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TRIBE

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10 IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA

11 UNITED STATES OF AMERICA,  
12 Plaintiff,

13 WALKER RIVER PAIUTE TRIBE,  
14 Plaintiff-Intervenor,

15 vs.

16 WALKER RIVER IRRIGATION  
17 DISTRICT, a corporation, et al.,  
18 Defendants.  
19

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In Equity No. CV-125-ECR  
Subfile No. C-125-B

RESPONSE OF THE UNITED STATES  
AND WALKER RIVER PAIUTE TRIBE  
TO JOINT MOTION BY THE STATE OF  
NEVADA AND WRID CONCERNING  
CASE MANAGEMENT

20 The United States and the Walker River Paiute Tribe ("Tribe") have reviewed the Joint Motion  
21 Concerning Case Management filed by the Walker River Irrigation District ("WRID") and the State of  
22 Nevada, which includes a Proposed Order Concerning Case Management ("WRID/Nevada Proposed  
23 Order"). As discussed below, we agree generally with some of the suggestions contained therein. We do  
24 not believe, however, that the WRID/Nevada Proposed Order will result in a case management structure  
25 that will "secure the just, speedy, and inexpensive determination of [this] action."<sup>1/</sup> Rather, it appears that  
26 the WRID/Nevada Proposed Order is drawn to complicate further the already complicated procedural  
27 hurdles the United States and Tribe must clear so that their claims may be heard.

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<sup>1/</sup> Fed. Rule of Civil Procedure 1.

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1 First, the WRID/Nevada Proposed Order does not establish procedures that will lead to the  
2 efficient resolution of a definable set of threshold legal issues in this litigation. On the one hand, the  
3 WRID/Nevada Proposed Order recommends a limited set of threshold issues to be determined at the  
4 outset of the case, which includes issues of jurisdiction and groundwater, but does not include any kind of  
5 defenses that other parties may assert. On the other hand, the WRID/Nevada Proposed Order would also  
6 authorize virtually unlimited discovery against the United States and the Tribe without regard to the range  
7 of issues to be decided in the initial phase of the case. Neither of these elements of the WRID/Nevada  
8 Proposed Order will assist the Court and the parties in establishing a process for the identification and  
9 orderly resolution of the issues raised by the United States' and Tribe's claims. At this point, the Court and  
10 parties should determine which issues the Court will address initially and then determine the related  
11 procedural aspects of the litigation, such as the scope and timing of discovery. Dividing this litigation into  
12 phases at the outset, based on parties and issues, as the United States and Tribe have suggested, is a logical  
13 and efficient way to proceed. See e.g., Manual for Complex Litigation, Third, Federal Judicial Center,  
14 1995, 21.211, 21.32.

15 Regarding the threshold issues, the United States and the Tribe have proposed that the initial phase  
16 of this litigation focus on certain legal issues related to this Court's jurisdiction, groundwater, and affirmative  
17 defenses the other parties may assert. We believe that this is logical, efficient, economic, and just. Focusing  
18 on threshold issues such as jurisdiction and related affirmative defenses is a logical first step, because it  
19 allows for the prompt resolution of these potentially or partially dispositive issues.<sup>2/</sup> If WRID or the State  
20 or any other party has a procedural or other defense to going forward, then this is the logical time to identify  
21 the defense and address it. It is efficient to resolve threshold issues regarding the Tribal Claims because  
22 it allows the parties to focus their time and resources on a manageable set of issues, and eliminates the  
23 temptation for the parties to litigate every issue in the case at once, without a coherent structure for doing  
24 so. Resolution of the threshold issues regarding the Tribal Claims may also lead to more efficient resolution  
25 of similar issues regarding the other federal claims. Finally, it is just because the Tribe and the United States

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27 <sup>2/</sup> The United States and the Tribe also assert that whatever statement of specific threshold issues the  
28 Court ultimately adopts, it should be by way of a more neutral phrasing of these issues than offered in the  
WRID/Nevada Proposed Order. See e.g. WRID/Nevada Proposed Order at Para. 11.A.

1 should have the opportunity to obtain legal redress for their claims in the most logical and efficient manner  
2 possible. This case originated in 1924 with certain claims made on behalf of the Tribe and the current effort  
3 to proceed with the counterclaims began in 1992 on behalf of and regarding the Tribal Claims. The Tribe  
4 should not have to remain on the sideline while other claims and issues are litigated before theirs and while  
5 the status quo as to water use, for which it and the United States wish to obtain legal redress, continues and  
6 likely worsens.

