

**IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA**

IN THE MATTER OF APPLICATION 75337 FILED)
TO CHANGE THE PLACE OF USE AND MANNER)
OF USE OF WATER PREVIOUSLY APPROPRIATED)
FROM THE WALKER RIVER, WALKER LAKE)
VALLEY – SCHURZ SUBAREA HYDROGRAPHIC)
BASIN (110A), LYON COUNTY, NEVADA.)

RULING
5746

GENERAL

I.

Application 75337 was filed on February 14, 2007, by the Walker River Paiute Tribe (Tribe) and the United States of America, Department of Interior, Bureau of Indian Affairs to change the place of use and manner of use of 26.25 cubic feet per second (cfs), not to exceed 9,370 acre-feet seasonally¹ of the water previously appropriated under the *Walker River Decree*² (Decree) for wildlife and conservation purposes within the Walker River from Little Dam to its terminus at Walker Lake.³ The existing place of use is 2,100 acres of land served by the Walker River Irrigation District within the Walker River Paiute Indian Reservation (Reservation). The season of use will be as decreed. There is no change in the point of diversion and the diversion will occur at Little Dam and the water will be allowed to flow into the main channel of the Walker River. The decreed manner of use is irrigation. The remarks section of the application indicates that the application was submitted to change temporarily the manner and place of use up to the maximum amount of water adjudicated for use during the 2007 irrigation season.

II.

The Application was timely protested by Joseph and Beverly Landolt on the grounds summarized as follows:

1. The use of the water will unreasonably lower the static water level in the Walker River and surrounding basin thereby adversely affecting wetlands in the areas surrounding

¹ By letter dated April 20, 2007, the Watermaster for the Walker River indicated that the total acre-feet should be 9,355.5 deriving that figure from 26.25 cfs multiplied by the 180-day irrigation season, converted to acre-feet using a multiplier of 1.98.

² Final Decree, *U.S. v. Walker River Irrigation District.*, In Equity C-125 (D. Nev. 1936), as amended April 24, 1940.

³ File No. 75337, official records in the Office of the State Engineer.

the dam, which would adversely affect the water quality of the remaining river water, ground water, and further threaten springs, seeps and phreatophytes which provide wildlife habitat, and areas for grazing livestock.

2. The use of the water will adversely affect existing rights, including those of the Landolts.
3. There is no unappropriated water in the source.
4. The Application was filed to aid in construction of the dam with no consideration of the ultimate use or priority of other water rights, and thus, is not in the public interest.
5. The Applicant does not own or control the proposed place of use (Walker Lake), which is controlled by the Nevada Department of Wildlife and use of water at Walker Lake has a junior priority date of 1970.
6. Granting the Application will deprive the area of origin of water needed for its environmental and economic well being.
7. The proposed diversion and export of water from the river is not environmentally nor economically sound at a time of dry conditions wherein upstream users are already been told to cut their water use so as to assure senior priority water right holders of their full rights, thereby reducing agricultural output and impacting wildlife while not providing substantial benefit.
8. The use of the water will threaten to prove detrimental to the public interest as it will allow the transfer of water for which there is no beneficial use.
9. The proposed diversion of water should first allow upstream users to use the water.
10. Allowing the construction of the dam without first obtaining permission from the *Walker River Decree Court* is in violation of the Court's Orders, which require that all actions that substantially affect water rights on the Walker River are stayed pending the outcome of negotiations and service of process therefor.
11. Re-building the dam without adequate provision for the preservation of wetlands currently surrounding it may run afoul of the regulatory authority of the U.S. Army Corps of Engineer, and if so, would therefore not be in the public interest.

CONCLUSION

1. Approval of the subject Application without appropriate modification or regulation will adversely impact existing rights including, but not limited to, those held by these Protestants.
2. Approval of the subject Application without modification or appropriate regulation will result in a waste of most if not all of the water thereby being diverted and is therefore not in the public interest.
3. Approval of the subject Application without modification or appropriate regulation will result in a *de facto* bypassing of long standing water rights in favor of a very junior right which is contrary to the spirit and letter of more than a century of Nevada water law and is therefore not in the public interest.
4. Approval of the subject Application without the prior permission of the U.S. District Court would violate that Court's Orders and is therefore not in the public interest.
5. The subject application is a threat to the wetlands currently surrounding the dam, has not made adequate provisions therefor nor adequately cooperated with the regulatory agencies responsible therefor (Army Corps of Engineers) and consequently is not in the public interest.³

III.

The Application was timely protested by the Walker River Irrigation District (WRID) on conditional grounds as summarized below.

