

TESTIMONY OF
THE WALKER RIVER IRRIGATION DISTRICT
BEFORE
LEGISLATIVE COMMISSION'S SUBCOMMITTEE
TO STUDY THE PROTECTION OF
NATURAL TREASURES
(SENATE CONCURRENT RESOLUTION NO. 35
[FILE NO. 101, STATUTES OF NEVADA 2005])

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Meeting Date 3/10/06

I. INTRODUCTION.

Senator Titus and members of the Committee, my name is Gordon DePaoli. I am speaking today on behalf of the Walker River Irrigation District. I have been the District's legal counsel since 1987. With me today Ken Spooner, the Manager of the Walker River Irrigation District.

Because I know that your focus here today is Walker Lake, the District's overview of its activities are directed to that topic. However, it is important to put those activities in the context of the District itself, and in the context of water regulation and issues in the Walker River Basin as a whole.

II. BACKGROUND.

A. The Walker River Irrigation District.

The Walker River Irrigation District (the "District") was formed on April 14, 1919, pursuant to Nevada's Irrigation District Act, which was enacted that year. There are 246,000 acres of land within the District's boundaries. All of these lands are in Lyon County, Nevada.

The District owns, operates and holds water rights for two reservoirs. Bridgeport Reservoir, an on stream reservoir, is situated on the East Walker River, has a capacity of 42,460 acre feet and is entirely within California. Topaz Reservoir, an off-stream reservoir, is situated adjacent to the West Walker River downstream of Antelope Valley and is located partly in California and partly in Nevada.

The District is the principal agricultural area in Lyon County and is the most productive agricultural area in Nevada on a per acre basis. The total market value of agricultural products in Lyon County have in recent years regularly exceed \$50,000,000 per year second only at times to

Elko and at other times to Humboldt County. However, this level of production is attained on only 40 percent of the total irrigated acreage of Elko County.

The District produces more white onions than any other area in the United States. About half of all seed garlic used by California garlic growers comes from Western Nevada, and most of it is grown in the District. Additionally, an estimated 8,500 tons of potatoes are produced within the District.

The irrigated lands within the District provide extensive habitat and food for eagles, geese, ducks, quail, wild turkeys, deer and many other birds and animals. The District's reservoirs are prime recreation areas in Mono County, California and Douglas County, Nevada. Bridgeport Reservoir produces the food chain which makes the East Walker River in California and Nevada a world class German brown trout fishery. The District is home to NDOW's Mason Valley Fish Hatchery and Wildlife Area. NDOW is the single largest water right holder in the District. The Mason Valley Fish Hatchery produces cutthroat, rainbow, cuttbow and brown trout for planting in streams, rivers and lakes throughout Nevada. The District works cooperatively with NDOW on the planting of fish in Topaz Reservoir.

B. Geography.

The Walker River is a non-navigable interstate stream, consisting of the East, West and Main Walker Rivers. *United States v. Walker River Irrig. Dist.*, 11 F. Supp. 158, 160-161 (D. Nev. 1935); *rev'd United States v. Walker River Irrig. Dist.*, 104 F.2d 334 (9th Cir. 1939). The East and West Walker Rivers rise high on the eastern slope of the Sierra Nevada in California. The West Walker flows into Antelope Valley, located mostly in California and then into Smith and Mason Valleys in Nevada. The principal streams forming the East Walker combine in Bridgeport Meadows in California. From there the East Walker flows into Mason Valley where it unites with

the West Walker to form the Main Walker River. The Main Walker River leaves Mason Valley and flows into and through the Walker River Indian Reservation and into Walker Lake.

C. Administration Of Surface Water Rights On The Walker River System.

1. Introduction.

Because the Walker River is an interstate stream, the right to use water from it necessarily involves Nevada and California law. In addition, because it flows into the Walker River Indian Reservation, the use of water from it also involves federal law. In the early part of the last century those facts gave rise to a series of skirmishes in the Nevada federal court, California state courts and the Supreme Court of the United States. *See, Rickey Land & Cattle Co. v. Miller & Lux*, 218 U.S. 258 (1910); *see also, Miller & Lux v. Rickey*, 127 F. 573 (D.Nev. 1904); *Miller & Lux v. Rickey*, 146 F. 574 (D.Nev. 1906); *Rickey Land & Cattle Co. v. Miller & Lux*, 152 F. 11 (9th Cir. 1907). The Supreme Court ultimately held that the United States District Court for Nevada had jurisdiction to declare the respective rights of the water users in both states. *Rickey*, 218 U.S. 258, 262. Exercising that jurisdiction, a decree (the "Rickey Decree") was entered by the United States District Court for the District of Nevada in 1919. *See, Pacific Livestock Co. v. Thomas Rickey, et al.*, No. 731, Final Decree (D. Nev. 1919).

