



November 22, 2013

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*Via Electronic Mail kgaffney@waterboards.ca.gov
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California State Water Resources Control Board
 Division of Water Rights
 Attn: Kate Gaffney
 P.O. Box 2000
 Sacramento, California 95812-2000

**Re: Petitions for Temporary Change Involving Water Transfer, Walker River
 Irrigation District Licenses 6000 and 9407 (Applications 2221 and 1389,
 respectively)**

Dear Ms. Gaffney:

This letter is the Walker River Irrigation District’s (“District”) response to comments received by the Division of Water Rights (“Division”) regarding the Petitions for Temporary Change Involving Water Transfers and Instream Flow Dedication to Walker River Irrigation District Licenses 6000 and 9407 (the “Petitions”). The Division has received the following comment letters with respect to the Petitions: (1) Antelope Valley Mutual Water Company, April 11, 2013; (2) Peter Fenili, April 16, 2013; (3) Mono County Board of Supervisors, April 16, 2013; (4) Six N Ranch, Inc., April 18, 2013; (5) National Fish and Wildlife Foundation (Don Springmeyer, Wolf, Rifkin, Shaprio, Schulman & Rabkin, LLP), April 19, 2013; (6) California Department of Fish and Wildlife, April 22, 2013; (7) Gary Garms, April 22, 2013; (8) Walker River Paiute Tribe (Dwight Smith), April 22, 2013; and (9) United States Board of Water Commissioners (Karen Peterson, Allison-MacKenzie), May 9, 2013 (collectively, the “Comment Letters”).

Because many of the Comment Letters raise similar issues, we have categorized and responded to similar issues by subject matter. However, we have identified each of the parties who raised each common issue. To the extent that a party has made a comment which is unique to that party, we have addressed it separately.

I. BACKGROUND.

A. The Walker River Decree

The Walker River Basin is essentially a closed basin in Eastern California and Western Nevada. Beginning in the Sierra Nevadas in California, the East and West Walker

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Rivers converge approximately 7 miles north of the town of Yerington, Nevada. Walker Lake is the terminus of the Walker River and the lowest point in the basin. The majority of streamflow is from snowmelt, with peak flow being in late May to early June. The Walker River is the main source of inflow for Walker Lake, but there is also a small amount of inflow from nearby small streams and sub-surface inflow of groundwater.

The District was formed in 1919 for the purpose of constructing Bridgeport and Topaz Reservoirs. The District constructed those reservoirs to extend the growing season and supplement the available natural flow during the irrigation/growing season.

As a result of litigation initiated in 1902, Decree 731 was issued in 1919, by the United States District Court for the District of Nevada, as the first regulatory control on the system as a whole. However, Decree 731 did not include rights for the Walker River Indian Reservation and other irrigators in the Basin. Decree C-125 (hereinafter referred to as the Walker River Decree) was issued by the United States District Court for the District of Nevada (Walker River Court) on April 14, 1936 (amended April 24, 1940) as the culmination of the suit *United States of America v. Walker River Irrigation District, et al.* For each water right owner, the Walker River Decree sets forth the source, priority date, the diversion rate at the point of diversion, the number of acres irrigated, and a general description of the place of use of the appropriation.

Under the Walker River Decree, the Walker River Court retains jurisdiction for regulatory purposes and for the purpose of appointing a Watermaster 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 water for storage and stored water, in accordance with the provisions of [the] decree.” On May 12, 1937, an order was entered appointing five persons to perform that function. An order adding a sixth member was entered in 1940. The orders establishing the “Board of Water Commissioners” gave that Board the authority to appoint an assistant, Chief Deputy Water Commissioner, who has the day-to-day responsibility of apportioning and distributing the waters of the Walker River, its forks and tributaries in the State of Nevada and in the State of California, including water for storage and stored water, in accordance with the provisions of the Walker River Decree. The Board of Water Commissioners, with approval of the Walker River Court, may make such rules as may be necessary and proper for the enforcement of the Walker River Decree and for carrying out its purposes. The Walker River Court approved such rules on September 3, 1953 (The 1953 Rules and Regulations). The 1953 Rules and Regulations state that these duties are to be assigned to the Chief Deputy Water Commissioner. For the purposes of this letter, the term “Watermaster” is used in most cases to refer to the Chief Deputy Water Commissioner.

B. Water Rights

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1. Decreed Natural Flow Rights

The Walker River Decree adjudicates the diversion of the Walker River and its tributaries for direct land application and diversion to storage facilities for subsequent use. The decreed rights were appropriated based upon and are entitled to the stream flow as it was when the appropriations were made. For the purpose of this letter, we have referred to decreed natural flow rights in order to distinguish between other water rights such as storage, and state certificated surface water rights. Below are highlights of the Walker River Decree relative to the natural flow for direct land application:

- The United States, for the benefit of the Walker River Indian Reservation, has the earliest priority (most senior) right of 1859 for 26.25 cfs for use on 2,100 acres. The irrigation season for this water right is 180 days within the period March 1 to October 31. The decreed diversion rate is 1.25 cfs per 100 acres. Pursuant to the 1953 Rules and Regulations the flow available for this right is currently measured and monitored at the United States Geological Survey (USGS) Walker River gage near Wabuska (No. 10301500).
- The Walker River Decree defines the source of water, the priority date, the rate of diversion, the acreage, and a general description of the lands to which water is to be applied. The majority of decreed diversion rates from the river are either 1.6 cfs, or 1.2 cfs for each 100 acres of irrigated land. The Walker River Decree does not set an acre-foot per irrigated acre water duty.
- The irrigation season for areas above Bridgeport Reservoir on the East Walker River and the Coleville gaging station on the West Walker River is from March 1 to September 15. The irrigation season for the remaining irrigated areas is March 1 to October 31.

2. Storage Water Rights - General

Water rights for the storage of water in numerous reservoirs are also set forth in the Walker River Decree. There are several small reservoirs on the tributaries upstream from Bridgeport and Topaz Reservoirs, used to serve Bridgeport and Antelope Valleys, which are identified in the Walker River Decree. The Walker River Decree does not recognize any right to store water in Weber Reservoir for the Walker River Tribe.

