

1 Scott B. McElroy
Jeff J. Davis
2 GREENE, MEYER & McELROY, P.C.
1007 Pearl Street, Suite 240
3 Boulder, CO 80302
303/442-2021

4 Richard E. Olson, Jr.
CLASSEN AND OLSON
5 P.O. Box 2101
Carson City, NV 89702
(702) 882-5007

6 *Attorneys for the Walker River Paiute Tribe*

Mar 21 5 30 PM '94
By JRH

7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF NEVADA**

9 UNITED STATES OF AMERICA,)

10 Plaintiff,)

11 WALKER RIVER PAIUTE TRIBE,)

12 Plaintiff-Intervenor,)

13 vs.)

14 WALKER RIVER IRRIGATION DISTRICT,)

14 a corporation, *et al.*)

15 Defendants.)

In Equity C-125
Subfile C-125-B

16 WALKER RIVER IRRIGATION DISTRICT,)

17 Petitioner,)

18 STATE OF NEVADA,)

19 Petitioner-Intervenor,)

20 vs.)

21 CALIFORNIA STATE WATER RESOURCES)
22 CONTROL BOARD, *et al.*,)

23 Respondent-Intervenor.)

WALKER RIVER PAIUTE
TRIBE'S RESPONSE TO
THE UNITED STATES'
MOTION FOR
INSTRUCTIONS AND
ORDER

24 WALKER RIVER PAIUTE TRIBE AND)
25 UNITED STATES OF AMERICA,)

26 Cross-Claimants,)

27 vs.)

28 WALKER RIVER IRRIGATION DISTRICT,)

a corporation, *et al.*)

Cross-Defendants.)

1 In the United States' Motion for Instructions and Order of
2 April 6, 1994 ("U.S. Mot."), the United States requests the Court
3 to clarify whether groundwater users are to be joined in this
4 case pursuant to the order requiring joinder of all water users
5 of the Walker River. See Order (Oct. 27, 1992). The Walker River
6 Paiute Tribe ("the Tribe") files the following response to the
7 United States' request.

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I. INTRODUCTION

On October 27, 1992, the Court ordered the Tribe and the United States to "join as parties and serve all existing claimants to water of the Walker River and its tributaries." Order at 5. The Court reasoned that:

In this case the Tribe and the United States want the Court to recognize additional water rights for the Tribe and integrate these rights into the Decree. Such a recognition might have the effect of reducing the water allocated to other federal rights holders or altering the priority which their allocation is given. Such a recognition may also give the Tribe's newly recognized rights priority over claimants who acquired their rights through a state permit. Thus, the claimants to the water of the Walker River clearly have an interest in the action.

Id. at 5-6. Previously, the only rights recognized in these proceedings have involved the use of the surface waters of the Walker River and its tributaries. Indeed, the Tribe's pending claims for the recognition of additional water rights are limited to the use of the surface waters of the Walker River. See United States v. Walker River Irrigation Dist., No. C-125, *Decree* (D. Nev. April 14, 1936), as amended by, *Stipulation and Agreement for Entry of*

1 amended Final Decree pursuant to Writ of Mandate of the Circuit Court of Appeals - Ninth
2 Circuit - and also amended Decree entered herein on April 15, 1936 to Clarify Certain
3 Provisions Thereof and Order for Entry of Amended Final Decree to Conform to Writ of
4 Mandate, etc. (April 14, 1940); Answer to First Amended Petition, and
5 Counterclaim and Cross-Claim of the Walker River Paiute Tribe ("Tribe's
6 Counterclaim") at 6-9 (Mar. 17, 1992). Despite the previously
7 limited nature of these proceedings, the case is now expanded to
8 include all water users of the Walker River and its Tributaries.
9 Prior to joining all these claimants, the United States asks the
10 Court to clarify whether groundwater users were contemplated as
11 part of "all claimants to water of the Walker River and its
12 tributaries," who should be joined in this subproceeding. See
13 Memorandum of Points and Authorities in Support of Motion For Instructions and Order
14 at unnumbered 2 (April 6, 1994) ("U.S. Mem.").

15
16 Because it appears highly likely that groundwater usage in
17 the Walker River basin affects the use of surface water in the
18 basin, the Tribe submits that all groundwater users should be
19 joined.

20 II. BACKGROUND

21 The United States initially brought suit in C-125 to
22 establish rights to the surface waters of the Walker River and
23 its tributaries on behalf of the Tribe. See United States v.
24 Walker River Irrigation Dist., 11 F. Supp. 158 (1935), reversed
25 in part, 104 F.2d 334 (1939). The district court noted that the
26 United States filed suit "against 253 defendants . . . [to quiet
27 title to] 150 cubic feet per second of time of the . . . [natural
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1 flow] of said rivers and their tributaries" Id. at 159.
2 The district court reduced the United States' claims to the
3 amount of water that the Tribe was actually using, holding that
4 "[t]he rights of the government . . . are to be adjudged,
5 measured, and administered in accordance with the laws of
6 appropriation as established in the state of Nevada." Id. at 167.

