

Attachment 1

TOWN OF TRUCKEE

DRAFT AGREEMENT FOR COMMISSIONING OF ART

1. PARTIES AND DATE

This Agreement for the Commissioning of Art ("Agreement") is made and entered into this _____ day of _____, 2024, by and between the Town of Truckee, a municipal corporation, organized under the laws of the State of California, with its principal place of business at 10183 Truckee Airport Rd., Truckee, California, 96161 ("Town") and _____ with a principal place of business at _____ ("Artist"). Town and Artist are sometimes individually referred to herein as "Party" and collectively as "Parties."

2. RECITALS

2.1 Artist.

Artist desires to perform and assume responsibility for designing and fabricating certain public art required by Town on the terms and conditions set forth in this Agreement.

2.2 Artwork.

Town desires to engage Artist to provide such public art as set forth in this Agreement.

3. TERMS

3.1 Scope of Work.

Artist promises and agrees to furnish to the Town all labor, materials, tools, equipment, services, and incidental and customary work necessary to finalize the design received as part of the Town's Request for Qualifications (RFQ) artist selection process and create the piece of art more particularly described in Exhibit "A" attached hereto and incorporated herein by reference (the "Artwork").

3.2 Responsibilities of Artist.

3.2.1 Independent Contractor; Control and Payment of Subordinates. The Artwork shall be created and fabricated by Artist or under Artist's supervision. Town retains Artist on an independent contractor basis and not as an employee. Any additional personnel assisting Artist with the Artwork under this Agreement shall also not be employees of Town and shall at all times be under Artist's exclusive direction and control. Neither Town, nor any of its officials, officers, directors, employees or agents shall have control over the conduct of Artist or any of Artist's officers, employees, or agents, except as set forth in this Agreement. Artist shall pay all wages, salaries, and other amounts due such personnel in connection with their performance of Services under this Agreement and as required by law. Artist shall be responsible for all reports and obligations respecting such additional personnel, including, but not limited to social security taxes, income tax withholding, unemployment insurance, disability insurance, and workers' compensation insurance.

3.2.2 Schedule of Work. Artist shall cause the Artwork to be completed not later than September 30, 2025. In addition, the following is a submittal schedule, including necessary review time:

Final Design including materials, structural, and foundation

Design of final art piece will be based off submittals accepted during the artist selection phase of the Request for Qualifications (RFQ) process. The Artist will meet with the Public Art Commission of Truckee (PACT) and Town Staff to discuss possible design changes to accomplish the final design. The Artist will submit the final design for PACT and Town Staff to review for completion prior to acceptance. Any additional requests will be formalized, and a final design resubmitted for consideration. Once the final design is accepted by PACT and the Town, Artist will begin the fabrication phase of the project.

Fabrication Complete: _____

Installation complete: _____

The schedule shall be extended to the extent necessary due to delays caused by the Town.

3.2.3 Town's Representative. Town hereby designates _____, or his/her designee, to act as its representative in all matters pertaining to the administration and performance of this Agreement ("Town's Representative"). Town's Representative shall have the power to act on behalf of the Town for review and approval of all sketches, mockups, models, and conceptual designs submitted by Artist but not the authority to enlarge the Scope of Work or change the total compensation due to Artist under this Agreement. The Town Manager shall be authorized to act on Town's behalf and to execute all necessary documents which enlarge the Scope of Work or change the Artist's total compensation subject to the provisions contained in Section 3.3 of this Agreement. Artist shall not accept direction or orders from any person other than the Town Manager, Town's Representative or his/her designee.

3.2.4 Laws and Regulations. In creating the Artwork, Artist shall at all times be in compliance with all applicable local, state and federal laws, rules and regulations, and shall ensure that the Artwork does not infringe upon any third party's intellectual property rights or moral rights. Artist shall defend, indemnify and hold Town, its officials, directors, officers, employees, agents, and volunteers free and harmless, pursuant to the indemnification provisions of this Agreement, from any claim or liability arising out of any failure or alleged failure to comply with such laws, rules or regulations, and/or any actual or alleged infringement of any third party's intellectual property rights or moral rights.

