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1 DANIEL E. LUNGREN, Attorney General
of the State of California
2 CHARLES W. GETZ, IV
Assistant Attorney General
3 MARY E. HACKENBRACHT
Deputy Attorney General
4 2101 Webster Street, 12th Floor
Oakland, California 94612-3049
5 Telephone: (510) 286-1356

6 Attorneys for STATE WATER RESOURCES CONTROL BOARD, et al.

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DISTRICT OF NEVADA
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10 IN THE UNITED STATES DISTRICT COURT

11 FOR THE DISTRICT OF NEVADA

12	UNITED STATES OF AMERICA,)	IN EQUITY NO. C-125
		)	Subfile No. C-125 <i>eB</i>
13	Plaintiff,)	
		)	CALIFORNIA STATE WATER
14		)	RESOURCES CONTROL BOARD'S
	WALKER RIVER PAIUTE TRIBE,	)	RESPONSE TO UNITED STATES'
15	Plaintiff-Intervenor,	)	AND WALKER RIVER PAIUTE
		)	TRIBE'S JOINT MOTION FOR
16		)	LEAVE TO SERVE FIRST
	vs.	)	AMENDED COUNTERCLAIMS, TO
17		)	JOIN GROUNDWATER USERS, TO
		)	APPROVE FORMS FOR NOTICE
18	WALKER RIVER IRRIGATION DISTRICT,	)	AND WAIVER, AND TO APPROVE
	et al.)	PROCEDURE FOR SERVICE OF
19	Defendants.)	PLEADINGS ONCE PARTIES ARE
)	JOINED

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INTRODUCTION

22 The California State Water Resources Control Board
23 ("California Water Board") files this Response to the United
24 States' ("U.S.") and Walker River Paiute Tribe's ("Tribe") Joint
25 Motion For Leave To Serve First Amended Counterclaims, To Join
26 Groundwater Users, To Approve Forms For Notice And Waiver, And To
27 Approve Procedure For Service Of Pleadings Once Parties Are
28 Joined ("Joint Motion"). In their Joint Motion, the United

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1 States and the Tribe seek an Order from this court to serve their
2 respective counterclaims upon surface water and groundwater
3 claimants in the Walker River basin. They also seek an order to
4 eliminate the requirement for personal service upon the surface
5 water claimants successfully served by Mineral County. They seek
6 an order to establish a procedure for service of pleadings upon
7 joined parties and finally to approve forms for purposes of
8 notice and waiver.

9 The California Water Board opposes joinder of all
10 groundwater claimants until the U.S. and the Tribe satisfy the
11 guidelines suggested by the Court in its July 8, 1994, order.
12 That is, the U.S. and the Tribe must not only assert groundwater
13 claims, which they have done in their amended counterclaims, but
14 they must also show that there is a genuine conflict between the
15 groundwater claimants in the Walker River Basin and the water
16 claims of the U.S. and the Tribe. Rather than incur the expense
17 and delay of serving all groundwater claimants, the California
18 Water Board suggests that a further showing that the claims of
19 the U.S. and the Tribe will affect groundwater claimants is
20 necessary before the claimants can be joined under Rule 19.

21 DISCUSSION

22 I. SERVICE OF PROCESS AND JOINDER OF PARTIES

23 The Joint Motion raises the question whether all groundwater
24 claimants should be served.¹ As stated by the U. S. and the

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26 1. The Joint Motion does not define what is meant by
27 "groundwater". Under California law, some underground waters are
28 considered to be part of a stream system, while most underground
waters are not. The California Water Board's authority to issue
water rights permits and to determine water rights as part of a
statutory adjudication applies to underground waters if they are
part of an "underground stream flowing through known and definite

1 Tribe, "Resolution of the question of who should be served, and
2 which claims shall be included, before proceeding further in this
3 matter will promote judicial economy and avoid unnecessary
4 expenses in this case." (Joint Motion 5:14-16.)

5 In the Court's July 8, 1994 Order (Doc. #30), the Court
6 addressed the question whether all groundwater claimants should
7 be joined as parties to the Amended Counterclaims, which at that
8 time asserted additional water rights for the Walker River
9 Reservation. The Court reviewed the question in the context of
10 groundwater claims and in the context of surface water claims.

