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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants	)))))))))))))	IN EQUITY NO. C-125-ECR Subproceeding: C-125-B **REPLY OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE: PROPOSED ORDER CONCERNING SERVICE CUT-OFF DATE**

The United States of America ("United States") and the Walker River Paiute Tribe ("Tribe") have proposed a service cut-off date of December 31, 2009. *Submission of Proposed Order Concerning Service Cut-Off Date* (Nov. 30, 2010) (#1613). Their proposal was made in response to concerns expressed by Magistrate Judge McQuaid that a service cut-off date is necessary to allow the Court to determine the Threshold Issues for Phase I of the litigation in this subproceeding. The Walker River Irrigation District has filed objections to the United States and

Tribe's proposal.[1] The United States Board of Water Commissioners,[2] Circle Bar N Ranch, LLC and Mica Farms, LLC join WRID's Objections. [3] The United States and Tribe hereby reply to WRID's objections and offer a revised proposed Order on this issue.

WRID does not object to a service cut-off date of December 31, 2009, for Phase I's litigation of the Threshold Issues regarding the Tribal Claims, but opposes establishing a cut-off date now for litigation of the merits of the Tribal Claims in Phase II or any subsequent Phase of litigation in sub-proceeding C-125-B. WRID Objections at 25-27. WRID also asserts that a service cut-off date should not be identified by water rights in existence as of a particular date and ties the issue to the substitution and joinder of all successors-in-interest. *Id.* at 25-27. WRID takes the position that service should continue to be reviewed, revised and supplemented throughout litigation of sub-proceeding C-125-B to include additional water rights claims that

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[1] *Walker River Irrigation District's Objections to Proposed Order Concerning Service Issues Pertaining to Defendants Who Have Been Served and to Proposed Order Concerning Service Cut-off Date* (Jan. 7, 2011) (C-125-B, #1621) ("WRID Objections").

[2] The U.S. Board of Water Commissioners joined WRID's Objections despite the fact that it is treated in these matters as a quasi-judicial entity "and is obligated to conduct itself in an impartial, unbiased manner." *Order* at 4 (C-125, Feb. 13, 1990) (#162) (ordering that it is inappropriate for the same attorney to continue representing both WRID and the Board). The Board is required to avoid the simple appearance of impropriety or partiality. *Id.* at 5. Despite the Court's clear mandate, the Board filed a pleading joining one party in this dispute against other parties in these subproceedings. While the Board's attorney has been involved in service related issues in the past, such as reviewing and commenting on service lists, taking a side in a dispute over the process to join successors-in-interest and the need to establish a cut-off date for service violates the Board's duty to administer justice impartially. The Board and its attorney are "obligated to function in an impartial manner in administering [their] duties under the Decree." *Id.* at 9. The Board was created in 1937 by court order to distribute the waters of Walker River in accordance with the Decree in C-125. The Board and its attorney are "bound by the Code of Judicial Conduct, and [are] obligated to conduct [themselves] in an impartial, unbiased manner." *Id.* at 4. At a minimum, the Board's action provides an appearance of impropriety and/or partiality. Plaintiff Parties have appreciated the feedback on Service Reports in C-125-B from the U.S. Board's attorney, which has assisted in identifying service issues to be clarified or corrected, but question the U.S. Board's decision to join the WRID Objections.

[3] These joinders were filed January 7, 2011, in C-125-B at ##1622, 1623.

may come into existence in the future, based on whatever phases of litigation the Court has already identified or might later designate pursuant to the CMO. *Id.* at 26-27.

The issue of a service cut-off date is unrelated to the treatment of successors-in-interest as a result of *inter vivos* transfers of claims to water rights or the death of a defendant claimant to a water right.[4] Successor-in-interest issues arise after a defendant, who has been served and brought under the Court's jurisdiction on the basis of a claim to a water right, transfers that interest. Service cut-off issues address whether additional categories of water rights claimants or new claims to water should be included in the litigation. If so, these new interests would have to be identified, served, and brought under the Court's jurisdiction.

