

1 BILL LOCKYER, Attorney General  
 of the State of California  
 2 MARY E. HACKENBRACHT  
 Assistant Attorney General  
 3 JOHN DAVIDSON  
 Supervising Deputy Attorney General  
 4 MICHAEL W. NEVILLE, State Bar No. 096543  
 Deputy Attorney General  
 5 455 Golden Gate Avenue, Suite 11000  
 San Francisco, California 94102-7004  
 6 Telephone: (415) 703-5523  
 Facsimile: (415) 703-5480  
 7 Attorneys for California  
 Department of Fish and Game and  
 8 State Water Resources Control Board

9  
 10 UNITED STATES DISTRICT COURT  
 11 DISTRICT OF NEVADA

12 UNITED STATES OF AMERICA, )  
 13 Plaintiff, )  
 14 WALKER RIVER PAIUTE TRIBE, )  
 15 Plaintiff-Intervenor, )  
 16 v. )  
 17 WALKER RIVER IRRIGATION DISTRICT, )  
 a corporation, et al. )  
 18 Defendants. )  
 19 \_\_\_\_\_ )  
 20 WALKER RIVER PAIUTE TRIBE, )  
 21 Counterclaimant, )  
 22 v. )  
 23 WALKER RIVER IRRIGATION DISTRICT, et al., )  
 24 Counterdefendants. )  
 25 \_\_\_\_\_ )

IN EQUITY NO. C-125-ECR  
 SUBFILE NO. C-125-B

**STATE OF CALIFORNIA'S  
 RESPONSE TO MOTION OF  
 THE UNITED STATES AND  
 WALKER RIVER PAIUTE  
 TRIBE TO ADOPT CASE  
 MANAGEMENT ORDER**

26  
 27 On January 24, 2000, the State of California Department of Fish and Game and  
 28 State Water Resources Control Board ("State of California" or "California") concurred in the

112

1 Joint Motion Concerning Case Management filed by the State of Nevada and the Walker River  
2 Irrigation District, and urged this court to adopt and sign the Order Concerning Case  
3 Management proposed by those parties. In this Response, the State of California will briefly  
4 respond to several points raised in the Motion of the United States and Walker River Paiute Tribe  
5 to Adopt Case Management Order and the proposed Case Management Order ("CMO") filed on  
6 or about January 20, 2000.

7           First, in the proposed CMO at page 5, paragraph 4, line 17, the words  
8 "MAMMOTH TIMES" should be substituted for the words "REVIEW-HERALD." Counsel for  
9 the State of California is informed that the REVIEW-HERALD recently ceased publication, and  
10 that the MAMMOTH TIMES in Mammoth Lakes, California, is the appropriate newspaper for  
11 publication of service on California residents, assuming such publication of service becomes  
12 appropriate in the future.

13           Second, the proposed CMO at paragraph 5, page 5, imposes upon, *inter alia*, the  
14 State of California, the duty to identify and provide (in electronic format to the extent available)  
15 the United States and the Tribe "all information in their possession, custody or control  
16 identifying all individuals and entities with any claims to surface water and/or ground water in  
17 the Walker River Basin" and a duty to supplement such information *within two weeks* of any  
18 modification or change. The State of California, will, of course, respond cooperatively to  
19 appropriate discovery requests from the United States and Tribe to appropriate California state  
20 agencies, pursuant to the provisions of the Federal Rules of Civil Procedure. However,  
21 California objects to the two-week supplemental informational requirement as impracticable and  
22 inconsistent with Federal Rule of Civil Procedure 26(e)(1), which imposes a duty to supplement  
23 or correct past disclosures of information *at appropriate intervals* if the disclosing party learns  
24 that in some *material* respect the information disclosed is incomplete or incorrect and if the  
25 additional or corrective information has not otherwise been made known to the other parties  
26 during the discovery process and in writing. The United States and the Tribe have not shown the  
27 necessity to impose a disclosure requirement which is inconsistent with Rule 26(e).

28

1           Notably, the State of California does *not* possess information which would  
2 identify *all* individuals and entities with any claims to surface water and/or ground water in the  
3 Walker River Basin. The State Water Resources Control Board ("SWRCB") maintains records  
4 of some, but not all, persons who claim a right to divert and use water in the Walker River Basin.

5           The SWRCB has records of all parties who hold a permit or license to appropriate  
6 surface water in the Walker River watershed for appropriations initiated after December 19,  
7 1914. However, persons who hold a riparian right or an appropriative right initiated prior to  
8 December 19, 1914 (a pre-1914 appropriative right), are not required to obtain a permit or license  
9 from the State. Some riparians and pre-1914 appropriators have filed Statements of Water  
10 Diversion and Use with the SWRCB pursuant to Water Code section 5100. But the failure to file  
11 a Statement of Water Diversion and Use does not deprive riparians or pre-1914 appropriators of  
12 any water rights that they may hold. Therefore, the SWRCB's records of those who have filed  
13 Statements of Water Diversion and Use do not include all parties who may hold a riparian or pre-  
14 1914 appropriative water right to the diversion and use of surface water.

