoir for
4 municipal and industrial purposes and upheld the Secretary's authority and discretion to operate
5 Stampede Reservoir for the benefit of the listed cui-ui and Lahontan cutthroat trout. That
6 operation continues to the present and, under the Settlement Act, must continue. Settlement
7 Act, § 207(d)(1).

8 In addition, the State of Nevada was a party to that litigation, and sought a declaration
9 that Reclamation required a permit from the Nevada State Engineer for Stampede's operations.
10 See, *Carson-Truckee Water Conservancy*, 537 F.Supp. at 113. The court held that no such
11 permit was required, and the court of appeals affirmed that decision. *Id.*; *Carson-Truckee*
12 *Water Conservancy District v. Clark*, 741 F.2d 257 (9th Cir. 1984).

13 In connection with implementation of the Truckee River Operating Agreement,
14 Reclamation filed Application 31487 with the State Board to appropriate 350 cfs by direct
15 diversion from January 1 to December 31, and up to 226,500 acre feet per annum by storage
16 from January 1 to December 31, for a maximum annual quantity to be appropriated by direct
17 diversion or by storage of 226,500 acre feet in combination with Permit 11605. See, TCID
18 Memorandum, Attachment C. TCID and others protested that Application. See, Ex. 5. The State
19 Board held a hearing on that Application and TCID's Protest and related matters, but has not yet
20 issued a decision. *Id.*

21 **C. Water Presently Being Stored in Truckee River Reservoirs Is Not Water**
22 **Appropriated Under the Tribe's Applications.**

23 TCID contends that water appropriated under Permit Nos. 48061 and 48494 is already
24 being stored in Stampede Reservoir. That is not true. Storage of water in Stampede Reservoir
25 happens under Reclamation's California Permit No. 11605. The Tribe, through its counsel,
26 reiterates the truth of what was represented to Judge Maddox, and is still true today: not one
27 single drop of water has been stored anywhere pursuant to the Permits granted to the Tribe,
28 Permits 48061 and 48494, for the unappropriated water. The Tribe said then, and maintains the
exact same position today, that it must file applications to the Nevada State Engineer to change

1 some part or all of the permitted rights to storage before **any** of the unappropriated water can be
2 stored in Stampede. The Tribe will do so when it sees fit, but no storage can or will occur unless
3 and until the State Engineer grants those as-yet-unfiled applications.

4 Moreover, water stored under Reclamation's California Permit was **not** included in the
5 water shown to be unappropriated in connection with State Engineer Ruling No. 4683. The
6 evidence presented to the State Engineer on that issue at the June 1, 1994 hearing on the Tribe's
7 Applications accounted for the fact that Truckee River water was being stored in Truckee River
8 Reservoirs, all of which existed during the 1973 to 1992 period covered by the Tribe's
9 evidence. The Tribe's evidence showed flows at the Nixon Gage **less** releases from Stampede
10 Reservoir. That data accounts for and does not include water in storage in Truckee River
11 Reservoirs. *See*, Ruling 4683 at 17-18; Vol. III, Tr. pgs. 463-471 (1994) (Bates stamped 799-
12 988); Exhibits 92 and 93.²

13 California Water Right Permit No. 11605, issued on October 27, 1958 to the United
14 States of America Bureau of Reclamation, allows for the diversion to storage of 126,000 acre
15 feet of water **per year** into Stampede Reservoir. The Truckee River water in Nevada which the
16 State Engineer found to be unappropriated took into account, and did not include, water being
17 stored under that Permit pursuant to California law. *See*, Exhibits 92 and 93. Moreover,
18 Stampede Reservoir is located on the Little Truckee River, and cannot capture any water which
19 flows in the main stem of the Truckee River.

20 **D. The Matters of Storage in Stampede Reservoir by Reclamation Under**
21 **California Permit No. 11605 and of Reclamation's Application in California**
22 **to Store Additional Water in Stampede Reservoir Were Briefed and Argued**
23 **to the Court in 2007 and 2008 in Connection With TCID's Request That the**
Rulings Be Set Aside and Remanded to the Nevada State Engineer for
Additional Evidentiary Hearings.

24 After the State Engineer issued Ruling 4683A, TCID filed a Supplemental Petition for
25 Review of that Ruling on or about November 21, 2006. Among other things, in that
26 Supplemental Petition for Judicial Review, TCID asserted "Further, given the opportunity,
27
28

29 ² These references are to the record of proceedings before the State Engineer and which were part
30 of the Record on Appeal.

1 TCID would provide evidence that applications to store this water had already been filed in
2 California and the water is in fact already being stored in Stampede Reservoir." See, TCID's
3 Supplemental Petition for Judicial Review at 5, lns. 14-16.

