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FILED

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 SUBFILE NO. C-125-B **MOTION FOR SCHEDULING AND PLANNING CONFERENCE**
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	

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Pursuant to Rule 16(b) of the Federal Rules of Civil Procedure and Rules 16-1 and 16-2 of the Rules of Practice for the United States District Court for the District of Nevada, the Walker River Irrigation District moves the Court for an order for a scheduling and planning conference in this matter to discuss and consider the issues raised by the United States and Walker River Paiute Tribe in their *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.*

This motion is made to expedite the disposition of this matter by bringing the Court and the parties together to discuss and consider the complicated issues related to joining as counter-defendants all claimants to groundwater within the Walker River Basin and to proceeding with a comprehensive adjudication of groundwater rights within the Walker River Basin. It is extremely important that the Court and the parties carefully consider and resolve the issues of who should be served and which claims should be included in order to promote judicial economy and avoid unnecessary expenses.

This motion is supported by all of the pleadings and papers on file in this matter and the accompanying *Points and Authorities in Support of Motion for Scheduling and Planning Conference and in 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.*

DATED this 9th day of November, 1998.

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CERTIFICATE OF MAILING

Pursuant to FRCP 5(b), I hereby certify that I am an employee of the law firm of Woodburn and Wedge and that on this 9th day of November, 1998, I deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing ***Motion for Scheduling and Planning Conference*** in a sealed envelope addressed to the following:

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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. UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	IN EQUITY NO. C-125 SUBFILE NO. C-125-B **WALKER RIVER IRRIGATION DISTRICT'S POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SCHEDULING AND PLANNING CONFERENCE AND IN 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 FOR PLEADINGS ONCE PARTIES ARE JOINED**

I. INTRODUCTION.

The United States and Walker River Paiute Tribe (the "Tribe") have filed a Joint Motion for an Order: (1) for leave to serve their First Amended Counterclaims upon surface water and groundwater claimants in the Walker River Basin; (2) to eliminate the requirement for personal service upon those surface water claimants Mineral County has served successfully; (3) to establish a procedure for service of pleadings on joined parties; and (4) to approve forms for purposes of notice and waiver. Simultaneous with filing its response to the Joint Motion, the Walker River Irrigation District (the "District") has moved the Court for a scheduling and planning conference so that the Court and parties can discuss these important and complex issues. As succinctly stated by the Tribe and the United States in their Joint Motion, the "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 at 5. Until the questions of who should be served and which claims should be included are resolved, it is premature to establish a procedure for service of pleadings on joined parties and to consider and approve forms for notice and waiver.

The issues of whether groundwater claimants should be joined and whether claims to groundwater should even proceed at this time are complex. In order to consider these important issues, it is helpful to briefly recite the history of this litigation.

II. STATEMENT OF FACTS.

A. Background.

1. Early Attempts to Determine Claims to the Waters of the Walker River – *Miller & Lux v. Rickey*; *Pacific Livestock v. Rickey*.

The history of litigation involving claims to the waters of the Walker River and its tributaries illustrates the need for careful consideration of the issues presented by the Joint Motion. On June 10, 1902, Miller & Lux brought an action in the United States District Court for the District of Nevada against Rickey and others to enjoin interference with its use of water of the Walker River in Nevada. On October 15, 1904, Rickey Land & Cattle Co. began two actions in a California state court against Miller & Lux to quiet its title and to establish its prior right to waters

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on the East and West Forks of the Walker River. *See*, *Rickey Land & Cattle Company v. Miller & Lux*, 218 U.S. 258 (1910); *see also*, *Miller & Lux v. Rickey*, 127 F. 573 (D. Nev. 1904); *Miller & Lux v. Rickey*, 146 F. 574 (D. Nev. 1906); *Rickey Land & Cattle Co. v. Miller & Lux*, 152 F. 11 (9th Cir. 1907).

In 1906, Miller & Lux and other defendants sought to enjoin the proceedings in the California actions on the grounds that the United States District Court for the District of Nevada had acquired prior jurisdiction. The Supreme Court of the United States agreed and prosecution of the California actions was enjoined. *Rickey*, 218 U.S. 258. Ultimately, a final decree (the "Rickey Decree") was entered by the United States District Court for the District of Nevada in 1919. *See*, *Pacific Livestock Company v. Thomas Rickey, et al.*, No. 731, Final Decree (D. Nev. 1919).

2. The Walker River Decree – *United States of America v. Walker River Irrigation District, et al.*

The United States, the Tribe and many other claimants to the waters of the Walker River had not been joined as parties in the *Rickey* litigation. Their rights were not determined by the Rickey Decree. Therefore, on July 3, 1924, the United States commenced *United States of America v. Walker River Irrigation District, et al.*, in the United States District Court for the District of Nevada, In Equity No. C-125. An amended complaint was filed on March 19, 1926. Some 253 defendants, all appropriators and users of waters of the Walker River, East Walker River, West Walker River and the tributaries thereof, were named as defendants. *See*, *United States v. Walker River Irrigation District, et al.*, 11 F. Supp. 158, 159 (D. Nev. 1935).