3.2.5 Insurance.

3.2.5.1 Time for Compliance. Artist shall not commence work under this Agreement until it has provided evidence satisfactory to the Town that it has secured all insurance required under this section. In addition, Artist shall not allow any subconsultant to commence work on any subcontract until it has either: (i) provided evidence satisfactory to the Town that the subconsultant has secured all insurance required under this section; or (ii) procured insurance covering each subconsultant to the same extent as Artist.

3.2.5.2 Types of Insurance Required. As a condition precedent to the effectiveness of this Agreement for work to be performed hereunder, and without limiting the indemnity provisions of the Agreement, the Artist, in partial performance of its obligations under such Agreement, shall procure and maintain in full force and effect during the term of the Agreement the following policies of insurance. If the existing policies do not meet the insurance

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requirements set forth herein, Artist agrees to amend, supplement or endorse the policies to do so. If Artist maintains higher limits than the specified minimum limits, Town requires and shall be entitled to coverage for the higher limits maintained by Artist.

(A) **Commercial General Liability:** Commercial General Liability Insurance which affords coverage at least as broad as Insurance Services Office "occurrence" form CG 0001, or the exact equivalent, and shall be no less than \$1,000,000 per occurrence and no less than \$2,000,000 in the general aggregate. Defense costs shall be paid in addition to the limits. The policy shall contain no endorsements or provisions limiting coverage for (1) contractual liability; (2) cross liability exclusion for claims or suits by one insured against another; or (3) contain any other exclusion contrary to the Agreement.

(B) **Automobile Liability Insurance:** Automobile Liability Insurance with coverage at least as broad as Insurance Services Office Form CA 0001 covering "Any Auto" (Symbol 1), or the exact equivalent, covering bodily injury and property damage for all activities shall be in an amount of not less than \$1,000,000 combined limit for each occurrence.

(C) **Workers' Compensation:** Workers' Compensation Insurance, as required by the State of California and Employer's Liability Insurance with a limit of not less than \$1,000,000 per accident for bodily injury and disease.

3.2.5.3 **Endorsements.** Required insurance policies shall not be in compliance if they include any limiting provision or endorsement that has not been submitted to the Town for approval.

(A) The policy or policies of insurance required by Section 3.2.5.2(A), Commercial General Liability and 3.2.5.2(B), Automobile Liability Insurance, shall be endorsed to provide the following:

- (1) **Additional Insured:** Artist agrees to endorse the third party general liability coverage required herein to include as additional insureds Town, its officials, officers, employees and agents, using standard ISO endorsement No. CG 2010 with an edition date of 2010, or such other edition date as may be acceptable to Town. Artist also agrees to require all subcontractors involved in delivery and installation associated with the Project contemplated by this Agreement to do likewise.
- (2) Artist shall provide immediate written notice if (1) any of the required insurance policies is terminated; (2) the limits of any of the required policies are reduced; (3) or the deductible or self insured retention is increased.

(B) The policy or policies of insurance required by Section 3.2.5.2(C), Workers' Compensation, shall be endorsed to provide the following:

- (1) **Waiver of Subrogation:** A waiver of subrogation stating that the

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insurer waives all rights of subrogation against the indemnified parties.

- (2) Artist shall provide immediate written notice if (1) any of the required insurance policies is terminated; (2) the limits of any of the required policies are reduced; (3) or the deductible or self insured retention is increased

3.2.5.4 Primary and Non-Contributing Insurance. All insurance coverages shall be primary and any other insurance, deductible, or self-insurance maintained by the indemnified parties shall not contribute with this primary insurance. Policies shall contain or be endorsed to contain such provisions.

3.2.5.5 Waiver of Subrogation. Required insurance coverages shall not prohibit Artist from waiving the right of subrogation prior to a loss. Artist shall waive all subrogation rights against the indemnified parties. Policies shall contain or be endorsed to contain such provisions.

3.2.5.6 Deductible. Any deductible or self-insured retention must be approved in writing by the Town and shall protect the indemnified parties in the same manner and to the same extent as they would have been protected had the policy or policies not contained a deductible or self-insured retention.

