

MEMORANDUM

TO: General Manager and Board of Directors of the Walker River Irrigation District
FROM: Gordon H. DePaoli / Dale Ferguson
DATE: August 4, 2016
RE: Revisions to By-Laws and Rules and Regulations of Walker River Irrigation District

I. Introduction.

The purpose of this memorandum is to provide the Board with an explanation of our suggestions for revising the By-Laws and the Rules and Regulations Governing the Distribution and Use of Water of the Walker River Irrigation District (the “District”).

The original By-Laws of the District were adopted on July 5, 1920. The original Rules and Regulations of the District were adopted in 1922. They were amended in 1986. N.R.S. 539.233(2) provides that an irrigation district’s by-laws, rules and regulations shall be printed in convenient form for distribution throughout the district.

As a result of the action taken in 1986, there presently exists a printed booklet entitled “Walker River Irrigation District, By-Laws and Rules and Regulations.” That booklet has four sections: (1) By-Laws; (2) Organization, Powers Generally, Authority Defined; (3) Penal Code; and (4) Rules and Regulations. A copy of that booklet is attached hereto as Exhibit A.

In 2012, Regulation 14 was adopted for the Stored Water Program. In 2013, an effort was made to revise the Rules and Regulations Governing the Distribution and Use of Water. Those revisions were considered at a meeting on February 22, 2013, and because not all directors were present at that meeting, no final action was taken on those revisions to the Rules and Regulations Governing the Distribution and Use of Water. In addition, in 2013, there was also some discussion

of the By-Laws, the Organization, Powers Generally, Authority Defined and Penal Code sections of the booklet. However, no changes were proposed. Given that most of you were not on the Board in 2013, it seems prudent to provide some background information on how we got to where we left off in 2013. For now, at least, that is the starting point for the proposed revisions to the Rules and Regulations.

II. By-Laws.

A. Introduction.

Article VIII of the By-Laws states that the By-Laws can be amended at any regular monthly meeting by unanimous vote of the Board of Directors or by a majority vote of the Board at a meeting held one month subsequent to the proposal of an amendment or amendments in writing. That article implies that the provisions in the By-Laws can be changed simply by Board action. However, in reviewing the By-Laws, we found that, to a large extent, the By-Laws are either a paraphrase or a verbatim statement of various provisions which are in N.R.S. Chapter 539. In those cases, the provisions in N.R.S. Chapter 539 will control, and an amendment to the District By-Laws which is not consistent with the provisions of N.R.S. Chapter 539 would not be effective. As you consider whether there should be changes to the By-Laws or, alternatively, whether some of the By-Laws are needed at all, please keep that in mind. What follows is information on each of the present By-Laws and our thoughts on any need to revise it.

B. By-Law Articles.

Article I. Name.

The name of the District was established when it was organized in 1919, and likely cannot be changed by an amendment to the By-Laws. We do not suggest any change here.

Article II. Divisions.

The divisions in the District were established when it was organized in 1919. The provisions of N.R.S. 539.110 set forth the process which must be followed to change the number of divisions. That cannot be changed by a By-Law revision.

Article III. Directors and Officers.

The number of directors of the District was established when it was organized in 1919 consistent with N.R.S. 539.045(2) and N.R.S. 539.063. The number cannot be changed by an amendment to the By-Laws.

In addition, N.R.S. 539.063 requires a president and vice-president to be elected from the Board, and also a secretary and treasurer. N.R.S. 539.075 provides for the appointment of a secretary and treasurer by the Board, and that those persons need not be members of the Board. Other than perhaps requiring the secretary and/or treasurer to be Board members, the By-Laws cannot change the statutory requirements. In other words, Article III is merely a paraphrase of N.R.S. 539.063 and 539.075.

Article IV. Vacancies.

This article is a paraphrase of some, but not all, of N.R.S. 539.070. N.R.S. 539.070 sets forth what is to happen when there is a vacancy in the office of director. The requirements of N.R.S. 539.070 cannot be changed by simply modifying the By-Laws.

Article V. Office.

