

**OVERVIEW OF LITIGATION ISSUES  
RELATING TO WATER**

**Before**

**LEGISLATIVE COMMISSION'S SUBCOMMITTEE  
TO STUDY WATER**

**By**

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EXHIBIT F - WATER  
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## **I. INTRODUCTION.**

Senator Goicoechea and members of the Committee, my name is Gordon DePaoli. I am a member of the Reno, Nevada law firm of Woodburn and Wedge. Since 1977, I have been active in various water matters in northern Nevada. I have been and continue to be involved in water litigation on the Truckee, Carson and Walker Rivers. I am also involved in water adjudications initiated by the Nevada State Engineer. I represent the Truckee Meadows Water Authority, a governmental water utility, and the Edgewood Water Company, a small private water utility at Lake Tahoe. I also represent the Walker River Irrigation District, which includes about 80,000 acres of irrigated land in Smith and Mason Valleys in Lyon County. From time to time, I also represent ranching families in various parts of Nevada.

However, today I am not speaking to you on behalf of any client. Rather, I will provide a brief overview of ongoing litigation related to water in Nevada, some in which I am involved, and some of which I am aware, but not directly involved. I will also discuss the subject of legislating on matters which are the subject of ongoing litigation. The views which I express will be mine, and mine alone, and should not be attributed to any of my clients.

## **II. OVERVIEW OF ONGOING LITIGATION.**

### **A. Litigation in the Walker River Basin.**

#### **1. Introduction.**

There is a good deal of ongoing water litigation in the Walker River Basin. 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.

Surface water rights on the Walker River in California and Nevada are administered by the United States District Court for the District of Nevada pursuant to the Walker River Decree entered in 1936 and amended in 1940. That court does not administer rights to groundwater in either state.

California has historically applied a “reasonable use” or “correlative rights” rule drawn from the riparian doctrine of surface water law with respect to the use of groundwater. 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).

However, California has recently enacted the “Sustainable Groundwater Management Act” which allows local and regional agencies to manage groundwater “sustainably.” California has defined “Sustainable Yield” as “the maximum quantity of water, calculated over a base period representative of long-term conditions in the basin and including any temporary surplus, that can be withdrawn annually from a groundwater supply without causing an undesirable result.” It is too soon to know how that legislation may impact groundwater use in California in the Walker River Basin.

Groundwater use in the Walker River Basin in Nevada is administered by the State Engineer. Groundwater is also used on the Walker River Indian Reservation without permits

issued by the Nevada State Engineer. There is ongoing litigation concerning groundwater use in the Walker River Basin.

**2. Claims to Surface and Groundwater Based Upon the Federal Reserved Water Rights Doctrine.**

In the Walker River Basin, there is ongoing litigation based upon the federal reserved water rights doctrine. Under that doctrine, federal reserved water rights are established by reason of the fact that land has been reserved by the United States, and that the primary purpose of the reservation cannot be fulfilled without water. In contrast, appropriative rights are established under state law by the actual application of water to a recognized beneficial use. A federal reserved water right exists even if it has not been applied to a beneficial use. The priority date of a federal reserved right vests no later than the date of establishment of the reservation. Under the prior appropriation doctrine, the priority date of a water right is the date the first steps were taken to apply it to beneficial use, provided that the water is actually placed to beneficial use with reasonable diligence.

The quantity of a federal reserved water right does not depend upon beneficial use, but upon the amount of water reasonably necessary to fulfill the primary purpose of the reservation. Under the prior appropriation doctrine, a water right is quantified and limited by actual beneficial use. *See*, NRS §§ 533.035 and 533.045. Once established, the validity and existence of a federal reserved right does not depend on use or continuous use. In contrast, surface water rights under Nevada law may be lost by abandonment, *see* NRS 533.060; and groundwater rights may be lost by forfeiture, *see* NRS 534.090.

