

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

GORDON H. DePAOLI
Nevada State Bar No. 0195
DALE E. FERGUSON
Nevada State Bar No. 4986
DOMENICO R. DePAOLI
Nevada State Bar No. 11553
Woodburn and Wedge
6100 Neil Road, Suite 500
Reno, Nevada 89511
Telephone: 775/688-3000

RECEIVED

2011 OCT 21 PM 2:43

STATE ENGINEER'S OFFICE

State 'S EXHIBITS 9
DATE: _____

Attorneys for Walker River Irrigation District

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF CHANGE)
APPLICATION NO. 80700 FILED BY) WALKER RIVER IRRIGATION
THE NATIONAL FISH AND WILDLIFE) DISTRICT'S STATEMENT OF ISSUES
FOUNDATION) TO BE CONSIDERED PRIOR TO A
_____) HEARING ON THE MERITS

I. INTRODUCTION.

As a result of the August 31, 2011 Prehearing Conference in this matter, the parties were directed to submit an outline of legal and factual issues which should be addressed in some fashion prior to a hearing on the merits of Application No. 80700. See 8/31/2011 Tr. p. 49, ln. 19 - p. 53, ln. 12. Based upon the discussion which took place at that time, it is the Walker River Irrigation District's (the "District") understanding that the issues to be submitted are those which a party believes the State Engineer should either decide or provide direction on prior to a hearing on the merits because the decision or direction will facilitate the orderly disposition on the merits. See, e.g., 8/31/2011 Tr. p. 52, ln. 12 - p. 53, ln. 6. It is also the District's understanding that briefs on proposed issues were not to be submitted at this time. The State Engineer will determine the extent to which briefing is required after a review of the issues submitted. See, e.g., *Id.*, p. 49, lns. 19-25; p. 50, ln. 17 - p. 51, ln. 8. Therefore, detailed and formal briefing on

1 some or all of the issues submitted will take place only upon further order of the State Engineer.
2 The District's submission here is based upon those understandings.

3
4 In some cases, an issue should be decided prior to a hearing on the merits. In other cases,
5 the Engineer should provide guidance on how the issue is to be considered or addressed in the
6 evidence to be presented at the hearing on the merits. In still others, more information is
7 required before one can determine if an early decision, or early guidance, would be helpful.

8 The District suggests that the following general topics are matters within the direction
9 provided at the August 31, 2011 Prehearing Conference:

- 10 1. Additional information necessary for a full understanding of the proposed change;
- 11 2. Whether, and if so, how, the proposal to retire certain supplemental underground
12 water rights relate to any of the issues the State Engineer must consider and decide in connection
13 with Application No. 80700;
- 14 3. Whether the State Engineer should require any studies under N.R.S. 533.368
15 before he acts on Application No. 80700 and, if so, on what subject or subjects;
- 16 4. Information related to additional, but similar, applications to be filed by the
17 National Fish and Wildlife Foundation ("NFWF") involving changes to irrigation water rights
18 which NFWF has acquired with points of diversion and places of use at and upstream of the
19 Yerington Weir;
- 20 5. Whether, and if so, how, the pending claims for additional water for the benefit of
21 the Walker River Indian Reservation relate to any of the issues the State Engineer must consider
22 and decide in connection with the requested changes;
- 23 6. Whether, and if so, how, the pending claims for water for the benefit of various
24 federal interests within the Walker River Basin relate to any of the issues the State Engineer must
25 consider and decide in connection with the requested changes;
- 26
27
28

1 7. Whether, and if so, how, the questions concerning the place of measurement for
2 the 1859 water right for the Walker River Indian Reservation recognized in the Walker River
3 Decree relate to any of the issues the State Engineer must consider and decide in connection with
4 the requested changes;
5

6 8. Whether, and if so, how, Mineral County's proposed complaint in intervention
7 related to Walker Lake relates to any of the issues the State Engineer must consider and decide in
8 connection with the requested changes;
9

10 9. Whether issues related to ensuring that any changes permitted are administered so
11 as to not conflict with existing rights are properly determined in the first instance by the State
12 Engineer and ultimately by the Walker River Court;

13 10. The evidence, if any, which the State Engineer will consider with respect to the
14 present consumptive use of the water rights being changed; and

15 11. Other issues related to evidence to be submitted at the hearing on the merits.

