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12 IN THE OFFICE OF THE STATE ENGINEER

13 OF THE STATE OF NEVADA

14 IN THE MATTER OF CHANGE)
15 APPLICATION NO. 80700 FILED BY) **PRE-HEARING CONFERENCE**
16 THE NATIONAL FISH AND WILDLIFE) **MEMORANDUM OF WALKER RIVER**
17 FOUNDATION) **IRRIGATION DISTRICT**
18 _____)

19 **I. INTRODUCTION.**

20 Pursuant to the Nevada State Engineer's Notice of a pre-hearing conference in this matter
21 for August 31, 2011, the Walker River Irrigation District (the "District") submits this Pre-
22 Hearing Conference Memorandum. This Memorandum is intended to provide the context in
23 which Application No. 80700 was filed, and important background information related to the
24 adjudication of water rights within the Walker River Basin, the administration of those rights,
25 and litigation involving claims to surface and groundwater which is presently pending in the
26 United States District Court for the District of Nevada.

27 The Memorandum attempts to identify the issues raised by Application No. 80700 and
28 the various Protests to it. It will address how and when, in the District's view, certain issues
should be addressed, and the need for adequate time to prepare for a hearing on the merits, as
well as to allow the interested parties an opportunity to explore the potential to resolve some, or

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1 perhaps all, of the issues on the merits. Finally, the District will suggest the manner in which
2 testimony and exhibits should be exchanged in advance of any hearing.

3
4 **II. APPLICATION NO. 80700.**

5 **A. Desert Terminal Lakes Legislation.**

6 Through a series of sections in five public laws, the United States appropriated funds for
7 providing water to Nevada's desert terminal lakes, including Walker Lake. Those laws include
8 Section 2507, Farm and Security Rural Investment Act of 2002, P.L. 107-171 ("Desert Terminal
9 Lake I"), which transferred \$200,000,000 from the Secretary of Agriculture to the Bureau of
10 Reclamation to be used "to provide water to at-risk natural desert terminal lakes." Section 207 of
11 P.L. 108-7 ("Desert Terminal Lakes II") identified the natural desert terminal lakes eligible for
12 benefits from the funding from Desert Terminal Lakes I as Pyramid, Summit and Walker Lakes in
13 Nevada, and authorized the Bureau of Reclamation to provide financial assistance to various
14 governmental and other organizations to carry out the purposes of Desert Terminal Lakes I. Section
15 208 of the Energy and Water Development Appropriations Act of 2006, P.L. 109-103 ("Desert
16 Terminal Lakes III") authorized the Secretary of the Interior to provide up to \$70,000,000 of the
17 appropriated funding to the University of Nevada (Nevada System of Higher Education (the
18 "NSHE")) to do various things, including acquire "from willing sellers land, water appurtenant to
19 land, and related interests in the Walker River Basin, Nevada" for, among other things,
20 "environmental restoration in the Walker River Basin." Section 2807 of P.L. 110-246 ("Desert
21 Terminal Lakes IV") "replenished" the \$200,000,000 by transferring \$175,000,000 from the
22 Secretary of Agriculture to the Bureau of Reclamation in 2008 to be used to lease water, or purchase
23 land, water appurtenant to land and related interests in accordance with Section 208(a)(1)(A) of
24 Desert Terminal Lakes III. Sections 206 through 208 of P.L. 111-851 ("Desert Terminal Lakes V")
25 authorized the Bureau of Reclamation to provide \$66,200,000 to the National Fish and Wildlife
26
27
28

1 Foundation ("NFWF") for various purposes related to Walker Lake, and authorized NFWF to
2 replace the NSHE in connection with its activities under Desert Terminal Lakes III.

3
4 **B. Application No. 80700.**

5 The water rights which are the subject of Application No. 80700 were acquired with funds
6 from the Desert Terminal Lakes Legislation. Application No. 80700 (the "Application") seeks to
7 change the place of use and manner of use of a portion of certain water rights adjudicated by the
8 United States District Court for the District of Nevada in the certain action entitled "The United
9 States of America, Plaintiff v. Walker River Irrigation District, et al., Defendants, In Equity
10 Docket No. C-125" (the "Walker River Action") pursuant to a final decree entered April 14,
11 1936, as amended April 24, 1940 (the "Walker River Decree"). The Application provides that
12 the water will be administered for non-diversion at the Weir Diversion Structure which serves
13 the West Hyland Ditch, Joggles Ditch, Dairy Ditch, SAB Ditch and Sciarani Ditch. The water
14 rights proposed to be changed are presently diverted at the Weir Diversion Structure into the
15 West Hyland Ditch.
16

17 The Application seeks to change the manner of use of the water rights from their decreed
18 use for irrigation to use for wildlife purposes. The Application seeks to change the place of use
19 of the water rights from 646.126 acres of irrigated land located within the boundaries of the
20 District to the Walker River from the Weir Diversion Structure into and including Walker Lake.
21

22 The Application involves water rights with 13 different priority dates ranging from as
23 early as 1874 to as late as 1906. The largest water right is appurtenant to 145.83 acres and has a
24 priority date of 1880, and the smallest water right is appurtenant to 4.0 acres and has a priority
25 date of 1904. The Application seeks to change the full flow rate allowed for each water right at
26 the point of diversion from the Walker River by the Walker River Decree.
27
28

