

MIKE PAVLAKIS
JOAN C. WRIGHT
KAREN A. PETERSON
JAMES R. CAVILIA
CHRIS MACKENZIE
DAWN ELLERBROCK
RYAN D. RUSSELL
JOEL W. LOCKE



ALLISON · MACKENZIE
PAVLAKIS · WRIGHT & FAGAN
L T D
ATTORNEYS AND COUNSELORS AT LAW

KEVIN NAUGHTON
JUSTIN TOWNSEND

GEORGE V. ALLISON
ANDREW MACKENZIE
PATRICK V. FAGAN
OF COUNSEL

MIKE SOUMBENIOTIS
(1932-1997)

March 24, 2014

Ref: KMG:A002221 & A001389

Records Unit
Attention: Kathy Mrowka
Division of Water Rights
State Water Resources Control Board
Cal/EPA Headquarters
1001 I Street, 2nd Floor
Sacramento, CA 95814-2828

Via Email & Federal Express
Kathy.Mrowka@waterboards.ca.gov
Tracking #: 7983 1569 3805

Re: In the Matter of Licenses 6000 and 9407 (Applications 2221 and 1389) of Walker River Irrigation District; Petitions for Temporary Change Involving the Transfer and Instream Flow Dedication of 25,000 Acre-Feet of Water – Petition for Reconsideration of Order and/or Objections to Draft Report

Dear Ms. Mrowka:

This letter should serve as the petition for reconsideration and/or objections of the United States Board of Water Commissioners for the Walker River and the Water Master/Chief Deputy Water Commissioner for the Walker River (collectively “USBWC”) to the order and draft report of the California State Water Resources Control Board (“State Water Board”) approving the temporary change applications filed by the Walker River Irrigation District (“WRID”) involving the transfer of water and instream flow dedication under Licenses 6000 and 9407. This petition for reconsideration is filed pursuant to Cal. Code Regs., Title 23, §§ 768 and 769. The objections are filed pursuant to Paragraph 7.c of the *Order of Appointment of California State Water Resources Board as Special Master* (April 9, 1990) (“Order of Appointment”). The Division’s notice dated February 21, 2014, provides that any objection filed must meet the requirements for reconsideration under the State Water Board’s statutes and regulations. The notice also provides that reconsideration before the State Water Board is an administrative remedy requiring exhaustion before seeking judicial review. While it is not clear that a petition for reconsideration is required pursuant to 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* as amended through June 3, 1996 (“Administrative Rules and Regulations”), the USBWC is filing this petition and submitting its objections to preserve its comments and concerns to be submitted to the United States District Court for the

District of Nevada in *United States of America v. Walker River Irrigation District, et al.*, Case in Equity No. C-125 pursuant to Sections 7 and 8 of the Administrative Rules and Regulations.

A. INFORMATION REQUIRED IN PETITION FOR RECONSIDERATION.

1. Name and address of the petitioner: United States Board of Water Commissioners for the Walker River and the Water Master/Chief Deputy Water Commissioner for the Walker River, 410 N. Main St., Yerington, Nevada 89447.

2. The specific board action of which petitioner requests reconsideration: Order Approving Temporary Changes, *In the Matter of Licenses 6000 and 9407 (Applications 2221 and 1389) of Walker River Irrigation District; Petitions for Temporary Change Involving the Transfer and Instream Flow Dedication of 25,000 Acre-Feet of Water* (“Order”). The Order also constitutes the draft report of the Special Master as provided in Paragraph 7.c of the Order of Appointment.

3. The date on which the order or decision was made by the Board: February 21, 2014.

4. The reason the action was inappropriate or improper: The order and draft report is not supported by substantial evidence and contains error in law. See statement of points and authorities in support of petition for reconsideration and legal issues below.

5. The specific action which petitioner requests: Reconsideration of the State Water Board’s findings based upon the provisions of the Walker River Decree (“Decree”), the *Rules and Regulations for the Distribution of Water on the Walker River Stream System Under the Provisions of Paragraph 15 of Decree in Equity, No. C-125*, adopted September 3, 1953 (“1953 Rules and Regulations”) and the points and authorities set forth below.

6. A statement that copies of the petition and any accompanying materials have been sent to all interested parties: Copies of the petition and any accompanying materials have been sent to all interested parties.

B. POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR RECONSIDERATION AND OBJECTIONS.

1. The Walker River Decree and the 1953 Rules and Regulation control in this proceeding to consider changes to water rights adjudicated by the Walker River Decree and not California law.

Section 7.0 of the Order states that the State Water Board proceeds under California law in considering changes sought to California water rights adjudicated in the Walker River Decree. *See* Order at 13. There is no cite to any authority to support this proposition. While Section 5.1 of the Administrative Rules and Regulations provides that proceedings before an agency with respect to change applications shall be in accordance with the practice and procedure of that agency, the Administrative Rules and Regulations do not state that change applications are to be considered in accordance with the law of California or Nevada to the exclusion of the provisions of the Walker River Decree or the Court's 1953 Rules and Regulations.¹ The Decree specifically reserves jurisdiction to the Court for regulatory purposes, including a change of point of diversion or of the place of use of any water user. *See* Decree at 72-73. There is no provision in the Walker River Decree or the Administrative Rules and Regulations or the Order of Appointment incorporating California law as the substantive water law for change applications filed pursuant to the Walker River Decree. *Cf. Pyramid Lake Paiute Tribe of Indians vs. Nevada, Department of Wildlife*, 724 F. 3d 1181, 1187 (9th Cir. 2013) (Rules and regulations for change applications incorporated Nevada law as substantive water law in the Alpine Decree). Allowing change applications to be approved according to state law instead of the provisions of the Walker River Decree or the Court's 1953 Rules and Regulations could result in inconsistent holdings for similar change applications dependent upon whether the change application is filed in California or Nevada.

Section 7.2 of the State Water Board's Order addressing legal injury to the rights of others and return flows does not consider the proposed change applications in the context of the Walker River Decree and the 1953 Rules and Regulations. The analysis of injury and return flows is premised on California requirements for legal injury or legal right to return flows and not the provisions of the Walker River Decree and the 1953 Rules and Regulations. *See* Order at 14-16. The Walker River Decree contemplates changes "so far as they [the party seeking the

¹ Copies of the Walker River Decree, Amended Final Decree and the 1953 Rules and Regulations were provided to the State Water Board with the USBWC's comments dated May 9, 2013.

Kathy Mrowka, Senior
Inland Streams Unit
Division of Water Rights
State Water Resources Control Board
March 24, 2014
Page 4

Via Email & Federal Express
Kathy.Mrowka@waterboards.ca.gov

change] may do so without injury to the rights of other parties hereto, as the same are fixed hereby.” *See* Decree at 71. The Court will also review whether the change application “would impair existing rights under the Walker River Decree, adversely impact some public interest or prejudice substantial right of the petitioner.” *See* Administrative Rules and Regulations, Section 7.9 at 15. It appears the State Water Board did not consider the terms of the Walker River Decree and the historical practices for administering and distributing waters under the Walker River Decree in determining issues regarding injury or return flow with regard to the rights of the other parties to the Decree. As set forth in its initial comments, the total amount of water available and the year of priority under the Walker River Decree is set daily. *See* 1953 Rules and Regulations at 4. Return flows, including return flows from stored water used in the system, are included in the total amount of water computed daily as available to serve water users and to set the year of priority. *Id.* It appears the Order contemplates the full duty of the stored water used for irrigation will be changed to an instream use, not just the consumptive use portion of the changed storage right. Non-diversion for instream use will decrease the ditch efficiencies for storage right holders. Thus, granting the change applications for the full duty of the stored water used for irrigation, not just the consumptive use portion, will impact the amount of water available to serve water users and to set the year of priority under the Decree.

