ORIGINAL

GORDON H. DEPAOLI
Nevada State Bar 00195
DALE E. FERGUSON
Nevada State Bar 04986
WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Post Office Box 2311
Reno, Nevada 89511
Telephone: (775) 688-3000

Attorneys for Defendant,
WALKER RIVER IRRIGATION DISTRICT

FRANKIE SUE DEL PAPA
Attorney General
MARTA ADAMS
Nevada Bar No. 1564
Senior Deputy Attorney General
100 North Carson Street
Carson City, NV 89701

Telephone: (775) 687-5866

Attorneys for the STATE OF NEVADA

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-ECR Subfile No. C-125-B **WALKER RIVER IRRIGATION DISTRICT'S AND STATE OF NEVADA'S POINTS AND AUTHORITIES IN SUPPORT OF MOTION CONCERNING CASE MANAGEMENT**
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	

I. Background.

The Walker River Paiute Tribe (the "Tribe") filed its original counterclaim in this matter on March 18, 1992. The Tribe's original counterclaim seeks recognition of a right to store water in Weber Reservoir for use on the Walker River Indian Reservation and for a federal reserved water right for lands included in the Reservation in 1936. These claims are in addition to the direct flow rights awarded to the United States for the benefit of the Tribe in the *Walker River Decree*. On July 22, 1992, the United States moved for leave to file its original counterclaim, which asserts similar claims to water for the benefit of the Walker River Indian Reservation. By Order dated October 22, 1992, the Court directed the Tribe and United States to serve their original counterclaims on all claimants to the waters of the Walker River and its tributaries pursuant to Rule 4 of the Federal Rules of Civil Procedure.

On or about July 30, 1997, the Tribe filed its *First Amended Counterclaim of the Walker River Paiute Tribe* ("Tribe's First Amended Counterclaim"). In addition to surface water claims as set forth in its original counterclaim, the Tribe's First Amended Counterclaim includes groundwater claims for the Reservation. On or about July 30, 1997, the United States filed its *First Amended Counterclaim of the United States of America* ("United States First Amended Counterclaim"). In addition to the surface water claims set forth in its original counterclaim, the United States' First Amended Counterclaim includes several specific claims to surface water and groundwater in the Walker River Basin for other federal enclaves, including the Hawthorne Army Ammunition Plant, the Toiyabe National Forest, the Mountain Warfare Training Center of the United States Marine Corps and the Bureau of Land Management. The United States' First Amended Counterclaim also advances claims for surface and groundwater for the Walker River Indian Reservation, the Yerington Reservation, the Bridgeport Paiute Indian Colony and several individual allotments.

There have been thirteen extensions of time to join additional parties and complete service of process. The Court granted the first extension by order dated February 23, 1993 (Doc. 19) and the last by order dated September 9, 1998 (Doc. 63).

On or about August 19, 1998, the Tribe and United States filed 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* (the "Joint Motion"). The Joint Motion also sought to extend the time to complete the joinder of parties and service of process in this matter. The Joint Motion moves the Court for an order:

1. granting leave to serve the *First Amended Counterclaim of the United States of America,* and the *First Amended Counterclaim of the Walker River Paiute Tribe* upon surface water and groundwater claimants in the Walker River basin;
2. to establish a procedure for service of pleadings upon joined parties; and
3. to approve forms for purposes of notice and waiver.

The Joint Motion also includes a proposed *Notice of Lawsuit and Request for Waiver of Summons and Waiver of Service of Summons* for consideration by the Court and the parties.

Various parties responded to the Joint Motion and on May 11, 1999, the Court entered a Minute Order (Doc. 81) which provided for a scheduling conference to establish procedures for the expeditious and efficient management and resolution of this matter and to hear argument and proposals on the following specific matters:

1) Whether the issue of joinder of all or some groundwater users in the Walker River basin should be decided:
   (a) after an evidentiary hearing on whether groundwater is sufficiently connected to the River to require joinder in order to provide complete relief; or
   (b) before such a hearing and based on the pleadings.
2) Whether in post judgment proceedings the Court has jurisdiction over groundwater claims.
3) The effect of the groundwater laws of Nevada and California on the jurisdiction of the Court to adjudicate relative rights to groundwater.

Doc. 81 at 2-4.

After a telephonic hearing with the parties, on May 21, 1999, the Court ordered the following:

> [T]he parties will have forty-five (45) days from this date within which to submit a stipulation, or if a stipulation cannot be reached, then a statement of the issues on which there is agreement and the issues which are disputed with respect to planning and scheduling according to the order of the Court of May 11, 1999, and any matters that are related to the issues and problems referred to in that order.

(Doc. No. 83).

After four (4) extensions of time to comply with the May 21, 1999 minute order, on December 15, 1999 the parties reported to the Court that they were unable to reach agreement and stipulated to the submission of their respective proposals for case management by way of motion.