The action included persons and entities who had been parties to or were successors to parties to the *Rickey* litigation. It also included persons who had not been parties to the *Rickey* litigation, although they clearly had established rights to waters of the Walker River prior to the commencement of the *Rickey* litigation. Finally, it included persons who had acquired rights to the waters of the Walker River after commencement of the *Rickey* litigation. *See*, Walker River Decree at 10-50, 50-63A and 63A-70.

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The United States alleged that because of its ownership of the Walker River Indian Reservation, which had been reserved and set aside for the Tribe, it was the owner of 150 cubic feet per second of waters of the Walker River and its tributaries. It sought to quiet title thereto and to restrain defendants from interfering with the alleged right. 11 F. Supp. at 159. Issues raised by the pleadings were referred to a special master who took testimony intermittently from March 22, 1928 through December 30, 1932. Commencing May 22, 1933, hearings were held before the court on exceptions to the report and findings of the special master. 11 F. Supp. at 162.

The United States relied upon the ruling of the Supreme Court in *Winters v. the United States*, 207 U.S. 564 (1908). The trial court ruled that the United States' claim to water for the Walker River Indian Reservation had to be adjudged, measured and administered in accordance with the laws of appropriation as established by the State of Nevada. 11 F. Supp. at 167; *see also, United States v. Walker River Irrigation District*, 14 F. Supp. 11 (D. Nev. 1936).

On June 6, 1935, the Walker River Decree was entered in this action and an appeal followed to the Ninth Circuit Court of Appeals. That court held that the rule of law established in *Winters v. United States* applied and that there had been an implied reservation of water at the time the Reservation was set aside. The Court of Appeals accepted the original report of the special master with respect to the quantity of water reserved. *See, United States v. Walker River Irrigation District*, 104 F.2d 334, 339-40 (9th Cir. 1939). The Walker River Decree was amended to conform to be mandate of the Court of Appeals on April 24, 1940.

B. Intervention by the Tribe.

On or about September 30, 1987, the Tribe sought permission to intervene in this action in connection with the then pending Petition to Establish Rules and Regulations Concerning Change Applications under the Walker River Decree. By Order entered March 2, 1988, the Tribe was granted permission to intervene as a matter of right. Because its intervention was based upon the water right which the United States had established for the benefit of its Reservation under the Walker River Decree, the Tribe has been recognized as a "plaintiff-intervenor."

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C. The Petition of the Walker River Irrigation District.

On January 9, 1991, the District filed its Petition for Declaratory and Injunctive Relief; Request for Order to Show Cause; or in the Alternative to Change the Point of Diversion against the California State Water Resources Control Board and its members. That Petition was Subfile No. C-125-A.

The only named respondents to the First Amended Petition were the California State Water Resources Control Board and its individual members. The District's first claim for relief involved three orders issued by the California State Water Resources Control Board with respect to water rights licenses for Bridgeport and Topaz Reservoirs. The District contended that those orders were contrary to and inconsistent with the Walker River Decree and sought a declaration from the Court to that effect. It also sought a declaration that the respondents lacked the power to enter and enforce orders which are contrary to and inconsistent with the Walker River Decree and which interfere with the jurisdiction of this Court. The District sought an injunction permanently enjoining the Board and its members from enforcing those portions of the orders which the Court finds inconsistent with and contrary to the Walker River Decree or interfere with the jurisdiction of the Court.

D. The Counterclaims.

The Tribe served an answer, counterclaim and cross-claim in response to the District's First Amended Petition. The United States subsequently filed a Motion for Leave to File Counterclaim. The Counterclaims sought recognition of a right to store water in Weber Reservoir for use on lands of the Walker River Indian Reservation and of a federal reserved water right to use water on lands added to the Reservation in 1936. These claimed rights were alleged to be in addition to the right awarded to the Untied States for the benefit of the Reservation by the Walker River Decree. All water users on the Walker River and its tributaries were alleged to be counterdefendants, although at that time they were not individually named, identified or served.

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E. The Motions to Dismiss the Counterclaims or, in the Alternative, to Require Joinder and/or Substitution of Claimants to the Walker River or Its Tributaries.

On or about October 5, 1992, the District moved to dismiss the counterclaims. (Document #5). Alternatively, the District moved to require the Tribe and the United States to join all claimants to the water of the Walker River as defendants in the action and to serve them in accordance with Fed. R. Civ. P. 4. (Document #5). The State of Nevada filed motions very similar to the District's motions. (Document #16).

On October 27, 1992, the Court entered an order (Document #15) denying the Motion to Dismiss and allowing the Tribe's and United States' counterclaims to be filed as "cross-claims." The Court granted the motions to require joinder and service of process in accordance with Rule 4 on all claimants to the waters of the Walker River and its tributaries.

