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October 20, 2011

VIA FEDEX

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Nevada Division of Water Resources
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Re: SUBMISSION OF APPLICANT NATIONAL FISH & WILDLIFE
FOUNDATION OF OUTLINE OF ISSUES FOR POTENTIAL PRE-HEARING
BRIEFING

Dear Mr. Wilson:

Enclosed please find two (2) originals and a copy of the above-identified documents.
Kindly, file and return a file stamped copy to our office in the enclosed self-addressed, stamped
envelope.

We appreciate your assistance in this matter and, should you have any questions, please
contact the me directly at (702) 341-5200 ext 119, or Christie at ext. 115.

Very truly yours,

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP


CHRISTOPHER W. MIXSON

CM:nv
Enclosures as stated

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

IN THE MATTER OF APPLICATION 80700
FILED BY THE NATIONAL FISH &
WILDLIFE FOUNDATION

**SUBMISSION OF APPLICANT
NATIONAL FISH & WILDLIFE
FOUNDATION OF OUTLINE OF ISSUES
FOR POTENTIAL PRE-HEARING
BRIEFING**

Applicant National Fish and Wildlife Foundation (NFWF) hereby submits to the State Engineer its outline of issues for potential pre-hearing briefing as ordered by the September 22, 2011 Notice of 2nd Pre-Hearing Conference. NFWF reserves the right to update or supplement this outline if additional issues arise or become known that are appropriate for such treatment.

I. INTRODUCTION

This matter concerns the application of NFWF, Application 80700, to change the place of use, and manner of use of 7.745 cubic feet per second (cfs) of natural flow water rights adjudicated by the Walker River Decree. Pursuant to the Walker Basin Restoration Program established by Public Law 111-85 and related authorities, NFWF requests to change irrigation water rights to water rights administered in-stream for the primary purpose of restoring and maintaining Walker Lake while protecting the ecological health of the Walker River from the

point of non-diversion to Walker Lake. As stated in the remarks section of Application 80700, NFWF is committed to ensuring that the change requested in Application 80700 is accomplished without conflicting with existing water rights.

On August 31, 2011, the State Engineer held the first pre-hearing conference in the matter of Application 80700. At that first pre-hearing conference, NFWF, various Respondents, and representatives of the State Engineer discussed, among other things, various legal issues which may be appropriate for resolution prior to a full evidentiary hearing on the Application. *See* Transc. (Aug. 31, 2011).

This outline of issues is intended solely for the purpose of providing the parties and the State Engineer with NFWF's view of predominantly legal issues which should be resolved by the State Engineer *prior to a full evidentiary hearing*. These issues have the potential to render a full evidentiary hearing unnecessary because they could theoretically result in rejection of App. 80700 on purely legal grounds. It is therefore in the interest of everyone involved to resolve such issues prior to a full evidentiary hearing in order to prevent the expenditure of both time and resources necessary for a full evidentiary hearing if the Application risks denial on purely legal grounds. NFWF also comments here briefly on several issues brought up by parties who submitted comment letters or filed protests against App. 80700 where questions have arisen over the scope of the issues to be addressed.

NFWF therefore proposes that the State Engineer order pre-hearing legal briefing in the nature of summary judgment on the following issues and protest grounds raised by various protestants:

- a. whether the State Engineer should postpone his decision on App. 80700 pending the outcome of the long-standing, yet still in its infancy, pending Walker River Decree litigation;

- b. whether NFWF has legal authority to change the water rights as requested in App. 80700 under both the Walker River Decree and according to the enabling legislation for the Walker Basin Restoration Program;
- c. the issue of the State Engineer's power to order that private negotiations between NFWF and the Walker River Paiute Tribe (WRPT or Tribe) be held in public or that the parties to the negotiation be required to allow the participation of non-parties;
- d. the issue of NFWF's conditional offer to withdraw and permanently retire approximately 646.16 acres of supplemental groundwater rights if App. 80700 is approved and survives all possible judicial review or appeals;
- e. whether there is a need for additional hydrological and/or environmental studies beyond those to be undertaken with the ongoing UNR-DRI Walker Basin Model and the USGS Lower Walker River Model;
- f. how to satisfy the "one-year rule" for State Engineer action on water rights change applications.

