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FILED

01 MAY 25 PM 3:43

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DEPUTY

8  
9 IN THE UNITED STATES DISTRICT COURT

10 FOR THE DISTRICT OF NEVADA

11  
12 UNITED STATES OF AMERICA, ) In Equity No. C-125-ECR  
13 ) Subfile No. C-125-B  
Plaintiff, )  
14 )  
WALKER RIVER PAIUTE TRIBE, ) **POSITION PAPER OF THE WALKER**  
15 ) **RIVER IRRIGATION DISTRICT RE:**  
Plaintiff-Intervenor, ) **MAY 30, 2001, STATUS CONFERENCE**  
16 )  
17 v. )  
18 WALKER RIVER IRRIGATION DISTRICT, )  
a corporation, et al., )  
19 )  
20 Defendants. )

21 **I. INTRODUCTION.**

22 **A. Background.**

23 At the status conference held on April 20, 2001, the Court ordered the parties to modify  
24 the service documents previously submitted to the Court pursuant to a stipulation among the  
25 parties filed on August 31, 2000. The modifications were to include information concerning the  
26 following documents adopted by the Court at the April 20, 2001, status conference: 1) *Order*  
27 *Regarding Changes in Ownership of Water Right*; 2) *Notice of Change of Ownership of Water*  
28 *Right*; 3) *Order - Disclaimer of Interest*; and 4) *Disclaimer and Notice of Change of Ownership*

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1 *of Water Right*. The Court also ordered the parties to discuss Paragraph 9 of the Case  
2 Management Order, the methods by which the Tribe and United States intend to complete  
3 service and the time frames involved, and whether the identification methods used by the Tribe  
4 and United States to identify counter-defendants appears to be adequate.

5 The discussion at the status conference suggested three reasons why the United States  
6 and Tribe seek to have Paragraph 9 changed. First, they seek advance assurance that any  
7 judgment will bind all persons with an interest, apparently even those not named or not served.  
8 Second, they wish to avoid a lengthy dispute over the completeness of their "list" out of  
9 concern that it will become stale in the process. Third, they desire to complete service in  
10 phases.

11 Since the April 20, 2001 status conference, the Tribe and United States served the *Joint*  
12 *Motion of the United States of America and the Walker River Paiute Tribe for Certification of*  
13 *Defendant Classes* (the "Class Certification Motion") on May 3, 2001. The Class Certification  
14 Motion asks the Court to certify as a class: 1) all successors in interest to water right holders  
15 under the Walker River Decree; and 2) all domestic groundwater users in Nevada.

16 Paragraph 6 of the Case Management Order requires the Magistrate Judge to establish a  
17 schedule for completion of service of process. Paragraph 9 of the Case Management Order  
18 provides:

19 After the U.S./Tribe have received the information and compiled the list of  
20 parties whom they intend to serve, that list and a description of the procedures  
21 by which it was compiled shall be filed and provided to the parties who shall  
22 have such period of time as the Magistrate Judge shall determine to file  
23 objections indicating whether the list is complete and includes all such water  
24 rights claimants within the categories described in paragraph (3) above who can  
25 reasonably be identified. The Magistrate Judge shall consider and rule on all  
26 such objections. Corrections to the list of intended parties may be made during  
27 the period of the service of process upon appropriate notice and approval of the  
28 Magistrate Judge.

25 **B. Discussions Since the Last Status Conference.**

26 A conference call concerning these matters took place on April 26, 2001.  
27 Participants included counsel for the United States, the Walker River Paiute Tribe (the  
28 "Tribe"), the Walker River Irrigation District (the "District"), Lyon County and Nevada.

1 During that conference call the participants discussed the manner in which the United States  
2 and the Tribe propose to complete service. As a result of that discussion, it appeared that the  
3 United States objects to Paragraph 9 in several respects. The United States was opposed to  
4 filing and serving its list and to allowing the parties to object to its completeness. According to  
5 the United States the only issue was whether the methods used to identify counterdefendants  
6 satisfied due process.

7 The United States also proposed to serve counterdefendants in phases.  
8 However, no time frames or groupings for phases were revealed.

9 Counsel for the District expressed concern about whether the Court could make  
10 rulings on due process which would bind persons who have not been identified to the Court,  
11 who have not been served with process and who have had no opportunity to appear and be  
12 heard on the issue. Counsel for the District also expressed concerns about how service in  
13 phases would impact the period of time needed for service and the need to update  
14 identifications previously made of persons or entities to be served in later phases.

15 At the conclusion of the conference call, counsel for the United States agreed to  
16 prepare a proposal to amend Paragraph 9 of the Case Management Order. She also agreed to  
17 prepare an initial draft of modifications to previously approved service documents.

18 **C. The Submission of the United States and Tribe.**

19 By facsimile dated May 16, 2001, counsel for the United States submitted  
20 proposed modifications to the service documents and to Paragraph 9 of the Case Management  
21 Order. Counsel for the District and the United States have discussed these proposed  
22 modifications. The District has no objection to the modifications to the service documents as  
23 proposed by the United States. As set forth below, the District does, however, object to the  
24 modifications to Paragraph 9 of the Case Management Order proposed by the United States.

