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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, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	IN EQUITY NO. C-125-ECR SUBFILE NO. C-125-B **MEMORANDUM IN SUPPORT OF THE MOTION OF THE UNITED STATES AND WALKER RIVER PAIUTE TRIBE TO ADOPT CASE MANAGEMENT ORDER**

The United States and the Walker River Paiute Tribe ("Tribe") respectfully request the Court to adopt the attached Case Management Order. Despite considerable discussion and effort, the parties have been unable to reach agreement on the nature of the Case Management Order that should be submitted to the Court for its approval, although we understand that the parties have all agreed that the appropriate groundwater and surface water users should be joined before turning to any of the substantive questions raised in the *Minutes of the Court* (May 11, 1999). Three fundamental differences, however, separate the parties and have precluded the submission of a jointly proposed order. First, there is disagreement over the proposal by the United States and the Tribe to bifurcate the case to consider initially the claims of the Tribe and those that the United States makes on the Tribe's behalf ("Tribal Claims"), without the complications of the other claims which the United States is asserting on its own behalf and as trustee for the other tribal and individual Indian interests in the Walker River Basin ("Federal Claims"). Second, the United States and the Tribe assert that the Court and the parties should, as threshold issues,

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address the frequently implied affirmative defenses of the other parties to the Tribal Claims at the same time that the Court considers the initial questions concerning groundwater that have been raised by the Court and others. Third, principally because of the disagreement over bifurcation, the parties disagree over who needs to be served in this phase of the proceedings. We address each of these disputes below.

1. The United States and the Tribe submit that it would be more efficient and more equitable to bifurcate the Tribal Claims from the Federal Claims. The Tribal Claims were filed first and are easily distinguished from the Federal Claims both legally and geographically. As a practical matter, the different claims would have to be addressed in sequence anyway and there is no disagreement that the Tribe's claims are at the heart of this stage of this proceeding. Moreover, the common practice in water rights adjudications involving tribal rights is to separate the tribal claims which are founded on federal law and determine those rights in a separate proceeding from the determination of competing state law claimants. Of equal importance, segmenting the Tribal Claims should reduce the burden on other users under state law by delaying the consideration of the possible inter se portion of the case until it is clear that the Tribal Claims pass the barriers imposed by the various threshold questions. As a result, fewer parties need to be joined and there should be less burden on the small users, at least at the outset of the case.

2. The second area of dispute among the parties is whether the threshold issues addressed by the parties following service should include additional issues beyond those raised by the Court concerning the groundwater claims of the United States and the Tribe. *See Minutes of the Court* (May 11, 1999). The proposed Case Management Order submitted by the United States and the Tribe sets forth a number of issues that, in our view, should be addressed

simultaneously with the legal issues related to groundwater that were identified by the Court and to which the other parties have agreed, at least in concept. In particular, some of the other parties to this case have frequently contended that, for one reason or the other, the Court may not consider the Tribal Claims. While the United States and the Tribe firmly believe that no legitimate obstacles exist to proceeding with the Tribal Claims, the validity of any potential affirmative defenses which would be dispositive of those claims should be addressed at the outset of the case along with the threshold legal issues related to groundwater that concern the Court. The resolution of those additional issues at this stage of the case has the potential either to dispose of the Tribal Claims as the other parties have suggested, or to advance substantially the likelihood of serious settlement negotiations. The suggestion by the other parties that interlocutory appellate review may be required for the groundwater issues identified by the Court further supports the efficiency of addressing the full range of the outstanding threshold issues related to the Tribal Claims at the outset rather than delaying the determination of those issues until after the threshold issues related to groundwater are addressed.

3. Finally, the United States and the Tribe disagree with the contention by the other parties that if the Tribal Claims are bifurcated from the Federal Claims and the Court proceeds with the threshold issues identified by the United States and the Tribe, it nevertheless is necessary to join every potential groundwater user (in effect, every landowner) in the basin. The Walker River Irrigation District, the State of California, and the State of Nevada will undoubtedly carry the burden of addressing the threshold issues before the Court. By joining the categories of claimants described in the proposed Case Management Order, those truly affected by the outcome of the identified issues related to the Tribal Claims will be given the opportunity to participate.

On the other hand, the inclusion of a broad range of additional parties would burden those parties with the cost and expense of participating in litigation that is only tangentially related to their water use. To be sure, if the case proceeds and the ultimate result is an inter se adjudication of all rights in the basin or if the administration of domestic rights in California becomes necessary, those parties may need to be joined. But those stages of the case are a long way off. The Tribes and the United States prefer to wait until it is clear that such parties will be affected by the litigation before subjecting those parties to the cost and expense of participating in the presently proposed proceedings which are not likely to affect them and to which they are unlikely to make any meaningful contribution.