4 Thereafter, the parties filed briefs regarding the Supplemental Petition for Review of
5 State Engineer Rulings 4683A. In its Memorandum filed on or about June 7, 2007, TCID stated
6 that water is in fact currently being stored in the Truckee River upstream reservoirs, referring
7 specifically to Stampede Reservoir. See, TCID 6/7/07 Memorandum at pg. 11, lns. 16-18; pgs.
8 10-15.

9 In its Memorandum here, TCID includes selected portions of the transcript of oral
10 argument before Judge Maddox which took place on May 2, 2008. It is clear that the discussion
11 there between the Court and counsel related to what approvals would be required if the Tribe
12 desired to store water in the future under permits issued by the Nevada State Engineer pursuant
13 to Ruling 4683. The dialogue with the Court confirms that storage of water appropriated under
14 those permits could only happen if appropriate applications were filed with, and approved by,
15 the Nevada State Engineer. See, TCID Memorandum at 8-9.

16 TCID would have the Court infer from that dialogue that Judge Maddox was unaware of
17 the storage taking place on the Little Truckee River in California. He was not. The Tribe, in its
18 Memorandum in Opposition to the Supplemental Petition for Review of State Engineer Ruling
19 4683A, specifically addressed the assertion that unappropriated water granted to the Tribe under
20 Ruling 4683A is already being stored in Stampede Reservoir. The Tribe noted that the past and
21 current operation of Stampede Reservoir, for the benefit of the Pyramid Lake Fishery, has
22 nothing to do with Ruling 4683. The Tribe also provided the history of the California permit for
23 Stampede Reservoir and the storage of water in Stampede Reservoir by Reclamation in
24 accordance with the *Carson-Truckee Water Conservancy District* decisions. See, Ex. 6, Excerpt
25 from Tribe's 9/21/07 Memorandum at 9, n. 5.

26 The Tribe acknowledged that water stored in Stampede Reservoir by Reclamation had
27 been released and used for the benefit of the Pyramid Lake Fishery for almost three decades
28 prior to the issuance of Ruling 4683 in 1998. The Tribe noted that if TCID had concerns or

1 complaints about the manner in which Stampede Reservoir has been operated since 1970, it
2 could direct those concerns to Reclamation, the Federal Water Master, or the California State
3 Water Resources Control Board. *Id.* In his oral argument, Mr. Van Zandt referred the Court to
4 that page and note in the Tribe's Memorandum. Ex. 7, Excerpt from 5/2/2008 Tr. of
5 Proceedings at pg. 70, ln. 24, pg. 71, ln. 8.

6 TMWA, in its brief, explained why issues related to storage with respect to Applications
7 48061 and 48494 were not ripe, and in addition, directly addressed the water that was then
8 being stored in Truckee River Reservoirs, including in Stampede Reservoir, under California
9 law. *See*, Ex. 8, 9/21/07 Excerpt from Answering Brief of Truckee Meadows Water Authority
10 filed on or about September 21, 2007 at pgs. 9-13. In its Reply, filed on or about October 5,
11 2007, TCID again addressed the storage issue. It recognized that California Permit 11605 was
12 issued in 1958, and that water stored under it was taken into account by the State Engineer in
13 issuing Ruling 4683. TCID argued, however, that the State Engineer should have considered
14 what might occur if California Application 31487 was eventually granted. *See*, Ex. 9, Excerpt
15 from TCID 10/5/07 Consolidated Reply at pgs. 4 and 5, n. 2.

16 Argument took place concerning this matter before Judge William Maddox on May 2,
17 2008. During that argument, the issues of storage in California, both under the existing permit
18 and potential storage under the California application, were argued and before the Court at that
19 time. *See*, Ex. 7, Excerpt from 5/2/2008 Tr. of Proceedings, at 15-18. Mr. Van Zandt himself
20 specifically referred to water now being stored in "Stampede for the benefit of the Pyramid
21 Lake Tribe," and in essence complained, as TCID has done to no avail since the 1980's, about
22 the decision in the Carson-Truckee Cases referenced above and the changes in use of the water
23 by the Secretary. Ex. 7 at 18, lns. 12-24.

24 Mr. Shahroody's testimony in the proceedings before the California State Water
25 Resources Control Board, which is the foundation for TCID's Motion/Independent Action here,
26 says nothing more, and nothing less, than that water is being stored in Stampede Reservoir by
27 Reclamation under Reclamation's existing California water permit, and that if that water is not
28 stored in Stampede Reservoir by Reclamation as allowed under California law, it would flow to

1 Pyramid Lake by reason of the priority system in place when the water enters Nevada. *See e.g.*,
2 TCID Memorandum at 12-13. All of that information was presented to the Court in briefs and
3 in argument, and after hearing it, the Court affirmed the State Engineer's Rulings 4683 and
4 4683A. Mr. Shahroody's testimony in California is not newly discovered evidence and does not
5 contradict what the Court was told in 2008: it confirms it.