The two major storage facilities and rights documented in the Walker River Decree are for Bridgeport and Topaz Reservoirs which are owned and operated by the District. These reservoirs are licensed by California License 9407, for Bridgeport Reservoir, and California

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License 6000, for Topaz Reservoir. The District uses the available stored water to supplement decreed natural flow rights, and as a primary source of supply for “new lands” (lands with no other surface water right). The Walker River Decree defines storage quantities and priorities, but the allocation of the available stored water from Bridgeport and Topaz Reservoirs is determined by the District.

3. Bridgeport and Topaz Reservoirs

The Walker River Decree states that the District is “the owner of the flow and use of the flood water of East Walker River...for storage in Bridgeport Reservoir” and “the owner of the flow and use of the flood water of West Walker River...for storage in Topaz Lake Reservoir.” For Bridgeport Reservoir, the Walker River Decree sets a maximum diversion to storage of 42,000 acre-feet from November 1 to March 1, without regard to priority. It also states that when there is “water in excess of the total amount adjudicated,” the District may store an additional 15,000 acre-feet at any time, providing there is no injury to other users. Similarly for Topaz Reservoir, the Walker River Decree sets a maximum diversion to storage of water from West Walker River of 50,000 acre-feet from November 1 to March 1, without regard to priority. It also states that when there is “water in excess of the total amount adjudicated,” the District may store an additional 35,000 acre-feet at any time, providing there is no injury to other users. The Walker River Decree includes no limit on the amount of water which can be withdrawn from storage in any one year.

Bridgeport and Topaz Reservoirs are also licensed by the State of California. The District holds License 9407 (Application 1389) for storage in Bridgeport Reservoir, having a priority date of August 8, 1919. The licensed season for collection to storage is about September 1 to about July 20 for up to 39,700 acre-feet annually, with maximum storage of 42,500 acre-feet. License 9407 for Bridgeport Reservoir notes that storage, in combination with the Licensee’s water rights confirmed by the Walker River Decree, is not to exceed 57,000 acre-feet annually. The District holds Licenses 6000 and 3987 (Applications 2221 and 2615, respectively) for storage in Topaz Reservoir, having priority dates of February 21, 1921 and October 28, 1921, respectively. The season for collection to storage under License 6000 is about October 1 to about July 15 for up to 57,580 acre-feet annually. License 3987 is for collection to storage of up to 200 acre-feet (year round) from an unnamed steam tributary to Topaz Reservoir. The District also holds Certificate 4972 for storage in Topaz Reservoir, issued by the Nevada State Engineer. The place of use under the water rights for Bridgeport and Topaz Reservoirs is lands within the District boundaries.

4. Allocation of Benefits From Stored Water

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As noted, the District holds the water rights to the stored water in Bridgeport and Topaz Reservoirs. A historical methodology using an average number of days that natural flow rights were not available to a given priority was used to establish a maximum quantity of stored water allocated to land by priority date of its appurtenant decreed natural flow right. Lands within the District with appurtenant junior decreed natural flow rights have been allocated more stored water than lands with appurtenant senior decreed natural flow rights. Stored water is also allocated to “new lands” which are irrigated areas with no natural flow rights; these new lands have allocated the most stored water on a per acre basis, up to approximately 2.0 acre-feet/acre. By April 1 of each year, the amount of stored water available to lands in the District is determined. The landowner can then call for this stored water for irrigation at any time during the period April 1 and October 31.

5. Summary

The water which is the subject of the Petitions is previously stored water. It is water which is stored either during the non-irrigation season, or during the irrigation season when all other decreed natural flow rights being exercised are fully satisfied. It is water which was not available when the senior decreed natural flow irrigation rights were established by diversion to beneficial use under Nevada and California law.

II. PURPOSE OF PETITIONS.

The Petitions seek: (1) to temporarily add to the existing place of use covered under the Licenses, in the case of Bridgeport Reservoir to include the East Walker River from Bridgeport Reservoir to the confluence of the Walker River, thence the Walker River to and encompassing Walker Lake, and in the case of Topaz Reservoir, to include the West Walker River from the outlet of Topaz Reservoir to the confluence of the Walker River, thence to and encompassing Walker Lake; and (2) to temporarily add Fish and Wildlife Preservation and Enhancement as an additional purpose or use for the release of up to 25,000 AF for instream dedication to Walker Lake.

The District has a Grant Agreement with the National Fish and Wildlife Foundation (“NFWF”) to administer and manage a “Stored Water Program” in the Walker River Basin. The purpose of the Stored Water Program is to release surface water from the Reservoirs for instream dedication to and including Walker Lake. Surface water will be made available for the proposed temporary transfer by releases from Bridgeport Reservoir and Topaz Reservoir of water that was previously stored or would have otherwise been held in storage absent the proposed transfer, some or all of which would otherwise have been released for irrigation purposes within the District, as described further in the Petitions. The District will seek additional approvals, and

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coordinate as necessary with the Nevada State Engineer and other entities in order to obtain the authorizations for the proposed water transfer and instream flow dedication.

III. RESPONSE TO COMMENTS.

A. Introduction

The table below sets forth the general subject matter of comments which are common to two or more of the Comment Letters, and identifies the parties making the comment. Those comments are addressed initially. The subject matter of comments which are not common to more than one party are addressed separately by party.

