

IGNACIA S. MORENO
Assistant Attorney General
Greg Addington, Assistant U.S. Attorney
Susan L. Schneider, Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Div.
999 – 18th Street, Suite 370
Denver, Colorado 80202
(303) 844-1348
susan.schneider@usdoj.gov
Attorneys for the United States of America

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

| | | |
|-----------------------------------|---|---------------------------------------|
| UNITED STATES OF AMERICA, |) | IN EQUITY NO. C-125-RCJ |
| |) | Subproceedings: C-125-B & C-125-C |
| Plaintiff, |) | 3:73-CV-00127-RCJ-WGC & |
| |) | 3:73-CV-00128-RCJ-WGC |
| WALKER RIVER PAIUTE TRIBE, |) | |
| |) | |
| Plaintiff-Intervenor, |) | |
| vs. |) | |
| |) | |
| WALKER RIVER IRRIGATION DISTRICT, |) | Proposed MINUTES OF THE STATUS |
| a corporation, et al., |) | CONFERENCE CONDUCTED ON |
| |) | AUGUST 2, 2012 |
| Defendants. |) | |
| |) | |
| MINERAL COUNTY, |) | |
| |) | |
| Proposed-Plaintiff-Intervenor, |) | |
| |) | |
| vs. |) | |
| |) | |
| WALKER RIVER IRRIGATION DISTRICT, |) | |
| a corporation, et al. |) | |
| |) | |
| Proposed Defendants. |) | |
| |) | |

The United States of America (“United States”), Plaintiff in Case No. C-125 and Subproceeding C-125-B, submits the following proposed Minutes to the Court of its August 2, 2012 Status Conference. Pursuant to this Court’s direction, the United States consulted with the

other Plaintiffs and the Primary Defendants (collectively “Primary Parties”) to prepare and submit the following Minutes:

PROCEEDINGS: STATUS CONFERENCE

Court convenes: 10:03 a.m.

Court recesses: 12:18 p.m.

PRESENT:

HONORABLE WILLIAM G. COBB, U.S. MAGISTRATE JUDGE

Operations Manager: Lia Griffin

Court Administrator/Deputy Clerk: Katie Lynn Ogden

Reporter: Donna Davidson

Counsel Present: Susan Schneider (United States), Wes Williams Jr. (Walker River Paiute Tribe), Simeon Herskovits and Iris Thornton (Mineral County and Walker Lake Working Group), Gordon DePaoli and Dale Ferguson (Walker River Irrigation District), Therese Ure (Mica Farm; Circle Bar N Ranch and others).

Counsel and Others Appearing Telephonically: Marta Adams (State of Nevada), Stacey Simon (Mono County), Michael Neville (State of California), Karen Peterson (U.S. Board of Water Commissioners), Christopher Watson (U.S. Department of the Interior, Solicitor’s Office), George Benesch (Lyon County), Eileen Rutherford (Paralegal for the United States).

I. PRELIMINARY MATTERS:

The Court and Counsel discuss the Court’s *Minute Order* (Aug. 1, 2012; Doc. #1096; B-#1725; C-#603) concerning preparation of minutes for each status conference. The United States will prepare and circulate minutes for the Primary Parties’ review before submitting them to the Court for approval. The Court and Counsel discuss the level of detail to be included in these minutes, which initially should be more than brief descriptions of the discussions and outcome, but less than copious notes.

II. AGENDA ITEMS:

The Court and Counsel discuss the agenda items on the *United States of America’s List of Proposed Agenda Items for the Status Conference Scheduled for August 2, 2012* (July 19, 2012; Doc. #1095, B-#1723, C-#602).

1. Transfer of C-125 and its Subproceedings to Chief Judge Jones.

The Parties express their appreciation and best wishes to Judge Reed. The Court concurs and will relay their comments to Judge Reed’s staff. The Court also relays Chief Judge Jones’ interest in moving these matters forward and the need for finality for dates and issues.

2. C-125-B -- Completion of Service and Service Issues:

a. Service Report 17 (Doc. B-#1717) and Proposed Order (Doc. B-#1722).

The United States filed its 17th Service Report on June 11, 2012, and filed a proposed Order to approve this Report on July 18, 2012. (Doc. B-#1717, B-#1722). Pursuant to the *Minutes of the Status Conference* on May 9, 2012 (B-#1715), all comments or objections to the 17th Service Report were to be filed no later than July 13, 2012. The 17th Service Report also invited parties to contact the United States before this deadline to identify any concerns.