6 The decision by Judge Maddox was not based upon any misrepresentations as to what
7 was occurring at that time; and what is occurring at the present time is not inconsistent with
8 what was presented at that time. If TCID believed that, because of that issue of storage in
9 Stampede Reservoir, a remand to the State Engineer was required, it should have appealed
10 Judge Maddox's decision. It chose not to appeal. It cannot now set aside the Maddox decision
11 by disingenuously manufacturing a misrepresentation to the Court, or announcing with mock
12 surprise an alleged new discovery of an admission of facts of which it was well aware not only
13 in 2008, but had been well aware of for over 30 years.

14 III. ARGUMENT.

15 A. This Independent Action Must Be Dismissed for Insufficiency of Process, 16 Insufficiency of Service of Process, and for Failure to Join a Necessary Party.

17 1. Rule 4 Requires Issuance of and Personal Service of a Summons for 18 the Commencement of an Action.

19 Nev. R. Civ. P. Rule 4 specifically requires the issuance of a summons. The summons is
20 to be signed by the Clerk under the Seal of the Court, and include certain required information.
21 In addition, a summons is to be personally served in accordance with the requirements of Nev.
22 R. Civ. P. 4(d). Here, there has been no summons issued, and in addition, the materials which
23 were "served" were delivered by mail on counsel for the Tribe and TMWA. As a matter of law,
24 the process is insufficient, and its service is insufficient. *C.H.A. Venture v. G.C. Wallace*
25 *Consulting Engineers, Inc.*, 106 Nev. 381, 384, 794 P.2d 707 (1990).
26

27 2. The Nevada State Engineer and the United States are Necessary 28 Parties.

1 Pursuant to Rule 12(b), an action may be dismissed for failure to join a party under Nev.
2 R. Civ. P. 19. Under Nev. R. Civ. P. 19(a), a person shall be joined as a party in the action if (1)
3 in a person's absence, complete relief cannot be accorded among those already parties, or (2)
4 the person claims an interest relating to the subject matter of the action and is so situated that
5 the disposition of the action in the person's absence may (i) as a practical matter impair or
6 impede the person's ability to protect that interest, or (ii) leave any of the persons already
7 parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent
8 obligations by reason of the claimed interest. See, Nev. R. Civ. P. 19(a); *Crowley v. Duffrin*,
9 109 Nev. 597, 855 P.2d 536 (1993).
10

11 Here, the Nevada State Engineer is a necessary party. N.R.S 533.450 requires that the
12 Nevada State Engineer be a party to any action which seeks to review an order or decision of
13 the State Engineer. In addition, the judgment from which TCID seeks relief here is specifically
14 a judgment which affirms two rulings of the State Engineer, and, if set aside, would require the
15 State Engineer to, in effect, rehear the Tribe's Applications.
16

17 Here also, the United States is a necessary party. Once Permit No.s 48061 and 48494
18 were issued to the Tribe by the State Engineer, a protectable real property interest came into
19 existence. *In re Application of Filipini (In re Waters of Duff Creek)*, 66 Nev. 17, 22, 202 P.2d
20 535, 537 (1949). It is clearly established and well-settled that actions against property that the
21 United States holds in trust for Indians or Indian tribes cannot proceed in the absence of the
22 United States, and that the United States cannot be sued without its consent. *Minnesota v.*
23 *United States*, 305 U.S. 382, 386-87 (1939); *Metropolitan Water Dist. v. U.S.*, 830 F.2d 139,
24 142-44 (9th Cir. 1987); *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987); and
25 *Carlson v. Tulalip Tribes*, 510 F.2d 1337, 1339 (9th Cir. 1975); see also, 28 U.S.C. § 2409a
26 (granting consent to sue the United States to adjudicate title to real property in which the United
27 States claims an interest, but excluding Indian trust or restricted land and water rights). Indeed,
28 in *Mineral County v. Nevada Department of Conservation and Natural Resources*, 117 Nev. 235

1 at 246, 20 P.3d 800 at 807 (2001), the Nevada Supreme Court explicitly commented that it
2 would be "problematic" for the Court to exercise jurisdiction over that matter in the absence of
3 several interested parties, including the United States, over which it lacked jurisdiction.

4 TCID has not attempted to join or serve the United States and the independent action
5 must fail on that basis alone.

6 **B. TCID's Motion Is Untimely.**

7 On the one hand, TCID has filed a "Motion for Relief From Judgment" which it admits is
8 time barred. On the other hand, TCID asks that its "Motion" be considered an independent
9 action. It cannot have it both ways. An independent action is a new civil action. It is not
10 brought under Rule 60(b). *Nevada Industrial Development v. Benedetti*, 103 Nev. 360, 364-65,
11 741 P.2d 802 (1987) (citing, *Atlas Const. Co. v. Dist. Ct.*, 589 P.2d 953, 956 (1979)). In *Atlas*,
12 the Colorado Supreme Court held that an independent action must be commenced like any other
13 civil action. *Atlas*, 589 P.2d at 955.