25 With one exception, Paragraph 9 of the Case Management Order is taken from  
26 the proposed order submitted by the United States and the Tribe on or about January 20, 2000.  
27 See Para. 7 of United States and Tribe Case Management Order. In response to that submittal  
28 the District argued that the United States and Tribe should report on the manner in which they

1 identified the parties to be served. It also objected to having to provide information on the  
2 completeness of the list with respect to persons on whom the District had little or no  
3 information, *i.e.*, claimants to underground water and claimants to surface water outside the  
4 boundaries of the District. *See* District's Opposition to Motion of the United States and Walker  
5 River Paiute Tribe to Adopt Case Management Order at pgs 10-11, Feb. 22, 2000. As can be  
6 seen Paragraph 9 of the Case Management Order included the requirement of a "description of  
7 the procedures" by which the list of defendants was compiled.

8           The United States and the Tribe propose to modify Paragraph 9 to read as  
9 follows:

10           Prior to the initiation of service of process, the Magistrate Judge shall review the  
11 documents proposed to be served and the methods by which the U.S./Tribe have  
12 identified the persons and entities described in Paragraph 3 of this Case  
13 Management Order and determine if they are reasonable and satisfy due process.  
14 Following the Court's determination that such documents and methods of  
15 identification are reasonable and satisfy due process, the U.S./Tribe may  
16 commence service. Upon notice to the Court, the U.S./Tribe may conduct  
17 service in phases (e.g., by Case Management Order category) in a manner to be  
determined by the U.S./Tribe. Following their completion of any phase of  
service, the U.S./Tribe shall provide a list of persons and entities for which they  
have attempted or have made service to the Court. Any objections or  
corrections to the list shall be made by any other party within 30 days thereafter.  
The Magistrate Judge shall consider and rule on all such objections.

18 Paragraph 9 of the Case Management Order should not be modified as proposed by the United  
19 States and the Tribe.

20 **II. THE COURT SHOULD CONSIDER POSTPONING ANY RESOLUTION OF**  
21 **THESE ISSUES UNTIL AFTER A DECISION ON THE CLASS**  
22 **CERTIFICATION MOTION.**

23           It is the District's position that the outcome of the Class Certification Motion could  
24 impact the need for and extent of any modifications to Paragraph 9. If the Court grants the  
25 Class Certification Motion, it is possible that the Tribe and United States will be allowed to  
26 serve representatives of the certified classes and to give notice to class members. This may  
27 have an impact on how Paragraph 9 must be modified. It could also affect the manner in which  
28 the Tribe and United States proceed to effect service on the counterdefendants. Under these

1 circumstances, it is the District's position that the Court consider postponing any modifications  
2 to Paragraph 9 until it decides the Class Certification Motion.

3 **III. PARAGRAPH 9 OF THE CASE MANAGEMENT ORDER DOES NOT NEED**  
4 **TO BE MODIFIED TO ALLOW SERVICE IN PHASES.**

5 There is nothing in Paragraph 9 of the Case Management Order which prevents service  
6 in phases. That does not mean, however, that the United States and Tribe should be allowed to  
7 conduct service in phases without regard to a time frame for completion of service. Service in  
8 phases should not be allowed without consideration of its impact on the need to update the  
9 "list" of persons or entities to be served in subsequent phases.

10 The District does not object to allowing the United States and Tribe to complete service  
11 in phases. However, any order allowing such service must address issues related to the time for  
12 completion of service and must insure that consideration is given to updating the identification  
13 of persons or entities to be served in subsequent phases.

14 **IV. THE COURT NEED NOT CURTAIL ITS ROLE AND ELIMINATE THE ROLE**  
15 **OF THE PARTIES AS CONTEMPLATED BY PARAGRAPH 9 IN ORDER TO**  
16 **INSURE THAT THE LIST OF COUNTERDEFENDANTS DOES NOT**  
17 **BECOME STALE.**

18 Pursuant to the original language contained in Paragraph 9 of the Case Management  
19 Order, the United States and Tribe were to file with the Court and serve on the parties a list of  
20 counterdefendants whom they intend to serve and a description of the procedures by which that  
21 list was compiled. The parties were then afforded an opportunity to file any objections  
22 indicating whether, in their judgment, the list is complete and includes all water claimants  
23 within the categories described in Paragraph 3 of the Case Management Order. Paragraph 9  
24 then required the Magistrate to rule on the objections and make corrections as necessary.  
25 Without question, it is possible that during that process ownerships and thus counterdefendants  
26 would change.

27 That does not mean, however, that the parties should have no role in the Court's  
28 evaluation of the methods employed by the United States and the Tribe in identifying

1 counterdefendants. It does not mean that neither the Court nor the parties should be allowed to  
2 even see the results of those methods until after service is complete.

