FILED
00 MAR -7 AM 9:42
LANCE S. WILSON
CLERK
DEPUTY

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 C-125-B **REPLY MEMORANDUM IN SUPPORT OF THE MOTION OF THE UNITED STATES AND WALKER RIVER PAIUTE TRIBE TO ADOPT CASE MANAGEMENT ORDER**

Alice E. Walker
Scott B. McElroy
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, Suite 220
Boulder, CO 80302
303/442-2021

Kelly R. Chase
P.O. Box 2800
Minden, NV 89423
702/782-5110

Attorneys for the WALKER RIVER PAIUTE TRIBE

Kathryn E. Landreth, United States Attorney
100 West Liberty St., Suite 600
Reno, NV 89509
702/784-5439

Susan Schneider
United States Department of Justice
Environment & Natural Resources Division
999 18th St., Suite 945
Denver, CO 80202
303/312-7308

Hank Meshorer, Special Litigation Counsel
United States Department of Justice
Environment & Natural Resources Division
Ben Franklin Station
P.O. Box 7397
Washington, D.C. 20044-7397
202/616-9643

Attorneys for the UNITED STATES OF AMERICA

105

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 2

II. ARGUMENT 3

A. BIFURCATION OF THE TRIBAL CLAIMS WILL CONTRIBUTE TO THE EFFICIENT ADJUDICATION OF THE TRIBAL AND FEDERAL CLAIMS 3

B. THE CURRENT PARTIES SHOULD BEGIN WORK ON THE THRESHOLD ISSUES WHICH THEY CAN IDENTIFY NOW 5

C. JOINDER OF PARTIES 7

1. The Determination of the Appropriate Parties to be Joined 7

2. The State Parties must Cooperate in the Identification of the Parties to Be Joined 10

III. CONCLUSION 13

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Page

Cases

Cook v. United Service Auto. Ass'n., 169 F.R.D. 359 (D.Nev. 1996) 5

Industrias Metalicas Marva, Inc. v. Lausell, 172 F.R.D. 1 (D. Puerto Rico 1997) 3, 4

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) 2

United States v. 1,071.08 Acres of Land, 564 F.2d 1350 (9th Cir. 1977) 4

Miscellaneous

MANUAL FOR COMPLEX LITIGATION, THIRD § 21.31 (1995) 6

MANUAL FOR COMPLEX LITIGATION, THIRD § 21.632 (1995) 3

Scott B. McElroy
Alice E. Walker
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, Suite 220
Boulder, CO 80302
303/442-2021

Kelly R. Chase
P.O. Box 2800
Minden, NV 89423
702/782-5110

Attorneys for the WALKER RIVER PAIUTE TRIBE

Kathryn E. Landreth, United States Attorney
100 West Liberty St., Suite 600
Reno, NV 89509
702/784-5439

Susan Schneider
United States Department of Justice
Environment & Natural Resources Division
999 18th St., Suite 945
Denver, CO 80202
303/312-7308

Hank Meshorer, Special Litigation Counsel
United States Department of Justice
Environment & Natural Resources Division
Ben Franklin Station
P.O. Box 7397
Washington, D.C. 20044-7397
202/616-9643

Attorneys for the UNITED STATES OF AMERICA

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 **REPLY MEMORANDUM IN SUPPORT OF THE MOTION OF THE UNITED STATES AND WALKER RIVER PAIUTE TRIBE TO ADOPT CASE MANAGEMENT ORDER**

I. INTRODUCTION

The United States and the Walker River Paiute Tribe ("Tribe") respectfully request the Court adopt the attached Case Management Order, which has been revised to reflect certain of the positions of the parties as stated in the recent round of briefing. A copy of the revised order is attached as Exhibit A with the revisions emphasized.