14 Although the Nevada Supreme Court has suggested that a motion may be treated as an
15 independent action, and vice versa, it has never held that an independent action may be brought
16 as a motion under Rule 60(b) when the motion is clearly time barred. *See, NC-DSH, Inc.*, at
17 857. Furthermore, the Court held in the same case, that a party seeking relief from a judgment
18 under Rule 60(b) "may not pursue both remedies simultaneously." *Id.* (citing, *Goodyear Tire &*
19 *Rubber Co. v. H.K. Porter Co.*, 521 F.2d 699, 700 (6th Cir. 1975)).

20 It is beyond dispute that TCID's Rule 60(b) motion is untimely, which even TCID
21 appears to concede. *See*, TCID Memorandum at 14. TCID's Motion relies on Rule 60(b)(2),
22 and impliedly relies on Rule 60(b)(3). Rule 60(b)(2) provides for relief from judgment based
23 upon "newly discovered evidence," and Rule 60(b)(3) allows for relief from a final judgment in
24 the case of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or
25 other conduct of an adverse party" *See*, TCID Memorandum at 1, Ins. 7-10, pg. 2, Ins. 23-
26 24.

1 By its express terms, a motion under either Rule 60(b)(2) or Rule 60(b)(3) shall be made
2 within a reasonable time [and] not more than 6 months after . . . the date that written notice of
3 entry of the judgment or order was served." That notice took place here on July 31, 2008.
4 Therefore, TCID's January 21, 2011 Rule 60(b) motion, if that's what it is, must be denied as it
5 is not brought within the express six month limitation applicable to both motions brought under
6 Rule 60(b)(2) and Rule 60(b)(3). *Deal v. Baines*, 110 Nev. 509, 874 P.2d 775, 777 (1994)
7 (reversing trial court's dismissal of its judgment because "[c]learly, Baines failed to act within
8 this time limitation since the judgment was entered in February 1900 and Baines filed his Rule
9 60(b) motion in September 1992").
10

11 **C. TCID's "Independent Action" Is Barred by Laches.**

12 An independent action is also time limited by laches; laches requires the passage of time
13 and either prejudice to the defendant or acquiescence in the alleged wrongdoing. *Nevada*
14 *Industrial Develop., Inc. v. Benedetti*, 103 Nev. 360, 365, 741 P.2d 802 (1987) [citing, *St. Pierre*
15 *v. Edmunds*, 645 P.2d 615, 618 (Utah 1982); also citing, *Terry v. Terry*, 387 P.2d 902, 903
16 (Colo. 1963); also citing, *Hayashi v. Hayashi*, 666 P.2d 171, 176 (Haw. Ct. App. 1983)].
17 Nearly three years have passed since this Court entered the judgment at issue. There is both
18 acquiescence in the alleged wrongdoing and prejudice here.
19

20 As demonstrated above, TCID has been aware of the storage of water in Stampede
21 Reservoir by Reclamation under California Permit 11605 for the benefit of Pyramid Lake since
22 at least the 1984 decision of the Ninth Circuit in *Carson-Truckee Water Conservancy v. Clark*,
23 741 F.2d 257 (9th Cir. 1984). It has done nothing to contest or prevent that storage.
24

25 Both the Tribe and TMWA are beneficiaries of the Settlement Act and the Truckee River
26 Operating Agreement. In 1990, the Settlement Act was enacted by Congress and signed by
27 President Bush. The purpose of the Settlement Act is to resolve various long-running disputes
28 over the rights to the waters of the Truckee and Carson Rivers in Nevada and California. See

1 e.g., *Churchill Co. v. Norton*, 276 F.3d 1060, 1064 (9th Cir. 2001). The Settlement Act provides
2 for the equitable apportionment of the waters of the Truckee River, Carson River and Lake
3 Tahoe between California and Nevada. It also authorized modifications of the purposes and
4 operations of various dams and reservoirs to benefit fish, wildlife, and recreation and municipal,
5 industrial and irrigation users. As a direct benefit to the Tribe and Pyramid Lake, the Settlement
6 Act is intended to promote the enhancement and recovery of the Pyramid Lake fishery to benefit
7 the threatened cui-ui and endangered Lahontan cutthroat trout. *Id.* at 1070.