Table 1 - Common Comments by Subject Matter and Party

<u>General Subject of Comment</u>	<u>Party(ies) Commenting</u>
1. Loss of Return Flows; Adverse to Delivery Efficiencies	Antelope Valley Mutual Water Company; Peter Fenili; Gary Garms; Board of Water Commissioners; Walker River Paiute Tribe (“Tribe”)
2. Loss of Carry Over Storage	Peter Fenili; Gary Garms; Board of Water Commissioners; Six N Ranch, Inc.
3. Releases from Storage Should Be Limited to the Irrigation Season Set Forth in the Walker River Decree	Peter Fenili; Gary Garms; Board of Water Commissioners; Six N Ranch, Inc.; Tribe
4. Clarify the Quantity Being Changed	Department of Fish and Wildlife; National Fish and Wildlife Foundation (“NFWF”)
5. Protection of California Resources	Department of Fish and Wildlife; Mono County
6. Compliance With CEQA Is Required Because the Lease Demonstration Program Is Authorized for 3 Years	Department of Fish and Wildlife; Mono County

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B. Relevant Requirements

For the most part, the Comment Letters do not address the standards which the California State Water Resources Control Board (the “State Board”) must consider in deciding whether to approve the Petitions. The Petitions are filed pursuant to California Water Code § 1725 to temporarily change the place and purpose of use to instream flow dedication under Water Code § 1707. California Water Code § 1725 provides:

A permittee or licensee may temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights if the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change, would not injure any legal user of the water, and would not unreasonably affect fish, wildlife, or other instream beneficial uses. For purposes of this article, “consumptively used” means the amount of water which has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion.

Water Code § 1727(b) sets forth the standards by which the State Board is to judge the Petitions. It provides:

(b) The board shall approve a temporary change if it determines that a preponderance of the evidence shows both of the following:

(1) The proposed temporary change would not injure any legal user of the water, during any potential hydrologic condition that the board determines is likely to occur during the proposed change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, or reduction in return flows.

(2) The proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses.

Water Code § 1727(e), dictates how the State Board is to apply the foregoing standards. It provides:

(e) In applying the standards set forth in paragraphs (1) and (2) of subdivision (b), the board shall not deny, or place conditions on a temporary change to avoid or mitigate impacts that are not caused by the temporary change.

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Finally, under Water Code § 1729, proposed temporary changes under Water Code §§ 1725-1732 are exempt from the requirements of the California Environmental Quality Act (CEQA), Public Resources Code § 21000, *et seq.*

Thus, the only real issues are whether the Petitions will injure any legal user of water, or will unreasonably affect fish, wildlife, or other instream beneficial uses.

C. Response to Comments

1. Comment - The Change From Irrigation to Instream Use Will Result in a Loss of Return Flows and Will Be Adverse to Delivery Efficiencies

As set forth above, the water involved here is water previously stored in priority. By its storage, it is “consumptively used” as defined in Water Code § 1725 because, when stored, it is removed from use in the downstream water supply. It only reaches the downstream water supply when its owner calls for it. Historically, the District has encouraged owners of stored water to establish farm reuse systems on their farms for the reuse of stored water.

This issue was raised by the Antelope Valley Mutual Water Company, Peter Fenili, Gary Garms, the United States Board of Water Commissioners, and the Walker River Paiute Tribe (“Tribe”). The Tribe uses this argument in several different ways. Importantly, the storage rights involved here did not exist when the natural flow rights in the Walker River Decree were established either under state or federal law. Therefore, a change to these stored rights cannot adversely impact such prior rights. There was no return flow from these stored rights on which the prior natural flow rights in the Walker River Decree could have relied.

Moreover, beneficial owners of stored water rights are allowed to call for their stored water when they have determined they need it, subject, of course, to beneficial use and any applicable period of use limitations. As a result, there is no assured pattern of use on which others have arguably relied for purposes of return flow or for delivery efficiencies in the River or in ditches. The requested changes will not injure other legal users of water because the water being changed is not water on which they have a right to rely.

A downstream water right is not entitled to benefit from water previously lawfully stored under another’s water right. The only rights that such a downstream appropriator has are those which he would have had under the natural conditions existing before the dam was erected. (*See, State Water Resources Control Board Cases* (2006) 146 Cal.App.4th 674, 738; *Stevens v.*

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Oakdale Irrigation District (1939) 13 Cal.2d 343, 350 [downstream appropriator has no right to continuation of existing pattern of releases from upstream reservoir]; *In the Matter of Applications 31487 and 31488 and Change Petitions 3723, 4196, 11605 and 10180* (October 16, 2012) Cal. St. Wat. Res. Bd. Dec. No. 1651, 23-24.)

2. Comment - There Will Be a Loss of Carryover Storage

Concerns over the loss of carryover storage have been expressed by Peter Fenili, Gary Garms, the United States Board of Water Commissioners, and Six N Ranch, Inc. Beneficial owners of stored water have an absolute right to call on their stored water for beneficial use during an irrigation season. None are required to leave any water in storage at the end of an irrigation season to benefit the common pool for the subsequent year. For the same reasons that a downstream appropriator has no right to a continuation of the existing pattern of releases from upstream storage, a change in use which results in a greater opportunity to beneficially use all of an owner's stored water is not an injury to legal users of water. An appropriator is not required to refrain from using stored water in order to make more water available to others. (*Stevens v. Oakdale Irrigation District, supra*. 13 Cal.2d 343; Decision No. 1651, *supra* 31.)

3. Comment - Withdrawals Should Be Limited to the Irrigation Season Set Forth in the Walker River Decree

This comment was made by Peter Fenili, Gary Garms, the United States Board of Water Commissioners, Six N. Ranch, Inc., and may also be reflected in the concerns of the Tribe. Nevada law grants an irrigation district the authority to adopt regulations for the use of water within the district. The District has exercised that authority, and has adopted a regulation which limits the use of stored water for irrigation purposes to the period April 1 to October 31. That period does not completely coincide with the irrigation season under the Walker River Decree.

Both the Walker River Decree provisions and the existing District regulation establish a season for "irrigation use." The Walker River Decree and California law allow for changes in use. The use here will not be an irrigation use, and therefore the period of use for irrigation simply does not apply. However, it is likely that releases will take place during the period April 1 to October 31, or immediately after October 31.

4. Comment - Clarify Whether the Changes Involve 50,000 Acre-Feet

This is a comment which is common to the California Department of Fish and Wildlife and the National Fish and Wildlife Foundation. The National Fish and Wildlife Foundation

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actually requests that the Petitions be interpreted to, in fact, involve 50,000 acre-feet rather than 25,000 acre-feet.