15           Moreover, parties who pump ground water in California may or may not have to  
16 obtain a permit from the SWRCB. Only ground water that is determined to be part of a  
17 subterranean stream is subject to the same application, permit, and license procedure which  
18 applies to diversion and use of surface water. (California Water Code section 1200 *et seq.*)  
19 Other ground water is considered to be "percolating ground water" and is not subject to the rules  
20 that apply to appropriation of surface water. (*City of Los Angeles v. Pomeroy* (1899) 124 Cal.  
21 597, 632, 57 P. 585.) Thus, the SWRCB does not maintain records of all parties who may claim  
22 a right to the use of percolating ground water.

23 //

24 //

25 //

26

27

28

1                   The State of California urges the adoption of the Case Management Order  
2 proposed by the State of Nevada and the Walker River Irrigation District. Should the court  
3 instead be inclined to adopt the Case Management Order proposed by the United States and  
4 Tribe, the State of California suggests that it be modified as outlined above.

5 DATED:       February 18, 2000

6                                   Respectfully submitted,

7                                   BILL LOCKYER, Attorney General  
8                                   of the State of California

9                                   MARY E. HACKENBRACHT  
10                                   Assistant Attorney General

11                                   MICHAEL W. NEVILLE  
12                                   Deputy Attorney General

13                                   Attorneys for State of California  
14                                   Department of Fish and Game and  
15                                   State Water Resources Control Board

**DECLARATION OF SERVICE BY MAIL**

Re: *United States v. Walker River Irrigation District, et al.*  
U.S.D.C. Nev. Dist., Case No. C-125-ECR (Subfile No. C-125-B)

I, **Helen Jellen**, declare that I am over 18 years of age, and not a party to the within cause; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102-7004. I served a true copy of the attached

**STATE OF CALIFORNIA'S NOTICE REGARDING SERVICE  
UPON STATE OF CALIFORNIA**

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

**SEE ATTACHED SERVICE LIST**

Each said envelope was then, on February 18, 2000, sealed and deposited in the mail in San Francisco, California, the county in which I am employed, with the fees thereon fully prepaid. Executed on February 18, 2000, at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

  
HELEN JELLEN

**SERVICE LIST (cont'd)**

*United States v. Walker River Irrigation Dist., et al.*

U.S.D.C. Nev. Dist. No. C-125-ECR (Subfile No. C-125-B)

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

Ross E. DeLipkau,  
P.O. Box 2790  
Reno, NV 89505

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

Gordon H. DePaoli  
Dale E. Ferguson  
Woodburn & Wedge  
6100 Neil Road, Suite 500  
P.O. Box 2311  
Reno, NV 89505

Robert C. Anderson  
Timothy A. Lukas  
Alex J. Flangas  
Hale, Lane, Peek, Dennison,  
Howard, Anderson and Pearl  
100 W. Liberty, 10th Flr.  
P.O. Box 3237  
Reno, NV 89505

Dan Frink  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95814

Evan Beavers  
Beavers & Young  
1616 Highway 395  
P.O. Box 486  
Minden, NV 89423

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

George Benesch  
210 Marsh Avenue, Ste. 105  
P.O. Box 3498  
Reno, NV 89505

Mary E. Hackenbracht  
Assistant Attorney General  
State Attorney General's Office  
1515 Clay Street, 20th Floor  
Oakland, CA 94612-1413

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

Roger Johnson  
Water Resources Control Board  
State of California  
P.O. Box 2000  
Sacramento, CA 95810

Linda A. Bowman, Esq.  
BOWMAN & ROBINSON  
540 Hammill Lane  
Reno, NV 89511

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

**SERVICE LIST**

*United States v. Walker River Irrigation Dist., et al.*  
U.S.D.C. Nev. Dist. No. C-125-ECR (Subfile No. C-125-B)

Robert L. Hunter, Superintendent  
Western Nevada Agency  
Bureau of Indian Affairs  
1677 Hot Springs Road  
Carson City, NV 89706

James T. Markle  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95814

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

William E. Hvidsten  
John A. Mendez  
Stuart L. Somach  
De Cuir & Somach  
400 Capitol Mall, Suite 1900  
Sacramento, CA 95814

Kathryn Landreth  
United States Attorney  
Shirley A. Smith  
Assistant U.S. Attorney  
100 West Liberty St., Ste. 600  
Reno, NV 89501

Susan Schneider  
U.S. Department of Justice  
Environment & Natural Resources Division  
Federal Building DR 3607  
999 - 18th Street, Ste. 945  
Denver, CO 80202

Scott McElroy, Esq.  
Alice Walker  
Greene, Meyer & McElroy  
1007 Pearl Street, Suite 220  
Boulder, CO 80302  
(3/98)

David E. McElroy, Esq.  
Matthew R. Campbell, Esq.  
McCutchen, Doyle, Brown & Emerson  
Three Embarcadero Center, Suite 1800  
San Francisco, CA 94111

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

Garry Stone  
290 South Arlington  
Reno, NV 89510

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

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

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

**SERVICE LIST (cont'd)**

*United States v. Walker River Irrigation Dist., et al.*

U.S.D.C. Nev. Dist. No. C-125-ECR (Subfile No. C-125-B)

James S. Spoo  
Trevia J. Hearne  
Zeh, Polaha, Spoo & Hearne  
450 Marsh Ave.  
Reno, NV 89509