7       Regarding discovery, the United States and the Tribe have proposed that procedures as to the  
8 scope and timing of discovery should only be addressed once it is clear which issues are the present focus  
9 of the litigation. Thereafter, and in light of the determination of issues to be decided in the initial phase, the  
10 parties should be required to confer on a proposed Discovery Plan for submission to the Court. If  
11 necessary, this plan can be finalized with the assistance of the Court and the Magistrate Judge. The  
12 approach suggested by the United States and the Tribe is consistent with the guidance of the Manual for  
13 Complex Litigation:

14       Discovery in complex litigation, characterized by multiple parties, difficult issues, voluminous  
15 evidence, and large numbers of witnesses, tends to proliferate and become excessively costly, time  
16 consuming, and burdensome. Early and ongoing judicial control is therefore imperative for effective  
17 management....

18       Fundamental to control is that discovery be directed at the material issues in controversy. The  
19 general principle governing the scope of discovery stated in Rule 26(b)(1) permits discovery of  
20 matters "relevant to the subject matter ... [of] the action" if "[t]he information sought . . . appears  
21 reasonably calculated to lead to the discovery of admissible evidence." But Rule 26(b)(2) directs  
22 the court to limit the frequency and extent of use of the discovery methods permitted by the rules,  
23 to prevent "unreasonably cumulative or duplicative" discovery and discovery for which "the burden  
24 or expense ... outweighs its likely benefit, taking into account the needs of the case. ... the  
25 importance of the issues at stake ... and the importance of the proposed discover in resolving the  
26 issues." Application of this underlying principle of proportionality means that even in complex  
27 litigation, conducting discovery does not call for leaving no stone unturned.

28       Early identification and clarification of issues is therefore essential to meaningful and fair discovery  
control. It enables the court to assess the materiality and relevance of proposed discovery and  
provides the basis for formulating a fair and effective discovery plan....

29       Manual for Complex Litigation, Third at 21.4, 21.41 (citations omitted).

30       By contrast, the WRID/Nevada Proposed Order does not establish meaningful controls on  
31 discovery. Although it purports to stay discovery subject to "limited" exceptions, it would authorize open-  
32 ended discovery against the United States and the Tribe. This would have several undesirable  
33 consequences. It would interfere needlessly with the service efforts of the United States and the Tribe, as

1 it would subject them to virtually unlimited discovery (interrogatories and requests for document  
2 production) on any claim from any party to the case, even as they work to identify and serve the additional  
3 parties. It would threaten to proliferate the issues in dispute at just the moment that they have been limited  
4 to manageable proportions, without regard to the range of issues to be decided in the initial phase. It could  
5 result in significant waste of resources, as discovery may be conducted needlessly on matters that never  
6 arise because of the resolution of initial-phase issues. For all of the above reasons, it would delay the  
7 ultimate resolution of this case. And for the same reasons, such one-sided discovery is unfair,  
8 overburdensome, and costly for the United States and the Tribe. Moreover, this proposal bypasses any  
9 less onerous, more reasonable and mutually applicable alternatives, such as the initial disclosure  
10 requirements of the Federal Rule of Civil Procedure 26(a)(1) or the local rules of this Court.

11       Second, the WRID/Nevada Proposed Order is more time-consuming. In addition to the above  
12 concerns regarding the WRID/Nevada Proposed Order's approach to discovery, we are concerned that  
13 service efforts, which will be long and difficult under the best of circumstances, will be further delayed. For  
14 the past five years, the parties and the Court have observed the difficulties Mineral County has encountered  
15 in attempting to intervene in this action in the C-125 subfile. We believe the Mineral County experience  
16 demonstrates that it will be critical to have the assistance of the Court as the United States and the Tribe  
17 seek to identify and serve the additional parties for resolution of the Tribal and other federal claims. Thus,  
18 the United States and the Tribe would like to identify and clarify from the start, as they have proposed, the  
19 categories of parties to be included in this action. Related to this effort, they seek the assistance of the  
20 Court in obtaining from the parties all information in their custody and control that identifies these persons.  
21 It will be unnecessarily time-consuming for the United States and the Tribe to be left to identify these parties  
22 on their own, only to meet at some future date the kinds of objections filed regarding the Mineral County  
23 service effort. We do not want to see service and related procedural requirements disputed in a manner  
24 that prevents access to the Court for redress of the Tribal Claims.

25       Third, the WRID/Nevada Proposed Order will be more costly for most of the parties. As noted  
26 above, discovery and service-related efforts under the WRID/Nevada Proposed Order will be  
27 unnecessarily expensive. In addition, this proposal would require the joinder of even more persons from  
28 the outset of the case than as proposed by the United States and the Tribe, which will burden not just the

1 United States and the Tribe with additional litigation costs, but also burden these additionally joined persons  
2 with unnecessary costs associated with being a party. This applies, for example, to groundwater users in  
3 California. Perhaps WRID and the State of Nevada want these persons included in the case, but with a  
4 bifurcation of parties and issues as suggested by the United States and the Tribe, their presence would not  
5 be necessary at this phase of the litigation, and may well not be necessary at any point in the  
6 litigation.