The Order states: “The proposed temporary changes only involve the release of water that was diverted to storage after senior rights had been met.” *See* Order at 15. This statement is not supported by substantial evidence and disregards the provisions of the Decree that allow the storage of water outside the irrigation season, from November 1 to March 1, when no rights are being met under the Decree other than water for stockwater or domestic purposes. Water stored outside the irrigation season will be used to meet storage demands after March 1. *See* Walker River Decree at 63A – 65. This is the stored water to which the irrigation storage right holders as identified on page 5 of WRID’s November 22, 2013 letter in whole are legally entitled.² The Decree provides that WRID “may distribute such water so stored in said reservoirs to the lands in the District entitled thereto, in accordance with their respective rights.” *See* Decree at 65. More water stored in the non-irrigation season means more water available and allocated to storage right holders during the irrigation season. If a water right holder does not use his rights under the Walker River Decree, including storage rights, a junior appropriator may use and has a legal right to use the water under the Decree if the Decree has been set to the junior appropriator’s priority. Allowing a non-irrigation use of storage water after all other storage water users are prohibited from using their stored water favors one storage right holder over

² It is not clear if the paragraph with this statement is only intended to address the Walker River Paiute Tribe’s comments or the injury claims of all commenters.

another based on use even though priorities may be the same. The proposed change allows for a greater opportunity for use of the stored instream right to the detriment of the stored irrigation right. The Decree requires that priorities shall be deemed to be identical in point of time and equal in point of right. *See* Decree at 71.

2. Construction of the Walker River Decree.

Sections 8.3 and 8.5 of the Order determine that Walker Lake is part of the Walker River Basin and water rights under the Decree do not depend on land ownership. Again, California law is cited and no analysis of the Walker River Decree is provided.

If the State Water Board is going to construe the Decree, the rules of construction relating to a federal decree apply. If a judgment or decree is unambiguous, the Court may not consider extraneous evidence to explain it. *See, W.O. Narramore v. United States*, 852 F.2d 485, 490 (9th Cir. 1988), *United States v. Gila Valley Irr. Dist.*, 961 F.2d 1432, 1440-1441 (9th Cir. 1992). If a term in a consent decree is ambiguous, then the contemporaneous construction by the parties to the decree may be given weight. *United States v. Gila Valley Irr. Dist.*, 961 F.2d 1432, 1440-1441 (9th Cir. 1992) citing *U. S. v. ITT Cont'l Baking Co.*, 420 U.S. 223, 237, 95 S. Ct. 926, 935, (1975) (“evidence of events surrounding [a consent decree’s] negotiation and tending to explain ‘ambiguous’ terms would be admissible in evidence”). The fact that the parties may disagree as to a decree’s meaning does not in and of itself establish that the decree is ambiguous. (cite omitted). *United States v. Gila Valley Irr. Dist.*, 961 F.2d at 1440-1441.

The Ninth Circuit Court of Appeals has discussed the rules governing interpretation of decrees of a hybrid nature, that is, decrees involving stipulations incorporated into a litigated decree. *See, Wakerman Dairy Inc. v. Wilson*, 7 F.3d 891 (1993) reversing *U.S. v. Angle*, 760 F.Supp. 1366 (1991). The Walker River Decree is such a hybrid because it involves stipulations of the parties incorporated into a litigated decree. The Ninth Circuit Court of Appeals stated in *Wakerman*: “Nevertheless, because the stipulation is incorporated into a litigated decree, it is necessarily of hybrid nature—the stipulation secures the contract rights, but in a manner understood by the Angle court to be consistent with the rights of all the Angle defendants.” *Wakerman Dairy Inc. v. Wilson*, 7 F.3d 891 (1993), citing *International Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063 (1986) and A. Dan Turlock, *Law of Water Rights and Resources* § 7.08[4], at 7-23 (1992). In *Wakerman*, the Court was reviewing a decree entered after twelve years of litigation and pursuant to several stipulations signed by some, but not all, the parties. *U.S. v. Angle*, 760 F. Supp. 1366 (1991) *rev'd on other grounds*, 7

Kathy Mrowka, Senior
Inland Streams Unit
Division of Water Rights
State Water Resources Control Board
March 24, 2014
Page 6

Via Email & Federal Express
Kathy.Mrowka@waterboards.ca.gov

F.3d 891 (9th Cir. 1993). The Ninth Circuit agreed with the district court's holding that the decree must be interpreted in a way that is consistent with the rights of all the defendants who were subject to the decree and that the court's intention controls. *Wakerman*, 7 F.3d at 897, nts. 12-13 ("Because the litigation adjudicated the claims of numerous defendants, barring some claimants altogether and fixing priorities as between those remaining, the court's intention controls. The stipulations, and whatever extraneous materials considered necessary to understand them, must be interpreted in a manner consistent with the overall decree.") The Court stated that the question of whether evidence extrinsic to the stipulations in interpreting the decree should be considered by the Court depends on whether the court found ambiguity in the portions of the decree that are critical to its determinations. *Id.* at nt. 13. If the terms of the stipulation as it appears in the overall decree were not ambiguous, there was no need to resort to the extraneous material to interpret them. *Id.*