In the Walker River Basin, the United States and the Walker River Tribe seek recognition of a right to store water in Weber Reservoir for use on the Walker River Indian Reservation and for a federal reserved water right for 167,460 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. They also assert federal reserved claims for groundwater on the Reservation. In addition, the United States asserts several specific claims to surface water and groundwater in the Walker River Basin for other federal reservations, both in Nevada and California, 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 Yerington Reservation, the Bridgeport Paiute Indian Colony and several individual Indian allotments.

The claims of the United States and Tribe were dismissed in 2015. However, those dismissals are presently on appeal to the Ninth Circuit Court of Appeals.

### **3. Claim Under the Public Trust Doctrine.**

The “Public Trust Doctrine” is a doctrine based upon state law which has been used primarily to evaluate a state’s disposition of lands which it owns by reason of the fact that the lands were or are part of a navigable water body. Relying on that doctrine, in *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983), the California Supreme Court set the stage for the California State Water Resources Control Board to eventually issue an order amending the Los Angeles Division of Water and Power’s water licenses restricting diversions out of the Owens River Valley in order to raise the level of Mono Lake and setting flow requirements for tributary streams. As a result of the State Water Board decision, the Division of Water and Power’s exports to Los Angeles were reduced to about 15% of the pre-injunction diversions. After a specific elevation at Mono Lake is reached, diversions may increase, but still to only 37% of pre-1989 diversions. The Water Board concluded that these restrictions would not produce water shortages in Los Angeles because replacement water was

available from a variety of other sources.

The Nevada Supreme Court announced in *Lawrence v. Clark County*, 254 P.3d 606 (Nev. 2011) that it was adopting the Public Trust Doctrine. However, that case does not discuss the contours of a public trust doctrine and its relationship to Nevada's water law. All of the Nevada cases referenced in *Lawrence*, and *Lawrence* itself, involved issues related to title to land underlying navigable waters. See, *State v. Cowles Bros., Inc.*, 478 P.2d 159 (Nev. 1970); *State v. Bunkowski*, 503 P.2d 123 (Nev. 1972).

Relying on California's application of the public trust doctrine in *Audubon*, Mineral County is seeking an adjudication and reallocation of the waters of Walker River to preserve minimum levels in Walker Lake. To achieve that goal, Mineral County seeks the right to, at least, 127,000 acre feet of flows annually reserved from the Walker River for the benefit of Walker Lake. Mineral County's claim was dismissed in 2015. However, that dismissal is also on appeal to the Ninth Circuit Court of Appeals.

#### **B. Water Right Acquisition for Desert Terminal Lakes.**

The United States Congress, through a series of public laws, has appropriated funds to provide water for desert terminal lakes in Nevada, i.e., Pyramid, Walker and Summit Lakes. The funding appropriated thus far totals \$525,000,000. See, Section 2507, Farm and Security Rural Investment Act of 2002, P.L. 107-171 ("Desert Terminal Lake I"); Section 207 of P.L. 108-7 ("Desert Terminal Lake II"); Section 208 of the Energy and Water Development Appropriations Act of 2006, P.L. 109-103 ("Desert Terminal Lake III"); Section 2807 of P.L. 110-246 ("Desert Terminal Lake IV"); Sections 206 through 208 of P.L. 111-851 ("Desert Terminal Lake V") (authorizing the Bureau of Reclamation to provide \$66,200,000 to National Fish and Wildlife Foundation ("NFWF") for various purposes related to Walker Lake); and Section 2507 of the

Agricultural Act of 2014, P.L. 133-179. Desert Terminal Lake V established the Walker Basin Restoration Program administered by NFWF.

Substantial portions of those funds have been and will continue to be granted for purposes of acquiring and changing existing water rights recognized by the Walker River Decree to benefit Walker Lake. To date, through the use of that funding, NFWF has acquired, for the benefit of Walker Lake, 61.0 CFS of water rights recognized by the Walker River Decree as appurtenant to approximately 4,000 acres of land within the Walker River Irrigation District, also including 5,570 acre feet of stored rights, 9,870 acre feet of groundwater rights, and over 6,300 acres of land.

