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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, 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 POINTS AND AUTHORITIES IN OPPOSITION TO MOTION OF THE UNITED STATES AND WALKER RIVER PAIUTE TRIBE TO ADOPT CASE MANAGEMENT ORDER**
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	

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I. BACKGROUND

The disagreement concerning case management, between the United States and the Walker River Paiute Tribe (the "Tribe") on the one hand, and Nevada, California and the Walker River Irrigation District (the "District") on the other, is much more basic than as described by the United States and the Tribe in their motion. The basic disagreement relates to the proper scope of any case management order entered before literally hundreds of necessary and interested parties have been joined and served and before any discovery on the nature of the claims being asserted.

At this early stage of the proceeding, the United States and the Tribe ask the Court to bifurcate the claims related to the Walker River Indian Reservation (the "Tribal Claims") from all of the other claims asserted by the United States (the "Federal Claims") and to determine the threshold issues to be addressed on the Tribal Claims. They ask the Court to order Nevada, California and the District to within 60 days identify equitable defenses to the Tribal Claims and to require that those defenses also be heard and decided as threshold issues.

At an appropriate time there is no doubt that it will be useful to consider the propriety of bifurcation of claims or issues, the identification of threshold issues and the sequence in which those issues should be addressed. However, now is not that time. Case management at this stage of the proceeding must be directed to identifying, naming and joining, through proper service, the necessary parties. Once that difficult task is accomplished, the Court and all of the necessary parties can then turn their attention to the sort of case management suggested by the United States and the Tribe.

In order to address this basic disagreement, it is helpful to briefly summarize the history of this litigation. It is also important to have a basic understanding of the Tribal Claims and the Federal Claims.

II. THE TRIBAL AND FEDERAL CLAIMS

A. The Original Claims.

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 identical 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.

The United States and the Tribe sought and obtained 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).[1]

B. <u>The Amended Claims</u>

On or about July 30, 1997, the Tribe filed the 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. The Tribe's claims to water for land included in the Reservation in 1936 and for groundwater are clearly based upon the federal implied reservation of water doctrine. See, Tribe's First Amended Counterclaim at paras. 2-3. The basis for the claim to store water in Weber Reservoir is not clear. Id. at paras. 1; 17-18.

On or about July 30, 1997, the United States filed the First Amended Counterclaim of the United States of America ("United States First Amended Counterclaim"). The First, Second and Third Claims of the United States allege claims identical to the Claims asserted in the Tribe's First Amended Counterclaim. The implied reservation of water doctrine clearly underlies the claims for lands included in the Reservation in 1936 and the groundwater claims for the Walker River Indian Reservation. See, United States First Amended Counterclaim at

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[1] Statements that this case must not become "a war of attrition in which those who benefit from the status quo win" must be judged against this history.

paras. 15 and 18. Similarly, the basis for the Weber Reservoir claim is not clear. In addition to the claims for the Walker River Indian Reservation, the United States' First Amended Counterclaim includes several additional claims to surface water and groundwater for other federal enclaves in the Walker River Basin.

The Fourth Claim for Relief seeks "federal reserved water rights" to surface and groundwater for lands which form the Yerington Paiute Tribe Reservation. United States First Amended Counterclaim at paras 23-24. It also seeks a "declaration and confirmation" of water rights held under state law. Id.. at paras. 28-29. The Fifth Claim seeks "federal reserved rights" to surface and groundwater for the Bridgeport Indian Colony, as well as rights based upon California law. Id. at paras. 28-29. The Sixth Claim asserts "federal reserved water rights" to surface and groundwater for the Garrison and Cluette Allotments, as well as rights based upon California law. Id. at paras. 34-35. The Seventh Claim asserts federal reserved water rights" to surface and groundwater claims for 55 individual allotments. Id. at para. 39.

The Eighth through Eleventh Claims for Relief include claims for 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. All of those claims are based upon the implied reservation of water doctrine, as well as relevant principles of California and Nevada law. All seek rights to surface and groundwater. See, United States First Amended Counterclaim at paras. 46; 51; 56-62; 65; 66; 69; and 70-73.