11 The Court ruled that until the United States and/or the
12 Tribe asserted a claim to groundwater rights, it would be
13 erroneous to require joinder under Rule 19 based upon mere
14 speculation. (July 8, 1994 Order, 6:2 - 8, citing ARMCO Steel
15 Corp. v. United States, 490 F.2d 688, 690 (8th Cir. 1974) (district
16 court erred in ordering joinder on hypothetical state of facts).)
17 In its Order, the Court suggested a two-prong test for including
18 groundwater claimants as counterdefendants. First, the
19 counterclaims had to assert a claim to groundwater. Second, even
20 if a claim to groundwater rights was asserted, one would have to
21 show why joinder of all groundwater claimants in the Walker River
22 basin is required.

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24 channels." (Cal. Wat. Code, §§ 1200, 2500.) For example, the
25 underflow of a stream may be subject to the same rules as surface
26 flows if the underflow is confined in a definite channel.
27 Underground streams in known and definite channels may be
28 distinguished from other underground waters, which are classified
as "percolating groundwater." (See generally 2 Slater,
California Water Law and Policy (1995) §§ 11.01 - 11.03, pp. 11-7
through 11-11.) References to "groundwater" often are intended
to mean "percolating groundwater". (See Cal. Wat. Code, § 10752,
subd. (a) (defining "groundwater" to exclude underground streams
in known and definite channels.)

1 The Court went on to discuss the showing that may be
2 required to justify joinder, without deciding the issue at the
3 time. "While there has been some indication in supporting
4 documents (see exhibits attached to Doc. #29) that groundwater
5 sources are connected to each other and to the Walker River,
6 there is nothing to indicate the extent of this connection is
7 such that withdrawal of groundwater will have any effect on
8 surrounding groundwater claimants." (Id. at 6:12-18.) The Court
9 stated that "It is possible that groundwater withdrawal on the
10 reservation lands will affect other groundwater claimants, but it
11 is a truism that nearly anything is possible. The U.S. must
12 offer more than a mere possibility to justify joinder under
13 Fed.R.Civ.P. 19." (Id. at 6:19 - 23.)

14 The Court's discussion of joinder within the context of the
15 U.S. and the Tribe surface water claims is complementary. The
16 Court ruled that the U.S. and the Tribe had not alleged the
17 necessary relationship between the surface water claims and
18 groundwater claimants. The test spelled out by the Court is that
19 "joinder of the groundwater claimants is required under Rule 19
20 only if groundwater claims and rights somehow affect the water
21 rights of the parties who have or claim rights to the waters of
22 the Walker River, or vice versa." (Id. at 10:12 - 15.)

23 With respect to the requisite showing, the Court states "As
24 discussed previously, the U.S. and the Tribe have only managed to
25 indicate that there is some degree of hydrological connection
26 between the surface waters of the Walker River and the ground
27 waters of the Walker River basin. Establishing the existence of
28 such a connection merely establishes the possibility that surface

1 water rights will come into conflict and competition with ground
2 water rights. Numerous other factors must also be considered in
3 determining if there is any likelihood of conflict between the
4 surface and groundwater claimants.

5 If there were any currently ascertainable conflict such
6 might be the basis of new litigation. Neither the U.S. nor the
7 Tribe indicate that there is any current conflict between surface
8 and ground water claimants.

9 In light of the fact that the additional water rights
10 claimed by the U.S. and the Tribe will in all likelihood be small
11 in relation tot he total amount of water appropriated from the
12 Walker River, it is unreasonable to assume that these additional
13 water rights will be the figurative straw that breaks the camel's
14 back. Without more specific allegations, this Court will not
15 assume the claimed right to additional water from the Walker
16 River will tip the scales and result in competition between
17 surface and ground water claimants." (Id. at 10:17 - 11:13.)

18 Judged against the court's July 1994 discussion about
19 joinder of groundwater claimants, the current joint motion
20 satisfies the requirement that the U.S. and the Tribe assert
21 groundwater claims before joinder can be granted. The joint
22 motion, however, lacks sufficient explanation about why all
23 groundwater claimants must be joined. More specifically, the
24 motion lacks sufficient information to show that there is a
25 conflict between the alleged groundwater claims and groundwater
26 claimants.

