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IN THE 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 SUBFILE NO. C-125-B **MEMORANDUM OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE CONCERNING THE IDENTIFICATION OF COUNTER-DEFENDANTS BY CASE MANAGEMENT ORDER CATEGORIES AND USE OF NOTICES OF LIS PENDENS**

I. Introduction.

During the December 21, 2000 status conference and at the suggestion of the Walker River Irrigation District ("District"), the Court directed the District, the United States and the Walker River Paiute Tribe ("Tribe") to state their respective positions on: "1) [a] procedure for recording notices of lis pendens; [and] 2) [the] extent to which it is necessary to identify the counter-defendants by

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categories referred to in the Case Management Order and to determine the nature and extent of their water rights." *Minute Order* (Jan. 11, 2001).

Almost eleven months ago, this Court issued its *Case Management Order* (Apr. 18, 2000) ("CMO"), and ordered the United States and the Tribe to serve the persons and entities described in each of nine specific categories of water rights holders and name each of them as a counter-defendant. CMO ¶3.[1] A necessary predicate to service on these persons and entities is to identify them. *See* CMO ¶7. In our December 2000 status report,[2] we detailed our efforts to identify the persons and entities within the CMO's categories and assessed initially whether the information sources they had located would accomplish this task. Our estimates are that there are approximately 3,000 to 4,000 persons within these categories. *Affidavit of Dennis Becker* ¶24.c. (Mar. 9, 2001) (attached as Exh. 1) ("Becker Aff."). We also asserted that we believed potential parties had to be identified by their respective water rights claims for service and to track changes in parties. *Status Report* at 25-26

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[1]In 1992, this Court ordered that "all claimants to the water of Walker River and its tributaries must be joined as parties to the claim. . . . and must be served in accordance with Rule 4 of the Federal Rules of Civil Procedure. In order to sufficiently join all appropriate parties, the Tribe and the United States must serve with process all claimants to the water of the Walker River and its tributaries." *Order* (Oct. 27, 1992) (regarding United States' and Tribe's initial counterclaims). In 1994, the Court expanded these requirements to include groundwater claimants if "groundwater claims and rights [asserted by the United States and the Tribe] somehow affect the water rights of the parties who have or claim rights to the waters of the Walker River, or vice versa." *Order* at 10 (July 8, 1994). Although the United States objects to the order that we serve these claimants pursuant to FED. R. CIV. P. 4 and name them counter-defendants, we have clearly been trying to accomplish what the Court directed. It is the view of the United States that the Court's concerns would be more than met by notice on these individuals, particularly since state water adjudications permit notice by mail and publication. If water claimants wish to participate in the action, they would be free to do so, but would not be forced to do so.

[2]*Status Report Submitted by the United States of America and the Walker River Paiute Tribe in Advance of this Court's Status Conference of December 21, 2000* (Dec. 19, 2000).

(Dec. 19, 2000). It should be apparent from our prior filing and this memorandum that we have spent a tremendous amount of time and resources on this effort and that it has been reasonably calculated to accomplish the task assigned. We are already well into our effort and anticipate that service on some of the CMO categories could begin this summer.[3]

Nevertheless, at this late date, the District wishes to redirect service efforts. It argues that it is unnecessary to determine the nature and extent of the water rights claims of the persons and entities we have been ordered to serve, or even to "categorize the defendants by the Case Management Order categories," and suggests service on some group of area property owners, possibly identified by the various county assessors.[4] This is simply an attempt to reinvent the wheel and discard our work to date. Even if we had not spent significant time and resources already, the District's suggestions would not improve on our effort.

The issue for the Court is whether our methods of identifying potential counter-defendants are reasonable and satisfy due process. This assessment should not involve a contest between competing methods of identification, particularly at this late date. As detailed herein, our efforts to identify the persons and entities described by the Court are diligent and reasonably calculated to achieve this end, and, therefore, satisfy due process. *Minutes of the Court* at 3, No. C-125-C (Apr. 1, 1997)

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[3]This assumes, among other things, that the Court approves in the near future all materials to be served and addresses any objections thereto from the parties. The United States and the Tribe do not yet have the Court's approval to commence service of their First Amended Counterclaims.

[4]*Memorandum of Walker River Irrigation District Concerning Procedures for Recording Notices of Lis Pendens and Concerning Identification of Counterdefendants by Case Management Order Categories* at 3 (Feb. 12, 2001) ("District Brief").

(summons by publication as to unidentifiable defendants allowed where process of identifying defendants was reasonable and showed exercise of due diligence). Our approach is also preferable. The District's proposal would be both over-inclusive and under-inclusive, by sweeping in many persons who do not belong in this action and omitting many who do.

In addition, the District reiterates an old saw – that service must be combined with the filings of notices of the pendency of this action pursuant to state law. The District claims this is necessary, first, to provide constructive notice to a transferee if there are changes in the ownership of a water right and eliminate what it calls "the moving target problem which exists before service is complete," and second, to insure that transferees are bound by this Court's final judgment, even if they are not named or substituted as counter-defendants. District Brief at 5. We disagree. State lis pendens laws are inapplicable and inappropriate for use here. Contrary to the District's claims, these procedures would be ineffective and mire the case and Court in significant and tangential litigation.

In this regard and in connection with accomplishing service on the categories described by the Court, we propose certain requirements be imposed on opposing parties, all essentially involving the identification of water rights claimed and the identification of conveyances or other transfers of water rights. Since the Court is determined that these claimants must be accorded party status in this action, it is only logical that they should identify what, if any, rights they have so we can try to include parties that should be here, and to let us know when these rights are transferred, so we can release them from this action. The Court should determine now if our methods to identify potential counter-defendants satisfy due process, so that we can complete this task without further delay. Moreover, by so doing, the Court can eliminate any question that due process has been satisfied as to all parties it deems to have a

potential interest in the outcome.

II. The United States' and Tribes' efforts to identify the persons and entities within the categories of paragraph 3 of the CMO satisfy due process.

The issue for the Court is whether the methods used by the United States and the Tribe to identify the persons and entities within paragraph 3 of the CMO satisfy due process. If our methods satisfy due process, we should be allowed to finish and begin service upon those who can be located and served. Thereafter, we should be able to complete service by publication according to state law.

A. Due process requires notice reasonably calculated under the circumstances of a case to apprize interested parties of the pendency of an action and afford them an opportunity to be heard.

The Court must consider how due process may be met in a case of this nature. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The right to be heard has "little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.* Thus, personal service of written notice is the "classic form of notice always adequate in any type of proceeding." *Id.* at 313. Nevertheless, as the Supreme Court recognized in *Mullane*, a "construction of the Due Process Clause which would place impossible or impractical obstacles in the way [can]not be justified." *Id.* at 313-314.

While actual service is always constitutionally adequate notice, the issued to be resolved here is what procedures must the United States follow to ensure that persons who are not identified or actually

served are given adequate notice of this action. As the Court recognizes: "Personal service is not always required before a court adjudicates the legal rights of a natural person or of a corporation. If with due regard for the practicalities and peculiarities of the case, these conditions of notice are met, the Due Process Clause is satisfied." *Minutes of the Court* at 3, No. C-125-C (Apr. 1, 1997) (citing *Mullane*, 339 U.S. at 314). A similar balance must be struck in the underlying effort to identify persons and entities for inclusion in this action. This effort should involve a "diligent search, reasonably calculated to identify all water users and claimants." 2 WATERS AND WATER RIGHTS § 15.02(b) at 218 (1991). In the *Minutes of the Court* , No. C-125-C (Apr.1, 1997), the Court established the proper framework for identifying and serving the CMO categories: reasonable and due diligence in identifying those entities from the available information and then completion of service by publication on those entities who cannot be identified or who cannot be served personally after reasonable efforts.

B. The United States and Tribe efforts are making a diligent search, reasonably calculated to identify the persons and entities with the categories of paragraph 3 of the CMO.

The United States has employed litigation support personnel to review and obtain documents, in consultation with the Tribe, in the offices of the U.S. Board of Water Commissioners, the District, the State of Nevada, and the State of California. Becker Aff. ¶12. The Affidavit of Senior Paralegal, Dennis Becker, Exhibit 1, details the level of effort being made to comply with the Court's CMO.[5] We have also asked each party to identify and make available information within its respective offices

[5]The investigator responsible for finishing review of materials in Nevada, *see Status Report* at 3 (Dec. 19, 2000), and reviewing materials in California in lieu of Mr. Becker, has been ill for a lengthy period of time. Mr. Becker intends to complete her tasks before March 20, 2001.

that identifies such persons and entities.[6] It is logical that information relevant to the identification of potential parties would be in the custody or control of the named parties, based on their relationship to and responsibilities for the administration of various water rights. We have consulted additional sources within the states, including county recorders' and assessors' offices, as well as other investigatory resources. Our assessment is that these sources identify the potential counter-defendants, with limited exception.

Category 3.a.: The successors in interest to all water rights holders under the Decree (April 14, 1936), modified, Order of Entry of Amended Final Decree to Conform to Writ of Mandate, Etc. (April 24, 1940) ("Decree").

Mr. Becker describes the materials reviewed and focus of ongoing work regarding this category. Becker Aff. ¶¶15.a.-15.l. Two issues remain. First, as previously noted, *Status Report* at 5 (Dec. 19, 2000), the Court must determine the role that Mineral County's service list in C-125-C will have in our efforts. Given the Court's prior ruling that Mineral County's process of compiling names from records of the country recorders, the U.S. Board of Water Commissioners, the District, and the Nevada State Engineers' Office was sufficient to comport with due process, the United States and the Tribe should be permitted to rely upon the information collected by Mineral County. *See Minutes of the Court* at 3, No. C-125-C (Apr. 1, 1997).[7]

Second, the Court will hear arguments on the *Joint Motion and Memorandum in Support of*

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[6] *See Status Report Submitted By the United States and the Walker River Paiute Tribe in Advance of this Court's Status Conference of October 16, 2000* at 1-2 (Oct. 13, 2000).