7 The Court of Appeals reversed the district court and held
8 that water rights for the benefit of the Tribe were reserved by
9 implication when the reservation was established. See United
10 States v. Walker River Irrigation Dist., 104 F.2d 334, 339-340
11 (9th Cir. 1939). The court, however, did not increase the rights
12 established by the district court, finding "the United States to
13 be entitled to the continuous flow of 26.25 cubic feet of water
14 per second to be diverted from the Walker River . . . and
15 enjoining the defendants from preventing or interfering with the
16 natural flow of the described quantities of water in the channels
17 of the stream and its tributaries to and upon the reservation."
18 Id. at 340. The decreed right was based on the water that had
19 been put to use by the Tribe since the creation of the
20 Reservation and prior to the time of the decision. Id.

21 The water rights of the water users named as defendants in
22 the suit were also determined. The Final Decree reflects the
23 opinion of the court of appeals, and sets out the priorities and
24 quantities of the various parties to the adjudication. The Final
25 Decree provides: "This decree shall be deemed to determine all of
26 the rights of the parties to this suit and their successors in
27 interest in and to the waters of the Walker River and its tribu-

1 taries as of the 14th day of April, 1936. . ." See Decree at 72
2 and *Stipulation and Agreement for Entry of Amended Final Decree Pursuant to Writ of*
3 *Mandate of the Circuit Court of Appeals - Ninth Circuit - And also Amended Decree*
4 *Entered Herein on April 15, 1936 to Clarify Certain Provisions Thereof* ¶ 2, at 3
5 (April 22, 1940). No groundwater uses were adjudicated.

6 On March 17, 1992, the Tribe filed claims for additional
7 water for use on the lands restored to the Reservation after
8 entry of the final decree and for storage in Weber Reservoir.
9 See Tribe's Counterclaim at 6-9. The United States filed a
10 counterclaim which is substantially similar to the Tribe's
11 counterclaim, on July 22, 1992. See *Counterclaim of the United States of*
12 *America* (July 22, 1992).

13 The Walker River Irrigation District ("WRID") and the State
14 of Nevada filed motions to dismiss the Tribe's and the United
15 States' counterclaims, or in the alternative to require that the
16 United States and Tribe join all claimants to the waters of the
17 Walker River and its tributaries. See *Walker River Irrigation District's*
18 *Points and Authorities in Support of Motions to Dismiss Counterclaims; to Require Joinder*
19 *of Parties; and to Require Service of Process in Accordance with Rule 4 of the Federal Rules*
20 *of Civil Procedure* (Aug. 3, 1992) ("WRID's Motion to Join"); *State of*
21 *Nevada's Preliminary Threshold Motions Re Dismissal of Counterclaims, Additional Parties*
22 *and Service of Process* (Aug. 3, 1992). WRID and Nevada asserted that
23 the United States and Tribe's had to join all water users because
24 "water rights on a stream system like that of the Walker River
25 are interdependent with respect to all water rights and all water
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1 users." See WRID's Motion to Join at 12 (citing favorably,
2 California v. United States, 235 F.2d 647, 663, 664 (9th Cir.);
3 and United States v. District Ct. in & for Eagle County, 401 U.S.
4 520, 525-526 (1971)). Specifically, WRID and Nevada asserted
5 that the United States and Tribe must join "claimants who have
6 established water rights under California or Nevada law after the
7 date of the Walker River Decree. . . . [in order to] provide
8 effective and complete relief and repeated litigation involving
9 essentially the same subject matter will be avoided." Id. at 13-
10 15 (citations omitted).

11 The Court granted WRID's and Nevada's request, "the
12 District's and the State of Nevada's motions (documents #11, #13)
13 to require joinder of parties are granted." See Order at 7. The
14 order is silent as to whether it contemplates the inclusion of
15 groundwater uses into the case. The Tribe submits that the
16 groundwater users of the Walker River Basin should be joined, in
17 order to be consistent with the all-inclusive nature of WRID's
18 and Nevada's request, the law of Nevada and California regarding
19 the use of groundwater, and the policy of judicial efficiency and
20 finality.

21 III. ARGUMENT

22 A. INTRODUCTION.

23 In seeking to expand the scope of this litigation, WRID and
24 Nevada previously argued that all water users should be joined in
25 this subproceeding because:

26 Here the waters of the Walker River and its
27 tributaries form a single res and are
28 analogous to one parcel of land in which

1 several parties are claiming an interest.
2 The subject matter of the Tribe's and United
3 States' claims involve how this single res is
4 to be divided among all water right claimants
5 and thus all water right claimants clearly
6 have an interest in its subject matter.

