

1 STATE OF NEVADA
2 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
3 DIVISION OF WATER RESOURCES
4 BEFORE JASON KING, STATE ENGINEER

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6 IN THE MATTER OF CHANGE
7 APPLICATION NO. 80700 FILED
8 BY THE NATIONAL FISH AND
WILDLIFE FOUNDATION

MOTION FOR CLARIFICATION

9 The UNITED STATES BOARD OF WATER COMMISSIONERS FOR THE WALKER
10 RIVER ("BOARD") by and through its attorneys, ALLISON, MacKENZIE, PAVLAKIS, WRIGHT
11 & FAGAN, LTD, submits this Motion for Clarification in accordance with NAC 533.142, requesting
12 clarification of the scope of the BOARD's participation as a party in these proceeding, as follows:

13 I.

14 STATEMENT OF RELEVANT FACTS

15 The NATIONAL FISH & WILDLIFE FOUNDATION ("NFWF") filed Application 80700
16 to change 7.745 cubic-feet per second ("cfs") of decreed Walker River surface water to instream use
17 for wildlife purposes in the Walker River and at Walker Lake. The BOARD was "appointed
18 pursuant to the orders of the court in the Walker River Action dated May 12, 1937, January 28,
19 1938, and June 27, 1940, to act as a water master or board of commissioners to apportion and
20 distribute the waters of the Walker River, its forks and tributaries in the State of Nevada an in the
21 State of California." See, *Administrative Rules and Regulations Regarding Change of Point of*
22 *Diversion, Manner of Use or Place of Use of Water of the Walker River and its Tributaries and*
23 *Regarding Compliance with California Fish and Game Code Section 5937 and Other Provisions of*
24 *California Law, as amended June 3, 1996* ("Administrative Rules"), Section 1.1(l). Recognizing
25 that Application 80700 raised several issues related to the Walker River Decree ("Decree"), the
26 BOARD filed a letter with the STATE ENGINEER as provided by the Administrative Rules,
27 Section 5.4, indicating that it intended to participate as a party in the proceedings associated with
28 Application 80700 and identifying issues which the BOARD believed would need to be addressed

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1 with regard to Application 80700. The BOARD thereafter filed an Intent to Participate on January 6,
2 2012, indicating that it intended to present a case in chief, including, but not limited to, presenting
3 testimony and evidence.

4 A Prehearing Conference was held on January 24, 2012, wherein the scope of the BOARD's
5 participation in these proceedings was raised. See, Transcript of January 24, 2012 Public Hearing,
6 pp. 62-70. The BOARD again indicated that it intended to fully participate including possibly
7 presenting witnesses. See, Transcript, p. 63, ll. 14-23.

8 The STATE ENGINEER entered an Interim Order and Notice of Hearing on July 17, 2012.
9 In the Interim Order and Notice of Hearing, the STATE ENGINEER details the manner in which
10 cases will be presented, providing the Applicant and Protestants the opportunity to present a case.
11 The STATE ENGINEER did not include the BOARD in the schedule of parties who will be
12 presenting a case. The BOARD hereby requests clarification of the scope of its participation as a
13 party in these proceedings.

14 II.

15 POINTS AND AUTHORITIES IN SUPPORT OF MOTION

16 The Administrative Rules explicitly provide as follows: "The United States Board of Water
17 Commissioners may participate as a party in all proceedings concerning a change application or
18 compliance application before any agency."¹ See, Administrative Rules, Section 5.4. Section 5.1 of
19 the Administrative Rules states that "[e]xcept as otherwise expressly provided by these Rules and
20 Regulations all proceedings before an agency with respect to change applications and compliance
21 applications shall be in accordance with the practice and procedure of that agency."

22 The rules of practice and procedure of the STATE ENGINEER, located in NAC Chapter
23 533, detail the process for hearings before the STATE ENGINEER. NAC 533.350, in part,
24 provides that:

- 25 (5) The parties shall present their cases in chief in the order
26 established by the State Engineer, including:
27 (a) Testimony, either by the narrative of each party or
28 the witness of each party or by direct examination
conducted by each party's attorney or agent;

¹ The State Engineer is bound by the Administrative Rules and the Hearing Officer has acknowledged such at the Prehearing Conference on January 24, 2012. See, Transcript, p. 12, 11.10-11.