F. The Motion for Instructions.

In mid-1994, the United States asked the Court whether its order of October 27, 1992 (Document #15) requiring that "all claimants to the water of Walker River and its tributaries must be joined as parties to the [Tribe's counterclaim]" extended to groundwater claimants and users in the Walker River Basin. (Document #23). In its Motion for Instructions (Document #23), the United States took no position, but merely indicated its need for clarification. Subsequently, the Tribe in its Response (Document #26) took the position that groundwater claimants must be joined as necessary parties pursuant to Fed. R. Civ. P. 19. Thereafter, the United States in its Reply (Document #29) abandoned its neutral posture and also took the position that groundwater claimants in the Walker River Basin must be joined as necessary parties.

The United States and the Tribe asserted that the groundwater of the Walker River Basin is hydrologically connected to and is part of a single unitary water supply with the surface waters of the Walker River and its tributaries. Based on that assertion, the United States and the Tribe speculated that increased groundwater use would eventually compete with surface water use. On this basis, the United States and the Tribe asserted that all water in the Walker River Basin forms a single *res*, and that, therefore, all claimants to water from that single *res*, be they ground or surface water claimants, must be joined.

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By Order dated July 8, 1994 (Document #30), the Court determined that its prior order did not require joinder of groundwater claimants and affirmatively denied the request to join such claimants. The Court's rationale for that decision as set forth in the July 8, 1994 Order is directly relevant here.

First, the Court concluded that the Walker River Decree adjudicated only the rights of the claimants to the surface waters of the Walker River and "did not concern itself in any way with underground water rights." (Document #30 at 3). Second, the Court concluded that neither the Tribe nor the United States had up to that time asserted any claim to groundwater, and even if they had, there was "nothing to indicate that withdrawal of groundwater on the restored reservation lands will have any effect on surrounding groundwater claimants." *Id.* at 6.

Next the Court analyzed whether the claims for additional surface water which the Tribe and the United States were making required joinder of groundwater claimants. The Court pointed out that throughout the litigation, the Court considered groundwater separate from surface water. It noted that Nevada state law treats surface and groundwater as separate, although related, sources. (Document #30 at 7).

Despite those facts, however, the Court noted that joinder of groundwater claimants would be required if: (1) in their absence complete relief could not be accorded among those already parties or (2) their claims to groundwater relate to the subject of this action (the United States' and the Tribe's claims to waters from the Walker River) and proceeding without the groundwater claimants might: (i) as a practical matter impair or impede their ability to protect their interests or (ii) leave any of the current parties subject to a risk of multiple or inconsistent obligations. The Court went on to say that groundwater claimants are necessary to accord complete relief to those already parties only if their water rights somehow affect the water rights of the parties. The Court concluded 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 water of the Walker River or vise versa. (Document #30 at 9-10).

The Court then considered the relationship that had been alleged by the United States and the Tribe between surface water and groundwater. It noted that establishing the existence of

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hydrologic connection between surface water and groundwater merely establishes the possibility that surface water rights may come into conflict in competition with groundwater rights.[1] It stated that numerous other factors must also be considered in determining if there is any likelihood of conflict between the surface water and groundwater claimants. It stated that if there were currently any ascertainable conflict, such might be the basis for new litigation. *Id.* at 10-11.

The Court pointed out that the additional water rights claimed by the United States and the Tribe would "in all likelihood, be small in relation to the total amount of water appropriated from the Walker River" and it was, therefore, "unreasonable to assume that the additional water rights would be the figurative straw that breaks the camel's back." (Document #30 at11). The Court refused to speculate that the claimed right to additional surface water from the Walker River would "tip the scales and result in competition between the surface and groundwater claimants." The Court, therefore, denied the request to join groundwater claimants. *Id.* at 11-12.

G. The Amended Counterclaims and the Pyle Affidavit.

Part of the foundation for the Joint Motion is the Amended Counterclaims filed by the Tribe and United States on or about July 30, 1997. The caption to both Amended Counterclaims lists several hundred individuals and entities who are alleged to be "claimants to the waters of the Walker River and its tributaries, including groundwater." *See*, Tribe's Amended Counterclaim at 1-15; United States' Amended Counterclaim at 1-11. It is not clear whether "groundwater claimants" is intended to include persons or entities holding water rights permitted by the Nevada State Engineer, holding vested groundwater rights and holding domestic well rights. *See*, N.R.S § 534.080; N.R.S § 534.100; N.R.S. § 534.185. It is also not clear who is a "groundwater claimant" in California in light of the fact that California does not regulate groundwater pumping.

In addition to seeking "a right to store water in Weber Reservoir and a reserved right under federal law to use surface water from the Walker River on land added to the Reservation in 1936," both Amended Counterclaims seek a right reserved under federal law to use groundwater underlying

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[1]It is important to note that since entry of the Decree, even in consecutive drought years, no party has ever brought a proceeding before this Court alleging that groundwater pumping was depleting surface water rights recognized by the Decree.

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and adjacent to the lands of the Reservation." Tribe's Amended Counterclaim at 17; United States' Amended Counterclaim at 13.

Neither Amended Counterclaim alleges that withdrawal of groundwater on the Reservation will have any effect on surrounding groundwater claimants. There are no allegations that the additional groundwater and surface water claims for the Reservation will be the "figurative straw that breaks the camel's back, resulting in competition between surface and groundwater claimants."