16 We address each of these topics in turn in greater detail below.

17 **II. ISSUES TO BE DECIDED, OR ON WHICH DIRECTION OR CLARIFICATION**
18 **SHOULD BE PROVIDED, PRIOR TO A HEARING ON THE MERITS.**

19 **A. Additional Information Necessary for a Full Understanding of the Proposed**
20 **Change.**

21 N.R.S. § 533.345(1) allows the State Engineer to require such information as may be
22 necessary to a full understanding of a proposed change in place of diversion, manner of use or place
23 of use of water already appropriated. Application No. 80700 provides for a manner of use for
24 "wildlife purposes in accordance with N.R.S. Chapter 533." "Wildlife purposes" include "the
25 watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife
26 habitats." N.R.S. 533.023. Section 208(a)(2)(B) of Public Law 109-103 ("Desert Terminal Lakes
27 III") provides that the federal funding provided at that time is to be used for acquisitions beneficial
28

1 to "environmental restoration in the Walker River Basin." Section 208(a)(1) and § 208(b)(1) of
2 Public Law 111-85 ("Desert Terminal Lakes V") provide that the federal funding is to be used for
3 the primary purpose of restoring and maintaining Walker Lake, while protecting agricultural,
4 environmental and habitat interests in the Walker River Basin. Finally, N.R.S. 533.330 provides
5 that no application for water may be used for more than one purpose.
6

7 The State Engineer should direct the Applicant National Fish and Wildlife Foundation
8 ("NFWF") to provide additional information which clarifies the "primary" beneficial use sought by
9 the change. This clarification is important for at least two reasons relevant to the State Engineer's
10 ultimate decision here.
11

12 If the change as requested is intended to allow for consumptive uses, for example, for
13 wetlands, between the point of non-diversion and Walker Lake, then those consumptive uses will
14 need to be quantified and their locations identified because they will bear on issues related to the
15 administration of the approved change. In addition, such uses may bear on the public interest
16 determination the State Engineer must make. If, on the other hand, the primary beneficial use is to
17 deliver as much water as possible to Walker Lake, subject only to conveyance losses and not to
18 upstream beneficial consumptive uses, then administration will be different and the public interest
19 issue will be different.
20

21 Pursuant to N.R.S. § 533.345, the State Engineer should require NFWF to submit technical
22 information regarding the administration of any approved change, including, but not limited to, how
23 the administration of the water rights under the changes will be different than how they are presently
24 administered, and how issues related to water delivery efficiencies will be addressed. *See, e.g.,*
25 Bureau of Indian Affairs Protest, Attachment 1 at para. 2; *see also*, Walker River Paiute Tribe
26 Protest, Exh. A at para. 7. Apparently, the United States, Tribe and NFWF expect that some of
27 these issues will be addressed in a "Conveyance Agreement" among them. *See* Application No.
28

1 80700 at para. 15; BIA Protest at para. 3; Tribe Protest at para. 10. Such information, whether it is
2 the subject of any studies referenced below or is set forth in some arrangement among those parties,
3 or among other parties, such as between NFWF and a ditch company, must be available to all
4 parties well before any hearing on the merits and any requirement for the submission of prefiled
5 testimony and exhibits.
6

7 **B. The Relationship of the Retirement of Supplemental Underground Water**
8 **Rights to Issues Which the State Engineer Must Decide in Connection With**
9 **Application No. 80700.**

10 The District understands why NFWF does not intend to voluntarily retire the underground
11 water rights which are supplemental to the surface water rights being changed until such time as
12 those changes have received final approval. However, if NFWF intends to use that conditional
13 retirement in support of its position on any issue which the State Engineer must decide, such as
14 whether the changes proposed conflict with existing rights, or threaten to prove detrimental to the
15 public interest, then the parties should be made aware of that now.

16 **C. Studies, If Any, Under N.R.S. 533.368.**

17 In situations where a governmental agency or other person has not conducted a study that
18 the State Engineer determines is necessary before making a final determination on an application,
19 the State Engineer can require the study. Studies can include hydrological studies, environmental
20 studies, and any other necessary study. *See* N.R.S. 533.368. This section was added to the Nevada
21 Revised Statutes in 1991. It was enacted in direct response to situations where inter-county and/or
22 inter-basin transfers of water were taking place, and to develop information for the protection of the
23 county of origin, including its economic and environmental interests. The statute recognizes that in
24 a variety of situations, other entities may have already undertaken such studies.
25

26
27 In September of 2007, the Bureau of Reclamation ("Reclamation") published notice of
28 intent to prepare an environmental impact statement ("EIS") and notice of public scoping meetings