9 The Settlement Act also directs the Secretary of the Interior to negotiate an agreement
10 between California and Nevada governing operation of the reservoirs in the Truckee River basin,
11 i.e. the Operating Agreement. *See*, Settlement Act, § 205. The Operating Agreement must
12 provide, among many other things, for the operation of Truckee River basin dams in a way that
13 enhances the flows of Truckee River surface water for the benefit of the Pyramid Lake fishery.
14 Section 207 of the Settlement Act authorizes the acquisition of water and water rights for the
15 recovery of the cui-ui and Lahontan cutthroat trout.

17 The Settlement Act also provides that the Operating Agreement "carry out the terms,
18 conditions and contingencies of the Preliminary Settlement Agreement." *See*, Settlement Act, §
19 205(a)(2)(C). The Preliminary Settlement Agreement, as implemented by the Operating
20 Agreement, will allow TMWA to store some of its water in unused space in Truckee River
21 reservoirs in order to provide a drought water supply for Reno, Sparks and Washoe County
22 adequate to allow TMWA to meet a normal water demand of 119,000 acre feet per year. It will
23 also change the time when certain water reaches Pyramid Lake in a way beneficial to the
24 endangered cui-ui and Lahontan cutthroat trout.

26 The Settlement Act also authorizes the Secretary of Interior to take such other actions as
27 are necessary to implement the Preliminary Settlement Agreement and TROA, including
28 allowing TMWA to use space in Truckee River reservoirs. Settlement Act, § 205(a)(6). The

1 Settlement Act also expressly authorizes the use of Washoe Project facilities (Stampede and
2 Prosser Creek Reservoirs), Truckee River Storage Project facilities (Boca Reservoir), and Lake
3 Tahoe to fulfill the purposes of the Preliminary Settlement Agreement and TROA. Settlement
4 Act, § 205(b)(1).

5 Congress conditioned the effectiveness of its authorization of the Operating Agreement
6 on final resolution of the Tribe's claim to the remaining waters of the Truckee River. Settlement
7 Act, § 210(a)(2)(B). TCID has waited nearly three years to bring this "independent action" for no
8 purpose except to further delay that final resolution and thus implementation of the Operating
9 Agreement to the prejudice of the Tribe and TMWA. The "independent action" is barred by
10 laches.
11

12 **D. TCID Has Failed to Make a Showing of a Prima Facie Case Sufficient to**
13 **State a Claim Upon Which Relief May Be Granted in an Independent Action**
14 **for Relief From Judgment.**

15 **1. Introduction.**

16 The savings clause of Nev. R. Civ. P. 60(b) allows continuation of whatever power a
17 court would have had to entertain an independent action if the rule had not been adopted. It is
18 not an affirmative grant of power. *Treadway v. Academy of Motion Picture Arts*, 783 F.2d 1418,
19 1420 (9th Cir. 1986); *see also, Nevada Industrial Develop., Inc. v. Benedetti*, 103 Nev. 360, 364,
20 741 P.2d 802, 805 [citing, *Bankers Mort. Co. v. United States*, 423 F.2d 73, 77-81 (5th Cir.
21 1970); *also citing, Atlas Construction Co. v. District Court in and for Boulder County*, 589 P.2d
22 953 (Colo. 1979) (further internal citations omitted)].

23
24 "An independent action is considered to be a new civil action, not a motion under Rule
25 60(b)." *Benedetti*, 103 Nev. at 364, 741 P.2d at 805 [citing, *Atlas*, 589 P.2d at 955]. "When the
26 statutory period in within which to obtain relief from a judgment has run, relief may be granted
27 in an independent action." *Benedetti*, 103 Nev. at 364, 741 P.2d at 804 [citing, *Wisconsin v.*
28 *Michigan*, 295 U.S. 455, 55 S.Ct. 786, 79 L.Ed. 1541 (1935); (further internal citations omitted)].

1 To maintain an independent action in equity a movant must demonstrate all of the
2 "essential elements of an independent action" in equity: (1) the judgment ought not, in equity and
3 good conscience be enforced; (2) a good defense to the alleged cause of action on which the
4 judgment is founded; (3) fraud, accident or mistake that prevented the defendant in the judgment
5 from obtaining the benefit of his defense; (4) the absence of fraud or neglect on the part of the
6 defendant; and (5) the absence of any adequate remedy at law. *Bankers Mort. Co. v. United*
7 *States*, 423 F.2d 73, 79 (5th Cir. 1970), *cert. denied*, 90 S.Ct. 2242 (1970) [internal citations
8 omitted]; *Dudley v. Keller*, 33 Colo. App. 320, 521 P.2d 175, 177 (Colo. App. 1974).

9
10 "Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be
11 reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross
12 to demand a departure' from the rigid adherence of *res judicata*." *Id.* "An independent action
13 should be available only to prevent a grave miscarriage of justice." *United States v. Beggerly*,
14 524 U.S. 38, 47, 118 S.Ct. 1862, 1868 (1998).