7 See *State of Nevada's and Walker River Irrigation District's Reply Points and Authorities in*
8 *Support of Motion to Dismiss Counterclaims; to Require Joinder of Parties; and to Require*
9 *Service of Process in Accordance with Rule 4 of the Federal Rules of Civil Procedure at*
10 *12 (Oct. 5, 1992).*

11 Because groundwater users may have an interest in the waters
12 that are the subject of this proceeding, they should be joined in
13 the case. The use of groundwater has the potential to interfere
14 with the rights claimed by the Tribe under federal law, and
15 therefore the Court has ample authority to adjudicate the
16 relationship between the tribal rights and those of groundwater
17 users in the basin. In any event, there is no conflict between
18 the state ground water law and the joinder of groundwater users
19 in this case.

20 **B. NEVADA GROUNDWATER LAW.**

21 All waters, surface and groundwater, are appropriable in
22 Nevada. See NEV. REV. STAT. §§ 534.010-534.190 (1991 & Supp.
23 1993). Chapter 533 addresses surface waters and provides:
24 "Subject to existing rights, . . . all water may be appropriated
25 for beneficial use as provided in this chapter and not
26 otherwise." NEV. REV. STAT. § 533.030 (1) (1991 & Supp. 1993).
27 The groundwater chapter similarly states: " All underground
28 waters within the boundaries of the state belong to the public,
and, subject to all existing rights to the use thereof, are

1 subject to appropriation for beneficial use only under the laws
2 of this state relating to the appropriation and use of water and
3 not otherwise." NEV. REV. STAT. § 534.020(1) (1991 & Supp. 1993).

4 "It appears that Nevada itself may recognize the potential
5 interrelationship between surface and ground water since Nevada
6 applies the law of prior appropriation to both." Cappaert v.
7 United States, 426 U.S. 128, 142 (1976) (citing NEV. REV. STAT.
8 §§ 533.010 et seq., 534.020, 534.080, 534.090 (1973)). In short,
9 groundwater users may affect the use of surface waters and in
10 turn, may be affected by surface water uses. Because groundwater
11 users may be competing claimants to the water of the Walker River
12 and its tributaries, they should be joined as parties.

13 **C. CALIFORNIA GROUNDWATER LAW.**

14 In California, the administrative process for appropriation
15 of waters is limited "to surface waters, and to subterranean
16 streams flowing through known and definite channels." CAL. WATER
17 CODE § 1200 (West 1971). There is no administrative process in
18 California which regulates ground water production. Instead,
19 ground water issues in California are generally resolved through
20 adjudications.

21 In California, all water use is governed by Article 10, § 2
22 of the State Constitution which provides in part:

23 The right to water or to the use or flow of
24 water in or from any natural stream or water
25 course in this State is and shall be limited
26 to such water as shall be reasonably required
27 for the beneficial use to be served, and such
28 right does not and shall not extend to the
waste or unreasonable use or unreasonable
method of use or unreasonable method of
diversion of water.

1 CAL. CONST. art. 10, § 2 (1976 & Supp. 1994) (formerly art. XIV,
2 § 3).

3 Article 10 applies to both groundwater and surface waters,
4 and rights to ground water have been adjudicated pursuant to this
5 article. See Wright v. Goleta Water Dist., 219 Cal. Rptr. 740,
6 750 (1985), review denied Mar. 12, 1986; see also City of Los
7 Angeles v. City of San Fernando, 537 P.2d 1250 (1975); Tulare
8 Dist. v. Lindsay-Strathmore Dist., 45 P.2d 972 (1935); Katz v.
9 Walkinshaw, 74 P. 766 (1903). Indeed, the court in Los Angeles
10 recognized that the allocation of ground water is subject
11 historic use, and the first in time appropriation principles.
12 Id. at 1260-1261.

13 In sum, the adjudication of the groundwater uses of the
14 Walker River Basin in California is not inconsistent with
15 California law. Moreover, these water users should be joined in
16 this subproceeding as they may also be claimants to the waters of
17 the Walker River and its tributaries.

18 **D. GROUNDWATER USERS SHOULD BE JOINED IN THIS PROCEEDING.**

19 The Court granted WRID's and Nevada's request that the
20 United States and Tribe join all claimants pursuant to Rule 19 of
21 the Federal Rules of Civil Procedure. See WRID's Joinder
22 Memorandum at 13. Rule 19 of the Federal Rules of Civil
23 Procedure requires joinder if:

- 24 (1) in the person's absence complete relief
25 cannot be accorded among those already
26 parties, or (2) the person claims an interest
27 relating to the subject of the action and is
28 so situated that the disposition of the
action in the person's absence may (i) as a
practical matter impair or impede the

1 person's ability to protect that interest or
2 (ii) leave any of the persons already parties
3 subject to a substantial risk of incurring
4 double, multiple, or otherwise inconsistent
5 obligations by reason of the claimed
6 interest.