4. In conclusion, this case raises complex and far reaching issues that will be time consuming and difficult to resolve in the best of circumstances. It should be structured in a fashion that is most likely to lead to the efficient resolution of those issues and does not unduly burden those who are not likely to be affected by the issues before the Court at any particular stage. Moreover, to the extent that there are potentially dispositive threshold issues, those issues should be promptly resolved. This case should not become a war of attrition in which those who benefit by the status quo win. The Case Management Order proposed by the United States and the Tribe strikes the right balance between ensuring that those who might logically be affected by the adjudication of the threshold issues are joined in the case while not unduly burdening those water users with no more than theoretical concerns over the initial issues to be presented to the Court. For the reasons stated above, the United States and the Tribe respectfully request the Court to adopt the Case Management Order which they have proposed.

Dated: Jan. 20, 2000

Respectfully submitted,

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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, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	)	IN EQUITY NO. C-125-ECR SUBFILE NO. C-125-B **CASE MANAGEMENT ORDER**

JAN 21

RECITALS

This Case Management Order establishes the procedures for the Court to begin consideration of the water rights claims of the Walker River Paiute Tribe ("Tribe") and the United States on behalf of the Tribe, contained in the *First Amended Counterclaim of the United States of America* (July 31, 1997), and the *First Amended Counterclaim of the Walker River Paiute Tribe* (July 31, 1997), and the defenses that may be raised to those claims. In addition to the claims it has asserted on behalf of the Tribe, the United States also has made surface water and groundwater claims for additional federal and tribal uses in the Walker River Basin. *See 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* (Aug. 19, 1998).

On May 11, 1999, this Court entered a Minute Order which provided for a scheduling conference to establish procedures for the management of this matter and identified certain issues of concern. *Minutes of the Court* (May 11, 1999). At a telephonic hearing with the Court on

May 21, 1999, the parties agreed to attempt to stipulate to a case management order that would address these issues. *Minutes of the Court* (May 21, 1999). After that effort failed, the parties presented their respective positions to the Court. This Case Management Order followed.

This Case Management Order bifurcates the claims asserted by the Tribe and the United States on the Tribe's behalf from those claims which the United States makes on its own behalf or on behalf of other tribal entities. The Order next defines certain threshold issues which must be addressed. The Order then establishes an initial approach to service that is intended to encompass those parties who should participate in the determination of the threshold issues raised by the tribal claims. Finally, the Order establishes a procedure for addressing discovery in connection with the threshold issues.

CASE MANAGEMENT ORDER

The Court hereby ORDERS as follows:

A. BIFURCATION

1. The claims of the Tribe contained in the *First Amended Counterclaim of the Walker River Paiute Tribe* (July 31, 1997) and those claims by the United States on behalf of the Tribe (First, Second and Third Claims for Relief) set forth in the *First Amended Counterclaim of the United States of America* (July 31, 1997) (collectively "Tribal Claims") are hereby bifurcated from all other claims (Fourth through the Eleventh Claims for Relief in the *First Amended Counterclaim of the United States of America* (July 31, 1997) ("Federal Claims") raised by the United States in its pleading.

2. The Tribal Claims shall proceed as described in this Case Management Order. All discovery and all other proceedings in this action related to the Federal Claims are stayed until further order of the Court.

B. THRESHOLD ISSUES RELATIVE TO THE TRIBAL CLAIMS

The following issues are threshold issues to the resolution of the Tribal Claims that should be addressed at the outset of the litigation.

1. Whether the Court has jurisdiction to adjudicate the Tribal Claims. If so, to what extent should the Court exercise its jurisdiction in these matters?

2. Does federal law govern the pumping of groundwater on the Walker River Indian Reservation by the Tribe or the United States on its behalf?

3. If the Tribe has the right to pump groundwater under federal law, are such rights, as a matter of federal law, subject to different protections than those provided by state law?

4. Whether the Court has jurisdiction over groundwater used pursuant to state law outside the exterior boundaries of the Reservation if such uses interfere with the Tribe's rights under federal law to use water from the Walker River system. If so, should the Court exercise that jurisdiction?

5. Whether equitable defenses bar all or some of the Tribal Claims. Within 60 days of the adoption of this Case Management Order, the present parties shall advise the Court and the other parties of any such defenses or issues they intend to assert.

C. JOINDER OF PARTIES

1. Within 30 days of the adoption of this Case Management Order or as otherwise ordered by the Magistrate Judge, the parties shall meet with the Magistrate Judge to determine the appropriate procedures for the exchange of information pursuant to ¶ 5 below and for such other purposes as the Magistrate Judge deems appropriate. The United States and Tribe shall report to the Magistrate Judge concerning the status of service at 120-day intervals following the entry of this Case Management Order. The parties shall meet periodically with the Magistrate

Judge at his discretion to ensure that matters related to service are proceeding appropriately and that the parties are cooperating in accomplishing that task.