The Walker River Irrigation District ("District"), the State of Nevada ("Nevada") and the State of California ("California") (referred to collectively as "state parties") previously requested the adoption of the *[Proposed] Order Concerning Case Management* ("state parties' proposed order") submitted by Nevada and the District. *Joint Motion Concerning Case Management* (Jan. 21, 2000), Exhibit. A. In advocating for the adoption of the state parties' proposed order, the state parties oppose the approach of the United States and the Tribe as reflected in the proposed *Case Management Order* previously submitted on January 21, 2000 ("U.S. and Tribe's proposed order"). The state parties take the position that nothing can or should be done to advance any aspect of this litigation until all of the necessary parties are identified, named and joined by the United States and the Tribe. *See 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* at 1 (Feb. 22, 2000) ("District Opp."). In contrast, the United States and the Tribe believe that the existing parties to the case must start immediately to develop the procedures for the efficient and fair adjudication of the Tribal and Federal Claims. Such a method should begin now rather than later to establish the procedures for resolving the multitude of currently identifiable issues related to the Tribal Claims.

All of the arguments among the parties over the proposed case management orders stem from this underlying disagreement which permeates the specific issues of bifurcation, threshold

questions, discovery and the joinder of the appropriate parties. We cannot overemphasize the significance of this dispute. The state parties fail to offer any suggestions for fostering the efficient adjudication of the pending claims but, instead, argue only that the proposals advanced by the United States and the Tribe are inadequate. The result of the state parties' approach would be to litigate this case in the most tedious and time-consuming manner imaginable, potentially denying to the United States and the Tribe the ability to have their claims heard at all.

II. ARGUMENT

A. BIFURCATION OF THE TRIBAL CLAIMS WILL CONTRIBUTE TO THE EFFICIENT ADJUDICATION OF THE TRIBAL AND FEDERAL CLAIMS.

In arguing against bifurcation, the District and Nevada confuse the distinct issues of joinder of parties and determination of threshold issues with the more basic question of bifurcation of the Tribal and Federal Claims. *See* District Opp. at 3-6; *State of Nevada's Response to the Motion of the United States and Walker River Paiute Tribe to Adopt Case Management Order* at 3 (Feb. 18, 2000) ("Nevada Response"). Parts B and C below address the questions related to the determination of the threshold issues and joinder. The question related to bifurcation, however, is considerably different, requiring the parties and the Court to consider whether it would be more efficient to address the Tribal Claims apart from the other Federal Claims or if, as the state parties contend, addressing all of the claims together would be more productive. *See* Industrias Metalicas Marva, Inc. v. Lausell, 172 F.R.D. 1, 5 (D. Puerto Rico 1997) ("The Court's decision hinges on one deceptively simple equation: Is the potential benefit of bifurcation greater or less than the potential detriment of bifurcation?"); *see generally* MANUAL FOR COMPLEX LITIGATION, THIRD § 21.632 (1995).

As even the District concedes, the various claims must be addressed in some order. District Opp. at 5 n.2. Despite that concession, the District appears to contend that before the

Court can address any substantive aspect of the Tribal Claims, the parties must complete pretrial proceedings on the full scope of the Federal Claims. Id. at 4-5. To state the obvious, that course of action would delay the resolution of the Tribal Claims for decades and would effectively prevent the Court from addressing any concrete issue for many, many years. *See* Industrias Metalicas Marva, Inc., 172 F.R.D. at 4 ("As an initial matter, we reject out of hand Marva's contention that this issue is premature. The Court believes that simplifying discovery would be the major benefit of bifurcation in this case.").

The United States and the Tribe assert that the logical order for the case is to begin with the Tribal Claims and to limit the initial phase of the case to those claims. Discovery, the preparation of expert reports, the resolution of threshold issues and the other pretrial requirements related to the Tribal Claims will be a monumental task which will keep the parties fully engaged. It makes no sense to require that while working on the pretrial aspects of the Tribal Claims, the parties simultaneously engage in the daunting task of preparing the Federal Claims for trial. In sum, the parties will be hard-pressed to deal with the pretrial proceedings for the Tribal Claims in a timely fashion; the job of addressing all the Federal Claims concurrently would be virtually impossible.

