ORIGINAL

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

Attorneys for STATE WATER RESOURCES CONTROL BOARD, et al.

FILED

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, **Plaintiff,** **WALKER RIVER PAIUTE TRIBE,** **Plaintiff-Intervenor,** **vs.** **WALKER RIVER IRRIGATION DISTRICT, et al.** **Defendants.**	**IN EQUITY NO. C-125** **Subfile No. C-125 B** **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**

INTRODUCTION

The California State Water Resources Control Board ("California Water Board") files this Response to the United States' ("U.S.") and Walker River Paiute Tribe's ("Tribe") 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 ("Joint Motion"). In their Joint Motion, the United

65

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

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

DISCUSSION

I. SERVICE OF PROCESS AND JOINDER OF PARTIES

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

---

1. The Joint Motion does not define what is meant by "groundwater". Under California law, some underground waters are 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

Tribe, "Resolution 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 5:14-16.)

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

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

---

channels." (Cal. Wat. Code, §§ 1200, 2500.) For example, the underflow of a stream may be subject to the same rules as surface flows if the underflow is confined in a definite channel. Underground streams in known and definite channels may be 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.)

The Court went on to discuss the showing that may be required to justify joinder, without deciding the issue at the time. "While there has been some indication in supporting documents (see exhibits attached to Doc. #29) that groundwater sources are 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 will have any effect on surrounding groundwater claimants." (Id. at 6:12-18.) The Court stated that "It is possible that groundwater withdrawal on the reservation lands will affect other groundwater claimants, but it is a truism that nearly anything is possible. The U.S. must offer more than a mere possibility to justify joinder under Fed.R.Civ.P. 19." (Id. at 6:19 - 23.)

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

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

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

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

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

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

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

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

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

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

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

///

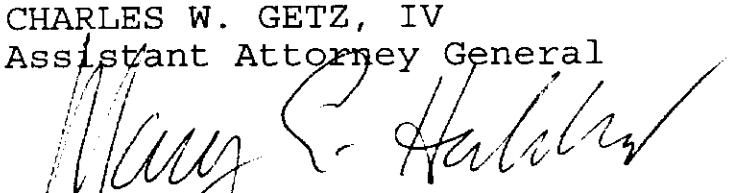
CONCLUSION

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 Overnite 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
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	DAVID E. MOSER McCutchen, Doyle, Brown & Enerson Three Embarcadero Center San Francisco, CA 94111 (Attorney for Cal Trout)
A	LINDA A. BOWMAN Bowman & Robinson 499 West Plumb Lane, Suite 4 Reno, NV 89509 (Attorney for U.S. Board of Commissioners)
A	GEORGE N. BENESCH 210 Marsh Ave., Suite 105 P. O. Box 3498 Reno, NV 89505
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	R. MICHAEL TURNIPSEED, P.E. Division of Water Resources State of Nevada 123 West Nye Lane Carson City, NV 89710

Type of Service	Addressee
A	ALICE WALKER Greene, Meyer & McElroy 1007 Pearl Street, #220 Boulder, CO 80302 (Attorney for Walker River Paiute Tribe)
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	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	JAMES S. SPOO TREVA J. HEARNE Zeh, Polaha, Spoo & Hearne 575 Forest Street Reno, NV 89509 (Attorneys for Mineral County)
A	GARRY STONE 290 South Arlingtn Reno, NV 89510
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
A	JIM WEISHAUPT General Manager Walker River Irrigation District P. O. Box 820 Yerington, NV 89447
A	ROGER BEZAYIFF Chief Deputy Water Commissioner U.S. Bd of Water Commissioners P. O. Box 853 Yerington, NV 89447
A	JOHN KRAMER Department of Water Resources 1416 Ninth Street Sacramento, CA 95814
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 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

Type of Service	Addressee
A	DAN FRINK California Water Resources Control Board P. O. Box 100 Sacramento, CA 95801 (Attorneys for California)
A	EVAN BEAVERS Beavers & Young 1616 Hwy. 395 P. O. Box 486 Minden, NV 89423
A	ROSS deLIPKAU Marshall, Hill, Cassas & deLipkau P. O. Box 2790 Reno, NV 89505
A	ROBERT L. HUNTER, Superintendent Western Nevada Agency Bureau of Indian Affairs 1677 Hot Springs Road Carson City, CA 89706

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