The Petitions are limited to a combined total of 25,000 acre-feet. The combined 25,000 acre-feet total is clearly enough to meet the District's participation goal of 25% of the total stored water allocated.

5. Comment - Safeguards Should Be Included to Protect Resources in California

This issue was raised by the California Department of Fish and Wildlife ("Department") and Mono County. It appears to encompass concerns related to recreational levels in Bridgeport and Topaz Reservoirs, as well as whether sufficient information is available to assess whether the proposed temporary changes would not unreasonably affect fish, wildlife, or other instream beneficial uses. Both the Department and Mono County are concerned with reservoir levels and stream flow changes.

Initially, it is important to understand what is presently allowed under these rights in the absence of the proposed changes. In order to determine whether the proposed changes will unreasonably affect fish, wildlife, or other instream beneficial uses, what is presently allowed must then be compared to what will be allowed if the proposed changes are approved.

First, the Petitions do not request any changes to diversion to storage. They request changes in the place and purpose of use upon release from storage. Because of that fact, there can be no impact to the West Walker River bypass flow which relates to when the water is diverted to storage in Topaz Reservoir. Moreover, releases from Topaz Reservoir storage will not impact any part of the West Walker River in California because the Topaz outlet is in Nevada.

Second, Bridgeport Reservoir will continue to be operated in accordance with the Bridgeport Reservoir Operations Manual. Minimum pool and ramping requirements will be satisfied. Minimum release requirements will be followed. Topaz Reservoir, which is located partly in California and partly in Nevada, has a dead pool of approximately 65,000 acre-feet. The Petitions will not affect the size of that dead pool at all.

Importantly, at present, farmers are allowed to call for stored water at any time for irrigation purposes during the period April 1 to October 31. There is no required pattern which limits how that water may be called for. The call is at the discretion of the owner. Today,

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nothing prevents early drawdown of reservoirs or fluctuating releases during the irrigation season. The Petitions will not alter those facts.

To the extent that those facts are problematic, they do not exist because of, and are not created by, the Petitions. Under Water Code § 1727(e), the State Board cannot deny, or even place conditions on, a temporary change “to avoid or mitigate impacts that are not caused by the temporary change.” Moreover, it is possible, if not probable here, that water will be released from storage near the end of or immediately after the irrigation season. This likely will improve, and certainly will not harm, summer recreation on Bridgeport and Topaz Reservoirs. To the extent that releases occur after October 31 of a year, the District will work with the Department to avoid unseasonal additions, abnormal quantities, or rapid fluctuations in the streams.

When all of the foregoing is considered, it is clear that there is adequate information for the State Board to find that the Petitions will not affect fish, wildlife, or other instream beneficial uses. There will be no such unreasonable effects resulting from the Petitions because they do nothing more than allow the same water which, without the changes, would flow out of California for diversion to irrigation in Nevada, to flow out of California, and into Nevada for non-diversion and on to Walker Lake.

6. Comment - The Lease Demonstration Program is a Three Year Program, Therefore the Filing Should Require Compliance With CEQA

This is an issue raised by the Department and Mono County. Although the lease demonstration program is authorized for three years, there is nothing which requires it be for three years or that the years be consecutive years. Moreover, there is no certainty that there will be a one year program, much less a three year program. Much will depend upon the price being offered for participation and, in addition, on the availability of water.

The California legislature in Water Code § 1729 has expressly provided that changes made under Water Code § 1725 are exempt from CEQA. The legislature has the absolute right to grant that exemption. (*Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288,299.) The State Board cannot disregard that exemption simply because another similar or perhaps longer change might be sought in the future. Moreover, the temporary changes will not authorize a change for longer than one year. Anything after that will require additional filings.

The District’s filing of the Petitions for a temporary one year change is not an attempt to evade CEQA requirements or to “chop a larger project into bite size pieces.” It is a practical approach to determine if a lease program is viable and can be implemented, even for one year.

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The authorities relied upon by Mono County have no application here. They involve situations where the environmental analysis did not take into account future expansion of or future actions related to a project. The California Supreme Court's decision in *Laurel Heights Improvement Association of San Francisco v. Regents of University of California* (1988) 47 Cal.3d 376, 396, is controlling here. There, the Court held that the environmental analysis "must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects."

Here, neither of those two circumstances exist. First, an additional two years of changes is not a reasonably foreseeable consequence of these changes. As noted above, at this point, there is no certainty that a lease program will be viable even for one year. Much will depend on water availability and lease price. It is entirely speculative to suggest that subsequent changes are a foreseeable consequence of the Petitions. A just as foreseeable consequence is that there will not be subsequent changes. Second, even if in the future there are two more years of changes, those changes will not alter the scope or nature of these changes, and will not alter the environmental effects of these changes.

7. Comment - The Walker River Irrigation District is a Public Agency Under California Law, and Must Itself Comply With CEQA

Mono County suggest that the District is a public agency under CEQA. The District is an irrigation district organized in 1919 under the laws of Nevada. Although there seems to be no case which holds that a governmental entity of another state is not a "public agency" within the meaning of Public Resources Code § 21063, it has been determined that federal agencies, like the United States Fish and Wildlife Service, are not "public agencies" within the meaning of CEQA or its Guidelines. (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1389.) There is no basis for concluding that the District is a "public agency" under CEQA.

8. Comment - Protection of Delivery Efficiency in Irrigation Canals

This issue was raised by Gary Garms. As noted above, owners have discretion as to when they call on stored water. Other farmers cannot control the exercise of that discretion for purposes of canal delivery efficiencies. In addition, as noted above, persons with decreed natural flow rights may not claim any reliance on stored water for purposes of canal delivery efficiencies because when their ditches were established, these stored water rights did not exist. In addition, they cannot claim injury as a result of a change in those stored rights. *See*, pgs. 8-9, *supra*.