The WRID requests that the Application be granted subject to the following conditions:

1. The Application indicates that it is a change up to the maximum amount of water adjudicated for the benefit of the Tribe; thus, it appears that it is possible that some portion of the water right might still be used for irrigation. Therefore, any permit issued should contain a permit term that when the portion actually changed is known, the United States and its Watermaster shall notify the State Engineer as to the quantity actually changed and shall identify the lands which will not be irrigated, and shall specify the diversion rate devoted to wildlife conservation.
2. Any permit issued by the State Engineer and approved by the Court shall require that water be diverted during the time period set forth in paragraph VI of the 2007 Plan of Distribution adopted by the United States Board of Water Commissioners on March 1, 2007, and filed with the Court on April 6, 2007.
3. Any permit issued by the State Engineer and approved by the Court shall recognize

that water will be measured at the gaging station at Parkers at the lower end of Mason Valley as provided in the Rules and Regulations for Distribution of Water on the Walker River Steam System under the Provisions of Paragraph 15 of the Decree, which Rules and Regulations were approved on September 3, 1953, and as provided in paragraph VI of the 2007 Distribution Plan.

4. Any permit issued will not take effect until the Walker River Decree Court approves it.

IV.

The Application was timely protested by Circle Bar "N" Ranch (CBNR) on the following grounds as summarized:

1. The total acre-feet should be limited to 9,355.5 and not 9,370.
2. The Decree does not provide for temporary changes such as this; however, NRS § 533.345 provides for temporary changes if the change is in the public interest and does not impair the water rights held by other persons.
3. The decreed point of diversion is at the Parkers Gage located near Wabuska, Nevada, not Little Dam. Any proposed change in point of measurement will create an adverse result for other water users, as an increased quantity of water will be required to flow past the Parkers Gage to insure that 26.25 cfs reaches Little Dam.
4. The Applicant should be required to maintain the point of measurement at Parkers Gage, minus evaporative, transpiration and transportation losses. The place of use would be Walker Lake with the provision that no diversions be made from the main channel before the water flows into the Lake.
5. The Application fails to provide an explanation of how the diversions from the River will be monitored and who will monitor to confirm that no diversion is made.

V.

The Applicant filed responses to the protests and indicated that it does not object to conditions 2 and 4 set forth in Exhibit A to WRID's protest and generally agrees with WRID's suggested conditions.³ The responses additionally address other protest issues. The Tribe did not object to notifying the State Engineer and the Federal District Court of what lands would be

irrigated, but did object to the point of measurement being Parkers Gage at Wabuska, Nevada, asserting that by use of that site the Tribe's right is diminished under the Decree by charging the Tribe for carriage losses. The Tribe alleges that if Parkers Gage is the place of measurement, the Tribe would receive substantially less than 26.25 cfs of direct stream flow on its 2,100 acres of irrigated lands. The Tribe recognizes that the United States Geological Survey has not agreed that the on-Reservation gage, located at Cow Camp, is sufficiently accurate to measure stream flows. Thus, the Tribe asserts that it will agree that the Parkers Gage may be used to measure the temporarily changed water right, but on the condition that the streamflow at the gage exceed the amount of the temporarily changed water right.

FINDINGS OF FACT

I.

The WRID is concerned that the Application indicates that a portion of the Tribe's water would be temporarily changed to wildlife purposes and that a portion may be used for irrigation and that the quantities for each use should be specific. The Tribe has since responded to this concern. The Tribe indicated that the owners of only 219 acres had elected not to fallow their irrigated land; however, the Bureau of Indian Affairs indicated that it would not deliver water to those lands and the entire water right requested for transfer would be used for instream-wildlife purposes. The WRID's remaining contentions merely assert that, if the Application is granted, that it reflect the conditions contained in the Decree and applicable Rules and Regulations.

The State Engineer finds by the fact the Bureau of Indian Affairs has indicated that no water will be delivered for irrigation and the entire water right will be used for instream purposes, that issue number 1 under the WRID protest is resolved. The State Engineer finds upon approval of the Application, no water will be allowed for diversion for irrigation use on the Reservation. The State Engineer finds that the Tribe agreed to the conditions proposed under issues number 2 and 4 of the WRID's protest; therefore, both those protest issues are resolved. The State Engineer finds as to issue number 3, regarding the the appropriate point of diversion, in the Tribe's response it indicated that it agreed that the Parkers Gage located at Wabuska, Nevada, may be used to measure the temporarily changed water right, but on the condition that the streamflow measured at Wabuska exceed the amount of the temporarily changed water right.

The Order for Entry of Amended Final Decree to Conform to Writ of Mandate, etc. entered on April 24, 1940, holds that the point of diversion for the rights of the United States for use on the Reservation is at a point upon or above the Walker River Indian Reservation. This point of diversion is more specifically identified in the Rules and Regulations for Distribution of Water of the Walker River Stream System approved by Order of the Decree Court dated September 3, 1953, which provides that the point of measurement for the water for the Indian Service is a “gaging station at Parkers at the lower end of Mason Valley...”

The State Engineer finds while the Application indicates the point of diversion is Little Dam, the point of diversion and place measurement is Parkers Gage and the amount of water will not exceed the 26.25 cfs as decreed.

II.