15
16 "Resort to an independent action may be had only rarely and then only under unusual and
17 exceptional circumstances." *Bailey v. Internal Revenue Service*, 188 F.R.D. 346, 355 (D. Ariz.
18 1999) [citing, Wright, Miller, & Cooper, *Federal Practice and Procedure*, § 2686, at 397-398].

19 "It is not the function of an independent action to relitigate issues finally determined in another
20 action between the same parties, nor is it a remedy for inadvertence or oversight by the losing
21 party in the original action." *Id.*

22
23 "Courts have consistently held that a party is precluded by *res judicata* from relitigating
24 issues that were open to litigation in the former action where the party had a fair opportunity to
25 make his claim or defense in that action." *Bankers*, 423 F.2d at 79. Only if a movant shows at
26 least one of the grounds justifying equitable relief will the purposes of *res judicata* be weighed
27 against policies for granting relief from judgment. *See, Pickett v. Comanche Const., Inc.*, 108
28 Nev. at 427, 836 P.2d at 45 (1992).

1 Even if TCID's rhetoric in its argument was presumed to be supported by evidence,
2 which it is not, TCID does not meet any of the essential elements necessary to maintain its
3 independent action in equity. Even if it is presumed that TCID has made a prima facie showing
4 that the testimony of Mr. Shahroody was some sort of admission concerning newly discovered
5 storage at Stampede Reservoir, which it was not, the admission does not reveal any fraud,
6 accident, or mistake that prevented TCID from obtaining the benefit of its defense. See,
7 *Bankers*, 423 F.2d at 79, accord, *Addington v. Farmer's Elevator Mutual Insurance Co.*, 650
8 F.2d 663, 667-668 (5th Cir. 1981).

9
10 Further, TCID has not shown, and cannot show, that: (1) the judgment ought not, in good
11 conscience and equity be enforced; (2) there is a good defense to the alleged cause of action on
12 which the judgment is founded; (3) there is an absence of fault or negligence on its part; or (4)
13 there is the absence of an adequate remedy at law. *Id.* Because TCID fails to demonstrate the
14 presence of any of the essential elements for maintaining an independent action in equity, its
15 action must be dismissed. See, *Bankers*, 423 F.2d at 79; see also, *Moore's Federal Practice*, §
16 60.82, *et. seq.*, (Prerequisites to relief by way of independent action must all be satisfied).

17
18 **2. There Was No Fraud, Accident or Mistake That Prevented TCID**
19 **From Obtaining the Benefit of Its Defense.**

20
21 A court should not grant relief in an independent action in a case where the most that may
22 be charged against the adverse party are grounds, "that would at best form the basis for a Rule
23 60(b)(3) motion, [or] the strict... time limit on such motions" would be rendered meaningless.
24 *Beggerly*, 524 U.S. at 46, 118 S.Ct. at 1867. Only when "the fraud that is so successful that the
25 other party is not even aware" of a claim or defense can it be said that "he had no reasonable
26 opportunity to present the claim or defense. *Libro v. Walls*, 103 Nev. 540, 542-543, 746 P.2d
27 632, 634 (1987) [internal citations omitted]. That conduct which prevents a real trial on the
28

1 issues is extrinsic fraud and forms the basis for equitable relief from judgment. *See, Libro*, 103
2 Nev. at 543, 746 P.2d at 634.

3 TCID appears to allege that the Court's order of June 13, 2008 should not be enforced
4 because the "Tribe misrepresented these facts" (regarding the alleged storage of water in
5 Stampede Reservoir), and that as a result of the alleged misrepresentation this Court did not
6 order remand. TCID Memorandum at 16, Ins. 7-15. TCID alleges such "fraud, misrepresentation,
7 or other misconduct" on the part of the Tribe, and that "at a minimum, the Tribe misrepresented
8 the actual facts to this Court regarding storage of unappropriated water," effectively preventing
9 "the issue of storage from being addressed by the State Engineer." *Id.* at 17, Ins. 12-13.
10

11 First, as we have shown at pages 4-10, *supra*, there was no misrepresentation of any
12 facts. Second, TCID did not need to wait for an admission concerning storage at Stampede
13 Reservoir by Reclamation under Reclamation's California Permit. TCID was well aware of that
14 set of procedures, and on more than one occasion, its counsel said he would prove it, if given an
15 opportunity. The fact of the matter is that neither the State Engineer, nor the Court here, was
16 interested in hearing about storage in Stampede Reservoir by Reclamation under a California
17 Permit. They were aware of it, and found it not relevant to their decisions concerning the
18 instream water rights granted to the Tribe. TCID was not unaware of this alleged "defense." It
19 unsuccessfully asserted it.
20