1 The Application provides that the period of use will be “as decreed.” The Application
2 proposes that water approved for change be conveyed from the Wabuska Gage to Walker Lake
3 pursuant to an agreement to be negotiated with the Walker River Paiute Tribe (the “Tribe”) and
4 the Bureau of Indian Affairs (the “BIA”). The distance from the Weir Diversion Structure at
5 Yerington to the Wabuska Gage is approximately 12 river miles. The distance from the
6 Wabuska Gage to Weber Reservoir on the Walker River Indian Reservation is approximately
7 21.3 river miles, and from Weber Reservoir to Walker Lake is approximately 24.3 river miles.
8

9 Finally, the Application states that “Applicant will withdraw 646.16 acres of associated
10 supplemental groundwater rights in the existing places of use as a condition of exercise
11 following approval by the State Engineer and the U.S. District Court.” The specific associated
12 supplemental groundwater rights are not identified in the Application. However, they appear to
13 include all or portions of Nevada Permit Nos. 58752, 58753, 58755 through 58759, 65262
14 through 65265, 68003, 68399, 68401 and 71533, and any other permits for supplemental
15 groundwater rights associated with the lands to which the surface water rights being changed are
16 appurtenant.
17

18 NFWF has acquired and presently owns additional water rights with points of diversion both
19 at the Weir Diversion Structure and upstream. However, it has not filed change applications related
20 to those acquisitions. In addition, NFWF will in the future acquire additional water rights within the
21 District for the same purposes and which will also require similar changes. NFWF’s website,
22 concerning the Walker River Basin Restoration Program, indicates at present it owns water rights
23 under the Walker River Decree which allow for the diversion of 28 cubic feet per second from the
24 Walker River (including the rights involved in this Application). The website states that NFWF is
25 exploring new acquisition agreements with “some of the dozens of potential new sellers who have
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27
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1 expressed interest in the Program since early 2010.” Moreover, in April of 2011, the Bureau of
2 Reclamation committed an additional \$88,000,000 of Desert Terminal Lake Funds to NFWF.

3
4 **C. Desert Terminal Lakes - Environmental Analysis.**

5 In September of 2007, the Bureau of Reclamation (“Reclamation”) published notice of
6 intent to prepare an environmental impact statement (“EIS”) and notice of public scoping meetings
7 in the Federal Register. The public scoping meetings were held, and a Draft EIS (“DEIS”) was
8 made available for public comments in July of 2009. In that DEIS, Reclamation stated that it had
9 determined that NEPA compliance was not required because Reclamation had determined that it
10 had no discretion for implementation or control over expenditures of the funds by the recipient.
11 Reclamation relied upon a November, 2008 change in its regulations for that conclusion.
12 Reclamation did not issue a Final EIS, and did not issue a Record of Decision. Instead, it issued a
13 “Revised DEIS.” Reclamation expressly stated that no mitigation measures were developed with
14 respect to adverse impacts.
15

16 As a result of the foregoing, parties, like the District, who participated in the EIS process
17 and who will be impacted by the changes to water rights contemplated under the EIS, and who
18 raised substantial issues with both the process for and the content of the DEIS, were arguably left
19 with no ability to challenge either. Thus, the so-called Revised DEIS has not been subjected to any
20 form of review for adequacy. In addition, as noted above, no mitigation measures for the many
21 adverse impacts identified in that document were developed.
22

23 **III. THE WALKER RIVER DECREE.**

24 The Walker River Decree is somewhat unique when compared to the federal decrees on the
25 Truckee and Carson Rivers. It does not expressly provide for an annual acre foot per irrigated acre
26 water duty for lands with adjudicated water rights, either at the point of diversion from the river or
27 at the farm headgate. Instead, it provides for a flow rate at the point of diversion from the river for
28

1 the irrigated acres. That flow rate is 1.2 cubic feet per second (“cfs”) for each 100 acres for all areas
2 except Bridgeport Valley and Antelope Valley. In the case of those valleys, the flow rate allowed at
3 the point of diversion is 1.6 cfs for each 100 acres.
4

5 The Walker River Decree includes no specific provisions for actual or estimated ditch
6 transportation losses. It does provide for an irrigation season of March 1 to October 31, except for
7 Bridgeport Valley and points above the Coleville Gage on the West Walker. The irrigation season
8 for those areas is March 1 to September 15 of each year. The Walker River Decree does not include
9 any provisions related to maximum diversion in any calendar month.
10

11 The Walker River Court retained jurisdiction for regulatory purposes and for the purposes
12 of appointing a water master to apportion and distribute “the waters of the Walker River, its
13 forks and tributaries in the State of Nevada and in the State of California, including water for
14 storage and stored water, in accordance with the provisions of [the] decree.” On May 12, 1937,
15 the Court entered an order appointing five persons to perform that function. Two of the persons
16 were from Yerington, one was from Smith, one was from Antelope Valley, and one was from
17 Bridgeport. On June 27, 1940, the Court entered an order adding a representative of the Walker
18 River Indian Reservation to the “Board of Water Commissioners.” The orders establishing the
19 Board of Water Commissioners gave that Board the authority to appoint an assistant, Chief Deputy
20 Water Commissioner, who has the day-to-day responsibility of apportioning and distributing the
21 waters of the Walker River, its forks and tributaries in the State of Nevada and in the State of
22 California, including water for storage and stored water, in accordance with the provisions of the
23 Walker River Decree.
24