N.R.S. 539.083 does allow the Board to designate someplace within the county where the organization of the District was affected to be the office of the Board. So long as the District office is in Lyon County, the Board could provide for a new location without violating that statute. There is no present need to amend that article.

Article VI. Monthly Meeting.

N.R.S. 539.085 requires a regular monthly meeting in the District office on the day of the month fixed by resolution of the Board entered in the minutes. Once that date is fixed, it cannot be changed for 12 months, and it can only be changed by resolution passed at least two months prior to the time such change is to take effect after publication in a newspaper of general circulation in the District for at least two weeks prior to the change. It also requires that if the regular meeting falls upon a non-judicial day, the meeting is to be held on the first judicial day thereafter.

The current By-Law is consistent with that statute. It requires the Board meeting to be on the 7th day of the month. If the 7th is on a weekend or legal holiday, then, technically, the meeting needs to be on the very next business day. It is somewhat unfortunate that the statute is so strict with respect to the day for the regular meeting when the regular meeting date is a weekend or a legal holiday. Under the statute and, technically, under the By-Law, the regular meeting must be on the next business day after the 7th of the month. It could never be before the 7th of the month, and if the 7th of the month is a weekend or holiday, the meeting must take place on the very next business day. At this point, there is not much we can do about any of that because the timing of the meeting when the regular date is a non-judicial day is in the statute.

Article VII. Quorum.

Article VII is a paraphrase of the provisions of N.R.S. 539.095. Those requirements may not be changed by any amendment to the By-Laws.

Article VIII. Amendments.

This By-Law should be revised to provide that only provisions of these By-Laws which are not controlled by a relevant Nevada statute may be amended by Board action. In all other cases, the By-Laws may only be amended to conform to the provisions of a relevant statute.

Article IX. Order of Business.

This By-Law is not dictated by any provision in the Irrigation District Act. However, although Nevada's Open Meeting Law does not require a particular order of business, it does include requirements concerning public comment, and its requirements could change in the future. We suggest that if there is a desire to keep a By-Law like this one, that it be made subject to compliance with applicable law, including N.R.S. Chapter 241. Flexibility suggests a less detailed and less restrictive provision concerning the order of business.

Article X. Duties of Officers.

To a certain extent, your authority to modify this By-Law is flexible. The Irrigation District Act does not contain a section which lists the precise duties of the officers. There are a number of sections which discuss certain duties of the president, secretary and the treasurer. The president may call a special meeting. N.R.S. 539.087. The secretary is the registrar of electors, and receives the returns from elections. N.R.S. 539.130; N.R.S. 539.155. The treasurer is to receive money from the county from assessments. N.R.S. 539.490. The treasurer has additional duties with respect to funds. *See, e.g.,* N.R.S. 539.525; N.R.S. 539.530.

However, some of the provisions in this By-Law perhaps should be revised. For example, currently, the president is required to sign all contracts, something which is not necessarily required, or followed. Who should sign a contract can be handled based upon the Board resolution authorizing the contract. The duties of the treasurer are quite detailed, specific and onerous. This By-Law may need to be revised to be consistent with current practices. Alternatively, the Board may need to consider whether the treasurer should be a non-Board member.

Article XI. Bonds.

This provisions simply authorizes what the statutes authorize. Subparagraph (a) is actually a quote from N.R.S. 539.480, but it has been amended, and this provision is out of date. Subparagraph (b) is also taken from N.R.S. 539.480.

Article XII. Engineer.

This provision of the By-Laws is narrowed from the provisions of N.R.S. 539.193, which authorizes the Board to employ and appoint such agents, officers and employees in the interest of the District as may be required.

Article XIII Assessments and Tolls.

The first paragraph of this By-Law is a paraphrase of N.R.S. 539.670(1). The remaining portions of this By-Law come from N.R.S. 539.513. The provisions are a paraphrase of that section of the Irrigation District Act.

Article XIV. Irrigation Season.

This is something that the Irrigation District Board can do pursuant to N.R.S. 539.233 concerning the Rules and Regulations for the Distribution and Use of Water. This is best included in those Rules and Regulations, rather than in a By-Law.