Although both the United States and the Tribe allege that numerous persons and other entities have appropriated additional water from the Walker River Basin and its tributaries since April, 1936, and that such claims to the use of water have not been subject to any "adjudicative" process, there are no direct allegations seeking such an adjudication. Tribe's Amended Counterclaim at 15; United States' Amended Counterclaim at 11. The prayers for relief, however, ask for a declaration that defendants and counterdefendants have no right to title or other interest in or to the use of the waters claimed by the Tribe and the United States and request that the Court preliminarily and permanently enjoin defendants and counterdefendants from asserting any adverse rights, title, or other interest in or to such water rights. Tribe's Amended Counterclaim at 17-18; United States' Amended Counterclaim at 31.

The United States includes claims for surface water and groundwater rights for the Yerington Paiute Tribe located in Mason Valley, Nevada; for the Bridgeport Indian Colony located in Bridgeport, California; for the Garrison and Cluette allotments located in California; for individual allotments, which may be in California and Nevada; for the Hawthorne Army Ammunition Plant in Hawthorne, Nevada; for the Toiyabe National Forest in California and Nevada; for the United States Marine Corp. Mountain Warfare Training Center in California, including family housing in Coleville, California; and for the Bureau of Land Management.[2] The Amended Counterclaim of the

[2]The claims of the United States for the Hawthorne Army Ammunition Plant include claims to water from sources which are not tributary to the Walker River, although they may be sources of supply for Walker Lake. *See*, United States' Amended Counterclaimant at 21-22. It is not clear whether such claims should be included here. It is also not clear that the United States has attempted to identify persons or entities who may be claimants to those sources of water.

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United States is similarly lacking in allegations concerning conflicts between the rights which it seeks and surface and groundwater rights of others. *See*, United States' Amended Counterclaim at 13-31.

The other part of the foundation for the Joint Motion is Attachment No. 1 to the United States' and Tribe's Joint Motion, the Affidavit of Peter M. Pyle, a hydrologist with Stetson Engineers.[3] That affidavit is primarily focused on an alleged hydrologic connection between ground and surface water. It does not provide any indication that withdrawal of groundwater on the Reservation will have any effect on groundwater claimants in Bridgeport Valley, Antelope Valley, Smith Valley and Mason Valley, the East Walker area or even the Walker Lake area.

With respect to the relationship between river flows and groundwater pumping, Pyle states that wells in Smith and Mason Valleys within two miles of the River derive most of their flow from the River. Pyle Affidavit at 5. He states that wells located distances from three to six miles from the River derive up to 30% of their water from the River. *Id.* Pyle does not differentiate between wells taking water directly from the River and wells that are recharged from canal losses and deep percolation caused by irrigation. The table on page 5 of the Pyle Affidavit is said to show that groundwater pumping has affected surface flows of the Walker River because the difference of surface inflow and outflow cannot be accounted for by surface diversions alone. *Id.* The table, however, makes no effort to quantify plant consumption, which undoubtedly accounts for a substantial part of the difference between surface inflow and outflow. The affidavit provides no information on when and to what extent pumping groundwater will actually affect stream flow. *See*, *Kupier v. Lundvall*, 529 P.2d 1328 (Colo. 1974) (groundwater which takes over a century to reach a stream not considered part of surface stream under Colorado law integrating administration of surface water and groundwater).

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[3]The District does not agree with many of the conclusions in the Pyle Affidavit. However, for purposes of the Joint Motion, the District considers the Affidavit in the light most favorable to the position of the United States and Tribe. In addition, the District finds it unusual that the United States and Tribe have not included allegations in their Amended Counterclaims based upon the conclusions which they have drawn from the Pyle Affidavit.

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Pursuant to his regulatory authority under N.R.S. § 534.110 within the Walker River Basin, the Nevada State Engineer has recognized the Antelope Valley (No. 106), Smith Valley Artesian (No. 107), Mason Valley (No. 108), East Walker Area (No. 109) and Walker Lake (No. 110) hydrographic basins. *See*, Exhibit "A" attached hereto. The California and Nevada portions of Antelope Valley undoubtedly form a single hydrographic basin. Bridgeport Valley in California is also a separate hydrographic basin. The Pyle Affidavit contains no information concerning the nature and extent of the groundwater claims of the United States and competition between those claims and other groundwater claimants within each of those groundwater hydrographic basins.

H. The Jurisdictional Bases for the Amended Counterclaims.

In connection with the issues of joinder, it is important to examine the jurisdictional bases alleged by the United States and the Tribe for assertion of the Amended Counterclaims in this action. Three of the jurisdictional bases afford grounds for jurisdiction over new actions. Those bases are 28 U.S.C. § 1331, arising under the Constitution, laws or treaties of the United States; 28 U.S.C. § 1362, brought by an Indian tribe arising under the Constitution, laws or treaties of the United States; and 28 U.S.C. § 1345, proceedings brought by the United States. The remaining allegations concerning jurisdiction are based upon the jurisdiction which results from the existence of the Decree. Those bases are the continuing jurisdiction of the court over the Walker River and its tributaries, 28 U.S.C. § 1367 (supplemental jurisdiction) and 28 U.S.C. § 1651, authorizing the court to issue all writs necessary or appropriate in aid of its jurisdiction. *See*, Tribe's Amended Counterclaim at 14; United States' Amended Counterclaim at 10-11.

