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July 15, 2011

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DATE: Aug. 31, 2011		

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STATE ENGINEERS OFFICE

Jason King, P.E., Nevada State Engineer
Division of Water Resources
Department of Conservation and Natural Resources
901 S. Stewart Street, Suite 2002
Carson City, NV 89701

Re: National Fish and Wildlife Foundation's Amended
Change Application No. 80700

Dear Mr. King:

Pursuant to Article V, Section 5.4 of the *Administrative Rules and Regulations Regarding Change of Point of Diversion, Manner of Use or Place of Use of Water of the Walker River and its Tributaries and Regarding Compliance with California Fish and Game Code §5937 and Other Provisions of California Law* as amended through June 3, 1996, the United States Board of Water Commissioners ("Board") provides the Nevada State Engineer with the following comments and recommendations within 60 days of receipt of a copy of Amended Change Application 80700 ("Change Application") filed by the National Fish and Wildlife Foundation ("NFWF")¹:

1. The Change Application requests that the manner of use of the full amount of water of Claims Nos. 23, 23-A, 35, 44, 67 and 89 of the Walker River Decree owned by the Applicant, 7.745 cubic feet per second ("cfs"), be changed from irrigation to wildlife purposes. The Applicant proposes water is to be administered for non-diversion in the full amount of the duty under the Claims it owns and not the consumptive use of the Claims. Return flows from this water would not be available for the Chief Deputy Water Commissioner to use in his computation of total amount of water available to serve the vested rights under the Decree as required on page 4 of the *Rules and Regulations for the Distribution of Water of the Walker River Stream System Under the Provisions of Section 15 of Decree Case in Equity C-125, in the United States District Court for the District of Nevada*, adopted September 3, 1953. In addition, pursuant to NRS 533.3703, the State Engineer should consider the consumptive use of the water rights sought to be changed and the consumptive use of the proposed beneficial use of water in determining whether the proposed change in the point of diversion, manner of use and place of use complies

¹ These comments are also provided to assist the State Engineer in complying with NRS 533.0245 which provides that the State Engineer shall not carry out his duties pursuant to NRS Chapter 533 in a manner that conflicts with any applicable provision of a decree or order issued by a state or federal court, an interstate compact or an agreement to which Nevada is a party for the interstate allocation of water pursuant to an act of Congress.

with the provisions of NRS 533.370(5). Further, NRS 533.3703(2) provides that the statute must not be applied by the State Engineer in a manner that is inconsistent with an applicable federal or state decree concerning consumptive use.

2. The Applicant owns a portion of Claim Nos. 23, 23-A, 35, 44, 67 and 89 of the Walker River Decree and the Applicant proposes water is to be administered for non-diversion in the full amount of the duty under the Claims it owns. The Applicant's request to change 7.745 cfs of water under its claims will conflict with existing rights contrary to the Walker River Decree and Nevada law. For example, Claim No. 23 has another water user, Claim No. 35 has two other water users, and portions of Claim Nos. 23A, 44, 67, 89 are owned by the seller of the water rights to NFWF. If there is rotation in the West Highland Ditch, the proposed non-diversion will impact the rotation. Non-diversion affects the efficiency of the ditch. Water is not always called for with an irrigation use and junior rights can use the water under the Decree. Pursuant to the Change Application, it appears the proposed non-diversion will always be called for and this is inconsistent with how the Decree has historically been administered.

3. In previous change applications approved pursuant to the Decree, an Applicant was not able to call for its water approved by a change application until it could put the water to beneficial use. Pages 4-5 of the *Rules and Regulations for the Distribution of Water of the Walker River Stream System Under the Provisions of Section 15 of Decree Case in Equity C-125, in the United States District Court for the District of Nevada*, adopted September 3, 1953, provide: "If at any time the Chief Deputy Water Commissioner through investigation determined that any users' water is not being put to beneficial use, but is going to waste, he shall immediately refuse delivery of water to the said user, unless and until he is satisfied that the water when returned to the user will be put to beneficial use within the meaning of the Decree." The Applicant acknowledges it will not be able to put the water sought to be changed pursuant to the instant change application to beneficial use until it can manage the conveyance of water from the Wabuska Gauge to Walker Lake. There is no provision to monitor that others will not use the non-diverted water. The Applicant should not be able to call for the water sought to be changed until it can put the water to beneficial use. In addition, it is not clear that the agreement necessary and intended to manage the conveyance of water from the Wabuska Gauge to Walker Lake is authorized under the Decree. Paragraph I of the Decree as amended by the Court's Order for Entry of Amended Final Decree to Conform to Writ of Mandate Etc., dated April 24, 1940, forever enjoins and restrains the Defendants in the Decree action and all persons claiming by, through or under them, "from preventing or interfering with the natural flow of said quantities of water from the channels of the said stream and its said tributaries down to and upon said Indian Reservation."