[7] We have not yet received a copy of Mineral County's service list, although we have tried to glean its contents by reviewing some of the documents it filed with the Court. *See* Becker Aff. ¶¶15.h.-j.

the Joint Motion of the Walker River Paiute Tribe and the United States of America for an Order Requiring the Identification of All Decreed Water Rights Holders and Their Successors (June 29, 2000). We contend that successors in interest to the *Decree* (Apr. 14, 1936), *as amended, Order for Entry of Amended Final Decree to Conform to Writ of Mandate, Etc.* (Apr. 24, 1940) ("Decree"), must identify themselves to the Court and the U.S. Board of Water Commissioners and comply with all provisions of state law regarding the transfer of water rights. This requirement should extend to all rights under the Decree, including those administered by and within the District. These are logical requirements for the administration of the Decree and will assist the Court, Mineral County, and us in updating the list of the parties to the Decree.

Category 3.b.: All holders of surface water rights under the laws of the States of Nevada and California in the Walker River Basin who are not presently parties to this adjudication.

Mr. Becker describes the materials reviewed and the focus of ongoing work regarding this category. Becker Aff. ¶¶16.1.-16.h. Many pre-statutory vested rights are already included in the Decree, which incorporated parties to earlier water rights litigation, and others have been identified to Nevada over time. It appears that few, if any, pre-statutory vested rights remain unidentified. Materials in Nevada files also identify additional and newer water rights claims. As stated, we have not yet reviewed California records. Use of this information is appropriate for this category.

Category 3.c.: All holders of permits or certificates to pump groundwater issued by the State of Nevada and domestic users of groundwater within Sub Basins 107 (Smith Valley), 108 (Mason Valley), 110A (Schurz Subarea of the Walker Lake Valley), and 110B (Walker Lake Subarea of the Walker Lake Valley).

Mr. Becker describes the materials reviewed and focus of ongoing work regarding this

category. Becker Aff. ¶17.a.-17.f. This information, which is a result of operation of Nevada law, is appropriate to address this category, with the possible exception of the domestic users of groundwater.

There appear to be a large number of domestic users of groundwater in these four sub-basins. We have already obtained information from the Lyon County assessor's office that should assist with their identification. Becker Aff. ¶¶17.e., 24.c. More importantly, however, we think the Court should consider alternative treatment of these water users, because naming them as counter-defendants solely because of their status as domestic users will place an unnecessary burden on them. Domestic users of groundwater have a statutory right to a designated amount of water without a priority date. NEV. REV. STAT. §§ 534.013, 534.180. Since their interests are limited and substantially identical, these users may be handled one of two ways. First, they may be omitted from this case for now and brought in at a later date if needed. Unless and until there is any indication of any potential impact on domestic wells by groundwater pumping on the Tribe's reservation or vice versa, the State of Nevada can represent their interests. CMO at 3; *Order* at 10 (July 8, 1994).

Second, domestic groundwater users may be certified as a class just as the Court treated certain limited groups of water users in *United States v. Truckee-Carson Irrig. Dist.*, 71 F.R.D. 10 (D. Nev. 1975). The State of Nevada or counsel for the District, who represents Lyon County in other water rights matters, may represent their interests. Under this approach, we would notify domestic users of this case and allow them to participate if they wish, but would not serve them or subject them to defendant status as individuals.

Category 3.d.: All holders of permits or certificates to pump groundwater issued by the State of Nevada within Sub Basins 106 (Antelope Valley), 109 (East Walker), and 110C (Whiskey Flat-Hawthorne Subarea of Walker Lake Groundwater Basin).

Mr. Becker describes the materials reviewed and focus of ongoing work regarding this category. Becker Aff. ¶¶18.a.-18.d. This information, which is a result of operation of Nevada law, is appropriate for this category.

Category 3.e.: All users of groundwater for irrigation in California in the Walker River Basin.

Mr. Becker describes the materials reviewed and focus of ongoing work regarding this category. Becker Aff. ¶¶19.a.-19.d. California's files include some information on these users. County records will be of limited use because they may not identify all wells or clarify if wells that are identified are for irrigation, domestic or other purposes, or if the wells had ever been capped. *Affidavit of Elizabeth Rimer* ¶11 (Mar. 12, 2001) (attached as Exh. 2) ("Rimer Aff."). To the extent these records identify wells, most will be domestic wells, which are not relevant to this category. We propose to use the information available in the state files and will supplement it, if reasonable and feasible, from readily-identifiable county records, in conjunction with publication, as discussed below.

Category 3.f.: All holders of "vested rights" to the use of groundwater under the laws of the State of Nevada within the Walker River Basin.

Mr. Becker describes the materials reviewed and focus of ongoing work regarding this category. Becker Aff. ¶¶20.a.-20.c. Nevada has no list for this category, but some applications on file with the State Engineer include a few claims for such rights. Nevada, however, with certain exceptions, has required permits for non-domestic groundwater use for a considerable period of time. Thus, it appears that few, if any, pre-statutory vested rights remain unidentified. Use of this information is appropriate for this category.

Category 3.g.: All municipal providers in Nevada within the Walker River Basin who

currently use groundwater.

Mr. Becker describes the materials reviewed and focus of ongoing work regarding this category. Becker Aff. ¶¶21.a.-21.c. This information is appropriate for this category.

Category 3.h.: All municipal providers in California within the Walker River Basin who currently use groundwater.

Mr. Becker describes the materials reviewed and focus of ongoing work regarding this category. Becker Aff. ¶¶22.a.-22.c. The information to identify this category should be easily obtained from the State of California and we have requested that it be provided to us.

Category 3.i.: All industrial users in Nevada within the Walker River Basin who currently use groundwater.

Mr. Becker describes the materials reviewed and focus of ongoing work regarding this category. Becker Aff. ¶¶23.a.-23.c. This information is appropriate for this category.

C. Identification of counter-defendants by the nature and extent of their claimed water rights is reasonably calculated to assist in the identification of persons and entities who may have interests in this case.

The District takes exception to our suggestion that it is necessary to ascertain the nature and extent of water rights claims of the persons and entities we have been directed to serve. *District Brief* at 3-5. We reiterate our position that the Court should be informed of sales and transfers of water rights to try to ensure that persons who are no longer water rights holders are deleted as parties and to make a reasonable effort to include successor water rights holders. *See* FED. R. CIV. P. 25.

We have three proposals to address this issue. First, each person and entity served should be required to provide information related to their water rights interest(s) in the form of the document attached as Exhibit 3. This form is based on forms used by Nevada and California in their general

stream adjudications, NEV. REV. STAT. § 533.115, CAL. WATER CODE § 2575, although we seek far less information. Second, the service documents should include an order from the Court, in the form of the attached Exhibit 4, requiring counter-defendants to notify the Court of any transfers of water rights and to comply with applicable state law regarding such transfers. *See* NEV. REV. STAT. §§ 533.382-533.387. Third, the U.S. Board of Water Commissioners, both states, and the District should be required to identify to the Court, as well as to the United States and the Tribe, when rights included in this action have been transferred and to notify the transferee. This is particularly important regarding those state reporting requirements already applicable to them. *See id.*

The rationale for these proposals is simple. Requiring parties to identify their water rights at the time of service is consistent with procedures used in water rights adjudications in Nevada and California.[8] Claimants must file statements, under oath, of their claimed rights. NEV. REV. STAT. §§ 533.115, 533.120; CAL. WATER CODE §§ 2575, 2576. The form we propose attempts to obtain the same kind of information. In addition, it seeks a declaration from persons and entities served if they

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[8]This action is analogous to a state water rights adjudication because its purpose is to determine the relative rights of claimants to the waters of the Walker River and its present posture is analogous to the early phases of a state adjudication. Following entry of the Decree, the Court retained jurisdiction for the administration of the system and oversees the regulation and distribution of the water of the Walker River in both states. The instant case is relatively unusual in that the Court's jurisdiction predates the McCarran Amendment, 43 U.S.C. § 666, which anticipates substantial deference by federal courts to state water law processes, and neither Nevada nor California seek to initiate an adjudication of the Walker River Basin under state law. Indeed, both Nevada and the District have long taken the position that the Court has exclusive jurisdiction over the waters of the Walker River Basin, *e.g., Nevada's Memorandum of Points and Authorities in Opposition to Motions to Dismiss of the State Board and California Trout* at 8 (Mar. 4, 1993), which, in effect, means that if the United States and Tribe cannot obtain service according to the Court's directives, they have no other forum available to adjudicate their claims to water.

have no water rights and provides a disclaimer for that purpose. Moreover, if they have transferred water rights, the form requires identification of all transferees. These requirements are efficient and practical. There is no reason for defendants to fail to inform the Court when their status as transferors renders them inappropriate as parties to the action. There is also no reason for persons to ignore state laws that require reporting water rights transfers. This information will help determine if we have identified and served the correct individuals. We will be better able to identify persons and entities served who have no water rights and eliminate them from this case, as well as those persons and entities who should be included in the case. It will assist the Court and parties in its administration of the Walker River system. Further, if at some point, there is a settlement or judicial resolution, it will assist the Court and parties in obtaining binding concurrence from those the Court has determined may be affected.

D. The District's suggestion that the CMO categories should be discarded should be rejected.

The District suggests service on some group of area property owners possibly identified by the county assessors. District Brief at 6-7. This suggestion would force a reorganization of service with little, if any, benefit, and further delay consideration of the merits of this case. We have, nevertheless, been in the process of obtaining information from the county assessors to supplement the information sources we already are consulting, but as explained below, Part IV.C.3., this information has serious limitations. Becker Aff. ¶¶13, 17.3; Rimer Aff. ¶¶8- 10.