The first water rights acquired by NFWF were approved for change by the State Engineer. That approval was overturned by the District Court, and the District Court's ruling is now on appeal in the Ninth Circuit. The primary issue in that litigation is whether the change as approved conflicts with existing rights.

### **C. Groundwater Litigation.**

In February of 2015, the State Engineer issued two orders curtailing the use of supplemental irrigation groundwater rights in Smith and Mason Valleys by 50% without regard to priority. Those orders did not curtail the use of domestic groundwater rights or any other groundwater right that was a primary irrigation right. Those orders were based upon the broad powers granted to the State Engineer under NRS 534.120 to regulate groundwater use in designated groundwater basins where groundwater is being depleted.

The State Engineer's orders were challenged in District Court. That Court entered a preliminary injunction enjoining enforcement of the orders on the basis that the State Engineer could not ignore the prior appropriation doctrine, and was required to regulate based on priority.

The order did not directly address the distinction the State Engineer had drawn between primary and supplemental groundwater rights. The Court relied primarily on NRS 530.110(6) in its decision. With the passage of the 2015 irrigation season, that litigation has become moot.

However, on October 28, 2015, the State Engineer issued two new groundwater curtailment orders, one for Smith Valley and one for Mason Valley, for the 2016 irrigation season. In those orders, the curtailment continues to apply only to supplemental irrigation groundwater rights, but will be enforced based upon priority, even though many of those rights are senior to many of the primary groundwater rights in those basins which are not curtailed. The extent of the curtailment, if any, will depend on the April 1, 2016 NRCS streamflow forecast for the Walker River.

These curtailment orders have introduced the concept of “system yield” for supplemental groundwater rights, rather than perennial yield. That has been defined to take into account recharge resulting from surface water flows. The orders are again being challenged in State District Court.

The curtailment orders and the litigation involving the claims asserted by the United States and the Walker River Tribe discussed above raise issues concerning the relationship between rights to surface water and rights to groundwater (the “surface-groundwater relationship issues”). Arguably, and until recently, one could have contended that Nevada law treats surface and groundwater as separate resources. However, as evidenced by the curtailment orders in Smith and Mason Valleys, the claims of the United States and the Walker River Tribe and similar issues on the Truckee and Humboldt Rivers, as well as in Diamond Valley, and potentially on the Carson River, that assumption, if it was one, may be changing.

These issues include the extent to which federal law governs groundwater on federal

reservations, whether rights to surface water established under federal law are entitled to protection from interference caused by the pumping of groundwater, which is different than the protections provided by Nevada law and the scope of a federal court's jurisdiction to provide such protection. Broadly, they involve whether surface and groundwater should be regulated as a single source of supply, and if so, how to do that.

As noted, those are issues are present in the Walker River litigation. In addition, they are present in litigation on the Truckee River where the Pyramid Tribe contends that changes in the point of diversion of some groundwater rights of the City of Fernley will reduce Truckee River flows and thus conflict with surface rights held by the Tribe, presumably under both federal and state law. In the past, similar issues have been raised in the past with respect to changes to groundwater rights in the Carson Valley,

**D. Litigation Concerning the State Engineer's Authority to Approve Appropriations or Changes to Water Rights Based Upon Conditions Requiring Mitigation of Conflicts or Potential Conflicts With Existing Rights.**

There is also litigation involving whether the State Engineer may approve an application conditioned on requirements for mitigation to avoid conflicts with existing rights. That litigation relates to changes to water rights in Eureka County, sought by General Moly and in southern Nevada, involving applications of the Southern Nevada Water Authority.

The Nevada Supreme Court has made it clear that there must be substantial evidence which supports a conclusion that a mitigation plan can fully mitigate a conflict with an existing right. It has left undecided the question of whether the State Engineer even has authority to grant an application that conflicts with existing rights based upon his determination that the conflict can be mitigated.