21 To have any weight in the consideration of a court, newly discovered evidence must be
22 material or important to the moving party. *Whise v. Whise*, 36 Nev. 16, 131 P. 967, 969 (1913).
23 Evidence on a matter collateral to the issue is seldom grounds for a new trial, and it is not
24 sufficient that the new evidence, had it been offered, might have changed the result. *Id.* It must
25 be sufficiently strong to make it probable that a different result would be obtained. *Id.* The new
26 evidence must be of a decisive and conclusive character, or at least as such to render a different
27 result reasonably certain. *Id.*
28

1 Where the alleged new evidence sought to be relied upon is not such as should or would
2 render a different result probable, there would be no material rights lost to the moving party by
3 denial of its motion, in that the evidence to be introduced could avail the moving party nothing,
4 while on the other hand "the granting of the motion would work great annoyance to the adverse
5 party, and would be sure to result in delay and involved litigation." *Whise v. Whise*, 36 Nev. 16,
6 131 P. 967, 969-970 (1913).

8 The "newly discovered evidence" that TCID alleges came to light via the testimony of
9 Mr. Shahroody before the California State Board can, at best, be characterized as evidence on a
10 matter collateral to the issue. Any evidence related to storage in California by Reclamation
11 under a California permit issued to Reclamation in 1958 is collateral to the issue of remanding
12 this action to the Nevada State Engineer for another determination to grant or deny the Tribe's
13 Applications No.s 48061 and 48494 to permit instream use in Nevada.

15 Even if this Court were to accept TCID's allegations concerning upstream storage in
16 California by Reclamation under its California Permit, that would not make it probable, as
17 opposed to possible, that TCID would obtain a different result before the State Engineer. Indeed,
18 the State Engineer knew of that storage when he issued Ruling 4683 and 4683A. The Court
19 knew of that storage in 2008 when it affirmed his Rulings. Since the alleged new evidence
20 concerns only storage in California, and would not make a different result in a new hearing
21 probable, TCID loses no material rights if its independent action is dismissed.

23 3. The Judgment, in Good Conscience and Equity, Must Be Enforced.

24 Another way to express the good conscience and equity requirement is that an
25 independent action in equity is only available when the party seeking relief shows unusual and
26 exceptional circumstances such that the judgment is manifestly unconscionable. *Moore's*
27 *Federal Practice*, § 60.82[4] (3d ed. 2010). In order to warrant equitable relief, the defeated
28

1 party must show something that renders it manifestly unconscionable to enforce the judgment.

2 *Pickford v. Talbott*, 225 U.S. 651, 658, 32 S.Ct. 687, 56 L.Ed. 1240 (1911).

3 TCID alleges that this Court's order of June 18, 2008, in good conscience and equity,
4 should not be enforced because the "Tribe misrepresented these facts" (regarding the alleged
5 storage of Tribal water in Stampede Reservoir), and that as a result of the alleged
6 misrepresentation this Court did not order remand, "thus preventing TCID from presenting
7 evidence before the State Engineer" regarding such storage. TCID Memorandum at 16, lns. 7-
8 15.

9
10 The Tribe did not misrepresent any facts. In point of fact, the Tribe reiterates here now
11 exactly what it represented before, and would produce witnesses from the Bureau of
12 Reclamation, the federal Water Master's office, and on behalf of the Tribe itself to prove those
13 facts, if they were at all relevant, which they are not as shown above.
14

15 The Court was aware of storage in Stampede Reservoir by Reclamation under its
16 California permit, as was the State Engineer. The Court did not order a remand because it
17 understood that issues related to storage under the Tribe's Nevada permits by the Tribe could
18 only arise if and when the Nevada State Engineer approved changes to them under applicable
19 Nevada law. Whether the State Engineer will or will not approve such changes, will not change
20 his decision to have granted the permits in the first instance, which is the relief which TCID
21 seeks.

22
23 It was the Court and the State Engineer who did not wish to hear evidence of storage in
24 Stampede Reservoir under permits issued by California because the evidence was not relevant to
25 the decision before them. If TCID believed they were wrong, it should have pursued an appeal
26 of the Court's judgment. It did not, and good conscience and equity require it to live with that
27 decision. The judgment must be enforced.
28

1 4. **TCID Has No Defense to the Alleged Cause of Action on Which the**
2 **Judgment Is Founded.**