The Court has directed us to identify, name, and serve the persons and entities described in the nine categories in paragraph 3 of the CMO -- not all property owners in the watershed. Blanket use of

property records, even if they specify properties with wells, is not necessarily helpful and may be over-inclusive. The Court has tailored its CMO such that not all categories of water rights holders are served everywhere in the basin. For example, domestic users are included in only four sub-basins in Nevada and not elsewhere. Thus, property records in California and the remainder of Nevada will be over-inclusive. On the other hand, use of such records may be under-inclusive. The county assessors' offices caution that to the extent their files identify improvements such as wells, which the District argues may be determinative, District Brief at 7, they only identify wells on property when property owners record such information. Rimer Aff. ¶11.

Further, property owners without water rights described in the CMO need not be served. Clearly, there is a risk of serving persons and entities with no water rights at issue. This should be avoided, but will undoubtedly happen, despite best efforts otherwise, due to the large numbers of potential defendants. If we adopt the District's approach, the numbers of persons and entities needlessly served will be extremely high. This will be a waste of time and resources for us, and a waste of time and resources for such persons and entities.

Many water rights are not held in the name of the person or entity listed as the owner of any given piece of property. *See Status Report* at 12 & Exh. I at 3 (Dec. 19, 2000) (text and letter from Gordon DePaoli, dated Nov. 22, 2000). Thus, simply serving persons and entities listed on a county's property rolls does not guarantee inclusion of the proper party and will probably be contested as constituting incomplete service. One has only to look at the many objections the District has made to Mineral County's service efforts to see the extent to which service efforts may be contested if, for example, family members are served but the family trust is not served.

Finally, we think service should be initiated according to the CMO categories. This will allow us to attempt service in more manageable numbers, "test the waters" with our initial effort, and correct any errors in this initial service phase. Also, if need be, we can apply promptly to the Court for the cost of service from individuals who refuse to waive service and force us to conduct personal service. *See* FED. R. CIV. P. 4(d). Certainly, for those persons and entities who fit in more than one CMO category, we will try to serve them only once.

E. Ongoing publication of this case will assist with meeting due process concerns.

We also propose to publish notice of the pendency of this action on a regular and reasonable basis in conjunction with service. As demonstrated above, we are making a diligent and good faith search reasonably calculated to identify the persons and entities to be served under the CMO. Publication can simply close any gaps in the information we have collected and provide added assurance that potential parties are notified of this action. While we believe that today it would be hard to find anyone in the Walker River Basin who is not aware of this case, our service and publication efforts should help erase any doubt. Nevada and California publish notices at various points in their adjudications in conjunction with ongoing notice of claimants they have identified. A similar process here could assist with identifying additional parties.

Specifically, we propose to publish notice of this action in certain area newspapers on an annual basis during our service efforts and during the progress of the case. This is a different approach than that Mineral County proposed in sub-proceeding C-125-C. Instead of waiting until the parties debate the specifics of individual service attempts before deciding whether or not to publish, we suggest that publication begin in conjunction with service. *See* NEV. REV. STAT. §§ 533.095 (noticed published at

commencement of adjudication), 533.110 (notice published prior to taking proofs of claims). Regular publication should assist in identifying individuals who do not receive service and will provide notice of this action on an ongoing basis. We also propose to make these publication efforts on an annual basis throughout this litigation. The nature of the publication should be similar to that required of other parties in this case. For example, the U.S. Board of Water Commissioners publishes notice of its annual budget hearing and the District published notice of its filing in sub-proceeding C-125-A.

F. Conclusion.

It should be clear that the methods being used by the United States and the Tribe to identify potential counter-defendants are reasonable and that our related efforts are diligent and reasonably calculated to achieve this end, and, therefore, satisfy due process. The present proposal by the District – which earlier balked at providing certain of the available information within its control – would divert the parties and the Court from the clear road map previously established in this case and have us follow a new and uncharted approach that by definition is not designed to incorporate the CMO categories. Notably, the District offers no criticism of the diligence of the efforts by the United States to gather all information pertinent to identifying the entities that fall within the CMO categories. Those efforts were described in considerable detail in our *Status Report* (Dec. 19, 2000). Yet we have heard nothing from the District to suggest that the United State's efforts are lacking in any respect. In short, the best way to complete the task assigned by the Court of serving the nine categories of water right claimants under the CMO is for the United States to complete its efforts and to serve the identified parties. At that point, it will be appropriate for the Court to sanction the completion of service by publication. Any party who has additional information that the United States should consider in identifying the entities to

be served should be directed to provide that information to the United States within a reasonable time from the March 20 hearing.

III. The procedures followed by the United States constitute due diligence under NEV. R. CIV. P. 4(e)(1)(ii) and CAL. CIV. P. CODE § 415.50.

As described above and in Mr. Becker's affidavit, the United States, over the past year, has expended tremendous amounts of time and resources to ascertain the entities who fit within the categories established by the Court. Once that process is finished and service is made on those identified entities who can be located and served, the United States and the Tribe should be permitted to complete service within Nevada by publication in accordance with NEV. R. CIV. P. 4(e)(1)(ii), as is allowed under FED. R. CIV. P. 4(e)(1). *See generally Minutes of the Court*, No. C-125-C (Apr.1, 1997) (concluding that Mineral County could complete service within Nevada by publication). Likewise, in California, the Tribe and the United States may complete service by publication under the terms of CAL. CIV. P. CODE § 415.50.[9] Publication would effect service on (1) those entities who could not be identified through the elaborate process followed by the United States, and (2) those entities who were identified by the United States as members of the categories established by the Court but who, despite diligent efforts, could not be served.

In its most recent pleading, the District undercuts the ongoing efforts of the United States, contending in effect that the only way by which the water users included within the nine categories of

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[9]CAL. CIV. P. CODE § 415.50 provides in relevant part: "A summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another manner specified in this article and that: (2) the party to be served has or claims an interest in real or personal property in this state that is subject to the jurisdiction of the court . . . ."

entities can be served is by serving all of the property owners within the relevant portions of the Walker River Basin. As noted above, the process now suggested by the District is doubly defective since not all of the property owners will have water rights that fit within the CMO categories and some water rights will actually be owned by entities who do not own the land on which the rights are used. Thus, the District's proposal is both overly and under inclusive. Contrary to the District's implication, the efforts by the United States to identify the entities who hold water rights within the CMO categories in conjunction with publication under the appropriate state provisions as endorsed by FED. R. CIV. P. 4 (e)(1) will ultimately bring before the Court all those entities who fit within the CMO categories.

IV. The use of state lis pendens statutes is inadequate to bind parties to the Court's determinations in these proceedings.

The District contends that 28 U.S.C. § 1964[10] requires the United States to file notices of lis pendens under Nevada and California law. District Brief at 1-6; NEV. REV. STAT. § 14.010; CAL. CODE CIV. P. § 405.5. The District is wrong for several distinct reasons. First, because § 1964 requires only that federal litigants provide "the same" notice required in state proceedings and neither Nevada nor California require such lis pendens filings in state water rights adjudications, lis pendens is

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[10] Where the law of a State requires a notice of an action concerning real property pending in a court of the State to be registered, recorded, docketed, or indexed in a particular manner, or in a certain office or county or parish in order to give constructive notice of the action as it relates to the real property, and such law authorizes a notice of an action concerning real property pending in a United States district court to be registered, recorded, docketed, or indexed in the same manner, or in the same place, those requirements of the State law must be complied with in order to give constructive notice of such an action pending in a United States district court as it relates to real property in such State.

28 U.S.C. § 1964 (emphasis added).

not required here. Second, because the United States is not affecting "title to" or "possession of" real property, these state statutes are inapplicable. Moreover, as discussed below, filing lis pendens would tie this Court up in potentially thousands of fruitless and tangential adjudications. For all of these reasons, the Court should reject the District's position.

A. 28 U.S.C. § 1964 does not apply because neither Nevada nor California make or require lis pendens filings in water rights adjudications.

28 U.S.C. § 1964 simply requires a litigant in federal court to comply with the recording procedures required in a state court proceeding of the same nature. Because Nevada and California do not file lis pendens under these provisions in state water rights adjudications, nor do they require such filings from parties objecting to water rights determinations, 28 U.S.C. § 1964 is simply inapplicable.

Congress' purpose in 1958 when it enacted 28 U.S.C. § 1964, was "that notice of an action (usually referred to as lis pendens) with respect to real property, pending before a United States District Court, must be recorded, if the state law so provides, . . . to be considered constructive notice to others that such action is pending." S. REP. NO. 85-2131, 1958 WL 3950 (1958). Two requirements had to be met before the United States would file lis pendens under state law. First, "State law must require that notice of local suits in State courts . . . be registered, recorded, docketed, or indexed," <u>and</u> second, "State law must also expressly authorize notice of federal suits to be registered, indexed, etc., in <u>the same manner</u> as notices in state courts." *Id.* (emphasis added). "These provisions, of course, will require future legislative action on the part of the individual state legislatures and they will not become effective within a state until it has expressly authorized such registering, recording, etc." *Id.*

Clearly, litigants in federal court must only provide the same notice required in state proceedings of the same nature -- no more, no less.