When the Court bifurcated the Tribal Claims from the remaining Federal Claims, it delineated nine categories of persons and entities for the United States and Tribe to serve with their respective Counterclaims. CMO at 5-6, ¶3. The Magistrate Judge has authority to adjust and modify the categories of persons and entities to be served as the Court may find to be appropriate. CMO at 3. To date, no one has contended that additional categories of persons and entities should be served in connection with any aspect of the Tribal Claims.[5]

New claims to water would encompass claims that fit within one of the nine existing CMO categories for which the United States has conducted service, but which have come into

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[4] The United States and Tribe filed a separate proposed service cut-off order, expressly stating that "[t]he proposed [service cut-off] order does not address issues regarding successors-in-interest, for which a separate proposed order is being filed." *Submission of Proposed Order Concerning Service Cut-Off Date* (Nov. 30, 2010) (#1613). The United States and Tribe respond to WRID's objections regarding successor-in-interest separately.

[5] The CMO also states that "[u]pon completion of Phase I [threshold issues for the Tribal Claims], it may be necessary to join additional parties," without further explanation of what this might entail. CMO at 13, ¶14. Nevertheless, once a person or entity is served with the United States and Tribe's Counterclaims, that defendant is served for all claims in sub-proceeding C-125-B.

existence after a specific date. The CMO states that the list of Threshold Issues for Phase I "will not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined." CMO at 9, ¶11. Thus, Magistrate Judge McQuaid recognized the need to end service to allow the Court to determine the Threshold Issues and begin Phase I:

> At some point in time it seems to me we're going to have to say, we're going to proceed with the people that we have served and the stragglers we'll somehow have to deal with.
>
> But I mean this could well go on indefinitely if we don't set some sort of a cutoff at some point.

Tr. at 8, Status Conference (C-125-B, July 25, 2008).[6] As a practical matter, service cannot continue endlessly and disputes about "stragglers" should not derail or sidetrack litigation. Otherwise, a very small tail would wag a very large dog.

The Court raised the issue of a service cut-off because domestic wells continue to be drilled in Nevada in areas where the Court required service on domestic users, but the public filings that identify such new wells are made many months after the wells are drilled, so that they cannot be identified and served timely. To date, despite WRID's arguments, defendants have not identified specific new water rights that have been or are being established other than certain wells in Nevada.

Establishing a service cut-off date for new rights that come into existence would identify a specific ending date for the temporal scope of service, such that water rights junior to that date are not served or included in the litigation. To the extent either State allows new water rights in the already over-appropriated Walker River system, such rights would be junior to any other

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[6] *See also Minutes of the Court*, Joint Status Conference in C-125-B & C-125-C (July 25, 2008) (C-125-B, #1381; C-125-C, #478) ("The Court advises the parties that, at some point in time, a cut-off will have to be set regarding service.") *See also Minutes of the Court*, Joint Status Conference in C-125-B & C-125-C (Dec. 3, 2008) (C-125-B, # 1468; C-125-C, # 489).

right. If any such rights were not brought into the litigation and thereby not bound by its result, they would nevertheless be subject to the ability of the owner of any water right before the Court to enforce its water right as against all junior appropriations. Thus, the right to seek enforcement of the priority of rights remains.

Based on WRID's objections, the United States and Tribe have amended their proposed order to clarify a service cut-off date for Phase I of December 31, 2009. If the Court wishes to require service on new claims during litigation, the States of Nevada and California should be required to cooperate with and identify all such new rights to the United States along with sufficient information to permit the United States to conduct the additional Rule 4 service.

Dated: February 23, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February 2011, I electronically filed the foregoing **REPLY OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE: PROPOSED ORDER CONCERNING SERVICE CUT-OFF DATE** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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and I further certify that I served a copy of the forgoing to the following non CM/ECF participants by U.S. Mail, postage prepaid, this 23rd day of February 2011:

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