

UNITED STATES BOARD OF WATER COMMISSIONERS

**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**

As Amended through June 3, 1996

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CODE SECTION 5937 AND OTHER PROVISIONS OF CALIFORNIA LAW

PREFACE

In applicable part paragraph X of the final decree (the "Walker River Decree") in United States of America, Plaintiff v. Walker River Irrigation District et. al., Defendants, in the United States District Court for the District of Nevada, Case In Equity, C-125 (the "Walker River Action") provides that "parties shall be entitled to change the manner, means, place or purpose of use or the point of diversion of [waters of the Walker River] 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."

P. 71

In applicable part paragraph XIV of the Walker River Decree provides that the Court retains jurisdiction for regulatory purposes regarding the point of diversion, manner of use and place of use of waters of the Walker River and its tributaries and that the Court may make such regulations as to notice and form or substance of any application for change, or modification of this Decree, or for change of place or manner of use as it may deem necessary.

P. 73

In applicable part paragraph XV of the Walker River Decree provides that the Water Master, with approval of the Court, may make such rules as may be necessary and proper for the enforcement of the Decree and for carrying out of its purposes and objectives.

P. 74

On July 15, 1987, the United States Board of Water Commissioners and the Chief Deputy Water Commissioner filed a petition in the Walker River Action for an order establishing the procedure, rules and regulations to be followed with respect to changing the point of diversion, manner of use or place of use of the waters of the Walker River.

The United States and the Walker River Paiute Tribe filed objections to the proposed rules and regulations.

On May 17, 1988, the Court in the Walker River Action entered an order provisionally adopting the proposed rules and directing that they be modified in accordance with the Court's order and also clarified. After additional briefing and argument the Court in the Walker River Action entered additional orders concerning the proposed rules and regulations on July 7, 1989 and on September 11, 1989.

On April 5, 1994, the United States Board of Water Commissioners filed a petition in the Walker River Action to amend the rules and regulations to correct certain addresses contained therein. On May 31, 1994, the Court entered an order approving that petition and amending the rules and regulations accordingly.

On December 22, 1995, the Walker River Irrigation District, the United States of America, the California State Water Resources Control Board, the State of Nevada, the Walker River Paiute Tribe and California Trout, Inc. filed a Stipulation for Entry of Order in Subfile No. C-125-A in the Walker River Action. The Stipulation for Entry of Order settled a Petition filed by the Walker River Irrigation District on January 9, 1991, related to certain orders issued by the California State Water Resources Control Board in 1990 pursuant to California Fish and Game Code section 5937. The Stipulation for Entry of Order provided for additional amendments to

the rules and regulations with respect to California Fish and Game Code section 5937 or any other applicable provision of California law with respect to the waters of the Walker River adjudicated in the Walker River Decree involving water rights established only under the law of the State of California. On June 3, 1996, the Court entered a Final Order Pursuant to Stipulation amended the rules and regulations as provided in the Stipulation.

The rules and regulations set forth herein are in compliance with the Court's orders of May 17, 1988, July 7, 1989, September 11, 1989, May 31, 1994 and June 3, 1996.

ARTICLE I

DEFINITIONS

Section 1.1 Unless the context otherwise requires, as used in these Rules and Regulations, the following words and phrases shall have the following meanings:

(a) "Agency" or "agencies" shall mean and refer to either or both of the State Engineer of the State of Nevada or the California State Water Resources Control Board as appropriate, which has the responsibility for adjudicating a specific change application or the responsibility for determining compliance with California Fish and Game Code §5937 or any other applicable provision of California law;

(b) "Applicant" shall mean and refer to any person making a change application or seeking to modify, amend, change or establish specific terms and conditions for compliance with California Fish and Game Code §5937 or any other applicable provision of California law;

(c) "Change Application" shall mean and refer to any application filed in accordance with these Rules and Regulations to change the point of diversion, manner of use and/or place of use of the waters of the Walker River adjudicated in the Walker River Decree.