II. The United States and Tribe Should Identify, Name and Join All Persons Who In Their Judgment Must be Joined Under Rule 19 of the Federal Rules of Civil Procedure In Order For Their Amended Counterclaims to Proceed.

In its November 8, 1998 Response to the Joint Motion, the District opposed joinder of groundwater users because of its positions that under Nevada and California law surface and groundwater within the Walker River Basin do not form a single res and in post judgment proceedings this Court does not have jurisdiction over the additional claims of the Tribe and the United States, particularly the groundwater claims. The District has not changed its position on how those issues should be decided. However, as a result of efforts to comply with the Court's May 11 and May 21, 1999 Orders, the District concluded that one of the most important issues to be considered was which, if any, issues should be decided before joining the additional parties who may be affected by those decisions.

Decisions on the legal and factual issues related to whether some or all of the groundwater users in the Walker River Basin are or are not properly joined as parties will determine the scope and course of this litigation. Those issues should be decided at the very outset of the litigation. Moreover, in a case of this magnitude, which may involve years, if not, decades, of litigation it is also possible, if not probable, that orders which determine the scope and course of the litigation should be the subject of immediate appellate review in order to avoid the waste which might otherwise occur if such significant orders were only reviewable after final judgment.

There are at least two reasons why persons who may be affected by those decisions should be joined so that they have an opportunity to participate before both the trial court and possibly the court of appeals, in the determination of those significant issues. First, fundamental fairness requires they be allowed to participate. Second, judicial economy requires that these significant issues be decided in a manner that binds all affected parties. Therefore, the United States and Tribe should identify, name and join all persons who in their judgment must be joined in order to comply with Rule 19 of the Federal Rules of Civil Procedure given the claims they seek to assert. Those persons may include users of groundwater.

The management of this case concerning service and joinder should heed the lessons learned through Mineral County's lengthy efforts to serve surface water claimants in connection with its motion to intervene. Those lessons suggest that care must be taken in identifying, naming and serving the persons to be joined, and in ensuring that changes in ownership occurring after service, but before service is complete on all parties, do not require that the new owners again be personally served.

For reasons stated all too frequently in the Mineral County matter any case management order must recognize that identifying all surface and groundwater claimants within the Walker River watershed is no easy task. Review of records of the District, the Board of Water Commissioners, the Nevada State Engineer and the California State Water Resources Control Board, although helpful, does not provide a complete or final answer to the problem.

Given the magnitude of the claims the United States and Tribe seek to assert, the process for identification of such claimants should involve several steps. One step would be to identify all land within the Walker River watershed. Another would be to identify the owner or owners of that land through records in the offices of county assessors and county recorders. An essential step would be to determine if land includes an appurtenant surface and/or groundwater right. The Walker River Decree and District, Water Commissioner, State Engineer and Water Resources Control Board records may be helpful in that endeavor. Given the facts that, in Nevada there may be no record of rights to groundwater established before 1939 and limited

information on domestic well owners, and in California there may be little or no information on any groundwater users, some site inspections may be necessary. An alternative to site inspections might include an assumption that unless property is within a city or town which provides domestic water service, it likely includes a domestic well.

Once the persons to be joined are identified they must be named as counter-defendants. Mineral County did not actually name the persons it intended to join until approximately January of 1998, some 3 years after it began attempts at service. Rule 10(a) of the Federal Rules of Civil Procedure requires that a complaint include the names of all the parties.

III. Once The Persons To Be Joined Have Been Identified And Named They Should Be Served With Process In Accordance With Rule 4 Of The Federal Rules And With Any Relevant Order Of The Court Concerning Case Management.

This Court has previously ruled that under the circumstances presented here the persons to be identified, named and joined must be served in accordance with Rule 4 of the Federal Rules of Civil Procedure. See, October 27, 1992 Order (Doc. 15). To the extent that the United States and the Tribe seek waivers of service pursuant to Rule 4(d) the Court should also approve the form of Notice and Request for Waiver.

Because it is likely that a substantial period of time will be required to complete service of process and because ownership of land with appurtenant water rights frequently changes, it is important to ensure that successors-in-interest to parties originally joined and served have notice of the pendency of this matter and can be substituted without additional personal service under Rule 4 of the Federal Rules of Civil Procedure. This has been and continues to be an issue in connection with the Mineral County service.

This problem can be avoided through the United States and Tribe preparing and the Court approving a form or forms of a Notice of Lis Pendens complying with the requirements of California or Nevada law as the case may be, and describing the property encompassed, the nature of these proceedings and the effect thereof as to any water rights appurtenant to the property. Upon approval of the form or forms, the Tribe and the United States should cause a Notice of Lis Pendens to be recorded with the county recorder of the county in which the real property is located. Upon compliance with this requirement successors-in-interest to properly

served original parties could be automatically substituted as parties pursuant to Rule 25 of the Federal Rules of Civil Procedure.