25 The Board of Water Commissioners, with approval of the Court, may make such rules as
26 may be necessary and proper for the enforcement of the Walker River Decree and for carrying out
27 its purposes. In 1953, the Court entered an order approving detailed “Rules and Regulations for
28

1 Distribution of Water on the Walker River System” (the “1953 Rules and Regulations”). The 1953
2 Rules and Regulations include a formula for determining priorities to be served at any point in time.
3 The Walker River Court, through the United States Board of Water Commissioners, has
4 administered the Walker River in Nevada and California for the last 74 years and continues to do so
5 today.
6

7 The Walker River Decree provides that “parties shall be entitled to change the manner,
8 means, place or purpose of use or the point of diversion of [waters of the Walker River] or any
9 thereof in the manner provided by law, so far as they may do so without injury to the rights of other
10 parties hereto, as the same are fixed hereby.” The Decree also provides that the Court retains
11 jurisdiction for regulatory purposes regarding the point of diversion, manner of use and place of use
12 of waters of the Walker River and its tributaries and that the Court may make such regulations as to
13 notice and form or substance of any application for change, or modification of this Decree, or for
14 change of place or manner of use as it may deem necessary. After numerous hearings and over a
15 period of several years the Court adopted “Administrative Rules and Regulations Regarding Change
16 of Point of Diversion, Manner of Use or Place of Use of Water of the Walker River and Its
17 Tributaries and Regarding Compliance With California Fish and Code Section 5937 and Other
18 Provisions of California Law” (the “Administrative Rules and Regulations”). The Application is
19 subject to the provisions of the Administrative Rules and Regulations.
20
21

22 **IV. THE DISTRICT AND ITS WATER RIGHTS.**

23 The District was formed on April 14, 1919, pursuant to Nevada's Irrigation District Act,
24 which was enacted in that year. There are approximately 246,000 acres of land within the
25 District boundaries. All of these lands are in Lyon County, Nevada. Of the approximately
26 80,041 water right acres in the District along the East Walker River and in Smith and Mason
27 Valleys in Nevada, the Walker River Decree provides for direct diversion rights from the natural
28

1 flow of the West, East and Main Walker River for approximately 45,420 acres. Those direct
2 diversion rights were appropriated by and are owned by individual farmers. They were
3 established under Nevada law.
4

5 The Walker River Decree recognizes the right of the District to store water from the East
6 Walker River in Bridgeport Reservoir in California for distribution to and use upon land within
7 the District. The Decree provides that the District:

8 "is hereby adjudged to be the owner of the flow and use of the flood water of East
9 Walker River and its tributaries for storage in the Bridgeport Reservoir situated on
10 the East Walker River, to the amount of forty-two thousand acre feet, such water
11 to be diverted from said river and stored in said reservoir from the first of
12 November to the first of March of each season irrespective of the rights and
13 priorities hereby adjudged and also the right to divert and store at any time an
14 excess of forty-two thousand acre feet up to fifty-seven thousand acre feet when
there is in the river a quantity of water in excess of the total amount adjudicated to
the parties hereto to the extent of such excess, but water shall not be stored in said
reservoir so as to deprive the parties hereto including the plaintiff and the assigns
of stock water or water for domestic purposes."

15 The Walker River Decree provides that the District is also adjudged to be the owner and entitled
16 to the uses of the flood and unappropriated waters of the East Walker River and its tributaries
17 under an application for permit to the State Water Commission of California as follows:

18 "Fifteen thousand acre feet per annum of the flood and unappropriated waters of
19 East Walker River for storage in Bridgeport Reservoir, or so much thereof as can
20 be beneficially used, being the excess over the present capacity of said reservoir
21 and the amount allowed under permit No. 2536 of said Commission approved
June 18, 1926."

22 Permit No. 2536 is now California Water Right License No. 9407 which allows the storage of
23 39,700 acre feet of water in Bridgeport Reservoir from about September 1 of each year to about
24 July 20 of the succeeding year with a priority date of August 18, 1919.

25 In addition, the Walker River Decree recognizes the right of the District to divert water
26 from the West Walker River in California into Topaz Lake Reservoir, located partly in California
27
28

1 and partly in Nevada, for distribution and use upon lands within the District. The Decree
2 provides that the District:

3
4 “is hereby adjudged to be the owner of the flow and use of flood water of West
5 Walker River and its tributaries for storage in Topaz Lake Reservoir situated near
6 West Walker River, to the amount of fifty thousand acre feet, such water to be
7 diverted and stored in said reservoir from the first of November to the first of
8 March of each season irrespective of the rights and priorities hereby adjudged and
9 also the right to divert and store at any time an excess of fifty thousand acre feet
10 up to eighty-five thousand acre feet when there is in the river a quantity of water
11 in excess of the total amount adjudicated to the parties hereto to the extent of such
12 excess, but water shall not be stored in said reservoir so as to deprive the parties
13 hereto including the plaintiff and its assigns of stock water or water for domestic
14 purposes.”