To be sure, there may be an overlap between some of the disputed legal issues raised by the Tribal Claims and those presented by the Federal Claims. Those issues, however, do not arise in a vacuum but are tightly intertwined with factual matters unique to the particular claim. Among other things, the history of each federal establishment is different, as are the water needs that are the subject of the Federal Claims. Ultimately, as the District notes, the different claims will have to be "tried" not argued. District Opp. at 4-5. *See* United States v. 1,071.08 Acres of Land, 564 F.2d 1350, 1352-53 (9th Cir. 1977) (holding that in a condemnation action, district

court did not abuse its discretion in ordering separate trials because, among other things, the "property interests" of one owner were "a separate claim" from that of the other). Here, instead of addressing all of the claims at each stage of the case before advancing to the next stage, it would be far more efficient and practical to proceed claim by claim, progressing from discovery through trial on the Tribal Claims prior to addressing any aspect of the other claims. *See* Cook v. United Service Auto. Ass'n., 169 F.R.D. 359, 362 (D.Nev. 1996) (noting that in that case "[b]ifurcation will also simplify the issues for trial." (citation omitted)). Following a different course of action threatens to bury the parties and the Court in massive and complex pretrial proceedings that encompass every aspect of water use in the Walker River basin and render it infeasible for the Court to address any issue in a meaningful fashion. *See Minutes of the Court* at 3 (May 11, 1999) (expressing concern that in the absence of the appropriate procedural foundation, such as the case management order proposed by the United States and the Tribe, "the introduction of groundwater claims may be necessary to the counterclaims, but such will greatly increase the complexity of the litigation and could possibly make it simply impractical to proceed."). Moreover, the decision to bifurcate should be made now so that the remainder of the case, including the other issues before the Court related to case management, can be resolved appropriately. *C.f.*, Cook v. United Service Auto. Ass'n., 169 F.R.D. 361-62. ("Under these circumstances, bifurcation furthers the interest in the expedient resolution of litigation.").

B. THE CURRENT PARTIES SHOULD BEGIN WORK ON THE THRESHOLD ISSUES WHICH THEY CAN IDENTIFY NOW.

The dispute over the threshold issues involves a disagreement over timing as well as a dispute over the scope of the threshold questions to be addressed. The state parties appear to contend that nothing should be done with regard to identifying threshold issues or working towards the resolution of those issues until "after all parties have been identified, named and

court did not abuse its discretion in ordering separate trials because, among other things, the "property interests" of one owner were "a separate claim" from that of the other). Here, instead of addressing all of the claims at each stage of the case before advancing to the next stage, it would be far more efficient and practical to proceed claim by claim, progressing from discovery through trial on the Tribal Claims prior to addressing any aspect of the other claims. *See* Cook v. United Service Auto. Ass'n., 169 F.R.D. 359, 362 (D.Nev. 1996) (noting that in that case "[b]ifurcation will also simplify the issues for trial." (citation omitted)). Following a different course of action threatens to bury the parties and the Court in massive and complex pretrial proceedings that encompass every aspect of water use in the Walker River basin and render it infeasible for the Court to address any issue in a meaningful fashion. *See Minutes of the Court* at 3 (May 11, 1999) (expressing concern that in the absence of the appropriate procedural foundation, such as the case management order proposed by the United States and the Tribe, "the introduction of groundwater claims may be necessary to the counterclaims, but such will greatly increase the complexity of the litigation and could possibly make it simply impractical to proceed."). Moreover, the decision to bifurcate should be made now so that the remainder of the case, including the other issues before the Court related to case management, can be resolved appropriately. *C.f.*, Cook v. United Service Auto. Ass'n., 169 F.R.D. at 361-62. ("Under these circumstances, bifurcation furthers the interest in the expedient resolution of litigation.").

B. THE CURRENT PARTIES SHOULD BEGIN WORK ON THE THRESHOLD ISSUES WHICH THEY CAN IDENTIFY NOW.

The dispute over the threshold issues involves a disagreement over timing as well as a dispute over the scope of the threshold questions to be addressed. The state parties appear to contend that nothing should be done with regard to identifying threshold issues or working towards the resolution of those issues until "after all parties have been identified, named and

served . . . ," at which time a conference would be held to begin to address the procedures for identifying and resolving such issues. District Opp. at 6. That approach is remarkably shortsighted. "The *sine qua non* of management of complex litigation rests on the definition of the issues in the litigation." MANUAL FOR COMPLEX LITIGATION, THIRD § 21.31 (1995) (citation omitted). That task should be initiated promptly among the existing parties.