No comments or objections were filed or provided to the United States and none are raised at the Status Conference. The United States asks the Court to approve the 17th Service Report and to approve and sign the *proposed Order Concerning Seventeenth Report of the United States of America Concerning Status of Service on Certain Persons and Entities* (Doc. B-#1722). Following brief comment on its organization and content, the Court approves and signs the proposed Order. (Note: the signed Order is found at Doc. B-#1722).

b. Any remaining personal service issues.

The United States relates that the process server is re-serving certain persons and entities because he cannot locate documentation of their personal service. Ms. Schneider notified the Defendant parties on July 17 of this issue and the process server began this effort on July 18. The United States anticipates submitting a Proof of Service for these and other parties by August 17th or during the week of August 20.

The Court and parties discuss the format of the Proof of Service filings and general differences between the defendant groups in C-125-B and C-125-C. Mr. Herskovits explains that in C-125-C, Mineral County seeks to reexamine and modify the C-125 decreed water rights based on the public trust doctrine, and Mr. DePaoli adds that pursuant to Judge Reed's 1995 *Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County* (Feb. 9, 1995; Doc. #19), C-125-C also includes all claimants to the waters of the Walker river including persons and entities who appropriated water from the Walker River after entry of the C-125 Decree. Mr. Herskovits states that the service list for C-125-C established and approved by the Court and parties in 1998 includes all applicable persons/entities.

c. Possible updates to California service.

The Court and Counsel discuss this issue, which is the first of several California service-related issues addressed at the Status Conference. Subsequent to the United States' identification of persons and entities to serve, California enacted a penalty for the failure to file statements of diversions and use of all surface water rights in California, including pre-1914 rights and riparian rights. As a result, the State received significant numbers of such filing and has been unable to process all of them. The State reviewed these filings and has now provided the United States with copies of filings regarding riparian rights that appear to concern the Walker River. This category of water rights appears to fit within Paragraph 3.b of the *Case Management Order* (Apr. 18, 2000; Doc. B-#108).

The United States is still reviewing these materials but estimates they may identify a small number of additional persons and entities to serve. The United States will finish its review and mail service packages to any newly discovered defendants within the next couple of weeks. The United States requests that the Court set a telephone status conference later in August for it to report on the status of this effort, among other service-related issues. Ultimately, the Court sets a status conference for 11:00 a.m. on August. 22, 2012.

d. Addressing persons and entities that were served but never responded or appeared.

On July 24, 2012, the United States circulated a *proposed Order Addressing Notice With Regard to Parties Who Already Have Been Served but Who Have Not Appeared* to the Primary Parties for review and comment. Receiving no comments, the United States filed the proposed Order. (Aug. 1, 2012; Doc B-#1726). The United States asks the Court to approve the proposed Order. None of the Primary Parties has any comments or concerns or wishes to discuss the proposed Order. The Court finds the proposed Order is consistent with the *Case Management Order* (Apr. 18, 2000; Doc. B-#108) and Magistrate Judge Leavitt's and Judge Reed's prior service-related orders, and then approves and signs the proposed Order as submitted (Note: the signed Order is found at Doc. B-#1727).

e. Status of efforts by the United States, Walker River Paiute Tribe, State of California and Mono Country to address the following service or threshold issue raised by the State of California: whether claimants with dormant or unexercised riparian surface water rights under the laws of California and/or claimants with overlying, unexercised groundwater rights are subject to compulsory joinder. See California State Agencies' Supplementary Report (Jan. 30, 2012; B-#1057).

The Court and Counsel discuss the types of rights brought into the case to-date, and the fact that many defendants have more than one type of right, before turning to these two categories of California water rights.

i. Dormant or unexercised riparian surface water rights:

The Court and Counsel conduct an extended discussion concerning dormant or unexercised surface riparian rights in California, during which the United States reports on the status of discussions among the Primary Parties and three possible options identified to address this category of persons and entities without delaying this proceeding:

1. Serve all applicable persons and entities identified by the State of California,
2. Draft agreed-upon language to protect riparian users, including a possible revision of the *Case Management Order*.
3. Brief the issue for a decision by the Court.