### **III. LEGISLATING ON ISSUES WHICH ARE THE SUBJECT OF ONGOING LITIGATION.**

#### **A. Introduction.**

Changing Nevada's water law is always controversial. Even more controversial is legislation on issues which are the subject of ongoing litigation. When making significant changes in Nevada's water law, previous legislatures have recognized that existing water rights are considered property rights, and that while they can be regulated, they cannot be confiscated. In those situations, the new legislation has included a provision which allowed the courts to decide the extent to which a change in law could be applied to existing water rights.

Depending on the nature of the issue, and its importance both to Nevada's water law and the stability of water rights in general, past legislatures have followed several approaches when legislating on issues which are the subject of ongoing litigation. In some cases, the legislature has acted only after the litigation ended, and then only if it did not agree with the outcome. In other cases, the legislature has acted with the intent to determine the outcome of the litigation. It has also acted while litigation was pending, but in a way which was neutral to the outcome of the litigation.

#### **B. Significant Changes to Nevada's Water Law.**

The legislature which adopted Nevada's comprehensive water law in 1913 recognized that the new law added significant new provisions to Nevada's water law. That legislature made the determination that its actions should not in any way "impair the vested right of any person to the use of water, including appropriations which were initiated in accordance with law prior to the effective date of the new water law, even if those water rights were not yet fully perfected." *See* NRS 533.085. It left it to the courts to determine which, if any, of those provisions might "impair" a vested right.

By way of example, the Nevada Supreme Court determined that as a result of that provision, surface water rights initiated prior to March 22, 1913 were not subject to loss by reason of forfeiture, and could only be lost through abandonment. *See, In Re: Waters of Manse Springs*, 60 Nev. 280, 108 P.2d 311 (1940). On the other hand, the Court determined that the section did not limit the power of the State Engineer to determine for administrative purposes the relative rights of users whose rights vested before 1913. *See, Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).

**C. Legislative Action at the Conclusion of Litigation.**

In 1949, the Nevada Supreme Court found that a right to the use of water in Nevada could be established by uninterrupted adverse use under claim of right, with knowledge, for a period of at least five years. *See, Application of Filippini*, 66 Nev. 17, 23, 202 P.2d 535 (1949). The legislature was in session when that decision was made, and shortly thereafter amended NRS 533.060 to expressly state that a right to use water could not be acquired by adverse use. *See, NRS 533.060(5)*

**D. Legislative Action to Direct the Outcome of Ongoing Litigation.**

In 1993, in *United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1993), the Ninth Circuit Court of Appeals ruled that under Nevada law one could not change the point of diversion, place of use or manner of use of water, unless the right to that water had been fully perfected by having been diverted at its permitted point of diversion and applied to its permitted manner of use, at its permitted place of use. Prior to that decision, a Nevada state district court had also reached the same conclusion. That state court litigation was still pending in 1993, as was similar litigation in federal court.

That outcome was not consistent with how State Engineers had applied Nevada's water

law in the past. They had regularly allowed such changes before a permitted water right had been fully perfected. The decision had the potential to impact those historic changes and to adversely impact the reasons the legislature had allowed for changes to water rights in the first instance.

As a result, during the 1993 legislative session, Assembly Bill 337 was introduced to correct what many saw as a bad decision, one which was entirely inconsistent with what the Nevada legislature had intended in the relevant statute, and one which had statewide ramifications. The bill effectively reversed and intended to reverse that decision, and to direct the result on that issue in still pending litigation. To do that, the legislature included the following provisions:

Section 2     1.     The legislature declares that it has examined the past and present practice of the State Engineer with respect to the approval or denial of applications to change the place of diversion, manner of use or place of use of water described in . . . this act and finds that those applications have been approved or denied in the same manner as applications involving water applied to the intended use before the application for change is made.

