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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,
Plaintiff,

WALKER RIVER PAIUTE TRIBE,
Plaintiff-Intervenor,

v.

WALKER RIVER IRRIGATION DISTRICT,
et al.,
Defendants.
_____/

WALKER RIVER PAIUTE TRIBE,
Counterclaimant,

UNITED STATES OF AMERICA,
Counterclaimant-Intervenor,

v.

WALKER RIVER IRRIGATION DISTRICT,
Counterdefendant,

STATE OF NEVADA,
Counterdefendant-Intervenor.
_____/

IN EQUITY NO. C-125
SUBFILE NO. C-125B

ORDER

The United States (hereinafter U.S.) and the Walker River Paiute Tribe (hereinafter Tribe) have filed separate but

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substantively similar counterclaims against the Walker River Irrigation District. The State of Nevada has intervened as a Counterdefendant (Doc. #7).

By order filed October 27, 1992, this Court deemed that what the Tribe and the U.S. designated counterclaims were in reality cross-claims and would be allowed to proceed on that basis. (Doc. #15). For clarity's sake we will continue to refer to the Tribe's and the U.S.'s pleadings as counterclaims although they are proceeding as cross-claims.

The substance of the counterclaims comprising subfile number C-125-B, are claims by the Tribe and the U.S. requesting this Court to recognize additional water rights to waters from the Walker River and its tributaries for the Tribe.

HISTORY

This Court entered a final decree establishing the rights to the waters of the Walker River as between the United States acting for the Tribe and competing claimants in 1936. United States v. Walker River Irrigation District, 1 F.Supp. 158 (D.Nev. 1935). On appeal the Ninth Circuit reversed some of the District Court's holdings. United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir. 1939). The decree was amended to conform to the mandate from the Court of Appeals on April 24, 1940.

The final decree determined various water rights of competing claimants to waters from the Walker River, including a determination that the United States, for the Walker River Paiute Tribe, was entitled to the continuous flow of 26.25 cubic feet of

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water per second, to be diverted from the Walker River during the irrigation season of one hundred and eighty days for the irrigation of two thousand one hundred acres of land on the reservation. Among the rights to the use of water adjudicated by the decree were determinations of the quantity of water a claimant was entitled to, the priority date of such entitlement and the uses of water upon which the claim was founded and the land on which the water was to be used.

The decree adjudicated only the rights of the claimants to the surface waters of the Walker River and did not concern itself in any way with underground water rights.

The current counterclaims of the U.S. and the Tribe seek to establish new and additional water rights. Both parties claim a new right to store waters drawn from the Walker River at Weber dam, rather than being limited to immediate use of the water. Both parties also seek a right to use waters from the Walker River on reservation lands not contemplated by the decree. Apparently, the Tribe was restored to possession of additional reservation lands in 1936, after the close of evidence in the original litigation. Therefore, the final decree does not allow the Tribe to use water drawn from the Walker River on the new reservation lands, but only on the old lands which were currently in the possession of the Tribe at the close of evidence. Finally, it appears that the U.S. and the Tribe seek a determination that when the new reservation lands were restored to the Tribe in 1936, a federal implied reservation of water rights was also granted. Thus, the U.S. and

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the Tribe are seeking a determination that they are entitled to additional waters from the Walker River, for use on the restored lands.

DISCUSSION

The question currently before the Court is whether our order of October 27, 1992 (Doc. #15) requiring that "all claimants to the water of Walker River and its tributaries must be joined as parties to the [Tribe's counterclaim,]" extends to groundwater claimants and users in the Walker River basin.

The U.S. originally filed a Motion for Instructions and Order (Doc. #23) requesting the Court to clarify its prior order (Doc. #15). In the Motion for Instructions and Order (Doc. #23) the U.S. took no position, but merely indicated its need for clarification. Subsequently, the Tribe in its Response (Doc. #26) took the position that such groundwater claimants must be joined as necessary parties pursuant to Fed.R.Civ.P. 19. Thereafter, the U.S. in its Reply (Doc. #29) abandoned its neutral posture and also took the position that groundwater claimants in the Walker River basin must be joined as necessary parties. [1]

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[1] Federal Rule of Civil Procedure 19 requires that

> [a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action 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

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The U.S. and the Tribe assert that the groundwaters of the Walker River basin are hydrologically connected to and are part of a single unitary water supply with the surface waters of the Walker River and its tributaries. Based on this assertion, the U.S. and the Tribe speculate that increased groundwater use will eventually compete with surface water use, in that use of one source of supply necessarily comes at a loss to the other. On this basis, the U.S. and the Tribe assert that all water in the Walker River Basin forms a single res and to do full justice in equity, all claimants to water from that single res, be they ground or surface water claimants, must be joined.

