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24

6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF NEVADA**

8  
9 UNITED STATES OF AMERICA, )  
10 Plaintiff )  
11 WALKER RIVER PAIUTE TRIBE, )  
12 Plaintiff-Intervenor, )  
13 v. )  
14 WALKER RIVER IRRIGATION DISTRICT, )  
15 Defendants. )  
16

IN EQUITY NO. C-125-B-ECR

**STATE OF NEVADA'S REPLY TO  
UNITED STATE'S AND WALKER  
RIVER PAIUTE TRIBE'S JOINT  
REPLY TO NEVADA'S MOTION  
FOR MORE DEFINITE STATEMENT**

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17 The United States of America ("United States") and the Walker River Paiute Tribe ("Tribe")  
18 have jointly moved this Court to (1) grant leave to serve their First Amended Counterclaims upon  
19 surface and groundwater claimants in the Walker River Basin; (2) establish a procedure for service of  
20 pleadings upon joined parties; and (3) to approve forms for purposes of notice and waiver. In response  
21 to the motion ("Joint Motion"), the State of Nevada ("Nevada") moved, pursuant to Rule 12(e) of the  
22 Federal Rules of Civil Procedure, for a more definite statement. The basis for Nevada' motion for more  
23 definite statement is that the Joint Motion is so vague and ambiguous that Nevada cannot reasonably be  
24 required to frame a responsive pleading. The United States and the Tribe filed a Response to Nevada's  
25 12(e) motion. This pleading is a Reply to their responsive pleading.

26 Distilled to its essence, Nevada has moved for a more definite statement from the United States  
27 and the Tribe because the claims contained in their respective First Amended Counterclaims are so  
28 encompassing that it is excessively difficult, if not impossible, for Nevada as well as other current or

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1 potential parties to formulate a proper response. To allow the United States and the Tribe to proceed to  
2 serve all groundwater claimants along the Walker River system could subject many claimants to the  
3 significant expense of securing legal counsel to determine whether their participation in these protracted  
4 proceedings is justified. (*See, McHenry, et al. v. Renn et al.*, 84 F.3d 1172, 1174 (9th Cir. 1996);  
5 F.R.C.P. 12(e) motion granted requiring the plaintiffs to file a second amended complaint which clearly  
6 and concisely explains which allegations are relevant to which defendants.)

7 **I. Introduction**

8 Rather than addressing the issues raised in Nevada's Motion For More Definite Statement, the  
9 United States and the Tribe boldly declare:

10 The District, Nevada and California all miss the point of the Joint  
11 Motion's request to include groundwater claimants in service of process,  
12 and instead confuse the Joint Motion's procedural request with actual  
13 adjudication of the Tribe's and the United States' additional claims to water  
14 in the Walker River Basin. The Joint Motion seeks the Court's permission  
15 to serve groundwater users because groundwater pumping in the Walker  
16 River Basin depletes the surface water flow in the Walker River. The  
depletion of surface flow extends to groundwater as the surface flow is the  
primary source of groundwater recharge in the Basin, particularly within the  
Reservation. The District, Nevada and California not only fail to acknow-  
ledge the effect of stream depletion due to groundwater pumping, they fail  
to provide any evidence that contradicts it.

17 *United States' and Walker River Paiute Tribe's Joint Reply Regarding Their Motion For Leave To*  
18 *Serve First Amended Counterclaims, To Join Groundwater Users, To Approve Forms For Notice and*  
19 *Waiver, and To Approve Procedure For Service of Pleadings Once Parties Are Joined (Joint Reply),*  
20 pp. 4, 5. Further, the United States and the Tribe argue that the State's position concerning service with  
21 respect to Mineral County's attempted intervention (subfile C-125-C) is inconsistent with its position  
22 *vis a vis* the service of the United States' and the Tribe's First Amended Counterclaims.

23 In response to these claims, Nevada respectfully submits that it is the United States and the  
24 Tribe who miss the point of Nevada's Rule 12(e) motion. Contrary to the United States' and the Tribe's  
25 arguments, Nevada is seeking resolution of the procedural issues relating to service only and will, at the  
26 appropriate time, respond to the evidentiary issues raised by the Peter Pyle affidavit. In its motion for  
27 more definite statement, the State of Nevada argued that the broad allegations contained in the United  
28 States' and the Tribe's First Amended Counterclaims, coupled with the assertions contained in Peter

