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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, Defendants.	IN EQUITY NO. C-125-B-ECR STATE OF NEVADA'S RESPONSE TO UNITED STATES' AND WALKER RIVER PAIUTE TRIBE'S JOINT MOTION FOR LEAVE TO SERVE FIRST AMENDED COUNTERCLAIMS TO JOIN GROUND-WATER USERS, TO APPROVE FORMS FOR NOTICE AND WAIVER, AND TO APPROVE PROCEDURE FOR SERVICE OF PLEADINGS ONCE PARTIES ARE JOINED; AND, MOTION FOR MORE DEFINITE STATEMENT

The United States of America ("United States") and the Walker River Paiute Tribe ("Tribe") have jointly moved this Court to (1) grant leave to serve their First Amended Counterclaims upon surface and groundwater claimants in the Walker River Basin; (2) eliminate the requirement for personal service upon those surface water claimants Mineral County has served successfully; (3) establish a procedure for service of future pleadings upon joined parties; and (4) to approve forms for purposes of notice and waiver.

The State of Nevada ("Nevada") respectfully submits this response to the motion ("Joint Motion"). In addition, Nevada moves, pursuant to Rule 12(e) of the Federal Rules of Civil Procedure, for a more definite statement because the Joint Motion is so vague and ambiguous that Nevada simply cannot reasonably be required to frame a responsive pleading. The United States and the Tribe have made sweeping assertions of claims to groundwater throughout the Walker River Basin without specifically linking their claims to particular groundwater rights in particular locations. Because of the

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wholesale nature of the allegations, it is excessively difficult for Nevada as well as other current or potential parties to formulate a proper response. To allow the United States and the Tribe to proceed with a blanket attempt to serve all groundwater claimants along the Walker River system could subject many claimants to the significant expense of securing legal counsel to determine whether their participation in these protracted proceedings is warranted. (*See*, *McHenry, et al. v. Renne et al.*, 84 F.3d 1172, 1174 (9th Cir. 1996); F.R.C.P. 12(e) motion granted requiring the plaintiffs to file a second amended complaint which clearly and concisely explains which allegations are relevant to which defendants.)

I. Introduction

The United States and the Tribe argue that because each has filed First Amended Counterclaims asserting various claims to groundwater along the Walker River system, "[r]esolution of the question of who should be served, and which claims shall be included, before proceeding further in this matter will promote judicial economy and avoid unnecessary expenses in this case." Joint Motion, p. 5. Nevada agrees that resolution of the question of who should be served and which claims shall be included is necessary and further suggests that the onus is on the United States and the Tribe to initially assert their claims with enough reasonable specificity so as to enable the identification of claimants to be served and then to allow for the formulation of adequate responses by the parties following service.

Relying upon the supporting affidavit of Peter Pyle for the argument that groundwater in the Walker River Basin is hydrologically connected to surface water, the movants declare:

> As a practical matter such connection means that the source of water for users along the Walker River, whether as a direct diversion of surface water from the stream, or as a diversion by pumping the connected groundwater, is actually the same source of water. . . . Thus, as the purpose of these proceedings is to determine the relative rights of those claimants who are claiming water from the same source, it is necessary to join both the surface and groundwater claimants.

Joint Motion, pp. 5, 6. As articulated below, the expansion of the United States' and the Tribe's claims to include unspecified groundwater along the geographically varied Walker River system reveals many

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unresolved jurisdictional issues[1] which of necessity must be further refined before Nevada can reasonably respond to the Joint Motion.

The precise nature of the United States' and the Tribe's claims to groundwater remains unknown. For instance, are the movants seeking to resolve perceived conflicts between groundwater pumping and their surface water claims under the rubric of the *Walker River Decree* ? Are these movants seeking to reopen the sixty-year-old decree to bring under this Court's continuing jurisdiction property rights to groundwater administered in Nevada[2] exclusively by the State Engineer? Obviously, the latter objective raises significant concerns as it could conflict with Nevada's system of administering its groundwater resources. If indeed the United States and the Tribe are seeking to expand this Court's jurisdiction over the *Walker River Decree* to include claims to groundwater, then are they also proposing to serve all domestic well owners[3] along the Walker River system who have unpermitted, but nevertheless valuable, property interests in groundwater? Are the United States and the Tribe proposing to serve all as yet undetermined vested groundwater right owners?[4] Are the United States and the Tribe intending to serve all other types of water users,[5] many of whom may hold neither decreed surface water rights nor supplemental irrigation rights to groundwater administered by the State Engineer? These are some of the questions that should be answered before this Court decides the Joint Motion before it.

