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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, *et al.* Defendants.	In Equity C-125 Subfile C-125-B
WALKER RIVER IRRIGATION DISTRICT, Petitioner, STATE OF NEVADA, Petitioner-Intervenor, vs. CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, *et al.*, Respondent-Intervenor.	WALKER RIVER PAIUTE TRIBE'S RESPONSE TO THE UNITED STATES' MOTION FOR INSTRUCTIONS AND ORDER
WALKER RIVER PAIUTE TRIBE AND UNITED STATES OF AMERICA, Cross-Claimants, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, *et al.* Cross-Defendants.	

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

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*

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

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

II. BACKGROUND

The United States initially brought suit in C-125 to establish rights to the surface waters of the Walker River and its tributaries on behalf of the Tribe. See United States v. Walker River Irrigation Dist., 11 F. Supp. 158 (1935), reversed in part, 104 F.2d 334 (1939). The district court noted that the United States filed suit "against 253 defendants . . . [to quiet title to] 150 cubic feet per second of time of the . . . [natural

flow] of said rivers and their tributaries . . . ." Id. at 159. The district court reduced the United States' claims to the amount of water that the Tribe was actually using, holding that "[t]he rights of the government . . . are to be adjudged, measured, and administered in accordance with the laws of appropriation as established in the state of Nevada." Id. at 167.

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

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

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

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

The Walker River Irrigation District ("WRID") and the State of Nevada filed motions to dismiss the Tribe's and the United States' counterclaims, or in the alternative to require that the United States and Tribe join all claimants to the waters of the Walker River and its tributaries. See *Walker River Irrigation District's Points and Authorities in Support of Motions to Dismiss Counterclaims; to Require Joinder of Parties; and to Require Service of Process in Accordance with Rule 4 of the Federal Rules of Civil Procedure* (Aug. 3, 1992) ("WRID's Motion to Join"); *State of Nevada's Preliminary Threshold Motions Re Dismissal of Counterclaims, Additional Parties and Service of Process* (Aug. 3, 1992). WRID and Nevada asserted that the United States and Tribe's had to join all water users because "water rights on a stream system like that of the Walker River are interdependent with respect to all water rights and all water

users." See WRID's Motion to Join at 12 (citing favorably, California v. United States, 235 F.2d 647, 663, 664 (9th Cir.); and United States v. District Ct. in & for Eagle County, 401 U.S. 520, 525-526 (1971)). Specifically, WRID and Nevada asserted that the United States and Tribe must join "claimants who have established water rights under California or Nevada law after the date of the Walker River Decree. . . . [in order to] provide effective and complete relief and repeated litigation involving essentially the same subject matter will be avoided." Id. at 13-15 (citations omitted).

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

III. ARGUMENT

A. INTRODUCTION.

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

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

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

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

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

B. NEVADA GROUNDWATER LAW.

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

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

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

C. CALIFORNIA GROUNDWATER LAW.

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

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

> The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such 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.

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

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

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

D. GROUNDWATER USERS SHOULD BE JOINED IN THIS PROCEEDING.

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

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

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

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

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

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

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

"[T]he United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." 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.

IV. CONCLUSION

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

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

Dated: 5/23/94

Respectfully submitted,

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CERTIFICATE OF SERVICE

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