In 1924, the United States brought an action in the United States District Court for the District of Nevada to establish a water right for the Walker River Indian Reservation and to determine the relationship between that water right and the other water rights on the Walker River system (the "Walker River Action"). 11 F. Supp. at 159-160. That litigation resulted in the entry of the *Walker River Decree* in 1936, as amended in 1940. The *Walker River Decree* adopted and incorporated the water rights determined by the Rickey Decree and additionally determined the rights of numerous other parties to use water from the Walker River. With certain exceptions, most

of the water rights recognized by the *Walker River Decree* were established before enactment of Nevada's statutory water law in 1913 and California's in 1914.

2. California Surface Water Rights Recognized By The Walker River Decree.

(a) Bridgeport Valley.

There are approximately 26,000 water right acres in Bridgeport Valley in California. With respect to those lands, the Walker River Decree provides for direct diversion rights from the natural flow of the various tributaries to the East Walker River. In addition it allows for the storage of water in Upper Twin Lake, Lower Twin Lake, East Lake, West Lake and Green Lake all in California to be used to irrigate those lands which also have a direct diversion natural flow right under the Walker River Decree. These direct diversion, storage rights and storage reservoirs are owned by individual farmers and the water rights are established under California law.

In addition, the Walker River Decree recognizes the right of the Walker River Irrigation District to store water from the East Walker River in Bridgeport Reservoir in California for distribution to and use upon lands within the District. This water right is established under California law for use in Nevada. Bridgeport Reservoir has a capacity of 42,460 acre feet and the District's storage right allows for filling and refilling in certain circumstances.

(b) Antelope Valley.

There are approximately 14,600 water right acres in Antelope Valley, substantially all of which are located in California. The Walker River Decree provides for direct diversion rights from the natural flow of the West Walker River for irrigation of those lands. In addition it allows for the storage of water in Poor Lake in California to be used to irrigate lands in Antelope Valley which also have a direct diversion natural flow rights. Those direct diversion,

storage rights and storage reservoir are owned by individual farmers and in some cases by the Antelope Valley Mutual Water Company and the water rights are established under California law.

In addition, the Walker River Decree recognizes the right of the District to divert water from the West Walker River in California into Topaz Reservoir, located partly in California and partly in Nevada, for distribution and use upon lands within the District. This water right is also established under California law for use in Nevada. Topaz Reservoir has a capacity of 59,400 acre feet and the District's storage right allows for filling and refilling under certain circumstances.

3. Nevada Surface Water Rights Recognized By The Walker River Decree.

(a) Walker River Irrigation District.

Of the 79,906 water right acres along the East Walker River, and in Smith and Mason Valleys in Nevada and located within the boundaries of the District, the Walker River Decree provides for direct diversion rights from the natural flow of the West, East and Main Walker Rivers for approximately 45,420 acres. Those direct diversion rights are owned by individual farmers and are established under Nevada law. In addition, and as authorized by the Walker River Decree, approximately 28,930 of the 45,420 water right acres having direct diversion rights with priorities of 1874 and later, receive supplemental storage water from Bridgeport and Topaz Reservoirs. Finally, as authorized by the Walker River Decree, approximately 34,370 acres of land with no direct diversion rights under the Decree receive stored water from Bridgeport and Topaz Reservoirs.

(b) Lands Within The Walker River Indian Reservation.

The Walker River Decree, as amended in 1940, provides that the United States is entitled for use on the Walker River Indian Reservation, to 26.25 cubic feet per second of the natural flow of the Walker River during the irrigation season for 180 days to irrigate 2,100

acres of land and to flows reasonably necessary for domestic, stock watering and power purposes, all with a priority of November 29, 1859. That water right is established under the federal implied reservation of water doctrine. *See, United States v. Walker River Irrigation District*, 104 F.2d 334, 339-340 (9th Cir. 1939).

4. Administration Of The Walker River System Under The Walker River Decree.

The Court in the Walker River Action retained jurisdiction for regulatory purposes and for the purpose of appointing a water master 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, the Court in the Walker River Action, entered an order appointing five persons to perform that function. Two of the persons were from Yerington, one was from Smith, one was from Topaz, and one was from Bridgeport. On June 27, 1940, the Court entered an order adding a representative of the Walker River Indian Reservation to the Board of Water Commissioners. 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 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. In 1953, the United States District Court for the District of Nevada entered an order approving detailed “Rules and Regulations for Distribution of Water on the Walker River System.” Among other things, those rules provide:

If at any time the Chief Deputy Water Commissioner determines that there is more water available in the stream than is required to fill the rights of all of the vested users including the rights of the Walker River Irrigation District and others similarly situated to store water, then he shall prorate such excess water to all users in proportion to the rights already established.¹

The United States District Court for the District of Nevada, through the United States Board of Water Commissioners, has administered the Walker River in Nevada and California for the last 69 years and continues to do so today.