(d) "Compliance Application" shall mean and refer to any administrative proceeding initiated by the Water Resources Control Board or any application filed in accordance with these Rules and Regulations to modify, amend, change or establish specific terms and conditions for compliance with California Fish and Game Code §5937 or any other applicable provision of California law with respect to the waters of the Walker River adjudicated in the Walker River Decree involving water rights established only under the law of the State of California.

(e) "Contested Application" shall mean and refer to a change application which is protested pursuant to the provisions of N.R.S. §533.365 or California Water Code §1704, or to a compliance application which is opposed as the case may be.

(f) "Intervenor" shall mean and refer to any person who, pursuant to Article IX of these Rules and Regulations, is allowed to appear in an agency proceeding by timely intervention, or after the time allowed for appearance of right has expired, or who, having not so appeared in the agency proceeding, is allowed by the court in the Walker River Action, pursuant to Rule 24 of the Federal Rules of Civil Procedure, to appear in a proceeding for approval or judicial review of an agency decision or report.

(g) "Order(s)" shall mean and refer to the decision of the Water Resources Control Board issued in connection with a Compliance Application.

(h) "Party" shall mean and refer to any person who appears or is allowed to appear in an agency proceeding or in a proceeding for approval or judicial review of an agency decision or report.

(i) "Person" shall mean and refer to a corporation, company, partnership, firm, association, society, governmental agency, Indian tribe, or any other entity, as well as a natural person.

(j) "Protestant" shall mean and refer to any person who protests a change application pursuant to the provisions of N.R.S. §533.365 or California Water Code §1704, or who opposes a compliance application as the case may be.

(k) "State Engineer" shall mean and refer to the state engineer of the State of Nevada.

(l) "United States Board of Water Commissioners" shall mean and refer to that certain six person board appointed pursuant to the orders of the court in the Walker River Action dated May 12, 1937, January 28, 1938, and June 27, 1940, to act as a water master or board of commissioners 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.

(m) "Walker River Action" shall mean and refer to that certain action entitled "United States of America, Plaintiff v. Walker River Irrigation District, et al., Defendants," in the United States District Court for the District of Nevada, In Equity No. C-125-ECR.

(n) "Walker River Decree" shall mean and refer to that certain final decree entered in the Walker River Action on April 14, 1936, as amended on April 24, 1940.

(o) "Water Resources Control Board" shall mean and refer to the California State Water Resources Control Board.

ARTICLE II
APPLICABILITY

Section 2.1 The Rules and Regulations shall apply to all change applications involving water rights adjudicated in the Walker River Decree, including the rights of the United States of America held in trust for the benefit of the Walker River Indian Reservation, with certain exceptions. These exceptions are set forth in Sections 2.2, 2.3 and 2.4. These Rules and Regulations shall also apply to all compliance applications.

Section 2.2 These Rules and Regulations do not apply to any change in point or points of diversion sought to be made for the Walker River Indian Reservation to a point or points above the boundaries of the Walker River Indian Reservation. Such changes shall be made in accordance with the provisions of Paragraph I of the April 24, 1940 Order for Entry of Amended Final Decree to Conform to Writ of Mandate, etc.

Section 2.3 These Rules and Regulations do not apply to any change in the point of diversion and/or place of use of water adjudicated to the United States of America for the benefit of the Walker River Indian Reservation, which change is entirely within the boundaries of the Walker River Indian Reservation.

Section 2.4 ~~Any change in the point of diversion and/or place of use of storage waters~~ adjudicated to the Walker River Irrigation District, ~~which change is entirely within the boundaries~~ of the ~~Walker River Irrigation District, shall be made pursuant to adopted rules and regulations~~ of the ~~governing body for said District.~~ This exception shall not apply to any transfer outside the present boundaries of the Walker River Irrigation District, nor shall this exception apply

should there be a change in the authority given the Walker River Irrigation District under Nevada law.

ARTICLE III

FILING CHANGE APPLICATIONS AND COMPLIANCE APPLICATIONS

Section 3.1 ~~Applicants within the State of Nevada shall file a change application with the State Engineer on such forms and in such manner as required by that office.~~

Section 3.2 Applicants within the State of California shall file a change application with the Water Resources Control Board on such forms and in such manner as required by that office.