The United States and the Tribe agree that the threshold issues cannot finally be resolved until all appropriate parties are joined, but assert that the current parties should begin to identify threshold issues related to the Tribal Claims and to initiate discovery in connection with those issues. That would not foreclose subsequently named parties from identifying additional issues or presenting supplemental information relative to the already identified issues. But the practical reality remains that the state parties are likely to carry the laboring oar in this litigation. Indeed, the District appears to have given the matter considerable thought already, asserting, for example, that claim preclusion "may apply to some or all of the Tribal Claims . . . ." District Opp. at 5. In short, there is no reason to delay grappling with the question of the appropriate threshold issues, recognizing that until all parties are joined, no final designation of issues can be achieved nor can those issues be resolved.

The alternative is not attractive. Under the state parties' approach, nothing will be done with regard to the Tribal Claims until service is complete. At that time, discovery would presumably commence with disclosures by the United States and the Tribe with the state parties thereafter requesting a substantial period of time to prepare their own expert reports, after which depositions and other discovery would be scheduled and completed. Under the state parties' proposal, only then would the parties be obligated to identify the appropriate threshold questions. We do not mean to suggest that the United States and the Tribe are ready to make full disclosure

relative to the Tribal Claims in the immediate future, only that there is no need to await completion of service to begin to identify the issues and to establish an appropriate approach to discovery, so that those issues may be addressed by the Court, within a reasonable time after service is complete, and the newly joined parties have had the opportunity to participate in the final framing of the issues and the production of the material necessary to address those issues.

C. JOINDER OF PARTIES.

The question of who should be joined in this case at what time is a difficult issue. It is complicated by the fact that the United States Board of Water Commissioners apparently cannot identify the parties entitled to use water under the Decree in this case, just as Nevada and California cannot specify who is entitled to use water from the Walker River or the associated aquifers under state law.[1] Only slightly less surprising is the fact that the District claims that it cannot name its members who use water under the terms of the Decree or pursuant to state law. District Opp. at 9-10. While the state parties adamantly assert that the identification of those entitled to use water under the Decree or state law is not necessary for the proper implementation of their legal duties, they are equally resolute that all such parties must be named, served and joined by the United States and the Tribe with no more than minimal assistance from the state parties and the Board of Water Commissioners. That position does not withstand scrutiny.

1. <u>The Determination of the Appropriate Parties to be Joined.</u>

The difficult question related to joinder is determining who should be named as a party in this case. The problem arises from the fact that there is no readily identifiable list of people who are legally entitled to use water under the Decree or pursuant to state law. Thus, to

---

[1]California has provided helpful guidance as to the general scope of the information which it does have in its files. California Response at 2-3.

carry out the Court's directive of naming all water users, the United States and the Tribe must find a way to identify such individuals from a variety of sources including the District's assessment roles, Nevada's and California's water rights files, and information held by the Board of Water Commissioners. Even in the best of circumstances, that information may not identify all users in the basin, nor will it tell who actually holds the legal right to use such water. Thus, some other process must be developed to name all parties with an interest in the use of water in the basin, particularly if California groundwater users are to be subject to the adjudication. Under such a process, it will be extremely difficult to determine the extent to which certain parties are truly affected by the adjudication. Undoubtedly, some parties will be named who will have little or no interest in the case.

The burden on parties who are named but who have little or no interest in the litigation may be substantial. The state parties advocate the filing of lis pendens on property that is the subject of the litigation. Extracting oneself from the litigation and the adverse consequences of a lis pendens may require retaining a lawyer and the expenditure of considerable funds. In addition to those with no interest who will be burdened by being named as a party, entities with minimal or distant interests may also have significant costs associated with their participation in the litigation, yet have relatively little risk. If such parties were not joined, they would not be bound by the litigation, just as the United States and the Tribe are not bound by the actions of the Nevada State Engineer in granting permits and certificates for the use of groundwater. In other words, balanced against the concern that every affected water user should have the right to participate in the litigation is the burden that will be placed on those who are named but have little or no real interest in the outcome.