D. Groundwater Rights In The Walker River Basin.

1. California.

With respect to groundwater, California applies a "reasonable use" or "correlative rights" rule drawn from the riparian doctrine of surface water law. Landowners in California may use groundwater on their overlying land provided such use is reasonable. No permit from California water authorities is required. *See, e.g., Katz v. Wilkinshaw*, 74 P. 766, 772 (Cal. 1903). Because of those facts, it is difficult to ascertain the extent to which groundwater is used within the Walker River Basin in California. However, there is no question that groundwater is in fact used in California within the Walker River Basin.

2. Nevada.

¹ The District holds additional permits to surplus Walker River surface water in Nevada. It holds Permit No. 5528, and Certificate No. 8859 on the West Walker River for 491.2 cubic feet per second not to exceed 89,612 acre feet annually to irrigate described land within the District. That permit was issued by the Nevada State Engineer in 1971 and has a priority of June 6, 1919. The District holds Permit No. 25017 and Certificate No. 8860 on the East Walker River for 349.1 cubic feet per second not to exceed 63,688 acre feet annually to irrigate described land within the District. That permit was issued by the Nevada State Engineer on October 15, 1976 and has a priority date of April 11, 1969. Use of water under all of these permits is limited to no more than 4.0 acre feet per acre of water from all sources. Finally, the District also holds Permit No. 9405, applied for in 1931 and issued in 1954, to appropriate up to 200,000 acre feet annually to be stored in a new reservoir on the West Walker River, downstream of Topaz Reservoir, commonly referred to as the Hoyer Canyon Reservoir. This reservoir has not been built.

Until 1913, groundwater could be appropriated in Nevada by diversion and application to beneficial use without the need for a permit to appropriate from the Nevada State Engineer. Since 1913 and except for a domestic well, groundwater can not be appropriated in Nevada without a permit issued by the Nevada State Engineer in accordance with the provisions of NRS Chapters 533 and 534. *See, Town of Eureka v. State Engineer*, 108 Nev. 163, 166, 826 P.2d 948 (1992); NRS. § 534.050. Primarily since 1960, the Nevada State Engineer has issued numerous permits to use groundwater in Nevada along the Walker River. By far the largest quantity of those rights are “supplemental,” *i.e.*, they are limited to use of no more than 4.0 acre feet per acre on the land from all sources of water, including surface water from the Walker River.

The District holds Permit No. 25813 for 9.01 cfs of groundwater not to exceed 3269.63 acre feet per season for use on specific lands. This right is further limited to no more than 4.0 acre feet per acre from all sources. Other groundwater rights within the District are owned by individual farmers and other entities.

The State Engineer has also issued permits for groundwater use in the Schurz, Walker Lake and Hawthorne areas. Included within those permits are permits issued to the United States for the Hawthorne Army Ammunition Plant and to Mineral County for use in Hawthorne.

3. Walker River Indian Reservation.

Because groundwater is used on the Walker River Indian Reservation without permits issued by the Nevada State Engineer, it is difficult to ascertain the extent to which groundwater has been used within the Reservation. It is estimated, however, that 2500 acre feet per year of groundwater is used for irrigation within the Reservation.

E. A Surface Water Right For Walker Lake.

On September 17, 1970, NDOW filed application number 25992 to appropriate up to 8000 cfs of all “unappropriated flood waters” in the “East Walker, West Walker Rivers, Walker River and tributaries” for fish, game and recreation and to support a more stable lake level at Walker Lake. Numerous protests to that application were filed.

In February, 1972, the Nevada State Engineer expressed concern to NDOW that its application would preclude any future water development within the Walker River – Walker Lake Basin, including future use of water for municipal and industrial purposes. The State Engineer was concerned with whether that would be in the “public interest”. In April, 1972, NDOW responded agreeing that any permit issued would be “subject to appropriation for future use for municipal and industrial purposes.” On April 19, 1972, the Nevada State Engineer overruled all protests and granted the application. A permit was issued on May 26, 1972.