To the extent that the United States and the Tribe desire to serve identified parties by publication, motions seeking an appropriate order should be filed in accordance with Rule 4(e)(1) of the Federal Rules. For purposes of giving notice to unidentified parties, the United States and the Tribe should publish in the *Mineral County Independent News* in Hawthorne, Nevada, the *Record Courier* in Gardnerville, Nevada, the *Mason Valley News* in Yerington, Nevada, and the *Review-Herald* in Mammoth Lakes, California for a period of four (4) weeks, and at least once a week during said time the following documents:

A. Summons to all unknown persons claiming to be holders of surface and ground water rights appurtenant to lands located in the Walker River Basin;

B. The Tribe's Amended Counterclaim;

C. The United States' Amended Counterclaim; and

D. The Case Management Order.

A time for completion of service must be established. It can best be established by the Court in consultation with the parties after more details are known concerning identification of persons to be joined. In order to keep the Court and the parties informed on progress, any problems encountered and the potential need for additional time, there should be regular, perhaps quarterly reports and perhaps even status conferences with the Court and/or the Magistrate Judge.

IV. Procedures for Filing and Serving Pleadings and Providing Notices of Hearings After Completion of Service of Process.

Persons served with process must be notified concerning how and when they must respond. They should be directed to file and serve upon the United States, the Tribe, the Walker River Irrigation District, Nevada and California a notice of appearance and intent to

participate. The filing and service of this notice would serve as the foundation for service of future pleadings and orders, including orders concerning case management.

Except for requiring a notice of appearance, the Court should order that no answer, counterclaim, cross-claim or motion shall be served or filed in response to the claims of the United States and the Tribe and no defaults shall be taken with respect thereto except upon further order of the Court. There are at least two reasons for this approach. First, it will allow the Court to define and limit the issues to be addressed at the outset of the litigation. Second, because of the relationship inter se of water rights a default against less than all the parties is meaningless.

Previously, the United States and the Tribe asked 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. The procedure outlined in the order which is attached to the Joint Motion bears careful review by the Court and the parties. However, it is premature to assume that such a procedure will be required here 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.

V. <u>Threshold Issues.</u>

The Case Management Order should provide that promptly after completion of service of process the Court will schedule and conduct a conference to identify and establish a schedule for deciding threshold issues. Although joined parties should have an opportunity to suggest which issues should be initially addressed, the Case Management Order should at least identify some issues for consideration. Set forth below are issues which the District suggests be

included along with their status in somewhat similar litigation pending in Arizona.[1] These issues, once decided, will determine the scope and course of this litigation. These issues are not necessarily presented in the order in which they should be decided.

One issue is the scope of the Court's jurisdiction in post judgment proceedings. That issue includes not only the Court's jurisdiction to adjudicate claims to groundwater, but also claims to additional surface water. This is not an issue in the Arizona litigation.

Three related issues involve the claim that groundwater use affects the availability of surface water. The first issue is whether, regardless of the extent of hydrologic connection between surface and groundwater, the Court is required to accept the distinction drawn between surface water rights and groundwater rights by California and Nevada law. In In Re General Adjudication of All Rights to Use Water in the Gila River Systems and Source, 175 Ariz. 382, 857 P.2d 1236 (1993), the Arizona Supreme Court held that it must accept the distinction drawn between surface and groundwater under Arizona law even if that distinction was not consistent with hydrology.

The second and related issue is whether holders of surface water rights established under federal law are entitled to protection from use of groundwater beyond the protection provided to holders of surface water rights established under state law. The Arizona Supreme Court so held in In Re General Adjudication of All Rights to Use Water In the Gila River System and Source, 989 P.2d 739 (Ariz. 1999).

If the Court has jurisdiction to protect surface water rights established under federal law from interference by junior groundwater right holders, the final issue in this trilogy is whether issues of interference must be decided as a part of the adjudication of surface water claims under federal law. This issue has not yet been decided in the Arizona litigation.

---

[1] A detailed procedural history of the Arizona litigation, which does not involve an existing federal court decree, may be found in In Re Rights to the Use of the Gila River, 171 Ariz. 230, 830 P.2d 442, 444-445 (1992) and In Re the General Adjudication of All Rights to Use Water in the Gila River System, 175 Ariz. 382, 857 P.2d 1236, 1240 (1993).

VI. Discovery.

With certain limited exceptions, no discovery should take place and all discovery should be stayed pending further order of the Court. The first limited exception relates to a need to perpetuate testimony, particularly as it may relate to water rights which are not the subject of an approval by any state agency. This may be important for holders of vested groundwater rights in Nevada and groundwater and riparian rights in California. Exhibit "A" to the motion suggests procedures to be followed in addition to those required by the Federal Rules of Civil Procedure.