III. THE AMENDED COUNTERCLAIMS AND THE PYLE AFFIDAVIT DO NOT INCLUDE SUFFICIENT ALLEGATIONS OF CONFLICT BETWEEN GROUND-WATER CLAIMS AND THE ADDITIONAL SURFACE WATER CLAIMS OF THE UNITED STATES AND THE TRIBE TO REQUIRE JOINDER OF GROUNDWATER USERS.

In its July 8, 1994 Order, the Court concluded that the additional surface water rights claimed by the United States and the Tribe would, in all likelihood, be small in relation to total amount of water appropriated from the Walker River and that it was unreasonable to assume that these additional water rights would be "the figurative straw that breaks the camel's back." The Court stated, without more specific allegations, it would not assume that the claimed right to additional surface water from

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the Walker River would "tip the scales and result in competition between surface and groundwater claimants." (Document #30 at 10-11).

Although the Pyle Affidavit includes information concerning the alleged hydrologic connection between surface water and groundwater, neither it nor the Amended Counterclaims provide information which satisfies the Court's requirement of specific allegations that the claimed right to additional surface water from the Walker River will result in competition between surface water and groundwater claimants. Without such specific allegations, the assertion that surface water and groundwater users are or will be in competition for waters comprising a single *res* is speculative and insufficient to require joinder under Rule 19 of groundwater claimants located in the Walker River Basin. At the requested scheduling and planning conference, the Court and the parties can explore whether the Tribe and United States intend to allege such a conflict, and if necessary, their pleadings can be further amended.

IV. THE CLAIMS OF THE UNITED STATES AND THE TRIBE TO ADDITIONAL SURFACE WATER DO NOT REQUIRE JOINDER OF GROUNDWATER CLAIMANTS BECAUSE, IN NEVADA AND CALIFORNIA, SURFACE AND GROUNDWATER WITHIN THE WALKER RIVER BASIN DO NOT FORM A SINGLE *RES*.

Assuming for the sake of argument that the Amended Counterclaims and Pyle Affidavit do contain allegations that there will be competition between the additional surface water claims of the Tribe and the United States and existing groundwater claimants, that does not mean that groundwater claimants should be joined. As the Court has already correctly stated in its July 8, 1994 Order, Nevada law treats surface and groundwater as separate resources. (Document #30 at 7). The decision to treat surface water and groundwater as a single resource for purposes of regulation and administration is for the Nevada legislature, not the courts.[4] Similarly, under California law, percolating water; i.e., water that does not form a part of the body or flow, surface or subterranean of any stream, is regarded as a separate water source and the owners of the land overlying a single

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[4]Colorado, through a complex statutory procedure adopted in 1969, integrated the appropriation, use and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all of the waters in the state. *See*, Colo. Rev. Stat. §§ 37-92-101, *et seq*.

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body of percolating water have correlative rights to the common supply. *See*, *Los Osos Valley Assoc. v. City of San Luis Obispo*, 36 Cal. Rptr. 2d. 758, 762 (Cal. App. 1994). The courts do not have the power to require surface water and groundwater to be regulated as a single resource in California.

That is not to say, however, that this Court is without authority to protect surface or groundwater rights established under federal law.[5] In *Cappaert v. United States*, 426 U.S. 128 (1976), the Supreme Court of the United States, dodging Nevada's argument that the implied reservation doctrine did not apply to groundwater, said:

> No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater...here however, the water in the pool is surface water. Federal water rights were being depleted because, as the evidence showed, the groundwater and surface water are physically interrelated as integral parts of the hydrologic cycle. [Citation]. Thus, since the implied reservation of water doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.

426 U.S. at 142-143. If in the future it is alleged that diversion of groundwater in California or in Nevada is actually depleting a prior water right established under federal law, an appropriate action can be brought joining all necessary parties and the Court can fashion appropriate relief to protect the prior federal surface right.

However, in the context of Nevada and California law, groundwater claimants need not be joined in an action involving surface water. Complete relief can be accorded among all surface water claimants. Because, as a matter of law, surface and groundwater are not a single *res*, the claims to groundwater do not relate to the subject of this action. For the same reason, proceeding without the groundwater claimants will not impair or impede the ability of groundwater claimants to protect their interests and will not leave current parties subject to a risk of multiple or inconsistent obligations.

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[5]No case has held that the implied reserved rights doctrine applies to groundwater. *See*, *In Re Rights to Use of Water in Bighorn River*, 753 P.2d 76, 99-100 (Wyo. 1988), *aff'd* by an equally divided court, *sub. nom.*, *Wyoming v. United States*, 492 U.S. 406 (1989).

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V. THE CLAIMS OF THE UNITED STATES AND THE TRIBE TO GROUNDWATER SHOULD NOT PROCEED AS A POST-JUDGMENT PROCEEDING IN THIS ACTION AND, IN ANY EVENT, DO NOT REQUIRE JOINDER IN A SINGLE PROCEEDING OF CLAIMANTS TO GROUNDWATER IN ONE HYDROGRAPHIC BASIN WITHIN CLAIMANTS TO GROUNDWATER IN SEVERAL OTHER SEPARATE HYDROGRAPHIC BASINS.