The State of California and Mono County assert that dormant or unexercised surface riparian rights are real and substantial rights in the State of California and seek their protection without unduly delaying this proceeding. The discussion notes that Judge Reed did not require service on certain categories of rights, *e.g.*, California domestic users, but that dormant or unexercised

surface riparian California rights may be within Paragraph 3(b) of the *Case Management Order* (Apr. 18, 2000; Doc. B-#108).

Mono County has prepared two spreadsheets that identify parcels with riparian lands, one showing publicly-owned lands and the second showing privately-owned lands. The United States has received this material and is currently reviewing it to identify the scope of any possible additional service. If service is expensive and lengthy, the United States asks California and Mono County to consider possible language to preserve these rights without serving them.

The Court states it is inclined to require service on the holders of dormant, unexercised riparian surface rights in California because the United States now has knowledge of and access to this information. Although the State of California and Mono County oppose a revision of the *Case Management Order*, the United States asks that they consider and draft whatever protective language they would seek. WRID states this is a threshold issue brought up in 2008 and it is now 2012, and asks to move forward claiming that these riparian rights will not be affected by the Threshold Issues. The United States is currently reviewing the information provided by Mono County and asks to report to the Court and Counsel on August 22, 2012, regarding the scope of any potential service effort based on this information before the Court reaches any decision about this issue.

ii. Overlying, unexercised groundwater rights:

After discussing this category of possible California water rights, the Court and Counsel agree these rights do not fit within the terms of the *Case Management Order* (Apr. 18, 2000; Doc. B-#108). Although overlying, unexercised groundwater rights in California may need to be joined at a later time, there is no need to join them at this time. The United States will draft a proposed Order on this issue for review by the Primary Parties before submitting it to the Court.

f. Status of and Schedule for Completion of Certain Tasks.

The Court, the Court's Operations Manager, and Counsel discuss merging names to the service list and updating the docket sheet. Ms. Griffin explains that the docket sheet will include the names, but not the addresses of persons or entities that were served but did not file a Notice of Appearance. The Court confirms that C-125-B is still governed by Magistrate Judge McQuaid's *Order Regarding Service by the Clerk's Office* (Feb. 1, 2008; Doc. B-#1300) that limits service of documents during preliminary case management to attorneys who have registered for electronic service.

i. the caption and filing deadline:

Following the last Status Conference (May 9, 2012), the United States compiled a draft caption that lists the defendants in alphabetical order, except for the primary governmental defendants, which are listed at the beginning of the caption. Following discussion with Counsel, the Court ultimately decides the caption is not ready to be filed for comment pursuant to Paragraph 9 of the *Case Management Order* (Doc. B-#108 at 8) because it is still in a draft stage. The United States will update the caption based on Service Report 17 and circulate the revised draft to Ms. Griffin and the Primary Parties for comment by the end of August 2012.

ii. a list of names and addresses of persons and entities served who have filed a notice of appearance (to be provided to the Clerk's Office):

The United States has compiled a preliminary list of defendants that have appeared and will update this list based on Service Report 17, and circulate the revised list to Ms. Griffin and the Primary Parties for comment. This list will also identify defendants represented by counsel. The Court asks if anyone objects if the United States has direct contact with Ms. Griffin on this matter; no objections are voiced.

iii. a list of persons and entities served who have not filed a notice of appearance:

The United States has not finished this list but plans to do so prior to the August 22 telephone status conference.

iv. clarification of any persons or entities that have filed an appearance but were not served:

The United States informs the Court that the National Fish and Wildlife Foundation falls into this category and will likely use the recently approved substitution documents.

3. C-125-C -- Completion of Service and Service Issues

a. Mineral County's Report Concerning Status and Completion of Service and Related Service Package:

i. Consideration of this Report, its attached documents, and related Proposed Order:

Mineral County informs the Court that it has filed an updated Proposed Order Relating to Completion of Service (Aug. 1, 2012; Doc. C-#604) that reflects WRID's comments and is ready for Court approval. The Court asks if the March 2013 service completion date can be accelerated. Mr. Herskovits responds that the date was set by reviewing the history of past mailings and the time needed to respond to those denying rights, research and re-mailing of returned packages, and effect personal service on those persons/entities who do not respond. Mr. Herskovits states that Mineral County proposed a March 2013 completion date with the intent that it would not need to be extended.

ii. Consideration of filed comments and objections:

There are no objections to Doc. C-#604 and, following several questions to clarify the various attachments, the Court approves its adoption. (Note: the signed order is found at Doc. C-#605).

iii. Schedule for completing various tasks related to this Report.