II. OUTLINE OF ISSUES FOR PRE-HEARING BRIEFING

A. Pending Walker River Decree Litigation

Protestants U.S. Board of Water Commissioners (USBWC), Walker River Irrigation District (WRID), and the Walker River Paiute Tribe (Tribe) each suggest in their protests that the State Engineer should postpone action on Application 80700 until the resolution of pending litigation in the federal Walker River decree court. There are at least two such pending cases, the oldest of which was initiated on or about March 18, 1992, and is, in a nutshell, the effort by the Tribe to establish additional decreed water rights for the Tribe's reservation. *See Walker River Paiute Tribe v. Walker River Irrig. Dist.*, 3:73-CV-127, *In Equity* C-125-B (D. Nev.). The other pending Walker Decree litigation was initiated on October 25, 1994, by Mineral County and seeks intervention in the Walker Decree for the purpose of obtaining Walker Decree water rights for the benefit and restoration of Walker Lake. *Mineral Co. v. Walker River Irrig. Dist.*, 3:73-CV-128, *In Equity* C-125-B (D. Nev.). Both proceedings have never reached the merits because

the last two decades have been consumed by service of process regarding the proceedings on holders of Walker River decreed water rights and holders of other water rights in the Walker River Basin that could be affected.

NFWF proposes that this is an appropriate issue for pre-hearing briefing and an interim order from the State Engineer. If the State Engineer is inclined to stay action on App. 80700 pending the resolution of decades-old, but still pending, litigation before the Walker River Decree court, then that decision should be made by the State Engineer prior to asking NFWF and the Protestants to devote considerable resources to preparing for an evidentiary hearing. NFWF's position is that the pending federal Walker Decree court litigation should not serve as the basis for postponing action on App. 80700 because change approvals involving acquired Decree water rights (whether acquired by purchase, lease, donation or court order) will need to be part of any eventual resolution of the pending litigation and should not be treated as a special category because of that litigation. Further, that litigation is likely to continue to drag on, at the best, for many more years.

We also point out that if the action on App. 80700 is stayed pending the outcome of that Walker Decree Court litigation, then due process and logic would compel the conclusion that any and all other change applications concerning waters of the Walker River should also be stayed and held similarly in abeyance.

B. Authority of NFWF to Undertake Walker Basin Restoration Program

The USBWC (in its July 15, 2011 comments to the State Engineer on App. 80700) has espoused the argument that NFWF may not have authority to operate its Walker Basin Restoration Program—one major goal of which is restoration of Walker Lake through the purchase (from willing sellers) and transfer of water rights intended to be used for instream

purposes in both the Walker River and ultimately to Walker Lake—because the Walker River Decree may prevent the transfer of decreed water rights outside of the Walker River Basin. Apparently, USBWC’s position is that Walker Lake is outside of the Walker Basin and therefore transfers of water rights to Walker Lake would be in violation of the Walker River Decree, and thus outside of NFWF’s authority under the Walker Basin Restoration Program. *See* Transc. (Aug. 31, 2011) at 38.

The USBWC has also explained that it believes the manner and place of use applied for in App. 80700 are unduly broad and may therefore be inconsistent with the stated purpose of NFWF’s water rights acquisition efforts as provided for in the Walker Basin Restoration Program. This issue can be resolved simply by noting that section 208(a)(1) of Public Law 111-85 established the Walker Basin Restoration Program “for the primary purpose of restoring and maintaining Walker Lake...consistent with protection of the ecological health of the Walker River,” and that Application 80700 is fully consistent with both purposes.

In any event, the notion that Walker Lake is not properly considered to be in or part of the Walker River Basin is absurd, and begs the question: where does all non-consumed water in the Walker River ultimately end up? If the State Engineer takes this argument seriously at all, then NFWF proposes that it is an appropriate issue for pre-hearing briefing and an interim order from the State Engineer.