Rather than requiring joinder of all groundwater claimants and embarking upon a court adjudication of all claims to groundwater in the Walker River Basin, the Court and the parties should consider separating such claims from the additional surface water claims being asserted. Should problems arise among groundwater claimants in Nevada, the Nevada State Engineer has adequate authority to proceed with one or more groundwater adjudications and, if necessary, to join the Tribe and the United States. *See*, N.R.S. § 534.100 and N.R.S. §§ 533.090-533.320, *et seq*. The District does not dispute that the claims that the United States and the Tribe assert to groundwater, at least within a hydrographic groundwater basin, involve claims to a single *res*, and if they are to proceed in this forum, joinder of certain groundwater claimants will be required. However, before the Court requires such joinder, and embarks upon several years of proof and adjudication, consideration should be given to separating such claims from the surface water claims and separating such claims by hydrographic basin.

First, by separating those allegations which support subject matter jurisdiction for a new action and from those which support subject matter jurisdiction for a post-judgment proceeding in this action, it is apparent that the jurisdictional allegations for subject matter jurisdiction for a post-judgment proceeding in this case do not apply to the claims of the United States and the Tribe with respect to groundwater. As this Court correctly stated in its July, 1994 Order, the Decree in this case adjudicates only the rights of the claimants to the surface waters of the Walker River and does not concern itself in any way with underground water rights. Therefore, the Court's continuing jurisdiction does not apply to groundwater. Similarly, if it applies at all in an action which has proceeded to final judgment, supplemental jurisdiction under 28 U.S.C. § 1367 does not apply here because this is not a post-judgment enforcement proceeding. *See*, 16 Moore's Federal Practice at § 106.05[9] (3d Ed. 1997). It is essentially a new action involving new claims. Finally, jurisdiction to adjudicate groundwater claims is not supported by the All-Writs Act, 28 U.S.C. § 1651. It is not

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necessary for the Court to adjudicate groundwater claims in order to enforce the Decree and there is no clear allegation that groundwater pumping presently or in the future will adversely affect surface water rights adjudicated by the Decree.

Second, consideration must be given to the impact on the resources of the Court of undertaking a comprehensive adjudication of groundwater rights within every hydrographic basin on the Walker River system. In the Order entered May 17, 1989, in C-125-ECR (Document #109), this Court addressed objections of the United States and the Tribe to appointment of the California State Water Resources Control Board as a special master with respect to change applications in California. In that Order, the Court observed the following:

> In addition, the special master is warranted by the fact that the Court does not have the resources to conduct the investigation needed to determine the merits of a particular application. Water law is intrinsically bound together with engineering, and the Court has no facility to conduct the surveys and tests which must accompany every change application. The California Board and the Nevada State Engineer have special expertise in the field, and will be able to handle these feats of engineering much more easily than the Court. It therefore appears that there are exceptional conditions which justify the appointment of a special master.

(Document #109 at 12).

Without question, if a comprehensive groundwater adjudication proceeding is to take place before this Court, a special master will be required to bring it to a conclusion. Therefore, careful consideration should be given to whether the Court should proceed with such an adjudication, particularly as a post-judgment proceeding in connection with an action involving only surface water which proceeded to final judgment over 60 years ago and where there has been no showing of such an adjudication is needed.

Finally, even if the decision is to proceed, recognition should be given to the fact that, at least with respect to groundwater, there are several separate and distinct groundwater basins involved. In Nevada, the Nevada State Engineer recognizes and separately regulates the Antelope Valley hydrographic basin, the Smith Valley hydrographic basin, the East Walker hydrographic basin, the Mason Valley hydrographic basin and the Walker Lake hydrographic basin. It is also likely that there is, in California, an Antelope hydrographic basin and a Bridgeport Valley hydrographic basin.

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Indeed, the Pyle Affidavit suggests that these groundwater basins are limited by impermeable bedrock. *See*, Pyle Affidavit at 4.

Therefore, groundwater claimants in each of those hydrographic basins should not be joined in a massive groundwater adjudication with groundwater claimants in each of the other hydrographic basins. For example, claimants in the Mason Valley hydrographic basin should not be joined in adjudication with groundwater claimants in the California and Nevada portions of Antelope Valley, or, for example, with California claimants in Bridgeport Valley.

VI. THERE IS NO BASIS FOR ELIMINATING AND IT WOULD BE IMPRUDENT TO ELIMINATE THE REQUIREMENT FOR PERSONAL SERVICE OF THE AMENDED COUNTERCLAIMS OF THE UNITED STATES AND THE TRIBE UPON THOSE SURFACE WATER CLAIMANTS WHO HAVE BEEN SUCCESSFULLY SERVED BY MINERAL COUNTY.