1 in the Federal Register concerning acquisition of water rights in the Walker River Basin. Although
2 a draft Environmental Impact Statement was in fact prepared and made available for public
3 comment in July of 2009, Reclamation stated that it had determined that compliance with the
4 National Environmental Policy Act ("NEPA") was not required because it had no discretion for
5 implementation or control over expenditures of the funds by the recipient. It, therefore, did not
6 issue a Final Environmental Impact Statement or a Record of Decision, and instead issued a
7 "Revised Draft Environmental Impact Statement."
8

9 Desert Terminal Lakes V expressly requires that federal funding be used for the primary
10 purpose of restoring and maintaining Walker Lake in a manner consistent with protection of
11 agricultural, environmental and habitat interests in the Walker Basin. P.L. 111-85, Sec.
12 208(b)(1)(A). It further provides specific funding (\$10,000,000) for stewardship activities,
13 including water conservation and management, watershed planning, land stewardship, and habitat
14 restoration. *Id.* at Sec. 208(b)(1)(B)(iv). It also provides funding (\$5,000,000) to the University of
15 Nevada and Desert Research Institute ("UNR-DRI") for additional research regarding
16 environmental restoration in the Walker River Basin and for stewardship initiatives to protect
17 agricultural, environmental and habitat interests in the Walker River Basin. *Id.* at Sec.
18 208(b)(1)(B)(v). In addition, pursuant to a number of Public Laws, substantial sums have been
19 allocated to the United States Geological Survey ("USGS") to undertake a variety of hydrologic
20 studies concerning evaluation of proposed actions to increase flows to Walker Lake, to predict how
21 changes in irrigation practices in and below Mason Valley will affect flows in the lower Walker
22 River, and to obtain enhanced monitoring of streamflow diversions and groundwater in the Walker
23 River Basin to assess the effectiveness of water acquisitions to increase flows to Walker Lake.
24

25 Application No. 80700 is only the first of several applications which will follow. NFWF
26 has already acquired additional water rights, with points of diversion at the Yerington Weir
27
28

1 Diversion Structure and upstream, which it will eventually seek to change with similar applications
2 to this one. In addition, NFWF will in the future acquire additional water rights within the District
3 for the same purposes, which will require similar changes. Application No. 80700 and those which
4 will follow involve changes which will move water from a place of use in Lyon County, Nevada to
5 Mineral County, Nevada. They involve the movement of water from the most productive
6 agricultural area in Nevada, and will have economic as well as environmental impacts on Lyon
7 County, Nevada.
8

9 As an initial step with respect to the provisions of N.R.S. 533.368, the State Engineer should
10 direct NFWF to provide information on what studies are actually underway, the subject matter and
11 scope of each study, the entity performing the study, and when each study will be available. To the
12 extent that activities, like land stewardship, are already underway, with or without formal study, that
13 information should also be provided.
14

15 Once that information is available, better consideration can be given to determining what
16 additional studies, if any, should be required. At this point, it does not appear that any studies are
17 underway concerning the economic impacts of this change and those which will follow.
18

19 **D. Future Applications to Be Filed.**

20 As noted above, NFWF has already acquired additional water rights, with points of
21 diversion at the Yerington Weir Diversion Structure and upstream. In addition, NFWF is in the
22 process of acquiring additional water rights, including water rights in Smith Valley, Nevada. All of
23 these water rights will eventually be the subject of similar applications to change. Depending on
24 when those additional change applications are filed and the schedule related to Application No.
25 80700, some consideration should be given to consolidating the proceedings on Application No.
26 80700 with those on other applications. Such consolidation may be beneficial to conserving the
27 resources of all of the parties, including those of the State Engineer. Moreover, information learned
28

1 as a result of processing changes to additional water rights upstream of the Yerington Weir and
2 upstream of Mason Valley will inform the decision here, and vice-versa, and thus ultimately result
3 in a better decision on the relevant issues under Application No. 80700 and under related upstream
4 applications.
5

6 **E. Pending claims for additional water for the benefit of the Walker River Indian**
7 **Reservation.**

8 The United States and the Walker River Tribe have pending claims in federal court to
9 establish a right to store water in Weber Reservoir, and a federal reserved water right for lands
10 added to the Walker River Indian Reservation at or near 1936. Those claims include claims against
11 both surface and groundwater, and assert that surface and groundwater in the Walker River Basin
12 must be regulated as a single source of supply. The Tribe's Protest here reflects those claims, and
13 contends that these changes cannot impact not only the Tribe's recognized 1859 right, but also these
14 claimed, but as yet unrecognized, rights. In addition, the Tribe contends that a new groundwater
15 management scheme must be adopted by the Nevada State Engineer, if these changes are approved.
16