27 The Affidavit of Peter M. Pyle discusses the hydrological
28 connection between groundwater in the Basin and surface water.

1 (Affidavit of Peter M. Pyle at 2-4 (Aug. 8, 1998)
2 ("Pyle") (Attachment No. 1 to the Joint Motion.) What is missing,
3 however, is a nexus between the information in the Pyle Affidavit
4 and each of the U.S. and Tribe's claims. There well may be
5 evidence available to show that for each of the U.S. and Tribe's
6 claims, there is a conflicting groundwater claimant or that each
7 groundwater claimant in the Basin will be affected by one or more
8 of the U.S. or Tribe's claims such that joinder of all claimants
9 is required under Rule 19. However, it is not clear from the
10 First Amended Counterclaims, the Pyle Affidavit or the Joint
11 Motion that the U.S.'s and the Tribe's claims for surface water
12 and groundwater will affect the groundwater users in the area.
13 For example, it is not clear that there is a conflict with
14 surrounding groundwater claimants about the asserted reserved
15 water rights at the Bridgeport Paiute Indian Colony (see U.S.
16 First Amended Counterclaim, Fifth Claim for Relief, at 15:7 -
17 21).

18 Before the parties incur the expense of serving all
19 groundwater claimants and before the scope of the case is
20 expanded perhaps exponentially, the necessity for joining
21 groundwater claimants should be demonstrated by showing that the
22 U.S. and the Tribe's claims affect these claimants.

23 **II. NOTICE AND WAIVER, AND PROCEDURE FOR SERVICE**
24 **OF PLEADINGS ONCE PARTIES ARE JOINED**

25 These issues should be addressed after the parties and the
26 court have a better understanding of the number and types of
27 groundwater claimants that will be joined.

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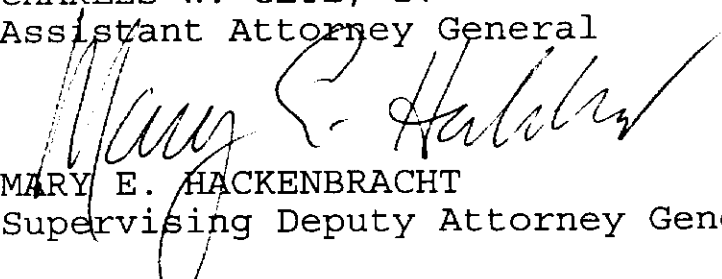
CONCLUSION

At this time, the U.S. and the Tribe have not adequately demonstrated that the groundwater and surface water claims in their respective First Amended Counterclaims create a conflict with groundwater claimants in the Walker River Basin. Until such time as it is shown that each of the U.S. and Tribe's claims will have an effect on groundwater claimants, the joinder of groundwater claimants is not required.

DATED: November 6, 1998

DANIEL E. LUNGREN, Attorney General
of the State of California

CHARLES W. GETZ, IV
Assistant Attorney General



MARY E. HACKENBRACHT
Supervising Deputy Attorney General

Attorneys for State Water Resources
Control Board, et al.

PROOF OF SERVICE

CASE: *United States of America, et al. v. Walker River Irrigation District, et al.*

NO: In Equity No. C-125, Subfile No. C

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 2101 Webster Street, 12th Floor, Oakland, California 94612-3049. On October 6, 1998, I served the following document(s):

**CALIFORNIA STATE WATER RESOURCES CONTROL BOARD'S
RESPONSE TO UNITED STATES' AND WALKER RIVER PAIUTE
TRIBE'S JOINT MOTION FOR LEAVE TO SERVE FIRST AMENDED
COUNTERCLAIMS, TO JOIN GROUNDWATER USERS, TO
APPROVE FORMS FOR NOTICE AND WAIVER, AND TO APPROVE
PROCEDURE FOR SERVICE OF PLEADINGS ONCE PARTIES ARE
JOINED**

on the parties through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

- (A) **By First Class Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.
- (B) **By Messenger Service:** I caused each such envelope to be delivered by a courier employed by Professional Messenger, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address on the date last written below.
- (C) **By Overnight Mail:** I caused each such envelope to be placed in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for.
- (D) **By Facsimile:** I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action by transmitting a true copy to the following fax numbers listed under each addressee below.
- (E) **By Personal Service:** I caused such envelope to be hand delivered.