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1 Pyle's affidavit attached to their Joint Motion, provide neither the Court nor the other parties with a clue  
2 as to how service should proceed. In response to Nevada's Rule 12(e) motion, the United States and the  
3 Tribe have offered nothing to respond to the issues raised. Moreover, there is no inconsistency in the  
4 position taken in this subfile from that advanced in subfile C-125-C with respect to service. As more  
5 fully discussed below, despite the length of their Joint Reply, neither the United States nor the Tribe  
6 have clarified whatsoever whether and how their "notice pleading" claims to groundwater which,  
7 according to their expert, correspond to an indefinite hydrologic connection between surface and  
8 groundwater in the Walker River basin, translates into a determination of who should be served. The  
9 question remains whether their proposed service will include, for example, domestic well owners,  
10 undetermined vested groundwater right owners<sup>1</sup>, or other types of groundwater users throughout the  
11 basin. With respect to Nevada's position concerning Mineral County's service attempts, it should be  
12 noted that Mineral County is claiming a lion's share of the flow of the Walker River for the benefit of  
13 Walker Lake. The State of Nevada has argued that because of the sweeping nature of the County's  
14 claims, all Walker River Decree holders should be served. Service in the subfile C-125-C proceedings  
15 has only included decreed surface water holders. If, however, as the United States and the Tribe  
16 suggest, flows of the river are so integrally connected to groundwater uses, then Mineral County should  
17 also be required to serve groundwater users.

18 **II. This Court's Continuing Jurisdiction Over the Walker River**  
19 **Decree Does Not Extend to Groundwater.**

20 The State of Nevada certainly acknowledges this Court's continuing jurisdiction over the  
21 Walker River Decree. As articulated in Nevada's Rule 12(e) motion, however, the expansion of the  
22 United States' and the Tribe's reserved right claims to unspecified groundwater along the  
23 geographically diverse Walker River system reveals many unresolved jurisdictional issues<sup>2</sup> which of

24 <sup>1</sup> A claim of vested right is defined as one which pre-dates the enactment of Nevada's statutory scheme for obtaining a  
25 permit to appropriate the public waters of the state. To validate such a claim, it must be established that steps were taken to  
26 divert and apply the water to beneficial use before (in the case of artesian groundwater) 1913, the year in which Nevada's  
27 Legislature enacted a permit procedure for obtaining permitted rights to the state's underground artesian water resources.  
28 *See*, 1913 Nev. Stat. 140. These pre-1913 rights are also commonly referred to as pre-statutory groundwater rights. Either  
this Court or the State Engineer would have to conduct a basin-wide groundwater adjudication to determine the identity of  
the the vested owners of groundwater in the Walker River Basin.

<sup>2</sup> 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

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1 necessity must be further refined before Nevada or any of the present or potential parties can reasonably  
2 respond to the Joint Motion. Moreover, the Walker River Decree itself does not contemplate the  
3 inclusion of groundwater claimants. The precise nature of the United States' and the Tribe's claims to  
4 groundwater remains unknown. The answers to the following questions illustrate the conundrum: Are  
5 the movants seeking to resolve perceived conflicts between groundwater pumping and their surface  
6 water claims contained in the *Walker River Decree*? Are they attempting to reopen the sixty-year-old  
7 decree to bring under this Court's continuing jurisdiction property rights to groundwater currently  
8 administered in Nevada exclusively by the State Engineer? What about domestic well owners,  
9 stockwater right owners, vested right owners and other users of water? There is no answer offered. The  
10 Court needs to require the United States and the Tribe to specify with greater precision the nature of the  
11 claims to groundwater. As it is, thousands of groundwater users would have no way of ascertaining  
12 whether their rights to the use of groundwater demands their participation in this case.

13 Not only do the United States and the Tribe obfuscate the issues raised by the Rule 12(e)  
14 motion, they respond as if this were a personal injury action with readily identifiable parties and a  
15 limited number of defendants. The argument that they are merely complying with notice pleading  
16 requirements fails to recognize that the Court is unable to fashion a service order without a more  
17 definitive explanation of what groundwater claimants the United States and the Tribe are proposing to  
18 include in their service list.

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28 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.

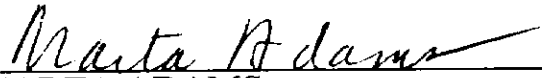
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**III. Conclusion**

The State of Nevada agrees that these procedural issues should be addressed in a Scheduling and Planning Conference under Local Rules 16-1 and 16-2. The United States and the Tribe have not answered the questions needed for the Court to fashion a service order relative to their claims. Until the Tribe and the United States provide greater specificity, neither the current nor the potential parties know whether their rights may be affected by the various, undelineated claims to groundwater.

Dated this 4<sup>th</sup> day of February, 1999.

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**CERTIFICATE OF MAILING**

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