15 The Walker River Decree provides that the District is also adjudged to be:

16 “the owner and entitled to the use of the flood and unappropriated waters of West
17 Walker River and its tributaries under applications for permits for the use of water
18 made to the State Water Commission of the State of California, as follows:

19
20 Thirty-five thousand acre feet per annum of the flood and unappropriated
21 water of West Walker River and its tributaries for storage in Topaz Lake
22 Reservoir, or so much thereof as can be beneficially used, being the excess over
23 the present capacity of said reservoir and the amount allowed under permit No.
24 2537 of said Commission approved June 18, 1926.

25
26 Two hundred acre feet per annum of the waters of the unnamed stream
27 flowing into Topaz Lake Reservoir, formerly Alkali Lake, for storage in said
28 reservoir, or so much thereof as can be beneficially used, under permit No. 2538
of said Commission approved June 18, 1926.”

Permit No. 2537 is now California Water Right License No. 6000 which allows for the storage of
57,580 acre feet of water in Topaz Lake Reservoir from about October 1 of each year to about
July 15 of the succeeding year with a priority date of February 21, 1921. Permit No. 2538 is now
California Water Rights License No. 3987 which allows for the storage from an unnamed stream
of 200 acre feet of water in Topaz Lake Reservoir from January 1 to December 31 of each year
with a priority date of October 28, 1921. The District is also the owner of Nevada Certificate of
Appropriation No. 4972 which allows for the storage from an unnamed stream of 1,500 acre feet

1 of water in Topaz Lake Reservoir from April 1 to October 31 of each year with a priority date of
2 November 3, 1921.

3
4 The District also holds rights to additional water from the West Walker River, East
5 Walker River and Main Walker River pursuant to permits and certificates issued by the Nevada
6 State Engineer. In addition, the District holds rights to underground water pursuant to a permit
7 and certificate issued by the Nevada State Engineer.

8 Because of their relatively small storage capacity, Bridgeport and Topaz Lake Reservoirs
9 are not large enough to store all of the water of the Walker River. Thus, lands within the
10 boundaries of the District do not have a single priority common water right as do lands within
11 other irrigation districts. Lands within the boundaries of the District retained their appurtenant
12 water rights for the direct diversion of water from the natural flow of the Walker River as
13 recognized by the Walker River Decree. In addition, because of those facts, all but two of the
14 ditches within the District are owned, operated and maintained by private ditch companies or
15 tenant-in-common ditches through private assessments.
16

17 **V. THE EVOLUTION OF LITIGATION CONCERNING THE RIGHTS TO WATER**
18 **FROM THE WALKER RIVER.**

19 **A. Early Attempts to Determine Claims to the Waters of the Walker River - *Miller***
20 **& *Lux v. Rickey; Pacific Livestock v. Rickey.***

21 In 1902, Miller & Lux brought an action in the United States District Court for the
22 District of Nevada against Rickey and others to enjoin interference with its use of water of the
23 Walker River in Nevada. In 1904, Rickey Land & Cattle Co. commenced two actions in a
24 California state court against Miller & Lux to quiet its title and to establish its prior right to
25 waters on the East and West Forks of the Walker River. *See, Rickey Land & Cattle Company v.*
26 *Miller & Lux*, 218 U.S. 258 (1910); *see also, Miller & Lux v. Rickey*, 127 F. 573 (D. Nev. 1904);
27 *Miller & Lux v. Rickey*, 146 F. 574 (D. Nev. 1906); *Rickey Land & Cattle Co. v. Miller & Lux*,
28 152 F. 11 (9th Cir. 1907).

1 In 1906, Miller & Lux and other defendants sought to enjoin the proceedings in the
2 California actions on the grounds that the United States District Court for the District of Nevada
3 had acquired prior jurisdiction. The Supreme Court of the United States agreed and prosecution
4 of the California actions was enjoined. *Rickey*, 218 U.S. 258. Ultimately, a final decree (the
5 “Rickey Decree”) was entered by the United States District Court for the District of Nevada in
6 1919. *See, Pacific Livestock Company v. Thomas Rickey, et al.*, No. 731, Final Decree (D. Nev.
7 1919).

8 **B. The Walker River Decree – *United States of America v. Walker River***
9 ***Irrigation District, et al.***

10 The United States, the Tribe, and many other claimants to the waters of the Walker River
11 had not been joined as parties in the *Rickey* litigation. Their rights were not determined by the
12 Rickey Decree. Therefore, in 1924, the United States commenced the Walker River Action. An
13 amended complaint was filed in 1926. Some 253 defendants, all appropriators and users of
14 waters of the Walker River, East Walker River, West Walker River and the tributaries thereof,
15 were named as defendants. *See, United States v. Walker River Irrigation District, et al.*, 11 F.
16 Supp. 158, 159 (D. Nev. 1935).