The Joint Motion requests that the Court eliminate the requirement for personal service upon those surface water claimants Mineral County successfully served. However, the supporting points and authorities do not explain the basis for that request. In September, 1998, when the parties stipulated to an extension of time to file responses to the Joint Motion, counsel for the District was advised that that request was intended to be eliminated. The District assumed that a pleading would be served and filed making that absolutely clear. It was for that reason that the stipulation (Document #63) at page 3, paragraph 7, did not include such a request in the description of the Joint Motion. However, to date, such official clarification has not been provided. Therefore, the District responds to that request.

There is no basis and no authority for the proposition that service of Mineral County's Intervention Documents on surface water claimants will in any way provide them with adequate notice of the very different claims being made here by the Tribe and the United States. Moreover, even if there was such a basis, it would be imprudent to adopt such a procedure here. The Court and the parties are well aware of the issues which have permeated Mineral County's attempt at service. At this point, it is difficult to determine precisely who Mineral County has, in fact, personally served. To adopt that service as service on all surface water claimants here would only serve to compound any errors made in Mineral County's personal service.

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VII. IT IS PREMATURE TO ESTABLISH A PROCEDURE FOR A SERVICE OF PLEADINGS ONCE THE PARTIES ARE JOINED.

The United States and the Tribe ask the Court's guidance regarding service of pleadings on parties once they are successfully joined in these proceedings. The basis for that request is that the Tribe and the United States anticipate that many claimants will not be represented by counsel and that, therefore, service of pleadings upon all such claimants once joined would be cumbersome, costly and would likely impede judicial efficiency.

Depending upon the claims which proceed in this post-judgment proceeding, and upon how many claimants are not represented by counsel, it may become necessary to adopt some special procedure for service upon joined claimants. However, it is premature to assume that such a procedure will be required or to define its contours. There will be ample time to adopt such a procedure once it is determined who will be joined, the claims which are to be asserted and the number of claimants who are not represented by counsel.

VIII. THE FORMS TO BE USED FOR NOTICE OF LAWSUIT AND REQUEST FOR WAIVER OF SERVICE OF SUMMONS AND FOR WAIVER OF SERVICE OF SUMMONS SHOULD NOT BE REVIEWED AND APPROVED UNTIL THE COURT HAS DETERMINED ISSUES RELATED TO WHO SHOULD BE SERVED AND WHICH CLAIMS SHOULD BE INCLUDED.

Until it is determined which claims will proceed and who will be joined as parties, it is premature for the Court to review and approve the Notice of Lawsuit and Request for Waiver of Service and Summons and Waiver of Service of Summons. Once it is determined what claims will proceed in this matter, consideration should be given to a number of issues. A decision on those issues may affect the form of Notice of Lawsuit and Request for Waiver of Service and Summons and Waiver of Service of Summons.

For example, the Court must consider whether this proceeding will involve an adjudication of surface water of the Walker River appropriated after entry of the Decree in 1936. If groundwater claimants are to be joined and groundwater claims are to be asserted, similar determinations will have to be made by the Court. The parties need to be advised as to whether they must include appropriate counterclaims and cross-claims with respect to their subsequent surface water and groundwater appropriations.

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Consideration should also be given to whether default judgments will be entered for failure to appear in a case which will certainly involve hundreds of participants. In a similar proceeding involving the Truckee River in 1973, the United States District Court for the District of Nevada entered an order providing that no default would be taken for failure to appear. Once those and perhaps other issues are addressed, the parties and the Court can work together to adopt an appropriate Notice of Lawsuit and Request for Waiver of Service of Summons and an appropriate Waiver of Service of Summons.[6]

IX. CONCLUSION.

The most important question for the Court and the parties is who should be served and which claims should be included. The Court and the parties need additional discussion and dialogue for purposes of resolving those questions. The District respectfully requests that the Court set a scheduling and planning conference at which the Court and the parties can discuss these significant and important issues.

DATED this 9th day of November, 1998.

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[6]The District objects to the statement in each of the Notices of Lawsuit to the effect that "a lawsuit concerning the rights of the Walker River and its tributaries has been ongoing for many years." That is simply not accurate. The litigation concerning the water rights of the Walker River and its tributaries for all practical purposes ended in 1936. What has been ongoing for many years is administration of the Walker River and its tributaries pursuant to the final decree entered in 1936 and amended in 1940. The United States and the Tribe seek to commence new litigation concerning additional claims. It is misleading to suggest that active litigation concerning the water rights of the Walker River and its tributaries has been ongoing for many years. There is no need for any statement whatsoever in that regard in any of the Notices.