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4. The Change Application provides that the estimated time required to complete the application of water to beneficial use is ten (10) years to serve all priorities. The use applied for is "wildlife purposes in accordance with NRS Chapter 533". "Wildlife purposes" as defined in NRS 533.023 "includes the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats." The place of use in the Application is "within the Walker River from the Weir Diversion Structure serving the West Highland and other Ditches through USGS Wabuska Gauge, then through Weber Reservoir into and including Walker Lake lying within portions of the sections, townships and ranges listed at pages 2-3 of Attachment A to the Change Application. *See also*, pages 2, 3, 4 and 5 of the place of use maps filed with the Change Application. The proposed manner of use and place of use are extremely broad. Merely putting the water in the Walker River below the Weir Diversion Structure would appear to satisfy the requirement that the water be placed to beneficial use in the applied for place of use. Thus, it is not clear if the water will be used in the broad manner of use applied for from the Weir Diversion Structure to Walker Lake and, if so, why 10 years is required to place the water to beneficial use. This information is required to be able to properly administer the Decree if the Change Application is approved as filed. If the manner of use and place of use are not to be so broadly construed, the Change Application needs to be amended.
 5. If the proposed change was granted as applied for, the 7.745 cfs of water under Claim Nos. 23, 23-A, 35, 44, 67 and 89 could be used for "wildlife purposes" including the establishment and maintenance of wetlands, fisheries and other wildlife habitats" from the Weir Diversion Structure serving the West Highland and other Ditches, all along the Walker River to Walker Lake. Historically, there have been no issues of potential interference with or impacts to the Tribe's decreed water rights by other decreed water users because the Tribe's use of water is last on the system. The Change Application proposes a new broad manner of use with new places of use both upstream and downstream from the Tribe's use. Granting the Change Application as filed affects the historical administration of the Decree. Currently, the Weir is the last ditch take-out, then the Stanley Ranch has a river pump prior to the Parker's Gage and Parker's Gage is the last measurement of water on the system. This issue has broader implications as additional change applications are filed to change the manner of use and place of use for additional quantities of Decree water.
 6. It is my understanding is that NRS 533.330 requires that a separate change application be filed with the State Engineer's Office for each water right sought to be changed. Notwithstanding that only one change application was filed for six claims, each claim will have to be reviewed individually to determine how the proposed change will impact others under the Decree.

7. The legal descriptions of the existing place of use for Claim Nos. 23 and 67 do not match the Walker River Irrigation District cards. There is a discrepancy of 1.41 acres for Claim No. 23 and a discrepancy of 2.29 acres for Claim No. 67.
8. It is our understanding that any storage rights associated with Claim Nos. 23, 23-A, 35, 44, 67 and 89 are not included as part of Change Application 80700. The Board reserves the right to address issues related to storage rights associated with these Claims if they are included in the Change Application.
9. Non-diversion of Claim Nos. 23, 23-A, 35, 44, 67 and 89 and placing the water to beneficial use outside the West Highland Ditch area will impact the aquifer in the West Highland Ditch area.
10. Under various federal laws, the purpose of the acquisition of water rights appears to be for delivery or increased delivery of water to Walker Lake. The broad manner of use and place of use applied for could be used for the establishment and maintenance of wetlands, fisheries and other wildlife habitats from the Weir Diversion Structure serving the West Highland and other Ditches, through USGS Wabuska Gauge, then through Weber Reservoir into and including Walker Lake. The broad manner of use and place of use applied for appear to be inconsistent with the stated purpose of the acquisition program. Again, if the manner of use and place of use are not to be so broadly construed, the Change Application needs to be amended.
11. While this issue may only ultimately be resolved by the Court, the Board wanted to bring it to the attention of the Applicant and the State Engineer². The Decree as amended provides at page 73, lines 2-6: “. . . also for regulatory purposes, including a change of point of diversion or of the place of use of any water user, *but no water shall be sold or delivered outside of the basin of the Walker River* except that appurtenant to the lands of Mrs. J A. Conway and R.P. Conway referred to in the foregoing tabulation.” (emphasis added.) This language in the Decree was derived from a stipulation of the parties entered into near the close of the hearing in order to shorten the time of the trial of the action. The language was part of the broader stipulation with respect to the water rights of the parties to this suit which were not determined by the Decree in the suit in Equity No. 731. *Report of the Special Master*, pages 8-11, In Equity Case No. C-125, filed December 30, 1932. Prior to this stipulation, all the defendants in the action except Sierra Pacific