17 The action included persons and entities who had been parties to or were successors to
18 parties to the *Rickey* litigation. It also included persons who had not been parties to the *Rickey*
19 litigation, although they clearly had established rights to waters of the Walker River prior to the
20 commencement of the *Rickey* litigation. Finally, it included persons who had acquired rights to
21 the waters of the Walker River after commencement of the *Rickey* litigation. *See, Walker River*
22 *Decree at 10-50, 50-63A and 63A-70.*

23 The United States alleged that because of its ownership of the Walker River Indian
24 Reservation, which had been reserved and set aside for the Tribe, it was the owner of 150 cubic
25 feet per second of waters of the Walker River and its tributaries. It sought to quiet title thereto
26 and to restrain defendants from interfering with the alleged right. 11 F. Supp. at 159. Issues
27 raised by the pleadings were referred to a special master who took testimony intermittently from
28 March 22, 1928 through December 30, 1932. Commencing May 22, 1933, hearings were held

1 before the court on exceptions to the report and findings of the special master. 11 F. Supp. at
2 162.

3 The United States relied upon the ruling of the Supreme Court in *Winters v. United*
4 *States*, 207 U.S. 564 (1908). The trial court ruled that the United States' claim to water for the
5 Walker River Indian Reservation had to be adjudged, measured and administered in accordance
6 with the laws of appropriation as established by Nevada. 11 F. Supp. at 167; *see also, United*
7 *States v. Walker River Irrigation District*, 14 F. Supp. 11 (D. Nev. 1936).

8 After the Walker River Decree was entered, an appeal followed. The Court of Appeals
9 held that the rule of law established in *Winters v. United States* applied and that there had been
10 an implied reservation of water at the time the Reservation was set aside. The Court of Appeals
11 accepted the original report of the special master with respect to the quantity of water reserved.
12 *See, United States v. Walker River Irrigation District*, 104 F.2d 334, 339-40 (9th Cir. 1939). The
13 Walker River Decree was amended to conform to be mandate of the Court of Appeals on April
14 24, 1940.

15
16 The Walker River Decree as amended in 1940 provides that, for use on the Walker River
17 Indian Reservation, the United States is entitled to 26.25 cubic feet per second of the natural flow
18 of the Walker River during the irrigation season for 180 days to irrigate 2,100 acres of land and
19 to flows reasonably necessary for domestic, stock watering and power purposes, all with a
20 priority of November 29, 1859.

21
22 **C. Groundwater Rights in the Walker River Basin.**

23 The Walker River Decree is silent with respect to rights to groundwater. With respect to
24 groundwater, California applies a "reasonable use" or "correlative rights" rule drawn from the
25 riparian doctrine of surface water law. Landowners in California may use groundwater on their
26 overlying land provided such use is reasonable. No permit from California water authorities is
27
28

1 required. *See, e.g., Katz v. Wilkinshaw*, 74 P. 766, 772 (Cal. 1903). Groundwater is in fact used
2 in California within the Walker River Basin.

3
4 Since about 1960, the Nevada State Engineer has issued numerous permits to use
5 groundwater in Nevada along the Walker River. By far the largest quantity of those rights are
6 “supplemental,” *i.e.*, they are limited to use of no more than 4.0 acre feet per acre on the land
7 from all sources of water, including surface water from the Walker River.

8 The District holds Permit No. 25813 for 9.01 cfs of groundwater not to exceed 3269.63
9 acre feet per season for use on specific lands. This right is further limited to no more than 4.0
10 acre feet per acre from all sources. Other groundwater rights within the District are owned by
11 individual farmers and other entities.

12
13 The State Engineer has also issued permits for groundwater use in the Schurz, Walker
14 Lake and Hawthorne areas. Included within those permits are permits issued to the United States
15 for the Hawthorne Army Ammunition Plant and to Mineral County for use in Hawthorne.
16 Groundwater is used on the Walker River Indian Reservation without permits issued by the
17 Nevada State Engineer.

18
19 **D. Pending Litigation.**

20 There are several matters pending before the United States District Court for the District
21 of Nevada involving claims to surface water from the Walker River and its tributaries and to
22 groundwater within the Walker River Basin. Those matters are summarized below.

23 **1. Claims of the Walker River Paiute Tribe and of the United States.**

24 The Tribe filed a claim in the Walker River Action in 1992, seeking recognition of a right
25 to store water in Weber Reservoir¹ for use on the Walker River Indian Reservation and for a
26

27
28

¹ Although Weber Reservoir was constructed by the United States in the 1930s, there is no
recognized water right for it.

1 federal reserved water right for 167,460 acres of land included in the Reservation in 1936. These
2 claims are in addition to the direct flow rights awarded to the United States for the benefit of the
3 Tribe in the *Walker River Decree*. Also in 1992, the United States filed a similar claim to water
4 for the benefit of the Walker River Indian Reservation.
5

6 In 1997, the Tribe amended its earlier claim to include groundwater claims for the entire
7 Reservation. In 1997, the United States also amended its claim to include several specific
8 claims to surface water and groundwater in the Walker River Basin for other federal interests,
9 including the Hawthorne Army Ammunition Plant, the Toiyabe National Forest, the Mountain
10 Warfare Training Center of the United States Marine Corps and the Bureau of Land
11 Management. The United States' First Amended Claim also advances claims for surface and
12 groundwater for the Walker River Indian Reservation, the Yerington Reservation, the Bridgeport
13 Paiute Indian Colony and several individual Indian allotments.
14

15 On April 19, 2000, the Court in the Walker River Action entered a Case Management
16 Order for purposes of managing these new claims asserted by the Tribe and the United States,
17 and for purposes of identifying who needed to be joined and served. With respect to joinder and
18 service resulting from the claims related to groundwater, the Case Management Order provides:
19

20 We have also expanded the categories of water rights holders who have
21 permits to pump groundwater issued by the State of Nevada and who are required
22 to be served with process to additional Sub Basins in Nevada. This has been done
because of the claim that underground and surface waters constitute a single
source.