Section 3.3 Persons initiating compliance applications shall file such pleadings as required by the Water Resources Control Board.

Section 3.4 Applicants shall pay such direct costs associated with the processing of the change application or compliance application, including, notice and attendant publication costs. In addition applicants for changes or parties initiating compliance applications in California shall pay such costs as are allowed by the order entered in the Walker River Action appointing the Water Resources Control Board as Special Master.

ARTICLE IV

NOTICE OF CHANGE APPLICATIONS AND COMPLIANCE APPLICATIONS

Section 4.1 Notice of all change applications, whether filed in the State of Nevada or State of California, and of compliance applications shall be given by the responsible agency as follows:

(a) Within ninety (90) days after the filing of a completed change application or compliance application in proper form, the agency shall cause notice thereof to be ^{NRS} 533.360 _{publicatio}

published five times during a period of four consecutive weeks in a newspaper of general circulation and printed and published in the county where the change is to occur or where compliance will be required.

(b) In addition to publication as required in (a) above, the agency shall cause a notice of the change application or compliance application to be published five times during a period of four consecutive weeks in newspapers of general circulation and printed and published in Mono County, California, Douglas County, Nevada, and Lyon County, Nevada. Provided, however, that publication pursuant to (a) above shall satisfy the publication requirement for one of the counties listed in this subsection (b).

*Special
Instructions
to publish
5 times
rather than
4 times*

(c) In addition to publication as required in (a) and (b) above, notice of the change application or compliance application shall be given in such manner as may be required by the law of the state where the change or compliance is to occur.

(d) Upon the filing of a change application or compliance application, the agency shall immediately forward a copy thereof to the ^①United States Board of Water Commissioners, P. O. Box 853, Yerington, Nevada 89447, to the ^②Calif. agency of the other state, to the ^③United States Attorney for the District of Nevada, 100 West Liberty Street, Suite 600, Reno, Nevada, 89501, to the ^④Walker River Paiute Tribe, Attention: Tribal Chairperson, P.O. Box 220, Schurz, Nevada, 89427, and to the ^⑤Nevada Department of Wildlife, 1100 Valley Road, Reno, Nevada, 89512.

Section 4.2 Any person holding a water right adjudicated under the Walker River Decree may file with the agencies a written request stating that said person desires special notice of all change applications or compliance applications filed pursuant to these Rules and Regulations. The request shall state the post office address of the person and thereafter upon the

filing of a change application or compliance application the agency shall immediately forward a copy thereof to said person at that address by United States mail certified, return receipt requested.

Section 4.3 The responsible agency shall ensure that each notice of change application or compliance application shall set forth:

533.360 (1)

- (a) That the application has been filed; (a)
- (b) The date of filing; (b)
- (c) The name and address of the applicant; (c)
- (d) The name of the water source that will be affected by the application; (d)
- (e) In the case of a change application the location of the existing point of diversion or place of use and the present manner of use and in the case of a compliance application the location and name of the dam or other facility affected; (e)
- (f) In the case of a change application the location of the new point of diversion or place of use and the new manner of use; (e)
- (g) The quantity of water involved in the change application or compliance application;
- (h) The purpose for which the application has been filed; and (f)
- (i) Such other information as may be necessary to permit complete understanding of the proposed change application or compliance application.

The agency shall ensure that each notice of publication of a change application or compliance application includes the date of first publication and the date of the last publication.

533.360(1)

Section 4.4 Proof that notice of a change application or compliance application has

Section 5.3 ~~A copy of an agency record shall be filed with the agency of the other state and with the United States Board of Water Commissioners.~~

Section 5.4 The United States Board of Water Commissioners may participate as a party in all proceedings concerning a change application or compliance application before an agency. Within the time provided by an agency, which time shall in no event be less than sixty (60) days after the United States Board of Water Commissioners receives a copy of a change application or compliance application, the United States Board of Water Commissioners shall provide the agency with comments and recommendations concerning the change application or compliance application.