3.2.5.7 Evidence of Insurance. Artist, concurrently with the execution of the Agreement, and as a condition precedent to the effectiveness thereof, shall deliver either certified copies of the required policies, or original certificates and endorsements on forms approved by the Town. The certificates and endorsements for each insurance policy shall be signed by a person authorized by that insurer to bind coverage on its behalf. At least fifteen (15) days prior to the expiration of any such policy, evidence of insurance showing that such insurance coverage has been renewed or extended shall be filed with the Town. If such coverage is cancelled or reduced, Artist shall, within ten (10) days after receipt of written notice of such cancellation or reduction of coverage, file with the Town evidence of insurance showing that the required insurance has been reinstated or has been provided through another insurance company or companies.

3.2.5.8 Failure to Maintain Coverage. Artist agrees to suspend and cease all operations hereunder during such period of time as the required insurance coverage is not in effect and evidence of insurance has not been furnished to the Town. The Town shall have the right to withhold any payment due Artist until Artist has fully complied with the insurance provisions of this Agreement. In the event that the Artist's operations are suspended for failure to maintain required insurance coverage, the Artist shall not be entitled to an extension of time for completion of the Services because of production lost during suspension.

3.2.5.9 Acceptability of Insurers. Each such policy shall be from a company or companies with a current A.M. Best's rating of no less than A:VII and authorized to do business in the State of California, or otherwise allowed to place insurance through surplus line brokers under applicable provisions of the California Insurance Code or any federal law.

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3.3 Fees and Payments.

3.3.1 Compensation. Artist shall receive compensation for the Artwork and the shipping of the Artwork to a location designated by Town, in the amount of Eighty-Two Thousand dollars (\$ 82,000). Extra Work may be authorized, as described below, and if authorized, will be compensated at the rates and manner set forth in this Agreement.

3.3.2 Payment of Compensation. Unless other terms are agreed upon by Town and Artist in writing, Artist shall submit to Town invoices upon completion of the following tasks/phases of the Artwork, but no more frequent than once a month:

EXAMPLE/DRAFT

- \$ 10,000 upon contract execution.
- \$ 20,000 upon completion of structural/foundation design.
- \$ 15,000 once fabrication is approximately 50 percent complete (will require documentation).
- \$ 20,000 once fabrication is complete but not installed
- \$ 17,000 once artwork is installed, accepted by the Town as satisfactory complete, and the long-term maintenance plan is submitted.

3.3.3 Reimbursement for Expenses. Artist shall not be reimbursed for any expenses unless authorized in writing by Town, or included in Exhibit "B" of this Agreement.

3.4 Acceptance of Artwork.

Town agrees to accept the completed Artwork unless:

- a. The Artwork was not completed in substantial conformance with the Proposal or the approved Design Proposal, or
- b. The Artwork as completed, or any portion thereof, does not conform to a reasonable standard of artistic or technical quality. Town shall provide its reasons for this finding to Artist in writing.

Upon the Town's refusal to accept the Work for the reasons stated in subparagraphs A or B, Town shall have the right to: 1) request that Artist correct the deficiencies in the Work within a reasonable time, or 2) terminate this Agreement and recover all sums previously paid to Artist. Enforcement of one such remedy shall not be exclusive nor shall it be deemed an election of such remedy to the exclusion of any other or further remedy. However, nothing contained herein shall limit Town's available remedies at law and equity.

No payments to Artist shall be deemed as a waiver of Town's right to refuse to accept the Work.

If the Town does not agree to accept the Artwork an attempt to the Artist disagrees with the Town's decision, the Town and Artist agree to meet and confer to develop a resolution.

3.5 Intellectual Property and Artist's Warranties.

3.5.1 Copyright. Artist reserves all copyrights and rights of reproduction in the Artwork and Artist shall retain the copyright and the right to claim authorship of the Artwork.

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Nothing herein shall prohibit Artist from making, exhibiting, using selling, or licensing for sale the images contained in the Artwork for any purpose whatsoever. Artist shall retain ownership and possession of any production models or molds created in connection with the completion of the Artwork. Artist also retains the right to dissociate from the Artwork if it is removed, or altered in a way that no longer represents the original intent of the project. If the Town is to relocate the artwork, they will make a reasonable effort to consult the artist in the relocation design.

