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October 21, 2011

Tim Wilson, P.E., Hearings Officer
Nevada Division of Water Resources
901 S. Stewart Street, Suite 2002
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Re: National Fish and Wildlife Foundation Change Application 80700 / United States Board of Water Commissioners List of Issues to be Addressed Prior to a Hearing

Dear Mr. Wilson:

In accordance with your order at the prehearing conference held on August 31, 2011 with regard to the above-referenced change application, the United States Board of Water Commissioners for the Walker River ("Board") provides you with the following list of issues to be addressed prior to a hearing on the above-referenced change application.

1. Will the State Engineer be able to comply with Article VI, Section 6.1 of the *Administrative Rules and Regulations Regarding Change of Point of Diversion, Manner of Use or Place of Use of Water of the Walker River and its Tributaries and Regarding Compliance with California Fish and Game Code Section 5937 and other Provisions of California Law*? This provision requires that the State Engineer approve or reject a change application within one year after the date of initial filing, unless the decision is postponed for an additional time period not to exceed two additional years where the applicant, protestant, as well as any intervenors jointly agree to an extension. It is the position of the Board that the time frames in this provision control for purposes of approving or rejecting Change Application 80700 and not the provisions of NRS 533.370(2).

2. Whether the proposed change in the place of use for Change Application 80700 violates the Walker River Decree which provides in pertinent part that "no water shall be sold or delivered outside of the basin of the Walker River". As stated in my letter to the State Engineer dated July 15, 2011, this language in the Decree was derived from a stipulation of the parties entered into near the close of the hearing in order to shorten the time of the trial of the action. The language was part of the broader stipulation with respect to the water rights of the parties to this suit which were not determined by the Decree in the suit in Equity No. 731. *Report of the Special Master*, pages 8-11, In Equity Case No. C-125, filed December 30, 1932. Prior to this stipulation, all the defendants in the action except Sierra Pacific Power Company entered into a stipulation filed with the Court on March 2, 1932 for the purpose of settling and adjusting certain controversies concerning questions of fact involved in the action. The stipulation provided in part: "That excepting the adjudicated appropriation rights of Mrs. J.A. Conway and Richard P.

Conway, the rights of the several appropriators and users of water who are parties hereto shall be restricted to application and use on lands within the particular water shed or basin of Walker River, East Walker River, West Walker River, respectively, and their respective tributaries where said water is now used." The Decree was entered to settle the rights of water users of the Walker River for irrigation of the lands of the parties to the suit. Comments made at the time by the attorneys for various parties acknowledged that there was no beneficial use of water that went to Walker Lake. To the undersigned's knowledge, the Decree language which provides "but no water shall be sold or delivered outside of the basin of the Walker River" has never been construed by the Court. There may need to be a determination made by the Court with regard to this prohibition contained in the Decree.

3. Because the Decree was entered to settle the rights of water users of the Walker River for irrigation of the lands of the parties to the suit, the question arises whether a Decree holder can own water rights but not own any land or the place of use for which the water is to be placed to beneficial use. Again, this may be an issue for the Court to decide as it is a legal issue.

4. The Change Application acknowledges that the Applicant will not be able to put the water to beneficial use until it can manage the conveyance of water from the Wabuska Gauge to Walker Lake. While the Applicant, the National Fish and Wildlife Foundation ("NFWF"), contends no one else has an interest in the Conveyance Agreement, the Board and the United States District Court have an interest in reviewing any such agreement to ensure it does not violate or otherwise hinder the apportionment or distribution of the waters of the Walker River. The Change Application proposes a new broad manner of use with new places of use both upstream and downstream from the Walker River Paiute Tribe's ("Tribe") use. The Board and the Court have an interest in the Conveyance Agreement because they administer the Decree. By Order filed May 12, 1937, the United States District Court entered its Order appointing the Board to constitute a water master or board of commissioners "to apportion and distribute the waters of the Walker River, its forks and tributaries in the state of Nevada and in the state of California, including waters for storage and stored water, in accordance with the provisions of the decree in the above entitled suit ...". The Order also provided:

"IT IS FURTHER ORDERED that the said members of said board, with the approval of the Court, may make such rules as may be necessary and proper for the enforcement of the decree herein and for the carrying out of its purposes and objects and the proper apportionment and distribution, including rotation, of the use of water where necessary, of the waters of said Walker River among and to the persons entitled thereto, including water for storage and stored water."