The United States and the Tribe proposed to resolve this dilemma by bifurcating the Tribal Claims and then seeking, in the first phase of the proceedings, to limit the water users to be joined to the geographic areas closer to the Reservation. Needless to say, those geographic areas could be expanded if the state parties assert that the hydrological relationship between the use of groundwater in such areas to the use of water on the Walker River Indian Reservation justifies the inclusion of additional areas in the adjudication. In addition, the United States and the Tribe suggested that there was no need to name domestic groundwater users at this time. Such an approach, in our view, includes those most affected by the immediate issues before the Court and would avoid unnecessary expense and burden to those with no practical interest in the outcome of the presently proposed first phase of the proceeding. We continue to believe that such an approach is a practical solution to a serious problem.

The state parties object to the United States' and the Tribe's position that the bifurcation of the Tribal Claims permits the joinder of a geographically limited number of water users. *See* District Opp. at 6-8. The notion that every groundwater user in the basin must be joined in order to adjudicate the Tribal Claims is not consistent with the prior position of the District. The District previously argued that "consideration should be given to separating [the Tribal and Federal Claims for groundwater] from the surface water claims and separating such claims by hydrographic basin." *Walker River Irrigation District's Points and Authorities in Support of Motion for Scheduling and Planning Conference and in Response to 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 for Pleadings Once Parties Are Joined* at 14 (Nov. 9, 1998) ("1998 District Response"). The District also asserted that "recognition should be given to the fact that, at least

with respect to groundwater, there are several separate and distinct groundwater basins involved." Id. at 15. According to the District, "[in] Nevada, the Nevada State Engineer recognizes and separately regulates the Antelope Valley hydrographic basin, the Smith Valley hydrographic basin, the East Walker hydrographic basin, the Mason Valley hydrographic basin and the Walker Lake hydrographic basin." Id. [2] Now that the United States and the Tribe have acceded to the concept previously espoused by the District, it changes course. But there is no reason to believe that the State Engineer's approach of separating the Walker River basin into separate hydrographic basins for groundwater regulatory purposes could not be similarly applied to this adjudication, to keep the determination of the Tribal Claims within manageable limits and to avoid the joinder of parties with no real interest in the outcome.

Although a decision needs to be made so that the difficult process of identifying the water users within each category can begin, the issue of who is joined is less significant than the other issues related to case management that are before the Court. The more troubling question with regard to joinder is determining the appropriate procedure for developing the list of entities to be served, whether that list includes some or all of the water users in the basin. Subpart 2 addresses that question.

2. <u>The State Parties must Cooperate in the Identification of the Parties to Be Joined.</u>

The most disconcerting aspect of the state parties' response to the U.S. and Tribe's proposed order is their apparent resistance to cooperating in the development of the list of entities to be joined in the case. *See State of California's Response to Motion of the United States and Walker River Paiute Tribe to Adopt Case Management Order* at 2-4 (Feb. 18, 2000)

---

[2] A map showing the different hydrographic basins was attached as Exhibit A to the 1998 District Response. That map is reproduced as Exhibit B to this memorandum.

("California Response"); District Opp. at 8-9 (among other things, the District complains that the proposed order would direct them to "advise their members and constituents of the need to cooperate fully with [the United States'] efforts" to complete service.);[3] Nevada Response at 1 (adopting the District's arguments). Our desire is to avoid the controversy that has plagued Mineral County's efforts to accomplish service. To attain that objective, four things are needed: (1) resolution of the categories of users to be joined; (2) the cooperation of the state parties and the Board of Water Commissioners in providing all relevant information in their files to the United States and the Tribe; (3) an interim process to ascertain whether the list developed by the United States and the Tribe is adequate; and (4) the supervision of the Magistrate Judge to ensure cooperation and that problems are identified and resolved expeditiously. The state parties offer little of substance in response.

First, rather than agree to cooperate, the District and Nevada complain that providing information which they possess to the United States and the Tribe related to the identification of parties "with claims to surface water and/or groundwater" somehow means that they, not the United States and the Tribe, would be required to identify the potential defendants in the case. District Opp. at 9. The state parties plainly have a substantial amount of information that is relevant to the identification of potential water rights claimants. Under the U.S. and Tribe's proposed order, they would be required to provide that information to the United States and the Tribe. Although not spelled out, presumably that process would work much the same as discovery with the producing party having a variety of options to make the relevant information

---

[3]The proposed Case Management Order would require the District to advise its members of the Court's directive that they cooperate in the service effort. That does not create an attorney client relationship between the District and its members. Dist. Opp. at 10. Instead, it simply attempts to facilitate procedural cooperation among the parties.

available to the requesting party. The only burden on the producing party is to specify the relevant information in their files and make it available in some fashion. Likewise, we fail to see the problem with requiring the state parties to provide modified or changed information within a reasonable time frame.