17 Both N.R.S. 533.370(2) and the Walker River Decree require that changes not conflict with
18 "existing rights" or injure rights fixed by the Decree. The claims made by the Tribe and United
19 States are neither. The District does not suggest that this is or should be the forum for determining
20 the viability of the Tribe's and the United States' claims, or the issues they raise concerning the
21 regulation of surface and underground water. The issue which must be considered and decided is
22 that presented by N.R.S. 533.370(4)(e) and the Administrative Rules and Regulations of the Court,
23 Section 6.1, *ie.*, whether action should be postponed because of the pendency of the claims
24 described above and those described below. The State Engineer exercised this discretion in the
25 1970s in connection with a similar claim being made for additional water for the Pyramid Lake
26 Indian Reservation. *See, Roundhill General Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534
27 (1981).
28

1 This question needs to be evaluated by considering whether the State Engineer can reach a
2 decision on the issues related to the changes requested here which would be the same regardless of
3 the ultimate decision on the claims made by the Tribe and the United States. In other words, can the
4 State Engineer confidently determine that any decision he must make here will be the same
5 irrespective of the outcome of those claims? For example, can the State Engineer be certain that his
6 decision on whether the change conflicts with existing rights will be correct, no matter what the
7 outcome of the claims, including their quantity and priority? Can he make a similar determination
8 now with respect to the public interest? Will his determination on all issues be the same, regardless
9 of the outcome of the issue of whether surface and underground water must be regulated in the
10 Basin as a single source of supply? This question and those which follow below in F., G. and H.
11 should be briefed.
12

13
14 **F. The Pending Claims for Water for the Benefit of Other Federal Interests**
15 **Within the Walker River Basin.**

16 The United States has pending claims in the Walker River Basin to both surface and
17 groundwater for other federal interests, including federal interests both downstream of and upstream
18 of the point of non-diversion under Application 80700. The claims are similar to those made for the
19 Walker River Indian Reservation (the "Reservation"). They include claims to surface and
20 groundwater, as well as the assertion that surface and groundwater in the Walker River Basin must
21 be regulated as a single source of supply. Again, when considering the postponement issue, the
22 State Engineer must evaluate whether the issues here can be correctly determined in a way that will
23 not change, regardless of the final determination of those proceedings.
24

25 **G. The Place of Measurement of the Tribe's Decreed Right.**

26 The United States and the Tribe contend that the place of measurement of the existing and
27 recognized 1859 water right for the Reservation should either be changed to a new gage on the
28 Reservation, or that additional water must be delivered to the Wabuska Gage to account for

1 transportation losses from that gage to Weber Reservoir, which is about 21.3 river miles
2 downstream. Here, too, the State Engineer must be satisfied that the decisions that he must make
3 here will be correct regardless of the ultimate outcome of that question.
4

5 **H. Mineral County's Proposed Complaint in Intervention.**

6 Mineral County has a motion to intervene pending in the Walker River Action for purposes
7 of filing a complaint in intervention related to Walker Lake. Mineral County proposes to seek "an
8 adjudication and reallocation of the waters of the Walker River to preserve minimum levels in
9 Walker Lake." To achieve that goal, Mineral County proposes to seek "the right to, at least,
10 127,000 acre feet of flows annually reserved from the Walker River." It asks that water rights
11 holders be enjoined so that 240,000 acre feet of water reaches Walker Lake annually until that
12 litigation is concluded. Here, too, the State Engineer must be satisfied that the decisions he must
13 make here, particularly on the public interest issue, will be correct, regardless of the ultimate
14 outcome of Mineral County's proposed complaint.
15

16 **I. Responsibility for Ensuring That Any Changes Permitted Are Administered in
17 a Fashion That Does Not Conflict With Existing Rights.**

18 NFWF's Application No. 80700 and the Protest of the Tribe suggest that the Tribe, the
19 United States and the Applicant unilaterally can define the criteria to be used for ensuring that any
20 changes approved are administered in a fashion that do not conflict with the Tribe's existing rights,
21 and that the State Engineer and the Walker River Court must recognize that unilateral
22 determination. It is the State Engineer's responsibility initially to consider what must be done to
23 ensure that an approved change can and will be administered in order to ensure that it will not
24 conflict with all existing rights, including the Tribe's right recognized in the Walker River Decree,
25 the downstream right of the Nevada Department of Wildlife for Walker Lake, and all rights
26 upstream. Given the fact that the Reservation's recognized right is the most senior on the River,
27 that includes ensuring that any water approved for change is properly accounted for all the way to
28