                  2.     The legislature intends by this act to clarify rather than change the operation of NRS 533.325, 533.345 and 533.425 with respect to the approval or denial of applications to change the place of diversion, manner of use or place of use of water described in . . . this act and thereby to promote stability and consistency in the administration of Chapters 533 and 534 of NRS.

                  The legislature hereby ratifies each approval granted by the State Engineer pursuant to NRS 533.325, 533.345 or 533.425 before the effective date of this act for a change of the place of diversion, manner of use or place of use of water already appropriated if the change is consistent with the interpretation of that term now codified in Section 1 of this Act.

Section 3     This act becomes effective upon passage and approval, and, to the extent that it ratifies previous decisions of the State Engineer in the manner described in Section 2 of this act, applies retrospectively as well as prospectively.

**E.     Legislative Action to Clarify and Stimulate Resolution of Litigation in a Way Which Is Neutral to Ongoing Litigation.**

In 1999, the legislature determined that clarification and additional definition was necessary with respect to how a surface water right might be lost by nonuse, but that the legislation should be neutral on pending litigation. The legislature also desired to stimulate resolution of some of that litigation.

The litigation involved changes to water rights within the Newlands Project and protests to those changes based upon claims of forfeiture and abandonment. At the time, those changes and protests had resulted in three decisions by the United States District Court for the District of Nevada, two decisions by the Court of Appeals for the Ninth Circuit, and weeks of hearings before the Nevada State Engineer, all spanning over 14 years. A definitive final outcome had not been achieved even by 1999. The court decisions had also spawned additional litigation, including litigation where similar changes elsewhere, notably, within the Truckee Meadows, were being protested on similar grounds. At the time, two State Engineer's rulings involving those Truckee Meadows applications were pending in Federal Court.

By 1999, parties on all sides of those issues had come to the realization that those proceedings and petitions had and would continue to be time consuming and expensive for all participants, and that those proceedings had consumed and would continue to consume substantial resources of the State Engineer's Office and the courts.

As a result, in 1999, the legislature enacted AB 380 to provide a funding mechanism to stimulate the resolution of some of those proceedings, to provide a simplified procedure for changing the place of use of surface water within farms within a reclamation project, to provide that surface water rights were not subject to forfeiture, to set out specific guidelines regarding abandonment of water rights, and finally to ensure that as agricultural lands evolved into urban uses, surface rights appurtenant to such lands remained viable and available for municipal use.

All were sound water law policies.

In enacting that legislation, the legislature intended to be neutral on the pending litigation. It included the following provision:

Sec. 7 The amendatory provisions of sections 1, 2 and 3 of this act:

1. Do not apply to water rights that are under challenge under any legal or administrative proceeding which is pending on or before April 1, 1999; and
2. Do not constitute a legislative declaration that the law to be applied in any such pending proceeding is different from or the same as set forth in this act.

Sec. 8 This act becomes effective upon passage and approval.

#### **IV. CONCLUSION.**

Without question, there are many issues concerning Nevada's water law that are the subject of ongoing litigation. Of significant importance are the surface-groundwater relationship issues, and the powers of the State Engineer under NRS 534.120. The relationship of the Public Trust Doctrine to Nevada's water law is also important, and has broad implications statewide.

In any study related to water, the fact that significant quantities of water have been and are being acquired for environmental uses and benefits should not be overlooked. The Desert Terminal Lake's acquisitions are a good example. Any study must also recognize that there are limits to water availability in the driest state in the Union.

Whether any of those issues justify legislation, particularly legislation intended to influence the outcome of that litigation, is a matter to be determined by the legislature. Previous legislatures have taken the step to influence the outcome of litigation only in rare circumstances, which had the potential to adversely affect the stability of Nevada's water law, where sound water law policy required such a measure, and where the issue had ramifications statewide.

I appreciate the opportunity to speak to you today. I look forward to participating in future meetings of this Subcommittee.