The same goes for the argument that the place and manner of use applied for in App. 80700 is “overly broad” and thus beyond NFWF’s authority as set forth by Congress. If the State Engineer takes this argument seriously at all, NFWF is eager to set the record straight on this issue and suggests that pre-hearing briefing and summary judgment is the appropriate place

to determine whether the use of water requested under App. 80700 is consistent with the stated purposes of the Walker Basin Restoration Program.

C. NFWF-Tribe Conveyance Agreement and USGS Lower Walker River Model

Several Protestants appear to argue that the Conveyance Agreement for conveyance of water rights across the Walker River Paiute Reservation, which is currently being negotiated by the Tribe, the United States and NFWF, should be conducted in public, potentially with the participation of any and all who wish to have a say in the agreement among these three parties. USBWC has also raised issues related to the NFWF-Tribe Conveyance Agreement and alleged but unspecified potential impacts and/or interference with the Tribe's decreed water rights.

NFWF's position is that the State Engineer has no authority or jurisdiction to order NFWF, the BIA and the Tribe to include any other parties in their private negotiations. The Conveyance Agreement will govern the conveyance of the subject water below the USGS Wabuska Gage on the lower Walker River, i.e. through the Walker River Indian Reservation, which is at the extreme lower end of the Walker River and below any and all points of diversion for any and all decreed water rights except for the Tribe's. It is legally, factually, and practically unlikely, if not impossible, for the outcome of the negotiated Conveyance Agreement to conflict with any existing upstream water right, either of any current Protestants to Application 80700 or any other holders of water rights upstream of the USGS Wabuska Gage.

The same holds true for the efforts of the U.S. Geological Survey to create a working model of the Lower Walker River. That model pertains only to the Lower Walker River from the Wabuska Gage down to Walker Lake, and is therefore not relevant to any upstream water rights of any of the current Protestants or any other holders of Walker River water rights because all other water rights have points of diversion above the USGS Wabuska Gage. The USGS

Lower Walker River model is therefore only relevant to the potential NFWF-Tribe Conveyance Agreement, and should not be treated itself as a necessary precursor to an evidentiary hearing in this matter.

For the reasons summarized above, NFWF believes that the time and place for review of a Negotiated Conveyance Agreement by other parties, and the relevance of the USGS lower Walker River model, are appropriate issues for pre-hearing briefing and an interim order from the State Engineer.

D. NFWF's Voluntary Abandonment/Retirement of Supplemental Groundwater Rights.

Pursuant to Application 80700, NFWF will voluntarily abandon and permanently retire certain supplemental groundwater rights upon the ruling, if any, granting Application 80700 becoming final and no longer subject to appeal. At the First Pre-Hearing Conference, NFWF provided a table of the specific supplemental groundwater rights that it will abandon and retire upon the event of that finality. *See Exhibit #4* (on file with State Engineer). Protestant WRID raised an issue regarding the various statutory factors for application approval that the retirement/abandonment of supplemental groundwater rights may relate to or affect, in addition to the public interest. It is not clear to NFWF what more, if anything, is useful on this topic. NFWF's commitment to retire can be made a condition of proof of beneficial use, and the effects of doing so can be quantitatively evaluated through appropriate use of the UNR-DRI model (see next section).

E. Need for Additional Hydrologic or Environmental Studies

Various Protestants have raised the issue of the necessity of additional hydrologic or environmental studies pursuant to NRS 533.368. If the State Engineer is inclined to consider this

protest ground, NFWF suggests it should first be the subject of pre-hearing briefing to determine whether and how such studies could possibly be necessary in addition to the comprehensive effort already underway, i.e. the Univ. of Nevada-Reno/Desert Research Institute Walker River Model (UNR/DRI Model).¹ If additional studies were to be required, it would certainly affect the timing of any evidentiary hearing. NFWF does not see the need for any additional studies of the Walker River Basin pursuant to NRS 533.368 beyond those underway with the UNR-DRI Model which will be used as part of this proceeding.