ARTICLE VI

AGENCY DECISION

Section 6.1 ~~The responsible agency shall approve or reject a change application or act upon a compliance application within one (1) year after the date of initial filing, except that the decision may be postponed for an additional time period not to exceed two (2) additional years upon written authorization by the applicant, or in the case of a contested application, where the applicant, protestant, as well as any intervenor(s) jointly agree to an extension. In the case of a compliance application, the time for agency action may be extended by the responsible agency for up to two (2) years, if the agency determines that additional time is required to obtain information needed to act upon the application. Where an action has been filed in any court which may affect the allocation and distribution of waters of the Walker River, the agency may withhold for good cause shown any pending decision on a change application or compliance application until such court action is concluded.~~

*Modified
NRS
533.370(3)*

Section 6.2 The decision of the State Engineer and the compliance order of the Water Resources Control Board shall be served by the agency on all parties to the agency administrative proceeding, on the ^②United States Board of Water Commissioners and on the ^③agency of the other state. ^① who is this?

Section 6.3 The report of the Water Resources Control Board shall be prepared, announced and filed in the Walker River Action in accordance with the orders entered in the Walker River Action appointing said Board as Special Master, with these Rules and Regulations and with Rule 53 of the Federal Rules of Civil Procedure, in that order of precedence. In review of any report and recommendation as to a change application or compliance application rendered by the California State Water Resources Control Board in its capacity as Special Master, the Court shall not be limited by the "clearly erroneous" standard prescribed by Fed.R.Civ.P. 53(e)(2). The report shall be served by the agency on all parties to the agency administrative proceeding, on the United States Board of Water Commissioners and on the agency of the other state. *Calif only*

Section 6.4 Decisions of the State Engineer and orders and reports of the Water Resources Control Board shall be subject to the provisions of Article VII and Article VIII.

ARTICLE VII

JUDICIAL REVIEW

Section 7.1 ~~Any decision, order or report shall be submitted to the Court in the Walker River Action. Any party to an agency administrative proceeding shall be entitled to petition for judicial review thereof in the Walker River Action. Any other entity or individual not a party to the agency proceedings may seek judicial review of the agency decision upon a~~

showing of good cause as to why such entity or individual was not a party to the agency proceedings. With respect to persons who participated in the agency proceedings, the Court shall not consider new objections or arguments, without a showing of good cause for failure of that person to present such objections or arguments in the agency proceeding.

Section 7.2 Proceedings for approval of modifications of the Walker River Decree in accordance with the decision or report of the agency regarding change applications, or for judicial review of any such agency decision or report, may be instituted by the filing of a petition in the Walker River Action by any party to the agency proceedings or upon petition by the agency. A petition must be filed within 45 days after service of the agency decision or report or, if a rehearing is held, within 45 days after the decision or report thereon. Copies of the petition shall be served on the responsible agency, all parties to the agency administrative proceeding, on the United States Board of Water Commissioners and on the agency of the other state, the United States Attorney for the District of Nevada, the Walker River Paiute Tribe and the Nevada Department of Wildlife.

Section 7.3 The Water Resources Control Board shall file a petition in the Walker River Action for approval of a compliance order within 35 days of its adoption or, if reconsideration is granted, within 35 days after an order is issued thereon. Copies of the petition shall be served on all parties to the proceeding which resulted in the compliance order, the United States Board of Water Commissioners, the State Engineer, the United States Attorney for the District of Nevada, the Walker River Paiute Tribe and the Nevada Department of Wildlife. Objections to the petition for approval shall be filed and served within 45 days of service thereof.

Objections shall be served on all parties who were served with the petition for approval of the compliance order.

Section 7.4 The petition for approval or judicial review shall have the agency decision, order or report appended to it and generally shall state the grounds for the petition.

Section 7.5 ~~The decision or report of the agency regarding a change application shall not take effect unless and until the court having jurisdiction over the Walker River Action finally approves it and enters an order modifying the Walker River Decree accordingly.~~ An order of the Water Resources Control Board regarding a compliance application shall take effect upon adoption unless stayed, except that such an order is automatically stayed without application for a stay if the Water Resources Control Board fails to file a petition for its approval within the time provided in section 7.3. The automatic stay provided for herein shall be deemed lifted upon the filing of a petition for approval of the order by the Water Resources Control Board and the actual receipt thereof by the party or parties affected by the order.