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9. Comment - The Approval Should Be Valid for a One Year Period After the Last of the Required Approvals Are Obtained

This comment was submitted by NFWF. The District agrees with this comment. Section 7.5 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 (the “Administrative Rules”) adopted by the Walker River Court provides that any approval given by the State Board or Nevada State Engineer cannot take effect unless and until the Walker River Court enters an order modifying the Walker River Decree accordingly.

Here, the District’s Regulation No. 14 concerning Temporary Changes to Stored Water Rights for Beneficial Use at Walker Lake requires State Board approval of the Petitions, and Nevada State Engineer approval of a Temporary Change Application for individual participants in the Stored Water Program. As a result, the Stored Water Program cannot take effect until the Walker River Court has approved any State Board order and any related Nevada State Engineer approvals of Temporary Change Applications. The one year period on any State Board order here should not begin to run until the Walker River Court has approved that order, and has approved at least one of the required Nevada State Engineer Temporary Change Applications.

10. Comment - Management of Releases of This Water Past the Wabuska Gage Cannot Be Assured or, Alternatively, Requires Approval From the Bureau of Indian Affairs and the Walker River Paiute Tribe

This is a comment from both the Tribe and the United States Board of Water Commissioners. This is an issue for the Walker River Court, and need not be addressed by the State Board. Moreover, in connection with Application 80700 before the Nevada State Engineer, NFWF and the Tribe have reached an agreement related to administration of changed water from the Wabuska Gage and through the Reservation. A copy of that agreement and the related Lower Walker River Conveyance Protocols is attached hereto as Exhibit A.

11. Comment - The Changes Cannot Impact Delivery of Stockwater

This is a comment from the United States Board of Water Commissioners. The Petitions will not impact, and have absolutely no relationship to, the delivery of stockwater. Stockwater is delivered during non-irrigation season. This stored water would either have been used during the irrigation season, or would be held in storage after the irrigation season. In either case, it would not and never has contributed to the delivery of stockwater.

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12. Comment - The Changes Propose a Use Outside of the Walker River Basin

This is a comment from the United States Board of Water Commissioners. This is an issue for the Walker River Court. In connection with NFWF Application No. 80700 filed with the Nevada State Engineer, the Nevada State Engineer in Interim Ruling No. 1 has concluded that Walker Lake is within the Walker River Basin.

13. Comment - Pending Litigation

This is a comment from the United States Board of Water Commissioners, and is a suggestion that the State Board should withhold action on the Petitions pending the outcome of litigation which has been ongoing for nearly two decades. This is a one year temporary change, which cannot in any way impact whatever may be the outcome of the pending litigation, which outcome is years, if not decades, away.

14. Comment - Water Should Not Be Used Outside the Irrigation District Boundaries

This is a comment from the Six N Ranch, Inc. These are temporary changes proposed and authorized under District Regulation No. 14 which will expire in 2017. There has been no decision to allow permanent use of District stored water outside the boundaries of the District, and these temporary changes will not permit such permanent use. This is not a State Board issue. It is an internal District issue.

15. Comment - There Is a Potential Loss of Groundwater Recharge

This is a comment of Six N Ranch, Inc. and the Tribe. Similar to other responses, there is nothing which requires a farmer to call for this water, and neither the State Board nor the District can require a farmer to irrigate for purposes of groundwater recharge. The Nevada State Engineer has recognized this fact in a number of rulings, and has essentially determined that impacts to groundwater recharge are not a valid basis for denying a change to a surface water right. (*See, In the Matter of Change Application No. 70934 (August 21, 2007) Nev. State Engineer Ruling No. 5760, 13-15.*)

16. Comment - The State Board Must Protect the Tribe's 1859 Right

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This is a comment from the Tribe. The Petitions involve previously stored water which has been stored in priority, after the Tribe's right is satisfied under the Watermaster's oversight. The Petitions cannot impact the Tribe's 1859 right.

17. Comment - The State Board Must Protect the Tribe's "Right" to Store Water in Weber Reservoir.

This is a comment from the Tribe. The Petitions involve release of previously stored water to which the Tribe has no right. At present, there is no recognized right to store water in Weber Reservoir beyond the Tribe's 1859 right recognized in the Walker River Decree. The Petitions do not include any change in the diversion to storage, and diversions to storage will take place in priority as they do today.

18. Comment - Ensure That Lands Participating in This Stored Water Program Are Not Irrigated.

This is a comment from the Tribe. The Grant Agreement with NFWF requires the District to ensure that lands participating in the Program do not receive water from other sources to replace this transferred water.

19. Comment - Do Not Allow Use of Water From Dormant Lands in Dry Years.

This is a comment of the Tribe. This comment assumes, without any support, that stored water which may be appurtenant to lands which, for some reason, are no longer irrigated is not used in dry years. District farmers with such lands can and do temporarily move stored water appurtenant to those lands to other lands during dry periods. The justification for this proposed limiting condition seems to be that in dry years, delivering stored water to Walker Lake from lands which have not been irrigated will create a new burden on the system. Given that this is previously stored water, that will not be the case. Moreover, Water Code § 1727(e) prohibits this proposed condition because it is intended to mitigate an issue not caused by the temporary changes identified in the Petitions.

20. Comment - Decree Holder Must Own the Place of Use to Exercise a Water Right.

This is a comment by the United States Board of Water Commissioners. If this is an issue, it is a Court issue. There is no such requirement under Nevada or California law.



Kate Gaffney
November 22, 2013
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III. CONCLUSION.

The Petitions should be granted. The proposed temporary changes will not injure any legal user of water. They will not unreasonably affect fish, wildlife, or other instream beneficial uses. None of the Comment Letters establish otherwise. If you have questions concerning this response to comments, or require additional information, please contact me or Darren Cordova of MBK Engineers.