The second limited exception relates to written discovery and document production concerning the claims of the Tribe and United States. In accordance with the Federal Rules of Civil Procedure, any party should be allowed to propound interrogatories and requests for production of documents to the United States and the Tribe concerning their contentions with respect to the claims alleged in their amended counterclaims. This information may be of assistance in identifying additional threshold issues and in developing subsequent orders concerning case management.

Dated this 21st day of January, 2000.

FRANKIE SUE DEL PAPA
Attorney General
100 North Carson Street
Carson City, NV 89701

By: Marta Adams
MARTA ADAMS
Nevada Bar No. 01564
Senior Deputy Attorney General

Attorneys for the STATE OF NEVADA

WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Post Office Box 2311
Reno, Nevada 89511

By: Dale E. Ferguson
GORDON H. DEPAOLI
Nevada State Bar No. 00195
DALE E. FERGUSON
Nevada State Bar No. 04986

Attorneys for WALKER RIVER IRRIGATION DISTRICT

CERTIFICATE OF MAILING

I certify that I am an employee of Woodburn and Wedge and that on this date, I deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing ***WALKER RIVER IRRIGATION DISTRICT'S AND STATE OF NEVADA'S POINTS AND AUTHORITIES IN SUPPORT OF MOTION CONCERNING CASE MANAGEMENT*** in an envelope addressed to:

Shirley A. Smith
Assistant U.S. Attorney
100 West Liberty Street, #600
Reno, NV 89509

Richard R. Greenfield
Department of the Interior
Two North Central Avenue, #500
Phoenix, AZ 85004

George Benesch
P.O. Box 3498
Reno, NV 89505

Western Nevada Agency
Bureau of Indian Affairs
1677 Hot Springs Road
Carson City, NV 89706

Kenneth Spooner
General Manager
Walker River Irrigation District
P.O. Box 820
Yerington, NV 89447

R. Michael Turnipseed, P.E.
Division of Water Resources
State of Nevada
123 West Nye Lane
Carson City, NV 89710

Garry Stone
United States District Court Water Master
290 South Arlington Avenue
Third Floor
Reno, NV 89501

Alice E. Walker
Greene, Meyer & McElroy
1007 Pearl Street, Suite 220
Boulder, CO 80302

John Kramer
Department of Water Resources
1416 Ninth Street
Sacramento, CA 95814

Matthew R. Campbell, Esq.
David Moser, Esq.
McCutchen, Doyle, Brown & Enerson
Three Embarcadero Center
San Francisco, CA 94111

Larry C. Reynolds
Deputy Attorney General
Nevada State Engineer's Office
123 West Nye Lane
Carson City, NV 89710

Ross E. de Lipkau
Marshall, Hill, Cassas & de Lipkau
P.O. Box 2790
Reno, NV 89505

Susan Schneider
Indian Resources Section
U.S Department of Justice
999 18th Street
Suite 945, North Tower
Denver, CO 80202

Marta Adams
Deputy Attorney General
State of Nevada
100 North Carson street
Carson City, NV 89701

Mary Hackenbracht
Deputy Attorney General
State of California
1515 Clay Street, 20th Floor
Oakland, CA 94612-1413

James Spoo
Treva J. Hearne
Zeh, Polaha, Spoo, Hearne & Picker
575 Forest Service
Reno, NV 89509

Roger Bezayiff
Water Master
U.S. Board of Water Commissioners
P.O. Box 853
Yerington, NV 89447

Hank Meshorer
United States Department of Justice
Natural Resources Division
Ben Franklin Station
P.O. Box 7611
Washington, D.C. 20044

William Hvidsten
Dec.ir & Somach
400 Capitol Mall, Suite 1900
Sacramento, CA 95814

Linda Bowman
Bowman & Robinson
540 Hammill Lane
Reno, NV 89511

Kelly R. Chase
P.O. Box 2800
Reno, NV 89423

John Davis
P.O. Box 1646
Tonopah, NV 89049

Kathryn E. Landreth
United States Attorney
100 West Liberty Street
Suite 600
Reno, NV 89501

Robert C. Anderson
Timothy Lukas
Hale, Lane, Peek, Dennison, Howard,
Anderson & Pearl
P.O. Box 3237
Reno, NV 89505

Michael W. Neville
California Attorney General's Office
455 Golden Gate Ave.
Suite 11000
San Francisco, CA 94102-3664

Sharon E. Claassen
P.O. Box 209
Carson City, NV 89702

Daniel N. Frink
Water Resources Control Board
State of California
P.O Box 100
Sacramento, CA 94814

Dated this 21st day of January, 2000.

Penelope H. Colter

Penelope H. Colter

wp:wrid:0063\P's and A's in Support of Motion