3.5.2 Waiver of Certain Rights. Artist, as the author and Artist of the Artwork, hereby acknowledges the existence of his or her federal and state statutory moral rights under VARA and CAPA, as those rights are more particularly described in 17 U.S.C. section 106A(a) ("VARA"), and in the California Civil Code section 987 ("CAPA"), and knowingly executes this waiver on the following terms:

- a. Scope: This waiver applies to the following visual work: the Artwork, as described in this Agreement and attached as Exhibit A.
- b. Uses Covered: This waiver applies to all applicable rights reserved to an owner of a lawfully copyrighted work under the copyright laws, including but not limited to, display the visual artwork publicly and to any and all applications in which either the attribution right, the integrity right, or the personal moral right may be implicated.
- c. Waiver: With respect to the Artwork enumerated in subparagraph (a) above and for uses enumerated in subparagraph (b) above, Artist, as the artist and author of the Artwork, hereby expressly and forever waives any and all moral rights arising under 17 U.S.C. section 106A(a) and California Civil Code section 987, and any rights arising under U.S. federal or state law or under the laws of any other country that conveys rights of the same nature as those conveyed under 17 U.S.C. section 106A(a) and California Civil Code section 987, or any other type of moral rights or droit moral.

3.5.3 VARA AND CAPA. As used herein, VARA means 17 U.S.C. section 106A added by the Visual Artists Rights Act of 1990, which confers upon authors of works of visual arts, several types of attribution and integrity rights, including the right to prevent any intentional distortion, mutilation, or other modifications of that work. As used herein, CAPA means the California Art Preservation Act, which confers to artists of works of fine art (original paintings, sculpture, drawings or original work of art in glass, of recognized artistic quality). In addition, this act prohibits the intentional commission of any physical defacement, mutilation, alteration, or destruction of a work of fine art by any person or entity who possesses or owns the fine art.

3.5.4 Warranties of Title. Artist represents and warrants that:

- a. The Artwork is solely the result of artistic effort of the Artist;
- b. Except as otherwise disclosed in writing to Town, the Artwork is unique and original and does not infringe upon any copyright; and
- c. The Artwork is free and clear of any liens from any source whatsoever.

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3.5.5 Warranties of Quality and Condition. Artist represents and warrants that the fabrication of the Artwork will be performed in a professional manner; will be free of defects or qualities which cause or accelerate deterioration of the work; and that reasonable maintenance of the Artwork will not require procedures substantially in excess of those described in the maintenance recommendations by Artist to Town. The warranties described in this section shall remain in place for 1 year after final acceptance of the Artwork by Town. Artist shall, at the request of Town, and at no cost to Town, cure reasonably and promptly any breach of any such warranty which is curable by Artist and which cure is consistent with professional standards, including, for example, cure by means of repair or refabrication of the Artwork. Upon completion of the Artwork, Artist shall supply long-term maintenance instructions to the Town.

3.6 Repair of Work.

In the event repair of the Work is required, at its sole discretion Town may, in its discretion, give Artist the opportunity to perform the repairs for a reasonable fee. In the case of disagreement between Town and Artist as to what constitutes a reasonable fee, the fee determined by an independent conservator selected by Town shall be considered a reasonable fee.

3.7 Town's Rights Regarding the Artwork

3.7.1 Town intends to display the Artwork on a site selected by Town, as represented in the project Request for Qualifications (RFQ) and Exhibit "A." Town may, in its sole discretion: change the position or placement of the Artwork, sell the Artwork, modify or dismantle or destroy the Artwork. However, Artist retains the right to dissociate from the Artwork if it is removed or altered in a way that no longer represents the original intent of the project. If the Town is to relocate the artwork, they will make a reasonable effort to consult the artist in the relocation design.

3.7.2 Town shall have a permanent and irrevocable license to graphically and photographically depict the Artwork for any purpose, including, without limitation, depictions of the Artwork designed to promote the Town, the area in which the Artwork is displayed, and/or Truckee as a visitor destination. Depictions of the Artwork may be included in, or in connection with, commercial or merchandising products or services (e.g., hats, t-shirts), whether or not for sale, without Artist's prior written consent.