Section 7.6 Within 30 days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. The court may require or permit subsequent corrections or additions to the record.

Section 7.7 If before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that additional evidence is material and that there was good cause for failure to present it in the proceeding

before the agency, the court may receive additional evidence. The court shall receive such additional evidence in such manner and form as it deems appropriate.

Section 7.8 The review shall be conducted by the court without a jury. In its review, the court shall consider the administrative record, any additional evidence received by the court, written briefs, and, where deemed appropriate by the court, oral argument. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in court.

Section 7.9 ~~The Court shall conduct a de novo review of all agency decisions regarding~~ change applications which recommend modification of the Walker River Decree, irrespective of whether any party files a formal request for judicial review. Except as set forth in Article VIII, the court may affirm the decision or approve the report of the agency or remand the case for further proceedings. The court may reverse or modify the decision if said decision would impair existing rights under the Walker River Decree, adversely impact some public interest or prejudice substantial rights of the petitioner. Substantial rights of the petitioner may be prejudiced where the administrative findings, inferences, and/or conclusions are:

- (a) Made upon unlawful procedure;
- (b) Affected by other error of law;
- (c) Erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (d) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Section 7.10 In reviewing any report of the Water Resources Control Board, the court in the Walker River Action shall not be limited by the "clearly erroneous" standard prescribed by Fed.R.Civ.P. 53(e)(2). In the event that no objections are filed to a petition for approval and judicial review of an agency decision or report, the court in the Walker River Action may, in its discretion, accept the agency decision or report regarding a change application without further proceedings.

Section 7.11 Except as provided in section 8.2, the scope and standard of review governing a petition for approval of a compliance order shall be determined by the Court on a case-by-case basis.

ARTICLE VIII

TRIAL DE NOVO IN CERTAIN CASES

Section 8.1

~~Whenever a compliance order is issued by the United States of America on behalf of the Walker River Paiute Tribe or of the Walker River Paiute Tribe on its own behalf, the court shall conduct a trial de novo.~~
The trial shall be to the court without a jury. The evidence before the court shall include the administrative record prepared and filed in accordance with these Rules and Regulations and any other relevant evidence offered to and admitted by the court.

Section 8.2 In a petition for approval of a compliance order involving an objection to a compliance application of the United States of America on behalf of the Walker River Paiute Tribe or of the Walker River Paiute Tribe on its own behalf, the Court shall conduct a trial de novo on the objection of the Tribe or the United States. The trial shall be to the Court without a jury. The evidence before the Court shall include the administrative record prepared and filed

in accordance with these Rules and Regulations and any other relevant evidence offered to and admitted by the Court. The scope and standard of review on all matters other than the objection of the Tribe or the United States shall be determined by the Court on a case-by-case basis.

ARTICLE IX

INTERVENTION

Section 9.1 In all proceedings before the federal court, whether for judicial review of an agency recommendation or for modification of the Amended Final Decree, Federal Rule of Civil Procedure 24 shall apply to all potential intervenors. In exercising its discretion to permit permissive intervention on behalf of one not a party to the agency proceedings, the Court shall consider whether the potential intervenor has shown good cause for failure to participate in the agency proceedings.

Section 9.2 Upon timely application anyone shall be permitted to intervene in an agency proceeding: (1) when a statute of California, Nevada or the United States confers an unconditional right to intervene; (2) when the proposed intervenor claims an interest relating to the subject of the proceeding and is so situated that the disposition of the proceeding may as a practical matter impair or impede the proposed intervenor's ability to protect that interest, unless the proposed intervenor's interest is adequately represented by existing parties.

Section 9.3 Upon timely application anyone shall be permitted to intervene in an agency proceeding: (1) when a statute of California, Nevada, or the United States confers a conditional right to intervene; (2) when the proposed intervenor's interest and the proceeding have a question of law or fact in common. In exercising its discretion the agency shall consider

whether the intervention will unduly delay or prejudice the determination of the rights of the original parties.

Section 9.4 A person desiring to intervene shall serve a motion to intervene upon all parties to the agency proceeding. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the position of the proposed intervenor for which intervention is sought.