ORIGINAL

GORDON H. DEPAOLI
Nevada State Bar 00195
DALE E. FERGUSON
Nevada State Bar 04986
WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Post Office Box 2311
Reno, Nevada 89511
Telephone: (775) 688-3000

Attorneys for Defendant,
WALKER RIVER IRRIGATION DISTRICT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>WALKER RIVER PAIUTE TRIBE,<br><br>Plaintiff-Intervenor,<br><br>v.<br><br>WALKER RIVER IRRIGATION DISTRICT, a corporation, et al.,<br><br>Defendants. | In Equity No. C-125-ECR<br>Subfile No. C-125-B<br><br>**WALKER RIVER IRRIGATION DISTRICT'S REPLY POINTS AND AUTHORITIES IN SUPPORT OF JOINT MOTION CONCERNING CASE MANAGEMENT** |
| UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE,<br><br>Counterclaimants,<br><br>v.<br><br>WALKER RIVER IRRIGATION DISTRICT, et al.,<br><br>Counterdefendants. | |

## I. BACKGROUND

On or about February 21, 2000, the Walker River Paiute Tribe (the "Tribe") and the United States filed their *Response of the United States and Walker River Paiute Tribe to Joint Motion By the State of Nevada and WRID Concerning Case Management* (the " Joint Response"). The Joint Response further demonstrates the disagreement between the parties with respect to case management at this early stage of the litigation. The Tribe and United States propose 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"). They then identify threshold issues and equitable defenses which the Court would consider on the Tribal Claims. Discovery would be limited to those issues and the terms and conditions of such discovery would be established before necessary parties are joined. Simply put, this approach is premature. The Tribe and United States have placed the proverbial "cart before the horse" in proposing case management of this nature before all of the necessary parties have been joined.

The Walker River Irrigation District (the "District"), Nevada and California believe that case management at this stage of the litigation must address and be primarily limited to identifying, naming and joining all necessary parties. That task must be accomplished in accordance with Rules 4, 10 and 19 of the Federal Rules of Civil Procedure. Decisions on issues concerning bifurcation, phasing of the proceedings, identification of threshold issues and the scope and extent of discovery should be made only after all necessary parties have been joined and only with their participation. Their participation is mandatory in order to satisfy concepts of due process and fundamental fairness and to ensure that the Court's decisions bind all affected parties and their successors in the future.

The Case Management Order proposed by the Tribe and United States and their Response ignores these concerns. They cannot, however, be ignored.

WOODBURN AND WEDGE
6100 Neil Road
Reno, Nevada 89511
Tel: (775) 688-3000

## II. THE TRIBE AND UNITED STATES OFFER NO EXPLANATION, NOR COULD THEY, FOR THEIR ARGUMENT THAT EFFICIENCY AND ECONOMY WILL RESULT FROM CASE MANAGEMENT BASED ON BIFURCATION AND THE EARLY IDENTIFICATION OF "THRESHOLD ISSUES" AND "EQUITABLE DEFENSES" WITHOUT THE PARTICIPATION OF ALL NECESSARY PARTIES

### A. Bifurcation.

Rather than demonstrating that bifurcation of the Tribal Claims from the Federal Claims will promote judicial economy and avoid inconvenience or prejudice to the parties, the Joint Response demonstrates the opposite. It acknowledges that the threshold issues to be addressed with respect to the Tribal Claims are also issues which must be addressed with respect to the Federal Claims. See Joint Response at p.2, lns. 24-25. As the District established in its Opposition Points and Authorities such a bifurcation is inappropriate. See District Opposition at pgs. 3-5.

### B. Threshold Issues.

The Tribe and United States argue at length that decisions concerning case management should be based on the current parties' identification of "threshold issues" and "equitable defenses." *See* Joint Response at 2 - 3. They completely fail, however, to offer any concrete "reasons" for basing case management decisions on these criteria. Instead, the Tribe and United States merely make unsupported assertions that proceeding in this manner is "logical, efficient, economic and just." The Tribe and United States assert that concentrating on threshold issues and resolving equitable defenses will conserve time[1] and resources thereby

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[1] With respect to timing issues, the statements that the "current effort to proceed with the counterclaims began in 1992 on behalf of and regarding the Tribal Claims" and that the "Tribe should not have to remain on the sideline while other claims and issues are litigated" is incredible. The Tribe and United States have sought and received thirteen extensions of time to join necessary parties and complete service of process since 1993. The Tribe amended its counterclaim to include claims for groundwater. The United States amended its counterclaim to include additional claims for the Tribe and to include claims on behalf of numerous other Tribal and Federal interests in the Walker River Basin. Under these circumstances, the parties responsible for any delay in the prosecution of the Tribal Claims are clearly the United States and the Tribe.