2. Prior to the resolution of the threshold issues identified in Section B of this Case Management Order, the United States and the Tribe shall effect service of their first amended counterclaims, notices in lieu of summons, requests for waiver of service, and this Case Management Order on all of the members of the categories of water right holders described below:

a. All holders of surface water rights under the laws of the States of Nevada and California in the Walker River Basin who are not presently parties to this adjudication.

b. All successors in interest to the water right holders under the *Decree* (Apr. 14, 1936), modified, *Order for Entry of Amended Final Decree to Conform to Writ of Mandate, Etc.* (Apr. 24, 1940) ("1936 Decree").

c. All holders of permits to pump groundwater issued by the State of Nevada within Sub Basins 107 (Smith Valley), 108 (Mason Valley), 110A (Shurz Subarea of the Walker Lake Valley), and 110B (Walker Lake Subarea of the Walker Lake Valley).

d. All holders of "vested rights" to the use of groundwater under the law of the State of Nevada within the Walker River Basin.

e. All municipal providers in Nevada who currently use groundwater.

f. All municipal providers in California who currently use groundwater.

g. All industrial users in Nevada who currently use groundwater .

h. All industrial users in California who currently use groundwater.

3. Within 30 days of the entry of this Case Management Order by the Court, the parties shall submit an agreed-upon Notice in Lieu of Summons for the Tribal Claims to the Court for its approval.

4. To the extent that the United States and the Tribe cannot effect service upon or obtain a waiver of service from all of the individual members of the categories defined in paragraph 2 of this Section, and after demonstration to the Magistrate Judge of reasonable efforts in attempting such service, the Court, upon motion of the United States and/or the Tribe shall allow completion of service as to such individuals and entities, and as to all other surface water and groundwater rights claimants not identified, by publication consistent with FED. R. CIV. P. 4. The parties have agreed that the notice requirements would be satisfied by publication at least once a week for four weeks of the Notice in Lieu of Summons, or any other document to which the parties agree, the Tribe's and the United States' first amended counterclaims, and this Case Management Order 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.

5. The Walker River Irrigation District ("District"), the State of Nevada, the State of California, the United States Board of Water Commissioners and Mineral County shall identify and provide (in electronic format to the extent available) to the United States and the Tribe all information in their possession, custody or control identifying all individuals and entities with any claims to surface water and/or groundwater in the Walker River Basin. As such information is modified or changed in any way, the District, the State of Nevada, the State of California, the United States Board of Water Commissioners, and Mineral County shall provide information on those modifications and changes to the United States and the Tribe within two weeks of its

receipt and shall so continue until the Court determines that service by the United States and the Tribe is complete. Those parties are directed to cooperate fully with the efforts of the United States and the Tribe to complete service and to advise their members and constituents of the need to cooperate fully with those efforts.

6. The United States and the Tribe may seek costs of service, pursuant to the requirements of FED. R. CIV. P. 4(d), at any time during their service efforts under this Case Management Order.

7. After the United States has received the information from the other parties described in ¶ 5 and compiled the list of the parties whom it intends to serve, that list shall be provided to the other parties who shall have 45 days to inform the Magistrate Judge whether, in their view, the list is complete and includes all of the water right claimants within the categories described in ¶ 2 who can reasonably be identified. Any disagreements among the parties over the adequacy of the list prepared by the United States shall be resolved by the Magistrate Judge.

8. Following the completion of service, the parties, by agreement or with the assistance of the Magistrate Judge, shall develop procedures for the efficient management of the litigation, given the number of parties to the case. Such procedures may include the use of common counsel, special procedures for the service of pleadings or any other mechanism which the parties deem likely to reduce the burdens on the Court and the parties in a case of this magnitude.

D. PHASING OF PROCEEDINGS

9. Pretrial proceedings in this case shall be conducted in multiple phases as follows:

a. Phase I proceedings shall relate to the threshold issues defined in Section B of this Case Management Order.

b. Additional phases of the proceedings shall encompass all remaining issues in the case, including but not limited to:

(1). All other claims, cross-claims, counterclaims, defenses and issues raised by the pleadings of the parties that are not included within the threshold issues identified in Section B of this Case Management Order.

(2). All other issues related to the Tribal Claims.

(3). All issues related to the Federal Claims.

10. All defendants and intervenors in these proceedings shall file answers to the United States' and Tribe's first amended counterclaims within 60 days of receipt of service, or where service is by publication, within 60 days of the last day of publication of such service. However, the time for filing cross-claims among the non-federal parties is tolled until further order of the Court. No default shall be taken for failure to appear.

11. Upon the completion of Phase I of the case, it may be necessary to join additional parties.

E. DISCOVERY AND FURTHER PROCEEDINGS

12. Discovery shall be allowed to all parties upon the threshold issues defined in Section B of this Case Management Order.

13. The United States, the Tribe, the States of Nevada and California and the District shall file a report with the Court, within 60 days after the entry of this Case Management Order, regarding the development of a second case management order addressing the extent of the parties' agreement upon the terms and conditions of discovery regarding Phase I issues.

14. All motions dispositive or partially dispositive of any threshold issue shall be deferred until after completion of discovery and shall be filed within three months after completion of discovery.

a. A party opposing such motions shall respond within 40 days of service thereof, and the moving party may file a reply within 20 days of service of such response.

b. To the extent the threshold issues are not resolved on the pleadings or documentary presentation associated with such motions, an evidentiary hearing shall be held on the unresolved issues.

15. Any party may move for modification of this Case Management Order for good cause shown.

IT IS SO ORDERED:

Dated _____, 2000.

_____
The Honorable Edward R. Reed
United States District Court Judge