Certainly, the District's reliance on Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978), is misguided. *See* District Opp. at 9. As the District notes, that case involved the assignment of costs relative to the development of information for the identification of members of a plaintiff class. While the Court found that the plaintiff may be required in such situations to bear the cost associated with completing an investigation as to the names and addresses of the members of the class, that rule applies only to tasks which remain to be performed, not information already available in the files. Oppenheimer, 437 U.S. at 356. The Court explicitly noted that the rule did not apply when "the task ordered is one that the defendant must perform in any event in the ordinary course of its business." Id. at 359. Here, we ask only for existing information related to the identification of parties who use water under the Decree or pursuant to state law. We have not asked the state parties to determine who the parties are to be named -- a task that might well fit within the Oppenheimer rule requiring the producing party to conduct tasks for which it is responsible. Perhaps the District has no obligation to ensure that its assessment role reflects the proper ownership of the lands within the District to which water is applied. But certainly the Board of Water Commissioners has an obligation to ascertain who is entitled to use water under the Decree. Likewise, California and Nevada have some obligation to determine who uses water under state law. In any event, if they had accomplished those tasks, this aspect of this dispute would not be before the Court.

Second, the District's point is well-taken that it is unable to respond to the list of parties proposed to be named by the United States and the Tribe in the absence of a description of how that list was compiled. District Opp. at 11. The critical point, however, is the need for the state parties to advise the United States and the Tribe of the adequacy of the procedures to identify the parties at the outset rather than being allowed to wait until service is complete to state any objections they may have to the procedure used by the United States and the Tribe to determine who should be named as parties.

Finally, the vigor of Nevada's and the District's opposition to the requirement that they cooperate in the development of the information required to identify the proper parties confirms the view of the United States and the Tribe that the procedures for service must be closely supervised by the Magistrate Judge from the outset to avoid lengthy delay in the completion of service. To the extent that the parties are able to cooperate on these matters, the need for supervision will diminish, but we continue to believe that it would be helpful to start with active involvement from the Magistrate Judge.

III. CONCLUSION.

For the reasons described above and in the prior pleadings of the United States and the Tribe, the Court should adopt the revised Case Management Order proposed by the United States and the Tribe.

Dated: Mar. 6, 2000

Respectfully submitted,

Kathryn E. Landreth
UNITED STATES ATTORNEY
100 West Liberty St., Ste. 600
Reno, Nevada 89509
702/784-5439

Susan Schneider
UNITED STATES DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
999 18th Street, Suite 945
Denver, Colorado 80202
303/312-7308

Attorneys for the United States of America

Scott B. McElroy
Alice E. Walker
GREENE, MEYER & McELROY, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
303/ 442-2021

Kelly R. Chase
P.O. Box 2800
Minden, Nevada 89423
702/782-5110

By: _____
Scott B. McElroy

Attorneys for the Walker River Paiute Tribe

CERTIFICATE OF SERVICE

I hereby certify that I have placed a true and correct copy of the foregoing Reply Memorandum in Support of the Motion of the United States and Walker River Paiute Tribe to Adopt Case Management Order in the U.S. Mail, first-class postage prepaid thereon, on this 6th day of March, 2000, addressed to the following:

Marta Adams
Deputy Attorney General
Capitol Complex
100 N. Carson St..
Carson City, NV 89701

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

George Benesch
1025 Ridgeview Dr., Suite 400
P.O. Box 3498
Reno, NV 89505

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

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

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

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

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

Gordon H. DePaoli
Dale E. Ferguson
Woodburn and Wedge
6100 Neil Rd., Ste. 500
Reno, NV 89511

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

Richard R. Greenfield
Field Solicitor's Office
Department of the Interior
2 North Central Avenue, Suite 500
Phoenix, AZ 85004