III. THE UNITED STATES AND THE TRIBE HAVE NOT DEMONSTRATED AND AT THIS EARLY STAGE OF THE PROCEEDINGS CANNOT DEMONSTRATE THAT BIFURCATION OF THE TRIBAL CLAIMS FROM THE FEDERAL CLAIMS IS NECESSARY TO AVOID PREJUDICE, IS CONVENIENT OR WILL BE CONDUCIVE TO EXPEDITION AND ECONOMY

The party seeking bifurcation has the burden to show that it will promote judicial economy and avoid inconvenience or prejudice to the parties. Spectra-Physics Lasers, Inc. v. Uniphase Corp., 144 F.R.D. 99, 101 (N.D. Cal. 1992); Novopharm Ltd v. Torpharm, Inc., 181 F.R.D. 308, 310 (E.D.N.C. 1998). The piecemeal trial of separate issues in a single lawsuit or the repetitive trial of the same issue in several claims is not the usual course. See, 9 C. Wright

& A. Miller, Federal Practice and Procedure § 2388 at 474 (1995). Decisions concerning bifurcation of issues and claims should not be made prematurely. See, Krueger v. New York Telephone Co., 163 F.R.D. 446, 448-449 (S.D.N.Y. 1995).

Here the Tribe and the United States propose to bifurcate the Tribal Claims from the Federal Claims and then to proceed to discovery on and disposition of the following issues with respect to the Tribal Claims:

> 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.

United States and Tribe Proposed Case Management Order at 3.

Judicial economy is not promoted by such a bifurcation. Contrary to the assertion of the Tr be and the United States, the Tribal Claims are not distinguishable legally from the Federal Claims as to the above issues. See, United States and Tribe Memorandum at 2. The issues concerning the Court's jurisdiction and the issues concerning the relationship between federal and state law applicable to groundwater are identical with respect to the Tribal Claims and the Federal Claims. Either those issues will have to be tried again on the Federal claims or the Tribe and the United States believe that a decision on them with respect to the Tribal Claims will be binding with respect to the Federal Claims. Repetitive trial of the same issues on several claims does not result in judicial economy. Seeking to bind unjoined necessary parties

to decisions on issues which clearly affect their rights is the epitome of prejudice and may be subject to challenge on due process grounds.

Similarly, some, if not all, equitable defenses apply to the Tribal Claims and the Federal Claims. The most obvious defense is claim preclusion as it relates to claims to reserved water rights for federal reservations in existence at or before the entry of the final judgment in this matter. That defense may apply to some or all of the Tribal Claims and it almost certainly applies to some or all of the claims for the Yerington Reservation, the Garrison and Cluette Allotments, the Individual Allotments, the Hawthorne Reservation, the National Forest and the Public Water Reserves.

The fact that the Walker River Indian Reservation is in a geographic location different than the other federal enclaves is not a basis for bifurcation. See, United States and Tribe Memorandum at 2. The very essence of the claims being made by the Tribe and the United States with respect to groundwater is that it is hydrology, not geography, which makes all the difference. From that perspective a federal claim to groundwater on the Yerington Reservation is as related to the Tribal Claims as is the groundwater claim of a farmer in Mason Valley, Antelope Valley, or the East Walker.

Equally irrelevant is the assertion that "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."[2] United States and Tribe Memorandum at 2. That simply is not the bifurcation which is proposed here. Here, the United States and Tribe seek to bifurcate Tribal and Federal Claims, all of which are based on the same implied reservation of water doctrine of federal law, and to have the Court initially address legal issues which apply equally to both the Tribal and Federal Claims.

Finally, bifurcating the Tribal Claims from the Federal Claims for purposes of addressing the issues listed by the Tribe and the United States has nothing to do with "delaying

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[2] We know of no such common practice. Obviously, in large water right adjudications individual claims are heard seriatim, but not in "separate" proceedings.

the consideration of the possible inter se portion of the case until it is clear that the Tribal Claims pass the barriers imposed by various threshold questions." United States and Tribe Memorandum at 2. The inter se portion of the case, should be delayed until both the Federal and Tribal Claims pass those barriers.

IV. THRESHOLD ISSUES

Except for whether the threshold issues should be limited to the Tribal Claims and except as to "equitable defenses," the parties have identified similar issues for early consideration by the Court. However, even on those issues there is a major difference.

The District, Nevada and California propose a conference after all parties have been identified, named and served at which the threshold issues will be finally identified and appropriate schedules established. That will allow other parties an opportunity to participate in the identification of such issues and in the schedule established to address them. The Tribe and the United States propose no such conference.

At this very early stage of the proceeding, it is impossible without discovery to identify all equitable defenses which should be raised. It is likewise impossible to determine how such defenses might be grouped and addressed for disposition. Finally, there is no basis for determining now that such defenses cannot be fairly and efficiently addressed by dispositive motions after discovery is complete. It is premature to address these matters in the initial case management order.