23 Case Management Order at 3. The categories of water right holders to be joined and served were
24 identified by the Court as follows:

25 (a) The successors in interest to all water rights holders under the
26 Decree (April 14, 1936), modified, Order for Entry of Amended Final Decree to
27 Conform to Writ of Mandate, Etc. (April 24, 1940) ("1936" Decree).
28

1 (b) All holders of surface water rights under the laws of the States of
2 Nevada and California in the Walker River Basin (*sic*) who are not presently
3 parties to this adjudication.

4 (c) All holders of permits or certificates to pump groundwater issued
5 by the State of Nevada and domestic users of groundwater within Sub Basins 107
6 (Smith Valley), 108 (Mason Valley), 110A (Schurz Subarea of the Walker Lake
7 Valley), and 110B (Walker Lake Subarea of the Walker Lake Valley).

8 (d) All holders of permits or certificates to pump groundwater issued
9 by the State of Nevada within Sub Basins 106 (Antelope Valley), 109 (East
10 Walker), and 110C (Whiskey Flat-Hawthorne Subarea of Walker Lake
11 Groundwater Basin).

12 (e) All users of groundwater for irrigation in California.

13 (f) All holders of "vested rights" to the use of groundwater under the
14 laws of the State of Nevada within the Walker River Basin.

15 (g) All municipal providers in Nevada within the Walker River Basin
16 who currently use groundwater.

17 (h) All municipal providers in California within the Walker River
18 Basin who currently use groundwater.

19 (i) All industrial users in Nevada within the Walker River Basin who
20 currently use groundwater.

21 Case Management Order at 5-6.

22 These claims have not yet reached any of the issues on the merits.

23 2. Claims of Mineral County.

24 In October, 1994, Mineral County, moved to intervene in the Walker River Action for
25 purposes of filing a complaint in intervention related to Walker Lake. As a result of that filing, a
26 status conference was held and, the district court entered an Order Requiring Service of and
27 Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County.

28 On approximately March 10, 1995, Mineral County amended its filing in the Walker
River Action. Mineral County's amended filing seeks "an adjudication and reallocation of the
waters of the Walker River to preserve minimum levels in Walker Lake." To achieve that goal,
Mineral County seeks "the right to, at least, 127,000 acre feet of flows annually reserved from
the Walker River." It asks that water rights holders be enjoined so that 240,000 acre feet of
water reaches Walker Lake annually until the litigation is concluded.

1 The Mineral County motion to intervene has not been briefed or heard on the merits.

2
3 **3. The Place of Measurement for the Tribe's Decreed Right.**

4 The Walker River Decree provides:

5 I. The plaintiff, United States of America, is hereby adjudged and decreed to
6 be the owner of the right to divert a continuous flow of 26.25 cubic feet per
7 second of the natural flow of the Walker River to be diverted from said stream
8 upon or above the Walker River Indian Reservation during the irrigation season of
9 180 days of each year for the irrigation of 2100 acres of land situated in the
10 Walker River Indian Reservation. . . .

11 The 1953 Rules and Regulations state that "a gaging station at Parkers at the lower end of Mason
12 Valley will measure water for the Indian Service." Those Rules also provide for a "plan of
13 distribution" for each irrigation season.

14 Since about 1988, that annual Plan of Distribution has stated that "a gaging station at
15 Parkers at the lower end of Mason Valley will measure [the 26.25 cfs] for the Indian Service."²
16 Since 1993 and continuing to the present time, the United States and the Tribe have asserted, but
17 not litigated, that the Tribe's right should be measured at a new gage on the Reservation, known
18 as the Cow Camp Gage, or alternatively that additional water must be delivered to the Parker's
19 (Wabuska) Gage to account for transportation losses from that Gage to Weber Reservoir, which
20 is about 21.3 river miles.

21 **VI. SUGGESTIONS FOR THE ORDERLY RESOLUTION OF THE ISSUES
22 RELATED TO APPLICATION NO. 80700 AND THE PROTESTS THERETO.**

23 **A. Introduction.**

24 In general, the Protests to this Application include at least all of the following protest
25 grounds: (1) the changes proposed by the Application conflict with existing water rights; (2) the
26 changes proposed by the Application will adversely affect the cost of water for other holders of
27 water rights; (3) the changes proposed by the Application will lessen the efficiency in the delivery

28 ² This is the Wabuska Gage.

