

APPLICATION FOR PERMISSION TO CHANGE POINT OF DIVERSION, MANNER
OF USE AND PLACE OF USE OF THE PUBLIC WATERS OF THE STATE OF
NEVADA HERETOFORE APPROPRIATED

Date of filing in State Engineer's Office SEP 21 2004

Returned to applicant for correction _____

Corrected application filed _____

Map filed NOV 21 2003 under 70649

The applicant **See Attachment A.** hereby make application for permission to change the review of a temporary change in the manner and place of use of water heretofore appropriated under the Decree in *United States v. Walker River Irrigation District, No. C-125 (D. Nev. 1936)*, as amended, 1940, for a portion of the Walker River identified as 26.25 cubic feet per second measured at the Tribe's point of diversion for use on 2,100 acres of land on the Reservation during a 180-day irrigation season, which may also be expressed as 9,370 acre-feet per year.

1. The source of water is **the Walker River**
2. The amount of water to be changed up to **9,370 acre-feet measured at Little Dam**
3. The water to be used for **wildlife and conservation**
4. The water heretofore permitted for **irrigation as decreed**
5. The water is to be diverted at the following point **For that portion of water to be changed, no diversion will occur at Little Dam and water will be allowed to flow into the main channel of the Walker River.**
6. The existing permitted point of diversion is located within **N/A**
7. Proposed place of use **Walker River from Little Dam to its terminus at Walker Lake.**
8. Existing place of use **2,100 acres of land served by the Walker River Indian Irrigation Project, operated by the Bureau of Indian Affairs, located within the exterior boundaries of the Walker River Indian Reservation.**
9. Use will be from **as decreed to as decreed** of each year.
10. Use was permitted from **as decreed to as decreed** of each year.
11. Description of proposed works **Existing dam, reservoir and natural river channel.**
12. Estimated cost of works **N/A.**
13. Estimated time required to construct works **N/A.**
14. Estimated time required to complete the application of water to beneficial use **N/A.**

71719

15. Remarks: See Attachment B.

John Philbin
Acting Deputy Regional Director
for Trust Programs, BIA/WRO

By Alice E. Walker, for Walker River Paiute Tribe
s/Alice E. Walker
Greene, Meyer & McElrov, P.C.
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Compared sc/ dr

AGENT
WITHDRAWN BY ~~AGENT~~ NOV 19 2004

Protested _____
Justicci, P.E. STATE ENGINEER
dam

Attachment A

The applicants are:

Walker River Paiute Tribe
P.O. Box 220
Schurz, Nevada 89427

United States of America
Department of the Interior
Bureau of Indian Affairs

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Application of Walker River Paiute Tribe and United States of America
Attachment A

Attachment B

15. Remarks:

Please refer to map number 70649 on file with the Division of Water Resources and the additional map included with this application.

The United States of America and the Walker River Paiute Tribe ("Tribe") jointly submit this application to change temporarily the manner and place of use of up to the maximum amount of water adjudicated for the benefit of the Tribe from irrigation to wildlife and conservation purposes. Nothing in this application shall be construed as a waiver of the sovereign immunity of the United States or the Tribe, except as otherwise provided by applicable law.

This application is for one year only, during the 2005 irrigation season. Under the Decree entered on April 14, 1936, and amended on April 24, 1940, the Tribe is entitled to a direct flow right from the Walker River of 26.25 cubic feet per second during an irrigation season of 180 days for use on 2,100 acres of land within the Walker River Indian Reservation. *Decree ¶ I, United States v. Walker River Irrigation Dist.*, No. C-125 (D. Nev. Apr. 14, 1936), *as amended, Order for Entry of Amended Final Decree to Conform to Writ of Mandate, Etc.* (D. Nev. Apr. 24, 1940). That right may also be expressed as 9,370 acre feet per year measured at the Tribe's point of diversion.

Because the water right adjudicated for the benefit of the Tribe is a right for use on lands held in trust by the United States for the use of the Tribe and its members, reserved pursuant to federal law, the United States and the Tribe do not admit that application before the Nevada State Engineer is necessary in order to change the purpose of the right adjudicated for the Tribe's benefit, since the Nevada State Engineer does not exercise jurisdiction over such reserved water rights. However, the *Administrative Rules and Regulations Regarding Change of Point of Diversion, Manner of Use or Place of Use of Water of the Walker River and Its Tributaries and Regarding Compliance with California Fish and Game Code Section 5937 and Other Provisions of California Law, United States v. Walker River Irrigation Dist.*, No. C-125 (D. Nev. June 3, 1996) ("Administrative Rules"), by which the Federal District Court administers the waters of the Walker River as adjudicated under the Decree, require that the United States and the Tribe "file a change application with the State Engineer . . .," when seeking to change the place of use outside the Reservation and the manner of use of the water right adjudicated for the Tribe's benefit. Administrative Rules §§ 2.3, 3.1; *see Minutes of Court, United States v. Walker River Irrigation Dist.*, No. C-125 (D. Nev. Apr. 9, 2004); *Transcript of Proceedings* at 4-5, *United States v. Walker River Irrigation Dist.*, No. C-125 (D. Nev. Apr. 9, 2004). Thus, the United States and the Tribe file this application consistent with the Federal District Court's Administrative Rules and recent rulings.

The test for determining whether the Court should approve the United States' and the Tribe's application for a temporary change in the place and manner of use of some or all of the water right adjudicated for its benefit is limited to the test set forth in the Decree:

Any of the said parties shall be entitled to change the manner, place or purpose of use or the point of diversion of the said waters or any thereof in the manner provided by law, *so far as they may do so without injury to the rights of other parties hereto*, as the same are fixed hereby.

Decree ¶ X at 70-71. In other words, the only test that the State Engineer may apply in reviewing whether to grant the United States' and the Tribe's application is whether the proposed temporary change in the manner and place of use of the water right adjudicated for the Tribe's benefit would cause injury to any other right holder under the Decree. *See Order* at 7-10, *United States v. Walker River Irrigation Dist.*, No. C-125 (D. Nev. May 17, 1988) (reserved water rights may be considered by a state agency consistent with the McCarran Amendment, 43 U.S.C. § 666); *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983) (the substantive law by which reserved rights for the benefit of Indian tribes are treated is federal law). The phrase in the Decree "in the manner provided by law" necessarily refers to applicable federal law which, in this case, is the Decree. *Transcript of Proceedings* at 15, *United States v. Walker River Irrigation Dist.*, No. C-125 (D. Nev. Apr. 9, 2004) (the phrase "as provided by law" does not mean "only Nevada state law . . .").

The total amount of the water right adjudicated for the Tribe's benefit which will be temporarily changed is unknown at this time, and will not be certain until the period for enrollment in the Tribe's 2005 fallowing program is closed. Accordingly, the United States' and the Tribe's application is for review of the temporary change in the place and manner of use of up to 9,370 acre-feet during the 2005 irrigation season.