V. JOINDER OF PARTIES

A. <u>The Parties Who The Tribe and the United States Would Not Join</u>.

The most telling part of the United States' and the Tribe's proposed Case Management Order is in subparagraph 11 of paragraph C which provides that "Upon completion of Phase I of the case, it may be necessary to join additional parties." Here, the United States and Tribe would intentionally not name and not serve the following claimants to water in the Walker River Basin:

(a) All domestic users of groundwater in Nevada and in California;

(b) All users of groundwater for irrigation in California; and

(c) Except for industrial users and municipal providers, all holders of permits[3] to groundwater issued by Nevada in the Antelope Valley Groundwater Basin (106), the East Walker Groundwater Basin (109) and the Whiskey Flat-Hawthorne Subarea of the Walker Lake Groundwater Basin (110C).

The justification for these omissions is said to be the bifurcation of the Tribal Claims from the Federal Claims, the as yet unestablished contention that the District, California and Nevada will carry the laboring oar and the inconsistent contention that the omitted categories of claimants are not "truly affected by the outcome of the identified issues related to the Tribal Claims". United States and Tribe Memorandum at 3.

This Court's October 27, 1992 order in this matter establishes principles concerning joinder which are equally applicable here. In that order the Court ruled that the Tribe and the United States must join and serve "all existing Claimants to the water of the Walker River and its tributaries" because those persons had an interest in the action and were so situated that disposition of the action in their absence would as a practical matter impair or impede their ability to protect that interest. Doc. No. 15 at 5-6.

Given the position of the United States and the Tribe with respect to claimants to the groundwater of the Walker River Basin, the same rule must be applied. The bifurcation of the Tribal Claims from the Federal Claims does not mean that the omitted categories of water right holders will not be affected legally or practically by the outcome of the identified issues as they relate to the Tribal Claims. First, as is established above, virtually identical issues are present with respect to the Federal Claims for which presumably the omitted categories of water right holders would be joined. Thus, resolution of those same issues with respect to the Tribal Claims will as a practical matter impair or impede their ability to protect their interests. See, Takeda v. Northwestern Nat. Life Ins. Co., 765 F.2d 815, 819-821 (9th Cir. 1985).

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[3] We have assumed that the United States and Tribe's use of the word "permit" is intended to encompass "permits" which have been perfected to "certificates".

Second, also as noted above, the essence of the claims of the Tribe and the United States with respect to groundwater is that surface and groundwater within the Walker River Basin are hydrologically connected. If those claims have merit, it is simply not possible to contend that the omitted categories of water right holders are not "truly affected by the outcome of the identified issues related to the Tribal Claims." Depending on the resolution of those issues the Tribal Claims may go forward. If they do go forward it is possible that the water rights of the omitted categories will be affected directly because of some direct hydrologic connection with Tribal water rights or indirectly because of some hydrologic connection to the water rights of others whose water rights are hydrologically connected to the Tribal water rights. See, Doc, No. 15 at 5-6.

Finally, it may well be that the District, Nevada and California will bear the laboring oar on all of these issues. However, the decision on whether that will be the case should be left to all of the necessary parties. It should not be made for them by a case management order which omits them from the proceedings altogether.

B. Identification of Parties.

In applicable part subparagraphs 1 and 5 of paragraph C of the United States' and Tribe's Proposed Case Management Order provide:

> 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 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.
>
> * * *
>
> 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.

It appears that the United States and Tribe seek to impose significant burdens on others to aid them in identifying the defendants in this matter. Initially, they would require the District and others to search for and then provide all information which they may have "identifying individuals and entities with any claims to surface water and/or groundwater in the Walker River Basin." There is no precedent for shifting the burden of identifying defendants from the plaintiff to one or more defendant.

Although the analogy is by no means perfect, the Supreme Court's reasoning in deciding when a defendant might be required to identify the members of a plaintiff class is helpful. In Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978), the Court drew an analogy to the practice under Rule 33(c) of allowing one to answer an interrogatory by specifying the records from which the answer may be obtained. Where the information needed can be derived with substantially the same effort by the party seeking the information or the party whose records must be examined, the party seeking the information must perform the task. Where the burden of deriving the information is not substantially the same and the task can be performed more efficiently by the responding party, that party may be required to provide the answer. 437 U.S. at 357. However, even in that situation in Oppenheimer where the Court required the defendant to direct a transfer agent to make certain records available for identifying members of the plaintiff class, it required the class representative to bear the expense of assimilating the information. Id. at 360.