² Article VII, Section 7.1 of the *Administrative Rules and Regulations* provides that new or different objections or arguments not presented to the agency will not be considered by the Court without a showing of good cause for failure of that person to present such objections or arguments in the agency proceedings.

Power Company entered into a stipulation filed with the Court on March 2, 1932 for the purpose of settling and adjusting certain controversies concerning questions of fact involved in the action. The stipulation provided in part: "That excepting the adjudicated appropriation rights of Mrs. J.A. Conway and Richard P. Conway, the rights of the several appropriators and users of water who are parties hereto shall be restricted to application and use on lands with the particular water shed or basin of Walker River, East Walker River, West Walker River, respectively, and their respective tributaries where said water is now used." The Decree was entered to settle the rights of water users of the Walker River for irrigation of the lands of the parties to the suit. Comments made at the time by the attorneys for various parties acknowledged that there was no beneficial use of water that went to Walker Lake. To the undersigned's knowledge, the Decree language which provides "but no water shall be sold or delivered outside of the basin of the Walker River" has never been construed by the Court. There may need to be a determination made by the Court with regard to this prohibition contained in the Decree.

12. While this issue may not be resolved by the State Engineer, the Board wanted to bring it to the attention of the Applicant and the Court. Under the Decree, all costs and expenses of the Board and the Water Master are assessed according to the acreage of the lands irrigated under the Decree. The assessment is based on the place of use of the water. It is not clear if the assessment to NFWF will remain with a change in the manner of use and/or if the place of use sought in the Change Application will be the acreage assessed with the rate of assessment.
13. Article VI, Section 6.1 of the *Administrative Rules and Regulations Regarding Change of Point of Diversion, Manner of Use or Place of Use of Water of the Walker River and its Tributaries and Regarding Compliance with California Fish and Game Code §5937 and Other Provisions of California Law* provides in part, that when an action has been filed in any court which may affect the allocation and distribution of waters of the Walker River, the agency may withhold for good cause shown any pending decision on a change application or compliance application until such court action is concluded. There is litigation pending which may affect the allocation and distribution of waters of the Walker River. The Board brings this provision of the *Administrative Rules and Regulations* to the attention of the State Engineer but takes no position as to whether or not the State Engineer should withhold action on the pending Change Application pursuant to this provision.
14. Because the Decree was entered to settle the rights of water users of the Walker River for irrigation of the lands of the parties to the suit, the question arises whether a Decree holder can own water rights but not own any land or the place of use for which the water is to be placed to beneficial use. Again, this may be an issue for the Court to decide.

Jason King, P.E., Nevada State Engineer
Division of Water Resources
Department of Conservation and Natural Resources
July 15, 2011
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The United States Board of Water Commissioners intends to participate as a party in all proceedings before the Nevada State Engineer concerning Change Application 80700.

If you have any questions regarding the enclosed, please contact my office. Thank you.

Sincerely,

***ALLISON, MacKENZIE, PAVLAKIS,
WRIGHT & FAGAN, LTD.***

By: 
KAREN A. PETERSON, ESQ.

KAP/nf
(King L01)

cc: Members of U.S. Board of Water Commission
Jim Shaw, Water Master
Don Springmeyer, Attorney for National Fish and Wildlife Foundation

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