Sincerely,

Gordon H. DePaoli

GHD:hd
Enclosure
cc: Attached Mailing List

Kate Gaffney
November 22, 2013
Page 17 of 17

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

IN THE MATTER OF CHANGE)
APPLICATION NO. 80700 FILED BY)
THE NATIONAL FISH AND WILDLIFE)
FOUNDATION)
_____)

STIPULATION TO RESOLVE
CERTAIN PROTESTS REGARDING
APPLICATION NO. 80700
)
)
)
)

RECITALS

1. The National Fish and Wildlife Foundation (“NFWF”) has pending before the Nevada State Engineer (the “State Engineer”) Amended Application No. 80700 (App. 80700) requesting to change the manner of use and place of use of portions of certain water rights adjudicated by that certain Decree (the Walker River Decree) entered April 14, 1936, and amended April 24, 1940, by the District Court (the Walker Decree Court) of the United States in and for the District of Nevada in that certain action (the Walker Decree Action) entitled *The United States of America, Plaintiff, vs. Walker River Irrigation District, et al., Defendants*, In Equity Docket No. C-125.

2. Application No. 80700 was protested by the United States Bureau of Indian Affairs (BIA) and the Walker River Paiute Tribe (WRPT), among others.

4. Pursuant to portions of several acts of Congress, which are generally referred to as the Desert Terminal Lakes legislation, NFWF is charged with, among other things, the acquisition, from willing sellers, of land, water appurtenant to land and related interests in the Walker River Basin for, among other things, environmental restoration in the Walker River Basin.

5. The undersigned parties (“Parties”) hereto desire that the protests of Application No. 80700 by BIA and WRPT be resolved by these Parties in advance of the

scheduled administrative hearing on App. 80700, and that App. 80700 be approved and granted pursuant to the terms and conditions of this Stipulation.

STIPULATION

NOW, THEREFORE, the Parties hereto, acting either individually or by and through their respective counsel, stipulate and agree as follows:

1. In the event the State Engineer grants App. 80700 in whole or in part, the Parties request that the State Engineer include this Stipulation and Exhibit 1 as part of the terms and conditions, including the following:

- A. The LOWER WALKER RIVER CONVEYANCE PROTOCOLS, attached as Exhibit 1 (“Protocols”), are adopted for use in accounting for the conveyance of water approved to be changed and administered in priority under App. 80700 (“Changed Water”) at the USGS Wabuska Gage, and from there on downstream to the USGS Little Dam Gage as set forth in the Protocols.
- B. The undersigned parties shall consult with the Chief Deputy Water Commissioner regarding the development, provision, and maintenance of a software tool, as may be updated and improved from time to time, to monitor and account for the conveyance of Changed Water as described in A., above. The Parties contemplate that the Protocols shall be operationally carried out by the Parties in cooperation among themselves and the Chief Deputy Water Commissioner, and under the jurisdiction of the Walker River Decree. The Chief Deputy Water Commissioner will be able to monitor the operations called for herein and shall have enforcement authority regarding those operations, if called upon by any of the Parties and otherwise at his/her discretion.

2. The parties stipulate that a permit subject to the terms and conditions set forth in paragraph 1 above will not injure or conflict with existing water rights in violation of the Walker River Decree and NRS 533.370(2), or threaten to prove detrimental to the public interest.

3. By entering into this Stipulation, no party waives any rights with respect to the content of any future change application, or with respect to any protest thereto, which any of them may file.

4. The provisions of this Stipulation are not severable, and in the event that this Stipulation is not approved by the State Engineer and the Walker Decree Court, without changes agreeable to the Parties, it shall be deemed withdrawn without prejudice to any claims or contentions which may have been made or may be made in this proceeding by any Party, and it shall not be admissible as evidence or in any way described or discussed in any proceeding subsequent to any non-approval as described in this paragraph.

5. WRPT and BIA hereby withdraw their protests of App. 80700. The Parties shall support approval by State Engineer and the Walker Decree Court of App. 80700 as provided in this Stipulation.

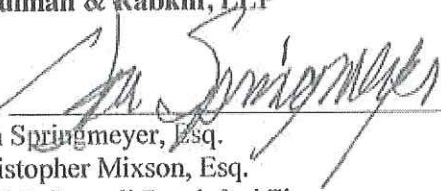
6. If the State Engineer, or the Walker Decree Court, does not approve this Stipulation as provided in Paragraph 1 above, no Party to this Stipulation shall be determined to be bound by any provisions or agreements reached and described herein.

7. This Stipulation represents a compromise of the Parties. Except as expressly set forth herein, the provisions of this Stipulation shall not be construed as or deemed to be precedent by any Party, the State Engineer or the Walker Decree Court with respect to any issue, principle, or interpretation, or application of law and regulations for


any purpose, or in connection with any proceeding before a court of law, or any state or federal government regulatory body.

8. This Stipulation may be executed in counterparts or via facsimile or electronic scanning.

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**U.S. Dept. Of Interior
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Dated: _____
*Attorneys for Protestant Bureau of
Indian Affairs*

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EXHIBIT 1

LOWER WALKER RIVER CONVEYANCE PROTOCOLS

Walker River Paiute Tribe (WRPT), U.S. Bureau of Indian Affairs (BIA),
and National Fish and Wildlife Foundation (NFWF)

September 18, 2013

1. Purpose

This document sets forth protocols for conveyance in the Lower Walker River through the Walker River Indian Reservation (WRIR) to Walker Lake of water acquired and/or secured, by purchase, lease, or otherwise, under authority of the Walker Basin Restoration Program in accordance with all necessary approvals (i.e., Program Water or PW). These "Protocols" are designed to provide transparency for the management and administration of Program Water in the Lower Walker River (i.e. from the USGS Gage at Wabuska down to Little Dam). The Protocols explicitly recognize the authority of the Chief Deputy Water Commissioner (i.e. Federal Watermaster or FWM) of the U.S. Board of Water Commissioners to administer water rights under the Walker River Decree, while providing a transparent set of tracking equations (and companion spreadsheet accounting tool) so that WRPT, BIA and NFWF may cooperatively and collaboratively manage Program Water conjunctively with the WRIR Irrigation Water in the Lower Walker River. The Operator of Weber Dam facilities and the Canal 1 and Canal 2 irrigation works (i.e. Operator) is the BIA.