Our issue here is with the first of these two requirements.[11] This is an adjudication of claims to water and lis pendens under the state laws cited are not made in state water rights adjudications.[12] Thus, any requirement that the United States adhere to State lis pendens procedures would be outside the framework of § 1964. Moreover, because the requirements to impose § 1964 are not met here, any attempt to impose state lis pendens procedures on the United States and the Tribe is barred by the principles of sovereign immunity.[13] There is no basis in § 1964 or elsewhere that require the Court to

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[11]The District's reliance on *Truckee-Carson* is misplaced. 28 U.S.C. § 1964 did not apply there. As set forth above, when Congress enacted the provisions found at § 1964, it required that "state law must require that notice of local suits in State courts (as distinguished from federal courts) be registered, recorded, docketed, or indexed" as one of two requirements that had to be met before § 1964 could apply. S. REP. NO. 85-2131, 1958 WL 3950 (1958) (emphasis added). In 1974, when the *Truckee-Carson* filings occurred, use of a notice of pendency was discretionary under the relevant Nevada law: "In an action . . . affecting the title or possession of real property, the plaintiff . . . may file with the recorder of the county . . . a notice of the pendency of the action . . . . NEV. REV. STAT. § 14.101(1) (1969) (emphasis added). Thus, the government's decision to file lis pendens in *Truckee-Carson* was discretionary only and is not binding in this proceeding.

[12] It is "settled in [Nevada] that the water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method of procedure but strictly limits it to that provided." *In re Waters of Duff Creek,* 202 P.2d 535, 540 (Nev. 1949).

[13]To the extent that 28 U.S.C. § 1964 is construed to waive sovereign immunity on the part of the United States, that waiver is limited to a requirement that a notice be "registered, recorded, docketed, or indexed" in a certain manner or in a certain place. Thus, the additional procedures in these state laws, some of which are discussed by the District, District Brief at 3-6, do not apply. A waiver of sovereign immunity by the United States must be unequivocally expressed and may not be implied, assumed, or based on speculation or ambiguity. *Block v. North Dakota*, 461 U.S. 273, 280 (1983); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. King*, 395 U.S. 1, 4 (1969). Waivers of sovereign immunity must be "clear and unambiguous," *United States v. Sherwood*, 312 U.S. 584, 590 (1941), and any assertions of waiver must be construed "strictly in favor of the

impose more onerous requirements on the United States than is required in state proceedings and it cannot force procedures upon it by implication that Congress did not expressly authorize. If lis pendens were required here, the United States and the Tribe would be subject to additional and onerous requirements not imposed on similar parties in State proceedings, which would be inconsistent with § 1964, unfair to the United States and the Tribe, and deny due process to the Tribe.[14]

B. This action does not affect the title or possession of real property.

In addition, § 1964 is inapplicable because this adjudication does not affect "the title or possession of real property." NEV. REV. STAT. § 14.010(1).[15] Although both states classify water rights as real property, they treat water rights differently than other forms of real property. That water rights may be correlative interests in a resource does not create a specific right to the possession of a specific amount of water. "[T]he water law provides not only for a method of appropriating the unappropriated waters belonging to the state, but in addition the means for determining the relative rights of users of waters of this state." *In re Waters of Duff Creek,* 202 P.2d at 540. A water rights adjudication defines the contours of valid water rights in relation to other valid rights on the stream

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sovereign" and "not enlarged beyond what the language requires." *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986) (citation omitted). Neither does § 1964 waive the Tribe's sovereign immunity.

[14] "The federal interest in ensuring that all citizens have access to the courts is obviously a weighty one. This Court and many state courts have long recognized that Indians share this interest in access to the courts . . . ." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, et al.,* 476 U.S. 877, 888 (1986) (citations omitted). This interest is especially weighty where "as here, the Tribe has no other effective means of securing relief for civil wrongs." *Id.* at 889.

[15] Lis pendens in Nevada are also used for the foreclosure of a mortgage upon real property. NEV. REV. STAT. § 14.010. California requires lis pendens filings for "real property claims," which include causes of action that "affect . . . title to, or the right to possession of, specific real property," as well as regarding certain easements. CAL. CIV. P. CODE § 405.4.

system, but does not affect the possession of a valid water right.

This action does not affect the title that any person or entity may have to a water right or real property. The United States and the Tribe have maintained repeatedly that they do not wish to prevent the sale or other transfer of a water right or appurtenant land. Indeed, their claims for additional water do not in any way affect title to real property or its alienability. Water rights are routinely sold separately from the appurtenant land in any event. *See* II.D., *infra.* Nor does this action affect the possession of real property. Because the Court's resolution of the United States' and Tribe's first amended counterclaims determines the relationship of the rights claimed vis a vis one another, the legal effect of our claims does not deprive anyone of possession. Our rights may be determined to be senior to other rights in the basin, but this is no different than the goal of a water rights adjudication in either state, which is to determine the relative interests of claimants to water of a stream or stream system. *See* NEV. REV. STAT. § 533.090; CAL. WATER CODE § 2550.

The District contends, without offering support, that the federal and tribal claims affect the possession of real property because these claims, "in effect seek to establish rights to possess water from a common res, *i.e.*, the Walker River, on the basis of priority," District Brief at 2-3. If the District were correct, each state would file a lis pendens for every water rights claimant in every water rights adjudication. If the District were correct, every person objecting to a state's determination of the existence and relationship of water rights on a stream system would be required to file a lis pendens regarding each water rights holder in that system in order to have that objection heard. To our

knowledge, neither Nevada nor California require such filings.[16] To the extent the Court might determine that the United States' and Tribes' claims "affect the possession of real property," they do so no differently than if this were a water rights adjudication conducted by either state.

C. Application of other State procedures would create numerous practical problems and render constructive notice efforts futile.

The filing of notices of pendency in this action under state law would create a variety of practical problems and absurd results. Application of state law would initiate potentially thousands of "mini-trials" before this Court with the likely and perverse result that none of these notices will ultimately have any legal effect. Our review of information available in the country recorders' offices demonstrates that water rights are not capable of sufficient or complete identification to enable the kind of broad placement of lis pendens envisioned by the District.

1. Nevada and California treat lis pendens filings as liens rather than simply notices of the pendency of an action.

In recent years, Nevada and California have added significant procedural requirements for maintaining lis pendens, treating them more as liens rather than simply notices of a pending action. In each state, the party filing the notice may be required to appear at judicial hearing and present evidence

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[16] We are unaware of any state that makes lis pendens in water rights adjudications in the same manner required by Nevada and California lis pendens statutes. While both states make filings of various documents with various county recorders, these are not made pursuant to state lis pendens law. Indeed, NEV. REV. STAT. § 533.160(1) directs that the order of determination, when filed with the district court, "shall have the legal effect of a complaint in a civil action." Plainly, if Nevada lis pendens law applied to a water rights adjudication, this order would have to be filed accordingly, but to our knowledge this is not done. In California statutory adjudications, which are apparently rarely done, CAL. WATER CODE § 2529(5)(b) requires the recording of notice of the pendency of the proceeding. The California recording form for such a filing makes no mention of state lis pendens laws.

to justify the filing. NEV. REV. STAT. § 14.015; CAL. CIV. P. CODE §§ 405.30, 405.31. In Nevada, the recording party must establish that:

> (a) The action is for the foreclosure of a mortgage upon the real property described in the notice or affects the title or possession of the real property described in the notice;
> (b) The action was not brought in bad faith or for an improper motive;
> (c) He will be able to perform any conditions precedent to the relief sought in the action insofar as it affects the title or possession of the real property; and
> (d) He would be injured by any transfer of an interest in the property before the action is concluded.

NEV. REV. STAT. § 14.015(2). In addition, the recording party must establish:

> (a) That he is likely to prevail in the action; or
> (b) That he has a fair chance of success on the merits in the action and the injury described in paragraph (d) of subsection 2 would be sufficiently serious that the hardship on him in the event of a transfer would be greater than the hardship on the defendant resulting from the notice of pendency, and that if he prevails he will be entitled to relief affecting the title or possession of the real property.

NEV. REV. STAT. § 14.015(3). In California, where lis pendens filings are limited to "meritorious" "real property claims," any party in the pending action or nonparty with an interest in the affected property may apply for a judicial expungement of the notice. CAL. CIV. P. CODE §§ 405.4, 405.30. The court may hear evidence and permit discovery and the recording party has the burden of proof. *Id.* In both states, if the court finds that the recording party has not carried its burden, it shall cancel the notice and order that the cancellation be recorded with the county recorder. NEV. REV. STAT. § 14.015(5); *see* CAL. CIV. P. CODE §§ 405.31, 405.32. Even if the notice is proper, the court may cancel the notice if the opposing party posts adequate security. NEV. REV. STAT. § 14.015(6); CAL. CIV. P. CODE § 405.33.

The consequences of a withdrawn or canceled lis pendens notice are stark. In Nevada:

> each person who thereafter acquires an interest in the property . . . shall be deemed to be without knowledge of the action or of any matter, claim or allegation contained therein, irrespective of whether the person has or at any time had actual knowledge of the action or of any matter, claim or allegation contained therein.

NEV. REV. STAT. § 14.017. This provision, added in 1987, provides for "absolute and complete transferability of real property after the withdrawal or cancellation of a notice of the pendency of an action affecting the property," NEV. REV. STAT. § 14.017(2), and "clearly indicates the legislative intent to relieve a prospective buyer of the possibility of continuing litigation over ownership of property once a lis pendens has been withdrawn." *Coury v. Tran*, 895 P.2d 650, 656 n.9 (Nev. 1995). In California:

> neither the notice nor any information derived from it, prior to the recording of a certified copy of the judgment or decree issued in the action, shall constitute actual or constructive notice of any of the matters contained, claimed, alleged or contended therein, or of any of the matters related to the action, or create a duty of inquiry in any person thereafter dealing with the affected property.