At the First Pre-Hearing Conference, NFWF suggested that, upon receipt of additional necessary information from WRID and subsequent incorporation into the UNR/DRI Model, the preparers of the Model would be able and willing to provide an informal information session and demonstration of the Model. *See* Transc. (Aug. 31, 2011) at 20. That suggestion and offer still stands.

G. The “One-Year Rule” for State Engineer Action on Application 80700.

As brought to light at the First Pre-Hearing Conference and by NFWF’s September 30, 2011 Authorization to Postpone Action on App. 80700, there will likely be an issue regarding NRS 533.370(2) and Walker Decree Rule 6.1, both of which require that the State Engineer act on App. 80700 within one year (although the starting date for the running of one year according

¹ The UNR/DRI Model is a work-in-progress that has been underway for several years. It is a comprehensive model of the Walker River Basin from the headwaters, through Smith and Mason Valleys all the way down to the Wabuska Gage. Numerous interested parties, including the majority of the Protestants or their representatives, have participated in the water group meetings during the development of the Model, including being afforded individual briefing sessions with UNR/DRI engineers and scientists who are developing and operating the Model. There have been seven meetings of the water group since January 2010, which were attended by representatives of the State Engineer’s Office, WRID, USBWC, WRPT, Bureau of Indian Affairs, Nevada Department of Wildlife, NFWF, U.S. Geological Survey, Walker Lake Working Group (local citizens group advocated for restoration of Walker Lake), Mason and Smith Valley Conservation Districts, and the U.S. Fish and Wildlife Service.

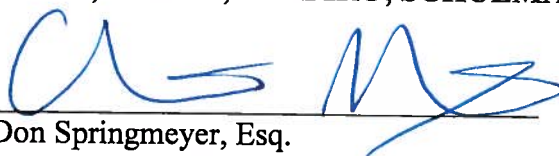
to Nevada statute is considerably different than the starting date according to the Walker Decree Rules & Regulations). Because it is clear that it will not be possible to act on App. 80700 within one year of the date it was filed, action on App. 80700 must be extended for a reasonable time, such as six months, so that both time and resources become available for the State Engineer to hold an evidentiary hearing, make factual and legal findings, and issue a ruling. How this may be handled in the face of requirement that all parties consent to postponing action where an application has been protested may also be an appropriate matter for either briefing or an interim order in this matter.

III. CONCLUSION

As explained at the First Pre-Hearing Conference, NFWF believes that the issues outlined above may be necessary and appropriate for pre-hearing briefing and an interim order from the State Engineer in the nature of summary judgment. Further, NFWF suggests that briefing can be accomplished, after the State Engineer determines which issues are appropriate for such treatment, by an order requiring simultaneous filing of briefs by the parties on a date certain, followed by simultaneous filing of response briefs by the parties within 30 days, or at some other date certain as established by the State Engineer.

Dated this 20th day of October, 2011.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP



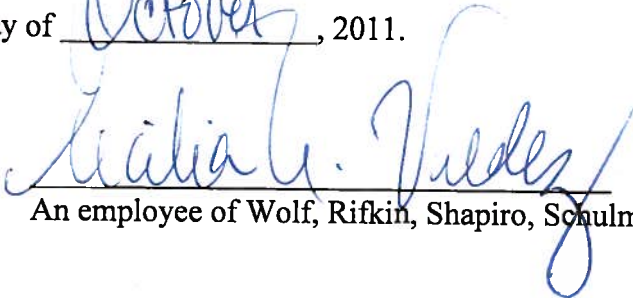
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CERTIFICATE OF MAILING

I certify that I am an employee of the law office of Wolf, Rifkin, Shapiro, Schulman and Rabkin, LLP, and that on this date I caused to be served by U.S. mail, postage prepaid, a true and correct copy of the foregoing **SUBMISSION OF APPLICANT NATIONAL FISH & WILDLIFE FOUNDATION OF OUTLINE OF ISSUES FOR POTENTIAL PRE-HEARING BRIEFING** on all those persons and entities listed on the following **Service List**.

Dated this 20th day of October, 2011.


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