- (b) Cross-examination;
- (c) Redirect examination; and
- (d) Recross-examination.

The same order of examination will be followed for each witness.

There is no provision in NAC 533.350 whereby the STATE ENGINEER limits the participation of a party to something other than the participation identified therein.²

In addition to the explicit provisions of NAC 533 addressing the scope of a party's participation in proceedings before the STATE ENGINEER, the Nevada Supreme Court has stated that in order for the STATE ENGINEER to hold a full and fair administrative hearing "all interested parties must have had a full opportunity to be heard." Revert v. Ray, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979) (internal citations omitted). See also, Bowles v. Baer, 142 F.2d 787, 789 (7th Cir. 1944). It has been recognized by the Nevada Supreme Court that included within a party's full opportunity to be heard is the right to call and examine witnesses. Nevada Bd. of Osteopathic Med. v. Graham, 98 Nev. 174, 175, 643 P.2d 1222, 1223 (1982).

Moreover the Seventh Circuit Court of Appeals has held that "[t]he parties to a hearing are entitled to participate therein, to argue, and to brief their case, and, if findings of fact and an order are made, they are entitled to be furnished copies." Bowles v. Baer, 142 F.2d 787, 789 (7th Cir. 1944). Finally, the term "party" in civil proceedings is generally defined as "one having a right to control proceedings, to make a defense, to adduce and cross-examine witnesses, and to appeal from the judgment." City of Chattanooga v. Swift, 442 S.W.2d 257, 258 (Tenn. 1969). See also, Mayhew v. Deister, 244 N.E.2d 448, 454 (Ind. App. 1969); Anderson v. Miller, 324 P.2d 856, 860 (OK 1958); State, Dept. of Family Services, Div. of Pub. Assistance & Soc. Services v. DDM, 877 P.2d 259, 261 (Wyo. 1994); and Chalpin v. Mobile Gardens, Inc., 501 P.2d 407, 410 (Ariz. App. 1972) (superseded by statute on other grounds as stated in Switzer v. Superior Court In and For County of Maricopa, 860 P.2d 1338, 1341 (Ariz. App. 1993).

The STATE ENGINEER recognized that the BOARD was a party to this case stating, "the U.S. Board of Water Commissioners is neither an applicant nor protestant, but is a party in this matter."

² "Party" is defined for purposes of NAC 533 as "an applicant or protestant." See, NAC 533.050. Nonetheless, Administrative Rule 5.4 clearly states that the Board may participate "as a party."

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1 Interim Order and Notice of Hearing, p. 2. Nonetheless, the Interim Order and Notice of Hearing does
2 not provide the BOARD an opportunity to present evidence and witnesses should it desire to do so.

3 The BOARD considers the scope of its participation as a party in these proceedings to include
4 the presentation of a case if it desires. Accordingly, the BOARD requests clarification regarding the
5 scope of its participation as a party in these proceedings. Alternatively, should the STATE
6 ENGINEER desire, the BOARD can refer this issue to the United States District Court to interpret the
7 scope of participation as a party intended by Administrative Rule, Section 5.4 and the rules of the
8 STATE ENGINEER, specifically NAC 533.350.


9 III.

10 CONCLUSION

11 The BOARD respectfully requests the STATE ENGINEER clarify the scope of the BOARD's
12 participation as a party in these proceedings because the STATE ENGINEER's Interim Order and
13 Notice of Hearing fails to do so. Alternatively, the BOARD respectfully requests that the STATE
14 ENGINEER refer the scope of the BOARD's participation as a party to the United States District
15 Court to interpret its Administrative Rule, Section 5.4.

16 DATED this 10th day of August, 2012.

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CERTIFICATE OF SERVICE

Pursuant to NAC Rule 533.142(10), I hereby certify that I am an employee of ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD., Attorneys at Law, and that on this date I caused the foregoing document to be served to all parties to this action by:

Placing a true copy thereof in a sealed postage prepaid envelope, first class mail, in the United States Mail in Carson City, Nevada [NAC Rule 533.142(10)]

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