CAL. CIV. P. CODE § 405.60. Further, as to a subsequent purchaser:

> no person . . . who thereafter becomes, by conveyance recorded prior to the recording of a certified copy of the judgment or decree issued in the action, a purchaser, transferee, mortgagee, or other encumbrance for a valuable consideration of any interest in the real property subject to the action, shall be deemed to have actual knowledge of the action or any of the matters contained, claimed, or alleged therein, or of any of the matters related to the action, irrespective of whether that person possessed actual knowledge of the action or matter and irrespective of when or how the knowledge was obtained

CAL. CIV. P. CODE § 405.61. The statute expressly states that "[i]t is the intent of the Legislature that this section shall provide for the absolute and complete free transferability of real property after the expungement or withdrawal of a notice of pendency of action." *Id.*

2. Application of state law will result in significant and fruitless tangential litigation before this Court.

Application of the state laws described above may initiate potentially thousands of mini-trials associated with statutory challenges to each lis pendens filing because of the significant cloud that the lis pendens places on real property title. Although Nevada law is silent as to what court would hear these claims, California law requires this hearing to be done by the Court where the action is pending. CAL. CIV. P. CODE § 405.30. Presumably, all such claims would be litigated before this Court. We estimate that there would be between 3,000 and 4,000 persons and entities to be served in this case under the CMO. Becker Aff. ¶24.c. If the Court follows the District's suggested use of tax rolls, that number will rise significantly. Each lis pendens filing could be contested pursuant to state law, and it is reasonable to expect that many such challenges will be brought to this Court. Clearly, these matters could occupy a huge amount of the Court's time and resources.

Furthermore, the United States and the Tribe have repeatedly informed the District and other defendants that they have no wish to impede the lawful transfer, use or possession of water rights. As a general matter, we are unable, and unwilling, to assert that we would be "injured by the transfer of an interest in the property before the action is concluded," so that we could not make the showing required by NEV. REV. STAT. §14.015(2). Thus, we would likely not meet the requirements of Nevada or California law as to such filings. Pursuant to NEV. REV. STAT. § 14.017 and CAL. CIV. P. CODE §§ 405.60, 405.61, the notices would be without effect and current and subsequent owners of these water rights, even if aware of the action, would be deemed to be without knowledge. Consequently, the notice filings would not stand, and by operation of state law, would have the opposite intended effect. This would, indeed, be a difficult basis on which to assert that all successors to water rights in the Walker River Basin received notice and are bound by the Court's determination. It is an

understatement to say that this circumstance would be circular, futile, and a complete waste of time and resources.

3. County recorders' offices do not include adequate information for lis pendens filings on water rights.

Another practical consideration is that county recorders' offices in the Walker River Basin do not track water rights and the deeds in their files do not necessarily reflect the existence or transfer of water rights. Based on our discussions with personnel in county recorders' offices in both states, Rimer Aff. ¶¶ 8-9, it simply cannot be assumed that all water rights will be found in records with the county recorder and/or assessor. Despite state law to the contrary, *see* NEV. REV. STAT. §§ 533.382-533.387, county personnel are mostly unaware of requirements for recording transfers of water rights. More importantly, county employees in both states are not required to review records filed for compliance with any such laws, are not in a position to enforce such laws, and are precluded from giving legal advice to anyone filing a deed who may inquire about lawful compliance.

Official personnel in the recorders' offices in both states said generally the same thing as to whether or not deeds or evidence of ownership of water rights would be found in their records, to wit: it cannot be assumed that all water rights existing in the county will be found in the records of the county recorder and/or assessor. The sale of water rights may or may not be reflected in the deed for sale of a property. Deeds to water rights might exist but not be recorded. In some cases, water rights are deeded separately from the sale of property, sometimes years after the sale of the real property. In other cases, the sale of a water right may not be reflected on documents recorded with the county. Each and every deed recorded in each of the relevant counties would have to be examined for the

inclusion of a water rights in its text, and even then its exclusion would not necessarily mean a water right was not sold with the property. Thus, use of these records may be under-inclusive and certainly inaccurate and incomplete.

5. Conclusion

Contrary to the District's assertions, state lis pendens procedures would be extraordinarily time-consuming, engender additional litigation, and be very expensive, with the likely result that notices filed thereunder would be of limited, if any, effect. For these reasons and because we estimate that the costs of just filing lis pendens (prior to service) would range from $55,000.00 to $80,000.00, according to the District's cost recitation, District Brief at 5-6, this idea must be rejected.

B. The Court may bind parties by other means.

Having demonstrated that state lis pendens procedures are not appropriate for this case, the question then becomes how the Court will bind parties to its determinations in light of the reality that water rights will be transferred. This too is an issue that must be measured by due process standards. We think there are a number of means available to address this issue.

The Court has discretion to substitute, by motion of a party, new parties who have acquired the property that is the subject of the lawsuit. FED. R. CIV. P. 25(c) provides: "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." According to the Ninth Circuit:

> The rule focuses on what was really going on in this case, and is designed to cope with that. As the Fifth Circuit has said, "Rule 25(c) is not designed to create new relationships among parties to a suit but is designed to allow the action to continue unabated when an interest in the lawsuit

changes hands." *Collateral Control Corp. v. Deal (In re Covington Grain Co., Inc.)*, 638 F.2d 1362, 1364 (5th Cir. 1981). And a leading treatise has underscored that by stating:

> The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment will be binding on his successor in interest even though he is not named. An order of joinder is merely a discretionary determination by the trial court that the transferee's presence would facilitate the conduct of the litigation.

In re Bernal, 207 F.3d 595, 598 (9th Cir., 2000) (quoting 7C CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1958 (2d ed.1986)) (footnote omitted). This could be helpful in combination with an order from the Court, as proposed above, requiring water rights claimants to notify the Court when they transfer such rights to different owners. Part II.C., *supra.* Thus, to the extent water rights are transferred before service is made, requiring persons served to identify to whom they have transferred their rights and notice efforts should allow the inclusion of all known potential counter-defendants for purposes of meeting due process. When transfers of such rights are made after service, the transferee is bound already, although the Court may apply Rule 25(c) and substitute the transferee. In combination with notice efforts, this too will allow the action to proceed to conclusion against all known counter-defendants and allow the Court to bind any interested person to its determinations.[17]

Moreover, water rights adjudications in both states culminate in decrees that are final and

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[17]Indeed, it might be argued that substitution of parties is unnecessary. To the extent this action is considered an in rem action, it may be argued that as to the res, here the waters of Walker River, a judgment will be conclusive and binding upon all the world. "If the action is considered an action in rem, and if provisions for search and for publication of notice are adequate to meet the requirements of due process, then the decree is binding on the world." 2 WATERS AND WATER RIGHTS § 15.02(b) at 226 (1991).

conclusive on all persons and rights lawfully within the adjudication. In Nevada, the judicial phase culminates in entry of a final judicial decree of water rights in the stream system that "shall be final and shall be conclusive upon all persons and rights lawfully embraced within the adjudication." NEV. REV. STAT. § 533.210. At the conclusion of its process, California courts enter decrees determining the rights of all persons involved in the proceeding that are "conclusive as to the rights of all existing claimants upon the stream system lawfully embraced in the determination," and claimants who fail to appear and submit proof of claims are barred from asserting rights in the system and forfeit any rights thereto other than rights provided in the decree. CAL. WATER CODE §§ 2768, 2773, 2774. Thus, to the extent that the Court looks to state adjudications for guidance, their manner of addressing the issues of identification of parties and notice may guide the Court on this issue.

CONCLUSION

The United States' and Tribe's efforts to make a good faith identification of those water rights claimants who could be affected by their first amended counterclaims is substantially underway. The Court has sanctioned Mineral County's effort, which the United States and Tribe have mirrored and, indeed, substantially expanded. It makes no sense at this late stage of our efforts to discard the information we have compiled in favor of the over-inclusive and wasteful lis pendens approach posited by the District. Nor does it make sense to backtrack from the road map the Court has already established. The United States and the Tribe seek now to commence service upon those who we have identified and simultaneously begin regular publication of notice of the pendency of the action. We do not wish, nor does it make sense, to switch horses so close to the other stream bank.

Dated: 3-12-01

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on this 12th day of March, 2001, I served a true and correct copy of the foregoing "**MEMORANDUM OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE CONCERNING THE IDENTIFICATION OF COUNTER-DEFENDANTS BY CASE MANAGEMENT ORDER CATEGORIES AND USE OF NOTICES OF LIS PENDENS,**" by first-class mail, postage prepaid, addressed to the following persons:

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MAR 13 2001

IN THE 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.,	)))))))))))))	IN EQUITY NO. C-125 SUBFILE NO. C-125-B **Memorandum of the United States of America and the Walker River Paiute Tribe Concerning the Identification of Counter-defendants by Case Management Order Categories and Use of Notices of Lis Pendens** **Exhibit 1:** **Affidavit of Dennis Becker**

I, Dennis Becker, hereby make the following declaration pursuant to 28 U.S.C. §1746:

1. The facts stated in this affidavit are based on my personal knowledge and I am competent to testify to the matters set forth herein.

2. I hold a B.A. from Tabor College, Hillsboro, Kansas, 1964; a Bachelor of Divinity from Mennonite Brethren Biblical Seminary, Fresno, California, 1967; a M.A. in Christian Education from Mennonite Brethren Biblical Seminary, Fresno, California, 1980; and a Paralegal Certificate from Denver Paralegal Institute, Denver, Colorado, 1990.

3. I am presently employed full-time as a Senior Paralegal by Labat-Anderson, Inc. I have been employed as a paralegal since August 1990, first by Acumenics Research and Technology,

Inc., and then by Labat-Anderson, Inc., after it acquired Acumenics Research and Technology, Inc. in December 1995.

4. Currently, I am working under the supervision of a Certified Legal Investigator (National Association of Legal Investigators), who is licensed in the State of California (1981 to present), and an attorney for the United States Department of Justice.

5. Labat-Anderson, Inc. has assigned me to work on the above-captioned case, *United States of America and Walker River Paiute Tribe v. Walker River Irrigation District,* on a part-time basis from January 2000 to June 2000, and on a full-time basis from July 2000 to the present.