Mary Hackenbracht
Deputy Attorney General
State of California
1515 Clay St., 20th Floor
Oakland, CA 94612-1314

Treva J. Hearne
James S. Spoo
Zeh, Polaha, Spoo & Hearne
575 Forest Street
Reno, NV 89509

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

John Kramer
Department of Water Resources
1416 - 9th Street
Sacramento, CA 95814

Kathryn Landreth, U.S. Attorney
Shirley A. Smith, Asst. U.S. Attorney
100 W. Liberty, #600
Reno, NV 89501

Hank Meshorer, Special Litigation Counsel
United States Department of Justice
Environment & Natural Resources Division
Ben Franklin Station
P.O. Box 7397
Washington, D.C. 20044-7397

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

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

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

Susan Schneider
U.S. Department of Justice
Environment and Natural Resources Div.
Indian Resources Section
999-18th Street, Suite 945
Denver, CO 80202

Stuart Somach
William Hvidsten
John A. Mendez
DeCUIR & SOMACH, P.C.
400 Capitol Mall, Suite 1900
Sacramento, California 95814-4407

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

Garry Stone
290 South Arlington Ave.
Reno, NV 89501

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

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**

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.

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

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

5. 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?

6. 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?

7. 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.

The above list of threshold issues regarding the Tribal Claims will not be finally resolved until all appropriate parties are joined. Nevertheless, the parties are directed to identify all potential threshold issues promptly and to work together and with the Court to resolve these issues so that this matter may proceed as promptly as possible upon the conclusion of service. In general, the Court will consider for inclusion as threshold issues, issues that address the following matters: jurisdiction, claim preclusion, applicable law, equitable and other defenses raised by any party.

C. JOINDER OF PARTIES

6. 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.

7. 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 **within the Walker River Basin** who currently use groundwater.

f. All municipal providers in California **within the Walker River Basin** who currently use groundwater.

g. All industrial users in Nevada **within the Walker River Basin** who currently use groundwater .

h. All industrial users in California **within the Walker River Basin** who currently use groundwater.

8. Within **60** 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 **and agreed-upon procedures related to the recording of these Notices** to the Court for its approval. **To the extent that the parties cannot agree upon these issues, they shall submit their own proposals regarding these issues. Procedures for the recording of Notices of Lis Pendens with the appropriate recorder of property will be finalized with the Magistrate Judge in conjunction with approval of the above Notice.**

9. 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 ¶ 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. **Before any such publication occurs, the parties and the Court will confirm that these newspapers remain the appropriate periodicals for publication, and, if appropriate, will designate any substitute periodicals.**

10. 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 **notify the United States and the Tribe of such modifications and changes** within two weeks of its receipt **and shall make this information readily available to the United States and the Tribe in compliance with this paragraph. The requirements of this paragraph** shall 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.

11. 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.

12. After the United States **and the Tribe have** received the information from the other parties described in ¶ 5 and compiled the list of the parties whom **they intend** to serve, that

list **and a description of the procedures by which it was compiled** 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 **and the Tribe** shall be resolved by the Magistrate Judge. **Corrections to the list of intended parties may be made during the service efforts of the United States and the Tribe.**

13. 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

14. 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.

15. All defendants and intervenors in these proceedings shall file answers to the United States' and Tribe's first amended counterclaims within **45** days **after completion 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.

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

E. DISCOVERY AND FURTHER PROCEEDINGS

17. **Although it is premature to implement schedules and orders concerning discovery, the parties shall begin to develop discovery plans consistent with this section.**

18. **Discovery shall be allowed to all parties upon the threshold issues defined in Section B of this Case Management Order**. 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. **This second case management order shall, among other things, address the timing of the commencement of discovery on Phase I issues.**

19. All motions dispositive or partially dispositive of any threshold issue shall be deferred until after completion of **Phase I** discovery and shall be filed within three months after completion of **this** 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.