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6100 Neil Road
Reno, Nevada 89511
Tel: (775) 688-3000

resulting in the efficient management of the case. That assertion may hold true at some later stage of the litigation, however, it is premature at this early stage. The identification of all threshold issues and equitable defenses cannot occur until after all necessary parties have been joined. Those necessary parties must participate in decisions involving the identification of threshold issues and equitable defenses. Proceeding without them in this process is futile. It can only result in subsequent challenges by necessary parties based on the fact that decisions were made, without their participation, that impact and possibly impair their interests. It can only result in current parties having to revisit issues. Under these circumstances, deciding case management issues based on the premature identification of threshold issues and defenses cannot be "logical, efficient, economic and just."

## III. JOINDER

### A. The Parties Who The Tribe And The United States Would Not Join.

The Joint Response argues that the District's proposal for case management will result in the joinder of parties who may not be necessary and thereby result in those parties and the Tribe and United States incurring unnecessary litigation costs. Joint Motion 4 - 5. In making this argument, however, the Tribe and United States conspicuously fail to identify these potentially unnecessary parties, with the exception of California groundwater users, and to explain why they may be unnecessary. Even after identifying California groundwater users as unnecessary the Tribe and United States fail to explain why they are unnecessary. The District in its Opposition has identified other categories of parties who the Tribe and the United States would not join and has explained why they must be joined. See District Opposition at pgs. 6-8. Finally, the Court should err on the side of Joinder given the wasted litigation costs that all parties will incur if these allegedly "unnecessary" parties ultimately turn out to be "necessary."

### B. Identification of Parties

The Joint Response argues that it "will be unnecessarily time-consuming for the United States and the Tribe to be left to identify" the proposed defendants "on their own." See Joint Response at 4. The District has already discussed the reasons for requiring the Tribe and United States to shoulder the burden of identifying the defendants in this matter. See District

WOODBURN AND WEDGE
6100 Neil Road
Reno, Nevada 89511
Tel. (775) 688-3000

Opposition at 9 -11. That discussion will not be restated here. The Tribe and United States have alleged numerous claims in their Amended Counterclaims. They must invest the time and resources necessary to identify the parties necessary in order to prosecute those claims.

The United States and the Tribe refer to the "Mineral County experience" with respect to identification and service on parties. The best way to avoid the "Mineral County experience" is for the United States and the Tribe to accept the responsibility of identifying and properly serving the parties. If they approach this responsibility in the same irresponsible manner as has Mineral County, there is no question that they will encounter similar problems.

The Joint Motion argues that "it may not be reasonable, practical, or even possible, to hold up service until all parties" are identified "with absolute certainty." See Joint Motion at 5. The justification for this statement is that the ownership of water rights is constantly changing. It may be true that service should commence before "all parties" are identified with "absolute certainty." Nevertheless, any addition of parties by the Tribe and United States after service has commenced must be accomplished by an appropriate motion. That motion must set forth the factual and legal bases for the addition of parties to the litigation. The Court has already clearly defined the procedure to be utilized in this regard in the C-125-C action. See March 2, 1999 Order Doc. No. 257.

## IV. DISCOVERY

The limitations placed on the scope and extent of discovery at this stage of the litigation should not be based solely on the current parties' identification of threshold issues and defenses. The Tribe and United States "have proposed that procedures as to the scope and timing of discovery should only be addressed once it is clear which issues are the present focus of the litigation." Joint Response at 3. For the reasons stated above, however, the final clarification of threshold issues should not occur until after all necessary parties are joined in the litigation. All necessary parties may then participate in the identification of threshold issues and defenses and the related extent and scope of discovery.

The Tribe and United States also object to any discovery concerning the nature of their claims as set forth in the Amended Counterclaims. They allege that discovery of this nature

WOODBURN AND WEDGE
6100 Neil Road
Reno, Nevada 89511
Tel: (775) 688-3000

would interfere with service efforts, proliferate the issues and possibly result in a significant waste of resources. Once again, the Tribe and United States make broad conclusory statements completely unsupported by any factual or legal basis. First, the discovery proposed by the District is not "open-ended". See Joint Response at p. 3. It is written discovery aimed at the contentions of the Tribe and the United States. Such discovery is essential to informed case management once the necessary parties are identified and served.