6. My primary assignment in this case is to work on the identification of the persons and entities described in the categories in paragraph 3 of the Case Management Order (Apr. 18, 2000) ("CMO") for purposes of conducting Court-ordered service on them as counter-defendants. To this end, among other things, I have located, gathered, and reviewed a variety of information from a variety of sources. Some of this information has come from certain parties to this case: the State of Nevada; the State of California; the Walker River Irrigation District; and the United States Board of Water Commissioners. It is my understanding that the documents I have reviewed from these sources are compiled and maintained as part of their respective statutory, regulatory or other authorities and duties regarding certain water rights claims and claimants. It is also my understanding that these documents are available to the public. I have also consulted a variety of other information sources, as described in this Affidavit.

7. As a basic matter, I am identifying and tracking potential counter-defendants by name, address, CMO category, and an identification of their respective water claim(s). I am categorizing them

by CMO category because this is how the Court described them and how it ordered the United States and the Tribe to identify them. Moreover, most of the information sources from the above defendants that I have obtained and reviewed employ identical or similar categories in their identification and tracking efforts of water rights claims and claimants.

8. Thus, as a general matter, once I identify a potential counter-defendant according to one of the CMO categories, I check and, if necessary, update addresses for the counter-defendant, and look for a description of the water right claimed. I have also found that some persons and entities have multiple water rights claims and claim rights to water in more than one of the CMO categories.

9. I have also found that maintaining an identification of water rights claimed by potential counter-defendants assists in updating my identification effort. Among other things, conflicting documents showing that different people claim the same right may indicate a possible sale or transfer of that right. Moreover, if I simply were to try to include names of persons and entities as water rights claimants without checking on the water right(s) claimed, I might end up tracking individuals or entities and updating address changes for them without necessarily knowing that they were no longer water claimants. Thus, tracking the water right(s) claimed, although it involves more work, is a significant further assistance in my work. Part of my effort has been to try to collect as much information as possible to enable me to: include potential counter-defendants whom the United States is directed to serve; to confirm that these identifications are accurate by locating them in more than one source; and to exclude potential counter-defendants who for one reason or another have transferred or no longer have water rights claims and,

therefore, do not need to be served.

10. I use several sources when I try to locate and update addresses for potential counter-defendants. Generally, I try to find two sources that give the same address for each counter-defendant. For example, one such source might be one of the index cards maintained by the U.S. Board of Water Commissioners or the Walker River Irrigation District. I then look for another source to confirm the address. Thereafter, I may find additional sources of information for further cross-references. For example, the permit files in the offices of the Nevada State Engineer include names and addresses of claimants to certain water rights. Beyond primary sources, I use various database sites such as QuickInfo, Yahoo or Switchboard. I also use Powerfinder phone discs and local telephone books. Through Ancestry.com, I access the Social Security Death Index to determine if a person is deceased. All of these sources are publicly available, although some of them are obtained through commercial sources.

11. The QuickInfo database is a very helpful computer tool. Through use of this database, I have the ability to search various other databases, including, but not limited to: National Residential Locater; National Property Tax Rolls; National Property Sales Info; National Bankruptcies; Liens and Judgments; Social Security Death Index; Nevada Corporations; Nevada Divorces; Nevada Marriages; Nevada Property; and Nevada Voters. In the People Locator–Credit Header Search, I can search by name and city or state, address and city, social security number and other combinations. Utilizing several databases together usually leads to positive results. This is also a publicly available database that can be obtained from a commercial source.

12. My work is ongoing. In December, I spent one week in Nevada reviewing and collecting documents at the offices of the U.S. Board of Water Commissioners, the Walker River Irrigation District, and the State of Nevada, Division of Water Resources. I will travel to Nevada and California from March 12-16, 2001, to complete an identification and collection of documents at the Nevada Division of Water Resources and the California Water Resources Control Board.

13. I have collected and/or reviewed or am in the process of collecting and/or reviewing the following documents, some of which are document sources other than those identified to us by the defendants:

    1. Service related material from counsel for Mineral County in Sub-proceeding C-125-C;
    2. California Water Resources Control Board Hydrographic Reports;
    3. California Water Resources Control Board Diversion Reports;
    4. California Water Resources Control Board Permit files;
    5. Nevada Division of Water Resources computer generated printout of active groundwater rights in the Walker River Basin, April 1999;
    6. Nevada Division of Water Resources hard copy report of Nevada water rights, permits, certificates and wells for surface water and groundwater in the Walker River Basin, May 2000;
    7. Nevada Division of Water Resources electronic and hard copy report of Nevada water rights, permits, certificates and wells for surface water

and groundwater in the Walker River Basin, October 2000;

8. Nevada Division of Water Resources Permit files based on the October 2000 list;

9. Nevada Division of Water Resources well log database from the Nevada Division of Water Resources web-site;

10. Nevada Division of Water Resources monthly updates from the Nevada Division of Water Resources web-site, beginning January 2000;

11. Nevada Domestic Well Log Database;

12. Nevada Division of Water Resources Water Budgets for Groundwater Rights for Smith Valley and Mason Valley;

13. Nevada Department of Human Resources, Health Division Municipal Systems list;

14. U.S. Board of Water Commissioners Assessment list, 2000-2001;

15. U.S. Board of Water Commissioners Water Rights Index Cards, December, 2000;

16. Walker River Irrigation District Assessment List, June 1999;

17. Walker River Irrigation District Assessment List, October 2000;

18. Walker River Irrigation District Registrar List Worksheet, March 1999;

19. Walker River Irrigation District Poll Book, April 1999;

20. Walker River Irrigation District Certificates of Appropriation of Water;

21. Walker River Irrigation District list of Reserved Water Rights;

22. Web-site, Nevada Division of Water Resources;

23. Web-site, California Water Resources Control Board;

24. Various deeds provided by Lyon County to the U.S. Board of Water Commissioners;

25. Various deeds provided by Lyon County to the Walker River Irrigation District; and

26. A variety of documents from the County Assessor's offices for Lyon, Mineral, Churchill, and Douglas County, Nevada, and Mono County, California, some of which may include property tax rolls, parcel descriptions and locations, and identifications of certain improvements identified by property owners, such as wells.

14. The following is a summary of documents I have collected or collected and reviewed and the results obtained, thus far, based on the CMO categories.

15. **<u>Category 3.a:</u> "The successors in interest to all water rights holders under the Decree (April 14, 1936), <u>modified</u>, Order for Entry of Amended Final Decree to Conform to the Writ of Mandate, Etc. (April 24, 1940)" ("Decree").**

15.a. I have reviewed the Assessment Rolls dated July 1, 2000, from the U.S. Board of Water Commissioners. This alphabetical list of 87 names and addresses is prepared by the U.S. Board of Water Commissioners and identifies individuals and entities billed for water rights assessments as of July 1, 2000. There is no indication of what water rights each individual or entity holds.

15.b. I reviewed, but did not photocopy, a collection of deeds provided by Lyon County to the U.S. Board of Water Commissioners. My understanding is that Lyon County sends these documents on a periodic basis to notify the U.S. Board of Water Commissioners of transfers of water rights.

15.c. I also have copies of the U.S. Board of Water Commissioners' index cards listing names, addresses and water rights. These are in the same format and contain the same kind of information as in the index cards of the Walker River Irrigation District, described below. My understanding is that these cards are the best source of information within the Board's files to identify Decreed water rights and water rights holders.

15.d. I have reviewed the Assessment Lists from the Walker River Irrigation District dated June 1999 and September 2000. Each of these alphabetical lists of over 500 names and addresses is prepared by the U.S. Board of Water Commissioners and identifies individuals and entities billed for water rights assessments as of the listed dates. There is no indication of what water right(s) each individual or entity holds or if, in fact, the individual or entity listed is the holder of any water right.

15.e. I have reviewed approximately 850 Walker River Irrigation District Index Cards that list specific water rights along with the identity and addresses of what appears to be the water rights holders. These cards also include some or all of the history of the ownership of each water right and transfers of title, which also identifies the water right holder(s). Some of these cards relate to water rights under the Decree and others are

identified as non-decreed rights. I have identified approximately 550 individuals and entities from these cards. My understanding is that these cards are the best source of information within the Walker River Irrigation District's files to identify Decreed water rights and water rights holders.

15.f. I have reviewed Walker River Irrigation District voter and election information for 1999. The Poll Books and the Registrar Worksheet Lists name eligible voters for irrigation district elections, but contain no specific water rights information or addresses.

15.g. I reviewed, but did not photocopy, a collection of deeds provided by Lyon County to the Walker River Irrigation District. My understanding is that Lyon County sends these documents on a periodic basis to notify the Walker River Irrigation District of transfers of water rights.

15.h. I have reviewed "Good Serve" lists served upon the parties by Mineral County in Sub-proceeding C-125-C. My understanding is that these are lists of individuals and entities holding Decreed water rights whose service by Mineral County in C-125-C is not in dispute. These documents also include a certain number of Waiver of Service and Return of Service documents. I have also obtained a number of Waiver of Service and Return of Service documents from the C-125-C Sub-proceeding that are not on any "Good Serve" list. I have identified approximately 700 individuals or entities from my review of the "Good Serve" and other lists.

15.i. I have some additional filings by Mineral County that I intend to review. In part, I have waited to complete this review because the accuracy of Mineral County's work in

many filings is still being debated in Sub-proceeding C-125-C. In addition, most of the documents served upon the United States by Mineral County to report successful service do not include Waiver of Service and Return of Service documents, so there is no identification of the specific defendants served. I have obtained a large number of these filings from the United States District Court in Reno, but am still missing some of these documents, particularly those that would have been included in the County's recent service-related filings with the Court.

15.j. None of the materials in Mineral County's service work in C-125-C identify any specific water rights information as to each person or entity served. In reviewing the documents provided to us by the U.S. Board of Water Commissioners, the Walker River Irrigation District and the State of Nevada regarding this category of water rights claimants, I have noticed that a significant number of the persons and entities named on the County's "Good Serves" list are not included in any of these other documents. As noted, my review of materials from the State of Nevada is in progress and the Court is still reviewing the completion of Mineral County's C-125-C service work.