3 It is the District's position that the Court has already ruled that participation by all  
4 parties and the Court in the identification process is warranted. The Court has ruled as follows  
5 with respect to Mineral County's efforts to identify parties:

6 Normally, it is true that a plaintiff exercises a fair degree of control over what  
7 entities or individuals are named as defendants in a case. In many respects,  
8 Mineral County is in the position of a plaintiff--it has been required to serve all  
9 defendants with notice of its claims. However, we cannot allow Mineral County  
10 complete freedom here to determine who the proper defendants are or should be.  
11 This case is essentially an action in rem to quiet title to property--that property  
12 being the water (or rather, the right to take the water) of the Walker River and its  
13 tributaries . . . Without all the owners of the property properly joined in the case  
14 as defendants, any reallocation of water rights that might result from the case  
15 could be subject to future attack.

16 Sub-file C-125-C at Docket No. 257 at 4. The District believes that this approach is also  
17 warranted with respect to the claims of the Tribe and United States.

18 The reasonableness of the methods employed to identify counterdefendants cannot be  
19 adequately reviewed without at least seeing the results produced by those methods, *i.e.*, the  
20 caption. Rule 10 of the Federal Rules of Civil Procedure requires a complaint to "include the  
21 names of all the parties." As such, the captions on the amended counterclaims of the Tribe and  
22 United States should include the names of all of the counterdefendants when those documents  
23 are served on the various individuals and entities with water rights.

24 That does not mean, however, that the review process should become a substitute for a  
25 motion under Rule 19 of the Federal Rules. A brief period could be allowed for any objections  
26 to the methods employed to identify counterdefendants. Assuming the methods are found  
27 reasonable, service could begin at once. As noted in Paragraph 9 of the Case Management  
28 Order, "corrections to the list . . . may be made during the period of service . . . upon  
appropriate notice and approval of the Magistrate Judge." This application of Paragraph 9  
requires little or no changes to it.



1 **V. PARAGRAPH 9 OF THE CASE MANAGEMENT ORDER DOES NOT AFFECT**  
2 **THE PROCESS FOR APPROVING THE DOCUMENTS TO BE SERVED.**

3 Paragraph 9 of the Case Management is not concerned with the approval of documents  
4 to be served. That subject is covered by Paragraphs 3 and 4 of the Case Management Order.  
5 The parties have thus far been able to stipulate on those issues. If at some point they are unable  
6 to agree, Paragraph 4 of the Case Management Order includes a process to resolve the  
7 disagreement.

8 **VI. THE COURT CANNOT DECIDE NOW THAT PERSONS NOT YET NAMED**  
9 **OR PERHAPS NOT EVER NAMED AS COUNTERDEFENDANTS WILL BE**  
10 **BOUND BY ANY FINAL JUDGMENT IN THIS MATTER.**

11 The District also questions the nature of and ramifications resulting from the due  
12 process ruling to which the United States refers in its proposed Paragraph 9. Apparently, the  
13 United States requests a due process ruling, based on the adequacy of the methods used to  
14 identify counterdefendants, that would prevent any water right holder from alleging that he or  
15 she did not receive adequate notice. In other words, the United States asks the Court to  
16 determine in advance that all water rights holders were notified of the claims of the Tribe and  
17 United States, sufficient to satisfy due process, regardless of the facts surrounding the service  
18 or lack thereof on any particular water right holder. The District believes that the Court cannot  
19 make a due process determination in advance of knowing the particular facts that may apply to  
20 some future challenge, based on due process considerations, that notice was insufficient.

21 Although Rule 4 is liberally construed, a federal court does not have jurisdiction over a  
22 defendant unless the defendant has been served properly under the Rule. Without substantial  
23 compliance with the Rule, "neither actual notice nor simply naming the defendant in the  
24 complaint will provide personal jurisdiction." *Direct Mail Spec. v. Eclat Computerized Tech.*,  
25 840 F.2d 685, (9<sup>th</sup> Cir. 1988). The Court simply cannot make that determination in a factual  
26 vacuum and certainly cannot make it without allowing the defendant to be affected by it an  
27 opportunity to be heard.

28 Paragraph 9 of the Case Management Order already contemplates consideration of the  
procedures used by the United States and the Tribe to identify counterdefendants. It provides

1 the parties and the Court an opportunity to judge the reasonableness of those procedures. It  
2 does not provide and should not be construed or amended to provide for an advance due  
3 process ruling intended to bind counterdefendants not yet named or served.

4 Dated this 25 day of May, 2001.

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CERTIFICATE OF MAILING

I certify that I am an employee of Woodburn and Wedge and that on this date, I deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing **POSITION PAPER OF THE WALKER RIVER IRRIGATION DISTRICT RE: MAY 30, 2001, STATUS CONFERENCE** in envelopes addressed to and where indicated by an asterisk by facsimile also:

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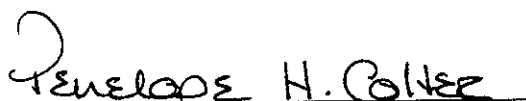
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