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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, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	In Equity No. C-125-ECR Subfile No. C-125-B **POSITION PAPER OF THE WALKER RIVER IRRIGATION DISTRICT RE: MAY 30, 2001, STATUS CONFERENCE**

I. INTRODUCTION.

A. Background.

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

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

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

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

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

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

B. <u>Discussions Since the Last Status Conference</u>.

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

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

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

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

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

C. <u>The Submission of the United States and Tribe</u>.

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

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

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

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

> Prior to the initiation of service of process, the Magistrate Judge shall review the documents proposed to be served and the methods by which the U.S./Tribe have identified the persons and entities described in Paragraph 3 of this Case Management Order and determine if they are reasonable and satisfy due process. Following the Court's determination that such documents and methods of identification are reasonable and satisfy due process, the U.S./Tribe may commence service. Upon notice to the Court, the U.S./Tribe may conduct 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

That does not mean, however, that the review process should become a substitute for a motion under Rule 19 of the Federal Rules. A brief period could be allowed for any objections to the methods employed to identify counterdefendants. Assuming the methods are found reasonable, service could begin at once. As noted in Paragraph 9 of the Case Management 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.

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

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

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

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

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

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

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

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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Dated this 25th day of May, 2001.

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