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[1] The Nevada State Engineer administers Nevada's groundwater code contained in Nevada Revised Statutes ("NRS") Chapter 534, which authorizes the State Engineer to regulate groundwater usage. The authority of the State Engineer over groundwater in Nevada has been part of Nevada's legal landscape with respect to artesian groundwater since 1913 and for percolating groundwater since 1939. The *Walker River Decree* adjudicated only surface water rights to the Walker River.

[2] Obviously, Nevada does not presume to speak for the State of California and its very different system for managing its water resources.

[3] The State Engineer does not issue permits for domestic wells. NRS 534.185.

[4] A claim of vested right is defined as one which pre-dates the enactment of Nevada's statutory scheme for obtaining a permit to appropriate the public waters of the state. To validate such a claim, it must be established that steps were taken to divert and apply the water to beneficial use before 1913 for artesian groundwater or before 1939 for percolating groundwater. *See*, 1913 Nev. Stat. 140; NRS Chapter 534. These pre-1913 or pre-1939 rights are also commonly referred to as pre-statutory groundwater rights. The State Engineer is authorized to conduct a basin-wide groundwater adjudication to determine the identity of the vested owners of groundwater in the Walker River Basin. *See*, NRS 533.090-533.320.

[5] Examples of other groundwater uses are stockwater, commercial, municipal, quasi-municipal, mining and recreation.

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II. Relevant Procedural Background

This Court entered the final *Walker River Decree* in 1936 establishing the rights to the surface waters of the Walker River as between the United States acting for the Walker River Paiute Tribe and competing claimants. *United States v. Walker River Irrigation District,* 1 F.Supp. 158 (D.Nev. 1935). On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed some of the district court's holdings. *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939). The decree was amended according to the mandate from the Ninth Circuit on April 24, 1940. The *Walker River Decree* adjudicated only the rights of the claimants to the surface waters of the Walker River and does not address in any way groundwater rights.

The Tribe filed its initial counterclaim on March 18, 1992, seeking the recognition of a right to store water in Weber Reservoir for use on the Walker River Indian Reservation and for a federal reserved water right for lands restored to the Reservation in 1936. These claims are in addition to the surface water rights decreed to the United States for the benefit of the Tribe in the *Walker River Decree*. The United States moved for leave to file its initial counterclaim on July 22, 1992, asserting claims similar to the Tribe's for the benefit of the Walker River Indian Reservation. Nevada and the Walker River Irrigation District ("WRID") filed motions to dismiss the counterclaims, arguing that if the claims are allowed, all existing claimants to the Walker River and its tributaries should be served. *State of Nevada's Preliminary Threshold Motions re Dismissal of Counterclaims, Additional Parties and Service of Process* (August 3, 1992), pp. 3-8; *Walker River Irrigation District's Motions to Dismiss Counterclaims; to Require Joinder of Parties; and to Require Service of Process in Accordance with Rule 4 of the Federal Rules of Civil Procedure* (August 3, 1992), p.2. The Court denied the motions to dismiss and ordered the United States and the Tribe to join as parties all the claimants to waters of the Walker River. *Order* (October 20, 1992). Since this Order, the parties have stipulated to numerous extensions of time for completion of service.

On April 7, 1994, the United States filed a *Motion for Instructions and Order*, seeking the Court's clarification of whether groundwater users should be included in the United States' and Tribe's service of process. By Order of this Court on July 8, 1994, the Court addressed this issue. At the time,

the Court provided the following summary of the United States' and Tribe's positions relative to joining groundwater rights' holders:

> [T]he U.S. and the Tribe assert that the groundwaters of the Walker River basin are hydrologically connected to and are part of a single unitary water supply with the surface waters of the Walker River and its tributaries. Based on this assertion, the U.S. and the Tribe speculate that increased groundwater use will eventually compete with surface water use, in that use of one source of supply necessarily comes at a loss to the other. On this basis, the U.S. and the Tribe assert that all water in the Walker River Basin forms a single res and to do full justice in equity, all claimants to water from that single res, be they ground or surface water claimants, must be joined.