15.k I have reviewed and am continuing to collect and review material from the Nevada Division of Water Resources, including the May 2000 and the October 2000 computer-generated lists of water rights holders and the actual permit files from the State Engineer's office. The State identified some rights recognized under the Decree on both the hard copy and the electronic file it provided us. These materials should identify a few additional Decreed rights holders.

15.l. To date, I have identified approximately 950 persons and entities in this category.

16. **<u>Category 3.b:</u> "All holders of surface water rights under the laws of the States of Nevada and California in the Walker River Basin who are not presently parties to this adjudication."**

16.a. Upon review, the Walker River Irrigation District Assessment lists and index cards, described above, identify claimants to surface water rights not set forth in the Decree, in addition to identifying the holders of Decreed rights.

16.b. Several sources from the State of Nevada assist with this category. I have several iterations of Nevada Division of Water Resources computer-generated printouts that list owners of surface water and ground water rights in the Walker River Basin. I have reviewed both the May 2000 list for all CMO categories and have begun to review the October 2000 list for all CMO categories. I used the October 2000 list of water rights holders to organize my review of the Nevada Division of Water Resources Permit hard copy files. It is helpful to use all three sources of information to obtain a more complete picture of the available information. To date, I have identified approximately 850 individuals and entities from this effort; not all of these individuals and entities have water claims in category 3.b.

16.c. As to the Nevada Division of Water Resources permit files, noted in the previous sub-paragraph, I have reviewed these materials for both CMO categories 3.a and 3.b and have begun the review for category 3.c. These files are based on the original application numbers and include specific water rights as well as the history of the transfer of the water rights. So far, I have also found a small number of previously

undiscovered water rights holders in these materials.

16.d. The Nevada Division of Water Resources updates water rights applications on its web-site monthly, which should be helpful to provide new information.

16.e. Although Mineral County has focused on Decreed water rights holders in Sub-proceeding C-125-C, its materials may be helpful in identifying non-Decreed water rights holders or addresses.

16.f. The California Water Resources Control Board Hydrographic Reports provide information on California Surface Water Rights holders by name and water rights.

16.g. The California Water Resources Control Board Diversion Reports should also yield information on California Surface Water Rights holders by name and address. The report identifies individual water files for further review and is the report I will use to pull out and review files within State offices in Sacramento. These are the materials I will be reviewing in detail in March.

16.h. To date, I have identified approximately 190 persons and entities in this category.

17. **Category 3.c: "All holders of permits or certificates to pump groundwater issued by the State of Nevada and domestic users of groundwater within Sub Basins 107 (Smith Valley), 108 (Mason Valley), 110A (Schurz Subarea of the Walker Lake Valley), and 110B (Walker Lake Subarea of the Walker Lake Valley)."**

17.a. I have reviewed the Nevada Division of Water Resources Surface and Ground Water Rights holders list for May 2000. Ground Water rights are listed by name and water rights.

17.b. I have begun to review the Nevada Division of Water Resources Surface and Ground

Water Rights holders list for October 2000 and to make a corresponding review of the Nevada Division of Water Resources permit files for this category. Ground Water rights are listed by name and water rights. Many of these water rights holders have already been identified as a result of earlier document reviews. The review of these documents allows me to confirm many water rights, correct others, and identify and correlate the claimants to specific water rights claims.

17.c. The Nevada Well Log Database, dated October 2000, lists approximately 690 wells, including domestic wells. This log identifies basin number, well log number, owner's name, and a partial or complete address. The Nevada Division of Water Resources also maintains a well log database on its web-site.

17.d. Nevada Division of Water Resources Water Budgets for Smith Valley and Mason Valley identify groundwater rights owners of record, and provide the relevant parcel number, description, permit number and acre-feet. It is my understanding that these are prepared on an annual basis as a matter of Nevada law.

17.e. Through the assistance of another employee at Labat-Anderson, I have also obtained materials from the County Assessor for Lyon County that should assist in identifying many well locations, including domestic wells.

17.f. To date, I have identified approximately 685 persons and entities in this category.

18. **<u>Category 3.d:</u> "All holders of permits or certificates to pump groundwater issued by the State of Nevada within Sub Basins 106 (Antelope Valley), 109 (East Walker), and 110C (Whiskey Flat-Hawthorne Subarea of Walker Lake Groundwater Basin)."**

18.a. I have reviewed the Nevada Division of Water Resources Surface and Ground Water

Rights holders list for May 2000. Ground Water rights are listed by name and water rights.

18.b. I have begun to review the Nevada Division of Water Resources Surface and Ground Water Rights holders list for October 2000 and make a corresponding review of the Nevada Division of Water Resources permit files for CMO category 3.c. Many of these water rights holders have already been identified as a result of earlier document reviews.

18.c. The Nevada Well Log Database, dated October 2000, lists approximately 690 wells, including domestic wells. This log includes basin number, well log number, owner's name and a partial or complete address. A well log database is also available on the Nevada Division of Water Resources web-site.

18.d To date, I have identified approximately 100 persons and entities in this category.

19. **Category 3.e: "All users of groundwater for irrigation in California in the Walker River Basin."**

19.a. I will be collecting information from the California Water Resources Control Board files, March 12-16, 2001.

19.b. The California Water Resources Control Board web-site may yield information for water rights holders in this category.

19.c. The California Water Resources Control Board does not maintain information in this category. Only groundwater that is determined to be part of a subterranean stream is subject to the same application, permit, and license procedures as surface

water users.

19.d. Because this work is still primarily to be done, I have not yet accounted for any persons and entities in this category.

20. **Category3.f: "All holders of "vested rights" to the use of groundwater under the laws of the State of Nevada within the Walker River Basin."**

20.a. While the State of Nevada reports that it has no information for this category, some applications on file with the Nevada Division of Water Resources include claims for such rights. Materials provided by the Nevada Division of Water Resources listed below contain vested water rights listing.

20.b. I have reviewed or am reviewing material from the Nevada Division of Water Resources, including the May 2000 and October 2000 computer-generated lists of water rights holders and hard copy of the permit files from the State Engineers office. The State lists some vested rights on both the electronic file and the hard copy.

20.c. To date, I have identified five persons and entities in this category.

21. **Category 3.g: "All municipal providers in Nevada within the Walker River Basin who currently use groundwater."**

21.a. Information on municipal providers may be found in the May 2000 and October 2000 water rights lists from the Nevada Division of Water Resources. I have reviewed these materials and identified the water rights owners relevant to this category.

21.b. The Nevada Department of Human Resources, Health Division, has provided a list of 130 water systems in Lyon, Mineral, Douglas and Churchill counties. Not all of these

systems are in the Walker River Basin. The list includes municipal, industrial and service businesses.

21.c. To date, I have identified six entities in this category. It is my understanding that Nevada does not define a "municipal provider." To the extent there is any dispute as to whether I have included all "municipal providers," other entities that may, for example, be small providers of water, should be included in the State lists and identified in another category.

22. **Category 3h: "All municipal providers in California within the Walker River Basin who currently use groundwater."**

22.a. The California Water Resources Control Board Hydrographic Reports will provide information on California Surface Water Rights holders by name and water rights.

22.b. The California Water Resources Control Board Diversion Reports will yield information on California Surface Water Rights holders by name and address. The report will indicate individual water files for review.

22.c. To date, I have identified one entity in this category.

23. **Category 3.i: "All industrial users in Nevada within the Walker River Basin who currently use groundwater."**

23.a. The Nevada Department of Human Resources, Health Division, has provided a list of 130 water systems in Lyon, Mineral, Douglas and Churchill counties. Not all of these systems are in the Walker River Basin. The list includes municipal, industrial and service businesses.

23.b. I have reviewed or am reviewing material from the Nevada Division of Water

Resources, including the May 2000 and October 2000 computer-generated lists of water rights holders and hard copy of the permit files from the Nevada State Engineer's Office. The State lists some rights as owned by industrial users on both the hard copy and the electronic files.

23.c. To date, I have identified eleven entities in this category.

24. **Evaluation of Resources**

24a. From a review of several of the resources listed above, it becomes apparent that no one list from any source is definitive for any one category within the CMO. When these all lists are read together, a more complete and accurate list emerges. In addition, many sources or lists purporting to relate to a specific CMO category may, in fact, include information regarding other categories as well.

24b. No source is willing to vouch for complete accuracy of its lists, even though the documents at issue are official documents prepared and compiled by them in the normal course of their duties, which may include statutory, regulatory or other authorities regarding certain water rights claims and claimants. This insecurity may be due to a number of reasons, including lack of reporting regulations or statutes requiring reporting, lack of reporting in a timely manner, lag time in getting reported information entered into databases, and clerical errors.

24c. To date, my document review has identified approximately 2,000 individuals and entities who are claimants to various water rights within one or more of the CMO categories and, therefore, potential counter-defendants. I estimate that upon

completion of my efforts, I will have identified between 3,000 and 4,000 potential counter-defendants, although I believe the final number will be closer to 3,000. One factor that may affect this total number will be the total number of domestic users in Category 3.c. I am now in the process of both adding and deleting counter-defendants as I discover additional current water rights holders and water rights holders who may have transferred their water rights to another party. I have also discovered a number of listed water rights holders who are deceased.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States of America and the State of Nevada that the foregoing is true and correct. Further, affiant sayeth not.

Executed this 9th day of March, 2001.

Dennis Becker

MAR 13 2001
COURT
DEPUTY

IN THE 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.,	)	IN EQUITY NO. C-125 SUBFILE NO. C-125-B **Memorandum of the United States of America and the Walker River Paiute Tribe Concerning the Identification of Counter-defendants by Case Management Order Categories and Use of Notices of Lis Pendens** **Exhibit 2:** **Affidavit of Elizabeth Huevler Rimer**

I, Elizabeth Huevler Rimer, hereby make the following declaration pursuant to 28 U.S.C. § 1746:

1. The facts stated in this Declaration are based on my personal knowledge and I am competent to testify to the matters set forth herein.