1 Walker Lake, so as to ensure that calls are not made on junior upstream water rights as a result of
2 incorrect administration through the Reservation of any water approved for change. Ultimately, the
3 Walker River Court will make the final determination on those requirements, and will have the
4 responsibility to administer any approved change in accordance with that approval. The question of
5 whether these and related matters may be unilaterally determined by the Tribe, the United States
6 and NFWF, or by unilateral agreement between NFWF and any other party, should be briefed and
7 decided promptly.
8

9 **J. The Evidence, if Any, Which the State Engineer Will Consider With Respect to**
10 **the Consumptive Use of the Water Rights Being Changed.**

11 It is the District's position, among others, that in order to avoid a conflict with existing
12 rights, the quantity of water allowed to be changed must be limited to the consumptive portion of
13 the water right. It would be helpful to have early direction from the State Engineer concerning the
14 evidence which the State Engineer expects with respect to that issue. In other words, will
15 participants present that evidence, and/or will the State Engineer rely partially or exclusively on the
16 report entitled "Evapotranspiration and Net Irrigation Water Requirements for Nevada" published
17 by the Nevada Division of Water Resources in January 2010 (the "Nevada Report")? In addition,
18 direction concerning the extent to which the State Engineer will rely on similar determinations made
19 on the Carson and Truckee Rivers will also be helpful.
20

21 **K. Additional Issues Related to Evidence.**

22 **1. The Revised Draft Environmental Impact Statement.**

23 At some point, the parties should advise the State Engineer and the other parties concerning
24 whether they intend to rely on and submit as evidence all or any part of the "Revised Draft
25 Environmental Impact Statement," and for what purpose or purposes. Any questions as to its
26 admissibility should be briefed and decided well in advance of any hearing.
27

28 **2. Availability of Models and Other Studies.**

1 At this point, the District is aware that there are two computer models which may be
2 relevant to Application No. 80700, and which are not yet fully developed. Those models are being
3 prepared by UNR-DRI and the USGS. The UNR-DRI model includes run-off hydrology, and
4 diversions on the East Walker downstream of Bridgeport Reservoir and in Smith and Mason
5 Valleys. It ends at the Wabuska Gage. The District believes that the USGS model begins at the
6 Wabuska Gage, and ends at Walker Lake.
7

8 Information needs to be obtained as to when these models will be developed, and the
9 intended uses of these models. For example, are these models being developed to be used to
10 perform analyses in support of the change application, or any future change applications? If so, the
11 State Engineer should direct NFWF to provide information on the subject matter and scope of any
12 modeling analysis, the entity performing the analysis, and when the analysis will be available. Time
13 must be allowed for access to such models to assess their assumptions and reliability for the
14 intended uses.
15

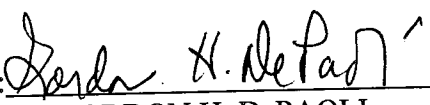
16 To the extent that there are other studies in preparation by UNR-DRI, USGS or by other
17 entities being funded under the Desert Terminal Lake legislation, including NFWF, they should be
18 identified, and the timing of their availability determined.
19

20 **III. CONCLUSION.**

21 The District reserves the right to suggest other issues which may become known to it at a
22 later date for similar consideration by the State Engineer.

23 Dated this 21st day of October, 2011.

24 WOODBURN AND WEDGE

25
26 By: 
27 GORDON H. DePAOLI
28 DALE E. FERGUSON
DOMENICO R. DePAOLI

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Darrell E. Pursel, Newhall Mutual Ditch Co.
42 McKenzie Lane
Yerington, Nevada 89447

Walker River Paiute Tribe
Melanie I. McFalls, Tribal Chairperson
P.O. Box 220
Schurz, Nevada 89427

Lucy A. Rechel, Eufrazia LLC, LJ Land
Limited, Snyder Livestock Co.
P.O. Box 550
Yerington, Nevada 89447

On October 21, 2011, I mailed electronically the *Walker River Irrigation District's*
Statement of Issues to Be Considered Prior to a Hearing on the Merits as follows:

David Yardas, National Fish and Wildlife
Foundation

David.Yardas@nfwf.org

Don Springmeyer

dspringmeyer@wrslawyers.com

Christopher Mixson

cmixson@wrslawyers.com

Karen Peterson

kpeterson@allisonmackenzie.com



Holly Dewar

SUBSCRIBED and SWORN to before
me this 21st day of October, 2011.


NOTARY PUBLIC