A certificate of appropriation was issued to NDOW under this permit for 795.2 cfs not to exceed 575,870 acre feet per year with a priority of September 17, 1970. The appropriation was quantified based upon flows into Walker Lake in 1983. The year 1983 produced the largest recorded volume of inflow to Walker Lake.

F. Pending Related Proceedings.

(1) Claims Of The Walker River Paiute Tribe And Of The United States.

The Walker River Paiute Tribe (the “Tribe”) filed a claim in the Walker River Action on March 18, 1992, seeking recognition of a right to store water in Weber Reservoir² for use on the Walker River Indian Reservation and for a federal reserved water right for 167,460

² Although Weber Reservoir was constructed by the United States in 1934, there is no recognized water right for it.

acres of land included in the Reservation in 1936. These claims are in addition to the direct flow rights awarded to the United States for the benefit of the Tribe in the *Walker River Decree*. On July 22, 1992, the United States moved for leave to file a claim in that same action, which asserts similar claims to water for the benefit of the Walker River Indian Reservation. By Order dated October 22, 1992, the Walker River Court directed the Tribe and United States to serve their original claims on all claimants to the waters of the Walker River and its tributaries pursuant to Rule 4 of the Federal Rules of Civil Procedure. The Walker River Court granted several extensions of time to join additional parties and complete service of process.

In 1997, the Tribe amended its earlier claim ("Tribe's First Amended Claim") to include groundwater claims for the entire Reservation. In 1997, the United States also amended its claim ("United States First Amended Claim") to include several specific claims to surface water and groundwater in the Walker River Basin for other federal reservations, including the Hawthorne Army Ammunition Plant, the Toiyabe National Forest, the Mountain Warfare Training Center of the United States Marine Corps and the Bureau of Land Management. The United States' First Amended Claim also advances claims for surface and groundwater for the Walker River Indian Reservation, the Yerington Reservation, the Bridgeport Paiute Indian Colony and several individual Indian allotments.

On April 19, 2000, the Court entered a Case Management Order which bifurcates the claims of the Tribe and United States for the Walker River Indian Reservation (the "Tribal Claims") from all of the other claims raised by the United States. The Order stays all proceedings related to the additional claims of the United States and sets forth initial procedures for the prosecution of the Tribal Claims.

The Order requires the Tribe and United States to serve their amended pleadings and related service documents on several categories of individuals and entities within the Walker River Basin. They must complete service on the successors-in-interest of the water rights holders listed in the Walker River Decree and all holders of surface water rights under the laws of Nevada and California. They must also complete service on several categories of groundwater rights holders including individuals and entities using groundwater for agricultural, municipal, industrial and domestic purposes in certain areas of the Walker River Basin. The Order also identifies certain threshold issues, related to the Tribal Claims, to be addressed by the parties at the outset of the litigation, *i.e.*, "Phase I" of the proceedings.

2. Claims Of Mineral County.

In October, 1994, Mineral County, moved to intervene in the Walker River Action for purposes of filing a complaint in intervention related to Walker Lake. As a result of that filing, a status conference was held and, the district court entered an Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County (the "Service Order"). Because over 60 years had passed since the *Walker River Decree* was entered, most, if not all, of the original parties to the Decree were no longer the owners of the land with the appurtenant water rights it adjudicated. In addition through state law processes in Nevada and California new and junior water rights have been established subsequent to the entry of the *Walker River Decree*. The Service Order required Mineral County to serve its intervention documents, pursuant to Fed. R. Civ. P., Rule 4, on all persons with water rights under the Decree or acquired by subsequent appropriation.

Mineral County is in the process of completing service of process on numerous owners of water rights on the Walker River system in Nevada and in California.

G. Interstate Allocation Of Water.

In 1955, the Congress and the Nevada and California Legislatures authorized the implementation of an interstate compact commission concerning the allocation of the waters of the Truckee, Carson and Walker Rivers and of Lake Tahoe. NRS §§ 538.270, *et seq.* That commission negotiated over a period of 14 years, until 1969, when the Nevada Legislature enacted legislation providing for apportionment of those water systems between the two States. In 1970, the California Legislature enacted a slightly amended version of the Nevada legislation. NRS § 538.600. That legislation has never been ratified by Congress.

Public Law 101-618, the Truckee-Carson-Pyramid Lake Water Settlement Act (104 Stat. 3289, 3294)(1990) (the "Settlement Act") provides for an allocation between Nevada and California of the waters of Lake Tahoe and the Truckee and Carson Rivers. However, it does not provide for a similar allocation on the Walker River. Settlement Act Section 204. Because the unratified 1971 interstate compact included provisions for an allocation of the waters of the Truckee, Carson and Walker Rivers as well as Lake Tahoe, it is now clear that it will not be ratified. Therefore, there is a need to independently pursue an interstate allocation of the Walker River system.