Article XV. Distribution of Stored Water.

This appears to be a provision which perhaps can be in the By-Laws or in the Rules and Regulations Concerning the Distribution of Water.

Article XVI. Revision of Apportionment of Benefits.

This By-Law is a paraphrase of the requirements of N.R.S. 539.680.

As you can see, many of the By-Law provisions are taken from statutes. Statutes control and can, from time to time, be amended. It would be our recommendation that the Board consider

eliminating from the By-Laws any provisions which are controlled and governed expressly by statute and which can be changed only if the statute changes.

In the last two audits of the District for the years ended June 30, 2014 and June 30, 2015, the auditors have questioned whether the District has complied with the posting and publication requirements of N.R.S. 539.483 through 539.487. An irrigation district is deemed in compliance with the budgeting, filing and publication requirements of N.R.S. 354.470 through 354.626 if it complies with the publication of claims and annual financial statements as required by N.R.S. Chapter 539. The issue relates to whether the District is required to post and publish all of the “bills” it approves at each of its regular monthly meetings. More often than not, those bills are incurred as a normal and regular operating expense of the District, and likely have already been paid by the time the Board approves them.

The requirement for posting and publication is set forth in N.R.S. 539.485, and it requires that the Board post in three public places of the District and publish one time in a newspaper of general circulation in the county a list of the “claims allowed by the Board for the preceding month.” In our judgment, the use of the word “claims” in that section is intended to be a reference to something that is outside the normal course of the District’s business. We find support for that conclusion in the provisions of N.R.S. 539.525, which allows the Board to establish by regulation the conditions under which the treasurer can disburse from the general and operation and maintenance funds, without prior Board approval. As near as we can learn, other irrigation districts in Nevada do not publish all of their individual bill payments. We suggest consideration be given to a regulation or a by-law which allows for payments from the general fund of bills incurred in the ordinary course of business without prior approval so as to narrow down what may need to be posted and published.

III. Organization, Powers Generally, Authority Defined.

In our judgment, there is no reason or need for these provisions. The Organization portion is simply a recitation of the fact that the Irrigation District was organized under the Irrigation District Act. The Powers Generally section is a compilation of some, but not all, of the provisions of N.R.S. Chapter 539 concerning the power or authority of an irrigation district. Not only is it incomplete, those sections may, from time to time, be amended. The Authority Defined section relates to a dispute that happened in 1941. It is an interpretation of the outcome of that dispute, which may or may not have application to future disputes. In addition, the second paragraph is best left to the U.S. Board of Water Commissioners.

IV. Penal Codes.

These provisions are an assortment of some of the provisions in Nevada law concerning penalties for interference with the delivery of water. They are not necessary for inclusion in a District booklet of its By-Laws and Rules and Regulations for the Use and Distribution of Water.

V. Rules and Regulations Governing the Distribution and Use of Water.

Attached hereto as Exhibit B is a copy of an initial draft of revisions to the Rules and Regulations Governing the Distribution and Use of Water which shows changes from the 1986 draft. A clean copy is attached as Exhibit C. These changes include changes which were considered in 2013, Regulation 14, which was adopted in 2012, and suggestions for a regulation concerning the permanent transfer of stored water.

A. Existing Regulations Which Are Not Proposed to Be Continued.

There are several of the existing regulations which are not, and were not in 2013, proposed to be continued. Existing Regulation No. 1, General is not included in the current draft. Much of that Regulation is a paraphrase of existing provisions of Nevada law. The second paragraph of

existing Regulation No. 1 is not entirely accurate. All water within the District has not been appropriated by the District. In fact, most has been appropriated by individual landowners. The fourth paragraph of existing Regulation No. 1 seems correct as to stored water. However, it may or may not be correct with respect to the District's certificated water rights and as to the District underground water right. The sixth paragraph of existing Regulation No. 1 is quite broad, and may not be enforceable as written. The final paragraph of Regulation No. 1 needs to be revised because it seems to suggest that the Rules and Regulations could be amended by unanimous vote, whether or not the proposed action was included on the agenda.