The Landolt's claim that granting the temporary change would unreasonably lower the static water level in the Walker River and surrounding basin thereby adversely affecting wetlands in the area surrounding the dam, which would adversely affect the water quality of the remaining river water, ground water, and further threaten springs, seeps and phreatophytes, which provide wildlife habitat, and areas for grazing livestock. It is unclear what dam would be affected. The Tribe has informed the State Engineer that the dam for Weber Reservoir is under repair this year and that it would not be impounding the usual amount of water regardless of the status of the temporary permit. As to the remaining concerns listed above, the State Engineer finds that the Tribe's water right will be delivered to Parkers Gage for use on the Reservation during a normal year in the same manner as if had been used for irrigation, and downstream wildlife and livestock will have access to the instream flows.

The Landolts assert there is no unappropriated water in the source. The State Engineer finds this is not an application for a new appropriation, but rather a change in a decreed water right; therefore, the protest ground is without merit.

The Landolts assert that the Tribe does not own the place of use, which they indicate is Walker Lake and that the water rights for Walker Lake are “grossly inferior” in priority to their own water rights. However, the place of use for the temporary use is for instream flow in the Walker River on the Tribe's Reservation; and thus, the State Engineer finds that the Tribe does have legal

access to the proposed place of use. The State Engineer acknowledges that the instream use may benefit Walker Lake, but any permit issued will be for instream use on the Reservation to benefit wildlife. Any downstream benefit to Walker Lake is incidental and water is not being delivered to fill the junior water rights of the Nevada Department of Wildlife for use in Walker Lake.

The Landolts argue that the water will be wasted in a time when it is needed to support upstream uses in a low water year, both for wildlife and the economic well-being of the area. The Federal Watermaster is bound by the *Walker River* Decree to deliver water to senior water right holders before he can deliver water to junior water right holders. Nevada Revised Statute § 533.023 provides that the use of water for wildlife includes the maintenance of wetlands, fisheries and other wildlife habitats. Nevada Revised Statute § 533.030 provides that the use of water for recreational purposes is declared a beneficial use and the Nevada Supreme Court has held that the watering of wildlife is encompassed in the definition of recreation as a beneficial use of water. *State, Bd. of Agriculture v. Morros*, 104 Nev. 709, 766 P.2d 263 (1988). The State Engineer finds the use of the water for instream purposes is a beneficial use under Nevada water law and delivery of the water right will be no different in terms of priority than if the water right had been delivered for irrigation. The State Engineer finds the Federal Watermaster sets the priorities to be served under the Decree.

The Landolts remaining protest issues address their concerns with the rebuilding of Weber Reservoir, permits required for that reconstruction, the impact of the reconstruction on wetlands in the area of the dam, and whether the Applicant has cooperated with the regulatory agencies responsible, i.e., the Army Corps of Engineers, and thus, alleges that consequently, approval of the Application is not in the public interest. The State Engineer finds the approval of this application does not waive any other requirements of local, state or federal agencies. The State Engineer finds use of water in the Weber Reservoir is not before him; thus, whether reconstruction of the dam will harm wildlife in the area is not a consideration relevant under the application being addressed in this ruling, and the protest allegations are dismissed.

III.

The CBNR protests the Application on the issue of whether the temporary permit will change certain terms of the decree, such as the point of diversion and the temporary nature of the

permit. The State Engineer has already found the point of diversion and place of measurement is the decreed point of diversion and place of measurement at Parkers Gage. The State Engineer finds the water right application was not filed under the provision of Nevada water law found in NRS § 533.345 that provides for temporary changes, but rather the Applicant pursued this change as one for a finite period of time. The State Engineer notes that a change for a finite period of time has previously been approved by the United States District Court for the Nevada Department of Wildlife⁴ and the Court has also previously approved an emergency change of the Reservation water right in 2004 for the same purpose as being requested under this application. The State Engineer finds this protest claim can be overruled.

The State Engineer finds that the Walker River Watermaster has indicated that 26.25 cfs converts to a seasonal duty of 9,355.5 acre-feet and the State Engineer defers to that figure.

The State Engineer finds that the remaining CBNR issue, which is that if the point of measurement is at Parkers Gage, there should be no deduction for evaporative, transpiration and transportation losses, is addressed in the State Engineer's finding that the 26.25 cfs is measured at Parkers Gage. The State Engineer finds upon approval of this application, no water may be diverted for irrigation or any other use on the Reservation and compliance with regulation of the river is within the control of the Watermaster and the Federal District Court and the issues are overruled.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁵

II.

The State Engineer is prohibited by law from granting a permit to appropriate or change the public waters where:⁶

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;

⁴ File No. 70649, official records in the Office of the State Engineer.

⁵ NRS chapter 533.

⁶ NRS § 533.370(5).

- C. the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

III.

The State Engineer concludes the issue of unappropriated water is not relevant in the case of a change application. The State Engineer concludes the proposed change will not conflict with existing rights, protectible interests in existing domestic wells or threaten to prove detrimental to the public interest.

RULING

The protests to Application 75337 are hereby overruled in part and upheld in part. Application 75337 is granted in the amount of 26.25 cubic feet per second, not to exceed 9,355.5 acre-feet, the point of diversion and place of measurement is Parkers Gage. The granting of this application will not take effect until the Walker River Decree Court approves the change and is subject to the payment of statutory permit fees.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/SJT/jm

Dated this 22nd day of
June, 2007.