The District can and on at least three separate occasions has provided its assessment roll to the United States. Going beyond that, however, violates the principles enunciated in Oppenheimer. First, the District should not be required to search records beyond its assessment roll to determine if it has other information which may identify or aid in identifying claimants to surface and groundwater in the Walker River Basin. Second, the District should not be

required to monitor all information coming to it to determine within two weeks whether that new information changes or modifies previous information. To a large extent the information to which the United States and Tribe refer will be contained in recorded deeds and probate orders. The burden of examining such information is substantially the same for the District, the Tribe and the United States. The District has no reason to update its assessment information more than once each year, just prior to finalizing its new assessment roll.

Most of the information the Tribe and the United States require can be derived from public records. Those records can be found and examined in assessors' offices, recorders' offices and the office of the water agencies of the two states. The burden of examining those records cannot be shifted from the United States and the Tribe to the District, Nevada or California. Cf. Securities and Exchange Comm. v. Samuel H. Sloan & Co., 369 F. Supp. 994, 995 (S.D.N.Y. 1973) (discovery need not be required of documents of public record which are equally accessible to all parties).

Finally, the case management order cannot extend the attorney-client relationship which exists between the District and its counsel to individual electors within the District.[4] Individual electors are entitled to select their own counsel and that counsel is entitled to provide advice concerning "cooperation" with the efforts of the United States and Tribe.

Paragraph 7 of the proposed case management order of the United States and Tribe provides:

> 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.

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[4] Which defendants might be considered "members" or "constituents" of Nevada or California is not clear. Thus, the responsibility intended to be placed on them is not clear.

First, any case management order should make it clear that it is the obligation of the United States and Tribe to identify and name the water right claimants to be joined in this proceeding. Their role in that regard is not simply to assimilate information received from the District, Nevada, California, and others. The case management order should require that, before proceeding with service, the United States and Tribe file and serve a report setting forth the manner in which they identified the parties to be served.

Second, to require the District to inform the Magistrate Judge whether all claimants have been identified and named in part will accomplish indirectly that which the United States and Tribe cannot accomplish directly. It would require the District to identify those defendants on which the District has little or no information, i.e., claimants to groundwater, and claimants to surface water outside the boundaries of the District. Unless the District did that, it could not provide meaningful information to the Magistrate Judge with respect to those categories of claimants. Some meaningful information can be provided, however, if the United States and Tribe are required to detail the manner in which parties were identified.

C. **Service On Identified Parties**

In applicable part subparagraph 4 of paragraph C of the proposed case management order provides:

> 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.

[Emphasis added].

There is no need and it is inappropriate for the case management order to suggest a standard for determining when service by publication on identified defendants is proper. In the subproceeding in this matter involving Mineral County this Court has clearly and expressly detailed the showings which are required. See eq. Subfile C-125-C, June 4, 1998 Order, Doc. No. 210; February 23, 1999 Order, Doc. No. 252.

Although subparagraph 1 of paragraph C of the proposed case management order provides for status reports on service at 120-day intervals, nowhere does it establish a date for completing the process of identifying and naming defendants and for completing all service except by publication. We recognize that it is difficult now to know how long those efforts will take. However, that difficulty does not negate the need to have some outside limit for completion of those tasks.

The proposed case management order does not address the fact that ownership of land with appurtenant water rights will change during the service period. The District will await the United States' and Tribe's response to its proposal on this issue before commenting further.

The parties appear to be near agreement on the appropriate response required as a result of service. Compare, United States and Tribe Proposed Case Management Order at subparagraph 10 of paragraph D with Nevada and District Proposed Case Management Order at paragraph 5. The District will await the United States' and Tribe's response to its proposal on this issue before commenting further.

VI. PHASING OF PROCEEDINGS

For the reasons stated above concerning bifurcation it is premature to make determinations on matters which go beyond identifying, naming, joining and serving necessary parties.

VII. DISCOVERY AND FURTHER PROCEEDINGS

For the reasons stated above with respect to bifurcation, it is premature to develop schedules and orders concerning discovery on threshold issues. That discovery and its schedule should be considered after all necessary parties have been joined and given an opportunity to participate.

The Tribe and the United States have not addressed perpetuation of testimony or documentary discovery on their contentions. The District will await their response to its proposal on those issues before commenting further.

Dated this 22 day of February, 2000.

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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 POINTS AND AUTHORITIES IN OPPOSITION TO MOTION OF THE UNITED STATES AND WALKER RIVER PAIUTE TRIBE TO ADOPT CASE MANAGEMENT ORDER*** in an envelope addressed to:

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Dated this 22nd day of February, 2000.

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