The Court inquires if Mineral County's motion to intervene (as opposed to the merits of its motion) can be decided without completing service, noting that Chief Judge Jones would like to resolve this issue, and also inquires whether the Chief Judge should decide this issue with or without a Report and Recommendation from the Magistrate Judge. Although the Case Management Order requirement that threshold issues may not be litigated without completing joinder only applies in C-125-B, Judge Reed's 1995 *Order Requiring Service of and Establishing*

Briefing Schedule Regarding the Motion to Intervene of Mineral County, (Feb. 9, 1995; Doc. C-#19) addresses the sequence of litigating intervention and the merits of C-125-C.

The Court inquires if there is any opposition to intervention. WRID responds that it has not yet determined whether it believes intervention should be granted and did not know if it would object to intervention.

b. Compiling a list of *pro se* parties.

Mineral County is completing a list of *pro se* parties that have appeared and is coordinating with the Clerk's Office, although it is premature to complete this list. Mineral County states this list is not long and should be manageable for future mailings. The Court confirms that C-125-C is currently in a similar preliminary case management status as C-125-B, in that only the main parties and parties represented by counsel need to be served. *See Order Regarding Service by the Clerk's Office* (Feb. 1, 2008; Doc. B-#1300).

c. Schedule for completion of service after approval of service package.

See the discussion at 3.a.i., above.

4. Issues Common to Both Subproceedings:

a. Publication:

The Primary Parties have not yet addressed this issue. The United States requests that it be discussed during the telephone status conference on August 22, 2012. The Court inquires into the need for publication and agrees any determination regarding its scope, content and process is premature.

b. Notification protocol and use in each subproceeding:

i. E-service order

1. Establish schedule for completion of list of names and addresses of persons and entities served who have filed a notice of appearance but who are not represented by counsel.

This is the same list discussed above (2.f.ii) that will be distributed for review.

2. Completion of E-service Order.

The Court and Counsel discuss the draft Order and likely similarities to the E-service Order in the Orr Ditch case. The United States provides the Court and parties with copies of an *Order in United States v. Fallbrook Public Utility Dist.*, Civ. No. 51-1247 GT(RBB) (S.D. Ca) (Apr. 14, 2010; Doc. 5236) ("Fallbrook Order") that addresses E-service, among other things. Counsel for the United States may possibly circulate a revised draft to be discussed on August 22, 2012.

3. Establish date for mailing of Notice and Order.

This issue is premature.

ii. Establish schedule for submission of Notice and Order Regarding Election By *Pro Se* Defendants to Receive Service from the CM/ECF System.

This issue is premature.

c. Website updates.

i. Status and coordination with Clerk's Office.

Ms. Griffin addresses a variety of issues regarding a possible website, including her review of the Fallbrook Order and the website for this case that is accessed through the website for the Southern District of California ("S.D.Ca"). The Court's "IT" staffer has contacted his counterpart in the S.D.Ca. regarding implementation of the Fallbrook website. Many questions remain unresolved, including costs and personnel needed to maintain a website, how to pay for a website, and a review of the cost of mailing versus the cost of creating and maintaining a website. The United States will work with the Clerk's office on these questions.

The Court inquired how the United States envisions the use of a website. Ms. Schneider stated that it should allow filings to be viewed, possibly for a limited amount of time, and include relevant forms. The Court also inquired into the operation of the Fallbrook site and whether a password was required for access (no password is needed). The Court asked how the Orr Ditch website is set up; Mr. DePaoli replied that it is privately run by Sunshine Litigation Services and paid for by the parties. Ms. Griffin noted that the Clerk's Office mails to around 400 parties when it issues orders in the Orr Ditch case. A Website update will be on the Status Conference agenda for October 3, 2012.

ii. Schedule for Progress on Timing of Website for this Matter for Access by *Pro Se* Defendants Who Do Not Elect to Receive Service from the CM/ECF System.

This issue is premature.

5. C-125-B – Post-Service Issues and Discussion of Sequencing Issues:

a. Establishment of schedule for any additional briefing and/or oral argument for purposes of a final determination of list of threshold issues.

The Court asks the parties if, with the passage of time, whether they believe there is a need to add to or subtract from the proposed list of Threshold Issues. In addition, the Court asks when it should identify the preliminary list of Threshold Issues. The Court requests a short filing from each party by noon on Monday, August 20, 2012, that identifies their proposed threshold issues with reference to prior filings to assist his review and a brief summary of each proposed Threshold Issue.

b. Establishment of schedule for any additional briefing and/or oral argument for purposes of determining whether, and if so, when answers are required.