A. CLAIM TO GROUNDWATER RIGHTS

Although it is not clearly alleged in the Counterclaim of the U.S. or the Tribe, it appears that the U.S. at least contemplates a possibility that its counterclaim seeking additional water rights for the restored lands encompasses a claim to groundwater rights. See, U.S. Reply, (Doc. #29) at pp. 5-6.

The U.S. never plainly states that it is seeking groundwater rights. Rather the U.S. states that if "investigations indicate that groundwater will be necessary to fulfill the purposes of the federal reservation of these [restored] lands, then the United States, and presumably the Tribe, fully intend to assert rights to the groundwater. . . ." Id. at p. 6, ln. 7-10.

A possible future claim by the U.S. and/or the Tribe to groundwater rights is not sufficient to justify current joinder

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inconsistent obligations by reason of the claimed interest.

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into this litigation of all groundwater claimants in the Walker River basin. Mere speculation by the U.S. is insufficient to justify such joinder. See, ARMCO Steel Corp. v. United States, 490 F.2d 688, 690 (8th Cir. 1974)(district court erred in ordering joinder on hypothetical state of facts). At such time as the U.S. and/or the Tribe do assert claims to groundwater rights, it may be necessary to join other parties, but at this time the mere possibility is insufficient to require joinder under Rule 19.

Without deciding this issue at this time, the Court notes that even if a claim to groundwater rights was currently asserted, the U.S. has alleged no reason why joinder of all groundwater claimants in the Walker River basin is required. While there has been some indication in supporting documents (see exhibits attached to Doc. #29) that groundwater sources are hydrologically connected to each other and to the Walker River, there is nothing to indicate the extent of this connection is such that withdrawal of groundwater on the restored reservation lands will have any effect on surrounding groundwater claimants.

All that is offered is speculation. It is possible that groundwater withdrawal on the reservation lands will affect other groundwater claimants, but it is a truism that nearly anything is possible. The U.S. must offer more than a mere possibility to justify joinder under Fed.R.Civ.P. 19.

For the above reasons, the potential claim by the U.S. and/or the Tribe that they are entitled to groundwater rights is

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insufficient to justify joinder under Rule 19 of all groundwater claimants in the Walker River basin.

B. CLAIMS FOR ADDITIONAL WATER RIGHTS

As noted in our previous order (Doc. #15),

> [i]n 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.

Order, (Doc. #15) p. 5, ln. 22- p. 6, ln. 4.

Therefore, the Court ordered "[i]n accordance with Rule 19, all claimants to the water of Walker River and its tributaries must be joined as parties to the claim." Id. at p. 6, ln. 14-16.

The Court's order certainly appears clear in its intent that only claimants to the water of Walker River and its tributaries, need be joined.

1. Surface and Ground Waters are Separate but Related Resources

The Court throughout the course of this litigation, has considered ground water separately from surface water. Nevada state law treats surface and ground waters as separate although related resources. See e.g., NRS ch. 533 & 534; see also Cappaert v. United States, 426 U.S. 128, 142 (1975)(Supreme Court noting that Nevada itself may recognize the potential interrelationship between surface and ground water since Nevada

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applies the law of prior appropriation to both.) Several specific statutes in these chapters indicate that under state law, competing claims of ground and surface water claimants might require joinder of all the claimants to settle the competing water claims. See e.g., NRS §§ 533.240, 534.015 & 534.100-534.120.

2. State Law is Inapplicable

The requirements and procedures of state law are however, inapplicable in this action. As the Supreme Court reaffirmed in Cappaert v. United States, 426 U.S. 128, 145 (1975), a federal implied-reservation-of-water-rights and federal water rights in general "are not dependent upon state law or state procedures[.]" The U.S. and the Tribe assert that the additional water rights they are now claiming were impliedly reserved.