2. Inputs and Conveyance Reaches

The Protocols require as an initial input the amount of Program Water that is administered in priority at the Wabuska Gage by the FWM. As with any other water right that is ordered and administered on the Walker River system, the FWM will administer and record the amount of Program Water that reaches the Wabuska gage (in mean daily flow) on a daily basis.

Downstream of the Wabuska Gage, the Protocols (as presented below) provide the measurements and equations necessary to account for gains and losses of Program Water through to Little Dam, just below the final point(s) of diversion at Canals 1 and 2. Program Water will be accounted for in two defined reaches of the Lower Walker River:

1. From the Wabuska Gage to the outlet of Weber Dam,
2. From the outlet of Weber Dam to Little Dam.

The Protocols are designed to be implemented on a daily time step using real-time online data from USGS gages to the extent possible and the best available sources for any other information needed in the Protocols. Most data used in the accounting calculations reflect the average daily values recorded from midnight to midnight of the day previous to operation ($t=0$), conforming to standard USGS reporting procedures. Flow, or Q , values in the equations below are converted to total daily quantity of water passing a particular gage or location, or the total quantity of water in Weber Reservoir, expressed in a volumetric unit of acre-feet. The conversion factor between cubic feet per second and acre-feet per day shall be 1 cfs equals 1.9835 acre-feet per day (AF/day). The Protocols are simplified by calculating Program Water at all locations on a same day basis, with an implied transit time through Weber Reservoir of one day. The results of the calculations then inform operations, including releases at Weber Dam and

regulation of flow at Little Dam, monitoring and administration for the day after the data was recorded (t+1).

3. Program Water at the Wabuska Gage

Measurement. Flows are measured by the USGS at the Wabuska Gage (10301500).

Accounting. There are two inputs to the Protocols at the Wabuska Gage:

Q_{wab} = Mean daily flow at the Wabuska Gage

PW_{wab} = Mean daily flow of Program Water at the Wabuska Gage (as provided by the FWM)

4. Program Water at Weber Dam

Measurement. The stage of Weber Reservoir and the amount of water stored are reported by the USGS daily at midnight for the Weber Reservoir gage (10301700). Daily maximum air temperature will be measured by the USGS at or near Weber Dam for estimation of daily evaporation from the water surface of Weber Reservoir. Daily total precipitation at Weber Reservoir will be measured by the USGS from a gage located at or near Weber Dam. Releases from Weber Dam are measured by a USGS gage just downstream of the dam called Walker River at PT site below Weber Reservoir (10301720).

Accounting. The Protocols are designed to simplify the accounting process in the reach from the Wabuska Gage to the release point from Weber Reservoir by applying a water balance to develop a daily estimate of unmeasured losses of flow from both the river channel and the reservoir (i.e. losses equal inflows plus change in storage less all outflows). Inputs to the water balance equation include the flow at the Wabuska Gage, the change in Weber Reservoir storage, releases from Weber Reservoir, evaporation, and precipitation. Losses during conveyance of water through the Walker River channel and seepage losses in Weber Reservoir are not differentiated, but are combined into a single river transmission loss variable. Program Water is assumed to pass from the Wabuska Gage through Weber Reservoir over a 24-hour period. Evaporation from Weber Reservoir is not charged to Program Water as it passes through on this single day. Program Water that does not pass through Weber Reservoir within 1 day is assigned a proportional share of reservoir evaporation.

The water balance equation is as follows:

$$LOSS_{tot} = WEB_{t-1} - WEB + Q_{wab} - Q_{webout} + Precip_{web} \quad \text{Eqn. (1)}$$

where:

$LOSS_{tot}$ = total net loss (if positive) or gain (if negative) in the Wabuska through Weber Reservoir reach, which consists of both river transmission losses (including reservoir seepage) and evaporative losses from Weber Reservoir less any direct precipitation on the reservoir.

WEB_{t-1} = beginning of day storage in Weber Reservoir

WEB = end of day storage in Weber Reservoir

Q_{webout} = total daily outflow from Weber Reservoir

$Precip_{web}$ = total daily precipitation at Weber Reservoir

Precipitation on Weber Reservoir, in acre-feet, is calculated as follows with the unit for WEB_{surf} being acres:

$$Precip_{web} = WEB_{surf} * PPT_{web} / 12 \quad \text{Eqn. (2)}$$

where:

WEB_{surf} = surface area in acres of Weber Reservoir determined based on reservoir stage and published bathymetry

PPT_{web} = daily precipitation at Weber Reservoir, inches

Daily evaporation in acre-feet from Weber Reservoir will be based on the best information available as determined by USGS including the current provisional relationship with air temperature calculated as follows:

$$Evap_{web} = WEB_{surf} * ((0.0003 * Temp_{web}) - 0.0116) \quad \text{Eqn. (3)}$$

where:

$Temp_{web}$ = maximum daily temperature recorded at Weber Reservoir, °F

The river transmission loss, $LOSS_{riv}$, is then calculated by subtracting Weber Reservoir evaporation from the total reach loss:

$$LOSS_{riv} = LOSS_{tot} - Evap_{web} \quad \text{Eqn. (4)}$$

The net river loss (or gain) derived in Equation (4) is then assigned proportionally to Program Water based on flow percentage at Wabuska in order to compute the Program Water inflow to Weber Reservoir, PW_{webin} .

$$PW_{webin} = PW_{wab} - (PW_{wab} / Q_{wab}) * LOSS_{riv} \quad \text{Eqn. (5)}$$

where:

PW_{webin} = Program Water inflow to Weber Reservoir after river transmission losses

Under the Protocols, if a daily gain in flow is calculated, represented by a negative value of $LOSS_{tot}$, then gains are likewise allocated proportionally. The proportional allocation of gains is necessary to prevent introduction of bias into the long-term flow accounting.