III. THE ONGOING MEDIATION.

A. Introduction.

The Walker River is a single integrated system. Because of that fact all of the critical issues on the Walker River must be considered and resolved simultaneously, if any single issue is to be resolved with certainty and finality. Issues related to Walker Lake cannot be finally resolved without also resolving the claims for additional water for the Walker River Indian Reservation and other federal reservations and the interstate issues between California and

Nevada, including a binding interstate allocation and river operation requirements. Similarly, issues related to claims for additional water for the Walker River Indian Reservation and other federal reservations up and down the River cannot be finally resolved without also resolving issues related to Walker Lake and California-Nevada interstate issues. Finally, issues related to an interstate allocation between Nevada and California cannot be conclusively resolved without also resolving issues related to Walker Lake and the federal claims for more water in both states.

Therefore, until those issues are resolved either through a comprehensive settlement or through litigation, there simply can be no certain solution for water issues at Walker Lake.

B. The Mediation.

In the fall of 2001, the District joined with Nevada, California, the Walker River Paiute Tribe, Mono County, California, Lyon County, Nevada, Mineral County, Nevada, and the Walker Lake Working Group in Requesting that the United States, through the Department of Justice and the Department of the Interior, assemble a team to represent the interests of the United States in negotiations with them with respect to issues on the Walker River system. While waiting for a response from the United States, those parties interviewed candidates to act as a mediator and, subject to approval by the United States, selected a mediator. In May, 2002, the United States appointed a team to represent its interests. A mediator was selected, and the first meeting took place in January, 2003. The initial series of meetings involved the negotiation of a Mediation Process Agreement. The mediation is a confidential process.

The next mediation session will take place on April 10 and 11, 2006. Although I cannot tell you that a comprehensive resolution of these issues has been or will be achieved, I can tell you that the mediation process has established relationships and communications which allow the parties interested in these issues to cooperate and work together on solutions that meet their

common objectives. The District continues to be optimistic that between the efforts in the Mediation and the efforts of Nevada's Congressional Delegation, a comprehensive solution will be achieved.

IV. THE DISTRICT'S ACTIVITIES WITH RESPECT TO WALKER LAKE.

Consistent with its obligations to its constituents, the District will continue to participate in the Mediation. In addition, the District will continue to work with those persons and entities involved in implementing the measures initiated under federal legislation.

Under the Desert Terminal Lakes Program of the Farm Security and Rural Investment Act of 2002, P.L. 101-171, the District is working with the Bureau of Reclamation to obtain funding for a voluntary stored water program within the District. Under that program, participating individual water right holders would be paid to allow a portion of their allocated stored water to be delivered to Walker Lake. The District is seeking funding for that program for the 2006 irrigation season.

In addition, the District, in the past, has funded three (3) cloud seeding units in the Walker River Basin. In addition, on an annual basis, the District has supported the cloud seeding efforts of the Desert Research Institute in the Walker River Basin. Finally, the District intends to pursue additional grant funding for enhanced cloud seeding in both the West Fork and East Fork watersheds in the Sierra Nevada, in the Mount Grant area, and other ranges identified within the overall watershed that have seeding potential. Included in any such effort would be funding for a monitoring system to track the long-term effectiveness of cloud seeding as demonstrated by increased stream flow.

In the past, the District has supported projects which have improved channel conveyance in the Walker River Basin. The District intends to seek funding for additional channel

conveyance improvements in the Basin. These projects are important to ensure that water dedicated to Walker Lake can be delivered to it without unreasonable transportation losses.

The District has and will continue to work cooperatively with interested parties on long-term solutions to the issues in the Walker River Basin. Cooperative efforts present the best opportunities for solutions which meet the goals of the interested parties. Such efforts allow for consideration and implementation of solutions which are not available through litigation. Cooperative efforts allow for the development of the broad based support needed to implement solutions from parties directly affected, and from public officials at a local, state and federal level.

At this point in time, the District does not have any specific recommendations for legislation with respect to Walker River Basin issues, and specifically for the protection and maintenance of Walker Lake. The issues in the Basin are complex and interrelated. All of the issues in the Basin must be resolved to achieve a long term solution which protects and maintains Walker Lake.

The District believes that your Committee and the mediating parties should continue to communicate to ensure that we help you with your efforts, you help us with our efforts, we each understand what the other is doing, and we work together to reach our common goals. Therefore, the District will seek the approval of the mediating parties to provide a joint report to your Committee on the progress of the mediation at each of your remaining meetings.