20. **If any party wishes to perpetuate testimony relevant to this matter, that party shall comply with FED. R. CIV. P. 27 and any other applicable rule of this Court. In conjunction with the first such effort in this matter, the parties shall confer to determine additional procedures, if any, for this and other such efforts in this case. The parties shall present the Court with their written agreement on any such additional procedures. If they cannot agree on procedures, the parties make a written application to the Court for assistance in resolving such procedures.**

21. 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

WALKER RIVER HYDROGRAPHIC REGION

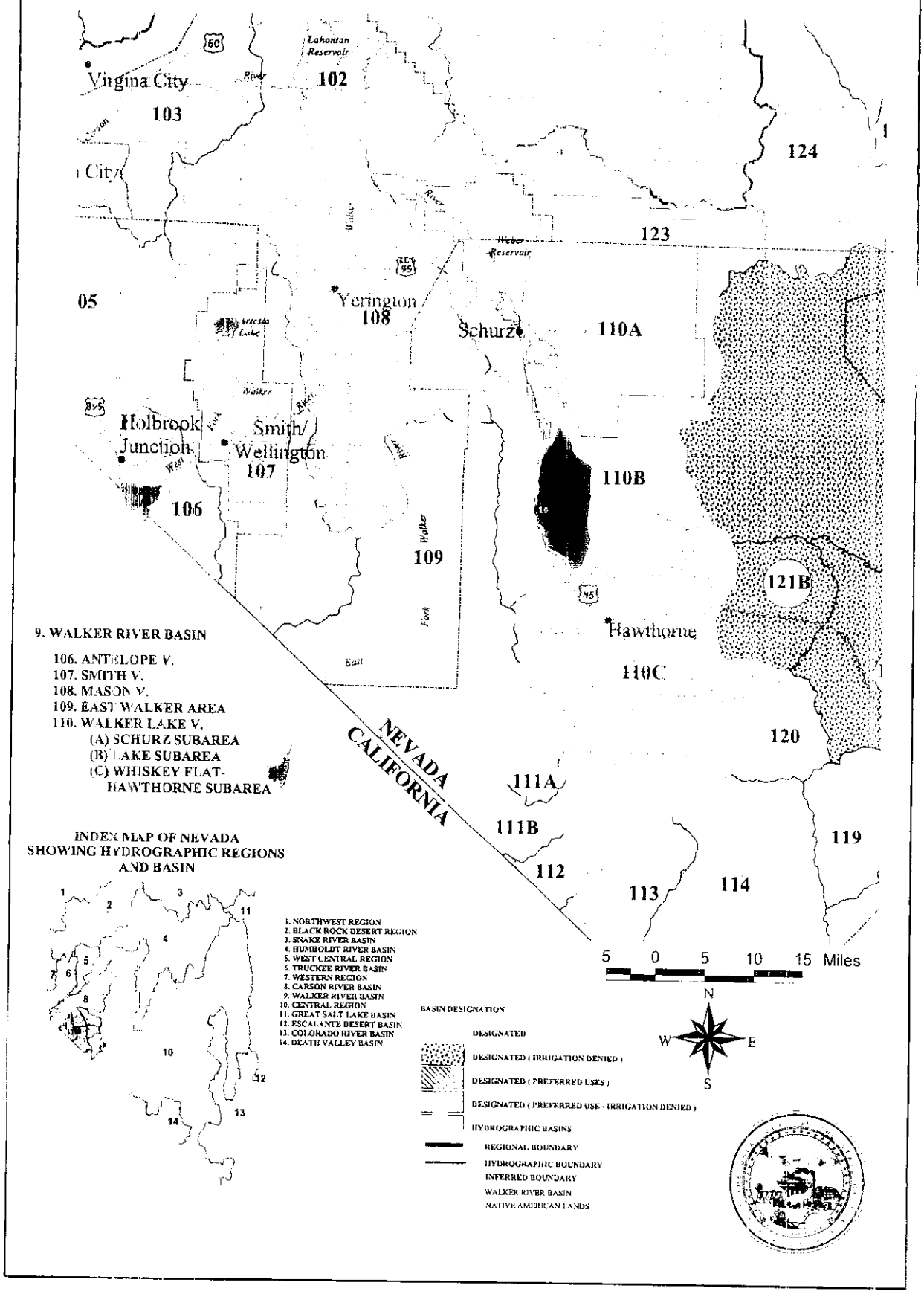

Exhibit B