The total net loss to Program Water in the Wabuska through Weber Reservoir reach, PW_{loss} , is then calculated by assigning proportional shares of river transmission loss based on flow and evaporative loss based on any Program Water not passed through Weber Reservoir within one day. The evaporative loss is allocated proportionally based on volume of Program Water in Weber Reservoir relative to the total Weber volume at the beginning of the day. The Program Water outflow (PW_{webout}) is subtracted from end of prior day Program Water in Weber ($PW_{web\ t-1}$) in the calculation because evaporative loss is not charged to Program Water as it passes through Weber Reservoir nor is it charged to any other Program Water that is released that same day.

$$PW_{loss} = PW_{wab} / Q_{wab} * LOSS_{riv} + (PW_{web\ t-1} - PW_{webout}) / WEB_{t-1} * Evap_{web} \quad \text{Eqn. (6)}$$

where:

$PW_{web\ t-1}$ = Program Water in Weber Reservoir at beginning of day

PW_{webout} = Program Water released from Weber Reservoir

PW_{webout} is back calculated based on actual Program Water observed at Little Dam, PW_{ld} , and is discussed in the next section.

The end-of-day Program Water not passed through Weber Reservoir, PW_{web} , is calculated by:

$$PW_{web} = PW_{web\ t-1} + PW_{wab} - PW_{webout} - PW_{loss} \quad \text{Eqn. (7)}$$

Operations. Under pass-through operations for Program Water, which is the default operation under these Protocols, the Operator will release the calculated Program Water inflow (PW_{webin}) on the following day, or on successive days at its discretion, except that NFWF shall always have the right to call for the release of Program Water. If the Operator is also releasing irrigation water then any Program Water release would be added to the irrigation water release.

5. Weber Dam to Little Dam

Measurement. At Little Dam there are three possible outlets, Canal 1 and Canal 2 that serve the WRIR irrigation project and the downstream outlet to the Walker River. The downstream outlet allows water not diverted at Canals 1 or 2 to flow into the Lower Walker River and on to Walker Lake. The USGS has gages on each of these three routes of river flow at Little Dam: Canal No 1 (10301755), Canal No 2 (10301742), and Walker River above Little Dam (10301745).

Accounting. In order to calculate the Program Water released from Weber Reservoir (PW_{webout}), as well as to estimate the next day target release of water from Weber Reservoir ($TPW_{webout\ t+1}$) the loss/gain factor between the gage below Weber Dam and Little Dam is needed. Program Water natural flow loss or gain in the reach of the Walker River downstream from Weber Reservoir to Little Dam will be determined by the gaged difference in flow between the USGS gage below Weber Dam and the sum of gaged flows at Little Dam. This loss/gain factor is derived using the observed loss between the gages as follows:

$$LGF = (Q_{webout} - (Q_{canal1} + Q_{canal2} + Q_{ld})) / Q_{webout} \quad \text{Eqn. (8)}$$

where:

Q_{canal1} = Mean daily flow at WRIR Canal 1

Q_{canal2} = Mean daily flow at WRIR Canal 2

Q_{ld} = Mean daily flow at the Little Dam Gage

A positive LGF signifies losses in the reach and a negative LGF signifies gains in the reach.

The loss/gain derived in this fashion is assigned proportionally to Program Water at Little Dam in order to back-calculate the Program Water released from Weber Reservoir for that day and to estimate Program Water targeted for release over Little Dam the next day (t+1). Program Water remaining in Weber Reservoir cannot be negative.

So, Program Water released from Weber Reservoir is determined as follows:

$$PW_{webout} = PW_{ld}/(1-LGF) \quad \text{Eqn. (9)}$$

where:

$$PW_{ld} = \text{Lesser of: } Q_{ld} \text{ or the Program Water available for release, which is } (PW_{web,t-1})*(1-LGF)$$

Mean daily flow of Program Water at the Little Dam gage would not normally exceed the Program Water available for release. Losses and gains are to be shared proportionally to avoid long-term bias in gage error, and also to proportionally recover upstream seepage losses, to the degree they may reemerge below Weber Reservoir. Program Water (PW_{web}) will not be charged for flows past Little Dam under that circumstance that no Program Water (PW_{webout}) has been released from Weber Reservoir in the previous or current day.

The calculated next day target release of Program Water over Little Dam is determined by:

$$TPW_{ld,t+1} = TPW_{webout,t+1} * (1-LGF) \quad \text{Eqn. (10)}$$

where:

$$TPW_{webout,t+1} = \text{Program Water targeted for release from Weber Reservoir the next day}$$

Operations. The Operator will seek to control diversions down the Canals so as to allow the targeted amount of Program Water ($TPW_{ld,t+1}$) to flow past Little Dam.

Monitoring. NFWF can directly monitor the flow of Program Water over Little Dam and the amount of Program Water as accounted for in Weber Reservoir.

Administration. There are no further water right deliveries or diversions below Little Dam. Little Dam is therefore the last point in the Walker River system for NFWF to call on the FWM for water rights administration. Good faith operations by the Operator, consistent with the intent and content of these Protocols, should obviate the need for active administration at Little Dam.

6. Little Dam to Walker Lake

Measurement. Flows downstream of Little Dam are measured by USGS gages including one located near the mouth of Walker Lake (10302025).

Accounting. Program Water reaching Walker Lake may be calculated by subtracting any observed losses between the Little Dam and Walker River near mouth gages.

Operations, Monitoring and Administration. There is no need for operations by BIA, compliance monitoring by NFWF, or water rights administration by the FWM below Little Dam due to the lack of other water right deliveries or diversions by the WRPT. However, NFWF may monitor flows downstream of Little Dam and account for losses to Program Water and any other water flowing past Little Dam, in order to estimate Program Water contributions to Walker Lake inflow for program evaluation purposes.

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 on Kristen Geddes with the Nevada State Engineer by express delivery, and the remaining parties via U.S. Mail a true and correct copy, of the foregoing **STIPULATION TO RESOLVE CERTAIN**

PROTESTS REGARDING APPLICATION NO. 80700 on the following persons

and/or entities:

Via Federal Express

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Via Regular U.S. Mail

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Dated this 3rd day of October, 2013.


An employee of Wolf, Rifkin, Shapiro,
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