The Decree does not allow decree right holders to administer the Decree or determine if water has been placed to beneficial use as they see fit. Because the Board administers the Decree, it has an interest in the terms of the Conveyance Agreement to ensure the Conveyance Agreement does not infringe upon the Board's and the Court's rights of administration or enforcement of the Decree.

In addition, the State Engineer has issued Permit 25792, Certificate 10860 to the Nevada Department of Wildlife. The State Engineer should ensure the Conveyance Agreement does not affect his jurisdiction to enforce the delivery of water to the permit/certificate holder if necessary. Further, since the Conveyance Agreement is required to place the water to beneficial use, the State Engineer has a regulatory interest in the Conveyance Agreement.

Thus, review and approval of any Conveyance Agreement entered into by NFWF and the Tribe is necessary to ensure the Conveyance Agreement does not infringe upon the regulatory authority of the Board or the United States District Court and the State Engineer, where applicable.

The Tribe's Protest recognizes that the State Engineer, Federal Water Master and Federal Court have jurisdiction over the Conveyance Agreement and any Water Management Plan developed by NFWF. *See*, Protest of the Walker River Paiute Tribe, paragraphs 10, 13.

5. Information needs to be obtained regarding the scope and status of the current United States Geological Survey ("USGS") modeling effort for the Walker River from Wabuska Gauge to Walker Lake. It is my understanding that this modeling effort may be for development of a groundwater model, not a surface water model, so information concerning the scope of the model needs to be obtained.

Further, a model for this portion of the river is necessary because the DRI model stops at the Wabuska Gauge. The majority of the proposed place of use of NFWF's Change Application 80700 is the Wabuska Gauge to Walker Lake section of the Walker River. Therefore, this section of the river should be the subject of a model to be utilized by the State Engineer in making a determination on this Change Application and any future Change Applications to be filed by NFWF.

6. The Tribe's Protest points raise the issue of whether action on this Change Application should be postponed under Article VI, Section 6.1 of the *Administrative Rules and Regulations Regarding Change of Point of Diversion, Manner of Use or Place of Use of Water of the Walker River and its Tributaries and Regarding Compliance with California Fish and Game Code Section 5937 and other Provisions of California Law*. The first sentence of paragraph 3 of the Tribe's Protest states: "Granting of the permit will detrimentally harm the

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Tribe's ability to store water in Weber Reservoir." This paragraph also indicates that the Tribe and the United States have filed counterclaims in the Walker River litigation to address the Tribe's water right claims associated with the Tribe's ability to store water in Weber Reservoir. Paragraph 3 of the Protest further states in part: "The Tribe's rights and use of water for storage in Weber Reservoir must be acknowledged and adequately accounted for in any terms or conditions of a permit that may be granted to prevent any harm to the Tribe's rights, to the Tribe, and to allottees." The State Engineer and the United States District Court would not be able to approve any such permit terms acknowledging and accounting for the Tribe's rights and use of water for storage in Weber Reservoir absent a final determination by the United States District Court on the counterclaims of the Tribe and the United States filed in the pending Walker River litigation.

In addition, if the Conveyance Agreement will recognize, measure and account for the Tribe's claims for water rights associated with its storage and use of water in Weber Reservoir, the Conveyance Agreement cannot be approved by the State Engineer or the United States District Court until there has been a final determination on the Tribe's counterclaims in the Walker River litigation for the reasons set forth in the previous paragraph. It appears from the Tribe's Protest, the Conveyance Agreement is intended to recognize, measure and account for the Tribe's use and/or storage of water greater than 26.25 cfs during the 180 day irrigation season for 2,100 acres of land as allowed and provided under the Decree.

If you have any questions, please do not hesitate to contact me.

Sincerely,

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

By: 
KAREN A. PETERSON, ESQ.

KAP/nf
(Wilson L01)

cc: Members of the US Board of Water Commissioners
Jim Shaw, Water Master
All parties of record