1 or use of water; (4) before acting on the Application, the State Engineer should exercise his
2 discretion to require hydrological and environmental and other studies pursuant to N.R.S. 533.368;
3 (5) the Application does not contain sufficient information necessary for a full understanding of the
4 changes proposed; (6) the State Engineer should consider postponing action on the Application until
5 pending court actions become final; and (7) the changes proposed by the Application threaten to
6 prove detrimental to the public interest.
7

8 Several of those protest grounds involve issues which should be properly presented, briefed
9 and decided before a hearing on the merits. Others are matters which, with some discussion among
10 interested parties, might be susceptible of resolution. Still others are matters which may only be
11 resolved through a hearing and State Engineer decision.
12

13 **B. Protest Grounds Which Should Be Considered and Decided in the Pre-hearing**
14 **Stage of These Proceedings.**

15 **1. Requiring Studies.**

16 Although the details are stated by the Protestants in a variety of ways, a number of them
17 suggest that the State Engineer should consider whether to exercise his discretion to require
18 completion of certain studies prior to scheduling a hearing on the merits. The District has made this
19 request. *See* Exh. A to District Protest at 14-15. The Tribe has included a request that technical
20 studies by the USGS on the Lower Walker River become available, and technical data supporting
21 proper measurement and accounting become available. *See* Tribe Protest, Exh. A at paras. 7; 8; 12;
22 13; *see also* Nevada Farm Bureau Federation Protest; David Sceirine Protest; Campbell Canal
23 Company Protest; Eufrazia LLC Protest; G&H Mutual Ditch Company Protest; LJ Land Limited
24 Protest; Mickey Mutual Ditch Company Protest; Newhall Mutual Ditch Company Protest; Snyder
25 Livestock Company, Inc. Protest; Eddie R. and Theresa Snyder Trust Protest; and Jim and Bunny J.
26 Snyder Protest.
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1 The changes requested by this Application involve complicated issues of measurement,
2 accounting and distribution of water not heretofore confronted on this River system. Those changes
3 cannot be considered in isolation, but must instead be considered with the recognition that
4 additional applications will follow this one. The Tribe in particular, and the BIA to a lesser extent,
5 have placed great emphasis on a "Conveyance Agreement" to be negotiated by the Tribe, the United
6 States and the Applicant. NFWF has made a similar reference in the Application. The Tribe asserts
7 that this Conveyance Agreement will protect the "Tribe's rights" and must address "river flows and
8 measurement on and upstream of the Reservation" and must be "recognized by the State Engineer
9 and the Federal Court." Tribe's Protest, Exh. A at 10.

11 These are not issues unique to the Tribe, the "Tribe's rights," or the Reservation. They are
12 issues which are important to all water right holders on the Walker River. To the extent that studies,
13 or an agreement is required, they must involve all interested parties. The Court, through its duly
14 appointed Board of Water Commissioners, must continue to have the authority to regulate the
15 Walker River System, including all headgates and diversion structures on the system to ensure that
16 any water right approved for delivery to Walker Lake is in fact delivered in accordance with the
17 approval and with the Walker River Decree.

18 Finally, as discussed in Section II.C. above, there has been no final environmental analysis
19 conducted with respect to the changes contemplated by the Application and the applications that
20 will be filed in the future requesting transfers of water to Walker Lake. N.R.S. 533.368 specifically
21 provides that the State Engineer may require environmental studies and other studies.

22 **2. The Need for More Information.**

23 A number of the Protests also contend that the Application does not contain sufficient
24 information necessary for a full understanding of the changes proposed. The District has raised that
25 issue in connection with certain supplemental groundwater rights which are to be withdrawn as a
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1 condition of exercise following approval by the State Engineer and the Walker River Decree Court.
2 District Protest, Exh. A at 15. The BIA has raised a similar ground. *See* BIA Protest, Attachment 1
3 at paras. 1-2. The Tribe has also included similar protest grounds. *See* Tribe Protest, Exh. A at
4 para. 2; 8; 11; 12 and 13. Whether, and if so, what, additional information is needed for an
5 understanding of the changes proposed, should be presented and decided early on in the process.
6

7 **3. Pending Court Actions.**

8 The Protests of a number of the parties suggest that the State Engineer should consider
9 postponing action on the Application until pending court actions become final. Such postponement
10 is allowed by N.R.S. 533.370(3)(b) and by Section 6.1 of the Administrative Rules and Regulations.
11 The District has raised this question directly. *See* District Protest, Exh. A at 15-16. The Tribe has
12 raised it in an indirect fashion in a number of places in its Protest. For example, in paragraph 3 of
13 Exh. A to its Protest, the Tribe notes the claims that it is asserting, and states that the Tribe's rights
14 and use of water for storage in Weber Reservoir must be acknowledged and adequately accounted
15 for. *See also* paragraphs 4, 6, 12 and 13 of Exh. A to the Tribe's Protest. Moreover, in paragraph
16 14 of the Protest, the Tribe states that Nevada must implement a groundwater management plan
17 upstream of the Reservation, including regulation of groundwater permits by priorities, in order to
18 "ensure that off irrigation season natural flows and long term base flows in the Walker River
19 downstream of the points of diversion are not detrimentally harmed due to the potential for increase
20 in usage of groundwater or loss of irrigation recharge as a result of transferring surface water rights
21 to Walker Lake."
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23