Order (July 8, 1994), p. 5.

Rejecting the United States' and Tribe's arguments, the Court declared:

> Without deciding this issue at this time, the Court notes that even if a claim to groundwater rights was currently asserted, the U.S. has alleged no reason why joinder of all groundwater claimants in the Walker River basin is required. While there has been some indication in supporting documents [citations omitted] that groundwater sources are hydrologically connected to each other and to the Walker River, there is nothing to indicate the extent of this connection is such that withdrawal of groundwater on the restored reservation lands will have any effect on surrounding groundwater claimants.

On July 30, 1997, the Tribe filed its *First Amended Counterclaim of the Walker River Paiute Tribe* which asserts, in addition to surface water claims previously made in its original counterclaim, also advances groundwater claims for the Walker River Reservation. On July 30, 1997, the United States filed its *first Amended Counterclaim of the United States of America*. Combined with the surface water claims made in its original counterclaim, the United States asserts other claims to surface water and groundwater throughout the Walker River Basin. These claims for other federal enclaves include claims for the Hawthorne Army Ammunition Plant, the Toiyabe National Forest, the Mountain Warfare Training Center of the United States Marine Corps and the Bureau of Land Management. The United States also asserts claims for surface and groundwater for the Walker River Indian Reservation, the Yerington Reservation, the Bridgeport Paiute Indian Colony and several individual allotments.

By their Joint Motion presently before the Court, the movants question whether the United States and the Tribe must serve groundwater claimants in the Walker River Basin because of the claims to groundwater advanced in their counterclaims. As a general proposition, to the extent the United States and the Tribe make claims as part of their respective counterclaims which directly impact

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groundwater claimants in and near the Walker River Basin,[6] Nevada agrees that basic fairness and due process requires that all appropriate claimants should be afforded service of process. Despite this general proposition, however, the undifferentiated nature of the Tribe's and the United States' allegations about the general connection of the surface water resource to groundwater throughout the vast Walker River system without delineating where the specific use of groundwater arguably impacts their claims, either to surface or groundwater creates a moving target which cannot be reasonably addressed.

III. Mineral County's service of its claims should not relieve the United States and the Tribe of their responsibility for service.

Part 2 of the Joint Motion states that the United States and the Tribe are seeking "to eliminate the requirement for personal service upon those surface water claimants Mineral County has served successfully." *Joint Motion*, p. 2. As the Court is aware, Mineral County is seeking to intervene in this case so as to achieve a reallocation of the Walker River system for the benefit of Walker Lake. *See*, *United States of America v. Walker River Irrigation District*, In Equity No. C-125-ECR, Subfile C-125-C. Although the merits of Mineral County's proposed intervention have not yet been addressed, it is clear that the County's claims on behalf of Walker Lake are completely separate and distinct from those being made by the United States and the Tribe. To relieve the United States and the Tribe of responsibility to serve their claims upon claimants who have notice of the County's proposed intervention would work an absurd result. Clearly, the Court cannot reasonably grant this request.

IV. It is premature for the Court to establish a procedure for service and to approve forms for purposes of notice and waiver.

Because it is uncertain at this time as to the extent groundwater claimants are appropriately in this action, it is premature for the Court to address Parts 3 and 4 of the Joint Motion.

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[6] Arguably the Walker River Basin comprises more than one basin as well as distinct areas referred to as subareas. Without considering any applicable geographic areas in California, groundwater subareas in Nevada which are arguably the subject of the United States' and Tribe's claims include the Nevada portion of Antelope Valley, Smith Valley, Mason Valley, the East Walker Area, the Walker Lake Valley including the Schurz subarea, the Lake subarea and the Whiskey Flat-Hawthorne subarea.

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V. Conclusion

Based on the foregoing, the State of Nevada respectfully requests that the Court issue an Order directing the United States and the Tribe to provide more specifically which of their claims to groundwater require the joinder of groundwater claimants in which specific locations. The overbroad argument that groundwater and surface water are connected and all claims to surface and groundwater are derived from the same source is not sufficiently definite to afford the Court with the focus required to issue an order relative to service of groundwater claimants. Moreover, the United States and the Tribe should address whether groundwater claimants to be served include all permitted groundwater holders, domestic well owners, and vested groundwater right holders.

Dated this 5th day of November, 1998

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