3 TCID alleges that its good "defense" to Rulings 4683 and 4683A was to remand the case
4 to the State Engineer to make a determination of injury to existing rights and to the public
5 interest from the proposed and actual storage of water under Permits 48061 and 48494." TCID
6 Memorandum at 16, Ins. 17-21. First, the Tribe's Applications and Permits Nos. 48061 and
7 48494 do not propose, nor do the terms of such allow, for anything but an instream, *in situ*, place
8 of use. See, Ex. 10 and Ex. 11. Issues related to possible future storage do not affect the Nevada
9 State Engineer's analysis in determining to permit an instream use right. If the State Engineer
10 determined that there was an issue with **storage** in Stampede Reservoir, he would address that
11 storage independent of any determinations regarding instream rights. Any issues related to
12 storage would not affect the status of the Tribe's instream rights under Permits Nos. 48061 and
13 48494. Even if this action was remanded to the Nevada State Engineer, and problems involving
14 storage are identified, the remedy would not include denial of the instream use rights already
15 granted to the Tribe under Permits Nos. 48061 and 48494. That is essentially what the State
16 Engineer said in Ruling 4683A, and if TCID believed he was wrong, it should have appealed the
17 Court's Order affirming that decision to the Nevada Supreme Court, rather than doing nothing.
18

19 5. **TCID Was Negligent.**

20 TCID argues that it could not have produced in 1994, 1996 or 2008 the admissions made
21 at the 2010 State Board hearings. TCID Memorandum at 22, Ins. 24-27. However, TCID
22 needed no "admission" to prove in 1994 and at any time thereafter that water was being stored
23 by Reclamation in a California reservoir under California Permit 11605. It knew that in 1994,
24 1996 and 2008, and its attorney argued he could prove it, and indeed he could have proved it.
25 However, that proof about **Reclamation's** storage is a very different thing from unjustifiably
26
27
28

1 accusing the Tribe of acting illegally, and blantly violating NRCP 11 in accusing the Tribe's
2 counsel of violating his oath as an officer of the court.

3 In the final analysis, that proof was not relevant to the State Engineer's decision or to the
4 Court's. If TCID believed that it was, it should have appealed. The situation in which it finds
5 itself now is of its own making.
6

7 **6. TCID Has Adequate Remedies at Law.**

8 To maintain an independent action in equity, the party requesting relief must have no
9 other adequate remedy at law. *See, Bankers*, 423 F.2d at 79. Here, TCID has several adequate
10 remedies to prevent illegal storage of water by the Tribe, some of which it is pursuing.

11 First, if there truly were storage of water happening under the Tribe's Nevada permits,
12 such storage would be unlawful in violation of N.R.S. Chapter 533. There are criminal penalties
13 for such violations. *See*, N.R.S. 533.475; 533.480. Thus, TCID may and, in fact, has asked the
14 State Engineer to investigate the diversion, impoundment or use of water in violation of a permit.
15 *See*, Ex. 12.
16

17 Second, TCID could request the Water Master appointed by the United States District
18 Court for the District of Nevada on the Truckee River to investigate the unlawful diversion,
19 impoundment or use. TCID has also done that. *See*, Ex. 13.
20

21 If either the State Engineer or the Federal Water Master finds that such unlawful
22 diversion, impoundment or use is occurring, he will enter cease and desist orders. He will **not**,
23 however, revoke or rescind the Tribe's instream water rights under its Nevada permits, which is
24 what TCID really seeks.

25 Third, TCID will have any opportunity to protest and be heard on any actual applications
26 filed to store water under the Tribe's Nevada permits, whenever the Tribe chooses to file those
27 applications *See*, N.R.S. 533.365. Fourth, TCID has protested, and has been heard on its protest
28 to California Application 31487.

1 Finally, if water is now being or has been stored in Stampede Reservoir in violation of
2 any permits issued by the State of California, the adequate and proper remedy would be to seek
3 the intervention and assistance of the California State Board, which TCID has not done here.
4 Stampede Reservoir is located in California, and storage is made in the Reservoir by
5 Reclamation under its existing California permit. If TCID believes that the terms of
6 Reclamation's existing California permit for Stampede Reservoir have been, or are being
7 violated, the proper agency to address that violation is the State Board which issued the
8 Stampede permit in the first place. TCID's proper remedy in such a case is not before the
9 Nevada State Engineer, because Stampede Reservoir and the existing Reclamation permit are
10 both subject to the State Board's jurisdiction.
11

12 California's policy is to vigorously enforce the terms and conditions of its permits and to
13 prevent the unlawful diversion of water. Cal. Water Code, § 1825. California has express
14 provisions for cease and desist orders. Cal. Water Code, §§ 1831-1836. California law imposes
15 penalties for violation of cease and desist orders. Cal. Water Code, § 1845. Moreover, if TCID
16 believes it is being harmed, California law allows it to bring its own action for violation of a
17 California permit. Cal. Water Code, § 1851.
18

19 IV. CONCLUSION.

20 TCID's "Motion" is clearly untimely, and must be denied. TCID has not commenced an
21 independent action, and has not complied with the procedures required for a new action. If this
22 filing is an "independent action," it must be dismissed.
23

24 ///

25 ///

26 ///

27 ///

28 ///

1 Most importantly, TCID has not demonstrated that it would be entitled to relief in an
2 independent action. In fact, its own evidence shows that it would not.

3 Dated: February 7, 2011.

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