FRANKIE SUE DEL PAPA
Attorney General
MARTA ADAMS
Nevada Bar No. 1564
Senior Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775)687-5866

Attorneys for Nevada Division of Wildlife

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 REPLY TO UNITED STATE'S AND WALKER RIVER PAIUTE TRIBE'S JOINT REPLY TO NEVADA'S 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) establish a procedure for service of pleadings upon joined parties; and (3) to approve forms for purposes of notice and waiver. In response to the motion ("Joint Motion"), the State of Nevada ("Nevada") moved, pursuant to Rule 12(e) of the Federal Rules of Civil Procedure, for a more definite statement. The basis for Nevada' motion for more definite statement is that the Joint Motion is so vague and ambiguous that Nevada cannot reasonably be required to frame a responsive pleading. The United States and the Tribe filed a Response to Nevada's 12(e) motion. This pleading is a Reply to their responsive pleading.

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

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

potential parties to formulate a proper response. To allow the United States and the Tribe to proceed 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 justified. (*See*, *McHenry, et al. v. Renn 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

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

> The District, Nevada and California all miss the point of the Joint Motion's request to include groundwater claimants in service of process, and instead confuse the Joint Motion's procedural request with actual adjudication of the Tribe's and the United States' additional claims to water in the Walker River Basin. The Joint Motion seeks the Court's permission to serve groundwater users because groundwater pumping in the Walker 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 acknowledge the effect of stream depletion due to groundwater pumping, they fail to provide any evidence that contradicts it.

United States' and Walker River Paiute Tribe's Joint Reply Regarding Their 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 Reply), pp. 4, 5. Further, the United States and the Tribe argue that the State's position concerning service with respect to Mineral County's attempted intervention (subfile C-125-C) is inconsistent with its position *vis a vis* the service of the United States' and the Tribe's First Amended Counterclaims.

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

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

II. <u>This Court's Continuing Jurisdiction Over the Walker River Decree Does Not Extend to Groundwater.</u>

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

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[1] 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 (in the case of artesion groundwater) 1913, the year in which Nevada's Legislature enacted a permit procedure for obtaining permitted rights to the state's underground artesian water resources. *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.

[2] 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

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

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100 N. Carson Street
Carson City, Nevada 89701-4717

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

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

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groundwater in Nevada has been part of Nevada's legal landscape with respect to artesion groundwater since 1913 and for percolating groundwater since 1939. The *Walker River Decree* adjudicated <u>only</u> surface water rights to the Walker River.

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 4th day of February, 1999.

FRANKIE SUE DEL PAPA
Attorney General

Marta Adams

MARTA ADAMS
Senior Deputy Attorney General
Attorneys for State of Nevada

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Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

CERTIFICATE OF MAILING

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this day I deposited for mailing, postage prepaid, true and correct copies of the foregoing documents addressed as follows:

ROBERT C ANDERSON ESQ
TIMOTHY A LUKAS ESQ
POB 3237
RENO NV 89505

LINDA BOWMAN ESQ
499 W PLUMB LN #4
RENO NV 89509

GORDON H DEPAOLI ESQ
POB 2311
RENO NV 89505

MARY E HACKENBRACHT
DEPUTY ATTY GENERAL
2101 WEBSTER ST 12TH FL
OAKLAND CA 94612-3049

TREVA J HEARNE ESQ
JAMES SPOO ESQ
575 FOREST ST #200
RENO NV 89509

KATHERYN LANDRETH
ASST US ATTORNEY
100 W LIBERTY ST #600
RENO NV 89501

SUSAN SCHNEIDER ESQ
US DEPT OF JUSTICE
999 18TH ST #945
DENVER CO 80202

HANK MESHORER
ENVIRONMENT, NAT'L RESOURCES
US DEPT OF JUSTICE
POB 7397 - BEN FRANKLIN STA
WASHINGTON DC 20044-7397

DAVID E MOSER ESQ
THREE EMBARCADERO CENTER
SAN FRANCISCO CA 94111

MICHAEL W NEVILLE
DEPUTY ATTY GENERAL
50 FREMONT ST #300
SAN FRANCISCO CA 94105-2239

ALICE WALKER ESQ
1007 PEARL ST #220
BOULDER CO 80302

Dated: 2-4-99

N. Clugage
Neoma Clugage

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717