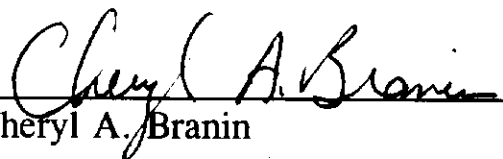
Service List

*United States of America v. Walker River Paiute Tribe
v. Walker River Irrigation District
In Equity No. C-125*

Type of Service	Addressee	Type of Service	Addressee
A	GORDON H. DePAOLI Woodburn, Wedge and Jeppson One East First St., Suite 1600 P. O. Box 2311 Reno, NV 89505 (Attorney for Walker River Irrigation District)	A	ALICE WALKER Greene, Meyer & McElroy 1007 Pearl Street, #220 Boulder, CO 80302 (Attorney for Walker River Paiute Tribe)
A	DAVID E. MOSER McCutchen, Doyle, Brown & Enerson Three Embarcadero Center San Francisco, CA 94111 (Attorney for Cal Trout)	A	KATHRYN E. LANDRETH United States Attorney JOHN P. LANGE U.S. Department of Justice Environment and Natural Resources Division 999 - 18th Street, Suite 945 Denver, CO 80202 (Attorneys for United States of America)
A	LINDA A. BOWMAN Bowman & Robinson 499 West Plumb Lane, Suite 4 Reno, NV 89509 (Attorney for U.S. Board of Commissioners)	A	MICHAEL NEVILLE Deputy Attorney General Attorney General's Office 50 Fremont Street, Suite 300 San Francisco, CA 94105-2239 (Attorney for California Department of Fish and Game)
A	GEORGE N. BENESCH 210 Marsh Ave., Suite 105 P. O. Box 3498 Reno, NV 89505	A	JAMES S. SPOO TREVA J. HEARNE Zeh, Polaha, Spoo & Hearne 575 Forest Street Reno, NV 89509 (Attorneys for Mineral County)
A	MARTA ADAMS Deputy Attorney General Office of the Attorney General 100 N. Carson Street Carson City, NV 89701-4717 (Attorney for State of Nevada)	A	GARRY STONE 290 South Arlingtn Reno, NV 89510
A	R. MICHAEL TURNIPSEED, P.E. Division of Water Resources State of Nevada 123 West Nye Lane Carson City, NV 89710	A	SHIRLEY A. SMITH Assistant U.S. Attorney 100 West Libery, Suite 600 Reno, NV 89501 (Attorney for United States of America)

Type of Service	Addressee	Type of Service	Addressee
A	JIM WEISHAAPT General Manager Walker River Irrigation District P. O. Box 820 Yerington, NV 89447	A	DAN FRINK California Water Resources Control Board P. O. Box 100 Sacramento, CA 95801 (Attorneys for California)
A	ROGER BEZAYIFF Chief Deputy Water Commissioner U.S. Bd of Water Commissioners P. O. Box 853 Yerington, NV 89447	A	EVAN BEAVERS Beavers & Young 1616 Hwy. 395 P. O. Box 486 Minden, NV 89423
A	JOHN KRAMER Department of Water Resources 1416 Ninth Street Sacramento, CA 95814	A	ROSS deLIPKAU Marshall, Hill, Cassas & deLipkau P. O. Box 2790 Reno, NV 89505
A	RICHARD R. GREENFIELD Office of the Field Solicitor U.S. Department of the Interior Two North Central Avenue, Suite 1130 Phoenix, AZ 85004-2383	A	ROBERT L. HUNTER, Superintendent Western Nevada Agency Bureau of Indian Affairs 1677 Hot Springs Road Carson City, CA 89706
A	ROBERT C. ANDERSON TIMOTHY A. LUKAS Hale, Lane, Peek, Dennison, Howard, Anderson & Pearl 100 W. Liberty St., 10th Fl. P. O. Box 3237 Reno, NV 89505		

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on October 6, 1998 at Oakland, California.


Cheryl A. Branin