The need for written discovery concerning the contentions of the United States and the Tribe results from the broad nature in which their claims are plead. The majority of the claims of the Tribe and United States are based on the federal implied reservation of water doctrine. A fundamental element of that doctrine is the implication that the United States reserved a quantity of water necessary to fulfill the purpose for which a reservation or other federal enclave was established. The numerous federal reserved claims set forth in the Amended Counterclaims contain little or no detail concerning the purpose for which the reservation or federal enclave at issue was established.

Furthermore, the Amended Counterclaims of both the Tribe and United States contain claims for storage rights in Weber Reservoir. The basis for the storage right claim is not set forth in the Amended Counterclaims. The Amended Counterclaim of the United States also contains several claims for water rights under Nevada and California law. The nature and extent of those claims, however, is not plead.

Under these circumstances, the necessary parties must be allowed discovery concerning, among other things, the purpose for which the reservation or enclave at issue was established, the nature of the storage right sought for Weber Reservoir and the nature and extent of water rights claimed by the United States under Nevada and California law. They must be allowed to identify and obtain copies of the documents which are alleged to support those claims. Without that discovery, it is impossible for the necessary parties to identify all affirmative defenses and issues which should be considered for resolution as threshold issues in future case management orders.

WOODBURN AND WEDGE
6100 Neil Road
Reno, Nevada 89511
Tel (775) 688-3000

## V. ANSWERS OR NOTICES OF APPEARANCE.

The Tribe and United States argue that defendants should be required to file answers to their First Amended Counterclaims. See Joint Opposition at 6. Because of the manner in which they have plead their claims, most answers will involve general denials and inclusion of basic affirmative defenses. If answers are required at the outset, provision should be made for later amendments without the need for motions. Amendments may be necessary after limited contention discovery. In addition, amendments to include counterclaims and cross-claims may be needed once jurisdictional and other issues concerning the scope of the litigation have been decided.

Dated this 7th day of March, 2000.

WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Post Office Box 2311
Reno, Nevada 89511

By: Gordon H. DePaoli
GORDON H. DEPAOLI
Nevada State Bar No. 00195
DALE E. FERGUSON
Nevada State Bar No. 04986

Attorneys for WALKER RIVER IRRIGATION DISTRICT

**CERTIFICATE OF MAILING**

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 REPLY POINTS AND AUTHORITIES IN SUPPORT OF JOINT MOTION CONCERNING CASE MANAGEMENT*** in an envelope addressed to:

Shirley A. Smith
Assistant U.S. Attorney
100 West Liberty Street, #600
Reno, NV 89509

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

George Benesch
P.O. Box 3498
Reno, NV 89505

Western Nevada Agency
Bureau of Indian Affairs
1677 Hot Springs Road
Carson City, NV 89706

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

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

Garry Stone
United States District Court Water Master
290 South Arlington Avenue
Third Floor
Reno, NV 89501

Alice E. Walker
Greene, Meyer & McElroy
1007 Pearl Street, Suite 220
Boulder, CO 80302

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

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

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

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

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

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

WOODBURN AND WEDGE
6100 Neil Road
Reno, Nevada 89511
Tel: (775) 688-3000

Mary Hackenbracht
Deputy Attorney General
State of California
1515 Clay Street, 20th Floor
Oakland, CA 94612-1413

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

William Hvidsten
Decuir & Somach
400 Capitol Mall, Suite 1900
Sacramento, CA 95814

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

Kathryn E. Landreth
United States Attorney
100 West Liberty Street
Suite 600
Reno, NV 89501

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

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

James Spoo
Treva J. Hearne
Zeh, Polaha, Spoo, Hearne & Picker
575 Forest Service
Reno, NV 89509

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

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

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

Robert C. Anderson
Timothy Lukas
Hale, Lane, Peek, Dennison, Howard,
Anderson & Pearl
P.O. Box 3237
Reno, NV 89505

Susan Schneider
Indian Resources Section
U.S. Department of Justice
999 18th Street
Suite 945, North Tower
Denver, CO 80202

Dated this 7th day of March, 2000.

Penelope H. Colter

Penelope H. Colter

WOODBURN AND WEDGE
6100 Neil Road
Reno, Nevada 89511
Tel. (775) 688-3000