7 FED. R. CIV. P. 19(a)(1), (2) (1994).

8 WRID and Nevada insist on the joinder of all claimants to
9 the waters of the Walker River because:

10 '[C]omplete relief cannot be accorded among
11 those already parties' . . . if there is a
12 possibility of repeated litigation involving
13 the same subject matter. . . . the ability of
14 claimants to water rights who have not been
15 joined to protect their interests may be
16 impaired or impeded by disposition of the
17 action. . . . [And] [w]ater rights on a
18 single stream system are interrelated. The
19 obligations of Nevada and the Irrigation
20 District with respect to any decision by the
21 Court on the Tribe's claimed rights may well
22 be inconsistent with their obligations to
23 other water right holders who. . . were not
24 joined.

25 Nevada and WRID's Reply at 11-14 (citations omitted).

26 "[T]he United States can protect its water from subsequent
27 diversion, whether the diversion is of surface or groundwater."
28 Cappaert v. United States, 426 U.S. at 141-143. To ensure
complete relief to all users of the waters of the Walker River
Basin, to protect all users interests in the system, and to avoid
the risk of possible inconsistent obligations, all groundwater
users in Nevada and California should be joined in these
proceedings.

29 IV. CONCLUSION

30 The groundwater in the Walker River basin appears to be
31 hydrologically connected to the surface water of the Walker River

1 and its tributaries and the extensive groundwater uses have had
2 an impact on the surface waters of the Walker River and its
3 tributaries. Therefore, the groundwater users should be joined
4 in this sub-proceeding.

5 Dated: 5/23/94

Respectfully submitted,
Scott B. McElroy
Jeff J. Davis
GREENE, MEYER & McELROY, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
(303) 442-2021

Richard E. Olson, Jr.
CLASSEN AND OLSON
P.O. Box 2101
Carson City, Nevada 89702
(702) 882-5007

15 By: 
16 Jeff J. Davis

Attorneys for the Walker River Paiute Tribe

CERTIFICATE OF SERVICE

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I hereby certify that I have sent a true and correct copy of the foregoing Walker River Paiute Tribe's Response to the United States' Motion for Instructions and Order, via U.S. Mail, first-class postage prepaid thereon, this 23rd day of May 1994, addressed to:

Shirley A. Smith
Assistant U.S. Attorney
100 West Liberty, #600
Reno, NV 89501

Margarct A. Twedt, Esq.
Deputy Attorney General
State Engineer's Office
198 South Carson Street
Carson City, NV 89710

Richard R. Greenfield
Department of Interior
Two N. Central Avenue, Suite 500
Phoenix, AZ 85004

Robert L. Hunter, Superintendent
Western Nevada Agency
Bureau of Indian Affairs
1677 Hot Springs Road
Carson City, NV 89706

Roger Bezayiff
Chief Deputy Water Commissioner
U.S. Board of Water Commissioners
P.O. Box 853
Yerington, NV 89447

Daniel Frink
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95814

John Kramer
Department of Water Resources
1416 Ninth Street
Sacramento, CA 95814

Ross E. deLipkau
Marshall, Hill, Cassas & deLipkau
P.O. Box 2790
Reno, NV 89505

Mary Hackenbracht
Deputy Attorney General
State of California
2101 Webster Street
Oakland, CO 94612-3049

Matthew R. Campbell, Esq.
McCutchen, Doyle, Brown & Enerson
3 Embarcadero Center, #1800
San Francisco, CA 94111

Linda A. Bowman
Vargas & Bartlett
201 W. Liberty St., Suite 300
P.O. Box 281
Reno, NV 89504

Garry Stone
290 South Arlington Ave.
Reno, NV 89510

Roger Johnson
Water Resources Control Board
State of California
P. O. Box 2000
Sacramento, CA 95810

R. Michael Turnipseed, P.E.
Division of Water Resources
State of Nevada
123 West Nye Lane
Carson City, NV 89710

John P. Lange
U.S. Department of Justice
Environment & Natural Resources Division
999 - 18th Street, Suite 945
Denver, CO 80202

1 Jim Weishaupt
Walker River Irrigation Dist.
2 P.O. Box 820
Yerington, NV 89447

3 Gordon H. DePaoli
4 Woodburn and Wedge
P.O. Box 2311
5 Reno, NV 89501

Sullivan J. Guion

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7
8
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12
13
14
15
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17
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