Existing Regulation No. 6, Waste Water was deleted in its entirety. If the regulation is not to be deleted, then consideration should be given to clarifying what it means and to how it will be enforced.

Regulation No. 8, Exchange Water is not included. However, given recent issues concerning groundwater and enforcement of water duties, perhaps the concepts in this regulation should be continued in some clarified form.

B. Suggested Revised Rules and Regulations Governing the Use and Distribution of Water.

What follows are comments on the suggested revised Rules and Regulations. They have been renumbered to reflect the deletion of some of the existing regulations.

1. Regulation No. 1 - Definitions

This definitions section incorporates the definitions which are in Regulation 14 unless the context requires otherwise. Regulation 14 has a number of definitions in it which are helpful in connection with some of the other regulations. To the extent that other definitions are needed, they can be added.

2. Regulation No. 2 – Records

This regulation revises existing Regulation No. 2, and is intended to be consistent with the District's current practices.

3. Regulation No. 3 – Basis for Charges

This regulation revises existing Regulation No. 3, and simply incorporates the requirement that District charges be consistent with the applicable provisions of N.R.S. Chapter 539.

4. Regulation No. 4 – District Office Hours

This revised regulation is intended to be consistent with the District's current practices. However, more flexibility might be provided by a simple regulation that allows the District Board to establish District office hours. It seems cumbersome to have to amend the Rules and Regulations in order to change office hours.

5. Regulation No. 5 – Ordering of Water

This regulation revises existing Regulation No. 5 is intended to be consistent with current practices.

6. Regulation No. 6 – Irrigation Season Changes to Stored Water

This revises existing Regulation No. 7, and is intended to allow for changes to stored water which are for a single irrigation season. It may be that consideration should be given to adding provisions which are intended to ensure that single season temporary changes are not used to allow for increased pumping of underground water.

6A. Regulation No. 6A – Permanent Changes to Stored Water for Irrigation Use Within the District

Regulation No. 6A is intended to allow for permanent changes to stored water for irrigation use within the District. Its provisions follow the applicable provisions in existing state law for permanent changes to water rights. It is a bit more lengthy and cumbersome than the

process set forth in N.R.S. Chapter 539 for the transfer of stored water to stripped lands. It can be made more streamlined if the Board desires.

There are a couple of matters which should be given consideration. One relates to changes which would permanently move Topaz water to the East Fork, or Bridgeport water to the West Fork. *See* section 6.A.2. The other issue is whether permanent changes to a Supplemental Stored Water Right should only be allowed if the natural flow right it supplements is changed to the same place of use. That is addressed in Section 6A.7(e).

7. Regulation No. 7 – Water From District Well

Regulation No. 7 concerns water from the District well. This regulation, as drafted, leaves the details of how the District well will be used during any irrigation season to the Board to prescribe during that irrigation season.

8. Regulation No. 8 – Diversion Works/Headgate

Regulation No. 8 replaces existing Regulation No. 9, and is intended to be consistent with current practices, including those related to remotely automated river diversion works.

9. Regulation No. 9 – Irrigation Season

Regulation No. 9 makes minor changes to existing Regulation No. 10.

10. Regulation No. 10 – Ditch Rider Requirements and Record Keeping

Regulation No. 10 makes changes to a portion of existing Regulation No. 11, and is intended to be consistent with current practices.

11. Regulation No. 11 – Water Use Reporting and Record Keeping

Regulation No. 11 makes changes to a portion of existing Regulation No. 11, and is intended to be consistent with current practices.

12. Regulation No. 12 – Rotation of Water

Regulation No. 12 makes minor changes to existing Regulation No. 12.

13. Regulation No. 13 – Complaints About the Distribution of Water

Regulation No. 13 makes changes to existing Regulation No. 13, and is intended to be consistent with the respective authorities of the District and the United States Board of Water Commissioners.

14. Regulations No. 14 – Temporary Changes to Stored Water Rights for Beneficial Use at Walker Lake

Regulation No. 14 was adopted in 2012, and there are no changes proposed for Regulation No. 14 at this time.