24 The pending litigation involving claims for recognition of additional rights to water present
25 issues which should be carefully considered at the outset. Both N.R.S. 533.370(2) and the Walker
26 River Decree require that changes not conflict with "existing rights," or injure rights fixed by the
27 Decree. The claims made by the Tribe are neither. The District's position in the pending litigation
28

1 is that such rights do not now and never have existed, or are barred from assertion by principles of
2 claim preclusion. This process should not become the forum in which those issues and issues
3 concerning the relationship between surface and groundwater are litigated. *See, e.g., Pyramid Lake*
4 *Paiute Tribe v. Ricci*, 245 P.3d 1145, 1148-49 (Nev. 2010). Therefore, the question of
5 postponement because of the pending court actions must be carefully considered at the outset.
6

7 **4. Conclusion.**

8 It is not the purpose of the Pre-Hearing Conference to decide the foregoing issues, and the
9 District does not suggest that decisions be made with respect to them. Rather, the District suggests
10 that the State Engineer establish a schedule by which motions related to the foregoing protest
11 grounds be filed and briefed by the interested parties. Once those issues have been decided by the
12 State Engineer, a second pre-hearing conference should be scheduled for purposes of moving
13 forward with the orderly and efficient disposition of the remaining issues.
14

15 **C. Protest Grounds and Other Issues Which Should Be Discussed by Interested**
16 **Parties.**

17 There are some issues which may be susceptible of resolution by discussions between the
18 Applicant and interested parties. One such issue relates to assuring the payment of assessments
19 needed to keep ditch companies and tenant-in-common ditches whole, as well as assessments levied
20 by the United States Board of Water Commissioners. *See* District Protest at Exh. A, pg. 11; *see also*
21 Campbell Canal Company Protest; Nichol Merritt Ditch Company, Inc. Protest; G&H Mutual Ditch
22 Company Protest; Greenwood Mutual Ditch Company Protest; Mickey Mutual Ditch Company
23 Protest; Newhall Mutual Ditch Company Protest; and Spragg Woodcock Mutual Ditch Company
24 Protest. *See also* D&GW Ditch Company Protest. The Applicant has, on numerous occasions,
25 indicated a willingness to ensure continued payment of such assessments, and it may be that that
26 issue can be managed early and before the hearing process commences.
27
28

1 Another issue, which is related to conflict with existing rights, is the consumptive use
2 portion of the water rights proposed to be changed. Subject to State Engineer approval, interested
3 parties might be able to agree on an appropriate quantity, even if they might continue to disagree on
4 its significance with respect to the Application.
5

6 A third issue relates to the manner in which the Applicant proposes to mitigate the
7 consequences of removing irrigation from parcels of lands which will no longer be irrigated. Again,
8 the Applicant has made it clear that such mitigation is planned.

9 During the time allowed for briefing and deciding the issues referenced in VI.B. above,
10 interested parties can explore the possibilities for discussing, and perhaps resolving, some of these
11 issues.
12

13 **D. Preliminary Suggestions Related to a Hearing on the Merits.**

14 The issues on the merits presented by the Application are complex and new to a river system
15 and Decree which are somewhat unique. From the District's perspective, it is important that
16 adequate time be allowed all parties and their witnesses to prepare for a hearing on the merits. To
17 the extent that any party intends to rely on and present evidence related to a computer model
18 (which, from the District's understanding, are not yet fully developed) sufficient time must be
19 allowed for access to such models to assess their assumptions and reliability.
20

21 Because there is a fairly large number of Protestants who are not represented by counsel,
22 consideration needs to be given to any special procedures needed to facilitate their participation in
23 the proceedings. Among other things, such procedures would include service on them and by them
24 of all material filed in this matter.

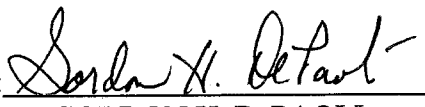
25 At this point in time, the District is of the view that the most expeditious manner of
26 proceeding with respect to a hearing on the merits is to require parties represented by counsel to
27 prepare and simultaneously file and serve written testimony, exhibits, lists of exhibits, and
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qualifications for all witnesses who will be presented by them at the hearing. The District suggests that such represented parties file and serve all of this material in written and electronic format. Until such time as the preliminary matters discussed above are decided, the District is not prepared to suggest the order in which NFWF and Protestants should proceed.

Dated this 26th day of August, 2011.

WOODBURN AND WEDGE

By: 

GORDON H. DePAOLI
DALE E. FERGUSON
DOMENICO R. DePAOLI

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AFFIDAVIT OF SERVICE

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

Holly Dewar, being first duly sworn, deposes, and states under penalty of perjury, as follows:

I am an employee of the law firm of Woodburn and Wedge, a citizen of the United States, over 18 years of age, and not an interested person to the above-entitled matter.

On August 26, 2011, I deposited in sealed envelopes in the United States Mail, postage fully prepaid, a true and correct copy of the *Pre-Hearing Conference Memorandum of the Walker River Irrigation District* filed in the above entitled matter, addressed to each of the names and addresses as follows:

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