3.8 General Provisions.

3.8.1 Termination of Agreement.

3.8.1.1 **Grounds for Termination.** Town may, by written notice to Artist, terminate the whole or any part of this Agreement at any time for a breach or default by Artist or any obligation hereunder, by giving written notice to Artist of such termination and the breach or default for which termination is being made, and specifying the effective date thereof, at least 30 days before the effective date of such termination. Artist shall have 30 days from receipt of such notice to cure the breach or default. If such cure is not timely completed, this Agreement shall terminate. Upon termination, Artist shall be compensated only for those services which have been adequately rendered to Town, in part or whole, and Artist shall be entitled to no

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further compensation. Artist may not terminate this Agreement except in case of a breach or default by Town of its obligations hereunder.

3.8.1.2 Effect of Termination. If this Agreement is terminated as provided herein, Town may require Artist to provide all finished or unfinished artwork or related documents or materials and other information of any kind prepared by Artist in connection with this Agreement. Artist shall be required to provide such document and other information within fifteen (15) days of the request.

3.8.2 Delivery of Notices. All notices permitted or required under this Agreement shall be given to the respective parties at the following address, or at such other address as the respective parties may provide in writing for this purpose:

Artist: _____

Town: Town of Truckee
10183 Truckee Airport Road
Truckee, CA 96161
ATTN: Town Manager

Such notice shall be deemed made when personally delivered or when mailed, forty-eight (48) hours after deposit in the U.S. Mail, first class postage prepaid and addressed to the party at its applicable address. Actual notice shall be deemed adequate notice on the date actual notice occurred, regardless of the method of service.

3.8.3 Cooperation; Further Acts. The Parties shall fully cooperate with one another, and shall take any additional acts or sign any additional documents as may be necessary, appropriate or convenient to attain the purposes of this Agreement.

3.8.4 Attorney's Fees. If either party commences an action against the other party, either legal, administrative or otherwise, arising out of or in connection with this Agreement, the prevailing party in such litigation shall be entitled to have and recover from the losing party reasonable attorney's fees and all other costs of such action.

3.8.5 Indemnification.

3.8.5.1 Scope of Indemnity. Artist will defend, indemnify and hold harmless Town, its directors, officials, officers, employees, volunteers and agents free from and against any liabilities, losses, investigations or inquiries, claims, suits, damages, costs and expenses (including without limitation, reasonable attorneys' fees and expenses) (each, a "Claim") arising out of or otherwise relating to Artist's performance or negligent failure to perform as required by this Agreement, Artist's acts or omissions, or any of Artist's representations or warranties contained in this Agreement. The provisions of this Section 3 shall survive four years past the installation of the Art.

3.8.5.2 Additional Indemnity Obligations. Artist shall defend, with

counsel of Town's choosing and at Artist's own cost, expense and risk, any and all claims, suits, actions or other proceedings of every kind covered by Section 3.8.5.1 that may be brought or instituted against Town or its directors, officials, officers, employees, volunteers and agents. Artist shall pay and satisfy any judgment, award or decree that may be rendered against Town or its directors, officials, officers, employees, volunteers and agents as part of any such claim, suit, action or other proceeding. Artist shall also reimburse Town for the cost of any settlement paid by Town or its directors, officials, officers, employees, agents or volunteers as part of any such claim, suit, action or other proceeding. Such reimbursement shall include payment for Town's attorney's fees and costs, including expert witness fees. Artist shall reimburse Town and its directors, officials, officers, employees, agents, and/or volunteers, for any and all legal expenses and costs incurred by each of them in connection therewith or in enforcing the indemnity herein provided. Artist's obligation to indemnify shall not be restricted to insurance proceeds, if any, received by the Town, its directors, officials officers, employees, agents, or volunteers.

3.8.6 Entire Agreement. This Agreement contains the entire Agreement of the parties with respect to the subject matter hereof, and supersedes all prior negotiations, understandings or agreements. This Agreement may only be modified by a writing signed by both parties.