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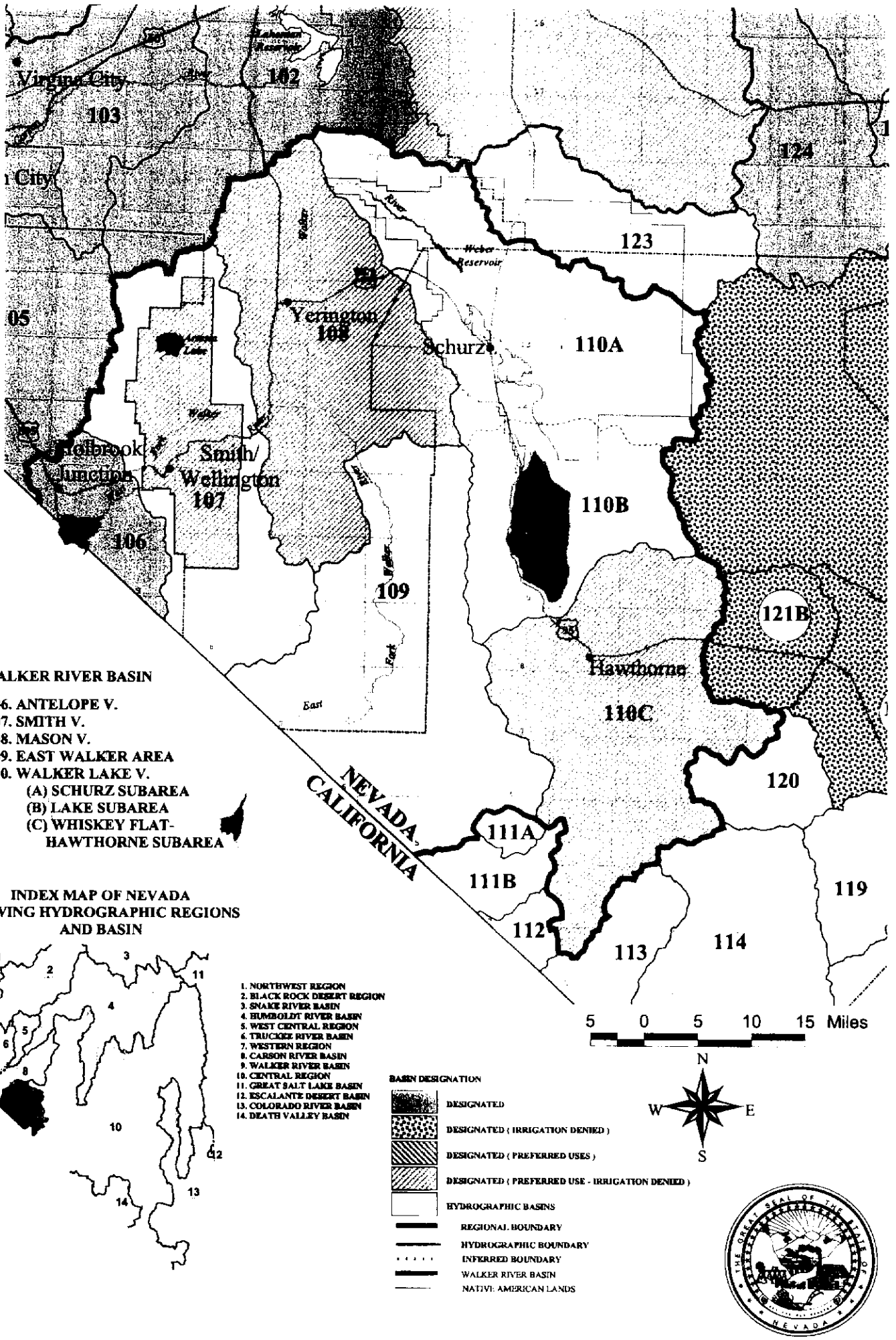
WALKER RIVER
HYDROGRAPHIC REGION



9. WALKER RIVER BASIN

106. ANTELOPE V.
107. SMITH V.
108. MASON V.
109. EAST WALKER AREA
110. WALKER LAKE V.
(A) SCHURZ SUBAREA
(B) LAKE SUBAREA
(C) WHISKEY FLAT-HAWTHORNE SUBAREA

INDEX MAP OF NEVADA
SHOWING HYDROGRAPHIC REGIONS
AND BASIN

1. NORTHWEST REGION
2. BLACK ROCK DESERT REGION
3. SNAKE RIVER BASIN
4. HUMBOLDT RIVER BASIN
5. WEST CENTRAL REGION
6. TRUCKEE RIVER BASIN
7. WESTERN REGION
8. CARSON RIVER BASIN
9. WALKER RIVER BASIN
10. CENTRAL REGION
11. GREAT SALT LAKE BASIN
12. ESCALANTE DESERT BASIN
13. COLORADO RIVER BASIN
14. DEATH VALLEY BASIN

BASIN DESIGNATION

- DESIGNATED
- DESIGNATED (IRRIGATION DENIED)
- DESIGNATED (PREFERRED USES)
- DESIGNATED (PREFERRED USE - IRRIGATION DENIED)
- HYDROGRAPHIC BASINS
- REGIONAL BOUNDARY
- HYDROGRAPHIC BOUNDARY
- INFERRED BOUNDARY
- WALKER RIVER BASIN
- NATIVE AMERICAN LANDS

CERTIFICATE OF MAILING

Pursuant to FRCP 5(b), I hereby certify that I am an employee of the law firm of Woodburn and Wedge and that on this 9th day of November, 1998, I deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing ***Walker River Irrigation District's Points and Authorities in Support of Motion for Scheduling and Planning Conference and in 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*** in a sealed envelope addressed to the following:

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