7 Notwithstanding the above concerns, there are some proposals in the WRID/Nevada Proposed  
8 Order with which the United States and Tribes agree generally, although the specifics of these proposals  
9 and their context do not allow complete and unqualified agreement. First, the United States and Tribe  
10 agree that their service efforts should be combined with an effort to record a Notice of Lis Pendens with  
11 the appropriate recorder(s) of the applicable property. We wish to explore further how each applicable  
12 county or recorder wishes this process to be done and to discuss further with both the parties and the Court  
13 the timing of such an effort, applicable procedures, and agreed-upon form for such notice. We believe that  
14 this is an issue for which the specifics should be able to be worked out by the parties with the assistance  
15 of the Court and Magistrate Judge.

16 Second, in the memorandum in support of the WRID/Nevada Proposed Order, WRID and the  
17 State appear to imply that the Counter-claims may not be served until all parties are identified in the caption  
18 of the Complaint under Federal Rule of Civil Procedure 10(a). (Mem. at p. 6.) The United States and  
19 Tribe recognize that their Complaint will have to comply with Rule 10(a), but it may not be reasonable,  
20 practical, or even possible, to hold up service until all parties were identified with absolute certainty.  
21 Indeed, it is clear from the efforts of Mineral County to effect service that the ownership of water interests  
22 named in its Complaint have changed over time. This issue and the application of Federal Rule of Civil  
23 Procedures 10 and 15, in conjunction with the completion of service, should be worked out by the parties  
24 with the assistance of the Court and Magistrate Judge.

25 Third, the United States and the Tribe agree generally with the proposed additional procedures in  
26 paragraph 12 of the WRID/Nevada Proposed Order regarding the potential need to perpetuate testimony,  
27 but only to the extent that these procedures supplement and do not change or conflict with the Federal  
28 Rules of Civil Procedure. To the extent that these proposed procedures change or conflict with existing

1 rules, then the parties should discuss the rationale for such proposals and determine if they can come to an  
2 agreement on procedures if such an issue arises. This is an issue that at this point is speculative and can  
3 be addressed with the assistance of the Court or Magistrate Judge in the context of further discussions on  
4 the scope and implementation of discovery and as such issues arise initially.

5 Third, the United States and Tribe agree generally with the proposals that no defaults should be  
6 taken against any party and that the parties should not be required to file counterclaims or cross-claims  
7 against each other. We do not agree, however, that the parties served should be excused from filing  
8 answers in this matter. All parties to the counterclaims of the United States and the Tribe should be  
9 required to file answers, although we would agree to delay the filing of these answers until shortly after  
10 completion of service, but before initiation of any discovery and litigation of what we have proposed as  
11 threshold issues in the initial phase of this litigation. If the parties do not file answers, then the Court and  
12 other parties will not know what the parties identify as issues, affirmative defenses, and other positions.  
13 It would leave the litigation of initial issues extremely one-sided, unfair, and ad hoc, as well as frustrate the  
14 goal of establishing and implementing a process for the identification and orderly resolution of the issues  
15 raised by the United States' and Tribe's claims.

16 The United States and the Tribe note that a hearing is scheduled on March 14, 2000, before the  
17 Magistrate Judge for the parties to address service issues in the C-125-C subfile concerning the Mineral  
18 County intervention effort. We suggest that, time permitting, this may be an opportunity for the parties to  
19 hold preliminary discussions with the Magistrate Judge concerning the procedural matters outlined in both  
20 proposed Case Management Orders to see if the parties can resolve any of these issues with assistance,  
21 to ascertain how service issues may be coordinated with or should proceed in the wake of the Mineral  
22 County effort, and to discuss how the parties may avoid the problems and delays that have plainly impacted  
23 the Mineral County case. The simple fact that the parties have been unable to agree upon a Case  
24 Management Order in over eight months underscores the need for such judicial assistance at this stage of  
25 the litigation and continuing thereafter.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21<sup>st</sup> day of February, 2000, I placed a true and correct copy of the foregoing "RESPONSE OF THE UNITED STATES AND WALKER RIVER PAIUTE TRIBE TO JOINT MOTION BY THE STATE OF NEVADA AND WRID CONCERNING CASE MANAGEMENT," by first-class mail, postage prepaid, to the persons on the attached mailing list.



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