3.8.7 Governing Law. This Agreement shall be governed by the laws of the State of California. Any action to interpret or enforce this Agreement shall be brought in the Truckee branch of the Nevada County Superior Court.

3.8.8 Time of Essence. Time is of the essence for each and every provision of this Agreement.

3.8.9 Town's Right to Employ Other Artists. Town reserves the right to obtain art from other artists at any time.

3.8.10 Successors and Assigns. This Agreement shall be binding on the successors and assigns of the parties.

3.8.11 Assignment or Transfer. Artist shall not assign, hypothecate, or transfer, either directly or by operation of law, this Agreement or any interest herein without the prior written consent of the Town. Any attempt to do so shall be null and void, and any assignees, hypothecates or transferees shall acquire no right or interest by reason of such attempted assignment, hypothecation or transfer. Artist shall not delegate the conception, design, or artistic direction in the production of the Artwork or substitute any person other than Artist to perform these tasks.

3.8.12 Construction; References; Captions. Since the Parties or their agents have participated fully in the preparation of this Agreement, the language of this Agreement shall be construed simply, according to its fair meaning, and not strictly for or against any Party. Any term referencing time, days or period for performance shall be deemed calendar days and not work days. All references to Artist include all personnel, employees, agents, and subconsultants of Artist, except as otherwise specified in this Agreement. All references to Town include its elected officials, officers, employees, agents, and volunteers except as otherwise specified in this

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Agreement. The captions of the various articles and paragraphs are for convenience and ease of reference only, and do not define, limit, augment, or describe the scope, content, or intent of this Agreement.

3.8.13 Amendment; Modification. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing and signed by both Parties.

3.8.14 Waiver. No waiver of any default shall constitute a waiver of any other default or breach, whether of the same or other covenant or condition. No waiver, benefit, privilege, or service voluntarily given or performed by a Party shall give the other Party any contractual rights by custom, estoppel, or otherwise.

3.8.15 No Third-Party Beneficiaries. There are no intended third party beneficiaries of any right or obligation assumed by the Parties.

3.8.16 Invalidity; Severability. If any portion of this Agreement is declared invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions shall continue in full force and effect.

3.8.17 Prohibited Interests. Artist maintains and warrants that it has not employed nor retained any company or person, other than a bona fide employee working solely for Artist, to solicit or secure this Agreement. Further, Artist warrants that it has not paid nor has it agreed to pay any company or person, other than a bona fide employee working solely for Artist, any fee, commission, percentage, brokerage fee, gift or other consideration contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, Town shall have the right to rescind this Agreement without liability. For the term of this Agreement, no member, officer or employee of Town, during the term of his or her service with Town, shall have any direct interest in this Agreement, or obtain any present or anticipated material benefit arising therefrom.

3.8.18 Equal Opportunity Employment. Artist represents that he/she/it is an equal opportunity employer and shall not discriminate against any subconsultant, employee or applicant for employment because of race, religion, color, national origin, handicap, ancestry, sex or age. Such non-discrimination shall include, but not be limited to, all activities related to initial employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination.

3.8.19 Labor Certification. By its signature hereunder, Artist certifies that he/she/it is aware of the provisions of Section 3700 of the California Labor Code which require every employer to be insured against liability for Worker's Compensation or to undertake self-insurance in accordance with the provisions of that Code, and agrees to comply with such provisions before commencing the performance of the Services.

3.8.20 Authority to Enter Agreement. Artist has all requisite power and authority to conduct his/her/its business and to execute, deliver, and perform the Agreement. Each Party warrants that the individuals who have signed this Agreement have the legal power, right, and authority to make this Agreement and bind each respective Party.

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3.8.21 Counterparts. This Agreement may be signed in counterparts, each of which shall constitute an original.

TOWN OF TRUCKEE

Approved by:

Jen Callaway
Town Manager

Date

Approved as to Form:

Andrew Morris
Town Attorney

Date

ARTIST

Reviewed and Accepted by Artist

Signature

Name

Title

Date

EXHIBIT “A”
THE ARTWORK

EXHIBIT “B”

ARTIST REIMBURSEMENT

Town of Truckee