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. . . . The doctrine applies to Indian reservations[.]

Id. at 138. The Court also held that the doctrine applies to both surface and underground supplies of water. Id. at 142-43.

The only limit on the Federal Government's power to impliedly reserve water rights appurtenant to land reserved to a federal purpose is that the water reserved must be for the federal purpose and can only be reserved to the extent it is unappropriated. Thus, the doctrine of federal implied-reservation-

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of-water-rights recognizes the supremacy of previously vested water rights.

3. Federally Reserved Water Rights are Not Balanced Against Competing Claims and Interests in Water

Last, the doctrine of federally reserved water rights does not include any equitable principle calling for a balancing of the competing (non-federal) rights. Id. at 138.

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

Id. at 139. Where there is an implied reservation of water rights, the United States is entitled to the full use of the reserved waters (to the extent not previously appropriated) and the interest of subsequent appropriators and users of water are not entitled to consideration or balancing as against the federal right. See, id.

4. Fed.R.Civ.P. 19 Might Still Require Joinder

Despite the fact that state law is inapplicable and that subsequent appropriators of water would not be entitled to an equitable balancing of their interests as against the United States' interest, Fed.R.Civ.P. 19 might require joinder of ground water claimants.

Joinder of the ground water claimants would be required if: (1) in their absence complete relief could not be accorded among those already parties, or; (2) their claims to groundwater relate to the subject of this action (the U.S. and Tribe's claims

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to waters from the Walker River) and proceeding without the groundwater claimants might (i) as a practical matter impair or impede their ability to protect their interests or (ii) leave any of the current parties subject to a risk of multiple or inconsistent obligations. Fed.R.Civ.P. 19(a).

The groundwater claimants are necessary to accord complete relief to those already parties only if their water rights somehow affect the water rights of the parties. Likewise, their claims to groundwater relate to the claims to waters from the Walker River only if the claims are somehow related, or interdependent.

Thus, joinder of the groundwater claimants is required under Rule 19 only if groundwater claims and rights somehow affect the water rights of the parties who have or claim rights to the waters of the Walker River, or vice versa.

5. No Adequate Relationship is Alleged

As discussed previously, The U.S. and the Tribe have only managed to indicate that there is some degree of hydrological connection between the surface waters of the Walker River and the ground waters of the Walker River basin. Establishing the existence of such a connection merely establishes the possibility that surface water rights will come into conflict and competition with ground water rights. Numerous other factors must also be considered in determining if there is any likelihood of conflict between the surface and groundwater claimants.

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If there were any currently ascertainable conflict such might be the basis of new litigation. Neither the U.S. nor the Tribe indicate that there is any current conflict between surface and ground water claimants.

In light of the fact that the additional water rights claimed by the U.S. and the Tribe will in all likelihood be small in relation to the total amount of water appropriated from the Walker River, it is unreasonable to assume that these additional water rights will be the figurative straw that breaks the camel's back. Without more specific allegations, this Court will not assume the claimed right to additional water from the Walker River will tip the scales and result in competition between surface and ground water claimants.

All that the U.S. and the Tribe have provided is a basis for speculation. Mere speculation is insufficient to require joinder, see, ARMCO v. Steel Corp. v. United States, 490 F.2d 688, 690 (8th Cir. 1974), of all ground water claimants in the Walker River basin in this litigation which focuses primarily on competing claims to the limited surface waters of the Walker River and its tributaries.

For the above reasons, the claim that surface and groundwater users are or will be in competition for waters comprising a single res is speculative and insufficient to require joinder under Rule 19 of groundwater claimants located in the Walker River basin.

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IT IS, THEREFORE, HEREBY ORDERED that our prior order (Doc. #15) requiring joinder of all claimants to the water of Walker River and its tributaries must be joined as parties to the claim does NOT require joinder of groundwater claimants.

IT IS FURTHER ORDERED that to the extent the United States' motion for instructions (Doc. #23) became a motion for joinder (see Doc. #29) under Fed.R.Civ.P. 19 and was joined in as such by the Walker River Paiute Tribe (see Doc. #26), said motions are **DENIED**.

DATED: JULY 8th, 1994.

Edward C. Reed

UNITED STATES DISTRICT JUDGE

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