The Court requests that the above filing to be made by August 20, 2012, also provide a reference to prior briefs on the question of when Answers should be required.

6. C-125-C – Post-Service Issues and Discussion of Sequencing Issues: Briefing and resolution of Mineral County’s Amended Complaint in Intervention (Doc. #C-20) and Motion for Preliminary Injunction (Doc. #C-22).

The parties suggest that this issue is premature until service is complete. Nevertheless, the Court wishes to address the status of service and a briefing schedule during the August 22 and October 3, 2012 Status Conferences, and raises the possibility of beginning briefing on intervention as early as Nov. 1, 2012, with the possibility of allowing supplemental briefing after service is complete. The Status Conference agendas should include a discussion on the sequencing of briefing and possible delay of briefing on the Preliminary Injunction component of Mineral County’s motion until after intervention is addressed.

7. Any implementation issues regarding Judge Reed’s service-related Orders: the Successor-in-Interest Order in C-125-B and C-125-C; Service Cut-off Order in C-125-B; and Service Report Order in C-125-C.

Nothing at this time.

8. Such additional issues that may be identified subsequent to the filing of this agenda and/or at the status conference.

The parties identify no additional issues. The Court informs Counsel that it will enforce Special Order 109, which requires e-filers to provide a paper copy to chambers of all electronic documents that exceed 50 pages in length, and Local Rule 10.3 (a) relating to tabbing of documents.

9. Scheduling next status conference and/or informal meetings and summary.

- a. The Court sets a telephone status conference for 11 AM on August 22, 2012. Parties may call in or appear in person.
- b. The Court sets the next Status Conference for 1:30 PM on October 3, 2012.
- c. The United States will draft, circulate and then file a proposed agenda in advance of each of these Status Conferences.
- d. With respect to C-125-B, the United States will draft, circulate and file a proposed Order on overlying unexercised groundwater rights in California for discussion during the August 22, 2012, telephone status conference.
- e. With respect to C-125-B, the parties shall file by noon on Monday, August 20, 2012, a list of their proposed Threshold Issues with reference to prior filings to assist his review and a brief summary of each proposed Threshold Issue and a reference to prior briefs on the question of when Answers should be required.
- f. The Court approves and will sign the following: Doc. B-##1722 and 1726, Doc. C-#604.
- g. The United States will draft, circulate and file proposed Minutes of this Status Conference.

Dated: August 14, 2012

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

Greg Addington, Assistant United States Attorney
Susan L. Schneider, Trial Attorney
U.S. Department of Justice
Environmental and Natural Resources Div.
999 – 18th Street, Suite 370
Denver, Colorado 80202
(303) 844-1348
susan.schneider@usdoj.gov

By /s/ Susan L. Schneider
SUSAN L. SCHNEIDER

Attorneys for the United States of America

APPROVED AND ISSUED this ____ day of _____, 2012.

Hon. William G. Cobb
United States Magistrate Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2012, I electronically filed the foregoing **Proposed MINUTES OF THE STATUS CONFERENCE CONDUCTED ON AUGUST 2, 2012** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses that are registered for this case;

and I further certify that I served a copy of the forgoing to the following non CM/ECF participants by U.S. Mail, postage prepaid, this 14th day of August, 2012:

Athena Brown, Superintendent
Western Nevada Agency
Bureau of Indian Affairs
311 E. Washington Street
Carson City, NV 89701-4065

Allen Biaggi/Leo Drozdoff
Dept. of Conservation & Natural Res.
State of Nevada
901 S. Stewart St.
Suite 1003
Carson City, NV 89701

State Engineer - Division of Water
Resources
State of Nevada
901 S. Stewart St., Suite 202
Carson City, NV 89701

Dist. Attorney for Lyon County
31 South Main Street
Yerington, NV 89447

William J. Shaw
Brooke & Shaw, Ltd
P.O. Box 2860
Minden, NV 89423

George M. Keele
1692 County Road, Ste. A
Minden, NV 89423

Arthur B. Walsh
Los Angeles City Attorney's Office
PO Box 51-111
111 North Hope Street, Suite 340
Los Angeles, CA 90054

/s/ Eileen Rutherford
Senior Paralegal, USIS for
United States Department of Justice