The USBWC filed a legal brief on the issues identified in Sections 8.3 and 8.5 of the Order with the Nevada State Engineer on February 3, 2012 in the proceedings involving National Fish and Wildlife Foundation Application 80700. That brief is incorporated herein by reference, as part of the points and authorities in support of the USBWC's petition for reconsideration if the State Water Board determines it will construe the Walker River Decree.³

Finally, if the State Water Board is going to consider California law in making its determination, it should consider California Water Code § 5976, adopted by the California Legislature in 1970, which defined the "Walker River Basin" in Article II (F) to mean "the area which naturally drains into the Walker River and/or Walker Lake upstream from the intersection of the river and/or lake in Mineral County, Nevada, with the northern township line of Tier 10 North, Mount Diablo Base Line."⁴

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³ The USBWC brief can be found at <http://water.nv.gov/hearings/upcoming/nfwf/>

⁴ Known as the California-Nevada Interstate Compact, the Nevada Legislature adopted the same provisions in 1969 and 1971, codified as Nevada Revised Statutes § 538.600. The Compact is not effective as it has not been consented to by act of Congress of the United States.

Kathy Mrowka, Senior
Inland Streams Unit
Division of Water Rights
State Water Resources Control Board
March 24, 2014
Page 7

Via Email & Federal Express
Kathy.Mrowka@waterboards.ca.gov

If you have any questions, please do not hesitate to contact me. Thank you.

Sincerely,

***ALLISON, MacKENZIE, PAVLAKIS,
WRIGHT & FAGAN, LTD.***

By: 
KAREN A. PETERSON, ESQ.

KAP/nf
Enclosures as stated
(Mrowka L01)

cc: Kathryn ("Kate") Gaffney (via e-mail only)
See Attached Mailing List

Kathy Mrowka, Senior
 Inland Streams Unit
 Division of Water Rights
 State Water Resources Control Board
 March 24, 2014
 Page 8

Via Email & Federal Express
Kathy.Mrowka@waterboards.ca.gov

Mailing List

National Fish & Wildlife Foundation c/o Don Springmeyer, Esq. Christopher W. Mixson, Esq. Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP 3556 E. Russell Road, 2 nd Floor Las Vegas, NV 89120-2234	Walker River Irrigation District c/o Darren Cordova MBK Engineers 1771 Tribute Road, Suite A Sacramento, CA 95815
David Yargas, Director Walker Basin Restoration Program 1133 15 th Street N.W., Suite 1100 Washington, DC 20005	Walker River Irrigation District P.O. Box 820 Yerington, NV 89447
Gary Garms P.O. Box 170 Smith, NV 89430	Erin K.L. Mahaney, Esq. Office of chief Counsel State Water Resources Control Board 1001 I Street, 22 nd Floor Sacramento, CA 95814
Stacy Simon Assistant County Counsel Mono County Board of Supervisors P.O. Box 715 Bridgeport, CA 93517	Jason King, P.E. State Engineer Division of Water Resources State of Nevada 901 S. Stewart Street, Suite 2002 Carson City, NV 89701
Walker River Paiute Tribe c/o Dwight L. Smith InterFlow Hydrology, Inc. P.O. Box 1482 Truckee, CA 96161	Dwain Chichester, President Antelope Valley Mutual Water Company P.O. Box 43 Topaz, CA 96133
Kimberly Nicol Regional Manager Department of Fish and Wildlife Inland Deserts Region 3602 Inland Empire Blvd., Ste. C -220 Ontario, CA 91764	Richard B. Nuti, President Six-N-Ranch, Inc. P.O. Box 49 Smith, NV 89430
Gordon H. DePaoli, Esq. Woodburn and Wedge P.O. Box 2311 Reno, NV 89505-2311	Peter A. Fenili Fenili Family Trust P.O. Box 3 Smith, NV 89430
Michael Neville, Esq. Deputy Attorney General State of California 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-3664	