2. I am presently employed on a part-time basis as a Researcher/Interviewer for Labat-Anderson, Inc. I have been employed in this capacity since 1999. As set forth below, I have been a licensed investigator in the States of Wisconsin and California. The State of Colorado, where I now live, has no similar licensing requirement.

3. I was a licensed investigator in the State of Wisconsin from 1987 through 1990, where I worked initially for several investigation agencies under their respective licenses, and then worked under my own agency license as Huevler Investigations.

4. I was a licensed private investigator in the State of California from 1991 into 1997, where I worked initially for a licensed investigation company, Pacific Legal Investigations, until I obtained my own State license and worked as Westpoint Investigations. In early 1992, I continued working as a licensed investigator for a law firm, the Crow Law firm, in Sacramento, California. I left employment there in 1997 in connection with pregnancy-related health issues.

5. I have had ten years of experience in conducting a variety of investigations that have involved a significant amount of records research. I estimate that I have conducted at least 200 title searches.

6. In connection with my work for Labat-Anderson, Inc., I have been assigned to work for the United States regarding litigation in the above-captioned matter, *United States of America and Walker River Paiute Tribe v. Walker River Irrigation District.* This work includes investigation to assist with the identification of water rights holders in the Walker River Basin.

7. In October 2000, I traveled to California and Nevada where, among other things, I visited the county recorder and assessor offices in Douglas, Lyon and Mineral Counties in Nevada and Mono County in California to ascertain, among other things, the extent to which the identity of water rights holders in the Walker River Basin might be determined by searching records maintained in their offices. Following this trip, I have spoken by telephone on numerous occasions with a variety of persons in these same offices.

8. Based on my conversations with these county personnel, county employees in the recorders and assessors offices do not review the contents of deeds filed with them to ensure compliance with any applicable law governing their content other than to ascertain that they are in the proper format to be recorded. Although Nevada now requires that water rights conveyances

be recorded, NEV. REV. STAT. § 533.382, the vast majority of employees in these offices are unaware that there is a legal requirement to record the conveyance or transfer of any water rights in the form of a deed. More importantly, county employees in both states are not required to review records filed for compliance with any such laws, are not in a position to enforce such laws, and are precluded from giving legal advice to anyone filing a deed who may inquire about lawful compliance.

9. Official personnel in the recorders' office in each of the above counties in Nevada and California said generally the same thing as to whether or not deeds or evidence of ownership of water rights would be found in their records, to wit: It cannot be assumed that all water rights existing in the County will be found in the records of the county recorder and/or assessor. The sale of water rights may or may not be reflected in the deed for sale of a property. Deeds to water rights might exist but not be recorded. In some cases, water rights are deeded separately from the sale of property, sometimes years after the sale of the real property. In other cases, the sale of a water right may not be reflected on documents recorded with the County. Each and every deed recorded in each of the aforementioned counties would have to be examined for the inclusion of a water rights in its text, and even then its exclusion would not necessarily mean a water right was not sold with the property.

10. I also contacted the various County assessors' offices to learn if lists could be compiled from property, tax or other records that provide: 1. Parcel numbers and/or names of landowners for the basin areas within the county; 2. An indication of which of these parcels have improvements; and 3. An indication of which of these improvements are wells. Much of this information appears to be available from the counties and I have obtained some such

information and am in the process of obtaining additional such information.

11. Some county officials, however, caution that information in the county assessors' offices regarding the presence of wells or other improvements on properties is incomplete and limited to only those wells and other improvements recorded by property owners. Thus, use of these records may not identify all wells in the county. Further, when county records include identifications of wells, they may not identify whether the well is used for irrigation or domestic or other purposes or whether or not the wells may have been capped at some time.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States of America and the State of Nevada that the foregoing is true and correct. Further, affiant sayeth not.

Executed this 9th day of March, 2001.

Elizabeth Huevler Rimer

Elizabeth Huevler Rimer

DISTRICT COURT
DISTRICT OF NEVADA
RECEIVED

MAR 13 2001

IN THE 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.*,	)))))))))))))	IN EQUITY NO. C-125 SUBFILE NO. C-125-B **Memorandum of the United States of America and the Walker River Paiute Tribe Concerning the Identification of Counter-defendants by Case Management Order Categories and Use of Notices of Lis Pendens** **Exhibit 3:** **PROPOSED ORDER**

STATEMENT OF CLAIMS AND/OR DISCLAIMER OF CLAIMS

Each person and entity who has been served or waived service in lieu of summons in this matter shall complete the following, within 90 days of receipt, applicable:

I. CATEGORIES OF WATER RIGHTS CLAIMANTS TO BE SERVED IN THIS MATTER:

Paragraph 3 of the *Case Management Order* (Apr. 18, 2000), sets forth nine specific categories of persons and entities to be served and named as counter-defendants in this case. Please review these categories, the *Case Management Order* and *First Amended Counterclaims* filed and the United States and by the Walker River Paiute Tribe. For convenience, the nine categories of persons and entities that the Court has ordered to be served and named are listed here:

1. Category 3.a.: The successors in interest to all water rights holders under the Decree (April 14, 1936), modified, Order of Entry of Amended Final Decree to Conform to Writ of Mandate, Etc. (April 24, 1940) ("Decree")

2. Category 3.b.: All holders of surface water rights under the laws of the States of Nevada and California in the Walker River Basin who are not presently parties to this adjudication.

3. Category 3.c.: All holders of permits or certificates to pump groundwater issued by the State of Nevada and domestic users of groundwater within Sub Basins 107 (Smith Valley), 108 (Mason Valley), 110A (Schurz Subarea of the Walker Lake Valley), and 110B (Walker Lake Subarea of the Walker Lake Valley).

4. Category 3.d.: All holders of permits or certificates to pump groundwater issued by the State of Nevada within Sub Basins 106 (Antelope Valley), 109 (East Walker), and 110C (Whiskey Flat-Hawthorne Subarea of Walker Lake Groundwater Basin).

5. Category 3.e.: All users of groundwater for irrigation in California in the Walker River Basin.

6. Category 3.f.: All holders of "vested rights" to the use of groundwater under the laws of the State of Nevada within the Walker River Basin.

7. Category 3.g.: All municipal providers in Nevada within the Walker River Basin who currently use groundwater.

8. Category 3.h.: All municipal providers in California within the Walker River Basin who currently use groundwater.

9. Category 3.i.: All industrial users in Nevada within the Walker River Basin who currently use groundwater.

II. STATEMENT OF CLAIMS TO WATER:

If you claim any water in any of the categories set forth in Paragraph 3 of the CMO, you must provide the following information FOR EACH SUCH CLAIM. These requests are based on similar requirements used by the State of Nevada in its general stream adjudications, Nev. Rev. Stat. § 533.115, and the State of California in its general stream adjudications. CAL. WATER CODE § 2575.

1. The full and correct name and post office address of the claimant/counter-defendant;

2. The nature of each right or use for which you claim surface or ground water in any of the categories listed in Paragraph 3 of the CMO;

3. The date on which each such right was obtained, the governmental or other source from which this right was obtained, and the purpose of use; and

4. A description of any works of diversion or distribution and the date such works were constructed.

This information must be provided under oath. Copies of several forms for your use are attached.

III. DISCLAIMER OF INTEREST AND IDENTIFICATION OF TRANSFEREES:

If you contend that you have been served in error because you do not claim a right to water under any of these categories, you may disclaim any such interest and seek to be removed from this case. If you have transferred any right to water within any of the above nine categories, you must also provide the information specified below to identify all persons and all entities to whom you transferred any such right.

A. Disclaimer of Interest:

I, _____, hereby make the following declaration pursuant to 28 U.S.C. §1746: I have reviewed *the Case Management Order* of the Court, dated April 18, 2000, the *First Amended Counterclaim of the United States of America* (July 31, 1997), and the *First Amended Counterclaim of the Walker River Paiute Tribe* (July 31, 1997), and hereby state that I have no interest in any claims to water within the nine categories of persons and entities to be served under Paragraph 3 of the Case Management Order and disclaim any interest in this matter.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States of America and the State of Nevada/the State of California that the foregoing is true and correct. Further, affiant sayeth not.

Executed this _____ day of _____, 2001.

_____
[name]

B. Identification of Tranferees:

All parties to this case shall follow the laws of Nevada and/or California, as appropriate and applicable, regarding any requirements to notify state or local authorities of transfers or other conveyances of water rights, including, but not limited to, any requirement to notify the Nevada State Engineer or California Water Resources Control Board and any requirement to file deeds of such transfers in the appropriate county recorders' office.

If you have disclaimed any interest in this case because you have transferred water rights that are within any of the above nine categories, you are directed to provide the following information, in writing, to the United States, at the same time you return your Disclaimer of Interest.

1. The full and correct name and post office address of the claimant/counter-defendant/tranferor;

1. The full and correct name and post office address of each person or entity to which each water right is transferred;

2. An identification of each right or use for which you claim surface or ground water in any of the categories listed in Paragraph 3 of the CMO that has been transferred;

3. The date on which each such transfer occurred; and

4. A copy of the deed or other document evidencing each such transfer.

This information must be provided under oath. Several of copies of forms for your use are attached.

IV. RESPONSES UNDER THIS ORDER:

All notices made pursuant to this Order shall be sent to the Court and to:

Susan L. Schneider
United States Department of Justice
999 - 18th Street, North Tower
Suite 945
Denver, CO 80220

IT IS SO ORDERED:
Dated _____, 2001.

_____
The Honorable Robert A. McQuaid, Jr.
United States District Court Magistrate Judge